

# The Witness Chair

Leading-edge Ideas for CPA Experts Providing Litigation and Dispute Resolution Services

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## New Evidence Code Sec. 730 Order Available in Los Angeles County

by Commissioner James D. Endman, Terry M. Hargrave, CPA and Donald John Miod, CPA

Appointments under Evidence Code Sec. 730 have been used in many ways by the courts. Sec. 730 states that when the court requires expert evidence, the court, on its “own motion or on the motion of any party, may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of an action relative to the fact or matter as to which the expert evidence is or may be required.”

In family law courts, there is an increasing trend to employ such a process for accounting issues. If one accounting expert is able to analyze and report on the financial issues, the cost savings can be significant. However, if the process does not work and one or both parties need to hire their own expert, the costs may be higher because the parties have paid for three experts.

The key to successfully using a Sec. 730 expert is to set up a process to facilitate its use.

To meet this need, in 2004, Judge Aviva Bobb, then supervising judge of the Downtown Los Angeles Family Law Court, charged a group of judges, attorneys, and accountants with exploring how

to optimize the results of using a Sec. 730 expert.

Members of the committee, including this article’s authors, first identified several issues to be addressed to improve the process, including:

1. Shortening the amount of time that passes between the appointment of a Sec. 730 expert and the commencement of the expert’s work;
2. The importance of clearly identifying the scope of work to be performed by the expert;
3. Agreement on the terms of payment of the expert’s retainer and fees;
4. Determining how the expert will receive documents and other needed information;
5. What steps to take when one party does not pay the expert or does not deliver documents;
6. Agreement on how the expert is to communicate with the parties and their counsel;
7. How the expert addresses disputes relating to the completion of the expert’s assignment;
8. The circumstances under which the expert either declines to take the assignment or withdraws from the engagement;
9. The ability of the expert to enforce the Sec. 730 order;
10. The reporting of the expert’s findings to the parties, their counsel, and to the court; and

11. How to proceed if one or both of the attorneys withdraw from the engagement.

The committee set up a process that will help eliminate problems and facilitate a successful result by creating the form, “Stipulation Appointing Evidence Code Sec. 730 Expert,” which is available in the Los Angeles Court system.

Users need only fill out the “check the box” format to identify the scope of work, case facts needed by the expert, method of payment, and each party’s responsibility for the documents and payment.

The Stipulation also specifies a process for the expert to resolve disputes that may arise from discovery, scope of work, and payment of the expert.

The result is a clearer and more expeditious understanding of what needs to be done and how it will get done.

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## Section ACTION

### Business Valuation by Ted D. Israel, CPA

There is something ominous on the horizon for those practitioners active in estate and gift tax valuations. JCS-02-05, a report from the Joint Committee on Taxation to, and at the request of, the Senate Finance Committee, consists of 430 pages of proposed tax law changes aimed at shoring up compliance, closing loopholes, and capturing lost tax revenue. Some 24 pages are devoted to curbing perceived abuses in the estate and gift tax area. The most significant proposals are the “aggregation” and “look-through” rules.

If implemented, the aggregation rule would deny a minority interest discount for the transfer (by gift or death) of a minority interest if: 1) immediately before the transfer, the transferor owned a controlling interest or 2) immediately after the transfer, the transferee had a controlling interest. In other words, the hypothetical buyer and seller would be replaced with a specific buyer and seller.

The look-through rule would have the effect of “looking through” the entity to the underlying assets. For the look-through rule to apply, at least one-third of the entity’s assets must be marketable, such as cash or securities, and the aggregation rule must apply.

If these two conditions are met, then a minority interest discount would be denied and a marketability discount also would be denied to the extent the entity’s underlying assets are marketable.

If adopted, these proposals would legislate away what the Tax Court has been adjudicating for years on the basis of facts and circumstances. We do not know how likely it is that these proposals will succeed, but we will keep you informed of the progress.

You may download the portion of the report related to estate and gift taxes from the AICPA BV/FLS homepage at <http://bvfls.aicpa.org/>.

