Source: Civil Litigation/California Expert Witness Guide/Contents

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Preface

> In these times when it is impossible to know everything, but becomes necessary for success in any vocation to know something of everything and everything of something, the expert is more and more called upon as a witness both in civil and criminal cases. In these days of specialists their services are often needed to aid the jury in their investigations of questions of fact relating to subjects with which the ordinary man is not acquainted.
>
> Francis L. Wellman,
> The Art of Cross-Examination (1903)

Although Francis Wellman's turn-of-the-century observations make it clear that experts have long been an integral part of the litigation process, until publication of the first edition of California's Expert Witness Guide it was difficult to find a single source attempting to address the full spectrum of issues that the California practitioner encounters when working with—and against—experts. With publication of this second edition, California lawyers continue to have a single volume devoted to the legal, theoretical, and practical aspects of using—and opposing—experts in litigation.

The first edition of this book was published in 1983 in hardcover format. The author, Raoul D. Kennedy, then of Crosby, Heafey, Roach & May, supplemented the book each year with the help of James C. Martin, a colleague at the same firm. Over the years, the authors added a large amount of new material to the supplement, based on their own research and experiences and on suggestions from other lawyers. These additions, combined with changes in the law, persuaded us that a new edition was needed.

The second edition is over 200 pages longer than the first edition, which reflects the wealth of new information that has been added. Another change is that the second edition is in looseleaf format, to permit the authors more flexibility in future supplementation.

This book, like the first edition, is intended to help the inexperienced lawyer find, select, prepare, and present the best possible expert testimony, as well as to give the attorney practical suggestions for effectively discovering, deposing, and cross-examining opposition experts. This book is also intended to help the experienced practitioner address the more sophisticated or infrequently encountered aspects of expert witness practice. Although it addresses itself primarily to state court civil practice, this book will also be helpful to the criminal practitioner. At the end of each chapter there is a discussion of relevant differences between state and federal rules and practice.

The authors wish to express their most sincere gratitude to Edwin A. Heafey, Jr., of Crosby, Heafey, Roach & May, whose thoughts, theories, and tactical advice permeate this book, and to Nora Skrukrud, director of library services at Crosby, Heafey, Roach & May, for her invaluable assistance in successfully integrating the original book, the 1989 supplement, and the authors' post-1989 additions.

Legal editing of this book was performed by CEB attorneys Linda Compton (chap 10), Mary Gerber (chap 8), and Anne Harris (the remaining 14 chapters).

Production and copyediting were performed by Richard Dempewolf. Legal research assistance was provided by Camille Bristow, Enrique De Anda, Duane deJoie, Elianne de la Vega, Rachael Greenberg, Nancy Malen, Mindy Spatt, and Amy Wheat. Diana Krevsky designed the book. Jenny A. Jones and Robert W. Burke, Jr., prepared the index. Composition was performed by CEB's Electronic Publishing staff.

January 2010 Update

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Foreword to the First Edition

There is no question that we live in an era of specialization. This is true not only in law and medicine but in most technical and scientific professions. For example, instead of someone carrying the broad mantle of "economist," we now see such specialists in that field as agricultural economists, health-care economists, labor economists, and the like. Engineering is likewise divided into specialties ranging from acoustical to traffic. Nicholas Murray Butler in a commencement address at Columbia University best summarized the specialization of experts when he stated: "An expert is one who knows more and more about less and less."

The role of experts in all phases of litigation certainly reflects this era of specialization. Many types of litigation such as product and medical negligence litigation frequently involve a battle of experts. Effective expert witnesses reduce complex matters to terms that can be easily understood, express their conclusions on relevant matters of liability, and demonstrate the validity of their analyses and conclusions. Thus, securing the assistance and the testimony of a qualified expert will be one of the most difficult, expensive, and important tasks facing the attorney in the preparation and presentation of his or her client's case. Whether or not an expert is necessary is also a pivotal question facing the practitioner.

Since modern litigation rarely involves arid theories of liability or defense but, rather, concerns the often difficult and intractable problems of proof and preparation, the California Expert Witness Guide serves as a welcome text in its timeliness, comprehensiveness and practicality. The author, Raoul D. Kennedy, drawing upon his own authenticating experiences, presents a cohesive approach to the subject that is a proper blend of the legal and practical considerations involved in working with experts. This work takes the practitioner through all phases of the attorney-expert relationship from its inception, through discover, and on to trial. Distinguished by brevity, clarity, and sound legal analysis, the text lives up to its title as a guide. Armed with it, the practitioner should be able to negotiate the minefield of problems that can be encountered with the expert witness.

Mr. Kennedy and CEB are to be congratulated for their joint efforts in this important field. The courts, the legal professions, and most importantly, the clients, should all benefit from this work.

BRUCE WALKUP
San Francisco

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RAOUL D. KENNEDY is a partner in the firm of Skadden, Arps, Slate, Meagher & Flom LLP, where he handles civil litigation at both the trial and appellate levels. He is a graduate of the University of California, Berkeley, School of Law. He is a member of the American College of Trial Lawyers, the American Board of Trial Advocates, the International Academy of Trial Lawyers, the American Academy of Appellate Lawyers, and is a past president of the California Academy of Appellate Lawyers. In 2005, Mr. Kennedy was selected as the Trial Lawyer of the Year by the Litigation Section of the State Bar of California and inducted into the State Bar Trial Lawyers Hall of Fame.

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Selected Developments

January 2010 Update

Subject Matter of Expert Testimony

- Although expert opinion is not subject to the limitations imposed on lay opinion testimony, it is subject to the general rule that it may be excluded if its probative value is substantially outweighed by the substantial dangers of undue prejudice, confusing the issues, misleading the jury, or taking an undue consumption of time. See *People v Hamlin* (2009) 170 CA4th 1412, 89 CR3d 402, discussed in §2.5.
- Several recent cases discuss whether certain topics are appropriate for expert testimony. See *People v Williams* (2009) 170 CA4th 587, 609, 88 CR3d 401 (crime committed to benefit or promote gang), and *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1334, 86 CR3d 274 (dangerous condition of public property; negligent supervision on school grounds), cited in §2.2, and *U.S. v Mejia-Luna* (9th Cir 2009) 562 F3d 1215 (modus operandi of alien smuggling), cited in §2.10.

Information Relied on by Expert

- A recent case notes that an expert, in forming his or her opinion, can rely on information obtained from the expert's own investigations as well as on information obtained from law enforcement officers, including police reports. See *People v Williams* (2009) 170 CA4th 587, 622, 88 CR3d 401, cited in §4.1.
- For two examples of limiting instructions that opposing counsel should consider requesting when hearsay information has been used as the basis for an expert's opinion, see *People v Williams* (2009) 170 CA4th 587, 622, 88 CR3d 401, discussed in §4.1.
- In *People v Dean* (2009) 174 CA4th 186, 94 CR3d 478, the court held that the rule allowing an expert to state the reasons for his or her opinion cannot be used to permit specific details of documented hearsay to be admitted, but concluded that the prejudice in that case was cured by limiting instructions regarding the effect of the hearsay and the limited nature of the experts' ultimate opinions. See §4.3.
- The court in *Dee v PCS Prop. Mgmt., Inc.* (2009) 174 CA4th 390, 405, 94 CR3d 456, held that expert testimony that a tenant's exposure to mycotoxins caused symptoms and susceptibility to cancer was properly excluded because there was no evidence of exposure to mycotoxins. See §4.37.
- For another example of a commercial case in which there was no basis for an expert opinion, see *Maatuk v Guttman* (2009) 173 CA4th 1191, 93 CR3d 381 (testimony of plaintiffs' damages expert regarding invalidation of plaintiff's patents properly struck because there was no basis for expert's assumptions concerning market penetration and underlying assumption that client had actual working device to sell), in §4.38.
- For an example of a case in which an expert was not permitted to rely on inadmissible evidence under Fed R Evid 703, see *Sommerfield v City of Chicago* (ND Ill 2008) 254 FRD 317 (expert not reasonably permitted to rely on summaries of deposition testimony provided by plaintiffs' attorney in forming opinion on adequacy of police department training and instruction protocols), discussed in §4.52.
- For another case supporting the proposition that the *Daubert* inquiry is whether an expert's methodology is sound, not whether the expert's conclusions are correct, see *In re Scrap Metal Antitrust Litig.* (6th Cir 2008) 527 F3d 517 in §4.56.
- The Ninth Circuit provided some insight into what constitutes an adequate record for determining the admissibility of scientific testimony in *Millenkamp v Davisco Foods Int'l, Inc.* (9th Cir 2009) 562 F3d 971, 979, discussed in §4.58.
- For two additional examples of the trial courts' wide discretion to perform their gatekeeping function under *Daubert,* see *In re Scrap Metal Antitrust Litig.* (6th Cir 2008) 527 F3d 517 and *U.S. v Nacchio* (10th Cir 2009) 555 F3d 1234 in §4.58.
- For two recent district court cases considering the admissibility of expert opinion concerning causation in

chemical exposure cases, see *Claar v Burlington N. R.R.* (9th Cir 1994) 29 F3d 499 and *Millenkamp v Davisco Foods Int'l, Inc.* (9th Cir 2009) 562 F3d 971 in §4.66.
- The Sixth Circuit provided useful insight into when the differential diagnosis methodology is properly employed in *Best v Lowe's Home Ctrs., Inc.* (6th Cir 2009) 563 F3d 171, discussed in §4.84B.

Expert's Opinion: **Certainty Required, Testimony on Ultimate Issue, Effect**

- Suing for attorney fees or sanctions can allow parties who have been harmed by inaccurate or improper expert witness testimony to recoup some of their losses. See *Depuy Spine, Inc. v Medtronic Sofamor Danek, Inc.* (D Mass 2008) 534 F Supp 2d 224, aff'd in part and rev'd in part (Fed Cir 2009) 567 F3d 1314, discussed in §5.7.
- For another example of a suit against one's own expert, see *Pace v Swerdlow* (10th Cir 2008) 519 F3d 1067, discussed in §§5.7, 7.31.
- In *U.S. v Boulware* (9th Cir 2009) 558 F3d 971, expert testimony that corporate distributions were legally nontaxable was properly excluded as legal opinion. See §5.11A.

Locating and Retaining Best Expert

- The court in *Plumley v Doug Mockett & Co.* (CD Cal, Dec. 22, 2008, No. CV 04-2868 GHK) 2008 US Dist Lexis 105634 addressed what constitutes a conflict of interest on the part of an expert and the appropriate remedy when a conflict exists. See §7.17.
- The court of appeal in *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477, refused to expand the scope of Evid C §730 to sentencing proceedings, holding that §730 provides for the appointment of experts in noncapital cases for indigent defendants "only for purposes of defense at trial on the issue of guilt." See discussion in §7.30.
- For a recent case suggesting that there may be an increasing resort to the use of court-appointed experts who are free from the biases of partisan commitments when objective scientific expertise is necessary to protect significant public health and welfare interests, see *People ex rel Brown v Tri-Union Seafoods, LLC* (2009) 171 CA4th 1549, 90 CR3d 644, discussed in §7.30.
- In *Monolithic Power Sys., Inc. v O2 Micro Int'l Ltd.* (Fed Cir 2009) 558 F3d 1341, the Federal Circuit held that district courts enjoy wide latitude in making Fed R Evid 706 appointments of experts under Ninth Circuit law and rejected Seventh Amendment challenges to such an appointment. See §7.33.

Discovering Identity and Noticing Depositions of Opposing Experts

- In *Boston v Penny Lane Ctrs., Inc.* (2009) 170 CA4th 936, 88 CR3d 707, the court held that plaintiff's production of expert reports and writings after the specified exchange date was not unreasonable because plaintiff promptly produced the reports, which did not exist on the exchange date, and the experts were available for deposition before trial. See §10.12.
- The court in *Gordon v Nissan Motor Co.* (2009) 170 CA4th 1103, 88 CR3d 778, held that, with regard to expert opinion, the effect of granting a new trial is to place the parties in the same position as if the case had never been tried. See §10.23A.
- When a party fails to submit an expert witness declaration or submits an incomplete or inaccurate declaration, CCP §2034.300(b), not the general provisions for discovery abuse in CCP §2023.030, governs the remedy available. *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 91 CR3d 617, discussed in §10.25.
- In *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 83 CR3d 306, the court held that a request for expert witness fees under Govt C §12965(b), which permits a court to award such fees to the prevailing party in a FEHA action, is timely when filed within the period for attorney fee motions prescribed by Cal Rules of Ct 3.1702. See §10.46D.
- For a comparison of the expert witness disclosure requirements of Fed R Crim P 16(b) and Fed R Civ P 26(a)(2), see *U.S. v Nacchio* (10th Cir 2008) 519 F3d 1140, aff'd in part and vacated in part (10th Cir 2009) 555 F3d 1234 and *U.S. v Mehta* (D Mass 2002) 236 F Supp 2d 150, discussed in §10.48.
- In *Employees Committed for Justice v Eastman Kodak Co.* (WD NY 2008) 251 FRD 101, the court permitted the scope of the trial expert's deposition to extend to the nature of his prior work as an expert consultant, the

methodologies used, and whether those methodologies were consistent with his analysis in this case. See §10.51.

- For a variation on the consulting expert theme, see *In re Asbestos Prods. Liab. Litig. (No. VI)* (ED Pa 2009) 256 FRD 151, discussed in §10.54.
- The Supreme Court held that expert witness fees sought in cases brought under its original jurisdiction are governed by 28 USC §1821(b). See *Kansas v Colorado* (2009) 556 US ___, 173 L Ed 2d 245, 250, 129 S Ct 1294, in §10.60.

Alternatives to Cross-Examination

- For a recent case considering the admissibility of expert testimony that exceeds the scope of the expert's deposition testimony, see *Easterby v Clark* (2009) 171 CA4th 772, 90 CR3d 81, discussed in §14.9C.

Experts and Summary Judgment Process

- In *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1333, 86 CR3d 274, the court of appeal applied a liberal construction to a declaration providing an expert's opinions in a case involving school officials' duty to supervise special needs students. See §16.3.

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Cutoff Dates and CEB Citation

Cutoff Dates

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I. OVERVIEW OF USING EXPERT WITNESSES IN STATE COURT

§1.1 A. Why Experts Are Used

Most commonly, an expert is hired to testify at trial. A National Law Journal/Lexis poll has confirmed that expert witnesses hold great sway with juries. See *Expert Witnesses Found Credible by Most Jurors*, Nat'l LJ (Feb. 22, 1993). Jurors sometimes give more weight to expert testimony than to lay opinions or to counsels' closing arguments. As a result, attorneys many times try to find topics within their cases that are sufficiently beyond common experience to permit expert testimony. For some issues, an expert is required. See §§2.4, 7.4. Printed sources of ideas can be found in the Judicial Council of California Civil Jury Instructions (CACI) and the California Criminal Jury Instructions (CALCRIM), practice books, annotated codes, and published opinions. Colleagues can be a helpful source of ideas. Some examples of subjects that have been considered proper topics for expert testimony are in §2.2. Types of experts are discussed in chap 6, and locating and retaining the best expert is discussed in chap 7.

PRACTICE TIP: Be imaginative in coming up with ideas for expert testimony. If an issue is important to your case, and expert testimony seems significant to you, the trial judge may agree. Be prepared with other testimony or evidence, however, if your expert is not allowed to testify. Even if no evidence on a particular topic is allowed, it may still be possible to include the topic in your closing argument.

Counsel may also hire an expert as a consultant. Consultants can help counsel evaluate a case, assist in developing a case, help educate counsel, and suggest experts to be hired to testify. For further discussion, in the context of the benefits of hiring the expert early, see §7.5.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.2 B. Hiring the Expert

§1.2 B. Hiring the Expert

Counsel should begin the relationship by personally contacting the expert. During this initial consultation, counsel should ensure that the expert has no conflict of interest and that he or she has the expertise needed for the case. If the expert is being retained to testify, counsel should also evaluate whether the proposed expert will be a persuasive witness.

If the expert is to be retained, counsel and the expert should agree at the outset on the expert's fee or fee structure. Counsel should reduce the agreement to a writing that includes an explanation of the consultant's duty of confidentiality, as well as confirmation of the payment terms and conditions. For a sample letter engaging an expert, see Hebert, *Protecting You and Your Expert Witness from Conflicts of Interest*, 20 CEB Civ Litigation Rep 202 (Sept. 1998).

NOTE: Expert witness compensation cannot be on a contingent basis, even if the lawyer is working on a contingency. Cal Rules of Prof Cond 5-310.

Counsel should also make clear to the expert what he or she is expected to do, and, if applicable, what the expert should *not* do. This will help keep the expert's charges down.

PRACTICE TIP: You will probably want to give the expert guidelines on the amount of time to spend on various tasks so that expenses stay within budget.

You may wish to hire more than one expert to testify on a given topic to help bolster your case. Opposing counsel, however, may object before or during trial that some of the testimony is cumulative. See §7.3.

For further discussion of hiring the expert, see chap 7.

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§1.3 C. Admissibility Requirements for Use of Expert Testimony in Court

Expert testimony can be used only if it involves a subject beyond the experience of ordinary witnesses (Evid C §801(a)), will help the trier of fact (Evid C §801(a)), and is given by a person with the special knowledge, skill, experience, training, or education necessary to qualify as an expert on that topic (Evid C §720(a)). For discussion, see chap 2 (subject matter of expert testimony) and chap 3 (skill necessary to be an expert).

An expert can rely on any information that is considered reliable. Evid C §801(b). The most commonly relied on matters are (1) information about the case itself, including any tests or experiments conducted by the testifying expert or by another expert; (2) depositions and other discovery information; (3) reliable texts and articles on the subject of the expert testimony; and (4) reliable information given to the expert in the form of a hypothetical question. For discussion, see chap 4.

The degree of certainty required of the expert is that his or her opinion provide reasonable support for the matter it addresses. See *Hinckley v La Mesa R.V. Ctr.* (1984) 158 CA3d 630, 205 CR 22. For discussion, see §5.1.

If a new scientific procedure or technique is relied on by the expert, it must at least be supported by "good grounds" and possibly by "general acceptance" within the applicable scientific community. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. For discussion, see chap 4.

An expert may testify on ultimate issues (Evid C §805), but may not give legal conclusions (*Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 456, 52 CR 518). For discussion, see §§5.2-5.4.

Jurors are usually free to decide the weight to give expert testimony. See CACI 221; Pen C §1127b. In professional malpractice cases, however, uncontradicted expert evidence can be conclusive proof of the prevailing standard of skill and learning in the locality. See, *e.g., Engelking v Carlson* (1939) 13 C2d 216, 221, 88 P2d 695, disapproved on other grounds in *Siverson v Weber* (1962) 57 C2d 834, 22 CR 337. See discussion in §5.5.

Counsel must be sure to comply with any local rules or uniform policy requirements.

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§1.4 D. Informing and Educating the Expert; Attorney-Client Privilege and Work Product Doctrine

In order to know what information to give an expert, counsel must consider what opinions counsel wishes the expert to reach. Ideally, the expert should be supplied with all information about the case that is necessary to form an opinion on a particular topic. Counsel must, however, consider whether he or she wishes the opposition to receive materials given to the expert.

There are two types of experts for purposes of discovering their identity before trial: (1) experts who will testify at trial, whose identity must be disclosed, and (2) consultants, whose identity need not be disclosed. See §10.6.

The attorney-client privilege rarely applies to experts (see §§8.2-8.6), and the work product doctrine usually applies only to the work of experts who will not testify (see §§8.8-8.19). The materials that counsel should be most careful *not* to give to experts who may testify are those with notes written by counsel that reflect his or her thoughts on the case, and counsel's summaries of information. Although some work product protection extends even through trial, counsel should not risk a finding that these notes are discoverable when it was not necessary to give them to the expert. See §§8.8-8.19.

Because counsel cannot always be certain whether a particular expert will be called on to testify, and therefore that materials given him or her will become discoverable (see §8.18), counsel should assume that everything said or given to experts will be discoverable. Therefore, counsel should either personally determine what will be discussed with the expert and given to him or her, or should have an associate intimate with discovery rules make those decisions.

PRACTICE TIP: You should not hold back information concerning the case from your expert just because it is negative, because it will undoubtedly be brought out on cross-examination; if the expert is unprepared for this information, the results probably will be disastrous.

Counsel must also inform the expert of the relevant legal principles and considerations involved in the case as they impact on the expert's opinion.

Counsel should continue to provide the expert with newly acquired or discovered information as the case progresses.

For further discussion, see chap 8.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.5 E. Informing and Educating the Lawyer

§1.5 E. Informing and Educating the Lawyer

Attorneys can use experts to help them become familiar with technical areas that will be important to their case. The expert can provide a bibliography, in addition to giving counsel an overview of the area.

Experts can also be helpful before and during opposing experts' testimony at deposition and trial by suggesting possible avenues of cross-examination.

For further discussion, see §§8.29-8.33.

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§1.6 F. Inspections, Tests, Experiments, and Demonstrative Evidence

The various types of demonstrative evidence that experts are capable of generating can be enormously helpful in persuading jurors to counsel's point of view. This is particularly true when difficult, complex, or highly technical issues of causation or damages are involved in a lawsuit.

Practitioners most commonly divide evidence into "real" evidence and "demonstrative" evidence. Real evidence refers to evidence actually involved in the lawsuit, *e.g.,* the contract involved in a contract dispute or the gun used in a homicide. Demonstrative evidence is evidence created for the trial, *e.g.,* computer simulations, diagrams, maps, and models.

Jurors like to think that counsel has left no stone unturned in trying to provide them with the facts of the case. Through the inspection and testing of real evidence, and the creation of clear and helpful demonstrative evidence, counsel can make jurors feel that he or she has shown them all relevant evidence in as clear a manner as possible; this may make jurors more comfortable with counsel's point of view than with the opponent's position.

For further discussion, see chap 9.

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§1.7 G. Discovery

In most civil cases, expert discovery is governed by CCP §§2034.010-2034.730, discussed in chap 10. Under §2034, exchange of information concerning experts does not occur until a trial date has been set, unless good cause is shown for an earlier date. CCP §2034.230.

A demand for the exchange of expert information must be made no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date. CCP §2034.220. The date of exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. CCP §2034.239(b). The exchange of expert witness information must be in writing. CCP §2034.260(a).

Failure to comply with the expert witness disclosure requirements can result in exclusion of the expert's opinion. CCP §2034.300. Despite failure to disclose an expert during discovery, however, that expert may be used for impeachment. CCP §2034.310.

PRACTICE TIP: Using an expert for impeachment does not mean that the expert can merely contradict an opposing expert's opinion. See §10.22.

If counsel has designated an expert on an issue, counsel can simply provide opposing parties with a supplemental list of names and addresses of additional expert witnesses on that issue within 20 days. CCP §2034.280(a). Counsel must also provide declarations by the newly named experts, and their discoverable reports and writings. CCP §2034.280(b). This supplemental procedure must be accomplished within 20 calendar days after the original exchange. CCP §2034.280(a).

If counsel fails to designate an expert on an issue following a party's CCP §§2034.210-2034.310 demand, a court order must be obtained to name an expert for the first time on an issue. A court order is obtained through a motion to augment or amend the expert witness list. CCP §§2034.610-2034.630. Because counsel cannot count on the trial court's indulgence in granting such motions, the authors recommend that counsel designate an expert on each relevant issue once any party initiates a demand under CCP §§2034.210-2034.310.

If counsel wants to obtain an opposing expert's discoverable reports and writings, a specific demand for them must be included in the CCP §§2034.210-2034.310 exchange of expert witness list demand. CCP §2034.210(c).

With regard to counsel's own expert, counsel should consider whether a report is necessary and, if so, discuss with the expert what is to go in it before it is written. See §§8.22-8.23.

PRACTICE TIP: In a limited civil case, counsel may wish to use CCP §96 procedures instead of those in CCP §§2034.010-2034.730. On limited civil cases, see CCP §§85-88.

On receipt of a party's expert witness list, any other party may depose any expert on that list. CCP §2034.410. Counsel does not have to show good cause for taking the depositions of disclosed experts when within the statutory deadlines of CCP §2034.210-2034.470. See CCP §2034.410.

If an opposing expert was deposed by any party, that expert can be called to testify at trial by any party. CCP §2034.310(a). Opposing experts cannot be called to testify if they were not deposed, except for impeachment. CCP §2034.310(b).

For further discussion of discovery in civil cases, see chap 10.

Discovery in criminal cases is governed by Pen C §§1054-1054.8, passed as part of Proposition 115. For discussion, see §8.24.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.8 H. Resisting Demands for Exchange and Other Discovery: Protective Orders

§1.8 H. Resisting Demands for Exchange and Other Discovery: Protective Orders

Any party to a civil case who has been served with a demand to exchange expert witness information may move for a protective order. CCP §2034.250. The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The grounds for such protective orders are discussed in §10.43.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.9 I. Experts and the Summary Judgment Process

§1.9 I. Experts and the Summary Judgment Process

A party to a civil action may move for summary judgment if it is claimed that the action has no merit or that there is no defense. CCP §437c(a).

Expert opinions may be submitted in support of or in opposition to summary judgment motions; they may even be required. These opinions are presented through declarations and should include appropriate exhibits or attachments when necessary and helpful.

It is probably unnecessary to have disclosed under CCP §§2034.010-2034.730 an expert used in support of or in opposition to a summary judgment motion. See §16.4.

For further discussion, see chap 16.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.10 J. Preparing Expert for Deposition and Trial

§1.10 J. Preparing Expert for Deposition and Trial

It is important for counsel to set aside time to meet with the expert before deposition and again before trial. Counsel should review where to go and when, what to wear, what materials to bring, the procedures involved, and the purpose and substance of the testimony.

Before trial, counsel should ensure that all demonstrative evidence has been prepared, and that the expert is comfortable with it and prepared to use it while testifying.

For further discussion, see chaps 12 (preparing expert for deposition and trial) and 9 (demonstrative evidence).

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§1.11 K. Depositions of Experts

Depositions of experts in civil cases are usually conducted by counsel on the opposing side as a form of discovery. Attorneys may sometimes choose to depose their own experts, particularly when they wish to record them on video and use the video recording at trial in place of having the expert testify. See discussion of video recording procedures in §1.12.

Counsel deposing an opponent's expert should try to obtain as much information as possible and to tie the expert down on points that will be used at trial for impeachment.

For further discussion, see chap 11 (depositions).

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.12 L. Video Recording Procedures at Deposition; Using Video Recording at Trial

§1.12 L. Video Recording Procedures at Deposition; Using Video Recording at Trial

A party may make a video recording of a deposition if the party gives proper notice of the intention to do so, if the parties agree to this procedure, or if one of the other parties serves written notice of the intent to make a video record of the deposition testimony. CCP §2025.330.

If a party gives proper notice of the intent to make a video recording of the deposition, and complies with the procedures set out in CCP §2025.340 at the deposition itself, any party may use a video recording of the deposition of the expert witness at trial, even though the expert is available to testify. CCP §2025.620(d).

For further discussion, see §§11.27-11.28.

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§1.13 M. In Limine Motions in Trial Court

Counsel may wish to raise evidentiary problems concerning his or her expert, or an opposing expert, with the trial court as an in limine motion before trial begins. By raising them before trial, counsel has sufficient time to reevaluate his or her trial strategy in light of the court's decision. Through an in limine motion counsel can object that one of the requirements discussed in §1.3 was not met. Evidence Code §352 provides another basis for objecting to the proposed testimony of a particular expert, particularly on the ground that all or part of the expert's testimony is cumulative.

Whatever the objection, counsel should be sure to make a complete record and obtain a ruling from the court. See California Trial Objections §2.18 (Cal CEB Annual).

During trial, counsel should review any objections made by motion in limine or other motion, and be prepared to enforce or renew those motions at the time the expert actually testifies. This step will avoid the possibility of a waiver of the objection for the remainder of the trial or on appeal. See *Heiner v Kmart Corp.* (2000) 84 CA4th 335, 100 CR2d 854 (trial court did not err in admitting expert testimony on plaintiff's lost future profits, because evidence was well founded and defendant failed to object when evidence was introduced at trial); Banke & Baird, *Waiver Worries: Failure to Make the Record Can Be a Trap for the Unwary*, San Francisco Daily Journal, Aug. 2, 2000, Report, p 5.

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§1.14 N. Qualification and Voir Dire of Expert at Trial

Counsel usually begins direct examination of an expert at trial by asking the expert questions that demonstrate that the expert is qualified to give an opinion on the particular issue involved. It is common for opposing counsel to then cross-examine (usually referred to as "voir dire") the expert on his or her qualifications, before counsel presenting the expert has begun direct examination on the facts of the case. After voir diring the expert, opposing counsel either accepts the expert as qualified or objects that the witness is unqualified to state an expert opinion.

For further discussion, see §§13.2-13.6, 14.4-14.7.

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§1.15 O. Direct Examination at Trial

The expert's substantive testimony should cover the work performed on the case, the bases for the expert's opinion, and the expert's opinion. Attorneys sometimes use hypothetical questions to elicit the expert's opinion. Demonstrative evidence is usually essential to ensure the most persuasive presentation.

Counsel must be sure that the expert testifies so that the jury understands clearly every fact and concept, and all technical language. It is often relatively easy for counsel to understand the testimony *because* he or she is so familiar with it; counsel must remember that this is the first time the jurors have heard it.

Counsel may ask leading questions of an expert on direct examination. See Comment to Evid C §767. Expert testimony is usually more persuasive, however, if elicited by open-ended questions.

For further discussion, see chap 13.

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§1.16 P. Cross-Examination at Trial; Alternatives to Cross-Examination

Cross-examination is the traditional way of attacking opposing experts at trial. It is not, however, the exclusive means. Alternatives include: use of motions in limine; challenging the expert's qualifications on voir dire; using objections and motions to strike during the expert's direct examination; and using counsel's own experts to attack the opposing expert's testimony.

The key to successful cross-examination is preparation. Counsel should be thoroughly familiar with the case. A trial notebook of some sort is essential. Documents that might be used for impeachment should be clearly marked for quick access.

For further discussion, see chap 14 (alternatives to cross-examination) and chap 15 (cross-examination).

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II. OVERVIEW OF USING EXPERT WITNESSES IN FEDERAL COURT

§1.17 A. Admissibility Requirements for the Use of Expert Testimony in Court

Subject Matter of Expert Testimony

Federal Rules of Evidence 702 provides that experts with scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue may testify in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. As in California, the federal courts exclude expert testimony on matters that are within the realm of common experience. See generally McLaughlin, Hon. Joseph M. Weinstein's Federal Evidence ¶¶4-702 to 4-702.06 (2d ed 1997). It is significant that Rule 702 permits expert testimony in the form of an opinion "or otherwise." For further discussion, see §§2.10, 4.55.

Subject Matter of Lay Opinion Testimony

Federal Rules of Evidence 701 allows a nonexpert to testify in opinion form when the opinion is rationally based on the witness's perception, is helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue, and is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. For further discussion, see §2.11.

Skill Necessary to Be Expert

The Federal Rules of Evidence use language similar to that found in Evid C §720(a) in describing the skill necessary to be an expert: "qualified as an expert by knowledge, skill, experience, training, or education." Fed R Evid 702. For further discussion, see §3.7.

Certainty with Which Opinion Must Be Expressed

Federal cases have drawn no clear boundaries concerning how certain an expert opinion must be to be admissible. See §5.10.

Testimony on Ultimate Issue

Federal Rules of Evidence 704, which is very similar to California Evid C §805, provides that opinion testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. See §§5.11-5.11B.

When Expert Testimony Is Conclusive

In most cases in federal court, opinions testified to by experts are not binding on the trier of fact; this is not true in some cases concerning professional malpractice. For further discussion, see §5.12.

Court Appointment of Experts

Federal Rules of Evidence 706 provides for court appointment of experts in federal courts. For further discussion, see §7.33.

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§1.18 B. Attorney-Client Privilege and Work Product Doctrine

Attorney-Client Privilege

The attorney-client privilege under federal law is similar to California statutory protection.

In the corporate context, the federal courts use a subject matter test. See *Upjohn Co. v U.S.* (1981) 449 US 383, 66 L Ed 2d 584, 101 S Ct 677. For further discussion, see §§8.36-8.37.

Work Product Doctrine

When the work of experts has actually been done for counsel in anticipation of litigation, it is entitled to work product protection. For further discussion, see §§8.38-8.42.

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§1.19 C. Demonstrative Evidence

Demonstrative evidence must be relevant under Fed R Evid 401-402 to be admissible. Charts and summaries of information are admitted under Fed R Evid 1006. Hearsay exceptions, such as records of regularly conducted activity, are admitted under Fed R Evid 801-804. Contents of writings, recordings, and photographs are admitted under Fed R Evid 1001-1008. For further discussion, see §9.25.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.20 D. Discovery

§1.20 D. Discovery

Discovery concerning experts in the federal courts is governed by Fed R Civ P 26(b)(4). Rule 26(b)(4) divides experts into four categories for purposes of discovery:

- Experts that a party expects to use as witnesses at trial.
- Experts retained or specially employed in anticipation of litigation or preparation for trial who are not expected to testify.
- Experts informally consulted in preparation for trial but not formally retained.
- Experts whose information was not acquired in preparation for trial.

Under the rules, a party must disclose the identity of anyone who may be used at trial to present evidence under Fed R Evid 702, 703, or 705. See Fed R Civ P 26(a)(2), (b)(4). The timing of the disclosure is set by court order or stipulation of the parties. If there is no such order or stipulation, the timing for such disclosures is set out in Fed R Civ P 26(a)(2)(C).

A separate process is used to discover the identity and the opinions of experts who have been retained or specially employed and who are not expected to be called as witnesses at trial. Under Fed R Civ P 26(b)(4)(B), facts known or opinions held by such experts are discoverable only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Discovery is precluded against experts who were informally consulted in preparation for trial, but not retained or specially employed. See Notes of Advisory Committee on 1970 Amendments to Rules.

Discovery is allowed of a party's "in-house" expert if his or her investigation was conducted as part of regular duties and not in anticipation of litigation. See Notes of Advisory Committee on 1970 Amendments to Rules.

Sanctions for Failure to Disclose Expert Witness Information

The federal courts can impose sanctions under Fed R Civ P 26(g)(3) and 37(a)(5) or can prohibit an expert from testifying either on certain issues, or at all, for failure to comply with required expert witness disclosure (see Fed R Civ P 37(c)(1)). See, *e.g.*, *Yeti by Molly, Ltd. v Deckers Outdoor Corp.* (9th Cir 2001) 259 F3d 1101 (addressing issue of sanctions under Rule 37(c)(1) for late disclosure of expert report).

For further discussion of discovery in federal court, see §§10.48-10.61.

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Source: Civil Litigation/California Expert Witness Guide/1 Overview/§1.21 E. Depositions

§1.21 E. Depositions

As in California law (see CCP §2025.460(b), (c)), objections in federal court to the competency of a witness or to the relevance or materiality of testimony and the like are not waived by failure to make them before or during the taking of a deposition. Only objections made on grounds that might have been obviated or removed if presented at that time are waived. Fed R Civ P 32(d)(3)(A). For further discussion, see §11.39.

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§1.22 F. Summary Judgment Motions

Some federal courts have rejected the use of affidavits of experts in summary judgment motions altogether because they contain opinion evidence. *Mapco, Inc. v Carter* (Temp Emer Ct App 1978) 573 F2d 1268. More typically, however, the cases accept such affidavits to the extent that the opinions expressed are adequately supported by specific facts. See *U.S. v Various Slot Machs. on Guam* (9th Cir 1981) 658 F2d 697, 700. For further discussion, see §16.5.

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§1.23 G. Trial

Motions in Limine

Federal courts recognize motions in limine as vehicles for testing the validity of expert testimony. In addition, Fed R Evid §104(a) requires the court to make a preliminary determination of the admissibility of expert testimony and the qualifications of expert witnesses.

Under Fed R Evid 103 (rulings on evidence), obtaining a definitive ruling on the admissibility of expert testimony in a motion in limine should alleviate any concerns about a waiver if the objection is not renewed at trial. Before the December 2000 amendment of Rule 103, a party risked waiver of an objection made by a motion in limine if the party did not renew the objection when the testimony was offered at trial. See *C. P. Interests, Inc. v California Pools, Inc.* (5th Cir 2001) 238 F3d 690.

Qualifying the Expert and Voir Dire

Federal Rules of Evidence 104 gives the judge wide discretion to determine whether an expert is qualified.

Direct and Cross-Examination

Direct and cross-examination of experts is conducted in essentially the same manner in federal court as in California state court.

For further discussion of rules concerning experts at trial in the federal courts, see §§13.19 (direct examination), 14.10 (alternatives to cross-examination), and 15.31 (cross-examination).

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2

Subject Matter of Expert Testimony

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I. SUBJECT MATTER OF EXPERT TESTIMONY

§2.1 A. Topics Must Be Beyond Common Experience and Assist Trier of Fact

To properly be the subject of expert testimony, a topic must be sufficiently beyond common experience that an expert's opinion on that topic would assist the trier of fact. Evid C §801(a).

PRACTICE TIP: In Evid C §801, the phrase "would *assist* the trier of fact" (emphasis added) allows you to argue for the admission of expert opinion testimony that is helpful, even though it is not necessary. See *People v Hopper* (1956) 145 CA2d 180, 191, 302 P2d 94, 101.

A virtually unlimited number of topics meet the requirement of Evid C §801(a). Some common types of specialists are discussed in chap 6. Topics that have been considered sufficiently beyond common experience to be the subject of expert testimony are listed in §2.2.

There are some subjects on which both lay witnesses and experts may testify because Evid C §800 allows lay testimony in opinion form "as permitted by law" when based on the witness's own perceptions and when that opinion is helpful to a clear understanding of the witness's testimony. For further discussion of lay testimony, see §§2.6-2.7.

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Source: Civil Litigation/California Expert Witness Guide/2 Subject Matter of Expert Testimony/§2.2 B. Examples of Topics Considered Appropriate for Expert Testimony

§2.2 B. Examples of Topics Considered Appropriate for Expert Testimony

Examples of topics that have been considered appropriate for expert testimony follow:

- Automobile accident: Cause. See *Visueta v General Motors Corp.* (1991) 234 CA3d 1609, 286 CR 402 (lay opinion on cause of automobile accident is not admissible).
- Conservatorship proceeding: Whether a conservatee who admits that he or she is suffering from a mental disorder may, as a result, be unable to provide for his or her basic needs. See *Conservatorship of Torres* (1986) 180 CA3d 1159, 226 CR 142.
- Criminal case: Credibility of eyewitness identification. See *People v McDonald* (1984) 37 C3d 351, 377, 208 CR 236.
- Criminal case: Criminal defendant's actual mental state at the time the crime was committed. See *People v Molina* (1988) 202 CA3d 1168, 249 CR 273; *People v Young* (1987) 189 CA3d 891, 906, 234 CR 819. But see *People v Bobo* (1990) 229 CA3d 1417, 3 CR2d 747 (*Molina* distinguished because of changes to mental state requirements for malice aforethought).
- Criminal case: Person's ability to unlatch a chain on a door from the outside. See *People v Allen* (1976) 65 CA3d 426, 436, 135 CR 276.
- Criminal case: Effect of sleep disorders. *People v Cegers* (1992) 7 CA4th 988, 9 CR2d 297 (held that *Kelly/Frye* test was improperly applied to exclude psychologist's testimony relative to sleep disorders alleged to have influenced defendant's behavior; testimony on oximeter test was within purview of ordinary expert testimony).
- Criminal case: Issues relating to gangs:
- Gang behavior. See *People v Martinez* (2008) 158 CA4th 1324, 1332, 70 CR3d 680; *People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876; *People v Valdez* (1997) 58 CA4th 494, 68 CR2d 135; *People v Gamez* (1991) 235 CA3d 957, 286 CR 894, disapproved on other grounds in *People v Gardeley* (1996) 14 C4th 605, 624 n10, 59 CR2d 356.
- Gang culture and witness intimidation by gang members. *People v Gonzalez* (2006) 38 C4th 932, 945, 44 CR3d 237.
- Significance of gang-related tattoos. *People v Ochoa* (2001) 26 C4th 398, 438, 110 CR2d 324.
- Whether and how a crime was committed to benefit or promote a gang. *People v Williams* (2009) 170 CA4th 587, 609, 88 CR3d 401.
- Criminal case: White supremacist culture and beliefs. *People v Lindberg* (2008) 45 C4th 1, 82 CR3d 323.
- Criminal case: Reason parents often refrain from filing reports on child molestation. See *People v McAlpin* (1991) 53 C3d 1289, 283 CR 382.
- Criminal case: Reason first-time victim of domestic violence would recant testimony. *People v Brown* (2004) 33 C4th 892, 895, 16 CR3d 447.
- Criminal case: Whether a seized vest was a "body armor vest." *People v Chapple* (2006) 138 CA4th 540, 549, 41 CR3d 680.
- Defamation case: Truth or falsity of statement. *Melaleuca, Inc. v Clark* (1998) 66 CA4th 1344, 1356, 78 CR2d 627.
- Defamation case: Implicit meaning of a publication. *Weller v American Broadcasting Cos.* (1991) 232 CA3d 991, 283 CR 644.
- Design defect: Deployment of air bag. *Pruitt v General Motors Corp.* (1999) 72 CA4th 1480, 86 CR2d 4.
- Family law case on mentally retarded person: Opinion on whether he or she should be involuntarily committed as a dangerous threat to society. See *In re Krall* (1984) 151 CA3d 792, 797, 199 CR 91.
- Handwriting comparison: See Evid C §1418. But see *People v Rodriguez* (2005) 133 CA4th 545, 34 CR3d 886 (under Evid C §1417, jury may compare signatures and may conclude, without benefit of handwriting expert testimony, that questioned signatures were made by criminal defendant); see also *Estate of Nielson* (1980) 105 CA3d 796, 165 CR 319.
- Personal injury case: Dangerous condition of public property. *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1334, 86 CR3d 274.
- Personal injury case: Driver's ability to see words on a road sign when traveling more than 25 miles per hour. See *New v Consolidated Rock Prods. Co.* (1985) 171 CA3d 681, 692, 217 CR 522.
- Personal injury case on medical causation: The effect of plaintiff's aspirin use on the risk of surgical

complications. *Betterton v Leichtling* (2002) 101 CA4th 749, 124 CR2d 644.

- Personal injury case: Negligent supervision on school grounds. *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1330, 86 CR3d 274.
- Personal injury case on seat belt use: Whether failure to use a seat belt was the proximate cause of a physical injury. See *Franklin v Gibson* (1982) 138 CA3d 340, 343, 188 CR 23; *Truman v Vargas* (1969) 275 CA2d 976, 982, 80 CR 373. But see *Lara v Nevitt* (2004) 123 CA4th 454, 19 CR3d 865 (no expert testimony is necessary to support reasonable inference that plaintiff would have suffered less injury had he been wearing seat belt); *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 118, 147 CR 733.
- Sanity. See Evid C §870.
- Value of property. See Evid C §813. See also *Escondido Union Sch. Dist. v Casa Suenos De Oro, Inc.* (2005) 129 CA4th 944, 982, 29 CR3d 89 (definition of fair market value in eminent domain action); *Redevelopment Agency v Attisha* (2005) 128 CA4th 357, 27 CR3d 126 (value of business goodwill in condemnation proceeding); *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 189 CR 749.

For further discussion of proper subjects for expert testimony, see chaps 6 (types of experts) and 7 (locating and retaining best expert). See also Jefferson's California Evidence Benchbook §§29.19, 29.22-29.23 (3d ed CJA-CEB 1997); 1 Witkin, California Evidence, *Opinion Evidence* §§45-78 (4th ed 2000).

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§2.3 C. Topics Not Sufficiently Beyond Common Experience to Permit Expert Testimony

Matter within common knowledge and experience. If a matter falls within common knowledge and ordinary experience, expert testimony is not permitted. See Evid C §801(a); see also *Caloroso v Hathaway* (2004) 122 CA4th 922, 19 CR3d 254 (on summary judgment, expert testimony on risks posed by sidewalk crack properly disregarded because it is within common knowledge of jurors to determine whether defect in sidewalk is dangerous; photographic evidence of crack was sufficient); *Ewing v Northridge Hosp. Med. Ctr.* (2004) 120 CA4th 1289, 16 CR3d 591 (jurors can ascertain whether psychotherapist actually believed or predicted that patient posed serious risk of injuring victim, giving rise to duty to warn under CC §43.92, based on their common knowledge without expert guidance).

As succinctly explained by one court: "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" *Jorgensen v Beach 'n' Bay Realty* (1981) 125 CA3d 155, 163, 177 CR 882. For example, experts are not permitted to testify as to the credibility of specific witnesses who testify at trial. No special expertise is required to evaluate the credibility of individual witnesses; that is the essence of an issue within common knowledge and ordinary experience. See *People v Sandoval* (2008) 164 CA4th 994, 1000, 79 CR3d 634 (proffered expert testimony on "make-up" sex properly excluded because subject was within jurors' common knowledge and testimony went to complaining witnesses' credibility, which would not assist trier of fact); *People v Sergill* (1982) 138 CA3d 34, 187 CR 497. Jurors are also capable of determining a party's motive by themselves, without an expert telling them which finding on that issue the evidence supports. *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 293, 8 CR3d 898 (human resources expert testimony that certain facts were "indicators" of retaliation improperly invaded province of jury).

Breach of statutory duty. Similarly, if a claim is based on breach of a legislatively mandated duty, expert testimony is admissible, but it is not conclusive (see Evid C §669(b)(1)) and is not required. See *Huang v Garner* (1984) 157 CA3d 404, 416, 203 CR 800 (expert testimony was admissible, but not required when the Uniform Building Code could establish the standard of care). For example, a jury is not restricted to considering only expert testimony when deciding whether a doctor complied with statutory requirements. *Daum v SpineCare Med. Group* (1997) 52 CA4th 1285, 1304 n5, 61 CR2d 260. In *Daum,* a patient alleged that his doctor violated requirements of state and federal law by failing to inform him that the surgery was part of an FDA-approved clinical investigation. The court in *Daum* held that the trial court had erred by restricting the jury to only the expert testimony when deciding whether the doctor had properly informed the patient.

Product liability and "consumer expectations" test. In a product liability design defect case, one court has noted that "where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to determine what an ordinary consumer would or should expect." *Pruitt v General Motors Corp.* (1999) 72 CA4th 1480, 1483, 86 CR2d 4, quoting *Soule v General Motors Corp.* (1994) 8 C4th 548, 567, 34 CR2d 607.

Courts have grappled with the issue of when it is appropriate to apply this "consumer expectations" test. For example, in *Pruitt v General Motors Corp., supra,* plaintiff was injured when her air bag inflated during a collision; the court of appeal affirmed the trial court's refusal to instruct the jury on the consumer expectations test, stating that deployment of an air bag was not part of the everyday experience of the consuming public and that the jurors needed expert testimony to evaluate the risks and benefits of the challenged design. In contrast, in *Bresnahan v Chrysler Corp.* (1995) 32 CA4th 1559, 38 CR2d 446, plaintiff was injured when her air bag deployed during a low-speed collision; the court of appeal reversed the trial court's grant of a nonsuit for defendant, ruling that the trial court erred in precluding plaintiff from proceeding under the consumer expectations test. In *McCabe v American Honda Motor Co.* (2002) 100 CA4th 1111, 123 CR2d 303, the court refused to find any conflict between the two cases, given their different factual scenarios. The court pointed out that deciding whether the functioning of an air bag lends itself to the consumer expectations test in every circumstance "would improperly focus on the nature of the product without regard to the circumstances of its purported failure." The critical question is not whether the product itself is beyond the ordinary knowledge of the consumer, but "whether the product, *in the context of the facts and circumstances of its failure*, is one about which the ordinary consumers can form minimum safety expectations." 100 CA4th at 1124 (emphasis in original). See *Morson v Superior Court* (2001) 90 CA4th 775, 109 CR2d 343 (complexity of causation analysis regarding exposure to latex in hospital gloves made it inappropriate to apply consumer expectations test for design defect). Thus, when reviewing published cases in search of authority to support the use of expert testimony in a particular case, counsel should not consider these opinions to state absolute rules that an expert should or should not be allowed to testify on that particular issue in a similar future case. Because appellate courts are reviewing trial court decisions, they

usually are dealing with whether an expert was properly allowed or should have been allowed to testify by the trial court. Appellate courts presume that the judgment or order appealed from was correctly decided by the trial judge, and view the evidence in the light most favorable to the respondent. See California Civil Appellate Practice §§5.11-5.45 (3d ed Cal CEB 1996). These rulings therefore more clearly demonstrate that it was not error for a particular trial judge, as viewed on appeal, to rule as he or she did on the admissibility of particular expert testimony. In the context of appellate cases finding a topic not sufficiently beyond common experience to permit expert testimony, the trial judge typically did not permit the expert testimony, and the appellate court has upheld the trial court's discretion under the circumstances.

PRACTICE TIP: Even when a topic found unsuitable for expert testimony in a published case is quite similar to the topic on which you wish an expert to testify, remember that you will have a different trial judge who may view the facts differently.

Depending on the facts of the case, lay opinion testimony may be allowed even though expert testimony is not. For issues on which lay opinions have been allowed, see §2.7. If neither type of opinion testimony is allowed, the issue is left to the trier of fact and commonly is addressed only in the opening statement and closing argument.

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§2.4 D. Topics Requiring Expert Testimony

Matter beyond common knowledge and experience. In addition to the wide range of areas in which expert testimony is permissible because the subject matter is sufficiently beyond the common knowledge and ordinary experience of jurors (discussed in §2.1), there is a comparatively narrow range of subjects in which expert testimony is usually mandatory and without which the dispute may not be submitted to the trier of fact.

Professional malpractice. Ordinarily, in professional malpractice cases the failure of a professional to possess or exercise the requisite learning or skill may be established only by the testimony of experts. See *Lawless v Calaway* (1944) 24 C2d 81, 88, 147 P2d 604; *Marriage of Friedman* (2002) 100 CA4th 65, 122 CR2d 412; *Unigard Ins. Group v O'Flaherty & Belgum* (1995) 38 CA4th 1229, 45 CR2d 565; *Selden v Dinner* (1993) 17 CA4th 166, 21 CR2d 153; *Munro v Regents of Univ. of Cal.* (1989) 215 CA3d 977, 263 CR 878. See also *Williamson v Prida* (1999) 75 CA4th 1417, 89 CR2d 868 (in veterinary malpractice claim, as in medical malpractice claim, expert testimony is needed to establish appropriate standard of care). In medical malpractice actions, expert witness testimony is generally required to establish any deviation from the standard of care because medical processes are generally beyond common knowledge; thus, the more complex the medical process, the more likely that expert testimony will be required to establish negligence. *Curtis v Santa Clara Valley Med. Ctr.* (2003) 110 CA4th 796, 2 CR3d 73.

Construction defects. Similarly, in construction defect cases, the standard of care and its breach must usually be established through expert testimony unless the defects "are of such common knowledge that men of ordinary education could easily recognize them." *Stonegate Homeowners Ass'n v Staben* (2006) 144 CA4th 740, 749, 50 CR3d 709, quoting *Raven's Cove Townhomes, Inc. v Knuppe Dev. Co.* (1981) 114 CA3d 783, 797, 171 CR 334. Even if there is no privity of contract between the owner and subcontractor, and the general contractor is satisfied with the work, the subcontractor still has a duty to perform tasks in a good and workmanlike manner. Thus, expert testimony is relevant and admissible in the owners' suit against the subcontractor. *Stonegate Homeowners Ass'n v Staben, supra*.

Other areas. Other areas in which expert testimony is essential include whether a work lacks serious artistic, scientific, literary, or political value in obscenity cases (see *Luke Records, Inc. v Navarro* (11th Cir 1992) 960 F2d 134) and claims for false advertising under the Lanham Act, under which the plaintiff must make a threshold showing that a statistically significant part of the audience has been misled (see *Johnson & Johnson Merck Consumer Pharm. Co. v Smithkline Beecham Corp.* (2d Cir 1992) 960 F2d 294; see also §6.54 discussing survey evidence generally).

Res ipsa loquitur. Expert testimony is not required if the plaintiff can invoke the doctrine of res ipsa loquitur, *i.e.,* when a layperson can say as a matter of common knowledge that the consequences of a procedure would not have occurred if due care had been exercised. See §2.4B.

It should be noted that there are cases based on res ipsa loquitur in which expert testimony may "seem mandatory … if the inference of negligence from the accident itself was obvious only to an expert." *Smoot v Mazda Motors, Inc.* (7th Cir 2006) 469 F3d 675, 680. If the expert testimony presents a complete explanation of the accident, "superseding any inference that might have been drawn from the accident itself," then res ipsa loquitur would no longer apply and giving instructions on it would only confuse the jury. *Smoot v Mazda Motors, Inc., supra*. If, on the other hand, the expert testimony rebuts the defendant's evidence showing the accident could have occurred without negligent behavior, a different scenario is presented: The expert's testimony serves only to repel a challenge to the inference created by the accident itself and should be admitted for this purpose in a res ipsa loquitur case. Nevertheless, as noted in *Smoot,* courts remain divided over whether it is ever appropriate to permit expert testimony to bolster the plaintiff's invocation of res ipsa loquitur.

For discussion of when a specialist within an expert field is required, see §3.3.

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§2.4A 1. When Expert Opinion Required in Professional Malpractice Case

When professional testimony is required to establish the standard of care, it is conclusive. *Howard v Owens Corning* (1999) 72 CA4th 621, 632, 85 CR2d 386. But see §5.12 (general rule that expert testimony is not conclusive in other types of cases). Thus, counsel must ensure that his or her experts are qualified both to state an opinion on the relevant standard of care and to state that their testimony is framed in terms of a breach of, or compliance with, the relevant standard of care. See *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101. See also *Wilson v Irwin Mem. Blood Bank* (1993) 14 CA4th 1315, 18 CR2d 517 (expert testimony reflecting relevant standard of care followed by blood banks at time of transfusion cannot be impeached with reference to testing and procedures adopted after transfusion; standard of care must be defined as of time of challenged procedure); *Vandi v Permanente Med. Group* (1992) 7 CA4th 1064, 9 CR2d 463 (to support informed consent instruction, expert testimony must establish that medical procedure is indicated and that it should be disclosed to particular patient).

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§2.4B 2. When Expert Opinion Not Required in Medical Malpractice Case

When the professional malpractice alleged is not beyond the experience of a lay person, expert testimony is not required in professional malpractice cases. For example, in medical malpractice the following issues do not require expert testimony:

- Res ipsa loquitur: Expert is not necessary on need for doctor to tell patient not to lift leg after operation (*Kerr v Bock* (1971) 5 C3d 321, 324, 95 CR 788); expert testimony not necessary concerning chiropractor's malpractice in avoiding injury to parts of patient's body not being treated (*Hurn v Woods* (1982) 132 CA3d 896, 901, 183 CR 495 (nonsuit reversed)).
- Informed consent, negligence per se: Expert testimony is not necessary to determine whether physician made disclosures required by statute or regulation, and it is error to require the jury to rely on expert testimony (*Daum v SpineCare Med. Group* (1997) 52 CA4th 1285, 61 CR2d 260).
- Informed consent, significant risk: expert testimony is not necessary to determine whether a significant risk of a surgical procedure should be disclosed to a patient (*Betterton v Leichtling* (2002) 101 CA4th 749, 124 CR2d 644).
- No need for expert testimony on care required of nursing home to protect its patients from aggressive behavior by other patients (*Mast v Magpusao* (1986) 180 CA3d 775, 779, 225 CR 689 (nonsuit reversed)).
- Expert opinion unnecessary to find that hospital staff had been negligent in failing to adequately monitor patient in hospital operating room during most critical time after operation (*Czubinsky v Doctors Hosp.* (1983) 139 CA3d 361, 367, 188 CR 685 (judgment notwithstanding verdict reversed)).
- Expert testimony not required to establish liability for psychotherapist's failure to disclose threat of violence to identifiable victim under CC §43.92 (*Ewing v Northridge Hosp. Med. Ctr.* (2004) 120 CA4th 1289, 16 CR3d 591).

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§2.4C 3. When Expert Opinion Not Required in Legal Malpractice Case

The following legal malpractice issues do not require expert testimony:

- Expert testimony not required to determine whether family law attorney was negligent in failing to conduct standard research on issues of retention of health coverage benefits and offset of tax liability (*Stanley v Richmond* (1995) 35 CA4th 1070, 1094, 41 CR2d 768);
- No need for expert testimony on value of lawyer's services (*Ball v Posey* (1986) 176 CA3d 1209, 1215, 222 CR 746);
- Expert not required when liability based on violation of ethical duties that were conclusively established by Rules of Professional Conduct (*Day v Rosenthal* (1985) 170 CA3d 1125, 1147, 217 CR 89);
- Expert not required on issue of whether counsel retained jointly by insurance carrier and its insured had abandoned the insured's best interests in deference to conflicting interests of insurance carrier (*Betts v Allstate Ins. Co.* (1984) 154 CA3d 688, 716, 201 CR 528);
- Expert testimony not necessary to establish reasonable value of attorney's services (*Bunn v Lucas, Pino & Lucas* (1959) 172 CA2d 450, 468, 342 P2d 508).

When Expert Opinion Not Required in Other Malpractice Cases

Expert testimony has also been found not to be required in cases involving other types of professional services. *Estate of Anderson* (1983) 149 CA3d 336, 351, 196 CR 782 (no need for expert testimony on whether bank violated its fiduciary duties in administering estate); *Easton v Strassburger* (1984) 152 CA3d 90, 105, 199 CR 383 (expert testimony not required concerning whether listing real estate broker met standard of care by failing to determine whether property in question had history of soil problems). See also §3.1.

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§2.5 E. Expert Testimony Not Subject to Lay Opinion Requirements

An expert's opinion is not subject to the limitations imposed on lay opinion testimony:

- Expert opinions do not have to be based on facts observed by the witness (*Hope v Arrowhead & Puritas Waters, Inc.* (1959) 174 CA2d 222, 229, 344 P2d 428; see discussion of this lay witness requirement in §2.6); and
- Expert opinions do not require a showing that the opinions are helpful to a clear understanding of the witness's testimony (contrast Evid C §800(b), which requires this for lay opinions, with Evid C §801, which makes no such prescription for expert opinions).

However, an expert's opinion is still subject to the general rule that the court may exclude evidence if its probative value is substantially outweighed by the substantial dangers of undue prejudice, confusing the issues, misleading the jury, or taking too much time. Evid C §352. See *People v Hamlin* (2009) 170 CA4th 1412, 1449, 89 CR3d 402 (no abuse of discretion when trial court reasonably determined that expert testimony would have little probative value because, although expert could testify that certain writings showed or did not show signs of having been written under stress, he could not say whether duress was cause of stress).

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II. SUBJECT MATTER OF LAY OPINION TESTIMONY

§2.6 A. Permissible Scope

Rationally based on witness's perception and helpful to understanding testimony. Unlike an expert witness, a lay witness may generally offer opinions only on facts observed by the witness. Evid C §800(a); see Comment to Evid C §800. See also 1 Witkin, California Evidence, *Opinion Evidence* §1 (4th ed 2000). Even with observed facts, a lay witness may testify in opinion form only if it is helpful to a clear understanding of his or her own testimony (Evid C §800(b)), *i.e.,* "when the matters… observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner." *Eger v May Dep't Stores* (1953) 120 CA2d 554, 558, 261 P2d 281.

As "permitted by law." Evidence Code §800 by its express terms "does not make inadmissible an opinion that is admissible under existing law, even though the requirements of subdivisions (a) and (b) are not satisfied." Comment to Evid C §800. Accordingly, in those areas in which lay opinion testimony was permitted by law before enactment of §800, such opinion is still allowed despite noncompliance with subsections (a) and (b).

Some examples of areas of lay testimony allowed by pre-§800 law include: sanity; a party's own intent, motive, or knowledge; estimates of speed, distance, or size; a person's appearance or demeanor, age, intoxication, identity, or handwriting; time; distance; whether the witness has suffered a particular illness or injury; the approximate age of a person; the witness's parentage; the witness's ownership or possession of property and its value; and the value of services performed by the witness. See Jefferson's California Evidence Benchbook §§29.1-29.3, 29.6-29.10 (3d ed CJA-CEB 1997); 1 Witkin, Evidence, *Opinion Evidence* §§5-25. For examples of proper areas of nonexpert opinion testimony, see §2.7.

The areas of lay opinion testimony "otherwise permitted by law" can also be expanded by the courts notwithstanding the limitations of Evid C §800(a)-(b). For example, in *People v Williams* (1988) 44 C3d 883, 245 CR 336, the supreme court observed that it had never considered the admissibility of lay opinion on drug-induced intoxication but noted that a court of appeal had held that, if sufficient foundation is laid, lay opinion testimony that a person is under the influence of narcotics is admissible. See *People v Moore* (1945) 70 CA2d 158, 160 P2d 857. See also *People v Newberry* (1962) 204 CA2d 4, 9, 22 CR 23 (point waived by failure to object, but court stated "[i]t is doubtful whether testimony that a person is under the influence of a narcotic requires expert qualifications on the part of the witness").

A lay witness, even when not allowed to state an opinion, should be able to testify to facts relating to the opinion testimony. For example, a lay witness not allowed to testify about a person's sanity under Evid C §870 should still be able to describe the person's actions and speech. See *Pfingst v Goetting* (1950) 96 CA2d 293, 215 P2d 93.

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§2.7 B. Examples

Some examples of subjects considered appropriate for opinion testimony by lay witnesses include:

- Age. *People v Caldwell* (1921) 55 CA 280, 296, 203 P 440.
- Distance. See *Dean v Feld* (1946) 77 CA2d 327, 330, 175 P2d 278 (case assumed lay testimony proper).
- Future earning capacity. *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 78 CR2d 557 (expert testimony about future earning capacity not required before jury can determine compensation for loss of future earnings).
- Handwriting identification. Evid C §1416. (Expert testimony is also possible under Evid C §1418.)
- Health, injury, or emotional distress testimony by subject. *People v Smith* (1976) 59 CA3d 751, 754, 129 CR 498, disapproved on other grounds in *People v Davis* (1994) 7 C4th 797, 810, 30 CR2d 50.
- Health, injury, or emotional distress testimony by another. *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 895, 103 CR 856.
- Identity and appearance, based on witness's own perception. *People v Perry* (1976) 60 CA3d 608, 612, 131 CR 629 (people who knew defendant identified him from movie taken at time of robbery by surveillance camera); *In re Corey* (1964) 230 CA2d 813, 41 CR 379 (defendant identified by victim of robbery).
- Intoxication. *People v Garcia* (1972) 27 CA3d 639, 643 n3, 104 CR 69 (alcohol); *People v Williams* (1988) 44 C3d 883, 914, 245 CR 336 (in dicta, drugs; see discussion of case in §2.6).
- Ownership, when not in issue. *Skinner v City of Los Angeles* (1936) 5 C2d 317, 54 P2d 446.
- Parentage. *Estate of Ganes* (1931) 114 CA 17, 19, 299 P 550.
- Possession. *Nathan v Dierssen* (1905) 146 C 63, 66, 79 P 739 (case defines definition of "possession" for purposes of lay testimony, distinguishing it from conclusion of law on possession).
- Sanity. Evid C §870.
- Seatbelts. Whether expert testimony is required on the effect of not having worn seatbelts is decided on a case-by-case basis. See *Lara v Nevitt* (2004) 123 CA4th 454, 19 CR3d 865; *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 147 CR 733; *Truman v Vargas* (1969) 275 CA2d 976, 982, 80 CR 373.
- Size. *People v Helm* (1907) 152 C 532, 546, 93 P 99.
- Speed. *Jordan v Great W. Motorways* (1931) 213 C 606, 612, 2 P2d 786; *Rash v City & County of San Francisco* (1962) 200 CA2d 199, 204, 19 CR 266.
- Value of one's own property. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 921, 114 CR 622 (lay testimony on this issue sufficient to support judgment based on that value); *Trapasso v Superior Court* (1977) 73 CA3d 561, 568, 140 CR 820. See also Evid C §§810, 813-815.
- Value of one's own services. See *Donahue v Ziv Television Program Inc.* (1966) 245 CA2d 593, 609, 54 CR 130.
- Value of ordinary services "of a nontechnical nature." *Parsons v Kazange* (1958) 158 CA2d 779, 783, 323 P2d 577 (judge may estimate value of ordinary services of type within general knowledge without *any* opinion evidence).

On areas of permissible lay opinion generally, see Brockett, *Trial Run—Everybody's Got an Opinion*, 13 CEB Civ Litigation Rep 250 (Sept. 1991). For further discussion of matters that may fall within the common knowledge and ordinary experience of jurors, see Jefferson's California Evidence Benchbook §29.22 (3d ed CJA-CEB 1997); 1 Witkin, California Evidence, *Opinion Evidence* §§5-19 (4th ed 2000).

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§2.8 III. FOUNDATIONAL ATTACKS ON SUBJECT MATTER OF EXPERT TESTIMONY

Objections to the subject matter of expert testimony are based on failure to comply with the requirements discussed in §§2.1-2.5. These objections are made at the same time as attacks on the expert's qualifications: at an in limine motion in the trial court before trial begins, or during voir dire of the expert at trial. See discussion in chap 14. These objections do not have to be raised at the expert's deposition in civil cases; they can be raised for the first time at trial. See CCP §2025.460(c).

Counsel may object to the subject matter of expert testimony if:

- The topic is not beyond common experience. Evid C §801(a).
- The expert's testimony will not assist the trier of fact. Evid C §801(a).

The proper objection to make is:

> Objection, your honor. _ _[*State topic*]_ _ is not a proper topic for an expert opinion because _ _[*state reason*]_ _. I ask the court to exclude any testimony by this witness concerning _ _[*state topic*]_ _. I also ask the court to instruct the witness not to mention this topic to the jury.

For further discussion, see California Trial Objections §§20.23-20.31 (Cal CEB Annual).

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§2.9 IV. FOUNDATIONAL ATTACKS ON SUBJECT MATTER OF LAY OPINION TESTIMONY

Objections to the scope of an opposing lay witness's opinion are made if that opinion is beyond ordinary experience. See *People v Williams* (1988) 44 C3d 883, 245 CR 336. The times for objecting are generally the same as for objecting to the subject matter of an expert's testimony. See discussion in §2.8. The only difference is that lay witnesses are not usually voir dired before being allowed to testify. If counsel knows that a lay witness will or may be asked to give opinion testimony, however, counsel can ask to voir dire the witness on the proposed opinion under Evid C §402.

Counsel may object to the subject matter of lay opinion testimony if:

- The opinion is not based on facts observed by the witness. Evid C §800(a).
- The opinion is not helpful to a clear understanding of the witness's own opinion. Evid C §800(b).

The proper objection to make is:

> Objection, your honor. This witness is not an expert and is therefore unqualified to give an opinion on _ _[*state topic*]_ _ because _ _[*state reason*]_ _. I also ask the court to instruct the witness not to mention this topic to the jury.

PRACTICE TIP: Justice Jefferson believed that a ruling excluding lay opinion testimony is more likely to be considered an abuse of discretion than a ruling permitting lay opinion testimony. Jefferson's California Evidence Benchbook §29.11 (3d ed CJA-CEB 1997).

For further discussion of how and when to make this objection, see California Trial Objections §§20.23-20.31 (Cal CEB Annual).

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V. FEDERAL RULES OF EVIDENCE

§2.10 A. Subject Matter of Expert Testimony

Federal Rules of Evidence 702 provides that experts with scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or a fact in issue may testify in the form of an opinion or otherwise, if the testimony is based on sufficient facts or data and is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. See *Hingson v Pacific Southwest Airlines* (9th Cir 1984) 743 F2d 1408, 1412 (error to exclude expert opinion solely because witness was employee of defendant when, under Rule 702, such opinion could assist trier of fact). Rule 702 is essentially a codification rather than an alteration of the preexisting common-law rule. See Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual §§3-702.01 to 3-702.04 (8th ed 2002). Rule 702 was amended in 2000 to incorporate the reliability standard established in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. See §4.55.

As in California, federal courts exclude expert testimony on matters that are within the realm of common experience. See *Beech Aircraft Corp. v U.S.* (9th Cir 1995) 51 F3d 834 (expert testimony on electronic sound enhancement and linguistics properly excluded on issue of what could be heard in tape-recorded conversation, because hearing is within ability and experience of trier of fact); see generally McLaughlin, Weinstein's Federal Evidence ¶¶4-702.01 to 4-702.06 (2d ed 1997). See also *Zachery v Wheeler* (ED Tenn 1981) 511 F Supp 591.

Significantly, Rule 702 permits expert testimony in the form of an opinion "or otherwise." Thus, in *Zenith Radio Corp. v Matsushita Elec. Indus. Co.* (ED Pa 1980) 505 F Supp 1313, 1337, 1366, appealed on other issues at (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, a background survey concerning Japanese cartels and the general nature of the market for television sets in Japan was admitted as helpful background for the jury. However, otherwise admissible evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading of the jury. Fed R Evid 403. In *Jinro Am., Inc. v Secure Invs., Inc.* (9th Cir 2001) 266 F3d 993, 1006, amended (9th Cir 2001) 272 F3d 1289, the Ninth Circuit held that the testimony of a purported expert on Korean business practices was so "tinged with ethnic bias and stereotyping" that it should have been excluded as unduly prejudicial under Rule 403.

Some examples of topics federal courts considered appropriate for expert testimony include:

- Amount owed on defaulted bank loans in a fraud action: plaintiffs introduced the loan agreements and promissory notes, and the expert relied on those documents to calculate the amount due. *De Saracho v Custom Food Mach., Inc.* (9th Cir 2000) 206 F3d 874.
- Antitrust action: determination of the relevant market and a showing of monopoly power. *American Key Corp. v Cole Nat'l Corp.* (11th Cir 1985) 762 F2d 1569, 1579.
- Copyright case: extrinsic similarity of two songs in an infringement action. *Swirsky v Carey* (9th Cir 2004) 376 F3d 841.
- Criminal case: dynamic governing the relationship between a prostitute and her pimp. *U.S. v Taylor* (9th Cir 2001) 239 F3d 994.
- Criminal case: whether firearms held by defendant were collector's items or held for illegal sale. *U.S. v Conn* (7th Cir 2002) 297 F3d 548.
- Criminal case: problems experienced by a special education student when attempting to communicate in a high-pressure situation. *U.S. v Vallejo* (9th Cir 2001) 237 F3d 1008, amended (9th Cir 2001) 246 F3d 1150.
- Criminal case: gang affiliations and gang behavior exhibited by defendant and associates. *U.S. v Hankey* (9th Cir 2000) 203 F3d 1160. See also *U.S. v Diaz* (ND Cal, Sept. 19, 2006, No. CR 05-00167 WHA) 2006 US Dist Lexis 71120 (permitting expert testimony concerning "street language" used by African American gangs).
- Criminal case: operations of narcotics dealers. *U.S. v Valencia-Amezcua* (9th Cir 2002) 278 F3d 901; *U.S. v Ginsberg* (2d Cir 1985) 758 F2d 823, 830.
- Criminal case: modus operandi of alien smuggling. *U.S. v Mejia-Luna* (9th Cir 2009) 562 F3d 1215, 1219.
- Defendant's role in a money laundering scheme. *U.S. v Gomez-Osorio* (9th Cir 1992) 957 F2d 636 (expert testimony explaining purpose and nature behind defendant's accounting practices).
- Discriminatory sexual stereotyping. *Price Waterhouse v Hopkins* (1989) 490 US 228, 104 L Ed 2d 268, 109 S Ct 1775.

- Legal climate existing in specialized areas of law, such as insurance and financial matters, on issue of attorney's fraudulent intent. *U.S. v Cavin* (5th Cir 1994) 39 F3d 1299.
- Publication's "tastelessness and vulgarity." *Douglass v Hustler Magazine, Inc.* (7th Cir 1985) 769 F2d 1128, 1141.
- Reconstruction of speed of boat and safety of boat design. *Snyder v Whittaker Corp.* (5th Cir 1988) 839 F2d 1085, 1089.
- Response of a victim of nonsexual abuse in a case charging the defendant with involuntary servitude. *U.S. v Alzanki* (1st Cir 1995) 54 F3d 994.
- School discrimination action: blacks possibly classified disproportionately as "educable mentally retarded" and therefore discouraged from attending school. *Little Rock Sch. Dist. v Pulaski County Special Sch. Dist. No. 1* (8th Cir 1985) 778 F2d 404, 422.
- Stockbroker's possible "churning" of an investment account. *Shad v Dean Witter Reynolds, Inc.* (9th Cir 1986) 799 F2d 525, 530.
- Stockbroker's standard of care and whether a stockbroker had control of a client's account. *Vucinich v Paine, Webber, Jackson & Curtis, Inc.* (9th Cir 1986) 803 F2d 454, 461.

Some examples of topics considered not appropriate by federal courts for expert testimony include:

- Claim interpretation in patent cases. See *Markman v Westview Instruments, Inc.* (1996) 517 US 370, 134 L Ed 2d 577, 581, 116 S Ct 1384 (claim interpretation in patent cases is a matter of law for court); *Vitronics Corp. v Conceptronic, Inc.* (Fed Cir 1996) 90 F3d 1576, 1583 (when analysis of intrinsic evidence, *e.g.,* words of claim, and patent prosecution history, will resolve any ambiguity, reliance on extrinsic evidence is improper; if necessary, extrinsic evidence such as dictionaries is more reliable than expert testimony, which is not available to the public before litigation).
- Credibility of witnesses. *U.S. v Scop* (2d Cir 1988) 846 F2d 135; *U.S. v Azure* (8th Cir 1986) 801 F2d 336.
- Dental malpractice. See *LaRoche v U.S.* (8th Cir 1984) 730 F2d 538, 541 n5 (no expert testimony necessary on whether a dentist should have filled permanent teeth that were possibly infected without taking proper precautions).

NOTE: Expert testimony is usually required to prove professional malpractice.

- Discharge of a firearm. See *U.S. v Seschillie* (9th Cir 2002) 310 F3d 1208 (criminologist could testify to general theories about the accidental discharge of a firearm, but could not render an opinion on whether the shootings in the particular case were "accidental" because that conclusion was a matter of common sense and did not need expert illumination).
- Out-of-pocket losses in brokerage "churning" case. See *McGinn v Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (8th Cir 1984) 736 F2d 1254, 1257 (no need for expert testimony to prove out-of-pocket losses by customer).
- Proper driving to avoid accident. See *Ellis v Miller Oil Purchasing Co.* (8th Cir 1984) 738 F2d 269 (no expert testimony required to show proper action driver in accident should have taken).
- Reasonable foreseeability of intent to cause harm. See *U.S. v Hanna* (9th Cir 2002) 293 F3d 1080 (expert testimony erroneously admitted on whether a reasonable person in defendant's position would foresee that his communications would be perceived by others as a serious expression of intent to harm the President).

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§2.11 B. Subject Matter of Lay Opinion Testimony

Federal Rules of Evidence 701 allows a nonexpert to testify in opinion form when the opinion is:

- Rationally based on the witness's perception;
- Helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue; and
- Not based on scientific, technical, or other specialized knowledge within the scope of Fed R Evid 702.

See *Nationwide Transp. Fin. v Cass Info. Sys., Inc.* (9th Cir 2008) 523 F3d 1051, 1059 (exclusion of lay opinion testimony regarding how UCC would apply to facts was properly excluded because it would simply advise jury on how to decide case and thus would not be "helpful to a clear understanding of the testimony or a fact in issue").

The third element of the lay opinion standard, added by amendment in 2000, was intended to preclude a party from obtaining technical or scientific expert testimony under the guise of offering a lay opinion. Thus, a lay witness cannot be used to avoid the more specific requirements of Fed R Evid 702 dealing with expert witnesses. The accompanying Advisory Committee note points out that the amendment is not intended to change the law concerning the traditional types of testimony ordinarily offered as lay opinion, *e.g.,* testimony as to the appearance of persons or things, identity, the manner of conduct, or degrees of light or darkness; the note also states that most courts have permitted the owner of a business to testify as to its value or profitability without having to be qualified as an accountant or similar expert.

Further, the note cites with approval the Third Circuit's opinion in *Asplundh Mfg. Div. v Benton Harbor Eng'g* (3d Cir 1995) 57 F3d 1190, 1196, with respect to the proper types of lay opinion evidence. In *Asplundh,* a tree trimmer was killed when a part of his aerial lift broke. An equipment maintenance supervisor with 10 years' experience was qualified to testify about the condition of the equipment and the condition of the part, but was not qualified to give his opinion on what caused the part to break. The Third Circuit held that a lay witness can testify on technical matters such as product defect or causation only if the "witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered." 57 F3d at 1201.

Lack of clarity as to what constitutes "scientific, technical, or other specialized knowledge." The reported cases since the 2000 amendment do not provide clear guidance on what constitutes "scientific, technical, or other specialized knowledge." Some of the opinions that have been handed down since the amendment took effect still cite to the old rule, which did not include subsection (c). See *U.S. v Mendoza-Paz* (9th Cir 2002) 286 F3d 1104, 1112; *U.S. v Parris* (6th Cir 2001) 243 F3d 286, 288; *Myers v Ostling* (Bankr ED Mich 2001) 266 BR 661, 664.

Restrictive view. The Tenth Circuit gave what appears to be an unduly restrictive interpretation to Rule 701 in *Randolph v Collectramatic, Inc.* (10th Cir 1979) 590 F2d 844. In *Randolph,* the plaintiff, a restaurant owner injured when a pressure cooker exploded, sought to offer his opinion on the allegedly defective design of the cooker, and on problems with that particular cooker. Although he had worked 5 years in the fast-food business and had serviced, cleaned, and operated similar pressure cookers, the trial court refused to permit him to give his opinion because he was not an expert.

The result in *Randolph* appears to confuse the purpose of Fed R Evid 701, which deals with lay opinion testimony, and the general rule requiring expert testimony on matters beyond the realm of common experience. Although the plaintiff in *Randolph* may not have been competent to offer an expert opinion on any defect in the design, his opinion about problems with the pressure cooker were (1) conceivably based on his perception as a witness and (2) would have been helpful to the understanding of his testimony.

Expansive view: personal knowledge is not specialized knowledge. In contrast, the Federal Circuit took a more expansive view in *Union Pac. Resource Co. v Chesapeake Energy Corp.* (Fed Cir 2001) 236 F3d 684, 693, in which the court permitted lay testimony in a patent case based on personal experience in the oil drilling industry, explaining:

> [w]e have allowed lay witnesses to express opinions that required specialized knowledge [and] [i]ndeed, many of the witnesses were employees of major oil drilling companies who had contributed extensively to the prior art in this field.

The court held that, because the eight witnesses testified on the basis of their own personal experiences, there was no abuse of discretion.

The "personal knowledge is not specialized knowledge" approach was followed in *Montgomery v Gooding, Huffman, Kelly & Becker* (ND Ohio 2001) 163 F Supp 2d 831, 838, in which the court permitted lay testimony on the marketability of real estate because the testimony was "based on the partners' personal knowledge and perceptions" concerning the impact of particular litigation on a property sale. The court found that "this information is not specialized

knowledge, and thus the partners do not have to be qualified or disclosed as experts." 163 F Supp 2d at 838. Similarly, the Ninth Circuit used the approach to permit what clearly appeared to be "specialized knowledge"—the age of marijuana—in *U.S. v Moreno* (9th Cir 2000) 2000 US App Lexis 31303 (unpublished opinion). The court found that the witness's testimony was based on her own perception because she could compare marijuana found in this case with marijuana she had seen in other cases. See also *U.S. v Espino* (8th Cir 2003) 317 F3d 788 (lay opinion testimony based on personal experience admitted on weight and quantity of methamphetamine sold by defendant).

The Eleventh Circuit followed a similar approach in *Tampa Bay Shipbldg. & Repair Co. v Cedar Shipping Co.* (11th Cir 2003) 320 F3d 1213, in which it upheld the admissibility of testimony by a ship repair company's employees on the reasonableness of charges to repair an ocean-going vessel that had run aground. Because the testimony was based on the employees' "particularized knowledge garnered from years of experience within the field," the court found that it was "of a type traditionally and properly considered lay witness testimony, as it was not based on specialized knowledge subject to Rule 702." 320 F3d at 1223.

Personal knowledge was also relied on by the Third Circuit in *Lightning Lube, Inc. v Witco Corp.* (3d Cir 1993) 4 F3d 1153, to permit the owner of a business to testify about how well the company would have done in the future. The court held that "given [the owner's] knowledge and participation in the day-to-day affairs of his business, his partial reliance on the [accounting] report, even if prepared by an outsider, does not render his testimony beyond the scope of Rule 701." 4 F3d at 1175.

Lightning Lube appears to conflict with the Advisory Committee's note to Rule 702, which suggests that property owners' testimony about the value of their own property should be governed by Rules 702-703, rather than by Rule 701. That approach was followed by the Fifth Circuit in *LaCombe v A-T-O, Inc.* (5th Cir 1982) 679 F2d 431, in which the owner of property destroyed by fire was held entitled, under Rule 702, to express an opinion on his property's value although that opinion was based in part on hearsay, *i.e.,* standard insurance cost-guide charts, because the court found they were reasonably reliable.

Yet another standard was adopted in *Wilburn v Maritrans GP Inc.* (3d Cir 1998) 139 F3d 350. The court found that the "essential difference between Rule 701 and 702 testimony is that a qualified expert may answer hypothetical questions." 139 F3d at 356, citing *Teen-Ed, Inc. v Kimball Int'l, Inc.* (3d Cir 1980) 620 F2d 399.

***Jerden v Amstutz:* Ninth Circuit takes somewhat restrictive view.** Finally, the Ninth Circuit took a more restrictive tack in *Jerden v Amstutz* (9th Cir 2005) 430 F3d 1231, amended (9th Cir 2006) 2006 US App Lexis 686, in which a nurse practitioner's testimony regarding an MRA report went beyond his factual observations on what occurred and provided opinion on scientific issues not shown to be within his qualifications. Specifically, the court found that it was error to admit the practitioner's opinion testimony interpreting the MRA report without a showing either that he was qualified to do so under Fed R Evid 702, or that he was otherwise permitted to give lay opinion testimony within the standards of Rule 701. The court cautioned that a relaxed approach to the proper scope of lay opinion under Rule 701 would improperly allow it to supplant the more specific requirements for expert testimony in Rule 702. See *U.S. v Figueroa-Lopez* (9th Cir 1997) 125 F3d 1241, 1246 (opinions that depend on specialized education, training, and experience are more properly considered under Rule 702).

Conclusion: lack of guidelines. The lack of clarity in the cases is a source of concern for a conscientious practitioner who is trying to fulfill his or her disclosure obligations under Fed R Civ P 26(a)(2) (see §§10.48-10.58), particularly in a complex case in which many of the percipient parties are lawyers, accountants, investment bankers, actuaries, underwriters, etc., who clearly have "scientific, technical, or other specialized knowledge." There are simply no clear-cut guidelines for the limits on such a witness's ability to testify, based on personal knowledge, under Rule 701, when the testimony will involve the witness's "scientific, technical, or other specialized knowledge." See Anno, *Construction and Application of Rule 701 of Federal Rules of Evidence, Providing for Opinion Testimony by Lay Witnesses Under Certain Circumstances*, 44 ALR Fed 919 (1979).

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Skill Necessary to Be Expert

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I. REQUIREMENTS FOR EXPERT'S QUALIFICATIONS

§3.1 A. Qualifications Necessary to Be Expert

Any person who has the "special knowledge, skill, experience, training, or education" necessary to become an expert in a particular field may be qualified to testify as an expert according to Evid C §720(a). See also California Trial Objections §20.6 (Cal CEB Annual); Jefferson's California Evidence Benchbook §§29.18-29.21, 29.24-29.30 (3d ed CJA-CEB 1997); 1 Witkin, California Evidence, *Opinion Evidence* §§38-43 (4th ed 2000).

Trial court discretion. Whether a particular witness has the qualifications necessary to give an expert opinion on a specific topic is an issue primarily left to the trial court's broad discretion, and it is difficult to attack that exercise of discretion after the fact. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 701, 106 CR 1. See also *Marriage of Hokanson* (1998) 68 CA4th 987, 995, 80 CR2d 699 (trial court did not abuse its discretion in allowing real estate agent with extensive experience and specialized training to provide expert testimony on home's fair market value). But see *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 470, 71 CR3d 707 (in medical malpractice action, trial court abused its discretion in excluding expert declaration because expert did not state that he was familiar with standard of care in Southern California).

Doubts about expert's qualifications may affect admissibility of testimony or its weight. Courts generally are inclined to admit expert testimony given by experts with marginal qualifications and to let jurors decide how much weight to give to it. *Mann v Cracchiolo* (1985) 38 C3d 18, 210 CR 762, a medical malpractice action, illustrates this tendency. The defendant-physicians had moved for summary judgment and prevailed principally because the trial court found that the declaration in opposition, filed by an expert doctor, did not create a triable issue of fact because that doctor lacked the qualifications to render an expert opinion on the standard of care involved. The supreme court reversed, finding that plaintiff's doctor whose declaration opposed the summary judgment motion, as a diplomate in surgery and neurosurgery, was qualified to render an opinion on the standard of care. The court stated that when a witness "has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility." 38 C3d at 38.

In *Miller v Silver* (1986) 181 CA3d 652, 226 CR 479, the court found a psychiatrist competent to testify on the standard of care for a plastic surgeon's administration of antibiotic therapy. The court based its opinion on the liberal trend of *Mann* permitting experts to testify concerning the standard of care despite the lack of occupational experience in a particular specialty. Perhaps suspecting that it was on the outer edges of *Mann,* however, the court qualified the scope of its holding (181 CA3d at 660):

> We have no hesitancy to find that [the psychiatrist] lacks the credentials to permit him to give expert testimony concerning the surgical technique of those physicians schooled in the highly specialized field of plastic surgery. However, … we do think that [the psychiatrist], by virtue of his medical education and internship training, possesses the ability to research the role prophylactic antibiotics play in implant patients who have experienced life-threatening complications from recent surgery.

According to the court of appeal, appropriate antibiotic therapy was within the common knowledge of every physician and surgeon, and any perceived problems with the qualifications of the witness could be brought out on cross-examination at trial. 181 CA3d at 661.

Accordingly, it is now established that "work in a particular field is not an absolute prerequisite to qualification as an expert in that field." *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 274, 7 CR2d 101.

A particularly liberal interpretation of the qualifications necessary to be an expert occurred in *Douglas v Ostermeier* (1991) 1 CA4th 729, 2 CR2d 594, a fraud action against an auto dealership. Because the plaintiff was seeking punitive damages, she had the burden of presenting evidence of the defendant's financial condition. See *Adams v Murakami* (1991) 54 C3d 105, 284 CR 318. The only evidence that the plaintiff presented on this issue was her own testimony concerning the value of the defendant's business. The plaintiff, a licensed real estate broker, acknowledged that she primarily sold residential real estate and only handled two or three commercial properties a year. She further

acknowledged that she did not know how the property was zoned, had not conducted any comparative market analysis, and had visited the property only three times, all in connection with purchasing her car. On the basis of this showing, she was allowed to testify that the property was worth $5-$6 million, an amount that her own attorney in closing argument conceded to be excessive. By contrast, the defendant testified that the entire business was worth no more than $400,000. The jury awarded $187,000 in punitive damages.

The court of appeal affirmed, finding that the judge had acted within his discretion in admitting the testimony and that it was to be presumed that the jury had taken plaintiff's limited qualifications and obvious bias into account in rendering its verdict.

It is difficult to predict in advance whether a particular trial judge will conclude that an expert's minimal experience or qualifications will go to the weight of his or her testimony or to its admissibility. Thus, counsel should take care to avoid the problem in the first place by using an expert whose qualifications are not likely to be seriously or successfully questioned in the field of expertise involved.

PRACTICE TIP: When you do find it necessary to go forward with an expert whose qualifications and experience may be questioned as insufficient for a particular subject, argue that any questions about the witness's qualifications should go to the weight—rather than to the admissibility—of the testimony. See CACI 219, which instructs jurors: "You do not have to accept an expert's opinion.… In deciding whether to believe an expert's testimony, you should consider: (1) The expert's training and experience; (2) The facts the expert relied on; and (3) The reasons for the expert's opinion." California Criminal Jury Instruction 332 has a similar instruction. See also *People v Chavez* (1985) 39 C3d 823, 218 CR 49.

For discussion of various types of experts, see chap 6. For discussion of selecting the right expert, see chap 7. See §3.3 for further discussion of when a specialist within a particular field is required.

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§3.2 B. Examples of Witnesses Found Unqualified to Testify as Experts

The following witnesses were held unqualified to testify as experts:

- The author of a book on the application of the law of physics to colliding billiard balls and other objects was not qualified to testify in an automobile collision case. *Neudeck v Bransten* (1965) 233 CA2d 17, 19, 43 CR 250.
- A jail inmate with no training in pharmacology, toxicology, or narcotics was not qualified to testify to the effects of consuming a mixture of liquor and "goofballs," despite personal experience with the combination. *People v Murray* (1967) 247 CA2d 730, 735, 56 CR 21.
- A mechanical engineer who specialized in hydraulics and hydrology was not qualified to offer expert opinion testimony on proper construction practices on grades and hill sites. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 106 CR 1.
- A marriage-family-child counselor was not qualified to testify to the standard of practice for psychologists in California. *Cooper v Board of Med. Examiners* (1975) 49 CA3d 931, 946, 123 CR 563.
- A technician and law enforcement officer did not have the scientific qualifications necessary to establish the general scientific acceptance of voiceprint analysis. *People v Kelly* (1976) 17 C3d 24, 39, 130 CR 144.
- A physician who was an expert in the fabrication and use of a catheter, but who did not know the product's chemical composition, tensile strength, or material construction, was not qualified to give an opinion on whether the catheter kinked because of a defect in its walls. *Putensen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1080, 91 CR 319.
- A police officer whose training and experience qualified him as an expert to administer a horizontal gaze nystagmus (HGN) test was not qualified to attribute observed eye movements to a particular cause. *People v Williams* (1992) 3 CA4th 1326, 5 CR2d 130.
- A criminalist qualified to give an opinion on the source of bloodstains was not qualified to testify that the stains were "spatters" that had not been caused by contact. *People v Hogan* (1982) 31 C3d 815, 852, 183 CR 817, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 281 CR 90.
- Arresting officer with expertise in determining whether an individual unlawfully possessed narcotics for sale was not qualified to testify on whether marijuana was lawfully in defendant's possession by virtue of prescription. *People v Chakos* (2007) 158 CA4th 357, 367, 69 CR3d 667.

For further discussion, see Jefferson's California Evidence Benchbook §§29.18-29.21, 29.24-29.30 (3d ed CJA-CEB 1997); California Trial Objections §§20.6-20.7 (Cal CEB Annual).

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Source: Civil Litigation/California Expert Witness Guide/3 Skill Necessary to Be Expert/§3.3 C. When Specialist Within Expert Field Is Required

§3.3 C. When Specialist Within Expert Field Is Required

There are areas of expertise, *e.g.,* surgery, that are performed only by persons with particular degrees. In addition, there are areas of practice, *e.g.,* identification of fingerprints, in which practitioners should hold a particular license. Counsel should check the Business and Professions Code and the associations connected with a particular area of expertise to find out about licensing requirements.

Within a particular field, there are areas that may require a specialist. For example, in legal malpractice cases based on the attorney's expertise, only a person knowledgeable in that specialty can usually define the applicable duty of care and render an opinion on whether it was met. *Wright v Williams* (1975) 47 CA3d 802, 810, 121 CR 194. A specialist in a particular law area is not required, however, if any lawyer would be expected to know the topic in question. See, *e.g., Goebel v Lauderdale* (1989) 214 CA3d 1502, 263 CR 275 (nonbankruptcy specialist allowed to testify concerning bankruptcy attorney's malpractice in representing general contractor).

For further discussion, see §3.1 (other examples), chaps 7 (selecting best expert), 13 (qualifying expert at trial), and §3.6 (objections and offers of proof based on objections to expert's skill). See §3.4 on the special requirements for emergency room doctors.

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Source: Civil Litigation/California Expert Witness Guide/3 Skill Necessary to Be Expert/§3.4 D. Required Qualifications of Emergency Room Physicians (Health & S C §1799.110)

§3.4 D. Required Qualifications of Emergency Room Physicians (Health & S C §1799.110)

In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court can admit expert medical testimony only from a doctor who has had substantial professional experience within the previous 5 years as a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department. Health & S C §1799.110(c). See *Miranda v National Emergency Servs., Inc.* (1995) 35 CA4th 894, 41 CR2d 593 (orthopedic specialist "on call" to an emergency room had not served as emergency room physician for prescribed 5-year period and was not qualified under the statute).

The 5-year period specified in §1799.110(c) is measured from the date of the alleged malpractice, not the date of trial. *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 15 CR3d 64. *Petrou* found that the most logical construction of the section required that the expert have substantial professional experience as of the time of the treatment in question. In addition, by using the date of the alleged malpractice, a party knows at the time of designation that the expert satisfies the section's requirements, regardless of when the trial may actually occur.

Issue of whether negligence arose out of "emergency medical services." There is some question whether the limitation on expert witnesses in §1799.110(c) applies in a case against an emergency room physician in which the alleged negligence did not arise out of emergency medical services as defined in §1799.110(b). For example, in *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73, 35 CR2d 372, plaintiff alleged that the defendant was not performing emergency services when he removed a ring from her swollen finger and replaced a splint previously provided by a different physician; therefore, her expert did not need to have emergency room experience.

In *Zavala v Board of Trustees* (1993) 16 CA4th 1755, 20 CR2d 768, the court held that defendant was an emergency room physician in an emergency department, and that therefore the language in Health & S C §1799.110(c) should be given a broad interpretation. On the other hand, the court in *Jutzi v County of Los Angeles* (1987) 196 CA3d 637, 242 CR 74, held that the term "emergency medical coverage" in Health & S C §1799.110(c) is synonymous with "emergency medical services," thus limiting the scope of Health & S C §1799.110(c).

Recognizing this split of authority, the court in *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73, 35 CR2d 372, looked at the language of Health & S C §1799.110, its legislative history, and controlling principles of statutory construction and held that the section applies whenever an emergency room physician treats a patient in a general acute care hospital emergency department as opposed to only when such a physician performs "emergency medical services." In so doing, the court concluded that *Zavala* represented the sounder view.

NOTE: The *James* opinion, authored by Justice Rodney Davis, is scholarly, well-reasoned, and appears to represent the sounder view. Given the conflict in the cases, however, the supreme court may decide at some point to review the statutory interpretation issue. See also *Miranda v National Emergency Servs., Inc.* (1995) 35 CA4th 894, 41 CR2d 593, in which the Fifth District Court of Appeal followed *Zavala* rather than *Jutzi*.

When hospital, not physician, is defendant. Health and Safety Code §1799.110(c) can also apply when only the hospital and not the allegedly negligent physician is named as a defendant in the action, according to the court in *Jutzi v County of Los Angeles, supra*. The relevant consideration is the nature of the claim, not the fortuitous circumstance of who is named in the lawsuit. When the action against the hospital implicates the performance of the emergency room doctor, as it did in *Jutzi,* §1799.110(c) is applicable. This section is *not* applicable, however, if the performance of the emergency room doctor is not implicated. *Baxter v Alexian Bros. Hosp.* (1989) 214 CA3d 722, 262 CR 867 (plaintiff claimed that hospital failed to provide essential hospital services).

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§3.5 E. Experts Who Have Never Testified

There is no basis under the Evidence Code or in published case law for excluding an expert simply because he or she has never testified. In fact, there are often advantages to using such an expert, primarily to avoid the "professional witness" label. Although not combat-hardened, witnesses who have never testified in court can often withstand more capably the rigors of cross-examination because they are not victims of expert witness burnout. Counsel must take care, however, to make sure that an expert who has never testified before understands what is involved.

The steps recommended for preparation of witnesses for deposition and trial (discussed in chap 12) apply with even greater force to a witness who has never testified than to a seasoned expert witness.

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§3.6 II. FOUNDATIONAL ATTACKS ON QUALIFICATIONS OF EXPERTS

Objections are made to an expert's qualifications to testify based on Evid C §720: The witness does not have the "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." For further discussion, see §§3.1-3.5. These objections do not have to be raised at the deposition. See CCP §2025.460(c).

Objections to an expert's qualifications can be raised at an in limine motion in the trial court before trial begins, or during voir dire of the expert at trial. See discussion in chap 14. A sample objection follows:

> Your Honor, I object to this witness being qualified as an expert on _ _[*state area of expert testimony*]_ _ because _ _[*he/she*]_ _ does not have the _ _[*knowledge/skill/experience/training/education*]_ _ necessary to qualify as an expert. _ _[*Detail why, e.g., the witness is only a psychologist but is being asked to testify on the effects of different medications, or the witness has only read about the topic but has no actual experience. Cite any relevant case.*]_ _

As a rule, judges tend to err on the side of admitting expert testimony. See, *e.g., Brown v Colm* (1974) 11 C3d 639, 646, 114 CR 128 ("[t]here are sound and persuasive reasons supporting this trend toward permitting admissibility more readily"). When an expert's qualifications are marginal or inferior, courts may hold that this affects the weight of the testimony rather than its admissibility. See also CACI 219; CALCRIM 332. Therefore, objections made in front of the jury should be aimed at educating them on why the expert's opinion should not be given much weight.

PRACTICE TIP: Judges have great latitude in making evidentiary decisions, so your best arguments must be made in the trial court; there is little chance of reversal on appeal for error concerning an expert's qualifications, except in egregious situations.

Testimony outside of area of expertise. One common situation in which a witness's qualifications to testify are challenged is when the witness can be or has been properly qualified as an expert in one area, and the attorney calling the witness asks for an expert opinion in a related area. The closer the new area of inquiry is to the area in which the witness is clearly qualified as an expert, the more likely the judge will allow the witness to give an expert opinion. See, *e.g., People v Chavez* (1985) 39 C3d 823, 828, 218 CR 49 (forensic pathologist allowed to testify to whether defendant, who had been drinking and smoking marijuana, had the intent to rob). Conversely, when an expert ventures too far outside his or her area of competence, the courts usually draw the line. See, *e.g.*, *Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 200 CR 870 (upheld trial court's refusal to permit dermatologist to testify on adequacy of pharmaceutical manufacturer's product warning; dermatologist had not been qualified as expert in drug epidemiology); *People v Hogan* (1982) 31 C3d 815, 183 CR 817, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 281 CR 90 (criminalist who had observed bloodstains at many crime scenes was not qualified to render opinion on whether particular stains were "splatters," caused by blood flying through air following impact, or result of mere contact with bloody object); *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 702, 189 CR 749 (qualified real estate appraiser and building contractor was not structural engineer and therefore could not testify on cost of bringing building into compliance with earthquake standards).

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§3.7 III. FEDERAL RULES OF EVIDENCE

Qualifications to testify as an expert in federal court are governed by federal law, primarily the Federal Rules of Evidence. *Geophysical Sys. Corp. v Seismograph Serv. Corp.* (CD Cal 1990) 738 F Supp 348. In the *Geophysical Systems* case, the plaintiff sought to disqualify three of the defendant's experts who were geophysicists but who were not from California and were not licensed to practice geophysics under California law. The court denied the motion on multiple grounds. First, the court reasoned that, if the drafters of the Federal Rules of Evidence had intended to have state licensing laws govern expert testimony in federal court, the drafters would have done so, as they did elsewhere in the Federal Rules when they wanted state law to supply the rule of decision. Second, the court found that testifying in court does not constitute the "practice" of a profession and is, therefore, beyond the scope of regulations governing "practice." Finally, the court rejected as provincial the notion that only properly licensed locals should be allowed to testify in federal court proceedings.

The Federal Rules of Evidence use the same language as Evid C §720(a) in describing the skill necessary to be an expert: "qualified as an expert by knowledge, skill, training, or education." Fed R Evid 702.

Trial court discretion. Federal district court judges enjoy wide discretion in determining who is qualified to testify as an expert. Professional degrees, education, and training are not necessarily required. Practical experience in a particular field or trade can be equally suitable. See *Garnac Grain Co. v Blackley* (8th Cir 1991) 932 F2d 1563; *Fox v Dannenberg* (8th Cir 1990) 906 F2d 1253; *Circle J Dairy, Inc. v A. O. Smith Harvestore Prods., Inc.* (8th Cir 1986) 790 F2d 694; *Southern Cement Co. v Sproul* (5th Cir 1967) 378 F2d 48.

The controlling inquiry under Rule 702 is whether the expert's knowledge of the subject matter in question "is such that his opinion will likely assist the trier of fact in arriving at the truth." *Mannino v International Mfg. Co.* (6th Cir 1981) 650 F2d 846, 850. See also *Tokio Marine & Fire Ins. Co. v Grove Mfg. Co.* (1st Cir 1992) 958 F2d 1169 (district court did not abuse its discretion in declining to qualify "professional witness" civil engineer as expert on hydraulic cranes); *U.S. v Barker* (6th Cir 1977) 553 F2d 1013, 1021.

In *Ralston v Smith & Nephew Richards, Inc.* (10th Cir 2001) 275 F3d 965, the appellate court made it clear that the *Daubert* factors for determining the admissibility of expert testimony apply with equal force to the witness's qualifications, training, and experience. A witness's lack of specialization in a particular area affects not only the witness's qualifications, but also the reliability of his or her testimony. All expert testimony must meet *Daubert*'s threshold reliability requirements, and to meet those requirements all experts necessarily must have particularized and specialized knowledge in the subject area of their testimony.

Once the district court has resolved the issue, moreover, its discretion will rarely be disturbed on appeal. *Peteet v Dow Chem. Co.* (5th Cir 1989) 868 F2d 1428; *McDonald v Federal Labs., Inc.* (1st Cir 1984) 724 F2d 243 (no error in district court's refusal to allow expert on chemical contents of mace canister to testify on its design aspects). But see *Pineda v Ford Motor Co.* (3rd Cir 2008) 520 F3d 237, 245 (trial court abused its discretion in failing to find expert on stresses and forces qualified to opine on design of automobile rear lift gate and on sufficiency of instructions for use); *Robertson v Norton Co.* (8th Cir 1998) 148 F3d 905, 907 (trial court abused its discretion by permitting expert on manufacturing defect in exploding ceramic grinding wheel to testify as expert on adequacy of product warning).

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Information Relied on by Expert

I. EXPERT CAN BASE OPINION ON ANY RELIABLE MATERIAL §4.1
A. Reliable Information Obtained From Other Experts
1. Facts, Tests, and Opinions of Other Experts §4.2
2. Other Reports and Scientific, Technical, or Professional Texts, Treatises, Journals, or Similar Publications §4.3
B. Eyewitness Information in Reports §4.4
C. Professional Books and Articles §4.5

II. WHEN EXPERT CAN BASE OPINION ON NEW SCIENTIFIC TECHNIQUES
A. *Kelly* "General Acceptance" Test §4.6
B. *Kelly* Test Applies Only to New Scientific Techniques §4.7
1. Technique Must Be New §4.8
2. Technique Must Be Scientific §4.9
3. Application of *Kelly* Test to Expert Medical Testimony §4.9A
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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.1 I. EXPERT CAN BASE OPINION ON ANY RELIABLE MATERIAL

§4.1 I. EXPERT CAN BASE OPINION ON ANY RELIABLE MATERIAL

According to Evid C §801(b), an expert may base opinion testimony on *any* reliable material, including inadmissible material such as hearsay. The cases do not clearly define the types of hearsay on which the expert may rely. See generally Jefferson's California Evidence Benchbook §§29.41, 29.44 (3d ed CJA-CEB 1997). Some lawyers view Evid C §801(b) as a conduit for apprising the jury of almost any otherwise inadmissible information by having an expert rely on it in reaching an opinion. Section 801(b), however, is considerably more limited. An expert may base an opinion only on *reliable* information; merely relying on information does not make it reliable.

In addition, the latitude granted by §801(b) is circumscribed by Evid C §§803 and 352. See *People v Coleman* (1985) 38 C3d 69, 90, 211 CR 102; see also §13.8A. Section 803 directs the trial court, on objection, to exclude those parts of a testifying expert's opinion that are based in whole or in significant part on matter that is not a proper basis for that opinion. Section 352 allows the trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will either consume too much time or create a substantial danger of prejudice, confusion, or misleading the jury.

PRACTICE TIP: Do not hesitate to use *reliable* hearsay information as the basis for your expert's opinion. See *People v Hayes* (1985) 172 CA3d 517, 218 CR 362 (criticizing defense counsel for not having had his psychiatrist rely on otherwise inadmissible information that defendant was under influence of PCP at time of crime). However, opposing counsel should strongly consider requesting a limiting instruction that the hearsay is not being admitted for its truth. *People v Williams* (2009) 170 CA4th 587, 622, 88 CR3d 401. See §4.50.

The main types of information that reasonably may be relied on are:

- Personal observations, tests, examinations. See *People v Wilson* (1944) 25 C2d 341, 348, 153 P2d 720. See discussion in chap 9.
- Information obtained from the expert's own investigations. *People v Williams* (2009) 170 CA4th 587, 622, 88 CR3d 401.
- Information obtained from law enforcement officers, including police reports. *People v Williams, supra*.
- Reports by other experts based on their personal observations, tests, and examinations. See *People v Bordelon* (2008) 162 CA4th 1311, 1324, 77 CR3d 14; *Christiansen v Hollings* (1941) 44 CA2d 332, 347, 112 P2d 723; *Hammond Lumber Co. v County of Los Angeles* (1930) 104 CA 235, 247, 285 P 896. See discussion in §4.2.
- Reliable books, treatises, and other professional literature. *Mann v Cracchiolo* (1985) 38 C3d 18, 37, 210 CR 762; *Forrest v Fink* (1925) 71 CA 34, 40, 234 P 860. See discussion in §§4.3, 4.5.
- The expert's own "special knowledge, skill, experience, training, and education." Evid C §801(b); *People v McDaniels* (1980) 107 CA3d 898, 905, 166 CR 12.
- The history related to the expert by a patient (*People v Wilson, supra*), the reports, tests, and opinions of other doctors (*Kelley v Bailey* (1961) 189 CA2d 728, 737, 11 CR 448), and studies of medical works (*Healy v Visalia & Tulare R.R.* (1894) 101 C 585, 591, 36 P 125).

PRACTICE TIP: Under Evid C §804, opposing counsel can call underlying witnesses on whose information your testifying expert relies, but the unavailability of those underlying witnesses does not preclude the testifying expert from relying on information from them. See §§4.2-4.5. See also Evidence Benchbook §§29.56-29.59.

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A. Reliable Information Obtained From Other Experts

§4.2 1. Facts, Tests, and Opinions of Other Experts

An expert can base an opinion on the facts found by another expert, or on tests done by another expert. See *Hope v Arrowhead & Puritas Waters, Inc.* (1959) 174 CA2d 222, 230, 344 P2d 428; *People v Arauz* (1970) 5 CA3d 523, 532, 85 CR 266 (prosecution's psychiatrist allowed to testify regarding defendant's alleged diminished capacity based solely on written reports of defense experts; defendant had refused to be examined by prosecution's psychiatrist, and prosecution would otherwise be unable to present evidence on issue of diminished capacity). Although the cases do not usually discuss this point, the expert relied on should be qualified, and his or her report should be reasonably reliable. See Evid C §§801, 803.

The cases have yet to specify exactly how far an expert can go in relying on the *opinions* of other experts (see Evid C §804), but there is a strong suggestion that it would be impermissible for one expert to base an opinion solely on the opinion of another expert. See *Rodwin Metals, Inc. v Western Non-Ferrous Metals, Inc.* (1970) 10 CA3d 219, 225, 88 CR 778 (dicta: president of company could not have testified to lead content of lead fume based solely on unauthenticated written report from assayer). In addition, the testifying expert cannot relate the opinions of other experts on whom the testifying expert did not rely. See *Whitfield v Roth* (1974) 10 C3d 874, 895, 112 CR 540 (improper to allow doctor to testify to other nontestifying doctors' opinions because testifying doctor did not rely on those opinions in determining treatment or diagnosis).

Counsel must be very sensitive to the risks inherent in having an expert rely on another's calculations or opinions as the basis of his or her testimony. In many cases, experts obviously must rely on outside sources of information to form an opinion. That information, however, simply should not become a substitute for the expert's own opinion. Further, although reliance on these outside sources is permissible, counsel should also make sure that the sources are those on which experts in the field may reasonably rely and be prepared to explain, with some specificity, the reasonableness of the expert's reliance. See *People ex rel Dep't of Transp. v Clauser/Wells Partnership* (2002) 95 CA4th 1066, 1085, 116 CR2d 240 (finding reasonableness of expert's reliance on books, courses, other individuals in field, and his own interviews to be matter for trier of fact).

EXAMPLE: In *People v Bordelon* (2008) 162 CA4th 1311, 1324, 77 CR3d 14, the court found that an expert should have been permitted to recite a statement in a report, prepared by a psychologist at a parole outpatient clinic, in support of his opinion that the defendant's behavior was consistent with a condition called institutionalization. The court noted that the recitation would violate the rule set out in *Whitfield v Roth, supra,* and relied on in *People v Campos* (1995) 32 CA4th 304, 308, 38 CR2d 113, that a testifying expert generally cannot reveal the contents of opinions of the nontestifying experts on which he or she relies. The *Bordelon* court rejected the notion that either *Whitfield* or *Campos* should be read to support a blanket prohibition on an expert's ability to refer to the contents of another expert's report on direct examination. *People v Bordelon,* 162 CA4th at 1326.

PRACTICE TIP: If opposing counsel says that your expert should not be allowed to rely on a particular report or opinion, you can argue that the report is reasonably reliable, and that any doubts concerning the report should go to its weight. See *People v Phillips* (1981) 122 CA3d 69, 85, 175 CR 703.

To provide the requisite foundation, the expert should make some attempt to verify the material furnished or, at a minimum, be prepared to explain why an expert performing the task to which he or she has been assigned would rely on this information. Counsel must also keep in mind that the expert's testimony will be subject to cross-examination on the credibility and validity of this outside data. See Evid C §804. Counsel accordingly should take steps to ensure that it is reliable as well. See Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand L Rev 577 (1986).

PRACTICE TIP: If your opponent has failed to subpoena the expert relied on, or that expert is unavailable to testify at trial, your testifying expert may still be able to rely on the other expert's report. Evid C §804(d).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.3 2. Other Reports and Scientific, Technical, or Professional Texts, Treatises, Journals, or Similar Publications

§4.3 2. Other Reports and Scientific, Technical, or Professional Texts, Treatises, Journals, or Similar Publications

An expert is entitled to rely on the reports of other experts in forming his or her own opinion. The testifying expert is not permitted to reveal the substantive contents of reports prepared or opinions expressed by nontestifying experts, however.

On direct examination, the testifying expert is permitted to state the reasons for his or her opinion, to state that reports prepared by other experts were a basis for that opinion, and to identify the other experts. See *Whitfield v Roth* (1974) 10 C3d 874, 894, 112 CR 540. The expert can be cross-examined in regard to a publication that is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, even if he or she did not rely on that authority in forming the opinion. Evid C §721(b)(3).

NOTE: The testifying expert may be cross-examined on the content of extraneous opinions relied on even when it is improper to elicit that information on direct examination. See Jefferson's California Evidence Benchbook §§29.67-29.74 (3d ed CJA-CEB 1997).

An expert may not testify about the details of inadmissible material on which he or she is relying. See §13.8A. This restriction avoids the wholesale introduction of inadmissible evidence under the pretense of explaining the reasons for the expert's opinion. See *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 37 CR3d 9 (vehicle stability expert not permitted to read into record conclusions of another expert he relied on); *People v Odom* (1980) 108 CA3d 100, 166 CR 283 (psychiatrist could not read "adverse reaction" reports from medical suppliers in support of diminished capacity defense). See also Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U Fla L Rev 234 (1984).

A comprehensive discussion of the proper balance to apply in this regard can be found in *Continental Airlines, Inc. v McDonnell Douglas Corp.* (1989) 216 CA3d 388, 264 CR 779. The plaintiff, an airline, sought damages arising out of the crash of an airplane manufactured by the defendant. Following a judgment in favor of the airline, the manufacturer appealed, contending, among other things, that the trial court had erred in restricting one of the manufacturer's experts in explaining the basis for his opinions. The expert testified that he and two members of his staff had undertaken a "joint effort" to determine which parts of the airplane would have needed repair or replacement even if the crash had not involved a fire. The court of appeal held that the "joint efforts" nature of the project did not alter the fact that the staff members had reached expert opinions of their own and, because they were not present in court, those opinions were hearsay. Accordingly, the trial court was correct in refusing to let the expert interject out-of-court opinion by another expert into the record. The appellate court found, however, that the trial judge erred, although not prejudicially, in not permitting the expert to testify concerning facts, specifically cost and price figures, that had been submitted by his staff and relied on by him in forming his opinion.

The proper balance noted in *McDonnell Douglas Corp.* was echoed in *People v Dean* (2009) 174 CA4th 186, 94 CR3d 478, in which the court found that the plaintiff's experts, in a case involving the defendant's commitment to the State Department of Health as a sexually violent predator, had erroneously been permitted to relate hearsay details found in various institutional records. The court of appeal explained the risks of allowing such a recitation of hearsay details, most notably that the jury will consider the evidence for an improper purpose, *i.e.,* "as substantive evidence against the defendant." 174 CA4th at 199. The court also noted that "[t]his risk is increased when the reports are particularly inflammatory or describe prior misconduct." 174 CA4th at 199. Accordingly, the rule that allows the expert to state the reasons for his or her opinion cannot be used to permit specific details of the documented hearsay to be admitted. The prejudice in *Dean* was cured, however, by specific limiting instructions regarding the effect of the hearsay and the limited nature of the experts' ultimate opinions. 174 CA4th at 201. For further comments on the need for limiting instructions when the testifying expert is relying on hearsay to support an opinion, see §§4.1 and 4.50.

An exception exists when the testifying expert is a physician who is also the treating doctor. In that case, and if the evidence shows that the out-of-court opinion of a second doctor was used by the testifying doctor in the course of

treatment or diagnosis of the patient, the second doctor's opinion can be revealed to the jury on direct examination. *Kelley v Bailey* (1961) 189 CA2d 728, 11 CR 448. See also *Jamison v Lindsay* (1980) 108 CA3d 223, 166 CR 443.

NOTE: This exception does not apply if the testifying doctor was consulted as an expert and called to testify as an expert. See *Whitfield v Roth* (1974) 10 C3d 874, 894, 112 CR 540 (testimony of doctor called as expert as to his opinion of other doctors not present in court was inadmissible hearsay).

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§4.4 B. Eyewitness Information in Reports

Eyewitness information in reports may be considered by a testifying expert, but cannot form the exclusive basis for the expert's opinion unless the eyewitnesses agree on the fact relied on. See *Arellano v Moreno* (1973) 33 CA3d 877, 885, 109 CR 421 (court held that investigating officer could permissibly base his opinion on testimony of owners of *both* cars in collision because they agreed on point of impact); *Hodges v Severns* (1962) 201 CA2d 99, 108, 20 CR 129 (accident reconstructionist cannot rely on extrajudicial statements of lay witnesses about point of impact); *Mason v Mason* (1960) 186 CA2d 209, 215, 8 CR 784 (auditor cannot rely on unsworn statements of loan and escrow officers); *Behr v County of Santa Cruz* (1959) 172 CA2d 697, 705, 342 P2d 987 (fire ranger cannot base opinion about fire's cause on lay statements); *Ribble v Cook* (1952) 111 CA2d 903, 906, 245 P2d 593 (same as *Hodges*).

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§4.5 C. Professional Books and Articles

Well-recognized and accepted professional treatises, books, and articles can be relied on by an expert to support his or her opinion. See Evid C §801(b); *Luque v McClean* (1972) 8 C3d 136, 148, 104 CR 443 (dicta; states rule). The publication must be one generally relied on in the trade or field, however, and must be regarded as an authoritative source of information. An expert opinion based on a nonauthoritative publication will not be allowed. See *Luque v McClean, supra* (expert in lawn mower design cannot base opinion on Reader's Digest article, because that magazine is not kind of professional technical literature that designer would rely on).

Counsel should avoid asking his or her own expert on direct examination to rely on a marginal publication that can be used during cross-examination to raise substantial doubts about the credibility of the expert's testimony. Support for an expert's opinions should be confined to trustworthy sources that are commonly used by others in the same trade or profession.

The expert can be cross-examined in regard to a publication that is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, even if the expert did not rely on it in forming his or her opinion. Evid C §721(b).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/ II. WHEN EXPERT CAN BASE OPINION ON NEW SCIENTIFIC TECHNIQUES/§4.6 A. Kelly 'General Acceptance' Test

II. WHEN EXPERT CAN BASE OPINION ON NEW SCIENTIFIC TECHNIQUES

§4.6 A. *Kelly* "General Acceptance" Test

NOTE: Many practitioners and some courts continue to refer to the *Kelly* test as the *Kelly/Frye* test. However, the California Supreme Court has noted that because the Federal Rules of Evidence overruled *Frye v U.S.* (DC Cir 1923) 293 F 1013, "the foundational requirement for admission of new scientific evidence in California should be referred to as the *Kelly* test or rule." *Cooley v Superior Court* (2002) 29 C4th 228, 242 n3, 127 CR2d 177. Accordingly, this book uses the terms "*Kelly* test" or "*Kelly* rule," except when discussing older cases that use the former terminology.

Experts are precluded from relying on new scientific techniques that have not gained general acceptance in the particular field in which the technique is offered. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; see also *Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014. To meet the standard of admissibility under *Kelly*, the party offering the evidence must show a consensus of scientific opinion on the reliability of the test, procedure, or manner of proof involved. *People v Leahy* (1994) 8 C4th 587, 612, 34 CR2d 663; *People v Brown* (1985) 40 C3d 512, 230 CR 834, rev'd on other grounds (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837. The party offering the evidence generally must use a qualified expert to establish its general acceptance in the field, and in addition must demonstrate that correct scientific procedures were used in the particular case. *People v Kelly, supra.* The proffering party need not, however, prove (*People v Bolden* (2002) 29 C4th 515, 546, 127 CR2d 802):

> to the satisfaction of a court that the technique is scientifically reliable or valid. [Citation.] Because courts are ill suited to make such determinations, admissibility depends upon whether the technique is generally accepted as reliable in the relevant scientific community.

The source of the general acceptance requirement is the seminal case of *Frye v U.S., supra* (adopted by the California Supreme Court in *People v Kelly, supra*), in which the court held that polygraph results were inadmissible in a criminal action:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principal or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

While acknowledging criticism of the "general acceptance" test endorsed in *Kelly* and *Frye—i.e.,* that it prevents the admission of relevant evidence—the California Supreme Court nevertheless forcefully reaffirmed its viability in *People v Leahy* (1994) 8 C4th 587, 612, 34 CR2d 663. The court said that the same criticism of *Frye* had been raised and rejected when *Kelly* was before the court 18 years earlier and that nothing in the intervening 18 years required *Kelly*'s reconsideration. The court agreed that adoption of the "truth-in-evidence" provision in Cal Const art I, §28(d) ("Relevant evidence shall not be excluded in any criminal proceeding") was a significant development. The court noted, however, that it had already held in *People v Harris* (1989) 47 C3d 1047, 1093, 255 CR 352, that the truth-in-evidence provision did not change the *Kelly* rule because reliability is an aspect of relevance, and the "general acceptance" standard of reliability determines whether the evidence is relevant and whether §28(d) even applies. 8 C4th at 599.

The court in *Leahy* made clear that "'general acceptance' under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community," and did not require that the technique be supported by a "majority" of the members of the relevant scientific community, as was suggested in *People v Guerra* (1984) 37 C3d 385, 418, 208 CR 162. 8 C4th at 612. In *Kelly,* the court had said that the inquiry "would require consideration of the views of a typical cross-section of the scientific community," which should include some critics of the new technique, and noted that it was "questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community regarding the reliability of a new technique." *People v Kelly* (1976) 17 C3d 24, 37, 130 CR 144. In *People v Shirley* (1982) 31 C3d 18, 56, 181 CR 243, the court clarified that "general

acceptance" could be pursued by reviewing treatises and journals as well as by hearing live testimony, to see if "scientists significant either in number or expertise" think the technique is unreliable.

The *Leahy* court declined the invitation to adopt the new federal rule for scientific testimony expressed in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. *People v Leahy*, 8 C4th at 591. The court reasoned that because the holding in *Daubert* was based on the Federal Rules of Evidence, not on any inherent problems with the *Frye* standard, *Daubert* did not apply to state court proceedings. Further, even though the relevant sections of the Federal Rules of Evidence have counterparts in the California Evidence Code, *Daubert*'s reasoning did not apply, because the relative timing of the court decisions and legislative directives was different for the two jurisdictions. Thus, while the federal rules were enacted more than half a century after the *Frye* decision, the state Evidence Code was adopted in 1965, 11 years before *Kelly* was decided. 8 C4th at 599. For discussion of *Daubert*, see §§4.55-4.65.

For further discussion of the admission of scientific evidence under *Kelly,* see Scientific Evidence in California Criminal Cases, chap 2 (Cal CEB 2008); Epstein, *Trial Practice: Scientific Evidence Must Pass Three-Pronged Test*, Los Angeles Daily Journal, Apr. 28, 2003, p 9.

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§4.7 B. *Kelly* Test Applies Only to New Scientific Techniques

The *Kelly* test is frequently misunderstood as applying to expert testimony generally. It does not. It is limited to testimony involving "new scientific techniques." According to the California Supreme Court in *People v Stoll* (1989) 49 C3d 1136, 1156, 265 CR 111, a "new scientific technique" is one that:

- Is *new* to science and, even more so, to the law; and
- Provides "some definitive truth which the expert need only accurately recognize and relay to the jury."

In *Stoll*, the techniques involved were two psychological tests that had been used for many years. A psychologist used these tests and a personal interview with the defendant as the bases for his testimony that in his expert opinion the defendant did not have a sexually deviant personality. (The defendant was charged with child sex abuse.) The court held that the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) did not apply to the psychological tests relied on by the expert because they did not fit the court's definition of a *new* scientific technique and because no reasonable juror would mistake an expert's reliance on the standardized tests as a source of infallible truth. As the dissent in *Stoll* pointed out, however, it is difficult to reconcile this application of *Kelly/Frye* with the reasoning and conclusions in other criminal cases involving similar types of evidence, usually called "profile" or "syndrome" evidence. For further discussion of syndrome evidence and *Stoll,* see §§4.29-4.31.

In *Texaco Producing, Inc. v Kern County* (1998) 66 CA4th 1029, 78 CR2d 433, a taxpayer attempted to mount a challenge to certain ratios used by the tax assessor's experts. The court found that the ratios were neither "new" nor even a "scientific technique." The court explained that the "new technique" strictures were aimed at scientific evidence, "which carries with it a misleading aura of certainty or a posture of mystic infallibility in the eyes of the jury." 66 CA4th at 1049. Scientific evidence stands in contrast to ordinary expert opinions, regarding which "[t]riers of fact can temper their acceptance … 'with a healthy skepticism born of their knowledge that all human beings are fallible.'" *Texaco Producing, Inc. v Kern County, supra,* quoting *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236. See also *Byrum v Superior Court* (Feb. 20, 2002, B153001; not certified for publication) 2002 Cal App Unpub Lexis 3809 (medical causation expert testimony is not subject to *Kelly/Frye* standard). The supreme court subsequently confirmed that "the *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." *People v Venegas* (1998) 18 C4th 47, 80, 74 CR2d 262. Thus, the *Kelly* test does not apply to testimony by a diagnostic radiologist as to the probable caliber of a bullet shown in an X ray, based on its size relative to another bullet also shown in the X ray. *People v Ayala* (2000) 24 C4th 243, 279, 99 CR2d 532. Similarly, in *Texaco Producing,* the tax assessor's experts had not "ascribed a 'definitive truth' to the ratios at issue. The ratios were not used to convert raw data into an objective and infallible answer." As a result, those opinions "did not carry a misleading aura of scientific infallibility" and were thus not subject to *Kelly/Frye*, regardless of how derived. *Texaco Producing, Inc. v Kern County, supra.*

The court of appeal in *People v Johnson* (2006) 139 CA4th 1135, 43 CR3d 587, added a very thoughtful opinion to the case law analyzing "new scientific techniques." Considering the admissibility of testimony concerning a "cold hit" DNA match, the court agreed with the defendant that the DNA database search (or trawl) was indeed "scientific." But it also found that the search was not subject to the *Kelly* test because it was not "new" and because it provided law enforcement with an investigative tool, not evidence of guilt. Thus, the search did not reveal a "definitive truth" as *Kelly* otherwise requires. 139 CA4th at 1148. The California Supreme Court has endorsed this holding that the "cold hit" technique falls outside the *Kelly* test requirements. See *People v Nelson* (2008) 43 C4th 1242, 1463, 78 CR3d 69.

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§4.8 1. Technique Must Be New

If the technique resulting in the evidence is not new, the court will not subject it to the *Kelly* test.

In *People v Clark* (1993) 5 C4th 950, 1018, 22 CR2d 689, for example, the supreme court did not require the *Kelly* test to be applied to "blood splatter" evidence, which is derived from matters of common knowledge and is a technique that has been used since before the 1976 *Kelly* decision. See also *People v Smithey* (1999) 20 C4th 936, 967, 86 CR2d 243, modified at 21 C4th 845a (*Kelly* test need not be applied to expert opinion testimony regarding mental state based on standardized psychological tests).

More recently, the supreme court found that a full *Kelly* hearing was not required to determine the admissibility of electrophoretic multisystem testing of blood stains because there was a published appellate decision holding that the procedure had general acceptance in the relevant scientific community. *People v Bolden* (2002) 29 C4th 515, 127 CR2d 802. In *People v Nolan* (2002) 95 CA4th 1210, 116 CR2d 331, the court held that a new urinalysis device designed for use by drug counselors instead of laboratory technicians is not a new scientific technique subject to the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6). The court noted that "[t]here will always be new devices to implement established scientific methods. But a *Kelly/Frye* hearing is not required for new devices; it applies to new methodologies." 95 CA4th at 1215. On the other hand, a technique that has been in effect for a number of years may still be considered new and thus subject to the test. In *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, the court held that the horizontal gaze nystagmus test for drunkenness was a "new" scientific technique even though it had been used by law enforcement agencies for more than 30 years.

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§4.9 2. Technique Must Be Scientific

The *Kelly* test applies only to "scientific techniques," with "scientific" being a term of art that means giving rise to a "definitive truth which the expert need only accurately recognize and relay to the jury." *People v Stoll* (1989) 49 C3d 1136, 1156, 265 CR 111.

That narrow definition excludes, among other things, expert medical opinion. *People v Ward* (1999) 71 CA4th 368, 373, 83 CR2d 828. The rationale for this exclusion is that the opinion of a physician, regardless of his or her credentials, lacks the "aura of infallibility" that frequently accompanies evidence "produced by a machine." *Wilson v Phillips* (1999) 73 CA4th 250, 254, 86 CR2d 204. In *Wilson*, the court held that the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) does not apply to expert testimony about studies showing that individuals who have suffered a painful or traumatic experience sometimes repress their memories of the event, when the studies were based on a psychiatrist's personal evaluations of the victims. 73 CA4th at 255.

The *Kelly* test has also been held inapplicable to a DNA database search resulting in a "cold hit" match (*People v Johnson* (2006) 139 CA4th 1135, 1155, 43 CR3d 587); studies about a defendant's propensities to repeat sexually violent behavior (*People v Ward*, *supra*), and those about the reliability of eyewitness identification. *People v McDonald* (1984) 37 C3d 351, 373, 208 CR 236; see also *People v Rowland* (1992) 4 C4th 238, 14 CR2d 377 (*Kelly/Frye* rule inapplicable to testimony that absence of genital trauma was not inconsistent with nonconsensual sexual intercourse); *Texaco Producing, Inc. v Kern County* (1998) 66 CA4th 1029, 78 CR2d 433 (appraisal methods used by county tax assessor not "scientific techniques" to which *Kelly/Frye* applied); *People v Brown* (2001) 91 CA4th 623, 110 CR2d 750 (shortcomings during testing such as mislabeling, mixing wrong ingredients, or failing to follow routine precautions against contamination are not "scientific," at least to the extent they can be evaluated by ordinary jurors).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.9A 3. Application of Kelly Test to Expert Medical Testimony

§4.9A 3. Application of *Kelly* Test to Expert Medical Testimony

As noted above, expert medical opinion is generally not subject to *Kelly* because a physician's opinion is not considered to have the "aura of infallibility" that accompanies evidence produced by a device, process, or machine. See *People v Stoll* (1989) 49 C3d 1136, 1157, 265 CR 111.

Recent court of appeal decisions have reached differing conclusions concerning the admissibility of expert medical testimony and the impact, if any, of the *Kelly* test on such testimony. These cases and their conclusions are difficult to harmonize. Ultimately, the California Supreme Court must provide more guidance on this issue. In the meantime, what follows is a brief discussion of the cases and the tentative conclusions that can be drawn from them.

Roberti: In *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827, plaintiff alleged that his autism was caused by a pesticide that defendant had applied at plaintiff's home both before and after he was born, including while his mother was pregnant with him. He offered testimony from several toxicologists and medical doctors who opined that the autism was caused by exposure to the pesticide. The trial court granted the defendant's motion in limine to exclude the expert testimony, finding the opinions were not derived from any accepted scientific methodology and thus did not meet the *Kelly* admissibility test.

The court of appeal reversed, holding that the *Kelly* test was inapplicable. "[M]edical theories of causation are not subject to the *Kelly* rule when they are based entirely upon generally accepted diagnostic methods and tests, including statistical studies that are not definitive." The "subjective thought processes" of a medical expert do not have the "'aura of infallibility'" that jurors "tend to attribute to scientific devices, techniques, or procedures." 113 CA4th at 903.

The *Roberti* court then rejected the suggestion that a *Daubert*-type of foundational analysis should be applied to the expert medical testimony at issue. The court specifically criticized *People v Mitchell* (2003) 110 CA4th 772, 2 CR3d 49, in which the court of appeal held the *Kelly* test applicable to use of a scent transfer device for a canine scent identification lineup and stated, citing *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, that even if *Kelly* did not apply, a "greater foundation" would still be needed to establish that there was "some basis" for the underlying assumptions of the proffered testimony. The *Roberti* court disagreed, stating "[i]n contrast to the *Mitchell* court's interpretation of *Leahy*, our reading of *Leahy* instead indicates that the Supreme Court has rejected the broader federal rule and reaffirmed its adherence to the narrower *Kelly* rule." 113 CA4th at 906. For discussion of *Mitchell,* see §4.15A.

Jennings: The next case to address expert medical testimony was *Jennings v Palomar Pomerado Health Sys., Inc.* (2003) 114 CA4th 1108, 8 CR3d 363. In *Jennings,* the plaintiff developed an abdominal infection following surgery. He sued the doctors and hospital, alleging that the infection was caused by the defendants' having negligently left a retractor in his abdomen. There was no dispute that the retractor was inadvertently not removed or that a second surgery was required as a result. The defense was that during the second surgery the doctors discovered a totally unrelated abscess liquefaction that was the cause of the infection. The retractor was in another part of the abdomen, separated from the abscess by the peritoneal wall and encased in the omentum, a specialized tissue that encases and contains the inflammation of foreign bodies and contains specialized cells that kill microorganisms.

Plaintiff offered testimony from an infectious disease specialist who opined that a contaminated protractor in the abdomen can become a focal point for the growth of bacteria and that the bacteria had migrated from the peritoneal cavity, causing the infection. The trial court granted defendants' motion to exclude the testimony because it did not show how the failure to remove the retractor was causally linked to the subsequent infection.

The court of appeal affirmed without mentioning *Kelly*, *Leahy*, *Mitchell*, or *Roberti*. Instead, the court found that the opinion was "too conclusory" and "was not supported by a reasoned explanation illuminating the etiology connecting the infected subcutaneous tissue to the nidus inside the peritoneal cavity where the retractor was retained, and did not contain a reasoned explanation accounting for or reconciling his theory with the apparent lack of inflammation or infection along the theorized migratory route." 114 CA4th at 1119, 1120.

Bushling: In *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 11 CR3d 653, plaintiff experienced shoulder pain after undergoing surgery to remove his gallbladder and take a biopsy on a mole on his abdomen. Defendants moved for summary judgment accompanied by declarations that plaintiff had been supine throughout the operation, that the

shoulder pain was the result of a suprascapular nerve palsy, which is idiopathic and occurs for a variety of reasons after well-performed surgical procedures. Plaintiff's opposition included declarations from two doctors who opined that the plaintiff was, in fact, moved during surgery and that the medical literature demonstrates that surgical positioning can cause an injury of the kind in question. The trial court granted defendants' motion, finding plaintiff's expert declarations too conclusory.

The court of appeal affirmed without mention of *Kelly, Leahy,* or *Mitchell*. The court did, however, rely heavily on *Jennings* for the proposition that "expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." 117 CA4th at 510.

Lockheed: The California Supreme Court granted, then dismissed, review in *Lockheed Litig. Cases* (review granted Apr. 13, 2005, S132167; review dismissed Nov. 1, 2007; court of appeal opinion at 126 CA4th 271, 23 CR3d 763), which involves a series of wrongful deaths allegedly caused by exposure to chemicals manufactured or used by defendants. Plaintiffs sought to establish causation through an expert who relied on epidemiological research that did not show a relative risk of greater than 2.0 (*i.e.,* incidence of disease among exposed persons is more than two times greater than among unexposed persons). The trial court granted defendants summary judgment, finding that the epidemiological evidence did not establish that it was more likely than not that the chemicals had caused the deaths.

The court of appeal affirmed. It found that expert opinion "has no value if its basis is unsound," which means that "the matter that the expert relies on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." 126 CA4th at 284.

The supreme court granted review for the purpose of determining whether Evid C §801(b) permits a trial court to review the evidence an expert relied on in reaching his or her conclusions to determine whether that evidence provides a reasonable basis for the expert's opinion. Review was unexpectedly dismissed when a majority of the permanent justices recused themselves.

Conclusions: The California Supreme Court denied petitions for review in *Mitchell*, *Roberti*, and *Jennings* and denied requests to depublish in *Mitchell*, *Roberti*, and *Bushling*. Given the supreme court's unusual decision to dismiss review in *Lockheed,* the impact of the *Kelly* test on expert medical testimony is still unclear. The existing court of appeal cases appear to hold that:

- *Kelly* is almost certainly *not* applicable to forms of expert testimony that do not purport to be based on some "infallible" machine, device, or scientific technique.
- In *Leahy*, the California Supreme Court clearly rejected a *Daubert*-type standard to replace the *Kelly* standard for expert opinions falling within *Kelly*.
- Consistent with Evid C §801(b), California trial judges do have a "gatekeeper" obligation to exclude expert testimony that is based on unsound, unsupported assumptions.

PRACTICE TIP: Those seeking to exclude medical (and other "non-infallible") expert testimony should base their positions not on *Kelly*, but rather on the expert's testimony being "excessively speculative," and should rely on cases such as *Jennings* and *Bushling*. Those seeking to introduce such testimony should argue that *Kelly* is inapplicable and that the supreme court in *Leahy* declined to adopt a *Daubert*-type standard, leaving it to the trier of fact to accept or reject "non-infallible" testimony, and should rely heavily on *Roberti*.

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§4.10 4. *Kelly* Applies in Civil and Criminal Cases

The *Kelly* rule is employed most frequently in criminal cases, in which scientific tests (*e.g.,* polygraphs) frequently form the basis for an expert's opinion. But the rule is by no means limited to the criminal context. The need to keep scientifically unsupported theory from overwhelming civil juries (and other civil fact finders) is just as great. See, *e.g., Huntingdon v Crowley* (1966) 64 C2d 647, 51 CR 254 (trial court's exclusion, based on *Frye,* of blood test results in paternity suit upheld); *Texaco Producing, Inc. v Kern County* (1998) 66 CA4th 1029, 78 CR2d 433 (*Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) applies in administrative hearings in which relaxed rules of evidence apply); *In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 (*Kelly/Frye* applied in juvenile dependency case; case discussed in §4.31). See also *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 239 CR 422 (*Kelly/Frye* applies to administrative hearings). Counsel in both civil and criminal cases thus should be prepared to meet *Kelly* objections to diagnostic scientific testimony.

PRACTICE TIP: When your opponent's expert uses a "first time ever" approach, whether he or she is an accountant, economist, epidemiologist, or any of the myriad other experts who testify routinely in sophisticated civil and criminal cases, be alert to the availability of the *Kelly* objection. Counsel seeking to avoid a *Kelly* challenge should emphasize that the expert's singular opinion does not involve a machine, test, or other scientific technique, or if it does, that it is not new or experimental. See §§4.8-4.9.

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§4.11 5. Resources on *Kelly*

Fortunately for practitioners, there are an increasing number of texts that deal specifically with opinion testimony that comes within the *Kelly* rule. These books not only deal with the admissibility of such testimony, but also offer practical explanations about the type of testimony involved, *e.g.,* scientific, statistical, psychiatric, or psychological. See, *e.g.,* Giannelli & Imwinkelried, Scientific Evidence (3d ed 2000); Wecht, Forensic Sciences (1981). See also discussion of *Kelly* in §§4.13-4.27 as it relates to particular types of evidence.

For a vigorous criticism of the willingness of courts to admit unaccepted scientific techniques, see Huber, Galileo's Revenge: Junk Science in the Courtroom (1991).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.12 C. Introducing Evidence in Support of New Scientific Techniques Under Kelly

§4.12 C. Introducing Evidence in Support of New Scientific Techniques Under *Kelly*

Attorneys proposing to introduce evidence concerning a new scientific technique must prepare for two separate stages: first, the evidentiary hearing on whether the evidence is admissible (discussed in this section; see also §§14.2-14.3 on in limine motions), and second, the actual presentation of the evidence (see chap 13 on voir dire and direct examination).

Evidentiary hearing evidence can consist of the testimony of the expert who will testify at trial, testimony of other experts in the field, and published professional literature in the field.

PRACTICE TIP: In a jury trial, the evidentiary hearing takes place out of the presence of the jury. Such hearings can last hours or even days. If a hearing is anticipated, counsel should notify the trial judge as soon as possible so that an appropriate schedule, with minimal jury inconvenience, can be established.

When it is undisputed that a particular expert's testimony will rely on a new scientific technique under *Kelly,* it may be useful to use two witnesses, one to prove that the technique is generally accepted in the relevant scientific community, and the other to show that the procedure is relevant to the present case. See *People v Ashmus* (1991) 54 C3d 932, 970, 2 CR2d 112 (prosecution used two witnesses to testify on electrophoretic analysis of dried semen stains discovered on body of assault victim; analysis was undisputedly new scientific technique within *Kelly/Frye* rule (now referred to as the *Kelly* rule; see Note in §4.6) and prosecution offered first expert's testimony to show general acceptance of analysis in relevant scientific community of forensic chemistry, then offered second expert's testimony to demonstrate procedure's relevance to particular case). A motion in limine may be used to determine whether a new scientific technique is generally accepted in the relevant scientific community. In *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 1309, 41 CR3d 80, the trial court properly used an in limine hearing to cross-examine experts on whether a *Kelly/Frye* foundation is established for admission of an immunosciences mycotoxin antibody test and an IBT blood serology test. On the use of motions in limine in challenging opposing expert witnesses, see §§14.2-14.3.

The California Supreme Court has said that the question of whether the new scientific technique meets the *Kelly* test is separate from the question of whether the new technique was properly applied; evidence of careless testing usually goes to the weight of such evidence, not to its admissibility and is usually brought out on cross-examination. See *People v Farmer* (1989) 47 C3d 888, 913, 254 CR 508, discussed in §4.19; *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1398, 55 CR3d 551 (evidence that cases in study were misclassified was not based on new scientific methodology, but rather challenged professionalism with which methodology was applied). In *People v Venegas* (1998) 18 C4th 47, 80, 74 CR2d 262, discussed in §4.17, the court distinguished *Farmer,* explaining that in cases involving DNA evidence, unlike, *e.g.*, fingerprint comparisons, which jurors can see for themselves, questions concerning whether a laboratory has adopted correct, scientifically accepted procedures for generating DNA evidence depend almost entirely on technical interpretations of experts, and thus resolution of these questions is a prerequisite to admissibility under *Kelly/Frye*. For discussion of the *Kelly* test, see §4.6.

PRACTICE TIP: Once counsel has shown that the scientific technique is generally accepted in the field and was properly applied in the particular case, counsel should also be prepared to show that the proffered expert testimony will assist the trier of fact and not be unduly prejudicial. By anticipating these latter two issues, counsel will be able to meet any possible relevancy or Evid C §352 objections to the proposed expert testimony.

On novel scientific techniques subject to the *Kelly* rule, see Scientific Evidence in California Criminal Cases, chap 2 (Cal CEB 2008).

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D. *Kelly* Test Applied to Specific Forms of Evidence

§4.13 1. Biomechanical Analysis

The courts seem prepared to accept biomechanical analysis (described in §6.11) from a combination of appropriately qualified witnesses, but not from a single biomechanical engineer who purports to bridge the gap between biology and engineering. Compare *People v Dellinger* (1984) 163 CA3d 284, 209 CR 503, in which the testimony of a biomechanical engineer was not buttressed by other expert testimony and was found in violation of *Kelly*, with *People v Roehler* (1985) 167 CA3d 353, 213 CR 353, in which physicians and an engineer supported the biomechanical expert's testimony, which was accepted. See also *Pineda v Los Angeles Turf Club, Inc.* (1980) 112 CA3d 53, 169 CR 66 (expert opinion testimony of doctor and biomechanic based on medical records and videotape of accidents). The proponent of biomechanical testimony should therefore buttress the medical aspects of engineering testimony with a physician's testimony and support the engineering aspects of medical testimony with the testimony of an engineer.

In *People v Dellinger, supra,* the defendant was convicted of murdering his 2-year-old child. The prosecution was allowed to present testimony by a biomechanical engineer concerning trajectory experiments with an anthropomorphic dummy of a weight and size similar to the victim. These tests indicated that the victim could not have died from falling downstairs as claimed by the defendant. The biomechanic also performed a "finite element analysis" in which the characteristics of a structure (in this case the brain and skull) are fed into a computer, a force is applied mathematically, and the computer then predicts the pressures and stresses in the structure. This analysis confirmed that falling down the stairs in question would not have produced enough force to produce the skull fracture and brain damage to the child that was in fact suffered.

The court of appeal reversed, holding that this biomechanical work failed to meet the *Kelly* test because the scientific acceptability of the anthropomorphic dummy and finite-element computer analysis tests were confirmed only by the engineer who had done the work in the case. The court in *Kelly* had noted that it was "questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community regarding the reliability of a new technique." *People v Kelly* (1976) 17 C3d 24, 37, 130 CR 144. The court in *Dellinger* also found that the credentials of the biomechanical engineer, while impressive, did not qualify her in the area of fall-related injuries to children.

The same biomechanical engineer whose testimony formed the basis for the reversal in *Dellinger* was used more successfully by the prosecution in *People v Roehler* (1985) 167 CA3d 353, 213 CR 353, in which the defendant was convicted of murdering his wife and stepson. The defendant contended that the victims drowned when their boat accidentally capsized. The prosecution, alleging that the victims drowned only after the defendant had fractured their skulls, presented testimony from the coroner and a pathologist that both victims had premortem neck and head injuries. The prosecution also presented testimony of a mechanical engineer concerning tests he had performed showing that the boat would not overturn under the conditions described by the defendant. The prosecution then was allowed to present the testimony of the biomechanical engineer on the results of anthropomorphic dummy tests that she had performed showing that the child's head striking the overturned boat would not be of sufficient impact to cause the head injuries that the boy suffered. This testimony was corroborated by an emergency medicine physician, a neurosurgeon, and a criminalist who had attempted unsuccessfully to duplicate the injury patterns on the boy's skull by smashing the head of a test dummy against various parts of the boat.

The court of appeal affirmed, rejecting, among other things, defendant's claim that the trial court should not have admitted the biomechanical engineer's dummy tests. In so ruling, the court stated that it was "not asked here to analyze and deliver an opinion on the emerging field of biomechanics, the application of engineering principles to biology, and we decline to do so—the *Kelly* and *Frye* courts undertook a far broader task than is required here." 167 CA3d at 388. The court distinguished the tests in *Dellinger* as consisting only "of a police officer's throwing the dummy down some stairs, without any trajectory analysis." 167 CA3d at 390.

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§4.14 2. Blood Typing

In *People v Brown* (1985) 40 C3d 512, 230 CR 834, rev'd on other grounds (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837, the supreme court applied the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) to the admissibility of evidence comparing dried fluid and stain samples taken from the victim's body with blood samples taken from the defendant. The defendant did not seriously dispute the scientific validity of the genetic blood typing tests involved, but argued that the performance of the test itself could be subject to contamination that affected the test's reliability. Because there was substantial debate in the scientific literature on whether an accepted methodology existed that would avoid the problem of contamination, the court found that the blood typing evidence was inadmissible under *Kelly/Frye*.

Electrophoretic multisystem testing of bloodstains was ruled to have gained sufficient general acceptance in the scientific community to meet the *Kelly* test in several later cases. See, *e.g., People v Fierro* (1991) 1 C4th 173, 3 CR2d 426; *People v Morris* (1991) 53 C3d 152, 279 CR 720; *People v Smith* (1989) 215 CA3d 19, 263 CR 678; *People v Morris* (1988) 199 CA3d 377, 245 CR 52; *People v Reilly* (1987) 196 CA3d 1127, 242 CR 496.

NOTE: In *People v Nation* (1980) 26 C3d 169, 177, 161 CR 299, the supreme court required the state to take reasonable steps to preserve semen samples recovered from rape victims.

Blood, breath, and urine tests that determine the blood alcohol level are accepted by the courts. *In re Newbern* (1959) 175 CA2d 862, 865, 1 CR 80 (blood); *People v Williams* (2002) 28 C4th 408, 121 CR2d 854 (breath); and *Quesada v Orr* (1971) 14 CA3d 866, 92 CR 640 (urine).

See Fam C §§7550-7558 on use of blood tests in paternity actions.

NOTE: In criminal cases, Evid C §712 allows certain technicians who took blood to testify through an affidavit.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.15 3. Exposure to Chemicals or Other Substances

§4.15 3. Exposure to Chemicals or Other Substances

Counsel should be alert to interposing a *Kelly* objection when injury causation testimony is based on novel scientific techniques or epidemiological statistics and studies. When it is not generally accepted in a particular field to draw injury causation conclusions for particular individuals by resort to such data, a court may be inclined to refuse to admit the expert's causation conclusions as outside the boundaries of what *Kelly* will tolerate. The court of appeal reached that conclusion in *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 41 CR3d 80, in rejecting testimony on whether exposure to mycotoxins could cause lung cancer or several other medical and immunological disorders. Although the court did not rule out that a proper *Kelly* foundation might support such testimony, it held that such a foundation had not been laid to admit an immunosciences antibody test and IBT blood serology test offered in support of a causation opinion.

On application of *Kelly* to expert medical testimony, see §4.9A. On using experts in cases involving products alleged to have caused injury, see §6.28. On federal cases involving chemical exposure, see §4.66.

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§4.15A 3A. Canine Scent Identification Lineup

The court of appeal in *People v Mitchell* (2003) 110 CA4th 772, 2 CR3d 49, held that the trial court erred in permitting evidence based on a canine scent identification lineup to be admitted without first holding a *Kelly/Frye* hearing (now referred to as a *Kelly* hearing; see Note in §4.6) to determine the reliability of the scientific technique. In rejecting such a hearing, the trial court analogized to published cases dealing with canine tracking and trailing, but the court of appeal found significant differences between those procedures and the scent recognition involved in a lineup. Thus, the court required a foundational showing, with scientific testimony establishing how dogs can be trained in the scent identification procedure and the reliability of the procedure itself, because the procedure appeared to provide the sort of "definitive truth" and "aura of infallibility" triggering a *Kelly/Frye* hearing.

