

Source: Torts/California Personal Injury Proof Update/Contents

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Preface

This update, like most CEB publications, was produced by and for members of the California Bar. Members of the Bar wrote and edited it, and the problems were discussed with California lawyers.

We consider this update part of a dialogue with our readers. Another update next year, cumulative of this one, will give us an opportunity to make corrections and additions you suggest. If you know something we did not include, or if we erred, share your knowledge with other California lawyers. Send your comments to:

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Source: Torts/California Personal Injury Proof Update/Selected Developments

Selected Developments

October 2009 Update

In *Henry v Superior Court* (2008) 160 CA4th 440, 455, 72 CR3d 808, the court held that a defendant may introduce evidence of a physician's later malpractice to limit noneconomic damages. See Update §3.19.

For a recent case discussing whether a trial court improperly excluded an expert witness's testimony after the plaintiff had explicitly notified the defendant that the expert would testify beyond the scope of the original deposition and the defendant was given an opportunity to depose the expert again, see *Easterby v Clark* (2009) 171 CA4th 772, 90 CR3d 81, in Update §5.33.

In *Dee v PCS Prop. Mgmt., Inc.* (2009) 174 CA4th 390, 94 CR3d 456, the court of appeal held that the trial court properly excluded an expert's opinion that plaintiff's exposure to mold caused susceptibility to cancer because there was no evidence that plaintiff was exposed to mycotoxins. See Update §5.62.

The court must resolve any doubts in a ruling on a motion to withdraw or amend an admission in favor of the moving party. See *New Albertsons, Inc. v Superior Court* (2008) 168 CA4th 1403, 86 CR3d 457, in Update §8.22.

For a recent case discussing the relevance of evidence of plaintiff's private life, see *Winfred D. v Michelin N. Am., Inc.* (2008) 165 CA4th 1011, 1026, 81 CR3d 756, in Update §8.10.

In *Garibay v Hemmat* (2008) 161 CA4th 735, 742, 74 CR3d 715, the court found that a declaration of a medical expert witness had no foundation because it was not based on facts from medical records admitted under business records exception. See Update §8.13.

Effective June 29, 2009, CCP §2031.010(e) permits service of a demand to produce and permit inspection, testing, sampling and copying of electronically stored information. See Update §10.25.

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Source: Torts/California Personal Injury Proof Update/Cutoff Dates and CEB Citation

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of July 13, 2009, and monitored developments through August 19, 2009.

CEB Citation

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/GENERAL CONSIDERATIONS/§1.01 Using Witnesses in Judicial Arbitrations

GENERAL CONSIDERATIONS

[§1.01] Using Witnesses in Judicial Arbitrations



Effective January 1, 2007, the California Rules of Court were reorganized and renumbered by the Judicial Council. All citations to the rules have been updated in this chapter and in other chapters of this publication.

The presentation of evidence in judicial arbitrations (under CCP §§1141.10-1141.31) is governed by Cal Rules of Ct 3.823, which requires the arbitrator to apply "the rules of evidence governing civil cases," except that specified reports, written statements, and deposition transcripts are more freely admitted in place of live testimony than in jury trials. Using such documents can save time and reduce expenses, but counsel must remember that the arbitrator is the trier of fact and consider whether presenting live, even video recorded, testimony would be more effective and convincing than merely introducing documents. Further, while testimony may be presented in the form of a written declaration under penalty of perjury (Cal Rules of Ct 3.823(b)(2)), copies of the statement must be submitted to all opposing parties at least 20 days before the hearing, and opposing parties may demand that the witness be produced at the hearing and then use the statement for cross-examination.

NOTE: Unlike judicial arbitrations that require the Evidence Code to be followed, a relaxation of evidentiary restrictions is permitted in contractual arbitrations conducted under CCP §§1280-1294.2. See, *e.g.*, CCP §1282.2(d) (parties are entitled to present evidence, "but rules of evidence and rules of judicial procedure need not be observed").