*Ted D. Israel, CPA, ABV, CVA is the Business Valuation Section chair and a partner at Eckhoff Accountancy Corp. in San Rafael.*

### Economic Damages by Lynn Carl Jones, CPA

What is the meaning of “enforceable,” and should an economic damages practitioner make that determination?

Sec. 5063.3 of the California Accountancy Act has been amended to strengthen the confidentiality of information a CPA obtains from clients. This section and California Code of Regulations Sec. 54.1 state that a CPA must receive written permission from the client before disclosing any client confidential information obtained in a professional capacity, with narrow exceptions.

Exceptions accommodate CPAs’ 1) ability to defend themselves in a legal procedure, 2) responsibilities to respond to government inquiry, 3) consultation with other professionals or in connection with a sale or merger of the CPA’s practice, and 4) responsibilities to comply with laws and regulations. Disclosures made by a licensee in compliance with a subpoena or a summons enforceable by an order of the court are excepted.

A subpoena is incredibly easy to create by attorneys or to obtain by someone else, and may or may not be enforceable. So, when is a subpoena enforceable by court order? The answer lies in interpreting the relevant Codes of Evidence and Civil Procedure. Essentially, the party issuing the subpoena has a right to discover relevant information that is not readily available from other sources.

CPAs have three options in responding to a subpoena for client information: 1) obtain written permission from the client to make disclosures; 2) provide notice to the

client, and possibly their general counsel or outside litigation counsel, that a subpoena has been served and that a response will be made. This affords the client the opportunity to have the subpoena’s scope reduced or quashed; and 3) assert that the information is privileged, which requires legal representation.

A CPA served with a subpoena should consider getting legal advice before proceeding, but should be able to stay within the bounds of the Accountancy Act with timely disclosure to the client and by soliciting client permission to disclose the information.

*Lynn Carl Jones, CPA, CFE is the Economic Damages Section chair and managing principal of Jones & Co. in Los Angeles.*

### Family Law by Leslie O. Dawson, CPA

One of the challenges facing CPAs providing family law support services is determining the parameters involving income. What constitutes income for child and spousal support purposes? What adjustments are appropriate? What time period should be used? *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075; 23 CR 273 addresses some of these issues.

In *Riddle*, Husband’s taxable income consisted of: 1) a steady monthly draw, 2) forgiveness of the monthly repayments owed to the employer for an advance (before separation), 3) forgiveness of interest income on the advance, and 4) a monthly variable commission.

In determining monthly income available for support, the trial court included only the draw, forgiveness of interest, and average of the last two months’ commissions.

The Appellate Court noted that accountants often use the phrase “cash flow” as a “sloppy synonym” for income as it pertains to child support statutes. The Court also discussed that while there is foundation under *In re Marriage of Kirk* (1990) 217

Cal.App.3d 597 to remove phantom income (income for tax purposes, but not cash, such as debt forgiveness), it pointed out that the language in Family Code Sec. 4058 and Sec. 4059 appears to have been derived from the Internal Revenue Code. Thus, it appears neither strict taxable income nor strict cash flow is necessarily appropriate for determining income for support purposes.

The Court also determined that the two-month time period used by the trial court was an “embarrassingly” short period upon which to predicate Husband’s ability to earn in the immediate future. The Court provided some income alternatives using the average commissions from the prior 12 months, prior 14 months, and most recent calendar year. All of these averages resulted in significantly lower income amounts—between 62 percent and 70 percent less. This was because the two months used by the trial court were unusually profitable for Husband.

The *Riddle* case demonstrates that accountants must look at the facts of each case to determine a reasonable expectation of income, not just the level most favorable to one’s client.

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*Leslie O. Dawson, CPA is Family Law Section chair and a partner in Glenn & Dawson LLP in Walnut Creek.*

## Fraud

*by Peter Salomon, CPA*

ChoicePoint, the nation’s largest provider of identification and credit verification services, recently disclosed that it sold names, Social Security numbers, driver’s license numbers, and addresses of approximately 145,000 people to individuals posing as ChoicePoint small-business customers. These individuals wanted the information to commit identity theft. This impacted approximately 34,000 Californians.

Identity theft is on the rise. Of the 635,173 consumer fraud complaints received by the Federal Trade Commission in 2004, 246,570 of them dealt with identity theft.