The *Mitchell* court went on to state, citing *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, that "regardless of whether evidence is deemed 'scientific,' it will not be admitted unless it is relevant," and "[i]n California evidence is relevant only if it has 'any tendency in reason to prove or disprove any disputed fact.'" 110 CA4th at 783, 784. Accordingly, even if *Kelly/Frye* did not apply, a "greater foundation" would still be needed to establish that there was "some basis" for the underlying "assumptions made about degradation and contamination of scent, both before and during collection, as well as the uniqueness of each person's odor, beyond the mere experiences of one trainer and one dog." 110 CA4th at 793. (For further discussion of this aspect of *Mitchell*, see §4.9A.) The *Mitchell* court found it unnecessary to pursue this discussion because there was an abundance of other identification evidence, rendering the admission of the scent identification lineup testimony harmless error. 110 CA4th at 794.

See also *People v Willis* (2004) 115 CA4th 379, 9 CR3d 235 (dog scent and scent transfer unit evidence inadmissible, following *Mitchell*).

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§4.16 4. Computer Animation

The court of appeal in *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137, found that no *Kelly* issue was presented when computer animation was used merely to illustrate an expert's testimony. On appeal, the defendant claimed that the prosecution's use of an animation video portraying the crime was erroneously admitted under *Kelly* because computer animation had not gained scientific acceptance in the relevant community. The appellate court disagreed, finding that the animation simply illustrated the expert's testimony, similar to an expert drawing on a board, and was not being introduced as substantive evidence in and of itself. Accordingly, there was no issue of scientific acceptance and the trial court did not abuse its discretion in admitting the animation—with the admonishment to the jury that the animation should be considered as nothing more than an illustration of the expert's opinion.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.17 5. DNA Typing

§4.17 5. DNA Typing

Deoxyribonucleic acid (DNA) typing, sometimes called "genetic fingerprinting," has become extremely important in criminal law cases. DNA typing involves comparing the bodily fluids, hair, or tissue of a known person, *e.g.,* the defendant in a criminal case, with bodily fluids, hair, or tissue related to the crime, *e.g.,* skin found under the fingernails of a murder victim. In *People v Axell* (1991) 235 CA3d 836, 1 CR2d 411, the first reported California appellate decision to consider the matter, the court held that DNA typing evidence satisfies the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6). The *Axell* opinion contains a detailed discussion of relevant decisions from other jurisdictions and articles on the subject from law reviews and elsewhere.

In *People v Barney* (1992) 8 CA4th 798, 10 CR2d 731, the First District appellate court considered whether DNA typing analysis evidence is admissible, and held that one element of current DNA analysis—the determination of the statistical significance of a match between the defendant's DNA and the DNA in bodily material found at the crime scene—does not satisfy the *Kelly/Frye* test. The court found, however, that the admission of DNA evidence in that case was harmless error. In rejecting the DNA evidence, the court determined that the *Axell* court's conclusion that DNA analysis evidence met the standard of general scientific acceptance had been "eclipsed by subsequent scientific developments." Because there was no longer general scientific acceptance of DNA typing, the *Barney* court reasoned that the evidence could no longer meet the *Kelly/Frye* test.

As noted in *Barney*, a court's legal conclusion concerning DNA admissibility may be eclipsed by more recent scientific developments. For example, in *People v Pizarro* (1992) 10 CA4th 57, 12 CR2d 436, the Fifth District appellate court held that DNA evidence is potentially admissible under the *Kelly/Frye* standard but remanded the case for further hearing because the prosecution had not met its burden. *Pizarro* recognized that there are two methodologies used by law enforcement officials to evaluate DNA evidence—that is, the methodologies used to determine the statistical likelihood that a match between the defendant's DNA and that of the material gathered at the crime scene indicates that the material from the crime scene came from the defendant. The methodology generally used was developed by the FBI, but criticized by the National Research Council, which proposed a more conservative approach. In a later case, the court that decided *Barney* disagreed with the reasoning in *Pizarro* and found, based in part on the disagreement between the FBI and the NRC, that scientific acceptance of DNA typing was still not conclusive enough to warrant its admission. See *People v Wallace* (1993) 14 CA4th 651, 17 CR2d 721. The state supreme court declined to take up the DNA controversy in *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663 (DNA evidence was not in issue).

The First District appellate court rejected *Barney* in *People v Taylor* (1995) 33 CA4th 262, 40 CR2d 132 (court acknowledged controversy, but affirmed conviction based on the "modified ceiling approach" to DNA analysis recommended by the NRC). In *People v Wright* (1998) 62 CA4th 31, 40, 72 CR2d 246, the First District appellate court noted that "whatever may have been the situation when *Barney* was decided in 1992, today … the RFLP method [of DNA typing] is generally accepted in the scientific community." The *Wright* court distinguished the RFLP method used in *Barney* from the PCR (polymerase chain reaction) method used in *Wright,* holding that the PCR method has "obviously acquired general acceptance in the scientific community" and "is a valuable method for determining the genetic similarity of individuals." 62 CA4th at 41; see *People v Reeves* (2001) 91 CA4th 14, 109 CR2d 728 (on review of exhaustive *Kelly/Frye* hearing, court of appeal held that PCR testing has received general acceptance in scientific community and such acceptance validates use of product rule in calculating frequency of PCR profile).

In *People v Venegas* (1998) 18 C4th 47, 79, 74 CR2d 262, the California Supreme Court held that the *Axell* and *Barney* opinions conclusively established the general scientific acceptance of the basic RFLP methodology used by the FBI. Thus, the prosecution did not have to prove the general scientific acceptance of the RFLP methodology. The court also held that the NRC "modified ceiling" method of computing the statistical probability of a random match between the evidentiary DNA samples and the DNA of an unrelated person in the general population was admissible under *Kelly*. See *People v Hill* (2001) 89 CA4th 48, 107 CR2d 110 (noting that DNA testing, using methods that are generally accepted by scientific community, need not be subject to *Kelly*/*Frye* analysis to determine scientific reliability). The *Venegas* court went on to hold, however, that the FBI made a technical error in using the scientific procedures to make the modified ceiling calculation, and that the probability statistic actually used by the FBI was thus inadmissible under

Kelly. 18 C4th at 90. The FBI's failure to follow correct scientific procedures in making the calculation was not a matter affecting only the weight of the evidence for the jury's consideration, but was a failure to follow correct scientific procedures within the meaning of *Kelly*'s third prong (proponent of scientific evidence must show that correct scientific procedures were used in the particular case). 18 C4th at 92. The question of whether adequate scientific procedures have been followed in DNA profiling, consistent with *People v Venegas*, is reviewed for abuse of discretion. *People v Brown* (2001) 91 CA4th 623, 649, 110 CR2d 750. The California Supreme Court has also held that evidence of statistical probabilities from using the "unmodified product rule" is admissible under *Kelly* in a criminal trial to assess the probative significance of a DNA match. *People v Soto* (1999) 21 C4th 512, 88 CR2d 34.

The reasoning in the foregoing cases was applied to affirm a "general acceptance" conclusion under *Kelly* for the use of PCR and short tandem repeats technology to analyze a mixed-source forensic sample in *People v Smith* (2003) 107 CA4th 646, 132 CR2d 230. Although the defense disputed the reliability of the test, the court of appeal noted that the trial court had properly considered exhaustive testimony of professionals, case law, and scientific evidence in reaching its conclusion. Nor was absolute unanimity in the scientific community required. Rather, the focus is on the consensus in the relevant scientific community.

Other blood evidence. Although the questions concerning the admissibility of DNA typing analysis remain unresolved, other aspects of blood evidence do not appear to be so controversial. For example, the California Supreme Court denied review of *People v Morganti* (1996) 43 CA4th 643, 50 CR2d 837, in which Division Two of the First District found no error in the admission of the results of an agglutination inhibition test—a test to detect specific genetic markers in blood. Of note, the court concluded that the affirmation of a scientific technique in a published appellate opinion could furnish sufficient evidence showing general acceptance of the test or technique in the relevant scientific community. 43 CA4th at 658. The court went on to find, moreover, that the defendant had introduced no credible evidence that there had been a change of the attitude of the scientific community in the acceptability of such evidence since the prior published opinion allowing it. Accordingly, there was no error in the admission of the testimony in this case. See *People v Yorba* (1989) 209 CA3d 1017, 257 CR 641 (approving admission of evidence based on agglutination inhibition testing).

The court of appeal in *People v Johnson* (2006) 139 CA4th 1135, 1149, 43 CR3d 587, reached a similar conclusion after considering testimony regarding a "cold hit" DNA match from a DNA database search. The court determined that the database search, although certainly "scientific," was not "new" and was used only to identify possible suspect, not as evidence of guilt. Thus, it was an investigative technique that fell outside the *Kelly* requirements. The holding in *Johnson* was endorsed by the supreme court in *People v Nelson* (2008) 43 C4th 1242, 1463, 78 CR3d 69 (noting that disagreement among experts about "cold hit" cases revolved around most probative method to judge significance of cold hit, disagreement that went to evidence's relevance, not its reliability).

For an excellent overview of the issues raised by DNA evidence and its presentation in a criminal case, see O'Reilly & Sincox, *Forensic DNA Case Evaluation and Litigation*, 28 ABA Litig 43 (Fall 2001).

On DNA typing under the Federal Rules of Evidence, see §4.82. On DNA evidence generally, see Scientific Evidence in California Criminal Cases, chap 5 (Cal CEB 2008).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.18 6. Eyewitness Identification

§4.18 6. Eyewitness Identification

In criminal cases, it is permissible for a psychologist to testify concerning the psychological factors that can affect the accuracy of eyewitness identification. See *People v McDonald* (1984) 37 C3d 351, 208 CR 236; see also *People v Vu* (1991) 227 CA3d 810, 278 CR 153 (error under *McDonald* to exclude proposed expert testimony on effects of stress and expectancy on criminal defendant's preconceived perceptions about what might happen when claiming "self defense").

In *McDonald,* the supreme court rejected the trial court's application of the *Kelly/Frye* rule (now referred to as the *Kelly* rule; see Note in §4.6) to expert testimony on eyewitness identification:

> We are not persuaded, however, that the *Kelly/Frye* rule applies to expert testimony on eyewitness identification. [Citation omitted.] It is important to distinguish in this regard between expert testimony and scientific evidence. When a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism borne of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many lay persons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently "scientific" mechanism, instrument, or procedure.

37 C3d at 372. Because no mechanical methods were at issue in the case, the court refused to test the admissibility of the psychologist's testimony under the rule in *Kelly/Frye,* even though the subject matter was "esoteric." 37 C3d at 373.

The court engaged in a detailed analysis of the vagaries of eyewitness testimony, the emerging empirical studies of psychological factors affecting eyewitness identifications, and the consistency of the results of these studies. The court concluded that eyewitness identification is a proper subject for expert testimony, could aid the jurors in their determination of the case, and would not invade the province of the jury because the jury remained free to reject an expert's opinion in its entirety after considering his or her reasons, qualifications, and credibility.

Published opinions after *McDonald* often have found either no error or harmless error when trial courts refuse to allow expert witness testimony on eyewitness identification. See, *e.g., People v Sanders* (1995) 11 C4th 475, 46 CR2d 751 (no error); *People v Brown* (1985) 40 C3d 512, 230 CR 834, rev'd on other grounds (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837 (harmless error); *People v Plasencia* (1985) 168 CA3d 546, 223 CR 786 (no error).

Factors in deciding whether to admit expert testimony. Apparently, the main factor that affects the admission of such expert testimony is whether the prosecution's case rests solely on eyewitness identification. See *People v McDonald, supra* (eyewitness identification sole basis for conviction). Other factors that may affect the court's decision on whether to admit expert testimony include:

- How sure the eyewitness is of the identification.
- The length of time of the eyewitness's observation, and conditions such as distance and lighting at the time of the incident.
- Whether the eyewitness knew the defendant before the incident took place.
- Whether the eyewitness and the defendant are of the same or different races.
- The length of time between when the incident took place and when the eyewitness first made an identification.

Under *McDonald*, expert testimony on the question of eyewitness identification is admissible only when (1) an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by independent evidence; and (2) the specific psychological factors that could have affected the accuracy of the identification for which qualified expert testimony is offered are not likely to be fully known to, or understood by, the jury. *People v McDonald* (1984) 37 C3d 351, 377, 208 CR 236; *People v Sandoval* (1994) 30 CA4th 1288, 1297, 36 CR2d 646 (psychologist's testimony on unfairness of lineup because persons in lineup were dissimilar from defendant held properly excluded; jury likely to know or understand such psychological factors, and psychologist not qualified to testify on fairness of lineup).

In *People v Jones* (2003) 30 C4th 1084, 135 CR2d 370, a capital murder case, the trial court excluded defense expert witness testimony on psychological factors affecting an eyewitness identification. The California Supreme Court

found that the exclusion was proper because the witness's identification of defendant was corroborated by the testimony of five other witnesses. Although three of the five witnesses were accomplices, and all five witnesses could be impeached by proof of bias or prior inconsistent statements, the court found that "the cumulative corroborative effect of the testimony of defendant's admissions is sufficient to give independent reliability to the eyewitness identification" and thus met the *McDonald* standard. 30 C4th at 1112.

For further discussion of eyewitness expert testimony, see Loftus, Eyewitness Testimony (1996); Abney, *Expert Testimony and Eyewitness Identification*, 91 Case & Comm 26 (Mar.-Apr. 1986); Note, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?,* 26 Ariz LJ 399 (1984); Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 Cal L Rev 1402 (1985). See also California Criminal Law Procedure and Practice §22.28A (Cal CEB Annual).

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§4.19 7. Fingerprint and Footprint Analysis

Fingerprint analysis. Fingerprint analysis is admissible in California courts, and is considered "the strongest evidence of identity." *People v Johnson* (1988) 47 C3d 576, 253 CR 710. See also *People v Farnam* (2002) 28 C4th 107, 121 CR2d 106 (fingerprint comparison performed by fingerprint expert is "long-established technique" used to show that defendant's fingerprints matched those found at crime scene). In *People v Webb* (1993) 6 C4th 494, 524, 24 CR2d 779, for example, the court held that *Kelly* does not apply to chemical, laser, and photographic processes used to expose and identify the defendant's fingerprint on duct tape found at the crime scene, because the familiar image of a fingerprint makes reliability of the processes readily apparent.

PRACTICE TIP: Although the general science of fingerprint comparison is established in California, attacks on the way in which fingerprint evidence is collected, compared, and presented continue. Defense counsel should consider hiring his or her own expert or have the court appoint one (see Evid C §730) to mount such an attack. See Begley, *Scientists Draw Bead on Fingerprint Matches*, San Francisco Daily Journal, Oct. 10, 2005, p 10; Levenson, *Fingerprint Evidence Is Routine but Not Infallible*, San Francisco Daily Journal, Feb. 24, 2003, Focus, p 5.

On fingerprint evidence generally, see Scientific Evidence in California Criminal Cases, chap 9 (Cal CEB 2008).

Footprint analysis. Footprint analysis was allowed in *People v Knights* (1985) 166 CA3d 46, 52, 212 CR 307, because the expert did not rely on an untested procedure, but on scientifically established measurement techniques.

The California Supreme Court also rejected a *Kelly/Frye* objection (now referred to as a *Kelly* objection; see Note in §4.6) to a footprint analysis in *People v Farmer* (1989) 47 C3d 888, 913, 254 CR 508. Although alleging *Kelly/Frye* error, the defense did not claim that the footprint testimony was a new scientific methodology, but only that the analysis had been done improperly. The supreme court made short work of this criticism:

> [T]he *Kelly/Frye* rule tests the fundamental validity of a new scientific methodology, not the degree of professionalism with which it is applied. [Citation.] Careless testing affects the weight of the evidence and not its admissibility, and must be attacked on cross-examination or by other expert testimony.

On fingerprint and footprint analysis under the Federal Rules of Evidence, see §4.83.

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§4.20 8. Hypnotically Induced Testimony

Hypnotically induced testimony was found to be inadmissible under the *Kelly/Frye* standard (now referred to as the *Kelly* standard; see Note in §4.6) in *People v Shirley* (1982) 31 C3d 18, 181 CR 243. That holding was reaffirmed by the court in *People v Guerra* (1984) 37 C3d 385, 208 CR 162. The legislature subsequently added Evid C §795, which allows the testimony of a witness who has undergone hypnosis to be admitted in a criminal proceeding on the satisfaction of certain conditions. See also §6.45.

Notwithstanding Evid C §795, the court of appeal in *People v Parnel* (1993) 16 CA4th 862, 20 CR2d 302, held that a clinical psychologist could not offer testimony on posttraumatic stress disorder based in part on statements obtained from the defendant while he was hypnotized. Relying on the *Kelly/Frye* rule and *Shirley*, the court found that an insufficient foundation had been laid for admission of the expert's testimony.

The court in *People v Alcala* (1992) 4 C4th 742, 15 CR2d 432, distinguished *Shirley* in an important way. In *Alcala* a witness who had assisted law enforcement personnel in creating a composite drawing of the defendant testified in a homicide prosecution. Once the composite had been provided, law enforcement personnel hypnotized the witness to try to help her provide further details. The supreme court held that while it was error to admit the witness's posthypnotic recollection under *Shirley,* there was no error in admitting either the details that she provided before hypnosis or the drawing that was based on those prehypnotic details.

In *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191, the court of appeal addressed the admissibility of testimony of a hypnotized witness in a civil case for sexual harassment. The court held that, when faced with an evidentiary challenge in a civil case based on *Shirley* and *People v Hayes* (1989) 49 C3d 1260, 265 CR 132, the trial court must conduct a hearing to determine whether the witness underwent hypnosis for the purpose of restoring memory about the subject of the hypnotic session and, if applicable, whether any proposed testimony is about events recalled and related to others before the hypnotic session. Under this analysis, the court found the plaintiff incompetent to testify because her only memory of the acts of harassment occurred after she had been hypnotized by her therapist.

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§4.21 9. Injury Patterns and Causes

In *People v Roehler* (1985) 167 CA3d 353, 213 CR 353, the trial court admitted a prosecution criminalist's testimony that he had been unable to duplicate the victim's head injury pattern by striking the head of a dummy against various portions of a boat. The court of appeal found that this testimony involved new techniques that did not meet the *Kelly/Frye* standard (now referred to as the *Kelly* standard; see Note in §4.6), particularly because there was no measurement of force by scientific method during the experimentation. The court held that the evidence should not have been admitted but was not sufficiently prejudicial to warrant a reversal of the defendant's murder conviction.

Dummy testing to try to determine the cause of injuries or death has had a mixed reception. See discussion in §4.13.

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§4.22 10. Nondeviant Propensities of Criminal Defendants

Under Evid C §1102, a defendant in a criminal case may present expert opinion testimony of his or her nondisposition to commit the charged offense. For example, in *People v Stoll* (1989) 49 C3d 1136, 265 CR 111, the supreme court held that a psychologist's proposed testimony that the defendant in a child victim sex case did not show any indication of sexual deviancy, based on two standard psychological tests and a personal interview, was not subject to the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) because the psychological tests relied on were not new.

Contrast *Stoll* with *People v John W.* (1986) 185 CA3d 801, 229 CR 783, disapproved on other grounds in 49 C3d at 1153. In *John W.,* a court of appeal affirmed a trial court's rejection of a psychologist's opinion that the defendant did not exhibit behavior characteristics consistent with those who commit sexual crimes against children. The psychologist's testimony was disallowed on the ground that the defendant made no clearly acceptable showing that the physical test performed on the defendant (a penile plethysmograph) was a reliable means of diagnosing sexual deviancy. The fact that the witness testified that the diagnostic test he relied on was widely used in other contexts did not satisfy the "general acceptance" standard in that case.

It is interesting to note that the *Stoll* court said *Kelly/Frye* can apply to a new scientific process that solely concerns psychological evidence (*People v Stoll* (1989) 49 C3d 1136, 1156, 265 CR 111), and that "profile" or "syndrome" evidence does not per se require *Kelly/Frye* analysis (49 C3d at 1161 n22). Syndrome evidence is discussed in §§4.28-4.34.

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§4.23 11. Paternity Tests

Blood tests are admissible to prove paternity in both civil and criminal cases if the requirements of the applicable statutes are met. See generally Fam C §§7550-7558 on blood tests to determine paternity. See also *In re Melissa G.* (1989) 213 CA3d 1082, 261 CR 894 (presumption of paternity set forth in former Evid C §621 held unconstitutionally applied in case in which blood tests established paternity).

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§4.24 12. Horizontal Gaze Nystagmus (HGN) Testing

In *People v Leahy* (1994) 8 C4th 587, 591, 594, 34 CR2d 663, the California Supreme Court applied the "general acceptance" standard to the admissibility of results of the horizontal gaze nystagmus (HGN) field sobriety test, reversing the defendant's conviction based on the admission of such results at trial. The court held that the prosecution had failed to satisfy the California rule requiring that a new scientific technique be sufficiently established to have gained general acceptance in the relevant scientific community before the results of such technique are properly admissible. Subsequently, in *People v Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6, the Fourth District appellate court concluded, after an exhaustive survey of relevant case law, that the majority of the relevant scientific community did accept a properly conducted HGN test as useful when combined with other tests and observations. The court found that the test had been properly conducted and upheld the defendant's conviction, which had been based in part on HGN test results.

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§4.25 13. Polygraph Results

Polygraph evidence is inadmissible in criminal cases unless the parties stipulate to its admission. Evid C §351.1; see *People v Thornton* (1974) 11 C3d 738, 114 CR 467. But see *Rupe v Wood* (9th Cir 1996) 93 F3d 1434 (holding that, under Washington law which, like California, excludes polygraph evidence in criminal proceedings unless both sides stipulate to its admission, exclusion of polygraph evidence at the penalty phase of a capital case violated the defendant's due process right to have relevant, mitigating evidence concerning the circumstances of the crime presented to a jury considering the death penalty). See also *People v Wilkinson* (2004) 33 C4th 821, 16 CR3d 420 (affirming that categorical prohibition on admission of polygraph evidence in criminal cases absent stipulation is mandated by Evid C §351.1). See also *U.S. v Scheffer* (1998) 523 US 303, 140 L Ed 2d 413, 118 S Ct 1261 (Supreme Court held that per se rule does not violate right to present a defense).

Polygraph evidence is also inadmissible in state bar disciplinary proceedings. *Arden v State Bar* (1987) 43 C3d 713, 239 CR 68. In *Arden,* the court noted that its holding in *Thornton* was reinforced by the later enactment of Evid C §351.1. Because of the doubtful reliability of polygraph results, the court held that they cannot be admitted in a disciplinary proceeding, in which findings must be based on reliable and convincing proof.

No reported California cases have based rulings on the use of polygraph evidence in *civil* cases. The court in *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1094, 234 CR 835, an insurance bad faith case, skirted the issue. The court relied entirely on *U.S. v Demma* (9th Cir 1975) 523 F2d 981 in upholding the trial court's refusal to allow argument to the jury on the results of a polygraph test administered 8 years after the incident in question and almost 5 years after the action was filed. The court noted that there had been no testimony from any qualified witness concerning the procedures used in administering the test. As discussed in §4.36, the Ninth Circuit has concluded that the per se rule of exclusion set forth in *Demma* is inconsistent with the "flexible inquiry" test assigned to the trial judge by *Daubert*. Given the California Supreme Court holding that *Daubert* is based on reasoning that is inapplicable in California (*People v Leahy* (1994) 8 C4th 587, 599, 34 CR2d 663), it appears that polygraph evidence is inadmissible in civil cases because of its continuing failure to satisfy the *Kelly* test. See generally *Symposium on the Polygraph and the Courts*, 16 U West LA L Rev 1 (1984).

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§4.26 14. Semen Analysis

Electrophoretic analysis of dried semen stains was held admissible under the *Kelly/Frye* rule (now referred to as the *Kelly* rule; see Note in §4.6) in *People v Ashmus* (1991) 54 C3d 932, 970, 2 CR2d 112. Reviewing the issue independently, the supreme court affirmed the trial court's ruling that, although the electrophoretic analysis of dried semen stains was a new scientific technique, the prosecution had met its burden of showing its general acceptance in the relevant scientific community of forensic chemistry.

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§4.27 15. Sodium Amytal to Refresh Memory

Relying on *Kelly*, the court in *Ramona v Superior Court* (1997) 57 CA4th 107, 66 CR2d 766, held that a witness whose memory regarding incidents of sexual abuse was refreshed using sodium amytal could not testify because the truth of her recollections—prompted by the sodium amytal interviews—had not gained general acceptance in the scientific community and there remained a lack of scientific certainty about the results of such interviews. In so holding, the court rejected the argument that recollections in the interviews should be admitted irrespective of *Kelly* because the interviews were conducted solely for therapeutic purposes before any lawsuit was filed. The witness's motive for undergoing the procedure had no relevance to the procedure's reliability.

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§4.27A 16. Survey Data

In *People ex rel Lockyer v R.J. Reynolds Tobacco Co.* (2004) 116 CA4th 1253, 11 CR3d 317, the California Attorney General, seeking to show that defendant tobacco company was violating a consent decree by targeting its advertising to youth, offered survey data by a research company measuring magazine readership (including teenage audience data) as well as expert testimony based on those data. The court found the survey data admissible because it was statistically reliable and was generally used and relied on as accurate in the industry to measure and compare readership of adults and teens.

For discussion of preparing and conducting a cross-examination of a survey or market research expert, see Hebert, *Cross-Examining Survey Experts*, 21 CEB Civ Litigation Rep 234 (Nov. 1999).

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17. Syndrome Evidence

§4.28 a. Definition of "Syndrome"

"Syndrome" and "profile" are terms used to cover psychological, emotional, and/or physical reactions common to a particular group of people, *e.g.,* children who have been sexually abused. See *People v Stoll* (1989) 49 C3d 1136, 1161, 265 CR 111. The American Psychiatric Association's Diagnostic and Statistical Manual, p xxii (1987) (commonly referred to as DSM-III) equates syndrome with mental disorder.

Most cases on syndrome evidence are either criminal or dependency cases. Syndrome evidence is, however, admissible in civil cases. See Tarantino, *An Attorney's Guide to Post-Traumatic Stress Disorder*, 1 Prac Litigator 73 (Mar. 1990), which discusses using posttraumatic stress disorder in personal injury cases.

NOTE: It is unclear whether there is any difference between "syndrome" and "profile." The terms appear to be used interchangeably.

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§4.29 b. Use of *Kelly* Test for Admissibility of Syndrome Evidence

Although case discussions concerning whether particular syndrome evidence is admissible generally focus on whether the *Kelly* test (discussed in §4.6) applies, and, if so, whether the syndrome in question is admissible under it, courts are not uniform in how they approach the problem or in the conclusions they reach. Some cases even accept or reject syndrome evidence without any mention of *Kelly*. See, *e.g., People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142; *People v Roscoe* (1985) 168 CA3d 1093, 215 CR 45 (no discussion of *Kelly;* child sexual abuse accommodation syndrome testimony should have been restricted to victims in general rather than victim of crime charged, but error was not prejudicial).

In deciding whether the *Kelly* test applies, some courts have focused on the tests relied on by the expert. The California Supreme Court took this approach in *People v Stoll* (1989) 49 C3d 1136, 265 CR 111, discussed in §4.7. In *Stoll,* the expert based his opinion on two psychological tests that the court said were not new, and thus did not require application of the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6). See also *People v Smithey* (1999) 20 C4th 936, 967, 86 CR2d 243, modified at 21 C4th 845a (*Kelly* test need not be applied to expert opinion testimony regarding mental state based on standardized psychological tests); *In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 (psychologist used anatomically correct dolls to help obtain information from children who were allegedly victims of sexual abuse; court found use of dolls a new scientific method that required application of *Kelly/Frye,* found method unproven, and reversed conviction).

The approach of the courts in *Stoll* and *Amber B.* contrasts with the more common analysis of many pre-*Stoll* cases that focused on the syndrome *opinion* rather than on the tests on which that opinion was based. Some of the factors important in syndrome cases are discussed below. While these varying and sometimes conflicting approaches may be a judge's nightmare, they frequently provide ammunition to litigators to argue their particular point of view.

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§4.30 (1) Syndrome's Purpose and Use in Scientific Community

Unlike most scientific tests to which the *Kelly* test is applied, syndrome evidence is frequently offered for a different purpose than the one it is used for in the scientific community. Therefore, one of the major factors courts have discussed in deciding whether a particular syndrome was admissible under *Kelly* is whether that syndrome was developed and is used in the scientific community for the same purpose as it will be at trial. For example, in *People v Bledsoe* (1984) 36 C3d 236, 203 CR 450, the court discussed the development of the rape trauma syndrome and noted that, as used in the scientific community, the syndrome assumes that the person who claims to have been raped has in fact been raped. The syndrome is meant to help the therapist work with the victim and not to help anyone determine whether the alleged victim was in fact raped. The *Bledsoe* court therefore held that this syndrome did not meet the *Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6). This same analysis was applied to exclude testimony concerning child sexual abuse accommodation syndrome (CSAAS) in *People v Bowker* (1988) 203 CA3d 385, 249 CR 886.

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§4.31 (2) Nature of Syndrome's Proponent

Courts in criminal and dependency cases sometimes focus on whether the syndrome evidence is offered by the defense or by the prosecution. When offered by the defense, *Kelly* is more likely to be found not to apply. See, *e.g., People v Stoll* (1989) 49 C3d 1136, 265 CR 111; see also the Comment to Evid C §1102.

In cases in which the prosecution offers syndrome evidence, the court's decisions on whether to apply *Kelly* depend on whether the syndrome evidence is to be used to prove that the defendant committed the crime, or for another purpose, such as to rehabilitate the victim. When the evidence is offered to prove that the defendant committed the crime, courts usually apply *Kelly*. See, *e.g., People v Bledsoe* (1984) 36 C3d 236, 203 CR 450; *In re Sarah M.* (1987) 194 CA3d 585, 239 CR 605; *In re Christine C.* (1987) 191 CA3d 676, 236 CR 630. See also *People v Robbie* (2001) 92 CA4th 1075, 112 CR2d 479 (explaining limited purposes for which rapist profile evidence can be admitted and holding that trial court abused its discretion in admitting expert testimony involving rapist profile evidence because testimony was offered by prosecution to prove that defendant committed identified sexual offenses); *People v Bergschneider* (1989) 211 CA3d 144, 259 CR 219, disapproved on other grounds in *People v Griffin* (2004) 33 C4th 1015, 16 CR3d 891 (explaining limited purposes for which expert testimony regarding child sexual abuse accommodation syndrome (CSAAS) can be admitted).

General or specific use of syndrome testimony. When syndrome testimony favorable to the victim is held admissible, there are conflicting views among the courts on whether the expert introducing it may testify only with regard to victims in general, or whether the expert can apply the syndrome to the victim in the case at issue. Most cases discussing this point have concerned the child sexual abuse accommodation syndrome. Compare *People v Bothuel* (1988) 205 CA3d 581, 252 CR 596, disapproved on other grounds in 9 C4th 331 (can discuss CSAAS only in general terms); *People v Bowker* (1988) 203 CA3d 385, 249 CR 886 (same); *In re Sarah M.* (1987) 194 CA3d 585, 239 CR 605 (same); and *People v Roscoe* (1985) 168 CA3d 1093, 215 CR 45 (same); with *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 239 CR 422 (psychiatrist could testify to personal opinion that victim had been abused based on his interviews with victim; court used *Amber B.* court's analysis), and *In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 (in dicta, court said that there is a difference between expert's opinion testimony based on personal interviews with victim and "scientific" evidence).

Battered women's syndrome. The distinction between the expert's testimony on syndrome victims in general, and on the particular victim in the case before the court, was extended to the battered women's syndrome in *People v Erickson* (1997) 57 CA4th 1391, 67 CR2d 740. In *Erickson*, the court concluded that Evid C §1107(a) was intended to permit testimony on battered women's syndrome with respect to the victims as a class, and not with respect to the victim of domestic violence in a particular case before the court. The court found this narrower construction of the section consistent with the traditional constraints placed on the admission of syndrome evidence.

In *People v Brown* (2004) 33 C4th 892, 16 CR3d 447, the California Supreme Court resolved a split in the court of appeal opinions on whether the prosecution may introduce evidence on battered women's syndrome in the absence of evidence that the victim was abused on more than one occasion. The court found the evidence admissible because it would assist the trier of fact in evaluating the credibility of the victim's trial testimony "by providing relevant information about the tendency of victims of domestic violence later to recant or minimize their description of that violence." 33 C4th at 897. The court concluded that Evid C §1107 did not bar introduction of the expert testimony because the testimony went to the victim's credibility and thus was independently admissible under Evid C §801(b) and because, consistent with §1107, there was independent evidence of domestic violence supplied by the victim's direct testimony. 33 C4th at 908. The supreme court in *People v Riggs* (2008) 44 C4th 248, 293, 79 CR3d 648, further explained that there need not be an explicit challenge to a witness's credibility on a basis that might be explained by battered women's syndrome before such evidence may be introduced.

For federal cases on syndrome evidence, see §4.78.

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§4.32 (3) Use of Syndrome Evidence in Rebuttal

When syndrome evidence is used in rebuttal only, *Kelly* may or may not be applied. Compare *People v Bowker* (1988) 203 CA3d 385, 249 CR 886 (*Kelly/Frye* test (now referred to as the *Kelly* test; see Note in §4.6) applied), with *People v Gray* (1986) 187 CA3d 213, 231 CR 658 (*Kelly/Frye* does not apply to child sexual abuse accommodation syndrome (CSAAS) testimony when it is used in rebuttal only, and is limited to testimony of victims in general, rather than relating to particular victim in case at issue).

One court held that CSAAS testimony can be introduced in rebuttal to rehabilitate the victim only. See *People v Housley* (1992) 6 CA4th 947, 8 CR2d 431 (psychologist's testimony properly admitted to help explain rape victim's delay in reporting rape and her recantation of charges at trial). See also *People v Wells* (2004) 118 CA4th 179, 12 CR3d 762 (proposed defense testimony that minor's demeanor was inconsistent with "usual" demeanor of trauma victims could not be used to rebut prosecution's expert, when prosecution's expert gave only general testimony about five components of CSAAS); *People v Harlan* (1990) 222 CA3d 439, 271 CR 653 (admission of testimony of expert on common reactions of child sexual abuse victims to explain contradictory testimony); *People v Bothuel* (1988) 205 CA3d 581, 252 CR 596, disapproved on other grounds in 9 C4th 331 (CSAAS testimony used to explain late reporting of crime and contradictory statements).

Other courts have allowed CSAAS testimony for other purposes. See *People v Bowker, supra* (CSAAS testimony can be used if tailored to purpose for which it is received; this can be either in rebuttal or can include testimony targeted to specific myth or misconception); *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 239 CR 422 (psychiatrist's testimony properly admissible that, in his opinion, based on his interviews with alleged victim, victim had in fact been abused); *In re Dorothy I.* (1984) 162 CA3d 1154, 209 CR 5 (psychiatrist allowed to testify to substantial future danger to child based on similar treatment by abuser of child's half-sister).

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§4.33 c. Introducing Syndrome Evidence

When possible, attorneys putting on syndrome evidence should introduce medical and other expert and nonexpert testimony concerning physical symptoms of the syndrome. This may well form an independent basis for introducing syndrome testimony. For example, in *People v Luna* (1988) 204 CA3d 726, 250 CR 878, disapproved on other grounds in *People v Jones* (1990) 51 C3d 294, 322, 270 CR 611, and superseded by statute on other grounds in *People v Johnson* (2002) 28 C4th 240, 242, 121 CR2d 197, a psychiatric witness had examined the victim using a colposcope to aid in his evaluation of whether the victim had been sexually abused. The colposcope magnifies the area that it examines and makes injuries more identifiable. The psychiatrist or physician must still make a medical diagnosis based on the results of the colposcopic examination and any other information concerning the presence of physical manifestations of abuse.

The defendant in *Luna* argued that the use of the colposcope was a new scientific technique prohibited by the *Kelly/Frye* standard (now referred to as the *Kelly* standard; see Note in §4.6) because it was not generally accepted in the relevant scientific community as a diagnostic tool. The court of appeal rejected this contention, finding that the *Kelly/Frye* standard did not apply to this type of medical diagnosis. The court relied heavily on *People v Mendibles* (1988) 199 CA3d 1277, 245 CR 553, which addressed the same issue. In *Mendibles,* the court held that the colposcope is a well-accepted diagnostic tool and that the expert testimony in question fell within a long line of California cases that have permitted the expert to testify on the cause of a particular injury from the appearance of the injury itself.

PRACTICE TIP: You should have your expert rely on accepted scientific tests and procedures whenever possible to help support an expert syndrome opinion.

The rules are not entirely clear on what statements by an alleged victim may be related to the jury as part of the basis of the expert's opinion on syndrome evidence. See *In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789 (expert could testify on child's activities during "play therapy"); *In re Sarah M.* (1987) 194 CA3d 585, 239 CR 605 (trial court properly ruled that psychologist could not testify to alleged victim's statement that defendant raped her).

When syndrome evidence is allowed in rebuttal only, one court said that the trial court must make sure that the syndrome testimony is sufficiently separated from the testimony in the case-in-chief so that the jury is not confused and can distinguish the two types of testimony. See *People v Luna, supra*. One way of doing this is to allow the expert to testify on one subject, complete with cross-examination, and then allow the expert to testify on the other subject. *People v Luna, supra*.

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§4.34 d. Resources on Syndrome Evidence

Articles on syndrome evidence include Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn L Rev 395 (1985); Comment, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Courts*, 17 Pac LJ 1361, 1373 (1986); and Tarantino, *An Attorney's Guide to Post-Traumatic Stress Disorder*, Prac Litigator 73 (Mar. 1990).

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§4.34A 18. Urinalysis

In a probation revocation hearing under the *Kelly* rule, the court accepted test results from the ADX Abbott urinalysis test. The defendant contended that the ADX Abbott test should be rejected because it was not designed for use by laboratory technicians and because it was new. In *People v Nolan* (2002) 95 CA4th 1210, 1214, 116 CR2d 331, the court rejected both those contentions, finding that general acceptance does not depend on who operates the test machinery and that the validity of urinalysis testing had been accepted for nearly a decade.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.35 19. Voice Print Identification

§4.35 19. Voice Print Identification

Voice print identification does not qualify for admission as evidence to prove guilt in criminal cases. *People v Kelly* (1976) 17 C3d 24, 130 CR 144.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/ III. MATTER ON WHICH EXPERT MAY NOT RELY/§4.36 A. Speculation, Information From Incompetent Witnesses, or Improper Reference Materials

III. MATTER ON WHICH EXPERT MAY NOT RELY

§4.36 A. Speculation, Information From Incompetent Witnesses, or Improper Reference Materials

An expert's opinion cannot be based on:

- Speculation and conjecture. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 93, 37 CR2d 457; *Blau v City of Los Angeles* (1973) 32 CA3d 77, 83, 107 CR 727.
- Unproven facts. *Toscano v Greene Music* (2004) 124 CA4th 685, 21 CR3d 732; *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 338, 145 CR 47.
- Assumptions of fact contrary to the evidence. See *Nardizzi v Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 CA4th 1409, 1415, 39 CR3d 530 (expert's opinion was directly contradicted by testimony of mechanic who examined vehicle immediately after accident); *Hyatt v Sierra Boat Co., supra; Estate of Powers* (1947) 81 CA2d 480, 485, 184 P2d 319.
- Assumptions of fact based on insufficient data. See *Blecker v Wolbart* (1985) 167 CA3d 1195, 1205, 213 CR 781 (medical expert cannot rely on isolated references to drug use in medical records to establish cause of death related to prior history of drug abuse); *Richard v Scott* (1978) 79 CA3d 57, 144 CR 672 (grant of new trial affirmed because expert allowed to base opinion on speed of car on insufficient evidence).
- Information from incompetent witnesses. See *In re Cheryl H.* (1984) 153 CA3d 1098, 1118, 200 CR 789 (psychiatrist cannot rely on statements of three-year-old to establish that her father was in fact perpetrator of rape-assault).
- Consideration of only part of evidence, disregarding evidence that is inconsistent with expert's opinion. *Richard v Scott, supra*.

EXAMPLE 1: A pathologist may be prepared to testify that a "street drug" found in a decedent's bloodstream during autopsy means that the decedent was under the influence of that drug at the time of the accident that caused his death. If that pathologist has not taken into account that the injured victim was hospitalized following the accident, and was treated with a drug that breaks down into several substances, including the chemical equivalent of the street drug, opposing counsel should seek to prevent the expert from expressing that opinion through voir dire.

EXAMPLE 2: In *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 116 CR2d 158, the court of appeal rejected plaintiff's evidence of its lost profits from the failed start-up of an Internet toy business. Although the evidence seemed to suggest that the business would have been viable, it failed to raise a triable issue because it did not show with reasonable certainty lost net profits by a preponderance of the evidence. 95 CA4th at 887. Plaintiffs offered no formula for determining lost profits; moreover, the online toy market was not established, and evidence of a similar business venture that was highly successful was not sufficient by itself to raise a triable issue. See also *Parlour Enters., Inc. v The Kirin Group, Inc.* (2007) 152 CA4th 281, 288, 61 CR3d 243.

An expert's opinion may not be based on conjecture, but may be formed by the process of eliminating other causes. See *Schreidel v American Honda Motor Co.* (1995) 34 CA4th 1242, 1253, 40 CR2d 576 (auto mechanic qualified as expert may testify to his opinion on cause of mechanical failure based on experience and firsthand observation, even though unable to identify exact mechanical cause of failure). See also *People v Sundlee* (1977) 70 CA3d 477, 484, 138 CR 834 (arson expert's opinion that fire was started with time-delay device, based on observation of fire, special knowledge, and experience, was properly admitted despite absence of remains of such device).

In addition, when there is little or no direct evidence, an expert may be permitted to rely on less substantial, more speculative, evidence to form an opinion. *Buckwalter v Airline Training Ctr.* (1982) 134 CA3d 547, 554, 184 CR 659. *Buckwalter,* however, is a most unusual case. Counsel should rely on this exception only when there are no alternatives because trial courts cannot be counted on to agree that the exception applies.

Appellate courts have been showing particular disaffection with allowing experts to espouse their point of view even

though the facts of the particular case do not support it. The clear directive from these courts is that the foundations for expert opinion must be closely examined *before* the expert is permitted to testify. See *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 41 CR3d 80; *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 37 CR3d 9; *In re Lockheed Litig. Cases* (2004) 115 CA4th 558, 10 CR3d 34; *PG&E v Zuckerman* (1987) 189 CA3d 1113, 234 CR 630; *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 145 CR 47. See also Kennedy & Martin, *Getting Rid of Unfounded Expert Opinions: Some Tips to Keep "Junk Science" Out of a California Courtroom*, 15 CEB Civ Litigation Rep 8 (Feb. 1993); Comment, *Brock v Merrell Dow Pharmaceuticals, Inc.: What Is the Court's Role in Evaluating Expert Testimony?* 64 Tulane L Rev 1263 (1990). Federal courts are taking the same approach as California state courts. See discussion in §§4.85-4.87.

For further discussion of inadmissible bases for expert opinions, see §§4.85-4.87, 14.8. On admissibility of expert medical testimony, see §4.9A. See also California Trial Objections, chaps 15-16, 20 (Cal CEB Annual). On challenging the bases of an expert's opinion through an in limine motion and on voir dire, see chap 14.

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§4.37 1. Examples: Personal Injury Cases

- *Dee v PCS Prop. Mgmt., Inc.* (2009) 174 CA4th 390, 405, 94 CR3d 456 (expert testimony that tenant's exposure to mycotoxins caused symptoms and susceptibility to cancer properly excluded because of absence of evidence of exposure to mycotoxins).
- *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 37 CR3d 9 (tire expert's testimony properly excluded because it lacked foundation; other tire failures relied on not sufficiently similar and amateur photographs not reliable).
- *In re Lockheed Litig. Cases* (2004) 115 CA4th 558, 10 CR3d 34 (expert opinion on increased risk of cancer from chemical exposure properly excluded because it was not supported by epidemiological studies that expert had relied on).
- *Ochoa v PG&E* (1998) 61 CA4th 1480, 72 CR2d 232 (treating physician's declaration incorporated letter in which he noted that plaintiff had possibly been exposed to nitrogen dioxide gas leak; in fact, she had been exposed to methane gas).
- *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 37 CR2d 457 (industrial hygienist's estimate of concentration levels of asbestos in the air is highly suspect when it is based only on the messy appearance of the worksite as shown in old black-and-white photographs; no foundation laid that industrial hygienists reasonably rely on photographs to assess asbestos levels).
- *Richard v Scott* (1978) 79 CA3d 57, 144 CR 672 (trial court granted new trial based on its error in permitting defendant's accident reconstruction expert to estimate speed of plaintiff's vehicle; insufficient evidence of facts on which expert relied).
- *Cavers v Cushman Motor Sales, Inc.* (1979) 95 CA3d 338, 350, 157 CR 142 (speculation for mechanical engineer to testify whether golf cart's propensity for readily tipping on sharp turns was "dangerous," or to speculate on reasonably probable consequences of this propensity; expert did not testify to sufficient foundation to support this opinion).
- *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 164 CR 343 (opinion by accident reconstruction specialist on point of impact too speculative; conditions during experiment on which opinion was based not substantially similar to those of accident; and too many of variables involved were not clearly established).
- *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 338, 145 CR 47 (defense expert not allowed to testify to speed of vehicle because testimony would be speculative; no evidence of facts on which expert would rely).
- *Jones v Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 209 CR 456 (expert medical testimony on alleged relationship between plaintiff's ingestion of contraceptive pill and precancerous condition too conjectural; expert testified in terms of possibilities only).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.38 2. Examples: Commercial Cases

§4.38 2. Examples: Commercial Cases

- *Maatuk v Guttman* (2009) 173 CA4th 1191, 1198, 93 CR3d 381 (trial court properly struck testimony of plaintiff's damages expert in legal malpractice case arising from litigation that resulted in invalidation of plaintiff's patents because there was no basis for either expert's assumptions concerning market penetration and/or underlying assumption that client had actual working device to sell).
- *Parlour Enters., Inc. v The Kirin Group, Inc.* (2007) 152 CA4th 281, 288, 61 CR3d 243 (lost profits generally not recoverable for unestablished businesses unless evidence makes them reasonably certain; expert testimony alone is sufficient if supported by substantial factual basis, but this threshold is not met if expert calculations are based on estimates not rooted in actual operations and market data is of dissimilar franchises).
- *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 887, 116 CR2d 158 (although plaintiff's evidence suggested that online toy business would have been viable, it did not show lost net profits with reasonable certainty).
- *Pan Asia Venture Capital Corp. v Hearst Corp.* (1999) 74 CA4th 424, 439, 88 CR2d 118 (error to exclude cost calculation model that was not "irrational," when opposing model was not "so persuasive that it alone would attract all reasonable minds").
- *City of San Diego v Sobke* (1998) 65 CA4th 379, 76 CR2d 9 (expert's valuation methodology inadequate to measure existence and loss of goodwill).
- *PG&E v Zuckerman* (1987) 189 CA3d 1113, 234 CR 630 (property valuation estimate totally disproportionate to any other estimate of value given).
- *Marriage of Rives* (1982) 130 CA3d 138, 181 CR 572 (accountant's valuation of good will of business held fatally flawed by false assumptions and by expert having completely ignored various relevant factors bearing on value of business's good will).

See §§4.51-4.52 for examples of commercial cases in federal court.

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§4.39 3. Examples: Criminal Cases

- *In re Alexander L.* (2007) 149 CA4th 605, 612, 57 CR3d 226 (expert testimony on gang activity rejected as unreliable because information establishing opinion's reliability was never elicited).

PRACTICE TIP: *Alexander* is instructive on the need for counsel to elicit the foundation for a testifying expert's opinion. The court must know the origins of the information testified to by an expert in order to assess its reliability. Compare *People v Gardeley* (1996) 14 C4th 605, 620, 59 CR2d 356 (court apprised of basis for gang expert's opinion and able to assess its reliability); *In re Nathanial C.* (1991) 228 CA3d 990, 1003, 279 CR2d 236 (gang expert's testimony insufficient because witness had no personal knowledge and relied on vague and second-hand information); *In re Leland D.* (1990) 223 CA3d 251, 259, 272 CR3d 709 (gang expert's testimony insufficient because expert relied on hearsay statements from unidentified gang members).

- *In re Cheryl H.* (1984) 153 CA3d 1098, 1124, 200 CR 789 (court properly refused to permit psychiatrist to rely on research study that demonstrated that father-defendant had one of "likely" characteristics of rapist because conclusions drawn from study were open to conflicting inferences and permitted rank speculation).
- *People v Murtishaw* (1981) 29 C3d 733, 767, 175 CR 738 (error in penalty phase of capital punishment case to admit expert testimony forecasting defendant's future violent behavior, because such forecasts would be unduly speculative based on evidence before court). Compare *Barefoot v Estelle* (1983) 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383 (psychiatric testimony on defendant's potential for future dangerous behavior admissible in sentencing hearing on capital crime). Because the decision in *Barefoot* was based on different grounds from those in *Murtishaw, Murtishaw* should still be controlling.

PRACTICE TIP: Remember that *argument* concerning future dangerousness is proper. See *People v Hendricks* (1988) 44 C3d 635, 649, 244 CR 181.

- *People v Collins* (1968) 68 C2d 319, 325, 66 CR 497 (prosecution called mathematics professor who used factors and probabilities that prosecutor had instructed him to assume as basis for his opinion that statistically there was only one chance in 12 million that someone other than defendants had committed crime; supreme court reversed because of lack of statistical evidence in support of probabilities for factors selected). But see *People v Marx* (1975) 54 CA3d 100, 112, 126 CR 350 (distinguishing *Collins,* and holding admissible expert testimony based in part on statistical analysis that did not devolve to mere "trial by mathematics"); *People v Morris* (1988) 199 CA3d 377, 245 CR 52 (distinguishing *Collins,* and holding that it was not error to permit testimony that only relatively small percentage of population could have deposited bloodstain in question).

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§4.40 4. Examples: Other Cases

- *Toscano v Greene Music* (2004) 124 CA4th 685, 21 CR3d 732 (suit under promissory estoppel theory for lost wages against defendant who reneged on employment offer; although lost future wages from prior employer are recoverable, evidence was insufficient to establish such damages here because expert's testimony did not establish that plaintiff had definite expectation of continued employment with former employer for particular period of time, and former employer did not testify). Compare *Toscano* with *Helmer v Bingham Toyota Isuzu* (2005) 129 CA4th 1121, 1131, 29 CR3d 136 (finding sufficient evidence to support expert testimony concerning future lost wages from former employer; plaintiff's former supervisor testified that plaintiff was "good" and "reliable" employee and that he was "sad" to see plaintiff go).
- *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 93, 37 CR2d 457 (action for damages against utility company and others by retired pipe fitter diagnosed with asbestos-related disease; admission of industrial hygienist's testimony about specific concentration levels of airborne asbestos, based on two old black-and-white photographs, held to be prejudicial error; no foundation was laid that industrial hygienists reasonably rely on photographs to assess asbestos levels).
- *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 211 CR 356 (personal injury case by doctor against hospital; expert was not allowed to base testimony on "crime statistics" because source was unidentified contact at police department). Compare *Isaacs* with *People v Gamez* (1991) 235 CA3d 957, 286 CR 894, disapproved on other grounds in *People v Gardeley* (1996) 14 C4th 605, 624 n10, 59 CR2d 356 (*Isaacs* distinguished when only part of foundation for expert's opinion was based on crime statistics gleaned from unidentified or unreliable source).
- *Baptist v WCAB* (1982) 137 CA3d 903, 187 CR 270 (workers' compensation case; physician's opinion that worker's cancer was not caused by on-the-job exposure was conjecture because based on report of other medical experts that contained reservations so fundamental that experts who wrote other report conceded their inability to assess potential inaccuracy of their conclusions).

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§4.41 B. Statutory Prohibitions

Evidence Code §801(b) expressly forbids an expert from relying on matter that "an expert is precluded by law from using … as a basis for his opinion." There are a variety of statutes restricting the evidence on which an expert may rely. The primary ones follow.

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§4.42 1. Character Evidence Used to Prove Conduct

As a general rule, character evidence is inadmissible to prove conduct on a specific occasion. See Evid C §1101. However, there are many exceptions, particularly in criminal cases. See discussion in Effective Introduction of Evidence in California, chaps 14-16 (2d ed Cal CEB 2000).

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§4.43 2. Employee Injury Reports

No violation or other finding based on Lab C §§6300-9061, which generally concern safety requirements, is admissible in third party personal injury or wrongful death actions. A finding based on Lab C §§6300-9061 is admissible, however, when introduced in a lawsuit between an employee and his or her own employer. Lab C 6304.5; *Spencer v G.A. MacDonald Constr. Co.* (1976) 63 CA3d 836, 134 CR 78 (Lab C §6304.5 found constitutional; no right to cross-examine third party's expert on Labor Code violations).

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§4.44 3. Liability Insurance

Evidence that a person was partially or completely insured against loss that is the subject of a lawsuit is inadmissible. Evid C §1155. See discussion in Jefferson's California Evidence Benchbook §§34.32-34.36 (3d ed CJA-CEB 1997); California Trial Objections §32.6 (Cal CEB Annual).

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§4.45 4. National Transportation Safety Board Reports

Title 49 United States Code §1154(b) generally precludes admission into evidence of conclusions or opinions contained in National Transportation Safety Board (NTSB) reports. In *Curry v Chevron, U.S.A.* (5th Cir 1985) 779 F2d 272, the Fifth Circuit held that the prohibition contained in the statute cannot be "backdoored" by funneling the investigator's opinions in through an independent expert. The prohibition, however, extends only to testimony regarding the report's opinions and conclusions. Experts are free to rely on the factual data in the report to support their own conclusions on the probable cause of an accident. See also *Mullan v Quickie Aircraft Corp.* (10th Cir 1986) 797 F2d 845. However, in *Chiron Corp. v National Transp. Safety Bd.* (DC Cir 1999) 198 F3d 935, the court criticized the limited exception enunciated in *Mullen* and drew a distinction between NTSB accident reports, which include NTSB's determination of the probable cause of accident and may not be admitted into evidence, and NTSB investigators' factual reports, which are admissible. "When the statute was interpreted broadly to include investigators' reports, there may have been a public policy justification for admitting factual information. However, once the statute was interpreted more narrowly [to include only NTSB accident reports], no justification remained for any exception to §1154(b)." 198 F3d at 941.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.46 5. Nolo Contendere Plea

§4.46 5. Nolo Contendere Plea

A nolo contendere plea to a misdemeanor criminal charge and any admission required by the court when taking the plea may not be used against that defendant as an admission in any civil suit based on or growing out of the act on which the earlier criminal case was based. Pen C §1016(3).

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§4.47 6. Settlement Conference Offers and Comments

The admissibility of developments at voluntary and mandatory settlement conferences, especially the judge's comments and recommendations, are unquestionably relevant to the "good faith" determination process in "bad faith" cases against insurance companies. Those discussions and the actual settlement offers, however, are inadmissible under Evid C §1152. See also Evid C §§1126-1128 on the inadmissibility of evidence arising from a mediation. For further discussion, see California Trial Objections §§21.8, 32.2-32.4, 33.3A (Cal CEB Annual).

PRACTICE TIP: Because this issue is unresolved, you should stipulate at the beginning of negotiations that the negotiations are undertaken with the understanding that nothing said will be admissible.

In criminal cases, evidence that a defendant offered to plead guilty, or other discussion that took place during plea negotiations, may be admissible under Cal Const art I, §28(d), the "truth-in-evidence" provision of Proposition 8, despite the contrary provisions of Evid C §§1153-1153.5 and Pen C §1192.4.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.48 7. Subsequent Safety Measures

§4.48 7. Subsequent Safety Measures

When remedial or precautionary measures are taken after an event, they are inadmissible to prove negligence or culpability. Evid C §1151. See discussion in Effective Introduction of Evidence in California, chap 52 (2d ed Cal CEB 2000); Jefferson's California Evidence Benchbook §§34.10-34.14 (3d ed CJA-CEB 1997); 1 Witkin, California Evidence, *Circumstantial Evidence* §§163-168 (4th ed 2000).

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§4.49 8. Traffic Accident Reports

A surprising number of practitioners are unaware that Veh C §20013 prohibits the use of traffic reports as evidence at trial. Police officers, however, are allowed to use their reports to refresh their recollection before testifying. *Robinson v Cable* (1961) 55 C2d 425, 11 CR 377.

In *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 129 CR 146, a police officer used his report to refresh his memory. One of the parties attempted to introduce the report into evidence, based on Evid C §771, which provides that, if a witness uses a writing to refresh his or her memory, that writing must be produced at the hearing at the request of an adverse party and those portions that are relevant to the testimony of the witness may be introduced into evidence. The court rejected this argument, holding that, to the extent Evid C §771 conflicts with Veh C §20013, the latter governs; the report was properly excluded.

The appellant in *Box* went on to argue that, if the report itself was inadmissible, the court should at least have admitted the diagram contained in the report. The appellant noted that in *Robinson v Cable* (1961) 55 C2d 425, 429, 11 CR 377, the accident scene diagram and a photograph of the scene were ruled admissible. The *Box* court distinguished *Robinson* because the diagram in *Robinson* was used only to explain the officer's testimony, whereas in *Box,* defendants wished to use it for impeachment purposes. The *Box* court also found it improbable that the diagram admitted in *Robinson* was a part of the accident report. *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 271, 129 CR 146.

Subsequently, in *Sherrell v Kelso* (1981) 116 CA3d Supp 22, 172 CR 667, a superior court appellate department held that an officer whose recollection was not refreshed after reading his report could read the report into evidence as past recollection recorded (Evid C §1237). The court reasoned that the actual reading of the report as past recollection recorded posed less risk of unreliability than did the already authorized practice of allowing the officer to use the report to refresh his memory. See also *Fisk v DMV* (1981) 127 CA3d 72, 179 CR 379 (police report admissible in DMV hearing as official record (Evid C §1280)).

On the discoverability of vehicle accident reports, see *Davies v Superior Court* (1984) 36 C3d 291, 204 CR 154. While *Davies* primarily discusses the discoverability of such reports, it should be noted that the supreme court appeared to disagree with the proposition that vehicle reports are always inadmissible at trial. Despite the language of Veh C §20013, the court held that the statute did not exclude the possibility that some of the data in an accident report might be admissible as evidence to show the state's knowledge of the existence of a defect.

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§4.49A 9. Hospital Peer Review Records

Hospital staff or peer review committee records are immune from discovery under Evid C §1157(a). In *Fox v Kramer* (2000) 22 C4th 531, 93 CR2d 497, the California Supreme Court held that a plaintiff in a medical malpractice action could not subpoena an expert to testify when the expert's conclusions and opinions were based substantially on hospital peer review committee records. The expert in question, an investigator for the California Department of Health Services, reviewed hospital peer review records as part of an official investigation. The fact of the investigation, however, did not constitute a waiver by the hospital of the discovery immunity; thus, the investigator's report, as well as testimony involving the report, could be excluded. The expert could not become a vehicle to accomplish indirectly what the plaintiff could not accomplish directly.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.50 IV. FOUNDATIONAL ATTACKS ON INFORMATION RELIED ON BY EXPERT

§4.50 IV. FOUNDATIONAL ATTACKS ON INFORMATION RELIED ON BY EXPERT

At the expert's deposition, the only objections required concerning improperly relied on information are:

- Privileged or work product information. CCP §2025.460(a).
- Any error that might be cured if promptly pointed out, *e.g.,* the wording of a question, such as a hypothetical question. CCP §2025.460(b).

If counsel opposing an expert is aware that the expert may rely on inadmissible information at trial, counsel should either make an in limine motion to exclude that information from the trial or should object during the voir dire or direct examination of the expert to testimony concerning that information and to any opinion based on that information. See chap 14 (in limine motions, and objections during expert's examination).

The main objections to information relied on by experts are:

- Information unreliable. See §4.1.
- Information speculative. See §4.36.
- Information from incompetent witness. See §4.36.
- Information from unreliable reference material. See §§4.3-4.5.
- Information violates *Kelly* test. See §§4.6-4.12.
- Statutory prohibition. See §§4.41-4.49.
- Under Evid C §352, that the information will create substantial danger of undue prejudice, confuse the issues, mislead the jury, or require such extensive cross-examination that it will take too much time. See *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 1308, 41 CR3d 80; *People v Phillips* (1981) 122 CA3d 69, 87, 175 CR 703.

The jury may not independently rely on reports of experts relied on by testifying experts, and counsel should prepare tailored instructions to this effect.

If the expert is allowed to testify concerning otherwise inadmissible material in reports by others, opposing counsel should be sure the expert does not relate details from those reports to jurors. See §4.3.

Opposing counsel should also request a limiting instruction advising the jury that inadmissible matter relied on by an expert in forming his or her opinion is not being admitted for the truth of the matter stated, and may not be considered by jurors as true.

Ordinarily, the use of a limiting instruction cures any hearsay problem involved (see *Hiser v Bell Helicopter Textron Inc.* (2003) 111 CA4th 640, 4 CR3d 249), but in aggravated situations, a limiting instruction may not remedy the problem (see, *e.g., People v Coleman* (1985) 38 C3d 69, 211 CR 102 (expert witness's discussion of letters containing past threats of violent behavior by defendant was found to have prejudiced jury despite limiting instruction)). See also *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348.

When syndrome evidence is involved, counsel opposing the evidence should write appropriate instructions concerning that evidence. The court in *People v Bowker* (1988) 203 CA3d 385, 249 CR 886, held that the jury must be instructed simply and directly that an expert's syndrome testimony used by the prosecution in rebuttal in a criminal trial is not intended and should not be used to determine whether the victim's molestation claim is true. The court pointed out that, on the facts of that case, the evidence was admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence were not inconsistent with having been molested.

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V. FEDERAL RULES OF EVIDENCE

§4.51 A. Expert May Base Opinion on Facts or Data Perceived or Made Known to Expert at or Before the Hearing

Experts in federal court can rely on information perceived by them or made known to them at or before the hearing or trial of the matter. Fed R Evid 703. See *Sementilli v Trinidad Corp.* (9th Cir 1998) 155 F3d 1130, amended at 162 F3d 1015 (expert opinion testimony concerning cause of injury admissible despite fact that expert did not examine injured person, but reviewed medical records only); *Ramsey v Culpepper* (10th Cir 1984) 738 F2d 1092 (expert mathematician relied on figures of real estate appraiser that had been placed in evidence at trial). The facts or data that an expert relies on in forming his or her opinion need not be admissible for the expert's opinion to be admitted, provided that the facts or data are of a type reasonably relied on by experts in the field in forming opinions on the subject. Fed R Evid 703. See §4.52.

Under a 2000 amendment to Rule 703, if an expert reasonably relies on inadmissible information or data to form an opinion, the expert is not permitted to relate that underlying information or data to the jury absent an advance ruling from the trial court. The amendment, the final sentence of the Rule, provides: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed R Evid 703.

This amendment effected a significant change in the prior federal law. Before the amendment, the underlying information or data supplied to an expert as a basis for his or her opinion was admissible for the limited purpose of explaining the expert's opinion, although not for the truth of the data relied on. See *Paddack v Dave Christensen, Inc.* (9th Cir 1984) 745 F2d 1254. Now relating the underlying information or data is not permissible absent an advance ruling from the trial court. The rule does not prevent the expert from stating what he or she relied on in forming his or her opinion; however, unless permitted by the trial court, the expert cannot go further. In its first opinion addressing application of the 2000 amendment, the Ninth Circuit held that the trial court did not abuse its discretion in refusing to admit expert testimony based on a lab report that was otherwise inadmissible hearsay, because substantial prejudice would result from admission of this evidence, and the probative value did not outweigh this prejudicial effect. *Turner v Burlington N. Santa Fe R.R.* (9th Cir 2003) 338 F3d 1058.

PRACTICE TIP: Rule 703 does not prevent opposing counsel from exploring the basis of the expert's opinion on cross-examination. Counsel should be aware, however, that depending on the nature of the questions asked, the cross-examination could open the door to the expert's reciting the inadmissible material, even if that material would not have been admitted initially under the balancing test.

If inadmissible evidence is admitted to illustrate and explain the expert's opinion, the court must give a curative instruction. *U.S. v 0.59 Acres of Land* (9th Cir 1997) 109 F3d 1493, 1496.

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§4.52 1. Information Need Not Be Admissible if of Type Reasonably Relied on by Experts in Field

Federal Rules of Evidence 703, which is closely patterned after Evid C §801(b) (see Advisory Committee's Note to Rule 703), allows experts in federal court to testify on matters that are not within their personal knowledge, provided the information is of a type reasonably relied on by experts in that field in forming opinions or inferences, even though the facts or data are not themselves admissible in evidence. See *Schafer v Time, Inc.* (11th Cir 1998) 142 F3d 1361, 1374 (if evidence on which expert relies is inadmissible, it must be of type reasonably relied on by experts in the field). For example:

- An expert computing real estate values may rely on appraiser's compilation of other similar transactions. *Ramsey v Culpepper* (10th Cir 1984) 738 F2d 1092.
- An expert may rely on pilot training records when the plaintiffs could establish that experts in the field reasonably rely on such data. *In re Air Crash in Bali, Indonesia* (9th Cir 1982) 684 F2d 1301, 1314.
- An expert may rely on otherwise inadmissible audit reports in forming an opinion on deficiencies in contributions to joint labor-management trust funds. *Paddack v Dave Christensen, Inc.* (9th Cir 1984) 745 F2d 1254, 1262.
- An expert was not reasonably permitted to rely on summaries of deposition testimony provided by plaintiff's attorney in forming an opinion on the adequacy of police department training and instruction protocols. The attorney was not an expert in the field, and the expert made no independent attempt to verify the information in the summaries. *Sommerfield v City of Chicago* (ND Ill 2008) 254 FRD 317, 321.

Before an expert will be permitted to relate the underlying outside information or data to the jury, however, the court must make a ruling under Rule 703; under the 2000 amendment to Rule 703, presumptive outside evidence that otherwise is inadmissible will be kept out unless its potential prejudice is substantially outweighed by its probative value. *Turner v Burlington N. Santa Fe R.R.* (9th Cir 2003) 338 F3d 1058. See *Olson v Ford Motor Co.* (D ND 2006) 410 F Supp 2d 855, 864 (customer complaints relied on by expert in forming product-defect opinion admitted for limited purpose of showing basis of his opinion, but specific details of complaints not permitted as prejudicial and misleading).

Rule 703 is of particular importance to California state court commercial litigators because there are few reported California state court decisions analyzing Evid C §801(b) in commercial settings. Given the similarity between Rule 703 and §801(b), the reported decisions discussing Rule 703 in a business litigation context have probative value for California state court cases. See, *e.g., Ways & Means, Inc. v IVAC Corp.* (ND Cal 1979) 506 F Supp 697, aff'd (9th Cir 1981) 638 F2d 143; *Bauman v Centex Corp.* (5th Cir 1980) 611 F2d 1115, 1120; *Merit Motors, Inc. v Chrysler Corp.* (DC Cir 1977) 569 F2d 666, 673; *Zenith Radio Corp. v Matsushita Elec. Indus. Co.* (ED Pa 1980) 505 F Supp 1190, 1313, 1325, 1330; and *Kaplan v Burroughs Corp.* (ND Cal 1977) 426 F Supp 1328, 1333.

On Rule 703, see generally Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual §§3-703.01 to 3-703.04 (8th ed 2002).

For discussion of Evid C §801(b), see §§4.1-4.5. For further discussion of matter on which an expert may *not* rely, see §§4.85-4.87.

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§4.53 2. Information May Be Obtained From Other Experts

Federal Rules of Evidence 703 permits expert opinion that is based in part on the opinion of another. See, *e.g., Southland Sod Farms v Stover Seed Co.* (9th Cir 1997) 108 F3d 1134 (trial court erroneously excluded expert witness testimony based in part on reliable data collected by third parties; it did not matter that the expert had not personally carried out the tests on which he relied); *Seese v Volkswagenwerk A.G.* (3d Cir 1981) 648 F2d 833, 845 (auto safety expert permitted to base opinion as to cause of injury in part on conclusion of plaintiff's treating physician). However, at least one case has suggested in dictum that in a criminal case the opinion of a prosecution psychiatrist that is based entirely on hearsay is in violation of the Sixth Amendment right of confrontation. *U.S. v Lawson* (7th Cir 1981) 653 F2d 299, 302. See *In re Imperial Credit Indus., Inc. Sec. Litig.* (CD Cal 2003) 252 F Supp 2d 1005 (expert not permitted to offer as evidence excerpts from opinions developed by another expert for use in other litigation).

Although an expert may base his or her opinion in part on the opinion of another expert, the expert may not use the witness stand as a means of admitting hearsay opinion of other nondisclosed and nontestifying experts. In *Hutchinson v Groskin* (2d Cir 1991) 927 F2d 722, the Second Circuit reversed a verdict for defendant when defense counsel had used his disclosed expert to convey to the jury the opinions of three other experts who were not disclosed. Because plaintiff did not have the opportunity to cross-examine these out-of-court experts or to challenge their qualifications or their opinions, the court of appeals found that these opinions should have been excluded. See *Mike's Train House, Inc. v Lionel, LLC* (6th Cir 2006) 472 F3d 398, 409 (reversing $40 million jury verdict in part because testifying expert relayed opinions and conclusions from nontestifying expert's report; citing *U.S. v Tran Trong Cuong* (4th Cir 1994) 18 F3d 1132 and *U.S. v Grey Bear* (8th Cir 1989) 883 F2d 1382).

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§4.54 3. Information May Be Obtained From Learned Treatises

The expert witness may rely on, *e.g.,* treatises, periodicals, or pamphlets, and, if these are established as reliable authority, they may be read into evidence despite the hearsay rule, although they may not be received as exhibits. Fed R Evid 803(18). The definition of a learned treatise extends beyond printed material. Despite the lack of an explicit reference to video recordings in Rule 803(18), the court in *Costantino v Herzog* (2d Cir 2000) 203 F3d 164 held that videotapes may be considered learned treatises and are subject to the rule's authoritativeness requirement.

The cross-examiner can call the treatise to the expert's attention on cross-examination or the expert may rely on it in direct examination. Counsel may cross-examine the expert on the basis of a publication that has been established as authoritative, even if the expert did not refer to or rely on it in his or her own evaluation of the case.

Rule 803(18) is similar to Evid C §721, but unlike §721, Rule 803(18) provides for the use of periodicals or texts on direct examination, not just on cross. On Evid C §721, see §4.3. For a discussion of Fed R Evid 803(18) and how it resembles and differs from Evid C §721, see Canepa, *Reevaluating Expert Testimony Following the Recent Amendment to Evidence Code Section 721*, 20 CEB Civ Litigation Rep 49 (Mar. 1998).

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B. Scientific Testimony or Information on Which It Is Based Is Admissible if It Meets *Daubert* Test

§4.55 1. Background to *Daubert*

For more than 50 years the admissibility of new scientific procedures in federal courts was governed by the "general acceptance" test enunciated in the seminal case of *Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014, which is still the test in California. See §§4.6-4.12 for discussion of *Frye.*

Following the adoption of the Federal Rules of Evidence in 1975, a split developed between the circuit courts on the continued viability of *Frye* in light of those rules. See, *e.g., U.S. v Downing* (3d Cir 1985) 753 F2d 1224 (*Frye* standard rejected; testimony regarding human perception and memory and reliability of witness identification admissible because it met helpfulness standard of Fed R Evid 702); *Christophersen v Allied-Signal Corp.* (5th Cir 1991) 939 F2d 1106 (*Frye* standard applied; trial court can and must exclude testimony supported solely by expert's own methodology if it has not achieved broad acceptance). See also Faulk, *"Paoli" and "Christophersen": A Comparative Analysis*, 6 BNA Toxics L Rep 1173 (1992).

In *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the United States Supreme Court addressed the apparent conflict between the requirement in *Frye* that scientific evidence must "have gained general acceptance in the particular field in which it belongs" to enjoy evidentiary admissibility (*Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014) and Fed R Evid 702 (adopted in 1975), which provides, in relevant part, that expert testimony based on "scientific, technical or other specialized knowledge" is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The court held that Fed R Evid 702 does not require that scientific testimony acquire "general acceptance" before it is admissible as evidence and that the "general acceptance" standard of *Frye* is inconsistent with the Federal Rules' policy of liberal admission of evidence. See Fed R Evid 402 (all relevant evidence is admissible).

Under the 2000 amendment, Fed R Evid 702 incorporates the reliability standard established in *Daubert*. In addition to its prior requirements, the Rule provides that scientific, technical, or other specialized knowledge can be relayed in the form of expert testimony only if (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Accordingly, a party offering expert testimony will have the initial burden, under Fed R Evid 104(a), of persuading the trial judge that the expert's testimony is based on scientific knowledge that will assist the trier of fact to understand or determine a fact issue (see *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 592, 125 L Ed 2d 469, 482, 113 S Ct 2786), and, additionally, that the testimony meets these three specific requirements of Rule 702. See *Micro Chem., Inc. v Lextron, Inc.* (Fed Cir 2003) 317 F3d 1387 (expert testimony in compliance with specific requirements of Rule 702 not made inadmissible simply because it is based on one version of conflicting facts).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.56 2. The Daubert Test

§4.56 2. The *Daubert* Test

Under *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the federal district court does not decide whether the proffered scientific testimony or the information on which it is based has acquired "general acceptance" in the scientific community before admitting the testimony. Instead, the trial judge faced with a proffer of scientific expert testimony must decide whether it is relevant and reliable. 509 US at 589, 125 L Ed 2d at 480.

The proffered evidence is relevant and reliable under *Daubert* if the court determines that it is about "scientific knowledge" (reliable) that will "assist the trier of fact to understand the evidence or to determine a fact in issue" (relevant). 509 US at 590, 125 L Ed 2d at 481. To qualify as "scientific knowledge," as opposed to "junk science," an inference or assertion must be derived by the scientific method. See *Daubert v Merrell Dow Pharmaceuticals, Inc., supra*. See also *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418, 1420.

The factors listed by the U.S. Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 593, 125 L Ed 2d 469, 482, 113 S Ct 2786, for determining whether a particular inference, theory, or technique is, in fact, "scientific knowledge," *i.e.,* whether it is reliable, include:

- Whether it can be and has been tested;
- Whether it has been subjected to peer review and publication;
- The known or potential rate of error; and
- Whether the theory or technique has acquired "general acceptance," because, although that standard is not controlling, it is still an important factor in determining admissibility, particularly if it has been satisfied.

See also Fed R Evid 702, which reflects *Daubert*'s reliability standards.

In the remand of *Daubert* to the Ninth Circuit (*Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1317 (*Daubert II*)), Judge Kozinski indicated that courts, in assessing the reliability of an expert's opinion, should also consider whether it seemed to be developed for litigation. Courts have begun to engraft this factor into the analysis, even though it does not appear in *Daubert* itself. See, *e.g., Johnson v Manitowoc Boom Trucks, Inc.* (6th Cir 2007) 484 F3d 426, 435 (magistrate judge viewed prepared-solely-for-litigation factor as very important).

The ultimate *Daubert* inquiry is not whether the expert's conclusions are correct, but whether his or her methodology is sound. See *In re Scrap Metal Antitrust Litig.* (6th Cir 2008) 527 F3d 517, 529 (under *Daubert,* expert opinions are admissible if they are reliable, regardless of whether they are credible or accurate); *Mike's Train House, Inc. v Lionel, LLC* (6th Cir 2006) 472 F3d 398 (analyzing expert's methodology and rejecting testimony because expert created novel methodology for purposes of litigation and methodology revealed lack of insight into industry standards and practices); *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1318 (*Daubert II*) (reviewing *Daubert* case on remand); *U.S. v Arnold* (9th Cir 2001) 2001 US App Lexis 28386, 3 Fed Appx 614, 616 (unpublished opinion) (*Daubert* factors not relevant to expert's testimony regarding *modus operandi* of alien smuggling because testimony's reliability depends on knowledge and experience of expert rather than methodology or theory behind it). Trial courts cannot surrender this difficult inquiry to the experts themselves. Although complaining that the "gatekeeper" role puts federal judges in "an uncomfortable position," the Ninth Circuit agreed that experts cannot themselves establish the reliability of their methodology. 43 F3d at 1315. "[S]omething doesn't become 'scientific knowledge' just because it's uttered by a scientist," wrote Judge Alex Kozinski for the unanimous Ninth Circuit in *Daubert II.* "[N]or can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive." 43 F3d at 1315.

The Third Circuit Court of Appeal has noted that, after *Daubert,* it is no longer true "that the principal arbiters of the reasonableness of reliance upon inadmissible evidence are the experts and not the trial judge." *In re Paoli R.R. Yard PCB Litig.* (3d Cir 1994) 35 F3d 717, 732 (expressly overruling *In re Japanese Elec. Prods. Antitrust Litig.* (3d Cir 1983) 723 F2d 238, rev'd on other grounds in *Matsushita Elec. Indus. Co. v Zenith Radio Corp.* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, a pre-*Daubert* case holding that trial court should have allowed testimony of experts who said their opinions were based on reliable data and that there was no contrary testimony).

In assessing the admissibility of proffered scientific testimony, district judges should be mindful of other potentially

applicable provisions, such as Fed R Evid 703 (expert opinions may be based on otherwise inadmissible hearsay if based on facts or data of type reasonably relied on by experts in field), 706 (trial judge may appoint expert of own choosing), and 403 (relevant evidence may be excluded if probative value outweighed by danger of unfair prejudice, confusion, or misleading of jury). *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 595, 125 L Ed 2d 469, 484, 113 S Ct 2786.

PRACTICE TIP: Practitioners can use The Daubert Tracker (http://www.dauberttracker.com) to track cases interpreting and applying *Daubert* and its progeny for a fee. This website includes a searchable database of all *Daubert* cases and offers an e-mail update of new cases, as well as other related services. Practitioners can also use a free website (http://www.daubertontheweb.com), that discusses the substance and procedure of *Daubert,* and allows a search of appellate decisions by circuit or field of expertise.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.57 3. Daubert Applies to Scientific, Technical, or Other Specialized Knowledge

§4.57 3. *Daubert* Applies to Scientific, Technical, or Other Specialized Knowledge

Unlike the *Kelly* test, which applies only to "techniques" that are "new" and accompanied by an "aura of scientific infallibility" (see §§4.7-4.9), the *Daubert* test applies coextensively with Fed R Evid 702 and encompasses "scientific," "technical," or "other specialized" knowledge. *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167.

Kumho is the logical extension of the Supreme Court's earlier holdings in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, and *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512. Together, these three opinions send the message that appropriate scientific and professional methods are not sacrificed when parties offer expert opinions in the courtroom. The district courts are responsible for making sure that the expert's reasoning and ultimate opinion are:

- Backed by sufficient personal knowledge and experience;
- Developed in a manner recognized by others in the field; and
- Supported by reliable data, facts, and principles.

Although *Kumho* has been described as a victory for business, the standards the Court articulated are neutral—they apply to expert opinion testimony offered by plaintiffs or defendants in civil trials and by prosecution or defense in criminal trials.

PRACTICE TIP: Practitioners in federal court should make sure that when their experts prepare opinions on any issue, they keep the working principles in *Daubert*, *Joiner,* and *Kumho* in mind. Experts for all sides must be ready to describe with particularity the facts, data, and principles they relied on as the bases for their opinions, as well as the full extent of the methodology and reasoning process they employed. Experts should be able to justify their ultimate conclusions in terms of what is acceptable in the relevant community and the peer analysis in the published literature.

For state practitioners, the impact of *Joiner* and *Kumho* may be less direct than on those practicing in federal court. California has not embraced the *Daubert* standard as a basis for evaluating the admissibility of scientific tests. See *People v Leahy* (1994) 8 C4th 587, 594, 34 CR2d 663. California law does require as a foundation for expert testimony that the reasons given for the opinion have sufficient indicia of reliability. Counsel in state cases should use the factors identified in *Daubert, Joiner,* and *Kumho* to help determine whether the requisite foundation exists and highlight any missing factors as reasons the expert's ultimate opinion should be viewed as unreliable and thus inadmissible.

WARNING: Before *Kumho,* there was widespread disagreement over *Daubert*'s reach. Numerous pre-*Kumho* decisions, particularly in the Ninth Circuit, limit *Daubert* to scientific testimony or testimony based on scientific knowledge. See, *e.g., Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226; *Desrosiers v Flight Int'l* (9th Cir 1998) 156 F3d 952; *Sementilli v Trinidad Corp.* (9th Cir 1998) 155 F3d 1130, amended at 162 F3d 1015; *U.S. v Plunk* (9th Cir 1998) 153 F3d 1011, amended at 161 F3d 1195; *McKendall v Crown Control Corp.* (9th Cir 1997) 122 F3d 803. Thus, any case decided before *Kumho* must be viewed with caution because it may no longer be valid authority.

In *U.S. v Hankey* (9th Cir 2000) 203 F3d 1160, 1169 n7, the Ninth Circuit specifically noted that prior cases stating that *Daubert* did not apply to nonscientific testimony were no longer good law after *Kumho.* As the court explained, *Kumho* eliminated the analytical distinction between "scientific" and "non-scientific" testimony. The court went on to note, however, that these cases are "still good law to the extent that they permit the admission of expert testimony on the basis of the expert's 'knowledge, skill, experience, training, or education,' which is consistent with *Kumho Tire*."

What is subject to *Daubert* test? It remains to be seen exactly what will be found to constitute "scientific," "technical," or "other specialized" knowledge. In *Kumho,* the Supreme Court found that the testimony of an expert in tire failure analysis might not be "scientific," but it was at least "technical" or "other specialized" knowledge so as to fall within *Daubert*'s purview.

Thus, it is safe to predict that *Daubert* applies to testimony in the "hard" sciences, such as medicine, engineering,

chemistry, mathematics (including statistics), and physics. See *Ancho v Pentek Corp.* (1998) 157 F3d 512 (*Daubert* standard applied to expert testimony offered on design of roller conveyer system); *Brumbaugh v Sandoz Pharm. Corp.* (D Mont 1999) 77 F Supp 2d 1153 (*Daubert* standard applied to expert's testimony that particular pharmaceutical caused type of seizures experienced by plaintiff); *Culbertson v Freightliner Corp.* (D Nev 1999) 50 F Supp 2d 998 (*Daubert* standard applied to mechanical engineering expert who offered testimony on alleged design defect in tractor seat).

"Technical" or "other specialized" knowledge would also seem to cover accountants, actuaries, annuitists, appraisers, economists, handwriting experts, questioned document examiners, and vocational training consultants. In fact, "other specialized" knowledge appears inclusive of expert, as opposed to lay, testimony generally; thus, *Daubert,* like Fed R Evid 702, on which it is premised, seems to apply to *almost all* expert testimony. See *Jinro Am., Inc. v Secure Invs., Inc.* (9th Cir 2001) 266 F3d 993, amended (9th Cir 2001) 272 F3d 1289 (citing *Kumho,* rejecting testimony of purported expert on Korean business practices who lacked education or training and based his opinion on personal observations and anecdotes); *Seatrax, Inc. v Sonbeck Int'l* (5th Cir 2000) 200 F3d 358 (rejecting proposed testimony about corporate profits from witness with no formal credentials who engaged in improper analysis of corporate sales figures); *Bickerstaff v Vassar College* (2d Cir 1999) 196 F3d 435 (rejecting testimony of college professor on gender and race discrimination because she relied on statistical regression analysis that failed to control for nondiscriminatory causes); but see *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225, 230 (*Daubert* is inapplicable to "specialized," as opposed to "scientific," knowledge; expertise regarding modus operandi of drug traffickers is based on experience and specialized, not scientific, knowledge).

It appears that medical doctors, psychologists, human factors experts, and economists, particularly in antitrust cases, are now subject to the same scrutiny that has traditionally been reserved for a narrow subset of experts, particularly epidemiologists and medical researchers. See, *e.g., EFCO Corp. v Symons Corp.* (8th Cir 2000) 219 F3d 734; *Coastal Fuels v Caribbean Petroleum Corp.* (1st Cir 1999) 175 F3d 18.

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§4.58 4. Procedure Under *Daubert*

Is witness an "expert?" The court's first step when qualifying a witness under *Daubert* is to determine whether the witness is an expert under Fed R Evid 702 by virtue of his or her "knowledge, skill, experience, training, or education" in the field that is the subject of the proffered testimony. See *Casey v Ohio Med. Prods.* (ND Cal 1995) 877 F Supp 1380, 1383 (occupational health physician and professor, although not an expert in hematology or toxicology, was sufficiently qualified by education and experience "in a medical field that is relevant to the subject matter" to allow his testimony as an expert on the issue of whether exposure to halothane could cause chronic active hepatitis). On qualifying the witness as an expert, see chap 3.

Does *Daubert* test apply? The next step appears to be the determination of whether the proffered testimony is of a type to which *Daubert* applies. Under *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, *Daubert* applies to "scientific," "technical," or "other specialized" knowledge. It is unclear exactly what those categories will cover, but it appears to make *Daubert* applicable to all expert testimony. See discussion in §4.57.

Is expert's methodology valid and does it apply to facts of case? The court then conducts preliminary fact-finding under Fed R Evid 104(a) to make a preliminary assessment of the scientific validity of the reasoning or methodology underlying the proffered testimony and whether it can properly be applied to the facts at issue. See *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 592, 125 L Ed 2d 469, 482, 113 S Ct 2786. In making this threshold determination, the trial court may decide that the expert's testimony is not in fact predicated on the scientific reasoning or methodology on which he or she purports to rely, but rather on some other unreliable reasoning or method. *Summers v Missouri Pac. R.R. Sys.* (10th Cir 1997) 132 F3d 599, 604 (expert's true diagnosis was of scientifically invalid "multiple chemical sensitivity," not of scientifically recognized "chemical sensitivity"). After undertaking this analysis, the court may also conclude that the expert has not relied on training and experience, but is instead offering an opinion that is outside his or her area of expertise on which he or she lacks the requisite education or training. As a result, the expert testimony can be found to be unreliable and thus outside the requirements of Rule 702. See *Jinro Am., Inc. v Secure Invs., Inc.* (9th Cir 2001) 266 F3d 993, amended (9th Cir 2001) 272 F3d 1289 (excluding as unreliable testimony of purported expert on Korean business practices). See also *Fashion Boutique, Inc. v Fendi, Inc.* (2d Cir 2002) 314 F3d 48 (exercising its gatekeeping function, district court properly rejected expert testimony in which expert's opinion assumed causal connection that plaintiff failed to prove).

Are conclusions reasonably drawn from material relied on? An insightful Ninth Circuit opinion also indicates that the proper application of *Daubert* requires a trial court to closely examine not only the expert's methodology, but also the substance of the reports and scientific research on which the experts purports to rely. In *Metabolife Int'l, Inc. v Wornick* (9th Cir 2001) 264 F3d 832, the company sought to rely on several expert risk assessments, Asian animal studies, and a cardiovascular study. The Ninth Circuit reversed the district court's decision to exclude the evidence, determining that it abused its discretion in rejecting the evidence on the grounds explicated. On remand, the district court was invited to explore more fully the relationship between the materials relied on and the conclusions drawn, consistent with its gatekeeping role under *Daubert*.

EXAMPLE 1: In *Domingo v T.K., M.D.* (9th Cir 2002) 289 F3d 600, the Ninth Circuit found that the district court had properly carried out its gatekeeping role and affirmed its rejection of plaintiff's technical expert because the expert's theory did not rise to the level of reliability required under *Daubert*. The expert's theory was unpublished, studies used to support it were not applicable to humans, and the expert's conclusion did not follow from his analysis. See Brown & Dodge, *Courts Will Dig Deep to Find Errors in Expert Opinions*, Focus, San Francisco Daily Journal, Apr. 1, 2002, p 5 (analyzing import of *Domingo*). See also *Sullivan v U.S. Dep't of the Navy* (9th Cir 2004) 365 F3d 827, 833 (district court used "inappropriately rigid *Daubert* standard" in excluding medical testimony; remanded with directions that case be assigned to different judge).

EXAMPLE 2: Courts may admit scientific findings arrived at through the "differential diagnosis," methodology without specific scholarly support. In *Clausen v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, amended (9th Cir, Sept.

25, 2003, No. 01-35928) 2003 US App Lexis 19727, the trial court admitted the testimony of an expert using "differential diagnosis" *i.e.,* a method to determine which of a number of diseases with similar symptoms is the one the patient is suffering from, by means of a systematic comparison and contrasting of the clinical findings. Affirming, the Ninth Circuit found that differential diagnosis testimony may be admitted without specific scholarly support, such as scientific literature and peer-reviewed studies, as long as the expert relied on a variety of objective, verifiable evidence. See also *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226 (effectively recognizing differential diagnosis method). See §4.84B.

Trial court discretion. Trial courts have wide discretion in how they perform their gatekeeping function under *Daubert*. Typically, it is done through a formal hearing on the record at which testimony is received. See *Nadell v Las Vegas Metro. Police Dep't* (9th Cir 2001) 268 F3d 924 (upholding exclusion of expert testimony that relied on quantitative electroencephalogram tests after 2-day evidentiary hearing finding testing to be error prone and inadequately subjected to peer review).

However, the gatekeeping function can properly be performed in a variety of other ways, and a party has no entitlement to a particular method. *U.S. v Nacchio* (10th Cir 2009) 555 F3d 1234, 1245 (trial court did not abuse its discretion by ruling to exclude expert testimony just as defense expert was taking stand and refusing to consider oral evidence); *In re Scrap Metal Antitrust Litig.* (6th Cir 2008) 527 F3d 517, 532 (district court not required to conduct evidentiary hearing to qualify expert witness because record on expert testimony was extensive and *Daubert* issue was fully briefed by parties). A trial court can perform its gatekeeping function:

- Through a ruling on a motion in limine. *Hangarter v Provident Life & Acc. Ins. Co.* (9th Cir 2004) 373 F3d 998 (district court satisfied gatekeeping function by probing expert's knowledge and experience in considering motion in limine); *U.S. v Hankey* (9th Cir 2000) 203 F3d 1160, 1169 (trial court did not abuse its discretion by assessing expert testimony during motion in limine).
- In response to a trial objection. *Anderson v Raymond Corp.* (8th Cir 2003) 340 F3d 520 (trial court did not abuse discretion by granting motion to strike expert's testimony without holding Fed R Evid 104 hearing; court had reviewed expert's lengthy deposition before ruling).
- Through voir dire at trial. *U.S. v Alatorre* (9th Cir 2000) 222 F3d 1098 (trial court did not abuse its discretion by refusing to hold separate, pretrial hearing, outside of jury's presence); see *In re Hanford Nuclear Reservation Litig.* (9th Cir 2002) 292 F3d 1124, 1138 (citing *Alatorre* with approval and noting that district courts are not required to hold *Daubert* hearing before ruling on admissibility of scientific evidence; however, record must reveal that district court had adequate record to make its rulings).

The need for an adequate record. Regardless of how the court elects to perform the gatekeeping function, *Goebel v Denver & Rio Grande W. R.R.* (2000) 215 F3d 1083 makes it clear that the trial court must make an adequate record for appellate review, including specific findings *on the record* indicating the court's evaluation of the witness's professional credentials and the soundness of the reasoning and methodology relied on by the witness. Otherwise, the appellate court cannot perform its own reviewing function to determine the substantiality of the expert's proposed testimony. See *Millenkamp v Davisco Foods Int'l, Inc.* (9th Cir 2009) 562 F3d 971, 979 (district court created adequate record when it was provided with briefing on expert's scientific expertise and proposed testimony before trial, and expert testified to his credentials before admission of his testimony); *Mukhtar v California State Univ., Hayward* (9th Cir 2002) 299 F3d 1053, 1066, amended at 319 F3d 1073 (reversing district court's admission of expert testimony in employment discrimination case because district court admitted testimony without reliability finding, and refusing to remand for postjury evidentiary hearing because *Daubert* requires hearing *before* jury is permitted to hear evidence); *Metabolife Int'l, Inc. v Wornick* (9th Cir 2001) 264 F3d 832 (reversing district court's rejection of scientific evidence because court's stated reasons for excluding testimony did not adequately explain its exercise of discretion).

PRACTICE TIP: Parties offering or opposing experts in federal court should take heed of *Goebel:* Because the trial court must make specific findings on issues regarding the expert's credentials and the soundness of his or her opinion, it is imperative that counsel make an adequate record showing that the expert should or should not be permitted to testify consistent with the requirements of *Daubert*. Thus, when relevant, the court's determination should address whether the expert's opinions or conclusions have been or can be tested, have been subjected to peer review or publication, have a known or potential rate of error, and have received "general acceptance" in the

scientific community.

The *Daubert* hearing. *Daubert* hearings can be lengthy events during which the parties' experts opine on whether particular evidence meets the *Daubert* test. To avoid waiving any objection to the conduct of the hearing, counsel must raise the objection in the hearing itself. See *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418, 1420 (by not raising objection at hearing, party waived objection to trial court's failure to permit a particular order of cross-examination).

A sprinkling of judges have also created scientific panels, comprised of experts of the court's own choosing, who attend the *Daubert* hearing, listen to the parties' experts, conduct their own interrogations, and offer their own opinions on how the judge should rule concerning admissibility. See, *e.g., Hall v Baxter Healthcare Corp.* (D Or 1996) 947 F Supp 1387 (judge in coordinated silicone breast implant cases appointed his own epidemiologist, rheumatologist, immunologist/toxicologist, and polymer chemist to advise him whether opinions of plaintiffs' experts were supported by generally accepted scientific reasoning and methodology, based on scientifically reliable data, and based on methodology and data that supported their conclusions).

Judge Pointer, who had national responsibility for breast implant cases, appointed his own scientific panel that held multiday *Daubert* hearings in which the appointed experts interrogated the parties' experts. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926. The panel reported in December 1998 that it saw no proven link between silicone breast implants and disease. See, *e.g*., Pfaff, *Fewer Implant Cases Seen in Wake of Scientific Findings*, San Francisco Recorder, Dec. 2, 1998.

Note that one of the intriguing questions yet to be addressed is the extent to which the parties can depose, or otherwise conduct discovery concerning the members of a scientific panel. See §7.33 for a full discussion of the differing discovery rights for experts appointed under Fed R Evid 706 and under the court's inherent power to appoint advisers.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/ 5. Appellate Review Under Daubert/§4.59 a. Abuse of Discretion Standard Applies to Admissibility Determinations

5. Appellate Review Under *Daubert*

§4.59 a. Abuse of Discretion Standard Applies to Admissibility Determinations

When ruling on a trial court's finding of admissibility or nonadmissibility after a *Daubert* hearing, the court of appeals applies the "abuse of discretion" standard. *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512. The holding in *Joiner* comports with earlier supreme court holdings that the appellate court must review a district court's evidentiary rulings for manifest error. See *Salem v United States Lines Co.* (1962) 370 US 31, 35, 8 L Ed 2d 313, 82 S Ct 1119 (district court's admission or exclusion of evidence "is to be sustained unless manifestly erroneous"). See also *Masayesva v Hale* (9th Cir 1995) 118 F3d 1371, 1378 (trial court's decision to admit and exclude expert testimony will be sustained unless manifestly erroneous).

The *Joiner* decision. In determining that the abuse of discretion standard applies to admissibility decisions under *Daubert*, the Supreme Court rejected the "preference for admissibility" that the Eleventh Circuit had applied in the underlying case. Instead, the majority opinion by Chief Justice William Rehnquist emphasized the trial court's responsibility to keep unreliable scientific evidence from juries. In his concurring opinion, Justice Stephen Breyer emphasized even more the importance of this gatekeeping function, noting that although judges are increasingly challenged to "make subtle and sophisticated determinations about scientific methodology," they must rise to the occasion "to help assure that the powerful engine of tort liability" does not reduce or eliminate the production of safe products and materials. *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 520, 118 S Ct 512.

In *Joiner*, the plaintiff claimed that his small-cell lung cancer resulted from exposure to chemicals, in addition to his eight-year habit of smoking up to a pack of cigarettes a day and childhood exposure to secondhand smoke. In support of that claim, Joiner's expert extrapolated from existing research to conclude that there was a causal link between the chemicals and the cancer. Before excluding the testimony of Joiner's experts, the trial court conducted a hearing to determine whether the testimony was relevant and scientifically valid, as required by *Daubert*. Because Joiner's expert based his opinion on studies that did not involve humans, did not involve the relevant chemicals, and were inconclusive, the trial court found that the expert testimony was too unconnected and unreliable, and therefore inadmissible. The trial court therefore granted summary judgment for General Electric.

On appeal, the Eleventh Circuit considered the standard the appellate court should apply when reviewing the results of a *Daubert* hearing. Appellate courts had split on the issue—the majority favoring an abuse of discretion standard, with the remainder holding that the application of the *Daubert* factors should be reviewed de novo. See, *e.g., Deimer v Cincinnati Sub-Zero Prods., Inc.* (7th Cir 1995) 58 F3d 341 (appellate court should defer to properly conducted *Daubert* inquiry); *Bradley v Brown* (7th Cir 1994) 42 F3d 434, 436 (district court's decision to exclude expert testimony based on *Daubert* parameters will not be disturbed unless manifestly erroneous); *In re Paoli R.R. Yard PCB Litig.* (3d Cir 1994) 35 F3d 717 (more stringent review standard should apply).

The Eleventh Circuit went both ways in its decision in *Joiner.* The court reasoned that a decision to *admit* scientific testimony should be reversed only for an abuse of discretion, but a decision to *exclude* such testimony should be independently reviewed under the "particularly stringent" plenary review standard. Thus, the Eleventh Circuit decided to err on the side of letting the evidence in, explaining that, "the Federal Rules of Evidence governing expert testimony display a preference for admissibility."

On review, the Supreme Court disagreed with the Eleventh Circuit in three significant respects. First, the court held that the same standard should be applied to all evidentiary decisions under *Daubert*, whether the ruling was to admit the evidence or to exclude it. Second, it held that the proper standard to apply is "abuse of discretion." Finally, the court echoed the district court's criticism of Joiner's scientific evidence and reentered the summary judgment for the manufacturer.

The Supreme Court recognized that in the absence of conclusive scientific proof, "experts commonly extrapolate from existing data" to reach new conclusions. However, the Court also cautioned against the blind acceptance of such conclusions:

> Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

General Elec. Co. v Joiner (1997) 522 US 136, 146, 139 L Ed 2d 508, 519, 118 S Ct 512. By upholding the district court's exclusion of the opinion testimony, the Court reinforced the notion that there must be an adequate and sufficient scientific foundation for any opinions an expert might ultimately express.

Consistent with *Joiner's* analysis, a district court's decision to admit or exclude scientific evidence under *Daubert* will be reviewed for abuse of discretion. See *U.S. v Finley* (9th Cir 2002) 301 F3d 1000, 1012 (district court abused its discretion by excluding presentation of expert's psychological testimony after application of *Daubert* factors); *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1315 (*Daubert II*) (rulings on scientific evidence should be "reviewed under the deferential abuse of discretion standard."). For a detailed discussion of the application of *Joiner* in a case excluding proffered expert testimony, see *Allison v McGhan Med. Corp.* (11th Cir 1999) 184 F3d 1300.

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§4.60 b. Sufficiency of Evidence Standard Unaffected by *Daubert*

The district court's expanded role in assessing the admissibility of scientific evidence under *Daubert* does not extend to consideration of the *sufficiency* of evidence already admitted. In *In re Joint E. S. Dist. Asbestos Litig.* (2d Cir 1995) 52 F3d 1124, the district court allowed the plaintiff's expert to testify about a causal link between asbestos exposure and colon cancer, but then set aside the jury's verdict for plaintiff as a matter of law for insufficiency of the expert evidence to support the verdict. The court of appeals reversed, holding that while *Daubert* had significantly expanded the district court's discretion in evaluating the *admissibility* of scientific evidence, *Daubert* did not alter the traditional standard for evaluating the *sufficiency* of evidence. In this case, the appellate court held that the trial court had "impermissibly crossed the line from assessing evidentiary reliability to usurping the role of the jury."

On the other hand, although evidence may be admissible under the *Daubert* standard, it may be insufficient to support a jury's verdict under the traditional standard of preponderance of the evidence. Thus, in *Rebel Oil Co. v Atlantic Richfield Co.* (9th Cir 1998) 146 F3d 1088, 1097, the Ninth Circuit rejected the argument that the trial court's grant of summary judgment was inconsistent with its decision under *Daubert* to admit an expert's cost analysis in a price discrimination case. The expert's testimony may be legally insufficient to create a question of material fact, even if his or her methodology is sound. Similarly, in *Conde v Velsicol Chem. Corp.* (6th Cir 1994) 24 F3d 809, the court of appeal upheld the district court's finding that the plaintiff's expert testimony concerning the health effects of chlordane on humans, although admissible under *Daubert*, was insufficient to allow a jury to find causation. "The holding in *Daubert* … dealt only with the circumstances under which expert testimony is admissible, and not with the separate question of when such testimony is sufficient to submit a case to the jury." 24 F3d at 813.

The Supreme Court took the issue one step further in *Weisgram v Marley* (2000) 528 US 440, 145 L Ed 2d 958, 120 S Ct 1011, by holding that under Fed R Civ P 50 a federal appeals court can instruct a district court to enter judgment as a matter of law after finding expert evidence insufficient to support a verdict. In *Weisgram,* the Supreme Court affirmed a ruling by the Eighth Circuit that vacated a jury verdict in favor of plaintiff and instructed the district court to enter judgment for defendant because the verdict for plaintiff was based on improperly admitted testimony of three expert witnesses. In support of its ruling, the Supreme Court noted that since its decision in *Daubert,* parties relying on expert testimony are on notice of the exacting standards of reliability that such testimony must meet. The Court thus assumed that, post-*Daubert,* parties would be presenting their best expert evidence at trial and had no reason to expect a second chance should the first effort fail.

Finally, courts should not confuse the issue of admissibility with that of sufficiency of the evidence. In *Stilwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187, 1192, the court of appeal concluded that the district court had "mingled the analysis required by [Fed R Evid 702] for the admissibility of expert testimony and [Fed R Civ P 56] for summary judgment." Rule 702 is "ordinarily prospective," and expert testimony can be admitted if it *will* assist the trier of fact. 482 F3d at 1192. Thus, a district court may not exclude expert testimony simply because, at the time of summary judgment, the court can determine that the testimony does not raise a triable issue of fact. To be admissible, the testimony need only be linked to the matter to be proved and need not establish causation or guarantee that the plaintiff will prevail. *Stilwell v Smith & Nephew, Inc., supra*.

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§4.61 6. Applicability of *Frye* Test After *Daubert*

Although the *Frye* test (see *Frye v U.S.* (DC Cir 1923) 293 F 1013) is no longer followed in federal courts (see §4.55), the body of case law discussing admissibility of scientific testimony under the *Frye* test is still useful for at least two reasons. First, forms of testimony deemed admissible under *Frye* are almost certainly also admissible under the less demanding standards enunciated in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (see §4.56). Second, discussion of forms of testimony previously held inadmissible for failing to meet the *Frye* test may provide valuable assistance, either pro or con, on whether such testimony meets the requirements of *Daubert.*

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§4.62 a. Evidence Admissible Under *Frye*: Admissible Under *Daubert*

Interestingly, many of the court of appeals decisions since *Daubert* have reviewed pre-*Daubert* rulings that applied the *Frye* test. In several cases, the courts upheld the admission of evidence that had been allowed under *Frye,* reasoning that it would also be admissible under the more relaxed *Daubert* standard. See, *e.g., U.S. v Bynum* (4th Cir 1993) 3 F3d 769, 773 (admissibility of chromatograph analysis of cocaine, which had been admitted by district judge under then-applicable *Frye* test, was also admissible under supervening *Daubert* standard); *U.S. v Martinez* (8th Cir 1993) 3 F3d 1191, 1197 (admissibility of DNA under test in *People v Castro* (Sup Ct 1989) 545 NYS2d 985 also satisfied less stringent mandate of *Daubert*; see §4.16 for further discussion of *Castro* test).

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§4.63 b. Evidence Excluded Under *Frye*: Not Admissible Under *Daubert*

In other cases, courts have analyzed evidence excluded under a *Frye* analysis and have concluded that the evidence also was not admissible under the *Daubert* standard. In *U.S. v Jones* (9th Cir 1994) 24 F3d 1177, for example, the defendant argued that the trial court had erroneously applied the *Frye* test to exclude an expert's testimony based on the expert's own unique method of voice identification.

Using the same information the trial court had considered in applying *Frye*—that the witness had never done research to verify the reliability of his method and knew of no one else who used the method—the appellate court held the testimony was inadmissible under the *Daubert* test as well. See *Porter v Whitehall Labs. Inc.* (7th Cir 1993) 9 F3d 607 (evidence that kidney failure caused by the drug ibuprofen was properly excluded under *Daubert*); *Zarecki v National R.R. Passenger Corp.* (ND Ill 1996) 914 F Supp 1566 (treating physician's affidavit based on his own subjective beliefs did not amount to "scientific knowledge" and was thus inadmissible under *Daubert*); *Casey v Ohio Med. Prods.* (ND Cal 1995) 877 F Supp 1380 (expert testimony that exposure to halothane caused plaintiff's chronic active hepatitis was properly excluded under *Daubert*).

The Ninth Circuit went through a similar process when reviewing the *Daubert* case itself on remand from the Supreme Court. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311 (*Daubert II*). Rather than send the case back to the district court and ask the trial judge to apply the high court's *Daubert* standards to expert testimony, the court of appeals acted as if it were once again reviewing the trial court's decision to exclude that evidence. Holding that the new standards required it to find "some objective, independent validation of the expert's methodology"—and finding no such validation—the court upheld the exclusion of the scientific evidence.

In rejecting the experts' testimony that the drug Bendectin causes birth defects when taken by pregnant women, the Ninth Circuit noted that none of the experts had conducted any research in the area until asked to do so in connection with litigation. Furthermore, even though the experts had begun years earlier to offer their theories in litigation, "the only place their theories and studies have been published is in the pages of federal and state reporters." 43 F3d at 1318. In the absence of any prelitigation research, publication in a peer-reviewed journal, or any other treatise or article showing the experts had followed "the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field," the testimony failed to meet the *Daubert* standards for admissibility. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311 (*Daubert II*).

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§4.64 c. Evidence Admitted Under *Daubert*: May Not Have Been Admissible Under *Frye*

Finally, some courts of appeal have acknowledged that the new test will sometimes lead to different results than *Frye* would have. Thus, the Ninth Circuit approved the admissibility of DNA evidence, despite a "raging controversy" over its reliability, which the court said might have made it inadmissible under a "general acceptance" test. *U.S. v Chischilly* (9th Cir 1994) 30 F3d 1144, 1155. (See §4.82 for discussion of DNA evidence.) Also, in *Glaser v Thompson Med. Co.* (6th Cir 1994) 32 F3d 969, the court admitted a controversial expert opinion that an over-the-counter diet pill caused severe hypertension, although the testimony was based largely on the expert's own peer-reviewed studies published in reputable medical journals.

For other examples, see *McCullock v H. B. Fuller Co.* (2d Cir 1995) 61 F3d 1038 (testimony on medical causation admissible under *Daubert* even though expert used differential etiology as a methodology and there was a lack of textual authority to support his opinion); *O'Conner v Commonwealth Edison Co.* (7th Cir 1994) 13 F3d 1090 (excluding testimony concerning cataracts allegedly caused by radiation exposure—not because expert was "lone voice," which would have required exclusion under *Frye,* not under *Daubert,* but because even articles expert cited to support his methodology established that it had no basis in fact). See also *Southland Sod Farms v Stover Seed Co.* (9th Cir 1997) 108 F3d 1134 (testimony based on scientific method practiced by recognized minority of scientists in field may be admissible consistent with *Daubert*); *In re Paoli R.R. Yard PCB Litig.* (3d Cir 1994) 35 F3d 717 (trial court had ruled expert's testimony unreliable under *Daubert* because expert did not know meaning of certain key terms; court of appeal held that trial court could not "exclude the expert's opinion based solely on a supposed lack of expertise when the expert meets the qualifications of Rule 702").

As these cases reflect, *Daubert* has had an impact on federal procedure. The criteria set forth in *Daubert* for evaluating expert testimony have, as the Supreme Court's opinion envisioned, been extended beyond novel scientific evidence to a broader range of expert testimony. See, *e.g., Joy v Bell Helicopter Textron, Inc.* (DC Cir 1993) 999 F2d 549 (speculative testimony of accountant not entitled to any weight and should not be given to jury, consistent with *Daubert*). See also Sherman, *"Junk Science" Rule Used Broadly*, 5 Nat'l LJ 3 (Oct. 4, 1993). The *Daubert* reliability standards have also been incorporated into Fed R Evid 702. See §4.55. The effect of *Daubert* was further broadened by *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167 (*Daubert* applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge). See discussion in §4.57.

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§4.65 7. Resources on *Daubert*

Daubert has generated substantial scholarly commentary concerning its applicability, utility, and impact. See, *e.g.,* Imwinkelried, *Arguing "Daubert,"* Nat'l LJ 12 (May 9, 2005); Shaughnessy, *Daubert After a Decade*, 30 Litigation 19 (Fall 2003); Hofer, *Experts In Antitrust Cases Face Increased "Daubert" Challenges*, San Francisco Daily Journal, Apr. 12, 2002, Focus, p 5; Rudlin, *The Judge as Gatekeeper: What Hath Daubert-Joiner-Kumho Wrought?,* ABA Section of Litigation, PC No. 5310176 (May 2001); Silberfeld & Day, *Avoiding the Pitfalls of a Daubert Challenge*, 22 Forum 22 (Oct. 1998); McClellan, *Sharpening the Focus on Daubert's Distinction Between Scientific and Nonscientific Expert Testimony*, 34 San Diego L Rev 1719 (1997); Reidinger, *They Blinded Me With Science!* 82 ABA J 58 (Sept. 1996); Fielder, *The* "Daubert" *Deposition*, Los Angeles Daily Journal, Verdicts & Settlements, p 1 (Sept. 6, 1996).

For discussion of the tendency of federal appellate courts since *Daubert* to defer to trial court rulings in recognition of the "gatekeeper" function that *Daubert* assigns the trial court, see Berry & Hobart, *The Ninth Circuit After* Daubert*: The District Court as Evidentiary Gatekeeper*, 9 Toxics L Rep 639 (1994) (noting that Ninth Circuit affirmed its first six *Daubert* cases). See also *Sorensen v Shaklee Corp.* (8th Cir 1994) 31 F3d 638 n15 (listing cases in both federal and state courts applying *Daubert* test) and Science for Professionals, Inc., of Green Brook, New Jersey, which has issued a computer-disk digest of opinions titled The Daubert Citator.

For general discussion of the Federal Rules of Evidence and expert testimony, see Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 31 Trial Law Guide 1 (1987).

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.65A C. Daubert Test Applied to Specific Forms of Evidence

§4.65A C. *Daubert* Test Applied to Specific Forms of Evidence

The *Daubert* test has been applied to many different forms of evidence, which are discussed in the sections that follow. In alphabetical order, these forms of evidence are:

- Accident Reconstruction and Analysis (§4.84)
- Alternative Designs and Warnings (§4.72)
- Biotechnology (§4.84A)
- Chromatography (§4.74)
- Class Certification (§4.84C)
- Differential Diagnosis (§4.84B)
- DNA Typing (§4.82)
- Economic Testimony (§4.70)
- Eyewitness Identification (§4.75)
- Exposure to Chemicals (§4.66)
- Exposure to Drugs and Medical Devices (§4.69)
- Exposure to Radiation (§4.68)
- Fingerprint and Footprint Analysis (§4.83)
- Forensic Psychology (§4.76)
- Handwriting Analysis (§4.76A)
- Polygraph Results (§4.77)
- Product Design (§4.71)
- Psychological Tests and Evidence (§4.73)
- Syndrome Evidence (§4.78)
- Thermography (§4.79)
- Voice Identification (§4.80)
- Voice Stress Analysis (§4.81)

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.66 D. Exposure to Chemicals

§4.66 D. Exposure to Chemicals

The critical issue in many toxic exposure cases is whether there is epidemiological evidence that the chemical at issue more likely than not caused the plaintiff's disease. In determining causation, the trier of fact must consider both general causation, *i.e.,* that the chemical *can* cause the plaintiff's disease, and specific causation, *i.e.,* that the chemical *did* cause the disease. *Casey v Ohio Med. Prods.* (ND Cal 1995) 877 F Supp 1380.

Cases excluding expert opinion on causation. In *Casey,* a post-*Daubert* case, the district court excluded an expert's opinion that an anesthesiologist contracted chronic active hepatitis as a result of exposure to halothane in anesthesia. The court found that (1) the expert's opinion failed to establish general causation because the case reports on which the expert relied were not controlled studies using scientific methodology, and (2) the expert's testimony about specific causation lacked sufficient information about the plaintiff's pathology.

Similarly, in *Bradley v Brown* (7th Cir 1994) 42 F3d 434, the court of appeals approved the trial court's decision to exclude experts' opinions about causation because "the method leading to their conclusions was merely anecdotal." In *Bradley*, the plaintiffs were office workers who claimed to have developed multiple chemical sensitivity disorder (MCS) as a result of pesticides used in their office. Acknowledging that the "general acceptance" standard of *Frye* had been superseded by the "helpfulness standard" under *Daubert*, the court noted that Fed R Evid 702 nonetheless requires evidentiary reliability and trustworthiness. In this case, the trial court had properly analyzed the admissibility of the offered testimony under *Daubert* standards, and had concluded that the experts' opinions as to the causation of MCS were hypothetical, anecdotal, subjective, and speculative. See also *Summers v Missouri Pac. R.R. Sys.* (10th Cir 1997) 132 F3d 599, 604 (expert testimony excluded because expert's true diagnosis was of scientifically invalid MCS, not of scientifically recognized "chemical sensitivity").

When the trial court's decision to exclude expert testimony of causation in chemical exposure cases is based on *Daubert* parameters, the appellate court will not disturb that decision unless it was manifestly erroneous. On appellate review under *Daubert*, see §§4.59-4.60. Thus, in *Moore v Ashland Chem., Inc.* (5th Cir 1998) 151 F3d 269, the Fifth Circuit held on rehearing en banc that the trial court did not abuse its discretion in excluding expert testimony that plaintiff's exposure to the industrial chemical toluene caused his pulmonary illness. In *Moore*, the bases for the expert's opinion were reduced to a "material safety data sheet" that warned of possible injury, but did not provide information on the level of exposure necessary to cause it, and the temporal proximity between the exposure and the injury, a factor the trial court was correct in viewing "with skepticism." 151 F3d at 278. The court noted that in the Fifth Circuit *Daubert* applies even though the expert opinion is not based on "hard science," but rather solely on the expert's experience or training. 151 F3d at 275 n6. For discussion of the issue of when *Daubert* applies, see §4.57.

For other decisions affirming the exclusion of expert testimony in chemical exposure cases under *Daubert,* see *Marmo v Tyson Fresh Meats, Inc.* (8th Cir 2006) 457 F3d 748 (toxicologist's failure to physically examine plaintiff, to inquire about other toxic exposures, or to exclude other factors supported exclusion of opinion on injuries allegedly related to exposure to hydrogen sulfide gas); *McClain v Metabolife Int'l, Inc.* (11th Cir 2005) 401 F3d 1233 (expert testimony that toxicity of ephedrine and caffeine in herbal weight loss supplement caused strokes rejected because expert failed to adequately consider relationship between dose and effect); *Rink v Cheminova, Inc.* (11th Cir 2005) 400 F3d 1286 (rejecting expert's causation theory based on isomalathion levels in stored pesticide spray because expert's reconstruction of storage conditions was conjecture and rough approximation, and lacked "intellectual rigor" required by *Daubert*); *Wills v Amerada Hess Corp.* (2d Cir 2004) 379 F3d 32 (rejecting plaintiff's expert's one-exposure oncogene theory of cancer causation because it failed to satisfy *Daubert*'s reliability factors and was not based on credible scientific methodology); *Nelson v Tennessee Gas Pipeline Co.* (6th Cir 2001) 243 F3d 244 (upholding rejection of expert testimony because no scientific literature supported opinion that PCB exposure caused specific brain disorder at issue); *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418, 1423 (in absence of peer review articles, supporting research, or evidence that expert used scientific method, court properly excluded testimony of expert who developed expressly for trial his opinion that plaintiff had autoimmune disease caused by silicone in shunt); *Schudel v General Elec. Co.* (9th Cir 1997) 120 F3d 991 (one expert's "whole person aggravation" theory of causation and another

expert's neurological symptom causation testimony held inadmissible under *Daubert* when experts attempted to extrapolate conclusions from irrelevant and inapplicable studies); and *Claar v Burlington N. R.R.* (9th Cir 1994) 29 F3d 499, 502 (experts' failure to adequately explain basis for conclusion that exposure to chemicals at facility caused plaintiffs' ailments supported refusal to admit testimony under *Daubert*; experts' unsupported scientific conclusion revealed testimony was based on improper methodology and speculation).

Cases admitting expert testimony on causation. On the other hand, if the trial court applies the *Daubert* test improperly, *e.g.,* by failing to consider the relevant scientific evidence on which the expert relied, the appellate court may find that the trial court abused its discretion in excluding the testimony. In *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226 n1, for example, the Ninth Circuit agreed with *Moore v Ashland Chem., Inc., supra,* that "clinical medical testimony" is subject to *Daubert,* but held that the trial court abused its discretion in excluding a medical doctor's testimony based on verifiable evidence and scientific methodology that Zyderm caused plaintiff's autoimmune disease. The fact that a cause-effect relationship between Zyderm and lupus in particular had not been conclusively established did not render the expert's testimony inadmissible. Similarly, in *McCullock v H. B. Fuller Co.* (2d Cir 1995) 61 F3d 1038, 1043, the court upheld a verdict in favor of a bookbinder who claimed exposure to hot glue caused polyps in her throat, even though the plaintiff's treating physician "could not point to a single piece of medical literature that says glue fumes cause throat polyps." The court said the doctor's opinion was based on "scientific knowledge," including his care and treatment of the plaintiff, and that the lack of textual authority for his opinion was relevant to the weight, not the admissibility, of his testimony. The Eighth Circuit, applying a *Daubert* analysis, similarly admitted testimony from a qualified toxicologist to establish that chemical exposure caused an individual's symptoms and injuries. See *Bonner v ISP Technols., Inc.* (8th Cir 2001) 259 F3d 924, 928.

The Ninth Circuit also affirmed the admission of an expert's opinion on the toxic effects of oil in causing oyster contamination even though the expert's research was neither conducted "independent of the litigation" nor subjected to "scientific scrutiny" through peer review. *Clausen v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, amended (9th Cir, Sept. 25, 2003, No. 01-35928) 2003 US App Lexis 19727. The court found that an opinion could still be proved to be reliable even if neither criterion was met as long as the expert adequately explained the basis for the opinion and could point to some objective and independent source showing that he or she followed a common scientific method in reaching the opinion. The court further held that the expert's use of a "differential diagnosis" in determining causation satisfied the *Daubert* standard for admissibility because it represented an accepted scientific method for explaining a set of clinical findings.

In *Millenkamp v Davisco Foods Int'l, Inc.* (9th Cir 2009) 562 F3d 971, 979, the court upheld the admission of an expert's opinion that the defendant's milk permeate likely caused a diary farmer's calves to become ill. The expert had a background in calf nutrition and had authored several peer-reviewed publications related to the causation issue. He also analyzed the allegedly defective feed mixture with a computer program for evaluating those mixtures. Although the defense urged that the expert's failure to employ a differential diagnosis methodology (as in *Clausen*) rendered the testimony inadmissible, the Ninth Circuit observed that *Clausen* does not preclude the use of other methodologies to determine causation. See §4.84B.

Mass tort cases. For three district court cases considering the admissibility of expert opinion concerning causation in chemical exposure cases, see *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.* (ND Cal 2007) 524 F Supp 2d 1166; *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.* (WD Wash 2003) 289 F Supp 2d 1230; and *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (CD Cal 2004) 318 F Supp 2d 879. These cases contain extremely detailed and searching analysis of epidemiological studies and expert testimony in mass tort cases.

Cases decided before *Daubert* under the former *Frye* standard may provide additional guidance for cases involving chemical exposure. See, *e.g., Ferebee v Chevron Chem. Co.* (DC Cir 1984) 736 F2d 1529; *Sterling v Velsicol Chem. Corp.* (6th Cir 1988) 855 F2d 1188.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.67 1. Frye Examples of Chemical Exposure [Deleted]

§4.67 1. *Frye* Examples of Chemical Exposure [Deleted]

Material formerly discussed in this section has been referenced at the end of §4.66.

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§4.68 2. Exposure to Radiation

In *Whiting v Boston Edison Co.* (D Mass 1995) 891 F Supp 12, the plaintiff offered the opinions of two medical experts, an epidemiologist and an internist, to establish causation between low doses of ionizing radiation received by plaintiff at a nuclear power station and his subsequent leukemia. The court excluded the testimony of both experts, explaining that the court's role as "gatekeeper" under *Daubert* is especially sensitive in cases alleging injury as a result of exposure to toxic substances, including radiation. The court found that the epidemiologist was not qualified to testify on the subject of health physics and radiation epidemiology, and that the doctor's reconstruction of plaintiff's whole body dose of radiation was "not science, but a figment of convenient invention." The court further found that the model used by the doctors had been "rejected by the overwhelming majority of the scientific community" and that both doctors' opinions on causation were "grounded on speculation shaped by result-oriented biases." 891 F Supp at 25. However, a recent Ninth Circuit case has held that, to show generic causation, plaintiffs needed only to establish by scientific evidence that radiation was capable of causing the type of injuries plaintiffs actually suffered; plaintiffs made this showing by offering expert testimony on the generic capacity of levels of radiation emitted from the nuclear facility to cause plaintiffs' illnesses. *In re Hanford Nuclear Reservation Litig.* (9th Cir 2002) 292 F3d 1124. The *Hanford* court held that, unlike other substances, for which there is little or no scientific evidence of causing injury to humans, radiation is recognized as capable of causing a broad range of illnesses, even at the lowest doses. The district court thus erroneously required plaintiffs to show that they had been exposed to the "doubling dose" of radiation (*i.e.,* the level that doubles the risk of disease or injury) to recover. 292 F3d at 1137. See also *In re Three Mile Island Litig.* (3d Cir 1999) 193 F3d 613, amended (3d Cir 2000) 199 F3d 158.

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§4.69 3. Exposure to Drugs and Medical Devices

Federal courts have excluded expert testimony related to prescription products under *Daubert* on grounds that the experts could not supply the requisite evidence to back up their conclusions. See, *e.g., Raynor v Merrell Pharmaceuticals, Inc.* (DC Cir 1997) 104 F3d 1371 (expert testimony that Bendectin had caused birth defects rejected because it failed on application of each one of the *Daubert* factors); *Lust v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1996) 89 F3d 594 (expert opinion that fertility drugs caused alleged birth defects rejected under *Daubert* because opinion was not subject to peer review and there was no objective demonstration that expert's methods were generally accepted or applied); *Rosen v Ciba-Geigy Corp.* (7th Cir 1996) 78 F3d 316 (the expert testimony concluding that 3 days of wearing a nicotine patch contributed to a lifelong smoker's heart attack was properly excluded because expert's testimony did not adhere to the standards of intellectual rigor and expert did not supply the requisite evidence to back up his conclusion).

The opposite result was reached in *Ambrosini v Labarraque* (DC Cir 1996) 101 F3d 129, in which the court of appeals held that expert testimony of an epidemiologist and teratologist was admissible under *Daubert* to support plaintiff's claim against the manufacturer of the prescription drug Depo-Provera. The court of appeals rejected the district court's exclusion of the expert evidence and granting of the manufacturer's motion for summary judgment.

For three district court opinions containing extremely detailed and searching analyses of epidemiological studies and expert testimony in mass tort cases, see *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.* (ND Cal 2007) 524 F Supp 2d 1166; *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.* (WD Wash 2003) 289 F Supp 2d 1230; and *In re Silicone Gel Breast Implants Prods. Liab. Litig.* (CD Cal 2004) 318 F Supp 2d 879.

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§4.70 4. Economic Testimony

Even before *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167 (see discussion in §4.57), many practitioners, particularly in antitrust cases, argued that *Daubert* applied to economic testimony. They have used *Daubert* aggressively to attack and restrict economic analysis in restraint of trade cases. For example, in *Aluminum Phosphide Antitrust Litig.* (D Kan 1995) 893 F Supp 1497, the defendants moved in limine to exclude the testimony of the plaintiffs' economic expert as not meeting the standards enunciated in *Daubert*. After a full evidentiary hearing, the court found the proffered testimony to be "economically unreliable and therefore inadmissible under Rule 702." 893 F Supp at 1507. In so ruling, the court specifically rejected the plaintiffs' argument that *Daubert* applies only to the "hard" sciences and not to "social sciences such as economics." 893 F Supp at 1506. While not all of *Daubert*'s factors may "be relevant in determining the reliability of expert testimony on non-scientific or social science subjects, the Court has no doubt that *Daubert* requires it to act as a gatekeeper, to determine whether [the economist's] testimony and report are reliable and relevant under Rule 702." 894 F Supp at 1506.

On the other hand, in *Ohio v Louis Trauth Dairy, Inc.* (SD Ohio 1996) 925 F Supp 1247, the court permitted testimony from an economist that was strikingly similar to that which had been disallowed in *City of Tuscaloosa v Harcros Chems., Inc.* (ND Ala 1995) 877 F Supp 1504, aff'd in part and rev'd in part (11th Cir 1998) 158 F3d 548. The court declined to follow *City of Tuscaloosa*, finding its reasoning to be contrary to *Daubert*'s liberal approach to admissibility. See *Masayesva v Hale* (9th Cir 1995) 118 F3d 1371, 1379 (expert's testimony regarding fair value of Navajo grazing derived from relatively straightforward application of range economics, rather than novel scientific theory, and thus *Daubert* did not apply). See also *Champagne Metals v Ken-Mac Metals, Inc.* (10th Cir 2006) 458 F3d 1073 (applying *Daubert* analysis to expert testimony on market conditions for service centers acting as middlemen in aluminum industry); *City of Tuscaloosa v Harcros Chems., Inc.* (11th Cir 1998) 158 F3d 548 (statistician's techniques and methodologies met *Daubert* test for reliability); *Blue Cross & Blue Shield United v Marshfield Clinic* (7th Cir 1998) 152 F3d 588 (plaintiffs' damage study excluded for failure to adjust calculations to market realities).

Now that Fed R Evid 702 expressly incorporates the requirement that expert testimony be based on sufficient facts or data and be grounded in reliable principles and methods, there seems to be little debate that *Daubert's* gatekeeping role extends to expert economic testimony. See *Hartley v Dillard's, Inc.* (8th Cir 2002) 310 F3d 1054 (applying *Daubert* analysis to expert testimony on economic conditions at shopping malls nationwide); *Children's Broadcasting Corp. v Walt Disney Co.* (8th Cir 2001) 245 F3d 1008 (applying *Daubert* analysis to expert testimony on damages caused by alleged misappropriation of trade secrets); *Hayes v Wal-Mart Stores, Inc.* (ED Okla 2003) 294 F Supp 2d 1249 (applying *Daubert* and rejecting proffered expert testimony that punitive damages equal to defendant's annual dividends would not cause defendant irreparable financial harm); *Coleman v Dydula* (WD NY 2001) 139 F Supp 2d 388 (expert economic testimony on lost future wages, increases in health insurance costs, and work life expectancy, subjected to gatekeeping analysis). A growing body of scholarly commentary also shares this view. See, *e.g.,* Freeman, *Guardians at the Gate*, 24 LA Law 26 (July/Aug. 2001); Badal & Slizewski, *Economic Testimony Under Fire*, 87 ABA J 56 (Nov. 2001); Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, and the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence:* Kumho*'s Expansion of* Daubert, 34 Akron L Rev 689 (2001); Adrogue & Ratliff, *Kicking the Tires After* Kumho*: The Bottom Line on Admitting Financial Expert Testimony*, 37 Hous L Rev 431 (Summer 2000).

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§4.71 5. Defective Product Design

Before *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, a number of decisions held that expert testimony in product design cases was based on knowledge and experience, rather than on scientific knowledge, and thus fell outside *Daubert*'s reach. See, *e.g., McKendall v Crown Control Corp.* (9th Cir 1997) 122 F3d 803.

The *Kumho* decision makes it clear that decisions such as *McKendall* took an overly restrictive view of *Daubert* and are no longer valid authority. The correct application of *Kumho* to product liability cases is found in decisions such as *Johnson v Manitowoc Boom Trucks, Inc.* (6th Cir 2007) 484 F3d 426, 430 (affirming rejection of expert's testimony on defective design of crane's outriggers because design was untested and defendant's opinion was made for litigation); *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418, 1423 (excluding proffered testimony that shunt for draining excess fluid from plaintiff's brain was defective because expert relied on impermissible "underground knowledge, untested and unknown to the scientific community"), and *Allison v McGhan Med. Corp.* (11th Cir 1999) 184 F3d 1300 (excluding proffered testimony in breast implant litigation).

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§4.72 6. Alternative Designs and Warnings

An expert in a particular field is not necessarily qualified to testify regarding the adequacy of a warning placed on a product in that field. In *Robertson v Norton Co.* (8th Cir 1998) 148 F3d 905, 907, for example, the court held that an expert on a grinding wheel manufacturing defect should not have been allowed to testify to his opinion that the manufacturer's warning was inadequate, because he had no scientific theory, practical knowledge and experience, or empirical research and testing to support his opinion regarding the warning as required under *Daubert*. (The expert also lacked the necessary expertise on display, syntax, and emphasis expected of an expert on warnings, testified squarely to an ultimate issue of fact, and gave testimony that was unfairly prejudicial.)

In *Cummins v Lyle Indus.* (7th Cir 1996) 93 F3d 362, the plaintiff brought a products liability action after she severed three fingers in an industrial trim press. Plaintiff's expert sought to testify that clearer written warnings and an alternative mechanical design would have made the trim press safer. Applying *Daubert*, the trial court found there was no reliable basis for the proposed testimony and excluded it. The court noted that the expert had not conducted any tests to substantiate his opinion that the alternative design feasibly could have been incorporated into the trim press. Nor had he read any studies, surveys, or analyses of how the trim press was designed, manufactured, or used. Regarding the written warnings, the expert admitted that, in the absence of testing, he did not know what warnings would have been effective. On appeal, the Seventh Circuit found that the trial court had properly applied *Daubert* and was "justified in concluding that [the expert's] testimony, predicated on his own untested observations, was not admissible." 93 F3d at 367.

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§4.73 7. Psychological Tests and Evidence

Before *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, there was considerable question whether *Daubert* applied to the "soft" sciences such as psychology and other disciplines in which the research, theories, and opinions do not have the exactness found in hard science methodologies. See *Jenson v Eveleth Taconite Co.* (8th Cir 1997) 130 F3d 1287, 1297 (court erred in excluding psychological evidence on mental harm to plaintiffs in sexual harassment and discrimination case; evidence was admissible under either *Daubert* or general parameters of Fed R Evid 702). *Kumho* strongly indicates that even if such areas of expertise do not constitute "scientific" knowledge, they fall within the "technical or other specialized knowledge" planks of Rule 702 and are subject to the dictates of *Daubert*. The Ninth Circuit followed *Kumho*'s lead and applied *Daubert* to a psychiatrist's expert testimony on posttraumatic stress disorder in *S. M. v J. K.* (9th Cir 2003) 315 F3d 1058.

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§4.74 8. Chromatography Tests

The thin-layer chromatography test has been held admissible under *Frye v U.S.* (DC Cir 1923) 293 F 1013 in the federal courts. *U.S. v Metzger* (6th Cir 1985) 778 F2d 1195. In *Metzger,* the defendant was charged with the interstate transportation of explosives that he used to destroy a car. The prosecution called a chemist, who testified that the debris around the explosion revealed trace amounts of monomethylamine nitrate, which permitted the government's investigators to trace the explosive to a particular manufacturer. The defendant objected to the thin-layer chromatography test used by the chemist because, although the test was generally accepted, its use in this particular type of case was unique. The Sixth Circuit rejected the defendant's contention, holding that the testimony was that of an expert in the area of his expertise, whose work in the narrow area at issue had been published and adopted by local, state, and federal agencies across the nation. The court held that under these circumstances the expert's testimony on the results of using thin-layer chromatography to discover trace quantities of monomethylamine nitrate was admissible under Fed R Evid 702.

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§4.75 9. Eyewitness Identification

The Ninth Circuit does not follow the court's decision in *People v McDonald* (1984) 37 C3d 351, 208 CR 236 (see §4.18), which permits a psychologist to testify in a criminal case about the psychological facts that can affect the accuracy of eyewitness identification. In contrast to the *McDonald* court, the Ninth Circuit in *U.S. v Langford* (9th Cir 1986) 802 F2d 1176 excluded expert testimony on eyewitness identification. See also *Robertson v McCloskey* (D DC 1988) 680 F Supp 408.

For a thoughtful analysis of the admissibility of eyewitness identification testimony under the *Daubert* standard, see *U.S. v Smith* (10th Cir 1998) 156 F3d 1046 (discussing authorities and finding no abuse of discretion in admitting testimony).

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§4.76 10. Forensic Psychology

The testimony of a forensic psychologist was disapproved in the pre-*Daubert* case of *U.S. v Kozminski* (6th Cir 1987) 821 F2d 1186, aff'd (1988) 487 US 931, 101 L Ed 2d 788, 108 S Ct 2751. A forensic psychologist in that case testified that certain farm workers had experienced an "involuntary conversion" to complete dependency on a certain dairy farmer, in support of the government's charges against that dairy farmer for holding farm workers in involuntary servitude. The court held that this testimony was subject to the test of "conformity to a generally accepted explanatory theory," adopted by the circuit in *U.S. v Green* (6th Cir 1977) 548 F2d 1261, and derived from *Frye*. Because the psychologist admitted that his analysis was the first such diagnosis he had ever made, the court held that his testimony did not have the requisite guarantee of reliability of scientific acceptance through peer evaluation.

Although four dissenting justices did not suggest that *Frye* had no role in the admissibility of scientific evidence, they argued that *Frye* should be confined to novel scientific measurements or devices (*e.g.,* lie detector tests) and should not apply to clinical judgments of the type offered by the psychologist.

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§4.76A 11. Handwriting Analysis

In *U.S. v Prime* (9th Cir 2004) 363 F3d 1028, vacated (2005) 160 L Ed 2d 1007, 125 S Ct 1005, the Ninth Circuit, recognizing the broad acceptance of handwriting analysis in other circuits that have considered the issue, held that the district court had not abused its discretion in determining that handwriting expert testimony can satisfy the *Daubert* reliability threshold. For cases from other circuits addressing the admissibility of handwriting expert testimony, see *U.S. v Crisp* (4th Cir 2003) 324 F3d 261; *U.S. v Mooney* (1st Cir 2002) 315 F3d 54; *U.S. v Jolivet* (8th Cir 2000) 224 F3d 902; *U.S. v Paul* (11th Cir 1999) 175 F3d 906; *U.S. v Jones* (6th Cir 1997) 107 F3d 1147; *U.S. v Velasquez* (3d Cir 1995) 64 F3d 844.

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Source: Civil Litigation/California Expert Witness Guide/4 Information Relied on by Expert/§4.77 12. Polygraph Results

§4.77 12. Polygraph Results

Before *Daubert*, polygraph evidence was inadmissible in civil actions to establish the truth of statements made during the polygraph examination unless the parties had stipulated to the admissibility of the test result before it was administered. *Brown v Darcy* (9th Cir 1986) 783 F2d 1389; see also *U.S. v Givens* (9th Cir 1985) 767 F2d 574, 585. This rule reflected the court's hostility to the admission of unstipulated polygraph evidence. *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225. After *Daubert*, in the Ninth Circuit the trial court must determine the admissibility of such evidence on a case-by-case basis. 104 F3d at 228.

NOTE: On remand, the district court in *U.S. v Cordoba* (CD Cal 1998) 991 F Supp 1199, aff'd (9th Cir 1999) 194 F3d 1053, determined that the polygraph evidence was inadmissible under *Daubert* because it does not have "general acceptance" for use as courtroom evidence, the real-life error rate is unknown and depends on the protocol followed in the particular case, and there are no controlling standards to ensure proper protocol.

In a criminal court-martial case, the United States Supreme Court has held that the military's per se rule excluding polygraph evidence does not violate the defendant's Sixth Amendment right to present a defense. *U.S. v Scheffer* (1998) 523 US 303, 140 L Ed 2d 413, 118 S Ct 1261. In reversing the court of appeal, the supreme court noted that although some federal courts of appeal have abandoned a per se rule excluding polygraph evidence, leaving its admission or exclusion to the trial court's discretion under *Daubert*, "state and federal courts continue to express doubt about whether such evidence is reliable." The court concluded that although individual jurisdictions may reasonably reach different conclusions concerning whether polygraph evidence should be admitted, the military's per se rule excluding all polygraph evidence is not arbitrary or disproportionate. Moreover, excluding such evidence preserves "the jury's core function of making credibility determinations in criminal trials" and avoids collateral litigation over issues other than the guilt or innocence of the accused. Justice Kennedy, joined by Justices O'Connor, Ginsburg, and Breyer in concurring, noted that although not unconstitutional in view of the "continuing, good-faith disagreement among experts and courts on the subject of polygraph reliability," he doubted that a rule of per se exclusion is wise and noted that there is tension between *Daubert* and *Scheffer*.

Among the courts cited by the supreme court in *Scheffer* as abandoning the per se rule excluding polygraph evidence are the Fifth and Ninth Circuits. See *U.S. v Posado* (5th Cir 1995) 57 F3d 428 (per se exclusion approach permitted under *Frye* not suitable after *Daubert*; instead, district court should evaluate scientific validity of procedures used in each polygraph test, along with witness qualifications, and determine test's admissibility by weighing the prejudicial and probative value of the offered evidence under Fed R Evid 403); *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225, 227 (voicing agreement with *Posado* and, while "not expressing new enthusiasm for admission of unstipulated polygraph evidence," finding that under *Daubert* admissibility of such evidence must be left to trial court's discretion on case-by-case basis). See also *U.S. v Ramirez-Robles* (9th Cir 2004) 386 F3d 1234 (no *Daubert* hearing held; polygraph evidence excluded because of its prejudicial effect under Fed R Evid 403); *U.S. v Benavidez-Benavidez* (9th Cir 2000) 217 F3d 720, 725 (affirmed exclusion of unstipulated polygraph evidence after district court conducted thorough *Daubert* hearing). The Second Circuit has also concluded that the "flexibility inquiry" rule enunciated in *Daubert* precluded any bright line rules excluding polygraph evidence on a per se basis. *U.S. v Kwong* (2d Cir 1995) 69 F3d 663, 668 (Second Circuit questioned whether the per se rule that held polygraph evidence inadmissible under *Frye* survived after *Daubert*; court found that the evidence was appropriately excluded under Rule 403).

Even under the pre-*Daubert* rule, the courts distinguished the situation in which the admission of the polygraph examination (regardless of its truth or falsity) was an operative fact in the litigation. Thus, when the fact of administering the exam is relevant, polygraph evidence may be admissible. See, *e.g., Brown v Darcy* (9th Cir 1986) 783 F2d 1389; *Thorne v City of El Segundo* (9th Cir 1983) 726 F2d 459 (polygraph questions admitted in action against employer and polygraph examiner for sexual discrimination); *Smiddy v Varney* (9th Cir 1981) 665 F2d 261 (polygraph evidence admitted when polygraph examination of defendant was cause of unlawful arrest of plaintiff).

The Ninth Circuit has taken the position that lie detector tests cannot be used to confuse the jury by making witnesses appear credible before they are examined in court. In *U.S. v Brown* (9th Cir 1983) 720 F2d 1059, 1072, the

court of appeals reversed the defendant's conviction, holding that the prosecution's statement in the plea bargain agreement that a key witness had promised to take a polygraph examination "constituted impermissible vouching for the credibility of its witnesses."

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§4.78 13. Syndrome Evidence

Syndrome evidence is another area in which, before *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, the Ninth Circuit, in particular, found *Daubert* inapplicable. See, *e.g., U.S. v Bighead* (9th Cir 1997) 128 F3d 1329 (court held that *Daubert* does not apply to expert testimony on general characteristics of child sexual abuse victims). This view is irreconcilable with *Kumho*'s holding that *Daubert* applies to all "scientific, technical, or other specialized knowledge." There are, however, numerous remaining questions about when syndrome evidence will satisfy the *Daubert* standard.

New Jersey has applied an analysis similar to that applied in *People v Bledsoe* (1984) 36 C3d 236, 203 CR 450, discussed in §4.2. In *State v Kelly* (NJ 1984) 478 A2d 364, the high court ruled that expert testimony describing the "battered woman's syndrome" can be admitted as evidence by an abused spouse trying to establish a claim of self-defense in a homicide case. See Rosen, *N.J. Allows Expert Testimony on Spouse Abuse*, Nat'l LJ 6 (Aug. 13, 1984). The court relied heavily on a psychologist's study that examined the "popular misconceptions" about battered women. Accordingly, this expert testimony was admissible to establish the actions and reactions of battered women consistent with defendant's claim of self-defense.

Although such testimony is usually offered in rebuttal, the Eighth Circuit in *Arcoren v U.S.* (8th Cir 1991) 929 F2d 1235 upheld the admissibility of testimony on the battered woman syndrome offered on behalf of the prosecution. The government used the evidence to explain why the defendant's estranged wife, the victim of abuse, might be unwilling to say something damaging against her husband. The court of appeals found that, under Fed R Evid 702, the testimony of the expert would assist the jury in understanding the evidence because the behavior and credibility of the wife, as the government's key witness, was central to the jury's determination of the defendant's liability. In reaching that conclusion, the court expressly rejected the argument that expert testimony on the battered woman syndrome is admissible only when a defendant offers it to justify actions allegedly taken in self-defense.

For discussion of admissibility of syndrome evidence under state law, see §§4.28-4.34.

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§4.79 14. Thermography

A thermogram is a highly creative way for plaintiff's attorneys to prove soft tissue injuries. A thermogram is essentially a heat-sensitive photograph that shows the areas of soft tissue impact that are not readily detectable by other methods of medical examination. Counsel seeking to introduce expert testimony based on a thermogram, either in support of or to rebut a claim of such injury, should be prepared for an objection under *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, discussed in §4.56. See Dombroff, *The Reliability of Thermograms*, Nat'l LJ 15 (Dec. 19, 1983).

Thermography evidence was considered and rejected in *McAdoo v U.S.* (ED Mich 1984) 607 F Supp 788, in which plaintiff had been evaluated by a medical doctor who was a self-proclaimed specialist in the field of thermography. The trial court concluded that the use of thermography as a diagnostic tool for back injuries had not received the degree of acceptance necessary within the scientific community to be admissible.

On the other hand, thermographic evidence was admitted in *Cherico v National R.R. Passenger Corp.* (ED Pa 1991) 758 F Supp 258. The court distinguished *McAdoo* on the basis that the proponent of the evidence in that case had submitted only legal articles relating to the technique's usefulness in litigation, whereas the plaintiff in *Cherico* had submitted numerous articles addressing the process's usefulness to medical diagnosis. The *Cherico* decision contains a comprehensive review of the relevant literature and should be studied by anyone seeking either to introduce or to exclude thermographic evidence.

For further references on thermography from a medical-legal perspective, see Ness & Ness, *Thermography: Its Legal Implications*, 33 Med Trial Tech 162 (1987); Uricchio, *Electronic Thermography in Orthopaedic Practice*, 33 Med Trial Tech 179 (1987).

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§4.80 15. Voice Identification

The Seventh Circuit, following the Second, Fourth, and Sixth Circuits, held that spectrographic voice identification evidence is admissible under the *Frye* standard. *U.S. v Smith* (7th Cir 1989) 869 F2d 348; *U.S. v Williams* (2d Cir 1978) 583 F2d 1194; *U.S. v Baller* (4th Cir 1975) 519 F2d 463; *U.S. v Franks* (6th Cir 1975) 511 F2d 25.

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§4.81 16. Voice Stress Analysis

In *Barrel of Fun, Inc. v State Farm Fire & Cas. Co.* (5th Cir 1984) 739 F2d 1028, the Fifth Circuit used the *Frye* rule to reject expert testimony based solely on the results of a psychological stress evaluation (PSE) in a case involving a fire insurance loss. The PSE is a type of "voice stress analysis" designed to indicate whether a person is lying by measuring the stress in his or her voice, based on the assumption that stress accompanies conscious deception. Relying on the results of a PSE, an arson investigator for the fire marshal's office testified that in his opinion an insured had prior knowledge of and authorized the setting of a fire. The court's explanation for rejecting the opinion illustrates the evidentiary burden in trying to meet the *Frye* test (739 F2d at 1032):

> The only evidence proffered below pertaining to the general acceptance and use of the PSE was Dey's testimony that the test is utilized by the State Fire Marshal's office in its arson investigations and that Dey had administered 300 to 500 of the tests. The evidence, however, does not establish the extent to which PSE results are actually relied upon in those investigations, nor whether the PSE has attained broader scientific acceptance among experts in fire investigation, psychology, psychiatry, psychology, and other related disciplines.

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§4.82 17. DNA Typing

The Eighth Circuit in *U.S. v Martinez* (8th Cir 1993) 3 F3d 1191 held that DNA evidence meets the standards set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. See §§4.55-4.65 for discussion of *Daubert.* In addition, the Ninth Circuit in *U.S. v Chischilly* (9th Cir 1994) 30 F3d 1144, 1155, held DNA evidence admissible despite controversy over the appropriateness of FBI data bases for analyzing such evidence. The court said that, assuming the controversy "has divided the scientific community into opposing camps," as the defendant claimed, the evidence would be admissible under *Daubert*'s more liberal test of admissibility, although it might have been excluded under the *Frye* test.

For an excellent overview of the issues raised by DNA evidence and its presentation in a criminal case, see O'Reilly & Sincox, *Forensic DNA Case Evaluation and Litigation*, 28 ABA Litig 43 (Fall 2001).

On DNA typing under state law, see §4.17.

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§4.83 18. Fingerprint and Footprint Analysis

The Ninth Circuit has accepted the admission of fingerprint evidence and related expert testimony, noting that fingerprint analysis is a generally accepted technique that has been subjected to peer review and publication. See, *e.g., U.S. v Sherwood* (9th Cir 1996) 98 F3d 402 (no clear error to admit expert's fingerprint analysis without *Daubert* analysis). In an exhaustive decision containing a thorough *Daubert* analysis of fingerprint identification based on a regimen known as "ACE-V," Judge Pollak of the Eastern District Court in Pennsylvania concluded that, although the testimony did not satisfy all of the *Daubert* factors, it was admissible based on its historical acceptance by law enforcement and by the courts. *U.S. v Plaza* (ED Pa 2002) 188 F Supp 2d 549. See Imwinkelried, *Fingerprint Science*, Nat'l LJ B14 (Dec. 23-30, 2002) (excellent discussion of importance of Judge Pollak's opinion as it relates to *Daubert* and *Kumho Tire*).

The Third Circuit applied the "helpfulness standard" under Fed R Evid 702 (much like the present *Daubert* standard), rather than the "general acceptance" standard under *Frye*, to the admissibility of expert testimony on footprint analysis. See *U.S. v Ferri* (3d Cir 1985) 778 F2d 985, 988 (expert's testimony admitted under standard enunciated in *U.S. v Downing* (3d Cir 1985) 753 F2d 1224, although inadmissible under *Frye* standard). As discussed in §4.55, *Downing* foretold *Daubert* and it thus appears that footprint analysis is admissible under *Daubert*.