Current specifications for identifying cases that must be judicially arbitrated before they can proceed to a civil trial are in CCP §1141.11(a). The statutes and rules by which judicial arbitrations are instituted and conducted are discussed in California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004).

Chapter 11 of A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005), updated annually, is a useful aid for attorneys with cases that are likely to be submitted to arbitration.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.1 Preparing Witness for Direct Examination

[§1.1] Preparing Witness for Direct Examination

 To Main Book

Updated References

The tape recording referred to in Book §1.1 is no longer available from CEB. See program materials on Courtroom Conduct: Tactics, Ethics, Contempt, and Common Sense (Cal CEB 1994); California Civil Procedure During Trial, referred to in Book §1.1, has been twice replaced, in 1982 and in 1995. California Trial Practice: Civil Procedure During Trial, chap 5 (3d ed Cal CEB 1995) now covers preparing witnesses for trial. On procedures and techniques for dealing with expert witnesses, see California Expert Witness Guide (2d ed Cal CEB 1991). Other useful references include Effective Introduction of Evidence in California (2d ed Cal CEB 2000), and California Trial Objections (Cal CEB Annual).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), 2.1050(e). Accordingly, see CACI 106 where BAJI 1.02 is cited in Book §1.1.

NOTE: Effective January 1, 2003, the statute of limitations for personal injury and wrongful death actions increased from 1 year to 2 years. CCP §335.1.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.2 Attendance; Dress; Behavior

[§1.2] Attendance; Dress; Behavior

 To Main Book

Customary clothing styles have become less formal over the years and the suggestion in Book §1.2 that prospective witnesses (other than those asked to wear their usual uniform or work clothes) be urged to wear "a conservative suit coat and tie" or "a conservative suit or dress" and "nylons," may now be inappropriate for some witnesses in some courtrooms. Otherwise, telling a witness that the idea is to "look neat and dignified, but not too stylish," remains good advice.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/Direct Examination Techniques/§1.6 Phrasing Questions

Direct Examination Techniques

[§1.6] Phrasing Questions



In questions and comments that will be heard by the trier of fact, counsel must avoid references to inadmissible matter. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 116 CR 153, which contains a good discussion of (1) in-chambers requests before trial for orders limiting evidence to which counsel can refer during examinations of witnesses; (2) problems in framing questions to witnesses that do not violate orders; and (3) what to do if it appears counsel who requested the order is asking questions in a prohibited area (plaintiff's attorney in *Charbonneau* was found guilty of contempt for violating the trial judge's in limine order). See also (prejudicial misconduct justifying a new trial for plaintiff's attorney to refer to individual defendant's insurance policy limits (see Update §3.16) or to corporate defendant's income and wealth); *DeGeorge v Superior Court* (1974) 40 CA3d 305, 114 CR 860 (attorney guilty of contempt for asking a question previously ruled improper, laughing at judge's rulings sustaining objections to his questions, and referring in closing argument to a traffic citation, evidence of which had been ruled inadmissible).

For other cases in which counsel referred to inadmissible matters, see California Trial Objections §§29.3-29.7 (Cal CEB Annual).

On direct examination of expert witnesses, see California Expert Witness Guide, chap 13 (2d ed Cal CEB 1991).

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.8 Addressing and Referring to Parties and Witnesses

[§1.8] Addressing and Referring to Parties and Witnesses

 To Main Book

In *Lane v Wallace* (10th Cir 1978) 579 F2d 1200, plaintiff's attorney was properly admonished for referring to his client by her first name during opening statement and direct examination. The court criticized the practice as "sometimes demeaning and patronizing, and at other times favor seeking." See *Hawk v Superior Court* (1974) 42 CA3d 108, 122, 116 CR 713 (referring to criminal client by first name and alluding to personal friendship amounts to personally vouching for his or her credibility and is contempt when done contrary to judge's order).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/Using Questions Objectionable in Form/
§1.9 Calling for Narrative Answers

