

CHAPTER 20

COURT OR NEUTRAL EXPERT

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20.1 INTRODUCTION: ROLE OF THE NEUTRAL, JOINT, OR COURT EXPERT

Serving as a neutral or joint expert is often a rewarding experience, but it can also be very difficult. Controlling the terms of engagement and anticipating potential problem areas can significantly increase the likelihood that the experience will be positive.

(a) Definition of Terms

A neutral or joint expert is an expert jointly retained by both parties to perform services on behalf of both parties. In many states, specific code sections allow the court to appoint its own expert whose scope of work is either determined by the court or stipulated by the parties. Alternatively, such an expert may be retained pursuant to a joint engagement letter. In federal court, Federal Rules of Evidence §706(a) provides for the appointment of the

court's expert. Unless it is meaningful to distinguish between neutral and court experts, the two terms are employed interchangeably throughout this chapter.

Form of Appointment

When performing joint engagements in states whose statutes provide for joint or court experts, rather than entering into an engagement letter, the parties mutually stipulate to the work parameters and payment arrangements. This process may begin with the court issuing an appointment order, which usually includes only the expert's name and a brief description of expected services. Therefore, providing a comprehensive order detailing the terms of the engagement is recommended. For instance, in California, Evidence Code §730 provides the court the ability to appoint its own expert. In New Mexico, it is Rule 11-706; in Minnesota, it is Rule 706. However, in Texas, there is no such statute. Alternatively, when the parties are in mediation, an engagement letter with both parties may be used; it usually addresses whether the expert's work will remain confidential to the mediation or if it may be used in subsequent litigation, should the parties not settle in mediation.

Quasi-Judicial Immunity of Expert

State statutes may provide quasi-judicial immunity, which protects the expert from litigation stemming from official, court-appointed duties. In *Ramalingam v. Thompson*,¹ the California Court of Appeals clarified that the privilege applies broadly "to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." The California Appellate Court held Mr. Thompson immune from litigation arising from his work as a neutral expert. State statutes, such as California's Civil Code §47, often specify this immunity's breadth, but courts may also extend such immunity as a matter of public policy. In *Peterka v. Dennis*,² the Minnesota Supreme Court stated that courts have discretion to extend immunity despite a lack of statutory authorization to do so. The court found extending such immunity to Minnesota Rule 706 experts appropriate because "public policy supports protecting such experts from harassing litigation and because such experts exercise discretionary judgment and provide assistance to the court." The court stated: "[neutral experts'] participation must not be chilled and [they] must be free to render independent and unbiased advice to the Court without fear of harassing litigation by dissatisfied parties. Such experts provide an important service to the Court and extending immunity to them will encourage their continued participation."

(b) Advantages of Using a Neutral Expert

To the Parties

When a single expert gathers facts, explains findings, and renders an opinion, both parties avoid duplicative work and benefit from lower aggregate fees. Furthermore, employing a single, neutral expert may enhance communication between both sides and mitigate the contentious nature in some cases.

To the Court

A neutral expert aids the court's decision making by addressing the court's specific questions and providing explanations of technical subject matter. Accounting experts often opine in technical areas of family law. According to Joe Cecil, J.D., Ph.D., and Thomas Willging, J.D., LL.M., of the Research Division of the Federal Judicial Center, Washington, DC, two-thirds of federal judges surveyed who had appointed a court's expert cited "assistance

in understanding technical issues necessary to reach a decision" in their reasoning for appointing an expert. Other federal judges surveyed indicated that enhancing settlement opportunities also motivated their appointments. Specifically, judges hoped an appointment might help resolve an impasse and permit parties to discuss other issues. Still another advantage to the Court may arise from the adversarial process. When one party submits unreliable or paltry evidence, or when parties submit contradictory evidence, a neutral expert can save the Court time and litigation expenses by minimizing the possibility that such evidence is presented in Court.³

To the Attorneys

A single, neutral expert can more efficiently analyze all materials for both parties. One expert can gather facts and provide financial analysis that both sides can use to assess the financial impact of their legal perspectives before incurring the time and expense of trial. If the process is well handled and both attorneys can trust the expert's report, then settlement becomes more achievable. Toward that end, many experts issue draft reports, requesting attorney and client inputs before filing a final report with the Court. Furthermore, a court-appointed expert may help avoid a costly discovery battle by more successfully obtaining cooperation from a difficult in-spouse (one who manages the business) than could an expert hired by an out-spouse (one not working at the business). In a similar vein, one expert may more efficiently contribute to deposition and trial preparation.