For discussion of footprint analysis under state law, see §4.19.

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§4.84 19. Accident Reconstruction and Analysis

In *Desrosiers v Flight Int'l* (9th Cir 1998) 156 F3d 952, the Ninth Circuit held that the trial court did not err in admitting testimony of plaintiff's expert witnesses on accident reconstruction and air-crash analysis. The court said that although the testimony was not "scientific" and should be assessed under Fed R Evid 702, rather than under *Daubert,* the testimony was also admissible under *Daubert*. For discussion of when *Daubert* applies and the effect of *Kumho Tire Co. v Carmichael,* see §4.57. The expert on accident reconstruction had extensive experience with instrumentation analysis and electronic equipment, and his methodology included extensive review of maintenance records, the wreckage, depositions, service manuals, textbooks, and the radar tape. Under both Rule 702 and *Daubert*, the district court's inquiry is a flexible one; the *Desrosiers* trial court struck the appropriate balance between "admitting reliable helpful expert testimony and excluding misleading or confusing testimony." 156 F3d at 961. See *White v Ford Motor Co.* (9th Cir 2002) 312 F3d 998, amended at 335 F3d 833 (applying Rule 702 and *Daubert* to expert opinion on product defect and accident reconstruction).

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§4.84A 20. Biotechnology

In *Carnegie Mellon Univ. v Hoffmann/LaRoche* (ND Cal 1999) 55 F Supp 2d 1024, the owner of a patent for a recombinant DNA polymerase brought an infringement action under the doctrine of equivalents. In considering proposed testimony by plaintiff's expert scientific witness, the district court analyzed the opinion under the factors set forth in *Daubert,* paying particular attention to the Supreme Court's observation in *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512, that there needs to be a close analytical connection between the underlying data and the opinion offered by the expert. Like the expert in *Joiner,* plaintiff's expert analyzed data that was not his own, and reinterpreted it in a manner inconsistent with the conclusions of those who originally had generated the data. The plaintiff's expert, like the expert in *Joiner,* also failed to connect the existing data to his conclusions using a valid scientific method practiced by at least a recognized minority of scientists in the field. *Carnegie Mellon Univ. v Hoffmann/LaRoche* (ND Cal 1999) 55 F Supp 2d 1024, 1040. As a result, the district court found that the studies relied on by the expert were insufficient, individually or in combination, to support his ultimate opinion on the patent infringement issue. His testimony thus was ruled inadmissible under *Daubert*'s reliability prong.

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§4.84B 21. Differential Diagnosis

In *Clausen v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, amended (9th Cir, Sept. 25, 2003, No. 01-35928) 2003 US App Lexis 19727, the Ninth Circuit upheld an expert's use of differential diagnosis, or differential etiology, which is a method for determining which one of a number of diseases with similar symptoms is the one a patient is suffering from, by means of systematic comparison and contrasting of the clinical findings. The court noted that this method is a common scientific technique, which, when properly conducted, has been accepted by other federal courts as admissible under *Daubert,* and was effectively recognized by the Ninth Circuit in *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226. A lack of specific scholarly support or peer review studies does not necessarily prevent the admission of differential diagnosis testimony. See *Turner v Iowa Fire Equip. Co.* (8th Cir 2000) 229 F3d 1202.

The mere employment of a differential diagnosis, even if based on clinical case studies, does not guarantee admissibility when there is epidemiological testimony at odds with the expert's conclusions. In *Norris v Baxter Healthcare Corp.* (10th Cir 2005) 397 F3d 878, the Tenth Circuit acknowledged the authorities supporting the admissibility of differential diagnosis testimony, but drew a distinction in a case involving breast implants because of the large body of epidemiological evidence showing the absence of a causal relationship between silicone breast implants and the immune system diseases alleged by plaintiff. The court further observed, applying *Daubert,* that the plaintiff's experts' opinions attempting to discredit this body of evidence could not be accepted because they were not peer-reviewed, not developed independent of the litigation, and not generally accepted in the relevant scientific community. 397 F3d at 886. See *Maras v Avis Rent A Car Sys., Inc.* (D Minn 2005) 393 F Supp 2d 801 (expert's differential diagnosis as to cause of fibromyalgia rejected because expert had no way of "ruling in" accident-related trauma as potential cause of fibromyalgia).

The use of differential diagnosis as a methodology to determine causation in exposure and other types of cases remains a disputed issue in the federal courts, although the weight of authority appears to be that differential diagnosis, properly employed, is a scientifically valid methodology for determining injury causation. See *Ruggiero v Warner-Lambert Co.* (2d Cir 2005) 424 F3d 249, 254; *In re Paoli R.R. Yard PCB Litig.* (3d Cir 1994) 35 F3d 717, 758; *Hardyman v Norfolk & W. Ry.* (6th Cir 2001) 243 F3d 255, 260; *Glastetter v Novartis Pharm. Corp.* (8th Cir 2001) 252 F3d 986, 989. The current debate centers on whether the methodology is properly employed, thereby giving the resulting causation opinion sufficient reliability to withstand scrutiny under *Daubert*. The Sixth Circuit's thoughtful discussion on this issue in *Best v Lowe's Home Ctrs., Inc.* (6th Cir 2009) 563 F3d 171 provides some useful insight into when courts will consider a differential diagnosis methodology to be properly employed and thus attain the requisite reliability. In the course of its analysis, the Sixth Circuit articulated the following test, adapted from the Third Circuit's landmark *In re Paoli* decision (563 F3d at 179):

> A medical-causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, (2) "rules in" one or more causes of the injury using a valid methodology, and (3) engages in standard diagnostic techniques by which doctors normally rule out alternative causes to reach a conclusion as to which is most likely.

In connection with the third "rules out" prong, the Sixth Circuit noted the following (563 F3d at 179):

> [I]f the doctor engage[s] in very few standard diagnostic techniques by which doctors normally rule out alternative causes, the doctor must offer a good explanation as to why his or her conclusion remain[s] reliable. [Citations omitted]. Similarly, the doctor must provide a reasonable explanation as to why he or she has concluded that [any alternative cause suggested by the defense] was not the sole cause.

Moreover, if the expert followed the appropriate methodology, the Sixth Circuit observed that any criticism of or weakness in the completeness or application of the methodology would affect the weight to be given the expert's opinion, not its admissibility. 563 F3d at 182.

PRACTICE TIP: This latter observation, if taken too far from the actual facts of *Best,* is likely to provoke some scrutiny,

particularly among those who are trying to exclude causation testimony. An expert who seemingly employs a proper methodology certainly can do so in such a speculative or subjective fashion as to provoke arguments regarding unreliability. Also, if the completeness or application of the methodology falls short of what would be expected from an expert in the field, then the expert's testimony, consistent with *Daubert,* should be held inadmissible.

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§4.84C 22. Class Certification

Use of experts in connection with class certification proceedings is complicated by the fact that it is inappropriate to consider the merits of the plaintiffs' claims at the certification stage of the proceedings. However, expert testimony is appropriate concerning the requisites of certification, such as commonality. In *In re Visa Check/MasterMoney Antitrust Litig.* (2d Cir 2001) 280 F3d 124, both parties offered expert reports on class certification. The defendants moved to strike plaintiffs' expert on *Daubert* grounds. The district court denied the motion, and the Second Circuit affirmed the district court's grant of plaintiffs' motion for class certification. The appellate court ruled that, in the class certification context:

- A motion to strike expert testimony under *Daubert* involves a different inquiry from that for evaluating expert evidence in support of, or opposition to, a class certification motion, although the parties' substantive arguments may be similar.
- The district court must determine whether any proffered expert opinion is so flawed as to be inadmissible as a matter of law.
- The district court may not weigh conflicting class certification expert evidence.
- The district court's job at the class certification stage is to determine only whether plaintiffs have shown, based on a methodology that is not inherently flawed, that the requirements of Fed R Civ P 23 have been met.

The reasoning in *In re Visa Check/Master Money Antitrust Litig.* is fast becoming the prevailing view in federal courts nationwide. The emerging consensus appears to be that a full-blown *Daubert* analysis is unwarranted at the class certification stage. See, *e.g., In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.* (D Minn 2003) 2003 US Dist Lexis 5188 (district court held that *Daubert* analysis of proffered expert medical testimony was inappropriate at class certification stage, citing *In re Visa Check/MasterMoney Antitrust Litig., supra*), reversed and remanded on other grounds in *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig*.(8th Cir 2005) 425 F3d 1116. Thus, expert testimony will be considered at the class certification stage if it follows a generally accepted methodology that is not fatally flawed and has any probative value. *Nichols v SmithKline Beecham Corp.* (ED Pa 2003) 2003 US Dist Lexis 2049; see also *In re Monosodium Glutamate Antitrust Litig.* (D Minn 2001) 205 FRD 229; *Thomas & Thomas Rodmakers, Inc. v Newport Adhesives & Composites, Inc.* (CD Cal 2002) 209 FRD 159; *Midwestern Machinery v Northwest Airlines, Inc.* (D Minn 2001) 211 FRD 562.

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§4.85 E. Matter on Which Expert May Not Rely

Experts in federal court may not rely on information that is not of a type reasonably relied on by experts in the same field in forming opinions. Fed R Evid 703; see *American Key Corp. v Cole Nat'l Corp.* (11th Cir 1985) 762 F2d 1569, 1580 (expert testimony relying on opinion of lay witness held inadmissible because expert did not testify he customarily relied on such opinions). See also *Faries v Atlas Truck Body Mfg. Co.* (8th Cir 1986) 797 F2d 619 (observations of eyewitnesses not considered reliable enough to be used by experts attempting accident reconstructions; investigative officer's reconstruction of accident based on this testimony held inadmissible).

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§4.86 1. Speculation, Information From Incompetent Witnesses, or Improper Reference Materials

Trial courts should not admit purely speculative information under the umbrella of Fed R Evid 703. As succinctly noted in *Park v El Paso Bd. of Realtors* (5th Cir 1985) 764 F2d 1053, 1067, "[a]lthough an … expert 'need not be armed on the right hand with a slide rule, on the left with a computer …' he cannot indulge in 'fantasy.'" The evidence must support the expert's opinion or the opinion will be insufficient to support any essential element in the case. See also *Calhoun v Honda Motor Co.* (6th Cir 1984) 738 F2d 126, 131.

The Fifth Circuit, in *In re Air Crash Disaster at New Orleans* (5th Cir 1986) 795 F2d 1230, forcibly denounced the laxity of trial judges who permit wholly speculative expert testimony with the rationalization that it is for the jury to determine the weight to which the testimony is entitled. The court in *Air Crash Disaster* reversed a $3.6 million judgment for the survivors of one of the victims of an airliner accident. The court stated that the ultimate issue in such cases can easily become whatever an expert witness says it is, and trial courts must be wary of the expert becoming nothing more than an advocate of policy before the jury. The reasoning and holding in *Aircrash Disaster* were followed by the District of Columbia in a wrongful death action arising out of a helicopter crash. In *Joy v Bell Helicopter Textron, Inc.* (DC Cir 1993) 999 F2d 549, the court of appeals found that the district court should have excluded the testimony of the plaintiff's damages expert because it "was based solely on guesswork, speculation and conjecture." 999 F2d at 568.

Following the amendment of Fed R Evid 703 in 2000, courts are now required to ask two questions when evaluating expert opinion based on otherwise inadmissible evidence: First, whether the facts are of the type reasonably relied on by experts in that field and, second, whether the probative value of the underlying data substantially outweighs its prejudicial effect. *Turner v Burlington N. Santa Fe R.R.* (9th Cir 2003) 338 F3d 1058, 1061.

In *Turner*, a fire investigator was prepared to opine that arson was the cause of a fire in a debris pile. The expert had taken samples from the pile and sent them to a forensic laboratory for analysis. The lab report found that one of the samples contained a mixture of petroleum distillate consistent with gasoline. The court found that, under these circumstances, the expert was not using the lab report "as data upon which an expert in his field would reasonably rely in forming an opinion, but rather … as substantive evidence of his ultimate conclusions that the fire was intentionally created by pouring gasoline into the soil." 338 F3d at 1062.

Cases in which expert opinion found too speculative. Cases condemning unduly speculative expert opinion abound. See *Bernhardt v Richardson-Merrell, Inc.* (5th Cir 1990) 892 F2d 440; *Brock v Merrell Dow Pharmaceuticals, Inc.* (5th Cir 1989) 874 F2d 307, modified (5th Cir 1989) 884 F2d 167; *Head v Lithonia Corp., Inc.* (10th Cir 1989) 881 F2d 941; *Sterling v Velsicol Chem. Corp.* (6th Cir 1988) 855 F2d 1188; *Lynch v Merrell Nat'l Labs.* (1st Cir 1987) 830 F2d 1190; *Viterbo v Dow Chem. Co.* (5th Cir 1987) 826 F2d 420; *In re Swine Flu Immunization Prods. Liab. Litig.* (D Colo 1981) 508 F Supp 897. For further discussion of admissibility of expert testimony based on speculation, see §4.7.

In cases involving an unestablished business that is interrupted or prevented from coming into being, lost profits generally are not recoverable because they are "uncertain, contingent and speculative." *Parlour Enters., Inc. v The Kirin Group, Inc.* (2007) 152 CA4th 281, 288, 61 CR3d 243. However, lost profits of unestablished businesses can be recovered if the evidence makes their occurrence and extent reasonably certain. Expert testimony alone is sufficient if supported by a substantial factual basis, but this threshold is not met if expert calculations are based on estimates that are not rooted in actual operations and rely on market data of businesses with minimal similarity to plaintiff's business. 152 CA4th at 290.

Cases in which expert relied on irrelevant, incomplete, or inaccurate information. Experts should not be allowed to base their opinions on irrelevant, incomplete, or inaccurate information. See, *e.g., Smoot v Mazda Motors, Inc.* (7th Cir 2006) 469 F3d 675, 681 (expert's study of accident was so perfunctory that he was barred from testifying); *Barker v Deere & Co.* (3d Cir 1995) 60 F3d 158 (expert testimony that relied on irrelevant statistical extrapolations and insufficiently probative prior accidents should not have been admitted); *Novak v U.S.* (6th Cir 1989) 865 F2d 718 (expert evidence by physician that he "knew" of cases of children developing dermatomyositis after viral inoculations was held not to support finding of causal relationship between swine flu vaccine inoculation and development of fatal condition); *Ricciardi v Children's Hosp. Med. Ctr.* (1st Cir 1987) 811 F2d 18, 24 (expert barred from relying on doctor's

handwritten note concerning cause of patient's injuries when doctor who prepared note had no personal knowledge of event described and could not recall source of information; note was also not of type on which expert would normally rely in forming opinion); *Faries v Atlas Truck Body Mfg. Co.* (8th Cir 1986) 797 F2d 619 (expert testimony concerning accident reconstruction was inadmissible because it relied on accident report that contained little physical data or evidence to support its statements concerning cause of accident and there was no method for checking or corroborating report); *Olympia Equipment Leasing Co. v Western Union Tel. Co.* (7th Cir 1986) 797 F2d 370 (projection of lost profits made by plaintiff's expert witness reversed because projection bore no relation to plaintiff's internal business planning or to economic reality); *Soden v Freightliner Corp.* (5th Cir 1983) 714 F2d 498, 502 (statistical charts and other sources used by fire expert held unreliable; testimony excluded); *Lima v U.S.* (10th Cir 1983) 708 F2d 502 (underlying reports on which expert testimony based were not sufficiently reliable); *Coleman Motor Co. v Chrysler Corp.* (3d Cir 1975) 525 F2d 1338 (damage case consisted largely of expert testimony projecting what plaintiff's sales would have been in total absence of company-owned stores, as opposed to what they would have been in absence of subsidies, and ignored deteriorating character of neighborhood where plaintiff's dealership was located; judgment vacated and remanded for new trial); *Joseph E. Seagram & Sons v Hawaiian Oke & Liquors, Ltd.* (9th Cir 1969) 416 F2d 71, 85 (accountant attempted to extrapolate selected sales figures and time periods without regard to countervailing factors, and ignored facts in evidence that tended to undermine plaintiff's projected losses; judgment reversed).

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§4.87 2. Statutory Prohibitions

Some matters are precluded by law from forming a basis for an expert opinion. For example, 49 USC §1154(b) generally precludes admission into evidence of conclusions or opinions in National Transportation Safety Board (NTSB) reports. In *Curry v Chevron, U.S.A.* (5th Cir 1985) 779 F2d 272, 275, the Fifth Circuit held that a similar prohibition in former 46 USC §761(e) could not be circumvented by funneling the investigator's opinions in through an independent expert. The prohibition, however, extends only to testimony on the report's opinions and conclusions. Experts are free to rely on the factual data in the report to support their own conclusions on the probable cause of an accident. See, *e.g., Mullan v Quickie Aircraft Corp.* (10th Cir 1986) 797 F2d 845, 848. See also *Pierce County v Guillen* (2003) 537 US 129, 154 L Ed 2d 610, 123 S Ct 720 (statute barring use of federal highway safety improvement program material in litigation is proper exercise of legislative power).

See generally Dombroff, *Just How Opinionated Can An Expert's Testimony Be?* Nat'l LJ 15 (Aug. 27, 1984).

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5

Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect

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Source: Civil Litigation/California Expert Witness Guide/5 Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect/§5.1 I. CERTAINTY WITH WHICH OPINION MUST BE EXPRESSED

§5.1 I. CERTAINTY WITH WHICH OPINION MUST BE EXPRESSED

There is considerable confusion on the minimum degree of certainty with which an expert's opinion must be expressed to be admissible. Almost all discussion of the subject in the reported cases concerns medical evidence, and these opinions differ.

"Reasonable certainty" requirement. A significant number of practitioners and trial judges assume that a medical opinion is not allowable unless it is expressed as a "reasonable medical certainty." This assumption is erroneous and is based on the failure to distinguish between the standard necessary to justify recovery for future consequences and the standard necessary to *permit* expert testimony concerning the claim. See *Bauman v City & County of San Francisco* (1940) 42 CA2d 144, 163, 108 P2d 989 (law does not require doctors to testify that future consequences will happen with "reasonable certainty"); *Cordiner v Los Angeles Traction Co.* (1907) 5 CA 400, 403, 91 P 436 (just because evidence must show with reasonable certainty that particular future consequences will follow in order for plaintiff to recover does not mean expert's testimony must be excluded unless expert is reasonably certain in his or her opinion).

NOTE: *Cordiner* and its progeny cases make clear that it is the jury, rather than the expert witness, that must be reasonably certain that future damage will occur. Therefore, an expert may give a medical diagnosis or testify concerning future consequences based on probability alone, subject to the court's discretion.

In *Espinosa v Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 37 CR2d 541, the court distinguished between a "reasonable medical probability" and a "medical possibility." "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." 31 CA4th at 1316. In this case, competent expert testimony was admitted to show that a reasonable medical probability existed that plaintiff's injury was the result of two out of three possible causes, even though plaintiff's expert could not quantify the part that each contributing cause played in producing the injury. A jury issue concerning causation is created when the expert is able to testify that each causal factor was "substantial, contributory and essential to produce the ultimate outcome." 31 CA4th at 1317.

Claims in which lesser degree of certainty is permitted. Expert testimony has been allowed to support other claims, *e.g.,* negligence, res ipsa loquitur, strict liability, and breach of warranty, even though the expert was not reasonably certain of his or her opinion. *Hinckley v La Mesa R.V. Ctr.* (1984) 158 CA3d 630, 205 CR 22 (nonsuit reversed in damages action against motorhome seller and manufacturer; expert testimony that there were two possible causes of fire and that electrical problem was most likely cause was sufficient to defeat nonsuit motion; res ipsa loquitur, strict liability, negligence, and breach of warranty alleged); *Hale v Venuto* (1982) 137 CA3d 910, 920, 187 CR 357 (expert testified that doctor's act was "most probable cause" of plaintiff's injury); *Schnear v Boldrey* (1971) 22 CA3d 478, 484, 99 CR 404 (medical expert expressed opinion in terms of "conjecture," "possibility," and "theoretical"; testimony upheld as proper because "every medical opinion, of necessity, must be in a sense speculative"); *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919 (medical diagnosis based on probability is admissible, and lack of scientific certainty does not deprive medical opinion of its evidentiary value; doctor testified concerning battered child syndrome).

Similarly, when proximate cause questions are concerned, experts may testify to probabilities. See *Estate of Rowley* (1967) 257 CA2d 324, 341, 65 CR 139 ("medical witnesses need not testify positively to support a finding of proximate cause. Their opinion of the probabilities is sufficient for that purpose"). See also *People v Phillips* (1966) 64 C2d 574, 579 n2, 51 CR 225, overruled on other grounds in 18 C4th at 490 n12 (expert's testimony on effect of surgery by defendant chiropractor in murder prosecution did not have to be in terms of "beyond a reasonable doubt"); *People v Stamp* (1969) 2 CA3d 203, 209 n2, 82 CR 598 (expert testimony properly couched in terms of "reasonable medical certainty" rather than "beyond a reasonable doubt").

More than mere possibility required. Nevertheless, California law makes it clear that an expert's testimony must, under any circumstances, rise above an expression of mere possibilities. See, *e.g., Ochoa v PG&E* (1998) 61 CA4th 1480, 1487, 72 CR2d 232 (expert did not express opinion with any reasonable degree of medical certainty, but only

hypothesized that he "feels" the gas leak was "probably" the cause of plaintiff's problems); *Abuan v General Elec. Co.* (9th Cir 1993) 3 F3d 329, 333 n4 (class action dismissed when plaintiffs could not produce expert testimony to reasonable degree of medical or scientific certainty that they had been exposed to sufficient level of toxic substances to show injury causation); *Whiteley v Philip Morris, Inc.* (2004) 117 CA4th 635, 701, 11 CR3d 807 ("[I]n toxic tort cases generally, 'plaintiffs must establish, to a *reasonable medical probability, their illnesses* were caused by the toxic exposure. The fact the chemicals increased the possibility of sickness in the overall population does not suffice to provide a causal link with plaintiffs' illnesses. [Citation.]" (emphasis in original); *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882 (expert testimony on alleged relationship between exposure to toxic chemicals and medical injuries must be stated in terms of reasonable medical probability); *Jones v Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 209 CR 456 (expert medical testimony on an alleged relationship between plaintiff's ingestion of contraceptive pill and precancerous condition too conjectural; expert testified there was "reasonable medical possibility," defined as less than a 50-50 chance). See also *Bromme v Pavitt* (1992) 5 CA4th 1487, 7 CR2d 608, in which the court held that a physician's failure to diagnose and treat decedent's cancer in a timely manner was not a "substantial factor" in causing her death because expert witnesses agreed that even with proper medical intervention, her chance of surviving the cancer was less than 50 percent. *Bromme* establishes that, at least in a wrongful death case, a physician's medical negligence must be proven to a "reasonable medical probability," *i.e.,* the death was more likely than not the result of negligence.

PRACTICE TIP: Counsel should take heed from cases such as *Bromme* when evaluating the evidence necessary to sustain a finding of fact. An expert must testify to more than mere possibilities to have his or her testimony rise to the dignity of relevant evidence.

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Source: Civil Litigation/California Expert Witness Guide/5 Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect/ II. TESTIMONY ON ULTIMATE ISSUE/§5.2 A. Testimony on Ultimate Issue Permissible

II. TESTIMONY ON ULTIMATE ISSUE

§5.2 A. Testimony on Ultimate Issue Permissible

Evidence Code §805 expressly authorizes ultimate issue opinions. Ultimate issue opinions, however, are not automatically admissible; the trial judge still has considerable discretion to exclude them if he or she does not think that they will assist the jury. See, *e.g., Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 845, 206 CR 136 (nonsuit reversed; expert testimony not required to show "dangerous condition" of public property in case involving sign allegedly obstructing motorist's view of intersection; "no special expertise was required to show that a driver looking east down Friars Road would have difficulty seeing oncoming westbound traffic"); *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 456, 52 CR 518 (permissible for court not to allow expert to testify whether conditions at time of accident constituted traffic hazard, because jury could decide issue itself based on facts presented).

As explained in *People v Arguello* (1966) 244 CA2d 413, 418, 53 CR 245, the court may request that a question be simplified so that an opinion on the ultimate issue is not required. If the question cannot be simplified, however, the expert's opinion is admissible even if it includes an opinion on the ultimate issue.

The following are examples of opinions on ultimate issues that appellate courts have held admissible:

Civil Cases

- Breach of contract action concerning payment for extra work: Expert testimony on "custom and usage" in the business, as it related to responsibility for such payments, was proper. *Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 271, 81 CR 849.
- Breach of contract action in entertainment industry: Expert testimony on customs and practices of music concert business properly admitted to determine whether parties reached a binding agreement. *PM Group, Inc. v Stewart* (2007) 154 CA4th 55, 63, 64 CR3d 227.
- Insurance "bad faith": Experts could state whether they believed the carrier's conduct constituted bad faith. *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 924, 148 CR 389.
- Negligence: Expert could state whether a given procedure was a safe practice. *State Compensation Ins. Fund v Operated Equip. Co.* (1968) 265 CA2d 759, 765, 71 CR 531.
- Medi-Cal: The court upheld admission of expert testimony concerning the Medi-Cal reimbursement framework and the expert's personal knowledge of the historical administration of the Medi-Cal reimbursement program, because it was not an opinion on the proper judicial interpretation of Medi-Cal rules and regulations. *Western Med. Enters., Inc. v Albers* (1985) 166 CA3d 383, 212 CR 434.
- Products liability: Expert testimony that an auto manufacturer had acted in conscious disregard for the safety of others was permitted to support an award of punitive damages. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 403, 185 CR 654.
- Products liability: Expert could state whether he or she believed the product was defective. *Self v General Motors Corp.* (1974) 42 CA3d 1, 6, 116 CR 575, overruled on other grounds in 8 C4th 548.

Criminal Cases

- Possession for sale: Experts could opine on whether the amount and packaging of drugs found in the defendant's possession indicated that they were intended for sale. *People v Martin* (1971) 17 CA3d 661, 668, 95 CR 250.
- Vehicular manslaughter: Testimony that road construction and speed reduction signs were required, and that construction in the area of an accident was not in accordance with accepted safety standards, was permissible even though it involved an opinion on an ultimate issue. *People v Glass* (1968) 266 CA2d 222, 226, 71 CR 858.

NOTE: Experts in criminal cases *cannot* give their opinion on the ultimate issue of a criminal defendant's guilt. *People v Brown* (1981) 116 CA3d 820, 829, 172 CR 221.

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§5.3 B. Testimony on Legal Conclusions Not Permissible

Although experts can offer opinions on the ultimate issue (see §5.2), pure legal opinions by experts are *not* permissible. See *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 884, 254 CR 336 (expert could not testify on probable cause in malicious prosecution case); *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1599, 71 CR3d 361 (expert testimony attempting to describe fiduciary relationship properly excluded as pertaining solely to question of law); *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568 (expert opinion properly rejected on ultimate legal principle of recklessness in connection with assumption of risk); *Chateau Chamberay Homeowners Ass'n v Associated Int'l Ins. Co.* (2001) 90 CA4th 335, 350, 108 CR2d 776 (expert opinion on ultimate question of whether insurer had proper cause to contest insured's claim was improper; whether there was genuine issue was for court, not jury); *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 973, 105 CR2d 88 (in legal malpractice action, expert could not opine on ultimate issue of what would have happened in underlying arbitration had it taken place); *Summers v A. L. Gilbert Co.* (1999) 69 CA4th 1155, 82 CR2d 162 (admission of expert testimony containing numerous legal opinions on duty of care and legality of truck hauling practices was reversible error); *People v Rocha* (1996) 48 CA4th 1060, 56 CR2d 212 (trial court properly restricted defense counsel's examination of psychiatrist called as defense witness on issue of whether defendant had specific intent when committing crimes); *Communications Satellite Corp. v Franchise Tax Bd.* (1984) 156 CA3d 726, 747, 203 CR 779 (court of appeal held that taxpayer's expert should not have been allowed to interpret tax statute); *Downer v Bramet* (1984) 152 CA3d 837, 199 CR 830 (court of appeal affirmed exclusion of proffered testimony by former lawyer for one of litigants on whether transfer of ranch constituted deferred compensation or gift).

Foreign law. Cases involving foreign law are an exception to the general rule that experts cannot offer purely legal opinions. Determinations of foreign law constitute questions of law that are to be decided by the court in the manner provided for taking judicial notice under Evid C §§450-459. Evid C §310(b). Under Evid C §452(f), the court may take judicial notice of foreign law, and in doing so, the court may consider "the advice of persons learned in the subject matter," *i.e.,* experts. Evid C §454(a).

The following are examples of cases in which expert opinion on foreign law has been accepted:

- *Manco Contracting Co. v Bezdikian* (2008) 45 C4th 192, 197, 85 CR3d 233 (expert testimony raised triable issue of fact about whether initial judgment was sufficiently "final" and "conclusive" under Qatari law to satisfy CCP §1713.2).
- *Nedlloyd Lines B.V. v Superior Court* (1992) 3 C4th 459, 489, 11 CR2d 330 (dissenting opinion of Panelli, J., Kennard, J.) (declaration of plaintiff's expert on Hong Kong law established conflict between Hong Kong and California law on breach of fiduciary duty claim).
- *TSMC N. Am. v Semiconductor Mfg. Int'l Corp.* (2008) 161 CA4th 581, 594, 74 CR3d 328 (in trade secret dispute, trial court considered expert testimony on Taiwanese export control laws).
- *Korea Water Resources Corp. v Lee* (2004) 115 CA4th 389, 8 CR3d 853, disapproved on other grounds in *Manco Contracting Co. v Bezdikian* (2008) 45 C4th 192, 203 n7, 85 CR3d 233 (expert opinion on Korean law considered on summary judgment motion).

Contract interpretation. The extent of permissible expert testimony in questions on interpretation of contracts, particularly insurance policies, has been a continuing source of litigation. Courts have repeatedly held that the interpretation of the scope of an insurance policy, including such matters as the insured's reasonable expectations of a defense, are pure questions of law on which experts may not state an opinion. See, *e.g.*, *Jordan v Allstate Ins. Co.* (2004) 116 CA4th 1206, 11 CR3d 169 (expert testimony is not generally admissible concerning meaning of particular language in insurance policy). As Justice Racanelli wryly noted in *National Auto. & Cas. Ins. Co. v Stewart* (1990) 223 CA3d 452, 458, 272 CR 625: "The opinion of a linguist or other expert as to the meaning of the policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person." The granting of a nonsuit in such cases is permissible even though expert opinion testimony may have been permitted. *Devin v United Servs.*

Auto. Ass'n (1992) 6 CA4th 1149, 1157 n5, 8 CR2d 263; *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 664, 136 CR 203.

Question of fact vs. question of law. The distinction between questions of fact and questions of law is not always clear. For example, in *Leonardini v Shell Oil Co.* (1989) 216 CA3d 547, 264 CR 883, a malicious prosecution case, Shell had previously filed, but then dropped, an action against the plaintiff for declaratory relief and to enjoin trade libel. The plaintiff then filed a malicious prosecution case against Shell. The trial court found that Shell lacked probable cause to bring the underlying case, after which the jury found for the plaintiff and awarded substantial damages. Shell appealed,

contending, among other things, that the trial court had committed reversible error in allowing the plaintiff to call three legal experts to testify on the subject of probable cause.

The plaintiff responded that two of the three experts, both of whom had been counsel of record in the underlying proceeding, had been called solely to establish that the underlying case was terminated favorably to the plaintiff. The court of appeal agreed that this was an appropriate subject for expert testimony. It noted that a "favorable determination," for malicious prosecution purposes, does not occur simply because the complaining party prevailed in the underlying action. In particular, when the underlying case has been voluntarily dismissed, there may be a conflict in the evidence on the real motive for the dismissal. Shell had denied that the dismissal of the underlying case was prompted by its assessment of the merits of the suit; Shell's motive therefore became a factual issue to be resolved by the jury. The court of appeal acknowledged that the third expert, who had no connection with the underlying case, had been "called as an expert to testify on the law" but found there was no need to rule on the propriety of his testimony since Shell had waived any claim of error by failing to object to the testimony.

For further discussion of the distinction between testimony on the ultimate issue and legal conclusions, see 1 Witkin, California Evidence, *Opinion Evidence* §§88-97 (4th ed 2000).

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Source: Civil Litigation/California Expert Witness Guide/5 Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect/§5.3A C. Testimony Concerning Punitive Damages

§5.3A C. Testimony Concerning Punitive Damages

One of the most important unanswered questions is the extent to which expert testimony can be used either to support or resist a punitive damages claim. California juries are instructed that, in arriving at the amount of a punitive damages award, they should consider all of the following:

> (a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:
> 1. Whether the conduct caused physical harm;
> 2. Whether [*name of defendant*] disregarded the health or safety of others;
> 3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [*him/her/it*];
> 4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and
> 5. Whether [*name of defendant*] acted with trickery or deceit.
>
> (b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm? [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [*his/her/its*] conduct?] [Punitive damages may not be used to punish [*name of defendant*] for the impact of [*his/her/its*] alleged misconduct on persons other than [*name of plaintiff*].]
>
> (c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [*him/her*] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

CACI 3942. See also CACI 3949.

Traditionally, courts have considered the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages in determining punitive damages. See, *e.g., Gagnon v Continental Cas. Co.* (1989) 211 CA3d 1598, 260 CR 305. More recently, it has been suggested that there are other appropriate punitive damage measures, such as the profits the defendant was hoping to make, even if those profits were not actually realized. *TXO Prod. Corp. v Alliance Resources Corp.* (1993) 509 US 443, 125 L Ed 2d 366, 381, 113 S Ct 2711.

Although there do not appear to be any reported California state court opinions dealing with the proper role, if any, of expert testimony in determining the amount of a punitive damages award when the damages are being sought under a lost profits measure, the matter has been considered in an unpublished opinion by at least one California district court. *Litton Sys., Inc. v Ssangyong Cement Indus. Co.* (ND Cal 1993) 1993 US Dist Lexis 12198. In *Litton*, which involved a theft of trade secrets, the court held a pretrial hearing at which each side was permitted to present their experts' suggestion as to the methodology that the court should apply in arriving at a proper punitive damage award. The plaintiff's expert testified that trade secret theft "is an inefficient, non-market transaction which imposes unnecessary costs on society."

He urged that "applying traditional economic principles of deterrence, … damages should exceed the greater of the victim's loss or the thief's expected gain, multiplied by a factor which reflects the probability of detection." The defendants' expert urged that damages be calculated "upon defendants' actual gain from the trade secret theft." The court adopted the approach urged by Litton's expert, *i.e.,* to award "the greater of [Litton's] loss or defendants' expected gain."

PRACTICE TIP: With *Litton* to build on, creative counsel for both plaintiffs and defendants should be able to offer a number of experts, and types of testimony, that could be used to assist the trier of fact in determining, "in view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct." CACI 3942.

The United States Supreme Court has indicated that due process requires that two additional factors be considered by juries in determining an award of punitive damages: "[T]he degree of reprehensibility of the non-disclosure" and "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW of North Am.,*

Inc. v Gore (1996) 517 US 559, 134 L Ed 2d 809, 826, 116 S Ct 1589. Under the holding of this case, it is arguable that expert testimony is available to contrast the reprehensibility of the defendant's conduct with that of other kinds of conduct for which punitive damages are permitted. 134 L Ed 2d at 826. Likewise, expert testimony would appear to be one way of presenting the type and amount of sanctions that are permitted for comparable misconduct. 134 L Ed 2d at 829. See also *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 155 L Ed 2d 585, 123 S Ct 1513 (expressing concern over "imprecise manner" in which punitive damages are decided and elaborating on applicable federal constitutional principles).

A particularly troubling question is whether experts should be permitted to testify concerning standards and comparisons generally or whether they can opine on the particular punitive damage award that would be appropriate in the subject case. For example, in the cross-racial witness identification area, experts are allowed to testify concerning the difficulties that people of one race have in identifying members of other races, but are generally not permitted to testify if any particular eyewitness identification was deficient for these reasons. See §4.18 for discussion of eyewitness identification.

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§5.3B D. Testimony Concerning Class Damages

The measure of damages in a class action was held to be a proper subject for expert testimony in *Bell v Farmers Ins. Exch.* (2004) 115 CA4th 715, 9 CR3d 544. In *Bell,* an employer was found liable for back overtime pay in a class action by current and former employees and the issue of damages then went to trial before a jury. The trial court refused to decertify the class before damages were determined because determining damages for individual employees by the administrative hearing procedure (codified under Lab C §§98 and 98.8) would have resulted in costly individual litigation and thwarted the public interest in effective enforcement of overtime laws. Through its expert witness, plaintiff class offered a case for determining aggregate overtime on the basis of extrapolating median weekly overtime from an initial pilot sample of 50 randomly selected class members. The court of appeal held that expert testimony relying on random statistical samples and extrapolation to determine back overtime pay in general was admissible to calculate the total class-wide damages, and computation of aggregate damages by statistical inference did not violate due process under the balancing test articulated in *Connecticut v Doehr* (1991) 501 US 1, 115 L Ed 2d 1, 111 S Ct 2105.

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§5.4 E. When Interpretation of Writing Can Be Testified to by Expert

The scope of permissible expert testimony in cases involving the interpretation of written instruments is a continuing area of controversy. As a general proposition, when there is no conflicting extrinsic evidence, the proper interpretation of a writing is a question of law for the court, and no opinion testimony on that issue is permissible. *Southern Pac. Land Co. v Westlake Farms, Inc.* (1987) 188 CA3d 807, 817, 233 CR 794. Extrinsic evidence may, however, be considered by the court as an aid in the interpretation of a written contract when the evidence is relevant to prove a meaning to which language in the document is reasonably susceptible. *Producers Dairy Delivery Co. v Sentry Ins. Co.* (1986) 41 C3d 903, 913, 226 CR 558. Such extrinsic evidence is *not* proper when it is offered to explain the "purpose" of a particular contractual provision or as the expert's opinion of what he or she thought the parties to the contract intended. *Transport Indem. Co. v American Fid. & Cas. Co.* (1970) 4 CA3d 950, 960, 84 CR 856.

The proper application of these rules was discussed in *Hartford Acc. & Indem. Co. v Sequoia Ins. Co.* (1989) 211 CA3d 1285, 260 CR 190, an insurance coverage dispute among insurance carriers. One of the carriers, Transamerica, sought to introduce evidence from a former employee of Farmers Insurance, who never worked for Hartford, as to his understanding of a clause in an umbrella liability policy that referred to a schedule of underlying insurance policies. The court found that the proposed testimony did not establish that the policy language was reasonably susceptible to the meaning urged by Transamerica and therefore failed to constitute admissible extrinsic evidence that would assist the court in performing its interpretation function.

On a motion for summary judgment granted in favor of a life insurance company, plaintiffs in *Suarez v Life Ins. Co.* (1988) 206 CA3d 1396, 254 CR 377, offered the declaration of a professor of linguistics. The professor expressed the opinion that an advertisement for an insurance policy and the policy itself were neither clear nor unambiguous regarding the limitation of coverage to accidental injuries resulting in complete physical separation of a limb from a body. The court of appeal held that the professor's testimony was properly rejected because the meaning the average reader would give to the advertisement on the policy was not the proper subject for the opinion of an expert witness.

The same rule was expressed more pithily in *National Auto. & Cas. Ins. Co. v Stewart* (1990) 223 CA3d 452, 458, 272 CR 625, in which the court observed: "The opinion of a linguist or other expert as to the meaning of the [insurance] policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person." See also *Jordan v Allstate Ins. Co.* (2004) 116 CA4th 1206, 11 CR3d 169 (expert testimony is not generally admissible concerning meaning of particular language in insurance policy).

Commercial Code §2202 provides that the terms of an agreement governed by the Commercial Code "may be explained or supplemented by … course of dealing, course of performance, or usage of trade." Therefore, expert testimony on relevant custom and usage was held admissible in *Balfour, Guthrie & Co. v Gourmet Farms* (1980) 108 CA3d 181, 166 CR 422 (expert testimony on custom and usage in the grain brokerage industry was held admissible to aid in interpreting contract pricing mechanism because case involved sale of "goods" within meaning of Com C §2105). See also *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 136 CR 203, questioned on other grounds in *Osborn v Mission Ready Mix* (1990) 224 CA3d 104, 273 CR 457 (expert may properly testify on custom and practice in construction industry but may not offer interpretation of law, whether contained in statute, ordinance, or safety regulation promulgated under statute).

For discussion of the admissibility of evidence concerning the interpretation of insurance contracts, see California Liability Insurance Practice: Claims & Litigation §§3.49-3.51 (Cal CEB 1991).

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III. EFFECT OF EXPERT TESTIMONY

§5.5 A. When It Is Conclusive in Civil Cases

In professional malpractice cases, uncontradicted expert evidence is conclusive proof of the prevailing standard of skill and learning in the locality. *Allied Props. v John A. Blume & Assocs.* (1972) 25 CA3d 848, 857, 102 CR 259 (architectural); *Lysick v Walcom* (1968) 258 CA2d 136, 156, 65 CR 406 (legal); *Engelking v Carlson* (1939) 13 C2d 216, 220, 88 P2d 695, disapproved on other grounds in *Siverson v Weber* (1962) 57 C2d 834, 22 CR 337 (medical). California Civil Jury Instruction 219 (CACI) does not mandate that a juror be bound by uncontradicted expert testimony. However, the directions for the instruction's use indicate that uncontradicted testimony is binding when the subject matter of the testimony relates to the standard of care in professional malpractice cases. See CACI 219-220; see also CACI 600 (instructing jury that, when deciding whether defendant professional was negligent, "you must determine the level of skill and care that other reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses [, including [*name of defendant*],] who have testified in this case").

In other areas, the general rule is that the trier of fact must decide the weight to give expert testimony. *Kastner v Los Angeles Metro. Transit Auth.* (1965) 63 C2d 52, 45 CR 129; *In re Robert T.* (1988) 200 CA3d 657, 246 CR 168; CACI 219. This means that the trier of fact is entitled to reject an expert's testimony in whole or in part (*Foreman & Clark Corp. v Fallon* (1971) 3 C3d 875, 890, 92 CR 162) and to decide how conflicts between the various experts' testimony should be resolved (see *Abbott v Taz Express* (1998) 67 CA4th 853, 79 CR2d 360 (weight jury should be instructed to accord expert testimony); CACI 221).

The trier of fact can disregard even uncontradicted expert testimony when it covers matters that are not exclusively within the expert's knowledge (see *Horn v Oh* (1983) 147 CA3d 1094, 1100 n1, 195 CR 720) and when the reasons given for the expert's opinion are unsound. *Howard v Owens Corning* (1999) 72 CA4th 621, 85 CR2d 386; *In re Thomas C.* (1986) 183 CA3d 786, 797, 228 CR 430; *Akers v Kelley Co.* (1985) 173 CA3d 633, 646, 219 CR 513, disapproved on other grounds at 16 C4th 561, 582 n5.

As with nonopinion testimony, however, triers of fact cannot *arbitrarily* disregard uncontradicted and unimpeached expert testimony. See *Mantonya v Bratlie* (1948) 33 C2d 120, 127, 199 P2d 677 (regarding nonexpert testimony: "the trier of fact is not entitled, arbitrarily or upon mere caprice, to disregard uncontradicted, entirely probable testimony of unimpeached witnesses"); *Mittelman v Seifert* (1971) 17 CA3d 51, 69, 94 CR 654 (uncontradicted expert testimony dispositive on pilot's willful misconduct; "jury was not free to disregard such testimony, and it is proper to resolve the issue here as a matter of law"); *Krause v Apodaca* (1960) 186 CA2d 413, 417, 9 CR 10 (trial judge in court trial not free to reject expert testimony on cause of fire when no other reasonable explanation); *Wirz v Wirz* (1950) 96 CA2d 171, 176, 214 P2d 839 (trial judge in divorce case not free to reject doctor's testimony on behalf of husband that wife was permanently insane, because testimony was uncontradicted and unimpeached; case affirmed, however, on another ground).

PRACTICE TIP: Consider the procedural posture of the appellate cases relied on to support your position on the conclusiveness of particular expert testimony. For example, appellate courts reviewing nonsuits look at the evidence as if the appellate court were the trier of fact, while a jury verdict is generally reversed on appeal only on a showing of prejudicial error. An appellate court might find the same expert testimony conclusive in one situation and not in another, depending on whether it is reviewing a judgment of nonsuit or a jury verdict.

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§5.6 B. When It Is Conclusive in Criminal Cases

In criminal cases, the trier of fact is entitled to decide the weight to give expert testimony. Pen C §1127b ("The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable"). See also *People v Jones* (1997) 15 C4th 119, 61 CR2d 386, overruled on other grounds in 17 C4th at 823 n1 (neither the court nor the jury is bound to accept any expert testimony as conclusive; a court or jury can disregard expert testimony if such testimony is found to be unreasonable).

Appellate courts reviewing trial verdicts in criminal cases usually show great deference to these verdicts. See *People v Samuel* (1981) 29 C3d 489, 505, 174 CR 684 (states rule). For example, in *People v Skinner* (1986) 185 CA3d 1050, 228 CR 652, and *People v Green* (1984) 163 CA3d 239, 209 CR 255, the appellate courts affirmed convictions despite unanimous expert testimony that the defendants lacked the necessary mental state to be found guilty. In *Skinner,* the court of appeal ruled that, despite unanimous expert testimony that the defendant was suffering from a "toxic cocaine psychosis," there was still sufficient evidence to sustain a finding that he could distinguish right from wrong, understand the nature and quality of his act, or both. In *Green,* despite the lack of any opposing expert testimony by the prosecution, the trial judge rejected the defense that several years of heavy drug use had so affected the defendant's brain as to preclude his having the necessary specific intent for kidnapping and robbery. In affirming the trial court, the court of appeal reiterated that the trier of fact is entitled to reject even unanimous testimony, particularly when experts speculate about a defendant's state of mind at the moment a crime is committed.

While neither *Skinner* nor *Green* discussed the substantial evidence test, that test is usually used to review the substantive guilt of a defendant and has been mentioned in several other cases involving unanimous expert testimony. See *People v Samuel, supra,* in which the supreme court reversed a finding that a defendant was competent to stand trial (see Pen C §1368) on the ground that the verdict was unsupported by substantial evidence. In *Samuel,* the appellate court found that the jury could not have reasonably rejected virtually uncontradicted evidence establishing that the defendant was not competent to stand trial. See also *People v Chavez* (2008) 160 CA4th 882, 891, 73 CR3d 189 (when there is conflicting expert testimony on issue of defendant's sanity and jury's determination of sanity is supported by substantial evidence, substantial evidence test applies to appellate review of sanity determination); *People v Duckett* (1984) 162 CA3d 1115, 1120, 209 CR 96 (appellate court reversed judgment finding defendant sane because evidence of insanity was so overwhelming that jury "could not reasonably reject it"); *People v Drew* (1978) 22 C3d 333, 350, 149 CR 275 (quoting from another case the court said, "[h]owever impressive this seeming unanimity of expert opinion may at first appear … our inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the jury's verdict"; sanity verdict reversed on other grounds).

NOTE: Sometimes it is unclear whether a particular type of proceeding in a criminal case should be reviewed as if it were civil or criminal. See the discussion of this issue in *People v Samuel* (1981) 29 C3d 489, 496 n3, 174 CR 684.

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Source: Civil Litigation/California Expert Witness Guide/5 Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect/§5.7 C. Effect of Inaccurate, False, or Perjured Expert Testimony

§5.7 C. Effect of Inaccurate, False, or Perjured Expert Testimony

The most effective remedies for those facing allegedly false or perjured expert testimony are those available to trial counsel before and during trial. Trial counsel can move to keep a witness from testifying if it can be proved that the witness has no personal knowledge of the matter to which he or she will testify. See Evid C §403(a)(2). Counsel can move to strike a witness's testimony, once given, because it is perjured under Evid C §§350 and 352. More commonly, trial counsel's remedy is impeachment, through cross-examination and the introduction of direct impeaching testimony or evidence. For extensive discussion and illustration of methods of impeachment, see Jefferson's California Evidence Benchbook, chap 28 (3d ed CJA-CEB 1997). For sample questions and answers involving impeachment of a witness, see Effective Introduction of Evidence in California, chaps 14-16 (character evidence), 19 (credibility), 20 (declarations against interest), 26-27 (felony convictions), 28 (former testimony), 38 (past recollection recorded), 44 (refreshing recollection) (2d ed Cal CEB 2000).

Suing for Attorney Fees or Sanctions

Although not the most effective remedy that can be sought during trial, suing for attorney fees or sanctions can allow parties who have been harmed by inaccurate or improper expert witness testimony to recoup some of their losses. For example, in *Depuy Spine, Inc. v Medtronic Sofamor Danek, Inc.* (D Mass 2008) 534 F Supp 2d 224, aff'd in part and rev'd in part (Fed Cir 2009) 567 F3d 1314, the district court ordered the payment of a portion of attorney fees as well as a $10 million sanction when the defendant asserted a patent infringement defense based on the testimony of two experts who attempted to undermine the mandatory Federal Circuit construction of the patent-in-suit. However, the Federal Circuit overturned the fees and sanctions award, concluding that although the reverse doctrine of equivalents defense is unusual and difficult to prove, that alone did not warrant assuming it had been asserted for the purpose of misleading and confusing the jury. *Depuy Spine, Inc. v Medtronic Sofamor Danek, Inc.* (Fed Cir 2009) 567 F3d 1314, 1339.

Suits Against Adverse Experts

The litigation privilege, CC §47(b), immunizes an expert from claims by an adverse party that the expert's testimony was perjured. *Carden v Getzoff* (1987) 190 CA3d 907, 235 CR 698. In *Carden,* the court held that one party to a marital dissolution proceeding did not have the right to pursue a tort action against an expert for the other party who supposedly gave perjured testimony. In sustaining a demurrer for the expert, the court of appeal held that CC §47(b) provides an absolute privilege for courtroom testimony and that the need to protect witnesses from the fear of subsequent civil suits by adverse parties outweighs the danger that particular witnesses will perjure themselves.

The privilege also protects neutral experts hired jointly by the parties to analyze issues in dispute, such as a neutral accountant retained by parties to a marital dissolution to aid in the resolution of community property and support issues. *Ramalingam v Thompson* (2007) 151 CA4th 491, 60 CR3d 11. Because the privilege protects only publications and communications that are communicative, a threshold issue is determining whether the defendant's conduct was communicative or noncommunicative; if the gravamen of the action is communicative, the privilege extends to noncommunicative acts that are necessarily related to the communicative conduct. *Rusheen v Cohen* (2006) 37 C4th 1048, 1058, 39 CR3d 516. The *Ramalingam* court held that even though the expert's investigation of the parties' stock and his alleged error in using the wrong vesting schedule may have been noncommunicative, it was his communication of his opinion regarding the stock that caused the plaintiff's alleged damages. Thus, the gravamen of the action was communicative and necessarily included all related noncommunicative conduct, such as work done in preparation for testifying. 151 CA4th at 503. Finally, the court of appeal rejected the plaintiff's argument that the litigation privilege applies only if the expert was retained to resolve disputes or make recommendations to the court. Rather, the privilege applies broadly to any publication used in judicial proceedings to achieve the objects of the litigation. 151 CA4th at 504.

Civil Code §47(b) does not, however, immunize an expert consultant against liability for statements to the press or to other persons who are in no way connected with the proceedings. *Susan A. v County of Sonoma* (1991) 2 CA4th 88, 3 CR2d 27 (psychologist who was retained by public defender to evaluate murder suspect and who later spoke to media

about results of evaluation was subject to suit for breach of confidence, invasion of privacy, defamation, and intentional infliction of emotional distress). See also Kesluik, *Cracks in the Shield*, The Recorder, Dec. 14, 1993, p 1 (listing instances in which courts have held expert witnesses legally accountable for actions in litigation).

In *Gootee v Lightner* (1990) 224 CA3d 587, 274 CR 697, one of the parties to a child custody dispute sought to pursue an action against a psychologist who had been retained by the parties to evaluate the family. The suit alleged that the psychologist had negligently administered various tests and wrongfully destroyed raw test data. The trial court granted a motion for summary judgment for the defendant psychologist, finding that the psychologist's conduct fell within the absolute testimonial privilege provided in CC §47(b). In so ruling, the court held that the testimonial privilege applies to matters logically related to the purpose of the proceeding, even though the specific conduct, such as the administration of psychological tests, occurred outside the actual courtroom. The court also refused to expand the tort action for "spoliation of evidence" to encompass an expert witness's failure to preserve notes or other work product generated in preparation to testify at trial. The tort of spoliation of the evidence has since been severely circumscribed in California. See discussion in §9.11.

The court in *Carden* suggested that a claimant's available remedies are to assist with the prosecution of criminal charges, to report the supposed allegations to the state agency that governed the expert's field of expertise (in this case, the Board of Accountancy), and to pursue a malpractice action against the claimant's own counsel for failing to demonstrate that the testimony in question was actually perjured. Perjured testimony can also be the basis for a motion for new trial (*Bowler v Roos* (1931) 213 C 484, 2 P2d 817) and a ground for a writ of coram nobis or coram vobis (*In re Mooney* (1937) 10 C2d 1, 73 P2d 554). Although there appears to be no cases on point, perjured testimony should also be subject to attack by a motion for nonsuit, for directed verdict, for mistrial, or for judgment notwithstanding the verdict, depending on which procedure is appropriate.

In the opinion of California's Attorney General, the bar on civil lawsuits against an adverse party's expert does not extend to professional disciplinary proceedings. A physician's standard of care testimony in a civil lawsuit may be subject to professional discipline by the Medical Board of California if the testimony constitutes unprofessional conduct. 87 Ops Cal Atty Gen 48 (2004).

Suits Against One's Own Experts

Civil Code §47(b) does not immunize an expert from suit by the party who retained the expert as a consultant or trial witness. *Mattco Forge, Inc. v Arthur Young & Co.* (1992) 5 CA4th 392, 6 CR2d 781. In *Mattco Forge,* plaintiff hired Arthur Young as an expert in an underlying action by plaintiff against General Electric. The judge in that case found that Mattco had created and produced fraudulent documents with the intention of artificially inflating Mattco's damages. The court ordered Mattco to pay General Electric $1.4 million in sanctions or have its case dismissed. The plaintiff then filed a separate action against Arthur Young alleging numerous theories, including professional malpractice, fraud, and negligence. The trial court granted summary judgment to Arthur Young on the basis of plaintiff's unclean hands and CC §47(b). The court of appeal reversed, finding that the sanction order in the underlying action did not collaterally estop plaintiff from suing Arthur Young. The court of appeal also found that the policies that underlie immunizing expert witnesses from suit by adverse parties have no applicability to suits by parties against their own experts. The court recognized that the policy of free access to the courts and encouragement of witnesses to testify would be damaged if the law allowed retaliatory lawsuits from adverse litigants who disagreed with the opinion being expressed. However, the court found that shielding a negligent expert from liability to the party who retained the expert would have the opposite effect and would inhibit access to the courts because parties would know that they would have to bear the penalty for the expert witness's negligence.

The trend permitting parties to sue their expert witnesses, as reflected in *Mattco Forge,* appears to be on the rise, according to one author. DeBenedictis, *Off-Target Opinions*, ABA J 76 (Nov. 1994). As highlighted in this article, the risks of these suits are substantial for potential experts:

- The judgment on remand against Ernst & Young in *Mattco Forge* totaled over $42 million in actual and punitive damages.
- In Alameda County, a serologist was hit with a $225,000 award for negligent forensic testing in a rape case. *Williams v Wraxall* (1995) 33 CA4th 120, 39 CR2d 658. Compare *Murphy v Mathews* (Mo Sup Ct 1992) 841 SW2d 671 (holding that immunity law does not protect experts who provide "litigation-related services for compensation") with *Bruce v Byrne-Stevens & Assoc.* (Wash Sup Ct 1989) 776 P2d 666 (holding that experts

are immunized from suit because they are deemed part of judicial process).

In *Lambert v Carneghi* (2008) 158 CA4th 1120, 70 CR3d 626, the court affirmed that "the litigation privilege does not apply to prevent a party from suing his own expert witness, even if that suit is based upon the expert's testimony." 158 CA4th at 1144. In *Lambert,* the court allowed homeowners to sue an appraiser that had been hired by their attorney specifically to testify about replacement costs, alleging that the appraiser had failed to properly present the owners' position in a fire insurance appraisal proceeding under Ins C §2071. By contrast, the court did not allow homeowners to maintain their suit against a second appraiser who was appointed by statute and required to be disinterested because he was performing a neutral dispute resolution function. 158 CA4th at 1136.

In *Pace v Swerdlow* (10th Cir 2008) 519 F3d 1067, 1075, a physician who had served as plaintiffs' expert witness in a state court medical malpractice action changed his opinion after reviewing the depositions of the defendant doctor and two nurses and decided that the defendant doctor's actions had not fallen below the professional standard of care. The Tenth Circuit concluded that the plaintiffs sufficiently alleged that the expert's last minute change of position as well as the timing of that change, which prevented plaintiffs from obtaining a new expert witness in time to defend against summary judgment, proximately caused them to lose the malpractice case. On remand, the district court was instructed to consider the alternative argument that expert witness immunity barred plaintiffs' claims.

Forensis Group, Inc. v Frantz, Townsend & Foldenauer (2005) 130 CA4th 14, 29 CR3d 622, involved a suit against a retained expert with an interesting twist. In that case, after the plaintiffs lost a motion for summary judgment based on an inadequate expert declaration, they sued the retained expert who had provided the declaration in opposition to the motion for professional negligence. The expert settled and pursued a cross-complaint for indemnity against the lawyers who had represented the plaintiffs. The expert alleged that the law firm had inadequately prepared him, failed to properly defend him at his deposition, and failed to provide an accurate portrayal of product liability law in the summary judgment motion.

In a case of first impression, the court of appeal held that the indemnity cross-complaint against the lawyers could be pursued and would not be barred as a matter of public policy. As far as the indemnity theory was concerned, the court reasoned that the expert and the law firm can and should be viewed as concurrently negligent professionals. In reaching this result, the court principally relied on §§8.29, 8.30, and 16.2 in this book, which describe the role of the lawyer in preparing an expert to testify and in preparing adequate expert declarations for summary judgment. With respect to the public policy considerations, the court held that the expert and the law firm could litigate the indemnity lawsuit without placing the law firm in a conflicting position versus its client or divulging client confidence. The expert was not seeking to prove a breach of duty by the law firm to its client, but simply to obtain indemnity based on proof that the law firm acted as a joint tortfeasor in causing the adverse summary judgment order to be entered in the underlying case.

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§5.7A D. Effect of Internally Inconsistent Expert Testimony: Question of Fact for the Jury

In *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 878, 151 CR 285, one of plaintiff's psychiatric experts testified that an individual had the mental capacity to know what he was doing and to know the nature and quality of his acts, but the same expert also testified that the individual did not know what he was doing at the time he shot the plaintiff's decedent because he was suffering from a paranoid delusion. The supreme court held that, even if this testimony was internally inconsistent, this fact did not require that the testimony be disregarded in its entirety or that the testimony was necessarily insufficient to support the verdict. Instead, the court found that it was for the trier of fact to determine whether an expert's testimony is internally inconsistent and, if so, to attempt to resolve the inconsistency, if possible.

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§5.8 E. When Expert Testimony Can Be Rejected as Matter of Law

In a series of cases that have grappled with the extent to which child molesters suffer from psychiatric disabilities that render their conduct nonwillful, the courts have held that judges have the right and power to reject even uncontradicted psychiatric testimony as a matter of law. For example, in *Fire Ins. Exch. v Abbott* (1988) 204 CA3d 1012, 1028, 251 CR 620, the court rejected uncontradicted expert testimony concerning the molester's mental disabilities as "inherently incredible." The California Supreme Court has since approved and expanded on this concept, noting that (*J.C. Penney Cas. Ins. Co. v M.K.* (1991) 52 C3d 1009, 1028, 278 CR 64 (and cases cited therein)):

> psychiatric testimony … that child molesters are really sheep in wolves' clothing—that their abuse of children is an attempt at affection … flies "in the face of all reason, common sense and experience."

The dissent in *J.C. Penney* criticized "this shocking attack on the science of psychiatry" (52 C3d at 1034) and charged the majority with "practicing psychiatry without a license and doing a terrible job of it" (52 C3d at 1030). It remains to be seen whether this concept will be expanded outside the emotion-charged area of child molestation. If it is, the appellate courts of California will have to provide both lawyers and trial judges with some explicit guidelines on where a judge's power to reject uncontradicted expert testimony begins and ends.

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§5.9 IV. FOUNDATIONAL ATTACKS ON CERTAINTY REQUIRED, ULTIMATE ISSUE, AND EFFECT OF EXPERT TESTIMONY

Certainty Required

The best check on an overly tentative expert opinion appears to be Evid C §352 and its grant of discretion to the court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. See *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1404, 55 CR3d 551 (evidence excluded as more prejudicial than probative).

Testimony on Ultimate Issue

Even when an objection to testimony on the ultimate issue is unavailable, objections on other grounds may be possible; *e.g.,* Pen C §29 prohibits experts from testifying on diminished capacity. See California Trial Objections §20.28 (Cal CEB Annual); California Criminal Law Procedure and Practice §§48.23-48.39 (Cal CEB Annual).

Counsel may be able to argue that the testimony involved concerns a question of law; experts are not allowed to give legal conclusions. See discussion in §5.3.

Effect of Expert Testimony

Counsel opposing expert testimony should determine first whether the proponent may assert that it should be given conclusive effect. If that is a possibility, counsel should consider obtaining his or her own expert so that the opposing expert's testimony will not be unopposed and thus conclusive. See §5.5.

Instructions can be quite helpful to counsel opposing particular expert testimony. California Civil Jury Instruction 221 (CACI) and Pen C §1127b tell jurors that they are to determine the weight, if any, to give expert testimony. Of course, cross-examination of opposing experts and argument also present opportunities for attacking the opposing expert's testimony.

Perjured Testimony

If testimony is determined to have been perjured during trial, it can be attacked in a number of ways. See §5.7.

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V. FEDERAL RULES OF EVIDENCE

§5.10 A. Certainty With Which Opinion Must Be Expressed

As in California state court cases, federal cases have drawn no clear boundaries concerning how certain an expert opinion must be to be admissible. In *Chaney v Smithkline Beckman Corp.* (8th Cir 1985) 764 F2d 527, the trial court was held to have properly refused to allow an expert to testify that there was a "strong possibility" ("probably greater than 20 percent and probably less than 80 percent") that a particular drug caused the plaintiff's stomach cancer. This opinion was considered too speculative to present to the jury. The court held that to ask jurors who lack scientific training to make a more precise diagnosis would invite the jury simply to guess where the causation probability fell within the 20-80 percent range. In a summary judgment motion in *Washington v Armstrong World Indus., Inc.* (5th Cir 1988) 839 F2d 1121, the trial court excluded testimony of the plaintiff's expert that the plaintiff's cancer was caused by exposure to asbestos on the ground that it was pure speculation and fundamentally unreliable, under Fed R Evid 703. The court of appeals noted that the problem with the expert's affidavit was its failure to connect the data to the decedent. The expert never actually concluded that the decedent's cancer was caused by asbestos exposure. He simply stated that such a link was statistically probable and could not be ruled out on the basis of the tests performed by the treating physicians.

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§5.11 B. Testimony on Ultimate Issue

Federal Rules of Evidence 704, which is very similar to Evid C §805 (see Advisory Committee's Note to Fed R Evid 704), provides that opinion testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. See, *e.g., U.S. v Logan* (10th Cir 1981) 641 F2d 860, 863. See also Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual §§3-704.01 to 3-704.04 (8th ed 2002).

Rule 704 does not, however, allow all opinions under the guise of their addressing an ultimate issue. *Owen v Kerr-McGee Corp.* (5th Cir 1983) 698 F2d 236, 240. Questions that allow a witness to tell the jury what result to reach are not permitted. In *Owen,* the witness was improperly asked: "Do you have any opinion as to the cause of the accident of July 8, 1978?" Rule 704(b) also limits opinion testimony on an ultimate issue in criminal cases:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

In *U.S. v Morales* (9th Cir 1997) 108 F3d 1031, the district court excluded an expert's testimony that defendant had a weak grasp of bookkeeping principles. The defendant had offered that testimony to help establish that she lacked the requisite mental state for the charges of embezzlement and willfully making false entries in union records, and to help the jury to infer from the expert testimony that her errors were due to ignorant but innocent mistakes. In addressing the exclusion of this testimony, the Ninth Circuit determined that Rule 704(b) applies to any expert—not just psychiatrists or other mental health professionals—who offers an opinion related to the mental state or condition of the defendant constituting the element of the crime. The court also concluded, however, that the expert testimony should have been admitted because it did not decide the ultimate issue of defendant's mental state as an element of the crime. The jury would have to make a further inference from defendant's weak grasp of accounting principles to reach the conclusion that she did not make the false entries willfully. See also *U.S. v Boyd* (DC Cir 1995) 55 F3d 667 (violation of Fed R Evid 704(b) when expert opinion that hypothetical facts, which exactly mirrored alleged facts surrounding defendant's arrest, showed possession with intent to distribute crack cocaine) and *U.S. v Webb* (9th Cir 1997) 115 F3d 711 (expert could testify about a typical situation in which criminals conceal weapons in cars).

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Source: Civil Litigation/California Expert Witness Guide/5 Expert's Opinion: Certainty Required, Testimony on Ultimate Issue, Effect/§5.11A 1. Questions of Fact versus Conclusion of Law

§5.11A 1. Questions of Fact versus Conclusion of Law

As under California law, experts in federal court cannot offer opinions phrased in terms of legal conclusions. *U.S. v Boulware* (9th Cir 2009) 558 F3d 971, 975 (expert testimony that corporate distributions were legally nontaxable properly excluded as legal opinion); *Owen v Kerr-McGee Corp.* (5th Cir 1983) 698 F2d 236. For example, in a will contest, it is permissible to ask an expert: "Did *T* have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" It is not permissible to ask: "Did *T* have the capacity to make a will?" *U.S. v Scop* (2d Cir 1988) 846 F2d 135. See also *Nationwide Transp. Fin. v Cass Info. Sys., Inc.* (9th Cir 2008) 523 F3d 1051, 1060 (trial court properly excluded expert's proposed legal conclusions on duties, obligations, and compliance under UCC); *Pelletier v Main St. Textiles, LP* (1st Cir 2006) 470 F3d 48, 54 (rejecting testimony from safety expert on applicability of OSHA regulations to defendant's conduct); *Bammerlin v Navistar Int'l Transp. Corp.* (7th Cir 1994) 30 F3d 898 (expert testimony regarding legal interpretation of Federal Motor Vehicle Safety Standards pertaining to truck-tractor seat belt assembly should have been excluded); *U.S. v Zipkin* (6th Cir 1984) 729 F2d 384 (prejudicial error to allow bankruptcy expert to testify on interpretation of bankruptcy law); *Stoler v Penn Cent. Transp. Co.* (6th Cir 1978) 583 F2d 896 (trial court correct in refusing to permit expert to testify that railroad crossing was "extra hazardous" under Ohio law); *In re Initial Public Offering Sec. Litig.* (SD NY 2001) 174 F Supp 2d 61 (disallowed testimony from ethics experts on whether judge should recuse herself under 28 USC §455); *Payne v A. O. Smith Corp.* (SD Ohio 1985) 627 F Supp 226 (disallowed proffered expert testimony that safety analysis performed according to rules of Consumer Product Safety Commission showed that defendants were required to recall their product).

In *Owen v Kerr-McGee Corp., supra,* the facts were undisputed that plaintiff, Owen, ran into a pipeline with his bulldozer, but plaintiff alleged that defendant was negligent in failing to provide adequate signs showing the location of the pipeline. Defendant's expert was asked to give his opinion as to the "cause of the accident." The court did not allow the expert to answer because the question of the legal "cause of the accident" was the issue the jury had to resolve after appropriate legal instructions by the court.

In *U.S. v Scop, supra,* the trial court was reversed because a prosecution expert on securities trading practices was allowed to testify that the stock in question had been manipulated and that certain individuals were active and material participants in the manipulation. The court stated that it would have been permissible for the expert to testify that controlled buying and selling of the kind alleged could create artificial price levels to lure outside investors. However, by going further and presenting his testimony in conclusory statements that drew directly on the language of the applicable statutes and regulations, the expert transcended his permissible province as an expert in securities trading.

Similarly, in *Breezy Point Coop., Inc. v Cigna Prop. & Cas. Co.* (ED NY 1994) 868 F Supp 33, a bad faith insurance case, the court refused to permit a legal expert to testify that the insured's delay in reporting various incidents was "unreasonable" and that the insured's behavior violated terms of the insurance policies under New York insurance law. The court held that both opinions expressed inadmissible legal conclusions and reaffirmed that the "function of informing the jury of the applicable law is reserved strictly for the court." 868 F Supp at 36. See also *Marx & Co. v Diners' Club, Inc.* (2d Cir 1977) 550 F2d 505, 508 (lawyer qualified as expert in securities regulation may testify as to ordinary practices of those engaged in securities business, but may not offer opinion as to the legal obligations of the parties under their contract); *Hygh v Jacobs* (2d Cir 1992) 961 F2d 359, 363 (expert's testimony that police officer's conduct was not "justified under the circumstances" violates Fed R Evid 704(a)).

The fine line between opinions of fact and mere statements of law was carefully analyzed by the Tenth Circuit in *Specht v Jensen* (10th Cir 1988) 853 F2d 805, a civil rights action in which the plaintiffs alleged that the defendants had searched their home and office without consent. The district court allowed the plaintiffs to call as an expert an attorney who testified that consent to the search had not been given and that, absent either consent or exigent circumstances, the search was illegal per se. On appeal, a three-judge panel originally affirmed admission of the testimony (*Specht v Jensen* (10th Cir 1987) 832 F2d 1516), but after a rehearing en banc, the court reversed. The court explained that the expert could have given an opinion that focused on a specific question of fact, even an ultimate

issue of fact in the case. Here, however, the expert had attempted to define the legal parameters within which the jury should exercise its fact-finding function. See *Hangarter v Provident Life & Acc. Ins. Co.* (9th Cir 2004) 373 F3d 998, 1017 (citing *Specht* and holding that expert's testimony that defendants' deviation from industry standards supported finding that they acted in bad faith was not equivalent of testimony to ultimate legal conclusion that defendants had acted in bad faith as matter of law).

PRACTICE TIP: If you are confronted with a close fact-versus-law question, the *Specht* opinion provides a good analytical framework for defining the expert's assignment so as not to cross the impermissible border between fact and law. See Thomason & Broderick, *Admissible Ultimate Issue Expert Testimony or Improper Legal Opinion; Where Is the Line to Be Drawn?,* ABA Section of Litigation, PC No. 5310171 (May 2001).

A particularly egregious example of a trial court's allowing an expert to testify concerning questions of law occurred in *Andrews v Metro N. Commuter R.R.* (2d Cir 1989) 882 F2d 705, a personal injury action arising out of a plaintiff's being run over by a train. The plaintiff, who was grossly intoxicated at the time of the accident, alleged that, while waiting for the train, he slipped on ice and debris, fell off the platform, and became disoriented. As a result, he walked down the tracks and failed to see or hear the oncoming train. The trial court allowed the plaintiff to call a "forensic engineer" who had no prior railroad experience, to testify to the following, among other issues:

- That it was "reasonable" after the plaintiff fell from the platform for him to walk along the railroad tracks;
- That "the railroad was negligent."

The appellate court remanded the case based on the trial court's error in permitting the expert to testify that it was reasonable for the plaintiff to walk on the railroad tracks and that the railroad was negligent.

Finally, note that a different analysis may be applicable under Fed R Civ P 44.1, when the issue involves a dispute over applicable foreign law. In *Universe Sales Co. v Silver Castle, Ltd.* (9th Cir 1999) 182 F3d 1036, the majority held that expert testimony could be considered on whether Japanese trademark law or contract law controlled in a royalties dispute. The majority further found that the district court erred in not considering an unrebutted expert declaration presenting and interpreting Japanese law as applied to the dispute.

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§5.11B 2. Interpretation of Writings

As is true under California law, federal cases generally do not admit expert testimony to interpret contractual language. Unless there is a need to clarify or explain a technical term of art, science, business or trade, Fed R Evid 702 precludes the use of expert testimony to decide what is essentially a legal question. *North Am. Specialty Ins. Co. v Myers* (6th Cir 1997) 111 F3d 1273 (expert report on proper meaning of terms in insurance contract held inadmissible absent a need to interpret ambiguous provisions or confusing technical terms, or to define or clarify terms of art, science or trade); *CMI-Trading, Inc. v Quantum Air, Inc.* (6th Cir 1996) 98 F3d 887 (expert's opinion on whether agreement was intended to be loan or joint venture held inadmissible because legal effect of the contract was an issue solely for the court).

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§5.12 C. Expert Testimony Not Usually Conclusive

In most types of cases, opinions testified to by experts are not binding on the trier of fact, and it is up to the trier of fact to accept or reject the expert's testimony. *Dorn v Burlington N. Santa Fe R.R. Co.* (9th Cir 2005) 397 F3d 1183 (it is for jury to decide between contradictory expert opinions; exclusion of defense expert's testimony discrediting plaintiff's damages expert was prejudicial abuse of discretion); *Mopkins v St. Louis Die Casting Corp.* (8th Cir 1978) 569 F2d 454; *U.S. v Bush* (5th Cir 1972) 466 F2d 236. That general rule applies even if the expert testimony is uncontradicted. *United States Steel Corp. v OSHA* (3d Cir 1976) 537 F2d 780. As in California, however, this general proposition has been qualified by some courts in certain cases involving professional malpractice. See, *e.g., Franklin Supply Co. v Tolman* (9th Cir 1971) 454 F2d 1059 (punitive damages reversed based on uncontradicted trial testimony of CPA experts). See also §2.4 (expert opinion conclusive in professional malpractice cases).

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§5.13 D. Effect of False or Perjured Testimony

New trials have been granted on the ground that the successful party relied in part on perjured expert testimony. In *Harre v A. H. Robins Co.* (11th Cir 1985) 750 F2d 1501, a personal injury action involving the Dalkon Shield, the plaintiffs won a reversal of an adverse jury verdict on the ground that a defense expert testified that he had conducted experiments on the product's tailstrings but admitted when he was deposed in another case that he had not done any tailstring experiments "other than to look at one, I think, under the microscope." See *Xanadu Maritime Trust v Meyer* (ND Cal 1998) 21 F Supp 2d 1104 (after trial, district court rejects plaintiff's expert testimony on design defect because it was deliberately misleading).

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I. ECONOMIC EXPERTS

§6.1 A. In General

There are almost as many subspecialties in the field of economics as in medicine. In choosing an economist, as in choosing a doctor, counsel should endeavor to select an individual whose field of expertise is as closely linked as possible to the subject matter of the case. A specialist in industrial organization should not be treated as interchangeable with one in finance and applied economics. Areas in which economic expertise is frequently needed are discussed in §§6.5-6.8.

On selecting, preparing, and presenting the testimony of economic experts, see Raffa & Haulman, *Utilizing Economic Experts*, 20 Trial 60 (Jan. 1984).

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§6.2 B. Accountants

In most cases in which financial data must be analyzed, it is useful to use the expert testimony of accountants on matters such as the cost of a clerical procedure, the value of an executive, the value of the stock of a closely held corporation, the value of goodwill, and whether markups should be included in damages. See, *e.g., Campbell v McClure* (1986) 182 CA3d 806, 227 CR 450 (accountant testified in fraud case involving sale of automobile salvage and rebuilding business).

Several larger accounting firms have established departments specifically assigned to assist in the preparation of cases, as well as to provide expert consultants and trial witnesses. See Dykeman, Forensic Accounting: The Accountant as Expert Witness (1982).

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§6.3 C. Actuaries and Annuitists

More than a century ago the United States Supreme Court held that standard life and annuity tables, showing a probable life expectancy and the present value of a life annuity, are competent evidence. *Vicksburg & Meridian R.R. v Putman* (1886) 118 US 545, 30 L Ed 257, 7 S Ct 1. See also *Chesapeake & Ohio Ry. v Kelly* (1916) 241 US 485, 492, 60 L Ed 1117, 1123, 36 S Ct 630, 632. The popularity of such testimony has increased dramatically since 1983, when Congress clarified the law to provide that damages received in personal injury actions are not taxable to the recipient, whether they are received in a lump sum or in periodic payments, provided that the victim is not in constructive receipt of the sum required to produce the periodic payments. 26 USC §104(a)(2). This provision has given rise to the so-called structured settlement in which the defendant purchases (and owns) an annuity but promises to pay the proceeds to the plaintiff. The structured settlement allows the plaintiff to receive both principal and interest on a tax-free basis, as contrasted with a lump sum settlement, in which the lump sum is tax free but the plaintiff must pay taxes on any income generated from that sum. Rev Rul 79-313, 1979-2 Cum Bull 75; Rev Rul 79-220, 1979-2 Cum Bull 74; Rev Rul 78-41, 1978-1 Cum Bull 148.

Defendants also find structured settlements attractive because they can frequently persuade plaintiffs to settle for a lower total sum than they would otherwise find acceptable, because all of the dollars received will be tax free.

In personal injury cases that do not settle, "annuitists" are frequently offered as expert witnesses by the defense in an effort to convince the trier of fact that through a tax-free annuity the plaintiff will be fully compensated by a lesser sum than the plaintiff is demanding. The acceptability of such testimony is still unsettled. The only reported California decision even to touch on the subject is *Emery v Southern Cal. Gas Co.* (1946) 72 CA2d 821, 826, 165 P2d 695, a wrongful death action in which the trial court refused to allow the plaintiff to call an actuary to present annuity tables in evidence concerning the present value of the heirs' future loss of support. The court of appeal reversed, holding that the evidence should have been permitted subject to an instruction that it was "not conclusive as to the amount to be awarded as damages, but is only one of several elements to be considered in determining the amount to be awarded." For discussion of federal cases on this issue, see §6.59.

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.4 D. Appraisers

§6.4 D. Appraisers

Any witness qualified to express an opinion on the value of property may do so. Evid C §813. Evidence Code §§810-824 deal exclusively with the permissible scope of expert testimony on the market value of property. Although extended discussion of §§810-824 is beyond the scope of this work, any practitioner who is involved in a condemnation proceeding, or a business, tort, or dissolution proceeding in which valuation of real property is an issue, should be familiar with these sections. See generally Condemnation Practice in California (3d ed Cal CEB 2005).

Appraisers can also be useful in various types of litigation, *e.g.,* valuing professional businesses in domestic relations disputes, art objects and antiques for insurance claims, machinery and equipment in fire claims, and forecasting the monetary earning power of certain classes of property when loss of income is in issue.

An appraiser's expertise extends well beyond giving an opinion on the market value of real property. A useful guide to the matters on which appraisers are competent to testify can be obtained from the American Society of Appraisers (ASA), 555 Herndon Parkway, Suite 125, Herndon, VA 20170, (703) 478-2228; fax (703) 742-8471, http://www.appraisers.org. Local chapters of the ASA are found in most metropolitan areas. The ASA puts out a professional appraisal services directory that provides the names of qualified appraisers and their areas of professional expertise. All consultants listed in it are tested and certified by the organization.

Appraisers fall into two broad categories:

(1) Those that value business and financial assets; and

(2) Those that value art, heirlooms, and personal property.

For further discussion of appraisers, see 1 Witkin, California Evidence, *Opinion Evidence* §§98-117 (4th ed 2000); Carlson, *Statutory Rules of Evidence for Eminent Domain Proceedings*, 18 Hastings LJ 143 (1966); Kraft, Using Experts in Civil Cases, chaps 6 (real estate, including eminent domain) and 9 (use of experts in matrimonial actions and court proceedings) (2d ed 1982).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.4A 1. Business and Financial Appraisers

§6.4A 1. Business and Financial Appraisers

Qualified business and financial appraisers frequently give opinions in such specialized areas as:

- Fairness of transactions, including share repurchases, acquisition, and divestitures;
- Intangible asset valuation, including issues relating to noncompete covenants, software, data bases, customer lists, contracts, and bank core deposits;
- Intellectual property, including issues regarding trade names, trademarks, patents, technology, and royalty/license agreements;
- Machinery and equipment valuation;
- Professional practice and license valuations;
- Real estate, buildings, and improvements valuation; and
- Stock or enterprise valuations, including minority or controlling equity interests, ESOPs, warrants, options, and buy-sell agreements.

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§6.4B 2. Art, Heirloom, and Personal Property Appraisers

Art, heirloom, and personal property appraisers frequently have subspecializations such as American crafts, antiquities and tribal art, arms and armor, decorative and fine arts, rare books and manuscripts, autographs, automobiles, books, Chinese rugs and textiles, clocks and watches, coins, collectibles, equines, fine arts, furniture and decorative arts, furs, gemstones, jewelry, judaica, musical instruments, oriental art, paintings, paper collectibles, photographs, porcelain, prints and drawings, rugs and tapestries, sculptures, silver, sports memorabilia, stamps, wine, and yachts.

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E. Using Economist's Testimony

§6.5 1. Division of Community Property

Economic experts can analyze and project the needs of the nonworking spouse and children for temporary and permanent support, project the working spouse's income flow, evaluate community property assets, and determine whether income-producing assets are being put to maximum use. See Kraft, Using Experts in Civil Cases, chap 9 (using experts in matrimonial actions and court proceedings) (2d ed 1982). See also §6.57 (vocational training consultants).

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§6.6 2. Lost Profits and Damages

Economic experts can calculate profits that a business has lost for many reasons. Some examples are:

- Breach of contract or other promise. *S. Jon Kreedman & Co. v Meyers Bros. Parking-Western Corp.* (1976) 58 CA3d 173, 130 CR 41.
- Wrongful encumbrance of assets. *Dean W. Knight & Sons v First W. Bank & Trust Co.* (1978) 84 CA3d 560, 148 CR 767.
- Employee's breach of covenant of noncompetition. *Macken v Martinez* (1963) 214 CA2d 784, 29 CR 867.
- Business operation interrupted or prevented from getting started. *Grupe v Glick* (1945) 26 C2d 680, 692, 160 P2d 832.
- Antitrust and restraint of trade. *Diesel Elec., Sales & Serv., Inc. v Marco Marine San Diego, Inc.* (1993) 16 CA4th 202, 20 CR2d 62 (adopting federal rule that damage issues in antitrust cases are rarely susceptible to kind of concrete, detailed proof of injury that is available in other contexts). See also §6.59.

For further discussion of lost profits, see Seabolt, *Lost Profits Damages: From Expert Testimony Through Jury Instructions*, 16 Cal Litig 4 (May 2003); Dunn, *Recovery of Damages for Lost Profits* (5th ed 1998); California Business Litigation (Cal CEB 2002).

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§6.7 3. Personal Injury and Wrongful Death Damages

Economic experts can calculate past and future lost earnings or earning capacity, including lost job opportunities, lost fringe and pension benefits, probable wage increases, the effects of inflation, and the factor by which an award should be reduced to reflect "present value." See CACI 3903C, 3903D, 3904; *Heiner v Kmart Corp.* (2000) 84 CA4th 335, 100 CR2d 854 (admitting expert testimony calculating plaintiff's lost future profits from dental practice); *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 662, 151 CR 399; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888; *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786. But see *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 1280, 78 CR2d 557 (no requirement that expert testimony on future earning capacity be presented before jury is entitled to determine compensation for loss of future earnings). See also Corboy, *Economic Experts in Tort Litigation*, 8 Litig 28 (Winter 1982).

In wrongful death actions, economic experts can project the decedent's probable income and earning capacity (*Syah v Johnson* (1966) 247 CA2d 534, 547, 55 CR 741) and personal consumption, as well as the heirs' loss of contribution and of value of household and other services performed by the decedent (CACI 3921, 3904; *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1229, 117 CR2d 849; *Irwin v Pacific Southwest Airlines* (1982) 133 CA3d 709, 717, 184 CR 228; *Fox v Pacific Southwest Airlines* (1982) 133 CA3d 565, 570, 184 CR 87). In *Rufo v Simpson* (2001) 86 CA4th 573, 103 CR2d 492, the court of appeal found that a trial court properly admitted expert opinion on the value of O. J. Simpson's name and likeness as an element of present net worth for the purpose of determining a punitive damage award in a wrongful death action.

On the other hand, economic experts are not allowed to opine on "hedonic damages," *i.e.,* the value of the enjoyment of life that is lost as a result of an injury or death. *Loth v Truck-A-Way Corp.* (1998) 60 CA4th 757, 70 CR2d 571. The plaintiff in that case offered testimony by an economist based on studies of what society is willing to spend on protective devices and mandated safety projects as well as the premium that must be paid to induce workers to perform hazardous jobs. From these studies the expert calculated a baseline enjoyment value for the plaintiff's life and then calculated what various percentage losses of that value were worth.

In reversing the judgment for the plaintiff, the court of appeal found the testimony to be prejudicial and inadmissible on multiple grounds:

- Hedonic damages are potentially duplicative of amounts awarded for pain and suffering;
- Loss of enjoyment of life is not sufficiently beyond common experience such that the opinion of an expert would assist the trier of fact;
- The experts' calculations were in no way based on the particular plaintiff;
- The testimony came dangerously close to constituting a forbidden "golden rule" argument (*i.e.,* asking the juror to decide what they would "charge" to change places with the injured plaintiff); and
- The testimony also came close to violating the rule against admitting other awards into evidence.

The defendant also argued that the hedonic damage methodology violated the *Kelly* test (discussed in §4.6), but the court found that it was unnecessary to reach this issue given the other, multiple bases for exclusion. Hedonic damages have been the subject of several federal cases and a number of articles; for discussion, see §6.60.

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§6.8 4. Tax Consequences

The California Supreme Court has never ruled on the admissibility of evidence by economic experts concerning the impact of income tax on lost earnings. The court has said only that the nontaxability of lost earnings awards is an "open" question in California. *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 12 n18, 84 CR 173.

Two California court of appeal decisions have held that the admissibility of the nontaxability of a personal injury or wrongful death award is discretionary with the trial court. *Irwin v Pacific Southwest Airlines* (1982) 133 CA3d 709, 717, 184 CR 228; *Fox v Pacific Southwest Airlines* (1982) 133 CA3d 565, 570, 184 CR 87. Another court, in *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 196 CR 82, found no prejudicial error in admitting evidence of a decedent's after-tax earnings and also held that it was error for the trial court to refuse to instruct the jury on the applicable discount rates for present cash values.

In 1977, in *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888, a division of the California court of appeal affirmed a trial court's refusal to permit cross-examination of the plaintiff's economist concerning the effect of income taxes on future earnings of the judgment. The court based its affirmance entirely on the defendant's failure to present evidence concerning future tax rates or the nontaxability of the judgment, implying that the question would have been proper but for this failure.

On the other hand, the court in *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 664, 151 CR 399, explained that what little California law exists on the subject "seems to favor the so-called 'majority' rule, which holds that income tax consequences are of no relevance in personal injury litigation."

For discussion of the Ninth Circuit rule on tax consequences, see §6.59.

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II. ENGINEERS

§6.9 A. Acoustical Engineers

Acoustical engineers specialize in the science of sound. They experiment with various sound levels emitted by, *e.g.,* machinery and transportation vehicles, to determine proper acoustical conditions. Acoustical engineers can examine noise levels present in a workplace to ensure they are within set standards and therefore will not harm employees.

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§6.10 B. Aeronautical Engineers

Aeronautical engineers are responsible for the design and testing of not only commercial and special purpose aircraft but also missiles, space vehicles, and satellites. Aerodynamic or thermodynamic engineers work primarily on the development of systems. Other engineers focus on more specific aspects of aircraft design and engineering and may act as consultants regarding such diverse areas as battery technology, propeller design, or spatial disorientation.

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§6.11 C. Biomechanical Engineers

Biomechanics is an interdisciplinary field that draws on both medicine and physics to determine the effect of forces on the human body, such as the effects of using (or not using) automobile seatbelts on the injuries suffered by a plaintiff. Biomechanical engineers can be either medical doctors or engineers who have training in this area. For further discussion of biomechanical testimony, see §4.13.

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§6.12 D. Ceramics Engineers

The work of ceramics engineers is similar to that of metallurgical engineers, except that they work with nonmetallic solids such as glass.

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.13 E. Chemical Engineers

§6.13 E. Chemical Engineers

Chemical engineers work on the development, manufacture, and/or control of chemical products, raw material (natural and synthetic) processing, petroleum refining, rubber production, chemical contamination, chemical corrosion, and food processing. They are concerned with the physical plant used to process materials (*e.g.,* pipes, boilers, pressure vessels), while chemists, whose work is often closely related, are more concerned with chemical reactions.

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§6.14 F. Civil Engineers

Civil engineers are responsible for (1) planning, designing, and building public and commercial buildings such as airports, terminals, and power plants; (2) planning and building highways, bridges, dams, tunnels, airport runways, and railroad rights-of-way; (3) hydrology (the control of water, water resources, flood control, and river and harbor development); (4) sanitation (air and water pollution; liquid, solid, and gaseous waste control) and radiological health problems; (5) soils and earthquake damage and geological problems; and (6) traffic engineering.

Subspecialties of civil engineering include structural, sanitation, or transportation engineering.

See Ryder, *How Good is Your Engineering Expert?* 92 Case & Com 14 (Jan.-Feb. 1987), which identifies and discusses five key factors in evaluating an engineering expert.

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§6.15 G. Electrical Engineers

Electrical engineers develop electrical machinery and power systems. They also work on problems related to electrical radiation, communications, computers, illumination, and electrical shock. For a case in which the testimony of an expert electrical engineer was critical to a design defect case, see *Aetna Cas. & Sur. Co. v Farmers Bros.* (1998) 65 CA4th 574, 76 CR2d 587 (testimony that heating element in coffee maker started fire sufficient to state prima facie case).

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§6.16 H. Health Chemistry Engineers

Health chemistry engineering is a relatively new field, which is concerned with radiation dangers from the health viewpoint. It encompasses safety aspects of radiation much as industrial or safety engineering deals with general safety problems.

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§6.17 I. Human Factors Engineers

Human factors engineering is a relatively new field, which is concerned with the safe design and manufacture of consumer products from the standpoint of function, probable users, anticipated use (and misuse), efficiency, cost benefit, and function. These engineers study human behavior and performance with regard to the design of products and systems. By testing and examining human experience in a given situation, such as an equipment operator in a workplace or under the stressful conditions of an accident, these specialists can determine the potential mental and physical reactions of those involved in similar situations, and from these results can create designs that will benefit potential users.

In addition to human factors specialists, whose orientation is similar to engineers and whose specialty is the interrelationship between human beings and machines, there are a growing number of human factors specialists with backgrounds in psychology, whose specialty is the interrelationship between human beings and their environment, including streets and highways, commercial areas, the workplace, and the home. A third area of human factors expertise has evolved that focuses on memory, perception, and linguistic and communications skills. Such experts are useful in establishing the adequacy or inadequacy of warnings in product liability and industrial accident cases. See, *e.g., New v Consolidated Rock Prods. Co.* (1985) 171 CA3d 681, 217 CR 522.

An excellent discussion of the availability and use of experts in the field of human factors or "ergonomics" to educate a jury appears in Weitz, *Educating a Jury—Ergonomics Experts as Witnesses*, Nat'l LJ 15 (Aug. 27, 1984). As the author notes:

> Through ergonomics, the skilled trial lawyer may guide the jury past the simple "cause of accident: driver inattentiveness" unthinkingly checkmarked on a policy accident report.
>
> Ergonomics is the study of the relationship between people and the products they use. This science has sometimes been described as biomechanics, biotechnology, engineering psychology, man-machine engineering, and human-factors engineering.
>
> The objective of human-factors engineering is to provide for safe and effective human use of products. The engineer's function is not limited to machine or product design, but includes all the tasks and the environment in which the worker will function. Using techniques of human factors analysis, the engineer does not conclude his investigation with the facile answer "worker's inattention." He asks, why was there such inattention. He knows that accidents are preventable and avoidable, and seeks to learn where the system failed and why.

The admissibility of human factors expert testimony was analyzed in *Scott v Sears, Roebuck & Co.* (4th Cir 1986) 789 F2d 1052. In *Scott,* testimony of a human factors witness was offered by the defendant to prove that a defect in a curb that caused a fall was open to view but not obvious. The defendant contended that the testimony was inadmissible because it dealt with probable human reaction to environmental conditions, which is within the "common knowledge" of jurors.

The Fourth Circuit noted that Florida courts had developed a rule that human factors testimony is admissible when there are unusual circumstances making it unlikely that the jury's common experience would enable it to resolve the factual issues presented. The court also noted that a slightly different approach was taken by the federal courts under Fed R Evid 702, under which the introduction of expert testimony is liberally permitted if it would assist the trier of fact to understand the evidence or to determine a fact in issue. However, under Rule 702, expert testimony is inadmissible if it relates to "common knowledge," not because it was within the common knowledge of lay jurors, but because it would be of no assistance to the jury in resolving fact issues.

In *Scott* the Florida rule and Fed R Evid 702 resolved the question of admissibility of human factors testimony in the same way. The expert's testimony that the defect in the curb was hidden because of the way it was designed was inadmissible because the jury had had the opportunity to personally view the scene and to review photographs that were in evidence. Whether the alleged defect was hidden from someone who was approaching the curb was within the jurors' perception and thus excludable under Fed R Evid 702. Under the facts of the case, however, the court held that testimony of the human factors witness that the yellow color of the curb might prompt the human eye to fill in discontinuities was not a matter within the common knowledge of jurors and thus was admissible to help the jury

understand the effect of color on human perception. In contrast to *Scott,* the court in *Westbrooks v State* (1985) 173 CA3d 1203, 219 CR 674, affirmed the rejection of testimony by a human factors psychologist specializing in transportation safety offered for the purpose of showing that an ordinary, prudent driver would have stopped at a traffic control point. The court held that the subject was not sufficiently beyond common experience to necessitate the assistance of an expert and thus was inadmissible under Evid C §801.

See Yules, *Human-Factors Experts in Products Liability Litigation*, 9 J Prod Liab 107 (1986). See also Messina, *The Human Factors Expert in Tort Litigation*, 20 Trial 38 (Jan. 1984).

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§6.18 J. Industrial Safety Engineers

Industrial safety engineers are primarily concerned with organizing and conducting the technical aspects of manufacturing operations, *i.e.,* the design of manufacturing systems and the prediction, control, and evaluation of the results obtained. Very often they are responsible for creating a safe environment for workers and protecting them against industrial accidents and diseases. Industrial engineers advise in the design, layout, and construction of plants and their equipment. They also attend to safety procedures in the production process, *e.g.,* developing rules and procedures for handling toxic substances, assuring proper ventilation, and providing safety clothing and equipment.

In *Troensegaard v Silvercrest Indus.* (1985) 175 CA3d 218, 225, 220 CR 712, testimony by a certified industrial hygienist was admitted to describe the symptoms experienced by individuals exposed to formaldehyde fumes.

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§6.19 K. Mechanical Engineers

Mechanical engineers design and build machines, vehicles (automotive, aeronautical, and maritime), propulsion systems, and a variety of mechanical equipment (*e.g.,* cranes, pipes, pumps). They work on heating, ventilation and air conditioning, air pollution, combustion and fires, vibration, friction, corrosion, lubrication, welding, power generation, and acoustical problems.

Automotive, petroleum, and aeronautical engineering are some of the subspecialties of mechanical engineering.

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§6.20 L. Metallurgical Engineers

Metallurgical engineers specialize in refining, alloying, and extracting metals from ores. They work with the chemical composition of metals and alloys, welding problems, and problems related to metal stress, fatigue, strength, and resistance to extremes in temperature. With the assistance of fractographs (photographs taken under an electron microscope), a metallurgist can determine the reasons for failure of an object, which can be crucial to the outcome of a variety of products liability and commercial disputes. See *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 669, 69 CR3d 888 (testimony by experts with degrees in mechanical metallurgy and mechanical and material engineering was permitted in wrongful death and products liability action to establish that allegedly defective motorcycle side stand was not manufactured by defendant).

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§6.21 M. Soils Engineers

Soils engineers are concerned with the natural and artificial condition of land and soil. They evaluate the causes of landslides, erosion, and earth movement, and the propriety of and care with which natural land conditions have been altered by landfill, soil compaction, water diversion and runoff, excavation, grading, and the erection of buildings and other structures.

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§6.22 N. Testing Engineers

An engineering specialty is emerging among engineers whose formal background is directed toward the testing of both component materials and finished products. Use of experts with that expertise is becoming increasingly frequent in products liability cases with claims of defective design.

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§6.23 III. JUDGES AS EXPERTS

Under Evid C §703, the presiding trial judge may not testify unless all parties consent. The section does not address testimony by a judge other than the presiding judge. In *Merritt v Reserve Ins. Co.* (1973) 34 CA3d 858, 110 CR 511, the judge who had presided at the trial of an underlying personal injury case, which resulted in an award in excess of the insured's policy limits, testified at the trial of the subsequent "bad faith" case against the original defendant's insurance company. The court of appeal reversed, holding that to permit testimony from the trial judge in a related case was prejudicial error and that the judge's testimony should have been excluded under Evid C §352 and former Canon of Judicial Ethics 4 (superseded by Cal Rules of Ct, Code of Judicial Ethics Canon 2).

In 1979, the legislature in effect codified *Merritt* by enacting Evid C §703.5, which provides that, with certain narrow exceptions, a judge cannot testify in any civil proceeding about any occurrences in a judicial or quasi-judicial proceeding at which he or she presided.

No case has yet decided whether someone other than the judge, such as a lawyer, can testify to what the judge did, said, or suggested, under Evid C §801(b). The answer to that question will depend on whether the courts conclude that, if the words do not come directly from the judge's mouth, the purpose of Evid C §703.5 has been satisfied, or whether they conclude that the opinion and statements of a judge are so likely to overimpress the jury that they should be precluded altogether. If the latter approach is adopted, the courts will then have to decide the treatment to be given judges' statements in subsequent nonjury proceedings.

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§6.24 IV. LEGAL EXPERTS

The permissible scope of expertise in legal malpractice cases poses special problems because these cases frequently concern questions of law, which ostensibly must be determined by the court. The law used to be that "once the facts underlying an action for attorney malpractice were established the question of the attorney's negligence was one of law to be determined by the court." There are still cases in which reasonable minds cannot differ on the question of whether the lawyer's conduct satisfied the requisite duty of care. In those cases, and when the lawyer's conduct has not been the proximate cause of any harm, the question is still one of law, not of fact, and expert testimony is not required. See *Stanley v Richmond* (1995) 35 CA4th 1070, 1093, 41 CR2d 768; *Wright v Williams* (1975) 47 CA3d 802, 808, 121 CR 194.

Expert testimony is proper on whether the attorney's conduct was negligent; however, if the issue of attorney malpractice is a true question of law, the testimony is irrelevant. *Wright v Williams, supra.* For example, when a legal malpractice case raises an issue of fact, expert testimony is proper, as in any other negligence action. *Starr v Mooslin* (1971) 14 CA3d 988, 996, 92 CR 583. See *Stanley v Richmond, supra.* See also §5.5 (conclusiveness of expert testimony in legal malpractice cases); Breslin & McMonigle, *Expert Testimony in Legal Malpractice Actions*, 6 Litig 30 (Fall 1979); Mallen & Smith, Legal Malpractice §§33.16-33.20 (5th ed 2000); Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 Kent LJ 1 (1986/1987); Brown & Tachna, *The Lawyer as Expert Witness*, 5 Cal Law 25 (Mar. 1985); Note, *Expert Legal Testimony*, 97 Harv L Rev 797 (1984).

The modern approach is supported by the statutory rules on judicial notice (Evid C §§450-452), which do not provide for the court to determine legal malpractice by resorting to its own experience, other than by taking judicial notice of the "'Rules of professional conduct for members of the bar….' (Evid C §451(c))." *Wright v Williams, supra*. See *Mirabito v Liccardo* (1992) 4 CA4th 41, 46, 5 CR2d 571 (expert testimony can be taken in legal malpractice action on attorney's duty under California Rules of Professional Conduct). See also *Smith v Lewis* (1975) 13 C3d 349, 118 CR 621 (supreme court upheld instructions allowing jury trial on issue of attorney's negligence).

The court of appeal in *Jeffer, Mangels & Butler v Glickman* (1991) 234 CA3d 1432, 286 CR 243, reversed the grant of a nonsuit in favor of the cross-defendants in an attorney malpractice case because the trial court had taken too narrow a view of the qualifications necessary to testify on, among other issues, the risk that the Federal Savings and Loan Insurance Corporation would take over a savings and loan. By analogy to cases involving medical malpractice, the court found that the failure of the expert witness to have actual experiential expertise on the precise issues involved did not disqualify the lawyer from acting as an expert. Private study of the subject area, contact with other professionals involved in the area, and practical experience with related issues sufficed.

The supreme court's decision in *Tech-Bilt, Inc. v Woodward-Clyde & Assocs.* (1985) 38 C3d 488, 213 CR 256, potentially has provided another area for the use of attorney experts. Under *Tech-Bilt,* a trial court is required to evaluate a case from a liability and damage perspective before determining whether a party's settlement is in good faith within the meaning of CCP §877.6. Part of the analysis necessarily must include the relative strengths and weaknesses of the parties' respective cases, including the plaintiff's, the settling defendant's, and those of any codefendants who are objecting to the settlement. Counsel for the parties themselves have always been the primary declarants and witnesses in these proceedings. Although this continues to be the case after *Tech-Bilt,* independent counsel could be provided with nonprivileged information concerning the action, including the pleadings filed in support of the good faith motion, and could then provide an opinion concerning the reasonableness of the settlement. Attorneys may find this independent testimony particularly useful when they are settling a case in an area in which they are relatively inexperienced.

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V. MEDICAL EXPERTS

A. Medical Doctors

§6.25 1. Use in Criminal Cases

Medical testimony is used in criminal cases in circumstances that range from proving whether a wound was self-inflicted (*People v Cole* (1956) 47 C2d 99, 103, 301 P2d 854) to the effects of heroin (*People v Hines* (1954) 128 CA2d 421, 424, 275 P2d 585). See also 1 Witkin, California Evidence, *Opinion Evidence* §§47-55 and 57-58 (4th ed 2000).

Forensic pathologists are frequently called to testify in criminal cases, particularly on the time and cause of death in homicide cases and on the effects of alcohol on the human body in drunk driving cases. Forensic pathologists are medical doctors who specialize in the nature and course of diseases. Imwinkelried, Scientific and Expert Evidence §1143 (2d ed 1981).

Defense attorneys can usually choose to elicit the information they want either from prosecution doctors on cross-examination or from their own experts on direct examination. Doctors who conduct examinations for the police, *e.g.,* in rape and child abuse cases, but who may not be called to testify at trial by the prosecutor can be subpoenaed by the defense to testify without being paid for their testimony, as long as it is limited to their examination of the victim. See Pen C §§1326, 1329-1329.1, 1331.

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§6.26 2. Use in Medical Malpractice Cases

Medical testimony is used by counsel for both sides in medical malpractice cases when a central issue is whether the defendant doctor has applied the degree of skill, knowledge, and care ordinarily exercised by other members of the medical profession under similar circumstances. *Bardessono v Michels* (1970) 3 C3d 780, 788, 91 CR 760. For example, in *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 71 CR3d 707, the court found that the trial court had erred in excluding the declaration of the appellant's sole medical expert because the expert did not say that he was familiar with the standard of care in Southern California. The court affirmed that the appropriate test for expert qualification in ordinary medical malpractice cases was not simply familiarity with the practices of a locality but whether the expert possessed the reasonable degree of skill, knowledge, and care ordinarily demonstrated by physicians under similar circumstances. 159 CA4th at 470. See also 1 Witkin, California Evidence, *Opinion Evidence* §46 (4th ed 2000); Gardner, *Malpractice and the Medical Expert*, 91 Case & Com 44 (Mar.-Apr. 1986).

In malpractice cases, a physician or a surgeon must usually have some occupational experience in the particular field at issue to be allowed to testify. *Huffman v Lindquist* (1951) 37 C2d 465, 476, 234 P2d 34. This is an area, however, largely left to the trial judge's discretion. See *Brown v Colm* (1974) 11 C3d 639, 646, 114 CR 128 (doctor who had not entered practice until several years after operation in issue was performed should have been permitted to testify in medical malpractice action). Testimony by a recognized specialist may also be required by statute. For example, Health & S C §1799.110 sets forth criteria for the admission of expert testimony in lawsuits against emergency room physicians. See §3.4 for further discussion of §1799.110.

PRACTICE TIP: Even when the medical expert has the occupational experience necessary to testify, there still needs to be an evidentiary basis for his or her testimony. An expert's opinion based on assumptions of fact that lack evidentiary support has no evidentiary value. See *Garibay v Hemmat* (2008) 161 CA4th 735, 743, 74 CR3d 715 (defendant did not meet burden of production required for summary judgment motion when its medical expert's opinion was based on hospital and medical records that had not been properly admitted into evidence).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.27 3. Use in Personal Injury and Workers' Compensation Proceedings

§6.27 3. Use in Personal Injury and Workers' Compensation Proceedings

Plaintiffs use the testimony of licensed medical doctors in personal injury litigation and workers' compensation proceedings to show:

- The nature and extent of the injuries.
- The causal relationship between the claimed injury or illness and the accident or event in issue.
- The nature, extent, duration, and degree of disability and suffering.
- The need for past and probable future treatment.
- The amount and reasonableness of charges for the treatment.

Similarly, defendants in these cases use medical doctors to:

- Refute false, exaggerated, or unsound claims of injury.
- Demonstrate the lack of a causal relationship between the alleged injuries and the defendant's claimed misconduct.
- Emphasize the availability and probable success of rehabilitation.
- Provide a more conservative assessment of the plaintiff's medical needs and expenses.

For further discussion, see California Personal Injury Proof §6.1 (Cal CEB 1970); 1 Witkin, California Evidence, *Opinion Evidence* §§45-46 (4th ed 2000); Lane, Med Trial Tech Q (1955-current year).

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§6.28 4. Use in Products Liability Litigation

Counsel for both sides use medical testimony in products liability litigation when the plaintiff alleges that a drug or other product has caused or contributed to plaintiff's illness, disease, or other medical abnormality. The following situations are illustrative: whether sulfuric acid fumes aggravated a dormant cancer (*Hagy v Allied Chem. & Dye Corp.* (1953) 122 CA2d 361, 368, 265 P2d 86); whether industrial workers' symptoms were caused by toluene poisoning (*Ruiz v Minnesota Mining & Mfg. Co.* (1971) 15 CA3d 462, 467, 93 CR 270); and whether lead poisoning exacerbated meningitis that led to death (*Travelers Ins. Co. v IAC* (1949) 33 C2d 685, 203 P2d 747).

Medical testimony may also be needed to prove whether asbestos causes asbestosis, other lung diseases, or mesothelioma (a particularly virulent form of cancer); whether diethylstilbestrol (DES) increases the likelihood of cancer in the offspring of the person who took the drug (*Sindell v Abbott Labs.* (1980) 26 C3d 588, 163 CR 132); and whether any of a host of so-called toxic elements, ranging from Agent Orange to dibromochloropropane (DBCP) cause sterility or increase the likelihood of cancer. See *Jones v Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 209 CR 456; Steinhart, *The Spectre of Toxic Substances*, 3 Cal Law 25 (Jan. 1983).

In combination with relevant psychiatric testimony (see §6.29), medical opinions may be necessary to establish serious and genuine emotional distress flowing from an objectively reasonable fear of contracting cancer or another disease in the future from exposure to a toxic substance. This testimony must raise such fears from the "merely subjective" to fears corroborated by relevant and admissible "medical and scientific opinion." *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 25 CR2d 550.

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B. Psychiatrists and Psychologists

§6.29 1. In General

A psychiatrist is a medical doctor who specializes in the study, treatment, and prevention of mental illness. A psychologist is a scientist who generally has either an M.S. or a Ph.D. degree and who specializes in the study of the mind and mental processes, particularly in relation to human or animal behavior. Within both branches, there are numerous subspecialties.

While there are differences of opinion among practitioners in all medical fields, from orthopedics to neurology, the level of disagreement is considerably greater in psychiatric and psychological communities.

Counsel dealing with psychiatrists should be aware of the vast gap in thinking between psychoanalysis, with its weekly therapy sessions, on the one hand, and organic psychiatry, on the other, which believes that most mental illness is traceable to chemical or electrical imbalances in the brain, and relies heavily on corrective medication. See, *e.g.,* Andreasan, The Broken Brain (1984).

Similarly, within the psychological community, there is ongoing debate over the reliability and validity of clinical judgment, as evidenced by the ever-quickening pace at which the American Psychiatric Association has been revising its Diagnostic and Statistical Manual of Mental Disorders (DSM). The scientific literature now carries articles from scholarly psychologists and psychiatrists questioning the ability of practitioners of their discipline to express opinions with "reasonable medical certainty," and cites studies supposedly demonstrating "that professional clinicians do not in fact make more accurate clinical judgments than lay persons." Faust & Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 Science 31, 32 (1988). See also Faust & Hart, *Pediatric Malingering: The Capacity of Children to Fake Believable Deficits on Neuropsychological Testing*, 56 J Consulting & Clinical Psychology no. 4, 578 (1988). For an excellent discussion of the nature of expert witness testimony dealing with the fear of future disease, see Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims and Toxic Tort Cases*, The Brief 11 (Summer 1996). See also *Barron v Martin-Marietta Corp.* (ND Cal 1994) 868 F Supp 1203, 1211 (court rejected plaintiffs' claim for damages for fear of cancer; found plaintiff failed to meet second prong of the *Potter* test (*Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 25 CR2d 550) that requires plaintiffs to show fear stems from knowledge corroborated by reliable medical or scientific opinion).

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§6.30 2. Use in Civil Cases

Among the variety of contexts in which psychiatric testimony is used in tort litigation are:

- When plaintiff claims to have suffered emotional distress or mental suffering because of the defendant's conduct. *Agarwal v Johnson* (1979) 25 C3d 932, 160 CR 141. See also 5 Witkin, Summary of California Law, *Torts* §§381-468 (10th ed 2005).
- When plaintiff claims to have suffered emotional distress or mental suffering because of physical injury. *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 893, 103 CR 856. See also 6 Witkin, Summary, *Torts* §§1409-1413. Plaintiff claims to have suffered emotional distress without impact or injury, *e.g.,* from being involved in a traumatic incident (*Di Mare v Cresci* (1962) 58 C2d 292, 301, 23 CR 772), or from witnessing a traumatic incident to a close relative (*Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831; *Dillon v Legg* (1968) 68 C2d 728, 69 CR 72; see also 6 Witkin, Summary, *Torts* §§891-1037).
- In child custody proceedings when the mental health of the child or either parent is in issue. *Colombo v Colombo* (1945) 71 CA2d 577, 582, 162 P2d 995. See also Kirkland, Lurvey, & Richmond, California Family Law Practice and Procedure §33.09 (2d ed 1978).
- When plaintiff has a fear of contracting a disease in the future. Hazlett, Maskin, & Hersch, *Diagnostic Approaches to Assessing Fear-of-Disease Claims in Product Liability and Toxic Tort Litigation*, BNA Product Safety & Liability Rep 1186 (Dec. 20, 1996).

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§6.31 3. Use in Criminal Cases

Testimony on mental health is used in criminal cases when lack of mental intent is offered as a defense (Pen C §§28-29), when insanity is asserted (Pen C §1017), and in incompetence to stand trial proceedings (Pen C §1368). It may also be relevant when the mental health of a witness is in question. Evid C §701; *People v St. Andrew* (1980) 101 CA3d 450, 161 CR 634. See also generally Jefferson's California Evidence Benchbook §§26.4-26.12 (3d ed CJA-CEB 1997).

PRACTICE TIP: Note that only a psychiatrist or a psychologist may be appointed by the court to determine the mental status of a defendant who has entered a plea of not guilty by reason of insanity. Pen C §1027(a).

Expert testimony, usually of a licensed psychologist, is also being offered with increasing frequency to show the vagaries of eyewitness testimony. *People v McDonald* (1984) 37 C3d 351, 208 CR 236, is the seminal case. See discussion in §4.18.

Testimony of psychotherapists is frequently elicited in cases involving the victims of abuse or rape to explain the behavior, actions, and reactions of those who are subjected to assaults. The emerging areas of expertise include "rape trauma syndrome," "child sexual abuse syndrome," and "battered woman syndrome." The admissibility of this type of testimony has met with mixed results and depends on a variety of factors controlled by the *Kelly* test and the purpose for which the testimony is offered. See *People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 (jury could consider psychiatric testimony on battered woman syndrome in deciding whether defendant actually believed it was necessary to kill in self-defense and in deciding whether that belief was reasonable); *People v Williams* (2000) 78 CA4th 1118, 93 CR2d 356 (properly qualified expert may testify to battered woman syndrome to explain inconsistent statements attributed to victim); *People v Gadlin* (2000) 78 CA4th 587, 92 CR2d 890 (properly qualified expert may testify to battered woman syndrome when it is relevant to contested issue at trial other than whether criminal defendant committed charged acts of domestic violence). See §§4.28-4.34.

The testimony of mental health professionals can also be relied on to determine whether a defendant is dangerous or likely to be dangerous within the meaning of the Sexually Violent Predators Act (Welf & I C §§6600-6609.3). *People v Therrian* (2003) 113 CA4th 609, 6 CR3d 415; *People v Ward* (1999) 71 CA4th 368, 371, 83 CR2d 828.

For further discussion generally, see California Criminal Law Procedure and Practice, chaps 22 (lineups and identification) and 48 (mental competence, mental defenses, and related issues) (Cal CEB Annual).

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§6.32 C. Nondoctor Medical Experts

A witness need not be a licensed medical doctor to give expert testimony on a medical issue. Psychologists, physiologists, therapists, psychotherapists, chemists, chiropractors, technicians, MSWs (persons with a master's degree in social work), and nurses may all qualify to offer expert opinions in limited medical areas. For example, a nurse can testify to the cause of death of a child under nursing care (*Longuy v La Societe Francaise* (1921) 52 CA 370, 376, 198 P 1011), a chiropractor can testify about orthopedic injuries and their causes (*Johnston v Peairs* (1931) 117 CA 208, 216, 3 P2d 617), a psychologist can testify that an accused murderer is suffering "a temporary functional psychosis" (*People v Davis* (1965) 62 C2d 791, 800, 44 CR 454), and a licensed clinical social worker can testify that the actions and responses of an alleged rape victim are consistent with those of rape victims generally to help the jury evaluate the victim's credibility (*Delia S. v Torres* (1982) 134 CA3d 471, 478, 184 CR 787, disapproved on other grounds in *Christensen v Superior Court* (1991) 54 C3d 868, 905 n28, 2 CR2d 79). See generally 1 Witkin, California Evidence, *Opinion Evidence* §41 (4th ed 2000).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.33 D. Needed Specialization

§6.33 D. Needed Specialization

In malpractice cases, a physician or surgeon must usually have some occupational experience in the particular field at issue to be allowed to testify. *Huffman v Lindquist* (1951) 37 C2d 465, 476, 234 P2d 34. For further discussion of using experts in malpractice cases, see §6.26 (medical malpractice cases). Otherwise, there is generally no need for a licensed physician to have any special training or experience in the particular subject matter in issue.

The following are examples of issues on which physicians with no special training or experience were allowed to testify:

- An eye, ear, nose, and throat specialist, who was not a psychiatrist, could testify about testamentary capacity. *Estate of Gore* (1953) 119 CA2d 796, 798, 260 P2d 859.
- A general practitioner, who was not an infertility expert, could testify about sperm survival. *People v Haney* (1967) 249 CA2d 810, 817, 58 CR 36.
- A general practitioner, who was not an ophthalmologist, could testify about impaired vision. *Thompson v City of Long Beach* (1953) 41 C2d 235, 241, 259 P2d 649.
- A pathologist, who was neither a gynecologist nor a surgeon, could testify about gynecological surgery. *Cline v Lund* (1973) 31 CA3d 755, 766, 107 CR 629.
- A podiatrist with good credentials could testify on what standard of care the defendant medical doctor should have used in treating the plaintiff's foot injury. *Chadock v Cohn* (1979) 96 CA3d 205, 214, 157 CR 640 (following *Brown v Colm* (1974) 11 C3d 639, 114 CR 128).
- A surgeon, who was not a neurologist, could testify about the nature and causes of brain injuries. *Rash v City & County of San Francisco* (1962) 200 CA2d 199, 206, 19 CR 266.

Without special training, however, physicians and surgeons are not qualified to give expert testimony on matters *other* than medical practice and procedure. For example, a physician was not qualified to testify about the chemical composition or tensile strength of tubing that kinked during surgery, nor was he qualified to testify that the tubing walls were defective. *Putensen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1080, 91 CR 319. See also *Baptist v WCAB* (1982) 137 CA3d 903, 187 CR 270, discussed in §4.40.

For discussion of when expert testimony is conclusive, see §§5.5-5.6.

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§6.34 VI. POLICE OFFICERS

The areas in which police officers are qualified to give technical opinions vary widely according to the training and expertise of the individual officers. Some of the subjects on which properly qualified officers have been allowed to testify include:

- Cause of automobile collision. *Wells Truckways, Ltd. v Cebrian* (1954) 122 CA2d 666, 676, 265 P2d 557.
- Impact point of automobile accident. *Kastner v Los Angeles Metro. Transit Auth.* (1965) 63 C2d 52, 57, 45 CR 129; *People v Haeussler* (1953) 41 C2d 252, 261, 260 P2d 8. But see *Applegate v Wilson* (1957) 156 CA2d 330, 332, 319 P2d 401 (refusing to permit such testimony).
- Ballistics. *People v Parks* (1968) 263 CA2d 490, 495, 69 CR 368.
- Whether heroin injection 8 months earlier would leave a scar. *People v Cruz* (1968) 260 CA2d 55, 58, 66 CR 772. See also 1 Witkin, California Evidence, *Opinion Evidence* §44 (4th ed 2000).
- Whether odor emanating from luggage was the same odor associated with cocaine and therefore sufficient to arouse a reasonable suspicion to conduct a search. *People v Shandloff* (1985) 170 CA3d 372, 215 CR 916.
- The modus operandi of armed robbers. *People v DeWitt* (1983) 142 CA3d 146, 151, 190 CR 726.
- The effect of the drug PCP on a person's ability to exercise rational intellect and free will. *People v Loftis* (1984) 157 CA3d 229, 236, 203 CR 590 (whether suspect knowingly waived *Miranda* rights when under effects of PCP at time of confession).
- A drunk driving suspect's blood-alcohol level on the basis of a lateral gauge nystagmus test, which measures the angle of oscillation of the suspect's pupils. *People v Loomis* (1984) 156 CA3d Supp 1, 203 CR 767. See also *People v Ojeda* (1990) 225 CA3d 404, 275 CR 472.

See also §4.49 on the admissibility of police accident reports.

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VII. OTHER AREAS OF EXPERTISE

§6.35 A. Determining Appropriate Specialty

The number of areas of technical expertise are virtually unlimited. Representative lists of areas are found below in §§6.36-6.58, and in California Personal Injury Proof §§5.3-5.7 (Cal CEB 1970).

Sometimes an expert will possess expertise in more than one area or have sufficient training or experience to qualify as an expert on certain issues in another specialty. These lists are thus only a general guideline to suggest where the lawyer may start searching.

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B. Description of Specialists

§6.36 1. Accident Analysts

Accident analysts are frequently mechanical or civil engineers, or physicists, but they can also be active or retired police officers and private investigators. They can provide assistance on a variety of issues in vehicular and pedestrian accident cases, including:

- Point of impact, angle of collision, and direction of travel. *Kastner v Los Angeles Metro. Transit Auth.* (1965) 63 C2d 52, 57, 45 CR 129; *Wells Truckways, Ltd. v Cebrian* (1954) 122 CA2d 666, 674, 265 P2d 557.
- Determination of speed and stopping distance. *Ungefug v D'Ambrosia* (1967) 250 CA2d 61, 65, 58 CR 223; *Hoffman v Slocum* (1963) 219 CA2d 100, 104, 32 CR 635; *Linde v Emmick* (1936) 16 CA2d 676, 685, 61 P2d 338.
- Reconstruction of accident, including probable cause. *Franck v Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 CA3d 1107, 1115, 204 CR 321 (testimony of accident reconstructionist on snowmobile accident supports finding of liability for defective design under *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 143 CR 225, discussed in §8.28); *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 397, 185 CR 654; *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 537, 138 CR 705; *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 274, 129 CR 146; *Self v General Motors Corp.* (1974) 42 CA3d 1, 116 CR 575, overruled on other grounds in 8 C4th 548.
- Automobile design. *DeLeon v Commercial Mfg. & Supply Co.* (1983) 148 CA3d 336, 195 CR 867. The court of appeal reversed a summary judgment for the defendant in a strict liability case concerning whether custom-made factory equipment, which was safe for use in some locations, was so defective when near other equipment as to produce a danger. The court found that the trial judge had erred in rejecting expert testimony concerning the necessity and feasibility of design changes, including testimony that the product in question was improperly located in its environment.

Reconstruction has traditionally been done on the basis of physical evidence, such as skid marks and examination of the vehicles involved. See Barzelay & Lacy, Personal Injury: Scientific Automobile Accident Reconstruction (Matthew Bender 2001). Although there are no reported California cases dealing with the admissibility of computer simulations to reconstruct accidents, there are a number of decisions on the issue from other jurisdictions. See Barzelay & Lacy, Scientific Automobile Accident Reconstruction (SMAC and CRASH Computer Reconstruction Programs).

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§6.36A 2. Accountant Experts

As noted in §6.2, accountants can be useful in providing testimony supporting various economic issues that arise in civil cases. An accountant's professional expertise may also be required, however, in cases alleging accountant malpractice. The rules developed for accountants are similar to those for physicians and attorneys. Thus, in cases in which a particular accounting specialty is involved (*i.e.*, auditing), retain an accountant with a background in that area. In preparing an accounting expert to testify, the burden of proof should also be considered. When a plaintiff alleges that he or she suffered losses because of an accountant's malpractice, the "trial-within-a-trial" approach used in attorney malpractice cases applies to accountants as well. See *Mattco Forge, Inc. v Arthur Young & Co.* (1997) 52 CA4th 820, 60 CR2d 780.

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§6.37 3. Agronomists

Agronomists study crop protection and crop-related problems. This group can include soil scientists and irrigation engineers. Soil scientists perform experiments on soil conditions and characteristics, which help to determine proper growing conditions for particular crops. This information is also useful to irrigation engineers, who develop water transport systems.

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§6.38 4. Anthropologists

Anthropologists are not commonly used in litigation. An imaginative defense counsel obtained an acquittal in a bank robbery case in Philadelphia, however, after a biological anthropologist testified that the defendant was not the person filmed by a bank's surveillance camera. See Tulsky, *Anthropology 1; Eyewitness I.D. 0*, Nat'l LJ, p 3 (July 23, 1984). And, in a title boundary dispute, the issue of whether National City, California, was a town or a village in 1871 was decided in part on the testimony of an anthropologist. *Dillon v San Diego Unified Port Dist.* (1972) 27 CA3d 296, 304, 103 CR 765. See also chap 7.

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.39 5. Architectural Consultants

§6.39 5. Architectural Consultants

Architects, architectural engineers, and other architectural consultants specialize in building design and construction. Environmental planners design housing, offices, and multipurpose projects on a large scale. A variety of engineers may be involved in architectural projects, including geological, geotechnical, and structural engineers. Architects can act as consultants in such areas as steel construction, lighting fixtures, and lighting conditions.

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§6.40 6. Chemists

Chemists deal with chemical reactions. They study the composition of various kinds of matter in their different states (gaseous, liquid, solid, solution, colloidal), their changes in composition, and the accompanying energy phenomena. Inorganic chemists study the properties and behavior of chemical elements and their inorganic compounds with a view to their application in research and industry. Organic chemists deal with carbon-containing substances, biochemists with processes and products of living organisms, and agricultural chemists with such subjects as soil, fertilizers, and insect pests.

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§6.41 7. Climatologists and Meteorologists

Climatologists and meteorologists study temperature, humidity, snow, rain, sunshine, clouds, and other weather phenomena. They can also give data on times of sunrise and sunset. See *Clarkson v Townsend* (8th Cir 1986) 790 F2d 676, 677 (testimony of professor of atmospheric science on wind conditions at approximate time and location of accident held admissible when plaintiff's theory of case was that strong gust of wind caused defendant to lose control of semi-tractor trailer).

Frequently, counsel's needs can be met by having the trial court take judicial notice of United States Weather Bureau reports (see Evid C §452(h)). Certified copies of weather reports for California may be obtained from the United States Dep't of Commerce, National Climatic Data Center (NCDC) of the National Oceanic and Atmospheric Administration (NOAA), Federal Bldg., 151 Patton Ave., Room 120, Asheville, NC 28801-5001, (828) 271-4800; fax: (828) 271-4876, http://www.ncdc.noaa.gov.

Although meteorology is commonly thought of as synonymous with weather forecasting, it is, in fact, a broad discipline concerned with the past, present, and future condition of the earth's atmosphere, including its physics, chemistry, motions, processes, and influences. Meteorologists are able to retrieve data concerning climactic conditions that were not specifically observed or recorded, such as wind-chill equivalent temperature, the force of wind on exposed objects of differing geometry, the energy of direct sunlight striking a flat surface of differing orientation, the weight of snow on the ground, the degree of natural illumination at dawn or dusk, the available visibility under fog or rain conditions, the survival of ice on paved surfaces, and the probable dispersion pattern of airborne pollutants. Meteorologists can opine whether a particular weather event was predictable or whether it was unanticipated given the place or time of year that it occurred. See, *e.g., Connelly v State* (1970) 3 CA3d 744, 84 CR 257 (marina owner allowed to maintain cause of action against government; owner pleaded facts taking him out of realm of general public receiving weather information and into position of businessman making personal inquiry and relying on weather data). Similarly, they can determine whether the condition appeared with or without warning.

For further discussion of meteorology, see Falconer, *Weather Expertise in the Courtroom: Is the Climate Finally Right for Forensic Meteorology?,* 30 For the Defense 13 (Dec. 1988); Loper, *Red Sky in the Morning, Forecasters Take Warning: The Liability of Meteorologists for Negligent Weather Forecasts*, 66 Tex L Rev 683 (1988).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.41A 8. Computer Forensic Experts

§6.41A 8. Computer Forensic Experts

Computer forensics is the application of specialized knowledge and techniques for the preservation, recovery, authentication, and analysis of electronically stored information (ESI). Electronic evidence must be carefully handled because it can be easily despoiled and its chain of custody can be broken. A qualified expert in the field of computer forensics should be trained to handle ESI in a way that keeps the data and its metadata intact. This requires specialized expertise that includes not only normal data collection and preservation but also extends to the recovery and analysis of active and deleted data. Computer forensics experts are needed when a case involves the analysis or authentication of data and computer usage.

Data that has been damaged or destroyed must be forensically recovered in a defensible manner, a process that also requires the skills of a computer expert. Data that must be recreated or recovered from system "slack" space requires an expert declaration to describe how this recovery was accomplished so that the data recovery or repair meets accepted standards. This is true for the data that may be recovered or repaired as well as the "invisible data" that a computer file maintains about itself, known as the metadata. Metadata, such as the automatic tracking each time a word processing file is modified, can become altered or corrupted along with the standard computer data. The astute computer forensic expert must be able to identify metadata that is preserved and authentic from that which has been altered or despoiled.

Computer forensics is critical to cases that turn on the presence or absence of ESI as evidence that can prove or disprove a fact of consequence in a lawsuit or presuit investigation. For example, a disgruntled employee leaves company A to join competing company B, and company A has reason to believe that proprietary and confidential electronic data belonging to company A, such as a client list, now appears on company B's hard drives.

A computer forensic expert should possess the ability to harvest ESI from the subject hard drives, and should be able to report what data may have been added, deleted, or modified as well as when and by whom. A qualified computer forensics expert can document via written declaration or live testimony how he or she handled or examined ESI without altering it so that it does not become inadmissible.

The forensic technologist can help attorneys as well as judges and juries understand the nature of ESI and how it pertains to a case; identify which drives to target for investigation; filter irrelevant data; find and access hidden or encrypted information that is germane to a lawsuit; describe how data has been manipulated or deleted by a party to the action; and assist the court or jury regarding the intent of the party who manipulated or deleted such data. A computer forensic expert can act as an interpreter of sorts, to describe to a lay judge or jury the way in which digital information should be considered or disregarded within the context of a dispute.

A computer forensic expert is also often needed to assist in electronic discovery (e-discovery). An outside expert who handles the collection and production of data and who can testify about the methods used can be useful for demonstrating a good faith effort to comply with the client's discovery obligations. Involving an outside expert also frees up client resources from a time-consuming task that requires specialized knowledge. On e-discovery, see California Civil Discovery Practice, chap 4 (4th ed Cal CEB 2006).

A computer forensic expert should be properly credentialed and experienced. In fact, many judges will not qualify a computer forensic consultant as an expert witness unless that person holds a relevant certification. Although the field of computer forensics is relatively new, several professional organizations provide certification. Common certifications include:

- EnCase Certified Examiner (EnCE);
- Certified Handheld Examiner;
- Certified Novell Engineer;
- Microsoft Certified Professional + Internet;
- Microsoft Certified Systems Engineer;
- NT Certified Independent Professional; and
- Certified Internetwork Professional.

NOTE: A certified computer forensic examiner falls within the broader category of forensic technologist; however, not all forensic technologists have the training to be a computer forensic examiner.

PRACTICE TIP: Due to the rapid increase in use of electronic evidence, many people hold themselves out as computer forensic "experts." It is important for counsel to distinguish between the skills needed for forensic technology and those needed to write computer programs or administer an information system.

In addition, a background of publishing, teaching, and lecturing in the field, plus prior experience serving as an expert witness, will help to qualify a computer forensic examiner as a strong expert witness.

The following are a few sample questions for preparing your expert to qualify as a computer forensics expert, and for examining the opposing party's expert:

- What are your certifications?
- What degrees have you earned, and from which institutions?
- Have you testified before in a court of law? If so, which courts, when, and how many times?
- Were you ever disqualified as an expert witness?
- How many years' experience do you have?
- Have you engaged in forensically sound data harvesting? If so, what tools were used and what type of media were acquired? Did you engage in full bit-by-bit imaging or did you target collect specific files?
- How do you maintain a chain of custody for data you handle and/or examine?
- How do you authenticate the data that you encounter?
- Have you examined and analyzed data on a local hard drive?
- Have you examined and analyzed data on a network drive?
- Have you examined and analyzed data on an e-mail server or file server?
- Have you examined and analyzed data on backup tape or archival media?
- How often do you examine media and report or testify as to your findings?

On computer forensic investigations in corporate environments, see Scientific Evidence in California Criminal Cases, chap 14 (Cal CEB 2008).

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§6.42 9. Environmental Experts

Environmental litigation growing out of state and federal government regulations aimed at cleaning up hazardous wastes has given a boost to this area of expertise. One group of environmental experts is essentially concerned with the identification and sources of contamination. Environmental experts include individuals with expertise in geology, hydrology, and geohydrology.

The other principal group of environmental experts consists of individuals who are concerned with identifying and quantifying the impact of pollution on people. They include epidemiologists (see §6.43) and neuropsychologists, whose expertise is somewhat distinct from either psychology or psychiatry. These experts focus on the administration of tests to determine whether exposed individuals have lost any cognitive functions, *e.g.,* memory or pattern recognition. Neuropsychologists also perform nerve conduction velocity tests to determine whether there are any peripheral neuropathies. For example, individuals who have been exposed to organic solvents have frequently been found to have abnormal neuropsychiatric characteristics.

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§6.43 10. Epidemiologists

An epidemiologist is essentially a medical statistician, generally educated and qualified in statistical analysis, with an M.D. or a Ph.D. in a medical discipline. The epidemiologist thus is able to provide both qualitative and quantitative expertise. Epidemiologists are frequently used in drug liability and toxic tort cases to address the issues of dual causation, *i.e.,* whether a specific drug or chemical has a general tendency to cause a given injury or disease and whether the drug or chemical actually caused the alleged injury. See *Finn v G. D. Searle & Co.* (1984) 35 C3d 691, 200 CR 870, discussed in §3.6.

The problems that counsel can encounter in attempting to establish liability through an epidemiologist, however, are dramatically illustrated by the decisions in *In re Agent Orange Prod. Liab. Litig.* (ED NY 1984) 597 F Supp 740, aff'd (2d Cir 1987) 818 F2d 145; *In re Agent Orange Prod. Liab. Litig.* (ED NY 1985) 611 F Supp 1223, aff'd (2d Cir 1987) 818 F2d 187; *Brock v Merrell Dow Pharmaceuticals, Inc.* (5th Cir 1989) 874 F2d 307, modified (5th Cir 1989) 884 F2d 167; and Judge Kozinski's trenchant opinion in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311 (*Daubert II*). To establish disease causation statistically, there must be evidence that the complained-of drug, device, etc., causes at least a doubling of the ordinary incidence of the disease. But see *In re Hanford Nuclear Reservation Litig.* (9th Cir 2002) 292 F3d 1124 ("doubling of the risk" test is not used when injury is allegedly caused by exposure to radiation because radiation is recognized as being capable of causing illnesses even at lowest doses).

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§6.44 11. Geneticists and Molecular Biologists

Although it has long been recognized that certain maladies tend to run in families, only comparatively recently has there been a recognition that common diseases such as breast cancer and common problems such as pregnancy losses may have heritable components in some individuals. Analyzing a family history to determine whether heredity has contributed to a plaintiff's ailment is the domain of a geneticist.

Geneticists generally have either an M.D. or a Ph.D. in a medical discipline, with specific postdoctoral training in medical genetics. Molecular biologists are also trained in medical genetics.

As geneticists and molecular biologists continue to explore and experiment with genetic engineering, they will increasingly be called on to testify on a wide variety of subjects from trademark infringement suits (see §6.47) to forensic medicine.

One of the most hotly debated areas of expertise in the field is forensic DNA typing. DNA fingerprinting is touted by some as infallible and is receiving increased attention in criminal cases. See *DNA Typing on the Witness Stand*, 244 Science 1033 (June 1989). See also discussion and citations in §4.17.

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§6.44A 12. Human Resources Experts

With the growth of wrongful discharge, sexual discrimination, and age discrimination cases, there has been increasing use of human resources experts. For example, in *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 8 CR3d 898, plaintiff's human resources expert testified that certain facts in evidence were "indicators" of retaliation. The court held that the expert's testimony improperly invaded the province of the jury and the expert's professional expertise did not provide a reliable foundation for the testimony. However, the court opined that human resource expert testimony may be admissible to show disproportionate punishment or a deviation from an employer's established procedures. 115 CA4th at 294 n6. For a good overview of human resource expert testimony generally, see Winikow, *Opinions of Human Resources Experts Shouldn't Be Obvious*, San Francisco Daily Journal, Feb. 12, 2004, Focus, p 5.

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§6.45 13. Hypnotists

Hypnosis is a procedure whereby an individual is induced into a suggestible state of mind. The police sometimes use hypnosis to help investigate crimes. The testimony of a witness (other than a defendant who testifies at trial) who has undergone hypnosis to restore his or her memory of the events in issue is inadmissible as to those events recalled that are based only on the hypnosis. See *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191 (plaintiff incompetent to testify because her only memory of acts of sexual harassment occurred after she was hypnotized by therapist). Such testimony, however, may be admitted at trial by stipulation. *People v Shirley* (1982) 31 C3d 18, 181 CR 243.

Evidence Code §795 prescribes the use of hypnosis in criminal cases. It permits the following people to perform hypnosis for purposes of §795: Licensed medical doctor; psychologist; licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis. The hypnosis should be performed independent of and not in the presence of law enforcement, the prosecution, or the defense. Evid C §795(a)(3)(D).

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§6.46 14. Insurance Experts

Insurance experts, who are generally past or present employees of insurance companies, can also include academics who teach insurance courses at the university or law school level. They are frequently used in both insurance coverage and "bad faith" litigation to give their opinions on claims handling, underwriting intent, and even the meaning of particular policy provisions. This testimony is frequently in the gray area that separates permissible opinion on ultimate issues in the case and impermissible opinion on questions of law. See §§5.2-5.3. In addition, in the "bad faith" area, counsel must be careful to make sure that the expert actually has the experience in the area on which testimony is sought. See, *e.g., California Shoppers, Inc. v Royal Globe Ins. Co.* (1985) 175 CA3d 1, 221 CR 171 (experienced lawyer who had handled numerous "bad faith" cases on behalf of plaintiffs but who was never employed by insurance company was not qualified to opine on propriety of insurance claims handling practices).

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§6.47 15. Intellectual Property Experts

In patent, copyright, and trademark cases, there are many areas in which expert testimony is helpful and, sometimes, even necessary. Frequently encountered experts include linguists, particularly in the copyright area; polling and survey specialists (see §6.54), particularly in trademark and trade name infringement cases; industry custom and practice specialists, particularly when the interpretation of contracts or licensing agreements is an issue; and, in patent cases, individuals with expertise in the subject area of the patent. See also §6.51 on musicologists, and Sugarman, *Use of Expert Testimony and Copyright Cases*, Litigating Copyright, Trademark & Unfair Competition Cases (PLI 1994).

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§6.48 16. Laboratory Technicians

Laboratory technicians are able to analyze many types of evidence, depending on their training and experience, including drugs, firearms, metal, paint, wood, glass, soil, fibers, questioned documents, gunshot residue on the hands, explosives, ballistics, ink, fingerprints, breath, hair, blood and other bodily fluids, teeth, bite marks, and voice. Admission of their testimony depends on whether the technique is new and thus subject to the *Kelly* test (discussed in §4.6), and whether it passes the *Kelly* test. Some of the scientific tests that have been approved in published cases are:

- Fingerprint analysis. *People v Riser* (1956) 47 C2d 566, 589, 305 P2d 1.
- Handwriting comparison. *People v Storke* (1900) 128 C 486, 60 P 1090.
- Ballistics examinations. *People v Trujillo* (1948) 32 C2d 105, 194 P2d 681.
- Blood (*In re Newbern* (1959) 175 CA2d 862, 865, 1 CR 80), breath (*People v Adams* (1976) 59 CA3d 559, 131 CR 190), and urine (see *Quesada v Orr* (1971) 14 CA3d 866, 92 CR 640) tests for intoxication.
- Odontology. *People v Marx* (1975) 54 CA3d 100, 126 CR 350.
- Typing of dried bloodstains. See *People v Nation* (1980) 26 C3d 169, 161 CR 299.
- HLA test to establish paternity. *Cramer v Morrison* (1979) 88 CA3d 873, 153 CR 865.

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§6.49 17. Lie Detector (Polygraph) Examiners

Polygraph examiners measure involuntary physiological responses, including blood pressure, breathing, and galvanic skin responses that occur while a subject is being questioned. The subject's responses are recorded on a chart that the examiner later reads to determine whether the subject was lying when answering the questions. Stipulated lie detector results are admissible with proper jury instructions. *People v Reeder* (1976) 65 CA3d 235, 241, 135 CR 421.

California has no licensing requirements for lie detector (polygraph) examiners at this time. There are, however, accredited American Polygraph Association schools, and national and state professional organizations.

Criminal defense counsel may be successful in obtaining dismissals when the examiner who tested a defendant is respected by local prosecutors and investigators.

Under Lab C §432.2, employers may not require prospective employees to take lie detector tests, but they may ask them to do so after advising them of their rights under Lab C §432.2. Federal and state government employees are not covered by Lab C §432.2.

For an excellent discussion of polygraphs and their admissibility in evidence, see Symposium on the Polygraph and the Courts, 16 U West LA L Rev (1984). See §4.77 for a discussion of the Ninth Circuit's treatment of the inadmissibility of polygraph evidence to establish the veracity or lack of veracity of a witness's testimony.

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§6.50 18. Marine Surveyors

There are two types of marine surveyors. One is similar to a geological surveyor and surveys marine constructions in rivers, harbors, and other bodies of water. The other is more specific in nature and inspects hull and equipment conditions of marine vessels for necessary repairs and to ensure that safety standards are complied with. In accident cases involving marine vessels or marine structures, or both, surveyors examine the damage to determine causes of the accident.

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§6.51 19. Musicologists

The elements of a claim for music copyright infringement include a showing that the defendant copied protected material. Expert testimony by someone with musical expertise to establish this element is crucial and is sometimes mandatory rather than permissive. See *Testa v Janssen* (WD Pa 1980) 492 F Supp 198, 203; *Selle v Gibb* (ND Ill 1983) 567 F Supp 1173, aff'd (7th Cir 1984) 741 F2d 896 (jury apparently based decision on one side's failure to call rebuttal expert). See also *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 Fordham L Rev 127 (1988).

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§6.52 20. Pharmacologists

Pharmacologists study the changes produced in living animals (from microorganisms to humans) by chemical substances other than food. They also study the action of drugs and other agents to treat disease, and in many respects their work is closely related to that of toxicologists. Pharmacologists are not to be confused with pharmacists, who prepare prescription drugs.

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§6.53 21. Physicists

Physics is the study of the structure and behavior of matter, energy, forces, and radiation. Physicists conduct experiments and formulate theories about electricity, light, atoms, heat, and mechanical forces. Their work is the theoretical foundation of all branches of engineering. Physicists work for industrial laboratories and factories, universities, and the government.

Biophysicists develop and apply the techniques of physics to diagnose and prevent diseases in plants and animals. Geophysicists apply principles of physics to geology, petroleum, mining, and the study of earthquakes. Optical physicists work with cameras, microscopes, spectroscopes, and infrared and ultraviolet rays; recently they have been instrumental in the development and application of the laser.

Chemical physicists consider the effect of extreme temperature or pressure on chemical substances. Specifically, they often work on the medical, electrical, and thermal properties of plastics, rubber, and metals.

Solid state physicists work on the optical, acoustical, electronic, and other properties of all kinds of solid matter. They were largely responsible for the development and application of transistors and diodes.

Atomic, nuclear, and particles physicists deal with the properties of atoms, nuclei, and particles. Most legal problems relating to their work, except problems of radiation, are normally handled by electrical engineers. Health problems related to radiation are generally handled by health chemistry engineers.

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.54 22. Polling and Survey Experts

§6.54 22. Polling and Survey Experts

Survey evidence has long been used in trademark and unfair competition litigation, particularly to establish the fact and extent of consumer confusion. See *Universal City Studios, Inc. v Nintendo Co.* (2d Cir 1984) 746 F2d 112, 118; *Seiko Sporting Goods USA, Inc. v Kabushiki Kaisha Hattori Tokeiten* (SD NY 1982) 545 F Supp 221, aff'd (2d Cir 1982) 697 F2d 296; *Anti-Monopoly Inc. v General Mills Fun Group, Inc.* (9th Cir 1982) 684 F2d 1316, 1323 (establishing strength of trademark); *Mead Data Cent., Inc. v Toyota Motor Sales., U.S.A., Inc.* (2d Cir 1989) 875 F2d 1026.

Similarly, survey evidence is frequently used to establish deceptive advertising by determining the public's perception of a particular advertising claim. See *Quaker State Oil Ref. Corp. v Burmah-Castrol, Inc.* (SD NY 1980) 504 F Supp 178 (84 percent of persons surveyed interpreted significant loss of viscosity to mean more than 10 percent, while actual viscosity difference between plaintiff's and defendant's products was less than 10 percent); *Boston Athletic Ass'n v Sullivan* (1st Cir 1989) 867 F2d 22, 31 (evidence of actual consumer confusion viewed as persuasive proof that others are also likely to be misled). For discussion of the use of consumer surveys in deceptive advertising cases, see Pappalardo, *The Role of Consumer Research in Evaluating Deception: An Economist's Perspective*, 65 AT Law J 793 (Spring 1997). The author discusses two cases that address the need and standard for consumer surveys. In the first case the court found that consumer surveys were not necessary to prove deceptive advertising. See *Kraft, Inc. v FTC* (7th Cir 1992) 970 F2d 311. In the second case the FTC found that consumer surveys are valid even without the use of control groups. See *In re Stouffer Foods Corp.* (Sept. 26, 1994) FTC Docket No. 9250, slip op; 118 FTC 746, 1994 FTC Lexis 196.

Surveys have become so common in unfair competition litigation that some courts now react negatively if such evidence is not offered. See *E. S. Originals, Inc. v Stride Rite Corp.* (SD NY 1987) 656 F Supp 484, 490. At least one court has held that survey evidence is essential to establish a claim for misleading advertising because plaintiff must make a threshold showing that a statistically significant part of the commercial audience has been mislead. *Johnson & Johnson Merck Consumer Pharm. Co. v Smithkline Beecham Corp.* (2d Cir 1992) 960 F2d 294.

Other areas in which survey evidence has been deemed admissible and useful, although not essential, include:

- Trade dress cases. See *Braun, Inc. v Dynamics Corp. of Am.* (Fed Cir 1992) 975 F2d 815, 827.
- Jury pool bias in change of venue proceedings. *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777.
- Consumer preferences in antitrust and employment discrimination cases. See *Town Sound & Custom Tops, Inc. v Chrysler Motors Corp.* (3d Cir 1992) 959 F2d 468, 494; *Richardson v Quik Trip Corp.* (SD Iowa 1984) 591 F Supp 1151.
- Consumer preferences as influenced by allegedly misleading statements about the superiority of a product. *Southland Sod Farms v Stover Seed Co.* (9th Cir 1997) 108 F3d 1134.
- Effectiveness of disclaimers. See *Consumers Union, Inc. v New Regina Corp.* (SD NY 1987) 664 F Supp 753, 768.
- Defense against claims of illegal price discrimination. See *State Wholesale Grocers v Great Atl. & Pac. Tea Co.* (ND Ill 1957) 154 F Supp 471, rev'd in part on other grounds (7th Cir 1958) 258 F2d 831.
- Determination of the legality of mergers and their potential impact on competition. See *U.S. v Philadelphia Nat'l Bank* (1963) 374 US 321, 10 L Ed 2d 915, 83 S Ct 1715.
- Proof of lost profits. See *Morgan v South Cent. Bell Tel. Co.* (Ala 1985) 466 So2d 107 (action by periodontist against telephone company for failing to carry his advertisement in yellow pages of phone directory); *Upjohn Co. v Rachelle Labs., Inc.* (6th Cir 1981) 661 F2d 1105 (action by distributor against manufacturer of defective pharmaceuticals for damages resulting from recall of product).
- Extent to which plaintiff's reputation has suffered in defamation actions. *Ollman v Evans* (DC Cir 1983) 713 F2d 838.
- Defense against a constitutional challenge to a state law requiring high school students to pass a functional literacy test as a graduation requirement. See *Debra P. v Turlington* (MD Fla 1983) 564 F Supp 177, aff'd (11th Cir 1984) 730 F2d 1405.
- Violation of consent decree prohibiting tobacco company from targeting advertising to youth. See *People ex rel*

Lockyer v R.J. Reynolds Tobacco Co. (2004) 116 CA4th 1253, 11 CR3d 317 (admitting survey data by research company measuring magazine readership, including teenage audience data).

Reliability of Surveys

There is a growing body of law dealing with the reliability of the methodology employed in compiling particular surveys. See, *e.g., Hutchinson v Essence Communications, Inc.* (SD NY 1991) 769 F Supp 541, 557, which provides that the trustworthiness and probative value of a survey depends on foundational evidence that:

- A proper universe (the population to be surveyed) was examined;
- A representative sample was selected from that universe;
- The questions asked were framed in a clear, precise, and nonleading manner;
- Sound interview procedures were followed by competent interviewers who were unaware of the litigation or why the survey was conducted;
- The data gathered was accurately reported;
- The data gathered was analyzed in accordance with accepted statistical principles; and
- The objectivity of the entire process was assured.