Using Questions Objectionable in Form

[§1.9] Calling for Narrative Answers

 **To Main Book**

The reference to Witkin should now be to 3 Witkin, *California Evidence, Presentations at Trial* §164 (4th ed 2000). See also [California Trial Objections, chap 10 \(Cal CEB Annual\)](#).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.10 Leading

[§1.10] Leading

 To Main Book

The reference to Witkin should now be to 3 Witkin, *California Evidence, Presentations at Trial* §167 (4th ed 2000). See also [California Trial Objections, chap 13 \(Cal CEB Annual\)](#).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.11 Preliminary and Foundational Matters

[§1.11] Preliminary and Foundational Matters

 To Main Book

The reference to Witkin should now be to 3 Witkin, California Evidence *Presentations at Trial* §167 (4th ed 2000). See also California Trial Practice: Civil Procedure During Trial, chap 15 (3d ed Cal CEB 1995).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/LAY WITNESSES/§1.14 Competency; Capacity

LAY WITNESSES

Qualifications

[§1.14] Competency; Capacity

 To Main Book

Evidence Code §701 was amended, effective January 1, 1986, to provide that the court may reserve challenges to the competency of a witness until the conclusion of the direct examination in any proceeding held outside the presence of a jury. Evid C §701(b). This procedure may be especially useful if the testimony of the witness may show the witness's ability to understand and express himself or herself, and if it is desirable to keep the length of the testimony as brief as possible, such as when children are witnesses. See Update §1.14A.

Evidence Code §700 now provides that every person, irrespective of age, is qualified to be a witness except as otherwise provided by statute. See People v Zambrano (2007) 41 C4th 1082, 1140, 63 CR3d 297, disapproved on other grounds in People v Doolin (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

The references to Witkin should now be to 2 Witkin, California Evidence, *Witnesses* §41 (4th ed 2000).

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At one time there was an absolute presumption that children over ten were qualified to testify and those under ten were qualified unless shown otherwise. Now, any child is qualified to testify irrespective of age (see Evid C §700, discussed in Update §1.14) as long as he or she satisfies the requirements of Evid C §701. See Update §1.14. However, certain statutes continue to provide special requirements for the testimony of children. For example, Evid C §765(b) requires that, when a witness is under 14 or is a dependent person with a substantial cognitive impairment, the court must take special care to protect the child from undue harassment or embarrassment and restrict unnecessary repetition of questions. That section also provides that during questioning of a child under the age of 14 the court must take special care to ensure that questions are stated in a form that is appropriate to the age or cognitive level of the witness. On objection by a party, the court may forbid the asking of a question in a form that is not reasonably likely to be understood by a person of the witness's age or cognitive level. Evid C §765(b). Evidence Code §767(b) permits leading questions to be asked of a child witness under 10 years of age or a dependent person with a substantial cognitive impairment in prosecutions under Pen C §§273(a), 273(d), 288.5, 368, 11165.1 or 11165.2. Determination of the competency of a very young child to testify is generally held to be within the discretion of the trial judge. See People v Bronson (1968) 263 CA2d 831, 70 CR 162. See, e.g., People v Trimble (1992) 5 CA4th 1225, 7 CR2d 450 (statement made by 2½ year-old witness one day after murder qualified as spontaneous statement).

See Anno, 60 ALR4th 369 (1988) (child witness competency statutes).

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.15 Personal Knowledge

[§1.15] Personal Knowledge

 To Main Book

The reference to Witkin should now be to 2 Witkin, California Evidence, *Witnesses* §46 (4th ed 2000). See *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191 (hypnotically restored testimony precluded under *Kelly* standard, although exceptions exist for admitting such testimony when related to other events before hypnotic session). For discussion of *Kelly* standard, see Update §5.62.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§§1.16-1.17 Lay Opinion Testimony; Subject Matter

[§§1.16-1.17] Lay Opinion Testimony; Subject Matter

 To Main Book

For further examples of admission of lay opinion testimony, see *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 362, 133 CR 775 (wife's testimony that husband signed hospital admission form without reading it was admissible as opinion "rationally based on the perception of the witness" under Evid C §800); *People v Moreno* (1973) 32 CA3d Supp 1, 7, 108 CR 338 (admissibility of lay witness's factual conclusion stated in form of opinion).