To reduce the risk of identity theft:



# Message from the Chair

*by Andy Mintzer, CPA*

Take advantage of the many opportunities to get together with your colleagues at section meetings and conferences this spring. Each section has upcoming meetings and has teamed up with another section to make the most of your travel time.

Peter Salomon and Lynn Jones, chairs of the Fraud and Economic Damages sections, respectively, had back-to-back meetings April 19–20 at the Westin LAX. Ted Israel and Leslie Dawson, chairs of the Business Valuation and Family Law sections will have back-to-back meetings in the Oakland area May 12–13.

Each meeting provides you with valuable CPE on relevant practice topics that you just don’t get anywhere else, and for a reasonable cost. You can really talk and interact with the speakers and your colleagues. We just can’t do that at the mega-seminars with hundreds

or even thousands in attendance. One of the most valuable facets of your Litigation Sections membership is the sections meetings, so go to the meetings and get to know your peers and your competitors—your referral network.

And while you’re making your travel plans don’t forget the Advanced Business Litigation Institute. The ABLI will be held at the La Quinta Resort & Club in La Quinta (near Palm Springs) May 5–6. You’ll get 16 hours of CPE with up to 7.5 hours of A&A credit. Exciting keynote speakers include Lynn Turner, former SEC chief accountant, and state Senator John Campbell, CPA. There will be advanced sessions on financial statement fraud, ethics, pension plan audits, employment law, business valuation, and technology, just to name a few. I look forward to seeing all of you there!

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*Andy Mintzer, CPA, CFE is a sole practitioner based in Santa Monica.*

1. Periodically review your credit reports for anything that looks suspicious and fix any errors.
2. Order your free credit reports online at [www.annualcreditreport.com](http://www.annualcreditreport.com).
3. Stop pre-approved credit card offers by calling toll-free (888) 5OPTOUT.
4. Buy a cross-cut shredder and shred all important papers and credit card receipts before throwing them away.
5. Put passwords on all your credit accounts and do not use your mother’s maiden name.
6. Update or install firewall, anti-virus, and spyware removal programs on your computers.
7. Do not carry your Social Security card with you.
8. Request that your medical insurance provider use a number other than your Social Security number for identification.
9. Get your picture on your credit cards.
10. Cancel credit cards you don’t use regularly.
11. Review your credit card and bank statements upon receipt for improper charges.
12. Keep track of your billing cycles for bills that are not received.

You can report identity theft to the FTC’s complaint database, Consumer Sentinel, at [www.consumer.gov/sentinel](http://www.consumer.gov/sentinel).

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*Peter A. Salomon, CPA is chair of the Fraud Section and a director in Navigant Consulting’s Litigation and Investigations practice in Los Angeles.*



# Crime-Related TV Shows Change Juror Expectations

by Noelle C. Nelson, Ph.D.

Americans' obsession with high-profile trials and their fascination with legal and crime-related television shows such as *Law & Order* and *CSI* are changing juror expectations in the courtroom. It was just a matter of time. The public is continually bombarded with legal commentary and analysis on the "trial of the moment," whether on the nightly news, *Larry King Live*, *Celebrity Justice*, or on an entire cable network devoted to law and order, Court TV.

Before "all-law-all-the-time" programming, jurors would enter the courtroom with beliefs based on their personal life experiences. Now, they expect swiftly moving trials, articulate and well-prepared lawyers, and easy-to-understand witnesses who can clearly explain physical evidence that will make the decision-making process much easier. To succeed as an expert witness in this atmosphere, experts must take into account this new juror perspective.

## Solving the Case

As if they were watching their favorite 60-minute television detective drama, jurors during a trial want to figure out what really happened in a case regardless of the legal importance. They want to get a

sense of who is right or wrong. "Accident" or "incident" reconstruction is vital to jurors even if it is not critical to the lawyers. The expert witness who is able to give the most common sense accident or incident reconstruction will be the expert witness on whom the jury relies.

## The Changing View of Expert Testimony

Another interesting development related to juror perceptions is that the point-counterpoint discussions by media "experts" during high profile court cases have left the public wondering if experts only espouse a view because they are paid to do so. As a result, jurors who hear experts from each side may discount each expert's testimony.