See also *Royal Appliance Mfg. Co. v The Hoover Co.* (ND Ohio 1994) 845 F Supp 469, 153 FRD 131.

Similarly, the Federal Judicial Center's Manual for Complex Litigation (4th ed 2004) provides that the party presenting a survey has the burden of showing that the survey was conducted using generally accepted principles of survey research, a burden that can be met by evidence that:

- The proper universe was selected and examined;
- A representative sample was drawn from that universe;
- A correct method of questioning the interviewees was used;
- The persons conducting the survey were recognized as experts;
- The data gathered were accurately reported; and
- The sample, questionnaire, and interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys.

Thus, in a case involving whether future purchasers were likely to be confused by the alleged infringer's goods or services, it was irrelevant whether the plaintiff's existing customers would be confused; the prospective purchasers of the defendant's product were the only proper survey universe. *Universal City Studios, Inc. v Nintendo Co.* (2d Cir 1984) 746 F2d 112, 118. By contrast, when postpurchase confusion was an issue, the proper survey universe included both those who had previously purchased the items in dispute and those who were likely to be exposed to them after purchase. See *Lois Sportswear, U.S.A., Inc. v Levi Strauss & Co.* (SD NY 1985) 631 F Supp 735, 744.

When there is going to be a potential dispute over the proper survey universe, it is often helpful to include identifiable subcategories, so that if a portion of the survey is disallowed, the remainder will still be admissible. See *National Football League Props., Inc. v Wichita Falls Sportswear* (WD Wash 1982) 532 F Supp 651 (entire population of U.S. was overinclusive universe in case involving manufacturer of NFL football jersey replicas, but subcategory consisting only of "likely purchasers" of such jerseys was proper universe).

Other aspects of surveys that are being subjected to increasing judicial scrutiny include:

(1) The use of suggestive or leading (as opposed to neutral or open-ended) questions. See *Universal City Studios, Inc. v Nintendo Co.* (2d Cir 1984) 746 F2d 112, 118 (leading questions disallowed as overly suggestive). See also *Wuv's Int'l, Inc. v Love's Enters.* (D Colo 1980) 208 USPQ 736, 755 (upholding admissibility of open-ended questions such as "what company or person do you believe owns or operates this restaurant?").

(2) The selection of the individuals sampled. "Probability surveys" in which each participant has a known chance of selection are generally regarded as more reliable than "mall intercept" surveys in which consumers are randomly selected. See *American Home Prods. Corp. v Barr Labs., Inc.* (D NJ 1987) 656 F Supp 1058, 1070, aff'd (3d Cir 1987) 834 F2d 368. "Mall intercept" surveys are, however, generally admitted in false advertising and trademark infringement cases as being reflective of what is done "by major American companies in making decisions of considerable consequence." *National Football League Props., Inc. v New Jersey Giants, Inc.* (D NJ 1986) 637 F Supp 507, 516.

Even if a survey itself is not admitted into evidence and was simply relied on by the expert, counsel should, as in all

other cases, exercise caution to ensure that the survey is reliable. See *Baumholser v Amax Coal Co.* (7th Cir 1980) 630 F2d 550. If the survey is to be admitted as evidence, it must independently meet the requirements for admission of such evidence. See *Pittsburgh Press Club v U.S.* (3d Cir 1978) 579 F2d 751; *Toys "R" Us, Inc. v Canarsie Kiddie Shop, Inc.* (ED NY 1983) 559 F Supp 1189; *Ways & Means, Inc. v IVAC Corp.* (ND Cal 1979) 506 F Supp 697, aff'd (9th Cir 1981) 638 F2d 143. See also *Dolphin Tours, Inc. v Pacifico Creative Serv., Inc.* (9th Cir 1985) 773 F2d 1506 (plaintiff's expert relied on market survey to show impact of alleged restraints of trade).

For the trial lawyer confronting a survey expert on cross-examination, there is an excellent overview of the issues to consider in Hebert*, Cross-Examining Survey Experts*, 21 CEB Civ Litigation Rep 234 (Nov. 1999).

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§6.55 23. Questioned Document Examiners

Questioned document examiners are capable of proffering opinions on whether a signature or other handwriting is legitimate or a forgery, as well as on the age of the ink or paper used in a given document, and are of obvious importance in will contest proceedings.

For a case discussing admission of expert handwriting analysis testimony, see *U.S. v Prime* (9th Cir 2004) 363 F3d 1028, vacated (2005) 160 L Ed 2d 1007, 125 S Ct 1005 (recognizing broad acceptance of handwriting analysis and holding that district court did not abuse discretion in determining that handwriting expert testimony can satisfy reliability threshold of *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.55A 24. Security Consultants and Experts

§6.55A 24. Security Consultants and Experts

Security consultants and experts are being used in a growing range of cases, including those concerning the responsibility of landlords, shopping centers, colleges, and special event promoters for assaults and other criminal conduct occurring at or near their premises (and the foreseeability of criminal conduct in such areas and locations), those in which allegations of excessive use of force by public or private police officers are involved, and those concerning the adequacy of security and protection provided by private security services.

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§6.55B 25. Sexual Harassment Perceptions Experts

In keeping with holdings that sexual harassment should be analyzed from the "victim's perspective" (*e.g., Ellison v Brady* (9th Cir 1991) 924 F2d 872, 878), a growing number of courts have permitted expert testimony concerning the different perspectives of men and women. For example, in *Robinson v Jacksonville Shipyards, Inc.* (MD Fla 1991) 760 F Supp 1486, 1502, the court permitted expert testimony on the beliefs and perceptions of women regarding male sexual behavior in the work place.

By contrast, in *Lipsett v University of Puerto Rico* (DVPR 1990) 740 F Supp 921, the court refused to allow testimony from one of the witnesses who was permitted to testify in *Robinson* on the grounds that her testimony would usurp the prerogative of the jury as the factfinder and would not assist the jury in understanding the evidence or determining the main issue of fact in the case. The *Robinson* judge distinguished *Lipsett* on the questionable ground that the case before him was being tried on a nonjury basis. 760 F Supp at 1507 n4.

Expert testimony has also been permitted in sexual harassment cases regarding company policies. For example, in *Shrout v Black Clawson Co.* (SD Ohio 1988) 689 F Supp 774, a human resources consultant was permitted to testify that an "open-door" policy of the company did not qualify as a sexual harassment policy because it was too broad, was not adequately disseminated, and did not contain assurances against retaliation. In a related area, the *Robinson* court permitted expert testimony about the reasons why victims of sexual harassment fail to complain. 760 F Supp at 1506. Similar testimony was permitted, although rejected, in another bench trial. *Spencer v General Elec. Co.* (ED Va 1988) 697 F Supp 204, 211, aff'd on other grounds (4th Cir 1990) 894 F2d 651.

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§6.56 26. Statisticians

Statisticians are becoming key experts in a wide variety of cases, including criminal, civil rights, and toxic torts. For an excellent discussion of this burgeoning field of expertise, see Weinstein, *Litigation and Statistics: Obtaining Assistance Without Abuse*, Toxics Law Rep 812 (1986); Lauter, *Making a Case With Statistics*, Nat'l LJ 1 (Dec. 10, 1984).

The Supreme Court analyzed statistical evidence in determining whether racial considerations were factors in a capital sentence in *McCleskey v Kemp* (1987) 481 US 279, 95 L Ed 2d 262, 107 S Ct 1756. The Court found that the statistical evidence concerned, the Baldus Study, did not establish that the defendant's particular sentence was the result of racial considerations despite the fact that the study apparently indicated a correlation between race and sentencing in Georgia generally.

The Court also examined statistical evidence in *Wards Cove Packing Co. v Atonio* (1989) 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115, a racial discrimination case in which the plaintiffs had attempted to establish a "disparate impact" case on the basis of statistical evidence showing a high percentage of nonwhite women in unskilled jobs. The Court held that this evidence was insufficient and that plaintiffs had the further burden of showing that the statistical disparity was the result of some particular employment practice of the defendant.

In *Ibarbia v Regents of Univ. of Cal.* (1987) 191 CA3d 1318, 237 CR 92, the court rejected generalized population data because there was no showing that the generalized population was qualified for the job in issue.

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§6.57 27. Vocational Training Consultants

Vocational training and rehabilitation experts are commonly used in personal injury cases to evaluate the retrainability and employability of a plaintiff as well as the need for, and probable cost of, various medical appliances and home modifications that have been necessitated by a particular injury or disability.

Family law courts frequently order a spouse to submit to an examination by a vocational training consultant to test and analyze work skills to relate these skills to possible career goals and the work market. These experts are most frequently called to testify to the employability of a nonworking spouse who claims to be unable to work, or to the job opportunities available to a spouse who is not working to capacity. See Fam C §4331.

See Booker, *A Guide to the Effective Use of Vocational Experts in Social Security Disability Hearings*, 9 Am J Trial Advoc 237 (Fall 1985).

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§6.58 28. Wood Technologists

Wood technologists analyze woods for their specific compositions and properties, and they experiment with various curings and treatments to determine the best applications for specific types. These experts can assess whether a wood used in a particular application, *e.g.,* in the building of a scaffold, was of the proper strength to safely perform in its required capacity.

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VIII. FEDERAL RULES OF EVIDENCE

A. Economic Experts

§6.59 1. Antitrust Experts

Antitrust counsel use economists to establish or refute liability, as well as to establish or refute damages. For example, in monopoly, attempt to monopolize, and merger cases, economists can define the relevant geographical and product market, measure market share, and determine levels of concentration, barriers to entry, and elasticity of demand. See *Marathon Oil Co. v Mobil Corp.* (6th Cir 1981) 669 F2d 378; *Berkey Photo, Inc. v Eastman Kodak Co.* (2d Cir 1979) 603 F2d 263. For discussion of the crucial ways in which experts can affect antitrust litigation, see Joseph, *From the Section Chair*, 17 Antitrust 3 (Spring 2003). See also Nagin, *Economic Experts in Antitrust Cases*, 8 Litig 36 (Winter 1982), analyzing the main schools of economic thought and the process for selecting an economist with a favorable philosophical bias.

Economists are used in predatory practice cases to formulate theories of injury, including evaluating the effects of lost opportunities. See *J. Truett Payne Co. v Chrysler Motors Corp.* (1981) 451 US 557, 68 L Ed 2d 442, 101 S Ct 1923; *California Steel & Tube v Kaiser Steel Corp.* (9th Cir 1981) 650 F2d 1001, 1003; *Northeastern Tel. Co. v American Tel. & Tel. Co.* (2d Cir 1981) 651 F2d 76, 91. There is an ongoing debate on the certainty with which antitrust injury must be presented once the fact of antitrust harm has been established. In general, antitrust plaintiffs are not required to meet "an unduly rigorous standard of proving antitrust injury." *Texaco Inc. v Hasbrouck* (1990) 496 US 543, 573, 110 L Ed 2d 492, 522, 110 S Ct 2535. In addition, the United States Supreme Court has explained that damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury that is available in other contexts. In the absence of more precise proof, the fact finder may conclude "as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, the defendants' wrongful acts had caused damage to the plaintiffs." *Zenith Radio Corp. v Hazeltine Research, Inc.* (1969) 395 US 100, 123, 23 L Ed 2d 129, 148, 89 S Ct 1562.

Experts may also be used to support economic damages claims in antitrust cases. In *Conwood Co. v United States Tobacco Co.* (6th Cir 2002) 290 F3d 768, the plaintiff, alleging that the defendant violated the Sherman Act by using its monopoly position to exclude competitors from the moist snuff market, presented expert testimony by a recognized expert on business valuation and lost profits in support of its economic damages claim. The expert used three methods to test the plaintiff's claims: regression analysis, a yardstick test, and a before-and-after test. The jury returned a verdict that fell within the expert's damages calculation. On appeal, the Sixth Circuit noted that all three of the expert's methods are generally accepted methods for proving antitrust damages, and rejected the defendant's arguments that, in applying the regression analysis, the expert ignored other market variables that could have caused the harm to plaintiff. For discussion of *Conwood,* see Rabe, *Economic Damages in Antitrust Litigation:* Conwood Co. v United States Tobacco Co., 17 Insights 32 (Summer 2003).

Counsel have also attempted to use economists to support and refute inferential conspiracy theories. For example, in *Zenith Radio Corp. v Matsushita Elec. Indus. Co.* (ED Pa 1980) 505 F Supp 1313, 1367, appealed on other issues at (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348, the court ruled that economic experts were attempting to testify outside their realm of expertise and to qualify as "conspiracyologists." For discussion of expert testimony on conspiracy, see Milne & Pace, *Conspiratologists at the Gate: The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, 17 Antitrust 36 (Spring 2003).

In at least one case, economic experts were used both to support and to oppose a class certification motion in a complex antitrust case involving alleged price-fixing of airplane tickets at 23 "hub" airports across the United States. The airline defendants argued that the purported class, consisting of all passengers who flew in or out of any of the 23 hub cities over a 4-year period, could not satisfy various elements of Fed R Civ P 23(b)(3), including commonality and fact of injury. The court rejected these arguments and granted certification largely on the testimony of the plaintiffs' chief

economic expert, who testified concerning how the alleged conspiracy would impact on the admittedly differing class members and concerning methods by which damages could be calculated without producing an impermissible "fluid recovery." *In re Domestic Air Transp. Anti-Trust Litig.* (ND Ga 1991) 137 FRD 677, 689.

On the use of experts in antitrust litigation generally, see *Dolphin Tours, Inc. v Pacifico Creative Serv., Inc.* (9th Cir 1985) 773 F2d 1506 (economist used to define market share plaintiffs would have attained if defendants had not erected barriers to entry in market and if market had been free of any competitive restraints).

See also von Kalinowski, Antitrust Laws and Trade Regulation, chap 110 (2d ed 1996); *Proof of Damages: Some Selected Problems*, 49 Antitrust LJ 1290 (1980); California Business Litigation (Cal CEB 2002); Kraft, Using Experts in Civil Cases, chaps 4 (Contract Actions), 7 (Patent Infringement Litigation), 5, 12 (Antitrust Cases), and 13 (Securities Cases) (2d ed 1982).

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.60 2. Hedonic Damages

§6.60 2. Hedonic Damages

One of the more controversial areas of expert economic damages continues to be "hedonic" damages or the "hedonic valuation of life," a measurement technique that purports to value the loss of enjoyment of life to assist the trier of fact in personal injury and wrongful death suits to award damages that will compensate for that loss. To date, the concept has been discussed more in the literature than in the reported cases. See, *e.g.,* Imwinkelried, *Expert Witness: Soft Science: Economics*, Nat'l LJ 18 (Apr. 30, 2007) (analysis of whether expert testimony on hedonic damages is admissible post-*Daubert, Joiner,* and *Kumho*); Bloomquist, *The Value of Human Life: An Empirical Perspective*, 19 Econ Inquiry 157 (1981); Schultz & Kneese, *Risk in Benefit-Cost Analysis*, 1 Risk Analysis 81 (1981); Usher, *The Value of Life for Decision Making in the Public Sector*, 2 Soc Phil & Pol'y 168 (1985); Havrilesky, *Valuing Life in the Courts: An Overview*, 3 J Forensic Econ 71 (1990); Smith, *Hedonic Damages in Wrongful Death Cases*, 74 ABA J 78 (Sept. 1, 1988); Franz, *Hedonic Damages: Applying The Methodology, Examining The Pros And Cons*, 16 Trial Diplomacy J 23 (1993) (analysis of valuation principal related to loss of enjoyment, satisfaction, and pleasures that can be derived from living).

There appears to be agreement that, in those cases in which hedonic damages are permitted (such as tort "survival" actions by a decedent's heirs at law, or tort suits by injured victims who are able to understand that they have suffered a diminution in the quality of their lives), the jury may assess hedonic damages without the benefit of expert testimony. However, there continues to be controversy over whether experts may be used to assist the jury in this assessment. If economic experts are permitted to testify, then under *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, and *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512, the court must scrutinize their particular methodology and determine whether a sufficient foundation has been laid. See Imwinkelried, *Expert Witness: Soft Science: Economics*, Nat'l LJ 18 (Apr. 30, 2007).

The few reported cases that have considered the admissibility of expert testimony concerning hedonic damages are not in agreement. Two cases from the Northern District of Illinois illustrate the split, at least under the former standard of admissibility of *Frye v U.S.* (DC Cir 1923) 293 F 1013. See §§4.55, 4.61. The first case, *Scherrod v Berry* (ND Ill 1985) 629 F Supp 159, aff'd (7th Cir 1987) 827 F2d 195, rev'd on other grounds (7th Cir 1988) 856 F2d 802, was a federal civil rights action that arose out of the shooting death of a black youth by a City of Joliet police officer. The trial court permitted "hedonic damage" testimony by an economist who testified on the "larger," noneconomic aspects of life, including "the pleasure of living." 629 F Supp at 163. The trial judge rejected pre- and posttrial motions by the defense to exclude the testimony as speculative, noting that such awards have been permitted in England since 1976 and have been the subject of study in the United States by "legal scholars, economists and social scientists." 629 F Supp at 164. The trial judge did not attempt to measure "hedonic damage" testimony against the *Frye* standard or any other commonly accepted measure for determining the admissibility of new scientific evidence. Rather, the court appeared satisfied that "the concept, although novel, is not unknown." 629 F Supp at 164.

The Seventh Circuit initially affirmed in a similarly nonanalytical opinion. After chastising the defendants for having failed to submit "contrary expert testimony," the court, without any discussion of standards governing acceptance of new scientific testimony, found the testimony to have been "invaluable to the jury in enabling it to perform its function of determining the most accurate and probable estimate of the damages recoverable for the hedonic value of [the decedent's] life." 827 F2d at 205. The circuit then vacated the affirmance and eventually reversed on other grounds, stating: "We leave [the district court's other evidentiary rulings] for the district court on remand to decide in light of this court's prior discussions of those matters, specifically those found in our earlier vacated opinion." 856 F2d at 807.

In the second case, another judge in the same district found that *Scherrod* was "not binding precedent." *Mercado v Ahmed* (ND Ill 1991) 756 F Supp 1097, 1101 n9, aff'd (7th Cir 1992) 974 F2d 863. *Mercado* involved a case of a child who had suffered catastrophic physical and mental injuries from being struck by a taxicab. Proceeding on the assumption that Illinois law allows recovery for "hedonic damages," the court held that proffered expert testimony by an economist to quantify those damages did not meet the required standards of reliability and validity. The court found that the fatal vice in the testimony was that it was based on attitude surveys by "persons who are no more expert than the jurors on the value of the lost pleasure of life." 756 F Supp at 1103.

The court rejected the suggestion in the vacated Seventh Circuit opinion in *Scherrod* (827 F2d at 205) that the solution to questions of disputed expert testimony is to allow the objecting party to call its own expert in the area. The judge noted that such a rule (756 F2d at 1101)

> would permit an astrologer to take the stand and say, "Smith, an Aries, could not have had (or must have had) an intent to defraud on November 18." Surely another astrologer could be found to disagree or to say that astrology is not knowledge.

When the issue of hedonic damages came before the same district court 3 years later, the court applied the supposedly more lenient requirements of the Federal Rules of Evidence and *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. However, the result was the same, *i.e.,* the opinion testimony was excluded as speculative and as more prejudicial than probative. *Ayers v Robinson* (ND Ill 1995) 887 F Supp 1049. Similarly, in *Hein v Merch & Co.* (MD Tenn 1994) 868 F Supp 230, the court evaluated the admissibility of expert testimony on hedonic damages under *Daubert*, as well as under additional factors promulgated by the court, including "the judge's experience and common sense." 868 F Supp at 231. Under this analysis, the court found the proffered testimony to be unreliable, invalid, and unhelpful to the jury, considering its speculative assumptions, the magnitude of variance in results, and errors in the methodology used, and excluded the testimony.

In *McGuire v City of Santa Fe* (D NM 1996) 954 F Supp 230, a wrongful termination suit, the court surveyed the reported cases and concluded that the trend of the cases before *Daubert* was to permit such testimony, but that since *Daubert* the cases had tended toward exclusion. The court further noted that there is a lack of any widely accepted standards for uniformly measuring the value of pleasure. Similarly, the sociological and economic foundations of hedonic damages have been attacked by respected economists as lacking any verifiable basis. Finally, the recent trend away from permitting such testimony indicated that the testimony failed to meet the "generally accepted" plank of *Daubert*. 954 F Supp at 233.

The court went on to note that permitting hedonic damage testimony in a wrongful termination suit was particularly inappropriate because the plaintiff was not claiming a total inability to enjoy life but was claiming only the reduction of enjoyment which resulted from the lack of a job. The court reasoned, however, that the back-pay award, which compensates for the loss of the job, concurrently compensates for any hedonic damage.

The Supreme Court's decision in *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, that *Daubert* applies to all expert testimony, not just to scientific submissions, confirmed that the *Ayers, Hein,* and *McGuire* courts were correct to use the *Daubert* framework to evaluate the admissibility of expert testimony on hedonic damages. However, even in the aftermath of *Kumho*'s clarification that a soft science such as economics would still be subject to the judge's gatekeeper function, it remains unclear whether hedonic damage testimony would pass the test. Edward J. Imwinkelried, a law professor at the University of California, Davis, believes that the key issues are whether the specific theory employed by the expert enables him or her to perform the task at hand; whether the court finds a sufficient connection between the data and the expert opinion to validate the specific theory; and finally, whether the data on which the expert relied was gathered in conditions roughly analogous to the pending case and adequate to sustain the inference drawn by the expert. Imwinkelried, *Expert Witness: Soft Science: Economics*, Nat'l LJ 18 (Apr. 30, 2007). Although Imwinkelried does not conclude that hedonic testimony would fulfill all of these requirements, he does speculate it would be possible to do so with data based on willingness-to-pay studies in which consumers are asked about the tradeoffs they would make between money and risk avoidance; these studies can serve as a proxy for how much average consumers value their lives.

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§6.61 3. Lost Profits and Impact of Income Taxes on Future Earnings

Economic experts have been permitted to testify on a wide variety of issues, including lost profits and damage recovery. Some examples are:

- Value of stock portfolio in a broker malpractice case. *Vucinich v Paine, Webber, Jackson & Curtis, Inc.* (9th Cir 1986) 803 F2d 454.
- Value of stock option plan in an action involving alleged excessive compensation of a majority shareholder. *Sugarman v Sugarman* (1st Cir 1986) 797 F2d 3.
- Value to a would-be purchaser from the seller's anticipatory breach of contract. *In re James E. O'Connell Co.* (9th Cir 1986) 799 F2d 1258.

Evidence of the impact of income taxes on future earnings is admissible, and the jury should be instructed as to the nontaxable status of the lost earnings portion of a damage award in an action under the Federal Employers' Liability Act (FELA) (45 USC §§51-60). *Norfolk & W. Ry. v Liepelt* (1980) 444 US 490, 62 L Ed 2d 689, 100 S Ct 755, citing with approval *Burlington N., Inc. v Boxberger* (9th Cir 1975) 529 F2d 284.

The issue of the admissibility of testimony concerning the nontaxability of defendant-purchased annuities has been more widely discussed in federal published opinions than in California state court published cases. In *Diede v Burlington N. R.R.* (9th Cir 1985) 772 F2d 593, a FELA case, the court held that the trial judge had not abused his discretion in excluding such testimony. The court noted that the measure of damages in a FELA action is governed by federal rather than state law and it was unsettled whether periodic payments, as opposed to a lump sum damage award, are even authorized in such a case. The court found, however, that there was no need to resolve this matter, because the defendant had failed to "offer a concrete written stipulation setting forth the details of the annuity it proposed to purchase" and because the terms of the railroad's offer conceivably gave the plaintiff "constructive receipt" of the annuity so as to render it taxable to the plaintiff. 772 F2d at 596.

In *Taylor v Burlington N. R.R.* (9th Cir 1986) 787 F2d 1309, the court again affirmed a trial judge's refusal to allow the railroad to call a structured settlement salesman to testify about the costs of various annuities. The court found that the judge had not abused his discretion in excluding the testimony, because it was conceded that the witness was not qualified to dispute the plaintiff's expert economist's analysis of the plaintiff's economic loss or present value of that loss.

Although the United States Supreme Court has not had occasion to rule specifically on the propriety of testimony concerning the cost of a defendant-purchased annuity, the Court held in two personal injury cases, in which the measure of damages is governed by federal law, that future loss must be discounted to present value and that it was error for the trial court to use a zero discount factor. *Monessen Southwest Ry. v Morgan* (1988) 486 US 330, 100 L Ed 2d 349, 108 S Ct 1837; *Jones & Laughlin Steel Corp. v Pfeifer* (1983) 462 US 523, 76 L Ed 2d 768, 103 S Ct 2541.

The federal rule on lost earnings, decided in the context of a FELA action, is that federal income taxes on lost earnings must be considered and that, on request, the jury must be instructed that the award is not subject to federal income tax. *Norfolk & W. Ry. v Liepelt* (1980) 444 US 490, 498, 62 L Ed 2d 689, 696, 100 S Ct 755, 759. In 1982, the Ninth Circuit followed *Norfolk* in *DeLucca v U.S.* (1982) 670 F2d 843, 845.

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Source: Civil Litigation/California Expert Witness Guide/6 Types of Experts/§6.62 B. Judge Not Allowed to Testify as Witness at Trial

§6.62 B. Judge Not Allowed to Testify as Witness at Trial

A judge presiding at a trial is not allowed to testify in that trial as a witness. Fed R Evid 605. No objection need be made to preserve that point. Rule 605 closely resembles Evid C §703, discussed in §6.23.

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Locating and Retaining Best Expert

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§7.1 I. DECIDING WHETHER EXPERT WITNESS IS NEEDED

To help decide whether an expert is needed, counsel should analyze the pertinent jury instructions. In particular, counsel should try to determine the respective burdens of proof as required by CACI 200. Once the elements of each party's burden are succinctly stated, it is generally apparent whether one or more of those elements "is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Evid C §801(a).

Counsel should resist the temptation to assume that an expert is needed simply because the other side has one or because experts have traditionally been used in similar cases, particularly if the amount in dispute is small or the client's litigation budget is strained. For example, in *Campbell v General Motors Corp.* (1982) 32 C3d 112, 124, 184 CR 891, the appellate court held that the jury, without expert testimony, was capable of deciding whether a bus was defectively designed because it lacked any grip within reach of the plaintiff's seat, from which she fell when the bus turned. In so holding, the appellate court reversed a nonsuit that had been entered in the bus manufacturer's favor because of plaintiff's failure to call a design expert. *Campbell* teaches a twofold lesson:

(1) Counsel should not automatically hire an expert merely because technical matters are involved; and

(2) In borderline areas, the savings produced by not calling an expert are often offset by the expense and delay of a protracted appeal.

For further discussion, see §§2.1-2.5 (permissible subject matter of expert opinion), and chap 6 (types of experts).

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§7.2 II. DECIDING KIND OF EXPERT TO USE

Once counsel decides that an expert is needed, it is necessary to give serious consideration to the exact kind of expert or type of expertise that is needed. For example, if counsel represents a plaintiff who has suffered greater injuries than are usually encountered in a relatively low-speed, rear-end automobile accident when the seat back or head restraint fails, the attorney must locate an expert who can account for the enhanced injuries. Initially, it might appear that using a doctor who specializes in the particular injury suffered would be sufficient. To maintain a products liability case against the automobile manufacturer, however, expertise is needed not just in the diagnosis and treatment of back and neck injuries, but also in the causative mechanisms that can produce more extensive injuries. Most orthopedists and neurologists lack the engineering background to offer expert testimony on that causative link, just as most engineers lack medical training. To bridge the interdisciplinary gap in such a case, counsel should consider retaining a biomechanic, who has the requisite skills and training to offer expert opinion on the effects of various physical forces on the human anatomy. For further discussion of using biomechanics, see §4.13.

A few hours spent in case analysis, in discussion with practitioners experienced in the area, and in background reading to pinpoint the precise kind of expertise required, can save countless dollars, wasted hours, and untold grief later in the proceedings. On the other hand, failure to retain the right kind of expert creates the risk of a nonsuit for not establishing a prima facie case at trial. See *Endicott v Nissan Motor Corp.* (1977) 73 CA3d 917, 141 CR 95. Such a failure could also result in a legal malpractice action for breach of duty to retain a particular type of expert. See *Bolton v Trope* (1999) 75 CA4th 1021, 89 CR2d 637 (attorneys representing injured plaintiff have no duty to consult particular type of expert to prove medical condition when no medical expert with whom they did consult recommended that particular type of expert).

On selecting and using experts generally, see Cannady, *Ten Steps to Selecting Your Expert Witness*, 4 Cal Litig 26 (Spring/Summer 1991); Snow, *Using Experts Effectively*, 4 Cal Litig 33 (Spring/Summer 1991); Friedman, *Practice, Malpractice and Expert Witness: (Mal)practice Makes (Im)perfect*, 4 Cal Litig 39 (Spring/Summer 1991).

On types of experts generally, see chap 6.

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§7.3 III. HIRING MULTIPLE EXPERTS ON SAME TOPIC

If the amount or question in issue justifies the expense, retaining multiple consultants in the same field affords a variety of advantages. Counsel can:

- Have the consultants "compete" and then designate the stronger as a witness to testify at trial;
- Place primary reliance on the stronger consultant, but designate both as trial witnesses, keeping the other in reserve in case a particular issue needs corroboration;
- Designate one as the eventual expert witness, keeping the other purely as a consultant in whom counsel can confide fully and whom counsel can use as a "guinea pig" for testing untried theories and as a "stalking horse" for the intended witness; or
- Have the different witnesses pursue entirely different theories and approaches, and wait until the formal CCP §§2034.010-2034.730 disclosure time to choose the expert who will make the stronger, more persuasive witness.

If multiple experts in the same field are used, they should be kept apart as much as possible. Ideally, each expert should not even know that any others are on the case. If this is impossible, each should be instructed to avoid contact with the others about the case. Only by maintaining such separateness can counsel ensure that one expert will not "contaminate" the other.

When the number of qualified experts is extremely limited (or at least the number available locally is extremely limited), some attorneys contact and retain every available expert, not with the intent of using them all, but to keep them from working for the opposition.

Counsel should be mindful that, although the number of experts a party can retain is unlimited, the court does have the power to limit the number of experts that a party can call at trial. Evid C §723. To date, no reported case has dealt with exercise of this power before trial, but several cases have affirmed the court's limitation of the number of experts a party may call at trial when testimony on a subject has become cumulative. See, *e.g., South Bay Chevrolet v General Motors Acceptance Corp.* (1999) 72 CA4th 861, 85 CR2d 301 (trial court properly excluded testimony of expert whose anticipated testimony was cumulative of subject matter covered by another expert); *Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78 (testimony by defendant's fifth expert that motorist could not have struck center of steering wheel was properly excluded). But see *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 266, 78 CR3d 738 (trial court erred in permitting only one expert to testify to particular opinion because it effectively destroyed plaintiff's evidentiary presentation; "[i]dentical or virtually identical evidence may not be cumulative if there is significance to the evidentiary weight to be given").

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IV. TIME TO HIRE EXPERT

§7.4 A. Architect, Engineer, and Land Surveyor Malpractice Cases

In malpractice cases involving architects, engineers, and land surveyors, counsel for plaintiff is not accorded any discretion in deciding the phase of the proceedings at which to retain an expert. Under CCP §411.35, the party suing such a professional must "on or before the date of service of the complaint" file and serve a certificate executed by the attorney that:

- He or she has reviewed the facts of the case, and has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant, and on the basis of that review and consultation, the attorney has concluded "that there is reasonable and meritorious cause for the filing of such action" (CCP §411.35(b)(1)); or

NOTE: The consultant may not be a party to the litigation. The consultant must render an opinion as to whether the named defendant or cross-defendant was negligent or not negligent in the performance of the professional services. See CCP §411.35(b)(1).

- Time limitations prevented counsel from obtaining the consultation (in which event the certificate need not be filed until 60 days after service of the complaint) (CCP §411.35(b)(2)); or
- Counsel made three separate good faith efforts to conduct the required consultation and none of the professionals contacted would agree to the consultation (CCP §411.35(b)(3)).

The section does not require that the expert who provided the certificate of reasonable and meritorious cause be retained as a consultant or trial expert, and plaintiff's counsel is free to use other experts of his or her own choosing. If time permits, however, considerations of consistency and economy favor using the same expert in other capacities as well. Therefore, in choosing an expert for consultation, counsel should consider whether he or she can (and will) serve as a consultant as the case progresses and will be willing and able to offer effective testimony at trial.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.5 B. Advantages of Early Retention in Other Cases

§7.5 B. Advantages of Early Retention in Other Cases

Defendants in the malpractice suits discussed in §7.4 and all parties to other litigation are free to retain experts at any time, subject only to the disclosure limitations of CCP §§2034.010-2034.730. It is, nonetheless, the authors' recommendation that, when expert testimony probably will be required, an expert should be retained as early as possible. Some of the benefits of early hiring follow.

- *Evaluating claims and defenses.* The expert's early retention allows plaintiff's counsel to determine whether a superficially meritorious claim is in fact a questionable or even a no-merit case before counsel has expended unnecessary time or money on the case. It gives defense counsel ammunition for a motion for summary judgment or a lower settlement figure.
- *Selecting theory of liability, or defense.* The expert can help counsel formulate a theory of liability, or a defense, that will accord with the "rules" of the expert's field of expertise as well as with the requisite legal elements.
- *Educating the lawyer.* The expert can help counsel quickly acquire a highly selective education on an arcane subject. The expert can supply documents and background information, and can carefully select books and articles to help the lawyer gain a working knowledge of the particular area in issue. For example, in a case involving a broken metal part, counsel needs a basic metallurgical vocabulary and an understanding of the differences between an impact and a fatigue fracture. Counsel need not, however, become an amateur metallurgist or become knowledgeable about any aspects of metallurgy other than fracture determination and analysis.
- *Conveying information about other similar cases.* The expert can advise counsel of other past or pending cases involving the same, or similar, issues that the expert knows about (or may even have worked on), and put counsel in touch with the lawyers and important witnesses from those cases.
- *Suggesting other experts.* The expert can suggest other experts who may be helpful to counsel in the expert's field or in other related areas of expertise.
- *Identifying opposition experts.* Even though the time for compulsory disclosure of expert witnesses may be far away, in narrow areas and small communities the expert frequently knows which of his or her "competition" is working for the opposition.
- *Examining tangible evidence and physical locations.* If relevant, the expert can go to the area where the case occurred, and can examine the real evidence connected with the case.
- *Identifying potential defendants and cross-defendants.* The expert can determine whether all potentially blameworthy defendants have been named. If they have not, counsel can amend the complaint early in the proceedings.
- *Preparing discovery requests.* The expert can assist in drafting interrogatories, document-production requests, and requests for admissions that will pinpoint areas of inquiry and help counsel determine what is relevant to the case from the expert's field of specialty.
- *Preparing witnesses.* The expert can assist in preparing clients and other witnesses for deposition by predicting likely areas of inquiry and anticipating sensitive areas. For example, in a brake failure case, the expert can help counsel interview witnesses to identify problem areas concerning the characteristics of brake failure and the physical signs of a failure.
- *Responding to discovery requests.* The expert can assist in responding to interrogatories and other discovery requests. Defendants frequently serve "contention" interrogatories or requests for admissions early in the action. The plaintiff who cannot supply responsive answers risks a summary judgment motion or at least the time, trouble, and inconvenience of repeated motions to compel further answers. The expert can provide answers that will meet such discovery requests and avoid making damaging concessions in the process.
- *Supporting and resisting summary judgment motions.* See chap 16 for discussion of the use of expert witnesses in connection with summary judgment motions.

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V. LOCATING POTENTIAL EXPERTS

§7.6 A. Personal Referrals

Other lawyers are among the most reliable sources of names of expert witnesses, particularly in areas in which the practitioner lacks significant prior experience. This task is easy if the practitioner already knows the other lawyer or can arrange an introduction through an intermediary. Even if the experienced lawyer is a total stranger, however, he or she probably will be flattered that the practitioner sought out his or her guidance. Larger bar associations may also be a source of experts who are willing to serve as witnesses. For example, the San Francisco Bar Association has an online directory of expert witnesses (http://www.sfbar.org/register), as does the Los Angeles County Bar Association (http://www.expert4law.org).

The practitioner can and should question colleagues about the expert's strengths, limitations, and idiosyncrasies. The practitioner can learn, *e.g.,* whether the expert is overworked, punctual, scrupulous about not straying beyond his or her field of expertise, willing to work on litigation cases, able to handle cross-examination, able to "project" to jurors. Through proper questioning, almost all of the mystery can be removed from the task of hiring an expert. On the other hand, because obtaining experts through personal referral is so effective, it is easy to rely on it to the exclusion of other methods of locating experts. The practitioner should resist the temptation to hire a "known quantity" simply because he or she comes through a personal referral, and to ignore all the other factors that should be considered when selecting an expert.

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§7.6A B. Online Resources

Resources available online are invaluable for finding expert witnesses and gathering background information about one's own or the opposing party's experts. A very useful guide to these resources is a "white paper" (authoritative article) titled *Finding and Researching Experts and their Testimony*, co-authored by five online legal research specialists, Michael Brennan, David Dilenschneider, Myles Levin, Carole Levitt, and Jim Robinson, in 2007. It is available at http://www.expertwitnesswhitepaper.com, and updated by the authors every six months. The contents are summarized and excerpted in part below. For further discussion of online research of expert witnesses, see the full text of the white paper.

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§7.6B 1. Searching the Subject Matter

Library Websites. Online library catalogs are a good place to find information on the subject matter and potential experts. Many online catalogs allow searches by specific topics. For example, a basic search on the Library of Congress's website for "handwriting identification" returns over 10,000 publications. See lists.webjunction.org/libweb/; catalog.loc.gov. Many libraries also offer free access to online pay databases—all you need is a library card and Internet access. Such databases include articles from newspapers and periodicals (full text); Gale's biographies; Physician's Desk Reference; and business directories (*e.g.,* Standard & Poor's).

Medical Websites. The National Library of Medicine (NLM) houses materials in all areas of biomedicine and health care. The site and its associated services, "PubMed" and "MedLine Plus," contain links to medical encyclopedias, news stories, and articles. In addition, the website of the American Board of Medical Specialties provides links to the individual medical specialty professional associations, many of which have article databases and membership directories. See http://www.nlm.nih.gov; http://www.webmd.com; http://www.abms.org.

Bookstore Websites. Searches on specific subject areas on commercial websites such as amazon.com and barnesandnoble.com result in a synopsis of the book, author's name, table of contents, and reviews of the book. Amazon.com may also list manuals and reports written by potential experts. See http://www.amazon.com; http://www.barnesandnoble.com.

Articles. Full-text articles on a wide variety of subjects dating back to 1998 can be found on Looksmart's FindArticles.com. In addition, some expert witness directories, such as JurisPro and Hieros Gamos, provide free access to articles written by experts. And many trade associations publish online newsletters, sometimes with an active discussion forum among members. See http://www.findarticles.com; http://www.ingentaconnect.com; http://www.jurispro.com; http://www.hg.org; http://www.accidentreconstruction.com; http://www.apa.org/psycarticles (psychology); http://scholar.google.com; http://www.phptr.com/articles/index.asp?st+45190&rl=1 (technical engineering); http://www.bpubs.com/Economics/ (economics).

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§7.6C 2. Searching For Experts

Search Engines: Value and Limits. Search tools such as Google can be overinclusive in results. Advanced search methods, such as putting the search term in quotes to find the exact phrase entered, will yield more precise results. The "Advanced Search" function on Google will retrieve Adobe Acrobat PDF files, Microsoft Word documents, and Microsoft PowerPoint presentations. Note that the first few results on Google are often "paid listings." Anyone can pay to have the top spot for such terms as "OSHA expert." Also, because the web is a mostly unpoliced forum, the information found through search engines may be inaccurate, and should not be relied on as the final word on an expert.

Product Searches. Searching for the name of a product at issue can potentially lead to the names of knowledgeable experts. More information about companies and products can be found at the ThomasNet site (formerly the Thomas Register). This free online directory provides access to over 650,000 industrial companies, indexed by product and service categories.

Expert Witness Referral Companies. Expert witness referral companies maintain databases of professionals available for consultation. They usually charge a fee to attorneys to retain an expert. Sites include: http://www.tasanet.com; http://www.forensisgroup.com; http://www.medquestltd.com; http://www.amfs.com; http://www.ims-expertservices.com; http://www.roundtablegroup.com.

Online Expert Witness Directories. Expert witness directories allow the researcher to browse for consultants and to contact them directly. Because the experts usually pay a listing fee, the search is free to the user. Many bar associations, including the Los Angeles County Bar Association and the San Francisco Bar Association, have online directories of expert witnesses. For example, Experts.com and the JurisPro Expert Witness Directory both provide free information on expert witnesses. Many of the large legal portals, such as Martindale-Hubbell, Law.com, Hieros Gamos, and Findlaw also have online directories of expert witnesses. Sites include: http://www.JurisPro.com; http://www.expert4law.org; http://www.sfbar.org; http://www.experts.com; http://www.findlaw.com; http://www.martindale.com; http://www.almexperts.com/ExpertWitness/; http://www.hg.org.

The "Invisible Web." Search engines can often fail to retrieve pages that may be available on other databases, such as the websites of colleges and universities, hospitals, and associations. These databases are excellent resources for expert witnesses. The "advanced search" button on Google gives the user the option to search only the websites of particular colleges or universities. University sites include: http://www.clas.ufl.edu/au/; http://www.utexas.edu/world/univ/alpha (alphabetical list of colleges and universities); http://www.utexas.edu/world/univ/state (list of colleges and universities by state). The Joint Commission on Accreditation of Healthcare Organizations website provides a directory of healthcare organizations. See http://www.jointcommission.org. Many of these organizations have excellent online directories of their doctors. See, *e.g.,* http://www.childrenshospital.org. Information about associations can be found through the Associations Unlimited Database, which can be accessed free online through public library websites, with a library card. See, *e.g.,* http://www.lapl.org.

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§7.7 C. Jury Verdict Reporting Services

A number of services publish information about jury trials in summary form. They give the nature of the case, the attorneys' names and addresses, the expert witnesses' names and fields of expertise, and the verdict. They also allow counsel to see what kinds of cases a particular expert has testified in, and the substance of the testimony. Thus, whether counsel is handling a slip-and-fall personal injury accident or an economic tort, he or she can readily determine whether a similar case has been tried to a jury verdict and ascertain each expert witness's identity and field of expertise. The practitioner may either contact the prospective experts directly or call the lawyers who participated in the trial for their opinions and recommendations.

The main services are:

- Jury Verdicts Weekly, Inc. Covers significant civil jury verdicts returned in California, Arizona, and Nevada; also publishes semiannual index that categorizes, by case and counsel, names of medical and nonmedical experts, type of injury, and cause of action.
- Verdictum Juris. Covers civil cases in Southern California; has annual index, "The Evaluator."

Both can be reached through the National Law Journal Litigation Services Network, (800) 832-1900, or http://www.nlj.com.

In addition, free online jury verdicts can be found at http://morelaw.com, and paid jury verdict reporters can be found at the Daily Journal's site (http://www.dailyjournal.com) for print subscribers only, and the National Association of State Jury Verdict Publishers' site (http://www.juryverdicts.com).

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§7.8 D. Reported Appellate Decisions

One frequently overlooked source of expert witnesses is reported appellate decisions, both from California and elsewhere. Reported decisions contain the names of lawyers who tried a particular case and frequently refer to the experts who testified as well. The lawyers can be contacted to learn the identities of the experts used and to obtain trial counsel's recommendations and opinions concerning the experts. Case law may be searched for no charge at LexisOne (http://www.lexisone.com) or Findlaw (http://www.findlaw.com). However, retrospective or nationwide searches will require a pay database such as Lexis or Westlaw.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.9 E. University and College Faculties

§7.9 E. University and College Faculties

University and college faculties are an excellent source of potential expert witnesses. To find a list of colleges and universities worldwide, with links to their home pages, use UniversityURL.com, The University and College Directory (http://www.universityurl.com), or, for American universities only, use American Universities (http://www.clas.ufl.edu/au). Counsel should call the department with the expertise that is needed (*e.g.,* physics, economics, forestry) and seek out the faculty member most knowledgeable in the area with which the practitioner is concerned. Many academic and public libraries maintain collections of current college course catalogs that list faculty members; some include biographical information. University websites include: http://www.clas.ufl.edu/au/; http://www.utexas.edu/world/univ/alpha (alphabetical list of colleges and universities); http://www.utexas.edu/world/univ/state (list of colleges and universities by state).

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§7.10 F. Authors of Books, Articles, and Treatises

A search of the scholarly writings in the area in question (*e.g.,* tensile strength of a given alloy, valuation of a particular kind of business, or the effects of a certain toxic substance on human beings) will produce a list of authors who can be contacted as prospective expert witnesses. Such a search can be done at a college or university library or at a large city or county public library. Books, reports, and pamphlets by potential experts may be listed in the library's subject catalog, the Library of Congress's Subject National Union Catalog (Washington, D.C., Library of Congress, http://catalog.loc.gov, Books in Print (New York, R. R. Bowker Co., http://www.booksinprint.com/bip), and the Bibliographic Index (Bronx, N.Y., H. W. Wilson Co., http://www.hwwilson.com/databases/biblio.htm). Counsel should particularly note college and graduate school textbooks because they usually contain bibliographies of generally acknowledged authorities. A search may also be done at a university or library website or by searching on an author's name on the Internet using a generic search engine.

Periodical indexes exist on virtually every subject area. Some of the more important ones follow, grouped by subject area:

- Medicine and the biosciences: Index Medicus (Washington, D.C., National Library of Medicine and Amsterdam: Excerpta Medica).
- Pure and applied sciences: Chemical Abstracts (Columbus, Ohio, American Chemical Society), Mathematical Reviews (Providence, R.I., American Mathematical Society), and Science Citation Index (Philadelphia: Institute for Scientific Information).
- Social sciences: Psychological Abstracts (Washington, D.C., American Psychological Association), Public Affairs Information Service (New York), and Social Sciences Citation Index (Philadelphia, Institute for Scientific Information).
- Business and economics: Business Periodicals Index (Bronx, N.Y., H. W. Wilson Co.) and Economic Titles/Abstracts (Ministry of Economic Affairs, Economic Information Service, Martinus Nijhoff, Publishers).

See Sheehy's Guide to Reference Books, American Library Association, Chicago, Ill., for a more complete list.

Many of these indexes have been computerized by the organizations listed below. Data bases are available to anyone with access to an ASCII-compatible computer terminal. Use costs range from $25 to $165 per hour.

- Dialog Corporation, 11000 Regency Parkway, Ste 10, Cary, NC 27511, (919) 462-8600 or (800) 3-DIALOG, http://www.dialog.com.
- Online Computer Library Center, Inc., 6565 Kilgour Place, Dublin, OH 43017-3395, (800) 848-5878; fax (614) 764-6096, http://www.oclc.org/home.
- Questel, 1725 Duke St., Ste 625, Alexandria, VA 22314, (703) 519-1820; fax (703) 519-1821, http://www.questel.com.
- MEDLINE, U.S. National Library of Medicine, National Institute of Health, 8600 Rockville Pike, Bethesda, MD 20894, (888) FIND-NLM; fax (301) 402-1384, http://www.nlm.nih.gov.

Many public and academic libraries perform computer searches for a fee. In addition, copies of articles can be obtained through information retrieval services such as the following:

- Research On Demand, Inc., (800) 200-4095; fax: (877) 564-4878, http://www.researchondemand.com, info@researchondemand.com.

Other excellent sources are newspaper indexes (*e.g.,* New York Times Index (New York, New York Times Co.), Wall Street Journal Index (New York, Dow Jones), and San Francisco Chronicle (Ann Arbor, Mich., University Microfilms International)), and popular magazine indexes (*e.g.,* Reader's Guide to Periodical Literature (New York, H. W. Wilson Co.)). Journalists often mention or interview noted authorities in their stories. See discussion of the wealth of information available through Internet research in §§7.6A-7.6C.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.11 G. Professional Directories, Deskbooks, and Society Membership Rosters

§7.11 G. Professional Directories, Deskbooks, and Society Membership Rosters

Virtually every discipline and field of expertise has one or more organizations to which specialists in that field belong. These organizations frequently publish membership lists with highly relevant biographical data about the members. The organizations are listed in the Encyclopedia of American Associations (Detroit: Gale Research Co.); the National Trade and Professional Associations of the United States (Washington, D.C., Columbia Books); and the Associations Unlimited Database, which can be accessed free online through public library websites with a library card. See, *e.g.,* http://www.lapl.org.

In addition, various organizations such as the following publish biographical directories or lists of specialists in particular fields:

- The American Association for Justice, The Leonard M. Ring Law Center, 1050 31st St., NW, Washington, D.C. 20007, (202) 965-3500 or (800) 424-2725, http://www.justice.org, has a wealth of information on potential plaintiffs' experts in a variety of fields.
- The Consumer Attorneys of California, 770 L St., Ste 1200, Sacramento, CA 95814, (916) 442-6902; fax (916) 442-7734, http://www.caoc.com, publishes the Recognition of Experience Directory, which focuses on California experts.
- Forensic Expert Witness Directory, Forensic Expert Witness Association, 2402 Vista Nobleza, Newport Beach, CA 92660, (888) 322-3231; fax (949) 640-9911, http://www.forensic.org/data/directory.asp, lists experts by fields.
- Marquis Who's Who, 562 Central Ave., New Providence, NJ 07974, (800) 473-7020; fax (908) 673-1189, http://www.marquiswhoswho.com, publishes the Directory of Medical Specialists, including the background of board-certified physicians in various fields.
- The Society of Automotive Engineers, Inc., (SAE), 400 Commonwealth Dr., Warrendale, PA 15096-0001, (724) 776-4841 or (877) 606-7323; fax (724) 776-0790, http://www.sae.org, in addition to publishing a membership roster, issues a Directory of Automotive Consultants, listing various individuals and organizations willing to testify in automobile liability and design cases and describing the experience and qualifications of those listed.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.12 H. Regulatory Bodies and Trade Associations

§7.12 H. Regulatory Bodies and Trade Associations

Although government employees are frequently precluded by law from testifying in private civil litigation, governmental regulatory agencies nonetheless can be an excellent source of leads for potential experts. An example of how a government employee can be used in a private dispute is found in *Loftleidir Icelandic Airlines, Inc. v McDonnell Douglas Corp.* (1984) 158 CA3d 83, 204 CR 358, in which the court reversed a judgment because a former employee of the National Transportation Safety Board (NTSB) was not permitted to testify for the plaintiff. The trial court, on a motion in limine by the defendant, had excluded that testimony under 49 CFR §§835.3-835.7. These sections limit both the ability of NTSB current employees to testify and the scope of the testimony that may be rendered by current and former employees concerning an accident investigated by the NTSB. In addition, under the regulations, while current and former NTSB employees may testify on the factual information obtained during the course of any accident the NTSB has investigated, they are prohibited from testifying on the NTSB's ultimate finding on the probable cause of the accident.

Because the case involved a former employee, the court of appeal held that the code restrictions limiting the testimony of current employees to depositions or written interrogatories did not apply. The court also pointed out that the expert should have been permitted to testify about the factual circumstances of the accident because the regulations permitted such testimony. This testimony was admissible even if it led the jury to NTSB's ultimate conclusion concerning the accident. 158 CA3d at 92. Finally, since the proposed expert witness was not involved in the NTSB's investigation of the accident during his employment with the Board, and since his opinions and conclusions were based on his own investigation and not on the NTSB's ultimate conclusion concerning the cause of the accident, the court held that he also should have been permitted to testify about such cause.

Potential agency sources for experts follow:

- The Technical Information Services of the National Highway Traffic Safety Administration, 400 7th St. SW, Room 2336, Washington, D.C. 20590, (888) 327-4236; TTY (800) 424-9153; fax (202) 493-2833, http://www.nhtsa.dot.gov/cars/problems/trd, has information on highway safety, including numerous studies, articles, and research papers.
- The National Transportation Safety Board, 490 L'Enfant Plaza SW, Washington, D.C. 20594, (202) 314-6000, http://www.ntsb.gov, has materials similar to those of the National Highway Traffic Safety Administration on airplane crashes.

In addition, a number of quasi-official organizations either supply experts directly or provide leads to experts in their areas of specialization. Examples include:

- The American National Standards Institute (ANSI), 25 W. 43rd St., 4th floor, New York, NY 10036, (212) 642-4900, http://www.ansi.org, which promulgates a multitude of standards and specifications.
- The American Society for Testing and Materials (ASTM), 100 Barr Harbor Dr., P.O. Box C700, West Conshohocken, PA 19428-2959, (610) 832-9585; fax (610) 832-9555, http://www.astm.org, which promulgates procedures, charts, codes, and standards in a host of fields.
- The Bureau of Explosives section of the Association of American Railroads, Transportation Technology Center, Inc., 55500 DOT Rd., Pueblo, CO 81001, (719) 584-0750; fax (719) 584-0711, http://www.aar.com, which promulgates rules, regulations, and safety requirements for the trucking and railroad industries.
- The Bureau of Land Management, Office of Public Affairs, Dep't of the Interior, 1849 C St., Room 406-LS, Washington, D.C. 20240, (202) 452-5125; fax (202) 452-5124, http://www.blm.gov, which establishes mining industry standards and codes.

Further, virtually every industry of any size in the United States has a trade association that issues publications and is knowledgeable about experts in specialized areas in that particular field or industry. For example, most manufacturers of pleasure boats and outboard motors belong to either the American Boat and Yacht Council, Inc., 613

Third Street, Ste 10, Annapolis, MD 21403, (410) 990-4460; fax (410) 990-4466, http://www.abycinc.org, or the National Marine Manufacturer's Association, 200 E. Randolph Dr., #5100, Chicago, IL 60601, (312) 946-6200, http://www.nmma.org. As a result, these organizations are familiar with persons knowledgeable on virtually any aspect of pleasure boat or engine design, performance, or safety. Similarly, the Asphalt Institute, 2696 Research Park Dr., Lexington, KY 40511-8480, (859) 288-4960; fax (859) 288-4999, http://www.asphaltinstitute.org, the Transportation Research Board (of the National Academy of Sciences), Keck Center of the National Academies, 500 5th Street, N.W., Washington, D.C. 20001, (202) 334-2934; fax (202) 334-2003, http://www.trb.org, or the California Dep't of Transportation, 1120 N Street, P.O. Box 942873, Sacramento, CA 94273-0001, (916) 654-5266, http://www.dot.ca.gov, can provide names of persons with expertise on almost any aspect of asphalt or paving.

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§7.13 I. Internet Research

The material in this section has been moved to §§7.6A-7.6C, closer to the beginning of the discussion on locating potential experts, because of the great importance of the Internet as a research tool.

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§7.14 J. "No-Degree" Expert

An expert witness need not be a professor or a published author, or have an advanced degree. In cases concerning operation of equipment, repair of machinery, or custom and practice in blue collar trades, to name but a few, the "no-degree" expert who has had firsthand experience with the subject in issue can often be more persuasive and infinitely more credible than the professor, consultant, or administrator who has only studied the area.

Experts who have gained their expertise on the job usually have had no prior testifying experience. Thus, some convey a simplicity and disarming candor that contrasts very favorably with the restrained sophistication of the opponent's expert who has impressive credentials. Others may be unable to adapt to the artificiality of the courtroom and will not make good witnesses.

No-degree experts are seldom located through normal expert witness procurement channels. Counsel must employ some ingenuity in seeking these experts, *e.g.,* at union hiring halls, construction sites, and factories.

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§7.15 K. Experts Already in Case

Frequently, an expert is already involved in the case, *e.g.,* the doctor who has provided treatment to the plaintiff in a personal injury action, the police officer who investigated the accident, the person who serviced the elevator the day before the accident, the representative of the defendant manufacturer who inspected the product shortly after the accident, or the accountant for the allegedly damaged business.

What these witnesses may lack in credentials is frequently offset by their position of disinterest (the Investigating officer) or actual identification with the opposing party, as when defendant calls plaintiff's treating doctor or accountant, or when plaintiff calls one of defendant's engineers.

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VI. SELECTING BEST POSSIBLE EXPERT

§7.16 A. Introduction

It is vitally important to find the right expert for the case. Both experts and fields of expertise are highly specialized and compartmentalized. An expert who is effective in one subject area may be completely ineffective in another, although closely related, area. Similarly, experts who are successful in one geographical area may not "sell" in another. Counsel should thus avoid the temptation to use an expert simply because counsel or someone else has had success with that expert in the past, or because the expert is readily available, or is personable and easy to get along with. Counsel should constantly be looking for new faces and should be willing to go outside both the immediate geographical area and the usual tried and proven group of witnesses to find the expert best qualified for the particular case and question in issue.

When looking for an expert, counsel should consider almost all prospective experts as potential trial witnesses whose identity will eventually be revealed and who will be deposed and cross-examined. If the expert is to serve solely as a consultant, many of these considerations will not apply. The uncertainties are such, however, that the practitioner can seldom be certain that an expert consultant will not have to be used as a witness.

See also Herron, *Tracking Down Expert Witnesses*, 4 Cal Law 57 (July 1984); Hanauer, *Choosing a Medical Expert*, 5 Cal Law 53 (May 1985); Hammel, *Expert Advice: What to Look for in an Expert Witness*, 24 CEB Civ Litigation Rep 226 (Sept. 2002).

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.17 B. Conflicts of Interest

§7.17 B. Conflicts of Interest

Disqualification of Witnesses Because of Conflicts

There are few reported decisions addressing what constitutes a conflict of interest on the part of an expert and what is an appropriate remedy when a conflict exists. See *Brand v 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 CA4th 594, 21 CR3d 380; *Western Digital Corp. v Superior Court* (1998) 60 CA4th 1471, 71 CR2d 179; *Peat, Marwick, Mitchell & Co. v Superior Court* (1988) 200 CA3d 272, 245 CR 873; *Plumley v Doug Mockett & Co.* (CD Cal, Dec. 22, 2008, No. CV 04-2868 GHK) 2008 US Dist Lexis 105634.

When the proposed expert is an attorney, the expert may be subject to disqualification if a substantial relationship exists between the expert's current employment and former representation if the relationship between the attorney and the former client is shown to have been direct, *i.e.,* the attorney was personally involved in providing legal advice and services. *Plumley,* 2008 US Dist Lexis 105634 at *9; *Brand,* 124 CA4th at 602. Moreover, courts will conclusively presume confidences were exchanged between the attorney and client, necessitating disqualification, whenever the nature of the prior representation would have permitted their exchange. An exception may apply if the attorney can establish that there was no opportunity for the attorney to receive confidential information and the current employment does not involve the attorney's former work on the same matter. 124 CA4th at 603, citing *City Nat'l Bank v Adams* (2002) 96 CA4th 315, 327, 117 CR2d 125.

In *Plumley,* defendants retained an expert witness who was also senior counsel at a law firm. Although the senior counsel had not previously represented plaintiffs, a partner at the firm had represented plaintiffs in the past in a substantially similar case that involved the same plaintiff and the same defendant litigating over the same patent. Under "the traditional California Rules of Conduct," an attorney's entire firm is disqualified when the attorney has a conflict. Although case law suggests that ethical conflicts do not have to be imputed to the entire firm if an ethical wall is erected, in this case screening procedures were ineffective. As a result, the partner's actual knowledge was imputed to the senior counsel, and the senior counsel was disqualified from acting as plaintiff's expert witness. 2008 US Dist Lexis 105634 at *9.

In *Brand,* the plaintiff sought to call one of the defendant insurer's former attorneys as an expert witness in a suit for breach of contract and bad faith arising out of mold-related damage to plaintiff's home. Twelve years before, the expert had personally represented, and supervised attorneys who represented, defendant for 3 years. During this time, the expert had given coverage opinions on various matters, including fungal infestation, defended coverage disputes and bad faith claims, taught defendant's claims adjusters how to evaluate claims for coverage, and made suggestions to defendant on how to improve its claims handling procedures. The court held that this representation was both "direct and personal" and "substantially related" to the present suit. 124 CA4th at 607. It reasoned that, because plaintiff was seeking coverage for a claim based on alleged moisture intrusion and mold on her property and was alleging bad faith, the two engagements arose in the same context and shared numerous factual and legal elements. In addition, the court found that neither the passage of 12 years nor the expert's professed failure to recall any confidential information overcame the conclusive presumption that he had received such information because the nature of his prior representation was such that confidential information material to the current dispute would normally have been imparted to him. Accordingly, the court directed that the defendant's motion to disqualify and exclude the expert testimony be granted. 124 CA4th at 608.

In *Western Digital Corp. v Superior Court* (1998) 60 CA4th 1471, 71 CR2d 179, the plaintiff claimed that the defendant sold it defective hard disk drives for incorporation in its computer with catastrophic financial consequences. The plaintiff's lawyers met three times with the founder of a damages consulting firm, but did not hire him or his firm. Several months after the last of these meetings, the consulting firm hired new employee Dan Carter. Nearly a year later, the defendant's lawyers hired Carter as an expert. The consulting firm created an "ethical wall" between the Carter team and all other employees that purportedly prevented other employees from disclosing to Carter or members of his team any confidential information they had learned from their interviews with plaintiff's lawyers. Plaintiff objected to defendant's retention of the consulting firm and moved to disqualify both the expert and defendant's lawyers on the

basis of conflict of interest.

The appellate court reversed the trial court's grant of the disqualification motion. It held that the plaintiff had a reasonable expectation of confidentiality in the preretention meetings, and that substantial evidence supported the finding that confidential information was disclosed in those meetings, but that Dan Carter, the expert actually retained by defendant, was not exposed to any confidential information. Disqualification of an expert can be justified only if the moving party establishes that the expert actually possesses confidential attorney-client information materially related to the proceedings before the court. 60 CA4th at 1487.

In *Peat, Marwick* the state charged an accounting firm with having negligently audited a now-insolvent entity. The state retained another accounting firm, Main Hurdman, as an expert concerning, among other things, Peat Marwick's professional negligence. For most of the time that Main Hurdman served as the state's litigation expert, it was also engaged in merger negotiations with Peat Marwick. These negotiations eventually resulted in a merger of defendant, Peat Marwick, and Main Hurdman, the state's expert, while the litigation was still pending. The trial court awarded sanctions against Peat Marwick, including an order precluding Peat Marwick's controverting those matters on which Main Hurdman would have testified, *i.e.,* Peat Marwick's standard of care, defects in a 1982 audit, and the amount of the liquidation estate's deficit as a measure of the state's damages. 200 CA3d at 289.

The issue of what constitutes a conflict of interest on the part of an expert has been the subject of considerable litigation in other jurisdictions. See discussion of those cases in §7.34. In this body of law, the focus for determining whether a "conflicted expert" should be disqualified depends on the nature of the confidences exchanged, the prejudice to the interests of the party who retained the expert previously, and the effect of the expert's continued participation on the integrity of the trial process.

The principles governing disqualification will necessarily make the outcome of any conflict an unpredictable one. Because the lateness of expert disclosure may postpone awareness of such conflicts by the other side, moreover, motions to disqualify may not be made until very late before trial. The granting of such a motion at the eleventh hour could leave counsel without the expert he or she needs to prove a case. To avoid that highly undesirable result, in selecting either potential trial witnesses or consultants, cautious practitioners should avoid dealing with an expert who has a potential conflict of interest.

PRACTICE TIP: According to the court in *Western Digital Corp. v Superior Court, supra,* an attorney interviewing an expert should use a written confidentiality agreement because such an agreement warns the expert that the attorney intends to disclose confidential information during the interview and that such disclosure would disqualify the expert from employment by the other side should the attorney not retain the expert. 60 CA4th at 1481 n2. Similarly, once a possible conflict of interest becomes apparent, the retaining attorney should disclose his or her intention to retain the particular expert and should advise the expert to distribute a memorandum to all personnel in the expert's firm, announcing the creation of a "screening wall." 60 CA4th at 1488.

For more advice on how to avoid disqualification of expert witnesses (and of counsel), see Hebert, *Protecting You and Your Expert Witness from Conflicts of Interest*, 20 CEB Civ Litigation Rep 202 (Sept. 1998).

"Conflicted" Expert Can Result in Disqualification of Counsel

Counsel must be aware that dealing with a "conflicted" expert can result in counsel's disqualification. Although *Plumley v Doug Mockett & Co.* (CD Cal, Dec. 22, 2008, No. CV 04-2868 GHK) 2008 US Dist Lexis 105634 is the most recent case on this issue, *Collins v State* (2004) 121 CA4th 1112, 18 CR3d 112, continues to have the most thorough discussion of the current state of the law.

In *Collins,* plaintiffs' counsel contacted, and eventually disclosed, Clark as an expert witness. Clark had not advised plaintiffs' counsel that the lawyers for two of the defendants in the case had hired Clark a year before he was contacted by plaintiffs' counsel to serve as a consultant for them on the same subject matter. On learning of the prior retention, plaintiffs' counsel immediately ceased all contact with Clark. The trial court granted defendants' motion to disqualify plaintiffs' lawyers. The court of appeal reversed, carefully analyzing two earlier cases that considered the same issue.

County of Los Angeles: In *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698, the defendant withdrew a disclosed expert before the expert was deposed. Plaintiff's counsel then met with the expert, and persuaded him to testify on plaintiff's behalf. The court of appeal held that these facts justified

disqualification of plaintiff's counsel. Parties may, for tactical reasons, withdraw designated experts *who have not yet been deposed*. But see §10.20 (explaining that testimony of expert who has been both disclosed and deposed cannot be withdrawn and can be used by any party to case). Communicating with the undeposed expert violated defense counsel's work product protection, justifying disqualification.

Shadow Traffic: In *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 29 CR2d 693, plaintiff's counsel interviewed, but did not retain, an accounting expert. Later, defense counsel contacted the same expert, was advised of the earlier contact and non-retention by plaintiff, and then retained and disclosed the accountant as a defense expert. Defense counsel argued that information shared with a prospective expert who is never actually retained is not confidential. The court rejected this argument, finding that actual retention is irrelevant, and that what matters is whether there was a reasonable expectation of confidentiality.

The *Shadow Traffic* court went on to articulate the test for determining whether communication with an expert who has spoken with another party in the case requires recusal:

> The party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court … Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment.

24 CA4th at 1085. The court found that plaintiff's counsel, who had first spoken with the expert, demonstrated that confidential information had been disclosed and that defense counsel failed to rebut the presumption that the accountants had deliberately or inadvertently passed along the information they had received from plaintiff's counsel.

Against the background of these two cases, the *Collins* court found that disqualification was not warranted. The defendant had established that confidential information was provided to Clark by demonstrating "the nature of the information and its material relationship to the proceeding." 121 CA4th at 1127. However, the court found that the rebuttable presumption articulated in *Shadow Traffic* did not apply. In *Shadow Traffic*, the plaintiff never actually retained the expert, so it was unable to talk directly with the expert about what had or had not been disclosed to defense counsel. In contrast, the defendant in *Collins* represented that Clark was still in its employ and in a position to discuss whether he had disclosed any confidential information to plaintiffs' lawyers.

The *Collins* court noted the conspicuous absence of a declaration from Clark stating that he had disclosed any confidential information. This left the court with the uncontradicted declaration of plaintiffs' counsel that Clark had not disclosed any confidential material and that, at the time they had spoken, Clark had forgotten about his prior contact with defense counsel and could not have disclosed anything he might had learned during those now-forgotten communications.

Thus, *Collins* stands for the proposition that disqualification is unwarranted when contact with an expert for another party is both innocent and does not result in the disclosure of any confidences. Further, the opinion strongly suggests that innocence alone, combined with immediate cessation of contact with the expert, is probably enough to avoid disqualification even if confidences are disclosed. For a case applying *Collins,* see *Shandralina G. v Homonchuk* (2007) 147 CA4th 395, 54 CR3d 207 (trial court improperly applied burden-shifting of *Shadow Traffic*).

The court in *Plumley v Doug Mockett & Co.* (CD Cal, Dec. 22, 2008, No. CV 04-2868 GHK) 2008 US Dist Lexis 105634, *11, distinguished *Shadow Traffic* by holding that when the expert is an attorney, courts will not presume that the expert will reveal confidential information to counsel.

A rare but difficult conflict situation is the subject of an opinion issued by the Los Angeles County Bar Association. LA County Bar Ass'n Formal Opinion No. 513 (July 18, 2005). This opinion concerns a matter in which a lawyer may have to cross-examine a former client who is now an expert for an adversary in subsequent litigation. The conflict issues are governed by (1) the nature of the prior confidences imparted to the cross-examining lawyer and (2) the timing of the expert's retention.

PRACTICE TIP: Most experts who consult or testify regularly are sensitive to conflict issues and will perform their own conflicts check before accepting an engagement. However, given the draconian nature of disqualification, counsel should not assume that the expert will make sure there are no conflicts. Cautious counsel should not only affirmatively inquire as to whether there are any potential conflicts, but should also provide the expert with a written list of the names of all of the other parties in the case and ask for the expert's assurance that there has been no prior contact with any of them. In addition, with larger consulting or professional firms, counsel should

request assurance that a conflicts check has been made with other members of the firm. In addition, at the first suggestion that the expert may have a conflict, counsel should make sure that there is no further direct contact with the expert. In larger cases, in which a number of people are working on the matter, this directive should be in writing.

For further discussion, see Morrow, *Issues Relating to Expert Disqualification*, 17 California Litigation 24 (Spring 2004); Hebert, *Protecting You and Your Expert Witness from Conflicts of Interest*, 20 CEB Civ Litigation Rep 202 (Sept. 1998); and Hicks & Jorrie, *Expert Witnesses and Attorney Disqualification: The Shadow, Toyota and Erickson Cases*, 18 CEB Civ Litigation Rep 401 (Nov. 1996).

PRACTICE TIP: Once you have hired an expert, you should explain conflict of interest principles to him or her. Advise the expert to remain free of conflicts and to inform you immediately if one does arise.

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C. Factors to Consider in Picking Best Expert

§7.18 1. Qualifications

The expert's qualifications, education, and experience should prepare him or her to offer opinions on the particular subjects in issue; testifying should not take the expert into foreign territory. In addition to making sure that the prospective witness will qualify as an expert (see Evid C §720(a), discussed in chap 3), counsel should assess how expert the witness will appear to a jury, particularly when contrasted with opposing experts. Counsel should remember the expert's key function—explaining complicated issues in a way that will enable the trier of fact to understand your case. For discussion of the expert's role as a teacher, see McElhaney, *Terms of Enlightenment*, 83 ABA J 82 (May 1997).

Several examples illustrate the difference between experts with varying experience in the same field:

- A number of accident reconstructionists with physics or mechanical engineering backgrounds are adept at calculating speed from skid marks; they can determine the point at which two cars collided based on, *e.g.,* damage to the vehicles or pavement gouges. However, these experts seldom have any product design experience in either a commercial or an academic setting. Accordingly, when used in a products liability design case, their credentials and the weight of their opinions often pale when pitted against those of someone with actual product design experience.
- A general surgeon who does one or two hernia operations a year will almost certainly qualify as an expert in a medical malpractice case involving a hernia operation. See *Hagy v Allied Chem. & Dye Corp.* (1953) 122 CA2d 361, 368, 265 P2d 86 (general practitioner allowed to testify about cause of plaintiff's larynx cancer). However, some surgeons perform a dozen or more hernia operations a week, and their opinions will probably carry far greater weight with the trier of fact. On the other hand, if the case is being tried in a rural area, there may be a local prejudice against "big city" experts. Counsel would be well advised in that event to select a less qualified but more "acceptable" local physician.
- Virtually any certified public accountant can analyze an automobile dealership's books and records to project the probable future profits the business would have enjoyed but for a fire, cancellation of its franchise, or other event that prompted the lawsuit. These projections will carry extra weight, however, if they are formulated by an accountant who has had automobile dealerships as clients for many years.

On the other hand, considerations of cost, time, and other practicalities often mean that counsel cannot retain a Mario Andretti in every case involving the handling characteristics of an automobile, or a Michael DeBakey in every case touching on heart surgery. Counsel must balance the real against the ideal and focus on getting the best possible expert for the particular case in issue. In making those tough choices, it cannot be overemphasized that academic qualifications alone do not make an expert. Practical experience in the relevant area is as important as education.

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§7.19 2. Effect on Jury

A jury should find an expert's appearance, demeanor, and manner of answering questions persuasive. In evaluating an expert's persuasiveness, counsel must keep in mind whether the case is going to be tried to a judge or a jury. While judges are certainly human, they are generally far less susceptible to an expert's personality and manner of testifying than they are to the hard content of what he or she says. On the other hand, jurors—particularly inexperienced jurors—may be more impressed with the wrapping than with the contents of the package. The glib, street-wise expert who may be effective in West Los Angeles may be totally unpersuasive to a Visalia jury. Conversely, an expert with a "folksy" approach may enjoy considerable success in Red Bluff but be viewed as "cornpone" by a San Francisco jury. Moreover, leaving aside regional variations, some otherwise eminently qualified experts simply "talk into their tie," are overbearing, or have spent too much time in the laboratory to be able to persuade a group of lay persons.

See also §§7.27-7.28 on experienced and inexperienced witnesses.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.20 3. Capability as Witness

§7.20 3. Capability as Witness

Experts must be able to withstand the rigors of direct and cross-examination and the pressures of the courtroom. Although there is no foolproof method of predicting how an individual will perform on the witness stand, simulated cross-examination (particularly by a lawyer other than the one responsible for the case) generally reveals a witness's potential weaknesses. In addition, reviewing an expert's deposition testimony can provide information on how the expert may perform at trial. There are online services providing access to deposition transcripts for a fee, including TrialSmith (http://www.trialsmith.com) for plaintiffs' lawyers and Idex (http://www.idex.com) for defense counsel.

See also §7.28 on inexperienced witnesses.

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§7.21 4. Independence

The expert should not be simply a "yes man" willing to say virtually anything that the lawyer wants to hear. Although a lawyer wants an expert who will vigorously assert his or her position, the expert should view the case critically and prepare the lawyer for any weaknesses in the case so there will be no surprises at trial. Further, unless the expert provides this assistance, the lawyer cannot fully or properly assess the settlement value of the case.

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§7.22 5. Available Time

The expert's schedule should permit him or her to devote sufficient time to counsel's case. While counsel has to be careful not to scare off the expert by suggesting that the entirety of the expert's waking hours during the next three and a half years will have to be devoted to the case, the expert must understand that he or she will be required to review and digest records that may be voluminous, will have to appear for deposition, and may have to testify at trial at a time that may be inconvenient. Counsel can soften the impact by emphasizing that he or she will do everything possible to accommodate the expert's schedule. However, the expert must understand that this will not always be possible and that, by agreeing to participate in the case, he or she is making an appreciable commitment of time and energy.

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§7.23 6. Compatibility With Attorney

The expert should be someone with whom the lawyer can work effectively, particularly under the stressful conditions that typify case preparation and trial. Some experts are not easy to get along with and may require a great deal of coddling. While the expert need not be someone with whom counsel plans to establish a lifelong friendship, it is unrealistic to think that counsel can work effectively with an expert whom he or she intensely dislikes. Counsel should assess the situation and, if it is obvious that relations with the expert are going to resemble an armed truce, counsel should look for another expert.

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§7.24 7. Bias

An expert who testifies overwhelmingly for one side or the other gives the opposition a golden opportunity to impugn the expert's objectivity and integrity. In this post-Watergate era of distrust of lawyers (and their expert witnesses), credibility is an expert's single most important trait. Although one expert may be better qualified or more talented than another, surface polish and mastery of the technique of testifying will not persuade a jury to believe an expert the jurors otherwise distrust, and jurors may distrust an expert who always testifies for one side.

A related problem arises when the professional expert's major or even sole source of income is from working and testifying for lawyers. Although counsel may become inured to this fact through experience, a lay jury may have trouble accepting the testimony of a jurisprudential gypsy who does not have a "real job."

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§7.25 8. Expert's Writings and Previous Testimony

If the expert has written anything on the subject in issue, counsel must determine if it is consistent or inconsistent with counsel's position. If inconsistent, can it be explained away? An expert who has written a book or an article on the subject concerning which he or she will testify will probably be considered quite authoritative by the trier of fact. Experts may not post all of their writings on their website; thus, counsel should conduct a nationwide search of writings by or about the expert through a database such as Lexis-Nexis or Westlaw, or the Internet. Counsel can obtain the full text of many articles published since 1998 at http://www.findarticles.com free of charge.

Similarly, counsel must determine what the expert said when he or she testified at previous depositions or trials. This ensures that the expert has not expressed an opinion "on the record" that is inconsistent with or in opposition to the opinion counsel is presenting to the trier of fact in support of his or her position in the instant case.

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§7.26 9. Expert's Acceptance of Counsel's Position

Counsel should try to find an expert who is truly comfortable with the position he or she has been asked to take in the case. Many experts will "bend" to meet the needs of a lawyer with whom they work regularly, or for whom they would like to work, or to get a case in an area they are trying to enter. If an expert is not completely comfortable with his or her position in the case, however, the rigors of discovery and cross-examination will most likely bring out his or her doubts. Counsel should therefore try to select a "true believer." This does not mean that the expert has to agree with counsel's side of the case in its entirety; the expert should, however, be completely comfortable with his or her portion of the case. For example, in a civil antitrust action in which defendant has already entered a nolo contendere or even a guilty plea in a related criminal prosecution, the defense economist does not have to endorse defendant's business practices. If, however, the economist is hired to show, *e.g.,* that the claimed antitrust violation had no effect on the civil plaintiff's business, counsel wants an expert who really believes that there was no economic impact on the plaintiff.

Counsel should therefore probe the expert with questions such as:

Q. Is there any aspect of the case that gives you any problem?

Q. What would be the thrust of your testimony if you had been retained by the opposition?

Q. Where do you think our position is the weakest?

By assessing the answers, counsel can determine whether the expert is totally comfortable with the testimony he or she will have to provide.

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10. Experienced or Inexperienced as Witness

§7.27 a. Experienced Expert

When deciding whether to hire an experienced expert, counsel should bear in mind the following:

- *What is the expert's reputation among judges and other lawyers?* Is the expert viewed with respect or is he or she viewed as a "prostitute" whose opinions change depending on who is paying the bills? Counsel should remember that few experienced experts are rated the same by everyone; an expert should not be abandoned at the first criticism. Litigation is a competitive and ego-involving activity. Many lawyers have difficulty distinguishing between an expert who simply got the best of them and one who compromises his or her principles when working for an opponent. Accordingly, it is essential to obtain a cross-section of opinion before concluding that an experienced expert's reputation is good or bad.
- *Has the expert "burned out?"* Experts, like boxers and relief pitchers, frequently have limited careers. When they begin to deteriorate, they may fall apart rapidly. Constant subjection to the stress of litigation and the rigors and abuse of cross-examination take a toll on many experts. Burnout can take many forms, ranging from the expert's becoming artificially casual, cocky, or all-knowing to becoming excessively conservative during direct examination and overly yielding on cross-examination. In selecting an experienced expert, counsel must know how the expert has performed in recent cases, not what he or she did five or ten years ago.
- *What kind of "book" exists on the expert?* While the experienced expert is learning courtroom savvy and mastering the sophisticated aspects of litigation, lawyers may be building a library of depositions and trial transcripts that can be used to cross-examine the expert. Such expert "books" are often devastating. For example, an expert who incorrectly claimed on one occasion many years before to have graduated from a university that he or she had really only attended can expect to be confronted with the unfortunate misstatement when taking the stand in the future. The same is true if the expert has said or done anything foolish or embarrassing that is in any way relevant to the subject matter of the present lawsuit. One well-known expert, who was fired many years ago for allegedly having tried to steal parts from his employer, carries a motion in limine to try to block reference to that embarrassing episode. In short, even though an experienced expert may have outstanding credentials and appear to be perfect for a particular case, it is essential to determine whether there are any skeletons in the closet.
- *Has the expert become too popular?* There is always an acute shortage of really outstanding experts. When a good one appears, his or her reputation generally spreads quickly and work comes flowing in. Unless the expert is extremely disciplined, he or she will quickly become immersed in more cases than he or she can properly handle. It is essential to determine whether the expert has enough time to work on counsel's case and can realistically foresee all that will be required to prepare for trial.
- *Has the expert been overused?* Just as good experts tend to take on more cases than they can handle, they also tend to be overused by particular lawyers, law firms, and clients, and in particular kinds of cases. If a prospective expert has testified for the lawyer or for the lawyer's firm ten times in the last two years, the expert will be vulnerable on cross-examination to the innuendo that he or she is somehow a "house organ" for the lawyers; counsel should seriously consider finding a fresh face. Similarly, the objectivity of an expert who has repeatedly testified on behalf of or against the same manufacturer or industry is obviously open to question.

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§7.28 b. Inexperienced Expert

In deciding whether to use an inexperienced expert, the lawyer should consider the following:

- *Does the expert clearly qualify as an expert in the subject area in question?* If an expert has qualified in previous cases, few judges will keep him or her off the stand, even if the expert's qualifications appear slim in the instant case. On the other hand, if the expert has never before qualified to testify as an expert, the judge may subconsciously or otherwise apply a stricter standard. Thus, an inexperienced expert needs better qualifications than an experienced one to ensure acceptance as an expert.
- *Will the witness be able to respond effectively to direct examination?* Although it might seem that anyone is capable of handling direct as opposed to cross-examination, this is not always true. Many people simply do not listen to questions, or are otherwise unable to answer the specific question asked. If a prospective witness gives nonresponsive or irrelevant answers in a lawyer's office, that witness, even with coaching, is likely to revert to habit during the stress of a deposition or trial. Counsel should not attempt to play Pygmalion but should realize that, although a witness's effectiveness can improve with coaching, it is virtually impossible to transform a really bad witness into a good one. Even though the prospective witness may have formidable expertise, if that expertise cannot be effectively demonstrated on direct examination, that person is not going to be an effective expert witness.
- *Will the prospective witness be able to handle cross-examination?* Although cross-examination may be the most effective truth-seeking device, it has a number of negative aspects as well, one of which is that it frequently causes honest but diffident witnesses to appear evasive or dishonest. Although jurors make allowances for a timid or nervous lay witness, they rarely make such allowances for the expert, who is being paid to testify. Unless the prospective witness has the poise, self-confidence, and quickness of mind to hold up under the stress of cross-examination, counsel should seek another witness. A prospective witness's strength (or weakness) in this regard generally shows up during an initial interview and can almost always be revealed through a cross-examination rehearsal. Lawyers run into trouble when they fail to acknowledge the existence of a witness's weaknesses and unrealistically cling to the notion that he or she will somehow improve as the case progresses.

In deciding whether an inexperienced witness would be an effective expert, counsel must remember that litigation is an artificial situation that requires a particular set of talents. Those talents simply are not possessed by many persons who otherwise have the requisite expert education, experience, and background. Just as every witness is not an expert, so too every expert is not a good witness.

See also Hanauer, *Choosing a Medical Expert*, 5 Cal Law 53 (May 1985).

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.29 11. Employee-Expert or Outsider

§7.29 11. Employee-Expert or Outsider

Advantages of Employee-Expert

Counsel's client may have employees who are experts, particularly in medical malpractice, products liability, insurance (bad faith), and commercial cases. These employees are generally available to provide guidance and assistance. In addition, they can be used without directly increasing litigation expense because they are already on the client's payroll. These employees often have the additional advantage of being more knowledgeable than an outsider about the particular part, incident, or other matter in issue.

Counsel should confer with the employee-expert as early as possible in the proceedings. This meeting should be in person and should take place at the employee's place of employment, so that the lawyer can assess the employee's potential as a witness and see the test track, production line, operating room, or other item involved in the case. At that time, counsel is also in a position to examine company records and the employee's own files and library, and to talk with other employees with related or ancillary knowledge. A day or so spent on such a visit usually pays handsome rewards.

The employee-expert is exempt from the claim of being a "hired gun." Further, in some cases it is tactically advisable, if not mandatory, for a representative of the party to testify. For example, it is almost impossible for the defendant in a products liability suit involving a claim of defective design not to call a representative of the company to "defend" the product. The same is true of a hospital defendant in a medical malpractice case.

In some instances, protective orders prohibit the use of employee-experts, or even experts who are affiliated with a party. For example in *Beam Sys., Inc. v Checkpoint Sys., Inc.* (CD Cal 1997) 42 US PQ2d (BNA) 1461, 1997 WL 423113, 1997 US Dist Lexis 8812, plaintiff alleged that defendant had infringed its copyrighted computer software. Under the court's protective order only plaintiff's counsel and plaintiff's independent expert could review defendant's software. When defendant learned that plaintiff's "independent" expert had performed substantial work for plaintiff over a number of years, defendant successfully moved to disqualify the expert. The court held that plaintiff's use of an independent contractor affiliated with plaintiff did not "minimize the risk of disclosure of highly confidential materials or information to the adverse party."

Disadvantages of Employee-Expert

Using employees as experts at trial presents at least three significant drawbacks:

- Because the employee works for the client and depends on the client for paychecks, future promotions, and pension, the employee's objectivity is subject to attack by the opposition on cross-examination.
- The employee frequently knows too much about the subject matter of the case, *e.g.,* other claims, related problems, or similar litigation. Engineers, in particular, can usually find fault with any product or procedure or can envision some unusual set of circumstances that would have allowed the incident to occur in the way the opposition alleges.
- The employee may simply not make a very good witness on the stand.

Resolving the Dilemma of Whether to Use Employee-Expert

When meeting with the employee-expert early in the proceedings, counsel should assess whether the employee single-handedly will be able to provide effective trial testimony. If not, counsel should determine whether an outside expert should be hired to supplement or replace the insider as a trial witness. The nonemployee-expert generally has the advantage of being unaware of counsel's in-house problems, *e.g.,* poor test results, that may "contaminate" the in-house expert. Further, counsel is then free to use an expert with previous experience who makes a good impression in court.

If counsel employs only an outside expert, he or she opens the client to the argument: "They couldn't find a single person in their own organization to defend the—[*e.g.,* product, operative procedure, practice]—and had to hire a mercenary at *X* dollars per hour to make their case."

There is no perfect solution to this dilemma; counsel must simply make the best of the situation on a case-by-case

basis. Often, a combination of an employee-expert and an outsider is the best solution.

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§7.30 VII. COURT-APPOINTED EXPERTS

Evidence Code §730 allows the court, on motion of any party or on the court's own motion, to "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 the action relative to the fact or matter as to which such expert evidence is or may be required."

However, §730 provides that a court cannot appoint an expert to testify concerning any conduct for which a license is required unless the appointed expert holds the appropriate license.

The court also has the power to select interpreters or translators (Evid C §752) and, when paternity is in issue, the court can appoint blood test experts. Fam C §§7550-7558.

During any medical examination, conducted to determine civil damages, requested by an insurer or by the defendant, of a party who does not proficiently speak or understand English, an interpreter must be present. Evid C §755.5.

In criminal cases, counsel may want to make an ex parte motion for confidential appointment of an expert. Many courts used to require that the motion be made in the prosecutor's presence, but most now allow an ex parte motion or in camera hearing that excludes the prosecutor. See *People v Faxel* (1979) 91 CA3d 327, 330 n1, 154 CR 132. Any transcript that is prepared is then sealed. The request, whether in or out of the prosecutor's presence, should be specific and detailed.

Court-appointed experts may be called and examined by the court or by any party to the action. When a court-appointed expert is called as a witness, each party is allowed to cross-examine him or her as though the witness had been called by an adverse party. Evid C §732; Comment to Evid C §732. See also Kraft, Using Experts in Civil Cases, chap 3 (2d ed 1982). Evidence Code §730 does not prohibit the court from advising the jury that an expert witness was court appointed.

The court's appointment of an expert does not abridge the rights of the parties, at their own expense, to hire experts of their own choosing to testify. Evid C §733.

Evidence Code §§730-731 allow the court to determine compensation of court-appointed experts. In civil actions, compensation is apportioned and charged to the parties in the same manner as the court determines other costs. Evid C §731(c). Medical experts are an exception to Evid C §731(c). County boards of supervisors have the right to determine whether fees paid to court-appointed medical experts in civil actions are chargeable to the parties or to the county treasury. Evid C §731(b).

To date, the courts have used their power to appoint expert witnesses very sparingly. Of the few cases in which an appointment was made, a significant portion dealt with experts as an extension of the right to counsel in the criminal field. See, *e.g., Torres v Municipal Court* (1975) 50 CA3d 778, 123 CR 553. However, the court of appeal in *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477, refused to expand the scope of Evid C §730 to sentencing proceedings, rejecting the argument that appointed experts must be provided at public expense whenever an indigent criminal defendant shows such an expert to be reasonably necessary. The court held that §730 provides for the appointment of experts in noncapital cases for indigent defendants "only for purposes of defense at trial on the issue of guilt." 175 CA4th at 908.

Case law suggests that at least when objective scientific expertise is necessary to protect significant public health and welfare interests, there may be an increasing resort to the use of court-appointed experts, who are free from the biases of partisan commitments. See *People ex rel Brown v Tri-Union Seafoods, LLC* (2009) 171 CA4th 1549, 1573, 90 CR3d 644.

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VIII. RETAINING EXPERTS

§7.31 A. Initial Contact by Attorney

Initial contact with the expert should be made by the attorney handling the case, or, in exceptionally time-consuming cases, by the attorney who will have primary responsibility for working with the expert. The task of retaining the expert should not be delegated to a subordinate lawyer, paralegal, secretary, or investigator.

What is said during initial conversations is probably discoverable if the expert is eventually designated as a potential trial witness. See chaps 8, 10. Therefore, someone familiar with the laws of discovery in general, and with the facts of the case in particular, should determine what should be said and supplied to the expert.

If the expert is busy or otherwise disinclined to work on the case, a plea to reconsider that position will carry the most weight if made by the lawyer in charge of the case.

Counsel should be aware that most potential witnesses (especially those who do not make a living serving as experts) are not particularly enthusiastic about getting involved in a contested lawsuit. Some do not want to make the time commitment, others do not want to go through the ordeal of being cross-examined, and others simply do not like lawyers. Therefore, counsel should figure out the most effective way to sell the potential expert on agreeing to work on the case. If contact is made by telephone, counsel should try to find a time the expert is relatively unoccupied. The expert's secretary can be helpful in this regard. Alternatively, a personal visit at the expert's convenience is often more persuasive than a telephone call. Counsel should not ignore using flattery and compliments. For example, when attempting to hire a doctor with a worldwide reputation in some specialty, counsel might want to start with "Doctor, I have spoken with at least eight specialists concerning this case, and every one of them has said that you are really the only person who can help my client."

It is a frequent concern among expert witnesses that they may be subject to later lawsuits as a result of their testimony in a judicial proceeding if the losing party feels victimized by their testimony, particularly if the losing party thinks the expert's testimony was either fabricated or without foundation. The recognition of a cause of action against an expert under these circumstances would, of course, have a chilling effect on the expert's willingness to testify. Some protection is provided by CC §47(b), which makes any publication or broadcast that is part of a judicial proceeding privileged. See *Carden v Getzoff* (1987) 190 CA3d 907, 235 CR 698 (absolute privilege in §47(b) barred action for abuse of process and intentional infliction of emotional distress against expert accounting witness who allegedly manufactured false evidence and gave false testimony in marital dissolution action; court held that those publications were absolutely privileged even if defendant *intentionally* committed perjury). But see *Pace v Swerdlow* (10th Cir 2008) 519 F3d 1067, 1074 (plaintiffs sufficiently alleged that their expert's last minute change of position on whether defendant doctor's actions fell below professional standard of care proximately caused state court to grant summary judgment against them; on remand, district court was instructed to consider alternative argument that expert witness immunity barred plaintiffs' claims).

The California Supreme Court in *Moore v Conliffe* (1994) 7 C4th 634, 29 CR2d 152, held that the litigation privilege of CC §47(b) applies to statements made in preparation for a private, contractual arbitration, and that therefore the statements made by an expert in a deposition before a private arbitration could not form the basis for an action against that expert. In *Moore,* the defendant in a malpractice action relied on the opinion of an expert stated in a deposition, and the arbitrators ruled in favor of the defendant. Plaintiffs later learned that the expert had stated the exact opposite opinion in a published article, and even used the decedent's case as an example of this contrary position. The court held, however, that plaintiffs could not maintain the action based on testimony in the private arbitration, and that therefore the trial court's granting of the demurrer without leave to amend was correct.

A different result was reached in *ITT Telecom Prods. Corp. v Dooley* (1989) 214 CA3d 307, 262 CR 773. In that case, Intercomsa had become dissatisfied with an international telephone switching system it had purchased from ITT. The matter eventually ended up in arbitration, where Intercomsa hired Dooley, a former ITT employee, who had promised in writing not to disclose any trade secrets or other confidential information that he might acquire during the

course of his employment. Intercomsa eventually sued ITT in federal suit in Florida. ITT attempted to depose Dooley in that case, but was prevented from doing so because he had not been designated as a trial witness. ITT then sued Dooley directly in California. Dooley moved for summary judgment, arguing that his conduct was judicially privileged under CC §47(b). The trial court granted the motion but the court of appeal reversed, finding that statements made by an expert consultant to assist an actual (or potential) litigant fall within the privilege. The court went on to hold, however, that, absent judicial compulsion, CC §47(b) does not authorize the voluntary breach of an express confidentiality agreement.

For a discussion of possible liability of expert to client, see §5.7. For a sample expert retention letter agreement, see §7.32A. For a discussion of expert retention letters, including sample provisions, see Joseph, *Engaging Experts*, Nat'l LJ 12 (Apr. 18, 2005). For an interesting overview of a general approach to a personal injury practice, including the retention of consultants and expert witnesses, see Charfoos & Christensen, Personal Injury Practice: Technique and Technology (1986).

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§7.32 B. Fee Agreement

Good experts are expensive. Rates vary widely, so it is all but impossible to state what counsel should expect to pay for expert services and, given the pace of inflation, such an estimate would quickly be outdated. Suffice it to say that few experts currently work for less than $100 an hour, and many now charge more than $500 an hour. Checking with other lawyers to learn what comparable experts are charging in other cases is the only way to ensure that counsel does not grossly overpay an expert.

Unless the expert is someone with whom counsel has previously worked and in whom counsel has considerable trust, it is best to have the fee agreement reduced to writing, with a specified maximum that the expert cannot exceed without both counsel's approval and a written modification of the fee agreement.

PRACTICE TIP: The existence of a written retention agreement between counsel and the expert will almost certainly require the court to disqualify the expert should he or she show up to testify for the other side. This alone may be good reason to use a written retention agreement as a matter of course. For a sample expert retention letter agreement, see §7.32A; Hebert, *Protecting You and Your Expert Witness from Conflicts of Interest*, 20 CEB Civ Litigation Rep 202 (Sept. 1998).

Some experts charge higher rates for testifying in deposition or at trial than they do for other work on a case. While such multitiered rate structures provide the opposition with additional ammunition for implying that the expert is a "hired gun" who is simply "selling" his or her testimony (and at a premium to boot), counsel generally has no choice but to accept the arrangement or retain another expert. Before selecting an expert with a multitiered fee structure, however, counsel should ask the expert how he or she justifies the arrangement. Counsel must decide whether the response would satisfy a jury if the same question were asked at trial. In addition, counsel should make sure that the multitiered rates are the same for all sides. The expert will not appear very objective if he or she, *e.g.,* charges one rate to provide trial testimony for the party who retained him or her, and a higher rate if subpoenaed to testify by an opposing party.

Expert witness compensation cannot be on a contingent basis, even if the lawyer is working on a contingency. Cal Rules of Prof Cond 5-310 (member of state bar may not offer to compensate witness—expert or otherwise —"contingent upon the content of the witness's testimony or the outcome of the case"). See also Model Rules of Prof Cond 3.4(b) ("[a] lawyer shall not … offer an inducement to a witness that is prohibited by law").

In any event, even if contingent compensation of expert witnesses were permitted, any lawyer concerned about the witness's credibility in the eyes of the trier of fact would strenuously wish to avoid such a manner of compensation.

On the ethics of expert fee arrangements, compensation of expert witnesses, and the recovery of expert fees as costs, see California Trial Practice: Civil Procedure During Trial §§4.41, 4.43, 4.44, 16.49, 16.48, 27.59-27.61, 27.82 (3d ed Cal CEB 1995). The discussion provides particular insight into the use of statutory offers of compromise under CCP §998 as a means of recovering expert witness costs. See also §§10.45-10.46 of this Book.

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Source: Civil Litigation/California Expert Witness Guide/7 Locating and Retaining Best Expert/§7.32A C. Form: Sample Expert Retention Letter Agreement

§7.32A C. Form: Sample Expert Retention Letter Agreement

Dear _ _[*Expert*]_ _:

This letter agreement ("Agreement") will confirm that _ _[*Counsel*]_ _ ("_____") has engaged you on behalf of our client, _ _[*Client*]_ _ ("_____"), to serve as a consultant, and to possibly provide testimony, in the case referenced above ("Action").

BILLING

_ _[*Client*]_ _ will pay you $_ _[*amount*]_ _ per hour for your services. You also will be reimbursed for reasonable and necessary out-of-pocket expenses incurred in connection with the engagement, such as travel, copying, postage, and courier costs. If you anticipate incurring any single expense in excess of $_ _[*amount*]_ _, you agree to consult with _ _[*Counsel*]_ _ before incurring that expense.

You agree to keep records of your time and expenses, and to submit monthly invoices directly to _ _[*either Counsel or Client, with a copy to the other*]_ _. Your billing statement should be in a narrative form and should describe the services performed and the time expended on each task.

You agree that _ _[*Client*]_ _, who has retained you, is solely responsible for payment of your fees and expenses, even if _ _[*Counsel*]_ _ occasionally advances payment on _ _[*Client*]_ _'s behalf.

Please note that you will not be reimbursed for overhead expenses, disbursements other than actual costs, meals other than reasonable travel meals, travel time other than time spent actually working on the Action, or any airfare other than coach. As you know, your engagement is in no way dependent on the outcome of the Action or on your opinions.

As an independent contractor and not an employee of either _ _[*Client*]_ _ or _ _[*Counsel*]_ _, you will be responsible for any tax obligations arising from payment of your consulting fees.

PROTECTION OF DOCUMENTS, THEORIES, AND EVIDENCE

During the course of this engagement, you may be asked to review or discuss confidential, proprietary, trade secret, financial, or personal information of _ _[*Client*]_ _ and/or other persons or entities. You may also receive attorney work product, opinions, facts, data, or other information as a result of your engagement in this Action. You agree that, during and after the pendency of the Action, you will keep strictly confidential and will not disclose or use any such privileged or confidential information, attorney work product, opinions, facts, data, or any other information other than as necessary to perform your engagement under this Agreement. With respect to any personal information you may receive, you agree to comply with the current online privacy guidelines of the Privacy Alliance, found at www.privacyalliance.org.

All written or oral communications, and any written reports, documents, notes, summaries, or other materials generated by or for, or provided to, you in connection with the work performed under the terms of this Agreement are intended to be and will be confidential attorney work product and shall be marked "Privileged and Confidential Attorney Work Product" and become and remain the property of _ _[*Counsel*]_ _.

It is essential that we be able to keep track of the documents you use and review in the course of this engagement. To facilitate our ability to track those materials, you will maintain a separate file for all such documents. At the end of the engagement, _ _[*Counsel*]_ _ will direct you to destroy or return the documents, at its option.

You agree to take all reasonable precautions to prevent unauthorized disclosure of confidential information and to maintain confidential information in a locked and secure manner. You agree that any confidential information shall not be transmitted via the Internet, fax, or wirelessly without _ _[*Counsel's*]_ _ or _ _[*Client's*]_ _ written authorization, and that no such materials will be transmitted or taken outside of the

United States by you without prior approval from _ _[*Counsel*]_ _ or _ _[*Client*]_ _. You agree to make certain that any notes or materials that you retain reflecting any confidential information prepared by, or provided to, you will be returned to Counsel at the conclusion of this engagement.

If any person or entity to whom disclosure has not been authorized requests, subpoenas, or otherwise seeks to obtain from you theories, opinions, facts, data, information, testimony, reports, documents, or other materials that relate to or refer in any way to your work under this Agreement, you shall immediately inform us. You agree to take any legal action and such other measures as we deem necessary or appropriate to resist or seek protection against disclosure (to the fullest extent lawful) of any such theories, opinions, facts, data, information, testimony, reports, documents, or other materials that relate to or refer in any way to your work under this Agreement.

CONFIDENTIALITY OBLIGATIONS

The time for formal disclosure of experts in the litigation has not yet arisen. Accordingly, you agree to refrain from discussing the Action, or your participation in it, with third parties. If you have any questions now or in the future about what you are permitted to disclose to third parties concerning this engagement, you agree to ask us before making any such disclosures.

You and each colleague and staff member who will be working on this engagement agree to execute the attached Undertaking of Confidentiality ("Undertaking") attached as Exhibit A before having access to any information relating to this engagement.

_ _[*This case is also subject to a Protective Order, a copy of which is attached as Exhibit B. You and each colleague and staff member who will be working on this engagement also agree to sign and to be bound by the terms of that Protective Order.*]_ _

Please contact me if you have any questions regarding _ _[*either*]_ _ the Undertaking _ _[*or the Protective Order*]_ _. Please execute the Undertaking _ _[*and Protective Order*]_ _ and have the original(s) forwarded to us (with copies maintained in your files).

Your confidentiality obligations under this Agreement shall continue even after the engagement is completed or the Action is resolved. You agree that on conclusion of this engagement, or on request by _ _[*Counsel*]_ _ or _ _[*Client*]_ _, you will deliver to us any and all notes, documents, or other materials (including electronic data and information) that you received, generated, or developed during the course of this engagement. If you are served with a subpoena or other request to disclose information related to the Action or your engagement, you agree to immediately notify _ _[*Counsel*]_ _.

We understand that you have performed a conflicts of interest check to determine whether there is any impediment to your engagement, and you have informed us that there is none. The names we have asked you to check include:

Plaintiffs: _____

Opposing Counsel: _____

OTHER EMPLOYMENT

You have confirmed that you have not been previously retained by any other client on an engagement involving the same subject matter as this engagement for _ _[*Client*]_ _, in which your prior work would in any way limit or impair your ability to perform this engagement or to provide your best independent and professional judgment with respect to all aspects of this engagement.

You agree that during your retention in this matter, you will not accept any employment that is adverse to _ _[*Client*]_ _ or that would conflict with the interests of _ _[*Client*]_ _ in this matter.

Either party shall have the right to terminate this Agreement at any time. Even after termination of this Agreement, however, you shall not use any confidential information obtained during the course of this engagement in connection with work performed for another person or entity.

In addition, no information provided to you by _ _[*Client*]_ _, its counsel, or other parties to the above-listed case in the course of this litigation shall be used for any purpose other than as set out in this Agreement, without _ _[*Client*]_ _'s express permission.

If this letter accurately sets forth your understanding of the terms and conditions of your engagement, please countersign below and return this original in the enclosed, self-addressed and stamped envelope. We have enclosed another original for your file.

Very truly yours,

Attorneys for: _____

By: _____

THE FOREGOING TERMS AND CONDITIONS HAVE BEEN REVIEWED AND ARE ACCEPTED.

Executed this ____ day of _____, 2009.

By: _____
Expert

EXHIBIT A

UNDERTAKING REGARDING CONFIDENTIALITY

I acknowledge that I, _ _[*Expert*]_ _, will have access to confidential information supplied by _ _[*Client*]_ _ or _ _[*Counsel*]_ _ with respect to the Action, in the Superior Court of the State of California in and for the County of _____ and any related litigation. I understand that such confidential information will be provided to me pursuant to the terms and restrictions in the _ _[*date*]_ _ engagement letter from Counsel ("Engagement Letter"). I further represent that I have been given a copy of and have read that Engagement Letter, and that I agree to be bound by all of its applicable terms. I also understand that all confidential information, and all copies, summaries, notes, and other records that may be made regarding such documents and/or information, shall be disclosed to no one other than the persons qualified under the Engagement Letter to have access to such information.

_____
Expert

Date

Comment: This sample expert retention letter agreement should be used whenever counsel retains an expert on behalf of a client. Not all of the provisions in this sample agreement are appropriate for every case. Counsel should carefully review this sample and conform it to meet his or her client's needs.

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IX. FEDERAL RULES OF EVIDENCE

§7.33 A. Court Appointment of Experts

Federal Rules of Evidence 706 provides for court appointment of expert witnesses in federal courts. Witnesses so appointed are required to advise all parties of their findings. These witnesses' depositions may be taken by any party, and they may be called to testify by either the court or by any party. They are subject to cross-examination by all parties, including the one calling the expert as a witness. Compensation in criminal (and in some civil) cases is paid by the government; in the balance of civil cases, the expert's compensation is paid by the parties in the proportion that the court determines.

Under Rule 706, the court has the authority to choose and appoint an expert without the consent of the parties. *Walker v American Home Shield Long Term Disability Plan* (9th Cir 1999) 180 F3d 1065. The question of the court-appointed expert's qualifications falls within the exclusive discretion of the court. *Students of Cal. Sch. for the Blind v Honig* (9th Cir 1984) 736 F2d 538, vacated on other grounds in *Honig v Students of Cal. Sch. for the Blind* (1985) 471 US 148, 85 L Ed 2d 114, 105 S Ct 1820. See also *Computer Assoc. Int'l, Inc. v Altai, Inc.* (2d Cir 1992) 982 F2d 693 (district court properly relied on its own expert witness under Rule 706 to decide whether defendant had improperly copied software); *Phillips Oil Co. v OKC Corp.* (5th Cir 1987) 812 F2d 265 (approval of court appointment of expert to interpret technical provisions of oil and gas accounting agreement); *Superior Beverage Co. v Owens-Illinois, Inc.* (ND Ill 1987) 1987-1 CCH Trade Reg Rep ¶67,461 (expert appointed to assist court in determining whether proposed class should be certified in antitrust litigation and whether class-wide proof proposed by class was valid alternative to individualized proof of injury and damages); *Smith v Armontrout* (WD Mo 1984) 604 F Supp 840 (court has power to appoint independent expert when mental competency is at issue).

The Sixth Circuit underscored that Rule 706 means what it says with respect to the calling of experts at trial. Once the expert has been designated and makes his or her findings, that expert may be called to testify by a party and there is no requirement of district court approval. The Sixth Circuit accordingly reversed and ordered a new trial in a case in which the district court erroneously refused to permit a plaintiff to call a favorable court-appointed expert and the error was prejudicial. *Nemir v Mitsubishi Motors Corp.* (6th Cir 2004) 381 F3d 540, 556.

In addition to the powers granted by Rule 706 to appoint "expert witnesses," federal judges have the inherent power to appoint "expert advisors or consultants." *Reilly v U.S.* (1st Cir 1988) 863 F2d 149, 155.

In *Reilly,* the First Circuit upheld the district court's appointment of an expert advisor; however, the court of appeals recommended that in the future:

- The parties be notified of the expert's identity;
- The parties be given an opportunity to object on grounds such as bias and lack of experience;
- The advisor be given a written "job description"; and
- The advisor file an affidavit at the conclusion of the assignment attesting that the description (or other instructions from the court) has been followed.

The court also noted that such appointments "should be the exception and not the rule, and should be reserved for truly extraordinary cases where the introduction of outside skills and expertise, not possessed by the judge, will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role." 863 F2d at 156. Consistent with the reasoning in *Reilly,* the Ninth Circuit upheld a trial court's utilization of a "technical advisor" appointed to assist the court in dealing with highly complex issues in *Association of Mexican-Am. Educators v State* (9th Cir 2000) 231 F3d 572 (*AMAE*). In his dissent, Justice Tashima proposed the following five procedural safeguards to be used by the court when appointing a technical advisor (231 F3d at 611):

> (1) utilize a fair and open procedure for appointing a neutral technical advisor; (2) address any allegations of bias, partiality, or lack of qualification; (3) clearly define and limit the technical advisor's duties; (4) make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information; and (5) make explicit, either through an expert's report or a record of ex parte

communications, the nature and content of the technical advisor's advice.

Although the *AMAE* majority did not adopt the dissent's recommendations, subsequent courts have endorsed the procedural safeguards in determining whether a trial court abused its discretion in employing a technical advisor. In *TechSearch, L.L.C. v Intel Corp.* (Fed Cir 2002) 286 F3d 1360, 1378, plaintiff's lawyers claimed that the trial court relied too heavily on a technical advisor to resolve factual disputes over patent infringement. Rejecting plaintiff's arguments on appeal, the Federal Circuit predicted that the Ninth Circuit would adopt safeguards governing the appointment of technical advisors similar to those proposed in Judge Tashima's *AMAE* dissent.

The principal advantage—and danger—of a non-Rule 706 appointment is that the expert's findings need not be shared with the parties and the expert is not subject to examination (or cross-examination). Thus, appointments made on this basis allow judges to draw upon the expertise of individuals who would be unwilling to assist if they had to undergo the rigors of cross-examination. On the other hand, such appointments create the risk that a judge will be influenced to make a decision on the basis of advice that the judge might well have declined to follow had the advisor been subject to the rigors of cross-examination.

For example, in *FTC v Enforma Natural Prods.* (9th Cir 2004) 362 F3d 1204, the Ninth Circuit held that the district court abused its discretion in the appointment and use of a technical advisor because the judge failed to clarify the advisor's role or to institute sufficient procedural safeguards governing the court's use of the expert.

In *Enforma*, the district court judge used a technical advisor to aid the court in determining whether defendant had made false and unsubstantiated claims regarding its dietary supplement products, as alleged by the Federal Trade Commission (FTC). After an informal conference, attended by the district court judge, both parties' experts, and the court's technical advisor, the district court granted the FTC's preliminary injunction request, adopting verbatim the FTC's findings of fact and conclusions of law. Defendant appealed the preliminary injunction, arguing that the judge improperly relied on the court-appointed expert's opinion and erroneously deprived defendant of the right to depose and cross-examine the court's expert. The Ninth Circuit found that, even though the district court's technical advisor did not offer independent evidence, there was an air of impropriety about the manner in which the court relied on the expert's undocumented opinion.

Because the district court did not detail the expert's actual role or provide sufficient factual findings to support issuance of the preliminary injunction, the Ninth Circuit was concerned that the district court may not have acted independently. Endorsing the five-factor test delineated in Judge Tashima's dissent in *AMAE,* the court remanded the case with instructions that the district court consider implementing some or all of those procedural safeguards.

In *Monolithic Power Sys., Inc. v O2 Micro Int'l Ltd.* (Fed Cir 2009) 558 F3d 1341, 1348, the Federal Circuit, applying Ninth Circuit law in a patent infringement action, commented that the "predicaments inherent in court appointment of an independent expert and revelations to the jury about the expert's neutral status trouble this court to some extent. Courts and commentators alike have remarked that Rule 706 should be invoked only in rare and compelling circumstances."

One district court judge appointed experts under Fed R Evid 104 (not Rule 706) to help him review the submissions of parties' experts in an admissibility hearing under *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. See *Hall v Baxter Healthcare Corp.* (D Or 1996) 947 F Supp 1387 (judge in coordinated silicone breast implant cases appointed his own experts to advise court on whether opinions of plaintiffs' experts were scientifically supported). See also *A&M Records Inc. v Napster Inc.* (9th Cir 2002) 284 F3d 1091 (district court judge appointed technical advisor to help her monitor defendant company's efforts to filter out copyrighted music through its online file-sharing service). For discussion, see §4.58.

For further discussion of Rule 706, see Wood, *From Scientific Tutorials to Court-Appointed Experts*, For the Defense 62 (DRI July 2009); Fortado, *In Some Cases, Judges Need Their Own Experts*, 27 Nat'l LJ 6 (Jan. 24, 2005) (discussing helpful use of court-appointed experts in *In re High Fructose Corn Syrup Antitrust Litig.* (CD Ill 2004) 303 F Supp 2d 971); Bechtle, *Rule 706 Court Appointed Experts: The Rule or the Exception?* 18 Toxics L Rev 375 (2003); and Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual §§3-706.01 to 3-706.04 (8th ed 2002). See also Cecil & Willging, *Defining a Role for Court-Appointed Experts*, 4 FJC Directions (Aug. 1992), finding that 87 percent of the responding federal judges thought that court-appointed experts were likely to be helpful in at least some cases, but that only 20 percent of the respondents had ever made a Rule 706 appointment and half of them had done so on only one occasion.

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§7.34 B. Expert's Conflict of Interest

A two-part standard is emerging in federal cases for evaluating the disqualification of experts who allegedly have conflicts of interests because of their contacts with both sides in the litigation. Under this two-part standard, an expert will not be disqualified absent a showing of:

(1) The existence of a confidential relationship; and

(2) The actual disclosure of confidential information during the course of that confidential relationship.

The burden is on the party seeking to disqualify the expert to meet both parts of this test. See *Wang Labs.*, *Inc. v Toshiba Corp.* (ED Va 1991) 762 F Supp 1246; *Paul v Rawlings Sporting Goods Co.* (SD Ohio 1988) 123 FRD 271, 277. For cases applying this two-part standard, see *Stencel v Fairchild Corp.* (CD Cal 2000) 174 F Supp 2d 1080 (district court, applying two-part standard, held that doctrine of imputed disqualification does not require an attorney's disqualification as expert witness simply because another attorney in same law firm was previously retained as expert by another party in same case); *English Feedlot, Inc. v Norden Labs. Inc.* (D Colo 1993) 833 F Supp 1498 (district court refused to disqualify expert because moving party had not disclosed any confidential communications and refused to disqualify law firm that had retained expert because firm's prior representation of objecting party did not constitute substantial relationship); *Mayer v Dell* (D DC 1991) 139 FRD 1 (refused to disqualify "conflicted" expert because insufficient showing was made); *Wang Labs., Inc. v Toshiba Corp., supra* (disqualified expert). See also Morrow, *Issues Relating to Expert Disqualification*, 17 California Litigation 24 (Spring 2004); Warren, *Disqualification of Expert Witnesses and Counsel Who Retain Them*, ABA, Section of Litigation (Aug. 1995); Shapiro, *Expert Lawyers*, 28 Litig 57 (Summer 2002).

Actions in Which the Expert Was Disqualified

There are numerous federal cases that have addressed whether an expert should be disqualified when the expert is in a conflict of interest. Here are a few examples:

EXAMPLE 1: In *Miles v Farrell* (ND Ill 1982) 549 F Supp 82, the plaintiff was treated by a physician both before and after the physician was retained as an expert by the defendant. Plaintiff's counsel moved to bar the physician from testifying at trial on behalf of the defendant either as an expert or as a treating physician. The court granted the motion, finding that, when the physician was employed by the defendant, he had a conflict of interest because of the physician-patient privilege. The court concluded that the only appropriate remedy for the breach of duty to disclose was to bar the physician from testifying in any capacity on behalf of the defendant.

EXAMPLE 2: In *Marvin Lumber & Cedar Co. v Norton Co.* (D Minn 1986) 113 FRD 588, a manufacturer of insulated windows sued the manufacturer of a sealant used in the construction of its windows, alleging that the sealant was defective. The defendant retained an independent scientific testing laboratory as a consulting expert. Plaintiff moved to disqualify the expert on the grounds that it had engaged in product development work for the plaintiff, had performed in-house tests that had given the expert access to sensitive product design information, and had also performed tests to determine water infiltration problems of the type at issue in the case. The defendant claimed that the expert had done nothing more than perform standardized routine industry tests that did not consist of giving any opinions or advice. The court held that, under either view, disqualification was warranted because the rules governing disqualification were designed to protect against the potential breach of such confidences, even without any showing of actual breach. According to the court, the threat or potential threat that confidences could be disclosed was enough.

EXAMPLE 3: In *Wang Labs.*, *Inc. v Toshiba Corp.* (ED Va 1991) 762 F Supp 1246, counsel for plaintiff contacted an expert concerning the validity of plaintiff's patents and supplied him with information that included the attorney's work product. Thereafter, the expert sent plaintiff's lawyer a detailed report stating that plaintiff's patents were invalid and that the expert had no interest in working as a consultant for plaintiff. The expert closed his file and sent a bill with a cover letter expressing the hope that he might be "of more useful service to you for some other

issues that might arise." Later, the expert was contacted by one of the defendants in the case, which elected to call the expert on the subject of patent validity at trial. Plaintiff filed a disqualification motion. In granting the motion, the court found that the disclosure of work products to the expert demonstrated convincingly that plaintiff's lawyer had both disclosed confidential information and thought that he had entered into a confidential relationship with the expert.

The court in *Wang* offered several suggested steps that "can be taken to avoid a repetition of these unfortunate circumstances," including:

(1) A lawyer seeking to retain an expert and establish a confidential relationship should make that intention unmistakably clear from the outset and should confirm it in writing;

(2) At the outset of the relationship, the lawyer should provide a written explanation of the consultant's confidentiality obligation as well as a confirmation of the payment terms and conditions;

(3) Work product communications to the consultant should be prominently labeled as such;

(4) If the consultant has any reservations about being retained, those reservations should be expressed unequivocally and in writing and the consultant should decline to accept any confidential disclosures; and

(5) Counsel seeking to retain a consultant should inquire specifically about the consultant's past relationship with other parties in the case and whether there is anything about the consultant's past employment that presents any problems.

EXAMPLE 4: A novel approach to a motion to disqualify an engineering firm that had been retained by both opposing parties occurred in *Sells v Wamser* (SD Ohio 1994) 158 FRD 390. In that case, plaintiff's counsel retained as an expert Dr. W, an engineer employed by S.E.A., 3 days after plaintiff's accident. A year later, the defendant retained Mr. S, employed by the same firm, as an expert. Mr. S conducted a computer search to verify that his firm did not have a conflict of interest but, owing to a good faith mistake, he failed to uncover Dr. W's involvement and accepted the assignment.

Noting that the court has inherent power to disqualify an expert witness when a conflict of interest arises, the district court went on to state that any remedy imposed in such circumstances should promote fundamental fairness in the litigation process. Provided that neither advantage nor disadvantage will accrue to either party in disqualifying its expert, and in the absence of any unwarranted disclosure of privileged or confidential information to an expert, the court should try to place the parties in the positions they would have occupied had the conflict of interest not occurred.

The court found that this goal could best be achieved by disqualifying Mr. S, as if the conflict of interest had been properly identified at the appropriate time, and by revising the pretrial schedule to allow the defendants to retain a new expert. Assuming that the defendants would be reimbursed for the money paid to S.E.A., the parties would then be placed in the positions they would have occupied had the conflict not occurred.

EXAMPLE 5: In another novel case, the court of appeals in *Erickson v Newmar Corp.* (9th Cir 1996) 87 F3d 298 held that defense counsel's hiring of the plaintiff's expert for another case violated Nevada rules prohibiting attorneys from disobeying court's discovery obligations and from engaging in misconduct prejudicial to administration of justice. The court noted that the consultation between plaintiff's expert and defense counsel took place outside the presence of plaintiff's counsel and was a deliberate attempt by plaintiff's counsel to circumvent the discovery rules. Such witness tampering required a new trial for plaintiff because the tampering deprived plaintiff of two essential expert witnesses and prevented plaintiff from having a fair trial.

Actions in Which the Expert Was Not Disqualified

There are also several examples of actions where the expert was not disqualified. A few of them are discussed below:

EXAMPLE 1: In *Nikkal Indus. v Salton, Inc.* (SD NY 1988) 689 F Supp 187, the plaintiff moved unsuccessfully to disqualify a market research expert whom it had consulted but not formally retained, and who had subsequently agreed to testify for the defendant. Applying federal law, the court held that the burden was on the plaintiff to demonstrate that privileged information had been supplied to the expert and that the plaintiff had failed to satisfy this burden.

EXAMPLE 2: In *Riley v Dow Chem. Co.* (ND Cal 1989) 123 FRD 639, 640, plaintiffs contended that they had retained

an expert whom the defendants later identified as an expected trial witness and moved to disqualify the expert. The expert denied this allegation and the plaintiffs failed to offer any factual support for it. The court summarily denied the motion.

EXAMPLE 3: A considerably closer issue was presented in *Paul v Rawlings Sporting Goods Co.* (SD Ohio 1988) 123 FRD 271, 277, in which it was conceded that the defendant had had extensive communications with an expert who was later retained by the plaintiff. The court found that its disqualification powers were dependent on (1) whether the defendant and the expert had entered "into a relationship (whether it rose to the level of a contract for services or not) which gave rise to an objectively reasonable expectation on Rawlings' part that it could, without risk, impart confidential information to [the expert]," (2) whether Rawlings had in fact disclosed confidential information to the expert, and (3) whether there was any risk that the expert might use such information to Rawlings' detriment.

The court found that the first question was extremely close, but went on to find that the parties' communications had consisted of the expert's imparting information to Rawlings such that it was comparatively easy to answer the second and third questions in the negative. Accordingly, the court denied the motion to disqualify the expert from testifying on behalf of the plaintiff but denied a request by the plaintiffs for tape recordings and transcripts of the expert's conversations with Rawlings. 123 FRD at 282. The court found that contact between the plaintiff and the expert was no more than a comprehensive employment interview and had not disclosed any of the plaintiff's legal theories or other privileged information.

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§7.35 C. Retention of Percipient Witnesses as Experts

In *McNulty v Taser Int'l Inc.* (CD Cal 2002) 61 USPQ2d 1937, the plaintiff subpoenaed Max Nerheim to appear at deposition and give expert testimony as a percipient witness. Defendant's counsel contacted Nerheim, retained him as an expert witness and agreed to pay for his time and services. The plaintiff moved to have defendant's counsel held in contempt for witness bribery.

The court denied the motion, noting that there was no legal authority prohibiting one side from paying a third party to act as an expert, regardless of whether the opposition does or does not consider that individual to be a percipient witness.

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8

Dealing With Counsel's Own Expert

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§8.1 I. PROBLEM OF MAINTAINING CONFIDENTIALITY

In all dealings with an expert, from initial contact through conferences during breaks in the expert's cross-examination at trial, counsel should proceed as though everything were being taped for later replay to opposing counsel, judge, and jury. To be sure, there is little likelihood that all the attorney's dealings with his or her own expert will be discovered, but the lawyer who assumes that communications with his or her expert will be kept from disclosure by the attorney-client privilege or the work product rule is courting disaster.

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A. Attorney-Client Privilege

§8.2 1. Narrow Applicability to Experts

Although lawyers regularly assert the attorney-client privilege as a basis for instructing their experts at deposition not to answer questions, even a moment's reflection readily reveals that the relationship between a lawyer and an expert witness does not satisfy the "client" prerequisite and may not satisfy the "confidential communications" prerequisite to the attorney-client privilege. Evid C §§951-962. See *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 395, 15 CR 90. As a result, counsel usually has no right to *instruct* an expert not to answer questions posed by opposing counsel. Counsel is entitled, however, to *advise* the expert—or any other nonclient witness—not to answer. See California Civil Discovery Practice §6.105 (4th ed Cal CEB 2006).

For discussion of special considerations concerning the attorney-client privilege in criminal cases, see §8.24.

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§8.3 2. No Privilege Generally

Most California courts that have considered the applicability of the attorney-client privilege to communications with the expert have found such communications to be unprotected, primarily because the communications were not from the client. Cases in which no attorney-client privilege was found to exist include:

- *Suezaki v Superior Court* (1962) 58 C2d 166, 176, 23 CR 368 (films of plaintiff in personal injury case taken by investigator hired by defendants' counsel not covered by attorney-client privilege, because films clearly did not constitute communication from clients to their attorneys);
- *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 201, 23 CR 384 (engineering report counsel secured from firm of architects not covered by attorney-client privilege; not confidential communication, because "neither the client's body, mind, nor private and confidential papers were submitted to the engineers for examination and report," and because attorney did not need engineer to analyze report);
- *Brown v Superior Court* (1963) 218 CA2d 430, 438, 32 CR 527 (oral communications between counsel and group of doctors consulted to assist counsel in evaluating medical malpractice claim and determining whether it should be compromised were not protected by privilege, although they were protected by work product; court distinguished *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 231 P2d 26, discussed in §8.4, as limited to situations in which client was lay person whose statements needed interpretation by others with scientific knowledge to make them intelligible to counsel, whereas present defendant was physician);
- *Grand Lake Drive In, Inc. v Superior Court* (1960) 179 CA2d 122, 126, 3 CR 621 (findings of testing engineer who performed "slipperiness tests" on portion of sidewalk where slip-and-fall accident occurred not covered by attorney-client privilege, because knowledge of tests and test results did not involve disclosure by client of any confidential information).

See discussion in §8.4 of cases in which the attorney-client privilege has been found to apply.

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3. Exceptions: When Privilege May Apply

§8.4 a. Expert as Agent of Client

If the expert consultant is acting as an agent of the client, the attorney-client privilege may apply. For example, if an expert is "retained to examine the client or the client's confidential affairs for the purpose of discovering (and reporting to the attorney) technical data which the layman is incapable of discovering, or which the layman cannot express in the proper technical language" (*San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 199, 23 CR 384), the expert may be considered the agent of the client. The California Supreme Court has held that communications were protected between a physician who was retained by counsel solely to examine the client to aid the attorney in preparing a lawsuit on the client's behalf, finding that the doctor acted as an interpreter or messenger through whom the client communicated with his attorney. *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 237, 231 P2d 26. In this situation, the doctor was viewed as a necessary intermediary to interpret the client's condition to the attorney. It has subsequently been held that similar communications with a psychiatrist are also protected by the attorney-client privilege. *People v Lines* (1975) 13 C3d 500, 514, 119 CR 225; *People v Goldbach* (1972) 27 CA3d 563, 568, 103 CR 800.

When the attorney-client privilege does apply, it protects privileged communications from disclosure whether the expert is a consultant or a witness, and at both deposition and trial. Evid C §954; *Grand Lake Drive In, Inc. v Superior Court* (1960) 179 CA2d 122, 125, 3 CR 621 (rule stated; court found no attorney-client privilege).

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b. Expert as Employee of Corporate Client

§8.5 (1) California Law

An employee-expert is a person employed by the client in his or her business, not a person such as a doctor or investigator hired by the client's attorney solely to work on the case. A communication from an expert who is also the client's employee may constitute a privileged communication from the client, *e.g.,* when the employee, in his or her capacity as a representative of the client, communicates with counsel about a matter that is in litigation. See *People ex rel Dep't of Pub. Works v Donovan* (1962) 57 C2d 346, 354, 19 CR 473 (court held that attorney-client privilege applied to expert's report, but not to subjective opinions). Although the specific holding in *Donovan* applied to an appraiser's value in a condemnation action, and CCP §1255.060 was subsequently enacted to prohibit an appraiser's value from being communicated to the condemnor's attorney, the basic principle of *Donovan* is still good law.

In California, the attorney-client privilege in the corporate context does not apply to communications to or from counsel by corporate employees in all circumstances. The California Supreme Court has promulgated an 11-point test for determining whether a communication between counsel and a given corporate employee is privileged. *D. I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 736, 36 CR 468. In *Chadbourne,* the court was concerned with the discoverability of an investigator's report of an interview with an employee-witness in a garden-variety slip-and-fall personal injury case. The basic principles focus on the employee's corporate role and position, *i.e.,* whether the employee is a member of a "control group," rather than on the subject matter of the communication. Some major considerations discussed by the court were:

- Is the employee also a defendant or subject to liability?
- Is the employee the natural person to be speaking for the corporation?
- Is the employee more than a mere witness?
- Is the dominant purpose for making the report to assist counsel in the litigation?
- Is the intent of the person from whom the information emanates that it be a confidential communication to counsel?
- Is the employee's statement required in the ordinary course of the corporation's business?

Unfortunately, the court's test leaves much to be desired when applied to more exotic corporate communications.

For full discussion of *Chadbourne* and its progeny, see California Civil Discovery Practice §§3.23-3.24 (4th ed Cal CEB 2006). For discussion of the federal standard for attorney-client privilege in the corporate context and its potential applicability to cases decided under California law, see §§8.6, 8.37.

PRACTICE TIP: You should attempt to bring communications with your experts within the attorney-client privilege whenever possible, but should seldom, if ever, reveal compromising information to an expert on the assumption that the communication enjoys the protections of the privilege. See §8.7 on waiver of the privilege.

The work of expert witnesses may also be covered by the work product doctrine. See §§8.8-8.19.

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§8.6 (2) Urging Application of Federal Law

A California practitioner confronted with a corporate attorney-client privilege problem to be decided under California law should consider whether to urge the court to adopt the rationale of *Upjohn Co. v U.S.* (1981) 449 US 383, 66 L Ed 2d 584, 101 S Ct 677, discussed in §8.37, instead of slavishly following *D. I. Chadbourne*, *Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468, discussed in §8.5, in which the California Supreme Court adopted a control group test for determining the applicability of the attorney-client privilege to a corporation.

In challenging *Chadbourne,* counsel could argue that predictability is less likely under the *Chadbourne* decision than under the *Upjohn* standard. When is an individual "the natural person to be speaking for the corporation?" *Chadbourne* Principle No. 2 (60 C2d at 736). When is an employee's statement "required in the ordinary course of the corporation's business"? *Chadbourne* Principle No. 4 (60 C2d at 737). When a statement is prompted by more than one purpose, which is "the dominant purpose"? *Chadbourne* Principle No. 6 (60 C2d at 737). When does an employee's statement that is required in the ordinary course of the corporation's business, and made for confidential transmittal to the corporation's attorney, satisfy the *Chadbourne* test? *Chadbourne* Principle No. 5 says that such communications *may be privileged* (emphasis added) (60 C2d at 737). Additionally, the principles all involve transmission of information to the lawyer, ignoring the advice imparted by the lawyer to the client.

Counsel should be prepared to meet the argument that *Upjohn* is "limited to its facts," *i.e.,* questionnaire responses and interviews given by corporate employees at the direction of their supervisors to an attorney acting for the corporation for the purpose of securing legal advice, and has no application to other disputes. In response, counsel should point out that, while the *Upjohn* court did leave future matters for determination on a case-by-case basis (449 US at 396), subsequent federal cases nonetheless are going to be decided under the *Upjohn* rationale, which means that counsel must follow the subject matter approach.

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§8.7 4. Waiver

Counsel must impress on the expert, especially the inexperienced expert (see §7.28), that the attorney-client privilege can be lost through waiver, *i.e.,* voluntary disclosure. Evid C §912. The waiver can be made by the actual holder of the privilege, by the client (Evid C §953), or by another if the disclosure appears to have been made with the holder's consent (Evid C §912).

Accordingly, the expert must understand that he or she must not talk about the case, informally or otherwise, with friends, colleagues, or associates. In addition, the expert must understand that the subject matter of the case, fascinating though it may be, may not be used as the basis for a speech, scholarly article, teaching example, or study without counsel's express prior approval.

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B. Work Product Doctrine

§8.8 1. Purpose; Who Is Protected

The work product doctrine is intended to preserve attorneys' rights to prepare cases for trial with enough privacy to encourage them to investigate not only the favorable but also the unfavorable aspects of their cases, and to prevent them from taking advantage of their adversaries' efforts. CCP §2018.020.

Unlike the attorney-client privilege, which is governed by statutes (Evid C §§953 and 912) that expressly state who holds the privilege and who may waive it, there are no statutes that state who may assert and waive the work product protection. Most case law holds that the rule is for the benefit of the attorney, and therefore it is the attorney who is the sole holder of the protection, although, in the absence of the attorney, the client has standing to assert the protection on behalf of the attorney. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 245 CR 682; *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 218 CR 205; *Fellows v Superior Court* (1980) 108 CA3d 55, 166 CR 274. For further discussion of who holds the work product protection, who may assert it, and who may waive it, see California Civil Discovery Practice, chap 3 (4th ed Cal CEB 2006).

A client's ability to raise the need for work product protection assumed critical importance in *Armenta v Superior Court* (2002) 101 CA4th 525, 124 CR2d 273. In that case, a qui tam plaintiff and the Los Angeles Department of Water and Power (LADWP) jointly retained several experts to analyze the zinc and lead content in the municipality's water systems. On the department's motion for approval of its settlement of the litigation, the trial court permitted disclosure to the defendant-manufacturers of test results submitted by one expert, who had been jointly retained by the plaintiff and the LADWP. The court also allowed the manufacturers to interview, depose, and retain other experts with whom the plaintiff had communicated.

On the plaintiff's writ petition, the court reversed this ruling and found that when the work product protection arose from a joint prosecution agreement, as it did with the qui tam plaintiff and the LADWP, the LADWP could not unilaterally waive the work product protection for the expert's test results. Rather, the individual plaintiff too had a reasonable expectation of confidentiality of the test result prepared by the jointly retained consultant expert, and because the joint prosecution agreement provided for confidentiality of materials received from the retained experts, the test reports qualified as work product. The work product protection accordingly applied to the consultant's work and materials unless and until the plaintiff and the LADWP designated the experts to testify at trial. 101 CA4th at 535.

For discussion of special considerations concerning the work product doctrine in criminal cases, see §8.24.

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2. Nature of Rule

§8.9 a. What Is Not Work Product; Work Product That Is Expressly Not Protected

Work product protection extends only to work done by the attorney. Accordingly, a lawyer cannot retroactively adopt the independent work of others and convert it into his or her work product. *Jasper Constr., Inc. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 16, 153 CR 767; *Bank of Orient v Superior Court* (1977) 67 CA3d 588, 598, 136 CR 741; *Wilson v Superior Court* (1964) 226 CA2d 715, 724, 38 CR 255.

It is therefore important that an expert be retained by counsel, not by the client, and that the expert's opinions, conclusions, and reports, if any, be transmitted directly to the attorney so that any independent work done by the attorney based on them will come within the work product doctrine.

EXAMPLE: In *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 68 CR3d 758, the plaintiffs' attorney inadvertently came into possession of notes written by the defendants' attorney summarizing, in dialogue format, a strategy session between the defense attorney and defense experts. Plaintiffs then used the notes during a deposition to impeach a defense expert. Plaintiffs argued that the document was not protected by the attorney work product doctrine because it reflected statements of declared experts. The California Supreme Court rejected this argument, noting that the document was not a verbatim record of the experts' own statements, but rather contained summaries of various points made during the session and included the defense attorney's own thoughts and impressions. 42 C4th at 815.

In addition, if a lawsuit has not actually been filed at the time the expert is retained, counsel should send the expert a letter explaining that the expert is being retained to assist the lawyer with a specific planned or threatened lawsuit, together with a brief explanation of why prefiling hiring of the expert is necessary to completely discharge the lawyer's duties in the case.

When an expert consultant or witness has percipient knowledge about the case, that information, as opposed to the expert's opinions, is not shielded by the work product rule. See generally *Petterson v Superior Court* (1974) 39 CA3d 267, 273, 114 CR 20. See also *Bureau of Med. Economics v Cossette* (1974) 44 CA3d Supp 1, 118 CR 242.

It is not altogether clear whether the work product rule applies at trial when the attorney's agent is called to testify by the adverse party who then questions the agent, usually an investigator, about his or her impression of a witness, taken during an interview with the agent, to impeach the testimony of the witness. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 648, 151 CR 399; Jefferson's California Evidence Benchbook, chap 41 (3d ed CJA-CEB 1997). But see *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888 (dicta that rule does not apply at trial in case involving agent who was expert); *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 448, 120 CR 787 (similar dicta involving agent who was investigator).

There are two categories of work product that, by statute, are not protected: (1) Work product relevant to an issue of breach by the attorney of a duty to his or her client arising out of the attorney-client relationship is not protected in an action between the attorney and client or former client (CCP §2018.080), and (2) the state bar may discover the work product of any attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the lawyer, subject to certain conditions (CCP §2018.070(a)).

For discussion of the perils of possible discovery of attorney work product reviewed by an expert, see §§8.20-8.23. See also Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 Colum L Rev 812 (1985).

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§8.10 b. Two Levels of Protection

Code of Civil Procedure §2018.030 defines two levels of work product, one absolutely privileged and the other conditionally privileged.

- Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is absolutely privileged and is not discoverable unless waived. CCP §2018.030(a). See §8.14 on waiver.
- Subject to CCP §2018.030(a), other attorney work product, which includes objective material, *e.g.,* scientific test results, that the attorney obtains in preparation for litigation but that does not include any of the lawyer's own subjective input or analysis, is conditionally privileged—that is, it is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice. CCP §2018.030(b).

The line between fully protected and conditionally protected work product is often fuzzy. Therefore, counsel should exercise great caution in communicating with experts and assume that any communications, orally or in writing, will be discoverable. This cautionary advice also should be passed on to experts so they may avoid inadvertent and unfortunate communications with counsel.

PRACTICE TIP: You should explore both counsel-to-expert and expert-to-counsel exchanges in deposing any hostile expert.

For general discussion of work product, see California Trial Objections, chap 35 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 41 (3d ed CJA-CEB 1997); 2 Witkin, California Evidence, *Witnesses* §§137-150 (4th ed 2000). See also White, *Taking the Byte Out of Discovery: Protecting Computer Information From Disclosure*, 19 Trial 44 (Mar. 1983).

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§8.11 c. Determining Level of Work Product Protection

In *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535, the court enunciated a three-step, in camera inspection process for determining whether an expert's *report* enjoys the protection of the attorney work product rule. See §8.16 for discussion of that case. Presumably, the same process will be used in determining whether communications to or from an expert that are not actually embodied in a report will be subject to the same process. See generally *Petterson v Superior Court* (1974) 39 CA3d 267, 271, 114 CR 20.

The three steps may be summarized as follows:

(1) If the report in whole or in part reflects the attorney's impressions, conclusions, opinions, or legal research or theories, the report or that part of it are absolutely privileged.

(2) The report or parts of it that are not absolutely privileged should be examined to determine whether the report is advisory in whole or in part. A report that is not advisory is not entitled to even conditional work product protection. Any part that is not advisory is discoverable if easily severable. A report that is advisory necessitates an analysis under step three below.

The determination of whether all or part of a report is advisory is based on whether the expert's services were rendered to help the attorney prepare pleadings, determine the manner of presentation of proof, or prepare cross-examination of an opposing expert witness, and were therefore advisory, or whether the services rendered were of the type that would qualify one as an expert witness, *e.g.,* that contain findings and opinions of the expert that help establish or deny a principal fact in issue, and therefore are not advisory.

(3) If the report is advisory, the judge must determine in camera whether good cause for discovery outweighs the principles supporting the conditional privilege. Good cause is discussed in §8.12.

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d. Overcoming Conditional Work Product Protection

§8.12 (1) Good Cause

In determining whether unfair prejudice exists under CCP §2018.030(b) (former CCP §2018(b)), the cases interpreting the statute require a showing of good cause to justify disclosure of conditionally protected work product. The determination of good cause requires a balancing of the needs of the requesting party against the purpose to be served by the work product doctrine. *Kizer v Sulnick* (1988) 202 CA3d 431, 248 CR 712; *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535.

Further enlightenment on the construction of §2018.030(b) is provided in *Armenta v Superior Court* (2002) 101 CA4th 525, 124 CR2d 273. In that case, the court undertook to define when the denial of discovery would unfairly prejudice the party seeking discovery in preparing a claim or defense. As the court put it (101 CA4th at 535):

> Unfair prejudice results where the party seeking discovery establishes that there exists 'no adequate substitute' for the material generated by the expert. [Citation.] Conversely, when the party has equivalent opportunity to generate comparable evidence in its own case presentation, there is no unfair prejudice. [Citation.]

In determining good cause, the following are factors that weigh in favor of overcoming work product protection and must be balanced against the purposes of the work product doctrine:

- It is "reasonably certain" that the expert will testify at trial about the material subject to disclosure. *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; *Sanders v Superior Court* (1973) 34 CA3d 270, 277, 109 CR 770. See discussion in §8.19.
- An object that was tested or inspected by the expert for one side is not available for testing or inspection by the opponent's expert, or one party is unable to obtain an adequate substitute for that which is sought by discovery. *Armenta v Superior Court* (2002) 101 CA4th 525, 536, 124 CR2d 273 (question is not whether party can duplicate tests performed by opponent's expert witness, but rather whether party has equivalent opportunity to generate comparable evidence); *Kizer v Sulnick* (1988) 202 CA3d 431, 441, 248 CR 712 (report of survey, contents of which could not be duplicated by other means, prepared by physician retained by counsel in connection with hazardous waste action); *Grand Lake Drive In, Inc. v Superior Court* (1960) 179 CA2d 122, 131, 3 CR 621 (slipperiness tests done by defendant's engineers). See also *Petterson v Superior Court* (1974) 39 CA3d 267, 272, 114 CR 20 ("unthinkable" not to permit expert to be deposed when testing of object was no longer possible or testing done by expert so altered objects that similar tests by adversary were impossible).
- There is impeachment value in the portions of an expert's report that are conditionally privileged. *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 490, 210 CR 535.

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§8.13 (2) Conditional Protection Lost When Expert Testifies

As with any other privileged information, the protection of the work product rule does not apply to privileged information on which an expert relies in forming an opinion. Once the expert testifies to such an opinion, the work product is discoverable without a good cause showing. *People v Milner* (1988) 45 C3d 227, 241, 246 CR 713. Counsel must therefore analyze the risks and benefits of disclosure before giving an expert otherwise protected work product to help the expert form an opinion.

A particularly dramatic illustration of this rule occurred in *Shooker v Superior Court* (2003) 111 CA4th 923, 4 CR3d 334, in which the plaintiff disclosed himself as an expert. When he appeared for his deposition, opposing counsel began examining him about conversations he had had with the lawyers who were representing him. Shooker refused to respond on attorney-client privilege and work product rule grounds. The deposition was then suspended to permit Shooker to seek a protective order. Up to that point, Shooker had not disclosed any privileged information.

The discovery referee denied the motion for a protective order, finding that disclosure of the plaintiff as an expert was an implied waiver of the privilege. Shooker then served notice that he was withdrawing his designation of himself as an expert witness. He also moved for reconsideration of the waiver ruling, but the motion was denied. The court of appeal reversed, holding that (111 CA4th at 930):

> The designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege because his initial status is that of a possible expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived.

Because Shooker had been withdrawn as an expert before any of these alternatives had transpired, there was no waiver.

PRACTICE TIP: If you want a "dry run" on whether the work product will truly have an impact on a particular expert's opinion, you can furnish the information to a similar expert-consultant and inquire about the materiality of the information. The consultant may be able to offer insights on the utility of the information that can help you decide whether to give the information to the expert who will actually testify.

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§8.14 e. Waiver

Regardless of whether material is absolutely or conditionally protected, work product protection can be waived in a number of ways. The most common follow:

- Voluntary disclosure of the material by a holder of the privilege to a person who has no interest in maintaining the confidentiality of the contents of the material. *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1261, 245 CR 682.
- Failure to make the claim when that is required. *BP Alaska Exploration, Inc. v Superior Court*, *supra*.
- Tendering of an issue involving the privileged material. *BP Alaska Exploration, Inc. v Superior Court, supra*.
- Conduct between discovery and trial that is inconsistent with the claim. *BP Alaska Exploration, Inc. v Superior Court, supra*.
- Disclosure of work product material in response to formal discovery requests. *Lohman v Superior Court* (1978) 81 CA3d 90, 99, 146 CR 171.
- Disclosure of protected matter in conversation with a nonholder of the privilege. *Petterson v Superior Court* (1974) 39 CA3d 267, 272, 114 CR 20.
- Allowing a witness to use work product material to refresh his or her recollection before testifying. *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 411, 72 CR 74.
- Discussion by counsel of privileged subjects with members of the press, particularly if the discussion appears in any resulting newspaper article. *City of Los Angeles v Superior Court* (1985) 170 CA3d 744, 755, 216 CR 311 (allegedly privileged information shared with press as part of publicity campaign lost its privileged status).

PRACTICE TIP: *City of Los Angeles* should make you carefully consider whether to debate the merits of a case in the media. There is no doubt that many cases tried in the civil setting today are newsworthy. Nevertheless, if you are going to discuss the basis of otherwise privileged information (*e.g.,* a consultant's opinion) to justify the merits of your case, there is no reason why those opinions should not then become subject to discovery under the waiver analysis of *City of Los Angeles*.

The perils of possible discovery of attorney work product reviewed by an expert witness are discussed in Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 Colum L Rev 812 (1985). See also §§8.20-8.23 on what information to provide the expert.

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§8.15 f. Misuse and Abuse of Work Product Protection

The work product rules are designed to protect a party's expense and industry in seeking out expert testimony, not to permit one party in a multiparty case to auction off an expert's testimony to the highest bidder. *Williamson v Superior Court* (1978) 21 C3d 829, 838, 148 CR 39. Normally, to discover in advance of trial the opinion of an expert who has not been designated as a witness, good cause must be shown. One factor in determining whether good cause has been shown is whether the expert may be called as a witness. See §§8.12-8.13. When, as in *Williamson,* however, the defendant first designates an expert as a witness and then withdraws the expert as the result of an agreement with a codefendant who would have been harmed by that expert's testimony, the withdrawal does not restore the protection, because the withdrawal flows from an illegal act, the suppression of evidence. The *Williamson* court found, under these facts, that denial of discovery would result in an injury and therefore held that the plaintiff was entitled to the expert's report and deposition.

Under *Williamson,* any settlement agreement or other arrangement by which one party transfers work product materials to another (*e.g.,* when one defendant in a multidefendant case agrees to turn its investigative or other files over to the plaintiff as part of a settlement) should be carefully examined to see if the arrangement might be viewed as an attempt to "suppress relevant evidence" (21 C3d at 838). If it is seen as suppression of evidence, work product protection will be lost. See also *Petterson v Superior Court* (1974) 39 CA3d 267, 114 CR 20 (deposition of handwriting expert and discovery of his observations, as a consultant, on behalf of another party to case allowed; court feared that disallowance of discovery could lead to deliberate attempts to suppress relevant evidence). *Petterson* was cited with approval by the California Supreme Court in *Williamson v Superior Court, supra,* as instructive on the principle that the work product rules are designed to protect industry, not to sanction suppression of evidence.

A similarly motivated result was reached in *Jasper Constr., Inc. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 153 CR 767, in which the court endorsed the calling by one party of an expert consultant retained by another party, to impeach the testimony of the hiring party. A work product objection was interposed on the ground that the expert was retained solely as a consultant, but the testimony was permitted to avoid the suppression of relevant factual impeachment.

When the suppression of relevant factual evidence is not involved, work product protection remains strong. For example, a lawyer was disqualified from a case for having contacted and learned of protected work product matter from an expert witness who had been disclosed and withdrawn by his adversary before his deposition was taken. *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698. Because the disclosed but undeposed expert returned to his status as a consultant, his opinions enjoyed full work product protection in the absence of a claim of suppression. Counsel's direct contact with his adversary's expert therefore involved a gross ethical breach and an improper attempt to obtain opposing counsel's work product. *County of Los Angeles v Superior Court, supra*.

However, an attorney who innocently contacts opposing counsel's confidential expert consultant may not be disqualified if the party moving for disqualification cannot meet its burden of showing that protected work product was disclosed. In *Shandralina G. v Homonchuk* (2007) 147 CA4th 395, 54 CR3d 207, plaintiff's attorney telephoned an expert, had a brief phone conversation with him, and designated him as a witness without realizing that he had already been retained as a confidential consultant for the defense. The court of appeal reversed the attorney's disqualification by the trial court, finding that the rebuttable presumption that work product was disclosed does not apply if the expert remains a consultant to the party moving for disqualification. 147 CA4th at 412. The presumption is unwarranted if the moving party still exerts control over the expert because evidence of work product disclosure can be discovered by dealing directly with the expert. 147 CA4th at 414. Thus, the defendant had the burden to prove work product was disclosed, which he failed to do.