To the Experts

Serving as a neutral expert provides further advantages beyond quasi-judicial immunity protection. Neutral experts can assist in creating an atmosphere conducive to settlement, and when cases settle directly from an expert's findings, it is not only rewarding but also leads to higher client satisfaction, which in turn yields more referrals and subsequent practice growth. Furthermore, the need to address both parties' perspectives and the need to present results creatively may be more intellectually stimulating.

(c) Disadvantages of Using a Neutral Expert

To the Parties

A client may need additional time and consulting input from his or her "own" expert. A neutral expert may be obligated to disclose private communications to the opposing party. The parties are very sensitive about the expert having ex parte communication with the other party. Also, a client may decide to hire a rebuttal expert, setting up the possibility of each party having his or her own expert. With three experts involved, the cost benefits of employing one neutral expert are not realized.

To the Court

Due to a lack of uniformity within and among same-state jurisdictions and the absence of standardized forms, many judges lack the necessary practical guidance to render effective expert-appointment orders. The practical difficulties of identifying, compensating, communicating with, and understanding the testimonies of suitable experts may deter some judges from appointing them. What is more, some judges consider the use of neutral experts an unnecessary intrusion into the court's naturally adversarial system. Nearly half the federal judges surveyed who do not appoint experts gave this reason.⁴

To the Attorneys

Some attorneys rely heavily on their expert and prefer, therefore, to hire one with whom they can solely consult regarding case strategy, settlement, and the like. Some attorneys view neutral experts as disadvantageous to an adversarial presentation of evidence.

To the Experts

Serving as a neutral expert can prove challenging. One must be able to negotiate the often extreme emotions of two divorcing parties. Irrational behavior stemming from anxiety, panic, paranoia, greed, depression, disappointment, betrayal, anger, and impatience may be misdirected at the expert. Furthermore, instead of the more easily navigated direct and cross examination, a neutral expert must face two cross examinations at trial. It sometimes feels very lonely to be the neutral expert, as each party wants to figure out how to attack the neutral expert's conclusion for their own benefit.

20.2 CONSIDERATIONS BEFORE THE EXPERT ACCEPTS THE ENGAGEMENT

Drawing on experience, the expert assesses whether a case situation is suitable for a neutral expert.

(a) Is the Case Situation Appropriate for a Neutral Expert?

Neutral experts should consider avoiding these case situations:

- The requested work's scope exceeds the parties' ability to pay.
- One or both parties is *in pro per*.
- One or both parties may benefit from personal attention or "hand-holding."
- The judge or attorneys appear unsupportive of neutral experts.
- There is excessive conflict between the parties and their attorneys.

(b) Neutral Expert Must Consider Both the Parties' and the Court's Expectations

Without clear court orders clarifying communication, discovery, and fee protocols, unnecessary delays can arise. Opposing counsels may disagree regarding an expert's duties. Therefore, it may be helpful to obtain the court transcripts for the hearing in which the expert's appointment was discussed. It is also important to thoroughly consider whether the scope of work and deadlines are reasonable.

20.3 CONSIDERATIONS WHILE SERVING AS THE COURT'S EXPERT

Succeeding as a neutral expert depends on effective communication and quality work.

(a) Quality Work Inspires Credibility

Performing quality examinations, producing thoughtful, supported opinions, and delivering clear, concise reports can assist the court, the attorneys, and the parties to either settle the case or try the case efficiently. This in turn will help create the kind of reputation on which one can build a successful practice. But beware: Serving as a neutral expert carries a heavy

responsibility to the public, because without rebuttal experts, there is no one to protect the parties from an expert's mistakes.

(b) Communications: Caution

An expert must work within the framework established in the case's governing document. It is wise to discuss communication protocol with the attorneys at the beginning of the case and to include both parties and/or their counsel on all correspondence, even if confirming a conversation with only one party. Be mindful of *ex parte* communications and take steps to keep both sides equally informed. Regular communications with both counsels simultaneously may be the expert's best tool to defend against accusations of bias.