Experts must address the jurors' needs for who, what, when, where, why, and how information as well as educate, not force, their opinions onto the jurors. They must be master communicators as well as leaders in their field. Jurors expect experts to look, talk, and walk the same as the experts on crime-related television shows.

## Physical Evidence

Physical evidence has taken on much greater importance in recent years. Blame it on the *CSI* effect. Jurors believe that physical evidence should exist in every case and they look for it—whether it's a thumbprint on a piece of paper or DNA at a crime scene. For expert witnesses in civil trials, evidence such as timelines, paper trails, or balance sheets is likely to be your only physical evidence.

Even contracts, loan agreements, and business correspondence can

have an impact on jurors if the significance is clearly explained and understood. We have become such a visual society that experts need to use visuals as part of the jury education process.

Experts can use enlarged documents, charts, graphs, PowerPoint presentations, and multimedia to help explain the case.

## Helping Jurors Reach the Right Decision

When determining liability or damages in a civil case, jurors take seriously the idea of examining the evidence and testimony and then

making a decision on their own. Your testimony as an expert witness should provide jurors sufficient information to make that decision.

For the jury to reach a verdict, four elements of the case must line up consistently and credibly:

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*Now they expect ... easy-to-understand witnesses who can clearly explain physical evidence that will make the decision-making process much easier.*

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the facts, the attorneys' interpretation of facts, the lay witnesses' testimony, and the experts' opinions. An explanation in the form of a flowchart, diagram, bar graph, organizational chart, model, or video reconstruction can go a long way to painting a clear picture of the experts' opinions.

## Focus Groups

Culture is now more universally shared. We live in a global village. Television has become ubiquitous—the same programs are seen in communities nationwide. Radio shows are nationally syndicated. Millions of us read the same books, magazines, and newspapers and click on many of the same internet sites. Our opinions are being shaped by many of these same forces no matter our status, race, or gender.

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by Jeffrey H. Kinrich, CPA

The AICPA continues to be active on behalf of litigation consulting practitioners.

### BV/FLS Task Forces

The AICPA's committee on Business Valuation and Forensic & Litigation Services (BV/FLS) has established several task forces to help improve AICPA communication and education. The task forces are Editorial, State Society Liaison, Economic Damages, and Family Law.

The Editorial Task Force is responsible for providing or procuring articles and technical content for the BV/FLS website and AICPA publications, including *CPA Expert*, *CPA Consultant*, and the *Journal of Accountancy*.

The State Society Liaison Task Force facilitates communication between the AICPA and various state litigation services committees. California's Litigation Sections is one of the most active state groups, so the task force is particularly interested in working with California as well as other states with active litigation groups.

The Economic Damages Task Force works on practice aids and

oversees the annual Litigation Services Conference. The task force is reviewing the near-final draft of a practice aid on Intellectual Property Damages. California members on this task force are Lynn Carl Jones, Chris Tregillis, and Jeff Kinrich.

The Family Law Task Force has just released a Family Law practice aid that BV/FLS Section members will receive.

### BV Standards Update

Stop me if you've heard this before: The business valuation standards are nearly final. This time I think they mean it. The exposure draft continues to reflect the input and concerns expressed by your Litigation Sections Steering Committee and by litigation services practitioners across the country.

There is one significant change from prior drafts: the "limited report" has been eliminated. The exposure draft has been released for final public review. The deadline to provide comments to the AICPA is June 15.

If there are no fatal flaws or serious revisions, the standards are expected to become effective for valuation engagements accepted after Dec. 31. It is expected that many state boards of accountancy may adopt the standard as part of their state regulations. No word yet on whether or not the California Board of Accountancy is likely to be one of the adopters.

### Proposed Ethics Interpretation

The AICPA's Professional Ethics Executive Committee (PEEC) is considering an ethics interpretation on providing litigation services to private company attest clients. Recall that Sarbanes-Oxley prohibits providing such services to publicly held attest clients.