For discussion of improper uses of work product in contexts other than that involving experts, see California Civil Discovery Practice §§3.52-3.67 (4th ed Cal CEB 2006).

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§8.16 g. Work Product Protection for Expert Hired as Consultant and Later Designated as Witness

When it becomes reasonably certain (see §8.13) that an expert who was originally hired as a consultant in a civil case will be a witness at trial, an issue that remains somewhat in question is whether all the expert's work from the date of original retention becomes discoverable or only work done after it became reasonably certain that the expert would testify at trial.

One view: no work product protection. In one case the court held that there is no work product protection for work done by a disclosed trial witness expert while the expert was a consultant. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 856, 139 CR 888. The court appears to have attached no importance to the fact that the expert's test results were done while he was still a consultant nor did it consider whether a showing of good cause beyond the expert's designation as a trial witness was needed to allow discovery. The court simply held that, once it became reasonably certain that the expert would testify, work product protection terminated for all of the expert's work.

Another view: three-step in camera inspection. The decision in *Brokopp* differs from that in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535, in which the court was faced with a question of the discoverability of the report of an expert designated as a witness that was prepared when the expert was a consultant in another case. Rather than hold that all of the expert's work was discoverable, the *National Steel* court enunciated a three-step, in camera inspection process for determining whether an expert's report is protected by the attorney work product rule. The court held that:

- The trial court must first determine whether the report reflects an attorney's impressions, conclusions, opinions, or legal research or theories. If so, the report is absolutely privileged under CCP §2018.030(a) (former CCP §2018(c)) and is nondiscoverable.
- If the report is not absolutely privileged, the court must decide whether the report is advisory, *i.e.,* done solely as consultant work, in whole or in part, and treat the advisory portions as conditional work product. The parts that are not advisory are discoverable if they are easily severable. 164 CA3d at 490.
- If the report contains advisory portions that are conditionally privileged, the third step is for the trial court to determine whether good cause for discovery outweighs the policies that underlie the traditional work product privilege. Good cause may be based on (1) the need to prepare for cross-examination and to impeach the expert's testimony, the (2) inability to obtain an adequate substitute for that which is sought in discovery, and (3) whether there is a reasonable inference that the expert considered the prior report in preparing for trial (Evid C §721(b)(1)). 164 CA3d at 490. See also *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 1079, 29 CR2d 693.

NOTE: Because most of these considerations come into play whenever an expert is reasonably certain to be a witness, the result under the *National Steel Prods. Co.* rule and under *Brokopp v Ford Motor Co., supra,* may be the same in most cases, *i.e.,* in favor of discovery.

There is dictum in one case that opinions reached while an expert is serving as a consultant continue to enjoy work product protection after the expert's status changes to that of a potential witness, while opinions formed thereafter are discoverable. *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 531, 51 CR 511. The rules set out in *National Steel Prods. Co. v Superior Court, supra,* seem better aimed at balancing the need for protection of work product with the need for full disclosure of evidence.

See also §10.10 on what reports and writings are discoverable.

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§8.17 h. Duration and Extent of Work Product Protection

Work product that is absolutely privileged (CCP §2018.030(a); see §8.10) cannot be discovered at all, unless waived, during the duration of the case. Two issues that arise in connection with absolutely protected and conditionally protected work product are: (1) Does that protection survive conclusion of the case in which the protected work is done, and (2) to what extent does the rule protect disclosure in one case of work product that was created in another case?

The duration and scope of work product protection are issues of real concern to all sides in multiple cases involving common issues, such as wrongful death suits stemming from a commercial airline crash, a widespread product design claim (*e.g.,* Pinto gas tanks or park-to-reverse problems on Ford transmissions), or related suits pertaining to drugs (*e.g.,* DES-diethylstibestrol) or toxic substances (*e.g.,* asbestos, Agent Orange, or DBCP).

Work product protection does extend beyond termination of the litigation in which the work product was created and may be asserted in subsequent litigation involving the same case. *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 502, 165 CR 748. See Note, *The Work Product Doctrine in Subsequent Litigation*, 83 Colum L Rev 412 (1983). See also discussion of *National Steel Prods. Co.* in §8.16.

NOTE: In a unique case, the court of appeal permitted plaintiff to depose an engineer who previously had sued General Motors for wrongful termination in Michigan and, as part of the settlement, had agreed to a permanent injunction enjoining him from disclosing trade secrets and from testifying in any litigation involving General Motors. The court found that the agreement settling the wrongful termination lawsuit extended far beyond matters which might legitimately constitute attorney-work product and that it irreconcilably conflicted with this state's public policy against the suppression of evidence, thereby justifying an exception to the application of the full faith and credit clause. *Smith v Superior Court* (1996) 41 CA4th 1014, 49 CR2d 20. But see *Williamson v Superior Court* (1978) 21 C3d 829, 836, 148 CR 39.

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3. The Expert and the Work Product Doctrine

§8.18 a. The Expert as Consultant

There is a general rule that discovery of non-trial-witness experts should be precluded in order to further the aims of the work product rule. Therefore, when an expert is retained as a consultant purely to assist and advise the attorney and not to be called as a witness at trial, the expert's reports, opinions, and knowledge are at least conditionally protected. *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888. See discussion in §8.10 of the two levels of protection available for work product.

When work product protection applies to an expert, even the identity of the expert is protected. *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 51 CR 511. See also *Williamson v Superior Court* (1978) 21 C3d 829, 834, 148 CR 39.

When only conditional work product protection applies, it can be lost if the party seeking discovery of the information can show good cause. See, *e.g., Grand Lake Drive In, Inc. v Superior Court* (1960) 179 CA2d 122, 129, 3 CR 621. For discussion of the requirement of good cause, see §8.12. For further discussion of expert consultants, see §10.6 (effect of expert's status as consultant or witness on discovering his or her identity and noticing deposition).

Before CCP §§2034.010-2034.730 was enacted, good cause existed for discovery of an expert's reports if it was reasonably certain that the consultant expert would be a witness, even if that expert had not yet been officially designated. *Williamson v Superior Court, supra*; *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; *Sanders v Superior Court* (1973) 34 CA3d 270, 278, 109 CR 770.

Under CCP §§2034.010-2034.730, the situation has changed: There is no provision for discovery of any information concerning an expert before the expert is actually disclosed as a trial witness. Even after disclosure, up to the point when the expert is actually deposed, the expert can—absent collusion—be "undesignated" (*i.e.,* withdrawn), for tactical reasons or otherwise. If the expert is withdrawn as a trial witness, his or her activities revert to the status of protected work product that is beyond the reach of discovery. *Shooker v Superior Court* (2003) 111 CA4th 923, 930, 4 CR3d 334; *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698, also discussed in §8.15.

Right to demand reports under CCP §2032.610. Even if an expert consultant is clearly not going to testify at trial, the findings, conclusions, and any report made by that expert may still be discoverable under CCP §2032.610.

Under §2032.610, if one party obtains a physical or mental examination of another party, agent of the party, or person in the custody or under the legal control of a party, because a physical or mental condition is in controversy in the action, and the person examined demands a copy of the examining doctor's report and copies of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner (CCP §2032.610), then the examining party may in turn demand a copy of any existing report or later report of any previous or subsequent examination of the same condition by any other physician, psychologist, or licensed health care practitioner. CCP §2032.640. If the examined party requests the examiner's report, the examined party, by the terms of the statute, waives any privilege, and any protection for work product under CCP §2018.030 that the party or examinee has regarding reports and writings. Also waived is the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or thereafter examines the party or other examinee regarding the same physical or mental condition. See *Queen of Angels Hosp. v Superior Court* (1976) 57 CA3d 370, 129 CR 282.

WARNING: Because protection of nondesignated experts is usually only conditional, it is always dangerous to rely solely on the expert's status as a consultant. For discussion of practical considerations in determining the expert's role, see §§8.20-8.23.

For further discussion of the discovery of information concerning experts who are consultants only, see §10.6. For discussion of possible ethical problems involved in calling opposition experts to testify, see §§8.15, 10.26.

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§8.19 b. The Expert as Witness

An expert's initial status as consultant changes character when the attorney decides to have the expert testify. At that point, the expert is no longer a consultant but "has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery." *Williamson v Superior Court* (1978) 21 C3d 829, 835, 148 CR 39; *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535.

For further discussion of the discovery of information concerning experts who will testify, see chap 10. For discussion of experts who are also percipient witnesses, see §10.23.

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C. Practical Considerations

§8.20 1. Determining Whether to Use Consultant as Expert Witness

Counsel has the need, as well as the right, to discuss candidly and openly the strengths and weaknesses of his or her case with nonparties possessing specialized expertise in the subject matter of the case. Counsel should not sacrifice this need in an overly formalistic effort to insulate those discussions from discovery. Although there is no way of guaranteeing that an expert's work will not be discoverable, the chances of successfully resisting discovery are greatly enhanced if the expert is used only as a consultant in a purely advisory capacity and is not designated as a potential trial witness. If counsel finds that the consultant has an opinion, has done experiments, or has information that is harmful to the case, counsel should seek to designate another expert who does not have those drawbacks. Doing so is likely to be both cheaper and safer than undertaking a protracted and risky attempt to block discovery that might prove embarrassing. See discussion in §8.16 on trying to protect an expert's work product that was performed while a consultant after being designated a trial witness. Even if an attorney takes these precautions, however, it is possible that a nontestifying expert consultant's report will be discoverable. For discussion of exceptions to the attorney-client privilege and work product rule that may allow an expert consultant's work to be discovered, see §§8.7, 8.14.

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§8.21 2. Minimizing Risk of "Contaminating" Expert

Counsel can substantially reduce the risk of imparting harmful information to the expert, without compromising the ability to have a free and open discussion, by following a few simple rules:

- The attorney handling the case should deal directly with the expert as much as possible. Communication with the expert should not take place through other lawyers, paralegals, secretaries, or investigators, who may not understand the rules of discovery or who may be unaware of the sensitive areas of the case.
- The attorney should not volunteer his or her own fears and misgivings about the case to the expert. The expert need not know that the lawyer thinks a particular witness or a particular aspect of the case is weak or unreliable; what matters are the expert's opinions and analyses. The attorney can elicit these without disclosing his or her own misgivings. The lawyer who follows this rule can relax when the expert is asked during deposition or at trial to describe the entirety of his or her conversations with the lawyer on any particular subject.
- The attorney should minimize editorial comment in written communications with the expert. In sending depositions, interrogatory answers, physical evidence, and the like to the expert, it is seldom necessary to include anything more than a transmittal letter identifying the enclosures. Written communications with an expert are not social letters and should not contain unnecessary "chitchat."
- Written communications with the expert should be kept on a formal level even if the lawyer and expert know each other well. The expert should always be addressed as Mr., Mrs., Miss, or Ms., and the lawyer should sign all communications with his or her full name. A series of letters addressed "Dear Chuck" and signed "Keep up the good work! Bill" can put both the author and the recipient in a needlessly compromising light if the letters are read to a jury by opposing counsel.
- The attorney should not supply the expert with unnecessary work product, *e.g.,* deposition summaries, particularly if they contain the lawyer's subjective evaluation. Many experts are too busy to read deposition transcripts, interrogatory answers, and other evidence in their entirety. Counsel may be tempted to send the expert a summary, *e.g.,* a copy of the letter summarizing the case that defense counsel has already sent to the insurance company. Such letters, however, frequently contain concessions, admissions, or similarly damaging statements, and they should not be made part of the expert's potentially discoverable file. Having a younger associate or paralegal prepare objective deposition summaries just for the expert may be expensive and time consuming, but it is preferable to supplying the expert with deposition summaries and letters that were not intended to be read by the opposition or to a jury. See §8.7 regarding the dangers of supplying the expert with attorney-client privileged materials.

For further discussion of information that should and should not be provided to the expert, see §§8.22-8.23.

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Source: Civil Litigation/California Expert Witness Guide/8 Dealing With Counsel's Own Expert/ 3. Reports, Notes, and Communications to and From Expert/§8.22 a. Generally Keep to a Minimum

3. Reports, Notes, and Communications to and From Expert

§8.22 a. Generally Keep to a Minimum

Although in the "real world" changes of mind on the part of scientists may be the badge of intellectual honesty, in litigation the expert who backs away from a position or changes an opinion is simply supplying the opposition with a source of impeachment. Accordingly, any time the expert makes a written record of his or her thoughts or opinions, the opposition is provided with a "paper trail" of potential impeachment material.

This is not to suggest that the expert should be instructed to lie or encouraged to develop a conveniently forgetful memory. The expert, like any other witness, must answer all questions truthfully. Under our adversarial civil system, however, there is no reason counsel or the expert should assist the opposition by providing written suggestions about potentially damaging areas of inquiry that might not otherwise occur to the opposition. For example, if the expert had trouble reconciling a particular fact or item of evidence with his or her overall theory at one stage of the case, the expert must disclose that difficulty if the opposition expressly inquires about it at deposition or trial. However, the expert has no reason to make a written record of the problem, thus *ensuring* that it will be brought to the opposition's attention. See, *e.g., Berkey Photo, Inc. v Eastman Kodak Co.* (2d Cir 1979) 603 F2d 263, 306, in which a defense expert in an antitrust case unnecessarily wrote to his attorneys expressing his misgivings over reconciling a 1915 consent decree with the defense theory that its dominant market position was based solely on superior skills.

Counsel should therefore be wary of anything that creates a written memorial of the expert's thoughts, opinions, doubts, or concerns. Special attention should be paid to reports, the expert's notes made to himself or herself, and correspondence to and from the expert. See Joseph, *Engaging Experts*, Nat'l LJ 12 (Apr. 18, 2005); Solovy & Byman, *Discovery: Do You Feel a Draft?* Nat'l LJ 38 (June 9, 2003).

Reports

Experts frequently prepare written reports while their thinking is still in the formative stages or before all the facts are known. Thereafter, something may develop during the deposition of another expert that requires modification or a shift in emphasis by one's own expert. Written reports inhibit the expert's flexibility, and flexibility is frequently essential to proper preparation as additional facts are elicited and additional theories of liability and defense are evolved. Experienced counsel generally encourage the expert to report orally and not to prepare written reports until discovery is complete and counsel request such reports. See Baum, Art of Advocacy—Preparation of the Case §9.44 (1981).

PRACTICE TIP: You should give instructions to the expert on this issue orally and cautiously. You should stress that avoiding written reports is prompted by a desire to avoid expense and unnecessary consumption of time in having the expert set forth his or her thinking before all necessary information has been developed through discovery. A written or an unexplained oral directive to an expert not to prepare a report can provide the opposition with a basis for suggesting a conspiracy of silence that can be used to impeach the integrity and objectivity of both you and your expert.

Notes

Too many attorneys carefully instruct their experts not to submit premature written reports but fail to check on what kinds of notes and written records the expert is inserting in his or her own files. Some practitioners even encourage relatively unrestricted note taking by the expert, feeling it is necessary for the expert to do his or her job and reasoning that, even if the notes are later discovered by the opposition, they will be unintelligible or sufficiently sketchy to be of any real use as an impeachment tool. Baum, Art of Advocacy—Preparation of the Case §9.44 (1981).

Although the experienced expert may have sufficient savvy to keep notes from being useful to the opposition, it is dangerous to assume that any expert, experienced or otherwise, will do so. When the expert is deposed and the file demanded (see §§10.12, 10.41), the file may contain a complete "paper trail" of all the expert's doubts, concerns, changed positions, and the like. Counsel should impress on the expert the need to confer orally with counsel when a problem, doubt, or concern arises, rather than make a written notation of the matter in the expert's file.

PRACTICE TIP: When you want a written note, you can make the note and keep it, rather than having the expert do so.

Correspondence

Counsel should avoid editorial and subjective comment in correspondence to the expert. The expert should be told to do the same when writing to the lawyer. The expert should be instructed to visit or telephone the lawyer when a problem or question arises, rather than highlighting the matter by expressing it in writing for later discovery by the opposition.

See §§10.8-10.10 on demanding experts' reports and writings.

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§8.23 b. When Reports May Be Useful

Sometimes the expert's work and opinions are so detailed that they are not susceptible to oral summarization, *e.g.,* a damages analysis in an antitrust case. Under those circumstances, the lawyer has little choice but to have the expert prepare a report. Under other circumstances, the lawyer may actually want a report from the expert; for example, a plaintiff's personal injury lawyer with a strong liability case may want a detailed report from one of the plaintiff's doctors to use in persuading the defendant to increase its settlement offer. Counsel should not automatically request reports from experts, however, and in those cases in which the expert's opinions are reasonably susceptible to oral summarization, reports generally should be avoided.

PRACTICE TIP: After receiving a report from an expert, consider converting the report to a digital format so that it may be used for presentation purposes. For example, data in the report could be imported into a graphic program and used as lively demonstrative evidence at trial. See Piganelli, *TechnoFeature*: *Enhancing Your Expert Witnesses by Marrying Testimony and Technology* (July 19, 2005), http://www.technolawyer.com.

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Source: Civil Litigation/California Expert Witness Guide/8 Dealing With Counsel's Own Expert/§8.24 D. Confidentiality in Criminal Cases: Attorney-Client Privilege, Privilege Against Self-Incrimination, and Work Product Doctrine

§8.24 D. Confidentiality in Criminal Cases: Attorney-Client Privilege, Privilege Against Self-Incrimination, and Work Product Doctrine

Discovery in criminal cases is available based solely on Pen C §§1054-1054.8, other express statutory provisions, or as mandated by the United States Constitution. Pen C §1054(e); *Verdin v Superior Court* (2008) 43 C4th 1096, 77 CR3d 287 (rejecting People's attempt to have its own expert conduct mental examination of defendant because such examination was neither authorized by statute nor mandated by Constitution). Discovery is reciprocal in both misdemeanor and felony cases. Cal Const art I, §30; Pen C §§1054-1054.7. See *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231 (reciprocal discovery is constitutional); *Hobbs v Municipal Court* (1991) 233 CA3d 670, 284 CR 655, overruled on other grounds in 18 C4th at 295 (applies to misdemeanors and felonies).

Under reciprocal discovery, similar discovery obligations apply to the defense and to the prosecution. Before passage of Proposition 115 in June 1990, discovery was primarily a one-way street requiring the prosecution to give discovery to the defense. Reciprocal discovery applies to offenses occurring before June 6, 1990, the date it became effective as part of Proposition 115. Evidence obtained by defense counsel before that date, however, is subject to Proposition 115 law. *Tapia v Superior Court* (1991) 53 C3d 282, 279 CR 592.

Under Pen C §1054(e) the items the prosecution and defense must disclose to each other before trial are set out in Pen C §§1054.1 (prosecution) and 1054.3 (defense). The items relevant to experts include the requirement that each side disclose to the other the names and addresses of persons they intend to call as witnesses at trial (except that the defense is not required to state whether the defendant will testify). Each side must also disclose "relevant written or recorded statements of witnesses or reports of the statements of witnesses" intended to be called at trial, along with "any reports or statements of experts made in connection with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which" that side "intends to offer in evidence at the trial." In addition, when the defense intends to place his or her mental state in issue through the testimony of a mental health expert, the prosecution can request that the court order the defendant to submit to an examination by a prosecution-retained mental health expert. Pen C §1054.3(b). Penal Code §1054.6 states that

> [n]either the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

Under the criminal discovery statute, Pen C §1054.6, those privileges provided by the United States Constitution and by other express statutory provisions remain effective, as does the work product protection of CCP §2018.030(a). The court of appeal in *Sandeffer v Superior Court* (1993) 18 CA4th 672, 22 CR2d 261, held that Pen C §1054.3 did not entitle the prosecution to the discovery of an expert's report from the defendant when the defendant had not yet decided whether to call the particular expert as a trial witness. *Sandeffer* applies a basic work product protection to an expert consultant who has not yet been designated as a trial witness.

However, if counsel intends to call an expert as a witness and as an expert at trial, expert witness reports and any test results must be disclosed. See *Woods v Superior Court* (1994) 25 CA4th 178, 181, 30 CR2d 182 (defense had to disclose expert's test results to prosecution since defense intended to call expert as witness and expert). See also *In re Littlefield* (1993) 5 C4th 122, 129, 19 CR2d 248 (discovery in criminal cases controlled exclusively by Proposition 115).

For detailed discussion of discovery in criminal cases, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual).

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II. INFORMING AND EDUCATING THE EXPERT

A. Supplying Expert With Facts

§8.25 1. Information That Should Be Provided

An expert's opinions are only as good as the material on which they are based. Opinions based on incomplete material are both unreliable and subject to attack on cross-examination. The expert rarely needs to read every word in the file, but he or she should at least be apprised of all available information. All doubts should be resolved in favor of supplying the expert with everything that might conceivably bear on his or her opinions. For example, in a personal injury or medical malpractice case, a doctor usually should be supplied with all medical records, including X rays, an objective medical chronology or records contents summary, transcripts of the depositions of any other doctors or medical personnel and, of course, the injured party's deposition. If, in the course of reviewing the records, a question or a need to cross-check or further investigate a reference arises, the doctor has the necessary information without having to call or write to counsel. Similarly, an automobile accident reconstruction expert should be supplied with the police report, all accident scene photographs and postaccident photographs of the cars, and depositions of the driver, witnesses, investigating officers, and any other accident reconstruction experts expected to testify as witnesses.

In especially complex cases, counsel should discuss with the expert the contents of counsel's entire file to make sure that the expert is provided everything counsel believes will assist the expert, as well as with everything the expert thinks would be of assistance.

PRACTICE TIP: You must take care, however, not to give the expert information, either oral or written, that is irrelevant, not discoverable, or privileged. For further discussion, see §§8.9, 8.17.

For discussion of other factors that counsel should consider in supplying information to the expert, see §8.21. See also Vines, *The Expert Witness in Depositions*, 20 Trial 44 (Jan. 1984).

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§8.26 2. Information That Should Not Be Provided

The expert should be concerned only with information that will be used by the trier of fact to determine the case. Other information is generally of no assistance to the expert; advising the expert of irrelevant or protected information only increases the likelihood that it will inadvertently come to the attention of the trier of fact.

EXAMPLE: In a wrongful death action, the plaintiff's economist need not know that the decedent's widow has remarried, because evidence of remarriage is inadmissible in California. *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 241, 71 CR 306; *Benwell v Dean* (1967) 249 CA2d 345, 355, 57 CR 394. Informing the economist of the widow's remarriage serves only to create the risk that the economist will inadvertently mention the fact at trial. Similarly, a plaintiff in a case with multiple defendants need not advise the expert of the terms of a settlement reached with one or more of those defendants; in fact, it may not even be necessary to advise the expert that there was a settlement.

If material is clearly protected by the attorney-client or some other privilege and will not be admissible, counsel should not advise the expert of its existence. Such information will not assist the expert but will only complicate his or her task by requiring him or her to remember not to mention the fact during deposition or at trial.

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§8.26A 3. Information Covered by Protective Orders

Experts are frequently provided with information that is covered by protective orders limiting its use to a particular case. Counsel must exercise particular care when using experts who have had access to such information in related cases. For example, in *McGinty v Superior Court* (1994) 26 CA4th 204, 31 CR2d 292, the plaintiffs in a case involving an allegedly defective airplane engine retained an expert who had previously been involved in another case against the same defendant involving the same type of engine. In the prior case, the expert had been provided with documents that were covered by a protective order limiting their use to that action. Thereafter, the expert inadvertently forwarded a portion of that data to counsel in the *McGinty* case. The defendant manufacturer moved for return of the documents and to disqualify the expert.

The trial judge granted the disqualification motion, but the court of appeal reversed, finding that the penalty was excessive because there was no willful conduct involved and the materials would have been discoverable through normal discovery. In so ruling, the court of appeal emphasized the nonwillful nature of the conduct, hinting strongly that it would have upheld the disqualification had intentional conduct been involved. 26 CA4th at 216.

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§8.27 4. Supplementing Expert's Factual Information

All too often, counsel diligently provides the expert with all relevant data developed up to the point when the expert is retained, and then neglects to supplement this information as investigation and discovery progress. All depositions, interrogatory responses, witness's statements, and other evidence should be screened as they are received to determine whether they should be supplied to the expert.

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§8.28 B. Explaining the Law

Lawsuits are determined according to a set of artificial rules that often differ significantly from those of the "real world," or at least from the expert's view of reality. Products liability, antitrust, dissolution, and a variety of other kinds of cases are determined according to laws that frequently ignore fault, individual responsibility, and other matters that nonlawyers, including experts, consider important. Accordingly, the lawyer must make sure that the expert, particularly the inexperienced expert, understands the governing legal principles and elements that each party to the litigation must prove in order to prevail. In addition, counsel's failure to explain applicable legal standards to the expert may result in the expert's trying to satisfy a far higher standard of proof than is needed or, conversely, optimistically assuring counsel that the case is defensible based on the expert's misunderstanding of the law.

EXAMPLE 1: In the products liability field, counsel must make sure the expert understands that liability does not depend on negligence or fault in the traditional sense. When dealing with a products liability expert who has not previously testified in California, counsel must make sure that he or she understands California law.

EXAMPLE 2: In a design defect case, other than one involving a drug manufacturer's liability for injuries caused by the defective design of a prescription drug (*Brown v Superior Court* (1988) 44 C3d 1049, 245 CR 412), the witness should be told that California no longer requires the plaintiff to prove that the product is "unreasonably dangerous"; rather, a California plaintiff may now recover in such a case by showing either that the product fails to meet consumer expectations or that, on balance, the dangers of the product outweigh its benefits. *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 143 CR 225; CACI 1204.

After counsel outlines and discusses with the expert the legal elements needed to prove the particular case, counsel should give the expert copies of pertinent Judicial Council of California Civil Jury Instructions (CACI) (civil) or the California Criminal Jury Instruction (CALCRIM) (criminal) instructions, if they cover the case. Alternatively, the expert should be supplied with copies or excerpts from the governing statutes and cases. Counsel may also want to give the expert pertinent briefs if, *e.g.,* there has been a relevant demurrer, motion for summary judgment, or the like.

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III. INFORMING AND EDUCATING THE LAWYER

§8.29 A. In General

Some lawyers, particularly those who, *e.g.,* failed biology and contrived not to take solid geometry, decide at the beginning of a case that they never will be able to understand what the expert is talking about, and they make no effort to do so. When preparing their own expert for trial, they say something like, "I'll ask you your name and address and you take it from there." An expert is not a mechanical toy that can simply be wound up and turned loose. Regardless of the expert's skill, it is the lawyer's responsibility to make sure that his or her expertise is presented to the trier of fact in an admissible and persuasive way. To accomplish this task, the lawyer needs to understand the substantive details of the expert's testimony and field of expertise.

Counsel should view the expert as a teacher. Eventually, counsel may want to use the expert as a witness to teach the judge or jury about some aspect of the case. First, however, the expert should be used to teach the lawyer. The role of student may not be one to which the lawyer is accustomed and, unless the lawyer follows several important rules discussed in §§8.30-8.35, the expert's skills and talents may be wasted. In *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 34, 29 CR3d 622, the court of appeal cited this book section as a source for a lawyer's affirmative duty to properly present expert testimony to a court in the context of a summary judgment motion.

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§8.30 B. Asking Questions

Many lawyers find it humiliating to admit that they do not know the meaning of various technical words used by an expert, or that they have no idea what the expert is talking about. This can be especially galling if the same subject has been discussed or explained on previous occasions. Nonetheless, counsel must learn to bury his or her pride and continue to ask questions. If counsel does not understand what the expert is saying, the average juror is not likely to understand the expert. It is counsel's job to see that the expert's testimony is presented in a form that can be understood by judge and jury; the lawyer can fulfill this responsibility only if he or she fully understands what the expert is saying.

If counsel acquires some familiarity with the particular area of expertise and its special vocabulary, discussing technical aspects of the case with the expert will be easier. In *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 34, 29 CR3d 622, the court of appeal cited this book section as a source for a lawyer's affirmative duty to properly present expert testimony to a court in the context of a summary judgment motion.

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§8.31 C. Learning Relevant Vocabulary

Virtually every field of expertise has its own vocabulary. Counsel must be able to "crack the code" and learn enough words to converse intelligently with the expert. When the expert uses unfamiliar words during preparation for trial, counsel should make the expert define them. If necessary, counsel should keep a list of words and definitions. Learning the relevant vocabulary not only eases counsel's task of reading the literature and becoming familiar with the subject but also gives counsel added self-confidence when deposing opposing experts. Most important of all, it allows counsel to conduct successful cross-examinations of opposing experts, coach his or her own experts so that they testify in a way that the judge and jury understand, and act as a "translator" during closing argument to make sure the jury fully understands the expert's testimony.

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§8.32 D. Reading Necessary Literature

Although talking with one's own expert is probably the best way of learning about an alien subject, counsel's overall understanding of the field and ability to discuss and challenge the ideas and theories of his or her own expert and of the opposing party's experts are greatly improved if counsel spends a reasonable amount of time reading in the area.

Counsel should ask the expert for the name of a good basic treatise on the subject (for general background) and the names of two or three articles or papers dealing with the precise question in issue, and read them before meeting with the expert for the first time. Counsel should also read all available reports and material already generated in the case before meeting with the expert. If there are any questions about the meaning or significance of any of the information in those materials, counsel can use at least some of the time with the expert in having those questions answered.

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§8.33 E. Witnessing Tests, Experiments, and Inspections

If a case involves an accident or a crime scene that must be inspected, a condition that must be duplicated, or a series of physical tests that must be run, counsel should consider whether he or she should be present during these activities. Reasons for attending include the following:

- To observe the expert in a setting other than the office or deposition room.
- To develop a rapport with the expert while, *e.g.,* riding to the site, stopping for coffee, or having lunch, that would otherwise not exist.
- To increase counsel's knowledge of the expert's field of expertise.
- To observe whether the expert's theories, ideas, and approaches can effectively and persuasively be presented to a judge or jury within the artificial limitations of litigation.
- To become familiar with evidence that will be important at trial.

There are many tasks performed by experts, however, that do not require counsel's presence, *e.g.,* the laboratory analysis of a piece of evidence. In addition, many experts object to having counsel present during experiments and tests because counsel may interfere, ask irrelevant questions, or upset the expert's concentration.

When witnessing an expert in action, counsel should remember, therefore, that he or she is present as an observer and not as a full participant. Counsel should write down thoughts, questions, and ideas for later discussion.

For further discussion of tests, experiments, and inspections, see chap 9. For discussion of evidentiary considerations concerning tests, experiments, and inspections, see Effective Introduction of Evidence in California, chap 23 (2d ed Cal CEB 2000); Jefferson's California Evidence Benchbook, chap 21 (3d ed CJA-CEB 1997); 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§35-109 (4th ed 2000).

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§8.34 IV. MAINTAINING CONTACT WITH EXPERT

Many experts, through overwork or otherwise, do not give a case the attention it needs. Alternatively, some spend far more time and run up far larger bills than the case warrants. Counsel is responsible for preventing both situations. Counsel should adopt a policy of keeping after the expert who procrastinates and of keeping tight controls on time expended by the expert who tends to overwork the case.

PRACTICE TIP: Telephoning the expert at 30-day or more frequent intervals is one good method of dealing with the former problem, while setting written dollar maximums, which the expert must call you for permission to exceed, is an excellent method of dealing with the latter tendency.

See Miller, *What Should an Attorney Expect From an Expert?* 89 Case & Com 40 (Sept.-Oct. 1984).

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§8.35 V. DEALING WITH MULTIPLE EXPERTS

Counsel frequently must retain more than one expert in the same case. As long as the experts are from different disciplines, *e.g.,* an orthopedist and an economist or a surgeon and an accident reconstruction specialist, they generally pose no particular problems other than the need for counsel to make sure that each has the same understanding of the facts and the law. Complications can arise, however, when multiple experts are from the same discipline (*e.g.,* two oncologists), from closely related disciplines (*e.g.,* a toxicologist and a pathologist), or from overlapping disciplines (*e.g.,* an orthopedist and a biomechanic). In addition to making sure that the experts are proceeding on common factual and legal premises, counsel also must know whether the experts' opinions differ concerning questions in their own fields of expertise. For example, do the toxicologist and the pathologist both agree that the absence of carbon particles in the decedent's lungs on autopsy prove that death occurred before the fire broke out? Or, do the oncologists agree that, had the precancerous condition been detected at an earlier stage, there was an available course of treatment that would have had positive results?

Absence of complete agreement among experts for the same party is not always fatal. It is, however, something of which counsel should be aware before designating expert consultants as witnesses, and something for which counsel should have a convincing explanation for the judge or jury.

Whenever counsel is using several experts from the same or related disciplines, the question arises: Should the experts meet and confer before being deposed or testifying? Tactical considerations and the facts of the particular case often result in conflicting answers to this question. In general, counsel's decision should be guided by the response to the question, "How is it going to sound to the jury if the experts do or do not meet?" If the experts are kept apart, opposing counsel will be able to make insinuations about an apparent effort to isolate the experts and will be able to ask each on cross-examination whether he or she does not think it would have been beneficial to have had at least an opportunity to discuss the case with his or her counterpart. On the other hand, counsel may have legitimate and persuasive reasons why an objective presentation of his or her case will be enhanced by keeping the experts apart and independent. Counsel's handling of the situation must be a considered one, and counsel and his or her experts must be able to justify this decision to a judge and jury.

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VI. FEDERAL RULES OF EVIDENCE

A. Attorney-Client Privilege

§8.36 1. In General

Federal Rules of Evidence 501 provides that, unless otherwise provided by rule or statute, privileged questions "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," except that, as to civil claims that are governed by state law, the law of that state shall be determinative.

The attorney-client privilege under federal law is similar to California statutory protection; absent a waiver, and with certain exceptions, the attorney-client privilege absolutely protects confidential communications between a client and the client's attorney on matters for which the attorney was consulted as a legal adviser. See generally 8 Wright, Miller, & Marcus, Federal Practice and Procedure §2017 (2d ed 1994).

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§8.37 2. Corporate Context: Subject Matter Test

An issue arises when the expert is an employee of a corporate client, *i.e.,* is the communication from the employee-expert protected under the attorney-client privilege? The Supreme Court in *Upjohn Co. v U.S.* (1981) 449 US 383, 386, 66 L Ed 2d 584, 589, 101 S Ct 677, while refusing to "lay down a broad rule or series of rules to govern all conceivable future questions in this area," did endorse a subject matter approach. The Court considered the subject matter about which counsel's advice is sought by the corporation and whether the communication was made by an employee in the performance of his or her duties of employment.

In *Upjohn* the Court rejected the "control group" test, under which the ability of the corporate employee to control decision-making in the area in which the attorney was advising the corporation was the key, because lower echelon employees frequently possess information counsel needs and the purpose of the privilege can be effected only if relevant communications by these employees are protected. Even in imparting legal advice, the attorney's advice will frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. After analyzing the varying, and frequently inconsistent, results that courts have reached in trying to determine control group membership, the Court also rejected the control group test because it lacks the degree of certainty necessary if the privilege is to function effectively. See §8.5 for discussion of the control group test as set forth in *D. I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468.

For further insight into the assertion of the federal attorney-client privilege by a corporation and the circumstances under which that privilege can be waived, see *Commodity Futures Trading Comm'n v Weintraub* (1985) 471 US 343, 85 L Ed 2d 372, 105 S Ct 1986 (voluntary disclosure by trustee of corporation in bankruptcy waived debtor corporation's attorney-client privilege for communications that occurred before bankruptcy petitions were filed); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.* (9th Cir 1981) 658 F2d 1355, 1361 (protections of *Upjohn* extended to include "orientation sessions" before depositions with ex-employee witnesses who were not employees of company at time sessions were held). See also §8.6.

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§8.38 B. Federal Work Product Doctrine: Contrasted With California Law

Under the federal rules, work product, including the work of experts, must have actually been prepared for counsel in anticipation of litigation or trial to enjoy any protection from discovery. See Fed R Civ P 26(b)(3). Most courts require that the predominant or sole purpose of preparation of the work must have been in anticipation of litigation for the work product doctrine to apply. In *Hermsdorfer v American Motors Corp.* (WD NY 1982) 96 FRD 13, the court considered it enough that one of the purposes for employing the experts was to prepare for litigation.

Although California cases hold that the work product rule is for the benefit of counsel and that it is the attorney who is the sole holder of the protection (see §8.8), federal work product protection may be claimed by both the client and the attorney. *In re Nat'l Mort. Equity Corp. Mort. Pool Cert. Litig.* (CD Cal 1987) 116 FRD 297, 301 (and cases cited therein). Under the federal rules, an attorney has no right to withhold work product from his or her own client. *Gottlieb v Wiles* (D Colo 1992) 143 FRD 241, 247 (compare with California rule in *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 276, 218 CR 205).

PRACTICE TIP: You should keep in mind that, absent a United States Supreme Court or Ninth Circuit opinion on point, reference to cases from other federal judicial district courts and the arguments raised in those cases may provide pertinent arguments and case law to be cited in California.

Cases applying predominant purpose test. Counsel should be aware, however, that federal law will not automatically grant work product protection to reports of investigations prepared only in part because of a concern about potential litigation. *Soeder v General Dynamics Corp.* (D Nev 1980) 90 FRD 253 (predominant purpose test: in-house accident report prepared by defendant concerning causes of aircraft accident not protected, because litigation concern was outweighed by more pressing business motives and need to minimize adverse publicity); *U.S. v Davis* (5th Cir 1981) 636 F2d 1028, 1040 (predominant purpose test: preparation for litigation must be primary motivating factor for writing to be entitled to work product protection). See also *Fine v Bellefonte Underwriters Ins. Co.* (SD NY 1981) 91 FRD 420 (predominant purpose test: report prepared by investigators retained to investigate cause of fire and reason for sprinkler failure not protected even though suits had been filed against defendant and defendant had retained counsel before key parts of report prepared; court held that company had not given sufficient, concrete signs that it intended to resist claims); *Grinnell Corp. v Hackett* (D RI 1976) 70 FRD 326, 332 (sole purpose test: for work product protection to apply, "the information sought [must have been] obtained for the very purpose of preparing for the litigation in question"). But see *Hermsdorfer v American Motors Corp., supra* (court held that work of experts retained for dual purpose of preparing for trial and assisting in product development was protected).

Alternative "because of" test. Recognizing the "form over substance" nature of the predominant purpose test, a number of circuits have adopted a "because of" test, which does not depend on whether litigation was a primary or secondary motive behind the creation of a document. As articulated by the Second Circuit in *U.S. v Adlman* (2d Cir 1998) 134 F3d 1194, the "because of" test considers the totality of the circumstances and grants protection when it can be reasonably established that the "document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation…." 134 F3d at 1195. This formulation has also been adopted in *Maine v U.S. Dep't of Interior* (1st Cir 2002) 298 F3d 60, 68; *Montgomery County v MicroVote Corp.* (3d Cir 1999) 175 F3d 296, 305; *Logan v Commercial Union Ins. Co.* (7th Cir 1996) 96 F3d 971, 976; *PepsiCo, Inc. v Baird, Kurtz & Dobson LLP* (8th Cir 2002) 305 F3d 813, 817; and *EEOC v Lutheran Social Servs.* (DC Cir 1999) 186 F3d 959, 968.

Ninth Circuit applies "because of" test. The Ninth Circuit, following *U.S. v Adlman, supra,* has adopted the "because of" standard for assessing whether to extend work product protection to particular documents. *U.S. v Torf (In re Grand Jury Subpoena)* (9th Cir 2003) 350 F3d 1010. In *Torf*, an environmental consultant was engaged, at the direction of the defendant's attorney, to investigate potential violation of waste management laws in anticipation of civil and criminal litigation by the government. Some of the documents the consultant created were then submitted to the government with the stipulation that work product protection was not being waived. Subsequently, a grand jury issued a

subpoena to the environmental consultant for the production of all work related to the disposal of waste material. On appeal, the Ninth Circuit held that the "dual purpose" documents were protected from grand jury subpoena under work-product privilege because their "litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." 350 F3d at 1018.

Two-level work product protection. If it is determined that materials are entitled to work product protection, Fed R Civ P 26(b)(3) sets forth a two-level work product rule that recognizes a distinction similar to that created under the California statute (see CCP §2018.030, discussed in §8.10) between absolutely protected and conditionally protected work product. See §8.39. In addition, the Rules expressly divide experts into four categories. See §8.40.

Under Fed R Civ P 26(b)(5), a party must notify other parties if it is withholding materials otherwise subject to disclosure, because it is asserting a claim of privilege or work product protection. Withholding materials without such notice subjects the party to sanctions under Rule 37(b)(2) and may be viewed as a waiver of the privilege or protection.

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§8.39 1. Two Types of Work Product

The mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning litigation are absolutely protected. Fed R Civ P 26(b)(3)(B); see *Maynard v Whirlpool Corp.* (SD WVa 1995) 160 FRD 85 (attorney's opinion work product conveyed to retained expert is not discoverable in expert's deposition, citing *Hickman v Taylor* (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385).

All other work product is only conditionally protected; it is discoverable on a showing that the party seeking discovery has substantial need of the materials in preparation for that party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Fed R Civ P 26(b)(3).

Both Rule 26(b) and the reported federal cases have avoided specifying any litmus test for determining the discoverability of conditionally protected materials, and in each situation counsel must examine case law to determine how Rule 26(b) has been applied. For discussion, see *Lewis v United Air Lines Transp. Corp.* (WD Pa 1940) 32 F Supp 21. See generally 8 Wright, Miller, & Marcus, Federal Practice and Procedure §§2021-2050 (2d ed 1994).

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§8.40 2. Four Types of Experts

In General

Specified procedures are set out in Fed R Civ P 26(b)(4) for discovering facts known and opinions held by experts that were acquired or developed in anticipation of litigation or for trial. Rule 26 expressly divides experts into two categories: those expected to be called as witnesses and those who have been retained or specially employed in anticipation of litigation but who are not expected to be called as witnesses. The Advisory Committee to the 1970 Amendment to Rule 26(b)(4) and case law (see *Ager v Jane C. Stormont Hosp. & Training Sch. for Nurses* (10th Cir 1980) 622 F2d 496, 501) recognize four categories of experts: in addition to the first two listed above, the other categories are expert consultants and percipient experts.

Trial Witnesses

A common question is what the status is of the work product that is created before the expert is designated as a trial witness. In some circumstances, work done by an expert when acting as a consultant or as a percipient witness who later becomes designated as an expert witness is discoverable. See, *e.g., Berkey Photo, Inc. v Eastman Kodak Co.* (2d Cir 1979) 603 F2d 263, 306 (in antitrust action, when it developed that the only expert witness had studied a key 1915 consent decree and advised attorneys that he was unable to reconcile it with Kodak's current claims, limited admissibility of its contents was allowed; it was not relevant that expert had analyzed and expressed misgivings about decree before he was designated prospective trial witness); *Construction Indus. Servs. Corp. v Hanover Ins. Co.* (ED NY 2001) 206 FRD 43 (material provided to consultant or prepared by consultant in consulting role that is relevant to his later role as testifying expert is subject to disclosure; any ambiguity should be resolved in favor of disclosure); *Krisa v Equitable Life Assur. Soc'y* (MD Pa 2000) 196 FRD 254 (draft reports of testifying experts are not protected work product). See *Baran v Presbyterian Univ. Hosp.* (WD Pa 1984) 102 FRD 272 (court held that defendant-physicians fit into category of "actors or viewers," not experts retained for purposes of litigation; therefore, they should have been allowed to testify about their medical opinions relating to their treatment of plaintiff without providing plaintiff's counsel with their written expert reports). See also Anno, *Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure*, 33 ALR Fed 403 (2001).

Nonwitness Experts Retained or Specially Employed

Although a nontestifying consultant's opinion generally is not discoverable (see §§10.52-10.53), counsel should keep in mind that, if a consultant renders an opinion, shares that opinion with an expert who testifies at trial, and the trial expert concedes that he or she relied in part on the consultant's report, the consultant's report and opinion may then become subject to cross-examination under Fed R Evid 703 and 705. See, *e.g., Lewis v Rego Co.* (3d Cir 1985) 757 F2d 66, 74 (cross-examination concerning conversations between consultant and trial expert should have been permitted). In *Employer's Reins. Corp. v Clarendon Nat'l Ins. Co.* (D Kan 2003) 213 FRD 422, the inadvertent disclosure of facts known to or opinions held by a consulting expert was held not to waive the work product protection from discovery.

Informally Consulted Experts

Neither the identities nor the opinions of informally consulted experts are discoverable, even if exceptional circumstances exist. Advisory Committee Notes to Rule 26, commenting on subdivision 26(b)(4)(B); see discussion in §10.54.

Percipient Experts

Experts whose information was not acquired in preparation for trial are the federal equivalent of percipient experts under state practice. See §10.56. Their knowledge does not constitute work product, and they can be either contacted informally or deposed like any other third party witness under Fed R Civ P 30. Federal Rules of Civil Procedure 26(b)(4) makes clear that such experts do not fall within its provisions.

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§8.40A 3. Jury and Trial Consultants

Litigators often will hire consultants to assist with witness preparation, test trials, and focus groups, as well as with jury selection. In *In re Cendant Corp. Sec. Litig.* (3d Cir 2003) 343 F3d 658, the court addressed the discoverability of the work of such jury consultants. A witness who was being deposed refused to answer any questions regarding contact with, or guidance received from, a jury consultant, Dr. Phillip C. McGraw, television's "Dr. Phil." The Third Circuit found that the communications were protected by the work product rule (Fed R Civ P 26(b)(3)), which extends to materials prepared by an attorney or representative acting on the attorney's behalf. The examining party argued, however, that the work product rule is not absolute and, in any event, is superseded by Rule 26(b)(4)(B). The court rejected the superseding argument and held that there were no exceptional circumstances justifying discovery of the actual communications between the consultant and the witness, under either the work product doctrine or Rule 26(b)(4)(B). The court found, however, that the witness could be asked questions that would not involve disclosure of substantive communications, such as the date, time, place, and duration of each meeting. One judge wrote a concurring opinion urging that the refusal to permit substantive examination should also have been based on the attorney-client privilege because the consultant was assisting counsel in the formulation of legal advice.

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§8.41 4. Duration and Extent of Protection

The reported federal decisions are split three ways on the duration of time that material covered by the work product rule enjoys the rule's protection. The three positions may be summarized as follows:

- At one extreme are the cases followed by California in *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 165 CR 748 (discussed in §8.17), such as *In re Murphy* (8th Cir 1977) 560 F2d 326 and *Duplan Corp. v Moulinage et Retorderie* (4th Cir 1973) 487 F2d 480, 484, espousing a philosophy of perpetual protection of work product.
- At the opposite extreme are cases such as *U.S. v Leggett & Platt, Inc.* (6th Cir 1976) 542 F2d 655, 660, and *U.S. v International Bus. Mach. Corp.* (SD NY 1974) 66 FRD 154, 178, holding that work product is protected only during, and in connection with, the case in which the protected work product was prepared.
- A third, intermediate position is that work product protection applies only in the case for which the material was prepared or in a second, closely related case. *Republic Gear Co. v Borg-Warner Corp.* (2d Cir 1967) 381 F2d 551, 557; *Hercules, Inc. v Exxon Corp.* (D Del 1977) 434 F Supp 136, 153; *Employer's Reins. Corp. v Clarendon Nat'l Ins. Co.* (D Kan 2003) 213 FRD 422; *Midland Inv. Co. v Van Alstyne, Noel & Co.* (SD NY 1973) 59 FRD 134, 138. See also 8 Wright, Miller, & Marcus, Federal Practice and Procedure §2024 (2d ed 1994).

In *FTC v Grolier, Inc.* (1983) 462 US 19, 103 76 L Ed 2d 387, 103 S Ct 2209, the Supreme Court adopted the first approach discussed above and held that attorney work product protection applied under Fed R Civ P 26(b)(3)(A) even though the litigation had terminated 6 years earlier and there was no related litigation involved. The decision in *Grolier,* however, also rested independently on an interpretation of the Freedom of Information Act (FOIA) (5 USC §552), Exemption 5, which may limit the applicability of the ruling. See, *e.g., Powell v U.S.* (ND Cal 1984) 584 F Supp 1508 (district court in dicta questioned government's reliance on *Grolier* in asserting work product privilege in response to FOIA request for information on *criminal* proceeding that had terminated 20 years earlier).

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§8.42 5. Waiver

In dealing with experts, an attorney must be aware that what he or she transmits to the expert may be the subject of attempted discovery, and that the outcome is uncertain. The majority of courts to have considered this issue have taken the position that anything that is transmitted to an expert who will actually testify at trial could conceivably have influenced the expert's opinion and, therefore, is discoverable. See *Elm Grove Coal Co. v Director, Office of Workers' Compensation Programs* (4th Cir 2007) 480 F3d 278, 302 n24; *Regional Airport Auth. v LFG, LLC* (6th Cir 2006) 460 F3d 697, 713; *In re Pioneer Hi-Bred Int'l Inc.* (Fed Cir 2001) 238 F3d 1370, 1375; *Johnson v Gmeinder* (D Kan 2000) 191 FRD 638, 644; *Karn v Rand* (ND Ind 1996) 168 FRD 633, 635; *Vaughn Furniture Co. v Featureline Mfg. Inc.* (MD NC 1994) 156 FRD 123, 127; *Boring v Keller* (D Colo 1983) 97 FRD 404, 405; *James Julian, Inc. v Raytheon Co.* (D Del 1982) 93 FRD 138, 145; *Berkey Photo, Inc. v Eastman Kodak Co.* (SD NY 1977) 74 FRD 613, 616. See also *William Penn Life Assur. Co. v Brown Transfer & Storage Co.* (WD Mo 1990) 141 FRD 142; *Intermedics, Inc. v Ventritex, Inc.* (ND Cal 1991) 139 FRD 384, 387; *Occulto v Adamar, Inc.* (D NJ 1989) 125 FRD 611, 616. This waiver principle has been extended to oral communications between a party or the party's counsel and the expert. *Synthes Spine Co. v Walden* (ED PA 2005) 232 FRD 460, 465. See *B.C.F. Oil Ref., Inc. v Consolidated Edison Co.* (SD NY 1997) 171 FRD 57, 67. One district court has likewise held that this waiver principle applies to a disclosed trial expert who receives privileged material prior to a deposition, is deposed, and is then withdrawn as a trial witness before the privileged material is disclosed. The decision not to call the expert could not reinvoke the privilege previously waived. *CP Kelco U.S., Inc. v Pharmacia Corp.* (D Del 2003) 213 FRD 176; see Schenkier, *The Limits of Privilege in Communications with Experts*, 33 Litigation 16 (Winter 2007); Joseph, *Rule Traps*, 30 Litigation 6 (Fall 2003); Anno, *Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts under Rule 26(b)(4) of the Federal Rules of Civil Procedure*, 33 ALR Fed 403 (1977).

A contrary line of cases holds that the transmission of documents to an expert, without more, does not waive work product protection and does not render discoverable portions of documents containing the most highly protected work product: an attorney's mental impressions, conclusions, opinions, and legal theories. See *Bogosian v Gulf Oil Corp.* (3d Cir 1984) 738 F2d 587, 593; *Magee v Paul Revere Life Ins. Co.* (ED NY 1997) 172 FRD 627, 642; *Haworth, Inc. v Herman Miller, Inc.* (WD Mich 1995) 162 FRD 289; *Hamel v General Motors Corp.* (D Kan 1989) 128 FRD 281; *Carter-Wallace, Inc. v Hartz Mountain Indus.* (SD NY 1982) 553 F Supp 45. Facts in such transmissions, however, may be discoverable on a showing under Fed R Civ P 26(b)(3) of substantial need, and unavailability from other sources.

The Northern District of California has rejected with "trepidation" the rule protecting such work product from discovery set forth in *Bogosian v Gulf Oil Corp., supra*. See *Intermedics, Inc. v Ventritex, Inc.* (ND Cal 1991) 139 FRD 384, which held that an attorney's work product made to an expert who will testify at trial is discoverable, unless an extraordinary showing of unfairness is made that goes well beyond interests generally protected by the work product doctrine. One of the primary concerns that the court in *Intermedics* had with *Bogosian* was the threat that the attorney's communications with his or her own expert could affect the independence of the expert's thinking. Communications from an attorney could not only influence the expert's opinion, but also furnish the expert with the opinion itself. Thus the district court held that because such communications would reflect directly on the credibility and reliability of the expert, they should be discoverable.

PRACTICE TIP: If the transmissions contain a combination of attorney opinion work product and facts, the author recommends that the lawyer who must oppose a claim of waiver of work product protection in a federal case for material given to his or her expert should request that the judge conduct an in camera inspection, as is authorized under Fed R Civ P 26 (*Hamel v General Motors Corp.* (D Kan 1989) 128 FRD 281, 284), and suggest that the court give serious consideration to applying the *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535, methodology or some variation of it (see discussion in §8.16).

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9

Inspections, Tests, Experiments, and Demonstrative Evidence

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§9.1 I. INTRODUCTION: TESTED VERSUS UNTESTED OPINIONS

Counsel should not only choose the best qualified expert (see chap 7), but must also make sure that the expert's work on the case is better than that of the opposing expert. In particular, counsel should ensure that the opinions of the expert, when applicable, are based on physical observation and testing, not on untested hypotheses. Jonas Salk did not discover polio vaccine merely by thinking about it. Rather, through painstaking trial-and-error experimentation—the scientific method—he proved that his vaccine was effective against polio. Effective expert testimony should be based on similar observations and tests as opposed to mere thoughts. In short, the expert should be directed to follow the scientific method. This has two advantages: It allows counsel to test the expert's thesis for accuracy; and it provides a firm basis for arguing why the judge or jury should accept the proven opinions of counsel's expert. The tested opinions of counsel's expert will be particularly persuasive if the opposing expert's theories are untested.

PRACTICE TIP: Remember that the results of tests and experiments performed by the expert will probably be discoverable and may have adverse consequences for the case. For discussion, see chaps 8, 10.

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II. FOLLOWING SCIENTIFIC METHOD CONCERNING PHYSICAL EVIDENCE

A. Collecting and Investigating Evidence

§9.2 1. Visiting the Scene

When a case involves a physical site, such as an accident scene, an expert should visit it under circumstances that are as close as possible to those that existed at the time the event occurred. Some common circumstances to be considered are time of day, lighting, exact location of persons and objects involved, weather, and noise. Frequently, such a visit provides the expert with new insight into or understanding of the case. The expert may even discover physical evidence not found or neglected by others. At a minimum, it renders the expert immune from the peripheral cross-examination question: "You've never even visited the accident scene, have you?"

PRACTICE TIP: You may wish to have an investigator photograph or make a video recording of the scene as soon as possible, in case later changes occur.

In *Pullin v Superior Court* (2000) 81 CA4th 1161, 97 CR2d 447, a slip-and-fall case, the court of appeal held that a demand for inspection under former CCP §2031 (now CCP §2031.010) was not necessary for plaintiff's expert to go into defendant's store, which was open to the public, and conduct tests on the condition of the floor. The expert used a "small machine" to conduct a test on the floor, purchased an item, and left. No one complained or asked him to leave, and no damage was done to the premises. After defendant's attorneys learned of the test at the expert's deposition, they moved in limine to exclude his testimony and the results of his test. The trial court agreed with defendant, suggesting that defendant had the right under the Discovery Act of 1986 to be present at all tests conducted by the plaintiff's expert. In response to the plaintiff's writ of mandate, the appellate court vacated the trial court's ruling and held that property open to the public could be examined by plaintiff's expert without recourse to former §2031 (now CCP §2031.010), provided that the examination could be conducted in a lawful manner.

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§9.3 2. Examining and Handling Physical Evidence

If a case involves tangible physical evidence, *e.g.,* a broken part in a products liability case, a machine in an industrial accident action, or a will in a testamentary dispute, an expert should personally examine, handle, and study the original. If it no longer exists, the expert should do the same with a facsimile. To be sure, counsel may have an accurately transcribed copy of the will, or, in a design (as opposed to manufacturing) product defect case, one 1973 Pinto gas tank may look the same as another. However, there is always the off chance that the original may have a minor but significant difference, or an original document may have a marginal notation that does not come through on photocopies. Even if examination of the original does not produce any revelations, it gives the trier of fact an indication of the expert's thoroughness and adherence to the scientific method.

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§9.4 3. Providing Expert With Originals or Complete Copies

The expert should be provided with the original or a copy of every significant writing or other matter on which his or her opinion will be predicated. For example, in a medical malpractice case the medical expert should be provided with complete copies of all of the plaintiff's medical records.

Although most medical experts will not have the time or need to read each word, the expert, rather than counsel, should determine which portions of the medical records are relevant. In addition, providing the expert with all of the records forecloses opposing counsel's peripheral question on cross-examination: "And, as a matter of fact, you were never even provided with the records of [Dr. X or Hospital X], were you?"

Similarly, if opinions of an accident reconstructionist are based on testimony of certain eyewitnesses, the expert should be provided with copies of the actual statements and depositions of those witnesses, not just with a summary of the statements. In a commercial case involving a claimed loss of income or profits, the accountant or economist should be provided with all of the financial records, or at least given access to them. Selected balance sheets or profit and loss statements are inadequate. Again, the reasons for giving the expert all records are that the expert may find relevant information in materials that counsel considers to be of little or no significance; and viewing originals allows the expert to proceed according to the scientific method, which is more persuasive to the trier of fact, and may foreclose another avenue of peripheral cross-examination at trial.

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§9.5 4. Having Expert Speak Directly with Parties and Witnesses

If an expert's opinions will be based on the observations, feelings, condition, and thoughts of the party represented by counsel, or of an available and cooperative witness, the expert should meet and talk with that individual. For example, in personal injury cases the recollection of the plaintiff driver or plaintiffs' industrial accident victim is crucial to the expert's opinion, yet plaintiffs' attorneys frequently fail to have their own experts meet the clients, and instead provide the expert with only a copy (or even a mere summary) of the client's deposition or statement. The expert must then depend on the information elicited by plaintiff's attorney at the deposition. The expert has no opportunity to make his or her own inquiries. This failure might allow defense counsel to imply that there is something almost conspiratorial about plaintiff's case because counsel would not even allow his or her own expert to talk to the client.

In a products liability suit or antitrust action, defendant's employees have firsthand knowledge of the product's design, or of preparation of the challenged pricing policy. Defense counsel who does not have his or her expert meet and confer with those employees exposes the client to the allegation in closing argument that defense counsel is afraid to have defendant's employees testify.

For further discussion, see §§8.2-8.7 (attorney-client privilege), 8.8-8.19 (work product privilege), and 10.6 (expert consultant versus expert witness).

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B. Testing Physical Evidence

§9.6 1. Following the Scientific Method

In adhering to the scientific method the expert should test and confirm each underlying fact or premise; nothing should be taken for granted. For example, even if there is abundant published evidence that a particular floor tile is excessively slippery, the expert should perform his or her own coefficient of friction tests on the same tile or a facsimile to determine that the product's skid resistance is below the accepted norm. In *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 387, 164 CR 343, the verdict was reversed because the prevailing party's accident reconstruction expert had not actually measured the coefficient of friction of the street when it was wet, as it was at the time of the accident.

Even when an expert is sure from past experience that a certain result will occur, he or she should be required to test the accuracy of the thesis, *e.g.,* that a given object is not observable from a particular point, that a driver will be unable to execute a particular maneuver within a given length of time, or that an automobile tire cannot be sufficiently compressed during a turn to permit the wheel flange to contact the pavement.

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§9.7 2. Checklist: Trial Considerations When Testing Evidence

In conducting tests on physical objects, counsel must always keep in mind the possibility that evidence of those tests will have to be presented at trial. The following considerations may be relevant, depending on the item being tested:

- "New" scientific tests must satisfy the *Kelly* test, discussed in §4.6.
- A proper chain of custody should be established. See discussion in §9.12.
- If a writing is involved, the rules regarding proof of the content of a writing (see Evid C §§1520-1523), including the "secondary evidence rule" (see Evid C §1521) and authentication requirements (see Evid C §§1400-1454), should be satisfied. See discussion and sample questions in Effective Introduction of Evidence in California, chap 11 (2d ed Cal CEB 2000) (authentication) and Effective Intro of Evidence, chaps 47-48 (secondary evidence).
- Generally accepted scientific procedures should be followed. *People v Kelly* (1976) 17 C3d 24, 130 CR 144.
- An expert who is qualified to give an opinion concerning the test involved should be used. See Evid C §801.

The cost of destructive testing of physical objects ordinarily must be borne by the party who desires the testing to be done and cannot be shifted to a party that does not want to pursue that form of discovery. The possibility that such testing may reveal evidence beneficial to parties other than the one pursuing the discovery is not sufficient to support a court order compelling those parties to bear a portion of the cost. Rather, the cost of destructive testing should be shared equally by the parties who have either affirmatively requested it or voluntarily agreed to contribute to pay for it. *San Diego Unified Port Dist. v Douglas E. Barnhart, Inc.* (2002) 95 CA4th 1400, 116 CR2d 65.

Other aspects of testing physical objects are discussed below in §§9.8-9.12. See also Effective Intro of Evidence, chap 23; 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§41-109 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 21 (3d ed CJA-CEB 1997); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations (3d ed 2000).

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§9.8 3. Obtaining Evidence for Testing When Counsel Does Not Have Custody of It

Civil Cases

It may be possible for civil parties not in possession of physical evidence to examine and analyze it through informal means. Frequently, counsel in possession of physical evidence is willing to loan it to opposing counsel or to other parties for examination and analysis, demanding nothing more than a signed acknowledgment of receipt. However, other attorneys are unwilling to part with evidence, however briefly, or are insistent that they, and even their experts, be present during the examination by opposing counsel. On occasion, attorneys even insist that examinations by the opposing party be recorded by photographs, audiotape, or video recording.

There are circumstances in which physical evidence may be obtained without the other party's cooperation and without recourse to CCP §2031.010. A party may conduct unilateral investigation without resort to any statutory discovery device as long as the discovery is lawful. *Pullin v Superior* Court (2000) 81 CA4th 1161, 97 CR2d 447 (plaintiff's attorney lawfully examined supermarket floor while store was open to public). However, "in most instances, a party's right to inspect documents or other physical evidence in the possession or custody of the opposing party depends upon compliance with the procedures set out in [former CCP §2031 (now CCP §2031.010).]" 81 CA4th at 1164.

Thus, a party not in possession of physical evidence who desires to inspect and analyze the evidence should demand production under CCP §2031 and concurrently seek a protective order under CCP §2019.030(b) prohibiting the party who has physical possession of the evidence from monitoring the inspection procedure. For suggested form of motion, see California Civil Discovery Practice, chap 8 (4th ed Cal CEB 2006).

Criminal Cases

In 1990, California voters enacted Proposition 115, which contains new discovery provisions for criminal law cases. See Pen C §§1054-1054.8. Penal Code §1054(e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." Penal Code §1054.1(c) and (e) directs the prosecutor to "disclose" to the defense all relevant real evidence, and any exculpatory evidence. The defense is required to "disclose" to the prosecution any real evidence intended to be introduced at trial. Pen C §1054.3(a)(2). It is unclear whether "disclose" requires counsel to make real evidence available to opposing counsel for testing or retesting.

Under earlier criminal case law, the defense had the right to inspect and test evidence taken from the defendant or from the scene of the crime. See *People v Washington* (1958) 163 CA2d 833, 330 P2d 67 (testimony concerning marijuana tracings introduced in rebuttal by prosecution, but defense not allowed access to that evidence or continuance for testing; case reversed); *Schindler v Superior Court* (1958) 161 CA2d 513, 520, 327 P2d 68 (defense should have been allowed to test specimens and samples taken from deceased that were in possession of autopsy surgeon; writ granted).

The court in *Keenan v Superior Court* (1981) 126 CA3d 576, 585, 177 CR 841, followed *Washington* but ordered the testing and examination of all prosecution evidence to be conducted in the Hall of Justice, under the prosecution's supervision. The defense experts could bring their own equipment, however, and were not required to disclose the results of their testing to the prosecution. If the reciprocal discovery provisions of Proposition 115 (Cal Const art I, §30(c); Pen C §1054.3) are upheld, it is doubtful that the defense would be allowed in the future to keep the prosecution from monitoring every aspect of testing, including the results.

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Source: Civil Litigation/California Expert Witness Guide/9 Inspections, Tests, Experiments, and Demonstrative Evidence/§9.9 4. Concealment, Alteration, or Destruction of Evidence

§9.9 4. Concealment, Alteration, or Destruction of Evidence

Civil Cases

Sanctions. A deponent's failure to answer a question, produce a properly requested document, or appear at a deposition without justification can result in a number of sanctions, including contempt, a fine, and, if the deponent is a party or an officer, director, managing agent, or employee of a party, imposition by the court of issue, evidence, or terminating sanctions under CCP §2023.030. CCP §2025.450.

The issue of terminating sanctions under CCP §2023.030 should also be considered in cases in which evidence has been changed, altered, or destroyed. If the absence of the evidence severely prejudices the ability to bring or defend an action, counsel should argue that an action should be dismissed, a default entered, or an issue established, to prevent a miscarriage of justice. See *R. S. Creative, Inc. v Creative Cotton, Ltd.* (1999) 75 CA4th 486, 89 CR2d 353 (affirming terminating sanctions based in part on party's destruction of evidence); *Valley Eng'rs, Inc. v Electric Eng'g Co.* (9th Cir 1998) 158 F3d 1051 (affirming dismissal as discovery sanction against party that hid "smoking gun" memo and lied about it throughout 3 years of discovery); *Unigard Sec. Ins. Co. v Lakewood Eng'g & Mfg. Corp.* (9th Cir 1992) 982 F2d 363 (under inherent powers court properly precluded expert's testimony when insurer had destroyed evidence before subrogation claim was filed); *Headley v Chrysler Motor Corp.* (D Mass 1991) 141 FRD 362, 1992 Prod Liab Rep (CCH) §13,109 (court refused to let driver's expert testify concerning alleged manufacturing defects in car's seatbelt and seating mechanism as sanction for the destruction of seatbelt and seatbelt mechanism while car in driver's custody). Compare *Unigard* and *Headley* with *Glover v BIC Corp.* (9th Cir 1993) 6 F3d 1318 (court found that allegedly defective lighter allegedly spoiled by plaintiff's expert was not spoiled to extent that it precluded defense expert from rendering opinion on issue of defectiveness).

Jury instructions. At trial, powerful instructions are available against parties who conceal or withhold evidence. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 11, 74 CR2d 248 (abolishing tort of spoliation of evidence by party to a lawsuit, at least when victim knows or should have known of the spoliation before trial or a decision on the merits, and setting out other remedies). Evidence Code §413 provides the basis for the instruction in CACI 204 that the trier of fact may consider whether a party has intentionally concealed or destroyed evidence when deciding what inferences to draw from the evidence or facts in the case against the party. Evidence Code §412 provides the basis for the instruction in CACI 203 that evidence offered may be viewed with distrust if weaker and less satisfactory evidence is offered by a party who had the ability to offer stronger and more satisfactory evidence. Note that CACI 203 instructs that the evidence *may* be viewed with distrust, whereas BAJI 2.02 (which has been replaced by the California Civil Jury Instruction (CACI) as the approved jury instructions) states that such evidence *should* be viewed with distrust.

"Destructive testing" and spoliation. When counsel has custody of the evidence, his or her experts have unlimited access to it and may examine and analyze it as extensively and frequently as desired. However, a recurring difficulty, particularly in product liability cases, is the extent to which a party's expert witness can perform "destructive testing" on the tangible evidence in the case. Conducting such testing is often essential to determine whether the product had a design or manufacturing "defect" as alleged in the complaint or as claimed by the other side's expert.

The tort of spoliation of the evidence by a party to a lawsuit has been eliminated in California, at least when the spoliation victim knows or should have known of the spoliation before trial or a decision on the merits. See *Cedars-Sinai Med. Ctr. v Superior Court, supra,* overruling *Smith v Superior Court* (1984) 151 CA3d 491, 499, 198 CR 829. The tort of intentional spoliation of evidence by a person who is not a party in a lawsuit has also been eliminated. See *Temple Community Hosp. v Superior Court* (1999) 20 C4th 464, 84 CR2d 852. Although the court has yet to directly address the issue of negligent spoliation (see 20 C4th at 471 n3), it appears likely that this cause of action is also no longer viable, given the court's reasoning in *Cedars-Sinai* and *Temple.* See *Coprich v Superior Court* (2000) 80 CA4th 1081, 95 CR2d 884 (consistent with *Cedars-Sinai* and *Temple,* no tort cause of action for negligent spoliation of evidence); *Farmers Ins. Exch. v Superior Court* (2000) 79 CA4th 1400, 95 CR2d 51 (same). However, destructive testing might still result in tort liability if the spoliation victim does not discover the destruction or suppression of the evidence until after the case is concluded. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 18 n4, 74 CR2d 248.

Misdemeanor offense. In addition, it is a misdemeanor criminal offense to willfully conceal or destroy evidence. Pen C §135. Section 135 applies to attorneys; however, its application is limited by the attorney-client privilege. In *People v Meredith* (1981) 29 C3d 682, 693, 175 CR 612, the supreme court ruled that the attorney-client privilege "extends to protect observations made as a consequence of protected communications." Thus, if defense counsel in a criminal case merely views evidence but does not alter or remove it, those observations are protected by the attorney-client privilege. If defense counsel removes or alters the evidence, however, counsel must disclose the original location and condition of the evidence to the court. *People v Superior Court* (Fairbank) (1987) 192 CA3d 32, 36, 237 CR 158.

Negative inference. At a minimum, the party that unilaterally alters evidence will have difficulty justifying such conduct to a judge or jury. If a party that conceals, alters, or destroys evidence had custody of it, that party becomes subject to the further criticism, "they altered the evidence before we ever had an opportunity to see it," and the insinuation that the alterations were deliberately made to prejudice the rights of the other parties.

A party who feels that destructive testing is essential must be careful either to preserve the evidence in its original condition or to ensure that the testing is extensively documented so that the evidence's original condition can be readily determined. Any such testing, however, is risky without a court order or the other side being present.

PRACTICE TIP: The authors recommend that you do not attempt any testing that might destroy the evidence without notifying every party of the intended test. This notice affords other parties the opportunity to apply to the court for restrictions or other limitations on the test.

For a collection of cases that have considered the appropriate safeguards required as a condition precedent to conducting destructive testing, see Anno, *Discovery Order—Destructive Testing of a Chattel*, 11 ALR4th 1236 (1982).

Criminal Cases

In criminal cases, bad faith concealment, alteration, and destruction of evidence probably are subject to the sanctions of Pen C §1054.5 (passed as part of Proposition 115 in 1990) when that evidence is required to be disclosed under Pen C §1054.1 or §1054.3. See Pen C §1054.5(b). Those sanctions include: Disclosure of the evidence; contempt; continuance; prohibiting the testimony of a witness or the presentation of real evidence; an appropriate jury instruction; dismissal of the case when required by the United States Constitution; and any other lawful order. See Pen C §1054.5(b)-(c). The imposition of sanctions might be subject to a due process challenge on a case-by-case basis. See discussion in §8.24.

Destruction of evidence can also be attacked by a *Trombetta-Youngblood* motion, discussed in §9.11.

As discussed above, the criminal proscription of Pen C §135 must be considered.

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§9.10 5. Loss of Evidence

Civil Cases

The consequences of losing evidence can be disastrous. In *Puritan Ins. Co. v Superior Court* (1985) 171 CA3d 877, 217 CR 602, the plaintiff failed to comply with an order compelling the production of a drive shaft because the shaft had been lost by plaintiff's expert witness. The defendant moved for sanctions and the trial court entered an order prohibiting plaintiff from introducing into evidence those portions of the shaft or any photographs of it that were tested, examined, analyzed, and then disposed of, and from introducing any evidence or testimony, expert opinion or otherwise, derived from testing, examining, or analyzing those portions of the shaft.

The court of appeal affirmed that portion of the trial court's order that precluded the plaintiff from introducing any expert testimony derived from the examination of the shaft itself. However, the court reversed the exclusion of expert testimony based on the photographs, noting that the defendant presumably had access to the photographs and was capable of getting another expert to interpret them. The court reasoned that the defendant was thus "better off than it would have been had the failed shaft been produced." 171 CA3d at 887. See also *Unigard Sec. Ins. Co. v Lakewood Eng'g & Mfg. Corp.* (9th Cir 1992) 982 F2d 363, 368 (prohibiting expert from testifying that a portable electric heater had caused a yacht fire because the plaintiff had inadvertently destroyed the heater before trial).

Additional sanctions beyond a *Puritan*-type order, however, are also available under the Code of Civil Procedure. When an informal inquiry or a formal discovery device reveals that critical physical evidence is in the custody of the opposing party, and a subsequent request for production reveals that the evidence has been lost or destroyed, counsel should consider bringing a motion requesting imposition of issue, evidence, or terminating sanctions as provided in CCP §2023.030. This is particularly true when the absence of the evidence severely prejudices the ability to bring or defend an action, *e.g.,* loss or destruction of the key part in a liability action. Counsel should argue that a *Puritan*-type of protective order does not go far enough, and that the action should be dismissed or default entered, or an issue established, to prevent a miscarriage of justice. See discussion in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248 (abolishing tort of spoliation of evidence by party to a lawsuit, at least when victim knows or should have known of the spoliation before trial or a decision on the merits, but setting out remedies including Evid C §413 (and related civil jury instructions), former CCP §2023 (now CCP §§2023.010-2023.040), and Pen C §135).

Criminal Cases

Loss of evidence in criminal cases is governed by Pen C §1054.5, which allows the trial court to make any lawful order when a party fails to disclose evidence covered by Pen C §1054.1 or §1054.3 after a proper request. See §9.9 for further discussion of Pen C §§1054-1054.8. Loss of evidence is also subject to challenge by a *Trombetta-Youngblood* motion, discussed in §9.11.

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§9.11 6. Failure to Preserve Evidence

Civil Cases

The tort of spoliation of the evidence by a party to a lawsuit has been eliminated in California, at least when the spoliation victim knows or should have known of the spoliation before trial or a decision on the merits. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248; *Penn v Prestige Stations, Inc.* (2000) 83 CA4th 336, 99 CR2d 602 (holding in *Cedars-Sinai* applies retroactively to cases pending at time it was decided); *Hassoldt v Patrick Media Group, Inc.* (2000) 84 CA4th 153, 100 CR2d 662 (same). The tort of intentional spoliation of evidence by a person who is not a party in a lawsuit has also been eliminated. See *Temple Community Hosp. v Superior Court* (1999) 20 C4th 464, 84 CR2d 852. The court in *Temple* stated that, because the case concerned intentional spoliation, there was no need to consider recent cases discussing negligent spoliation of evidence. 20 C4th at 471 n3. However, given the court's reasoning in *Cedars-Sinai* and *Temple,* it appears that a cause of action for negligent spoliation is also no longer viable. See *Coprich v Superior Court* (2000) 80 CA4th 1081, 95 CR2d 884 (relying on *Cedars-Sinai* and *Temple* and finding no cause of action for negligent destruction or suppression of evidence); *Farmers Ins. Exch. v Superior Court* (2000) 79 CA4th 1400, 95 CR2d 51 (same).

At least one case has pointed out that nothing in *Cedars-Sinai* and *Temple* precludes a cause of action for spoliation of evidence in violation of a contractual obligation to preserve the evidence. See *Coprich v Superior Court* (2000) 80 CA4th 1081, 1091, 95 CR2d 884. The contractual obligation can be the result of either mutual agreement or promissory estoppel. However, it might be exceedingly difficult to establish damages resulting from an alleged breach of a contractual duty to preserve evidence.

PRACTICE TIP: When evidence is given to an opposing expert for examination and testing, counsel should attempt to negotiate a contractual agreement that certain penalties, including evidentiary preclusion and/or liquidated damages, will result if the evidence is damaged or destroyed.

Criminal Cases

In criminal cases, the government violates due process when it suppresses or fails to disclose material, exculpatory evidence. *Brady v Maryland* (1963) 373 US 83, 86, 10 L Ed 2d 215, 218, 83 S Ct 1194. This general rule has been qualified by two later Supreme Court cases. In *California v Trombetta* (1984) 467 US 479, 489, 81 L Ed 2d 413, 422, 104 S Ct 2528, the Court held that a due process violation exists only if the evidence's exculpatory value was clear *before* the evidence was destroyed, and in *Arizona v Youngblood* (1988) 488 US 51, 58, 102 L Ed 2d 281, 337, 109 S Ct 333, the Court held that the government's failure to preserve "potentially useful" evidence does not violate due process unless the defendant can show that the government acted in bad faith. See *People v Johnson* (1989) 47 C3d 1194, 1234, 255 CR 569 (*Trombetta* standard controls in California state courts).

The sanctions available for failure to comply with *Trombetta* and *Youngblood* are suppression of the evidence concerned, and of any testimony about it. See *California v Trombetta, supra,* and *Arizona v Youngblood, supra*.

PRACTICE TIP: You might argue that the sanctions available to the trial court under Pen C §1054(b)-(c) are available any time evidence that is subject to Pen C §1054.5 is not disclosed, including when failure to disclose is because of failure to preserve.

When evidence must be consumed by one side in a criminal case in order to test it, there is no due process violation. *People v Griffin* (1988) 46 C3d 1011, 1021, 251 CR 643.

On the government's duty to preserve evidence in criminal cases, see California Criminal Law Procedure and Practice §§11.27-11.28 (Cal CEB Annual).

There appears to be no law on failure to preserve evidence in civil cases, except as it falls under destruction of evidence, discussed in §9.9.

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§9.12 7. Chain of Custody Considerations

Parties offering physical evidence at trial have the burden of showing that it is "reasonably certain" that the item has not been altered; this requirement is not satisfied if any vital link in the item's chain of possession cannot be accounted for. *People v Lozano* (1976) 57 CA3d 490, 495, 127 CR 204 (court found no error); *McGowan v City of Los Angeles* (1950) 100 CA2d 386, 392, 223 P2d 862 (reversible error).

Therefore all parties who have occasion to possess physical evidence, whether through ownership or discovery, must be constantly mindful of maintaining the item's authenticity. This is especially true when physical evidence is passing to and from experts. For example, in a routine products liability case in which an allegedly defectively manufactured tie rod caused a vehicle to go out of control and crash, the remains of the part should be photographed and documented before it is removed from the vehicle. The entire vehicle should also be photographed and its license and identification numbers recorded. The precise date, time, and place of the part's removal should be recorded and counsel should consider making a video recording of the actual removal process. Thereafter, each time possession of the part is transferred, however briefly, written receipts should be exchanged and, if the part is transferred to another party in the case, it should be photographed before and after transfer so that there will be an objective record of its condition.

Following these procedures should eliminate any challenge to an item's authenticity, or to its condition at time of trial, and satisfy the "reasonably certain" requirement of *People v Lozano, supra*.

For sample questions and answers showing how to authenticate an item, including showing chain of custody, see Effective Introduction of Evidence in California, chap 11 (2d ed Cal CEB 2000).

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Source: Civil Litigation/California Expert Witness Guide/9 Inspections, Tests, Experiments, and Demonstrative Evidence/ C. Experiments/§9.13 1. Requirements

C. Experiments

§9.13 1. Requirements

In a number of areas, such as products liability suits, experimental evidence must be relied on to prove or disprove competing claims and theories. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110. See also Cotchett, *Experimental Evidence in Products Liability*, 44 Cal SBJ 866 (1969).

The court in *Culpepper* set out three prerequisites to the admissibility of experimental evidence:

- The experiment must be relevant. Evid C §§210, 351.
- The experiment must be conducted under the same or substantially similar conditions as those existing when the accident took place. However, it is necessary only that the conditions be substantially, not absolutely, identical. *People v Roehler* (1985) 167 CA3d 353, 213 CR 353. See also *Beresford v PG&E* (1955) 45 C2d 738, 749, 290 P2d 498.
- The experiment must not consume undue time, confuse the issues, or mislead the jury. See Evid C §352. See also *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 455, 52 CR 518.

Other cases suggest that the proponent of the experiment also has an affirmative duty to demonstrate how the experiment will assist the trier of fact. *Holling v Chandler* (1966) 241 CA2d 19, 50 CR 219; *Cervantes v Maco Gas Co.* (1960) 177 CA2d 246, 2 CR 75.

Under Evid C §352, the trial judge has almost total discretion to admit evidence of demonstrations, experiments, and tests. See *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 52 CR 518. An abuse of discretion must be shown before the appellate court will reverse this type of error. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 522, 109 CR 110. See also *Grupe v Glick* (1945) 26 C2d 680, 685, 160 P2d 832.

Thus, in *Culpepper,* which involved a claim that one of defendant automobile manufacturer's cars had an undue propensity to tip over when making sharp turns at low speeds, plaintiff's expert was allowed to present experiments in which a cable was attached to a driverless vehicle and then attached to giant rubber bands to simulate turning maneuvers. The court of appeal upheld admission of this evidence, finding the experimental conditions to be "substantially identical" to the accident conditions. The court of appeal also upheld the trial court's admission of defense experiments involving vehicles equipped with outriggers that were not on the accident car.

Cases upholding trial court admission of experimental evidence. For other examples of experiments found to meet the "substantially similar" requirement, see *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 550, 138 CR 705 (duplication of automobile brake failure); *Staples v Hoefke* (1987) 189 CA3d 1397, 1416, 235 CR 165 (intensity of vibrations emitted by defendant's punch press; plaintiff alleged that vibrations interfered with plaintiff's computerized photography business); *People v Roehler, supra* (tests to show boat would not capsize accidentally); *People v Guillebeau* (1980) 107 CA3d 531, 166 CR 45 (criminalist found slight differences between bloody shoe prints left at scene and marks made by pair of shoes appellant was wearing when arrested 4 days later; criminalist sought to ascertain whether, as a physical possibility, shoe pattern could be worn away in 4-day period); *Endicott v Nissan Motor Corp.* (1977) 73 CA3d 917, 141 CR 95 (automobile crash tests); *Yecny v Eclipse Fuel Eng'g Co.* (1962) 210 CA2d 192, 26 CR 402 (burning of product in explosion case).

Cases upholding trial court refusal to admit experimental evidence. Trial courts who refused to allow testimony concerning experiments were upheld in the following cases: *Long v Cal-Western States Life Ins. Co.* (1955) 43 C2d 871, 882, 279 P2d 43 (no error in exclusion of tests by ballistics expert on whether decedent's gunshot wounds were accidentally, rather than intentionally, inflicted); *Ehrhardt v Brunswick, Inc.* (1986) 186 CA3d 734, 231 CR 60 (no error in trial court refusal to admit videotape or any testimony based on demonstration of how water skier could be pulled into boat's propeller if tow rope were to wrap about propeller because demonstration was inconsistent with testimony of eyewitnesses); *Holling v Chandler* (1966) 241 CA2d 19, 50 CR 219 (no error in refusal to admit evidence of attempt to duplicate automobile skid-marks not involving substantially similar conditions).

Cases reversing trial court refusal to admit experimental evidence. Although the trial court has enormous

discretion in admitting testimony concerning an experiment, that discretion is not unlimited. For example, in *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 164 CR 343, the court of appeal ruled that the trial judge erred in admitting evidence of an accident reconstruction expert who reconstructed the speed of a bus at the time it struck a pedestrian. The court found error because there was inadequate foundation for the expert's opinion testimony. The expert had not measured the coefficient of friction of the street where the collision occurred, did not know the exact condition of the bus tires at the time of the accident, and had not checked the speedometer on the bus for accuracy. 105 CA3d at 387. See also *Andrews v Barker Bros. Corp.* (1968) 267 CA2d 530, 73 CR 284 (error to admit experiments regarding reason for collapse of chair because of lack of evidence that victim had used chair in way assumed by expert); *Bettencourt v Direct Transp. Co.* (1962) 210 CA2d 405, 26 CR 623 (error to admit evidence of controlled experiments concerning driver's visibility because simulated accident not sufficiently similar to actual accident).

Courtroom experiments. Experiments conducted inside the courtroom, like evidence of those conducted outside the courtroom, are permitted largely at the judge's discretion, and may be precluded if they will unduly delay the trial or tend to confuse or prejudice the jury, or if they are irrelevant. See Evid C §352; *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 455, 52 CR 518.

PRACTICE TIP: Most experienced trial attorneys avoid courtroom experiments because of the unpredictability of their outcome. If the experiment does not go according to plan, the consequences can result in loss of the case. The better course is to introduce a video recording of the experiment. See Baum, Art of Advocacy—Preparation of the Case §10.34 (1981); California Personal Injury Proof §8.36 (Cal CEB 1970).

For further discussion of experiments, see Effective Introduction of Evidence in California, chap 23 (2d ed Cal CEB 2000); 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§35-40 (4th ed 2000); California Trial Practice: Civil Procedure During Trial §§13.85, 13.110 (3d ed Cal CEB 1995); Jefferson's California Evidence Benchbook §21.40-21.44 (3d ed CJA-CEB 1997).

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§9.14 2. Checklist: Trial Considerations Concerning Experiments

Counsel must always assume that any experiment planned before trial will have to satisfy the Evidence Code at trial. The following considerations may apply:

- The conditions of the experiment are substantially similar to those of the relevant activity in the case. See discussion in §9.13.
- The expert who conducted the experiment is qualified to do so. See Evid C §801.
- If the test is new, it is generally accepted in the relevant scientific community. See discussion of the *Kelly* test in §§4.6-4.35.
- A proper chain of custody has been established. See discussion in §9.12.
- The experiment is relevant. Evid C §§351-352.
- If the experiment is to be performed during trial, it is not too time-consuming or confusing. See Evid C §352.

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Source: Civil Litigation/California Expert Witness Guide/9 Inspections, Tests, Experiments, and Demonstrative Evidence/ III. USING DEMONSTRATIVE EVIDENCE AT TRIAL/§9.15 A. Using Demonstrative Evidence to Enhance Counsel's Presentation

III. USING DEMONSTRATIVE EVIDENCE AT TRIAL

§9.15 A. Using Demonstrative Evidence to Enhance Counsel's Presentation

There is no definition of "demonstrative evidence" in the Evidence Code. The only allusion to it is in the definition of the word "evidence" in Evid C §140 as including "material objects or other things presented to the senses." The Comment to §140 explains that this includes sights (*e.g.,* a jury view or the appearance of a person exhibited to a jury), sounds (*e.g.,* the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof.

In practice, demonstrative evidence is used to refer to two main categories of evidence: real and illustrative (frequently called demonstrative). Real evidence is a substantive part of the case, *e.g.,* the contract in a contract action or the murder weapon in a homicide case. Illustrative evidence is created specifically for trial. At least one set of commentators contends that the phrase "demonstrative evidence" should be limited to "proof [that] has only a secondary or derivative function at trial: It serves only to explain or clarify *other* previously introduced, relevant substantive evidence." Brain & Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 UC Davis L Rev 957, 961 (1992). See also Brain & Broderick, *Demonstrative Evidence: The Next Generation*, 17 Litig 4, 21 (1991).

Demonstrative evidence (real or illustrative) can be direct or circumstantial. An example of direct demonstrative evidence is exhibiting plaintiff's body to the trier of fact to show an allegedly botched surgical procedure. An example of circumstantial demonstrative evidence is the prosecutor's introduction of defendant's revolver and cartridges, which were of the same caliber as those that killed the decedent, to support the prosecution's claim that the defendant committed the crime. See, *e.g., People v Peete* (1921) 54 CA 333, 347, 202 P 51.

PRACTICE TIP: Whenever possible, supplement your expert's verbal testimony with a visual presentation that enhances the trier of fact's understanding of the expert's testimony. Judges and jurors are conditioned to receive information via television. Graphic presentation also can enhance comprehension. As a result, anything that you can do to make your presentation of a lawsuit more nearly resemble a television program will increase the judge and jury's understanding of that presentation. For a discussion of using visual aids during expert testimony, see Piganelli, *TechnoFeature: Enhancing Your Expert Witnesses by Marrying Testimony and Technology* (July 19, 2005), http://www.technolawyer.com.

Counsel wishing to use demonstrative evidence should be prepared to authenticate the evidence if it is a writing (see Evid C §§250, 1401), and to satisfy the court that a qualified person prepared the evidence (see Evid C §720) using accurate information from the case (see Evid C §350). There may be additional requirements depending on a number of variables: Is the evidence "real" evidence or "illustrative" evidence; is it being used to refresh recollection (see Evid C §771); is it being used for impeachment (see Evid C §785); is it being used to rehabilitate a witness (see Evid C §791); is it being offered in evidence; are there special requirements for that type of evidence, *e.g.,* a photograph or an experiment? Generally, judges are more likely to permit the use of evidence that merely illustrates testimony. Such evidence is still vulnerable to objections of irrelevance and violation of Evid C §352. See the checklist of possible objections in §9.24.

PRACTICE TIP: Admission of illustrative demonstrative evidence is discretionary; be prepared to convince the court that your exhibit is accurate, clear, and necessary to the presentation of your case.

In cases involving unfamiliar technical words, counsel might consider using a glossary, either in the form of enlarged charts or individual copies given to each juror. It is suggested that court and counsel meet and confer in advance to agree on the words and definitions to be included.

For further discussion of demonstrative evidence, see California Trial Practice: Civil Procedure During Trial, chap 13 (3d ed Cal CEB 1995) (laying a foundation for introduction of evidence, authenticating it, and making and meeting

objections concerning it); 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§3-34 (4th ed 2000); California Personal Injury Proof §§8.1-19.19 (Cal CEB 1970) (discusses a number of specific types of demonstrative evidence, *e.g.,* photographs, police reports, X rays).

Examples of some of the more common types of demonstrative evidence are discussed in §§9.16-9.22.

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Source: Civil Litigation/California Expert Witness Guide/9 Inspections, Tests, Experiments, and Demonstrative Evidence/ B. Some Common Types of Demonstrative Evidence/§9.16 1. Charts, Graphs, and Summaries

B. Some Common Types of Demonstrative Evidence

§9.16 1. Charts, Graphs, and Summaries

Comprehensible charts, graphs, or summaries are often necessary to allow lay jurors to make sense of difficult financial transactions. Federal Rule of Evidence 1006 provides for the admissibility of charts or summaries if there are voluminous writings that cannot conveniently be examined in court. Although the similar former Evid C §1509 has been repealed (see Stats 1998, ch 100), it appears that such charts, graphs, and summaries will continue to be admissible under Evid C §§1523(d) (oral testimony not inadmissible to prove content of numerous accounts or writings that cannot be examined in court without great loss of time when evidence sought from them is only the general result of the whole) and 1521 ("secondary evidence rule"). On charts, graphs, and summaries in general, see 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidenc*e §24 (4th ed 2000); California Personal Injury Proof §§19.8-19.16 (Cal CEB 1970); Tufte, The Visual Display of Quantitative Information (2d ed 2001); Schulman, *The Expert's Use of Graphics to Analyze and Present Quantitative Information*, 19 Trial Diplomacy J 11 (1996).

PRACTICE TIP: Be sure the information in your chart or graph is accurate and can be or has been testified to by a witness. Make the chart or graph big enough to be seen clearly by jurors.

Most courts are receptive to charts or other summaries that are based on business records. See, *e.g., Vanguard Recording Soc'y, Inc. v Fantasy Records, Inc.* (1972) 24 CA3d 410, 418, 100 CR 826 (written summary of 50,000 sales invoices properly introduced); *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 605, 128 CR 697 (accountant's one-page "Fire Cost Report" summarizing individual records of fire crew properly admitted).

Use of charts and summaries is not, however, without limitation. Although there do not appear to be any reported California cases addressing whether the potential prejudice of charts outweighs their probative value, this subject has been addressed in a number of federal cases. In *Holland v U.S.* (1955) 348 US 121, 128, 99 L Ed 150, 160, 75 S Ct 127, the Supreme Court cautioned that charts and summaries "have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." This admonition has been echoed by later courts, particularly in deciding whether summaries should go to the jury as an exhibit. See *U.S. v Poschwatta* (9th Cir 1987) 829 F2d 1477, 1481 (charts of defendant's income properly admitted; court of appeals stated that better practice may have been to allow charts as testimonial aids only); *Gomez v Great Lakes Steel Div., Nat'l Steel Corp.* (6th Cir 1986) 803 F2d 250, 257 (abuse of discretion to admit chart summarizing damages without proper limiting instruction informing jury of summary's purpose and that it does not itself constitute evidence).

Federal Rules of Evidence 1006 provides that the originals or duplicates of material presented in the form of a chart, summary, or calculation "shall be made available for examination or copying, or both, by other parties at reasonable time and place." In *Amarel v Connell* (9th Cir 1996) 102 F3d 1494, the plaintiff objected to the introduction of summary defense exhibits because the underlying data and computations had not been produced. The district court overruled the objection, finding the exhibit was based on an analysis performed by one of the defendant's own experts. The court of appeal found that this ruling violated the "mandatory language" of Fed R Evid 1006 that underlying materials must be made available to opposing counsel. The court went on to "conclude under the unusual circumstances here, including impeaching evidence given by plaintiff's expert in rebuttal, that the error was not prejudicial and therefore does not require reversal." 102 F3d at 1517.

PRACTICE TIP: Clearly, if counsel intends to present evidence in summary form in federal proceedings, it must be prepared to comply with the mandatory language of Fed R Evid 1006. Cautious practitioners in state court proceedings should be similarly prepared.

No reported California case has addressed the propriety of letting summaries go into the jury room, but this practice appears to have been allowed in some federal cases, including *U.S. v Robinson* (8th Cir 1985) 774 F2d 261, 275 (13-page summary of loans to 105 clients); *U.S. v Radseck* (7th Cir 1983) 718 F2d 233, 237 (summaries of evidence showing defendant had unpaid tax liability; proper limiting instruction given).

Charts and summaries may not be used as a vehicle to circumvent the hearsay rule by being employed as a "prop" to allow a witness to talk about otherwise inadmissible statements. *U.S. v Goss* (5th Cir 1981) 650 F2d 1336, 1344 n5 (holding that FBI agent cannot use charts to summarize otherwise inadmissible out-of-court statements). Admission of a chart that is unreliable or inaccurate is erroneous and may justify reversal. See *U.S. v Seelig* (6th Cir 1980) 622 F2d 207, 214.

By contrast, the use of charts that extrapolate or contain assumptions is permitted if they are supported by evidence in the record. *U.S. v Diaz* (5th Cir 1975) 515 F2d 892. Even if the chart is unusually large, its use does not generally rise to the level of prejudicial error warranting reversal. See, *e.g., U.S. v Nathan* (2d Cir 1976) 536 F2d 988, 992 n5.

Summaries of oral testimony. There is a split in the federal circuits over the propriety of summaries of previously admitted oral testimony. The Fifth Circuit reads Fed R Evid 1006 as being broad enough to encompass such summaries. *U.S. v Winn* (5th Cir 1991) 948 F2d 145, 158. However, the Ninth Circuit held that summaries of previous testimony are contrary to the plain language of Rule 1006. *U.S. v Baker* (9th Cir 1993) 10 F3d 1374, 1411. In *Baker,* an FBI agent had been allowed to summarize and calculate a total value of narcotics transactions that had been testified to by other witnesses during the government's case. The Ninth Circuit did find that the admission of the summary testimony was "a valid exercise of the district court's discretion under [Fed R Evid 611(a)]."

Although California courts are given control over the "mode of interrogation of a witness" under Evid C §765(a), there is no California authority comparable to Fed R Evid 611(a) giving the court control over the mode of "presenting evidence…." No reported California cases have addressed the significance, if any, of this difference in language.

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§9.17 2. Computer Simulations and Video Animations

Illustrative of testimony. In *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137, the court discussed the admissibility of computer animations for the limited purpose of illustrating an expert's testimony. The computer animation consisted of a video portraying the crime, and the defendant objected to its admission on the grounds that the computer animation had not gained general acceptance in the scientific community necessary for admissibility under the *Kelly* test. The appellate court found, however, that no *Kelly* issue was presented because the animation simply illustrated the expert's testimony (similar to an expert's drawing on a board), and was not being introduced as evidence in and of itself. The court therefore held that the trial court properly admitted the animation with the admonishment to the jury that the video was no more than an illustration of the expert's opinion and should be evaluated as such.

Independent admissibility. However, no reported California case has discussed how, or to what extent, the proponent of computer-generated evidence submitted as evidence and not merely as an illustration must be prepared to meet the requirements enunciated in *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144. (*Kelly* is discussed further in §4.6.) The inadmissibility of finite computer element analysis was discussed briefly in *People v Dellinger* (1984) 163 CA3d 284, 209 CR 503, but the court focused primarily on the scientific acceptability of the expert's methods and qualifications, rather than on the acceptability of computer simulations generally. Compare *People v Lugashi* (1988) 205 CA3d 632, 252 CR 434 (discusses requirements for admissibility of computer-generated business records under Evid C §1271), with *Huber, Hunt & Nichols, Inc. v Moore* (1977) 67 CA3d 278, 136 CR 603 (court refused to admit computer printout on ground that without explanation it would be unintelligible to jurors), and *People v Hernandez* (1997) 55 CA4th 225, 240, 63 CR2d 769 (witness could not rely on computer database that was constructed from police reports because police reports are hearsay; merely being in a computer database does not make the data nonhearsay). In *People v Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627, the court distinguished between the different types of information that a computer can generate, *i.e.,* stored documents and information entered by human operators, and information that the computer is programmed to generate on its own, such as a record of its internal operations. The court concluded that a computer printout of dates and times it accessed was admissible and not subject to a hearsay objection because it was not a statement by a person. According to the court (98 CA4th at 1449):

> [The] true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the regular course of business, but whether the computer was operating properly at the time of the printout.

Reliability concerns. Issues frequently arise over the extent to which the proponent of computer-generated evidence must demonstrate its reliability, including the absence of data collection errors, data entry errors, or other processing errors. See generally Naus, Data Quality Control and Editing (1975). It is undisputed that such errors can occur. See, *e.g., Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939 (employee inserted bankruptcy into defendant's financial credit report).

In *Brake v Beech Aircraft Corp.* (1986) 184 CA3d 930, 229 CR 336, a wrongful death action arising from the crash of a private plane, plaintiffs sought to introduce a computer-generated statistical analysis that compared accident rates for the plane in question with rates for other aircraft, on a per-flight-hour basis. The trial court rejected the evidence as hearsay on hearsay, unreliable, speculative, and conjectural. The court of appeal affirmed in a partially published opinion that does not discuss exactly what was wrong with the statistical analysis, and states only that the appellants did not present arguments that overcame the trial judge's rulings, and that error had not been shown.

A growing number of decisions from other jurisdictions squarely address the admissibility of computer generated simulations, in which computers are used to reconstruct accidents or other events, with the reconstruction depicted via computer graphics. See Note, *Computer Simulations: How They Can Be Used at Trial and the Arguments for Admissibility*, 19 Ind L Rev 735 (1986); Marcotte, *Animated Evidence*, 75 ABA J 52 (Dec. 1989).

For example, in *Datskow v Teledyne Continental Motors* (WD NY 1993) 826 F Supp 677, the plaintiffs brought a products liability action against an engine manufacturer based on the crash of a private plane. Plaintiffs offered a

videotaped, computer-generated animation that illustrated their expert's theory of where the fire began inside the engine and how it spread. The district court allowed the tape to be shown but only after instructing the jury that it was intended simply to help them understand the expert's theory of what happened and was not meant to be a recreation. The court also ordered that the tape be played with the volume turned off so the jury could not hear a taped voice-over of the actual radio communications between the ill-fated aircraft and the airport control tower. It rejected any suggestion that the jury would be more likely to give an animated video with moving images more weight than would otherwise be warranted, stating:

> If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it.... Jurors, exposed as they are to television, the movies, and picture magazines are very sophisticated. With proper instruction, the danger of their overvaluing such proof is slight.

826 F Supp at 685 (quoting 1 Weinstein & Berger, Weinstein's Evidence §403[5] at 403-88 (1992)). See also *Robinson v Missouri Pac. R.R.* (10th Cir 1994) 16 F3d 1083, 1086 (allowing videotaped animation to illustrate expert's theory of how accident occurred to be shown to jury, provided jury is cautioned that animation is not literal recreation of accident).

In *People v McHugh* (Sup Ct 1984) 476 NYS2d 721, a defendant charged with manslaughter and drunk driving contended that he was neither drunk nor speeding at the time of the accident. He was successful in introducing an animated computer graphic reenacting his version of the accident. The prosecution contended that the reconstruction was derived from an unrecognized scientific device. The court held, however, that it was more like a chart or diagram than a scientific device, and that it was unimportant whether the diagram was hand-drawn or mechanically drawn by means of a computer. The computer reenactment was introduced through the testimony of a properly qualified expert who had prepared it.

In *Starr v Campos* (Ariz Ct App 1982) 655 P2d 794, the trial court likewise admitted evidence derived from a computerized analysis of an accident performed by an accident reconstruction expert. The appellate court reversed, finding that the trial judge had erred in admitting the evidence without first conducting a hearing to determine whether the evidence was derived from principles and procedures that had achieved general acceptance in the scientific community. See also *Bartley v Isuzu Motors, Ltd.* (D Colo 1993) 151 FRD 659 (in product liability action arising from car accident, plaintiff submitting computer simulation of how car in question performs under certain circumstances must give defendants access to computer's work product, and also to data put into computer, programs used to manipulate data and produce conclusions, and theory of logic employed by those who planned and executed experiment). See Brown, *Animations Add a New Dimension*, Nat'l LJ 19 (May 27, 1991); Canter, Pahre, & Immel, *Admissibility of Computer Generated Videographics in the Courtroom*, 13 CEB Civ Litigation Rep 296 (Nov. 1991); Krieger, *Now Showing at a Courtroom Near You*, 78 ABA J 92 (Dec. 1992).

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§9.18 3. Diagrams and Maps

Diagrams and maps can take many forms, ranging from hastily drawn sketches to professionally prepared documents and illustrations. For example, they can help the judge or jury visualize the intersection where an automobile collision occurred, the location of a particular portion of the cervical spine, the workings of an internal combustion engine, the flow of dollars in a "laundered" money case, or the relative locations of parcels of property in an easement or boundary dispute proceeding.

It is important to assign work on diagrams and maps to a qualified expert early enough for them to be completed before the hearing or trial begins at which they will be used. Counsel must also consider authentication problems; diagrams and maps must be authenticated (see Evid C §§250, 1401). Counsel should make sure information used on diagrams and maps is accurate and, on maps, to scale.

PRACTICE TIP: It is wise to have witnesses who will use a diagram or map during their testimony become familiar with it before trial.

Counsel should consider whether he or she wishes opposing counsel to have witnesses mark on counsel's own diagram or map. If not, counsel can either move the map or diagram into evidence at the conclusion of the direct examination of the authenticating witness, or ask the judge to have opposing counsel provide his or her own diagram or map for witnesses to use.

For further discussion, see California Personal Injury Proof §19.1 (Cal CEB 1970) (accident scenes), P I Proof §19.2 (government and commercial maps), P I Proof §19.3 (custom-made diagrams), P I Proof §19.5 (police accident report diagrams), P I Proof §19.6 (diagrams made by witnesses), P I Proof §19.7 (medical drawings), P I Proof §§19.8-19.14 (authenticating diagrams and maps), P I Proof §19.15 (judicial notice of official maps), P I Proof §19.16 (using diagrams and maps to aid or illustrate testimony), P I Proof §19.17 (use by jury), and P I Proof §§19.18-19.19 (use by witnesses). See also Effective Introduction of Evidence in California, chap 12 (2d ed Cal CEB 2000) (books, maps, charts, and treatises) and Effective Intro of Evidence, chap 39 (physical evidence).

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§9.19 4. Jury Views

The court may order a jury to view any place or object outside the courtroom. CCP §651 (in civil cases); Pen C §1119 (in criminal cases). Code of Civil Procedure §651 also allows civil juries to view demonstrations and experiments and to hear testimony outside the courtroom, and requires that a court reporter keep a record of the proceedings. By contrast, Pen C §1119 does not provide for the taking of testimony, or the performance of demonstrations or experiments outside the courtroom, nor does it require that the proceedings outside the courtroom be transcribed.

Trial judges have almost unlimited discretion to permit or deny such a visit. Therefore, counsel who proposes a jury view should be prepared to explain what a jury visit will contribute that would not be obtained through examination of diagrams, aerial photographs, or video recording.

For further discussion, see California Trial Practice: Civil Procedure During Trial §§13.110-13.111 (3d ed Cal CEB 1995). See also California Personal Injury Proof §8.35 (Cal CEB 1970).

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§9.20 5. Models

Although often expensive to construct, models can be extremely useful in helping the trier of fact understand testimony, *e.g.,* concerning the operation of complex machinery, typography, or the interior of a building. In medical cases, plastic or plaster models of the particular portion of the anatomy involved can be helpful. See *U.S. v Cox* (9th Cir 1980) 633 F2d 871, 873 (upholding admissibility of three mock-up bombs into jury room during deliberations).

A model must be authenticated to be admissible. Evid C §§250, 1401. Be sure it is accurately constructed by a qualified expert and completed early enough to allow those who will refer to it during testimony to become familiar with it.

For further discussion of models, see California Personal Injury Proof, chap 18 (Cal CEB 1970).

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§9.21 6. Photographs

Of the many uses of still photographs, the most common examples are those that depict damage to automobiles, physical injuries, and the appearance of complex products and objects.

The admissibility of still photographs is well established. See *Berkovitz v American River Gravel Co.* (1923) 191 C 195, 201, 215 P 675. See also 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§14-19 (4th ed 2000); California Personal Injury Proof, chap 15 (Cal CEB 1970).

A photographer need not offer photographs into evidence in person; the requisite foundation may be established by anyone who was present when the photographs were taken. *Adams v City of San Jose* (1958) 164 CA2d 665, 667, 330 P2d 840.

Photographs are not automatically admissible into evidence, however, and can be excluded when they are unduly prejudicial (*Akers v Miller* (1998) 68 CA4th 1143, 80 CR2d 857 (Evid C §352, limiting expert testimony to description of demonstrative evidence); *Calandri v Ione Unified Sch. Dist.* (1963) 219 CA2d 542, 552, 33 CR 333) or of minimal evidentiary value. See Evid C §352. Other objections include insufficient foundation (see Evid C §§403, 1400) and misleading or cumulative (see Evid C §352). *Summers v Burdick* (1961) 191 CA2d 464, 471, 13 CR 68.

Because photographs can present distorted images, counsel should be watchful for photographic techniques that tend to alter reality. See Baum, Art of Advocacy—Preparation of the Case §10.27 (1981) (explaining photographic techniques that can be used to distort the appearance of objects and things).

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§9.22 7. Video Recordings and Motion Pictures

In General

Video recordings and motion pictures can be used to depict relevant matters in a forceful way, *e.g.,* a victim's injuries (*People v La Vergne* (1966) 64 C2d 265, 271, 49 CR 557), and a representative day in the life of a catastrophically injured individual (*Jones v City of Los Angeles* (1993) 20 CA4th 436, 24 CR2d 528; *Lehmuth v Long Beach Unified Sch. Dist.* (1960) 53 C2d 544, 555, 2 CR 279).

Counsel must ensure that the foundational requirements for admitting films are established. Video recordings and motion pictures are writings and so must be authenticated. See Evid C §§250, 1401. In addition, the court may be less likely to allow a film to be used than many other types of demonstrative evidence because film is such powerful evidence. Counsel must be prepared to overcome objections such as improper camera lens or angle, or that the film does not accurately portray what it claims to. See, *e.g., Lehmuth v Long Beach Unified Sch. Dist.* (1960) 53 C2d 544, 2 CR 279 (film of representative day in life of plaintiff property admitted); *Harmon v Board of Retirement* (1976) 62 CA3d 689, 133 CR 154 (trial court properly admitted film showing plaintiff golfing and working in yard despite plaintiff's testimony that his injury prevented his doing these activities); *Deward v Clough* (1966) 245 CA2d 439, 54 CR 68 (trial court properly excluded film showing flow of traffic at site of accident because film was taken 2 years after accident); *Heiman v Market St. Ry.* (1937) 21 CA2d 311, 69 P2d 178 (trial court properly admitted film showing plaintiff's movements to combat plaintiff's claim that he was confirmed invalid).

Advantages of Video Recording

Video recording has a number of practical advantages over motion pictures. First, there is no wait for developing video recording; it can be played back immediately. This allows a scene to be easily reshot if initial results are not satisfactory. Second, video recordings can be shown on ordinary television monitors, eliminating the need to set up a screen and darken the courtroom. By using multiple monitors, it is possible to allow the judge and jurors to have a good view. Finally, a video-recorded presentation approximates a television format and is therefore more likely to be found credible by jurors.

Video Recording of Depositions

Under CCP §2025.620(d), any party at trial may use a video recording of the deposition testimony of any expert witness or treating or consulting physician, even though the deponent is available to testify, if several conditions are met.

- First, the deposition notice must have reserved the right to use the video recording of the expert at trial. CCP §2025.220(a)(5).
- Second, the party must follow required video recording procedures. They are discussed in §10.40.
- Third, counsel must notify the court and all parties in writing of the intent to use the video recording at trial and of the parts of the deposition to be offered, and must do so within enough time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the tape. CCP §2024.340(m).

See §§11.27-11.28 for further discussion of video recording the expert's deposition when it is intended to be introduced at trial.

For further discussion of video recordings and motion pictures, see California Personal Injury Proof, chap 17 (Cal CEB 1970).

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§9.23 C. Using Computer or Other Means to Present Demonstrative Evidence; Providing Copies of Evidence to Jurors

Attorneys should not expect a jury to rely entirely on its sense of hearing to grasp the content of written material. In any case involving more than a minimal number of documents, counsel should consider using one of the available technologies that will present a document on a screen or wall and allow the judge and jury to read a document as it is discussed. Use of a lap-top computer, a projector, and either a screen or a hook-up to television monitors provides an effective way to present documents for viewing.

The widespread use of digital technology has revolutionized the creation and presentation of exhibits. Many courtrooms are now wired for computer use; in other instances, with the court's concurrence, computer equipment can be brought in and set up for trial. Documents can be scanned into the computer and quickly and easily called up when needed. The visual assistance that computer graphics provide can significantly enhance the persuasive value of an expert's testimony. It can also simplify complex material and enliven what is dense. The computer displays likewise can be tied to trial exhibits or other portions of the trial record to provide a direct link to what has transpired in the case.

Another useful tool is the document camera, which projects documents, transparencies, and three-dimensional objects onto the screen. Finally, an old-fashioned overhead projector can be used to project transparencies of documents onto a screen or wall. The transparencies can be made on most photocopy machines at little cost, and allow the attorney to highlight key words and portions, either by underlining or by pointer.

Counsel may also wish to seek the court's permission to provide a copy of each document to each juror. If there are a large number of documents, counsel should consider providing them in a tabbed and indexed binder so that jurors can readily find each document as it is discussed. It is difficult enough to absorb written material when reading it. It is foolhardy to expect jurors to understand and remember written material based only on an oral presentation.

For further discussion of the foundational requirements for demonstrative evidence, including computer-generated evidence, see California Trial Practice: Civil Procedure During Trial §§13.85-13.111 (3d ed Cal CEB 1995).

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§9.24 IV. FOUNDATIONAL ATTACKS ON INSPECTIONS, TESTS, EXPERIMENTS, AND DEMONSTRATIVE EVIDENCE

As with other objectionable areas of expert testimony, counsel must decide whether to make an in limine objection out of the jury's presence, or to object in front of the jury when counsel knows that demonstrative evidence will be introduced by opposing counsel. For discussion of this issue, see §14.3.

The most common objections to inspections, tests, experiments, and demonstrative evidence follow:

- Proof of content of a writing requirements not met. Evid C §§1520-1523; see Effective Introduction of Evidence in California, chaps 11, 47-48 (2d ed Cal CEB 2000).
- Chain of custody not properly shown. See §9.12.
- Cumulative. See California Trial Objections §§31.6-31.10 (Cal CEB Annual).
- Evidence only admissible for limited purpose. Evid C §355.
- Expert should have been used to prepare exhibit; either lay witness or unqualified expert used instead. See Evid C §720; see also chap 2.
- Hearsay. Evid C §1200.
- Impeachment requirements of Evid C §785 not satisfied.
- Improper opinion. Evid C §§800-805.
- Inaccurate information used in preparing experiment, demonstrative evidence, etc. See Evid C §402; chap 4.
- Irrelevant. Evid C §350; see Trial Objections, chap 17.
- New scientific method used that does not pass *Kelly* test. See §§4.6-4.35.
- Not properly and timely produced in response to discovery request under CCP §§2034.010-2034.240.
- Opposing counsel altered or destroyed evidence on which test based. See §9.9.
- Opposing counsel's, *e.g.,* test should not be allowed in evidence because opposing counsel would not make it available for retesting. See §9.8.
- Past recollection recorded requirements of Evid C §1237 not satisfied.
- Privileged. Evid C §§950-1070; see Trial Objections, chaps 33-51.
- Refreshing recollection requirements of Evid C §771 not satisfied.
- Rehabilitation requirements of Evid C §791 not satisfied.
- Speculative. See §§4.36-4.40.
- Technical objection to type of equipment used in test, experiment, etc., *e.g.,* that wrong lens was used on camera so that scene was distorted. See §§9.16-9.22; see also California Trial Practice: Civil Procedure During Trial §§13.85-13.109, 13.116 (3d ed Cal CEB 1995).
- Too time consuming, confusing, prejudicial, or misleading. Evid C §352; see Trial Objections, chap 31.
- Unconstitutional. See, *e.g., People v Bracamonte* (1975) 15 C3d 394, 124 CR 528 (due process violation to force tube through defendant's nostrils to obtain evidence for discovery purposes).
- Unreliable. See §§4.1-4.5.
- Writing not authenticated. Evid C §1401; see Effective Intro of Evidence, chap 11.

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§9.25 V. FEDERAL RULES OF EVIDENCE

Use of Demonstrative Evidence; Evidentiary Considerations

Demonstrative evidence must be relevant under Fed R Evid 401-402 to be admissible. In addition, it must not be too time-consuming, prejudicial, confusing, or misleading. Fed R Evid 403. Many types of demonstrative evidence, primarily "real" evidence (see §9.15), must be authenticated and identified. See Fed R Evid 901. The best evidence rule applies to writings. Fed R Evid 1001-1002.

Charts and summaries of information are admitted under Fed R Evid 1006. Hearsay exceptions, such as records of regularly conducted activity, are admitted under Fed R Evid 801-804, 807. Contents of writings, recordings, and photographs are admitted under Fed R Evid 1001-1008.

To be admissible in federal court, experimental evidence must be conducted under circumstances that are substantially similar to the conditions involved in an accident or event, or the evidence will be inadmissible. *McKnight v Johnson Controls, Inc.* (8th Cir 1994) 36 F3d 1396 (experimental test on car battery not substantially similar to conditions of accident and should have been excluded, but erroneous admission held harmless under circumstances of case). While the events need not be identical, they must be sufficiently similar to provide a fair comparison. See *Four Corners Helicopters, Inc. v Turbomeca, S.A.* (10th Cir 1992) 979 F2d 1434 (exclusion of expert's videotaped experiment supporting defendant's argument that loose labyrinth screw could not have caused seizure of helicopter engine because experiment did not accurately depict events occurring inside helicopter engine at time of accident; court also rejected defendant's argument that experiment was offered simply to illustrate physics principles).

For general discussion of inspections, tests, experiments, and demonstrative evidence in the federal courts, see 1 Weinstein & Berger, Weinstein's Evidence ¶3-702 (1992); 3 Wigmore on Evidence §§790-798 (4th ed 1961); O'Brien & Goldman, Federal Criminal Trial Evidence, chaps 8-10 (1989).

Destructive Testing

A party's ability to compel production of evidence in the other party's possession for purposes of destructive testing was addressed in *Ostrander v Cone Mills, Inc.* (D Minn 1988) 119 FRD 417, in which an infant suffered serious burns allegedly because of the flammability of nightwear manufactured and sold by the defendants. Plaintiffs' expert subjected a similar pair of pajamas belonging to the infant's brother and two pairs identical to that worn by the infant to destructive flammability testing. The tests were conducted without any prior notice to the defendants and without any input from them on the testing methodology or pretesting handling of the garments. The tests were videotaped, and the tested garments and the untested remnants were preserved.

After viewing the videotape and examining the leftover pieces, the defendants moved to compel production of the remaining pieces to conduct their own flammability and other destructive testing. Plaintiffs objected on the ground that they wanted to preserve all the remaining fabric for use at trial.

In granting the defendants' motion to retest, the district court noted that it was required to balance the interests to be served by destructive testing against the value of preservation of the evidence on behalf of the opposing party. The court noted that, in instances in which the entire piece of evidence would be consumed by the testing, the balance might dictate the denial of the request for the testing. Although some of the fabric swatches were to be consumed, the court nevertheless ruled that all the remaining pieces of fabric had to be produced for testing because defendants should have the same opportunity as plaintiffs to test the garments.

The court provided several safeguards, including ordering that the tests were to be preserved on videotape, to give plaintiffs a fair opportunity to challenge the test procedures and results. The court also ordered that plaintiffs be given the opportunity to attend and observe the testing with their own expert. They thus had an advantage that the defendants did not enjoy when plaintiffs tested the material.

The court also rejected plaintiffs' argument, based on the affidavit of its expert, that tests should not be ordered because the information defendants sought through the tests they proposed to conduct was irrelevant. The court stated that, when experts disagree on the relevancy of certain evidence, it would be unjust to select the view of one of those experts with the result that the other party's discovery would be barred. The court noted that, during the discovery

stage, it would be premature to make what is essentially an evidentiary ruling, and that, once the testing was completed, plaintiffs would be free to make a motion in limine to prevent the introduction of the evidence if they still believed the tests were irrelevant.

The balance struck by the district court in *Ostrander* was a fair resolution of the problems posed by destructive testing. The need for such testing is often critical in rebutting a defective product claim when either the design or manufacture of the product is under attack. By contrast, the destruction of evidence can be prejudicial because it creates a vacuum in both sides' ability to meet the burden of proof in their respective cases. Appropriate safeguards, *e.g.,* attendance of the parties and their experts and video recording, should thus be required. Any such testing done ex parte should include these same safeguards. Otherwise counsel risks the exclusion of the testing evidence on the ground that the other side does not have an adequate opportunity to rebut it.

Spoliation of Evidence

In *Transue v Aesthetech Corp.* (9th Cir 2003) 341 F3d 911, the Ninth Circuit addressed the issue of the spoliation of plaintiff's breast implants in a product defect case. The defendant maintained that, because the implants had been "mangled" by plaintiff's treating physician and then "destroyed" by her expert, she should be barred from putting on her manufacturing defect claim. The district court opted instead for a spoliation instruction and believed that the instruction was sufficient to remedy the prejudice. The Ninth Circuit affirmed the exercise of discretion, citing its earlier opinion in *Glover v BIC Corp.* (9th Cir 1993) 6 F3d 1318. See §9.9 (discussing *Glover* and other spoliation cases).

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Discovering Identity and Noticing Depositions of Opposing Experts

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I. EXPERT DISCOVERY IN CIVIL CASES

A. Statutory Authority for Expert Witness Discovery

§10.1 1. Exchange of Expert Witness Information; When Discovery Occurs

Discovery of the identity of expert witnesses, exchange of information about them, including their reports and writings, and the right to depose them are primarily governed by CCP §§2034.010-2034.310.

Although CCP §2034.210 does not state whether it is the exclusive method for discovery of experts, the section is closely patterned after its predecessor statutes (former CCP §2034 and before that former §§2037-2037.9), which were generally regarded to have preempted case law decided before their enactment in 1978. See, *e.g., St. Vincent Med. Ctr. v Superior Court* (1984) 160 CA3d 1030, 206 CR 840 (no deviation permitted from time limits of former CCP §2037). Although sometimes counsel have had to argue that former CCP §2034 merely supplemented the previously existing methods of obtaining discovery of experts, *e.g.,* interrogatories and depositions of expert witnesses permissible on a showing of good cause (see *Bolles v Superior Court* (1971) 15 CA3d 962, 93 CR 719), in fact, judges have treated former CCP §2034 (now §§2034.010-2034.730) as the exclusive mechanism for obtaining discovery of experts.

Section 2034.210 procedures cannot be initiated until a trial date has been set. CCP §2034.220. Before a trial date is set, however, counsel can request an earlier date of exchange of expert information on motion, for good cause. CCP §2034.230(b). Counsel may also be able to obtain information about opposing experts through other discovery devices, *e.g.,* interrogatories, the exchange of medical reports under CCP §2032.610, or as necessary under CCP §2018.030(b) (discussed in §8.12). The exchange of expert witness information is only one of six statutory discovery methods in California. The other five are: Depositions; interrogatories; inspection of documents, things, and places; physical and mental examinations; and requests for admission. CCP §2019.010.

A later date for the exchange of expert information is also possible on motion, for good cause. CCP §2034.230(b).

Similarly, an earlier date for the mutual exchange of expert witness information is permissible, but an order requiring just one side to make disclosure at an earlier date is not authorized. In *Hernandez v Superior Court* (2003) 112 CA4th 285, 4 CR3d 883, the trial judge in a wrongful death action against 80 defendants issued a case management order, finding that the plaintiffs needed to make a prima facie showing of exposure and causation in order to "narrow the roster of defendants." The court directed the plaintiffs to file declarations from qualified experts stating to a reasonable degree of medical and scientific probability that the decedent's exposure to each defendant's product or equipment was a substantial factor in causing the decedent's injury and eventual death. The court of appeal found that the order exceeded the trial court's power to formulate rules of procedure for managing complex litigation in that it conflicted with former CCP §2034 (now CCP §2034.230(b)), which authorizes "an earlier simultaneous, mutual exchange, but … does not permit a unilateral exchange." See Corless, *The Case for Early Expert Disclosure*, 18 Cal Litig 4 (2005) (discussing benefits of early expert discovery on parties' ability to resolve cases before trial).

The procedures for identifying and deposing experts under CCP §§2034.010-2034.730 are available in any civil action or special proceeding of a civil nature, except in eminent domain proceedings under CCP §§1258.010-1258.300. In eminent domain proceedings, the exchange of valuation data is governed by CCP §§1258.210-1258.300. See *Padre Dam Mun. Water Dist. v Burkhardt* (1995) 38 CA4th 988, 45 CR2d 506 (admission of co-owner's testimony on valuation was reversible error because statutory exchange requirements not met).

This chapter gives an overview of the exchange of expert witness information in civil cases. For more detailed discussion, see California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006).

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§10.2 2. Determining Who Is a Retained Expert

CCP §§2034.010-2034.310 makes a distinction between "retained" experts and other experts. An expert witness declaration (CCP §2034.260) is required only for an expert who "is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action." CCP §2034.210(b).

Under *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293, a treating physician does not become a "retained" expert within the meaning of former §2034(a)(2) (now §2034.210(b)) simply because the physician gives opinion testimony, and an expert witness declaration generally is not required for a treating physician. The *Schreiber* court disapproved *Plunkett v Spaulding* (1997) 52 CA4th 114, 60 CR2d 377, to the extent that it concluded that a treating physician could never, regardless of the manner in which he or she obtained the factual basis of his or her opinion, testify about standard of care without an expert witness declaration.

Consistent with *Schreiber,* to the extent a treating physician acquired personal knowledge of the facts independent of the litigation, no expert witness declaration is required, and he or she may testify regarding any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience, including opinions regarding causation and standard of care. See also *Huntley v Foster* (1995) 35 CA4th 753, 756, 41 CR2d 358 (expert witness declaration not required for treating physician to give opinion testimony). However, if a treating physician is formally retained for the purpose of offering opinion testimony at trial, CCP §2034.260 and the reasoning of *Schreiber* would require that an expert witness declaration be submitted along with the party's expert witness designation. For further discussion, see §10.6.

PRACTICE TIP: It does not take much in an expert witness declaration to put the other side on notice of the substance of the testimony. It also does not take much to provide a more complete description that does not even risk an objection. Therefore, when in doubt, a complete expert witness declaration should be included for each designated expert. In any event, counsel who fail to submit a timely and adequate expert declaration should move promptly for relief under CCP §2034.710.

For a thoughtful discussion on issues involving expert designation and employee-witnesses, see Martinez & Arlyn-Pessin, *Undesignated Hitters*, 26 Los Angeles Lawyer 28 (Feb. 2004).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.3 3. Special Rules in Cases Ordered to Arbitration

§10.3 3. Special Rules in Cases Ordered to Arbitration

In cases ordered to arbitration (as opposed to actions proceeding to arbitration by stipulation or plaintiff's election), all discovery generally must be completed not later than 15 days before the date set for the arbitration hearing, unless the court orders otherwise. See Cal Rules of Ct 3.822(b).

After an arbitration award in a court-ordered arbitration, a party may demand the exchange of expert witness information under CCP §2034.210. No other discovery is permitted after an arbitration award unless the court orders it for good cause shown, or the parties so stipulate. CCP §1141.24 (permitting discovery after arbitration under CCP §§2034.010-2034.730).

On judicial arbitrations generally, see California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004).

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B. Demand to Exchange Expert Witness Information

§10.4 1. When to Make Demand

Discovery of expert witness information is not available until after the initial trial date has been set. After that, any party may serve a demand that all parties simultaneously exchange expert witness information. CCP §2034.210.

The demand must be made no later than the 10th day after the initial trial date has been set or 70 days before that trial date, whichever is closer to the trial date. CCP §2034.220.

EXAMPLE 1: On July 1, a trial date is set for October 1. The 10th day after the trial date has been set is July 11; 70 days before the trial date is July 23. Thus a party has until July 23, the date closer to the trial date, to make a demand to exchange expert witness information and may do so any time during the period from July 1 to July 23.

EXAMPLE 2: On July 1, a trial date is set for August 15. The 10th day after the trial date has been set is July 11; 70 days before the trial date was June 6. Thus a party has only until July 11, the date closer to the trial date, to make a demand.

The first party to make the demand triggers the exchange procedure. Although exchanging expert witness information is optional in any given case, after the statutory procedure has been invoked, all parties must participate. See CCP §2034.260(a); *Hirano v Hirano* (2007) 158 CA4th 1, 6, 69 CR3d 646 ("where no demand is made by any party, no party is required to comply with the statutory exchange requirements").

PRACTICE TIP: You should be careful not to waive the right to present expert testimony at trial. Code of Civil Procedure §§2034.010-2034.730 contain no provision for permitting a court or a party, on a showing of good cause, to extend the time for making a demand to exchange expert witness information after the time prescribed by CCP §2034.220 has expired. See *St. Vincent Med. Ctr. v Superior Court* (1984) 160 CA3d 1030, 206 CR 840, in which the court held that there could be no deviation from former CCP §2037's time requirements for serving a demand to exchange expert witness lists. In practice, the courts have treated former CCP §2034 (now CCP §§2034.210-2034.310) in a similar manner.

Note that a waiver can also occur by a failure to disclose "simultaneously," as the statute's terms expressly require. In *Fairfax v Lords* (2006) 138 CA4th 1019, 1027, 41 CR3d 850 (construing former CCP §2034, now CCP §§2034.210-2034.310), the court held that the trial court erred in allowing the defendant to unilaterally delay designation of his retained experts until 20 days after the plaintiff's disclosure; the court noted that the section by its terms requires simultaneous disclosure.

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§10.4A a. Effect of Premature Demand

When a party inadvertently serves a demand *before* the dates authorized and fails to discover that mistake until after the last proper date to do so has passed, the party may, on a proper showing of good cause, obtain relief under CCP §473. *Zellerino v Brown* (1991) 235 CA3d 1097, 1104, 1 CR2d 222.

The court in *Zellerino* concluded that availability of relief under CCP §473 for failure to timely comply with the discovery provisions of the Code of Civil Procedure depends on the specific provisions involved. If the specific discovery provision spells out what relief is available, then it should control and displace §473. To the extent that the discovery provisions do not consider the question of relief, however, the court held that §473 should be read into the discovery provisions. In this case, the court applied §473 to relieve the defendants from their premature filing of a demand to exchange expert witness information.

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§10.4B b. Effect of Reversal and Remittitur

Although CCP §§2034.010-2034.730 are silent about the effect of a reversal and remittitur on the expert witness disclosure process, it is established that the time clock for the "initial trial date" is reset when the case is reversed and remitted to the trial court. *Beverly Hosp. v Superior Court* (1993) 19 CA4th 1289, 1292, 24 CR2d 238. On retrial, the parties must fully comply with the statutory requirements, *i.e*., they must renew their demands, redesignate any experts they intend to use again, and designate any new or additional experts from whom they intend to elicit testimony. *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667.

The effect of reversal on the expert witness disclosure process was illustrated in *Hirano v Hirano* (2007) 158 CA4th 1, 69 CR3d 646. In *Hirano*, plaintiff's action was dismissed for failure to prosecute. On appeal, that judgment was reversed. On remand, a new trial date was set, but neither party made a demand for the exchange of expert witnesses and no exchange of expert witness information occurred. The trial court precluded plaintiff from introducing any expert testimony in the new trial because he had not complied with defendant's expert witness demand made before the case had been dismissed and appealed. The court of appeal disagreed, noting that after the prior judgment had been reversed, the matter remanded, and a new initial trial date set, discovery automatically reopened, which gave the parties a new opportunity to make demands for the exchange of expert witness information. And because neither party made a demand, neither was required to comply with CCP §2034.260. 158 CA4th at 8.

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§10.5 2. Determining Date of Exchange

The date of exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. CCP §2034.230(b).

EXAMPLE 1: Given October 1 as the trial date and a demand made on July 10, 20 days after service of the demand is July 30; 50 days before the trial date is August 12. Thus the date of exchange will be August 12, the date closer to the trial date.

EXAMPLE 2: Given August 15 as the trial date and a demand made on July 10, the date of exchange will be July 30 (20 days after service of the demand, which is closer to the trial date than 50 days before trial).

NOTE: For good cause shown, a party may apply to the court for an order specifying an earlier or later date of exchange. See §10.43 (protective orders).

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§10.6 3. Expert Witnesses Whose Identity Must Be Disclosed

A percipient witness who will testify to expert opinions based on his or her personal observations must be designated as an expert witness in an exchange of expert witness information in order for a party to be able to call that witness as an expert at trial. See *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667.

Treating physician. A treating physician who will testify as an expert should be disclosed. *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293. Under *Schreiber,* treating physicians generally are not experts "retained" within the meaning of CCP §2034.210(b) (former CCP §2034(a)(2)), requiring the submission of an expert witness declaration, even if the treating physician gives opinion testimony. See also *Huntley v Foster* (1995) 35 CA4th 753, 756, 41 CR2d 358 (expert declaration not required for treating physician to give opinion testimony). In reaching this result, however, *Schreiber* expressly noted that the treating physician had been designated as an expert, thereby providing notice of the intent to elicit expert opinion from the witness at trial. To avoid any possible sanction, a party who intends to elicit expert testimony from a treating physician should designate the physician as an expert witness when the expert designation is timely filed. See *Gotschall v Daley* (2002) 96 CA4th 479, 116 CR2d 882 (failure to disclose treating physician as an expert resulted in dismissal because of lack of evidence on causation; no relief available under CCP §473(b) for failure to make timely expert witness disclosure); *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570 (trial court correctly rejected standard of care testimony from plaintiff's treating physicians who were not designated as expert witnesses; absence of expert testimony on standard of care resulted in nonsuit for defendant). See also *Fatica v Superior Court* (2002) 99 CA4th 350, 120 CR2d 904 (trial court erred in prohibiting plaintiffs' treating physician, who was timely designated as expert but had not reviewed all plaintiffs' medical records at time of his deposition, from testifying at trial about his opinions; citing *Schreiber,* court of appeal held that, as treating physician, he should have been permitted to testify about his opinion). For further discussion, see §10.2.

A party may take the deposition of a treating physician, surgeon, or other treating health care practitioner as a percipient witness, but must pay the treating physician expert witness fees under CCP §2034.430(a), (b) if the party asks the expert to express an opinion or factual testimony regarding the past or present diagnosis or prognosis made by the witness, or the reasons for a particular treatment decision made by the witness. The witness would not be considered to be giving an expert opinion if the testimony requires the witness only to read words and symbols contained in a relevant medical record or, if those words and symbols are not legible to the witness, to give an approximation of what those words or symbols are. See CCP §2034.430(a), (b).

Expert hired as consultant. The opinions of an expert hired as a consultant or advisor to an attorney, who will *not* be offered as an expert at trial, are protected by the work product rule; even the identity of such an expert is not discoverable. *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 51 CR 511; *Swartzman v Superior Court* (1964) 231 CA2d 195, 41 CR 721.

Once a consultant is designated as a trial witness and actually deposed, the extent to which the expert's work remains protected by the work product rule is governed by the three-step test enumerated in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535, discussed in §8.16.

For further discussion of the work product rule, see §§8.8-8.19. See generally California Civil Discovery Practice §§3.52-3.67 (4th ed Cal CEB 2006); California Trial Objections, chap 35 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 41 (3d ed CJA-CEB 1997); 2 Witkin, California Evidence, *Witnesses* §§137-150 (4th ed 2000).

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§10.7 4. Contents of Demand; Service

The demand must be in writing and must identify, below the title of the case, the demanding party. CCP §2034.230(a). It must include a statement that it is being made under CCP §§2034.010-2034.730. See form in §10.62.

The demand must specify the date for the exchange of lists of expert trial witnesses and expert witness declarations, and any demanded production of writings. CCP §2034.230(b).

A demand to exchange information concerning experts must be served on all parties who have appeared in the action. CCP §2034.240.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/ 5. Demanding Discoverable Reports and Writings/§10.8 a. Specific Demand Required; Experts Subject to This Demand

5. Demanding Discoverable Reports and Writings

§10.8 a. Specific Demand Required; Experts Subject to This Demand

A demand for the reports and writings of experts must be specifically included in the demand for exchange of expert witness information. CCP §2034.210(c).

Expert percipient witness. Not all experts whose identity must be disclosed under CCP §2034.210 are required to produce their reports and writings for inspection and copying. Percipient witnesses (*i.e.,* those who have independent knowledge of relevant facts) are not required to make their reports and writings available, nor are other expert witnesses who are neither parties nor employed or retained by a party. CCP §2034.210(b).

EXAMPLE: Common examples of expert percipient witnesses include the police officer who investigates or reconstructs a traffic accident that results in a civil lawsuit, the industrial hygienist employed by the industrial accident victim's employer, and the regular outside accountant for the company that is now making a claim for economic loss. Percipient witnesses also include a doctor who treats a person who thereafter becomes a personal injury plaintiff and the doctor is asked to opine concerning the patient's diagnosis and prognosis. See §10.2 for further discussion.

While expert percipient witnesses may eventually be disclosed as experts who will testify at trial by one or more sides of the case, they do not "belong" to any party; their knowledge is in the public domain and is available to anyone to whom they are willing to speak, for compensation or otherwise. Although they can be deposed, it is also appropriate to interview or consult with them on an informal basis. Depending on the facts and circumstances of the case, counsel should consider meeting with a percipient witness before, or even in lieu of, a deposition. Meeting informally with a percipient witness avoids the time and expense of formally deposing him or her, and may allow counsel the opportunity to establish more rapport with the witness.

PRACTICE TIP: You should avoid any ex parte contact with a treating physician, even if that person has not yet been designated an expert by the opposing side. See discussion in §10.26 (attorneys' informal communication with other parties' experts).

According to the State Bar-Judicial Council Joint Commission on Discovery Reporter's Notes to Proposed California Civil Discovery Act of 1986, because a percipient expert acquires information independently of the party who expects to be calling him or her, such an expert is more like a fact witness. See, *e.g., City of Long Beach v Superior Court* (1976) 64 CA3d 65, 80, 134 CR 468 (court held that compelled disclosure of anticipated testimony of fact witnesses is invasion of work product rule). Thus, under CCP §2034.210, only the *identity* of certain expert witnesses—but not the general substance of their testimony or copies of their writings and reports—must be disclosed.

It is an open question, however, whether such a percipient expert has to be considered an "expert" within the meaning of §2034.210. For example, treating physicians are often designated by one side or the other as expert witnesses for purposes of trial. But unlike testifying experts or expert consultants, they are not always contacted well in advance of the trial date and may never actually be formally "retained" by the party calling them. In some cases, moreover, neither side plans to call the treating physician as his or her own expert. Nothing in §2034.210 would prevent discovery of the opinions of these fact witnesses, who happen also to be experts, before the time period for expert disclosure, if they are not retained. Counsel should therefore consider using an ordinary deposition procedure to elicit these opinions in advance of the time frame for expert discovery. The information supplied by witnesses such as treating physicians could be very useful to the formation of the retained consultant or testifying expert's opinion.

NOTE: Counsel noticing the deposition of the treating physician, surgeon or other treating health care practitioner must pay the expert's reasonable fees if the deponent is to be asked during the deposition to express an opinion or give factual testimony regarding the past or present diagnosis or prognosis made by the deponent, or the reasons

for a particular treatment decision made by the deponent. The witness would not be considered to be an expert due expert witness fees if the testimony requires the deponent only to read words and symbols contained in a relevant medical record or, if those words and symbols are not legible to the deponent, to give an approximation of what those words or symbols are. See CCP §2034.430.

For further discussion of work product, see §§8.7-8.20. See generally California Civil Discovery Practice, chap 3 (4th ed Cal CEB 2006).

Another important distinction in CCP §2034.210 is that only "discoverable" reports and writings that were made "in the course of preparing that expert's opinion" must be produced. CCP §2034.210(c). Section 2034.210(c) does not specify how this language is to be applied. Presumably, these issues will be determined under the three-step analysis set out in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535, discussed in §8.16.

PRACTICE TIP: Because of this language in §2034.210(c), you should always consider obtaining copies of the opposing expert's entire file. See discussion in §10.10.

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§10.9 b. Form and Service

A demand to exchange all discoverable reports and writings made by CCP §2034.210(b) experts must be included in the written demand for the exchange of expert witness information. CCP §2034.210(a), (c). The service provisions are the same. CCP §2034.210.

See the form in §10.62.

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§10.10 c. Types of Discoverable Reports and Writings

Under Evid C §250, a "writing" means

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Thus, if an employed or specially retained expert has generated computer disks or printouts, photographs, movies, video recordings, or sound recordings, they are discoverable under CCP §§2034.210(c), 2034.270.

Does a "writing" include reports or documents not generated by the expert but in the expert's possession and part of the expert's file? No California case decided under former CCP §2037.3 or CCP §2034.210(c) has yet determined this question. In *Heitmann v Concrete Pipe Mach.* (ED Mo 1983) 98 FRD 740, the report of a nontestifying expert was held to be discoverable when a testifying expert said that the basis of his opinion rested in part on that report.

Although CCP §2034.270 refers to "all discoverable reports and writings," the demand procedure in CCP §2034.210(c) is limited by its express terms to the production of discoverable reports and writings made by any §2034.210(b) expert "*in the course of preparing that expert's opinion*" (emphasis added). Counsel should not assume that a demand for production under CCP §2034.210(c) will yield production of all materials that might otherwise be discoverable. For example, other documents that could be part of the expert's file include reports of the expert that were *not* prepared for this particular case and thus not made in the course of preparing the expert's opinion in the current action, any correspondence by the retaining party to the expert containing "background" information for the expert's consideration, and articles or other writings of the expert on related issues that might provide useful material for cross-examination.

Counsel should use a deposition subpoena for production of business records to obtain the expert's file before deposition. See forms in §§10.64-10.66. Alternatively, counsel may make reciprocal stipulations with the attorneys for the other parties to voluntarily produce all of each expert's file. If, after being served with the subpoena, the producing party then objects to production of the entire file on the basis that some of its contents are not "discoverable," counsel is at least alerted to the existence of additional writings and may be able to overcome any claims of privilege or work product protection.

While no case has yet interpreted the word "discoverable" as it is used in CCP §2034.210(c), whether an expert's reports and writings or other materials in the expert's file are discoverable is presumably subject to the standards enunciated in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 489, 210 CR 535 (decided under former CCP §2037; see case discussion in §8.16).

See also the following language in CCP §2017.010: "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or … is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." For discussion of key discovery principles generally, see California Civil Discovery Practice, chap 1 (4th ed Cal CEB 2006).

For further discussion of producing experts' reports and writings in response to a demand for exchange, see §§10.12-10.14. On production of documents at the expert's deposition, see §10.41. On the attorney-client privilege and work product rule, see §§8.1-8.19.

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C. Exchange of Expert Witness Information

§10.11 1. Contents; Attorney's Expert Witness Declaration

The parties' exchange of expert witness information must be in writing. CCP §2034.260(a). The exchange of information may occur at a meeting of the parties' attorneys or by a mailing on or before the date of exchange. By expressly providing that the mailing may be made *on* or *before* the specified date for exchange, CCP §2034.210(a) makes clear that the duty to respond after service of the demand is not extended under the mailing provisions of CCP §1013.

The exchange of expert witness information must include either (CCP §2034.260(b)):

- A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial (with certain exceptions discussed in §§10.23-10.24), *or*
- A statement that the party does not presently intend to offer the testimony of an expert witness.

If the list includes an expert who is a party, employee of a party, or an expert retained "for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action," the exchange must include or be accompanied by a declaration, signed by the disclosing party's attorney (or by the party, if unrepresented) under penalty of perjury, containing all of the following elements (CCP §2034.260(c)):

- A brief narrative statement of the qualifications of each expert;
- A brief narrative statement of the general substance of the testimony that the expert is expected to give;
- A representation that the expert has agreed to testify at the trial;
- A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial; and
- A statement of the expert's hourly and daily fee for providing deposition testimony.

For a form of exchange containing a statement of intention not to offer expert trial testimony, and one with a list of expert witnesses with the attorney's declaration included, see §10.63.

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2. Production of Reports and Writings

§10.12 a. Who Must Produce Reports and Writings; Time of Production

If an expert witness demand included a request for production of the expert's discoverable reports and writings made in the course of preparing that expert's opinion, all parties, including the party initiating the demand, must also exchange these written materials. CCP §2034.270. For discussion of what constitutes "discoverable reports and writings," see §10.10.

Unlike other expert information (*e.g.,* lists of experts, declarations containing statements of expert's fee rates) that may be exchanged either at a meeting of the parties' attorneys or by a mailing on or before the date of exchange (see CCP §2034.260), CCP §2034.270 provides that all parties must produce reports and writings that are subject to inspection and copying on the date of exchange specified in the demand. On stipulation to exchange copies of reports by mail, see §10.13.

In some cases, an expert may not create any reports or writings until after the date of exchange specified in the demand. This by itself is not a violation of CCP §2034.270, but to avoid the exclusion of the expert's testimony under CCP §2034.300, the party must produce the reports and writings as soon as possible after their creation. *Boston v Penny Lane Ctrs., Inc.* (2009) 170 CA4th 936, 952, 88 CR3d 707 (exclusion of expert's testimony was not warranted because plaintiff promptly produced reports created after specified exchange date and experts were available for deposition before trial). The court in *Boston* identified a gap in the statutory scheme. Although there are procedures for augmenting a party's list of experts or submitting late information about retained experts (see CCP §§2034.610, 2034.710, and 2034.720), there is no provision for the production of reports and writings created after the specified date for exchange of expert witness information. 170 CA4th at 951. The court declined to read into the statutory provisions a rule that expert reports and writings must be created by the exchange date or not at all. Rather, CCP §2034.300 empowers the trial court to exclude the expert testimony of a witness offered by a party who *unreasonably* fails to produce reports until after the specified exchange date. 170 CA4th at 952. See §10.25.

PRACTICE TIP: The result in *Boston* likely would have been different had there been evidence that the plaintiff or her experts were dilatory in producing the reports or that the depositions on the eve of trial were insufficient to cure the prejudice resulting from late disclosure. Counsel faced with the late disclosure of reports and writings should request appropriate discovery to determine the reasons for the late disclosure. Counsel should also insist on appropriate time to prepare for and take the expert's deposition and, if necessary, ask for a trial continuance. If no continuance is granted, counsel should make a full record on the prejudice resulting from the late disclosure, including the tactical disadvantages occasioned by the delays. Once the expert's deposition is taken, these objections should be renewed, supported by the nature of the testimony supplied by the expert. The lack of any realistic ability to prepare for cross-examination of the expert, or to offer affirmative testimony from a party's own experts in response, should be highlighted for the trial court.

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§10.13 b. Stipulation to Exchange Copies of Reports by Mail; Copying Costs

Under CCP §§2034.210, 2034.260, and 2034.270, the parties are entitled to a mutual and simultaneous production of the originals of expert reports and writings to inspect and copy. Like other provisions of the discovery statute (see, *e.g.,* CCP §§2020.430(c), 2031.280(c)), §2034.210(c) contemplates that reproduction costs will be borne by the party receiving copies of the documents. As a practical matter, the parties who desire to exchange expert reports and writings by mail should stipulate that copies may be made and delivered along with a bill at an agreed rate per page for the costs of copying the records. See CCP §2016.030 (allows stipulations on methods of discovery).

To avoid processing multiple copying charges among the parties, counsel frequently stipulate that the parties cover their own copying costs in exchange for other parties covering theirs. This tends to be a practical solution when the volume of documents to be produced is minimal or similar for all parties.

The stipulation should also require a producing party to execute a declaration establishing that the copies mailed are "true copies" of the expert's reports and writings.

PRACTICE TIP: Before stipulating to an exchange of copies by mail, you should consider whether you should instead inspect the original reports and writings. Original documents sometimes contain notes or marks that do not appear on the copies. If you wish to inspect an expert's entire file, including materials read, considered, or relied on by the expert, rather than just the expert's own reports and writings (or writings that could fall into the category of not having been made "in the course of preparing that expert's opinion"; see CCP §2034.210(c)), you should also serve a subpoena. See discussion in §10.10 on demanding discoverable reports and writings. Or you can arrange reciprocal stipulations for the parties to produce voluntarily all of each expert's file.

See sample forms of subpoena in §§10.64-10.66. On production of documents at expert's deposition, see §10.41.

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§10.14 c. When Not Demanded, but Other Parties Desire Production of Reports

If the original demand to exchange expert information did not include a request for all discoverable reports and writings, can another party trigger document production? CCP §§2034.210-2034.310 is silent on this issue, but the construction of §2034.210(c) contemplates the situation in which "any party" may include a request for production of all discoverable reports and writings in the initial demand.

PRACTICE TIP: If you are served with such a demand and decide that the exchange of experts' reports and writings is desirable, you should immediately serve on all parties a new demand that includes a request for production under §2034.210(c). You should then promptly seek agreement of all parties that document production will be made in accordance with the new demand. Absent agreement of counsel, compliance may be compelled by the court.

On seeking protective orders, see §10.43. On producing expert's reports and writings along with supplemental expert witness information when production was not originally demanded, see §10.16.

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§10.15 3. Custody of Original Demand and Any Information Received in Response to It

The demand to exchange expert witness information and any expert witness lists and declarations received in response to that demand are not required to be filed with the court (CCP §2034.290(a)) unless "their contents become relevant to an issue." CCP §2034.290(c).

When these documents are not filed with the court, the demanding party must retain both the original demand (with the original proof of service attached) and the original of all the parties' expert witness lists and declarations exchanged in response to the demand. The originals may not be destroyed until 6 months after final disposition of the action unless the court, on a party's motion for good cause shown, orders that the original be preserved for a longer period. CCP §2034.290(b).

PRACTICE TIP: If you receive an adverse ruling in a dispute over expert witness disclosure or testimony during trial (*e.g.,* a motion to exclude experts or to permit supplemental or rebuttal expert testimony is denied), you should ensure that all relevant documents, including pretrial disclosures and declarations, become part of the record during argument on the motion or when the ruling is made. This will facilitate a full and fair review on appeal.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.16 4. Submission of Supplemental Expert Witness Information After Exchange Date

§10.16 4. Submission of Supplemental Expert Witness Information After Exchange Date

Within 20 calendar days after the exchange of expert witness information, any party who participated in the exchange may submit, without leave of court, a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing the list "has not previously retained an expert to testify on that subject." CCP §2034.280(a).