(c) Practical Situations and Suggestions

When possible, begin the case with a conference call involving both attorneys. Discuss scope of work, discovery, communication protocols, fees, and report delivery formats. The parties usually agree that the expert may contact each party for information. Consider contacting each party early in the case to learn what both spouses know about the relevant finances. Copying both attorneys and parties on all incoming and outgoing correspondence keeps the parties updated and stymies fears of bias. If a fact-finding meeting is scheduled with one spouse, consider notifying the other spouse and his or her attorney in advance. Anticipating each party's potential emotional reactions, encouraging a sense of process inclusion, and communicating cautiously helps smooth the process. Intuiting emotional reactions and adjusting delivery appropriately are useful skills in serving as a neutral expert; the absence of such skills may severely limit an expert's efficacy regardless of experience, technical knowledge, or other skills.

Public opinion of certified public accountants (CPAs) is important, and a neutral CPA must follow professional codes of conduct and be perceived as objective and open-minded. A neutral expert who fails to consider both parties jeopardizes his or her opinion's reliability, opens him- or herself to challenges, and risks the ability to garner consensus. Avoiding even the appearance of bias is important, and the expert is encouraged to take proactive, situation-specific steps toward that end.

20.4 CONSIDERATIONS WHEN DELIVERING FINDINGS

Effective delivery of neutral expert's findings increases the success of the engagement.

(a) Format of Delivery

Delivery formats (e.g. written reports, meetings, e-mails, etc.) should be designated in advance and comply with any court-ordered instructions. In addition, consider the most efficient use of fees when choosing delivery formats. Often a meeting at which the expert delivers and explains the draft report can be very beneficial to generating agreement and managing the parties toward settlement.

(b) Payment of Fees

Owing to the conflict inherent in many neutral-expert cases, fee payment can become a deterrent to experts completing their work. Often the investigated spouse is responsible

for expert fees, and that spouse may opportunistically attempt to avoid, limit, or delay bill payment. If possible, it is ideal to designate a neutral, community account (such as an attorney trust account) as the payment source. When two or more parties are responsible for fees, nonpayment risks increase. Discuss ways to avoid these potential pitfalls during initial conversations with both attorneys.

(c) Achieving Agreement and Settlement

After performing quality research and analysis, the expert may best facilitate agreement and settlement by effectively communicating his or her findings. Although a thorough presentation is important, remaining unbiased, identifying facts, supporting opinions, and delivering information in an understandable manner is just as critical.

(d) Practical Situations and Suggestions

Human nature often cannot help but become entrenched in a position. A meeting affords the neutral expert an opportunity to preempt such digging in by explaining the work he or she did and the reason for his or her opinion to both parties before the parties know the result. As the meeting progresses, questions may be encouraged. With patience, factual errors, inconsistencies, gray areas, alternative approaches, and possible solutions can be addressed. This open discussion at a meeting enhances settlement. If the assignment's scope and findings are relatively straightforward or simple, coupling report distribution with a conference call may be sufficient. Alternatively, some practitioners, anticipating settlement discussions, choose to distribute reports in advance of meetings.

If the neutral expert considers schedules to be adequate, costs may be reduced by eliminating drafts of narrative reports. Distributing and discussing schedules without full reports can save costs, as many cases settle without the need of a written narrative report.

20.5 PRACTICAL TIPS

The best intentions are often more difficult than expected to execute in practice. Included next are some practical tips that may improve an expert's experience serving as a neutral expert.

(a) Fees

Receiving an advance or retainer before beginning work is recommended business practice. This advance is held and applied to the last invoice. Any unused portion is refunded. Although tracking the status of outstanding fees can be difficult while juggling document requests, conflicting instructions, missing information and deadlines, we recommend billing at least monthly and monitoring any unpaid fees. The courts concur that the expert should be paid but do not enjoy being the expert's collection agent. Hence, we recommend monitoring the outstanding fees and notifying counsel, the parties, and, if necessary, the court that fees have not been paid and the work will need to stop pending payment. Notification that work will need to stop allows the parties and, if necessary, the court to order payment from a specific source, modify the scope of work, or defer the work being done. The court's priority is to have the work done so the case can be finished, but it understands that experts need to be paid. Hence, it is important for the neutral expert to have procedures to help ensure payment to avoid the problem and to communicate early and often. The sample

order included in Section 20.9 sets forth the procedures we employ; it includes affording the expert the right to request a conference call with the court and bring a motion for fees, should the expert be left carrying a sizable receivable. Although motions may take time to collect, the court is usually accommodating. If nothing else, during the process one can learn whether a particular court is helpful, which is valuable information when considering future appointments.