On using lay testimony in a products liability case to show that a design defect caused the plaintiff's injuries, see *Pruitt v General Motors Corp.* (1999) 72 CA4th 1480, 86 CR2d 4 (lay opinion may be given when the minimum safety of a product is within the common knowledge of lay jurors). See also *Campbell v General Motors Corp.* (1982) 32 C3d 112, 127, 184 CR 891; *Bresnahan v Chrysler Corp.* (1995) 32 CA4th 1559, 38 CR2d 446.

The California Supreme Court held in *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 206 CR 136, that proof that the defendant's sign obstructed plaintiff's view of an intersection did not require any special expertise on the part of the witness.

In *People v Williams* (1988) 44 C3d 883, 245 CR 336, the supreme court observed that it had never considered the admissibility of a 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 that it "is doubtful whether testimony that a person is under the influence of a narcotic requires expert qualifications on the part of the witness").

In *People v Williams, supra*, the court held that because defendant's expert used the term "strung out," defendant had waived any imprecision of the term or prejudice resulting from its use by two prosecution witnesses in rebuttal. The court also noted that defendant had not presented any basis on which to distinguish evidence of drug-induced intoxication from evidence of alcohol-induced intoxication.

It is common knowledge that the ability to remember a human voice diminishes over time, and a voice on the telephone can sound different from the same voice on tape. Therefore, a trial court may accept a witness's voice identification without considering expert testimony on the reliability of voice identification. *People v Clark* (1992) 3 C4th 41, 10 CR2d 554. The concept that lay opinion testimony may be received on issues of common knowledge was applied in *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 118, 147 CR 733, in which lay testimony was allowed to establish that plaintiff's injuries were proximately caused by defendant's failure to make seat belts available.

Expert testimony is not necessary to support the reasonable inference that a plaintiff passenger would have suffered less injury if he had been wearing a seat belt, but expert testimony is admissible to distinguish which of plaintiff's specific injuries would have been less severe if he had been wearing a seat belt. *Lara v Nevitt* (2004) 123 CA4th 454, 458, 19 CR3d 865. Similarly, no expert testimony was needed to decide whether the size or shape of a crack in a sidewalk made it dangerous. *Caloroso v Hathaway* (2004) 122 CA4th 922, 928, 19 CR3d 254 ("trivial defect" improper subject of expert opinion). For discussion of admissible expert testimony generally, see Update §§1.24-1.25.

The reference to Witkin in both Book §§1.16 and 1.17 should now be to 1 Witkin, California Evidence, *Opinion Evidence* (4th ed 2000). The following chart gives the references to the edition of Witkin noted in the Book, and the corresponding sections of the fourth edition in the order in which they are cited in the Book:

<i>Old Section</i>	<i>New Section</i>
391	4
393	7
394	8
402	16
403	18
392	5, 6
396	10
397	11
398	12

399	13
400	14
401	15
1241	23

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/EXPERT WITNESSES/§1.19 Special Qualifications

EXPERT WITNESSES

[§1.19] Special Qualifications

 To Main Book

A witness's testimony concerning his or her qualifications as an expert should be accurate and truthful. See *People v Dickinson* (1976) 59 CA3d 314, 130 CR 561 (perjury prosecution for alleged false testimony in attempt to qualify as expert witness).

A trial judge should not appear as a witness to give opinion testimony about matters that were before him or her in a former trial. *Merritt v Reserve Ins. Co.* (1973) 34 CA3d 858, 882, 110 CR 511.