NOTE: A party participating in the exchange includes a party who submitted a statement under CCP §2034.260(b)(2) that that party did not at that time intend to offer the testimony of any expert witness.

When submitting the supplemental expert witness list, the party must meet all of the following requirements (CCP §2034.280):

- Include an attorney's (or if unrepresented, the party's) expert witness declaration containing all the information required by CCP §2034.260(c);
- Enclose all discoverable reports and writings, if any, made by the additional experts designated in the supplemental witness list; and
- Prepare the experts immediately for deposition.

Section 2034.280 appears to require that the party listing expert witnesses in a supplemental list produce all of their discoverable reports and writings, even if not requested in the original demand for exchange of information.

The deposition of additional experts designated in the supplemental list may be taken even though the time limit for discovery under CCP §2024.030 had expired. CCP §2034.280(c).

During the legislative process, AB 1334 (1986), from which former CCP §2034 (now CCP §§2034.010-2034.730) was enacted, was amended to substitute the word "retained" for "designated" in former CCP §2034(h) (now CCP §2034.280(a)). This change appears to indicate a legislative intent to prevent a party from withholding the name of a retained expert during the initial simultaneous exchange of expert witness information and later deciding, after studying the other parties' lists of experts, whether to file a supplemental list disclosing that expert's identity. Therefore, CCP §2034.280(a) probably authorizes supplementation only by a party who has not retained an expert to testify on a particular subject before the initial CCP §2034.260 exchange takes place.

Are there circumstances in which a party who has previously retained but not disclosed an expert on a subject at the time of the initial exchange date can designate that expert in a supplemental list? Probably, if the courts interpret CCP §2034.280(a) to mean that it is permissible for a party to designate an expert in a supplemental list if that expert was retained to be a consultant and not retained as "an expert *to testify* on that subject" (emphasis added). For example, counsel may have retained an expert as a consultant in a particular area with no intention of having that witness testify because the consultant has a great deal of expertise but would not be a particularly good witness, or happens to be vulnerable to cross-examination based on prior testimony or a past publication. Or, the consultant has previously testified primarily for the other side in the type of litigation involved, and counsel may have retained the expert as a consultant for an "insider's" point of view. Since none of these types of consultants are "retained to testify," counsel's use of them should not prevent supplementation of the expert witness list in the particular subject area for which the consultants were used as long as counsel had not designated an expert on that subject in the original list.

On when a motion to submit tardy expert information or a motion to augment or amend an expert list are appropriate procedures, see §§10.17-10.19.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.17 5. Checklist: Motion to Submit Tardy Expert Witness Information

§10.17 5. Checklist: Motion to Submit Tardy Expert Witness Information

A party who has failed to submit expert witness information on the exchange date specified in the demand may apply to the court for an order granting leave to submit that information on a later date. CCP §2034.710. Counsel should make the motion as soon as the tardiness is discovered, and immediately serve copies of the proposed exchange of expert witness information required by CCP §2034.260. See §10.11.

The court can grant the motion only after finding that certain elements specified in CCP §2034.720 have been met. These required elements are set out in the following checklist:

Timing

- The motion must be made either:
- A sufficient time in advance of the time limit for completion of the expert's deposition under CCP §2024.030 so that the deposition of the expert to whom the motion relates can be taken within that time limit (on or before the 15th day before initial trial date); *or*
- At a later time, if the court finds that exceptional circumstances exist.

Declaration

- The motion to submit tardy expert witness information must be accompanied by a declaration, stating facts showing:
- A reasonable and good faith attempt to informally resolve each issue presented by the motion;
- Failure to submit the information earlier was the result of mistake, inadvertence, surprise, or excusable neglect;
- The motion to submit tardy expert witness information was made promptly after learning of the mistake, inadvertence, surprise, or excusable neglect; *and*
- Copies of the proposed expert witness information required by CCP §2034.260 (see §10.11) were thereafter served promptly on all other parties.

Trial Court Considerations

- The trial court must take into account the extent to which the opposing party relied on the absence of a list of expert witnesses; *and*
- Determine that the opposing party will not be prejudiced in maintaining an action or defense on the merits if the motion is granted.

NOTE: For cases interpreting "prejudice," see §10.18 (motion to augment or amend).

Conditions of Order

- The moving party must make the expert in question available immediately for a deposition under CCP §§2034.410-2034.470, *and* at any other times that may be just.
- The court may allow any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated.
- The court may continue the trial for a reasonable time.
- The court may award costs and litigation expenses to any party opposing the motion.

Sanctions

- The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds:
- The one subject to the sanction acted with substantial justification; *or*
- Other circumstances make the imposition of a sanction unjust.

NOTE: Monetary sanctions include attorney fees. CCP §§2023.030(a), 2034.620(d). See also *Estate of Maron* (1986) 183 CA3d 707, 228 CR 402 (court held, under former CCP §2037.6 (see CCP §2034.620(d)), that phrase "cost and litigation expenses" included attorney fees, rejecting argument that award of attorney fees under former CCP §2037.6 required finding of bad faith or willfulness).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/ 6. Motion to Augment or Amend Expert Witness Information/§10.18 a. Purpose and Application

6. Motion to Augment or Amend Expert Witness Information

§10.18 a. Purpose and Application

If a party has already engaged in a timely exchange of expert witness information, and the proper grounds exist for granting the motion (see checklist in §10.19), the court may grant that party leave to do the following (CCP §2034.610(a)):

- Augment its expert witness list and declaration by adding the name and address of an expert subsequently retained; *or*
- Amend its expert witness declaration concerning the general substance of the testimony that a previously designated expert is expected to give.

Grounds. Proper grounds for augmenting or amending expert witness information primarily include the following: that the party could not in the exercise of reasonable diligence have known of the need for the new expert witness information, or that the failure to determine the need for the new expert witness information was due to mistake, inadvertence, surprise, or excusable neglect. CCP §2034.620(c).

EXAMPLE: In *McLaughlin v Sikorsky Aircraft* (1983) 148 CA3d 203, 210, 195 CR 764, the court held that, because the plaintiff's expert testified at trial to opinions that were more harmful to the defendant than those to which he had testified in his deposition, it was proper under former CCP §2037 to permit the defendant to call a new, previously undisclosed expert to rebut those charges. (There was no mention in *McLaughlin* of whether a "during-trial" deposition of the new expert was sought or obtained.)

Opposing party's reliance. The trial court, in ruling on a motion to augment or amend expert witness information, is also to consider the extent to which the opposing party relied on the moving party's expert disclosure list, and whether the opposing party will be prejudiced by allowing augmentation or amendment. CCP §2034.620(a), (b). If the court is inclined to permit supplemental disclosure, it can and probably should order the trial recessed to allow opposing counsel to depose the expert. See *Whitehill v United States Lines, Inc.* (1986) 177 CA3d 1201, 1210, 223 CR 452.

Surprise, inadvertence, excusable neglect. In *Dickison v Howen* (1990) 220 CA3d 1471, 270 CR 188, the court addressed the question of whether the failure of a disclosed witness to testify as anticipated by the disclosing party constitutes "surprise" under former CCP §2034(k) (now CCP §2034.620), so as to allow the disclosing party to amend or augment its expert witness list. The court held that it did. In *Dickison,* a medical malpractice action, the defendant anticipated that a disclosed expert physician would testify that the defendant doctor's care and treatment was within the standard of care. During his deposition, the expert testified to the contrary, giving differing answers to the very same questions he had been asked during deposition preparation. The court, noting that a change in testimony by a witness has been found sufficient to grant an entire new trial on the basis of surprise, held that the trial court did not abuse its discretion in finding that the changes in the expert's testimony were a surprise that could not have been prevented and, therefore, justified augmentation of the defendant's expert witness list.

Timeliness. Code of Civil Procedure §2034.610 restricts the right to augment witness lists (or to amend the expert witness declarations concerning the substance of testimony that a previously disclosed expert is expected to give) to parties who have *timely* complied with the exchange of information required by CCP §2034.260. Moreover, under CCP §2034.610(a)(1), the court may allow augmentation of the list only with experts retained *after* the original disclosure.

EXAMPLE: For a stark illustration of the need to strictly comply with the procedures governing augmentation, see *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR 790, in which a party's failure to properly augment its list of expert witnesses resulted in a dismissal of the action because the plaintiff did not have expert testimony on an issue essential to her case. The court held that a party cannot simply serve a "supplemental" expert witness designation and attempt to call the witnesses at trial. A timely motion to augment must be made.

PRACTICE TIP: Counsel take note! Civil and criminal cases often *require* the testimony of qualified experts to establish

essential issues. If the experts disclosed in counsel's initial designation become unavailable or cannot otherwise supply the needed testimony, replacement experts can and should be consulted. When they are retained, however, counsel must make a timely motion to augment under the provisions of CCP §§2034.610-2034.630 to ensure that the later-consulted expert can testify or that the trial court's rejection of a proposed augmentation can be preserved as a ground of error on appeal.

Tactical decision to withhold expert's identity. During the legislative process, AB 1334 (1986), from which former CCP §2034 (now CCP §§2034.010-2034.730) was derived, was amended to substitute "any expert witness whom that party has subsequently retained" in former CCP §2034(k) (now CCP §2034.610(a)) for earlier language reading "any expert whom that party has subsequently decided to offer in evidence at the trial." It is thus clear that augmentation of an expert witness list is not available to a party who retained an expert to testify but, for tactical reasons, decided to withhold disclosure of the expert's identity from the original exchange of expert witness information.

Need for limitations on ability to augment or amend. The opportunity to depose an expert during trial, particularly if the testimony relates to a central issue, often provides a wholly inadequate opportunity to understand the expert's opinion and to prepare to meet it. See, *e.g., City of Fresno v Harrison* (1984) 154 CA3d 296, 300, 201 CR 219; *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 701, 189 CR 749. As California's leading commentator in the area has pointed out, "the need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses" because of the difficulty of coping with an expert's specialized knowledge. Hogan & Weber, California Civil Discovery §10.1 (1997). That is why the Code of Civil Procedure demands significant advance disclosure and why exceptions should be limited. See *City of Fresno v Harrison, supra*; *Collin v Connecticut Valley Arms, Inc.* (1982) 137 CA3d 815, 821, 187 CR 306.

Further support for limiting orders allowing the augmentation or amendment of expert witness lists is provided by the fact that all of the discovery statutes, including those for expert witnesses, are designed to enable counsel to adequately prepare for trial and to facilitate in *advance* of trial the disclosure of information necessary to make the contest a fair one. See, *e.g., Lehman v Superior Court* (1986) 179 CA3d 558, 564, 224 CR 572; *West Hills Hosp. v Superior Court* (1979) 98 CA3d 656, 659, 159 CR 645. Today's discovery rules are meant to "make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent." *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 487, 210 CR 535. Late disclosure of experts, accordingly, frustrates the very purposes of the discovery statutes, and should be permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a miscarriage of justice.

PRACTICE TIP: If you are confronted with a late-disclosed expert, you should be prepared to make a record that your case will be substantially prejudiced if the expert is permitted to testify, notwithstanding the availability of a deposition. Adequate trial preparation requires more than just a deposition hastily taken on the eve of or during trial.

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§10.19 b. Checklist: Motion to Augment or Amend Expert Witness Information

Counsel should make a motion to augment or amend as soon as it becomes apparent that an additional expert is necessary to the party's action or defense, or that a change in the general substance of a previously designated expert will occur. Copies of the updated declaration and any augmented expert witness list containing the proposed changes should be served immediately on all parties. CCP §2034.610.

The court can grant a motion to augment or amend only after finding that certain elements specified in CCP §§2023.610-2034.630 have been met. These required elements are identical in the categories of "timing," "conditions of order," and "sanctions," to those listed for a motion to submit tardy expert witness information. CCP §§2034.710-2034.730. See Checklist in §10.17.

The requirements for the moving party's "declaration," the court's "findings," and the additional procedure of "lodging expert witness information in court" follow:

Declaration

- The motion to augment or amend must be accompanied by a declaration, stating facts showing:
- A reasonable and good faith attempt at an informal resolution of each issue presented by the motion;
- The motion to augment or amend was made promptly after deciding to call the expert witness or to offer the different or additional testimony;

Or

- Copies of the proposed expert witness information concerning the expert or the testimony required by CCP §2034.260(c) (see §10.11) were thereafter served promptly on all other parties; *and*
- The moving party would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony;

Or

- Failure to determine to call that expert witness, or to offer that expert's different or additional testimony, was the result of mistake, inadvertence, surprise, or excusable neglect.

Findings

- In addition to finding that the showing made in the moving party's declaration on the above points is sufficient, the court must:
- Take into account the extent to which the opposing party relied on the moving party's original list of expert witnesses; *and*
- Determine that the opposing party will not be prejudiced in maintaining an action or defense on the merits if the motion is granted.

Lodging Expert Witness Information in Court

Although not expressly required by CCP §§2034.610-2034.630, it is better practice to lodge original documents with the court or, in the instance of lodging deposition transcripts, certified copies of the transcript. See CCP §2025.480(d). On custody of originals of demand and expert witness lists and declarations, see §10.15.

- The moving party should arrange for the following documents to be lodged with the court "when their contents become relevant to an issue" in the action (CCP §2034.290(c)):
- The demand for exchange of expert witness information; *and*
- All expert witness lists and declarations exchanged in response to it.

PRACTICE TIP: Although the lodging requirement is stated somewhat ambiguously, until the meaning of this language is clarified by judicial interpretation it is recommended that all parties' documents submitted in the exchange of

expert witness information be lodged with the court. Alternatively, the moving party may seek an order narrowing the requirement.

- All materials "lodged" with the court must be accompanied by an addressed envelope with sufficient postage for returning material by mail. After determination of the motion, "the clerk may mail the material to the party lodging it." Cal Rules of Ct 3.1302(b).

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§10.20 7. Withdrawal of Designated Expert Witness Who Has Not Been Deposed

Code of Civil Procedure §§2034.010-2034.730 do not expressly provide for a party's "withdrawal" of an expert who has been designated as a trial witness. Once listed, a CCP §2034.210(b) expert must be made available to testify at a deposition. See CCP §2034.260(c).

If the designating party does not call an expert who has been deposed to testify at trial, any other party, including parties who did not originally designate that expert as an intended trial witness, may call the expert to the stand. See CCP §2034.310(a). Thus, as a practical matter, the designating party does not have the ability to withdraw a listed expert whose deposition has been taken.

Under some circumstances, however, a party may withdraw a designated expert, provided he or she has not been deposed. In *Williamson v Superior Court* (1978) 21 C3d 829, 835, 148 CR 39, a case decided before the 1978 and 1986 discovery statutes took effect, the supreme court acknowledged in dictum that "a party may, indeed, enjoy the right to withdraw an expert witness at any time prior to disclosure of that witness' proposed testimony." In a later case, *County of Los Angeles v Superior Court* (Hernandez) (1990) 222 CA3d 647, 271 CR 698, the court of appeal ruled that the defense was properly allowed to withdraw an expert who had been designated as a trial witness, but whose deposition had not yet been taken.

The court in *County of Los Angeles* ruled that a designated expert does not have to be withdrawn by noticed motion. No notice at all is required. 222 CA3d at 656.

The reasoning in *County of Los Angeles* was extended to a party-expert in *Shooker v Superior Court* (2003) 111 CA4th 923, 4 CR3d 334. There, the plaintiff, Shooker, was designated as an expert and his deposition was noticed, but before he disclosed any of his opinions, he was questioned about conversations he had had with his lawyers. Shooker refused to answer on attorney-client privilege and work product rule grounds. After the trial court ruled that his designation as an expert was an implied waiver of the privilege, Shooker withdrew his designation. The court of appeal held that Shooker's mere designation of himself as an expert was not an implied waiver of the attorney-client privilege when his designation was withdrawn before (1) a significant part of any privileged communication was disclosed and (2) he testified in deposition (or in a declaration) as an expert. 111 CA4th at 930.

The court in *Williamson* suggested that a party who withdraws a designated but undeposed expert has the burden of justifying its conduct, and implied that a jury admonition on that issue might be given. *Williamson v Superior Court* (1978) 21 C3d 829, 835 n2, 148 CR 39. It is difficult to square that dicta with the purpose of the work product doctrine which protects counsel's tactical choices from discovery under any circumstances. Further, such a jury instruction would appear to be of marginal utility and in most cases should be denied based on an Evid C §352 objection: that the probative value of the instruction is substantially outweighed by the probability that giving it will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

No withdrawal of examining physician. In the case of an examining physician under CCP §2032.020, a party does *not* have the freedom to withdraw a witness as an expert and thus preclude his or her deposition about the examination. *Kennedy v Superior Court* (1998) 64 CA4th 674, 679, 75 CR2d 373 (court ordered examining party to prepare written report of medical examination under former CCP §2032(h) (now CCP §2032.610), which explicitly waives work product privilege with regard to such exam). The *Kennedy* court said, "A party may 'hide' an expert from deposition by withdrawing him and dubbing him a 'consultant,' thereby reinstating work product protection—but when the expert is also the examining physician per [former] section 2032 [now CCP §2032.610], the specific terms of the statute must control." 64 CA4th at 679.

For discussion of the work product problems inherent in withdrawal of an expert by one party, and the opposing party's subsequent use of that same expert in the same case, see §10.26.

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D. Exceptions to Expert Disclosure Requirements

1. When Party Entitled to Call Undesignated Expert at Trial

§10.21 a. Expert Previously Deposed

A party may call as a witness at trial an expert not previously designated by that party if the expert has been designated by another party and was deposed under CCP §2034.410. CCP §2034.310. This subdivision codifies *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 200 CR 387, in which the court held that a party who does not disclose an expert is nonetheless entitled to present testimony by that person if he or she has been disclosed as an expert by another party and deposed, even if the disclosing party ultimately elects not to call the person as an expert witness. See also *Powell v Superior Court* (1989) 211 CA3d 441, 445, 259 CR 390, in which the defendants in a medical malpractice suit disclosed a doctor who had performed a defense medical examination of the plaintiff as an expert witness. The plaintiff took the doctor's deposition. The defendants then moved for a protective order to prevent the plaintiff from calling the expert as a trial witness. The court granted the motion and plaintiff petitioned for extraordinary relief, arguing that because the expert had performed a defense medical examination he was a percipient witness. The court of appeal found it unnecessary to reach plaintiff's argument and held that the situation was squarely governed by former CCP §2034(m)(1) (now CCP §2034.310). That is, because the expert had been disclosed by the defendant and then deposed under former CCP §2034(i) (now CCP §2034.410), the plaintiff was entitled to call the expert as a trial witness even though not designated in the plaintiff's expert witness list.

Similarly, in *Alef v Alta Bates Hosp.* (1992) 5 CA4th 208, 6 CR2d 900, the court of appeal found reversible error when the trial court refused to let plaintiff read from the deposition of a disclosed and deposed defense expert who was not called by the defense at the trial. The court also held that a party disclosing an expert in a particular subject area, and who states in the disclosure that the expert's knowledge of that subject area is sufficient to permit him or her to testify, vouches for the qualifications, skill, and experience of the expert in the field identified.

The "disclosed and deposed" admissibility principle does not extend, however, beyond the case in which the expert testimony is given. In *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1403, 55 CR3d 551, the court affirmed the granting of a motion in limine excluding the prior deposition testimony of two experts, retained by the defendant in an earlier case, regarding whether a particular pharmaceutical was associated with strokes. The court held that the fact that the experts had been retained by the defendant did not create the necessary agency relationship for an admission against interest, because the experts were not subject to the defendant's control in either their consultation or testimony. Further, because the issues in the two cases were not related and the testimony was offered for a different purpose, the trial court's exclusion of the testimony under Evid C §352, as more confusing than probative, was appropriate.

PRACTICE TIP: The right to call an opposing party's expert under CCP §2034.310 is subject to the power of the court to grant a protective order under CCP §2034.250, and counsel who is confronted with the prospect of his or her retained expert being called by an opposing party should consider seeking such an order. As one leading commentator has noted, the calling of an expert who was originally retained by an adverse party has "explosive" potential that is totally unrelated to the substance of the expert's testimony. 8 Wright, Miller, & Marcus, Federal Practice and Procedure §2032 (2d ed 1994). While "[i]t may be possible to keep this explosive fact from the jury … there seems little reason to require that effort if other expert witnesses are available." Wright, Miller, & Marcus at §2032. Unless the witness in question has unique testimony to present, counsel for the party who originally retained the expert should seek a protective order on the ground that the potential for prejudice and confusion outweighs the merely cumulative testimony that could be offered by the expert. Evid C §352; *Rubel v Eli Lilly & Co.* (SD NY 1995) 160 FRD 458 (plaintiff deposed expert initially consulted by defendant, then sought to subpoena expert to testify at trial; subpoena quashed on ground that prejudice to defendant outweighed

cumulative testimony of expert). For further discussion of *Rubel*, see §10.50.

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§10.22 b. Impeachment Expert

A party may present trial testimony from a previously undesignated expert who is called as a witness to testify to the falsity or nonexistence of any fact used as the foundation for an opinion by an expert witness called by any other party at the trial. *Stark v City of Los Angeles* (1985) 168 CA3d 276, 287, 214 CR 216, illustrates this principle, which was later embodied in CCP §2034.310. In *Stark,* a defense expert had testified on the audibility of a police siren. The trial court permitted an undisclosed rebuttal expert for impeachment purposes, but limited his testimony to the foundational facts concerning the siren's audibility range. The court of appeal affirmed, holding that this limited area of impeachment was a proper matter for an unlisted expert to address. In permitting the impeachment testimony, the trial court could also properly consider that the expert's testimony was a surprise because there had been no prior disclosure that the defense expert would testify on the audibility range.

Code of Civil Procedure §2034.310(b) also provides that the court may not permit an undesignated expert witness to contradict the opinions themselves. See *Kennemur v State* (1982) 133 CA3d 907, 921, 184 CR 393 (decided under former statute; appellate court affirmed trial court's refusal to permit plaintiffs to call unlisted expert on rebuttal to offer contradictory opinion, holding that "impeachment" under Evid C §780 is limited to testimony tending to prove error or nonexistence of fact on which expert's opinion is based).

An example of this limitation occurred in *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329, in which plaintiffs attempted to call an expert in rebuttal on the permeability of certain soils. Plaintiffs proposed to have their rebuttal expert contradict the testimony given by the defense expert on the permeability rate of the soil. The court of appeal affirmed the trial court's exclusion of this testimony on the grounds that it was not impeachment to establish that the defense experts had relied on incorrect foundational facts, but rather was an effort to offer a contrary opinion. See *Mizel v City of Santa Monica* (2001) 93 CA4th 1059, 113 CR2d 649 (rejecting purported impeachment expert because undisclosed expert was expected to render contrary opinion, not to contradict underlying factual foundation of physician's direct testimony); *Howard Contracting, Inc. v G. A. MacDonald Constr. Co.* (1998) 71 CA4th 38, 54, 83 CR2d 590 (noting that under former CCP §2034(m) (now CCP §2034.310(b)) undisclosed expert witness cannot be called to express opinion contrary to that of another expert).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.23 c. Expert Offering Nonopinion Factual Testimony

§10.23 c. Expert Offering Nonopinion Factual Testimony

If an expert's testimony will be confined to facts only and no opinions concerning those facts will be offered, except as are permitted by lay witnesses, the witness can be considered a type of percipient witness to whom expert witness disclosure requirements do not apply.

EXAMPLE: In *Stone v Foster* (1980) 106 CA3d 334, 164 CR 901, the defendant in a medical malpractice suit arising from a plastic surgery procedure known as a "tummy tuck" sought to call another doctor who had performed a previous tummy tuck on the same patient. The trial court refused to allow the other doctor to testify because he had not been disclosed as an expert witness. The court of appeal reversed, explaining that the defendant had not sought to examine the other doctor concerning any matter of "opinion," such as the standard of practice or the plaintiff's current condition. Rather, the defendant sought only to have the earlier doctor testify as a percipient witness on the issue of whether the plaintiff was aware of the risk in the tummy tuck procedure despite defendant's alleged failure to warn her of those consequences.

NOTE: If a party asks a treating physician, surgeon, or other treating health care practitioner during a deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the witness, or the reasons for a particular treatment decision made by the witness, that witness must be paid the reasonable and customary expert fee. The witness would not be considered to be giving an expert opinion if the testimony requires the witness only to read words and symbols contained in a relevant medical record or, if those words and symbols are not legible to the witness, to give an approximation of what those words or symbols are. CCP §2034.320(a)(2).

See §10.6 for discussion of percipient witnesses also offering expert opinions.

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§10.23A d. Expert Designated After New Trial Granted

A party has a right after a new trial is granted on damages to designate new expert witnesses. *Guzman v Superior Court* (1993) 19 CA4th 705, 708, 23 CR2d 585. In *Guzman,* the trial court granted a new trial on the issue of damages in part because of the absence of expert witness testimony on a key issue related to the damages award. On retrial, the plaintiff attempted to designate a new expert witness who could provide the link. The trial court denied the motion on the ground that the new designation was outside the purview of former CCP §2034 (now CCP §§2034.210-2034.310). The court of appeal held that the trial court's ruling was an abuse of discretion because it put the plaintiff in an unwarranted Catch-22 situation, and it found nothing in the statutory scheme that required such a circular result. See *Gordon v Nissan Motor Co.* (2009) 170 CA4th 1103, 1112, 88 CR3d 778 (when new trial is granted, effect is to place parties in same position as if case had never been tried; plaintiff was entitled in second trial to present new expert witness testimony regarding his roof defect claim, even though he abandoned claim in first trial and even if factual basis of roof defect claim contradicted facts presented in first trial).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.24 2. Expert Trial Witness Disclosure Requirements Not Applicable to Pretrial Hearing Testimony

§10.24 2. Expert Trial Witness Disclosure Requirements Not Applicable to Pretrial Hearing Testimony

The expert witness disclosure requirements appear to apply only to disclosure for trial purposes. In *Kennedy v Modesto City Hosp.* (1990) 221 CA3d 575, 270 CR 544, the trial court refused to consider the declaration of a doctor not designated as a trial witness, and granted a summary judgment motion. The court of appeal reversed, noting that references to "trial," "trial date," and "testify at trial" pervade former CCP §2034 (now CCP §§2034.210-2034.230). The court concluded that "the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding."

PRACTICE TIP: You can argue that the reasoning of the *Kennedy* decision extends beyond summary judgment motions and applies to any use of an expert that does not involve testimony at trial. For example, it can be argued that an undisclosed expert might be used as the basis for the response to a contention interrogatory seeking grounds on which a party makes a particular claim or contention. Similarly, the opinion of an undisclosed expert might be a valid basis for denial of a request for admission.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.25 E. Sanctions for Failure to Meet Expert Disclosure Requirements

§10.25 E. Sanctions for Failure to Meet Expert Disclosure Requirements

Subject to specific exceptions, on objection of a party who has made a complete and timely exchange of expert witness information, the trial court must exclude from evidence the opinion of any expert that is offered by a party who has unreasonably failed to do one or more of the following things (CCP §2034.300):

- List that witness as an expert under CCP §2034.260;
- Submit an expert witness declaration that meets the requirements of CCP §2034.260(c);
- Produce reports and writings of expert witnesses under CCP §2034.270; or
- Make that expert available for a deposition under CCP §§2034.410-2034.470.

Subject matter of testimony. A trial court may preclude an expert witness from testifying at trial on a subject whose general substance was not previously described in an expert witness declaration. *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289. In so holding, the court declared that the provisions of former CCP §2034 (now CCP §§2034.010-2034.730) mean what they say, at least about the disclosure and discovery of expert witness information: Counsel must disclose the general substance of an expert witness's testimony in the narrative required by CCP §2034.260(c) (former §2034(f)(2)(B)); otherwise, the trial court can preclude the testimony under CCP §2034.300 (former §2034(j)).

Giving the trial court such power to restrict the scope of expert testimony reinforces the basic purpose of expert witness information disclosure statutes—to give fair notice of what an expert may testify to at trial. As the court noted, the need for meaningful pretrial discovery of expert witnesses and their testimony is acute, particularly in light of their specialized knowledge and impact on the jury. An inaccurate or incomplete description of the areas an expert will cover can make the expert's pretrial deposition less useful, and can handicap advance planning for a cross-examination, affirmative case presentation, or rebuttal. As the court said, a deposition taken on the fly at trial is not an adequate substitute for proper pretrial preparation.

Bonds does not conceptually favor any particular party to a civil or criminal lawsuit. No matter who offers the expert, the plain message is to make the §2034.260(c) narrative descriptive enough so that the other parties can determine the testimony's subject matter in advance. Although with a little forethought counsel can meet the statutory standard, the penalty for noncompliance can be severe. The narratives should thus be as comprehensive as possible to ensure the unfettered use of the experts at trial.

NOTE: Although presenting an expert opinion at trial that was not contained in the expert witness declaration may lead the court to exclude the expert opinion, it may not lead to the imposition of monetary sanctions. Code of Civil Procedure §2034.300(b), not the general provisions for discovery abuse in CCP §2023.030, governs the remedy available when parties have failed to submit a witness declaration or have submitted an incomplete or inaccurate declaration. *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617.

PRACTICE TIP: When a party learns, through deposition or otherwise, that an opposing expert will testify to matters beyond those contained in the disclosure statement, the party should move promptly for appropriate relief. If the party waits until an effort is made to elicit the testimony at trial, the court may well deny the relief sought on the basis of waiver or inexcusable delay.

The appellate court's opinion in *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216, underscores the importance of giving appropriate breadth to an expert witness declaration. In *Jones,* a plaintiff unsuccessfully tried to exclude the testimony of a family law expert on a pension/retirement plan issue. Plaintiff argued that the expert testimony was outside the scope of the expert witness declaration. That declaration provided that the defense expert would "testify regarding the standard of care of a family law attorney in marital dissolution matters, whether defendant's representation of plaintiff was within the applicable standard of care, and potential remedial actions available to plaintiff." The court of appeal held that this declaration was sufficient to permit the defense expert to opine "that defendant did not fall below the standard of care of family law attorneys by failing to join [the] pension plan as a party or use the plan as security for the note, since by its terms the pension plan could not be used as security." 80 CA4th at 566. Based on his "sufficiently

broad" declaration, the defense's family law expert was essentially permitted to testify as a "pension/retirement plan expert."

The court also noted that the defense expert *was not asked* during his deposition about the pension plan or to affirmatively state whether his opinions at trial would be limited to those expressed during his deposition. In distinct contrast, plaintiff's expert's testimony was excluded to the extent it included opinions not expressed in his deposition. See §14.9 for the analysis applied to plaintiff's expert.

PRACTICE TIP: Counsel should not rely on the disclosure statement alone to determine the permissible scope of the expert's testimony at trial. Rather, counsel should ask specific questions at the deposition as to the subjects on which the expert will give an opinion and whether the opinions at trial will be limited to those expressed during the deposition.

NOTE: A party's failure to complete any of the listed requirements for fewer than all of a party's experts does not forfeit that party's right to offer any expert testimony. Rather, the exclusion sanction is limited to the particular expert or experts for whom the party has failed to complete all the required acts.

Proper designation. The failure to file a timely disclosure as required by statute, or an expert's refusal to cooperate in the discovery process, may also result in the exclusion of the expert's testimony. For example, in *Basham v Babcock* (1996) 44 CA4th 1717, 52 CR2d 456, the court of appeal reversed a defense verdict in a personal injury action because defendant had violated former CCP §2034 (now CCP §2034.280) by failing to properly designate an orthopedist as a supplemental expert. Defendant originally designated an orthopedist to testify that the plaintiff's back problems were due to a preexisting annular tear. Thereafter, the defendant filed a supplemental designation identifying a radiologist who would also testify as to the cause of the plaintiff's injury. Plaintiff deposed the orthopedist who testified that a radiologist could not diagnose an annular tear. The plaintiff did not depose the radiologist. At trial, over the plaintiff's objection, defendant called the radiologist but did not offer the orthopedist. Plaintiff attempted without success to subpoena the orthopedist or read his deposition. The jury returned a verdict for the defense. The court of appeal reversed, finding that the radiologist had not been listed as an expert originally and had not been properly designated as a supplemental expert since the defendant already had an expert on causation.

PRACTICE TIP: It is not clear what the *Basham* court would have found had the plaintiff been able to present the testimony of the defendant's orthopedist. But *Basham* is yet another illustration that courts will rigorously enforce the provisions of CCP §§2034.010-2034.730, at least when its disclosure provisions are involved. In that regard, §2034.280 means what it says—a party may submit a "supplemental" expert witness list only if he or she has not previously retained an expert to testify on the same subject. See, *e.g., Zellerino v Brown* (1991) 235 CA3d 1097, 1112, 1 CR2d 222 (expert testimony excluded when plaintiff filed a belated and incomplete expert witness declaration only 6 days before trial and completely ignored a demand for production of documents); *Waicis v Superior Court* (1990) 226 CA3d 283, 276 CR 45 (court excluded the trial testimony of an expert witness who refused to cooperate in pretrial discovery and was not prepared to testify at his deposition).

However, when an expert's inability to cooperate in the discovery process is not "unreasonable," the court will not exclude the expert's testimony under CCP §2034.300. In *Stanchfield v Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 44 CR2d 565, the defendant stipulated that its expert economist would be available for deposition after reviewing the opinions and conclusions of the plaintiff's expert. The depositions of both experts were taken on the same day, and the defendant's expert was unable to testify fully because he had not had the opportunity to completely review the opinions testified to by the plaintiff's expert. Rather than requesting a follow-up deposition of the defendant's expert, plaintiff's counsel moved in limine to exclude the testimony of defendant's expert at trial. The trial court rejected the motion and the court of appeal affirmed, finding that the inability of the expert to testify at the deposition had not been unreasonable and that plaintiff had had ample time to further depose the expert. The court distinguished *Zellerino* and *Waicis,* finding that in this case it was the plaintiff who had acted unreasonably.

In *Williams v Volkswagenwerk Aktiengesellschaft* (1986) 180 CA3d 1244, 1257, 226 CR 306, plaintiff disclosed the experts and defendant deposed the experts before trial. At these depositions, the experts were not prepared to express any opinions as to the possible defects in a VW car, but at the trial the experts testified that in their opinions the car was defective. The court found that plaintiff's disclosure in the expert witness declaration was adequate, and that cross-

examination of the experts at trial was sufficient to remove any possible prejudice to the defendant.

The *Williams* case predates the requirement of CCP §2034.260(c)(4) that the attorney's expert witness declaration include "[a] representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial."

For an overview of the multiple issues raised in making an adequate declaration under CCP §§2034.210-2034.310, see Kahn, *Expert Declarations: Recent Decisions Have Blurred the Line Between Providing Too Much and Too Little Information in Expert Witness Declarations*, 28 LA Lawyer 28 (Mar. 2005).

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§10.26 F. Attorneys' Informal Communications With Other Parties' Experts; Ethical Considerations

Counsel may not communicate directly with opposing counsel's consultants or designated trial experts. *Torres v Superior Court* (1990) 221 CA3d 181, 270 CR 401; *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 271 CR 698. In *Torres,* the defendants in a medical malpractice action disclosed as one of their experts a physician who had previously treated the plaintiff. Although the court held that there was no prohibition against the defendants' use of the doctor as an expert on their own behalf, the court ruled that the defendants could not communicate ex parte with the doctor. The court also held that contact with the defendants' expert could only be through statutorily authorized discovery procedures to ensure that the ex-patient/plaintiff would be present and would have a reasonable opportunity to preclude disclosure of any privileged matters.

In *County of Los Angeles,* the defendant disclosed, and then withdrew an expert pathologist. The plaintiff's counsel then retained the pathologist. The defendant obtained both a protective order and an order disqualifying plaintiff's counsel. The court of appeal affirmed, explaining that defendant's withdrawal of the pathologist as a trial witness returned him to the status of consultant. A party is barred from communicating with another party's expert consultant; otherwise, an expert retained by one party could always withdraw and offer his or her opinions to the highest bidder. The court also found that plaintiff's counsel had to be disqualified because he had "become privy to an opposing attorney's work product." 222 CA3d at 658.

Later, in *Province v Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1684, 25 CR2d 667, the court of appeal, relying on *Torres,* held that defense counsel must avoid ex parte communications with plaintiff's treating physicians before discovery is completed. Recognizing that there might be ethical considerations regarding whether the doctor should testify against the patient's interests, the court in *Province* explained (20 CA4th at 1685, citing *Torres v Superior Court* (1990) 221 CA3d 181, 187, 270 CR 401):

> "[w]e are persuaded the better rule is to permit [the plaintiff's treating doctor] to testify for the defense…" as to his expert opinion *provided the defense timely and properly designates its intention to call him as an expert witness and provides [the plaintiff] the opportunity to thoroughly depose him.* "[T]he need for truth outweighs any claimed privacy interest resulting from the [treating doctor's work]."

The California Supreme Court disapproved *Torres* and *Province* to the very limited extent that these cases could be read to prohibit all ex parte contacts between a physician and the insurer or attorneys that represent the physician. *Heller v Norcal Mut. Ins. Co.* (1994) 8 C4th 30, 41, 32 CR2d 200. In *Heller,* the physician, Dr. Yamaguchi, was an associate of another physician that plaintiff had sued for malpractice. Both physicians were insured by Norcal, and Dr. Yamaguchi provided some of plaintiff's medical records to Norcal during the malpractice action. The court held that this communication was specifically allowed by CC §56.10(c)(4), and that neither *Torres* nor *Province* considered any contact between a physician and insurer under that statute. Therefore, these cases did not preclude the communication at issue.

The propriety of ex parte communications between defense counsel and plaintiff's treating physicians has been considered in a number of out-of-state cases; a clear split of authority has developed. See discussion in §10.61 (federal cases).

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G. Independent Medical Examinations

§10.27 1. Independent Medical Examination Procedures Generally; Examination by Stipulation

Discovery of information through physical and mental examinations is considered to be a separate discovery method. CCP §2019.010. The procedures and restrictions for demanding a physical examination without leave of court (see §10.28) and for obtaining a court-ordered physical or mental examination (see §10.31) are specified in CCP §§2032.210-2032.310, respectively. See also Evid C §755.5, requiring the presence of an interpreter during medical examinations of parties who do not proficiently speak or understand English.

In lieu of these statutory procedures and restrictions, a physical or mental examination may also be arranged and carried out under the parties' written agreement. See CCP §2016.030.

Any party may obtain discovery by means of a physical or mental examination of a party, agent of a party, or person in the custody or legal control of a party, in any action in which the mental or physical condition (including blood group) of that party or other person is in issue. CCP §2032.020(a).

A party required to submit to a physical or mental examination (or required to produce another person unless inability to produce the person for examination can be demonstrated) who fails to do so may be subject to any court order that is just, including the imposition of issue, evidence, terminating and/or monetary sanctions for which the party entitled to the examination successfully applies. CCP §2032.410.

If a person submits or authorizes access to X rays of any area of his or her body for inspection by an examining physician, the physician may not take any additional X rays of that area without the consent of the examinee or a court order for good cause shown. CCP §2032.520.

On rules concerning an observer's attendance at physical and mental examinations and their recordation, see §10.32. On tendering fees to a treating or examining physician who is to be asked to express an opinion during a deposition, see §10.38.

For detailed discussion of physical and mental examinations generally, see California Civil Discovery Practice, chap 10 (4th ed Cal CEB 2006).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/ 2. Procedures for Independent Medical Examination When Initiated by Defendant/§10.28 a. Demand for Physical Examination by Defendant

2. Procedures for Independent Medical Examination When Initiated by Defendant

§10.28 a. Demand for Physical Examination by Defendant

In cases in which a plaintiff is seeking recovery for personal injuries, any defendant without leave of court may demand (after being served or appearing in the action, whichever occurs first) one physical examination of the plaintiff, if the following conditions are met (CCP §2032.220):

- The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive;
- The examination is conducted within 75 miles of the residence of the person examined;
- The demand specifies the time, place, manner, conditions, scope, nature of the examination, identity, and specialty, if any, of the examining physician;
- The demand is served on the plaintiff and all other parties who have appeared in the action; *and*
- The examination is scheduled at least 30 calendar days after service of the demand, unless on motion of the demanding defendant the court has shortened the time.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.29 b. Plaintiff's Response to Demand for Physical Examination

§10.29 b. Plaintiff's Response to Demand for Physical Examination

Within 20 days after service of the demand for physical examination (unless the court has shortened the time on motion of the demanding defendant or lengthened the time on motion of the plaintiff to whom the demand is directed), the plaintiff must serve, on all parties who have appeared, a written response that the plaintiff (CCP §2032.230):

- Agrees to comply with the demand as stated;
- Will comply with the demand as specifically modified in the response; *or*
- Refuses, for reasons specified in the response, to submit to the demand.

A plaintiff who fails to serve a timely response to defendant's demand request waives any objection to it unless, on motion, the court finds that the plaintiff subsequently served a response that substantially complies with CCP §2032.230 *and* that the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. CCP §2032.240(a).

PRACTICE TIP: If you wish to object to a demand, but determine that a response was not served within the required 20 days after the demand was served, you should immediately serve the response containing those objections, and then seek a stipulation with opposing counsel. If opposing counsel will not stipulate, you should file a motion for relief from failure to serve a timely response on the grounds stated in CCP §2032.240(a).

If the plaintiff has failed to serve a response, the defendant may move for an order compelling plaintiff's response and compliance with a demand for physical examination. The court must impose a monetary sanction, unless it finds the unsuccessful party acted with substantial justification or other circumstances make it unjust to do so. See CCP §2032.240(b), (c).

NOTE: No declaration showing an attempt to resolve the matter informally need accompany this motion.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.30 c. Defendant's Response to Plaintiff's Failure to Comply

§10.30 c. Defendant's Response to Plaintiff's Failure to Comply

If a defendant considers a plaintiff's modification of a demand or refusal to submit to a physical examination unwarranted, defendant may move to compel compliance with the demand. CCP §2032.250(a). In response to the motion, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. The court may impose a monetary sanction instead of or in addition to any of those sanctions. CCP §2032.240(d).

NOTE: This motion must be accompanied by a declaration stating facts showing that a reasonable and good faith attempt has been made to resolve the matter informally. In the situation in which the plaintiff has both failed to serve any response and then refused to comply with a court order to do so, however, there is no requirement that the defendant attach a declaration showing an attempt to informally resolve the matter.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.31 3. Court-Ordered Physical or Mental Examinations

§10.31 3. Court-Ordered Physical or Mental Examinations

A noticed motion is required for a mental examination, or a physical examination other than that described in CCP §2032.220 (*e.g.,* a physical examination that *is* painful, protracted, or intrusive, or *not* conducted within 75 miles of the examinee's residence). CCP §2032.310(a).

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by written agreement of the parties under CCP §2016.040. The court may grant the motion only for good cause shown. CCP §2032.320(a).

In its order, the court must specify "the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." CCP §2032.320(d). See *Carpenter v Superior Court* (2006) 141 CA4th 249, 269, 45 CR3d 821 (trial court's order vacated for failure to list by name diagnostic tests and procedures to be used in mental examination; "standardized written psychological tests" for evaluating "emotional and cognitive functioning" is not sufficiently specific); *Baqleh v Superior Court* (2002) 100 CA4th 478, 492, 122 CR2d 673 (trial court's order vacated for failure to specify examiner and time of examination, and to limit scope and nature of exam).

Except on a showing of exceptional circumstances, the court may not order the mental examination of a plaintiff seeking recovery for personal injuries if the plaintiff stipulates to the following (CCP §2032.320(c)):

- No claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed; and
- No expert testimony concerning this usual mental and emotional distress will be presented at trial in support of the claim for damages.

In connection with a competence trial under Pen C §§1367-1369, a trial court has the authority to order a criminal defendant to submit to a competence evaluation conducted by a prosecution expert. The exercise of that authority must, however, conform with the requirements of CCP §2032.020. *Baqleh,* 100 CA4th at 491.

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§10.32 4. Observer's Attendance; Suspension of Examination; Recordation

Physical Examination

The attorney for the examinee or party producing the examinee, or that attorney's representative, is entitled to attend and observe any *physical* examination and to record, either stenographically or by audio technology, any word spoken to or by the examinee during the examination. CCP §2032.510(a). If an attorney's representative is to serve as the observer, the representative must be so authorized in writing by the attorney.

Both the observer and the examining physician are entitled to suspend the physical examination to enable a party to apply to the court for a protective order if either of the following situations occur (CCP §2032.510(d), (e)):

- The examiner is abusive or attempts to undertake unauthorized diagnostic tests and procedures; or
- The observer monitoring the examination begins to participate in or disrupt the examination.

The presence of anyone other than the examinee's counsel and a court reporter at a physical examination lies within the sound discretion of the court, and the examinee may not, *e.g.,* insist on having his or her personal physician present. *Long v Hauser* (1975) 52 CA3d 490, 125 CR 125.

Mental Examination

Both the examiner and examinee may record a mental examination using audio technology. CCP §2032.530(a). Generally, however, observers may not be present. Section 2032.530(b) (former CCP §2032(g)(2)) specifically states that it may not be construed to change existing case law concerning the presence of the examinee's attorney or other persons at a mental examination; under existing case law, observers may not be present during a psychiatric examination. *Edwards v Superior Court* (1976) 16 C3d 905, 910, 130 CR 14 (presence of counsel would hinder establishment of rapport between examiner and examinee necessary to psychiatric examination); *Whitfield v Superior Court* (1966) 246 CA2d 81, 86, 54 CR 505 (plaintiff's request that attorney and court reporter be present during psychiatric examination properly denied). See also *Ramirez v MacAdam* (1993) 13 CA4th 1638, 16 CR2d 911 (while plaintiff was entitled to have attorney and court reporter present at defense medical examination, no videotaping of court-ordered physical examination was permissible). In *Golfland Entertainment Ctrs. v Superior Court* (2003) 108 CA4th 739, 133 CR2d 828, the court of appeal let stand the portion of a trial court order permitting the mother of a brain-damaged minor plaintiff to be present during his mental examination. However, the court of appeal also vacated portions of the trial court order prohibiting the examiner from asking questions eliciting "narrative responses"; the court found that such a vague restriction improperly limited the scope of the examination.

Section 2032.320(a) (former CCP §2032) does not place a numerical limit on the number of mental examinations that may be ordered in a given case on a showing of good cause. *Shapira v Superior Court* (1990) 224 CA3d 1249, 274 CR 516 (court ruled mental examinations by both clinical psychologist and psychiatrist warranted, in addition to physical examination, under facts of case).

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5. Reciprocal Exchange of Reports

§10.33 a. Demand by Party Examined; Waiver of Privilege; Sanctions

A party who submits to or produces another person for a physical or mental examination may make a written demand for copies of the following (CCP §2032.610(a)):

- A detailed written report of the history, examinations, and findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; and
- Reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

Copies of the reports must be delivered within 30 calendar days after service of the demand, or within 15 calendar days of trial, whichever is earlier. CCP §2032.610(b). The protection for work product under CCP §2018.030 does not apply to the examiner's writings or reports or to the taking of the examiner's testimony. CCP §2032.610(c).

The consequence of demanding the examiners' reports is the waiver of any privilege—including protection for work product—that the plaintiff or examinee has in the pending action, or any other action involving the same controversy, regarding reports, writings, and testimony of every other physician, psychologist, or licensed health care practitioner who has examined or who may thereafter examine the plaintiff or examinee with respect to the same condition. CCP §2032.630. For further discussion of waiver of work product protection, see §8.14.

If the examiner did not prepare a written report and the examined party demands one, the court can order the examining party to have a report prepared. *Kennedy v Superior Court* (1998) 64 CA4th 674, 679, 75 CR2d 373 (former CCP §2032 (now CCP §2032.610) "clearly" requires that party who submits to physical examination is entitled to report of that exam, which contains certain specific information; former §2032(h) (now CCP §2032.610(c)) explicitly waives work product privilege with regard to such exam).

Counsel for plaintiffs who submit to examinations should carefully compare the examiner's reports with the litany in CCP §2032.610 to make sure that all required items have been covered. Section 2032.610 specifies exactly what the examiner's report must contain, *i.e.,* "the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner."

If the examining party fails to make a timely delivery of the reports demanded, the plaintiff is entitled to move to compel their delivery. A declaration showing a reasonable and good faith attempt to resolve the issue informally must accompany the motion. The court must impose a monetary sanction against the unsuccessful party unless it finds the unsuccessful party acted with substantial justification, or other circumstances make the sanction unjust. CCP §2032.620(b).

If the examining party then fails to obey an order compelling delivery of medical reports, the court may make any just order, including the imposition of issue, evidence, terminating, and/or monetary sanctions. In addition, the court must exclude at trial the testimony of any examiner whose report has not been provided by a party. CCP §2032.620(c).

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§10.34 b. Examining Party's Right to Exchange of Reports; Sanctions

By exercising the option of demanding the examiner's reports, the plaintiff *must* in return exchange a copy of any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner. CCP §2032.640.

The examining party who complies with the demand becomes entitled, at the time of delivery of the reports, to receive all other reports concerning the plaintiff's condition. In addition, the examining party has a continuing right to receive promptly any reports prepared later concerning previous or subsequent examinations of the same condition. CCP §2032.640.

If the plaintiff fails to comply with the duty to exchange reports, the examining party who has complied with the demand may move to compel the plaintiff to exchange existing or later medical reports. A declaration showing a reasonable and good faith attempt to resolve the matter informally must accompany the motion. The court must impose a monetary sanction on the unsuccessful party unless it finds that the unsuccessful party acted with substantial justification or other circumstances make it unjust to do so. See CCP §2032.650(a), (b).

If the plaintiff then fails to obey an order compelling delivery of medical reports, the court may make any just order, including the imposition of issue, evidence, terminating, and/or monetary sanctions. In addition, the court must exclude at trial the testimony of any health care practitioner whose report the plaintiff was ordered to but did not provide to the examining party. CCP §2032.650(c).

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H. Depositions of Experts; Tendering Fees

§10.35 1. When Experts Can Be Deposed

After receiving an expert witness list, any party may take the oral or written deposition of any person on the list without a showing of good cause. CCP §2034.410. An expert can be deposed earlier or later than the date specified in the demand by stipulation (CCP §2016.030), or for good cause shown (CCP §2025.210(b)).

Except as specifically provided in CCP §§2034.410-2034.470, the procedures for taking depositions under CCP §§2025.010-2028.080 apply to depositions of expert trial witnesses. On depositions generally, including depositions taken outside of California, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006).

The expert witness exceptions to general deposition procedure concern compelling attendance, place of deposition, and payment of witness fees. See discussion in §§10.36-10.39.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.36 2. Compelling Expert's Attendance

§10.36 2. Compelling Expert's Attendance

Under CCP §§2034.410-2034.470, different procedures apply to compelling an expert's attendance at a deposition, depending on the expert's status:

- Service of a proper deposition notice is effective to require a party to produce a CCP §2034.210(b) expert (*i.e.,* an expert who is a party, employee of a party, or retained for litigation purposes). See sample form in §10.67.
- All other experts must be commanded to appear at a deposition by subpoena. See, *e.g.,* CCP §2025.280(b), which requires service on the deponent of a deposition subpoena under CCP §2020.020. See sample Judicial Council form in §10.65.

Experts who have agreed to testify on behalf of a party at trial are perceived to be under the party's control and thus notice is considered sufficient to compel their attendance. Experts who do not "belong" to a party, *e.g.,* percipient witnesses, are treated like any other nonparty witness. *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 1202, 272 CR 324.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.37 3. Place of Deposition

§10.37 3. Place of Deposition

Different rules apply to the location of an expert's deposition, depending on the expert's status:

- The deposition of a CCP §2034.210(b) expert (*i.e.,* an expert who is a party, employee of a party, or retained for litigation purposes) must be taken at a place that is within 75 miles of the courthouse where the action is pending, unless the court orders on a showing of exceptional hardship that the deposition be taken at a more distant place. CCP §2034.420.
- Depositions of all other experts are subject to the general deposition procedures set forth in CCP §§2025.010-2028.080. CCP §2034.410. For example, the oral deposition of a natural person (as opposed to the representative of an organization), taken in California, must be at a place that is, at the deposing party's option, either within 75 miles of the deponent's residence, or within the county where the action is pending and within 150 miles of the deponent's residence. CCP §2025.250(a).

NOTE: The Discovery Act makes no provision for authorizing the court to order the deposition of a natural person who is *not* a party, employee of a party, or a CCP §2034.210(b) expert, at a more distant place. See CCP §§2025.260(a), 2034.420. However, CCP §2025.310(b) permits deposition of a nonparty by telephone or other remote electronic means if the court finds good cause and no prejudice to any party.

A party designating a CCP §2034.210(b) expert who desires the deposition to be taken at a more distant place must make a motion for a protective order accompanied by one or more declarations stating facts showing exceptional hardship if the expert's deposition is not taken more than 75 miles from the courthouse. CCP §2034.420. On seeking protective orders generally, see §10.43.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/ 4. Tender of Expert Fees/§10.38 a. How Payment Is Determined

4. Tender of Expert Fees

§10.38 a. How Payment Is Determined

The deposing party must pay the "reasonable and customary" fee for the following experts (CCP §2034.430):

- Experts retained for litigation purposes (but *not* experts who are parties or employees of a party); and
- Treating physicians and surgeons or other treating health care practitioners who will be asked to express an opinion during the deposition, when such opinion includes opinion or factual testimony regarding the past or present diagnosis or prognosis made by the witness, or the reasons for a particular treatment decision made by the witness. The witness would not be considered to be giving an expert opinion if the testimony requires the witness only to read words and symbols contained in a relevant medical record or, if those words and symbols are not legible to the witness, to give an approximation of what those words or symbols are. See CCP §2034.430(a)(2). Former CCP §2034(i)(2) (now CCP §2034.430(a)(2)) was amended in 1995 to abrogate the holding in *Brun v Bailey* (1994) 27 CA4th 641, 651, 32 CR2d 624 (a treating doctor who is deposed solely concerning factual matters and is not asked for any opinions is not entitled to expert witness fees).

According to the Fourth District Court of Appeal, the words "reasonable and customary" in former CCP §2034(i)(2) (now CCP §2034.430(b)) are different and both must be satisfied. *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493. The expert's "customary" hourly fee for deposition testimony is merely one factor in determining what a "reasonable" fee is under former §2034(i) (now CCP §2034.430(b)), and that determination is within the trial court's sound discretion. *Marsh v Mountain Zephyr, Inc., supra*. In *Marsh*, an expert architect sought to charge $360 per hour for deposition testimony. While this was his "customary" rate for testifying, his rate for consulting was $120 or $240 per hour, depending upon the nature of the services. In addition, San Diego County, where the case was venued, had a local rule determining that $200 per hour was the customary hourly fee charged by local architects for deposition testimony. The trial court concluded that $250 per hour was a "reasonable" deposition fee under the circumstances.

The court of appeal affirmed, finding that the amount was within the trial court's discretion and that the local rule was a valid implementation of former CCP §2034(i)(4) (now CCP §2034.470(e)), particularly because the section provides that "[t]he court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination."

Additionally, the hourly or daily fee charged by an expert witness to the opposing party "shall not" exceed the fee charged the party who retained the expert, except when the expert donated his or her services to a charitable or other nonprofit organization. CCP §2034.430(d). In *Rancho Bernardo Dev. Co. v Superior Court* (1992) 2 CA4th 358, 2 CR2d 878, the court of appeal held that the expert's fee charged for testifying at deposition need not be the same one charged to his or her client for ordinary consulting services, as long as the fee charged at deposition is the same one charged to the client for testifying. In *Rancho Bernardo,* the retained expert charged his client $200 per hour for ordinary consulting services and $250 per hour for testimony given on his client's behalf. The real party in interest argued that it should only have to pay the lesser figure for services rendered at deposition, but the appellate court disagreed. The higher fee represented the charge made for services similar to that provided at the deposition.

Furthermore, "an architect, professional engineer, or licensed land surveyor, who was involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding" must be paid the expert's reasonable and customary fee for testifying at the deposition. CCP §2034.430(a)(3).

NOTE: Because the exchange of expert witness information requires disclosure of the expert's hourly and daily fee for providing deposition testimony (see CCP §2034.260(c)(5)), the party noticing the deposition will be aware of the fee and need merely multiply it by the length of the expected examination.

As with discovery generally, §2034.430(b) is probably subject to limitation in cases of abuse. If, for example, counsel for the plaintiff notices the deposition of a particularly expensive defense expert in a multidefendant case and counsel

for the defendant deliberately prolongs the deposition with protracted questioning of the expert, a persuasive argument could be made that the plaintiff should not be required to pay for that portion of the examination.

PRACTICE TIP: When a party disputes the reasonableness of an opposing expert's proposed fee for deposition, the party must make an informal effort to resolve the matter. If that effort fails, the party can move the court for an order setting the expert's compensation. On fee disputes, see §§10.45-10.46D.

The reasonable and customary amount to be paid an expert is calculated from the time noticed in the deposition subpoena or, if the expert is late, from the time the expert witness arrives at the deposition until the time the expert is dismissed from the deposition, whether or not the party actually is deposed by any party attending the deposition. CCP §2034.430(b). See also Govt C §68092.5. Moreover, "if any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel." CCP §2034.430(c).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.38A b. How Payment Is Made

§10.38A b. How Payment Is Made

A party taking the deposition of an expert must tender the expert's fee based on the anticipated length of the deposition either when the deposition notice or subpoena is served, or at the commencement of the deposition. CCP §2034.450(a). See *True v Shank* (2000) 81 CA4th 1250, 97 CR2d 462 (expert witness fees can be tendered either with deposition notice or at commencement of deposition).

An opposing expert's fee must be delivered to the attorney for the party who designated the expert being deposed. CCP §2034.450(b).

The deposing party is obligated to compensate an expert only for time spent at the deposition. The party who designated the expert is responsible for the expert's travel expenses and for counsel's own fees and expenses incurred in preparing for and traveling to and from the deposition. CCP §2034.440.

If an expert's examination takes longer than anticipated, the party giving notice of the deposition must pay the balance of the fee within 5 days of receipt of an itemized statement from the expert. CCP §2034.450(c).

PRACTICE TIP: Many attorneys enter into reciprocal stipulations to waive the opposing expert fee provisions by agreeing, *e.g.,* that each expert will submit a bill to the opposing party at the conclusion of the deposition and that payment will be made within 2 weeks. Alternatively, in cases in which each side has the same kind and number of experts, the parties simply agree that each will be responsible for the entirety of its own experts' fees, including time spent in depositions.

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§10.39 c. Expert Fees in Workers' Compensation Proceedings

In workers' compensation cases arising under Lab C §§3200-6002 or Lab C §§6100-6149, any party desiring to depose an expert "on another party's expert witness list" must pay the "reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition." CCP §2034.430(b).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.40 5. Video Recording Expert's Deposition

§10.40 5. Video Recording Expert's Deposition

If the deposing party intends to record the testimony by video or audio technology in addition to the required stenographic recording, the deposition notice must so state. CCP §2025.220(a)(5).

Similarly, the deposing party must state if it intends to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician, or of any expert witness, under CCP §2025.620(d). If so, the operator of the video camera must be a person who is authorized to administer an oath, and must not be financially interested in the action, or be a relative or employee of an attorney of any of the parties. CCP §2025.220(a)(6).

The special requirements for video recording a deposition are listed in CCP §2025.340 and include, *e.g.,* technical matters for the camera operator, the rules for identifying counsel present and administering the oath on camera, and numerous other items. See discussion in California Civil Discovery Practice §§5.75-5.84 (4th ed Cal CEB 2006).

NOTE: If the deposition of a designated expert who does not fall within the description of CCP §2034.210(b) will be recorded by video technology and possibly used at trial, the appropriate boxes should be checked on the deposition subpoena. See the Judicial Council forms reproduced in §§10.64-10.65.

Under CCP §2025.330(c), any other party may make an audio or video record of the deposition testimony if that other party promptly, and in no event less than 3 calendar days before the date on which the deposition is scheduled, serves a written notice of this intention on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served, and on any deponent whose attendance is being compelled by a deposition subpoena under CCP §2020.020. If this notice is given as late as 3 calendar days before the deposition, notice must be by personal service under CCP §1011. CCP §2025.330(c).

Counsel should consider the implications on his or her case of CCP §2025.620(d), which allows *any party* to use a video recording of the deposition testimony at trial of a treating or consulting physician or of any expert witness, "*even though the deponent is available to testify*" (emphasis added) if the deposition notice reserved the right to use the deposition at trial, and if the requesting party has complied with the requirements of CCP §2025.340(m).

The cost of video recording the deposition may be a recoverable cost for the party prevailing at trial. *Nelson v Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753.

PRACTICE TIP: You should be aware that having an underprepared expert attend a deposition can be a much greater risk if the deposition is recorded on video. If you or the expert take such a deposition lightly, both run the risk of being embarrassed when the video recording is played publicly at trial.

Parties frequently serve notice of an intention to video record the depositions of their own experts, both to avoid the problems of scheduling the expert's personal appearance at trial and to avoid the expense of paying the expert to give live testimony. Conversely, many parties noticing the depositions of opposing experts give notice of an intention to video record to take a "dry run" at cross-examining the expert.

By allowing parties to make video recordings of deposition testimony and then use those recordings at trial despite the expert's being available to testify, CCP §2025.620(d) potentially undermines the fundamental purpose of discovery —*i.e.,* to give each party the opportunity to learn the details of the other party's case *before* trial. Section 2025.420(b)(3) appears, however, to create a solution to this problem.

Code of Civil Procedure §2025.420(b)(3) authorizes the court, for good cause shown, to enter a protective order directing that a video-recorded deposition of a treating or consulting physician or of any other expert witness intended for possible use at trial under CCP §2025.620(d) be postponed until the moving party has had an "adequate opportunity to prepare, by *discovery deposition of the deponent,* or other means, for cross-examination." (Emphasis added.)

The Code of Civil Procedure is not specific in defining either "good cause" or what "other means" might be necessary for cross-examination to support a showing of "good cause." Because the video-recorded deposition will likely be used at trial, however, the Code recognizes that counsel must be ready to conduct a full and effective cross-examination at the deposition. Accordingly, if all reports prepared by the expert have not been received or if further

discovery needs to be completed to permit all avenues of impeachment to be explored, counsel should be prepared to make a motion for a protective order to prevent the deposition from going forward. Such a motion should also be made if counsel is waiting for more information from his or her own consultants, experts, or other sources to be prepared to adequately cross-examine the expert testifying on a video recording.

The Discovery Act does not define the phrase "discovery deposition." Apparently, however, this language was purposefully intended to be construed as a term of art (*i.e.,* a deposition preparatory to a video-recorded deposition) because, in one of the revisions of the portion of the bill that eventually became former CCP §2025(i)(3) (now CCP §2025.420(b)(3)), a comma was inserted between the words "discovery" and "deposition" but later was expressly removed by amendment.

A CCP §2025.420(b)(3) protective order for a discovery deposition should be available to the examining party whenever any other party serves notice of an intention to use a video recording of an expert's deposition testimony at trial. Otherwise, the video-recorded deposition may well be the examining party's only opportunity to examine the expert. Under appropriate circumstances, such a protective order should even be available to the party who retained the expert.

Code of Civil Procedure §2025.620(d) reflects the practical realities of attempting to schedule court appearances by overburdened doctors and other experts. It also provides a vehicle for ensuring the admissibility of the testimony of these persons while relieving counsel of the difficulties inherent in scheduling their live testimony. This provision requires counsel to recognize that, when an expert's deposition testimony is recorded by video technology, there is no guarantee that the expert will appear at trial, even if he or she is able to do so.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.41 6. Production of Documents at Deposition

§10.41 6. Production of Documents at Deposition

When counsel wishes the following types of witnesses to bring documents to the deposition, the only notice required is a demand in the notice of deposition of disclosed expert (CCP §2025.280(a)):

- Parties.
- Employees of parties.

Counsel must use a subpoena to compel the production of documents at deposition by the following experts (see CCP §2025.280(b)):

- Experts retained for litigation purposes.
- Nonretained experts, *e.g.,* percipient witnesses.

See the sample forms in §§10.67 (notice of deposition of expert), 10.65 (deposition subpoena for personal appearance and production of documents and things), 10.66 (deposition subpoena for production of business records).

NOTE: Under CCP §2034.210(c), experts retained for litigation must exchange, according to those deadlines, the same types of documents as parties and employees of parties, *i.e.,* "discoverable reports and writings" made "in the course of preparing that expert's opinion." See CCP §2034.270.

PRACTICE TIP: You should arrange to have an opposing CCP §2034.210(b) expert served with a subpoena to produce documents at the deposition (see form in §10.65) in addition to serving the expert with a deposition notice. More commonly, all counsel enter into reciprocal agreements with all other parties in the action agreeing that all experts will produce their entire files before or at time of deposition, as well as at time of trial. This agreement should make clear that the expert's time records also are to be produced.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.42 7. Timing of Expert Witness Depositions

§10.42 7. Timing of Expert Witness Depositions

No Priority

Code of Civil Procedure §§2034.010-2034.730, governing expert witness discovery, are silent concerning priority of experts' depositions. As a result there is generally no priority during discovery unless the court orders otherwise (see CCP §2019.020). Because of the requirement that the exchange of expert witness information not take place until the trial date has been set and that it occur simultaneously, parties in cases in which numerous experts have been disclosed are sometimes inclined to rush to see who can be the first to prepare and hand-deliver deposition notices to try to depose other parties' experts before their own experts can be deposed. There is a continuing need for counsel to use common sense and curtail some of the excesses that frequently accompany spirited advocacy to reach some acceptable compromise on the order in which the experts will be deposed.

Common Time Deadlines

Some of the time parameters affecting discovery of expert witness information and the depositions of opposing parties' designated experts follow, with reference to where they are found in the statutes:

- The procedure under CCP §§2034.010-2034.730 for discovery of expert witness information, absent stipulation or court order, is not available until after a trial date is set. CCP §2034.210.
- A demand for exchange of expert information must be made no later than the 10th calendar day after the initial trial date has been set, or 70 calendar days before that trial date, whichever is closer to the trial date. CCP §2034.220.
- The date of exchange must be 50 calendar days before the initial trial date, or 20 calendar days after service of the demand, whichever is closer to the trial date. CCP §2034.230(b).
- Discovery proceedings pertaining to experts identified under CCP §2034.210(b) must be completed on or before the 15th calendar day before the date initially set for trial, and motions concerning expert witness discovery must be heard on or before the 10th calendar day before the date initially set for trial. CCP §2024.030.
- Except as specified in CCP §§2034.410-2034.470, expert witness depositions are governed by CCP §§2025.010-2028.080. Under CCP §2025.270(a), 10 calendar days' notice is required for depositions, plus 5 additional calendar days if the deposition notice is served by mail. See CCP §1013(a). Thus, the statutory framework seems to provide a maximum of 25 calendar days (50 minus 25) within which to depose experts who have been disclosed, or a maximum of 20 calendar days if deposition notices are served by mail.

Other provisions of the discovery act that may modify this time frame include:

- On motion of any party, the trial court has the discretion to permit the completion of discovery within 15 calendar days before trial, to permit a motion to be heard within 10 calendar days before trial, or to reopen discovery after a new trial date is set. CCP §2024.050.
- The parties to an action may, with the consent of any party affected by it, enter into an agreement to extend the time for the completion of discovery or for the hearing of motions concerning discovery, or to reopen discovery after a new trial date is set. CCP §2024.060.

Solutions to Problems With Time Limitations

In cases in which numerous experts are disclosed by several parties, counsel must take the time limitations of CCP §2024.030 into consideration in establishing a discovery plan. Because of CCP §§2034.210-2034.310 requirements governing disclosure of experts as well as attorneys' scheduling conflicts, practically speaking, discovery frequently cannot be completed within those required time limitations. Possible solutions include the following:

- In cases in which many experts must be deposed before trial, counsel should seriously consider seeking a stipulation with the attorneys for other parties to establish an expert discovery schedule starting before the statutory disclosure period of CCP §§2034.210-2034.310, and to permit discovery to continue after the dates established under CCP §2024.030.

- If opposing counsel are unwilling to enter into a stipulation to solve the problem, counsel should promptly make use of CCP §2034.230(b), which allows the court on motion and a showing of good cause to order an exchange date that is earlier or later than that specified.
- To prevent a client's interests from being prejudiced, or to protect a party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense, counsel may move for a protective order under CCP §2034.250(b) (*e.g.,* asking the court to reduce the list of designated experts).
- For good cause shown and in the interests of justice a party may apply to the court to establish the sequence and timing of discovery for the convenience of parties and witnesses under CCP §2019.020(b).
- If a new trial date has been set, counsel can ask the trial court to change discovery cutoff dates or reopen discovery. CCP §2024.050(a).

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I. Resisting Demands for Exchange and Other Discovery

§10.43 1. Seeking Protective Order; Sanctions

Any party who has been served with a demand to exchange expert witness information may move for a protective order. CCP §2034.250(a). The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense.

Like other provisions of the discovery statute, all parties are under a duty to confer informally and attempt to work out the terms and conditions of the exchange of expert witness information without the intervention of the court. A motion for a protective order must therefore be accompanied by a declaration stating facts showing that counsel applying for the order made a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. CCP §2034.250(a).

A protective order may include, but is not limited to, any one or more of the following requests:

- That the demand for exchange of expert witness information be quashed because it was not timely served.
- That the date of exchange be earlier or later than that specified in the demand.
- That the exchange be made only on specified terms and conditions.
- That the production and exchange of any report and writings of experts be made at a different place or at a different time than that specified in the demand.
- That some or all of the parties be divided into sides on the basis of their identity of interests in the issues in the action, and that the designation of any experts as described in CCP §2034.210(b) be made by any side so created.
- That the deposition of an expert be taken at a different time or place than that provided by statute, or set by the opposing party.
- That a party or a side reduce the list of employed or retained experts designated by that party or side under CCP §2034.210(b). A more detailed discussion of challenging an excessive number of experts is found in §10.44.

The only case to squarely address the point indicates that the recipient of a defective demand has an affirmative duty to seek a protective order and is not free simply to ignore the demand. In *Zellerino v Brown* (1991) 235 CA3d 1097, 1108, 1 CR2d 222, one of the defendants served a premature expert witness demand. Plaintiff did not seek a protective order and, instead, served an "Objection … and … Request That Defendant Withdraw Its Demand for Exchange of Experts." The defendant then obtained leave under CCP §473 to file a belated demand. Thereafter, the plaintiff failed to make an expert disclosure as required by the statute. Six days before trial, plaintiff served incomplete declarations concerning two experts but did not provide reports or writings as requested. On the 1st day of trial, defendants obtained an order precluding plaintiff from introducing any expert testimony. The court of appeal affirmed the exclusion order, criticizing plaintiff for having failed to seek an appropriate protective order. The court emphasized that former CCP §2034 (now CCP §2034.250) clearly contemplates that a party who is served with an improper demand will bring such a motion and, because the prevailing party is entitled to monetary sanctions, the burden of bringing such a motion is minimal.

If the motion for protective order is denied in whole or in part, the court has the discretion to order that "the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just." CCP §2034.250(c).

The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully made or opposed the motion for protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2034.250(d).

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§10.44 2. Challenging Excessive Number of Experts Designated in Exchange

Under former CCP §2037, which preceded former CCP §2034, it was an all too common practice for counsel to file expert witness disclosure statements that resembled the yellow pages of the telephone book, listing multiple experts, many of whom counsel had never contacted and had no intention of using. They were listed either to harass the opposition, or simply because disclosing counsel had not yet decided the actual membership of the expert team that would be used at trial. Several provisions in former CCP §2034, which is now CCP §2034.260, have tended to curtail this practice. Counsel must file a declaration representing that experts have agreed to testify (CCP §2034.260(c)(3)) and are prepared to give meaningful oral depositions (CCP §2034.260(c)(4)). The declaration also must set forth each expert's hourly and daily fee, which information suggests that the expert has been contacted, if not retained. See CCP §2034.260(c)(5).

In addition, CCP §2034.250(b) authorizes the court to issue a protective order reducing the list of experts who are parties or employed or retained experts designated by a party or side, or any other order "to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense."

A list containing an excessive number of names, particularly of experts in the same field of expertise whose testimony manifestly will overlap or be cumulative, is also subject to attack under Evid C §723, which allows the court at any time *before* or *during* the *trial* of an action to limit the number of expert witnesses to be called by any party.

All reported cases considering Evid C §723 have dealt with the court's power to limit the number of experts that any one party may call *during* trial. See, *e.g., Horn v General Motors Corp.* (1976) 17 C3d 359, 371, 131 CR 78. See also *Ruud v U.S.* (9th Cir 1958) 256 F2d 460 (recognizing court's inherent power to limit number of experts at trial). Counsel, however, should not hesitate to invoke the "before" trial portion of Evid C §723.

PRACTICE TIP: You should check the local rules of the county in which the action is pending. Some courts, particularly in counties under long term "fast track" programs, have adopted local rules limiting the number of experts that can be called at trial on any single issue. See, *e.g.,* San Diego Ct R 2.1.11.

Counsel's motion challenging an excessive number of disclosed experts should argue that reducing the number of experts when too many are listed is best accomplished at the disclosure stage; the parties should not be left to guess, after taking a burdensome number of depositions, which one of the many listed experts the designating party will choose to call on a particular issue at trial.

By successfully moving the court for an order restricting the number of experts that can be disclosed before trial, all parties in the case are relieved of the burden of conducting needless depositions and covering witness fees and expenses for experts whom the designating party may have no serious intention of actually calling at trial.

Despite the provisions of CCP §2034.250 and Evid C §723, California state court practitioners generally have not been aggressive in bringing motions to limit the number of experts that can be disclosed before or called to testify at trial. It is the authors' belief, based on federal court practice and on new trends in state court practice, that state court judges would be receptive to such limitations if counsel would only ask.

In federal district court, judges customarily enter sua sponte orders limiting each side to one expert per substantive field. For example, in *Riley v Dow Chem. Co.* (ND Cal 1989) 123 FRD 639, the court held "it is the usual practice of this Court, in the absence of extraordinary circumstances, to limit the parties to one expert for each distinct discipline, such as, respectively, epidemiology and oncology. The parties should be prepared for such an order at the pretrial conference."

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J. Disputes Over Expert Witness Fees

§10.45 1. Court Order Setting Expert Fees

Code of Civil Procedure §2034.470(a) provides that, if a party desiring to depose an expert witness believes that the expert's hourly or daily fee stated in the disclosure statement is unreasonable, the party may move the court for an order setting the compensation to be paid to the expert. On reasonableness of fees, see §10.38.

The motion must be accompanied by a declaration stating facts showing that the moving party made a reasonable and good faith attempt to resolve the matter informally. The court must impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes the motion unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2034.470(g).

As part of the effort at an informal resolution, the expert can be compelled to provide proof of the ordinary and customary fee actually charged and received by the expert for similar services in other litigation, the total number of times the demanded fee has ever been charged and received by the expert, and the frequency and regularity with which the demanded fee has been charged by the expert over the immediately preceding 2 years before the motion. CCP §2034.470(b). The party designating the expert who is attempting to charge the fee must also provide the information that can be compelled in the informal exchange (proof of the fee actually charged, total number of times the demanded fee has been charged, and the frequency and regularity with which it has been charged) to aid the court in hearing the motion. The court "may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination." CCP §2034.470(e). See also *Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 50 CR2d 493, discussed in §10.38.

PRACTICE TIP: As a practical matter, the cost of preparing and arguing a motion to resolve a dispute over an expert's fee often exceeds the amount in dispute. Consequently, counsel are increasingly entering into stipulations that each side will bear the entirety of its own experts' expenses, including time spent giving deposition testimony. Such stipulations are particularly attractive in cases in which both sides have a similar number of experts.

Fee disputes concerning expert testimony other than at deposition are governed by Govt C §68092.5(c).

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§10.46 2. Recovery of Expert Witness Fees as Costs of Suit

Consistent with the language of CCP §1033.5, expert witness fees ordinarily are not allowable as costs unless expressly allowed by law and ordered by the court. *Posey v State* (1986) 180 CA3d 836, 225 CR 830; *Rabinowitch v California W. Gas Co.* (1967) 257 CA2d 150, 65 CR 1. See, *e.g.,* Govt C §12965(b) (permitting court in its discretion to award expert witness fees to prevailing party in FEHA cases). See also *Sanchez v Bay Shores Med. Group* (1999) 75 CA4th 946, 89 CR2d 634 (trial court cost award modified to delete medical expert witness fees because experts were not ordered by court as required by CCP §1033.5); *Desplancke v Wilson* (1993) 14 CA4th 631, 17 CR2d 586 (trial court's award of expert witness fees to party prevailing on summary judgment reversed because experts were not ordered by court as required under CCP §1033.5 and no CCP §998 offer was made).

Disputes may arise as to whether fees for particular services should properly be considered expert witness costs, which generally are not recoverable, or recoverable costs under §1033.5(a), such as models and blow-ups of exhibits. The court of appeal in *El Dorado Meat Co. v Yosemite Meat & Locker Serv., Inc.* (2007) 150 CA4th 612, 618, 58 CR3d 590, holding that costs awards are reviewed on appeal for abuse of discretion, rejected plaintiff's argument that fees for an exhibit projected onto a screen during trial should be considered akin to witness fees because they were paid to the firm where defendant's expert witness worked as a partner. Moreover, although some of the evidentiary support for the costs to produce the exhibit was light, it was not "so light as to be insubstantial." 150 CA4th at 620.

In addition, expert witness fees may not be awarded to a prevailing party under CCP §1021.5. *Olson v Automobile Club* (2008) 42 C4th 1142, 1148, 74 CR3d 81 ("plain language of section 1021.5 does not indicate an intent to authorize an award of expert witness fees").

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§10.46A a. CCP §998 Offers

Certain costs are withheld or augmented under CCP §998 when an offer is made under §998, the offeree does not accept the offer, and the offeree does not obtain a more favorable judgment at trial or arbitration. Code of Civil Procedure §998(c) provides for recovery of "costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." See *Michelson v Camp* (1999) 72 CA4th 955, 85 CR2d 539 (successful defendant who had made §998 settlement offer was entitled to recover fees for expert witness who was disclosed but never deposed or called); *Stiles v Estate of Ryan* (1985) 173 CA3d 1057, 219 CR 647 (recovery allowed defendants in wrongful death action for expense of deposition of two of plaintiffs' experts, and for fees of two defense experts who did not testify at trial).

Unlike the defendant's costs, which the plaintiff "shall pay," expert witness fees "may" be recovered at the discretion of the court or arbitrator. CCP §998(c)(1). The award may not be denied, however, because the fees were covered by insurance. *Skistimas v Old World Owners Ass'n* (2005) 127 CA4th 948, 26 CR3d 319.

In *Skistimas,* the plaintiff sued fellow Old World Owners Association members for allegedly violating covenants, conditions, and restrictions to the detriment of his business. After refusing a proffered settlement, the plaintiff lost at trial. The trial court awarded defendants their attorney fees but denied recovery of the expert witness fees. The court reasoned that defendants were not entitled to recover the costs associated with their expert witnesses because those costs were paid by the defendants' insurer and none of the individual defendants paid "out of pocket."

The court of appeal reversed, holding that the defendants were entitled to the expert fees under CCP §998, which provides for reimbursement of "a reasonable sum to cover costs of the services of expert witnesses … actually incurred and reasonably necessary." The court rejected the plaintiffs' argument that "actually incurred" required the fees to be incurred by the defendants themselves, reasoning that fee-shifting statutes regularly award attorney fees to parties when those fees are paid by another and that an award of fees "is not equivalent to a right to retain such fees." 127 CA4th at 952. In other words, the insurer remained free to collect its costs from its insureds, with the defendants effectively acting as the insurer's subrogate. The court concluded that the trial court retained discretion over the granting of expert witness fees, but that an award could not be denied because the fees were paid by an insurer on the defendant's behalf.

The offer made under CCP §998 must have been made in good faith, even though this requirement is not stated in §998. Whether the settlement offer was reasonable and made in good faith is left to the trial court's sound discretion. *Barba v Perez* (2008) 166 CA4th 444, 450, 82 CR3d 715. See *Thompson v Miller* (2003) 112 CA4th 327, 338, 4 CR3d 905 (trial court abused its discretion in finding that defendants' $300,000 settlement offer, in case that resulted in defense verdict, was not reasonable and that defendants were not entitled to expert witness fees); *Jones v Dumrichob* (1998) 63 CA4th 1258, 74 CR2d 607 (defendant's offer to have judgment entered against him was in good faith; in doing so, defendant waived his considerable cost bill, and, in any event, absence of net monetary sum as part of offer is not per se violation of good faith requirement); *Culbertson v R. D. Werner Co.* (1987) 190 CA3d 704, 235 CR 510 (defendant's $5000 settlement offer was reasonable and in good faith despite fact that workers' compensation carrier for plaintiff's employer had filed lien for $36,239.64 against any settlement or judgment rendered in plaintiff's favor; award upheld); *Wear v Calderon* (1981) 121 CA3d 818, 175 CR 566 (defendant's offer of $1 was not in good faith; no damages awarded). See also *Elrod v Oregon Cummins Diesel, Inc.* (1987) 195 CA3d 692, 241 CR 108 (trial court's refusal to award costs upheld because amount of offer, $15,001, was not reasonable prediction of what offeror would have had to pay given magnitude of injuries and potential for liability, despite fact that net judgment resulted in plaintiff's taking nothing from defendant who made offer); *Rose v Hertz Corp.* (1985) 168 CA3d Supp 6, 214 CR 795 (court considered effect of §998 offers on prevailing plaintiff's right to expert witness under CCP §§1031-1032); *Santantonio v Westinghouse Broadcasting Co.* (1994) 25 CA4th 102, 120, 30 CR2d 486 (rejecting plaintiff's argument that defendants' §998 offer was "trick" or "ploy" to "shift the bulk of [defendants'] litigation costs" to him and that "he would have considered the offer differently if he had thought rejection would expose him to such exorbitant amounts for defendants'

expert fees"). 25 CA4th at 119.

Finally, CCP §998 recovery of expert fees does not apply to certain federal statutory claims brought in state court. The court of appeal in *Miller v Union Pac. R.R. Co.* (2007) 147 CA4th 451, 459, 53 CR3d 893, held that the availability of expert witness fees in an action under the Federal Employers' Liability Act (FELA) filed in state court is controlled by federal law and refused to impute to Congress an intent to make expert witness fees available when the statute was silent on the issue. Although FELA cases adjudicated in state courts are generally subject to state procedural rules while being governed by federal substantive law, state procedure must give way to the Congressional purpose of national uniformity in personal injury actions by railroad employees. 147 CA4th at 458.

NOTE: *Miller* involved the recovery of fees by the plaintiff under CCP §998(d) rather than the defendant under CCP §998(c), and the court noted that although federal procedural rules permitted recovery of costs by prevailing defendants, they did not do so with respect to plaintiffs (147 CA4th at 459); thus, it is possible that the outcome may be different for defendants' recovery of expert fees in FELA cases.

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§10.46B b. Contractual Provisions

There is a split of authority in the cases as to whether contractual provisions entitling the prevailing party "to reasonable attorney's fees and costs" allow the recovery of expert witness fees.

In *Bussey v Affleck* (1990) 225 CA3d 1162, 275 CR 646, the First District, Division Four, held that expert witness fees are part of the recoverable "costs" covered by such a clause. The thrust of the holding in *Bussey* was that such clauses reflect a desire to circumvent the ordinary statutory provision (CCP §1033.5(b)) that severely restricts recoverable "costs" and does not allow for the recovery of such items as attorney fees. The *Bussey* court reasoned that contractual recovery provisions are designed to make the prevailing party whole and that permitting recovery of attorney fees reflects an intent to allow recovery of related items such as expert fees.

The Third District refused to follow *Bussey,* however, in *Ripley v Pappadopoulos* (1994) 23 CA4th 1616, 28 CR2d 878. The court reasoned that, because expert witness fees are not recoverable as costs under CCP §1033.5(b), there is no reason to believe that private parties would intend their contractual provisions to include such costs absent some express indication. See *Carwash of Am.-PO LLC v Windswept Ventures No. I, LLC* (2002) 97 CA4th 540, 118 CR2d 536 (finding that weight of authority follows *Ripley* and not *Bussey*); *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (finding *Ripley* persuasive and declining to follow *Bussey*); *Cloud v Mikesell* (1999) 69 CA4th 1141, 82 CR2d 143 (following *Ripley*).

Most recently, in *Benson v Kwikset Corp.* (2007) 152 CA4th 1254, 62 CR3d 284, the Fourth District, Division Three, has joined *Ripley* and *First Nationwide Bank v Mountain Cascade, Inc.* (2000) 77 CA4th 871, 92 CR2d 145, stating: "Every subsequent published decision confronting the issue has criticized and rejected *Bussey*'s approach." 152 CA4th at 1280. *Benson* notes that some opinions approve recovery of expenses not authorized by §1033.5 when they are pled and proven as damages at trial, but not when they are sought by postjudgment motion. 152 CA4th at 1281. *Benson* concludes that *Bussey*'s holding that attorney fees can include expert witness fees conflicts with statutory language and a substantial body of case law fails to comport with the California Supreme Court's definition of attorney fees and its reasoning in *Davis v KGO-TV, Inc.* (1998) 17 C4th 436, 71 CR2d 452, and is "outright rejected" in the federal context by *Virginia Univ. Hosps. v Casey* (1991) 499 US 83, 113 L Ed 2d 68, 111 S Ct 1138, 152 CA4th 1283. Applying the plain language doctrine to the statutory language, *Benson* finds that the legislature clearly intended to allow recovery of attorney fees in private attorney general actions, but not fees explicitly barred by §1033.5, such as expert witness fees.

In *First Nationwide Bank,* the First District, Division Two, also rejected the holding in *Bussey*. The court found that costs and attorney fees are mutually exclusive, and that the prohibition on the award of expert fees contained in CCP §1033.5(b)(1) cannot be avoided by characterizing expert witness fees as an element of attorney fees. The court also found that the expert fees could not be awarded under a contractual provision providing for "necessary expenses" because the party requesting the fees had not (1) specifically pled and proven the contractual provision as a basis for a fee award and (2) did not otherwise notify the opposing party or trial court before the entry of judgment that the contractual theory would be relied on as a basis for such an award. See also *Hsu v Semiconductor Sys., Inc.* (2005) 126 CA4th 1330, 1341, 25 CR3d 82 (holding that attorney fees and expenses of litigation are mutually exclusive and that, although some authority indicates parties may contract to change definition of "costs" to include attorney fees, term's meaning is question of fact that must be pleaded and proven at trial).

First Nationwide Bank and *Hsu* appear to follow the approach of *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 492, 54 CR2d 888, which held that the prevailing party was entitled to recover litigation expenses because the contracts authorized recovery of all "costs, charges and expenses" and litigation expenses were pleaded and proven at trial under a procedure stipulated to by the parties. The court in *Arntz* found that whether litigation costs were recoverable when pleaded and proven at trial was expressly left for later resolution by *Ripley*. It also found no legislative intent to bind sophisticated parties to the generally accepted statutory definition of costs. This is in stark contrast to *Fairchild v Park* (2001) 90 CA4th 919, 929, 109 CR2d 442*,* which held that CCP §1033.5 precludes parties from adopting a broader definition of "costs" than that of CC §1717.

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§10.46C c. Arbitration Requests

When a party to an arbitration requests a trial de novo and fails to obtain a more favorable result, the costs collectible by the opposing party under CCP §1141.21 include expert witness fees incurred in the proceeding. *Boyd v Oscar Fisher Co.* (1989) 210 CA3d 368, 381, 258 CR 473.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.46D d. Statutory Provisions

§10.46D d. Statutory Provisions

Expert witness fees may be recoverable pursuant to statutory provision. See the following examples:

- **Code of Civil Procedure §1033.5.**
- In *Jensen v BMW of N. Am.* (1995) 35 CA4th 112, 137, 41 CR2d 295, the defendant argued that, under CCP §1033.5(a)(8) and (b)(1), expert witness fees are not allowable as costs except when expressly ordered by the court. On that basis, the trial court denied recovery. The appellate court reversed, finding that the legislative history of the Act disclosed that the word "expenses" was intended to include expert witness fees. 35 CA4th at 138.
- In *California Hous. Fin. Agency v E. R. Fairway Assoc. I* (1995) 37 CA4th 1508, 44 CR2d 591, the court of appeal affirmed a postjudgment award of expert witness fees to the California Housing Finance Agency and held that the limitations on the award of expert fees reflected in CCP §1033.5(b)(1) did not apply because of the express provisions of the Health and Safety Code. The CHFA had prevailed in an action to enforce compliance with a regulatory agreement and management contract, and the action was brought under the provisions of Health & S C §51205. Section 51205(f) of that code provides that "[n]otwithstanding any other provision of law, the prevailing party in any action instituted pursuant to this section shall be awarded costs and reasonable attorney's fees in an amount to be determined in the court's discretion." In construing this statute, the court of appeal reasoned that the introductory phrase "notwithstanding any other provision of law" evinced an express intent on the part of the legislature to exempt actions brought pursuant to the section from the more limiting provisions of CCP §1033.5. The court accordingly distinguished its earlier holding in *Ripley v Pappadopoulos* (1994) 23 CA4th 1616, 28 CR2d 878, and held that the trial court had the discretion to award expert witness fees to CHFA.
- **Civil Code §3333.**
- In *Stearman v Centex Homes* (2000) 78 CA4th 611, 92 CR2d 761, the court of appeal found that expert witness fees could be recoverable as damages in a construction defect case under CC §3333. See *Raven's Cove Townhomes, Inc. v Knuppe Dev. Co.* (1981) 114 CA3d 783, 171 CR 334. The court noted that tort damages awarded under §3333 in construction defect cases are intended to make the injured plaintiff whole. Plaintiffs were billed $37,500 by the experts who formulated the repair plan for the discovered defects; these investigatory expenses were recoverable damages, not nonrecoverable expert witness fees. See *El Escorial Owners' Ass'n v DLC Plastering, Inc.* (2007) 154 CA4th 1337, 1361, 65 CR3d 524 (following *Stearman*); *Regan Roofing Co. v Superior Court* (1994) 21 CA4th 1685, 27 CR2d 62.
- **Government Code §12965(b).**
- In *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 83 CR3d 306, the court considered the timeliness of a request for expert witness fees under Govt C §12965(b), which permits a court, in its discretion, to award expert witness fees to a prevailing party in a FEHA action. The defendant objected to the timeliness of the request for fees because the plaintiff filed the memorandum of costs outside the 15-day period required under Cal Rules of Ct 3.1700(a)(1). The trial court awarded the fees, and the court of appeal affirmed. The appellate court noted that while the expert fees were "costs," they were not among the costs allowable under CCP §1033.5, to which the 15-day limit applied. Because the expert fees fell outside of §1033.5, the 15-day time limit did not control. 166 CA4th at 1015. Rather, the longer statutory period for attorney fee motions (set forth in Cal Rules of Ct 3.1702 and requiring such a fee motion to be filed within the time to file a notice of appeal) applied. 166 CA4th at 1016. The court of appeal also rejected as baseless the argument that the trial court has no discretion to award fees under Govt C §12965(b) unless the expert was ordered by the court. 166 CA4th at 1017.

See also CC §1794(d) (part of the Song-Beverly Consumer Warranty Act (CC §§1790-1797.96)), which authorizes a prevailing consumer to recover "costs and expenses," but does not define which costs and expenses may be

recoverable.

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§10.47 II. EXPERT DISCOVERY IN CRIMINAL CASES

Civil discovery statutes do not apply to criminal cases. See *Clark v Superior Court* (1961) 190 CA2d 739, 12 CR 191 (court said legislature did not intend civil discovery provisions to apply to criminal cases). See also Pen C §1054(e) ("no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States").

NOTE: See discussion in §8.24 of possible constitutional problems with Pen C §1054(e).

In *People v Municipal Court (Runyan)* (1978) 20 C3d 523, 529, 143 CR 609, the California Supreme Court specifically rejected the argument that the defendant was entitled to take the deposition of witnesses in a criminal case, except under the narrow provisions of former Cal Const art I, §13 (now Cal Const art I, §15), as implemented by Pen C §§1335-1345 (defense or prosecution in criminal noncapital case may conditionally examine material witness who is sick, infirm, over age 65, a dependent adult, or about to leave state; defense or prosecution in case in which defendant is charged with serious felony may conditionally examine witness if there is evidence witness's life is in danger).

Discovery of information concerning experts in criminal cases is basically the same as discovery of information concerning other witnesses in criminal cases under the discovery rules prescribed in Pen C §§1054-1054.8, passed June 5, 1990, as part of Proposition 115. Discovery is reciprocal under Cal Const art I, §30(c), also passed as part of Proposition 115.

The prosecutor must disclose the names and addresses of persons he or she intends to call as witnesses at trial; any relevant written or recorded statements by persons intended to be called as witnesses, or reports of their statements; and the results of any physical or mental examinations, scientific tests, experiments, or comparisons intended to be introduced in evidence. Pen C §1054.1.

The defense is required by Pen C §1054.3 to disclose the same information as the prosecution (except that the defense does not have to disclose whether the defendant will testify). In addition, when the defense intends to place the defendant's mental state in issue through the testimony of a mental health expert, the prosecution can request that the court order the defendant to submit to an examination by a prosecution-retained mental health expert. Pen C §1054.3(b).

For further discussion of discovery in criminal cases, see §8.24. See generally California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual).

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III. FEDERAL RULES OF EVIDENCE

A. Discovery Concerning Experts

§10.48 1. Federal Rules of Civil Procedure 26

In 1970, the federal rules were amended to specify a procedure for discovering facts known and opinions held by experts that were acquired or developed in anticipation of litigation or for trial. Fed R Civ P 26(b)(4). See, *e.g., Ager v Jane C. Stormont Hosp. & Training Sch. for Nurses* (10th Cir 1980) 622 F2d 496, 501. See generally 8 Wright, Miller, & Marcus, Federal Practice and Procedure §2029 (2d ed 1994). The 1970 amendments to Rule 26(b)(4) subdivided experts into four categories for purposes of discovery:

- Experts that a party expects to use as witnesses at trial (Fed R Civ P 26(b)(4)(A); see §§10.49-10.51);
- Experts retained or specially employed in anticipation of litigation or preparation for trial who are not expected to testify (Fed R Civ P 26(b)(4)(B); see §§10.52-10.53);
- Experts informally consulted in preparation for trial but not formally retained (Advisory Committee Notes to Fed R Civ P 26; see §10.54); and
- Experts whose information was not acquired in preparation for trial (see §10.56).

Rule 26(a) provides for three types of self-executing disclosure:

- Initial disclosure (Fed R Civ P 26(a)(1));
- Expert disclosure (Fed R Civ P 26(a)(2)); and
- Pretrial disclosure (Fed R Civ P 26(a)(3)).

Rule 26(b) sets forth the scope and limitations of discovery.

Under Rule 26, parties are *required* to disclose to other parties the identity of any expert witnesses to be used at trial to present evidence under Fed R Evid 702-703 or 705. Fed R Civ P 26(a)(2)(A).

PRACTICE TIP: Counsel should be aware that the disclosure provisions of Rule 26(a)(2)(A) are independent and exclusive. Disclosing the identity of a witness under Rule 26(a)(1)(A) (pertaining to witnesses with "discoverable information") does not meet the requirements of Rule 26(a)(2)(A) (pertaining to expert disclosures). *Musser v Gentiva Health Servs.* (7th Cir 2004) 356 F3d 751. Counsel also must be mindful that Rule 26(a)(2)(A) requires disclosure of any witness who will offer expert testimony. This requirement extends to retained or nonretained experts. The distinction between retained and non-retained experts in Rule 26(a)(2)(B) relates only to who must file a report with the disclosure, not to who must be disclosed. See *Everingham Bros. Bait Co. v Williams* (SD Cal, May 13, 2008, No. 06-cv-2708-L (POR)) 2008 US Dist Lexis 39287 (court struck attempted late disclosure of nonretained experts who would testify and imposed sanctions for abuse of discovery process).

The timing of the required disclosure under Fed R Civ P 26(a)(2) is set by court order or stipulation of the parties. If there is no such order or stipulation, the disclosures must be made at least 90 days before the trial date or the date the case is to be ready for trial or within 30 days after disclosure made by the other party if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by the party in that party's required disclosure. Fed R Civ P 26(a)(2)(C).

When a witness is retained or specially employed to provide expert testimony or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure must be accompanied by a written report prepared and signed by the witness. The report must contain (Fed R Civ P 26(a)(2)(B)):

(1) A complete statement of all opinions to be expressed and the basis and reasons for the opinions;

(2) The data or other information the witness considered in forming the opinions;

(3) Any exhibits to be used as a summary of or support for the opinions;

(4) The qualifications of the witness, including a list of all publications written by the witness within the preceding 10 years;

(5) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years; and

(6) The compensation to be paid for the study and testimony.

NOTE: In comparison to Rule 26(a)(2)'s requirements for expert disclosure, which apply in civil cases, neither side has a general right to discover the other's evidence in criminal cases except that a criminal defendant is entitled to request and obtain certain specific types of evidence from the prosecution. The counterpart of Rule 26(a)(2) in criminal cases, Fed R Crim P 16(b), provides that if a defendant requests and receives a written summary of any expert testimony the government intends to introduce, the defendant must provide similar notice of any expert testimony he or she intends to use. However, these written summaries fall far short of the "complete statement" required of litigants in civil cases. See *U.S. v Mehta* (D Mass 2002) 236 F Supp 2d 150, 155. See also *U.S. v Nacchio* (10th Cir 2008) 519 F3d 1140, 1152, aff'd in part and vacated in part (10th Cir 2009) 555 F3d 1234.

In *Smith v State Farm Fire & Cas. Co.* (SD WV 1995) 164 FRD 49, the court held that any witness who testifies under Fed R Evid 702 and receives different consideration than the standard statutory witness fee ($40 per day) is a retained expert who must file a written expert report. Also, the court held that a written expert report must do more than incorporate by reference plaintiffs' answers to interrogatories. See also §10.49A (treating physicians must submit written reports if their testimony goes beyond the scope of treatment).

Under Rule 26(b)(4)(A), a party may depose any person who has been identified as an expert whose opinions may be presented at trial. The deposition may not take place, however, until after the report required by Rule 26(a)(2)(B). Under Fed R Civ P 26(e)(1), a party must disclose any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report required by Rule 26(a)(2)(B) or in testimony given at a deposition. According to the Notes of the Advisory Committee on the 1993 Amendments to the Rules, because depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the depositions of those experts should be reduced, and in many cases the report may eliminate the need for a deposition.

An expert's testimony must, as faithfully as possible, track the substance of the report provided under Rule 26. Unjustified deviation can result in the exclusion of the expert's opinion. See *Coastal Fuels v Caribbean Petroleum Corp.* (1st Cir 1999) 175 F3d 18, 34; *Licciardi v TIG Ins. Group* (1st Cir 1998) 140 F3d 357, 364. A similar admonishment follows for attempts at supplementation under Rule 26(e)(1). That rule is intended to provide for correction of errors, not a remaking or reworking of an expert's original opinion so as to comply with the requirements of Rule 26(a)(2)(B). *Sharpe v U.S.* (ED Va 2005) 230 FRD 452, 462 (rejecting motion to supplement to attempt to remedy expert's initial inadequate review).

Federal Rule of Civil Procedure 26(b)(5) requires a party to notify other parties if the party is withholding materials otherwise subject to disclosure or discovery because the party is asserting a claim of privilege or work product protection. The party must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 26 does not necessarily provide litigants with any expert witness information that is beyond the purview of the former federal discovery procedures. What the revisions do, however, is make the information available in every case, on a different timetable, and in a changed format. See Koski, *Mandatory Disclosure*, ABA J 85 (Feb. 1994). See also Keyte, *A Risk-Averse Guide for Working with Non-Testifying Consultants or Experts*, 17 Antitrust 30 (Spring 2003) (offering practical tips for maximizing protection for testifying expert and minimizing risk of opening up nontestifying expert to discovery).

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§10.48A 2. Draft Experts' Reports

Experts frequently prepare written reports while their thinking is still in the formative stages or before all the facts are known. Thereafter, something may develop that requires modification or a shift in emphasis by the expert. Several courts have held that draft reports prepared by testifying experts are discoverable under Fed R Civ P 26(a)(2)(B). See *e.g., Trigon Ins. Co. v U.S.* (ED Va 2001) 204 FRD 277, 88 AFTR2d 6883; *W. R. Grace & Co. v Zotos Int'l, Inc.* (WD NY 2000) 2000 US Dist Lexis 18096; *B.C.F. Oil Ref., Inc. v Consolidated Edison Co.* (SD NY 1997) 171 FRD 57. See also Joseph, *Expert Spoliation*, 25 Nat'l LJ B7 (Feb. 3, 2003) (summarizing *Trigon* and other cases dealing with production of draft reports).

The opposition can use the draft reports to show that the expert testimony at trial varied from the drafts, potentially undermining an expert's credibility. See *EEOC v United Parcel Servs.* (ND Cal 2000) 149 F Supp 2d 1115.

PRACTICE TIP: Counsel should advise experts that, because their drafts must be disclosed during discovery, they should report orally and not prepare written reports until discovery is complete and counsel requests such reports. See §8.22. Experts should not, however, be advised to destroy drafts to prevent them from being disclosed; intentional destruction of drafts is sanctionable.

See *W. R. Grace & Co. v Zotos Int'l, Inc., supra* (attorney told expert to get "rid" of drafts in his possession when his final report was filed); see also Schenkier, *The Limits of Privilege in Communications with Experts*, 33 Litigation 16 (Winter 2007); Joseph, *Rule Traps*, 30 Litigation 6 (Fall 2003); Solovy & Byman, *Discovery: Do You Feel a Draft?* 25 Nat'l L J 38 (June 9, 2003).

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§10.48B 3. Case-Specific Disclosure Requirements

The courts have authority to shape the scope and the timing of the disclosure requirements. See *Sylla-Sawdon v Uniroyal Goodrich Tire Co.* (8th Cir 1995) 47 F3d 277, 284. The courts also have that authority under Fed R Civ P 26(a)(2)(B) and (C). Thus, counsel must be careful to comply both with the Rule 26 provisions and with any case-specific disclosure requirements set out by the court. If a party does not comply with disclosure requirements in a court's order, the court may restrict or exclude expert witness testimony. The court in *Sylla-Sawdon* restricted the plaintiff's expert's testimony to the matters the expert had disclosed in a very brief affidavit, and based on those limited facts, *Sylla-Sawdon* was not able to qualify the expert as an expert witness. 47 F3d at 283.

EXAMPLE: In the silicone breast implant litigation, Judge Pointer of the Judicial Panel for Multidistrict Litigation issued a series of orders that set out different procedures and timetables for disclosure by each of several categories of experts. See, *e.g., In re Silicone Gel Breast Implants Prods. Liab. Litig.,* MDL No. 926. The cases were later remanded back to the local district courts, including the district court of Nebraska. Some of the Nebraska plaintiffs violated Judge Pointer's orders as well as the Nebraska court's orders by missing deadlines and submitting written expert reports that were incomplete or unsigned. Under Fed R Civ P 37, the Nebraska court imposed monetary sanctions, restricted the testimony of some of plaintiffs' experts to issues set out in those expert's reports, and excluded some of plaintiffs' experts altogether.

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4. Experts Who Will Testify

§10.49 a. Identifying Expert Trial Witnesses

Under Fed R Civ Proc 26(a)(2), a party must disclose the identity of any person who may be used at trial to present evidence under Fed R Evid 702, 703, or 705. For experts retained to give testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure must be accompanied by a written report setting out the opinions the expert will express and their basis, the expert's qualifications, and a list of other cases in which the expert has testified in the last 4 years. Fed R Civ P 26(a)(2)(B). See Martinez & Arlyn-Pessin, *Undesignated Hitters*, 26 Los Angeles Lawyer 28 (Feb. 2004) (dealing with disclosure issues involving employee experts).

The 2000 amendment to Rule 701, which precludes lay opinion that is based on "scientific, technical, or other specialized knowledge," greatly complicated the task of determining not only who must be disclosed under Rules 702, 703, and 705, but also, particularly regarding percipient witnesses who arguably have "scientific, technical, or other specialized knowledge," which portions of the testimony must be included in the required written report setting out the opinions the expert will express and the basis for those opinions. Unfortunately, the reported cases do not provide needed guidance, so the cautious practitioner is either going to have to "overdisclose," which may involve enormous expense or, preferably, work with the other parties in the case to come up with an agreed stipulation (subject, of course, to the court's approval) of what will and will not constitute permissible lay opinion for purposes of that case. See *Indemnity Ins. Co. v American Eurocopter LLC* (MD NC 2005) 227 FRD 421, 423 (wrestling with issue of lay opinion versus expert opinion for individuals who were current or former employees of defendant).

Unlike California practice (see CCP §2030.060(g)), the federal rules require a party who has made a disclosure under Rule 26(a) or responded to a discovery request to supplement or correct the disclosure if the party learns that the disclosed information is incomplete or incorrect in a material respect and the correct information has not been communicated to the other parties during discovery or in writing. Fed R Civ P 26(e).

Smith v Ford Motor Co. (10th Cir 1980) 626 F2d 784 illustrates the importance of full compliance with Rule 26(e). In that case, judgment for the plaintiff in a products liability suit was reversed because the plaintiff filed supplemental interrogatory answers disclosing an intention to call a doctor to "testify as to his medical treatment of the Plaintiff, as well as to his prognosis" (626 F2d at 788), but did not reveal that the doctor would also testify that the plaintiff's injuries were caused by defective seat belts in plaintiff's car. 626 F2d at 798. The court of appeals reversed the case and remanded it to the trial court because the trial judge exceeded the wide discretion accorded him in the discovery and pretrial areas by allowing the testimony. The court of appeals thoroughly analyzed a variety of factors including prejudice, ability to cure, and bad faith, and concluded that Ford's counsel was prejudiced by the surprise testimony. The available remedies (including a brief continuance of the trial) were inadequate, even though there was no showing of bad faith or willfulness on the part of the plaintiff.

For other examples of reversals of judgments due to a party's failure to properly supplement interrogatory responses dealing with expert witnesses, see *Shelak v White Motor Co.* (5th Cir 1978) 581 F2d 1155; *Holiday Inns, Inc. v Robertshaw Controls Co.* (7th Cir 1977) 560 F2d 856.

There are cases, however, in which a Rule 26 error was not considered prejudicial enough to cause a reversal. See, *e.g., Phil Crowley Steel Corp. v Macomber, Inc.* (8th Cir 1979) 601 F2d 342 (court of appeals affirmed finding that prevailing party's failure to fully supplement interrogatory responses dealing with expert witnesses did not unduly prejudice opposition).

See generally 8 Wright, Miller, & Marcus, Federal Practice and Procedure §§2048-2050 (2d ed 1994).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.49A b. Disclosures About Treating Physicians

§10.49A b. Disclosures About Treating Physicians

Under the initial disclosure requirements of Fed R Civ P 26(a)(1)(A)(i), a party must disclose information regarding each "individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." In a case involving medical issues, this provision would require disclosure of information on a party's treating physician in the same fashion as would be true of other testifying experts. This information would include documents, including limited personal financial information, relating to the physician's credibility. *Behler v Hanlon* (D Md 2001) 199 FRD 553 (detailing permissible scope of discovery as to financial information on treating physician expert). However, the courts have found it difficult to define when a treating physician must submit a written expert report under Fed R Civ P 26(a)(2)(B). The notes of the Advisory Committee to the 1993 Amendments to Fed R Civ P 26 merely provide that a treating physician can "be deposed or testify at trial without any requirement of a written report."

A treating physician must submit a written expert report if his or her testimony goes beyond the scope of the treatment. *Brandon v Village of Maywood* (ND Ill 2001) 179 F Supp 2d 847. In *Hall v Nationwide Mut. Ins. Co.* (ED V 1995) 164 FRD 46, the defendant argued that plaintiff's treating physician was required to submit a written expert report merely because he had been paid to testify. The court disagreed, finding that a treating physician must submit a written expert report only if he or she "is specially retained or employed to render a medical opinion based on factors that were not learned in the course of treatment of the patient." 164 FRD at 48. See *Sullivan v Glock, Inc.* (D Md 1997) 175 FRD 497 (report not necessary when physician's testimony is limited to facts learned in care and treatment).

Another case provides just such an example. *Zarecki v National R.R. Passenger Corp.* (ND Ill 1996) 914 F Supp 1566. In *Zarecki*, the court found that the testimony of plaintiff's treating physician (914 F Supp at 1573)

> goes far beyond any personal observations that he might have made during the course of treating Zarecki; instead he purports to offer conclusions as to the ultimate cause of Zarecki's [injury] and the foreseeability of Zarecki's injuries based on the work conditions at [defendant's place of business].

The court held that plaintiff's treating physician should have submitted a written expert report and therefore excluded his testimony. See *Kirkham v Société Air France* (D DC 2006) 236 FRD 9, 12 (summarizing information and issues to be evaluated in determining whether treating physician will be offering expert testimony).

There is a split of authority about whether a treating physician who testifies as to causation must submit a written expert report. The *Zarecki* court noted that the Seventh Circuit does "not distinguish the treating physician from other experts when the treating physician is offering expert testimony regarding causation." 914 F Supp at 1573 (citing *O'Conner v Commonwealth Edison Co.* (7th Cir 1994) 13 F3d 1090, 1105 n14). For other cases on the side of the split prohibiting treating physicians from testifying on causation if they do not provide an expert report, see, *e.g., Thomas v Consolidated Rail Corp.* (D Mass 1996) 169 FRD 1; *Widhelm v Wal-Mart Stores, Inc.* (D Neb 1995) 162 FRD 591.

In contrast, a district court in Alabama noted that "courts have routinely held that because a treating physician considers not just the plaintiff's diagnosis and prognosis, but also the cause of the plaintiff's injuries, opinions as to the cause of injuries do not require a written report if based on [the physician's] examination or treatment of the patient." *Brown v Best Foods* (ND Ala 1996) 169 FRD 385, 388 (denying defendant's motion to exclude plaintiff's treating physician). On this side of the split, see, *e.g., Seifert v U.S.* (ED Cal, Dec. 14, 2005, No. CIV-S-04-0553 DFL GGH) 2005 US Dist Lexis 33088 (finding uncertainty on issue "surprising" and holding that treating physician called on to give expert testimony on causation is not required to prepare report); *Martin v CSX Transp., Inc.* (SD Ind 2003) 215 FRD 554, 556 (recognizing split and finding that, under circumstances presented, treating physician's opinion testimony on causation should be permitted without written report); *McCloughan v City of Springfield* (CD Ill 2002) 208 FRD 236, 240 (following "majority rule" and finding that treating physicians may offer opinion testimony on causation, diagnosis, and prognosis without prerequisite of providing written report); *Shapardon v West Beach Estates* (D Haw 1997) 172 FRD 415, 416 (treating physician may testify about cause of injury based on his opinion on examination and treatment of patient without submitting written report).

PRACTICE TIP: Given this split of authority, the safest course (though perhaps not the most cost-efficient) is for counsel seeking to elicit trial testimony from a treating physician that strays from the core of that treatment to produce an expert report. *Martin v CSX Transp., Inc.* (SD Ind 2003) 215 FRD 554, 557 n3.

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§10.49B c. Designation of Additional Expert Witnesses

When the parties have designated their expert witnesses under Fed R Civ P 26(a)(2), they are entitled to supplement their responses under Fed R Civ P 26(e). However, when a party seeks to call a witness who was not included on a pretrial witness list, the party may not be permitted to call the witness. *Price v Seydel* (9th Cir 1992) 961 F2d 1470, 1474. Under Fed R Civ P 16, federal judges are allowed to "customize" the procedures to be followed in any given case and, not infrequently, courts order that experts, or subclasses of experts, be disclosed independent of the procedure set forth in Rule 26.

When a scheduling order sets deadlines for submitting supplemental expert reports, those deadlines supplant the operative Federal Rules. However, when the scheduling order is silent on supplemental disclosures, the supplemental disclosure must be made consistent with the deadlines for pretrial expert disclosure set forth in Fed R Civ P 26(a)(3)(B) (30 days before trial). Failure to comply with the controlling disclosure deadlines may result in the exclusion of the supplemental testimony. See *Luma Corp. v Stryker Corp.* (SD W Va 2005) 226 FRD 536, 542; *Akeva LLC v Mizuno Corp.* (MD NC 2002) 212 FRD 306; *Tucker v Ohtsu Tire & Rubber Co.* (D Md 1999) 49 F Supp 2d 456.

In *Price v Seydel* (9th Cir 1992) 961 F2d 1470, 1474*,* the Ninth Circuit enunciated four factors to consider in determining whether a party should be allowed to designate additional experts when disclosure has not occurred in accordance with Rule 26:

(1) The prejudice to the party against whom the supplemental expert witness would testify;

(2) The ability of that party to cure the prejudice (through a counterdesignation of a supplemental expert or otherwise);

(3) The extent to which the relief sought would disrupt the orderly and efficient trial of the case (or of other cases in the court); and

(4) The moving party's bad faith (if any) or willfulness in failing to comply with the court's previous order.

A party seeking to designate an additional expert under this procedure should seek leave to supplement as soon as the need for additional expert testimony becomes apparent and should be prepared to demonstrate why surprise, changed circumstances, or other factors warrant supplementation, as well as why the additional expert was not disclosed at the time the original disclosure took place.

Under Rule 26(a)(2)(C), a rebuttal expert's report, in the absence of court-established deadlines, must be disclosed within 30 days of the disclosure of the evidence to which it pertains. Compliance with this deadline cannot be circumvented by characterizing a rebuttal expert as "supplemental." If it is apparent from an expert's report that his or her testimony is primarily directed to contradicting a disclosed expert, then that newly disclosed expert is a rebuttal expert notwithstanding that the expert intends to rely on new material developed after the original expert disclosure. *Equant Integrations Servs., Inc. v United Rentals Inc.* (D Conn 2003) 217 FRD 113.

PRACTICE TIP: Counsel should play close heed to the resolution in *Equant*. If the principal purpose of an expert's report is to contradict the testimony of a previously disclosed expert, counsel should meet the 30-day disclosure period in Rule 26(a)(2)(C).

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§10.50 d. Withdrawal of Designated Expert Witnesses

The absence of a federal counterpart to CCP §§2034.010-2034.730 has resulted in conflict in the reported decisions concerning the right of one party to call an expert who has been both consulted and disclosed by another party, but who is not called as a witness at trial by the consulting party. See Note, *Must the Show Go On? Defining When One Party May Call or Compel an Opposing Party's Consultative Expert to Testify* (1994) 78 Minn L Rev 1191, 1199.

A particularly thoughtful discussion of the question is found in *Rubel v Eli Lilly & Co.* (SD NY 1995) 160 FRD 458. The court there notes that there are multiple, and sometimes conflicting, considerations that must be taken into account, for example:

- "[T]he desire for all probative information in service of the overall search for truth…." 160 FRD at 459.
- The interest in allowing counsel to obtain expert advice and evaluate their clients' positions without fear that every consultation with an expert will yield grist for the adversary's mill. 160 FRD at 460.
- The inequity of allowing one party to benefit from the effort and expense incurred by the other in preparing its case. 160 FRD at 460.
- The chilling effect on the willingness of experts to serve as consultants if their testimony could be compelled by other parties. 160 FRD at 460.
- The risk of very substantial prejudice stemming from the fact of the expert's prior retention by the other party. 160 FRD at 460.

Applying these factors, the *Rubel* court noted that the defendant, who had initially retained the expert, had permitted the plaintiff to depose the expert without objection. Although this fact would otherwise weigh heavily in favor of permitting the plaintiff to call the expert as a witness at trial, the court found that the expert's testimony would offer nothing unique or novel, but would be merely cumulative. Under these circumstances, the court held that the potentially "explosive" impact of testimony on behalf of plaintiff from an expert initially retained by the defendant justified an order prohibiting the plaintiff from calling the expert as a witness at trial.

In a slight variation on the *Rubel* fact pattern, the district court in *Penn Nat'l Ins. Co. v HNI Corp.* (MD Pa 2007) 245 FRD 190 permitted the defendant to elicit testimony at trial from three expert witnesses designated by plaintiffs, but whom plaintiffs indicated they would not call at trial. The court held that once an expert has been designated and has submitted a report, other parties are entitled to take that expert's deposition under Fed R Civ P 26(b)(4)(A). Without a designation, however, the expert could be deposed only on a showing of exceptional circumstances under Rule 26(b)(4)(B).

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§10.51 e. Depositions of Trial Experts

Under Fed R Civ P 26, a party may depose any designated expert whose opinions may be presented at trial. Fed R Civ P 26(b)(4)(A). If a report from the expert is required under Rule 26(a)(2)(B), the expert cannot be deposed until after the report is provided. Fed R Civ P 26(b)(4)(B). The disclosure requirement of Rule 26(a)(2)(B) extends to draft reports from testifying experts and correspondence related to those reports, as well as any other data or information "considered" or "reviewed" by the expert in forming an opinion. See *Employees Committed for Justice v Eastman Kodak Co.* (WD NY 2008) 251 FRD 101, 104; *Colindres v Quietflex Mfg.* (SD Tex 2005) 228 FRD 567, 570; *Indemnity Ins. Co. v American Eurocopter LLC* (MD NC 2005) 227 FRD 421; *J.B. ex rel Palmer v ASARCO, Inc.* (ND Okla 2004) 225 FRD 258, 261 (nonparty medical information considered by expert may be subject to disclosure when information is relevant to expert's opinion and disclosure does not infringe privacy rights); *Trigon Ins. Co. v U.S.* (ED Va 2001) 204 FRD 277, 88 AFTR2d 6883; *W. R. Grace & Co. v Zotos Int'l, Inc.* (WD NY 2000) 2000 US Dist Lexis 18096; *B.C.F. Oil Ref., Inc. v Consolidated Edison Co.* (SD NY 1997) 171 FRD 57; Joseph, *Expert Spoliation*, 25 Nat'l LJ B7 (Feb. 3, 2003) (summarizing *Trigon* and other cases dealing with production of draft reports).

PRACTICE TIP: As is true under California law, designation of a previously retained consultant as a trial expert on a subject that relates to his or her prior retention as a consultant presents certain risks. Experts who have served as consultants cannot necessarily immunize their prior work from disclosure, particularly when there is a plausible relationship between the prior work and the opinions to be offered. Unless a clear line can be drawn between the consulting and the trial testimony, courts are likely to favor disclosure—at least in some fashion—of the substance of the prior work. See *Euclid Chem. Co. v Vector Corrosion Technol., Inc.* (ND Ohio, May 29, 2007, No. 1:05 CV 80) 2007 US Dist Lexis 38720, *16; *SEC v Reyes* (ND Cal, Mar. 30, 2007, No. C 06-04435 CRB) 2007 US Dist Lexis 27767, *6.

In practice, counsel routinely stipulate that all trial experts are to be deposed and are to produce their written reports, rather than use the formal notice procedure authorized by Fed R Civ P 26(b)(4)(A). See, *e.g., Hockley v Zent, Inc.* (MD Pa 1980) 89 FRD 26, 31 n11; *Hubbard v Rubbermaid, Inc.* (D MD 1979) 28 Fed R Serv 2d 896, 899; *Pearl Brewing Co. v Joseph Schlitz Brewing Co.* (SD Tex 1976) 415 F Supp 1122, 1134.

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5. Discovery of Opinions of Nontestifying Experts

a. Retained or Specially Employed Experts

§10.52 (1) Discoverable on Showing of Exceptional Circumstances

The Federal Rules of Civil Procedure set out a separate process for discovering the identity and learning the opinions of experts who have been retained or specially employed and who are not expected to be called as witnesses at trial. Under Fed R Civ P 26(b)(4)(B), facts known or opinions held by such experts are discoverable only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. See, *e.g., Marsh v Jackson* (WD Va 1992) 141 FRD 431.

Neither Rule 26(b)(4)(B) nor the accompanying Advisory Committee Notes explain what is necessary to constitute exceptional circumstances. However, Professor Albert Sacks, reporter to the committee, has suggested that such circumstances include those in which one party has had the opportunity to conduct experiments or tests concerning an item or piece of equipment that is no longer available, or in which the number of experts in a field is small and those available have already been retained by other parties in the case. See, *e.g., Lewis v United Air Lines Transp. Corp.* (WD Pa 1940) 32 F Supp 21.

The courts are divided on whether the exceptional circumstances requirement applies only when a party seeks to discover facts known or opinions held by a retained or specially employed expert (*e.g., In re Folding Carton Antitrust Litig.* (ND Ill 1979) 83 FRD 256), or whether exceptional circumstances must be shown to discover even the identity of such an expert (*e.g., Guilloz v Falmouth Hosp. Ass'n* (D Mass 1976) 21 Fed R Serv 2d 1367; *Perry v W. S. Darley & Co.* (ED Wis 1971) 54 FRD 278; see also Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 Mich L Rev 513 (1982)).

These conflicting lines of cases were considered by the Tenth Circuit Court of Appeals in *Ager v Jane C. Stormont Hosp. & Training Sch. for Nurses* (10th Cir 1980) 622 F2d 496, 503. The court concluded, after carefully analyzing the Advisory Committee Notes to Rule 26, that exceptional circumstances must be demonstrated to ascertain either the identity of or other collateral information concerning a retained or specially employed expert who is not expected to be called as a witness at trial. Cases following *Ager* include *In re Pizza Time Theatre Sec. Litig.* (ND Cal 1986) 113 FRD 94 (following *Ager,* court held that identities of nontestifying experts should be subject to same standard as discovery of their opinions, *i.e.,* that of "exceptional circumstances"); *Hermsdorfer v American Motors Corp.* (WD NY 1982) 96 FRD 13 (counsel attempted to circumvent Rule 26(b)(4)(B) by arguing that defendant's experts were retained to assist in product development, not in anticipation of litigation or preparation for trial; court rejected this argument, saying experts might also have been retained in anticipation of litigation or preparation for trial).

Unfortunately, the *Ager* decision does not provide counsel with any guidance on how to learn enough about a retained or specially employed expert to establish that there are exceptional circumstances justifying revelation of his or her name and knowledge. This information can be obtained, however, through interrogatories worded as follows:

(1) Have you retained or specially employed any experts in anticipation of litigation whom you do not expect to call at trial?

(2) If yes, please describe the types of experts retained (*i.e.,* their fields of expertise) and the nature of the services that they performed in anticipation of litigation or preparation for trial.

Interrogatories drafted in this manner avoid the *Ager* court proscription against seeking the specially retained expert's identity absent a showing of exceptional circumstances, and also manage to avoid offending the express prohibition of Fed R Civ P 26(b)(4)(B) against seeking facts known or opinions held by a specially retained expert absent a showing of exceptional circumstances. On the other hand, such questions elicit the information necessary to satisfy the exceptional circumstances hypotheticals proposed by Professor Sacks in Underwood, A Guide to Federal Discovery

Rules §1.04(e) (2d ed ALI-ABA 1985). See *In re Welding Fume Prods. Liab. Litig.* (ND Ohio 2008) 534 F Supp 2d 761 (finding that case law favored view that identifying information regarding nontestifying experts could be obtained through properly framed interrogatory without any exceptional circumstances; however, in this case, requisite exceptional circumstances existed in that nondisclosed experts might be authors of certain "learned treatises" on which defendant intended to rely and allowing discovery of names would permit plaintiffs to discover possible sources of bias).

PRACTICE TIP: If a consultant renders an opinion that is not discoverable, shares that opinion with an expert who testifies at trial, and the trial expert concedes that he or she relied in part on the consultant's report, the consultant's report and opinion may then become subject to cross-examination. See, *e.g., Lewis v Rego Co.* (3d Cir 1985) 757 F2d 66, 74 (cross-examination concerning conversations between consultant and trial expert should have been permitted).

For further discussion of retained or specially employed experts, see *Discovery of the Nontestifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 Hastings LJ 201 (1985); Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 Mich L Rev 513, 523 (1982); Pielemeirer, *Discovery of Non-Testifying "In-House" Expert Under Federal Rule of Civil Procedure 26*, 58 Ind LJ 597 (1983).

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§10.53 (2) What Constitutes "Exceptional Circumstances"

Most courts have interpreted the "exceptional circumstances" requirement for discovering the identity and learning the opinions of nontestifying experts who have been retained or specially employed as meaning an inability to obtain equivalent information from other sources. *In re Shell Oil Refinery* (ED La 1990) 132 FRD 437, 442 (and cases cited therein).

In particular, cost alone has generally been found insufficient to satisfy the requirement. For example, in *Shell Oil Refinery* the plaintiffs' expert opined that it would cost from $230,000 to $315,000 to duplicate tests performed by Shell employees, whom the court concluded were retained or specially employed in preparation for trial. The court held that, because the plaintiffs were capable of duplicating those tests, cost alone did not constitute "exceptional circumstances."

One court ruled that "exceptional circumstances" were present when both the plaintiff and the defendants had been provided with tissue samples from plaintiff's decedent. In *Coates v AC&S, Inc.* (ED La 1990) 133 FRD 109, both sides sent the samples to multiple experts in an effort to ascertain whether the death was due, as plaintiffs alleged, to mesothelioma. The court ordered the parties to disclose the identity of all doctors to whom the samples had been sent, regardless of whether the doctors would be called as witnesses at trial or not. The court justified this order as being needed to prevent "shopping" of the samples and on the ground that examination of tissue samples from a deceased person was sufficiently analogous to an independent medical examination to entitle all parties to the type of discovery permitted in the independent medical examination arena.

The defendants protested that sending samples to more than one doctor was reflective not of "shopping" but of the difficulty of rendering a definitive diagnosis of mesothelioma. The court rejected this argument, stating: "The reality of the situation is that if a number of other experts have been consulted herein, but who could not make a definitive diagnosis, and these experts are not called as witnesses, then the jury could be misled regarding the truth of plaintiff's condition." The court failed to explain how this differs from any other situation in which a party has consulted multiple experts before finding one who would offer an opinion favorable to that party's position. It is, in short, difficult to reconcile the *Coates* decision with the underlying philosophy for the work product rule.

In *Pearl Brewing Co. v Joseph Schlitz Brewing Co.* (SD Tex 1976) 415 F Supp 1122, plaintiff's experts, who were not expected to testify at trial, had created a complicated computer program concerning beer marketing. Another plaintiff's expert, who was expected to be called at trial, based his conclusions on this program. The defendant protested that its expert would be unable to understand the program without an explanation of certain undefined short-hand codes. The court granted discovery as to the code explanations only, emphasizing that the defendant was not trying to use the plaintiff's efforts to establish its own case but was, rather, only attempting to expedite analysis of the proffered testimony of the plaintiff's experts.

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§10.54 b. Informally Consulted Experts

Although not mentioned in Fed R Civ P 26(b)(4), a separate category of informally consulted but not expressly retained or specially employed experts is recognized in the Advisory Committee Notes to Rule 26:

> Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed.

Neither the identities nor the opinions of informally consulted experts are discoverable, even if exceptional circumstances exist. See *Ager v Jane C. Stormont Hosp. & Training Sch. for Nurses* (10th Cir 1980) 622 F2d 496, 501. See also *Kuster v Harner* (D Minn 1986) 109 FRD 372. Relying on *Ager,* the presiding United States Magistrate in *Kuster* explained that the restriction in Fed R Civ P 26(b)(4)(B) on discovery of nontestifying experts constitutes a specific limitation on the general rule of discovery found in Fed R Civ P 26(b)(1). As a result, the magistrate denied a motion to compel a response to an interrogatory seeking the identity of all persons consulted or retained in anticipation of litigation or preparation for trial who were *not* expected to be called as trial witnesses.

NOTE: *Kuster* also includes an especially insightful analysis of the discussion in the Advisory Committee Note to the 1970 Amendment to Rule 26 on discovery of the identity of persons who will not testify.

Based on *Ager,* the task confronting an opposing party is to confirm whether an expert who is purportedly of the informally consulted variety does, in fact, fall within that category. The decision in *Ager* enumerated several factors that should be considered in determining whether a given expert was informally consulted, or retained or specially employed:

- The manner in which the consultation was initiated.
- The nature, type and extent of information or material provided to, or determined by, the expert in connection with his or her review.
- The duration and intensity of the consultative relationship.
- The terms of the consultation, if any (*e.g.,* payment, confidentiality of test data or opinions).

In *Inspiration Consol. Copper Co. v Lumbermen's Mut. Cas. Co.* (SD NY 1973) 60 FRD 205, the court was confronted with the task of determining the discoverability of opinions held by an accountant who had performed three separate functions: (1) regular auditor for one of the parties; (2) a consultant with respect to one aspect of a complex, interrelated case; and (3) a trial witness concerning another aspect of the dispute.

All concerned conceded that the information acquired in the lattermost category was discoverable. The court held that the second category of information fell within general work product protection and was discoverable only on a showing of exceptional circumstances. The first category was found not to enjoy any work product protection whatsoever and was subject only to the relevancy standards that govern discovery generally. 60 FRD at 209. See also *In re Shell Oil Refinery* (ED La 1990) 134 FRD 148 (limiting discovery to opinions formulated by employee-experts in their preparation for trial testimony and foreclosing discovery about their opinions formulated as members of defendant's postaccident investigation team).

An even more complex separation task arose in two personal injury cases, in which the same expert demonstrated a remarkable penchant for switching sides. In *Barkwell v Sturm Ruger Co.* (D Ala 1978) 79 FRD 444, the plaintiff claimed that there were defects in the safety of a gun manufactured by the defendant. The defendant hired a consultant who had testified for the plaintiff's lawyer in previous gun safety defect cases. When the plaintiff attempted to notice the deposition of his former expert, the defendant objected, explaining that it had no intention of calling the expert as a witness at trial and that the plaintiff had failed to demonstrate "exceptional circumstances" (see §10.53) that would justify deposing the expert in his role as consultant.

The court had little difficulty in finding that the plaintiff was not entitled to depose the expert concerning information he had developed as a consultant in the present case. The more troublesome question was whether the expert could

be deposed concerning the opinions formed or facts learned while employed by plaintiff's counsel in connection with previous cases.

The court acknowledged that, although this information had literally been acquired in anticipation of litigation, the work product rule was intended only to prevent one from taking advantage of the efforts of one's adversary, and therefore had no applicability to opinions held or facts learned in connection with other litigation. Hence the court ruled that the expert could be questioned concerning expertise developed while working with plaintiff's counsel on earlier cases. 79 FRD at 446.

This same expert surfaced again in *Sullivan v Sturm, Ruger & Co.* (D Mont 1978) 80 FRD 489, in which counsel for plaintiffs sought to depose him. Sturm objected and a motion to compel ensued. In ruling on the motion, the judge noted that Sturm retained the expert as a consultant in the *Sullivan* case in 1976. Thereafter, the expert wrote to counsel for the plaintiff in the *Barkwell* case, indicating that he desired to work for the plaintiff in that action. Subsequently, Sturm retained this expert for a second time as a consultant in the *Sullivan* matter. Sturm argued that, because it employed this expert both before and after his employment by Barkwell, his employment by the defendant was entitled to protection from discovery. The judge was neither persuaded nor amused. He held that the expert was subject to deposition concerning facts known and opinions held by him before his employment by the defendant the second time. The court also found that Sturm was responsible for making the expert available for deposition, and made clear that sanctions would be imposed if Sturm persisted and claimed lack of control over him.

Another variation on the consulting expert theme arose in *In re Asbestos Prods. Liab. Litig. (No. VI)* (ED Pa 2009) 256 FRD 151, 156, in which the plaintiffs in multidistrict asbestos injury litigation had been diagnosed by various screening physicians as suffering from medical conditions caused by occupational asbestos exposure. The defendants sought discovery of screening reports and diagnoses as well as some of the foundational materials relied on by the physicians. The physicians resisted the discovery on the ground that they were informally consulted experts. The district court determined that the physicians fell outside Rule 26(b)(4)(B)'s protection because their reports, based on the screening examinations, were the only evidence plaintiffs intended to rely on for causation. Given plaintiffs' tactical choice, the court determined that the physicians—through their reports—were more analogous to testifying experts than nontestifying consultants.

NOTE: The authors anticipate that the California courts, confronted with a dual or triple role expert, will follow the federal courts and permit or disallow discovery depending on whether a nontestifying consultant's knowledge was acquired in a work product-protected setting.

Discovery of the identity and opinions of informally consulted experts should be obtainable through a variant of the interrogatories proposed in Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 Mich L Rev 513, 523 (1982), such as the following:

Have you had any contact of any sort with any experts other than those that you have identified as potential trial witnesses or described in response to questions (1) and (2)? [*For questions (1) and (2), see §10.52.*]

(3) If your answer to the preceding interrogatory is in the affirmative, please state separately, for each such expert, the following:

(a) The manner in which consultation was initiated;

(b) The precise nature, type, and extent of information or material provided to the expert in connection with his or her review;

(c) The precise nature, type, and extent of material, if any, determined by the expert in connection with his or her review;

(d) The duration of the consultative relationship, including, but not limited to, the date of first contact with the expert, the date of the last (or most recent) contact, the total number of contacts, and the total number of hours expended by the expert on the matter; and

(e) The terms of the consultation, including, but not limited to, terms of payment, amount of payment, if any, confidentiality of test data or opinions reached by the expert, and the plans, if any, for the expert to render any

future services.

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§10.55 6. The In-House Expert

One of the fundamental purposes of the work product rule is to prevent one side from laying back, doing nothing, and then taking advantage of the opponent's industry. In furtherance of that goal, both California and the federal courts provide, in the absence of compelling circumstances, that only retained experts who can be discovered are those who will actually testify at trial. See, *e.g., National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535; *Pearl Brewing Co. v Joseph Schlitz Brewing Co.* (SD Tex 1976) 415 F Supp 1122, 1134.

Conversely, when an expert has not been retained to assist in the defense or prosecution of a case, there are no work product considerations and that individual's expertise is subject to discovery, even when the individual had no interest or stake in the litigation. See, *e.g., Wright v Jeep Corp.* (ED Mich 1982) 547 F Supp 871.

The distinction between these categories becomes blurred when an expert, who has been employed or has served as a consultant for one of the parties and has acquired a certain amount of expertise as a consequence of that employment, acquires additional expertise as a nontestifying consultant who assists in the preparation of a lawsuit.

The cases that have dealt with this problem have permitted discovery when a party's "in-house" expert had investigated a matter as part of his or her regular duties and not in anticipation of litigation. See, *e.g., In re Sinking of Barge Ranger I* (SD Tex 1981) 92 FRD 486. Applying a similar test, the court in *Grinnell Corp. v Hackett* (D RI 1976) 70 FRD 326, permitted discovery concerning a master's degree thesis that had been written by an "in-house" expert for one of the parties.

On the other hand, discovery has been disallowed as to work done by an "in-house" expert who was not to testify at trial and who was merely consulted informally concerning a matter in litigation. *USM Corp. v American Aerosols, Inc.* (6th Cir 1980) 631 F2d 420.

One district court judge has adopted a dramatically different rule. He found that an "expert" is someone who not only possesses expertise but is also in a position to testify neutrally and not as a partisan. He then found that employees are necessarily partisans, can never be "experts," and are, therefore, subject to discovery on the same basis as any other ordinary witness. *Virginia Elec. & Power Co. v Sun Shipbuilding & Drydock Co.* (ED Va 1975) 68 FRD 397.

Most of the courts that have addressed the question have concluded that "retained or specially employed" means "something more than simply the assignment of a current employee to a particular problem raised by current litigation." *Kansas-Nebraska Natural Gas Co. v Marathon Oil Co.* (D Neb 1983) 109 FRD 12, 16; *In re Shell Oil Refinery* (ED La 1990) 132 FRD 437, 442.

Additional criteria that tend to move an employee into the "retained or specially employed" category include having the employee's work directed by attorneys or by the legal department, having the employee report only to the legal department or outside counsel, and having the employee's written report directed only to the legal department or outside counsel. On the other hand, the fact that the employee did not receive any additional compensation for the particular work is generally nondeterminative. Finally, the mere fact that the employee's work is used not only to defend a lawsuit but also to improve the company's products or operations does not, without more, preclude an employee from falling within the "retained or specially employed" category. *Hermsdorfer v American Motors Corp.* (WD NY 1982) 96 FRD 13, 15.

The myriad approaches make it clear that, with respect to employee experts, courts confronting the "retained or specially employed" language in Fed R Civ P 26(a)(2)(B) will continue to reach divergent results until more definitive appellate guidance is provided. Compare *KW Plastics v United States Can Co.* (MD Ala 2000) 199 FRD 687 (any employee designated as expert meets statutory requirement) with *Navajo Nation v Norris* (ED Wash 1999) 189 FRD 610 (status as employee cannot be squared with statutory requirement).

Although there remains difficulty in determining whether a designated employee expert falls within the "retained or specially employed" category, when a court determines that the employee-expert falls within that category, an expert report, as required by Rule 26(a)(2)(B), must be provided for that witness. In these circumstances, there is no "employee exception" to the written report requirement. *McCulloch v Hartford Life & Acc. Ins. Co.* (D Conn 2004) 223 FRD 26, 28.

PRACTICE TIP: Given the uncertainty in the federal case law dealing with designations involving employee experts and the adverse consequences if no report is provided and the employee is determined to be "retained or specially employed" as an expert, counsel should seriously consider supplying a proper report for each designated expert, including employees.

For an overview of treatment by the federal courts of the discoverability of the identity and opinions of nontestifying experts under the Federal Rules of Civil Procedure, see Emerick, *Discovery of the Non-Testifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 Hastings LJ 201 (1985).

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§10.56 7. Discovery of Opinions of Percipient Witnesses Who Are Also Experts

Percipient witnesses who also are experts (*e.g.,* treating physicians) and who possess information that was not acquired in preparation for trial are not subject to the discovery available under Fed R Civ P 26(b)(4). For example, defendant-physicians are allowed to testify concerning their medical opinions relating to their treatment of a plaintiff without providing plaintiff's counsel with their written expert reports. *Baran v Presbyterian Univ. Hosp.* (WD Pa 1984) 102 FRD 272; *Keith v Van Dorn Plastic Mach. Co.* (ED Pa 1980) 86 FRD 458. These witnesses can be deposed, however, like any other percipient witness (Fed R Civ P 30). Fed R Civ P 26(b)(4).

If a percipient expert witness is not listed in response to an interrogatory seeking the identity of experts that the other party intends to call as witnesses, it is unclear whether that expert can testify. In, *e.g., Baran v Presbyterian Univ. Hosp., supra,* the court held that it was permissible for defendant-physicians to testify concerning their medical opinions relating to their treatment of plaintiff without providing plaintiff's counsel with their written expert reports. The court held that the defendant-physicians fit into the category of "actors or viewers" and not the category of experts retained for purposes of litigation. The district court also pointed out that before trial the plaintiff had deposed both defendant-physicians, and under federal discovery rules could have asked them for their ultimate opinion concerning the malpractice issue. See also §10.49A (treating physicians must submit written expert reports if their testimony goes beyond scope of treatment).

A problem area counsel should be aware of is employment by one side of a percipient witness as an expert who has a relationship with the other side. For example, in *Miles v Farrell* (ND Ill 1982) 549 F Supp 82, a doctor who treated the plaintiff before and after being retained by the defendant as an expert did not reveal his consultant status to the plaintiff. As a result, the physician was not permitted to testify for the defendant either as an expert or a treating doctor because of the conflicting roles he had played in the case.

See also §8.40 (percipient experts and the work product doctrine).

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§10.57 8. Sanctions for Failure to Disclose Expert Witness Information

The federal courts take a dim view of insufficient responses to interrogatories concerning the subject matter of the testimony of retained experts, and the failure to disclose experts. See, *e.g., Ferrara v Balistreri & DiMaio, Inc.* (D Mass 1985) 105 FRD 147 (sanctions awarded for inadequate disclosure of testimony of two disclosed experts; two late-disclosed experts prohibited from testifying); *Emerick v U.S. Suzuki Motor Corp.* (3d Cir 1984) 750 F2d 19 (court of appeals affirmed district court's refusal to admit expert and videotaped testimony of testing by expert during presentation of plaintiff's case or in rebuttal because plaintiff had clearly violated local rules by failing to disclose existence of testing or of videotape during discovery).

Sanctions for failure to disclose expert witness information can include:

- Sanctions under Fed R Civ P 26(g)(3) and 37(a)(5). See also *Duncan v WJLA-TV, Inc.* (D DC 1984) 106 FRD 4 (court assessed sanctions for plaintiff's disclosure of unqualified expert and for failing to conduct reasonable inquiry into, and therefore misrepresenting, qualifications of substituted expert).
- Expert prohibited from testifying. See Fed R Civ P 37(c)(1). See also *Wong v Regents of Univ. of Cal.* (9th Cir 2004) 379 F3d 1097 (plaintiff's late-disclosed expert excluded because need for expert on his "disabled" status could reasonably have been anticipated in this action brought under Americans with Disabilities Act); *Yeti by Molly, Ltd. v Deckers Outdoor Corp.* (9th Cir 2001) 259 F3d 1101 (expert precluded from testifying because disclosure of expert's report was delayed until 1 month before trial); *Grogan v Garner* (8th Cir 1986) 806 F2d 829, rev'd in part on other grounds (1991) 498 US 279, 112 L Ed 2d 755, 111 S Ct 654 (testimony of defendant's expert excluded because defendant had failed to indicate in interrogatory answer the subject area of expert's testimony); *Sealy, Inc. v Easy Living, Inc.* (9th Cir 1984) 743 F2d 1378 (testimony of one of defendant's expert witnesses excluded because defendants had not given plaintiff short narrative statement of expert's qualifications and expected trial testimony as required by local rules; Ninth Circuit upheld exclusion, stating that it rested within sound discretion of trial judge); *Smith v Union Pac. R.R.* (ND Ill 1996) 168 FRD 626 (expert testimony barred because inadequate expert report submitted at close of discovery and dilatory conduct represented "extraordinary distortion" of litigant's disclosure obligations).
- Expert prohibited from testifying on certain issues or to certain opinions. See *Doe v Gaughan* (1st Cir 1986) 808 F2d 871 (expert for mentally ill patients allowed to testify to facts but not as expert witness because of lateness of patients' disclosure that witness was to be called as expert). See also *Easley v Anheuser Busch, Inc.* (8th Cir 1985) 758 F2d 251, 257.

For a contrasting case, see *Uresil Corp. v Cook Group, Inc.* (ND Ill 1991) 135 FRD 168, in which one party had repeatedly failed to file answers sufficiently identifying its intended expert witnesses and their expected testimony. However the court ordered only that the experts be made available for deposition and that reasonable fees for time actually spent in deposition by the experts be shared equally by the parties. See also *Valencia v U.S.* (ED Cal 2008) 2008 US Dist Lexis 17797 (Fed R Civ P 26 statement, when fairly read, disclosed that expert would be testifying on causation and, even if statement was technically deficient, there was no prejudice justifying exclusion because defendant took full advantage of opportunity to depose expert on causation); *MMI Prods., Inc. v Long* (D Md 2005) 231 FRD 215, 218 (district court refused to award sanctions under Fed R Civ P 26(g)(3) to compensate defendant for expenses incurred in retaining expert to refute report of expert withdrawn before trial).

For some useful insight into defending against expert witness discovery in the federal courts, see Daniels, *Protecting Your Expert During Discovery*, 71 ABA J 50 (Sept. 1985). See also Golden, *Discovering Opinions on an Opponent's Expert*, 2 Fed Litig 53 (Feb. 1987).

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§10.58 9. The Research Scholar

There are a growing number of disputes concerning the right to depose the "research scholar," who has no percipient information concerning the case and no desire to work for any of the parties, but who has relevant knowledge or expertise gained through research or otherwise. For a thorough analysis of the current status of the debate, see McLaughlin, *From the Field to the Courthouse: Should Social Science Research Be Privileged?,* 24 L & Soc Inquiry 927 (Fall 1999). The court may refuse to compel disclosure of subpoenaed information when compliance would force an unreasonable burden on the person from whom production is sought. In deciding whether to quash or modify a subpoena in this context, the reported decisions discussed below use a balancing test: weighing the need and the relevance of the requested information against the harm or burden on the other party.

EXAMPLE 1: (professor required to testify): In *Wright v Jeep Corp.* (ED Mich 1982) 547 F Supp 871, a party to a personal injury action arising out of a rollover accident served a subpoena on a professor and research scientist who was the principal author of a report on rollover accidents. The professor had no firsthand knowledge of the case, and had not been retained as an expert by either side. He objected to the subpoena on numerous grounds: First Amendment protection for a researcher and writer; academic privilege; documents sought were privileged and confidential; testifying would be burdensome and would have a chilling effect on future research. 547 F Supp at 873.

While expressing sympathy for the professor's plight, the court held that "[t]he solution is … to use the tools available to lessen the burden and to permit the information to become available" (547 F Supp at 877) and to ensure that the professor is properly compensated. The court specifically found that compelling the professor to testify did not violate any First Amendment rights and would not tend to chill scientific research. 547 F Supp at 875. But see *Michigan v Ewing* (1985) 474 US 214, 226, 88 L Ed 2d 523, 106 S Ct 507 (discusses court's responsibility to safeguard academic freedom, which is protected by First Amendment); *Sweezy v New Hampshire* (1957) 354 US 234, 262, 1 L Ed 2d 1311, 77 S Ct 1203 (Frankfurter, J., concurring) ("[t]he dependence of a free society on free universities … means the exclusion of governmental intervention in the intellectual life of a university … the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor"); *Brown v Trustees of Boston Univ.* (1st Cir 1989) 891 F2d 337, 350 (upholding inadmissibility of statements made by university officials because of "the chilling effect that admission of such remarks could have on academic freedom").

EXAMPLE 2: (disclosure of copies of working papers, notes, etc. for research project done for university not required because it would be hardship on university): In *Dow Chem. Co. v Allen* (7th Cir 1982) 672 F2d 1262, Dow was confronted with potential government cancellation of its right to manufacture herbicide, arising from the government's reaction to studies published by the University of Wisconsin indicating animal toxicity findings in such herbicides. Dow sought copies of all notes, reports, working papers, and raw data relevant to the university's research, arguing such materials were necessary to evaluate whether earlier, completed studies were accurate, and whether proper protocol and methodology were followed.

The university argued that disclosure of such information would be unduly burdensome, both as to the present state of the study and its future efficacy as a medical research project. Specifically, the university argued that dissemination of the data into the public domain would invalidate the usefulness of such studies as a basis for further scientific research and papers; that years of research effort, professional reputations and credibility would be lost by such forced disclosure; and that the capacity of an academic institution to be free from unwarranted intrusion would be jeopardized, resulting in the stifling of academic freedom.

In evaluating the competing interests, the district court found that the hardship such disclosure would place on the university outweighed the need for such information. In so deciding the court considered Dow's arguments in support of disclosure: First, whether Dow had sufficient access to enough relevant data that, if confronted with adverse material at trial, it could test the validity of the studies; second, whether the data were essential to raise a negative inference that if

undisclosed information revealed changes in protocol, Dow could argue earlier studies were flawed or erroneous.

After evaluating both factors, the appellate court affirmed the lower court's determination that plaintiff had failed to show the requisite necessity. Since the undisclosed research requested would not be relied upon at trial, the plaintiff's alleged need for this material therefore was unwarranted. In addition, there was support for the district court's finding that Dow had failed to show protocols had been significantly altered from the earlier studies, and even if modifications had taken place such changes were normal during the course of a long range research study. See also *Buchanan v American Motors Corp.* (6th Cir 1983) 697 F2d 151 (affirming district court's quashing of subpoena addressed to stranger to litigation lacking special knowledge of particular facts concerning products liability action, where other expert sources available and appellant's purpose is attempt to discredit expert's written studies); *Anker v G.D. Searle & Co.* (MD NC 1989) 126 FRD 515 (quashing subpoena addressed to nonparty physician since records and opinions sought not unique or unavailable from other experts and methods and procedures from evaluating physician's research already disclosed through publication).