(b) Marketing

CPA experts can market neutral expert services just as they market forensic accounting services. Working pro bono, attending professional association meetings, accepting speaking engagements, and contributing to professional literature provide effective opportunities to highlight one's willingness to accept, and expertise in handling, joint cases.

(c) Approaches to Gray Areas of the Work

Experts must recognize when it is appropriate to quantify multiple answers in a given analysis. CPA experts cannot practice law and must avoid legal interpretations that provide a singular answer when several may be valid. Contrary legal positions may necessitate quantifying multiple interpretations of the same facts.

(d) Dealing with Difficult Situations

While effective communication can mitigate most difficult situations, anticipating particular problems and incorporating appropriate language into court orders or engagement agreements is recommended. When difficult situations arise, it is usually best to consult with both attorneys before seeking a court resolution. In some cases, the only solution may be to withdraw. The order appointing the expert should include a provision allowing for the expert's withdrawal.

20.6 LANGUAGE AND CONTENT OF COURT ORDERS

A specific, well-written court appointment order is helpful to an efficient, effective engagement with all stakeholders. Standard order usage varies by jurisdiction, and the authors are most familiar with California's statute. This author participated on a committee, established by a supervising family law judge, consisting of judges and attorneys that developed language for an order to promote successful court appointments. The sample order included in Section 20.9 includes the recommendations of that committee. The judges on the committee encouraged experts to ensure they are paid before issuing a draft report. The *Matrimonial Commission Report to the Chief Judge of the State of New York* contains a proposed appointment order as Appendix K to its February 6, 2006 report.⁵ This document addressed similar topics.

Effective orders should be specific but not constrictive. Suggested topics include:

- Specifying the expert's tasks
- Stating basic facts (e.g., marriage and separation dates, if relevant in one's state)
- Defining compensation parameters
- Identifying financially responsible parties and applicable fund sources

- Addressing discovery protocol compliance
- Detailing communication and reporting protocols
- Planning for possible expert withdrawal
- Clarifying case-specific items and terminology

Further specifications may include assigning the expert settlement duties and allowing for additional analyses necessary for case closure.

20.7 CONCLUSION

Utilizing all his or her skills, the court's expert must provide facts, analyses, and opinions relevant to the case situation. Before accepting an appointment, the expert should consider whether the case situation is appropriate for a neutral expert. Concurrent with acceptance, the neutral expert should protect herself by including quasi-judicial immunity language in the agreement. Finally, throughout the process, the neutral expert should rely on open communication to avoid both bias and the perception of bias.

Serving as a neutral expert can be challenging, but intellectually and practically rewarding, work. Most important, a neutral expert can more quickly resolve cases, allowing the parties to move to the next chapter in their lives.

20.8 LIST OF CASES

The following is a list of cases that are referred to above or that provide additional information to the neutral expert.

- Boraks v. American Arbitration Association*, 205 Mich.pp. 149, 517 N.W.d 771 (1994)
Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108
Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894
Delcourt v. Silverman, 919 S.W. 2d 777 (Tex.App. 1996)
Diehl v. Danuloff, 242 Mich. App. 120, 618 N.W. 2d 83 (1999)
Duff v. Lewis, 114 Nev. 564, 958 P. 2d 82 (1998)
Dziubak v. Mott, 503 N.W. 2d 771 (Minn. 1993)
Foster v. Washoe Co., 114 Nev. 936, 964 P. 2d 788 (1998)
Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W. 2d 364 (1955)
Hathcock v. Barnes, 25 P. 2d 295 (Okla. App. 2001)
Koelln v. Nexus Residential Treatment Facility, 494 N.W. 2d 914 (Minn. App. 1993)
Lavit v. Superior Court, 173 Ariz. 96, 839 P. 2d 1141 (Ariz. App. 1992)
Linder v. Foster, 209 Minn. 43, 295 N.W. 2d 299 (1940)
Loran v. Iszler, 373 N.W. 2d 870 (N.D.1985)
Lythgoe v. Guinn, 884 P. 2d 1085 (1994)
Melady v. S. St. Paul Live Stock Exch., 142 Minn. 194, 171 N.W. 806 (1919)
Myers v. Price, 463 N.W. 2d 773 (Minn. App. 1990)
Nardini v. Nardini, 414 N.W. 2d 184, (Minn. 1987)
Nussbaumer v. Fetrow, 556 N.W. 2d 595, 599 (Minn. App. 1996)
Papatheofanis v. Allen (2009), NMCA-084, New Mexico Court of Appeals (June 30, 2009)

