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2 IN THE UNITED STATES DISTRICT COURTS
3 FOR THE EASTERN DISTRICT OF CALIFORNIA
4 AND THE NORTHERN DISTRICT OF CALIFORNIA
5 UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES
6 PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE
7

8 RALPH COLEMAN, et al.,
9 Plaintiffs,
10 v.
11 ARNOLD SCHWARZENEGGER,
12 et al.,
13 Defendants.

NO. CIV S-90-0520 LKK JFM P
THREE-JUDGE COURT

14 MARCIANO PLATA, et al.,
15 Plaintiffs,
16 v.
17 ARNOLD SCHWARZENEGGER,
18 et al.,
19 Defendants.

NO. C01-1351 TEH
THREE-JUDGE COURT
**ORDER RE: DEFENDANT-
INTERVENORS' MOTION FOR
CLARIFICATION**

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21 This matter comes before the Court on Defendant-Intervenors' August 14, 2008
22 motion for clarification. At issue in this motion is whether intervenors, such as police chiefs
23 and district attorneys, or employees of intervenors, such as department commanders of a
24 sheriff's department, who intend to testify as both percipient and expert witnesses must
25 disclose expert reports before they are allowed to present opinion testimony under Federal
26 Rules of Evidence 702, 703, or 705. Upon careful consideration, the Court GRANTS IN
27 PART and DENIES IN PART Defendant-Intervenors' motion as discussed below.
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1 **DISCUSSION**

2 Plaintiffs first contend that this Court's pretrial orders require all expert witnesses to
 3 submit expert reports. For example, on October 10, 2007, the Court ordered that "[d]irect
 4 testimony from expert witnesses will be presented through their expert reports *and* no more
 5 than thirty minutes of live testimony, followed by cross-examination." Oct. 10, 2007 Order
 6 Bifurcating Proceedings & Setting Deadlines for Phase I at 6 (emphasis added). Similarly,
 7 on July 2, 2008, the Court ordered that "[e]xpert disclosures shall be made, *and* expert
 8 reports exchanged, on or before **August 15, 2008.**" July 2, 2008 Order for Pretrial Prep. at 3
 9 (emphasis added). Plaintiffs contend that these provisions make clear "that all expert
 10 testimony will be disclosed in writing, with a limited amount of additional live testimony."
 11 Opp'n at 2. However, the Court did not consider the sort of non-retained percipient-expert
 12 witnesses at issue in the pending motion when issuing its orders regarding expert reports, and
 13 Plaintiffs' argument based on these orders is therefore unpersuasive.

14 Instead, the Court turns to the Federal Rules of Civil Procedure to resolve this dispute.
 15 Federal Rule of Civil Procedure 26(a)(2)(B) provides that:

16 Unless otherwise stipulated or ordered by the court, [the]
 17 disclosure [of the identity of an expert witnesses] must be
 18 accompanied by a written report – prepared and signed by the
 19 witness – if the witness is one retained or specially employed to
 provide expert testimony in the case or one whose duties as the
 party's employee regularly involve giving expert testimony.

20 Fed. R. Civ. P. 26(a)(2)(B). Plaintiffs contend that the witnesses at issue in this motion are
 21 essentially "specially employed to provide expert testimony in the case" or individuals
 22 "whose duties as the party's employee regularly involve giving expert testimony," *id.*,
 23 because they are testifying outside the scope of their employment.

24 Defendant-Intervenors do not dispute that "a majority of courts require reports from
 25 employee experts who render opinions on matters outside the scope of their employment."
 26 *Funai Elec. Co. v. Daewoo Elecs. Corp.*, Case No. C04-1830 CRB (JL), 2007 WL 1089702,
 27 at *3 (N.D. Cal. Apr. 11, 2007). Rather, Defendant-Intervenors argue that their witnesses
 28 have been designated to testify on issues within the scope of their duties as public officials.

1 Plaintiffs do not appear to contest that it is within the scope of an employee's duties to
 2 form opinions on the potential impact of a prisoner release order on operations within that
 3 employee's jurisdiction. For example, Plaintiffs argue that the scope of employment for one
 4 witness, who has since been withdrawn as an expert witness,¹ "surely does not include
 5 assessing impacts of potential court orders on other counties," but they do not argue that the
 6 witness's ordinary course of employment would not include assessing the impacts of such
 7 orders within his county of employment Opp'n at 4. The Court agrees that a city or county
 8 employee may, within the regular scope of his or her employment, develop opinions as to the
 9 impact of a prisoner release order on his or her city or county. Consequently, the designated
 10 witnesses need not prepare expert reports regarding such opinions.

11 However, Defendant-Intervenors fail to persuade the Court that it is within a city or
 12 county employee's scope of employment to opine on the possible effects of a prisoner release
 13 order on other cities or counties or, more broadly, on public safety generally. Indeed,
 14 Defendant-Intervenors' reply makes clear that such opinions are not based on personal
 15 experience gained during the regular scope of employment:

16 Only those designated experts who have personal experience
 17 based on employment related service on such committees and
 18 commissions [such as the Little Hoover Commission or
 19 committees related to Assembly Bill 900], or through service in
 20 statewide organizations such as the California State Sheriff's
 Association, California Police Chief's Association or Chief
 Probation Officers of California, or through employment with
 more than one law enforcement agency will be testifying
 regarding impacts beyond their current employing agency.