EXAMPLE 3: (subpoena for documents quashed for overbreadth, but court noted there is not academic privilege that protects expert from being subpoenaed): In *In re Snyder* (D Ariz 1987) 115 FRD 211, the same research scientist who had been subpoenaed in *Wright* was again subpoenaed for deposition and production of data that led to his rollover report. As in *Wright*, the expert was not a party or otherwise retained as an expert. The court in *Snyder* agreed with *Wright* that there is no general academic privilege that protects an expert from being either subpoenaed to testify or required to produce documents in his or her possession. Nevertheless, the court found that the former federal rules authorized issuance of a protective order to quash the subpoena if it was unduly burdensome. The court quashed the subpoena, finding it to be unduly burdensome because of the breadth of the documentation that it sought.

The court was equally concerned about the potential chilling effect on scientific research of the indiscriminate issuance of subpoenas to involuntary, nonparty expert witnesses to produce testimony in litigation. The court found that the potential for harassment through the discovery process might deter members of the public from studying defects in products or practices. The court thus recommended that members of both the legal and research communities propose amendments that would increase certainty in the scope of discovery from involuntary expert witnesses.

EXAMPLE 4: (court set forth factors to be considered in determining whether research scholar expert should be compelled to testify): The Second Circuit addressed the same subject in a thoughtful opinion in *Kaufman v Edelstein* (2d Cir 1976) 539 F2d 811, holding that the factors to consider in determining whether an unwilling expert should be compelled to testify include:

- the extent to which the expert is being called because of his or her knowledge of facts relevant to the case, rather than to give opinion testimony;
- the extent to which the testimony sought pertains to a previously formed and expressed opinion or to a new one;
- the uniqueness of the witness's knowledge;
- the extent to which the party seeking the testimony is unable to obtain a comparable witness willing to testify; and
- the extent of the oppression the witness will suffer by being required to testify.

EXAMPLE 5: (subpoenaed document had to be produced under protective order): The Second Circuit was again confronted with the research scientist's duties in *Mount Sinai Sch. of Medicine v American Tobacco Co.* (2d Cir 1989) 880 F2d 1520, which arose out of a number of product liability suits in which the plaintiffs' decedents had died from a combination of cigarette smoking and exposure to asbestos. Although no one from Mount Sinai was expected to testify as an expert in any of those cases, the plaintiffs planned to present expert witnesses who would rely on seminal studies that had been made by members of the Mount Sinai staff.

Initially, the tobacco company defendants served a sweeping subpoena duces tecum on Mount Sinai incident to a case that was pending in the New York State court system. Mount Sinai successfully moved to quash. *In re R. J. Reynolds Tobacco Co.* (Sup Ct 1987) 518 NYS2d 729. The tobacco companies then served a somewhat narrower subpoena on Mount Sinai in connection with cases pending in federal court in Louisiana and Pennsylvania. Mount Sinai

filed a motion to quash in district court in New York, alleging: (1) the subpoenas were barred by res judicata and collateral estoppel; (2) under New York law there is an absolute privilege that applies to a scholar's work; and (3) even if there is no absolute privilege, researchers enjoy a qualified privilege, and the tobacco companies failed to demonstrate that their interest outweighed those of the researchers. Mount Sinai moved, in the alternative, for a protective order allowing the subpoenaed documents to be redacted to eliminate potential matters of privacy.

The district court denied the motion to quash but issued a protective order designed to ensure the privacy of the individuals who participated in the studies. On appeal, the Second Circuit affirmed. In so ruling, the court emphasized that the subpoenaed matters consisted largely of computer tapes and other support documentation. In addition, the parties had agreed that, when necessary to protect the anonymity of study participants, pertinent identifying information could be redacted. The court also noted that the tobacco companies were not seeking to compel any member of the Mount Sinai staff to testify or prepare a report.

Against that background, the court considered, and rejected, each of Mount Sinai's specific objections:

- First, because the subpoena in the federal court action was narrower than the one that had been quashed in the state court action, the court found that the state court ruling did not have any preclusive effect.
- Second, the court found that there was *no* absolute privilege covering production of the requested documents. The decision indicates that New York law might have compelled a different result had the tobacco companies sought to compel any of the Mount Sinai staff to testify.
- Third, the court acknowledged that the Seventh Circuit recognizes a qualified scholar's privilege but found no indication that New York had done so. Further, even if the existence of such a qualified privilege were assumed, its underlying basis is to eliminate the possibility that research results discovered before publication would be vulnerable to preemptive or predatory publication by other. The results of the materials in question had all been published years before; therefore this consideration was absent.

The Second Circuit did, however, recognize the need for an appropriate protective order to protect the confidentiality of the studies' participants.

EXAMPLE 6: (discovery of confidential information denied when other, comparable studies were available): In *Bluitt, et al. v R. J. Reynolds Tobacco Co., et al.* (ED La 1994) 1994 WL 658470, 1994 US Dist Lexis 16933, a district court upheld a magistrate judge's opinion to quash a subpoena issued by tobacco manufacturers. The discovery sought all raw data underlying a study published by a university relating tobacco smoke to cancer in women. The university was neither a party to the case nor retained by either side. It sought to quash the subpoena on the basis that some of the underlying information sought was privileged, confidential, and/or proprietary under Louisiana state law.

In upholding the finding to quash the subpoena, the district court found, first, that the information the university sought to withhold was confidential (Fed R Civ P 45(c)(3)(B)), and second, that the tobacco company failed to show the requisite need for the information to overcome the confidentiality of the documents. In support of the second part of its finding, the court concluded that all of the standard criteria by which scientific research normally is evaluated had been fully presented and disclosed. Moreover, the court noted that while in *Wright* there was a "high probability" the results of the author's research would be used, in *Bluitt* there were twelve other ETS-lung cancer studies available. *Bluitt, et al. v R. J. Reynolds Tobacco Co., et al., supra*. The court did not find it necessary to reach the issue of whether the university's documents were protected by an absolute privilege.

EXAMPLE 7: (discovery permitted for research documents in possession of corporate defendant when defendant failed to demonstrate that disclosure would seriously impinge on confidentiality): *Smith v Dow Chem. Co.* (WD NY 1997) 173 FRD 54 was a wrongful death action involving claims that plaintiff's husband died of brain cancer caused by exposure to vinyl chloride manufactured by the defendants. Plaintiff requested that defendants produce research papers in their possession concerning work done by a trade association of which the defendants were members.

In permitting discovery, the court noted first that all the cases that had denied production of a research scholar's work involved discovery requests directed to the scholar. Here, in contrast, the plaintiff sought only that portion of the scholar's work that had been provided to the defendants. Further, the defendants' objections contained "no itemization of the documents claimed to be privileged, and there is no information about the nature or contents of the study, the

methodology employed, the need for assurances of confidentiality to the sources employed to conduct the study, or any facts to provide a basis for assessing whether the disclosure requested by plaintiff will seriously impinge upon that confidentiality." 173 FRD at 58.

PRACTICE TIP: The *Smith* opinion provides a veritable checklist of what a party or person resisting discovery of a research scholar's work should include in their objections. Concurrently, it provides the party seeking such work with a checklist of what should be included in the discovery and points to focus on if the objecting party fails to raise them.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.59 B. Independent Medical Examinations

§10.59 B. Independent Medical Examinations

Federal Rules of Civil Procedure 35 closely parallels CCP §§2032.010-2032.650 and, according to the Advisory Committee Notes, was patterned after a number of state statutes, including that of California.

As with the California statutes, Rule 35 makes no independent provision for deposing the examining physician or psychologist. A deposition is available only if the expert is designated as a trial witness.

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C. Recovery of Expert Witness Fees

§10.60 1. Recovery as Costs

Expert witness fees taxable as costs to the losing party (see Fed R Civ P 54(d)) are limited by 28 USC §1821(b) to $40 per day in a federal court action. *Crawford Fitting Co. v J. T. Gibbons, Inc.* (1987) 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494. According to the Supreme Court majority, a federal court is bound by the limits of 28 USC §1821 in the absence of a contract or specific statutory authority to the contrary.

The fees awarded in *Crawford Fitting* were nearly $87,000. In light of the proliferation of cases involving expert witnesses and the large fees that experts ordinarily charge, the inability to shift these fees when a party prevails will have a significant impact on litigation in the federal courts. It will be necessary for parties to monitor closely their expert witness expenses, or they will lose the deterrent effect of those expenses as a negotiating tool in resolving litigation before trial. See Miller, *Expert Witness Fees: The Next Battleground in the War Over Litigation Expenses*, 13 Preview 380 (ABA 1987).

Relying on its holding in *Crawford Fitting,* the Supreme Court has also held that full expert witness fees (*i.e.,* beyond the $30 per day then allowed in federal actions under 28 USC §1821(b)) may not be shifted to the losing party as part of a reasonable attorney fee awarded in a federal civil rights case brought under 42 USC §1983. *West Virginia Univ. Hosps. v Casey* (1991) 499 US 83, 113 L Ed 2d 68, 111 S Ct 1138. Finding support in its *Crawford Fitting* and *Casey* decisions, the Supreme Court has recently held that the fee-shifting provision in the Individuals with Disabilities Education Act (IDEA) (20 USC §1415(i)(3)(B)) does not authorize prevailing parents to recover fees for expert consultants. *Arlington Cent. Sch. Dist. Bd. of Educ. v Murphy* (2006) 548 US 291, 165 L Ed 2d 526, 126 S Ct 2455.

Expert witness fees sought in cases brought under the Supreme Court's original jurisdiction also are governed by 28 USC §1821(b). *Kansas v Colorado* (2009) 556 US ___, 173 L Ed 2d 245, 250, 129 S Ct 1294.

In the Civil Rights Act of 1991, Congress amended 42 USC §2000e-5(k) to provide for the award of expert fees to the prevailing party in Title VII (Civil Rights Act of 1964) (42 USC §§2000e—2000e-17) actions. A split has arisen in the circuits on whether Congress intended the amended provisions on expert fees to apply retroactively in pending cases. If the amended provisions are held not retroactive, then expert costs cannot be awarded under the Supreme Court's holding in *West Virginia Univ. Hosps. v Casey, supra*. The Sixth and Seventh Circuits have held that the provisions regarding expert fees should not be applied retroactively. See *Luddington v Indiana Bell Tel. Co.* (7th Cir 1992) 966 F2d 225; *Mozee v American Commercial Marine Serv. Co.* (7th Cir 1992) 963 F2d 929; *Vogel v City of Cincinnati* (6th Cir 1992) 959 F2d 594.

In *Agredano v Mutual of Omaha Cos.* (9th Cir 1996) 75 F3d 541, the Ninth Circuit rejected plaintiff's attempt to recover $10,000 in expert witness fees under ERISA (29 USC §§1001-1371). The plaintiff relied on 20 USC §1132(g)(1), which permits the courts to shift "reasonable attorney's fees and costs of action to either party." The court held, however, that the word "reasonable" refers to attorney's fees *only* and not to costs. Instead, the costs permitted under the section are only those defined by 28 USC §1920, and that section does not include expert witness fees.

Rule 26(b)(4)(C) also provides that a reasonable fee need *not* be paid for an expert's time in responding to discovery if a "manifest injustice" would result. In *Fisher-Price Inc. v Safety 1st Inc.* (D Del 2003) 217 FRD 329, an expert's delay in responding to a subpoena in a patent infringement lawsuit did not meet this exception. The delay was not in bad faith and much of the information required by the subpoena was not within the expert's control. Although the delay might have created some unfairness, it did not reach the "stringent standard" of "manifest injustice." One court found, however, that the "manifest injustice" standard was satisfied by an attempt to recover the costs incurred for a disclosed expert whose testimony was ruled inadmissible following a *Daubert* hearing. *Rogers v Penland* (ED Tex 2005) 232 FRD 581.

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§10.60A 2. Recovery of Preparation Time

In contrast to CCP §2034.430(b), which limits recoverable deposition fees to the time that is actually spent in deposing the expert (see §10.38), Fed R Civ P 26(b)(4)(C)(i) provides that the court must require that the party seeking discovery "pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B)." The reported decisions have reached conflicting conclusions concerning recovery of costs for time spent in preparation for deposition. A magistrate judge in Colorado has twice found that time spent in review of materials in preparation for deposition is not compensable. *Baker v Taco Bell Corp.* (D Colo 1995) 163 FRD 348; *Benjamin v Gloz* (D Colo 1990) 130 FRD 455. A similar result is reached in *Dominquez v Syntex Lab., Inc.* (SD Ind 1993) 149 FRD 166, 169.

In contrast, another district court held that the party deposing an expert had to compensate the party sponsoring the expert for the five hours that the expert spent preparing for the deposition. *S. A. Healy Co. v Milwaukee Metro. Sewerage Dist.* (ED Wis 1994) 154 FRD 212. In *Healy,* the expert had completed his work and prepared his report many months before he was deposed. To prepare for his deposition, it was necessary for the expert to spend five hours refamiliarizing himself with the case and with his report, which consisted of 36 pages of single-spaced text, together with more than 100 supporting schedules. The court found reimbursement of this time to be reasonable under the amended section. 154 FRD at 214. See also *Patterson v City of Britton* (D SD 1998) 22 F Supp 2d 1085 (right to fees for time expert spends reviewing deposition transcript).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.61 D. Informal Communication by Attorney With Other Parties' Experts

§10.61 D. Informal Communication by Attorney With Other Parties' Experts

Federal Courts Are Split on Propriety of Attorneys Communicating With Other Parties' Expert

The federal courts and courts in other states have been split on the propriety of attorneys communicating informally with other parties' experts. For discussion of California case holdings on this issue, see §10.26.

One line of cases disallows such communications. See *Weaver v Mann* (D ND 1981) 90 FRD 443 (Federal Rules of Civil Procedure do not specifically authorize such practice); *Garner v Ford Motor Co.* (D Ala 1973) 61 FRD 22 (same); *Jaap v District Court* (Mont 1981) 623 P2d 1389 (Montana rules do not mention private interviews, so courts cannot order them); *Anker v Brodnitz* (Sup Ct 1979) 413 NYS2d 582 (state rules do not authorize private interviews and there is risk that in ex parte context physician will not understand extent to which physician-patient privilege has been waived and expose physician to suit for wrongful disclosure).

Another line of cases, typified by *Doe v Eli Lilly & Co.* (D DC 1983) 99 FRD 126, authorizes such contacts on the grounds that, once suit has been filed and the physician-patient privilege has been waived, the court should not give plaintiff's counsel the tactical advantage of having informal access to the physician while denying that right to counsel for other parties to the suit. See *Stempler v Speidell* (NJ 1985) 495 A2d 857; *Trans-World Inv. v Drobny* (Alaska 1976) 554 P2d 1148; *Green v Bloodsworth* (Del Super Ct 1985) 501 A2d 1257.

Still another line of cases focuses on the lack of a physician-patient privilege under the Federal Rules of Evidence or under federal common law. See *Gilbreath v Guadalupe Hosp. Found., Inc.* (5th Cir 1993) 5 F3d 785, 791; *Perkins v U.S.* (ED Tex 1995) 877 F Supp 330. Some courts have reasoned that the lack of privilege permits ex parte contact between a defense lawyer and the plaintiff's treating physicians. See, *e.g.*, *Filz v Mayo Found.* (D Minn 1991) 136 FRD 165, 175; *Sipes v U.S.* (SD Cal 1986) 111 FRD 59, 61. Other cases hold that if the law of the state wherein a federal action has been filed recognizes a physician-patient privilege, then that privilege may apply to bar ex parte communications with a treating physician, not only in cases based on diversity jurisdiction but also in cases premised on a federal statute. *Perkins v U.S., supra* (in action brought under Federal Tort Claims Act, opinions of nonparty treating physician held discoverable under Texas law, but not on ex parte basis; opinions admitted despite ex parte communication under circumstances of the case).

Some states have enacted rules addressing the problem of ex parte communications between defense counsel and plaintiff's treating physician. See, *e.g.,* Minnesota statute §595.02(5) (patient waives physician-patient privilege by filing action alleging physical or mental injury). See also *Sanderson v Boddie-Noell Enters.* (ED Va 2005) 227 FRD 448 (concerning contact between plaintiff's counsel and employer of defendant's expert witness; noting that Fed R Civ P 26(b)(4) does not prohibit such contact, but finding violation of Virginia ethics rule).

Appropriate Sanction If Communication Is Improper

Outright tampering with an opposing expert may justify reversal of the judgment and disciplinary action against the attorney who made the improper communication. See *Erickson v Newmar Corp.* (9th Cir 1996) 87 F3d 298 (judgment for defendant reversed with directions to impose appropriate sanctions and disciplinary action upon defense counsel where defense counsel hired plaintiff's expert to work on an unrelated case, prompting plaintiff to fire the expert and be left without expert testimony at time of trial).

However, the court must be very careful in fashioning the order excluding the expert from testifying. For example, in *Lewis v Telephone Employees Credit Union* (9th Cir 1996) 87 F3d 1537, the civil plaintiffs designated one of the police officers who had investigated the underlying criminal fraud. Thereafter, without the knowledge of plaintiff's civil counsel, the officer interviewed one of the defendants and obtained a handwriting sample. The police officer informed plaintiff's counsel of these activities and turned over documents he had obtained from the defendant in response to a subpoena. The trial judge found this course of conduct to be improper and issued an order prohibiting the officer from testifying.

While the court of appeals agreed that a sanction was appropriate, it held that the exclusion order was an abuse of discretion. The court held that sanction orders must be "carefully fashioned" to deny the offending party "the fruits of its misconduct yet not to interfere with [the party's] right to produce other relevant expert testimony." 87 F3d at 1557 (quoting *Campbell Indus. v M/V Gemini* (9th Cir 1980) 619 F2d 24, 27). The court thus held that the sanction should

have been limited to precluding the results of the interviews that occurred after the officer began reporting to plaintiff's counsel. 87 F3d at 1557. In reaching that result, the court further emphasized that the propriety of an exclusion order will vary depending on whether there are other experts capable of providing the same testimony or, as in *Lewis*, when there is no other available expert. 87 F3d at 1557.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/ IV. FORMS/§10.62 A. Form: Demand for Exchange of Expert Trial Witness Information

IV. FORMS

§10.62 A. Form: Demand for Exchange of Expert Trial Witness Information

Pat F. Baker [State Bar No. 9000000]
BAKER & CROSS
A Professional Corporation
1000 Sixth Street
Oakland, CA 94600
(415) 123-4567

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY

ROBERT C. ADAMS, **Plaintiff** **vs** **AAA CORPORATION, *et al.,*** **Defendants** _____	**No. 000 000** **DEMAND FOR EXCHANGE OF EXPERT TRIAL WITNESS INFORMATION UNDER CCP §2034.210(a)** _ _[*AND DEMAND FOR PRODUCTION OF EXPERT REPORTS AND WRITINGS (CCP §2034.210(c))*]_ _ **PARTY MAKING THIS DEMAND:** _ _[*name*]_ _ **DATE AND TIME OF EXCHANGE:** _ _ _ _ _ _

To each party and attorney of record:

_ _[*Name of party making demand*]_ _ **hereby demands under CCP §2034.210 on or before the above date of exchange and at the above place of exchange that all parties to this action participate in a mutual and simultaneous exchange of information concerning each party's expert trial witness(es), in writing as required by CCP §2034.260, to the following extent:**

1. A list containing the name and address of each natural person, including any party, whose oral or deposition testimony in the form of an expert opinion the party providing the list expects to offer in evidence at the trial or, in the alternative, a statement that the party does not presently intend to offer the testimony of any expert witness.

2. If any witness on the list to be exchanged is a party, an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for trial, an expert witness declaration signed by the responding party's attorney of record (or, if that party is without an attorney of record, by the party), containing for each such witness:

(a) A brief narrative statement of the qualifications of the expert;

(b) A brief narrative statement of the general substance of the testimony that the expert is expected to give;

(c) A representation that the expert has agreed to testify at the trial;

(d) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial; and

(e) A statement of the expert's hourly and daily fee for providing deposition testimony.

[*Add, if simultaneous production of discoverable reports and writings of listed experts under CCP §2034.210(b) is desired*]

3. The mutual and simultaneous production for inspection and copying, at the time and place stated above, of all discoverable reports and writings, if any, made by each expert (described in paragraph 2 above and included in any expert witness declaration) in the course of preparing that expert's opinion.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _**,**
_ _[*name*]_ _

Copies: Original (retain with original proof of service for possible filing with court); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: This form is usually prepared on pleading paper. The demand for exchange of expert trial witness information is discussed in §§10.4 (when to make demand), 10.5 (determining the date of exchange), 10.7 (contents of demand and service), 10.8-10.10 (demanding discoverable reports and writings), and 10.41 (production of documents at deposition).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.63 B. Form: Exchange of Expert Trial Witness Information; Expert Witness Declaration

§10.63 B. Form: Exchange of Expert Trial Witness Information; Expert Witness Declaration

Pat F. Baker [State Bar No. 9000000]
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Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY

ROBERT C. ADAMS, **Plaintiff** **vs** **AAA CORPORATION, et al. ,** **Defendants** _____	**No. 000 000** **EXCHANGE OF EXPERT WITNESS INFORMATION UNDER CCP §2034.260(a)** _ _[*AND EXPERT WITNESS REPORTS AND WRITINGS (CCP §2034.260(c))*]_ _ **PARTY MAKING THIS DEMAND:** _ _[*name*]_ _ **DATE AND TIME OF EXCHANGE:** _ _ _ _ _ _ **PLACE OF EXCHANGE:** _ _ _ _ _ _ _ _ _ _ _ _

To each party and attorney of record:

[*If expert witness testimony will be offered*]

The name and address of each person whose expert opinion _ _[*name of party*]_ _ expects to offer in evidence at the trial are:

1. _ _[*Name and address of expert*]_ _

2. _ _[*Name and address of expert*]_ _

[*If no expert testimony is presently intended to be offered*]

_ _[*Name of party*]_ _ **does not presently intend to offer the testimony of any expert witness in evidence at the trial.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _,
_ _[*name*]_ _

ATTORNEY'S EXPERT WITNESS DECLARATION

[*Required if any witness is listed as an expert; see CCP §2034.210(b)*]

I, _ _[*name of attorney*]_ _**, declare:**

1. I am the attorney of record in this action for _ _[*name of party*]_ _**. I make this Attorney's Expert Witness Declaration as required by CCP §2034.260(c).**

2. _ _[*Name of expert*]_ _. As to this expert, I am informed and believe that the following is true:

A. Qualifications:

[*Give a brief narrative statement; e.g., Dr. Keppler was awarded a B.S. degree in physics from U.C. Berkeley in 1970, an M.S. degree in engineering from Harvard in 1972, and a Ph.D. degree in materials science from U.C. Berkeley in 1975; employed as a structural engineer from 1975 to present with Acme Engineering, Inc.; Adjunct Professor of Metals Science at UCLA, 1977-1982; author of the following books, articles, and treatises: _ _[list]_ _; specializes in the subject of molecular structure and strength of synthetic materials; member of the following professional societies: _ _[list]_ _.*]

B. The general substance of the testimony this expert is expected to give:

[*Give a brief narrative statement; e.g., Dr. Keppler was retained by _ _[name of party]_ _ to conduct tests of material to determine cause of failure of material; performed tests; based on tests and expertise, formed opinion that cause of failure was stress and was a design defect that was foreseeable.*]

C. This expert's hourly fee for providing deposition testimony is _ _[*dollar amount*]_ _. This expert's daily fee for providing deposition testimony is _ _[*dollar amount*]_ _.

3. _ _[*Name of expert*]_ _. As to this expert, I am informed and believe that the following is true:

[*Give same type of information for this expert as for the expert in (2)*]

[*Continue with a new number for each expert, with the same type of information*]

4. Each expert identified in this declaration has agreed to testify at the trial, and will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning any opinion and its basis.

I declare under penalty of perjury under the laws of the State of California that this declaration was executed on _ _[*date*]_ _ and that the foregoing is true and correct of my own personal knowledge except as to matters stated to be based on information and belief, and as to such matters I am informed and believe that they are true and correct.

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (to party initiating demand for exchange, with original proof of service affixed); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: This form is usually prepared on pleading paper. The exchange of expert trial witness information and expert witness declaration are discussed in §§10.11 (contents) and 10.15 (custody of original demand and any information received in response to it).

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.64 C. Form: Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015)

§10.64 C. Form: Deposition Subpoena for Personal Appearance (Judicial Council Form SUBP-015)



SUBP-015

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT:	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date:	Time:	Address:

a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.230.)

b. ☐ This deposition will be recorded stenographically ☐ through the instant visual display of testimony and by ☐ audiotape ☐ videotape.

c. ☐ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).

2. ☐ If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(TITLE)

(Proof of service on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-015 [Rev. January 1, 2009]

DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

CEB

Code of Civil Procedure §§ 2020.310, 2025.220, 2025.230, 2025.250, 2025.620
Government Code, § 68097.1
www.courtinfo.ca.gov

Print

SUBP-015

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this *Deposition Subpoena for Personal Appearance* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:

   b. Address where served:

   c. Date of delivery:

   d. Time of delivery:

   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: . . . . . $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: . . . . . $ _____

   f. Fee for service: . . . . . $ _____

2. I received this subpoena for service on *(date)*:

3. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Comment: A subpoena is required to compel the attendance at deposition of all non-CCP §2034.210(b) experts, *i.e.*,

all experts who are *not* parties, employees of a party, or retained for litigation purposes (see §10.36). For discussion of using deposition subpoenas, see §§10.35 (when experts can be deposed), 10.37 (place of deposition), 10.40 (requirements in notice for videotaping expert's deposition).

The attendance of CCP §2034.210(b) experts is compelled by the notice of deposition of disclosed expert. See the form in §10.67.

This deposition subpoena form is used to compel the witness' personal appearance *only* (CCP §2020.310). To compel personal appearance *and* production of documents and things (CCP §2020.510), see the form in §10.65; for production of business records *only* (CCP §2020.410), see the form in §10.66.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.65 D. Form: Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020)

§10.65 D. Form: Deposition Subpoena for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-020)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
DEPOSITION SUBPOENA **FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS**	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date:	Time:	Address:

a. ☐ As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
b. ☐ You are ordered to produce the documents and things described in item 3.
c. ☐ This deponent will be recorded stenographically ☐ through the instant visual display of testimony and by ☐ audiotape ☐ videotape.
d. ☐ This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).

2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.

3. The documents and things to be produced and any testing or sampling being sought are described as follows:

☐ Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

☐ Continued on Attachment 4.

5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: ▶ _____

(SIGNATURE OF PERSON ISSUING SUBPOENA)

(TYPE OR PRINT NAME) (Proof of service on reverse) (TITLE)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-020 [Rev. January 1, 2009]

DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

CEB
Code of Civil Procedure §§ 2020.510, 2025.220, 2025.230, 2025.250, 2025.620; Government Code, § 68097.1
www.courtinfo.ca.gov

Print

SUBP-020

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: . . . . . $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: . . . . . $ _____
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Comment: This form is used to compel the personal appearance and production of documents at the deposition of all

non-CCP §2034.210(b) experts, *i.e.,* all experts who are *not* parties, employees of a party, or retained for litigation purposes. See §10.41.

Production of documents at the deposition by experts who are parties, employees of parties, or retained for litigation purposes may be accomplished by using the notice of deposition of disclosed expert. See form in §10.67. However, to obtain the expert's entire file, use a deposition subpoena requiring production of documents. See discussion in §§10.10, 10.41.

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Source: Civil Litigation/California Expert Witness Guide/10 Discovering Identity and Noticing Depositions of Opposing Experts/§10.66 E. Form: Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010)

§10.66 E. Form: Deposition Subpoena for Production of Business Records (Judicial Council Form SUBP-010)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS	CASE NUMBER:

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:

1. **YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:**

To *(name of deposition officer)*: On *(date)*: At *(time)*: Location *(address)*:
Do not release the requested records to the deposition officer prior to the date and time stated above.

a. ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

b. ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).

c. ☐ by making the **original** business records described in item 3 available for inspection at your business address by the attorney's representative and permitting **copying** at your business address under reasonable conditions during normal business hours.

2. *The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*

3. **The records to be produced are described as follows:**

☐ Continued on Attachment 3.

4. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(TITLE)

(Proof of service on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-010 [Rev. January 1, 2007]

DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

Code of Civil Procedure, §§ 2020.410–2020.440;
Civil Code, § 15(a)(e);
Government Code § 68097.1
www.courtinfo.ca.gov

Print

SUBP-010

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:

   b. Address where served:

   c. Date of delivery:

   d. Time of delivery:

   e. (1) ☐ Witness fees were paid.
   Amount: . . . . . $ _____
   (2) ☐ Copying fees were paid.
   Amount: . . . . . $ _____

   f. Fee for service: . . . . . $ _____

2. I received this subpoena for service on *(date)*:

3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Comment: This subpoena is used to compel production of business records of all non-CCP §2034.210(b) experts,

i.e., all experts who are *not* parties, employees of a party, or retained for litigation purposes. See §10.41. This form is used to obtain the expert's file before deposition to give counsel the opportunity to review the file before deposing the expert.

Production of business records at the deposition by experts who are parties, employees of parties, or retained for litigation purposes may be accomplished by using the notice of deposition of disclosed expert. See form in §10.67. However, to obtain the expert's entire file, use a deposition subpoena requiring production of documents. See discussion in §§10.10, 10.41.

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§10.67 F. Form: Notice of Deposition of Disclosed Expert; Demand for Production of Documents at Deposition

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1000 Sixth Street
Oakland, CA 94600
(510) 123-4567

Attorneys for Defendants

SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY

ROBERT C. ADAMS, **Plaintiff,** **vs** **AAA CORPORATION, et al.,** **Defendants** **_____**	**No. 000 000** **NOTICE OF DEPOSITION OF DISCLOSED EXPERT** _ _[*AND PRODUCTION OF EXPERT'S FILE AT DEPOSITION*]_ _ _ _[*AND INTENTION TO MAKE VIDEO RECORDING OF TESTIMONY*]_ _ **(CCP §§2025.220(a)(5), 2034.410-2034.470)**

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _ **at** _ _[*address*]_ _**,** _ _[*name of party noticing deposition*]_ _ **will take the deposition of** _ _[*state name of expert, and, if expert is not a party, the expert's address and telephone number*]_ _**.**

[*Add, if the expert is to bring documents or other tangible things to the deposition*]

The deponent must bring to the deposition the following documents: _ _[*Specify with reasonable particularity the materials or category of materials, e.g., that the expert is to bring his or her entire file, including time and billing records.*]

[*Add if deposition will be recorded by audio or video technology*]

This deposition will be recorded by _ _[*audio or video*]_ _ **technology in addition to stenographic recording.**

[*Add, if deposing party intends to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or other expert*]

_ _[*Name of deposing party*]_ _ **intends to reserve the right under CCP §2025.620(d) to use the video recording of this deposition testimony at the trial in this action.**

[*Choose one of the following alternatives*]

This notice has been served on the following persons: _ _[*List all parties or attorneys for parties served*]_ _.

[*or*]

All parties or attorneys for parties on whom this deposition notice has been served are listed on the attached proof of service.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _**,**
_ _[*name*]_ _

Copies: Original (retain with original proof of service for possible filing with court); copies for service (one for each attorney of record and unrepresented party); office and client copies.

Comment: This form is usually prepared on pleading paper. A notice of deposition is sufficient to compel the attendance at deposition and the production of documents of CCP §2034.210(b) experts: experts who are parties, employees of a party, or retained for litigation purposes. See §§10.36, 10.41. However, to obtain production of all discoverable material in the expert's file, use a deposition subpoena requiring production of documents. See discussion in §§10.10, 10.41. For other experts, subpoenas must be used. See the forms in §§10.64 (deposition subpoena for personal appearance), 10.65 (deposition subpoena for personal appearance and production of documents and things), and 10.66 (deposition subpoena for production of business records).

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11

Expert's Deposition in Civil Case

I. ROLE OF COUNSEL TAKING DEPOSITION OF OPPOSING EXPERT
- A. Purpose of Deposition; Procedures §11.1
- B. Scheduling Expert Depositions in Cases With Numerous Experts §11.2
- C. When to Have Own Expert Attend Opposing Expert's Deposition §11.3
- D. Stipulations §11.4
- E. When Expert Is Unprepared or Uncooperative; Sanctions §11.5
- F. How Not to Depose Expert §11.6
- G. Areas That Must Be Covered
  - 1. Checklist: Questions to Ask Opposing Expert at Deposition §11.7
  - 2. Education and Employment Background §11.8
  - 3. Prior Experience as Expert §11.9
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I. ROLE OF COUNSEL TAKING DEPOSITION OF OPPOSING EXPERT

§11.1 A. Purpose of Deposition; Procedures

It is most common for experts to be deposed as a form of discovery. The examiner, therefore, is usually on the opposing side from the expert being deposed. Occasionally, however, counsel will depose his or her own expert for the purpose of using the deposition testimony at trial in place of having the expert testify. See CCP §2025.620(d). See discussion in §11.35.

The task of deposing the opposition's expert is simplified immeasurably by always keeping in mind the deposition's fundamental purpose: to discover *all* of the expert's opinions and *all* of the bases for those opinions.

To be sure, the expert may be discredited during the deposition, but that is not its purpose. The questioner's goal should not be to impeach or impugn the expert but rather to concentrate on learning *everything* the expert thinks about the case, has been told or learned about the case, and has done or plans to do in connection with the case. By following the format outlined in this chapter, even the most inexperienced questioner can make sure that these objectives are accomplished.

Depositions of experts, like those of nonexperts, usually begin with counsel entering into stipulations concerning agreed procedures. See §11.4. The attorney who noticed the deposition then examines the expert.

NOTE: The word "examination" is usually used rather than "direct examination" in reference to civil depositions. See CCP §2025.330(d) ("[e]xamination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code").

The attorney who hired the expert may question the expert if desired following opposing counsel's examination.

For detailed discussion of the procedures and strategies of taking and defending depositions generally, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006) (depositions generally). See also Vines, *The Expert Witness in Depositions*, 20 Trial 44 (Jan. 1984).

This chapter does not apply to criminal cases. On inapplicability of civil discovery statutes to criminal cases, see §10.47.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.2 B. Scheduling Expert Depositions in Cases With Numerous Experts

§11.2 B. Scheduling Expert Depositions in Cases With Numerous Experts

In cases in which multiple experts are disclosed by several parties, counsel must take the time limitations of CCP §§2024.030, 2034.220, and 2034.230(b) into consideration in establishing a discovery plan. Because depositions of experts frequently cannot be completed within the time limitations of those sections, counsel should strongly consider stipulating to an earlier exchange of expert witness information than specified in CCP §2034.230(b) and a later discovery cutoff date than provided under CCP §2024.030.

PRACTICE TIP: If opposing counsel is unwilling to reach an agreement, you should promptly move the court, for good cause shown, for an order setting earlier and/or later exchange dates.

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§11.3 C. When to Have Own Expert Attend Opposing Expert's Deposition

Evidence Code §777 authorizes the exclusion of witnesses, other than parties and designated representatives of parties who are not natural persons, "from the courtroom." There is no satisfactory counterpart for "the deposition room." Thus, there is no automatic bar to having one's own expert attend the deposition of an opposition expert. Consequently, a substantial number of lawyers bring their own experts to depositions of opposing experts to provide guidance and assistance.

This practice can become burdensome and needlessly time-consuming, particularly if the lawyer takes frequent breaks to confer with the expert or becomes little more than a "translator" of questions being framed by the expert. Counsel who are concerned about the impact an opposing expert will have on the deposition, in terms of length or otherwise, should seek a protective order under CCP §2025.420(b)(12) that authorizes the court to order that "designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition." This order should be sought, if possible, in advance of the deposition and should fully explain counsel's concerns regarding potential disruptions.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.4 D. Stipulations

§11.4 D. Stipulations

At the beginning of the deposition, counsel may wish to enter into stipulations with the other attorneys present. Some examples follow:

- All objections are reserved until the time of trial.
- An objection by one attorney reserves that objection for all parties present.
- Counsel examining the deponent may mark documents for identification without first requesting the court reporter to mark them; the court reporter can then mark them at the conclusion of the deposition.
- Copies of exhibits are to be treated as if they were originals.
- The parties have agreed to mark certain exhibits as part of pretrial discovery and will not have them remarked at the deposition or attached as exhibits to the deposition transcript.

For further discussion of stipulations at deposition, see California Civil Discovery Practice §§6.35-6.44 (4th ed Cal CEB 2006).

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§11.5 E. When Expert Is Unprepared or Uncooperative; Sanctions

Each party's expert disclosure statement must include "[a] representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis that the expert is expected to give at trial." CCP §2034.260(c)(4).

Counsel who nonetheless encounters an expert who is unprepared to give a meaningful deposition should proceed with the deposition and elicit as much information as possible, thereafter moving to bar the expert from testifying at trial, and for sanctions. On sanctions generally, including sample motions, see California Civil Discovery Practice, chap 15 (4th ed Cal CEB 2006). See also Gilmore & Woods, *The Opposing Party's Unprepared Expert: Strategies for Deposition and Trial*, 2 CEB Civ Litigation Rep 65 (July 1980).

Trial judges have the authority to bar the expert from testifying under CCP §2034.300, which provides that the trial court must exclude from evidence the expert opinion of any witness that is offered by a party who has unreasonably failed to make the expert available for a deposition under CCP §2034.260. See *Waicis v Superior Court* (1990) 226 CA3d 283, 276 CR 45. In *Waicis,* the court held that an expert who does not cooperate in the deposition process can be precluded from testifying altogether. One of the plaintiff's experts in that case—a dentist—demanded $500 an hour to testify. The defendant obtained a court order reducing this amount to a still seemingly excessive $350 per hour. The expert then insisted that his deposition be scheduled at 5 p.m. or later to avoid conflicting with his regular practice. He then sought, and obtained, five continuances of the deposition. The court reserved ruling on a request for sanctions on condition that the expert appear for deposition on the following Saturday. The expert appeared but walked out midway through the examination to attend a "personal meeting." The trial court then entered an order precluding the witness from testifying. The court of appeal affirmed, emphasizing the egregiousness of the expert's conduct and noting that the plaintiff acknowledged that she had other experts who could testify on the same issues. Thus, there are still open questions as to when a noncumulative expert can be precluded from testifying; the rights, if any, of the party who retained the expert to belatedly disclose an alternative expert; and the civil remedies available against the precluded expert if the retaining party's case is prejudiced by the preclusion order. But see §10.25 for a discussion of when an expert's inability to cooperate in the discovery process is not "unreasonable," and the court will not exclude the expert's testimony under CCP §2034.300; see also *Stanchfield v Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 44 CR2d 565.

The approach taken in *City of Fresno v Harrison* (1984) 154 CA3d 296, 201 CR 219, decided before the enactment of former CCP §2034 (now CCP §§2034.010-2034.730), underscores one of the basic purposes of discovery: to prevent surprise at trial. In that case, neither the identity of the expert nor the gist of his proposed testimony was disclosed until a month before trial. Because the expert was not ready for his deposition, the purported opportunity to depose him before trial was meaningless. This combination of factors led the court of appeal to conclude that permitting the expert to testify at trial was highly prejudicial and to uphold the trial court's granting of a new trial.

Sanctions were awarded in a federal case because an expert witness was unprepared at deposition. *Bhan v NME Hosps., Inc.* (9th Cir 1991) 929 F2d 1404 (sanction award of over $90,000 against plaintiff because plaintiff's expert was not prepared for his scheduled pretrial deposition and summarily left deposition after answering only few initial questions; expert also excluded from trial).

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§11.6 F. How Not to Depose Expert

All too many examiners begin an expert's deposition with no clear plan. Lacking any other organizational framework, they simply begin with the top paper in the expert's file, ask the expert about that item, and then proceed through the balance of the file, item by item. This procedure is time consuming and contains no system for ensuring that the questioner has learned everything the expert thinks about the case and the basis for each conclusion the expert has reached. Using this approach, the questioner can come away from the deposition with only a hazy idea of the work the expert has already performed and no idea at all of any plans the expert may have for doing further work that will bear on the expert's opinions about the case.

Other questioners skip around haphazardly in an apparent effort to trick the expert by a nonsequential questioning technique. Although this method may reveal useful inconsistencies or contradictions in the witness's testimony, it also fails to fulfill the questioner's intention of learning everything about the expert's work on the case. Still other lawyers begin by asking for the expert's ultimate opinion and then become so confused or overwhelmed that they fail to inquire systematically into the factual or other evidentiary bases and underlying reasoning of each element of the opinion.

PRACTICE TIP: The questioner should imagine himself or herself as a psychiatrist and the expert witness as a patient. As with the psychiatrist, the questioner's goal is to get the patient to talk freely, with a minimum of interruption and interjection by the questioner. Unlike the approach used at trial—keeping the opposing expert tightly constrained and restricted to giving yes and no answers—the aim of the deposition is getting the expert to talk openly and give complete explanations without holding anything back.

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G. Areas That Must Be Covered

§11.7 1. Checklist: Questions to Ask Opposing Expert at Deposition

When deposing an opposition expert, counsel might consider inquiring about the following issues (discussed in more detail in §§11.8-11.17):

- Date expert was first contacted about case; number of hours expert has worked on case; how many hours expert anticipates working on case in the future.
- Expert's fee.
- Expert's credentials; other similar cases expert has worked on; has expert always been on same "side?" See also checklist on qualifications in §13.3.
- Expert's assignment when hired; any changes or new assignments since then; reasons for assignments.
- What written or other material was expert given or did expert examine concerning case? See discussion in §11.12 on questioning expert regarding contents of his or her file.
- What other information, including outside reading, has the expert considered concerning the case?
- Has the expert performed any experiments, or made any demonstrative evidence for trial?
- What opinions has the expert reached? On what are they based? Has the expert written a report concerning the case? Has the expert put his or her thoughts on paper concerning the case?
- Give the expert additional evidence, or describe it, that the expert did not consider in arriving at his or her opinion, and ask if that changes the expert's opinion.
- How sure is the expert of his or her opinion?

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.8 2. Education and Employment Background

§11.8 2. Education and Employment Background

Unless the witness has been deposed previously and information concerning the expert's background is already available in the form of sworn testimony, the beginning point of the deposition is generally the nature of the expert's formal education, other training and experience, awards, employment history, and experience as a trial consultant and witness. See checklist in §13.3. The opposition must qualify its expert to testify at trial. See Evid C §720. See also §§13.2-13.6. The questioner must have this background information to determine whether the expert is qualified to testify, to avoid surprise at trial, and to evaluate whether different or more experts are needed to compete favorably with the opposition's expert.

EXAMPLE 1: In a case involving a handling problem with an automobile, whether the expert has, *e.g.,* ever participated in competitive driving or racing is a matter that should be explored in addition to the expert's employment background.

EXAMPLE 2: If the case is a medical malpractice action incident to removal of a cataract, the questioner should find out how many cataract operations the witness has performed or assisted in and compare this information to the professional experience that the questioner's expert may be able to catalog for the jury.

It is not necessary to object at the deposition to the witness's competence to testify as an expert. Counsel can wait until trial. CCP §2025.460(c) (objections to deponent's competency "or to the relevancy, materiality, or admissibility at trial of the testimony … are not waived by failure to make them before or during the deposition").

Background information can be elicited in succinct form by asking the expert: "Please state your educational background, starting at the high school level." Counsel should then ask whether the expert has had any other training (*e.g.,* correspondence courses, seminars) that bears in any way on the work performed or to be performed in the present case.

Next, a description of the expert's employment history in chronological order, beginning with the first full-time job and including details of any military experience, should be put on the record. Counsel should not neglect to ask questions covering whether any other part-time or temporary jobs may have shed light on the expert's work on the present case.

Depending on the area of expertise, the examiner should ascertain whether the expert has any other relevant qualifications. For example, when deposing a doctor, it is essential to find out whether he or she is board certified and, if so, in what specialty. When deposing an engineer, the questioner should ask what state licenses the deponent has.

Finally, any other relevant information should be elicited, such as whether the expert has:

- Maintained membership in any professional societies or organizations.
- Taught or lectured in a relevant area.
- Written any articles, books, or papers in the area.
- Participated in drafting any relevant legislation, such as a regulation, or testified before any legislative body that has considered legislation or regulations relevant to the case.
- Done anything else that may have had a bearing on the expert's work on the case.

Generally, counsel need not cross-examine the expert with regard to any of this background information during the deposition. Learning of it is all that is necessary. For example, if the case involves a claimed automobile defect, the examiner now knows whether the expert has ever worked for an automobile manufacturer, participated in designing the part of the vehicle in question, or even worked as an automobile mechanic. Moreover, it is probably better not to give the witness a practice session in responding to counsel's cross-examination before the trial. The ways in which background information obtained from the expert can be used during trial are discussed in chaps 14-15.

PRACTICE TIP: Although you must learn the witness's educational and employment background at some point before trial, tactical considerations may militate against your developing this information at the deposition. For example, if you know that the expert will not be available to testify in person at trial, and the deposition is being recorded on video, you may want to ignore qualifications altogether or, to be less obvious, touch on them only briefly, in hopes

that opposing counsel will neglect to qualify the expert at the deposition and that lack of a qualified expert will bear either on settlement value or on the persuasiveness of the opposition's case at trial. In addition, if the expert is from out of state or makes such a poor personal appearance that opposing counsel may try to introduce the deposition at trial instead of calling the expert as a live witness, a similar motive may prevail. Absent such tactical considerations, however, you should thoroughly explore the expert's qualifications. Note that, even when the questioner's tactics dictate otherwise, opposing counsel will generally rectify these omissions by properly qualifying the expert during his or her portion of the deposition.

Conversely, when the expert has been deposed, and neither examining or disclosing counsel has questioned the expert concerning his or her qualifications, and it later develops that the expert is not going to be able to testify at trial, *disclosing* counsel should consider calling another expert for the sole purpose of establishing the qualifications of the unavailable expert so that the deposition can be read at trial. If there is no previously disclosed expert in the case who would be capable of establishing the absent expert's qualifications, counsel should promptly seek leave of court to present such expert testimony. See §§10.16-10.19.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.9 3. Prior Experience as Expert

§11.9 3. Prior Experience as Expert

Having learned about the expert's overall educational and employment background, the questioner next should ascertain the witness's prior experience as a litigation expert. For discussion of how to use this information at trial, see §§15.12, 15.15-15.21.

If the witness has never been retained as an expert before, this phase of the deposition will be extremely short. When the expert has been retained in other cases, substantial interrogation is needed to learn the following:

- How long has the expert been testifying in litigation matters, on either a part-time or a full-time basis?
- During that time, in how many cases has the expert been contacted as a consultant, given a deposition, and testified at trial?
- In what percentage of *each* category given above has the expert worked for plaintiff or defendant, respectively? Many experts work almost entirely, if not exclusively, for one side or the other in litigation, but are understandably reluctant to reveal this fact. A general estimate of the overall breakdown of cases in which the expert has been hired is insufficient. If the witness's responses in this area seem to be ambivalent, counsel should press for the specific names and locations of cases during the past 12 or 24 months in which the expert has actually testified at a deposition or in court for each side. For names of jury verdict reporting services that list experts in cases by name, see §7.7.
- How many of the expert's prior cases, if any, have involved the same fact situation or issue as in the present case? For example, this may be the first case involving a bus that an expert in automobile accident cases has encountered.
- In what other types of cases has the expert been consulted, been deposed, or testified at trial? This question is particularly germane to the professional accident-reconstruction expert, who estimates accident speeds and time of impact one day, criticizes the design of a helicopter the next day, and, in between, attacks or defends the coefficient of friction of a bathtub. With this expert, the questioner should develop as many different areas as possible to later show that the expert will offer opinions on almost any subject.
- Has the expert previously testified on behalf of the same law firm or defendant? Many defendants, and lawyers on both sides, fall into the habit of repeatedly using the same expert. The questioner should find out the total number of cases in which the expert has been retained—not just those in which he or she has testified—by both the opposing lawyer and the opposing party, assuming the party is a corporation or other repeat litigant.

The rationale for learning about an expert's prior litigation experience is helpful to show potential bias. However, the court has set limits. In *Allen v Superior Court* (1984) 151 CA3d 447, 198 CR 737, the attorney was permitted to examine a medical expert regarding the percent of time and amount of compensation derived from his work as an expert. But the details of his billing and accounting, and the specifics of his prior testimony at trial and depositions, were considered proper subjects of a protective order. In the court's view, "[e]xact information as to the number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing bias." 151 CA3d at 453. See also *Russell v Young* (Tex 1970) 452 SW2d 434.

Allen's caution about the scope of discovery of an expert's financial or practice information is reinforced in *Stony Brook I Homeowners Ass'n v Superior Court* (2000) 84 CA4th 691, 101 CR2d 67. In *Stony Brook,* the court of appeal acknowledged that an expert must provide enough information about his or her role in prior proceedings to give an adversary a meaningful opportunity to show bias or prejudice. But the court held that the expert is not required to provide precise information about the number of cases in which he or she has testified or the compensation received. The trial court had ordered the physician expert to produce a summary that included the total number of patients he had treated over the last 4 years, the number he had examined for plaintiffs, the number for defendants, and his total compensation from both parties. Relying on *Allen,* the appellate court held that although plaintiff was entitled to know what percentage of the expert's practice involved examining patients for plaintiffs or defendants, and how much compensation he received for that work, the discovery order went too far when it required a more excessive intrusion

into information about the expert's practice and patients.

When an expert testifies at a deposition or trial, his or her opinions become a matter of public record and are the proper subject matter for impeachment. However, *Allen* leaves open the question of whether, and to what extent, opinions reached and reports prepared by the expert in previous cases are discoverable. What about the situation in which the expert was designated as an anticipated trial witness, but the case was settled before the expert was deposed? Or, the expert did additional work after being deposed, but the case was settled before the expert testified at trial? Is counsel entitled to ask an expert designated in a prior case about opinions reached when that expert was not actually called at trial? Some of these issues were discussed in *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 210 CR 535. In *National Steel,* the court allowed discovery of reports created by an expert who had been a consultant in a prior case in New York and who had provided confidential information about a steel building to that defendant's attorney. The same expert was later retained as a trial expert in a California case concerning a different building produced by the same manufacturer. The expert declared that he had neither referred to nor relied on his previous report about the New York building in arriving at his opinions in the California case. The court stated that it was still possible that the expert had "considered" the earlier report and remanded the case for the trial court to determine whether, under a three-part test, discovery should be denied on the ground of attorney work product privilege. See §8.16 for discussion of the three-part test enunciated in *National Steel*.

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§11.10 4. Assignment in Present Case

The questioner should learn the date on which the expert was first contacted. Often it will have been only a day or two before the deposition, even though the expert may have been disclosed as a potential witness at an earlier date. The opinions of an expert who was retained on the eve of deposition are frequently subject to attack as not being the product of considered study and analysis.

The opinions of an expert who was retained after disclosure are subject to attack on credibility grounds. Was the lawyer who disclosed the expert before retention simply clairvoyant and able to augur that the expert would be supportive of counsel's case without even knowing the facts, or did counsel have reason to believe that the expert was sufficiently "malleable" that he or she would be able to testify for whoever was paying the bill?

Counsel should also ascertain the circumstances of the original contact (*e.g.,* letter, telephone call, personal visit) and the nature of the assignment. Significantly, many experts cannot answer this last inquiry because the expert never asked and the lawyer never explained exactly what was desired of the expert. For discussion of the importance of explaining the litigation assignment for which the expert is hired, see §12.11.

PRACTICE TIP: If the expert was retained in writing, or if there are notes on some of the written materials given the expert by the attorney, you should review them to see whether they contain compromising admissions or give the expert a distorted view of the case.

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§11.11 5. How Time on Case Has Been Spent

To ensure that all work the expert has completed on the case is examined during the deposition, there is no substitute for breaking down the expert's time into hours. The questioner should ask how many total hours the expert has spent on the case, starting with the date the expert was retained. If the expert professes to be unable to answer this question, counsel should establish that the expert is being paid on an hourly basis and should continue to press for a best estimate of hours. If necessary, counsel should demand production of the expert's time sheets. On compelling deposition answers from expert witnesses, see §11.25. On procedures for compelling deponent to respond after refusal to answer or produce, see California Civil Discovery Practice, chaps 5, 8 (4th ed Cal CEB 2006).

Next, counsel should determine by general category the way in which the expert's time has been spent on the case and the approximate number of hours expended on each category:

- Hours spent reading and the nature of what has been read, *e.g.,* depositions, interrogatories, answers, other pleadings or file materials, and secondary sources such as books, articles, reports, studies, and medical records.
- Hours spent discussing the case and with whom, *e.g.,* opposing counsel, the opposing party, other experts, and independent third parties, as well as the nature of the discussion with each.
- How the balance of the time has been spent. Here, the nature of the inquiry will depend on the nature of the case, but it will frequently include such matters as visiting the accident scene, examining and testing parts, examining exemplars or competitive products, doing calculations, and researching comparable properties, businesses, or other similar facts, circumstances, or conditions.

Finally, this is an opportune time in the deposition to inquire about the expert's rates, charges, and manner of billing, with particular emphasis on any discrepancy in the billing rate or method for time spent at a deposition noticed by the questioner's client compared to the fees, including those at trial, charged the party who retained the expert. On the statutory requirement that the expert's fees for the retaining party be the same as for the party noticing deposition, see CCP §2034.430(d), discussed in §10.38. On the importance of inquiring about any additional work the expert may be contemplating, see §11.17.

NOTE: The party designating the expert is responsible for any fee charged for preparing for and traveling to the deposition, and the party noticing the deposition is responsible for paying for the expert's time at the deposition. CCP §§2034.440, 2034.430(b). See §10.38.

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§11.12 6. File and Reports

The questioner should next turn to the expert's file. Counsel should first have the expert provide a general inventory of the file and identify the categories included, *e.g.,* deposition transcripts, photographs, calculations, medical records, notes. Generally, it is not necessary at this point to go through each item in the file page by page or line by line. Rather, it suffices to have the general categories identified and the materials marked as exhibits to the deposition. For discussion of marking exhibits at a deposition, see California Civil Discovery Practice §§6.4, 6.42 (4th ed Cal CEB 2006).

Next, counsel should ask whether the expert has submitted any written reports if they are not contained in the expert's file or not yet produced by the opposing party in connection with an earlier demand for production or the parties' exchange of expert witness information. If reports have been submitted, counsel should demand copies of them.

The expert who has not prepared a written report should be asked whether a report will be prepared in the future, and, if so, counsel should demand that the expert deliver a copy to counsel when it is provided to opposing counsel. If written reports have been neither submitted nor contemplated, the questioner should ask whether the expert has received any instructions, express or implied, not to prepare a report and, if so, from whom. Facts suggesting to a jury that the expert and opposing lawyer conspired to remain silent may reflect negatively on their integrity and objectivity. The considerations concerning whether to have an expert prepare a report are discussed in §§8.22-8.23.

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§11.13 7. Assistance That Expert Has Received

Ideally, the breakdown of how the expert's time has been spent (see §11.11) will have disclosed whether anyone assisted the expert. To eliminate all uncertainty, however, counsel should specifically inquire into this area. The identity of each assistant and the precise nature of the work performed by each must be established for several reasons:

- First, it may be desirable, or even necessary, to depose the assistant to understand fully the nature of the opposition's case. Even if it is not necessary to depose the assistant, it may be desirable to do so. Frequently, the assistant has had little or no experience testifying and may be far easier to impeach or otherwise discredit than the designated expert.
- Second, the assistant may not fully concur with all the expert's opinions or may otherwise disagree with the expert in some respect.
- Third, particularly in cases in which a significant portion of the work in the file has been done by an assistant, it may be desirable for tactical reasons to demonstrate that the designated expert is actually just a front chosen for his or her appearance, manner, or ability to withstand cross-examination. This can be used to discredit the entire opposition.

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§11.14 8. Expert's Opinions

Following the questions asked in §§11.8-11.13, the questioner should move on to the opinions—tentative or otherwise—that the expert has reached in the case. Sometimes the area of opinion may be obvious.

EXAMPLE: Does the expert believe that an automobile part failed before or after the accident? Does the expert feel that the doctor's failure to diagnose cancer was negligent? Does the expert have an opinion concerning the total loss of support and contribution suffered by the decedent's survivors?

When the question is less obvious, the questioner should simply say, "Tell us each opinion you have reached as a result of your work on this case."

PRACTICE TIP: As a precautionary device, before moving on to the next category in which the expert may have formed an opinion, you should ensure that no opinions have been overlooked by asking, *e.g.,* "Are there any other opinions or conclusions you have reached in this case that you have not already told us about? What are they?"

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.15 9. Bases for Each Opinion

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The questioner should then ask the expert to state separately for each opinion all facts or other information on which the opinion is based. The questioner should resist the temptation to quarrel with the expert or challenge the basis for the opinion. Rather, the questioner should strive to give the expert an unfettered opportunity to explain everything on which the opinion or conclusion is based.

At appropriate intervals, the questioner should ask whether there is "anything else" not previously discussed that forms the basis for each opinion, to make sure nothing has been omitted. The strategy behind this tactic is twofold:

First, it minimizes the risk that the expert will be able to change the factual basis for that opinion at time of trial and certainly renders the expert subject to impeachment if such a change occurs.

Second, it may develop facts, lines of reasoning, or other matters that the questioner and his or her own experts have overlooked and that may have to be taken into account or that even undermine or destroy the questioner's theory of liability or defense. Problems in the examiner's case can be dealt with far more effectively if they are discovered during the deposition rather than at trial.

The kinds of information an expert will offer to support his or her opinions vary widely. Generally, however, the examiner should try to elicit:

- Any admissible evidence, *e.g.,* photographs, records, tests, experiments, or statements, on which the expert relies.
- The inadmissible or arguably inadmissible data, *e.g.,* other accidents or "similar situations," on which the expert relies.
- All assumptions, conjectures, or reasoning that form the basis for the opinion.
- Corroboration, if any, for the opinion.
- Any other reasons the expert may have for reaching or holding the opinion, including any books, articles, or treatises that the expert contends support the opinion.

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§11.16 10. Inconsistencies With Each Opinion

The examiner should ask whether the expert has encountered any fact, article, or other matter—either in material relied on or otherwise—that is either inconsistent or not fully consistent with each opinion reached. Assuming the expert is truthful and candid, this line of questioning should apprise the examiner of any weaknesses in the opposition's case, some of which may not have occurred to either the examiner or the examiner's own experts.

In addition, answers to these questions frequently provide good ammunition for impeachment of the expert at trial. For example, if at the deposition the expert acknowledges having read certain conflicting or inconsistent testimony, the expert who claims at trial that he or she has encountered nothing that is inconsistent with the opinions reached has some explaining to do. Likewise, counsel may impeach an expert witness at trial if at the deposition the expert acknowledged having relied on books, articles, studies, or other secondary sources that contain information inconsistent with the expert's opinion.

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§11.17 11. Other Contemplated Work

The examiner should ascertain whether there is anything further that the expert is scheduled to do in the case, *e.g.,* additional reading, calculations, or experiments. The examiner should also find out whether the expert has additional work planned or contemplated, even though not presently scheduled, and the nature of this work.

Finally, the examiner should ask, assuming an essentially unlimited budget and ample time, whether the expert would like to do any additional work to further test, corroborate, or solidify any opinions expressed.

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§11.18 H. Additional Questions That May Be Appropriate

All questions necessary to fulfill the questioner's goal at an expert's deposition, *i.e.,* to learn everything the expert thinks about the case and has done or plans to do in connection with the case, are discussed in §§11.8-11.17. The inexperienced examiner often is well advised to stop there and not attempt further questioning.

Depending on the nature of the case and the skill and experience of the examiner, however, several other areas may be worth pursuing. These lines of inquiry are discussed in §§11.19-11.24.

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§11.19 1. Traditional Cross-Examination

In some instances, it may be beneficial to test apparent absurdities in the expert's opinions or reasoning by using a trial-type cross-examination to discredit the witness at the deposition. This may serve to shake up an inexperienced expert or let opposing counsel know, for purposes of possible settlement or other partial resolution, just how weak his or her case might be. As a general rule, however, profitable areas of cross-examination are best left for trial. Otherwise, the expert obtains a preview of what is to come and is given an opportunity to prepare to meet it at trial.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.20 2. Assume Expert Is Correct

§11.20 2. Assume Expert Is Correct

An often effective technique is for the questioner to assume that the opposing expert is correct.

EXAMPLE 1: In the typical slip-and-fall case, if the plaintiff's expert claims that the plaintiff slipped not because of some foreign substance on the pavement or flooring but because the surface itself had too low a coefficient of friction, the questioner might ask a line of questions that assume that the floor really was as slippery as claimed. Then the questioner can ask whether the expert has heard of any other similar incidents and, if not, how the expert accounts for this seeming lack of consistency.

EXAMPLE 2: If the defendant's expert in a products liability suit contends that the accident happened because of the plaintiff's habitual misuse of the product, the expert should be questioned about why the plaintiff was not injured while misusing the product on some earlier occasion, or why other users of the product, who have similarly misused it, have been able to escape injury.

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§11.21 3. Make Expert Go to Extreme

When the expert's opinion seems questionable, the examiner can make it appear ludicrous by applying it to similar but more extreme facts. For example, if an expert states that no automobile gas tank should suffer a fuel loss in a 50-mile-an-hour accident, the examiner might ask if the expert feels the same way about an accident at 60, 80, or 100 miles an hour.

This line of questioning puts the expert in the dilemma of either committing to some fixed, litmus-paper speed (*e.g.,* 62.8 miles an hour) above which fuel loss is permissible but below which it is untenable, or claiming inability to answer the question without additional data. The expert who admits the need for additional data is not out of the woods. For example, one expert recently testified that, even in an assumed 300-mile-an-hour accident, he would still have to examine the wreckage of the vehicles to know for sure whether the resulting fuel loss had been caused by a defective gas tank.

An expert who can be led to such an extreme suffers a loss of credibility in the jury's eyes, and opposing counsel will have a strong basis for arguing that the expert—far from being an objective scientist—is simply an advocate seeking to be hired to testify in as many cases as possible.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.22 4. Is Expert Too Consistent?

§11.22 4. Is Expert Too Consistent?

Although the professional expert who has testified dozens of times in similar or identical cases may appear abundantly qualified, this past experience can often be the expert's greatest weakness. The examiner should fully explore the expert's prior testimony and work the expert has performed in earlier related cases.

EXAMPLE: It may develop that the expert has testified in 30 previous failure-to-diagnose-cancer cases that the failure to diagnose was not negligent. If the questioner can elicit testimony from the expert that the cases occurred in different states, involved different doctors with differing levels of experience, and involved diagnoses of differing kinds of cancer and differing claims of delay, the way will be paved for counsel to note at trial that the only consistency in the case is that the defendant's expert always finds a lack of negligence. The plaintiff's expert who travels around the country attacking a particular product or condition is subject to similar impeachment.

The expert who has testified for years concerning the same allegedly dangerous condition may be vulnerable to attack before judge or jury if he or she has done nothing to eliminate the problem besides testifying for pay. Many judges and jurors expect an ordinary, well-intentioned human being who spends a considerable portion of time testifying about some problem to do something about it.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.23 5. Does Expert Really Fit Case?

§11.23 5. Does Expert Really Fit Case?

An expert may offer an opinion at the deposition in an area in which he or she appears to have insufficient expertise. See §3.1. In such instances, the examiner should return to the expert's qualifications to determine whether they qualify him or her to give that particular opinion.

For example, an accident reconstruction expert who is qualified to render opinions concerning stopping distances and interpretation of skid marks may try to offer opinions concerning automobile design or the driver's subjective reaction to danger. Under these circumstances, the examiner may want to find out whether the expert has:

- Ever been qualified by a California court to render an opinion in court.
- Rendered such an opinion in a previous deposition.
- Obtained a degree or other formal training in vehicle design, psychology, human factors, or other disciplines that would seem to cover the area of opinion being expressed.
- Read or written on the subject.
- Has any other expertise in that particular area.

Information about the expert's previous trial experience can also be obtained from jury verdict reporting services. See §7.7. Data about any publications by the expert, depending on the individual's field of expertise, can be found in Index Medicus (for doctors) and Lockheed's Dialog Information Services, Inc. (for other fields). See §7.11. For discussion of uses that can be made of this information during voir dire and cross-examination of the expert, see §§15.12, 15.15-15.21.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.24 6. What Would Satisfy Expert?

§11.24 6. What Would Satisfy Expert?

It is sometimes a good strategy at the deposition to ask what the expert contends the opposing party should have done to avoid the expert's judgment of fault.

EXAMPLE: In a products liability action involving failure to warn of a danger, the defendant's attorney could ask the expert exactly what kind of warning would have to be given to make the product defect-free. Would the warning have to be in writing and, if so, precisely what wording should it contain, and where should it be placed, distributed, or otherwise disseminated?

Similarly, the plaintiff's counsel whom the defense has accused of having failed to take proper steps to mitigate damages (be they physical, financial, or otherwise) should consider asking the expert what alternative measure the plaintiff should have taken to achieve a standard the expert would consider not blameworthy.

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§11.25 I. Compelling Expert to Answer Deposition Questions

It is sometimes necessary for counsel to compel an expert to answer questions asked at the deposition. Situations in which this occurs include the following:

- The attorney for the party retaining the expert has instructed the expert not to answer questions, as if the expert were a client. See §8.2.
- The retaining attorney refuses to allow the expert to answer a hypothetical question because an essential element is missing or misstated. Note that the examining party should demand specification of the omission or misstatements. See §11.32. See also *Parlier Fruit Co. v Fireman's Fund Ins. Co.* (1957) 151 CA2d 6, 15, 311 P2d 62.
- The expert does not bring his or her complete file to the deposition. See §10.10 on compelling production of expert's file.
- The expert refuses to answer questions concerning similar pending lawsuits.

When these or similar problems arise during deposition, rather than adjourning the deposition as permitted by CCP §2025.460(d), counsel should opt to continue examining the expert to obtain the maximum benefit from the deposition. Counsel's position will not benefit from refusing to proceed because the expert or opposing counsel has improperly blocked inquiry in a particular area. Expert depositions are generally taken close to the trial date, making it imperative for counsel to glean as much information as possible from expert witnesses.

Counsel should then move to compel further discovery responses after the deposition has been completed. The court should be more sympathetic to an examiner who can represent that everything possible was done to minimize the damage. Notice of the motion must be given to all parties and to the deponent either orally at the examination or by subsequent service in writing. In any event, the motion must be made no later than 60 days after the completion of the record of the deposition and must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of the dispute. CCP §2025.480(a), (b).

If notice of the motion is given orally, the deposition officer must direct the deponent to attend a session of the court at the time specified. Not less than 5 days before the hearing, the moving party must lodge with the court a certified copy of any parts of the stenographic transcript (and any portions of an audio or video recording) that are relevant to the motion. If the court determines that the answer sought is subject to discovery, it must order that the answer be given on resumption of the deposition. CCP §2025.480(e).

For further discussion of motions to compel deposition answers, see California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006).

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§11.26 J. Updating Information Concerning Previously Deposed Expert

CCP §§2034.010-2034.730, and deposition procedures generally, envision a "never-never land" where courtrooms are always available on the day assigned for trial, lawyers never have conflicts, and cases are never continued or dropped. In the real world, however, particularly in major metropolitan areas, the continued trial seems to be an unavoidable fact of life.

CCP §2024.030 compounds the problem by requiring that expert witness discovery must be completed on or before the 15th day before *the date initially set for trial of the action,* and that motions concerning expert witness discovery must be heard on or before the 10th day before *the date initially set for trial of the action*.

It is unrealistic to expect that all judges will disallow testimony on later-developed facts or opinions, particularly if there has been a significant lapse of time between the deposition and the trial testimony. Under CCP §2024.050, the court may grant a motion to reopen discovery after a new trial date is set if the motion is accompanied by a declaration showing that a reasonable and good faith attempt to resolve the matter informally has been made.

Alternatively, parties to the action may, with the consent of any affected party, enter into an agreement to reopen discovery after a new trial date is set, but this agreement must not require a court to postpone the trial. CCP §2024.060.

The authors recommend that, whenever a trial date is continued, the parties agree to make all expert witnesses available for further deposition if the experts do any additional work or refine or alter any of their opinions. If the parties cannot agree to do so, the authors recommend that counsel make a formal motion to reopen discovery to permit deposing of experts. See CCP §2024.050(b), setting forth guidelines for the court to consider in ruling on a motion to reopen discovery.

PRACTICE TIP: You should consider propounding contention interrogatories as the new trial date approaches, asking whether any opposing expert has done additional work on the case, formed new conclusions, or changed previous opinions since being deposed. If answered in the affirmative, the interrogatory responses can be used to support a good cause showing to permit subsequent expert depositions to be taken. See CCP §2025.610 (prohibits subsequent deposition absent leave of court or stipulation).

Counsel should particularly consider a subsequent deposition when there has been a long delay since the initial deposition, if the areas of expertise involved include economic damage or the medical, physical, or mental condition of a party. Opinions in these areas are frequently subject to change as time passes. In the economic arena, *e.g.,* lost profits may increase, competitive conditions may change, or a party's earning power may increase or drop. In the medical arena, the party's condition may improve or deteriorate, his or her mental outlook may do the same, or rehabilitation efforts may prove successful. Even if the deposition shows only that there has been no change in the expert's opinion, that may be significant or helpful in planning counsel's trial strategy. This is particularly true, for example, when the prior opinion given by the opposing expert was favorable and counsel intends to elicit it again at trial. A subsequent deposition, pinning the expert down again, can avoid the difficulties encountered in finding out for the first time at trial that the expert has changed his or her mind on a topic. In light of the language of CCP §2025.610, counsel would do well to consider a reciprocal stipulation that experts in these types of areas can be deposed again as trial approaches. Such a stipulation avoids the chance that either side will be the victim of a surprise or miss important and advantageous new information.

For authority allowing counsel to depose the same person more than once, see *Carlson v Superior Court* (1961) 56 C2d 431, 15 CR 132. To minimize costs, the deposition notice can be accompanied by an offer not to proceed with the deposition if counsel for the expert will certify in writing that the expert will not testify about, or testify differently about, anything covered in the original deposition.

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K. When Deposition Is Recorded on Video

§11.27 1. Controlling Law; Procedures

Unless the parties agree or the court orders otherwise, deposition testimony must be recorded stenographically; if recorded stenographically, the recording must be done by a person certified under Bus & P C §§8020-8027. CCP §2025.330(b). In addition to the stenographic recording, an audio or video recording may be made if (CCP §2025.330(c)):

- The deposition noticed an intention to record the testimony by either of those methods;
- The parties agree that the testimony may also be recorded by either of those methods; or
- Any other party promptly serves on all other parties and on a nonparty deponent written notice of an intention to record the testimony not less than 3 calendar days before the deposition.

If given as late as 3 calendar days before the deposition, the notice must be by personal service. CCP §2025.330(c). For further discussion of noticing intention to record the deposition by video technology, see §10.40.

Under CCP §2025.620(d), any party may use a video recording of the deposition testimony of an expert witness at trial, even though the expert is available, if the deposition notice reserved the right to use the deposition at trial and that party has complied with the procedures required by CCP §2025.340(a)-(m). For example, CCP §2025.340(a)-(m) requires all counsel to identify themselves on the audio or video recording, and requires written notification to the court and all parties before trial of the intent to use the recorded portions of the deposition with sufficient time for objections and rulings to be made.

If a stenographic recording of the deposition was not made, the party offering an audio or video recording of the testimony at the time of trial must accompany that offer with a stenographic transcript prepared from the recording. CCP §2025.340(m). When the testimony has been recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of the testimony for the purpose of the trial and any subsequent hearing or appeal. CCP §2025.510(g). Any person may request a copy of the transcript of the deposition testimony or an audio or video recording of the deposition testimony from the deposition officer. See CCP §2025.570.

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§11.28 2. Treat Expert Like Witness at Trial

When an expert's deposition is recorded by video technology, counsel should use a different approach than that described for depositions in §§11.1-11.24. Essentially, the video-recorded deposition testimony of an expert (which can be shown in whole or in part to the jury, depending on the trial judge's rulings, as a substitute for live testimony) is not a discovery vehicle. See CCP §§2025.340(m), 2025.620. See also discussion in §11.35 of deposition by counsel of his or her own expert.

The examiner who learns that an expert's deposition will be recorded on video should consider seeking a protective order under CCP §2025.420 to postpone the deposition until after a discovery deposition (see §10.40) has been taken or the examiner has had other adequate opportunity to prepare for cross-examination. On using deposition testimony at trial, see California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006). See also Brockett, *Trial Run—The Videotape Revolution (Trial)*, 12 CEB Civ Litigation Rep 288 (Nov. 1990).

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II. ROLE AT DEPOSITION OF COUNSEL WHOSE OWN EXPERT IS BEING DEPOSED

§11.29 A. Preparing Expert for Deposition

The key to a successful deposition when one's own client is being deposed is preparation of the expert before the proceeding begins. This includes anticipation of the types of questions and the areas of inquiry the expert is likely to encounter in the particular case.

The properly prepared expert will be able to function adequately at the deposition with only minimal assistance from the attorney for the party retaining the expert. The improperly prepared expert is likely to perform inadequately at the deposition regardless of how actively the attorney may attempt to frustrate the proceedings.

Except for specified exceptions concerning the place of an expert's deposition and the payment of expert witness fees (see §§10.37-10.39), the procedures governing depositions of lay witnesses under CCP §§2025.010-2028.080 also apply to expert witness depositions. CCP §2034.410.

Preparing the expert is particularly important when the deposition will be recorded by video technology. Under CCP §2025.620, *any* party may use the video recording of a deposition of a treating or consulting physician or of any expert witness as a substitute for live testimony at trial, even though the deponent is available, if the deposition notice reserved that right and the requirements of CCP §2025.340(m) have been met. See discussion in §11.27. The most common uses of video recorded depositions by opponents are for impeachment at trial (see CCP §2025.620(a)) and to see how the expert performs under a trial-type cross-examination.

In preparing counsel's own witness for video recording a deposition noticed by the opposing side, counsel should treat the occasion as if the witness were about to testify at trial. On video-recorded depositions of experts, see §§11.27-11.28. For applicable discussion of preparing experts for cross-examination at trial, see chap 12.

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§11.30 B. Seeking Protective Order

On occasion, counsel accompanying the expert to the deposition may find it necessary to suspend the proceeding in order to seek a protective order. On the demand of any party or the deponent, the deposition officer must suspend the deposition to enable that party or deponent to move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party. CCP §2025.470. The court, for good cause shown, may terminate the deposition or limit its scope or manner of taking in accordance with CCP §2025.420.

The court must impose a monetary sanction under CCP §2023.030 against any party, person, or attorney who unsuccessfully makes or opposes a motion for the protective order unless it finds that other circumstances make the imposition of the sanction unjust. CCP §2025.420(d). For further discussion, see California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006).

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.31 C. Deposition Objections

§11.31 C. Deposition Objections

Errors and irregularities of any kind occurring at the deposition that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition. CCP §2025.460(b). These errors include, but are not limited to, those relating to the manner of taking the deposition; the oath or affirmation administered; the conduct of a party, attorney, deponent, or deposition officer; or the form of any question or answer. CCP §2025.460(b). For discussion, see California Civil Discovery Practice §§6.94-6.101 (4th ed Cal CEB 2006).

Unless the objecting party demands that the taking of the deposition be suspended to permit a motion for protective order under CCP §2025.470 (see §11.30), the deposition must proceed subject to the objection. CCP §2025.460(b).

Objections to the competency of the deponent or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary. These objections are not waived by failure to make them before or during the deposition. CCP §2025.460(c).

NOTE: Because the expert is not a client, counsel has no right to instruct the expert not to answer questions; however, counsel may advise the expert not to do so when appropriate. See discussion in §8.2.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.32 1. Inadequate Hypothetical Questions

§11.32 1. Inadequate Hypothetical Questions

Hypothetical questions are used frequently in all types of depositions to try to draw concessions out of experts. Objections protecting the record regarding inadequate hypotheticals are particularly important when a deposition is recorded on video for use at trial. Counsel should take care to object to incomplete hypotheticals or hypotheticals that assume facts that are not proven during discovery depositions, as well.

An expert who answers an incomplete hypothetical, or one that the evidence does not support, typically will be either speculating or creating an avenue for potential impeachment. A proper objection, vigorously adhered to, either will get a better framed question or will avoid the risk of an imprecise answer.

NOTE: If counsel fails to object at the deposition to a hypothetical question that is defective because it assumes facts not in evidence, the objection may be deemed to have been waived. See CCP §2025.460(b). To fully preserve the objection, missing or misstated elements should be specified with sufficient particularity to allow the examiner to rectify the problem. See *Parlier Fruit Co. v Fireman's Fund Ins. Co.* (1957) 151 CA2d 6, 15, 311 P2d 62, 68. For discussion, see California Trial Objections §§15.4, 20.19-20.20 (Cal CEB Annual).

Counsel representing the expert should advise him or her before the deposition begins not to volunteer answers to these types of questions when objections are interposed.

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Source: Civil Litigation/California Expert Witness Guide/11 Expert's Deposition in Civil Case/§11.33 2. Materials Not Consulted, Referred to, or Relied on

§11.33 2. Materials Not Consulted, Referred to, or Relied on

The examiner can ask questions concerning written materials only if any of the following occurs (Evid C §721(b)):

- The expert has consulted, referred to, or relied on them in arriving at his or her opinion;
- The publication has been admitted in evidence;
- The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

PRACTICE TIP: If the expert is questioned about a writing that does not fall within one of these classifications, or is asked to read some new material during the deposition, you should explain the law to the expert and advise the expert of his or her right to decline to answer the question or read the writing. On advising expert not to answer, see §8.2.

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§11.34 3. Questions Outside Expert's Designated Area of Expertise

Counsel should inform the expert who is asked to answer questions in an area outside the expert's designated field of skill or expertise of his or her right not to respond. For further discussion, see §§8.2 (advising expert not to answer), 12.11 (instructing expert on nature of assignment).

Different rules may apply with respect to questions that are beyond the scope of the expert's designation in the present case but relate to matters as to which the expert has expressed an opinion in a previous case. Thus, an expert who has been deposed in a prior action involving some of the same parties and issues may not refuse to testify in a deposition to opinions he or she previously expressed solely because the expert was not retained by the party who seeks the opinions. *Selvidge v U.S.* (D Kan 1995) 160 FRD 153.

In a medical malpractice action which preceded *Selvidge* but involved some of the same parties and issues, the defendant's medical expert had disclosed his views concerning the medical negligence of Army physicians while being deposed by the plaintiff. In *Selvidge*, the same plaintiff and the same defendant each designated the medical expert as their own witness. When the plaintiff sought to depose the expert as to the views he had expressed in the previous case, the defendant objected on the ground that such opinions were outside the scope of testimony designated by the defendant. The court found that when an expert witness has willingly testified to his opinions in a prior case, without objection by the party who had retained him, and those opinions are in issue in the present case, that witness may not withhold opinions within his area of expertise simply because the inquiring party is not the party who has retained him. 160 FRD at 156.

PRACTICE TIP: While *Selvidge* represents the views of only one magistrate in Kansas, it must be regarded both as a threat and a challenge to practitioners everywhere. In retaining and designating experts, counsel must familiarize themselves with the views and opinions that the expert has expressed on other occasions and the potential import of adverse counsel asking the expert to reiterate those views. Conversely, in evaluating the experts designated by opposing parties, creative counsel should give careful consideration to the previous expressions of opinion by those experts and whether any of those opinions may be elicited to advantage in the case at hand.

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§11.34A 4. Fact Witness Who Is Also an Expert

Independent fact witnesses who also happen to have expertise are not required to respond to deposition questions intended to elicit what amounts to an expert opinion when they have not been designated as experts under CCP §§2034.010-2034.730. *County of Los Angeles v Superior Court (Martinez)* (1990) 224 CA3d 1446, 1454, 274 CR 712 (construing former CCP §2034, now CCP §§2034.010-2034.730). While these defendant-physicians could be questioned about the "reasons for their actions at the time the medical procedure was performed," questions concerning after-the-fact opinions or impressions about the procedure performed were held to be properly objected to unless and *until* the defendant-witnesses were designated as experts.

As the appellate court also pointed out, however, if such a witness is later designated as an expert after his or her fact deposition, a question calling for such an opinion would have to be answered if not otherwise objectionable.

A fact witness who nonetheless offers an expert opinion can be deposed concerning that opinion. *St. Mary Med. Ctr. v Superior Court* (1996) 50 CA4th 1531, 58 CR2d 182. In *St. Mary Med. Ctr.*, for example, a treating physician provided a declaration to establish the existence of a triable issue of fact in response to a motion for summary judgment disputing the alleged negligence of two defendant doctors. After the declaration was filed, attorneys for the defendant-physicians attempted to depose the physician-declarant, but the trial court entered an order denying the deposition on the grounds that the declarant-physician had not yet been designated as an expert as required by *County of Los Angeles*. The court of appeal reversed, finding that *County of Los Angeles* was not controlling. Instead, because the declarant-physician had offered what amounted to expert testimony in opposing the summary judgment, the trial court should have allowed the deposition to go forward. Because there was a legitimate question regarding the foundation of the declarant-physician's opinion, the provisions of CCP §§2034.010-2034.730 did not preclude the deposition of the declarant-expert, even though there had not yet been an exchange of expert witness information as required by the section.

For discussion of the situation in which an expert offers nonopinion factual testimony only, see §10.23.

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§11.35 III. DEPOSING COUNSEL'S OWN EXPERT

Counsel may wish to depose his or her own expert and use the deposition testimony in place of having the expert testify at trial. See CCP §2025.620(d) (video-recorded deposition of expert to be used at trial). The procedures required in order to take advantage of CCP §2025.620(d) are discussed in §§11.27-11.28.

When deposing counsel's own expert, the attorney must prepare as he or she would for direct examination at trial. See chap 13. The expert must have completed all work on the case, including, *e.g.,* all exhibits and models that he or she plans to use during the deposition.

PRACTICE TIP: Remember to question the expert on his or her qualifications. See §§13.2-13.6. This foundation will be necessary to permit the introduction of the deposition at trial so that the trial court is satisfied that the expert has the requisite qualifications to offer an opinion on the disputed issue.

It is important for counsel to try to think of all possible objections that may be made at trial before beginning the deposition and to be prepared to elicit unobjectionable testimony from the expert at the deposition. Unfortunately, the rules are not entirely clear on every objection that should have been made at the deposition (as opposed to those that may be made for the first time at trial) despite the language in CCP §2025.460, discussed in §11.31. In addition, CCP §2025.340(m) appears to allow the court to permit further objections at the time of trial "as justice may require," a phrase that has yet to be interpreted in a published appellate opinion.

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§11.36 IV. ROLE OF ATTORNEY WHEN OPPOSING COUNSEL IS DEPOSING OPPOSING COUNSEL'S EXPERT

When opposing counsel has noticed the deposition of his or her own expert, counsel should treat the deposition as if it were direct examination at trial because the video recording may be used at trial in place of the witness. See CCP §2025.620.

Counsel should prepare carefully for objections. See §§11.31-11.34 on objections that must be made at the deposition.

PRACTICE TIP: You might consider making only those objections that must be made at the deposition, saving others for later when opposing counsel submits the video recording to the trial court for formal trial objections under CCP §2025.340(m). It may be difficult for opposing counsel to salvage all the expert's important testimony at trial if, *e.g.,* incompetent, irrelevant, immaterial, or inadmissible testimony or evidence was introduced by the expert at the deposition. See CCP §2025.460(c) ("[o]bjections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition").

Counsel should prepare carefully for cross-examination of the expert at the deposition because the video recording will undoubtedly be shown to the jury, and it may be the only opportunity the jury has to see the expert.

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§11.37 V. USE OF WRITS TO REVIEW DEPOSITION RULINGS

The use of writs to review discovery is disfavored. *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 170 n11, 84 CR 718. The rationale is that discovery problems are frequently rendered moot by settlement of the case or corrective action at trial; and, in any event, if there is lingering prejudice, it can be raised on appeal after trial. However, examples of cases in which such writs were successfully obtained include *De Los Santos v Superior Court* (1980) 27 C3d 677, 166 CR 172, and *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 231 P2d 26.

Accordingly, counsel's use of a writ petition to review discovery in connection with an expert's deposition is likely to be effective only when irreparable harm is involved, *e.g.,* forced disclosure of a privileged communication. On the rare situation in which the attorney-client privilege may apply to an expert's potential testimony, see §§8.4-8.6. For discussion of protection of the attorney's work product and the need for counsel to exercise extreme caution in providing materials or other information to the expert, see §§8.8-8.19.

For more detailed discussion of using writ petitions to seek review of discovery orders, see California Civil Writ Practice §§4.60-4.70 (3d ed Cal CEB 1996).

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VI. FEDERAL RULES OF EVIDENCE

§11.38 A. Deposition of Expert Trial Witness

Under Fed R Civ P 26(b)(4)(A), experts who are expected to be witnesses are subject to deposition before trial. This is similar to California state law, which allows the opposing party to take an expert's deposition in order to discover that witness's opinions and their underlying bases by simple notice. See CCP §2034.410. The deposition of an expert who is required by the disclosure provisions of Fed R Civ P 26(a)(2)(B) to provide a written report, however, may not be taken until the report has been served. Fed R Civ P 26(b)(4)(A).

Like California law, which permits expert testimony on subjects sufficiently beyond common experience (see Evid C §801), the federal rules of evidence permit an expert trial witness to testify in the form of an opinion if the testimony is related to scientific, technical, or other specialized knowledge and that testimony would assist the trier of fact to understand the evidence. Fed R Evid 702. The opposition is then entitled to fully cross-examine the expert about the bases and reasons for each opinion. See Fed R Evid 705.

PRACTICE TIP: Deciding whether to depose an expert, regardless of whether it is your own or an opposing expert, requires careful consideration. Not deposing an opposing expert can, for example, give counsel the benefit of surprise during cross-examination. Further, because an expert is limited to opinions and exhibits that have been timely disclosed under Fed R Civ P 26(a) or otherwise made known during discovery, counsel taking an expert's deposition may inadvertently open the door to material that would otherwise be excluded. See Joseph, *Expert Approaches*, 28 Litig 20 (Summer 2002).

With testifying experts, Fed R Civ P 26(a)(2)(B) requires disclosure of the "compensation to be paid for [the expert's] study and testimony." Federal courts generally agree that this provision extends to more than simply the expert's hourly rate. But there is no agreement on the threshold standard that must be met in order to compel disclosure of other information related to compensation. Compare *Cary Oil Co. v MG Ref. & Mktg.* (SD NY 2003) 257 F Supp 2d 751 (requiring requesting party to show "reasonable suspicion" that compensation arrangement "materially changed" expert's opinion) with *Amster v River Capital Int'l Group, LLC* (SD NY 2002) 2002 US Dist Lexis 16595 (requiring requesting party to show "plausible argument" that total amount of compensation could be relevant to showing of bias) and *Boselli v Southeastern Pa. Transp. Auth.* (ED Pa 1985) 108 FRD 723 (permitting requesting party to obtain compensation information because it would be "useful" for purposes of effective cross-examination).

In federal proceedings, experts may be examined concerning fees earned in prior cases. *Collins v Wayne Corp.* (5th Cir 1980) 621 F2d 777, 783.

For further discussion of federal rules in connection with depositions generally, see California Civil Discovery Practice §§5.200-5.215 (4th ed Cal CEB 2006).

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§11.39 B. Objections at Deposition

Like California law (see CCP §2025.460(b), (c), discussed in §11.31), objections to the competency of a witness, or to the relevance or materiality of testimony and the like, are not waived under federal law by failure to make them before or during the taking of the deposition. Only objections made on grounds that might have been obviated or removed if presented at that time are waived. Fed R Civ P 32(d)(3)(A).

For example, in *Cordle v Allied Chem. Corp.* (6th Cir 1962) 309 F2d 821, the grounds for objections to testimony at trial were waived for failure to make them at the deposition because hypothetical questions on the same subject matter could have been substituted for questions actually asked of the expert if a proper objection had been made at the deposition.

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§11.40 C. Writs to Review Discovery Orders

Extraordinary writs that review discovery rulings are rarely issued in the federal courts. See *Bogosian v Gulf Oil Corp.* (3d Cir 1984) 738 F2d 587. However, in exceptional cases, such as when there is an extreme need or the matter is of extraordinary significance, the federal courts of appeal have the discretion to reverse by writ a discovery order made by a federal district court. See, *e.g., In re Von Bulow* (2d Cir 1987) 828 F2d 94 (appeal after judgment would be inadequate remedy to protect attorney-client privilege); *Texaco, Inc. v Borda* (3d Cir 1967) 383 F2d 607 (writ issued to set aside order denying leave to take deposition of 71-year-old man).

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Preparing Expert for Deposition and Trial

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III. FEDERAL RULES OF EVIDENCE §12.38

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I. NEED FOR PREPARATION; SCHEDULING

§12.1 A. Need for Preparation

Preparing experts to testify should begin during the auditioning process. By the time counsel is required to designate expert witnesses under CCP §§2034.210-2034.310, counsel should have determined whether the selected experts have jury appeal, respond to instructions, can explain their areas of expertise clearly to the jury, and can stand up well to cross-examination.

Intensive preparation of the expert to testify at deposition is frequently deferred until the expert's deposition has actually been noticed or it has become apparent that the expert's deposition will be taken. Some attorneys do not begin to prepare experts to testify until the day before, or even the day of, the deposition. Such last-minute cramming should be avoided if at all possible so that counsel has sufficient time to prepare the expert to testify persuasively. Counsel should arrange to meet with the expert at least a week before the deposition, generally for a period of several hours, and then arrange to meet again on the eve or day of the deposition for a 15- to 30-minute review session. The same is true of preparation before trial.

Counsel should assume that the expert may need several days of intensive work before meeting with counsel to prepare for testifying. When setting up an appointment for a deposition or trial preparation session, counsel should tell the expert what work counsel expects the expert to have completed by the time they meet. For example, before the preparation session, counsel will probably want the expert to have read all materials counsel has sent; to have completed the tests, experiments, and other work that counsel has requested; and to have fully thought through all important aspects of the case, particularly possible questions from the opposition and how to respond to them.

There are legal as well as practical reasons for early preparation of the expert. Code of Civil Procedure §2034.260(c) provides that, if any disclosed witness is a party or an employee of a party, or is retained for litigation purposes, the expert witness disclosure statement must include an expert witness declaration containing, among other things, a representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

There are a number of articles that the authors have found helpful in preparing experts. A sampling includes: O'Sullivan, *What Testifying Experts Need to Know about Daubert Challenges*, Insights (Summer 2004); Malone & Zwier, *Effective Expert Testimony*, Nat'l Institute for Trial Adv (2000); Craft, *An Expert: Preparation Is The Key*, Nat'l LJ 15 (Feb. 22, 1988); Daniels, *Managing Litigation Experts*, 70 ABA J 64 (Dec. 1984); Younger, *A Practical Approach to the Use of Expert Testimony*, 31 Clev St L Rev 1 (Winter 1982); *Preparing and Using Expert Witnesses*, 20 Trial 1 (Jan. 1984); Sumpter, Civil Trial Strategy and Technique Notebook, chaps 10, 17 (1983).

A useful tool for consulting engineers (or any other expert witness) to study is Consulting Engineers and Land Surveyors of California (CELSOC), The Consulting Engineer as an Expert Witness (3d ed 1990). This pamphlet contains useful information about all stages of the witness's involvement. The address and telephone number of the organization are 1303 J St., Suite 450, Sacramento, CA 95814, (916) 441-7991, http://www.celsoc.org.

On preparing expert testimony on scientific evidence, see Scientific Evidence in California Criminal Cases, chap 3 (Cal CEB 2008).

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.2 B. Scheduling

§12.2 B. Scheduling

One commentator has quite properly described the scheduling of appointments with experts as a nightmare. See Baum, Art of Advocacy—Preparation of the Case §9.73 (1981). Medical experts frequently have calendars that are completely full for months in advance, while experts who testify and consult often have schedules that are more crowded than those of the busiest trial lawyer.

The statutory framework of CCP §2024.030, CCP §2025.270(a), and CCP §2034.230(b) provides a maximum of 25 calendar days within which to depose experts who have been disclosed, or a maximum of 20 calendar days if notices are served by mail. Discovery frequently cannot be completed within these short time limitations because of scheduling conflicts, particularly when multiple experts have been disclosed by several parties. There are several ways to avoid this problem:

- Seek a stipulation with counsel for other parties to establish a discovery schedule that starts before the disclosure period under CCP §§2034.210-2034.310 and permits discovery to continue after the dates established under CCP §2024.030.
- Make a motion under CCP §2034.230(b) for an exchange date that is earlier or later than that specified under CCP §2034.230(b).
- Make a motion under CCP §2024.050 seeking permission to complete discovery after the date for completion set under CCP §2024.030 (15 calendar days before trial).
- Seek a continuance of the trial date.
- Seek a protective order under CCP §2034.250 to prevent the client's interests from being prejudiced.

Scheduling of expert testimony during trial is equally difficult. Trial judges are understandably anxious to maximize the effective use of courtroom time and often refuse to bend to meet an expert's schedule. Trying to match the limited time an expert has available to the often unpredictable pace of a trial can be very difficult. To minimize these problems, counsel should know the expert's schedule before selecting a trial date at the trial-setting conference so that a trial date can be secured that is convenient to the expert. If the expert is coming from out of town, counsel should advise the trial court of this fact at the beginning of trial. Given advance notice, most trial judges will attempt to schedule other witnesses around the out-of-town expert or even let the expert testify out of order. If worse comes to worse, counsel may have to pay the expert to sit at the courthouse until called.

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II. PREPARING EXPERT TO TESTIFY

§12.3 A. Checklist: Preparing Expert to Testify

Attorneys should divide the expert preparation process into procedural and substantive aspects, prepare checklists for each of these two areas or use the checklists in this section, and then check off items as they are accomplished. This not only simplifies preparation of the expert but also reduces the risk of overlooking an important aspect of preparation.

PRACTICE TIP: Some experts like to receive a copy of a preparation checklist so they can use it to make sure that they have completed all their tasks. If this is to be done, you should add detailed information to the checklists, *e.g.,* the address of the courthouse, a list of all exhibits to be prepared, and a list of documents to be reviewed.

PROCEDURAL CHECKLIST

- Location of deposition or trial; what to wear. See §§12.21-12.22.
- Purpose of expert's testimony at deposition or trial. See §§12.4, 12.7.
- Deposition or trial procedures, *e.g.,* where to sit, questions by judge or jurors. See §§12.5, 12.21, 12.23.
- Objections; how to respond; areas concerning which you recommend that expert not testify at deposition or trial. See §§12.6, 12.16.
- Which parties and lawyers will be there; their interest in the litigation. See §12.7.
- Hypothetical questions. See §12.26.
- Habits and idiosyncrasies of other attorneys who will be at deposition or trial. See §12.9.
- Avoiding arguments with other counsel. See §12.27.

SUBSTANTIVE CHECKLIST

- Compensation. See §12.15.
- Expert's qualifications. See §§13.2-13.6.
- Nature of expert's assignment. See §12.11.
- Materials consulted or relied on; every document expert should review before testifying. See §§12.12, 12.29-12.35.
- Attorney-client or work product problems. See §§8.1-8.9.
- Refreshing recollection. See §12.13.
- Expert's file contents; what to bring to deposition or trial; what not to bring. See §12.14.
- Work already performed on case; work to be performed on case; opinions reached and bases for them. See §§12.11, 12.16-12.17.
- Inconsistencies and how explained. See §12.17.
- Anticipating scope of opposing counsel's examination or cross-examination of expert. See §12.18.
- Help expert plan relevant experiments, exhibits, and demonstrative evidence that expert will bring to deposition or trial; view them before they are presented. See §§12.34-12.35.
- Review how expert will explain technical concepts and language. See §12.24.
- Go over actual questions that are similar to those that will be asked on direct examination at trial. See §§12.18, 12.36.
- Ask expert his or her view of opposing experts, what their testimony will probably be at deposition or trial, and the strengths and weaknesses of their testimony. See §12.36.

- Have expert educate you on any technical concepts on which you are still unclear. See §12.24.
- If desired, have jury consultant work with expert to improve expert's presentation. See §12.36.

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B. Preparing Expert to Testify at Deposition in Civil Cases

1. Explaining Deposition Procedures to Expert

§12.4 a. Purpose of Deposition

In dealing with expert witnesses, particularly inexperienced experts, counsel often overlook the possibility that the expert may not be fully conversant with the nature and purpose of a deposition. Even with experienced experts, counsel should explain how the expert's testimony fits into the overall framework of the particular case and exactly what is expected of the expert at the deposition.

Counsel must make clear to the expert whether counsel wants to use the deposition as a vehicle for persuading the other side of the correctness of counsel's position in hopes that the case can be settled before trial, or whether counsel wants to reveal as little about the case as possible during the deposition so that his or her position is a surprise at time of trial.

If counsel follows the former approach, the expert should be encouraged to adopt an advocate's stance, fully explain answers, volunteer testimony that may not specifically be called for by the opponent's questions, and, in general, try to "sell" counsel's side of the case at every available opportunity. If the latter approach is followed, counsel should remind the expert to respond only to the particular questions asked, to use yes or no answers whenever possible, to resist the temptation to elaborate on answers, and in general to avoid assisting opposing counsel with insights or observations not directly called for by the examiner's queries.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.5 b. Deposition Procedures

§12.5 b. Deposition Procedures

When dealing with relatively inexperienced experts, deposition preparation should include the same information that is covered with lay witnesses. Counsel should familiarize the witness with deposition procedures:

- The expert is under oath.
- The expert should be sure that he or she understands a question before answering it. The expert can ask for clarification if necessary.
- The expert should not talk at the same time as another person because the reporter cannot transcribe more than one person's words at a time.
- All parties may review the deposition transcript. Opposing counsel may comment on revisions to the transcript.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.6 c. Objections

§12.6 c. Objections

If the expert is not an experienced witness, counsel should explain the purpose of objections in lay language. Counsel should explain that objections may be made to the form or the substance of questions. If an objection is made only to the form of the question, the expert will be permitted to answer.

The expert should be told to listen carefully to the objections because they frequently contain clues from counsel that indicate what the expert should do in responding to questions or that provide the expert with a basis for not answering questions. For example, if counsel objects to a question as vague and ambiguous because it is indefinite about time, the expert should be encouraged to explain his or her inability to answer the question as phrased because of the vague time frame. Counsel should tell the expert that when counsel raises his or her hand it is a signal for the expert to listen to the forthcoming objection before attempting to respond.

Any areas in which counsel does not want the expert to answer questions should be discussed ahead of time, and the expert should be instructed to notify counsel before responding to a question when the answer would disclose such material. Counsel should explain that he or she cannot instruct the expert not to answer (see §8.2), but can suggest that the expert not answer, and that the expert can follow this advice.

PRACTICE TIP: Your communications with the expert will seldom be protected by the attorney-client privilege. See §8.3. They may enjoy work product protection, although this protection rarely survives to the deposition stage of the case. See §§8.8-8.19.

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§12.7 d. Distinguishing Friend From Foe

The expert should be able to distinguish friend from foe. He or she must know which attorney represents which party and how each attorney's interests coincide with or differ from those of the expert's employer. The expert must distinguish when to be wary and when not to frustrate the efforts of an ally. It is most important for counsel to acquaint the expert with potential questions and how they relate to the lawsuit.

The expert should be provided with or shown each party's expert witness disclosure list so the expert knows who the opposing and allied experts are. Counsel should ask for the expert's opinion of the other experts. If counsel's expert is friendly with or highly regards an opposing expert, counsel should anticipate a question regarding that friendship or esteem and help the expert determine how to disagree with the views of the friend, mentor, or idol.

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§12.8 e. Hypothetical Questions

Although hypothetical questions are permissible both on direct and cross-examination of experts (*People v Busch* (1961) 56 C2d 868, 16 CR 898), they are difficult to frame in a nonobjectionable manner and generally should be written out before the deposition.

Most hypothetical questions asked at deposition omit one or more essential foundational elements, assume facts not in evidence, or are otherwise objectionable as to form. Cautious counsel whose expert is being deposed frequently object on foundational grounds to every hypothetical question asked during deposition.

If a question is objected to on a foundational ground, the questioner is entitled to demand a statement of the missing elements. *Parlier Fruit Co. v Fireman's Fund Ins. Co.* (1957) 151 CA2d 6, 15, 311 P2d 62. See also California Trial Objections §§20.20, 20.31 (Cal CEB Annual). Objecting counsel may therefore wish to volunteer the missing or incorrect elements of the hypothetical as part of the objection. Another reason for volunteering this additional information is that it can assist objecting counsel's expert in giving the most complete and accurate answer possible. For example, in an ordinary intersection accident case, experts frequently are asked questions such as: "Do you think the accident could have been avoided if driver *A* had been going five miles per hour slower?" Depending on the facts of the case, counsel may want to object to such a question on foundational grounds because it does not take into account, *e.g.,* the condition of the car's brakes, the driver's attentiveness, the driver's reaction time, or any effect the lower speed might have had on the other driver's actions. By listing these omissions, counsel satisfies the requirements for a proper foundational objection (151 CA2d at 15, 311 P2d at 68) and provides valuable assistance to the expert, who can then state that he or she cannot answer the question until opposing counsel supplies the missing facts.

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§12.9 f. Habits and Idiosyncrasies of Other Counsel

Lawyers employ various tactics in examining witnesses, ranging from charm (in hopes of getting the witness to drop his or her guard) to abuse (in hopes of intimidating the witness). Counsel should prepare the expert witness for any tactics counsel knows the opposition is likely to use. For example, through design or otherwise, lawyers frequently ask an expert a long list of questions that the expert knows nothing about, either because the questions have nothing to do with the case or because they concern areas that are unrelated to the expert's singular role in the case. During deposition preparation, experts should be counseled not to be embarrassed or disconcerted if they must repeatedly answer, "I do not know."

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.10 g. Avoiding Arguments With Other Counsel

§12.10 g. Avoiding Arguments With Other Counsel

Because expert witness depositions are concerned largely with opinion testimony, the risk of argument is greater than in the depositions of factual witnesses. The expert should be instructed to resist the temptation to argue with the other lawyers, particularly if the expert is disputatious by nature. Counsel should tell the expert that his or her credibility and ability to persuade may be undermined if he or she is perceived as an advocate; and, when tempers flare, the expert is more likely to blurt out a damaging or poorly conceived answer.

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2. Preparing Expert's Substantive Testimony

§12.11 a. Nature of Assignment

The expert must understand and should be able to articulate his or her assignment in the case, preferably in 25 words or less. It is embarrassing when an expert at the deposition stage of a case cannot succinctly state what work he or she has performed on a file. Moreover, an expert who has a concrete understanding of his or her assignment can control the questioning, distinguish relevant from irrelevant questions, and avoid answering questions that do not relate directly to his or her assignment in the case.

In framing the expert's assignment, it is frequently helpful to look at relevant jury instructions for the elements that must be satisfied to prevail in the case, and then select the particular elements that the expert will be relied on to establish or disprove. The expert is then knowledgeable enough to know which questions call for information the expert has not been hired to address.

The expert who offers opinions at trial in an area not included in the expert witness disclosure statement may create reversible error. See, *e.g., Kennemur v State* (1982) 133 CA3d 907, 184 CR 393.

EXAMPLE 1: In a products liability case involving a claim of defective manufacture (as opposed to defective design), the plaintiff must prove that the product differed from the manufacturer's design or specifications or from others of like kind. CACI 1202. Neither the plaintiff nor the plaintiff's expert is obligated to redesign the product in nondefective form or to conceive of an optimum product. It is sufficient, for example, if the plaintiff's expert has determined that a particular failed metal part has a greater number of voids or fissures than are contained in its nondefective counterparts. The expert who understands the limited nature of his or her assignment can deflect questions such as, "What is the minimum number of voids and fissures that you think a part of this kind should have in order to be nondefective?" by stating that he or she has not been called on to make such a determination but has focused entirely on analyzing the differences between the failed part and its nondefective counterparts.

EXAMPLE 2: In multidefendant tort litigation, the individual defendants are not responsible for establishing how the accident occurred; rather, counsel for a particular defendant need only show that the accident was not caused by an act or omission on the part of his or her client. For example, when it is alleged that an automobile accident occurred because of excessive speed and inattention on the part of various drivers, and because of a malfunctioning traffic light, counsel for the defendant that manufactured or maintained the signal light need only show that the light was performing properly. The assignment of the expert for that party could be to determine whether the signal light was properly functioning at the time of the accident. If the expert is then asked his or her opinion concerning the driving of some other defendant, the design of that traffic signal as contrasted with other traffic signals, or about anything other than the expert's precise assignment, the expert can respond without hesitation that the question relates to areas that he or she has not been called on to consider.

PRACTICE TIP: When you have noticed a video recording of your own expert to use at trial, you and your expert must be fully prepared to ensure that the testimony will be effective and that the opinions stated are supportable.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.12 b. Materials Consulted or Relied on

§12.12 b. Materials Consulted or Relied on

During deposition preparation, counsel and the expert should compile a written list of all materials that the expert has referred to, considered, or relied on in arriving at or forming his or her opinion, and should incorporate the list in the file that the expert witness brings to the deposition. Evid C §721(b)(1). The expert then does not have to rely on memory to recollect everything that he or she referred to while working on the case, and counsel can interpose appropriate objections (see §12.6) to any attempt to cross-examine the expert concerning material not on the list.

NOTE: Experts can also be cross-examined concerning writings that are admitted in evidence, or that are established as a reliable authority. See Evid C §721(b)(2)-(3).

Counsel should not furnish the expert with privileged material on which the expert may base his or her opinion unless counsel recognizes the risks of such disclosures and is prepared to run them. If the expert reviews the material and relies on it in forming his or her opinions, the expert can be cross-examined on it. See Evid C §912. The privileged material itself will also most likely be subject to disclosure because any work product, attorney-client, or other applicable privilege will be considered waived by the expert's reliance. *Julrik Prods., Inc. v Chester* (1974) 38 CA3d 807, 113 CR 527 (plaintiff testified to contents of letter sent to his attorney; defendant entitled to examine letter because attorney-client privilege waived by disclosure of significant part during trial).

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.13 c. Refreshing Recollection

§12.13 c. Refreshing Recollection

All witnesses, including experts, are subject to the Evid C §771(a) provision that writings used to refresh a witness's memory are subject to production on demand by the opposing party. The statute is silent concerning its application to material that is covered by the attorney-client privilege or the work product rule. Therefore, materials that contain damaging omissions or compromising statements, or that counsel does not want the opposition to see, should not be shown to the expert. For example, counsel should use actual deposition transcripts rather than deposition summaries to prepare the expert, especially if the summaries contain subjective comments or analyses.

The first case to address the conflict between §771(a) and attorney-client and work product protection squarely was *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 411, 72 CR 74, in which an employee of one defendant testified that he had prepared reports concerning the case, but stated that he had no memory about the matters in question independent of the reports. He further stated that he would have been unable to testify had he not been able to review those reports before his deposition. Opposing counsel made demand for the reports, and the employee's attorney objected on attorney-client privilege and work product grounds. The opposing party then instituted writ proceedings to compel production of the reports under Evid C §771. The court of appeal ordered production, finding that use of the reports to prepare the witness for deposition constituted a waiver of both protections. *Kerns Constr. Co. v Superior Court, supra*.

Subsequently, in *People v Aikin* (1971) 19 CA3d 685, 694, 97 CR 251, disapproved on other grounds at 13 C3d 500, a criminal defendant argued on appeal that his conviction should be reversed because the trial court had ordered production of a report used by a defense psychiatrist to refresh his recollection before testifying. The court of appeal first observed that, if the report was privileged, that privilege "should override the more mechanical features of section 771." 19 CA3d at 695. The court went on to find, however, that the defendant had waived the psychotherapist-patient privilege by making his emotional condition an issue in the case so that production of the report was proper. 19 CA3d at 696.

The next reported California case that squarely addressed the effect of Evid C §771 on privileged materials was *Sullivan v Superior Court* (1972) 29 CA3d 64, 67, 105 CR 241, in which the plaintiff's counsel tape-recorded an interview with his client. While preparing for deposition, the plaintiff read a transcript of the tape and acknowledged during the deposition that she had used the transcription to refresh her recollection. The defendant demanded production of the tape, citing *Kerns Constr. Co. v Superior Court, supra*. The trial court granted the motion, and the plaintiff petitioned for a writ of prohibition.

Noting an apparent conflict between Evid C §954, which exempts attorney-client communications from disclosure, and Evid C §771, and without citing any supporting authority, the court held that the word "writing" in §771 did not include a transcription of a client's conversations with her attorney concerning the subject matter of the action. In reaching this conclusion, the court ignored Evid C §250, which explicitly defines a "writing" as including specific, enumerated forms of recordation

> and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any other record thereby created, regardless of the manner in which the record has been stored.

The court went on to find that there had been no waiver of the attorney-client privilege and that the defendant was not entitled to the transcription. The *Sullivan* court tersely distinguished *Kerns* on the grounds that the employee in *Kerns* used his reports during the deposition to refresh his recollection, whereas the *Sullivan* plaintiff read the transcription before the deposition began. 29 CA3d at 72. In distinguishing between whether recollection is refreshed before or during the deposition, the *Sullivan* court ignored the language in Evid C §771 that its production requirements apply "if a witness, either while testifying or prior thereto, uses a writing to refresh his memory."

Only the court in *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 449, 120 CR 787, has discussed both *Kerns* and *Sullivan*. In *Mize,* a trial witness testified that he had used writings to refresh his recollection, and the trial judge ordered production of those materials, overruling a claim that they were covered by the work product rule and the

attorney-client privilege. The appellate court affirmed, finding that the materials had not been covered by either protection in the first instance. 46 CA3d at 450. Accordingly, the *Mize* court was not required to reconcile *Kerns* and *Sullivan,* although there is dictum in the opinion that "the mere fact of" allowing witnesses to refresh their recollection from a communication by them to their attorneys does not necessarily waive the lawyer-client privilege. 46 CA3d at 449.

A careful reading of *Kerns* and *Sullivan* suggests that *Sullivan* involved a genuine refreshing of present recollection (*Sullivan v Superior Court* (1972) 29 CA3d 64, 72, 105 CR 241), whereas *Kerns* involved past recollection recorded (Evid C §1237). Materials that serve to actually refresh a witness's recollection should not be discoverable because the sanctity of the attorney-client privilege overrides "the more mechanical features of section 771." *People v Aikin, supra*. However, when a witness's recollection is not refreshed, and the witness recites, in parrot-like fashion, past recollection recorded, fairness dictates that opposing counsel be able to examine that recorded recollection. See Evid C §1237(b).

PRACTICE TIP: Until a reported California decision reconciles, or at least clarifies, the full import of *Kerns* and *Sullivan,* you must assume that anything shown to an expert in preparation for testimony will have to be produced.

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§12.14 d. File Contents

During the deposition preparation session, counsel should ensure that all of the expert's file is assembled, so that the file can be produced at deposition, if required.

The expert should make a written notation in the file of any items that are temporarily unavailable because of size or that are not part of the file. In that way, the expert need not trust to recollection when asked about the contents of the file at deposition. Similarly, if the expert's file contains anything that counsel believes should not be produced because of privilege or other considerations, this material should be removed from the file and put in a safe place so that there will be one less housekeeping detail to worry about during the actual deposition. It should be noted, however, that any privileged material that has been provided to the expert, and on which the expert at least in part will base his or her opinion, should be provided to the opposition. Even though otherwise privileged, such material falls within the category of material read and relied on and therefore becomes fair game for discovery and cross-examination. See §12.12.

PRACTICE TIP: You should assume that anything given to an expert witness may become the subject of discovery if that witness is disclosed as a trial witness. Therefore, otherwise privileged material should only be given to experts if you know that the expert will be retained only as a consultant, or if the material is absolutely necessary to the expert in order for him or her to form an opinion.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.15 e. Compensation

§12.15 e. Compensation

The amount of compensation being paid to the expert is almost certain to come up during deposition, and experts should be prepared to deal with it. If experts do not bring their time records, they should at least consult those records before testifying so they can give a reasonably accurate estimate of the total amount of time spent on the case, a breakdown of how the time was spent, and an estimate of the total charges incurred. Experts who try to estimate hours worked and dollars billed may guess wrong and thus provide the opposition with a basis for cross-examination at trial, while experts who profess not to have such estimates may seem unprofessional or evasive.

See also §15.14 on compensation of experts.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.16 f. Work Performed on Case; Opinions Reached and Bases for Them

§12.16 f. Work Performed on Case; Opinions Reached and Bases for Them

The expert should be prepared to delineate the substantive work he or she has performed on the case and the approximate amount of time spent on each activity.

When asked for his or her opinions, the expert should be prepared to give them precisely and with confidence. Numerous or complex opinions should be written and made a part of the file so the expert can refer to them. The expert also should be able to recite the particular facts or other matters on which each opinion is based.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.17 g. Inconsistencies and Additional Contemplated Work

§12.17 g. Inconsistencies and Additional Contemplated Work

The expert should be prepared to deal with whether he or she has encountered anything that is either inconsistent or not fully consistent with the opinion reached. For example, if there is contradictory eyewitness testimony and the expert has adopted the testimony of one witness while excluding that of the other, the excluded testimony must be regarded as inconsistent and the expert should be prepared to justify the reasons for rejecting that testimony. If inconsistencies are numerous or if, during preparation, the expert has difficulty remembering inconsistencies, a written record should be made of them and it should be incorporated in the file.

Likewise, if the expert contemplates any additional work, he or she should be prepared to discuss it in enough detail to eliminate any claim by the opposition during trial that the work was not disclosed during discovery and that the results should be excluded.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.18 h. Anticipating Scope of Opposing Counsel's Examination of Expert

§12.18 h. Anticipating Scope of Opposing Counsel's Examination of Expert

CCP §§2034.010-2034.730 does not prescribe the permissible scope of examination of an expert. The primary restriction appears to be CCP §2034.260(c), which states that an expert may not testify about subject matter beyond which he or she was designated to testify. See *Kennemur v State* (1982) 133 CA3d 907, 916, 184 CR 393 (in automobile accident case, plaintiffs' expert was prohibited from testifying regarding origin of tire tracks because plaintiffs' pretrial discovery had not disclosed that expert would testify on that subject).

An expert frequently will have expertise beyond that of his or her designated area of testimony. Counsel who is using multiple experts with overlapping fields of expertise may elect to limit the intended testimony of each to avoid needless duplication or potential conflict. Opposing counsel frequently ignore these limitations and attempt to depose the expert in areas outside the designated scope of intended testimony for a variety of tactical purposes, *e.g.,* catching the expert unprepared, or creating a conflict between the testimony of that expert and another expert who has been designated to testify in that area. The proponent of the expert testimony can argue that opposing counsel's proposed examination is in violation of CCP §2034.260(c).

As discussed in §8.2, an attorney generally has no right to instruct an expert not to answer a question on any ground, because an expert witness is not a client of the attorney. There is, however, nothing to prohibit counsel from *advising* the expert that he or she should not feel obligated to respond to questions that are outside the designated area of testimony and to which the expert is unprepared to give a definite response. Counsel should obtain the expert's agreement in advance that the expert will heed such advice. If the expert is uncomfortable with this, counsel should advise him or her of the area of expertise in which he or she has been disclosed and that the Code of Civil Procedure gives the expert the right to confine his or her opinions to that area. If the expert remains uncomfortable with counsel's directive, and the gratuitous testimony is likely to hurt counsel's case, counsel should consider withdrawing the expert as a trial witness.

PRACTICE TIP: Many experts are versed in several fields, and their testimony can help in one area but hurt in another. By disclosing the witness only in the helpful area, you can minimize the risk that the other opinions the expert holds on issues in the case will not be discovered. You need full cooperation from such a witness, however, to make sure this risk does not materialize.

The scope of deposition and trial testimony of party-experts that will be allowed is unclear. For example, in a commercial dispute involving a small business run by a single entrepreneur who is a party, it is conceivable that, if questions such as the going concern value of the business are at issue, the entrepreneur is in an excellent position to offer an expert opinion on them. However, the entrepreneur may also be qualified to render expert opinions on other aspects of the case, *e.g.,* lost profits, that are beyond the scope both of the entrepreneur's expert testimony and of his or her testimony as a fact witness at deposition or trial. These opinions would be protected by the attorney-client privilege if the entrepreneur did not intend to testify as an expert witness. But if the party does intend to testify as an expert, he or she is potentially vulnerable to questions on cross-examination designed to impeach the testimony of other expert witnesses retained by the party-expert to give opinions on the lost profits issue. No California case has attempted to resolve this problem. Although convenience and cost may make it advantageous to use a client as an expert, counsel must be sensitive to the client's expertise and knowledge in other areas and not permit his or her expert testimony, particularly at the deposition, to become a method of undermining other aspects of the case.

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C. Preparing Expert to Testify at Trial

§12.19 1. Attorney's Organization

The attorney should segregate preparation of the expert into procedural and substantive aspects, prepare checklists for each area, and check items off as they are completed. This will simplify the preparation process and reduce the risk of overlooking an important task.

See the sample checklists in §12.3.

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§12.20 2. When to Prepare

Preparation for trial should not be deferred until the last moment. Counsel should meet with the expert a week or more before the expert is scheduled to testify to make sure that all necessary work will be completed before the expert takes the stand. The final preparation session should be held on the day before, or the day of, the expert's testimony.

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3. Explaining Trial Procedures

§12.21 a. Courtroom Procedures

Counsel should not neglect to tell the expert such obvious matters as where and when the expert should appear for trial. Counsel should tell the expert the department number, judge's name, courthouse floor, and telephone number of the judge's clerk, and whether to come into the courtroom, wait outside in the hall, or go to some other location, to meet with an attorney, paralegal, or other assistant in charge of witnesses. This is particularly important if there is an order excluding witnesses.

PRACTICE TIP: Your secretary should call the expert several days before trial begins to review this information with the expert.

If the expert is relatively inexperienced, counsel should make sure that he or she is acquainted with the nature of courtroom procedure and, if possible, encourage the expert to attend a portion of the trial of a similar case. Counsel should acquaint even experienced experts with any procedural peculiarities of the court in which the case is being tried. For example, some judges do not allow experts to leave the witness chair to show physical evidence to the jury or to describe some aspect of testimony from a chart or graph without first asking permission of the court. The expert should be made aware of these practices to avoid embarrassment or disruption in the testimony.

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§12.22 b. Expert's Appearance

Generally, it is sufficient to advise the expert to dress conservatively (a suit or subdued sport jacket and tie for male witnesses and a businesslike suit or dress for female witnesses). There are exceptions: The police officer, nurse, mechanic, and firefighter may be more effective witnesses if they testify in their work clothes.

If the expert shows a tendency to dress in a way that might distract jurors, more specific instructions may be required. The witness's clothing should be neither garish nor conspicuously expensive. Counsel should watch for potential problems during pretrial meetings with the expert. For example, if the expert shows up for deposition in a black shirt and white tie, each item of the expert's wardrobe should be discussed in detail with him or her before trial. Likewise, if counsel notes that a radiologist carries his X rays in a custom-made Gucci portfolio (as is true of one respected Bay Area doctor), counsel should advise the doctor to use an ordinary manila envelope for transporting X rays to trial.

The expert should sit up straight in the witness chair with hands in lap or on the rail and, during cases being tried to a jury, should face slightly, but not directly, toward the jury. The expert, particularly if inexperienced, should be cautioned against lounging in the witness chair, adopting a defiant, arms-crossed-across-the-chest posture, or ignoring or paying excessive attention to jurors. If, despite prior preparation, the expert lapses into a bad habit while testifying, counsel should call this problem to the expert's attention at the first recess.

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§12.23 c. Questions From Judge

The expert should be forewarned that the judge may ask questions and that most judges want a direct yes or no answer rather than an explanation. If the question requires an explanation, the expert should first give a direct answer (preferably "yes," "no," or "I don't know") and then follow up with an explanation, rather than the other way around. The expert should also be reminded to treat the court with the proper respect and address the judge as "Your Honor," not "Judge," because the latter term offends some judges, particularly when they are on the bench. An admonition not to start an argument or debate with the judge on any point should also be given, no matter what the expert thinks of the questions or the judge's demeanor in asking them. Such a confrontation could prove very counter-productive to the expert's credibility with the jury, who will likely hold the judge in some regard.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.24 d. Technical Language

§12.24 d. Technical Language

Counsel should be on guard for any tendency by the expert to use technical language or phrases that an average juror will not readily understand, and should help the expert find more easily understood synonyms or ask the expert to explain special terms as they occur.

Counsel may wish to prepare a glossary of technical terms, clear it with the judge and other counsel, and give all jurors copies that they can refer to during the proceedings.

Models and charts may also help clarify the expert's explanation to jurors.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.25 e. Leading Questions

§12.25 e. Leading Questions

Although case authority permits leading questions during direct examination of an expert witness (see California Trial Objections §13.8 (Cal CEB Annual)), a number of trial judges will not allow them. In any event, the purpose of calling the expert as a witness is to have the expert, not the lawyer, testify, and therefore, from a strategic standpoint, counsel should avoid leading questions.

For sample questioning of expert witnesses, including objections and responses to objections, see Effective Introduction of Evidence in California, chap 24 (2d ed Cal CEB 2000). See also §§13.4, 13.13, 13.15, 13.17.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.26 f. Hypothetical Questions

§12.26 f. Hypothetical Questions

Any hypothetical question counsel intends to ask his or her own expert during direct examination should be written out in advance and carefully reviewed with the expert to ensure that all essential elements have been included and that the expert is completely comfortable with the question.

The expert should also be alerted to the possibility that hypothetical questions will be asked during cross-examination and, as with deposition, should be prepared to listen carefully for missing elements and any foundational objections that counsel may interpose. For further discussion of hypothetical questions, see §§13.9-13.12, 15.29-15.30.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.27 g. Avoiding Arguments With Other Counsel

§12.27 g. Avoiding Arguments With Other Counsel

The importance of avoiding arguments with opposing counsel should be reemphasized (see §12.10 on avoiding arguments with counsel at the deposition) or, if the expert has not been deposed, explained in depth. Counsel should make clear, however, that avoiding arguments with other counsel does not mean that the expert must agree with everything the cross-examiner says.

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4. Preparing Expert's Substantive Testimony for Trial

§12.28 a. Review of Deposition Preparation

If the expert has been deposed, the subjects that were covered in preparation for deposition (see §§12.4-12.18) should be reviewed with particular emphasis on any areas that were not inquired into during deposition or that the expert had difficulty with during deposition. The nature of the expert's assignment should be reviewed and refined, particularly if it has changed in any way since the expert was deposed. See §12.11. Objections and how to handle them should be discussed. See §§12.6, 14.9.

If the expert has not been deposed, trial preparation should include all suggested areas of deposition preparation.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.29 b. Review of Materials

§12.29 b. Review of Materials

In addition to the file materials that were covered in preparing for deposition and that should be reviewed for trial, at least four types of written materials should be carefully read and analyzed in preparation for testifying at trial:

- The expert's own deposition.
- Depositions of opposing experts.
- Other key depositions.
- Key reports, materials, and documents.

Finally, counsel should find out whether the expert has reviewed any other information. Evidence Code §771 generally allows the opposition to discover anything that a witness uses to refresh his or her recollection. See §12.13.

PRACTICE TIP: You should warn the expert not to decide unilaterally what to review for trial because of the danger that opposing counsel may therefore be entitled to information that he or she might otherwise not discover.

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§12.30 (1) Expert's Own Deposition

The transcript of the expert's deposition should be forwarded to him or her as soon as it is received, with instructions to read it carefully word for word, note any additions or changes that appear warranted, and discuss the matter with counsel before asking the court reporter to make any revisions. The expert should have a definite deadline by which to inform counsel about changes, and counsel should telephone the expert if counsel has not heard from the expert by the deadline. In the interim, counsel should review the transcript and compile his or her own list of needed changes.

Counsel should also assemble a list of those portions of the deposition that might be used during cross-examination by the opponent. These should be discussed at length with the expert, and appropriate responses should be formulated.

If any changes will be made to the expert's deposition transcript, the expert should be prepared to explain and justify them, particularly if they are substantive.

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§12.31 (2) Depositions of Opposing Experts

The expert must read and be intimately familiar with the deposition testimony of opposing experts so that he or she can assist counsel in preparing for cross-examination of the opposing experts, and can respond to questions on direct examination concerning portions of the opposing experts' depositions.

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§12.32 (3) Other Key Depositions

Although the expert usually need not read the depositions of all witnesses in a case in their entirety, and in a large case may not be able to do so, in most cases there will be several key depositions that the expert should read, either in whole or in part, that bear on the expert's role in the case.

For example, in the ordinary automobile intersection accident case, the reconstruction expert must read and be completely familiar with at least those portions of the drivers' depositions that deal with the facts of the accident and the events leading up to it. The expert should not rely on written or oral summaries of this testimony. First, it is unprofessional and unscientific for the expert not to have read the actual depositions. Second, if the expert is supplied with oral or even written summaries of the testimony, key facts, statements, or other items of significance may be omitted or may not be related accurately. Finally, if the expert relies on incomplete or incorrect facts, his or her opinion may not be admissible as evidence or, at a minimum, will not likely be trusted.

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Source: Civil Litigation/California Expert Witness Guide/12 Preparing Expert for Deposition and Trial/§12.33 (4) Key Reports, Materials, and Documents

§12.33 (4) Key Reports, Materials, and Documents

Although it is seldom necessary and sometimes impossible for the expert to read every document in a case personally, there are almost always key documents, *e.g.,* the police report in a traffic accident collision, a change order in a construction case, or correspondence in a contract dispute, that the expert must read and with which he or she must be thoroughly conversant. During trial preparation, counsel and the expert should pinpoint these key documents and ensure that the expert fully and accurately understands them before taking the stand.

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§12.34 (5) Examination of Places and Physical Objects

If the case involves a physical location (*e.g.,* an accident or crime scene) or a physical part (*e.g.,* a failed tie rod in a products liability case), the expert's credibility will be enhanced if he or she has visited the scene or has examined the object (if it is available) or an exemplar (if the object at issue in the case is no longer available). Otherwise, the expert is subject to potentially damaging cross-examination, *e.g.,* "And although you do think the widget in question is defective, you have never actually seen the widget involved in this case, have you?" Moreover, having the expert visit the accident scene or examine the physical part may lead to the discovery of previously overlooked pertinent information. For example, in the ordinary automobile intersection accident case, a scene inspection may disclose a previously unreported obstruction, a lighting condition, or another phenomenon that may have a significant bearing on the expert's opinion.

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§12.35 (6) Examination of Exhibits and Demonstrative Evidence

If counsel anticipates using any exhibits or demonstrative evidence that bear in any way on the expert's testimony, the actual exhibits, charts, mock-ups, or models should be shown to the expert. If the expert is supplied with only an oral, or even a written, description of the exhibit or object, the expert may not fully understand or appreciate some aspects of it, to the detriment of the expert, the lawyer, and the case.

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§12.36 5. Rehearsal; Reevaluation of Case

Although it is boring and easy to avoid during the press of trial preparation and trial, there is no substitute for actual rehearsal of the expert's anticipated testimony. At a minimum, the key questions that counsel intends to ask on direct examination to elicit the expert's opinion and the factual basis for those opinions should be rehearsed on a question-by-question basis. If possible, the entire examination should be rehearsed in the same way. Depending on the expert, the difficulty of the subject matter, and the importance of the expert's testimony, counsel may want to have an associate conduct a mock cross-examination of the expert.

The rehearsal stage of direct examination is also a good time to reevaluate the case from the standpoint of needed expert testimony. Frequently, the issues in the case, as well as counsel's own theory of liability or defense, will shift significantly from what they were when counsel first decided to retain expert consultants. It is essential, therefore, that counsel consider whether all experts that were originally retained, either from one field or from different fields, are still required, or whether an expert's original assignment should be expanded, contracted, or redefined. For example, it may develop, through interrogatory responses, answers to requests for admissions, or the disclosed testimony of an opposing expert witness, that an issue that counsel originally thought needed expert testimony no longer requires such testimony. Alternatively, it may develop that one expert alone can establish a particular fact or theory that counsel originally thought would require the testimony of two experts.

Calling more experts than are needed, or having any one expert testify at greater length than is needed, creates the multiple risks of boring the jury, diverting attention from the points that counsel really has to establish, and creating the risk that inconsistent or contradictory statements will be made. In general, therefore, counsel's goals should be to (1) call the fewest number of experts possible and (2) have the experts that are called testify on the narrowest grounds possible. Winning lawsuits is difficult enough without counsel voluntarily undertaking greater burdens than those imposed by law.

For example, in a major libel suit against the Washington Post, one of the Post's editors, Robert Woodward, wanted to defend on the theory that the paper had printed the "best available version of the truth," but lead counsel chose to defend on the theory that every word in the disputed article was the absolute truth. Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am Law 1, 92 (Nov. 1982). Whether this tactical decision was responsible for the Post's losing the trial is debatable. The point is that counsel should continually reassess exactly what he or she must do to prevail legally in the case, and then decide whether each retained expert and each area in which the expert has been directed to work is essential to fulfill that burden. If a particular expert or area of expertise is not necessary, absent some strong countervailing tactical consideration, counsel should eliminate that expert or area from the testimony counsel will present at trial.

It is becoming commonplace for lawyers to video record both the direct examination and simulated cross-examination of witnesses, particularly inexperienced witnesses, to evaluate the effectiveness of their verbal presentation and nonverbal characteristics. See Aron, Fast & Klein, Trial Communication Skills §29.14 (1986). In large cases, it is not uncommon to have these tapes critiqued, and the witness coached, by communication specialists. Obviously, the more work that counsel does in this area the greater the likelihood that the witness who "talks to his tie" can be transformed into a polished performer who could do the six o'clock news.

As the amount of effort that is expended in this regard increases, the opposition is more likely to learn of these efforts and bring them to the attention of the trier of fact to try to establish that counsel's witnesses' testimony is really nothing more than a "Hollywood production." In addition, the lawyer who video records any portion of a witness's preparation runs the risk that the recordings themselves will be subpoenaed and might not qualify as work product. The alternative, of course, is to erase the recordings promptly, but, as was illustrated by Watergate, that is a less-than-foolproof solution.

Cautious counsel must make a witness-by-witness determination of how much rehearsal, polishing, and other preparation is needed, balancing that against the likelihood that such efforts will be discovered, with the resulting consequences.

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§12.37 D. Preparation in Criminal Cases

Preparation of expert witnesses in criminal cases is usually identical to preparation of witnesses in civil cases; counsel can use most of the information in this chapter and can modify the checklists in §12.3. One major difference between criminal and civil cases is that depositions are limited in criminal cases; they rarely occur. See discussion in California Criminal Law Procedure and Practice §§38.18 (depositions prepared for sentencing hearings), 55.15 (conditional examinations) (Cal CEB Annual).

Another difference between criminal and civil cases is that there are more occasions in criminal cases for the use of expert testimony outside of trial. The most common nontrial uses are at preliminary hearings (see Crim Law, chap 22) and at search and seizure hearings (see Crim Law, chap 20). The special rules for those proceedings are discussed in the respective chapters given above.

When defense counsel is preparing experts for trial, he or she must be careful of showing the expert privileged material, particularly if the privilege against self-incrimination applies as it did before Proposition 115. See discussion in §8.24 of the viability of the California Constitution as a basis for decisions in criminal cases after Proposition 115.

Defense attorneys in criminal cases sometimes rely on the experts produced by the prosecution rather than paying for their own experts, usually because of budget constraints. This can be very dangerous. Defense counsel should carefully consider the ramifications before deciding to rely on cross-examination of an opposition expert, and on closing argument, to convince jurors of a matter on which the prosecutor has had an expert testify.

In criminal cases, it is particularly important for counsel to have had an investigator present during interviews with witnesses, so that the investigator can be called to impeach the witness if necessary.

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§12.38 III. FEDERAL RULES OF EVIDENCE

The same type of preparation done for state court cases, discussed earlier in this chapter, should be done for federal court. For discussion of deposition and trial in federal court, see §§11.38-11.40 (depositions), 13.19, 15.31 (trial).

A novel issue regarding the preparation of an expert witness to testify arose in *U.S. v Seschillie* (9th Cir 2002) 310 F3d 1208. The expert was a criminologist retained by the defendant to opine on whether a firearm was discharged accidentally. The defendant wanted the criminologist to be present in the courtroom during the victims' testimony and the government did not object; however, the trial court ordered the expert excluded. On appeal, the defendant argued that the criminologist's presence was essential to the presentation of his case and thus the trial court's decision to exclude the expert was an abuse of discretion under Fed R Evid 615(3). 310 F3d at 1209. The Ninth Circuit agreed, but found the error to be harmless.

With regard to the error in excluding the witness, the Ninth Circuit noted that a retained expert can be an "essential party" within the meaning of Rule 615(3) and that the Advisory Committee Notes to the Rule contemplate as much, stating that the exception includes "an expert needed to advise counsel in the management of litigation." 310 F3d at 1211. Permitting the expert to hear the testimony of the victim would have allowed him to base his opinion on more accurate factual assumptions. The district court rejected this argument on the basis that the criminologist could read the trial transcripts. From the appellate court's perspective, however, trial transcripts were not a substitute for live testimony, and that was particularly true in this case because some of the victims' testimony was demonstrative rather than oral. 310 F3d at 1213.

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13

Direct Examination of Expert at Trial

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§13.1 I. INTRODUCTION: PHILOSOPHY OF DIRECT EXAMINATION

Most civil trials are won on direct examination. Whatever may have been true in the days of Clarence Darrow, discovery has largely eliminated the lawyer's ability to pull rabbits out of the hat on cross-examination. By mastering the techniques of peripheral cross-examination (see §15.7), counsel should be able at least to "stay even" during the opponent's presentation. It is during the presentation of counsel's own case that the scales can be tipped in favor of counsel's client. This change should be regarded as good news, because direct examination is a talent that can be mastered through ordinary hard work and does not depend on wit, humor, quickness of mind, or articulateness, as is the case with cross-examination.

Criminal defense lawyers, on the other hand, may not have to rely as heavily on direct examination as civil lawyers because the burden is on the prosecutor in criminal cases to prove the defendant guilty beyond a reasonable doubt. Pen C §1096. This burden, which is more difficult to meet than the burden of proof in civil cases, sometimes allows defense counsel to use only cross-examination of prosecution witnesses and a closing argument that the prosecutor has not proven his or her case beyond a reasonable doubt.

See McElhaney, *Direct of Experts*, 21 Litig 57 (Winter 1995) for a useful list of "do's" in direct examination of expert witnesses. See also Cheshire, *Direct Examination of the Expert Medical Witness*, 20 The Brief 58 (Summer 1991); Effective Direct & Cross-Examination, chap 2 (Cal CEB 1986); McElhaney, *Qualifying Experts*, 11 Litig 43 (1984).

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II. EXPERTS' QUALIFICATIONS

§13.2 A. How to Approach Questions Concerning Expert's Qualifications

To give an expert opinion, a witness must have the "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." Evid C §720(a); see chap 3.

The qualification of an expert should not be treated as a mere formality to be covered in desultory fashion and in a minimum of time. The expert's qualifications should convince jurors that they are fortunate to have someone as qualified as the expert to assist them in deciding the case, and that counsel's expert is better qualified than the opposing expert.

NOTE: The expert's qualifications must be elicited if opposing counsel requests them. Evid C §720(a).

The qualifying process should be used to create an aura of anticipation; jurors should look forward to hearing what the expert is going to say. This atmosphere can be created only if counsel actually is interested in, and impressed by, the expert's qualifications.

To ensure that the expert meets the requirements of Evid C §720(a), counsel must begin by hiring an expert whose qualifications are exceptional. If the case involves the handling of an automobile, the ideal expert should have an engineering background, have raced cars or motorcycles competitively, and have taught high-speed handling techniques to police officers, or written for an automobile enthusiast's magazine. If an orthopedic problem is involved, counsel should look for a doctor who has medical school teaching experience, has written for scholarly journals on orthopedic subjects, and has performed surgery on college or professional athletes or has been a team physician for a college or professional athletic team. If economic testimony is needed, counsel should look for an economist who has teaching and writing experience and who has served on governmental advisory commissions or panels.

Counsel should recognize that few jury members will have any familiarity with the nature of the expert's work, and will appreciate all the time counsel spends covering the expert's background and activities. For example, few jurors know what is meant by a "medical residency" or "board certification," the significance of having an article accepted by a publication such as Science or Nature, or the responsibilities involved in serving as team physician for a college or professional athletic team. The expert should be asked not only to define and explain these terms and accomplishments, but to elaborate on them, *e.g.,* to explain the board certification process, quantify the number of doctors who are board certified in a given field, give examples of the kinds of articles that first appeared in Nature or Science, and list the names of well-known athletes that he or she has treated as a team doctor.

Counsel must avoid assumptions about the knowledge of jurors and should be thorough in explaining all facts. In a case involving a libel suit against the Washington Post, counsel for the defense did not bring before the jury's attention the fact that Robert Woodward, co-author of All the President's Men, was one of the defendants. Representatives of the Post, in interviewing the six jurors, learned that only one of them knew of Woodward's role in the Watergate affair and that that juror made no mention of the fact in the jury room. One juror was reported to have exclaimed: "You mean that's the same Bob Woodward? Oh my God." Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am Law 1 (Nov. 1982).

Counsel should not hesitate to spend up to an hour eliciting the experiences, achievements, and responsibilities of a well-qualified expert. A qualification process that takes less than half an hour probably indicates that counsel has not fully developed the expert's qualifications, or that the expert has limited qualifications.

For further discussion of qualifying the expert witness, see Scientific Evidence in California Criminal Cases §§3.25-3.31 (Cal CEB 2008).

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.3 B. Checklist: Qualification Questions to Ask Expert

§13.3 B. Checklist: Qualification Questions to Ask Expert

Counsel should tailor questions concerning each expert's qualifications to the issues on which the expert will testify, and to the expert's unique background. The more common areas of inquiry follow:

- Profession.
- Issue(s) on which expert will testify.
- Education; degrees.
- Work experience.
- Publications.
- Teaching experience.
- Honors and awards.
- Qualification as expert on related topics in other cases.

PRACTICE TIP: Be sure to ask the trial judge to qualify the witness as an expert at the conclusion of your questioning concerning the expert's qualifications. The judge's ruling makes clear to jurors that the expert is qualified to testify and removes this issue from contention on appeal.

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§13.4 C. Building Drama Into Qualification Process

Counsel may wish to vary the usual order of questions concerning qualifications followed by direct examination questions by asking the witness at the beginning of questioning, before any qualifications questions have been asked, whether he or she has an opinion concerning the particular subject in issue; the expert should respond with a simple yes. Then, rather than have the expert disclose the opinion right away, a good deal of expectation and suspense can be created by first taking the expert through his or her qualifications and work on the case, with frequent reminders to the jury that the actual opinion is yet to come. For example:

> Q. Before getting to your opinion, let's talk briefly about your educational background and achievements.
>
> Q. And could you tell us about your work experience, with particular emphasis on the parts that have assisted you in arriving at the opinion you reached in this case?
>
> Q. Have you published any books or articles that you have consulted or relied on in arriving at the opinion you reached in this case?
>
> Q. And these follow-up tests that you have just told us about, were they among the things that you relied on in reaching your opinion in this case?
>
> Q. And have you formed an opinion as to what caused Mrs. Baxter's car to suddenly veer to the left and strike the bridge abutment in July of last year?

For question-and-answer examples of how to qualify an expert, see Effective Introduction of Evidence in California, chap 24 (2d ed Cal CEB 2000); Effective Direct & Cross-Examination, chap 7 (Cal CEB 1986); 1 Barzelay & Lacy, Personal Injury: Scientific Automobile Accident Reconstruction, chap 1.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.5 D. Waiving Qualification of Expert

§13.5 D. Waiving Qualification of Expert

Opposing counsel frequently offers to stipulate that the expert is qualified to offer an expert opinion, thus obviating the need for qualification questions. The qualification procedure should never be waived, however, unless the witness is so renowned that his or her qualifications are known to the average juror, *e.g.,* Muhammad Ali in a case involving boxing. Other exceptions are when the expert's qualifications are so marginal that counsel does not want the jury to know about them, or when counsel would like to elicit expert opinions outside an expert's particular specialty.

PRACTICE TIP: Remember that, even in those cases in which the expert's stature is obvious to everyone involved, you can use qualifying questions to "warm up" the expert before getting to the substantive issues in the case.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.6 E. Opposing Counsel's Voir Dire of Expert

§13.6 E. Opposing Counsel's Voir Dire of Expert

Once you have asked your expert questions concerning the expert's qualifications to testify, opposing counsel may ask to voir dire the expert, in effect cross-examining the expert on his or her qualifications. The most damaging cross-examination usually points out that:

- The expert is only minimally qualified.
- The expert is a "hired gun" because he or she testifies for one side only.
- The expert has never before qualified in court as an expert.
- The expert is not sufficiently qualified on one or more of the topics on which he or she will testify.
- The expert has some interest in the case or in some other way is biased.

Opposing counsel must object to qualifying the witness as an expert, or any error in this regard may be considered to have been waived. *McGuire v Baird* (1937) 9 C2d 353, 357, 70 P2d 915. An objection is usually made after counsel has asked qualifying questions, opposing counsel has cross-examined the expert on his or her qualifications, and counsel has asked the court to qualify the witness as an expert.

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III. EXPERT'S SUBSTANTIVE TESTIMONY

§13.7 A. Work Performed on Case

After the expert has been qualified to give an expert opinion (see §§13.2-13.6), examination generally should turn to the work the expert has performed on the case. The goal of this questioning is to establish that the expert has spent more time, given more thought, probed deeper, and analyzed more carefully than has his or her opponent. The judge or jury should be provided with a concrete set of reasons why this expert's work on the case makes his or her opinions more reliable than those of the opposing expert. Examples of such reasons include visiting the accident scene, operating a similar piece of equipment, subjecting the parts to examination under an electron microscope, formulating a computer program to duplicate market conditions, or conferring with the originator of the surgical procedure as opposed to simply reading the published results of his or her work.

For discussion of material the expert can rely on concerning the case, see chap 4. The attorney-client privilege and work product doctrine are discussed in §§8.2-8.19.

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B. Expert's Opinion

§13.8 1. Stating Opinion and Grounds

Before the adoption of Evid C §802 in 1965, an expert was required to preface his or her opinion with a statement of assumed facts on which the opinion was based. *Eisenmayer v Leonardt* (1906) 148 C 596, 84 P 43; Comment to Evid C §802. The hypothetical question was used to meet this requirement; however, it proved to be a less than satisfactory device. See §13.12.

Evidence Code §802 did not abolish the hypothetical question; it is still frequently used. Rather, §802 gives the expert the right to state his or her opinion and the reasons for it before giving the grounds for it, unless the court requires the expert to "be first examined concerning the matter upon which his opinion is based."

In court trials, when the judge is familiar with the expert and the nature of the work that he or she has done on the case, it is acceptable to open direct examination by asking for the expert's opinion. However, in jury trials jurors are probably unfamiliar with the expert's standard procedures in preparing to give an opinion. Counsel should then make certain that the jurors understand the basis for the expert's opinion.

The usual procedure for eliciting an expert opinion before a jury is to:

- Elicit the expert's qualifications (see §§13.2-13.6).
- Have the expert describe the work he or she has done on the case before coming to court.
- Ask whether the expert has an opinion concerning the subject in issue (*e.g.,* which car had the green light in its favor).
- Ask for the expert's opinion. (The expert may express an opinion on the ultimate issue in the case; see Evid C §805.)
- Ask for an explanation of the facts, reasoning, and other bases for the expert's opinion.
- Have the expert explain why he or she disregarded alternative facts and explanations.

The expert does not have to base his or her opinion on admissible testimony, but may rely on material "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates," and that is not otherwise precluded by law from constituting a basis for an expert opinion. Evid C §801(b); see chap 4.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.8A a. Presentation of Inadmissible Evidence

§13.8A a. Presentation of Inadmissible Evidence

As discussed in §4.1, an expert may base opinion testimony on any reliable material, even though the material itself may not be admissible in evidence. Evid C §801(b). There are, however, restrictions on how inadmissible testimony is presented, particularly in jury cases.

First, the inadmissible material generally cannot be introduced into evidence as an exhibit. See *People v Nicolaus* (1991) 54 C3d 551, 582, 286 CR 628. See also *People v Price* (1991) 1 C4th 324, 3 CR2d 106.

Second, most judges will not allow the expert to refer to any more of the inadmissible matter than is absolutely necessary to establish how it provides support for the expert's opinion. *People v LaMacchia* (1953) 41 C2d 738, 744, 264 P2d 15, overruled on other grounds in *County of Los Angeles v Faus* (1957) 48 C2d 672, 680, 312 P2d 680.

EXAMPLE 1: In *West v Johnson & Johnson Prods., Inc.* (1985) 174 CA3d 831, 859, 220 CR 437, an expert whose opinion was based in part on otherwise inadmissible consumer complaints was allowed to describe the nature of the complaints and to read excerpts from pertinent ones. The court held, however, that the written consumer complaints would not be admitted into evidence and that the witness should refrain from reading the complaints verbatim. Similarly, in *People v Coleman* (1985) 38 C3d 69, 211 CR 102, the court held than an expert psychiatrist could not read a murder victim's poignant letter into evidence, even though it was one of the bases for the psychiatrist's opinion concerning the defendant's sanity.

EXAMPLE 2: In *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348, defendant complained that one of plaintiff's experts in a product liability case had been allowed to testify in excessive detail concerning inadmissible material on which he based his opinions. As succinctly noted by the court of appeal, "[w]hile an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible." 119 CA3d at 788. The court explained that, absent such a rule, the parties could bombard the jury with incompetent hearsay (and other) evidence under the guise of explaining an expert's opinion testimony.

The *Grimshaw* court additionally noted that the courts have no sua sponte responsibility to enforce this practice and found that Ford's counsel had waived their right to complain by having failed to object at the time. Finally, the court noted that the expert had been allowed to testify in some detail concerning the inadmissible matter, but had in no instance been permitted to actually read the inadmissible material into the record or relate its contents in specific detail. 119 CA3d at 789. See also *Continental Airlines, Inc. v McDonnell Douglas Corp.* (1989) 216 CA3d 388, 416, 264 CR 779 (one expert entitled to rely on cost and price figures in report prepared by other experts but not on details of report). *Genrich v State* (1988) 202 CA3d 221, 248 CR 303 (expert properly permitted to rely on reports of accident statistics and to describe accidents reported as they related to expert's opinion).

Third, the courts distinguish between inadmissible evidence that is not offered for the truth of the matter stated (*e.g.,* whether the defendant had notice of a condition) and that "presented by the expert in connection with proof of the matter asserted." *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 1525, 3 CR2d 833.

EXAMPLE 3: The plaintiff in *Korsak* was a hotel guest who had been injured when a shower head fell off and struck him. The plaintiff retained a mechanical engineer who had no expertise in plumbing or hotel maintenance. The expert contacted other nearby hotels and was told the type of preventative plumbing maintenance program they followed. On the basis of these conversations, the expert was allowed to testify at trial that the defendant was negligent with respect to its preventative maintenance program. 2 CA4th at 1519.