- Parker v. Dodgion*, 971 P. 2d 496 (Utah, 1998)
- Pekarek v. Pekarek*, 362 N.W. 2d 394 (Minn. App. 2008)
- Peterka v. Dennis*, Minnesota Supreme Court No. A07-0165, 764 N.W.2d 829 (May 7, 2009)
- Ramalingam v. Thompson*, 151 Cal. App. 4th 491, 60 Cal. Rptr. 3d 11 (2007)
- Riemers V. O'Halloran*, 678 N.W. 2d 547 (ND 2002)
- Shatzman v. Cunningham*, 2002 WL 31955214 (Mich. App. Dec. 17, 2002)
- Sloper v. Dodge*, 426 N.W. 2d 478 (Minn. App. 1988)
- Stewart v. Case*, 53 Minn. 62, 54 N.W. 938 (1893)
- Tindell v. Rogosheske*, 428 N.W. 2d 386 (Minn. 1988)
- Yaselli v. Goff*, 12 F. 2d 396
- Zagaros v. Erickson*, 558 N.W. 2d 516, 523 (Minn. App. 1997)

20.9 SAMPLE 730 ORDER

Pursuant to the stipulation of the parties, set forth below, and good cause appearing therefor, IT IS HEREBY ORDERED that:

1. APPOINTMENT OF EXPERT:

TERRY M. HARGRAVE, C.P.A. (hereinafter referred to as "EXPERT") is appointed as the Court's EXPERT under California Evidence Code §730. EXPERT's contact information is:

Address: 520 Broadway, Suite 680
Santa Monica, CA 90401
Telephone: 310/576-1090
Facsimile: 310/576-1080

2. TASKS OF EXPERT:

EXPERT is deemed qualified to perform the following tasks and shall do so, provided that the parties comply with the provisions set forth below regarding COMPENSATION, DOCUMENTS AND INFORMATION, and subject to the provision regarding WITHDRAWAL.

- Perform an analysis of _____ Respondent's and/or _____ Petitioner's income available for support.
- Prepare a conclusion of value of the business known as _____ as of the most practical date nearest _____ and _____.
- Prepare a valuation of community's interest in stock options in _____
- Calculate the income tax consequences of _____.
- Calculate the community and separate property interest in that certain real property located at (address) _____.
- Prepare a tracing of _____
Said tracing shall be in written form.
- Prepare an analysis of _____'s separate property claims relating to _____.

- Prepare an analysis and quantification of reimbursements for _____
- Calculate child and/or spousal support arrearages including interest due.
- Assist with settlement.
- Other _____

If there is any dispute over the scope of the work, EXPERT may request a conference call with the Court and the attorneys according to the provisions in paragraph 7 below. When doing her work, EXPERT may need to quantify more than one result based on contrary legal positions or contrary positions of the parties.

Expert may transmit confidential information received from the parties, or their counsel, to third parties to assist Expert in performing her work. If utilized, the third parties will provide data entry or similar work for Expert. The hours incurred for such work will be included in Expert's monthly bills. Expert will take reasonable precautions to determine that she has the appropriate procedures in place to prevent the unauthorized release of confidential information to others. The parties are free to inquire if they would like additional information regarding the transmission of confidential information to entities outside Expert's firm.

3. FACTS:

The parties' date of marriage is _____
 The parties' date of separation is _____ Petitioner.
 _____ Respondent.