On questioning an expert about his or her qualifications, see California Expert Witness Guide §§13.2-13.6 (2d ed Cal CEB 1991).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §27 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.21 Sufficiency

[§1.21] Sufficiency



For further examples of the sufficiency of background that qualifies a person as an expert, see *Douglas v Ostermeier* (1991) 1 CA4th 729, 2 CR2d 594 (plaintiff who testifies as to value of defendant's commercial real property qualifies as expert based on 12 years' experience as broker, familiarity with property at issue, and previous experience as expert witness); *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 455, 120 CR 787 (railroad division engineer who investigated more than 100 derailments and engine foreman who saw approximately 50 derailments were qualified to testify as experts concerning cause of derailment). See *Stevens v Roman Catholic Bishop* (1975) 49 CA3d 877, 882, 123 CR 171 (qualification of law professor as expert on canon law).

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §190 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.23 Arguing Comparative Qualifications

[§1.23] Arguing Comparative Qualifications

 To Main Book

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 219, 221 where BAJI 2.40-2.41 are cited in Book §1.23.

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The rule permitting an expert to base opinion testimony, in part, on the opinions of other experts (see *Kelley v Bailey*, cited in [Book §1.24](#)) does not always permit testimony about those other opinions. In *Continental Airlines, Inc. v McDonnell Douglas Corp.* (1989) [216 CA3d 388, 264 CR 779](#), the court did not allow an expert to testify on the details of a report prepared by subordinates because it was inadmissible hearsay, but the expert's testimony that he relied on the report to arrive at an opinion on the cost of an airplane repair was admissible; to have admitted the details of the report would have deprived the adversary party of an opportunity to cross-examine the authors of the report; *Stephen v Ford Motor Co.* (2005) [134 CA4th 1363, 1375, 37 CR3d 9](#) (expert could not read expert opinions of another into record at trial, although those opinions could serve as a basis for his own expert testimony), citing *Whitfield v Roth* (1974) [10 C3d 874, 895, 112 CR 540](#), discussed in [Update §6.56](#).

The trial judge may, under [Evid C §352](#), exclude proffered expert testimony as speculative, conjectural, and remote if its probative value is outweighed by the danger that it might confuse the jury. See *Culpepper v Volkswagen of Am., Inc.* (1973) [33 CA3d 510, 520, 109 CR 110](#) (witness could not assure that automobile paint scrapings he obtained and analyzed 3 years after accident matched paint on plaintiff's vehicle).

An expert's testimony may be precluded by the trial judge if the proponent has failed to comply with discovery requests. See discussion in [Update §1.45](#).

The trier of fact may reject in total the testimony of an expert or any other witness, provided the jury does not act arbitrarily. *Conservatorship of McKeown* (1994) [25 CA4th 502, 508, 30 CR2d 542](#). See CACI 219. However, uncontradicted testimony by experts on matters of expert knowledge is conclusive in professional negligence cases when the standard of care must be established by expert testimony. *Howard v Owens Corning* (1999) [72 CA4th 621, 632, 85 CR2d 386](#); *Mittelman v Seifert* (1971) [17 CA3d 51, 94 CR 654](#).

An expert's opinion based on incomplete data cannot by itself support a finding or decision. See *Turner v WCAB* (1974) [42 CA3d 1036, 1043, 117 CR 358, 363](#).

For a discussion of some problems in using expert witnesses, see Houser, *Expert Witnesses: Some Problem Areas*, 3 CEB Civ LR 129 (Aug. 1981).

See Anno, 66 ALR4th 213 (1988) (compelling testimony of opponent's expert).