The court of appeal reversed, finding that there was no assurance that the interview information on which the expert had relied was reliable and, even if it was, there was no way of knowing whether it was truly representative or otherwise constituted a valid scientific sampling of the hotel industry. In so ruling, the court emphasized that the testimony went to the truth of the matter being asserted by the applicable standard of care regarding hotel maintenance and was therefore subject to a stricter standard of scrutiny than if the truth of the matter asserted

had not been in issue. 2 CA4th at 1525. See also *Garibay v Hemmat* (2008) 161 CA4th 735, 742, 74 CR3d 715 (in medical malpractice action, summary judgment in favor of defendant was reversed when defendant relied solely on opinion of medical expert witness with no personal knowledge of underlying facts of case and whose declaration was based on facts culled from medical and hospital records that were not properly before court under business records exception).

PRACTICE TIP: Whenever an opposing expert's opinions are premised on inadmissible evidence that is potentially inflammatory, confusing, or prejudicial, opposing counsel should file a motion in limine requesting that the court explain to the jury that the material is not being admitted for the truth of the matter stated and is being allowed only as the basis for an expert opinion. In addition, counsel should seek a ruling precluding introduction of any of the inadmissible material as an exhibit, forbidding the expert's reading of inadmissible material into evidence, and carefully limiting the expert's discussion of the material to the bare minimum needed to explain how it supports the opinions being offered.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.8B b. Charts and Summaries

§13.8B b. Charts and Summaries

See the discussion on demonstrative evidence in §9.16.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/ 2. Hypothetical Questions/§13.9 a. Contents

2. Hypothetical Questions

§13.9 a. Contents

Hypothetical questions may be asked of an expert during either direct examination (*Sullivan v City & County of San Francisco* (1950) 95 CA2d 745, 762, 214 P2d 82) or cross-examination (*People v Busch* (1961) 56 C2d 868, 874, 16 CR 898).

When hypothetical questions are used, the expert is asked to assume the correctness of facts and other matters that have been testified to by other witnesses, and to express the opinion he or she has reached based on those assumptions. *Rosenberg v Goldstein* (1966) 247 CA2d 25, 30, 55 CR 306. The trial judge has broad discretion over the precise wording of a hypothetical question. *Estate of Collin* (1957) 150 CA2d 702, 310 P2d 663; *Graves v Union Oil Co.* (1918) 36 CA 766, 173 P 618.

PRACTICE TIP: If you elect to use hypothetical questions, you should not attempt to draft them extemporaneously during the course of examination but should draft them in advance and circulate them to both the court and opposing counsel, to eliminate all objections on form before posing the question to the witness. See *People v Hayes* (1985) 172 CA3d 517, 218 CR 362. See also California Trial Objections §§15.4, 20.19-20.20 (Cal CEB Annual).

Each assumed fact in a hypothetical question must be supported by the evidence. *Rowe v Such* (1901) 134 C 573, 576, 66 P 862. "However, minor variances between the facts assumed and the facts in evidence do not render the question incompetent." *Division of Labor Law Enforcement v Gifford* (1955) 137 CA2d 259, 266, 290 P2d 281.

There need not be direct testimony to support each fact; counsel can base a hypothetical question on any reasonable inference from the evidence, because it is for the jury to decide whether the inference is sound. See *Sullivan v City & County of San Francisco, supra*. Nor are the assumed facts required to be undisputed; a question is proper if it recites facts within the range of what is possible or probable if the assumption is not unfair or misleading. *Guardianship of Jacobson* (1947) 30 C2d 312, 324, 182 P2d 537 (upholding use of 40-page hypothetical question).

NOTE: Jurors are generally instructed that, if any fact in a hypothetical question is not established by the evidence, they should weigh the effect of that omission on the value of the opinion. CACI 220; CALCRIM 332.

It is not necessary that the question contain "a statement of all the evidence in the case" as long as the assumed facts are "within the limits of the evidence [and] not unfairly assembled." *People v Wilson* (1944) 25 C2d 341, 349, 153 P2d 720. Counsel is afforded "[c]onsiderable latitude… in the choice of facts [used] to frame a hypothetical question." *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 229 CR 513; *Rosenberg v Goldstein* (1966) 247 CA2d 25, 30, 55 CR 306 (citing from *Treadwell v Nickel* (1924) 194 C 243, 267, 228 P 25).

The assumed facts can include hearsay statements, *e.g.,* a patient's statements about his or her condition to a physician (*People v Wilson* (1944) 25 C2d 341, 348, 153 P2d 720), and other inadmissible material, as long as it is of a kind that may reasonably be relied on by an expert. See Evid C §801(b). See also *People v Hayes* (1985) 172 CA3d 517, 523 n3, 218 CR 362 (court criticized the proponent of expert testimony for failing to understand and take advantage of Evid C §801(b)).

Although a certain amount of latitude is accorded hypothetical questions, they must not assume facts that are not in evidence or that are inconsistent with the facts that are in evidence. *Coe v State Farm Mut. Auto. Ins. Co.* (1977) 66 CA3d 981, 994, 136 CR 331; *Am-Cal Inv. Co. v Sharlyn Estates Inc.* (1967) 255 CA2d 526, 544, 63 CR 518.

During cross-examination (but not direct examination), the rule against assuming facts not in evidence is relaxed, if not totally eliminated, in order "to test the expert as to his accuracy or competency." *People v Busch, supra*.

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§13.10 b. Opinions That May Be Expressed in Response

Experts may express an opinion on the ultimate issue in the case. Evid C §805; see §5.2. They may not offer legal conclusions. See §5.3.

Experts cannot be required to answer a hypothetical question with only an unqualified yes or no. *McGuire v Baird* (1937) 9 C2d 353, 70 P2d 915.

There is a conflict in the cases concerning whether a psychotherapist can offer an opinion on a person's mental condition without having examined him or her. Contrast *People v McIntyre* (1967) 256 CA2d 894, 900, 64 CR 530 (court held that psychiatrist's opinion concerning party's mental condition could not be based on assumed facts in absence of personal interview), with *People v Phillips* (1981) 122 CA3d 69, 83, 175 CR 703, *People v Arauz* (1970) 5 CA3d 523, 531, 85 CR 266, and *People v Schindler* (1969) 273 CA2d 624, 643, 78 CR 633 (psychiatrists in these three cases were permitted to base opinions entirely on reports and opinions of other doctors).

See chap 5 for discussion of the degree of certainty required of the expert's opinion.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.11 c. Objections

§13.11 c. Objections

If a hypothetical question contains an inadvertent omission or misstatement, failure by opposing counsel to object promptly and require that the question be framed correctly will defeat counsel's right to complain about the hypothetical question on appeal. *Waller v Southern Pac. Co.* (1967) 66 C2d 201, 210, 57 CR 353; *People v Gutierrez* (1993) 14 CA4th 1425, 18 CR2d 371 (counsel who objected to hypothetical questions posed to gang expert only on vagueness grounds could not on appeal challenge admission of testimony on grounds that it went beyond proper scope of expert testimony). Similarly, if a hypothetical question includes material amounting to misconduct on the part of counsel, a timely objection and request for an admonition must be made or it will be considered to have been waived. *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 796, 174 CR 348.

The most common bases for objecting to hypothetical questions for lack of foundation are discussed in §§13.9-13.10, 14.9. They are listed here:

- Contains speculative information.
- Does not include all relevant facts.
- Assumes facts not in evidence.
- Assumes facts inconsistent with the evidence.
- Misstates the evidence.
- Includes information excluded from consideration by the trial judge, *e.g.,* because privileged or irrelevant.

PRACTICE TIP: Adequate preparation for trial requires an awareness of the specific objections that can be made to expert testimony that go beyond the form of the questions asked. In particular, objections can be made to the expert's qualifications, the foundation for his or her testimony, whether the questions attempt to elicit testimony that is of proper subject matter for expert opinion, and whether the testimony meets the standards under the *Kelly* test (see §§4.6-4.35 for discussion of *Kelly* test). The testimony of every disclosed and deposed expert should be analyzed from each of these perspectives to determine if one or more of these objections can be raised. See Kennedy & Martin, *Getting Rid of Unfounded Expert Opinions: Some Tips for Keeping "Junk Science" Out of a California Courtroom*, 15 CEB Civ Litigation Rep 8 (Feb. 1993).

For further discussion of objections to hypothetical questions, see Jefferson's California Evidence Benchbook §29.43 (3d ed CJA-CEB 1997); California Trial Objections §§20.19-20.20 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §§194-196 (4th ed 2000).

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§13.12 d. Pros and Cons

The principal advantage of the hypothetical question is that it allows counsel to summarize favorable evidence before the closing argument. This summary is particularly helpful if the case is tried before a jury. Hypothetical questions are also particularly useful in medical malpractice and toxic tort cases because the theory of liability is based on the defendant's having allegedly ignored or not properly considered a number of, *e.g.,* symptoms, case reports, or epidemiological studies. The hypothetical question permits counsel to give the jury a capsule reminder of what the case is all about.

On the other hand, hypothetical questions have been criticized frequently. Wigmore decried them as being "misused by the clumsy" and "abused by the clever," and said that in practice they led to obstructing the truth. 2 Wigmore on Evidence §686 (4th ed 1961). The California Supreme Court complained about them as early as *People v Le Doux* (1909) 155 C 535, 554, 102 P 517, overruled on other grounds in *People v Cahan* (1955) 44 C2d 434, 445, 282 P2d 905, and again in *People v Bassett* (1968) 69 C2d 122, 70 CR 193. See also 3 Witkin, California Evidence, *Presentation at Trial* §§194-196 (4th ed 2000); Dieden & Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 Cal L Rev 543, 557 n46 (1964).

In addition, hypothetical questions are difficult to draft. If essential factors or conditions are omitted, the question is subject to objection because of lack of foundation. Evid C §§405, 720, 870. See the discussion of objecting to hypothetical questions in §13.15.

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Source: Civil Litigation/California Expert Witness Guide/13 Direct Examination of Expert at Trial/§13.13 C. Clarification and Simplification of Technical Concepts

§13.13 C. Clarification and Simplification of Technical Concepts

Counsel should work with the expert before trial to ensure that he or she testifies clearly enough to be understood by every juror. This means that the expert should use common words instead of jargon, and should explain technical words and phrases, if necessary, each time he or she uses them. The expert should be told to speak slowly enough for jurors to follow the testimony.

Counsel must be sure to structure direct examination so that there are no inductive leaps that leave jurors behind.

PRACTICE TIP: You may wish to prepare a glossary of technical terms to be given each juror. However, this should be cleared first with the judge and opposing counsel.

Counsel should not hesitate to use as many different types of media as possible to ensure that the expert's testimony is presented in the clearest, most forceful, and most easily remembered fashion. For suggestions and examples of various kinds of demonstrative evidence, see chap 9 and §13.14.

During trial, counsel should have the expert restate the subject matter to help ensure that the judge and jury remember the key ideas. Some examples follow:

Q. Doctor, could you tell us again what you mean by "transverse myelitis"?

Q. Could you come over here to the diagram and show the jury the exact location of the high-pressure fitting and explain its purpose?

Q. Would it be fair to say that a "grommet" is a piece of rubber, shaped like a doughnut, that keeps the filler pipe in place?

PRACTICE TIP: You can ask an expert leading and semi-leading questions. See §13.16.

Q. To make sure we all understand what you mean by "fungibility," could you tell us whether wax paper and Saran wrap could be considered fungible?

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§13.14 D. Use of Exhibits and Demonstrative Evidence

The trier of fact's understanding of an expert's direct examination testimony is usually increased when the oral testimony is accompanied by exhibits, charts, movies, models, or other demonstrative evidence. For example, when referring to figures, methodology, processes, and the like, charts and diagrams should accompany the expert's testimony. When letters or other documents are discussed, counsel should either provide the judge and jury with individual copies or, preferably, have the document displayed on an overhead projector, and have the expert use a pointer to emphasize the relevant portions.

Counsel should be constantly mindful that most of us are used to receiving information from television. Anything that can be done to make direct examination more nearly resemble television will increase the likelihood that the information imparted is understood and remembered. For example, in describing a mechanism or piece of equipment, the expert should display the actual part or a model of it, or at least a drawing or picture of the item. When discussing particular positions or operations, the expert should point to the appropriate area on the model, diagram, or other visual aid.

For further discussion of demonstrative evidence, see chap 9.

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§13.15 E. Elimination of Alternative Explanations

After the expert has given his or her opinion and the factual or other evidentiary basis for it, counsel should ask the expert why he or she rejected alternative explanations. This is done in order to anticipate and defuse cross-examination questions, as well as to enhance the expert's credibility by demonstrating that the expert has considered the problem in its entirety.

EXAMPLE: If an eyewitness in an automobile collision case testified that the cars collided on *B*'s side of the road, counsel for *A* should elicit this information during his or her expert's direct examination instead of letting opposing counsel bring it up for the first time on cross-examination. Sample questions and answers for such a scenario follow.

Q. The materials that were provided to you include the deposition of Witness *X,* correct?

A. That is correct, and I have read that deposition in its entirety.

Q. And you saw that Witness *X* places the initial impact on *B*'s side of the road?

A. Yes, I took that testimony into account in reaching my opinion.

Q. And so you find that testimony to be at variance with your opinion?

A. Not really. I am sure Witness *X* accurately and honestly related what he thought he saw. However, the testimony of witnesses *A* and *B* is that the truck blocked Witness *X*'s view of the actual impact. In addition, for the cars to have collided in the place where Witness *X* believes they collided, the broken headlight glass would have had to have been at least eight feet from where the two policemen found it. Also, the deep gouge in the road that was observed and measured by the investigating officer and that was still visible when I first visited the accident scene would have had to have started at least 16 feet further back if the collision occurred on *B*'s side. Therefore, while I am sure Witness *X* is telling us what he thinks he saw, as a scientist, I have to choose between that testimony and the physical evidence. I find the objective, physical evidence to be the more persuasive.

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§13.16 F. Leading Questions Permitted on Direct Examination of Expert

Leading questions are permitted during direct examination of one's own expert. *People v Campbell* (1965) 233 CA2d 38, 44, 43 CR 237; *Chula v Superior Court* (1952) 109 CA2d 24, 240 P2d 398; see Comment to Evid C §767. Although not clearly articulated in the reported decisions, the rationale for the rule seems to be that there is little danger that the testimony of an expert will be influenced by improper suggestion on the part of the questioner. See Comment to Evid C §767. For tactical reasons, however, counsel should limit the use of leading questions during examination of the expert to avoid having the jury infer that the lawyer is simply putting words in the expert's mouth. See California Trial Objections §13.8 (Cal CEB Annual).

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§13.17 G. Eye Contact With Jury

One of the greatest difficulties in conducting direct examination of an expert witness at trial is to decide where the expert should look. Communication experts agree that eye contact is a crucial element of persuasion. See, *e.g.,* Aron, Fast, & Klein, Trial Communication Skills §§3.01-3.10 (1986). When called to the stand, many experienced expert witnesses immediately position themselves (or even physically move the witness chair) so that they are facing the jury. This produces a strange and artificial situation, however, because the expert virtually ignores the questioner.

If the physical setup of the courtroom will permit, an excellent way for the expert to establish eye contact with the jury without resort to pretense is for the questioner to position himself or herself at the rear or even behind the jury box so that the witness looks at the jury and the questioner simultaneously. This has the added advantage of forcing the questioner and the expert to keep their voices up, ensuring that everything said will be heard by the jury.

Unfortunately, the construction of many courtrooms does not lend itself to this solution, or, particularly in federal court, counsel is required to stand at a lectern or other specified physical location while questioning witnesses. Under those circumstances, the authors recommend that counsel phrase questions in terms that direct the expert to address the response to the jury. For example:

> Q. Doctor, would you please provide the ladies and gentlemen of the jury with a summary of your educational background, starting at the college level?
>
> Q. Professor, would you now explain to the jury the exact function that the flow control valve provides in the operation of an automatic power steering system?
>
> Q. Would you please come over to the blackboard and diagram for the jury the process by which lost future income is reduced to present value, assuming a 10-percent discount rate?

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IV. SUBSTITUTES FOR LIVE TESTIMONY

§13.18 A. Video Recording of Expert Substituted for Live Testimony

Expert testimony may be presented through the video recording of the expert's deposition. CCP §2025.620(d). A number of requirements must be met before and at the deposition for the video recording to be admissible. They are discussed in §§10.40, 11.27-11.28.

The attorney who wishes to use the video recording at trial also must notify the trial court and all parties in writing of that intent, and of the parts of the deposition to be offered, in sufficient time for objections to be made and ruled on and for the tape to be edited. CCP §2025.340(m). For further discussion, see §11.27.

No reported California case has expressly considered the admissibility of this type of video technology as it relates to the authentication rules, but it should be subject to the same evidentiary rules for authentication as are motion pictures. See Effective Introduction of Evidence in California, chap 11 (2d ed Cal CEB 2000) (discussion and sample authentication questions at trial).

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§13.19 B. Using Expert Testimony Given in Former Trial

Evidence Code §1292 governs admissibility of former testimony. It makes evidence of former testimony admissible if (1) the declarant is unavailable; (2) the former testimony is offered in a civil action; and (3) the issue "is such that the party to the action … in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered" has in the present case.

In *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 55 CR3d 551, plaintiffs, who were seeking damages for injuries allegedly caused by the drug PPA, argued on appeal that the trial court erred in excluding expert testimony given in a former, unrelated case. In the former case, Novartis wanted to show causes of stroke other than the drug at issue in that case; thus, expert testimony implicating PPA as a possible cause would have been helpful. In *O'Neill,* this evidence would be potentially harmful. The court of appeal affirmed the trial court, finding that plaintiffs failed to show both that the experts were unavailable as witnesses and that Novartis had a similar interest and motive in examining the experts. 147 CA4th at 1404.

In the alternative, plaintiffs argued that the former testimony was admissible as an authorized admission of the defendant under Evid C §1222. However, they presented no evidence of this, and the fact that the experts were retained by Novartis in the previous case did not automatically establish the necessary agency relationship, especially when expert witnesses should be offering impartial testimony. *O'Neill v Novartis Consumer Health, Inc., supra.*

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§13.20 V. FEDERAL RULES OF EVIDENCE

The general principles of direct examination discussed in this chapter also apply in federal court, *e.g.,* the importance of bringing out the expert's qualifications, the bases for the expert's opinion, and using demonstrative evidence whenever possible.

See Fed R Evid 703 (bases of opinion testimony by experts), 704 (opinion on ultimate issue), and 705 (disclosure of facts or data underlying expert opinion and hypothetical questions). See also §§4.51-4.54.

Federal Rules of Evidence 703 permits an expert to rely on inadmissible material in stating his or her opinion at trial provided the material is reasonably relied on by experts in the particular field in which the testimony is offered. Under a 2000 amendment to Rule 703, if an expert reasonably relies on inadmissible information to form an opinion, the expert is not permitted to relate that underlying information to the jury absent an advance ruling from the trial court that the probative value of the information substantially outweighs its prejudicial effect. See *Turner v Burlington N. Santa Fe R.R.* (9th Cir 2003) 338 F3d 1058 (trial court did not abuse discretion under Fed R Evid 703 in refusing to admit expert testimony based on lab report that was otherwise inadmissible hearsay because substantial prejudice would result from admission of this evidence, and the probative value did not outweigh this prejudicial effect). This does not prevent the expert from stating what he or she relied on in forming his or her opinion; however, unless permitted by the trial court, the expert cannot go further. If the expert mentions that material in explaining his or her conclusion or opinions, the trial court must admonish the jury that they cannot rely on the inadmissible material. Similarly, if the inadmissible material comes before the jury as an exhibit to an expert's report—without any admonishment or limiting instruction—prejudicial error may occur if the jury could have been influenced by the inadmissible material in reaching its verdict. See, *e.g., U.S. v 0.59 Acres of Land* (9th Cir 1997) 109 F3d 1493.

PRACTICE TIP: When deposing an expert who relied on inadmissible facts or data in forming an opinion, counsel should be prepared to argue that the underlying material is not more prejudicial than probative under the balancing test of Rule 703. See Stern & Kruse, *Rule 703 Requires Attention to Expert's Underlying Sources*, San Francisco Daily Journal, Jan. 29, 2003, p 5.

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Alternatives to Cross-Examination

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§14.1 I. WAYS TO CHALLENGE OPPOSING EXPERTS

The most common ways of challenging an opposing expert's credentials or opinions follow:

- Motion in limine before trial. See §§14.2-14.3.
- Motion to limit or disallow an expert's testimony after voir dire examination of the expert during trial because the witness is not qualified to give an expert opinion on the topic in question. See §14.7.
- Objections or motions to strike the expert's testimony during trial. See §14.9.
- Cross-examination. See chap 15.
- Impeachment of the expert.
- Presentation of testimony of an expert who is much better qualified than the opposition's expert and who persuasively destroys the opposing expert's opinion.

For an overview on various ways to combat an opposition's experts, see Schmalz, *Attacking Expert Testimony*, 15 LA Law 46 (Nov. 1992). See also Kennedy and Martin, *Getting Rid of Unfounded Expert Opinions: Some Tips to Keep "Junk Science" Out of a California Courtroom*, 15 CEB Civ Litigation Rep 8 (Feb. 1993).

Failure to object to impermissible opinion testimony in a timely manner can waive the objection. Evid C §353; see *Gaehwiler v Occupational Safety & Health Appeals Bd.* (1983) 141 CA3d 1041, 191 CR 336.

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II. MOTIONS IN LIMINE

§14.2 A. Description of Motions in Limine

Motions in limine, also referred to as motions to exclude, are requests for the trial judge to rule on evidentiary matters before trial begins. Literally translated from the Latin, "in limine" means at the threshold. In limine motions are designed to keep the jury from ever hearing of matters that are so inflammatory, improper, or unfounded that they may leave an indelible impression on the jury that cannot be totally erased by either cross-examination or admonition from the court.

Motions in limine are usually made informally in the trial judge's chambers before the jury panel is summoned. Local rules should be consulted on the form for such motions and, in particular, for any requirements on service in advance of trial. In the absence of any controlling local rules, such motions can be made orally or in writing and need not be noticed or served in advance. California Trial Practice: Civil Procedure During Trial §§7.7, 7.13-7.18 (3d ed Cal CEB 1995).

Although not specifically authorized by statute, motions in limine are a clearly established part of California civil and criminal procedure. See *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 17, 84 CR 173; *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 339, 145 CR 47; *People v Delgado* (1973) 32 CA3d 242, 108 CR 399; *Sacramento & San Joaquin Drainage Dist. v Reed* (1963) 215 CA2d 60, 29 CR 847; *Pierce v J.C. Penney Co.* (1959) 167 CA2d 3, 334 P2d 117.

Motions in limine are especially appropriate for limiting or excluding expert witness testimony because Evid C §803 authorizes the court, on objection, to exclude opinion testimony for which there is no proper basis. See, *e.g., County Sanitation Dist. No. 8 v Watson Land Co.* (1993) 17 CA4th 1268, 22 CR2d 117 (motion in limine granted to preclude testimony by expert on valuation of easement when record demonstrated that expert had not followed correct valuation methodology); *Cottle v Superior Court* (1992) 3 CA4th 1367, 1384, 5 CR2d 882 (proof of alleged medical injuries from toxic exposure excluded when expert testimony insufficient to support claimed injuries); *In re Mark C.* (1992) 7 CA4th 433, 8 CR2d 856 (exclusion of certain expert testimony concerning psychological and physiological testing on issue of father's propensity to molest his children). But see *Kelly v New West Fed. Sav.* (1996) 49 CA4th 659, 667, 56 CR2d 803 (finding the trial court abused its discretion in granting motion in limine to preclude all testimony by an elevator expert in case involving dispute and shift in plaintiff's testimony as to whether accident had occurred in a building's large or small elevator; the expert had "guessed" that it had occurred in the large one).

As a practical matter, the effective use of a motion in limine can narrow or even eliminate the support for a party's affirmative case. For example, when expert testimony is needed to support a claim, an in limine motion that results in the exclusion of the expert, or material portions of his or her testimony, can result in a dismissal or perhaps a significant adverse impact on the presentation of a prima facie case. The utilization of a hearing, outside the presence of the jury under Evid C §402, also can be considered in support of such a motion. This provides an opportunity for cross-examination to more clearly demonstrate the foundational problems that support exclusion of the particular testimony. See *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 41 CR3d 80 (in limine hearing under §402 resulted in exclusion of toxicologist's testimony based on Evid C §352, *Kelly/Frye* test, and lack of reliability); *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 37 CR3d 9 (in limine hearings resulted in exclusion of testimony by tire expert and by directional stability expert for lack of adequate foundation).

The court in *Sacramento & San Joaquin Drainage Dist. v Reed, supra,* held that, once a motion in limine has been granted, no further objections or motions are necessary to preserve the point on appeal. Despite this rule, if any attempt is made during trial to interject a matter that was previously excluded by a motion in limine ruling, counsel who successfully objected to the matter should not only object to this misconduct (see, *e.g., Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 353, 133 CR 42; *Charbonneau v Superior Court* (1974) 42 CA3d 505, 116 CR 153), but also consider moving for a mistrial.

Counsel whose motion in limine was denied may object whenever the subject in issue arises during trial to ensure that the point is preserved for appeal. Alternatively, counsel can ask the judge to rule that counsel's first objection is a

continuing one that does not need to be renewed.

For further discussion of motions in limine, see Civ Proc During Trial, chap 7 (general discussion and sample written motion); California Trial Objections, chap 2 (Cal CEB Annual).

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§14.3 B. Determining Whether Motion in Limine Is Needed

Counsel should analyze each case to determine if a motion in limine is needed. Counsel should look for testimony, opinions, or documentary evidence that are not ultimately admissible in evidence; that lack sufficient foundation; that are inflammatory, prejudicial, or confusing; that cannot legally be relied on by experts; or that counsel, for whatever reason, wants to ensure never come to the jury's attention during testimony, opening statement, or even voir dire examination.

For example, evidence concerning remarriage of a widow or widower in a wrongful death case is not admissible. *Cavallaro v Michelin Tire Corp.* (1979) 96 CA3d 95, 157 CR 602. If remarriage is mentioned during trial, the judge will tell the jurors to disregard that fact. However, there is a serious question whether they will be able to clear their minds of the information when considering damages. Similarly, it may be irrelevant in a particular case that one party is an alcoholic, a wife-beater, or a Nazi sympathizer, and the court will almost certainly grant a motion to strike any such reference during trial. It is highly unlikely, however, that the motion to strike will completely "unring the bell." Counsel should file a motion in limine in each of these situations to ensure that expert witnesses make no reference to potentially prejudicial subjects.

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III. VOIR DIRE EXAMINATION OF EXPERT

§14.4 A. Basis and Purpose

Although the term "voir dire" is generally associated with the examination of prospective jurors, it is also used to describe questioning of opposing experts to determine whether they should be allowed to testify. Voir dire of the expert takes place after opposing counsel attempts to qualify the expert (see Evid C §§720(b), 721), either in or out of the jury's presence (see Evid C §402).

Counsel may choose to object to an expert's proposed testimony through a motion in limine, and/or to voir dire the expert out of the jury's presence. See §14.5 for discussion of when voir dire should occur out of the jury's presence.

The most common objection raised during an expert's voir dire is that he or she is unqualified to give all or part of his or her proposed testimony. See §14.7. However, if counsel has obtained a copy of the hypothetical questions that opposing counsel intends to ask, counsel may raise any relevant objection, *e.g.,* that the expert's opinion is based on an insufficient foundation or on speculation, or that it assumes facts not in evidence. See §13.11 for illustrations.

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§14.5 B. Whether to Voir Dire in Front of Jurors

Generally, counsel wishing to voir dire an expert should request that the examination take place outside the jury's presence, because the purpose of the voir dire is to keep the jury from hearing certain evidence. If counsel questions the expert in the jury's presence, it will be obvious to them that counsel is trying to keep the opinion out, and the subject matter may be unduly emphasized. Further, if the judge ultimately admits the opinion testimony, the jury may interpret that ruling as an implied endorsement of the witness and his or her opinion.

In some cases, however, counsel may want to use voir dire to discredit the expert before the jurors, even though counsel knows the judge will allow the expert to testify. For example, in the highly publicized Ford Pinto criminal trial in Indiana, Ford chose to attack one of the prosecution's main experts in front of the jury. Ford questioned the expert concerning classes he had failed in college, misleading and incorrect entries on his resume, and an advertisement for a legal education program put on by the expert inviting lawyers to learn about expanding accident cases into products liability cases. Strobel, Reckless Homicide?: Ford's Pinto Trial, p 148 (1980).

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§14.6 C. Avoiding Overuse of Voir Dire

Although voir dire can be extremely effective when used in moderation, it can be overused. The lawyer who attempts to voir dire every expert in a case with a significant number of experts will quickly test the patience of the judge, who generally views voir dire as a means of obtaining an out-of-order shot at cross-examination. In addition, the helpful effects of voir dire on the jury are quickly diminished if the device is employed on a routine basis. Finally, while voir dire affords the jury a preview of things to come on cross-examination, it provides a similar preview to both the witness and opposing counsel. Thus, thoughtless voir dire may provide the key that the witness and his or her lawyer need to effectively withstand later cross-examination.

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§14.7 D. Illustrative Areas for Voir Dire Examination

Challenging Qualifications

Voir dire of experts occurs most frequently with respect to the experts' qualifications. As Justice Jefferson points out, the qualification of a witness to testify as an expert must relate to the particular subject about which he or she is asked to express an opinion. It is irrelevant that the witness possesses expert qualifications on other subjects. Jefferson's California Evidence Benchbook §29.27 (3d ed CJA-CEB 1997); see *Putensen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1080, 91 CR 319.

Experts are, however, found to be unqualified to give expert testimony only infrequently. More commonly, an expert is found qualified to testify in one field, *e.g.,* accident reconstruction, but unqualified to testify in another field, *e.g.,* suitability of an automobile design.

See chap 3 on the requirements necessary to be considered an expert.

Blocking Opinions Based on Improper Matter

Expert testimony is inadmissible if the assumptions made by the expert are not supported by the factual evidence in the case, or if they are otherwise based on insufficient or inadmissible matter. See chap 4 on information on which experts may and may not rely.

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§14.8 IV. USING OWN EXPERT TO ATTACK OPPOSING EXPERT'S TESTIMONY

Probably the most common means used to attack the opinions of opposing experts is for counsel to counter with his or her own experts. While many deplore the extent to which modern trials have become a "battle of the experts," it is a reality that trial attorneys must take into account.

The first considerations counsel must make when preparing for trial are whether there is an area that warrants the testimony of an expert and whether opposing counsel will use an expert.

Counsel using an expert should try to get the best one for the case. See discussion in chap 7. Counsel's expert should outshine the opposition's expert in qualifications, the amount and quality of work done on the case, and communication skills.

Experts are most commonly used to give an opinion on a particular issue in the case. Experts are sometimes used, however, to attack the entire subject matter of an opposing expert's testimony. Perhaps the most common testimony of this nature occurs in criminal cases to the effect that psychiatrists cannot make a determination concerning competence or sanity accurately enough to testify to those issues in court. For example, in *People v Prince* (1988) 203 CA3d 848, 250 CR 154, the prosecution called a psychiatric expert to testify that he had studied the reliability of the tools and methods used by psychiatrists in trying to form legal opinions on a defendant's competence to stand trial. His research disclosed that the track record of psychiatrists in this regard was "terrible" and that expert opinions on this issue "do not deserve any real credibility or any weight, because … psychiatrists don't have methods that are really unavailable to lay people." 203 CA3d at 856. The expert then testified that he had examined the specific data on which the defense psychiatrist had relied in forming an opinion and testified that it was not sufficient to be the basis for a valid professional opinion on competency. The court of appeal affirmed the admissibility of the testimony, reasoning that, if expert testimony is admissible on the reliability of something as relatively straightforward as eyewitness identification, then certainly expert testimony is appropriate on something as comparatively esoteric and beyond common experience as psychiatric opinion on mental competency.

In the authors' opinion, the *Prince* court overlooked the fact than an eyewitness does not need to satisfy any threshold judicial scrutiny before being allowed to testify. An expert, however, must satisfy three separate judicial requirements:

(1) The testimony must pertain to a subject that is sufficiently beyond common experience that the opinion will be a benefit to the trier of fact;

(2) The expert's opinion must be based on material of a type that an expert may reasonably rely on in forming an opinion; and

(3) The expert must have the requisite special knowledge, skill, experience, training, or education to qualify as an expert in the subject area of his or her testimony. See §3.1.

If the expert fails to satisfy any of those three requirements, the court should prohibit the testimony. See §14.7.

In allowing the defense psychiatrist to testify in *Prince,* the trial judge found that these three criteria were met. However, by allowing the prosecution psychiatrist to testify that lay people are as qualified as psychiatrists to determine competency and that the opinion being offered by the defense psychiatrist was not based on sufficient information to form "a valid professional opinion," the court in effect granted the jury the right to "reverse" all three of the threshold determinations prerequisite to permitting expert testimony.

In the authors' view, the prosecution psychiatrist's testimony should have been the basis for an in limine motion (see §§14.2-14.3) or the basis for voir dire examination (see §§14.4-14.7), after which the court should have barred the defense psychiatrist from testifying altogether or barred the prosecution psychiatrist from offering opinions that were directly contrary to the court's own threshold findings.

For now, however, *Prince* is the law and the resourceful practitioner should regard it as providing another alternative to cross-examination for attacking opposing expert testimony.

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Source: Civil Litigation/California Expert Witness Guide/14 Alternatives to Cross-Examination/§14.9 V. OBJECTIONS AND MOTIONS TO STRIKE DURING DIRECT EXAMINATION

§14.9 V. OBJECTIONS AND MOTIONS TO STRIKE DURING DIRECT EXAMINATION

A number of objections that can be interposed to questions asked of an expert on direct examination will, if sustained, keep the witness from being allowed to answer.

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§14.9A A. Lack of Foundation

The most common objection to an expert's testimony is lack of foundation. *Ungefug v D'Ambrosia* (1967) 250 CA2d 61, 65, 58 CR 223 (counsel objected that witness stated improper "conclusion," when problem was that witness was not qualified to testify as expert on issue in question; proper objection would have been "lack of proper foundation"). The most common grounds for the lack of foundation objection are as follows:

- Speculative.
- Assumes facts not in evidence.
- Assumes facts contrary to the evidence.
- Witness not properly qualified.
- Subject not sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Evid C §801(a).
- Based on inadmissible matter, *e.g.,* privileged information.

PRACTICE TIP: When, through inadvertence, failure to react quickly enough, or failure to perceive a deficiency in a question, you fail to object before the answer is given, you should move promptly to strike both question and answer on the ground that would have warranted an objection beforehand. When a nonresponsive or otherwise improper answer is given to a proper question, you should also move to strike.

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Source: Civil Litigation/California Expert Witness Guide/14 Alternatives to Cross-Examination/§14.9B B. Evidence Code §352

§14.9B B. Evidence Code §352

An additional objection that is sometimes overlooked is an objection based on Evid C §352, which gives a court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will be too time-consuming, prejudicial, confusing, or misleading.

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Source: Civil Litigation/California Expert Witness Guide/14 Alternatives to Cross-Examination/§14.9C C. Opinion Goes Beyond Deposition Testimony

§14.9C C. Opinion Goes Beyond Deposition Testimony

Under the right circumstances, counsel can raise an objection that the expert's opinion goes beyond those given in his or her deposition. In *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216, the court upheld the trial court's exclusion of testimony that went beyond the opinions that the plaintiff's expert expressed at his deposition. During the deposition, the expert stated that the opinions offered were the only ones he had and that, if he had others, he would notify defense counsel. No notification was ever given.

The court of appeal noted that this situation was not precisely the same as in *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289, in which the issue was not the adequacy of the expert witness declaration, but whether a party had the right to rely on the expert's express representation that the opinions given in deposition were the only ones that would be offered at trial. The court held that a party was entitled to rely on such an express representation and that an expert making such a representation should be limited to the opinions expressed in the deposition. See *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1599, 71 CR3d 361 (trial court properly granted motion in limine foreclosing expert's testimony on issues related to fraud cause of action because witness testified at deposition that he would have no opinion on that cause of action).

Despite *Jones,* one court of appeal has held in an unpublished opinion that the expert may testify on matters that merely "expand" the description and interpretation of conclusions in his deposition, as opposed to introducing new subjects. *DePalma v Rodriguez* (May 4, 2007, B190062; not certified for publication) 2007 Cal App Unpub Lexis 3629, *12. However, there appears to be a fine line between *Jones* and *DePalma*. Although *Jones* had noted that the expert witness's declaration "arguably was broad enough to encompass" his trial testimony, the *DePalma* court nevertheless considered its case to be "quite different from the situation in *Jones,* where testimony excluded by the trial court involved an entirely new area of testimony not previously disclosed."

In *DePalma,* the court of appeal found no "unfair surprise" (2007 CA Unpub Lexis 3629 at *13) when the expert, Dr. Burkhard, stated during deposition that he would not expect plaintiff to have suffered any injury from the accident, and subsequently testified at trial (even though plaintiff claimed he had undesignated his own expert witness) that he would not expect plaintiff to have specific knee or shoulder injuries. 2007 CA Unpub Lexis 3629 at *9. Moreover, it was not reasonably probable that the jury would have arrived at a different result; thus the alleged error was "not so prejudicial as to have resulted in a miscarriage of justice warranting a new trial." 2007 CA Unpub Lexis 3629 at *14. In fact, the jury's special verdict was supported by the plaintiff's own physician, who testified that the accident "wasn't the sole cause of the underlying process which is degenerative joint disease." *DePalma v Rodriguez, supra*. Finally, *DePalma* also distinguished *Bonds* as a case "concerning the scope of the *declaration* by an expert witness" as opposed to that of the expert's deposition. 2007 CA Unpub Lexis 3629 at *10.

In *Easterby v Clark* (2009) 171 CA4th 772, 780, 90 CR3d 81, the court of appeal found no "unfair surprise" when defendants learned approximately 3 months before trial that the plaintiff's expert would go beyond his original deposition testimony and offer a causation opinion at trial. *Easterby* characterized *Bonds* as standing for the overarching principle that (171 CA4th at 780)

> a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is unreasonably difficult.

In *Easterby,* a simple letter informing defendants that plaintiff's expert had changed his position was sufficient, even though no additional expert witness declarations were submitted. The court emphasized that the critical issues were whether defendants were on notice and had time to adequately prepare for the change by deposing plaintiff's expert again. 171 CA4th at 780.

PRACTICE TIP: *Jones* provides useful insights to both sides on taking an expert's deposition. Counsel who is examining the expert should make sure to ascertain whether the expert intends to offer any opinions other than those expressed at the deposition. In response to that line of questioning, counsel offering the expert should make

sure that all opinions are offered or, if there is further work to be done in support of additional opinions, that opposing counsel will be notified when the work has been completed and the opinions formulated. It is unclear from *Jones* whether notification will be enough to permit introduction of the subsequently formulated opinion, but it is clear that in the absence of such notification, the expert opinion may be excluded.

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§14.10 VI. FEDERAL RULES OF EVIDENCE

Motions in Limine

Federal courts recognize the motion in limine as a vehicle for testing the validity of expert testimony. In addition, Fed R Evid 104(a) requires the court to make a preliminary determination of the admissibility of expert testimony and the qualifications of expert witnesses. See also Manual for Complex Litigation §§23.350-23.354 (pretrial rulings on objections) (4th ed 2004), which encourages the use of pretrial motions to test the admissibility of proffered expert testimony that may be pivotal.

Voir Dire Examination

Federal Rules of Evidence 104 gives the judge wide discretion to determine whether an expert is qualified, and the trial judge's determination will not be overturned except for abuse of discretion or clear error of law. *Soo Line R.R. v Fruehauf Corp.* (8th Cir 1977) 547 F2d 1365, 1374. See also Berens, *Pretrial Challenges to Expert Testimony*, 8 Litig 27 (Summer 1982).

When counsel has unsuccessfully sought to exclude an expert's testimony, federal courts also have power under Fed R Civ P 50 to grant a judgment as a matter of law or a conditional new trial if the verdict is not supported by the evidence and expert testimony was required to sustain the verdict. See *Brown by Brown v Syntex Labs., Inc.* (8th Cir 1985) 755 F2d 668. In *Brown,* the Eighth Circuit upheld the conditional grant of a new trial on the basis that an expert of marginal qualifications had not established a causal link between the product and the alleged injuries. The district court found that the expert had taken several unscientific analytical shortcuts, engaged in circular reasoning, ignored data relied on by other experts in the field, selectively sifted through the evidence, and dismissed too quickly the possibilities of alternative causes of the alleged injuries. In light of these findings, the appellate court held that there was no abuse of discretion in granting a new trial.

Objections and Motions to Strike

See §14.7 for discussion of grounds for objecting to an expert's testimony in state court; they are roughly the same in federal court. Expert testimony may be objected to on the ground that it is unduly prejudicial under Fed R Evid 403. In *Jinro Am., Inc. v Secure Invs., Inc.* (9th Cir 2001) 266 F3d 993, amended (9th Cir 2001) 272 F3d 1289, the court excluded expert testimony on Korean business culture and practices because the testimony was tinged with ethnic bias and thus unduly prejudicial. See also *U.S. v Varela-Rivera* (9th Cir 2002) 279 F3d 1174 (prejudicial error to admit expert testimony on modus operandi of drug trafficking organization because defendant was not charged with conspiracy to distribute drugs and testimony unfairly portrayed him as member of drug trafficking organization); *U.S. v Vallejo* (9th Cir 2001) 237 F3d 1008, amended (9th Cir 2001) 246 F3d 1150 (excluding expert opinion testimony on drug trafficking organization because such testimony would create same undue prejudice that has made drug courier profiles inadmissible). Expert testimony that extends beyond the general modus operandi for drug production and trafficking and that is probative of the defendant's guilt because of his proximity to the production operations when he was arrested may be admissible, particularly if no objection is interposed to the testimony at trial. See *U.S. v Valencia-Amezcua* (9th Cir 2002) 278 F3d 901, 909 (distinguishing *U.S. v Vallejo*).

In *Mukhtar v California State Univ., Hayward* (9th Cir 2002) 299 F3d 1053, amended at 319 F3d 1073, the Ninth Circuit found that a contemporaneous objection to an expert's testimony was not required after the trial court had definitively ruled on the admissibility of the expert's testimony in response to the university's motion in limine raising the objection. Because the district court had made it clear in ruling on the motion that it would admit the testimony, the university had adequately preserved its arguments for appeal and the trial court's ruling accordingly was reviewed for abuse of discretion. See also *Varela-Rivera,* 279 F3d at 1177 (preservation of objection by motion in limine).

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Cross-Examination of Opposing Experts at Trial

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§15.1 I. INTRODUCTION

The many difficulties and risks that counsel encounters when cross-examining a lay witness concerning everyday matters are greatly compounded when the witness is an expert. The expert witness may have spent more time in court than the cross-examiner, and has special expertise in the subject area of the questioning that the cross-examiner lacks. In short, cross-examination of experts is difficult; such witnesses are almost impossible to destroy, and often difficult to damage. In addition, cross-examination of experts—especially those with extensive courtroom experience—is risky. They frequently are aggressive and look for ways to "score points" at the cross-examiner's expense.

To be an outstanding cross-examiner requires natural abilities, including quickness of mind, judgment, wit, and timing, that cannot be learned from a book. Fortunately, most trials can be won by cross-examiners who are competent rather than outstanding. With thorough preparation and attention to the suggestions discussed in this chapter, almost any lawyer can learn to cross-examine expert witnesses competently.

One of the most important things for counsel to do before beginning cross-examination of an expert is to determine what counsel hopes to achieve with that witness. Some beginning trial lawyers cross-examine experts as if their success were judged by the length of their cross-examination. It is crucial to think of cross-examination from the jury's point of view. Counsel should not waste time on matters that are of no consequence because jurors will probably become bored with such questioning. Counsel should instead limit questions to those that further counsel's goals. Does counsel wish to entirely discredit the expert? Does counsel want to tie the expert down to an opinion that can be discredited through counsel's own expert? Is the expert's opinion irrelevant? Can information be obtained from the expert that is favorable to counsel's client?

PRACTICE TIP: If the expert's opinion is irrelevant, you may want to just stand up and move to strike the expert's entire testimony on the grounds of relevance instead of cross-examining him or her. Such a "talking objection" might include the reasons why the expert's testimony has nothing to do with the case.

Once the goal or goals to be achieved are defined, counsel should think of the most interesting way of conducting the cross-examination. Counsel is not required to proceed in any particular order. It is usually better to start and finish strong, and leave the less interesting material for the middle.

Suggestions for further reading include the following:

Books

- Scientific Evidence in California Criminal Cases, chap 4 (Cal CEB 2008) (on challenging expert testimony on scientific evidence).
- Effective Direct & Cross-Examination, chaps 3-6 (Cal CEB 1986) (discussion of suggested techniques with brief, succinct, illustrative question-and-answer sequences).
- Houts, Cross-Examination of Medical Experts (1982).
- Jeans, Trial Advocacy (2d ed 1993).
- Purver, Young, & Davis, Trial Handbook for California Lawyers, chap XXIX (2d ed 1987).
- Stevenson, Successful Cross-Examination Strategy (8th ed Executive Reports Corp. 1971).
- Tigar, Examining Witnesses (2d ed ABA 2004) (discussion and analysis of suggested techniques and approaches with illustrative question-and-sequences).
- Wellman, The Art of Cross-Examination, chap V (4th ed 1936).

Articles

- Baldwin, *Cross-Examination*, 6 CEB Civ Litigation Rep 117 (1984).
- Baum, *Taking on the Opposing Expert: An Approach to Cross-Examination*, 4 San Francisco Trial Law, No. 7 (July 1984), also in 20 Trial 74 (Apr. 1984).
- Fielder, *Litigators Need to Use Science to Debunk Expert Testimony*, San Francisco Daily Journal, Apr. 26, 2006, Focus, p 9.
- Hebert, *Cross-Examining Survey Experts*, 21 CEB Civ Litigation Rep 234 (Nov. 1999).
- McElhaney, *Nine Ways to Cross-Examine an Expert*, 31 Litig 55 (Winter 2005).
- Parker, Mills, & Patel, *Expert Grilling*, 24 LA Law 41 (Nov. 2001).
- Reilly, *Using On-Line Services to Investigate Experts*, The Practical Litigator 61 (Jan. 1996).
- Ritter, *Expert*, 14 Cal Trial Lawyer's Ass'n Forum 182 (1984).

- Strutin, *How to "Permanently Investigate" Experts*, The Practical Litigator 65 (Mar. 1996).
- Suplee & Woodruff, *Cross-Examination of Expert Witnesses*, 34 Prac Law 41 (Jan. 1988).

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II. PREPARATION FOR CROSS-EXAMINATION

§15.2 A. Review Expert's Deposition and Other Discovery Concerning Expert

Counsel should begin to prepare for cross-examination of the opposing expert by reviewing the expert's deposition and all other discovery concerning the expert, *e.g.,* written interrogatories, and reports prepared by the opposing expert. The contents of the expert's file materials, disclosed during the deposition, should also be carefully reviewed. Finally, counsel should consider what other discovery taken, *e.g.,* other expert's depositions, depositions of fact witnesses, and documents produced, may bear on the foundation for any assumptions made by the expert. At the very least, this other discovery should be reviewed for potential sources of impeachment. Counsel should also consider whether any of the material facts in the case have changed, or what facts may have been newly discovered since the expert's deposition, and reflect on how these factual developments might bear on the expert's previously rendered opinion.

PRACTICE TIP: Be sure your opponent has given you all of the reports the expert said he or she would complete following his or her deposition.

It is becoming increasingly fashionable to have young associates or paralegals summarize depositions. In a large case this practice must be followed. There is no substitute, however, for the trial lawyer's personal review of the entire deposition transcript and every other document prepared by the expert. Otherwise, significant word choices, inconsistencies, and contradictions may be overlooked.

If the case is too large for counsel to review all depositions and other documents, he or she should at least reread the most significant material, together with the summary prepared by the associate, making his or her own additions and modifications.

In preparing a deposition or other digest, particularly of an expert witness, counsel must remember that the purpose of the digest is to aid counsel in discrediting the expert on cross-examination, not to paraphrase. Key words, including modifiers and qualifiers, must be transcribed precisely into the digest. Otherwise, the cross-examiner may think he or she has caught the expert in a conflict between what the expert says on the stand and, *e.g.,* what he or she said in deposition, only to find on reading the actual deposition passage that the conflict exists only because of the manner in which the deposition was abstracted.

For discussion and a sample question-answer segment involving impeachment of a witness with a deposition transcript, see Effective Introduction of Evidence in California, chap 28 (2d ed Cal CEB 2000).

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§15.3 B. Review Information on Which Expert Relies

The facts and assumptions on which the opposing expert's opinions are based should be carefully compared with deposition testimony of witnesses who have personal knowledge of the facts to verify that the facts truly support the expert's assumptions. The expert's assumptions and opinions also should be carefully cross-checked against responses to interrogatories and requests for admissions by factual witnesses because these are frequently not shown to experts. There may be other statements as well by factual witnesses, *e.g.,* in police reports. A contradiction between an assumption by an expert and an interrogatory answer from the party who retained the expert frequently will be a fruitful area for cross-examination.

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§15.4 C. Review the Expert's Subject Matter Area

Before cross-examining an expert at trial, the cross-examiner should review and update his or her knowledge of the opposing expert's area of expertise. The cross-examiner should not try to master all of the expert's field of expertise or be diverted by matters that are not directly germane to the lawsuit, but must master the particular portion of the field of expertise that is in issue, including the technical vocabulary. The cross-examiner should also be confident in dealing with the physical facts, observations, or other data that form the basis for the differing opinions being offered by the competing experts. For example, if the case involves a claim that an injury victim suffered a traumatically induced cataract, the cross-examiner will want to review a leading ophthalmology text such as Sir Stewart Duke-Elder's monumental work, Parson's Diseases of the Eye. The cross-examiner, however, has neither the need nor the time to read all 13 volumes of Duke-Elder's treatise. Rather, he or she need only acquire a good understanding of the anatomy of the eye. A diagram of the eye with the key areas marked should be part of the cross-examiner's trial book. The cross-examiner should also memorize the characteristics of a traumatically induced cataract, such as the cataract's having a unique, rosette shape, and the improbability that, if a cataract is traumatically induced, the victim will have any cataract problem in the other eye.

If the opposing expert is a metallurgist, and the issue is whether a part failed because of fatigue or impact, the cross-examiner need not memorize the periodic chart of the atoms or even read an entire introductory college textbook on metallurgy, but should focus on the differences between the characteristics of a fracture surface that has failed through fatigue and one that has been broken by an impact. The cross-examiner should study fractographs (photographs taken under an electron microscope) of both kinds of fractures to familiarize himself or herself with the differing appearances and, in particular, with the unique ridges or bench marks that typify the incremental series of failures that culminate in a fatigue fracture.

A number of treatises and articles set forth suggestions for cross-examining specific types of experts. While not all of the suggestions are in complete accord with the peripheral cross-examination philosophy espoused in this chapter, they are, nonetheless, recommended to the practitioner who is preparing to cross-examine an expert in that field:

Automobile Accident Reconstruction Specialists

- Barzelay, Lacy, et al., Personal Injury: Scientific Automobile Accident Reconstruction (2001): seven-volume work covering all phases of automobile accident reconstruction with numerous transcript segments setting forth actual and suggested cross-examination of reconstruction specialists.

Medical Experts

- Examination of Medical Experts (Matthew Bender, 1968, 1973): discusses numerous aspects of cross-examination of doctors, including exemplar segments.
- Medical Trial Technique Quarterly (Callaghan & Co.): quarterly publication devoted to the trial of medical issues and cases, containing frequent articles on cross-examination.

Psychiatrists and Psychologists

- Ziskin, Coping With Psychiatric and Psychological Testimony (Law and Psychology Press, 5th ed 1995): two-volume work with detailed discussion of weaknesses in, and bases for, attacking numerous areas of psychiatric and psychological testimony, including exemplar examination transcripts.

Other Experts

- Habush, Art of Advocacy: Cross-Examination of Nonmedical Experts (1981): brief discussion of cross-examination technique, with extensive transcript segments setting forth actual cross-examinations of a variety of technical and engineering experts.
- Trial Diplomacy Journal (Court Practice Journal, Inc.): Quarterly publication covering same general type of material as the Trial Lawyer's Guide.
- Trial Lawyer's Guide (Callaghan & Co.): Quarterly publication devoted to trial tactics, including frequent articles on cross-examination.

Counsel's own expert can be helpful in recommending texts and articles and in suggesting fruitful areas of cross-examination.

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§15.5 D. Consult With One's Own Expert; Complete Trial Notebook

The cross-examiner must confer and discuss the proposed cross-examination of opposing experts with his or her own expert. Counsel's expert can recommend promising areas of cross-examination, give counsel feedback on counsel's proposed cross-examination, and advise counsel on what points the opposing expert is most likely to stress. Counsel may want the expert to draw up a list of questions that the expert thinks the opposing expert should be asked.

Before trial begins, counsel should complete his or her trial notebook. The sections relevant to cross-examination of an expert might contain the following, depending on the case and on counsel's style:

- Copies of any in limine motion concerning the expert's testimony that is to be made before the expert takes the stand. The motion can either be prepared for submission to the court and opposing counsel, or can be a checklist or summary from which counsel may make the motion orally.
- Checklist of topics for voir dire of expert.
- Checklist of topics for cross-examination.
- Pages flagged from discovery that might be used for impeachment.
- Copies of any pretrial orders that might be needed during trial, *e.g.,* orders that may have limited the areas in which the expert will be permitted to testify.
- Copies of any evidence memoranda prepared in anticipation of an evidentiary dispute concerning the expert's testimony.
- Any hypothetical question(s) to pose to the expert.

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III. CROSS-EXAMINATION OF OPPOSING EXPERT

§15.6 A. Having Counsel's Own Expert Present; Permissible Scope of Cross-Examination

A number of lawyers consider it good practice to have their own expert present while the opposing expert is testifying to assist in understanding the testimony and to offer thoughts and recommendations concerning cross-examination. However, under Evid C §777, the trial judge has the power to exclude all witnesses, other than parties, from the courtroom. This power has been specifically held to encompass exclusion of expert witnesses for one side while experts for the other side are testifying. *People v Valdez* (1986) 177 CA3d 680, 686, 223 CR 149.

An expert witness may be cross-examined the same as any other witness. Evid C §721(a). In addition, an expert may be cross-examined concerning his or her qualifications, the subject to which the expert testimony relates, the matter on which the opinion is based, and the reasons for the opinion. Evid C §721(a). An expert may not be cross-examined concerning the content of any scientific, technical, or professional text, treatise, journal, or similar publication, unless any of the following occurs (Evid C §721(b)):

- He or she referred to, considered, or relied on it in arriving at or forming his or her opinion;
- The publication was admitted in evidence;
- The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

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B. Peripheral Cross-Examination

§15.7 1. Nature of Peripheral Cross-Examination

As every soldier who has been through basic training knows: "You don't attack a machine-gun nest head on." An opposing expert witness should be regarded as the legal equivalent of a machine-gun nest. An expert should rarely be attacked directly. The cross-examiner's goal is usually to find peripheral or tangential ways of assailing the expert's views.

For example, if the medical doctor who performs an independent medical examination (IME) of a plaintiff for the defense testifies that the plaintiff's back problems resulted from preexisting arthritic changes rather than from an automobile accident, direct questions by plaintiff's counsel about the doctor's opinion (*e.g.,* "Doctor, are you sure that the present problems are the result of preexisting arthritic changes?") will usually result in the doctor's merely reiterating the damaging opinion, frequently with a self-serving explanation. Similarly, the near-suicidal inquiry, "Doctor, why are you so sure that my client's present problems are the result of preexisting arthritic changes?" is likely to evoke an otherwise inadmissible dissertation on, *e.g.,* the inevitability of arthritic deterioration and the number of other Americans afflicted with arthritic problems, or a subjective and unsupported opinion that the plaintiff is misrepresenting his or her condition.

Peripheral cross-examination should focus on the following:

- Matters that the witness cannot deny.
- Work that the witness has not performed.
- Work that the witness has performed and must acknowledge in order to cast doubt on the expert's qualifications, objectivity, and thoroughness.

Peripheral cross-examination of the defense doctor could proceed as follows:

Q. Doctor, you have seen my client only once in his life, correct?

A. That's right.

Q. That one-time visit occurred approximately 8 months ago, correct?

A. That's correct.

Q. That one-time visit lasted only 20 minutes, correct?

A. Approximately, yes.

Q. The views that you have expressed here today are all based on that one-time, 20-minute examination that took place 8 months ago, correct?

A. Yes.

Q. Doctor, you have patients of your own, do you not, as well as injury victims like my client who are referred to you by law firms?

A. Yes.

Q. In treating your own patients, you try to avoid making an irrevocable medical decision based on a single examination whenever possible, right?

A. That is correct.

Q. Now, Doctor, you are aware that my client had not missed a single day of work, other than for an occasional cold, for more than 5 years before the day of the accident in question?

A. That's what I am informed.

Q. Doctor, you are further aware that my client has not worked a single day since his car was rear-ended

by the defendant, correct?

A. That's correct.

Q. Doctor, this is the eleventh time in the past ten years that you've testified on behalf of _ _[*name of counsel for the defendant*]_ _ in a personal injury suit, isn't that correct?

A. I think that's about right.

Q. In each of those ten other cases you testified, as you've testified here today, that you believed the plaintiff's disability was the result of something other than the fault of _ _[*name of defense counsel's client*]_ _, isn't that correct?

A. That's correct, and I still feel that way.

Q. Thank you very much, Doctor.

Nowhere in this sequence does the cross-examiner directly attack the witness's central opinion that the plaintiff's present problems are due to arthritis instead of the accident. In fact, that opinion is never even mentioned. Instead, the cross-examiner has undermined the credibility of the doctor's central opinion by emphasizing that:

- The opinion is based on a single examination.
- Single examinations are inconsistent with the way the doctor treats his or her regular patients.
- By implication, plaintiff's treating doctor, whose opinions are based on numerous visits, is more credible.
- Plaintiff's inability to work started after the accident.
- By implication, the doctor is a biased "tool," who travels from courtroom to courtroom trying to deprive deserving claimants of legitimate compensation.

By shifting the questioning away from the expert's opinion, the peripheral cross-examiner can increase the chances of success; in some cases, there is virtually no way for the examiner to lose. Peripheral cross-examination can also almost eliminate the risk of losing the case by asking the wrong question of an opposing expert during cross-examination, and can provide the trial lawyer who is not a Clarence Darrow, and whose skills and confidence in the area of cross-examination are limited, with a way to cross-examine that minimizes the importance of spontaneity and mental agility while maximizing the importance of advance preparation.

For most attorneys, modern litigation, with its emphasis on discovery, combined with the attorneys' own limited skills in the field of cross-examination, mean that their cross-examinations are going to be neither brilliant nor devastating. This does not mean, however, that cross-examination has to be a source of embarrassment for the cross-examiner, let alone an area in which an otherwise winnable case is lost. Through thoughtful and thorough advance preparation, and adherence to a well-planned and primarily peripheral cross-examination, even the inexperienced practitioner can ensure that cross-examination will be marginally productive and, with a little luck and a little practice, something more than that.

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§15.8 2. Advantage of Small Victory

The doctor in the example in §15.7 probably has not been destroyed as a witness and the jury has not dismissed the testimony as a lie, but the peripheral cross-examiner may have discredited the opposing expert enough that the trier of fact will not entirely accept the expert's testimony "lock, stock, and barrel." It is now likely that the jury will listen to the testimony of the cross-examiner's own experts, and will await final argument before deciding which side has the more persuasive case.

Although peripheral cross-examination may produce only a small victory, it may be the best counsel can achieve, regardless of his or her technique of cross-examination. Rarely can a cross-examiner actually destroy an expert witness, and, if cross-examination results in a bickering contest between the witness and the cross-examiner, the witness generally is the beneficiary of the jury's sentiment. Experts, like professional football teams, are simply too good to be "shut out," at least not with any regularity. In addition, peripheral cross-examination is unlikely to destroy a witness's testimony. Any attempt at destruction is of necessity a head-on attack on the machine-gun nest, and such attacks should usually be avoided at all costs. Expert witnesses frequently know how to counter an attack and to seize the opportunity to introduce material that otherwise would be irrelevant or excludable.

To use another military analogy, the cross-examiner's position can be likened to that of a bomber pilot attacking a heavily fortified position. The goal is to get in, drop the bomb load on any reasonably acceptable target (primary, secondary, or other), and get out as quickly as possible to avoid the anti-aircraft fire. Cross-examination of the expert witness should be treated with similar respect and caution. The cross-examiner should conduct the cross-examination as expeditiously as possible, minimizing the risk of counterattack by the expert.

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§15.9 3. Yes and No Answers

Expert witnesses are likely to be talkative on cross-examination and may say things that will damage the cross-examiner's position. The cross-examiner must try to limit the witness's answers to the fewest possible words, ideally a simple yes or no, as illustrated by the cross-examination of the defense doctor in §15.7.

One good approach is to start a question with the phrase, "Isn't it a fact that…," or to conclude the question with a word such as "correct?" or "right?" or the phrase "Isn't that so?" If the expert's response begins with an explanation, the cross-examiner can restate the question and request that the witness answer yes or no, or can interrupt, saying, "Doctor [or other title], all I asked was whether or not it is a fact that [restate question]. Surely you can tell us, 'Yes, that is a fact' or 'No, that is not a fact.'"

These and similar devices generally keep all but the most obstreperous witness on the yes-and-no leash. For an especially aggressive expert who will not answer the cross-examiner directly, questions asked in this form quickly alert the jury that the expert is biased and is not attempting to help the jury decide the case objectively. Counsel can also ask the court to order the witness to answer yes or no.

PRACTICE TIP: Many judges will admonish the expert to answer yes or no, but will also tell the expert he or she can then explain the yes or no. See *McGuire v Baird* (1937) 9 C2d 353, 70 P2d 915 (experts must be given opportunity to explain yes or no answers).

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§15.10 4. Controlling Expert's Eye Contact With Jury

Eye contact is the single most important element in nonverbal communication. Accordingly, just as it is the direct examiner's function to try to promote as much eye contact as possible between the expert and the jury, it is the goal of the cross-examiner to try to minimize eye contact between the opposing expert and the jury.

Ideally, cross-examination should be conducted from a point in the courtroom that is well away from the jury, so that the expert will have to artificially avoid looking at the examiner to address his or her responses to the jury. In addition, when counsel encounters an expert who insists on looking at the jury, it is frequently helpful to "personalize" the questions, both to induce the witness to look at the examiner and to highlight for the jury what the expert is doing. For example:

> Q. Sir, can you tell me the name of even one mass-produced automobile that was manufactured before 1975 and that had a fuel tank in that location?

> Q. Doctor, I want you to read to me each and every entry in your notes for the June 29th visit that you claim indicated that the surgical recovery was not proceeding normally.

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§15.11 5. Principle of Graduality

Because peripheral cross-examination focuses on the achievement of small victories, it is desirable to draw as much attention as possible to those victories and ensure that they are not overlooked by the trier of fact.

One of the best ways to accomplish this is by deliberately breaking down matters that could be combined into a single question, so that they appear in several questions.

In the example in §15.20 the expert could simply have been asked whether he or she had ever been involved in a previous dual master cylinder case. However, by first asking whether the expert had any prior cases involving a dual master cylinder in the exact make and model of the car in question, whether the expert had any other dual master cylinder cases for any car of any make for that model year, any dual master cylinder cases for any car of the kind in question from any year and then, finally, asking whether the expert has had any other dual master cylinder cases, the trier of fact is first alerted that there is a problem with the expert's prior experience in this area. Once the trier of fact's attention has been captured, the extent of that lack of experience is unfolded "gradually," almost as if the examination were the verbal equivalent of a "flip chart."

Similarly, in the example in §15.21, the expert could simply have been asked whether he or she had any knowledge about power steering systems aside from that accumulated in the course of the consultation. However, by asking a series of questions about the numerous other areas in which the expert could, but did not, acquire such experience, the import of this weakness is emphasized and dramatized for the trier of fact.

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§15.12 6. Prior Testimony

When dealing with an experienced expert, the cross-examiner should seek out as many of the expert's earlier depositions and trial testimony transcripts as possible to determine whether the expert testifies with such an unvarying consistency that he or she seems to be a biased professional rather than an objective, impartial observer. See §7.7 on locating information concerning experts in jury verdict reporting services and §11.9 concerning limitations on counsel's ability to require an expert to testify or produce information concerning other cases with which the expert has been involved.

More frequently, the expert has previously given testimony that is at least inconsistent with, and may be flatly contradictory to, his or her opinion in the present case. This is particularly true if the expert has attempted to testify for both sides to avoid being typecast as a proponent for either the plaintiff's or defendant's position. In addition, even experts who do not sell their services to the highest bidder sometimes change or modify their opinions with the passage of time. Researchers generally must adapt and abandon hypotheses in an effort to reach the truth. Although these changes in position may reflect an open mind in the laboratory, they may be cast in a far less charitable light in the courtroom.

For example, during the period of high inflation in the 1970s, many economists progressively raised the amount by which lost future income, profits, and so on had to be increased to offset inflation, but their changes in position seriously undermined their credibility when they attempted to project into the future the figures that were valid at the time they were testifying. The following dialogue illustrates how counsel might cross-examine an economist in this situation:

> Q. You have told us that Mr. A's wages, had he lived and worked to age 65, would have to be increased by 10 percent per year to compensate for the inflation that we expect to experience between now and the year 2007, when Mr. A would have reached age 65 and retired, correct?
>
> A. That's correct.
>
> Q. You testified in Bakersfield in 1974, in *Smith v Gigantic,* that the jury should increase Mr. Smith's lost wages by 8 percent to offset the expected rate of inflation between then and the year 2000, correct?
>
> A. I believe that was my testimony.
>
> Q. And in 1971, in *Jones v Consolidated,* you told the jury that they should increase the decedent's wage loss by 4 percent to offset future inflation, isn't that correct?
>
> A. That was my testimony, at that time, based on the information available to me.
>
> Q. That's right. All you can do is testify on the basis of the information available to you at the time you're actually testifying in any particular case?
>
> A. That, and my best judgment, on the basis of that information, regarding future developments.
>
> Q. And all you can do is give your best judgment? You don't have a crystal ball back at your office, do you?
>
> A. Of course not.
>
> Q. And if you had been testifying in a wrongful death lawsuit back in 1929, you would have testified that the stock market was going to keep getting higher and higher and things were going to keep getting better and better, wouldn't you?
>
> A. No, I think as of 1929 I could have seen the coming downturn.
>
> Q. You would have been able to foresee the Great Depression in a way that you were not able to see 10-percent inflation in 1971, or even 1974, is that correct?

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§15.13 7. Lack of Entries and Notes

Whenever any expert—either a doctor or another expert—attaches significance to, or bases an opinion on, a statement, event, or circumstance, the cross-examiner should verify that there is an entry for that statement, event, or circumstance in the expert's notes. An expert's failure to record anything of significance provides the cross-examiner with an effective form of cross-examination, *e.g.:*

Q. Doctor, during the 21 months that you treated the plaintiff, you made notes every time the plaintiff came to your office or even called you on the telephone, correct?

A. I did.

Q. In your notes, Doctor, you attempted to write down everything of significance, didn't you?

A. Yes.

Q. And you preserved those notes and made them a part of your official files, correct?

A. I did.

Q. From time to time during your treatment of the plaintiff, you occasionally glanced back over those notes, isn't that right?

A. From time to time, I did, yes.

Q. I assume that you looked over those notes in preparation for your testimony here in court, did you not, Doctor?

A. Yes, I did look them over before coming here.

Q. Doctor, I note that in your records for each of the first seven office visits that the plaintiff made to you —that is, up through the middle of September of last year—you expressly noted that the plaintiff complained of continuing pain in the lower back. Do you see those notations, Doctor?

A. I do.

Q. Doctor, I want you to look through your notes for the next 19 office visits that the plaintiff made to you —that is, from mid-September of last year through the beginning of last month—and tell the jury if you see any entries in which you've recorded plaintiff making complaints to you of pain in her lower back?

A. Looking these over, I do not see any such entries, but I know she continued to complain of pain.

Q. Are you telling the jury that she complained to you of pain during every one of those 19 visits for which there is nothing in your notes about her complaining of pain? Is that your testimony, Doctor?

A. Well, I'm not saying she complained of pain on each of those visits, but I am sure she made complaint of pain on some of them.

Q. Doctor, you attempted to write down everything of significance in your notes, didn't you?

A. Well, I tried, but it's impossible to get everything down.

Q. But looking back at the notes of those most recent 19 visits, you'll note—and feel free to check my arithmetic—that you do make mention of her complaining of pain in the right knee on 11 of those 19 visits, don't you?

A. Well, I notice quite a number of references to right knee pain; I'll take your word for the exact number.

Q. The reason you made those notations concerning the right knee was because you considered continuing pain in the knee to be a matter of significance, didn't you?

A. Well, I considered it to be a factor.

Q. And it is a fact, is it not, that you did not make any similar notes with regard to pain in the plaintiff's lower back, did you, Doctor?

A. No, it appears that I did not.

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§15.14 8. Payment Received by Expert; Costs of Preparation

Many lawyers routinely ask all expert witnesses how much they are being paid per hour or per day to testify, suggesting by their tone that there is something nefarious about the expert's being compensated for his or her labors. The subject is a legitimate topic for cross-examination and is expressly authorized by Evid C §722(b). See *People v Berryman* (1993) 6 C4th 1048, 25 CR2d 867, overruled on other grounds in 17 C4th 800, 823 n1 (trial court properly admitted evidence of compensation paid to defense expert). The problem with this question, however, is that the lawyer asking it generally will be presenting his or her own expert witness, who is also being compensated, perhaps at a higher rate than the compensation of the witness under cross-examination. The logic of this line of questioning under these circumstances is unclear.

The subject of compensation, even in peripheral examination, must be considered selectively. For example, the design expert who assails a long-standing design as "obviously defective" may be vulnerable to a compensation-based examination:

> Q. You have told us that the use of a grommet, rather than a fused link, in a widget is an obvious design defect, correct?
>
> A. Absolutely.
>
> Q. You, of course, are aware that widgets have been made with grommets for at least 20 years?
>
> A. Unfortunately, that is the way some manufacturers have been making them for that length of time.
>
> Q. And for the past 13 years you have been a member of the Widget Advisory Safety Board, correct?
>
> A. I have served in that position for nearly 14 years.
>
> Q. It is a fact, is it not, that until 90 days ago you never suggested to the Widget Safety Advisory Board that they should advocate a standard or practice prohibiting the use of grommets in widgets, right?
>
> A. I do not believe I did, no.
>
> Q. As a matter of fact, only within the last 90 days have you been on record as opposing the use of grommets in widget construction, correct?
>
> A. I do not recall addressing the matter at any time before that.
>
> Q. It was approximately 90 days ago that you were first retained in this case for $250 an hour and asked to assist plaintiff, who claims to have been injured because of a widget containing a grommet, correct?
>
> A. I believe that's what the record reflects.
>
> Q. So it is correct then, is it not, that your criticism of widgets with grommets started at the same time that you began getting paid $250 an hour to work on this case, correct?
>
> A. ….

In some cases, one party has more money than the other to spend on the preparation and trial of the case. For example, when the plaintiff's inability to identify a particular manufacturer has resulted in the imposition of industry-wide liability, preparation of an effective defense is necessarily far more expensive than the cost of preparing the plaintiff's case. Although extensive experimentation and testing by the wealthier party are often helpful—indeed indispensable—and although complicated mock-ups, graphics, video recordings, and so on may greatly enhance the jury's understanding of the case, these expenditures also provide a fruitful area for peripheral examination by opposing counsel. Through cross-examination such as the following, opposing counsel can create a suggestion that (1) the wealthy party must be worried about the case or it would not have spent so much money in preparing for trial, and (2) there appears to be a David-and-Goliath disparity between the resources available to the parties:

> Q. Doctor, during the 2½ years that you have been assisting Monolift to defend this case, how many

hours have you and your associates expended on this lawsuit?

A. According to the latest timesheets, slightly under 200 hours.

Q. Your billing rate during that time has been $130 an hour, correct?

A. That's correct.

Q. Please tell the jury the total amount that you have billed Monolift to date for the work you have done on this one lawsuit?

A. A little over $26,000.

Q. At any time while you've been working on this case, have you been given a maximum budget figure by Monolift that you were told you could not exceed?

A. I do not believe so.

Q. Is there any particular activity or work that you have wanted to do to prepare for this case that Monolift or its lawyers have told you that you could not do because they thought it would cost too much money?

A. I do not recall anything of that sort occurring.

Q. So you have been able to do anything and everything you wanted to get ready for trial on this case and Monolift has paid you for doing so, correct?

A. That's right.

Q. One of the things you did in connection with your work on behalf of Monolift was fly to Dallas, Texas, to examine the accident vehicle, right?

A. That's right. Yes, sir.

Q. And you were accompanied on that trip by two assistants, Mr. Hodges and Mrs. Gaines, correct?

A. Yes, sir; I felt that their assistance was needed.

Q. How long before you took the stand to start testifying in this case yesterday did you actually arrive here in Fairfield?

A. I got in a week ago Tuesday.

Q. So you've actually been here for 10 days, is that correct?

A. Yes.

Q. Where have you been staying during that time?

A. At the _ _[*almost certainly the most expensive hotel or motel in the area*]_ _.

Q. And Monolift has paid for your room, meals, and living expenses during that time?

A. They have.

Q. How have you been spending your time during those days. I don't believe I've seen you here in the courtroom, have I?

A. I've spent most of the time in my hotel room, reviewing the file, depositions, and, of course, the daily transcript.

Q. Do I understand that Monolift has been having the reporter here actually print up a copy of what each witness has been saying day by day and then shipping that transcript over to your hotel room for you to read?

A. That's right.

Q. Could you give the jury some estimate of the number of hours that you've spent working on this case during the 8 days you were here in town before you actually started testifying yesterday?

A. I would say something in excess of 50 hours.

Q. By my calculations, if you're billing your time at $130 an hour, you have billed—or will be billing—Monolift around $6500 for your time and will, of course, be adding on expenses as well, correct?

A. That's correct. Yes, sir.

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§15.15 9. Comparative Qualifications

The examiner should not only analyze his or her expert's general qualifications to testify in the case, and the extent of his or her specific experience in the subject area in dispute, but should also compare them with the qualifications and experience of the opposing expert. If there is serious doubt about an opposing expert's qualifications to render an expert opinion on the subject in issue, counsel will probably wish to interpose a challenge through a motion in limine or voir dire examination. See §§4.2-4.5.

If the opposing expert is qualified to testify, counsel should try to make clear to the jury that his or her own expert is more qualified. If counsel's own expert has a graduate degree and the opposing expert does not, or counsel's doctor is board-certified and the opposition's is not, or counsel's expert has performed 300 laminectomies (or crash tests or accident investigations) and the opposing expert has been involved in a lesser number, counsel should develop those facts so that the comparative expertise of the competing experts can be discussed during final argument.

Counsel also should not overlook that the comparative qualifications and reputations of the competing experts may not be a matter of dispute among those experts. For example, in a case involving a complex medical procedure or causation issue, there may be general agreement as to who are the pioneers or leaders in the field. Very often other experts will concede the qualifications of individuals in such a category because their status among peers is universally regarded and it would be foolish or professionally embarrassing to contend otherwise.

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10. Bias

§15.16 a. In General

There are a number of ways in which bias or lack of complete objectivity on the part of a witness can be suggested on cross-examination. The main ones follow:

- The expert receives large fees for his or her testimony. See §15.14.
- The expert works for a corporate party. See §15.17.
- The expert always testifies for the same side. See §15.19.
- The expert frequently testifies for the same lawyer or law firm. See §15.7.
- The injury victim was referred to the opposing doctor-expert by his or her attorney, rather than by a treating physician.
- The expert has ignored, overlooked, or not fully explored facts or other evidence in conflict or not fully consistent with his or her opinion.

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§15.17 b. Witness Who Works for Corporate Party

The employee of a party to litigation is not likely to be objective because the employee's interests may be adversely affected by the outcome of the lawsuit. An employee depends on his or her employer for paychecks, advancement, and retirement, and may even have an ownership interest in the corporation through a profit-sharing program or other such investment. The employee cannot deny these facts without appearing defensive and evasive.

PRACTICE TIP: You must have proof of these facts before cross-examining the employee so that you can impeach the employee through independent testimony if the employee denies them.

Counsel should ask the employee-witness questions concerning his or her bias in favor of the corporation in a simple, straightforward, and low-key manner to avoid alienating members of the jury.

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§15.18 c. Witness Who Does Not Work for Corporate Party

Although the corporate party that uses its own employees as expert witnesses is subject to the charge that its witnesses' economic self-interest compromises their objectivity, the corporate party that uses an outside expert may be accused of being unable to find a single employee who would support its position and having to resort to a "mercenary." This low-risk area of peripheral cross-examination may yield large dividends.

Opposing counsel can ask the outside expert whether he or she ever asked anyone in the corporation why they hired an outside expert. This question is rarely precluded by either the attorney-client or the work product privileges, particularly when the expert is not a corporate employee (see §8.5). Therefore, when the witness takes the stand, all of his or her communications with both counsel and individual representatives of the corporate party are fair game for cross-examination.

PRACTICE TIP: You should have elicited this information initially at the expert's deposition.

It can be argued to the jury during closing argument that the outside expert who has not spoken with his or her in-house corporate counterpart lacks the intellectual curiosity to be expected of an objective witness. The jury also may be asked to conclude that the opposition deliberately attempted to conceal relevant, and presumably damaging, information from the outside expert by not having the outside expert speak with his or her in-house counterpart as a matter of course.

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§15.19 d. Expert Who Only Testifies for One Side

There is an acute shortage of expert witnesses who have both the requisite expertise and the ability to effectively project themselves as good witnesses. This is particularly true in the esoteric areas. As a result, good witnesses tend to be used, indeed overused, by both plaintiffs and defendants.

Jurors initially may be impressed by an expert who has performed accident reconstructions for many leading automobile manufacturers, or who has analyzed the side effects of drugs for many ethical drug makers, and who has extensive trial experience. The cross-examiner, however, can easily portray the same witness as an overpaid professional with a bias toward a particular camp, as in the following example of a professional plaintiff's expert:

> Q. Sir, in your many years of experience as an accident reconstruction expert, have you ever testified in any court, in any state, in any kind of automobile case, that you believed the accident was caused by a defect in the car?
>
> A. I don't believe so.
>
> Q. So in each of the 70 or 80 cases in which you told us on direct examination that you've testified in court, you've expressed the opinion that the accident was due to driver error?
>
> A. I believe that's substantially correct.
>
> Q. Well, as a matter of fact, that's precisely correct, is it not?
>
> A. I believe it is.

The professional defense expert is subject to the same attack. For example, assume that the expert has criticized the placement of the automobile gas tank in a personal injury case:

> Q. Sir, these 32 other automobile tank fire cases in which you testified have involved many types of vehicles, haven't they?
>
> A. That's right.
>
> Q. They have involved regular-sized passenger cars, compact cars, station wagons, pickup trucks, and several van-type vehicles, correct?
>
> A. They certainly have.
>
> Q. And they have involved motor vehicles manufactured not only by my client, Wombat Motors, but also by Ford, General Motors, Chrysler, American Motors, Toyota, Datsun, Volkswagen, and a number of other manufacturers, correct?
>
> A. They have.
>
> Q. And the gas tanks on the vehicles in those other 32 cases were in different locations (some in front of the car, others in the rear), and they had different kinds of material (most were metal but a few were plastic) and construction (some were top fill, others were rear fill, and some were bottom fill), correct?
>
> A. I believe that's basically correct.
>
> Q. And in each of those cases, with differing types of vehicles, from differing manufacturers, you testified that on every occasion you felt the gas tank was in some way defective, isn't that a fact?
>
> A. Well, what I said…
>
> Q. In each of those other 32 cases you testified, as you testified here this morning, that you felt the tank was defective, isn't that right?
>
> A. Yes, there was something wrong with each of those tanks.

Q. And it is your opinion, is it not, that every gas tank on every mass-produced passenger vehicle that has ever been manufactured anywhere in the world is defective in some way; that is true isn't it?

A. The defect-free tank has not yet been produced, on a mass basis, that's correct.

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§15.20 11. Lack of Precise Prior Experience as Expert Consultant or Witness

Cost or other considerations may require a party to use a local expert who, though generally qualified in the area, has not previously encountered the precise problem in issue. This type of expert is subject to the following kind of peripheral attack (the plaintiff in the example is claiming a defect in an automobile master brake cylinder):

Q. Professor, it is correct, is it not, that in addition to your teaching duties at the engineering school you also do outside consulting work for lawyers?

A. I do.

Q. Over the past 13 years, you have been consulted in something over 300 different accident cases, correct?

A. I believe the number is now closer to 350.

Q. Tell me, Professor, have any of those nearly 350 other cases involved a claimed defect in the dual master brake cylinder on a 1977 Wombat Flyer automobile?

A. Not to the best of my recollection.

Q. Have any of those 350 cases involved a claimed problem with a dual master cylinder on a Wombat Flyer that was manufactured in any year, 1977 or otherwise?

A. I do not believe so.

Q. Have any of those other cases involved a claimed problem with a dual master cylinder on any truck or automobile manufactured by Wombat Motors in any year from the beginning of time to the present?

A. Not that I can think of.

Q. Have any of those other cases involved a claimed dual master cylinder problem in any car, of any kind, manufactured in any year, by any other American or foreign automobile manufacturer?

A. I don't think there have been any other dual master cylinder cases.

Q. I take it, therefore, that none of those other 350 cases involved any claimed problem in any dual master cylinder in any production automobile, manufactured anywhere in the world, by any manufacturer—American, French, German, Japanese or otherwise—in any year, from the beginning of time to the present, is that correct?

A. I believe that's correct, yes.

Q. So this is actually the first dual master cylinder brake case in which you've testified, given a deposition, or been consulted, correct?

A. Yes, I believe that's correct.

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§15.21 12. Lack of Precise Expertise in Subject

Experts who do not have directly relevant education, employment, or practical experience are susceptible to the following type of cross-examination (this case involves a claim of metal particles in a power steering system):

Q. You've never actually designed a power steering unit yourself, have you?

A. That's correct.

Q. As a matter of fact, you've never even worked for an automobile manufacturer, have you?

A. That's correct.

Q. Similarly, you've never been licensed as a journeyman auto mechanic?

A. That's correct.

Q. You've never actually made your living repairing power steering systems on cars, have you?

A. That's correct.

Q. As a matter of fact, the knowledge that you have about power steering systems is what you've accumulated in the course of the consultation activity that you've told us about, correct?

A. Not quite. A power steering system is simply a hydraulic control system, and I studied those rather extensively when I was in college. I've also worked on other hydraulically actuated control systems, so I'm quite familiar with these.

Q. Aside from the general hydraulic background, however, your knowledge of power steering systems in real live automobiles is something you picked up in the course of your consultation activities on this case.

A. That is correct.

Q. And for over 15 years, you've told us, you've been consulting?

A. Yes.

Q. Excluding the present case for the moment, how many power steering consultations have you worked on during those 15 years?

A. One, other than this case.

Q. And did that one involve any claim of metal particles in the power steering fluid?

A. At the time I looked into it, there was no claim one way or another. I was simply asked to examine the unit to see if there was any defect.

Q. Did you find any metal particles in the unit in the one other case involving power steering systems you worked on?

A. No, I found no particles.

Q. Would it be correct to say that this is the second power steering case you've worked on and the first one involving the presence of metal particles?

A. That is correct.

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§15.22 13. Eliciting Expert's Opinion on Correcting Problem

Another peripheral approach that is especially productive with experts is for the cross-examiner to ask the opposing expert how counsel's client should have, *e.g.,* behaved, acted, designed its product, so as to satisfy the expert, instead of quarreling with the expert's opinion that the defendant's course of conduct, product, or decision to terminate the plaintiff was wrong, defective, negligent, or otherwise actionable.

The applicability of this approach is readily apparent in the products liability field; the cross-examiner can ask the expert to, *e.g.,* redesign the product, or to change or create a warning. The plaintiff's expert who attempts to meet this challenge knows that his or her design will be criticized by the defendant's expert at a later stage of the case, but an expert who declines to accept this challenge may appear to be a nonconstructive criticizer who does not like the way other people do things but apparently cannot think of a better way of doing them.

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C. Nonperipheral Cross-Examination

§15.23 1. Reason for Nonperipheral Cross-Examination

Because experts are frequently experienced courtroom veterans, and are almost certainly more knowledgeable about their fields of expertise than are the cross-examiners, counsel will seldom want to risk a direct attack on them and instead should conduct a peripheral cross-examination. See §15.7. Still, there are occasions, such as those described in §§15.24-15.28, when nonperipheral cross-examination is warranted.

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§15.24 2. Conflicts With Publications Considered Reliable Authority or Referred to, Considered, or Relied on by Expert

Any difference in position between the expert's opinion in the current case and his or her opinion in a published article or book is an especially fruitful area for cross-examination. Therefore, during the expert's deposition, the cross-examiner should have determined whether the expert has ever written anything touching on the subject in question and, before trial, should have carefully compared the expert's opinion in the case at hand with his or her views and statements in all prior writings.

Even if the expert has not personally written anything in the field, the cross-examiner should have learned from the expert at his or her deposition all written materials that the expert has referred to, considered, or relied on in reaching the opinions expressed and the cross-examiner should be familiar with any publications that are recognized as reliable authority in the field. Evid C §721(b).

The following cross-examination illustrates how the cross-examiner can make use of the texts relied on.

Q. In the course of your work on this case, I assume you checked the standard works in the field, such as Highway Collision Analysis by Collins and Morris?

A. I've read it, yes.

Q. And did you consult it in connection with this case?

A. I may have looked at it, yes.

Q. And in the course of looking at it, did you happen to see that the author of the book explains that small particles of metal accumulate during normal operation and will not interfere with normal operation in the absence of actual damage or markings?

A. I remember it, yes,

Q. And in the present case, when you examined the vehicle, you didn't find any actual damage or actual markings inside the unit, did you?

A. I found large particles, rather than small, but I found no actual marks from those particles, that is correct.

Q. So you did not find the kind of condition that the author states would be necessary before you'd get actual interference in operation. Is that correct, Doctor?

A. No. He's talking about small particles, files, which are fairly common in hydraulic systems. They don't interfere with the operation; but reasonably large, coarse particles, which he doesn't discuss, could well cause the system to jam.

Q. You agree with the author's basic statement, but you say he's talking about a different size particle from what you're talking about?

A. That is correct.

The examiner must keep in mind the requirements of Evid C §721(b) and must establish the requisite foundation. For example, although the opinions of an opposing orthopedic expert are contradicted by several of the leading orthopedic treatises, the expert may not be cross-examined concerning those treatises unless:

- He or she referred to, considered or relied on it in arriving at or forming his or her opinion;
- The publication was admitted in evidence;
- The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

PRACTICE TIP: Under Evid C §721(b), you may impeach the expert on cross-examination with the contradictory treatises, as long as you establish that the treatises are reliable authority, either through your cross-examination of the expert or by having your own expert testify that the treatises are reliable. The opposition is then left to explain

why the opinions of his or her expert conflict with learned authorities. For discussion, see Canepa, *Reevaluating Expert Testimony Following the Recent Amendment to Evidence Code Section 721*, 20 CEB Civ Litigation Rep 49 (Mar. 1998).

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§15.25 3. Inconsistencies or Contradictions With Judicially Noticeable Materials

A witness can be cross-examined concerning a publication if it has been admitted in evidence. Evid C §721(b)(2). Many areas of impeachment material can be admitted in evidence under the judicial notice rules (Evid C §§450-460). Under Evid C §451, mandatory judicial notice must be taken of some matters, *e.g.,* facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute. Under Evid C §452, judicial notice is permissive for most governmental decisions, statutes, rules, laws, or treaties, as well as "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Judicial notice of matters permitted under Evid C §452 becomes mandatory when counsel requests in advance that the court take judicial notice of those propositions. Evid C §453.

Through judicial notice, counsel can admit into evidence a host of items, *e.g.,* civil aeronautics board rules and regulations, union safety rules, and codified industry standards and recommended practices, which can also be used to impeach an expert witness's conflicting statements. If the publication is admitted, the relevant portions of the publication may be read into evidence, but may not be received as an exhibit. Evid C §721(b).

For further discussion of judicial notice, see Effective Introduction of Evidence in California, chap 31 (2d ed Cal CEB 2000) (contains sample oral motions under Evid C §§451-453); California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

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§15.26 4. Conflicts Between Expert Opinion and Other Evidence

Because experts are seldom percipient witnesses to the matters about which they testify, their opinions are only as good as the facts on which they rely. When the evidentiary support for their opinions is incorrect, it provides an excellent source for cross-examination. See, *e.g., Richard v Scott* (1978) 79 CA3d 57, 144 CR 672, discussed in §4.37.

During the expert's deposition, the cross-examiner should have the expert set forth all facts and assumptions on which his or her opinion is based. The cross-examiner then can carefully review the remainder of the record, particularly the statements and testimony of eyewitnesses and others with firsthand knowledge, to see whether the "facts" assumed by the expert fully accord with the admissible evidence.

In the following example, the expert testified on direct examination that the left door of a vehicle involved in an accident had been opened before impact:

> Q. You, of course, were not physically present on the night of the accident?
>
> A. That's correct.
>
> Q. You have never actually seen any of the cars involved in the accident, because they had all been dismantled before you were first hired in this case, isn't that true?
>
> A. Regrettably, that is true.
>
> Q. You're aware that Mr. Aikens, the witness who stopped beside the car just before the accident, testified here, under oath, that the door was closed before the impact, correct?
>
> A. I realize he did so testify.
>
> Q. You are not aware of any reason why Mr. Aikens would lie about a thing like that, are you?
>
> A. I am sure Mr. Aikens is not lying, but in reconstructing accidents one learns that witnesses sometimes have failures of observation or failures of recollection and eyewitness testimony cannot always be accepted.
>
> Q. So, in arriving at your opinions in the present case, you have assumed that Mr. Aiken's testimony about the door being closed is incorrect, right?
>
> A. Yes, that is correct.
>
> Q. And you are also aware, of course, that Mr. Dernier, on whose behalf you've been retained to testify in this case, told the investigating officers that the door was closed before the impact, correct?
>
> A. I realize that's what he said, but the physical facts indicate that Mr. Dernier must have been confused and was apparently mistaken.
>
> Q. So you've also assumed in arriving at your opinions that Mr. Dernier was wrong when he told the police officers that the door was closed, is that right?
>
> A. That's correct….

In addition, the Supreme Court has held that during cross-examination "a party seeking to attack the credibility of the expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion of which the expert was unaware or which he did not consider." *People v Bell* (1989) 49 C3d 502, 532, 262 CR 1.

The cross-examiner does not have to build up very many instances of assumptions by the expert that are diametrically opposed to the evidence to be able to argue that the expert was "fighting the facts" in an effort to come up with an opinion that would accommodate the liability theories of the lawyer who hired him or her.

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§15.27 5. The "So What" Cross-Examination

Counsel should not assume that an expert's testimony is necessarily relevant to any of the contested issues in the case. Sometimes the expert's opinion is so unrelated to the issues in dispute that it can be dismissed with one or two questions, or what one writer calls the "so what" cross-examination. Tigar, *Handling the Expert Like an Expert: Back to Basics*, Nat'l LJ 21, 31 (Mar. 1, 1982).

For example, when the issue is whether the defendant doctor's malpractice aggravated the plaintiff's preexisting injuries and delayed the patient's eventual recovery, the defense witness who states only that the plaintiff is now completely recovered can be disposed of with one or two "so what" questions demonstrating that plaintiff is not disputing that he or she is now well.

Similarly, when there is a dispute over whether the defendant's vehicle was at the scene of the accident, the testimony of the tire tread expert that tire marks found at the scene are "consistent" with those of defendant's vehicle is easily countered with a question or two establishing that the marks are also "consistent" with the tires on 50,000 other cars.

PRACTICE TIP: Counsel might instead object to this testimony during voir dire under the *Kelly* test (see §4.6) or as irrelevant.

An excellent opportunity for a "so what" cross-examination would have existed had the trial judge in *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 109 CR 110, allowed defendant's expert to testify that he found paint scraping on the freeway divider that "matched" the paint on plaintiff's vehicle. Plaintiff's counsel could have countered by establishing that the paint also "matched" that of thousands of other Volkswagens and that the expert had no idea how many of those other Volkswagens had contacted the divider strip during the many months that elapsed between the time of the accident and the time when the paint samples were removed.

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§15.28 6. Cover Questions

The risks of cross-examining an expert are greatly minimized by asking questions to which the answers are known and documented so the expert can be impeached if he or she offers a different response. Sometimes, however, the cross-examiner may want—or be forced—to stray outside this cocoon of safety and ask a question whose answer is unknown, undocumented, or both.

There is no way to totally eliminate the risk of asking questions with uncertain answers, anymore than a tightrope walker can ensure that he or she will not fall. However, just as a tightrope walker can minimize the consequences of a fall by working with a safety net, so too the cross-examiner can blunt the damage of a harmful answer by using the equivalent of a safety net or, as one commentator has aptly termed them, "cover questions." Smith, *Cross-examination: Use of the "Cover Question,"* 5 Trial Diplomacy J 25 (Winter 1982-1983).

The cover question consists of a witness's concession or admission that the examiner can use to cushion the adverse impact of a later answer, thus allowing the examiner to stray into uncharted waters and ask a question when he or she is unsure of the answer. The cover question is, in short, a hiding place to which the examiner can retreat with safety.

EXAMPLE 1: If the only way of knowing the effect of a loss of power steering on a driver's ability to negotiate the curve where the accident took place is to deliberately unhook the power steering on a similar car and then actually drive the car around that curve, and counsel knows that the opposing accident reconstructionist has not conducted this test, counsel has the basis for a cover question. If the expert gives a damaging answer during the cross-examination, the examiner can quickly counter with: "But you haven't actually performed the only experiment that would establish with certainty that this would actually happen, have you?"

EXAMPLE 2: The plaintiff's attorney who can get the psychiatrist who examined the plaintiff on behalf of the defendant to acknowledge that he or she saw the plaintiff on only one occasion and that a totally reliable psychiatric picture cannot be drawn from one visit now has a cover question with which to blunt the effect of a later, harmful response.

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D. Hypothetical Questions on Cross-Examination

§15.29 1. In General

Hypothetical questions, particularly when written out and submitted to the court and opposing counsel in advance to ensure that all objections to form have been eliminated, provide another relatively safe vehicle for conducting peripheral cross-examination. A series of hypothetical questions that alter, add, or eliminate key elements, but that the expert says have no effect on his or her opinion, can be an especially effective way of casting doubt on the expert's objectivity and credibility.

The requirement that hypothetical questions posed during direct examination must be based on facts in evidence is relaxed, if not eliminated, when they are asked during cross-examination to test the credibility of expert witnesses. See *People v Busch* (1961) 56 C2d 868, 16 CR 898. The cross-examiner is accorded wide latitude (*Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 796, 174 CR 348; *Brown v Affonso* (1960) 185 CA2d 235, 238, 8 CR 156); questions need only be "fair in scope and fairly relate to the state of the evidence in the case" (*Dincau v Tamayose* (1982) 131 CA3d 780, 799, 182 CR 855; *Marriage of S.* (1985) 171 CA3d 738, 217 CR 561).

Even on cross-examination, however, it is error to require an expert to answer a lengthy hypothetical question with an unqualified yes or no. Experts must be given the opportunity to explain their yes or no. *McGuire v Baird* (1937) 9 C2d 353, 70 P2d 915.

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§15.30 2. Progressively More Absurd Hypothetical Questions

Hypothetical questions can be used with devastating effect on cross-examination, particularly by taking one of the expert's premises and then gradually varying it until it reaches the absurd. The expert is left with the dilemma of either going along with the absurdity, or trying to stop the progression at some point and then convince the jury why it is logical, and not arbitrary, to stop there.

Assume, for example, a products liability case arising from the explosion of an automobile gas tank during a rear-end accident. The plaintiff's accident reconstruction expert has calculated that there was no more than a 30-mile-per-hour speed difference between the striking and struck cars, and has stated the opinion that a gas tank that cannot withstand any impact of that magnitude is defective. On cross-examination the expert could be asked the following:

> Q. Doctor, I want you to assume that the accident happened just the way it did, and that all the conditions were exactly the same, except that the difference in speed between the two cars was 35 miles per hour. In your opinion, would the tanks still have been defective?

Presumably, the expert will have little difficulty responding in the affirmative. However, as the cross-examiner asks successive questions, increasing the difference by five or ten miles per hour each time, the expert is going to eventually be testifying that any automobile gas tank that cannot withstand a 250-mile-an-hour impact is defective, or alternatively, is going to have to decide that there is *some* speed at which a gas tank cannot reasonably be expected to withstand the impact. If the expert is a "professional," that number is going to have an impact on the expert's ability to testify in future cases because the expert knows that his or her testimony in this instance is undoubtedly going to be circulated among the products liability defense bar. In addition, the expert is confronted with the dilemma of having to justify that lower speed:

> Q. Doctor, please explain to the jury why it is you believe the gas tank is not defective if it fails in a 55-mile-an-hour crash but is defective if it fails in a 50-mile-an-hour crash?

> Q. What about a tank that fails in a 52.5-mile-an-hour impact: Is that defective or not?

Such examination graphically illustrates that expert testimony is really "opinion" testimony and that the expert who implies that his or her views are totally objective and can be proved with litmus-paper certainty is really misleading the trier of fact.

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§15.31 IV. FEDERAL RULES OF EVIDENCE

In general, the same advice concerning peripheral and direct cross-examination given in §§15.1-15.30 concerning California courts also applies to cross-examination in federal courts.

The treatise must be established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. Fed R Evid 803(18). If admitted, the statements may be read into evidence but may not be received as an exhibit. As of January 1, 1998, Evid C §721(b) is in close alignment to Rule 803(18) allowing cross-examination regarding the content of a publication that is a reliable authority. See discussion of the California rule in §15.25. For discussion of cases interpreting Rule 803(18), see Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual (8th ed 2002).

In addition, the expert need not necessarily disclose the underlying facts on direct examination. Opposing counsel, however, can require disclosure of this information on cross-examination. Fed R Evid 705.

If a case involves conduct that is subject to federal tests or regulations, counsel should ensure that the expert has taken them into account. In products liability cases, experts tend to overlook that automobile manufacturers and ethical drug makers, to name but two, are not free to market a product just because it is technologically feasible and economically practicable. Their products must also comport with a host of government regulations. Cars must withstand numerous crash tests and be equipped with various forms of specified equipment. See, *e.g.,* 49 CFR pt 571 (Federal Motor Vehicle Safety Standards). The drug manufacturer's product must have passed laboratory tests, and have survived animal and human trials. 21 CFR pt 314. Obviously, few design alternatives offered by trial experts will have undergone these rigors, and counsel should consider questioning the expert with regard to these missing elements.

In a product liability action in which a plaintiff attempts to introduce evidence of other accidents as proof of a design defect or as proof of the fact that the defendant had notice of such a defect, a substantial similarity between the other accidents and the accident at issue must generally be shown. The circuits are split, however, on whether evidence of dissimilar accidents is admissible to impeach an expert who has testified that a product is safe. The Tenth Circuit in *Wheeler v John Deere Co.* (10th Cir 1988) 862 F2d 1404 took the position that dissimilar accidents could not used for impeachment purposes, while the Eighth Circuit in *Hale v Firestone Tire & Rubber Co.* (8th Cir 1987) 820 F2d 928 adopted the opposite view. The Ninth Circuit sided with the Eighth Circuit on the issue in *Cooper v Firestone Tire & Rubber Co.* (9th Cir 1991) 945 F2d 1103. In *Cooper,* the court held that such evidence of dissimilar accidents could be admitted when relevant to the expert witness's credibility (945 F2d at 1105):

> When an expert testifies that a product is generally safe, as appellant's experts did, the witness's credibility can be undermined by showing the witness had knowledge of prior accidents caused by the product. [Citation.] The evidence of other accidents, whether similar or not, tends to show that the witness's claims of product safety are overstated and the witness therefore may not be reliable.

The defendants complained that this ruling would effectively deter manufacturers from bringing knowledgeable experts into court because experts with wide practical experience were likely to be aware of other accidents involving the product. The Ninth Circuit dismissed these concerns (945 F2d at 1105):

> It is not the expert's knowledge of prior accidents that triggers the admissibility of evidence of other accidents, however, but the expert's assertion that the product involved is generally safe. If an expert restricts his testimony to the product's safety with respect to the type of accident at issue, or acknowledges on direct examination the occurrence of prior accident in this similar circumstances, evidence of such accidents will not be relevant to his credibility and will not be admissible.

PRACTICE TIP: Counsel can avoid cross-examination based on dissimilar accidents by tailoring his or her expert's opinion on direct examination as set forth in *Cooper.* Only when an expert in the Ninth Circuit's words "potentially overstates" the safety of the product without acknowledging other accidents, will "dissimilar accident" cross-examination be available. It should be relatively easy for a testifying expert to account for these other accidents, and careful practice dictates that the expert should do so anyway to enhance his or her credibility with the jury.

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16

Experts and Summary Judgment Process

I. SUMMARY JUDGMENT MOTIONS
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- B. Motions for a New Trial After Summary Judgment §16.2

II. REQUIREMENTS CONCERNING EXPERT'S AFFIDAVIT OR DECLARATION
- A. Form and Content of Affidavit or Declaration §16.3
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- C. Disclosure of Experts Used to Support or Oppose Motion §16.5
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III. FEDERAL RULES OF EVIDENCE
- A. Role of Expert Opinion in Summary Judgment Motions §16.6
- B. Burden of Proof §16.7

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I. SUMMARY JUDGMENT MOTIONS

§16.1 A. Purpose of Summary Judgment Motions and Motions for Summary Adjudication of Issues; Use of Experts

A party to a civil action may make a motion for summary judgment if it is claimed that the action either has no merit, or that there is no defense. CCP §437c(a). A related motion that may be made instead of or as an alternative to the summary judgment motion is the motion for summary adjudication of issues. A motion for summary adjudication of issues is appropriate if less than all issues or defenses that are challenged are supported by proof that would be offered in a summary judgment motion. CCP §437c(f). The procedures for making the two motions are the same; they are set out in CCP §437c.

Parties opposing a summary judgment motion or a motion for summary adjudication of issues may file a cross-motion for summary judgment or for summary adjudication of issues, in addition to opposing the original moving party's motion.

Both motions for summary judgment and for summary adjudication of issues may be supported by the following evidence (CCP §437c(b)(1)):

- Affidavits or declarations.
- Answers to interrogatories.
- Depositions.
- Matters of which judicial notice may be taken.

At first glance, expert opinion would appear to have nothing to do with summary judgment motions. Nonetheless, there is a growing body of law dealing with the propriety, and in some instances even the necessity, of expert opinion to support or defeat motions for summary judgment. See *Garibay v Hemmat* (2008) 161 CA4th 735, 742, 74 CR3d 715 (defendant did not meet burden of production required for summary judgment motion when his medical expert relied on hospital and medical records that had not been admitted into evidence); *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 470, 71 CR3d 707 (summary judgment reversed because trial court erroneously excluded plaintiff's medical expert's declaration for lack of familiarity with standard of care in southern California; appropriate test for expert qualification in ordinary medical malpractice cases is familiarity with standard of care under similar circumstances, not locale); *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 669, 69 CR3d 888 (in wrongful death and products liability action, summary judgment was affirmed in case in which testimony by experts with degrees in mechanical metallurgy and mechanical and material engineering was used to show that defective motorcycle side stand was not manufactured by defendant).

Summary judgment motions are discussed in detail in California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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§16.2 B. Motions for a New Trial After Summary Judgment

In some cases, a plaintiff may make a motion for a new trial even after the defendant's motion for summary judgment has been granted. In *Tortorella v Castro* (2006) 140 CA4th 1, 4, 43 CR3d 853, a medical malpractice case, the trial court granted defendant doctor's summary judgment motion, finding that plaintiff's expert declaration failed to raise a triable issue with respect to causation. However, the trial court then granted the plaintiff's new trial motion based on "the equities" and the policy favoring "resolutions [on] the merits." 140 CA4th at 3. Although the court of appeal found this rationale did "not fit within the statutory framework," it nevertheless affirmed, because a "new trial order will be upheld if correct on any ground" (140 CA4th at 9), and here, a new trial was warranted because the trial court improperly granted summary judgment. The court of appeal held that when surgery has been performed unnecessarily, as plaintiff's opposing expert declaration had asserted, "the mere fact the surgery was performed is sufficient to constitute harm to the patient." 140 CA4th at 3. Thus, the trial court properly granted plaintiff's subsequent motion for new trial, even though it had done so for the wrong reasons.

Tortorella also expressly affirmed that although *Gray v Cotton* (1917) 174 C 256, 258, 162 P 1019, once held that "proceedings for new trial do not lie to secure the re-examination of the decision of a motion," the law has evolved to the point where a "motion for a new trial is appropriate following an order granting summary judgment[,] … even though, strictly speaking, 'summary judgment … is a determination that there shall be no trial at all.' [Citation.]" *Tortorella v Castro* (2006) 140 CA4th 1, 13, 43 CR3d 853, quoting *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 858, 107 CR2d 841. Therefore, plaintiff was entitled to bring a motion for new trial despite the fact that summary judgment had been granted.

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II. REQUIREMENTS CONCERNING EXPERT'S AFFIDAVIT OR DECLARATION

§16.3 A. Form and Content of Affidavit or Declaration

The testimony of an expert in support of a motion for summary judgment or for summary adjudication of issues can be presented either through an affidavit or a declaration. A declaration is usually used rather than an affidavit, because declarations do not require witnessing by a notary public. See CCP §2015.5.

Declarations must be made under penalty of perjury. CCP §2015.5. If executed in California, the declarant must state the date and place of execution. If executed outside California, the declarant must state the date of execution, and that it is made under the laws of the state of California. CCP §2015.5. A sample declaration in support of a motion for summary judgment is in California Civil Procedure Before Trial §36.156 (4th ed Cal CEB 2004).

Expert qualifications. In the declaration or affidavit, the expert should first state what type of expert he or she is, and give enough information about his or her background to qualify as an expert in that field. The published cases are fairly lenient in allowing experts to testify somewhat far afield in this context. See, *e.g., Mann v Cracchiolo* (1985) 38 C3d 18, 38, 210 CR 762 (supreme court reversed trial court's grant of summary judgment, and held that defendant's expert, a diplomate in surgery and neurosurgery, was qualified to render opinion concerning whether several consulting radiologists had met standard of care in reading and interpreting certain X rays and preparing certain reports; court stated that when a witness "has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility"). See also *Miller v Silver* (1986) 181 CA3d 652, 226 CR 479 (psychiatrist found competent to testify on standard of care for plastic surgeon's administration of antibiotic therapy).

Factual basis for opinion. The expert should then set out the facts of the case on which his or her opinion is based, state his or her opinions, and enumerate any additional bases for those opinions. If the declaration does not disclose the matter on which the expert relied in forming his or her opinion, the declaration will be inadmissible. *Kelley v Trunk* (1998) 66 CA4th 519, 524, 78 CR2d 122. How far the declaration must go to adequately support the expert's opinion is, however, an open question. In *Hanson v Grode* (1999) 76 CA4th 601, 608 n6, 90 CR2d 396, the court disagreed with the implication in *Kelley* that an expert's declaration on summary judgment must set out the factual basis for an opinion in "excruciating detail." After considering the prevailing legal standard for evaluating evidence submitted on summary judgment, the *Hanson* court liberally drew inferences in favor of an expert's declaration and found that it was sufficient to resist a motion for summary judgment on the standard of care in a medical malpractice case. A similar liberal construction was applied to find triable issues of fact on duty and causation in *Tortorella v Castro* (2006) 140 CA4th 1, 13, 43 CR3d 853 (breach of duty and inference of causation could be drawn from expert's opinion that preoperative evaluation and endoscopic sinus surgery fell below accepted standard of care and that surgery was unnecessary). See also *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1333, 86 CR3d 274 (applying liberal construction to expert declaration in case involving school officials' duty to supervise special needs students).

Under any circumstances, the declaration must contain enough credible evidentiary support to substantiate the opinion given. See *Powell v Kleinman* (2007) 151 CA4th 112, 59 CR3d 618 (applying rule of liberal construction to physician's declaration opposing defense summary judgment motion, and concluding that declaration raised triable issues of fact as to breach of standard of care and causation); *Johnson v Superior Court* (2006) 143 CA4th 297, 308, 49 CR3d 52 (defendants were not entitled to summary judgment in medical malpractice case because their expert declaration was conclusory and thus insufficient to establish nonexistence of triable issues of fact); *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 510, 11 CR3d 653 (defendants were entitled to summary judgment because plaintiff's expert declarations in opposition to motion were conclusory); *LaPlante v Wellcraft Marine Corp.* (2001) 94 CA4th 282, 114 CR2d 196 (rejecting on summary judgment declaration of former Coast Guard Chief of Product Safety Assurance because it was conclusory and thus incompetent to establish purpose for which it was offered). For example, in *Thai v Stang* (1989) 214 CA3d 1264, 263 CR 202, in which the plaintiff was injured in a drive-by shooting outside a roller rink, the plaintiff's opposition to a motion for summary judgment by the rink included a declaration from a security

management consultant who opined, on the basis of the deposition testimony of one of the investigating police officers, that the presence of a uniformed security guard outside the rink would have averted the shooting. The trial judge found there was nothing in the police officer's deposition to support such a conclusion and that the expert's declaration was devoid of independent facts supporting such a conclusion. The judge dismissed the declaration as "pure speculation" and granted the motion. The court of appeal affirmed, endorsing the trial court's reasoning and analysis.

Provide adequate support. *Salasguevara v Wyeth Labs., Inc.* (1990) 222 CA3d 379, 271 CR 780, provides a veritable textbook concerning the traps that may be encountered in seeking a summary judgment based on expert testimony. In that case, the plaintiff claimed to have suffered neurological damage because of a vaccine that he alleged had been negligently manufactured by Wyeth and negligently administered by the defendant doctors. The plaintiff failed to designate any trial experts within the time provided by law.

Wyeth then moved for summary judgment. Although Wyeth had designated four experts who had impressive credentials concerning the epidemiology of the vaccine and the exotic causation issues, Wyeth based its summary judgment motion solely on a snippet of deposition testimony from another doctor, who had been designated not as an expert on any of the liability issues but rather as a treating physician who would testify concerning the plaintiff's present condition and complaints.

One of the defendant doctors who had administered the vaccine moved for summary judgment on the grounds that expert testimony is required to establish negligence in a medical malpractice case and that plaintiff's failure to make a timely expert witness disclosure meant that he would not be able to satisfy the expert testimony requirement. The trial court granted both summary judgment motions. The court of appeal reversed both rulings, ruling that Wyeth's motion was insufficient because it did not establish that the treating physician had the requisite qualifications to render an opinion on the issue of causation.

The court further ruled that, although expert testimony is required to establish negligence in a medical malpractice case, a party need not rely on its own designated experts. Under former CCP §2034(m)(1) (now CCP §2034.310), a party may call an expert who has been designated by another party and been deposed in the case. The doctor's summary judgment motion failed to establish that this avenue had been foreclosed as a matter of law. The court further rejected the doctor's suggestion that the plaintiff had the burden of demonstrating some breach of the standard of care by the doctor. "The plaintiff has no such burden until the defendant negates the issue upon which the summary judgment is brought." 222 CA3d at 387.

PRACTICE TIP: *Salasguevara* teaches that the declaration of an expert offered in support of a motion for summary judgment must make the same showing concerning qualifications and expertise that would be required if the expert were testifying in person at trial. Even in cases in which expert testimony is required and the party against whom the motion is made has failed to make a timely designation, the moving party must establish that none of the testimony of any expert for any other party who has been deposed will satisfy the defaulting party's burden of proof.

A particularly searching analysis of the expert testimony necessary to defeat a motion for summary judgment is found in *Spann v Irwin Mem. Blood Ctrs.* (1995) 34 CA4th 644, 40 CR2d 360. The issue in that case was whether a blood bank had met its professional standard of care when, in October 1984, it supplied blood that caused the recipient to contract AIDS.

The blood bank moved for summary judgment on the grounds that its procedures complied with the professional standard of care applicable in 1984. Plaintiff opposed the motion on the testimony of a single expert that the blood bank should have offered a donor reduction program to reduce the risk of infection and should have informed plaintiff of the risk of contracting AIDS. However, it was undisputed that (1) in 1984, no blood bank or other health care provider offered a donor reduction program, and (2) the patient and her husband knew of the risk of AIDS at the time of the transfusion.

The trial court granted the blood bank's motion for summary judgment and the court of appeal affirmed. The court emphasized that the plaintiff's expert had "merely expressed his personal opinion of what the industry *should* have done in 1984. He did not state what the industry was *actually* doing at the time." 34 CA4th at 655 (emphasis in original). Because "a professional standard of care is established by the accepted industry practice, not the opinion of a single expert, [plaintiff] failed to create a triable issue of fact on this issue." 34 CA4th at 655.

The court went on to hold that the plaintiff had also failed to create a triable issue of fact concerning the issue of

informed consent. The court, relying largely on *Cobbs v Grant* (1972) 8 C3d 229, 244, 104 CR 505, noted that it was undisputed that the recipient had been aware of the risk of AIDS but was suffering from such a serious condition for which there was no alternative treatment that no "reasonable person in the patient's position would have declined the treatment had full disclosure been made." 34 CA4th at 657. See also *Elcome v Chin* (2003) 110 CA4th 310, 1 CR3d 631 (plaintiff's physician declaration failed to raise triable issue of material fact on elements of res ipsa loquitur); *Schiff v Prados* (2001) 92 CA4th 692, 112 CR2d 171 (relying on *Spann* and *Cobbs,* court of appeal held that alternative treatment that cannot legally be administered in state is "not available" for purposes of doctor's obligation to obtain informed consent and thus doctor cannot be held liable for failing to disclose existence of such treatment).

Speculation is not enough. The California Supreme Court took the same rigorous approach to the adequacy of the foundation in an expert declaration in *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 107 CR2d 617, and *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. In *Saelzler,* an expert's testimony on proximate causation was insufficient to create a triable issue of fact because the expert's opinion that allegedly inadequate security measures caused an assault rested solely on speculation and surmise. In *Aguilar*, expert testimony concerning an allegedly unlawful antitrust conspiracy was rejected as insufficient on summary judgment because the expert could do no more than speculate on whether the defendants had engaged in collusive action. The expert's opinion that the defendants had acted collusively could not be substituted for direct evidence establishing an unlawful conspiracy. 25 C4th at 864. See also *Nardizzi v Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 CA4th 1409, 1414, 39 CR3d 530 (summary judgment for defendant affirmed; expert's opinion rejected as speculative because it failed to take into account percipient testimony of mechanic who examined vehicle immediately after accident and undisputed testimony of driver on condition of brakes and absence of brake warning light); *In re Lockheed Litig. Cases* (2004) 115 CA4th 558, 563, 10 CR3d 34 (summary judgment for defendant affirmed; expert's opinion on increased cancer risk from workplace chemicals rejected because epidemiological studies relied on by expert provided no reasonable basis for opinion); *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 116 CR2d 158 (summary judgment for defendant affirmed; plaintiffs' evidence regarding lost profits from their Internet retail site, including expert testimony regarding anticipated profits, was based on speculation and conjecture); *McGonnell v Kaiser Gypsum Co.* (2002) 98 CA4th 1098, 1105, 120 CR2d 23 (summary judgment for defendant affirmed in asbestos exposure case in which expert declarations in opposition offered nothing more than speculative possibilities that did not rise to status of contradictory evidence).

PRACTICE TIP: When making or opposing summary judgment motions with expert testimony, counsel should heed the message provided by these appellate decisions: Provide enough factual material to support the opinion to make it rise above speculation or a bare conclusion. The same admonishment holds true if the expert will rely on a report or other documentary evidence that accompanies the motion or opposition. In structuring the declaration or affidavit, imagine that the expert is testifying at trial and provide all the foundational elements (*e.g.,* qualifications, evidentiary and factual support) that would otherwise be necessary to make the expert's live testimony admissible. See *Ochoa v PG&E* (1998) 61 CA4th 1480, 72 CR2d 232. In *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 34, 29 CR3d 622, the court of appeal cited this book section as a source for a lawyer's affirmative duty to properly present expert testimony to a court in the context of a summary judgment motion.

Expert declaration of foreign law. Expert declarations can be important in cases involving interpretations of foreign law. In *Manco Contracting Co. v Bezdikian* (2008) 45 C4th 192, 85 CR3d 233, the supreme court affirmed the court of appeal's reversal of a grant of summary judgment because the declaration of an expert on Qatari law raised a triable issue by demonstrating that Qatari judgments are not final until an appeal has been adjudicated. 45 C4th at 197. Expert opinions on foreign law are an exception to the general rule that an expert cannot offer opinions on purely legal questions. See §5.3.

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Source: Civil Litigation/California Expert Witness Guide/16 Experts and Summary Judgment Process/§16.4 B. Whether to File Expert Affidavit or Declaration in Response to Motion

§16.4 B. Whether to File Expert Affidavit or Declaration in Response to Motion

If the issue involved in the summary judgment or summary adjudication of issues motion requires the testimony of an expert, counsel opposing the motion should submit expert testimony. See *Mann v Cracchiolo* (1985) 38 C3d 18, 210 CR 762, discussed in §16.2. The testimony must come from the expert. Trial counsel's declaration concerning what the expert's testimony will provide is insufficient to create a triable issue of material fact and will leave the motion unopposed. *Lincoln Fountain Villas Homeowners Ass'n v State Farm Fire & Cas. Ins. Co.* (2006) 136 CA4th 999, 1009, 39 CR3d 345.

Affidavits or declarations in opposition to motions for summary judgment or for summary adjudication of issues should contain the same type of information as those filed on behalf of the motion. *Kasparian v Avalon Bay Communities, Inc.* (2007) 156 CA4th 11, 19, 66 CR3d 885 (grant of summary judgment reversed on appeal because expert declarations in opposition created triable issue of fact on triviality of sidewalk defect); *Gordon v Havasu Palms, Inc.* (2001) 93 CA4th 244, 112 CR2d 816 (grant of summary judgment reversed on appeal because expert declarations submitted in opposition were adequately supported by record and based on matters on which experts could reasonably rely). See §16.2.

For example, there are several reported decisions on medical malpractice cases in which the defendant moves for summary judgment on the basis of declarations from physicians who assert that the defendant doctor's conduct met the standards of the community where the defendant practices. To defeat the summary judgment motion, the plaintiff must usually counter with opposing expert declarations. *O'Connor v Bloomer* (1981) 116 CA3d 385, 172 CR 128. In *O'Connor,* the plaintiff sued a surgeon, the hospital, and two doctors who had assisted the surgeon in an aortic valve replacement. During the surgery, after the surgeon had removed the plaintiff's existing aortic valve, the surgeon found that the container that was supposed to contain the replacement valve was empty, so he used a different model valve. The assistants filed a motion for summary judgment supported in part by their own declarations stating that neither had any responsibility for ordering, or assuring the availability of, the replacement heart valve. The plaintiff did not file any opposing expert declarations. The trial court granted the motion, finding that the absence of an opposing declaration from a doctor mandated that the motion be granted. On appeal, the court affirmed, rejecting the plaintiff's argument that determination of whether a replacement valve was available was a matter of common knowledge such that "no specialized medical testimony is required." 116 CA3d at 391.

The plaintiff's failure to file opposing declarations was also found fatal in *Jambazian v Borden* (1994) 25 CA4th 836, 30 CR2d 768. The issue in that case was whether the plaintiff's treating physician had properly explained the increased risks of surgery that the plaintiff might suffer because of his diabetes. The treating doctor moved for summary judgment, supported by expert declarations stating that the plaintiff did not have diabetes and, therefore, there was no duty to explain the increased risks. The plaintiff did not file an opposing expert declaration, although he did file a declaration stating that he had diabetes. The trial court granted the doctor's motion and the court of appeal affirmed, explaining that the expert testimony offered by the defendant shifted the burden to the plaintiff, who had failed to meet that burden. 25 CA4th at 846. See *Villa v McFerren* (1995) 35 CA4th 733, 747, 41 CR2d 719. See also *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 50 CR2d 785, a landowner negligence case in which the court held that the plaintiff's security expert's affidavit was insufficient to defeat a summary judgment motion. There was no evidence as to whether the rapist who assaulted the plaintiff entered the building because a door was propped open, he followed another tenant into the building, or he somehow obtained, found, or stole a key. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury." 43 CA4th at 487.

In *Cooksey v Alexakis* (2004) 123 CA4th 246, 19 CR3d 810, the court granted summary judgment for the defendant after the plaintiff intentionally withheld her expert's declaration as a litigation tactic. Plaintiff had waited until 2 weeks before trial and nearly 9 months after filing her lawsuit to serve her initial discovery requests. She set the deposition of defendant for a date later than when her opposition brief to the motion for summary judgment was due. To avoid

revealing her expert's opinion before the deposition, her attorney withheld the expert's declaration and submitted an opposition brief that consisted solely of a request for a continuance. The trial court denied the request and granted defendant's summary judgment motion.

The court of appeal affirmed the judgment, holding that trial courts may properly consider whether a party has been diligent in completing discovery when determining whether to grant a continuance of a summary judgment motion hearing. The court found that plaintiff failed to explain why further discovery was necessary to oppose the motion and why that discovery had not been completed earlier. Although plaintiff alleged that her expert's opinion was preliminary, the court noted that the opinion itself did not mention any need for further information that could be gained by discovery. The court also found significant plaintiff's attorney's concession that he purposely decided against initiating discovery as a litigation tactic. It concluded that, despite the availability of sanctions, the trial court did not abuse its discretion by denying plaintiff's request for a continuance.

Recall that an expert is not required to successfully oppose a motion for summary judgment or summary adjudication of issues if the issue in question would not require the testimony of an expert at trial. This is true even if the motion itself is supported by expert testimony. For example, in *Kotler v PacifiCare* (2005) 126 CA4th 950, 24 CR3d 447, the plaintiff sued his health care provider for breach of contract after it allegedly unreasonably delayed authorization of a referral to a specialist. The trial court granted defendant's summary judgment motion but the court of appeal reversed, rejecting defendant's argument that plaintiff was required to offer evidence, in the form of expert testimony, that the delay he experienced violated a community, medical, or other standard. It held that the standard of reasonableness applicable to the case was a conventional one, derived from the situation of the parties, the nature of the transaction, and the facts of the particular case, and that its establishment did not require any further proof.

The court noted that, under CC §1657, obligations of a contract may be performed either at a time specified by the contract or within a reasonable time. The contract at issue required defendant to provide plaintiff with the medically necessary services of specialists, as authorized by the primary care physician. Thus, the court held, even without the declaration of an expert, sufficient facts existed for a reasonable trier of fact to conclude that defendant breached the contract by failing to provide plaintiff with treatment by a specialist within a reasonable time.

PRACTICE TIP: A party faced with a motion for summary judgment supported by expert declarations should consider whether to depose the experts to better oppose the motion. If there is a need to depose experts, counsel should request a continuance under CCP §437c(h). See *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780 (noting that continuance should be granted when such expert depositions would be essential to opposing motion).

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§16.5 C. Disclosure of Experts Used to Support or Oppose Motion

It appears that an expert used in support of or in opposition to a motion for summary judgment or for summary adjudication of issues does not have to be disclosed under CCP §§2034.010-2034.730. See *Kennedy v Modesto City Hosp.* (1990) 221 CA3d 575, 270 CR 544, discussed in Tabak, *A Logical Break Between CCP Sections 437(c) and 2034*, 20 CTLA Forum 209 (Aug. 1990).

PRACTICE TIP: To be safe, you should disclose the experts to be used in such a motion, under CCP §§2034.010-2034.710.

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§16.5A D. Deposition of Experts Used to Support or Oppose Motion

Declarations of experts are often submitted in support of or in opposition to a motion for summary judgment or summary adjudication. If a legitimate question is raised regarding the foundation of the expert's opinion as presented in the affidavit or declaration, a party should be allowed to depose this expert. *St. Mary Med. Ctr. v Superior Court* (1996) 50 CA4th 1531, 58 CR2d 182. In reaching this decision, the court in *St. Mary Med. Ctr.* questioned whether former CCP §2034 (now CCP §§2034.010-2034.730) precludes the deposition of an expert who has furnished a declaration where (1) there has not yet been an exchange of experts and (2) a significant question is raised regarding the foundation for the expert's opinion. The controversy arose in the context of a medical malpractice action, and in response to the defendants' motion for summary judgment. Since the defense motion was based on an expert declaration that no malpractice had occurred, plaintiffs responded with an expert declaration, from Dr. Leslie Eber, which related his opinion that the defendants had been negligent, in part because they had used an improper surgical procedure. The defendants then took their motion for summary judgment off calendar and served plaintiffs with a deposition notice and subpoena for Dr. Eber. Dr. Eber was instructed not to appear for his deposition on the ground that he was a retained expert and thus could only be deposed consistent with the procedures, and within the timeframe, set forth in former §2034 (now CCP §§2034.010-2034.730).

The defendants moved to compel the deposition of Dr. Eber, pointing out that their own expert had evaluated Dr. Eber's conclusions and found them untenable. A deposition thus would allow them to show that Dr. Eber's declaration was insufficient to resist their well-supported motion. The trial court issued a tentative ruling denying the motion, finding that it would be improper to take a retained expert's deposition until there was a proper exchange of expert witness information undertaken right before the trial date. When the court stuck to its tentative ruling, the defendants took a writ to determine whether a limited deposition of Dr. Eber should be permitted consistent with the statutory requirements.

To resolve the issue, the court of appeal had to analyze and distinguish the line of cases that confine expert discovery to the time period set forth in former §2034 (now CCP §§2034.010-2034.730). While the court acknowledged that the holdings in these cases should be applied in appropriate circumstances, summary judgment proceedings also should be treated differently and an expert should be deposed where there is a legitimate question regarding the declaration's foundation. 50 CA4th at 1539. Having so concluded, the court cautioned that it did not expect well-supported motions for summary judgments routinely to be turned into mini-trials. Rather, there "must be objective facts presented which create a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundational basis of the affidavit or declaration" before discovery should be permitted. 50 CA4th at 1540.

PRACTICE TIP: The result reached in *St. Mary Med. Ctr.* strikes an appropriate balance between the purposes furthered by CCP §437c and the disclosure provision of CCP §§2034.010-2034.730. Counsel should take heed, however, of the court's cautionary advice and present a strong showing why there is a significant question about the validity of the opposing declaration. The logic of the opinion ought to work in reverse as well. That is, if counsel for the responding party believes that a movant-expert's declaration is unfounded, he or she may want to consider a limited deposition to substantiate that position and thus avoid summary judgment on the ground that the moving party has not met its burden of showing that a triable issue of material fact exists.

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Source: Civil Litigation/California Expert Witness Guide/16 Experts and Summary Judgment Process/ III. FEDERAL RULES OF EVIDENCE/§16.6 A. Role of Expert Opinion in Summary Judgment Motions

III. FEDERAL RULES OF EVIDENCE

§16.6 A. Role of Expert Opinion in Summary Judgment Motions

Under Fed R Civ P 56(c), a summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Triton Energy Corp. v Square D Co.* (9th Cir 1995) 68 F3d 1216, 1221. Federal cases have been grappling with the proper role of expert opinion in the summary judgment process. In particular, the courts have wrestled with the extent to which an expert's opinions have a sufficient foundation in fact. See Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 UC Davis L Rev 93 (1988).

In reviewing a grant or denial of summary judgment, the appellate court first reviews the trial court's evidentiary rulings and accords them due deference, and then, with the factual record defined, reviews the summary judgment decision de novo. See *Raskin v Wyatt Co.* (2d Cir 1997) 125 F3d 55 (expert economic statistical evidence did not create triable issue of fact for age discrimination because it did not account for impact of retirement plan on workers' decisions to retire early). The appellate court defers to trial court evidentiary rulings even when a ruling on expert testimony disposes of the motion and determines the outcome of the case. *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418, 1420.

Some courts have rejected the use of expert affidavits in summary judgment motions altogether because they contain opinion evidence. *Mapco, Inc. v Carter* (Temp Emer Ct App 1978) 573 F2d 1268. More typically, however, the cases have accepted such affidavits to the extent they contain specific facts. *U.S. v Various Slot Machs. on Guam* (9th Cir 1981) 658 F2d 697, 700; *Merit Motors, Inc. v Chrysler Corp.* (DC Cir 1977) 569 F2d 666. These cases have, however, tended to view expert declarations with a healthy dose of skepticism, causing one commentator to label them as "cautionary decisions." 22 UC Davis L Rev at 101.

Cases Rejecting Use of Expert's Opinion Because of Insufficient Facts

In *Merit Motors*, the plaintiff alleged that the defendant's fleet sales program violated the antitrust laws. Chrysler moved for summary judgment. The plaintiff responded with an affidavit from its economics expert who stated that Chrysler's fleet rebate payments to fleet buyers injured the plaintiff by increasing the number of available used cars, prevented Chrysler from lowering prices to dealers, and allowed fleet buyers to compete with the plaintiffs. Chrysler responded with nonexpert evidence that the economic impact of fleet sales was ambiguous. 569 F2d at 671.

The trial court rejected the affidavit of the plaintiff's expert and granted the motion. The plaintiff appealed. Affirming summary judgment, the appellate court rejected the notion that summary judgment is "impossible whenever a party has produced an expert to support its position." 569 F2d at 673. The court found, however, that the affidavit in question contained opinion but not fact, and made "unsupported assumptions about the elasticities of demand in various markets [while ignoring] the impact of the dominant forces in the automobile market: General Motors and Ford." 569 F2d at 673.

Similarly, in *Evers v General Motors Corp.* (11th Cir 1985) 770 F2d 984, the plaintiff contended that the defendant had negligently designed and manufactured her car because it did not contain an air bag restraint system. The plaintiff opposed the manufacturer's motion for summary judgment on the basis of the affidavit of a design engineer who opined that an air bag "would probably have reduced the severity of, or prevented [plaintiff's] injuries." 770 F2d at 985. The trial court granted the motion, and the court of appeals affirmed, finding that the affidavit had no probative value because it failed "to provide specific facts … to support its conclusory allegations." 770 F2d at 986.

The Ninth Circuit examined three separate expert opinions in *Guidroz-Brault v Missouri Pac. R.R.* (9th Cir 2001) 254 F3d 825, and rejected each expert's ultimate opinion because the conclusions drawn were not supported by the facts on which they relied. The plaintiffs sued for injuries sustained when the defendant's train derailed. One of the material disputed issues involved what would have been visible to the train crew at the time of the derailment. The locomotive engineer offered an opinion that the track separation would have been visible, but there were no facts on which he could base that assumption. The lighting engineer similarly concluded that the track separation would have been visible, but also lacked any direct proof of what would have been visible. The accident reconstructionist, however, assumed that

there were gaps in the rails that would have been visible, but he too offered no factual support for that element of his opinion. Consequently, none of the opinions were based on proof that there was something that could have been seen by the train crew in time for them to apply the brakes and prevent the derailment. Accordingly, summary judgment was granted for the railroad.

Cases Rejecting Use of Expert's Opinion Because of Information on Which Expert Relied

Federal courts have rejected expert opinions that lack reliable supporting sources. In *Viterbo v Dow Chem. Co.* (5th Cir 1987) 826 F2d 420, the court found the plaintiff's expert medical testimony to be lacking in foundation and reliability and, therefore, insufficient to defeat the defendant's motion for summary judgment. See also *Diviero v Uniroyal Goodrich Tire Co.* (9th Cir 1997) 114 F3d 851 (district court correctly refused to admit expert testimony that tire was defective because expert's testimony was uninformed, unclear, unsubstantiated, and unreliable); *Slaughter v South Talc Co.* (5th Cir 1990) 919 F2d 304 (district court correctly disregarded plaintiffs' experts' affidavits in opposition to summary judgment because source on which experts relied was insufficient to give their opinions any weight); *American Key Corp. v Cole Nat'l Corp.* (11th Cir 1985) 762 F2d 1569, 1580 (antitrust defendant moved for summary judgment on proper market definition; plaintiff's opposition affidavit by expert economist stated that plaintiff's market definition was correct, based on facts supplied by plaintiff's president; court found that this reliance on the opinion of others left expert's opinion without "credible support" and insufficient to "create an issue of fact").

In re Agent Orange Prod. Liab. Litig. (ED NY 1985) 611 F Supp 1223, aff'd (2d Cir 1987) 818 F2d 187, continues to be one of the most frequently cited cases on the adequate foundation issue. In that case, a class composed of Vietnam veterans brought an action against seven chemical herbicide manufacturers for injuries the plaintiffs had allegedly suffered while exposed to the defendants' products in Vietnam. The defense moved for summary judgment, asserting that there was no evidence that Agent Orange was the cause of the alleged injuries.

The plaintiffs' opposition to the motion included voluminous expert epidemiological evidence detailing the plaintiffs' symptoms. The court rejected this evidence as supplying "no basis for an inference of causation" and lacking "other reliable data." 611 F Supp at 1234. He further found that the experts were relying on data so "lacking in probative force and reliability that no reasonable expert could base an opinion on them." 611 F Supp at 1245.

Similarly, in *Berry v Armstrong Rubber Co.* (5th Cir 1993) 989 F2d 822, the Fifth Circuit declined to find a triable issue of fact on the essential elements of the plaintiff's claim because the expert opinions offered to support those elements were so inherently unreliable as to not rise above conjecture and speculation. See also *Zarecki v National R.R. Passenger Corp.* (ND Ill 1996) 914 F Supp 1566 (striking affidavit of treating physician's expert opinion, at least in part, because it did not set forth facts and reasoning used in reaching its conclusion).

Cases Rejecting Use of Expert's Interrogatory Answers in Summary Judgment Motion

A number of courts have been particularly skeptical of parties who attempt to resist motions for summary judgment on the basis of interrogatory answers setting forth what the expert *would* testify to if called on to do so. For example, in *Vidrine v Enger* (5th Cir 1984) 752 F2d 107, 109, the plaintiff's opposition included an answer to an interrogatory describing how a particular doctor would testify. The court held the answer inadequate to defeat the defendant's summary judgment motion, noting that the plaintiff presented no affidavit or deposition from the doctor, rendering the doctor's testimony pure hearsay. 752 F2d at 110.

The First Circuit voiced similar sentiments in *Garside v Osco Drug, Inc.* (1st Cir 1990) 895 F2d 46. The plaintiffs in that case alleged that their child had contracted toxic epidermal necrolysis due to an adverse reaction to prescription drugs. The defendants moved for summary judgment. The plaintiffs resisted on the basis of an interrogatory answer stating that the plaintiffs' expert would testify that the child's condition was caused by a combination of two prescription drugs that she ingested. The trial court granted the motion, and the court of appeal affirmed, pithily noting: "More was required. After all, a mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax." 895 F2d at 49.

The award for the most vituperative criticism of expert testimony in the summary judgment arena undoubtedly belongs to Judge Easterbrook of the Seventh Circuit for his opinion in *Mid-State Fertilizer Co. v Exchange Nat'l Bank* (7th Cir 1989) 877 F2d 1333. The plaintiff in that case alleged that the defendant's lending policies, which included a "lock box" for control of customer payments, violated both the Bank Holding Company Act and the Racketeer Influenced and Corrupt Organizations Act (RICO). 877 F2d at 1334. The trial judge granted summary judgment to the lender, rejecting the plaintiff's expert affidavit from a professor of finance at the University of Illinois. The trial judge noted that

the affidavit "does not recite any of the specific facts or steps in his reasoning." 877 F2d at 1339.

Judge Easterbrook agreed fully with the trial judge, noting that the professor "would not accept from his students or those who submit papers to his journal an essay containing neither facts nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in his professional life?" 877 F2d at 1339.

"Confident" Decisions Allowing Expert Affidavits

A growing number of cases have applied a clearly more permissive standard in evaluating expert affidavits, particularly those filed in opposition to summary judgment motions. One commentator has labeled this line of cases the "confident decisions." 22 UC Davis L Rev at 103.

EXAMPLE 1: In *Bieghler v Kleppe* (9th Cir 1980) 633 F2d 531, the plaintiffs were injured while riding their motorcycles through a tunnel. One of the plaintiff riders died of his injuries and the other two had retrograde amnesia concerning the event. They filed suit under the Federal Tort Claims Act alleging that the tunnel was negligently designed and constructed. The government moved for summary judgment on the grounds that the plaintiffs could not establish a causal connection between the alleged negligence, if any, and the accident.

The plaintiffs' opposition to the motion included an affidavit from an accident reconstruction expert who stated he had visited the scene, examined the damaged motorcycles, and reviewed reports of the incident. On the basis of that information, he had reconstructed the accident and concluded that it was caused by defective lighting in the tunnel. The trial judge rejected this affidavit as being speculative, and granted the motion.

The court of appeal acknowledged that the affidavit "did not describe in detail how he had arrived at his conclusions" but did give "more than a bare conclusion that defendants had been negligent and that their negligence caused the accident." 633 F2d at 533. Since the government had not moved to strike the affidavit, the court found that it was admissible and sufficient to defeat the motion. 633 F2d at 534.

EXAMPLE 2: In *Bulthuis v Rexall Corp.* (9th Cir 1985) 789 F2d 1315, the plaintiff sought damages for injuries allegedly caused by her mother's ingestion of diethylstilbestrol (DES) during pregnancy. The defendant drug manufacturers moved for summary judgment on the basis of deposition testimony showing that the mother actually took progesterone, rather than DES, during her pregnancy. The plaintiff's opposition included affidavits of two physicians who had treated the plaintiff for cervical cancer, and who stated that they had noted changes in plaintiff's tissue that were consistent with DES-exposed offspring, rarely seen in non-DES exposed individuals, and, in the doctor's opinion, were caused by the mother's ingestion of DES. The trial court rejected these affidavits as being without factual support. The court of appeals reversed, explaining (789 F2d at 1318):

> Expert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. If further facts are desired, the movant may request and the district court may require their disclosure.

EXAMPLE 3: In *Maffei v Northern Ins. Co.* (9th Cir 1993) 12 F3d 892, the court followed *Bieghler* and *Bulthuis* in finding reversible error in the grant of summary judgment when the district court refused to consider the impact of an expert declaration on the purported cause of "hostile fire."

Role of Expert Testimony in Pharmaceutical Products Liability Arena

The role of expert testimony in the summary judgment process has been hotly contested in the pharmaceutical products liability arena. For example, the case of *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, arose from the grant of a summary judgment in which liability theories of the plaintiff's experts had been found insufficient to create a triable issue of fact. The Supreme Court reversed, finding that the lower courts had improperly applied the so-called "*Frye* test" rather than the standards in Fed R Evid 702. See discussion in §§4.55-4.58. On remand, the Ninth Circuit found that there was no need to return the case to the district court because summary judgment was mandated under Rule 702 as well. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1315 (*Daubert II*). In so ruling, the court listed four nonexclusive factors that should assist in separating inadmissible opinions based on junk science from admissible opinion developed under the scientific method: (1) whether the method has gained general acceptance in the relevant scientific community, (2) whether the method has been subjected to peer review, (3) whether the method "can be (and has been) tested," and (4) whether there is a "known or

potential rate of error." 43 F3d at 1316.

Following a similar methodology, the Ninth Circuit later held in *Lust v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1996) 89 F3d 594 that the defendant was entitled to summary judgment when the plaintiff claimed to have suffered defects as a result of his mother's having ingested a fertility drug manufactured by the defendant. The court determined that the plaintiff's expert did the work on which he based his opinions after he had been retained by the plaintiff and that none of it had been subjected to peer review. The court also noted that these deficiencies could have been overcome had the expert "explained how he went about reaching his conclusions and had pointed to an objective source demonstrating that his methods and premises were generally accepted by or espoused by a recognized minority of teratologists. But he failed to do so." 89 F3d at 597.

Although the standards for determining admissible scientific opinion set out in *Daubert* govern on motions for summary judgment, those standards must be applied to the appropriate issue in determining whether summary judgment can be granted. In *In re Hanford Nuclear Reservation Litig.* (9th Cir 2002) 292 F3d 1124, the Ninth Circuit reversed the grant of summary judgment after determining that the district court had erred in rejecting the plaintiffs' expert testimony on causation issues involving radiation exposure. Although the case is more noteworthy for its discussion of the differences between generic and specific causation in a toxic exposure case, it also indicates that *Daubert* challenges to the sufficiency of expert witness testimony must be directed at dispositive issues before summary judgment is properly granted. Expert testimony also has been used effectively in defeating summary judgment in the intellectual property field, including copyright infringement and parent and trademark cases. In *Swirsky v Carey* (9th Cir 2004) 376 F3d 841, a musical infringement suit, the Ninth Circuit held that the trial court erred in finding that the expert testimony evidence was insufficient to survive a summary judgment motion. See also *Cosmos Jewelry Ltd. v Po Sun Hon Co.* (CD Cal 2004) 71 USPQ2d 1126, 2004 US Dist Lexis 14208 (expert testimony supported artist's testimony regarding originality of work). Similarly, in *Playboy Enters., Inc. v Netscape Communications Corp.* (9th Cir 2004) 354 F3d 1020, 1027, a trademark infringement case, the Ninth Circuit affirmed the denial of summary judgment, noting that the expert's report, despite being criticized for its methods and conclusions, created a genuine issue of material fact.

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§16.7 B. Burden of Proof

Beyond an examination of the expert's qualifications and the nature of the opinion testimony offered, counsel should also keep in mind the ultimate burden of proof when examining the sufficiency of expert declarations supporting or opposing a motion for summary judgment. If an expert's affidavit supplies nothing more than a legal conclusion and does not have an explanation of the facts and reasoning used in formulating the opinion, it likely will be held inadmissible and thus insufficient to either support or oppose a motion for summary judgment. See, *e.g., Mid-State Fertilizer Co. v Exchange Nat'l Bank* (7th Cir 1989) 877 F2d 1333 (rejecting affidavit); *Zarecki v National R.R. Passenger Corp.* (ND Ill 1996) 914 F Supp 1566 (rejecting affidavit).

In *Triton Energy Corp. v Square D Co.* (9th Cir 1995) 68 F3d 1216, the court found the expert's declaration insufficient to defeat a motion for summary judgment. Triton's expert had examined a photograph of the allegedly defective circuit breaker in its "on" position and had concluded not only that the circuit breaker had failed to "trip," thus causing the fire, but that the circuit breaker's failure to trip had been caused by a design or manufacturing defect. However, Triton's expert was unable to examine the circuit breaker itself, because it had been destroyed when the hangar was demolished after the fire. Square D moved for summary judgment, arguing that Triton's expert testimony should be excluded because of evidence spoliation and that, without such testimony, no genuine issues of material fact would remain for trial. In support of its motion, Square D offered its own expert testimony to the effect that the circuit breaker could have tripped even though it was still in the "on" position.

The court found that, "[a]t best, neither party has succeeded in establishing that its version of the facts is more probable than not." The fact that Triton's expert was unable to examine the allegedly defective circuit breaker "substantially impaired his ability to express a reliable expert opinion based upon specific facts. Therefore … [the] expert opinion and the inferences Triton seeks to draw from it are not of sufficient quantum or quality to create genuine issues of material fact." 68 F3d at 1221.

Under Fed R Civ P 56(c), a summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. 68 F3d at 1221. Triton could not establish, by a preponderance of the evidence, that Square D's circuit breaker was defective when manufactured over 2 decades earlier. Although Square D also could not demonstrate, by a preponderance of the evidence, that its circuit breaker was sound when it left its plant, that did not matter, as the burden of proof rested with Triton. Under the circumstances, the court held that Triton "failed to present sufficient probative evidence that would require a jury decision" and affirmed the district court's grant of summary judgment. 68 F3d at 1222.

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HG.org
http://www.hg.org
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Idex (for defense counsel)
http://www.idex.com
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IMS Expert Services
(877) 838-8464
http://www.ims-expertservices.com
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Index of American Universities
http://www.clas.ufl.edu/au/
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informit
http://www.phptr.com/articles/index.asp?st+45190&rl=1 (technical engineering)
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IngentaConnect
http://www.ingentaconnect.com
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Joint Commission on Accreditation of Healthcare Organizations
http://www.jointcommission.org
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JurisPro Expert Witness Directory
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Jury Verdicts Weekly Inc.
NLJ's Litigation Services Network
128 Carleton Ave.
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(800) 832-1900
http://www.juryverdicts.com
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Law.com
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San Francisco, CA 94105
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611 W. 6th St., Ste 1900
Los Angeles, CA 90017
(800) 253-4182
http://www.lexis-nexis.com
http://www.lexisone.com
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Libweb
http://lists.webjunction.org/libweb/
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Library of Congress Online Catalog
http://catalog.loc.gov
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Los Angeles County Bar Association
261 S. Figueroa St., Ste 300
Los Angeles, CA 90012
(213) 627-2727
http://www.expert4law.org
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Los Angeles Public Library
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Los Angeles, CA 90071
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http://www.lapl.org
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Marquis Who's Who
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(800) 521-8110
http://www.marquiswhoswho.com
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Martindale.com
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MEDLINE
U.S. National Library of Medicine
National Institute of Health
8600 Rockville Pike
Bethesda, MD 20894
(888) FIND-NLM
http://www.nlm.nih.gov

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National Marine Manufacturers Association
200 E. Randolph Dr., Ste 5100
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(312) 946-6200
http://www.nmma.org
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National Transportation Safety Board
490 L'Enfant Plaza SW
Washington, DC 20594
(202) 314-6000
http://www.ntsb.gov
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Northern California Association of Law Libraries
100 First St., Ste 100
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http://www.nocall.org/links/expertwitness.html

Office of Public Affairs, Bureau of Land Management
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Washington, DC 20240
(202) 452-5125
(202) 452-5124 (fax)
http://www.blm.gov
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Online Computer Library Center, Inc.
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Dublin, OH 43017
(800) 848-5878
http://www.oclc.org/home
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Questel Orbit, Inc.
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Alexandria, VA 22314
(703) 519-1820
http://www.questel.com
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PsychARTICLES
http://www.apa.org/psycarticles
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Research On Demand, Inc.
P.O. Box 479
Santa Barbara, CA 93102
(800) 200-4095
(877) 564-4878 (fax)
http://www.researchondemand.com
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Round Table Group
http://www.roundtablegroup.com
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San Francisco Bar Association
301 Battery St., Third Floor
San Francisco, CA 94111
(415) 982-1600
(415) 477-2388 (fax)
http://www.sfbar.org/register/default.aspx
§7.6

Society of Automotive Engineers, Inc. (SAE)
400 Commonwealth Dr.
Warrendale, PA 15096
(724) 776-4841
http://www.sae.org
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TASA
The TASA Group Headquarters
1166 DeKalb Pike
Blue Bell, PA 19422-1853
(800) 523-2319
(800) 329-8272 (fax)
http://www.tasanet.com
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Technical Information Services

National Highway Traffic Safety Administration
400 7th St. SW, Rm 2336
Washington, DC 20590
(800) 445-0197
(202) 493-2833 (fax)
http://www.nhtsa.dot.gov/cars/problems/trd
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Transportation Research Board (of the National Academy of Sciences)
500 5th St. NW
Washington, DC 2001
(202) 334-2934
(202) 334-2003 (fax)
http://www.nas.edu/trb
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TrialSmith
http://www.trialsmith.com
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United States Dep't of Commerce
National Climatic Data Center (NCDC) of the National Oceanic and Atmospheric Administration (NOAA)
Federal Bldg.
151 Patton Ave., Rm 120
Asheville, NC 28801-5001
(828) 271-4800
(828) 271-4876 (fax)
http://www.ncdc.noaa.gov
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The University and College Directory
http://www.universityurl.com
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Usenet
http://www.usenet.com
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http://www.utexas.edu/world/univ/alpha
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