4. COMPENSATION:

A. The fees of EXPERT shall be as follows:

- \$ _____ per hour for EXPERT.
- \$ _____ per hour for Managers.
- \$ _____ per hour for Professional Staff.
- \$ _____ per hour for Support Staff.

Expert's billable rate per hour is subject to periodic increases.

In addition to the foregoing, EXPERT shall be entitled to be reimbursed for out-of-pocket costs, such as photocopy costs, mileage, parking, and chart preparation. The above rates are subject to increase periodically. The Court finds these fees to be reasonable. Said EXPERT shall also be paid the above standard hourly rates for time incurred enforcing this Order. If EXPERT retains counsel, EXPERT shall be reimbursed for attorney's fees and costs incurred. EXPERT's fees and costs billed in excess of the retainer (hereinafter "billed amounts") shall be paid in full before EXPERT issues any oral or written report. Both parties are jointly and severally liable for the billed amounts.

For depositions and court appearances, a minimum fee shall be paid in advance representing four hours of EXPERT's time. The party noticing the deposition or requiring EXPERT's appearance in court shall advance the costs of this time at least forty-eight (48) hours prior to such deposition or court appearance.

B. Payment of Fees and Retainer shall be as follows:

The retainer of EXPERT, in the amount of \$ _____, will be applied to the final invoice and shall be paid as follows:

- Petitioner shall pay to EXPERT the sum of
 \$ _____ forthwith and Respondent shall pay to EXPERT the sum of
 \$ _____ forthwith.

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- The retainer shall be withdrawn by either party from the
account located at _____,
account number _____,
and paid to EXPERT.
- _____ Petitioner or _____ Respondent shall pay the entire retainer forthwith.
- The provision for the payment of the retainer is without prejudice; the Court retains jurisdiction to later order a different allocation of payment, as between the parties. The billed amounts shall be paid on a timely basis as follows:
- By withdrawal from the account located at _____,
account number _____. Either party is authorized to make such withdrawal.
- Petitioner and Respondent are both responsible for the payment of EXPERT's fees, subject to the Court's subsequent allocation. It is anticipated that Petitioner and Respondent shall pay the billed amounts in the following percentages: Petitioner _____%; Respondent _____. Notwithstanding, they are both responsible for keeping EXPERT's bills current. The billed amounts are to be paid within 15 days of receipt of the invoice.
- The provisions for the payment of the billed amounts are without prejudice; the Court retains jurisdiction to later order a different allocation of the billed amounts as between the parties.

5. DOCUMENTS AND INFORMATION:

The tasks assigned to EXPERT cannot be completed without the necessary documents and information. The parties shall provide all records requested by EXPERT within ten (10) days of receipt of a written request. Each party shall provide timely responses to questions propounded by EXPERT. If requested by EXPERT, the parties shall provide EXPERT with written authorizations directing third parties to provide documents, records and/or information.

6. COMMUNICATION:

EXPERT shall have the right to initiate contact with any party or their counsel, ex parte. In the event that counsel for any party, or any party, communicates with EXPERT in writing, said counsel, or party, shall send a copy of such communication to the opposing counsel, or if the other party is pro per, to such party directly. The attorneys shall notify EXPERT of all court dates. EXPERT may participate telephonically regarding scheduling of meetings and/or hearings and the status of EXPERT's work.

7. DISPUTES:

EXPERT may initiate contact with the Court to obtain the Court's assistance in resolving disputes relating to the completion of EXPERT's assignment, such as, but not limited to, the production of documents, the scope of the assignment, scheduling of court appearances, the payment of EXPERT's fees, or any issue related to a breach of this Order.

Prior to initiating such contact with the Court, EXPERT shall give written notice to each side of the nature of the dispute and EXPERT's intention to notify the Court at least two (2) business days prior to contacting the Court. At the direction of the Court clerk, contact by EXPERT with the Court shall be by letter, by telephone conference call, by declaration or by motion filed by EXPERT. Any telephone conference call with the Court shall include counsel for the parties. Notwithstanding the above, EXPERT may provide a copy to the Court of written correspondence that provides a status regarding EXPERT's

work, to counsel for the parties, or to the party if the party is in pro per. Any written communication to the Court shall be copied to counsel for the parties, or the party if the party is in pro per.

8. PROCEDURES FOR REPORTING:

At any time EXPERT shall be entitled to provide a status report to the Court. The status report shall be communicated according to paragraph 7 above.

