

RICHARD M. GILMAN, et al., Plaintiffs,
v.
EDMUND J. BROWN, et al., Defendants.

[No. CIV. S-05-830 LKK/GGH.](#)

United States District Court, E.D. California.

August 31, 2011.

ORDER

LAWREMCE K. KARLTON, District Judge.

On July 25, 2011, the court ordered the parties to show cause why a statistical expert witness should not be appointed pursuant to FRE 706, and if appointment is made, whether the court should apportion such expert costs half to plaintiffs and half to defendants. (Doc. No. 359). The court also instructed the parties to submit nominations for statistical expert witnesses.

On August 24, 2011, the parties responded to the order to show cause and submitted nominations for potential expert witnesses. Plaintiffs have agreed that an expert should be appointed and that costs should be apportioned equally. Defendants contend, however, that an expert will not be helpful in the instant case and that plaintiffs should pay the entire cost of any neutral experts appointed by the court.

For the reasons discussed in the order to show cause, the court finds that appointment of a neutral expert witness is appropriate in this case. The court has reviewed the background information for the proposed expert witnesses, and will appoint Professor Richard A. Berk of the University of Pennsylvania. The court is confident that Professor Berk can provide unbiased testimony.^[1]

Professor Berk's fees are \$250 per hour for this case. The court finds this rate to be reasonable. Defendants urge the court to apportion his fees entirely to plaintiffs. They do not argue that they lack the resources to pay the expert costs, but rather contend that plaintiffs should bear any costs because the expert will only be evaluating plaintiffs' evidence. The argument is without merit. The court is appointing an expert because it believes it needs his expertise to evaluate the evidence, regardless of who produced it. Accordingly, it concludes that costs and fees should be apportioned equally between plaintiffs and defendants.

The scope of Professor Berk's expert testimony shall be to determine the statistical probability that Proposition 9 will have the effect of prolonging incarceration for all or some class members. Professor Berk should separately consider the evidence presented by plaintiffs at the April 6, 2011 hearing and the evidence accumulated by plaintiffs to date. In the order to show cause, the court separated the analysis into two separate questions: first, to consider the likelihood that the modified deferral periods will prolong incarceration and second, to consider the likelihood that the advanced hearing process, as applied, will mitigate any prolonged incarceration.^[2] The court

in no way intends to constrain Professor Berk's analysis, and encourages him to go beyond the limitations of these questions to the extent that he determines that additional analysis will shed light on the question before the court: namely whether Proposition 9 creates a significant risk for increased incarceration by class members.

The court further notes that the current motion before the court is for a preliminary injunction. Accordingly, the court recognizes that there may not yet be sufficient evidence from which to draw conclusions as to certain subgroups of the class. The focus of the instant inquiry is whether some or all class members are likely to experience prolonged incarceration as a result of Proposition 9 before final resolution of this case, and not whether they are likely to experience prolonged incarceration ever. For this reason, the court further instructs Professor Berk to opine on the likely time in which the class or a subgroup of the class will experience a likelihood of prolonged incarceration, if any.

Professor Berk is appointed as a neutral expert. For this reason, plaintiffs and defendants may no longer communicate directly with him. The court will coordinate with Professor Berk.

Plaintiffs shall submit to the court within fourteen (14) days of the issuance of this order all evidence presented in the evidentiary hearing, all data underlying the summaries and other analyses presented at the hearing, and all data obtained to date from the Rutherford class action and concerning implementation of the advanced hearing process. If possible, plaintiffs shall submit this information in electronic format. Plaintiffs shall also serve a copy of this evidence upon defendants. Upon receipt, the court shall send the evidence to Professor Berk for analysis.

Further, a status conference is currently set for September 6, 2011. In light of this court's expert appointment, the court vacates the status. The court shall set a further status conference after Professor Berk provides the court with an estimate on the time required to prepare his expert report.

For the foregoing reasons, the court **ORDERS** as follows:

- (1) Professor Berk is appointed as a neutral expert witness.
- (2) Professor Berk shall be compensated at the rate of \$250 per hour. He shall quarterly submit itemized bills to the court. The court will file the bills and provide the parties with fourteen (14) days to object. The court will then direct payment of the bill, in full or in part.
- (3) Plaintiffs shall submit to the court within fourteen (14) days of the issuance of this order an electronic version of all data described above. They must also serve a copy of such data upon defendants.
- (4) The September 6, 2011 status in this case is **VACATED**.

IT IS SO ORDERED.

[\[1\]](#) Defendants appear to have concerns about the ability of an expert to be impartial. To perhaps assuage the concerns of defendants about his ability to be neutral, Professor Berk has informed the court that he had served as an expert for the California Department of Corrections and Rehabilitation in the past and currently serves as an expert for the parole and probation departments of several mid-Atlantic states.

[2] The court notes that in the order to show cause it used the term "significant risk" when describing the questions for expert testimony. Recognizing the ambiguity caused by use of the term significant with respect to statistical expert testimony, the court now makes clear that the expert is to analyze the likelihood of increased incarceration and the court is to determine whether the likelihood demonstrates a significant risk of increased incarceration.