21 Barlow Decl. ¶ 4. Thus, to the extent that the designated witnesses "testify regarding impacts
 22 beyond their current employing agency," they do so based not on their day-to-day
 23 employment responsibilities but, rather, based on specialized knowledge gained through
 24 prior employment or service in organizations or on committees and commissions. Such
 25 testimony is therefore indistinguishable from expert testimony that would be obtained from a

26 ¹The witness, Rick Dostal, appears in the Law Enforcement Intervenors' list of expert
 27 witnesses dated August 15, 2008. Ex. A to Norman Decl. at 3. However, he does not appear
 28 in the Law Enforcement Intervenors' amended list of expert witnesses dated August 27,
 2008. Ex. A to Barlow Decl.

1 retained expert, and this Court would ordinarily be inclined to require expert reports
2 regarding such testimony.

3 Nonetheless, “[t]he reason for requiring expert reports is the elimination of unfair
4 surprise to the opposing party and the conservation of resources.” *Elgas v. Colo. Belle*
5 *Corp.*, 179 F.R.D. 296, 299 (D. Nev. 1998) (internal quotations and citation omitted). Given
6 the history of this case, as well as Plaintiffs’ completed or planned depositions of all
7 designated non-retained experts, the Court does not find it expedient to order all designated
8 witnesses to produce expert reports. In particular, Plaintiffs have not demonstrated that they
9 will be unduly prejudiced by being required to take depositions of these witnesses in the
10 absence of expert reports. Accordingly, the Court finds good cause to order the parties and
11 intervenors to proceed as follows:

12 1. For Jerry Powers and John Ingrassia, who were deposed by Plaintiffs prior to the
13 designation of expert witnesses and whose depositions did not include questions regarding
14 expert testimony, Barlow Decl. ¶ 7, Defendant-Intervenors shall either withdraw the witness
15 as an expert witness on or before **September 15, 2008**, or allow a brief supplemental
16 deposition of the witness limited to expert testimony. If Defendant-Intervenors choose the
17 latter option, they shall either (a) produce an expert report prior to the supplemental
18 deposition and no later than **September 15, 2008**, or (b) have the witness’s expert testimony
19 at trial be limited to the scope of the witness’s supplemental deposition testimony.

20 2. For all other non-retained expert witnesses disclosed by Defendant-Intervenors
21 who have not produced an expert report but who have been deposed, Defendant-Intervenors
22 shall either (a) produce an expert report on or before **September 15, 2008**, and thereafter
23 allow a brief supplemental deposition of the witness limited to any additional issues raised in
24 the report that were not discussed at the original deposition, or (b) have the witness’s expert
25 testimony at trial be limited to the scope of the witness’s original deposition testimony.

26 3. For all non-retained expert witnesses disclosed by Defendant-Intervenors who have
27 neither produced an expert report nor yet been deposed, Defendant-Intervenors shall either
28 (a) produce an expert report prior to the deposition and on or before **September 15, 2008**, or

(b) have the witness's expert testimony at trial be limited to the scope of the witness's deposition testimony.

4. Any expert reports produced in compliance with this order need only include issues outside of the witness's scope of employment. Thus, such reports need not discuss opinions on the potential impact of a prisoner release order within the city or county in which the witness is currently employed, but they must discuss opinions on the potential impact of a prisoner release order outside the city or county in which the witness is currently employed.

5. Plaintiffs shall have until **September 25, 2008**, to disclose rebuttal experts and produce rebuttal expert reports in response to any expert reports produced by Defendant-Intervenors in compliance with this order.

6. The expert discovery cut-off shall remain on **October 6, 2008**. However, the following may, if necessary, be taken through **October 13, 2008**: (a) supplemental depositions of Jerry Powers and John Ingrassia regarding their expert testimony; (b) depositions of any designated witnesses at issue in this motion who produce expert reports following the date of this order; and (c) depositions of any rebuttal witnesses disclosed by Plaintiffs in compliance with the preceding paragraph.

CONCLUSION

For the reasons discussed in this order, Defendant-Intervenors' motion for clarification is GRANTED IN PART and DENIED IN PART. The parties and intervenors shall proceed with discovery regarding non-retained expert witnesses as ordered above.


IT IS SO ORDERED.

Dated: 09/05/08

/s/
STEPHEN REINHARDT
UNITED STATES CIRCUIT JUDGE
NINTH CIRCUIT COURT OF APPEALS


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Dated: 09/05/08



LAWRENCE K. KARLTON
SENIOR UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF CALIFORNIA

Dated: 09/05/08



THELTON E. HENDERSON
SENIOR UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF CALIFORNIA