The parties agree to meet with EXPERT and counsel after he/she has finished her report. Alternatively, EXPERT may choose to distribute a draft report to counsel for the parties, or to the parties directly if they are in pro per. At such meeting, or within ten (10) days of meeting or receipt of report, the parties agree to provide to EXPERT, in writing, any and all objections to the findings and conclusions, any additional factual information they believe EXPERT should consider and/or any errors they believe EXPERT made.

If ten (10) days is not sufficient, counsel for the parties, or the party if the party is in pro per, may request additional time, up to a maximum of thirty (30) days. EXPERT's report not being delivered to the Court and counsel for the parties, or the party if the party is in pro per, at least ten (10) days prior to the hearing or trial, will be grounds for a continuance.

The final report of EXPERT shall be sent to the Court and copies provided to counsel for the parties, provided that the parties have complied with the provisions set forth herein including the COMPENSATION, DOCUMENTS AND INFORMATION provisions.

The final report of EXPERT shall be admitted into evidence at any hearing or trial in this matter, over any hearsay and foundation objections, subject to cross examination provided that EXPERT is given timely notice of the hearing or trial, and the fees are advanced as set forth in the COMPENSATION paragraph. EXPERT shall have the opportunity to provide an explanation of the work they did before cross-examination.

If either party wishes to cross-examine EXPERT, that party will give EXPERT no less than five (5) business days written notice and shall advance the fees requested by EXPERT to prepare for and appear at the hearing, subject to reimbursement or reallocation by the Court. Fees for preparing and appearing, as requested by EXPERT, shall be tendered no less than five (5) business days prior to the appearance.

If at any point the provisions regarding compensation of this Order have not been complied with, EXPERT shall be entitled to stop all work or refuse to issue their draft and/or final report.

9. ENFORCEMENT BY EXPERT:

EXPERT shall have the right to initiate and shall have standing to bring in her own name a motion in this action to enforce the COMPENSATION, DOCUMENTS, AND INFORMATION provisions of this Order. The Court shall determine whether said motion will be heard in this proceeding or in another department.

10. WITHDRAWAL BY EXPERT:

EXPERT shall have the right to withdraw at any time as a result of a breach of the foregoing provisions regarding COMPENSATION, DOCUMENTS AND INFORMATION, or if at any time EXPERT determines that he/she cannot complete the assignment, or if there is a substitution of either party's attorney. EXPERT shall, upon determining that said conditions exist, notify the Court and counsel for the parties in writing of the fact of his/her withdrawal, and the circumstances giving rise to the need to withdraw. Fees earned up until the time of withdrawal are due to EXPERT. Any unused portion of the retainer shall be refunded by EXPERT.

11. EXECUTION OF THIS ORDER:

The parties and their respective counsel shall sign and return this order within five (5) days of receipt of this order. If EXPERT does not receive signed originals within such

five day period, EXPERT shall notify the Court in writing that it has not received signed originals of this Order from all parties with a copy of such notice to the parties' counsel. EXPERT shall not be obligated to commence work until EXPERT has received an executed copy of this Order.

Stipulation for Entry of Order

The parties hereto stipulate that the Court may enter the foregoing as an Order, each party waiving the right to request a statement of decision, the right to notice of entry and the right to appeal there from.

Signatures from all and the Court

20.10 NOTES

1. *Ramalingam v. Thompson*, 151 Cal. App. 4th at 504.
2. *Peterka v. Dennis*, Minnesota Supreme Court No. A07-0165, 764 N.W.2d 829 (May 7, 2009)
3. Joe S. Cecil and Thomas E. Willging, "Court Appointed Experts," in *Reference Manual on Scientific Evidence*, 1st Ed. (Washington, DC: Federal Judicial Center, 1994), pages 538–539.
4. *Ibid.*
5. The Honorable Sondra Miller, Chairperson, *Matrimonial Commission's Report to the Chief Judge of the State of New York* (February 2006).

Family Law Services HANDBOOK

THE ROLE OF THE
FINANCIAL EXPERT

DONALD A. GLENN

THOMAS F. BURRAGE

DONALD J. DEGRAZIA

WILLIAM B. STEWART, JR.