Application of the law to particular facts is a legal question and is not subject to expert opinion. Ferreira v WCAB (1974) 38 CA3d 120, 126, 112 CR 232 (doctor's statement in report that hernia was not an industrially related injury was legal conclusion—not medical opinion—and did not constitute substantial evidence). In Jennings v Palomar Pomerado Health Sys., Inc. (2003) 114 CA4th 1108, 1117, 8 CR3d 363, the court noted that an expert who gives a conclusory opinion does not *assist* the jury to determine what occurred, but instead attempts to supplant the jury by *declaring* what occurred. The jury is charged with determining the facts in the case before it. The expert's job is to employ his or her superior knowledge and training to explain why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* that the negligent act was a cause-in-fact of the plaintiff's injury. See California Expert Witness Guide §5.3 (2d ed Cal CEB 1991).

A psychologist may testify about a person's character traits based on testing and interviews with the person. See People v Stoll (1989) 49 C3d 1136, 265 CR 111 (testimony in criminal prosecution that the defendant was not sexually deviant admissible under Evid C §§801 and 1100, as well as under §1102, which is applicable only in criminal actions).

An expert economist's testimony on "hedonic damages," or damages for the loss of enjoyment of life, is not admissible because such damages are not "a subject that is sufficiently beyond common experience" under Evid C §801(a). Loth v Truck-A-Way Corp. (1998) 60 CA4th 757, 767, 70 CR2d 571.

Although lay witnesses can give opinion testimony on issues of common knowledge (see Update §§1.16-1.17, 5.2), professional negligence (malpractice) cases often require that expert testimony be used to establish that the defendant breached a duty owed to the plaintiff. Without expert testimony, the plaintiff cannot be successful. See, e.g., Wilkinson v Rives (1981) 116 CA3d 641, 172 CR 254 (attorney malpractice case; court held that expert testimony was required to prove that attorney was negligent in way he prepared a homestead declaration). See also James v St. Elizabeth Community Hosp. (1994) 30 CA4th 73, 35 CR2d 372 (standard of duty for emergency room physician under Health & S C §1799.110(c) may be established only by physicians who have had substantial emergency room experience within the last 5 years; split in various appellate divisions exists over interpretation of this subdivision). But see Petrou v South Coast Emergency Group (2004) 119 CA4th 1090, 1094, 15 CR3d 64, in which the Fourth District Court of Appeal held that the applicable standard of care is that which existed on the date the alleged medical malpractice occurred and thus the five-year period under §1799.110(c) should be measured from the date of the alleged malpractice, not from the trial date.

In a medical malpractice action, the issue of whether a physician should disclose "the risk of death or harm and significant potential complications" posed by a prospective medical procedure is not a matter that requires expert testimony. But whether a particular risk exists in a particular instance must usually be addressed by medical expert opinions. Betterton v Leichtling (2002) 101 CA4th 749, 754, 756, 124 CR2d 644 (jury should have been instructed to rely only on expert testimony when it determined whether patient's prior aspirin use might have caused significant risks during surgery). On medical malpractice, see California Tort Guide, chap 9 (3d ed Cal CEB 1996).

Expert testimony may be admissible to distinguish specific injuries that would have been less severe if a plaintiff had been wearing a seat belt. Lara v Nevitt (2004) 123 CA4th 454, 458, 19 CR3d 865 (but no expert testimony is needed to support reasonable inference that plaintiff passenger would have suffered less injury if he had been wearing a seat belt). For additional discussion of Lara, see Update §§1.16-1.17.

The references to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* (4th ed 2000). The following chart gives the references to the edition of Witkin noted in the Book, and the corresponding sections of the fourth edition in the order in which they are cited in the Book:

<i>Old Section</i>	<i>New Section</i>
413	45-46
415	56
418	59-60
419	61
420	62
422	516
423	101



State Court

The trial judge's inquiry about whether the bases for the proffered opinion satisfy the requirements of Evid C §801(b) (set forth in Book §1.26) can be made in camera. See Hyatt v Sierra Boat Co. (1978) 79 CA3d 325, 337, 145 CR 47 (motion in limine used to raise issue of admissibility of expert testimony; testimony about probable speed of vehicle before impact excluded on ground of insufficient foundational facts); Stephen v Ford Motor Co. (2005) 134 CA4th 1363, 1366, 37 CR3d 9 (motion in limine used to (1) exclude testimony of plaintiff's tire expert and (2) substantially limit testimony of directional stability expert for lack of foundation on alleged design defect and causation). For further discussion on motions in limine to require proponent to establish foundational facts, see California Trial Practice: Civil Procedure During Trial §7.4 (3d ed Cal CEB 1995).