Essentially, the interpretation states that litigation services *can* be provided to privately held attest clients, but only if all legal privileges are waived and if full communication to the audit team is allowed. Since it's unlikely that many attorneys and clients will consent to these conditions, it will be difficult, but not impossible, to provide such services to privately held attest clients. The proposed interpretation will be subject to public comment before it becomes final.

### Discussion Paper Released

As part of its anti-fraud efforts, the AICPA released the discussion paper, *Management Override of Internal Controls: The Achilles' Heel of Fraud Prevention*. Litigation Sections Secretary Ron Durkin led the paper's development. The paper has received favorable reviews from numerous commentators. It is available for download at <http://bvfls.aicpa.org/>.

Jeffrey H. Kinrich, CPA, ABV is a managing principal of Analysis Group in Los Angeles.

### Keepin' It Legal

Continued from Page 4

A focus group of 10 to 12 representative jurors targeting the key issues in a case will help lawyers learn how to educate jurors so that their perceptions of the case are favorable.

For example, if the focus group participants are dismissing the opinion of an expert witness on the grounds that "Well, they are all hired guns anyway," the lawyer can ask questions, such as, "What could

I say to show you that's not so?" or, "What could my expert say to demonstrate credibility to you?"

If lawyers are willing to engage in these types of question-discussion sessions with focus group participants, they can gain insights and ideas on how to best present information to jurors so that their perceptions match the evidence of the case.

Trial and expert witness techniques used by attorneys and experts 20 years ago will not work in today's courtroom. Both attorneys and experts at trial must

update their approach to take advantage of changing juror perceptions and to ensure that their courtroom strategies create a positive impact in the jury room.

Noelle C. Nelson, Ph.D. is a Malibu-based trial consultant who specializes in expert witness preparation, trial strategy, witness preparation, and focus groups. She is the author of *A Winning Case* (Prentice Hall) and *Connecting With Your Client* (ABA). You can reach her at [nnelson@dr.noellenelson.com](mailto:nnelson@dr.noellenelson.com).



# H A P P E N I N G S

## Litigation Sections Meetings

Business Valuation	Thursday, May 12, Oakland Thursday, Aug. 4, LAX
Economic Damages	Wednesday, Aug. 3, LAX Monday, Oct. 10, Oakland
Family Law	Friday, May 13, Oakland Friday, Aug. 5, LAX
Fraud	Tuesday, Aug. 2, LAX Monday, Oct. 10, Oakland

Each section will send individual meeting notices.  
Download a copy at [www.calcpa.org/LIT](http://www.calcpa.org/LIT)  
or contact Bobbie Nochenson at (818) 546-3502

### Education Foundation Courses—(800) 877-5897 or [www.educationfoundation.org](http://www.educationfoundation.org)

Advanced Business Litigation Institute	May 5-6, La Quinta Resort & Club
Financial Statements and Tax Fraud Conference	June 16, So. California June 17, SF
Business Valuation Overview	July 8, SF
Business Valuation Fundamentals: Part 1	July 25–27, LA/BH
Business Valuation Fundamentals: Part 2	Aug. 29–31, LA/BH
2005 ABV Examination Review Course	Sept. 26–27, LA/BH

## Sec. 730

*Continued from Page 1*

The Stipulation can be completed and signed while the parties are at the courthouse, then entered as an order and signed by the court.

With this process, the committee hopes that more cases will succeed using Sec. 730 experts and provide for a more positive experience for the professionals and litigants. Also, the costs associated with the dissolution matter could be significantly lower.

While there are many cases that have and will benefit from Sec. 730 experts, there are some cases that are better served by each side retaining their own expert. For instance, Sec. 730 experts are limited in their com-

munications with the parties. Some cases benefit when an expert can work more closely with one party.

A copy of the Stipulation may be obtained by calling Terry M. Hargrave at (310) 576-1090 or Donald J. Miod at (818) 898-9911.

*Commissioner James D. Endman has been a commissioner with the Superior Court since 1988.*

*Terry M. Hargrave, CPA, ABV, CFE, former chair of the Family Law Section, is a partner with Hargrave & Hargrave in Santa Monica.*

*Donald J. Miod, CPA, ABV, CVA, CBA, former chair of the Family Law Section, is a founding partner of Miod & Co. in Mission Hills and Palm Desert.*

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