An expert's opinion must not be based on assumptions of fact or speculative matters unsupported by the evidence. Jennings v Palomar Pomerado Health Sys., Inc. (2003) 114 CA4th 1108, 1116, 8 CR3d 363. An expert testifying about the theoretical possibility that the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation. Instead, the plaintiff must offer an expert opinion that contains a reasoned explanation illustrating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* that the negligent act was a cause-in-fact of the plaintiff's injury. 114 CA4th at 1118. See Stephen v Ford Motor Co. (2005) 134 CA4th 1363, 1371, 37 CR3d 9 (postaccident amateur photographs of car no substitute for qualified expert's tire examination and could not provide proper basis for expert opinion). See California Expert Witness Guide §5.3 (2d ed Cal CEB 1991).

Articles about power mower injuries in Reader's Digest, Today's Health, and Consumer Bulletin are not the types of professional technical literature that, under Evid C §801(b), "reasonably may be relied on by an expert in forming an opinion" and are objectionable as hearsay. Luque v McLean (1972) 8 C3d 136, 148, 104 CR 443. A party may be able, however, to establish that a booklet containing statistics compiled by a Public Health Service officer is a reasonable basis for an expert's testimony. See 8 C3d at 148, 104 CR at 452. See also Lewis v American Hoist & Derrick Co. (1971) 20 CA3d 570, 582, 97 CR 798 (safety engineer could not base opinion on "unreliable matter" such as others' hearsay statements). But see Update §6.65 for discussion of Board of Educ. v Haas (1978) 82 CA3d 278, 147 CR 88, in which information in teacher's personnel file was allowed as a proper basis for opinions of psychiatrists in fitness for continued employment case.

A statute forbidding certain regulations from being considered in a personal injury or wrongful death action may preclude expert witnesses from basing opinions about the safety of conditions on those regulations. Spencer v G.A. MacDonald Constr. Co. (1976) 63 CA3d 836, 134 CR 78 (Lab C §6304.5 precludes evidence of or reference to construction safety orders).

An expert who testifies that he or she is unable to recall the specific testing method used in forming an opinion is not necessarily precluded from stating the opinion; such testimony would not violate the constitutional right of confrontation and opportunity for effective cross-examination. See Delaware v Fensterer (1985) 474 US 15, 106 S Ct 292, 88 L Ed 2d 15, which might be cited as authority for the more liberal admission of expert testimony under Evid C §§800-802, and for considering challenges to the lack of basis for the opinion as affecting the weight of the evidence rather than its admissibility.

Federal Court

In response to Daubert v Merrell Dow Pharm., Inc. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, and its progeny, including Kumho Tire Co. v Carmichael (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, Fed R Evid 702 was amended to affirm the trial court's role as gatekeeper to exclude unreliable expert testimony. See Committee Note to Fed R Evid 702. The amendment to Rule 702 provides some general standards that the trial court must use to assess the reliability and sufficiency of the basis for the expert's testimony. In Domingo v T.K., M.D. (9th Cir 2002) 276 F3d 1083, modified (9th Cir 2002) 289 F3d 600, 606, the Ninth Circuit affirmed a district court's exclusion of a plaintiff's expert's testimony under Daubert and Fed R Evid 702. For discussion of the factors the trial court may consider in assessing the reliability of expert testimony under the federal standards, see Update §5.62.

Significantly, when "a district court has already excluded testimony under one evidentiary rule, no Daubert hearing, which is used to assess the scientific validity of an expert's underlying reasoning or methodology, is required." U.S. v Verduzco (9th Cir 2004) 373 F3d 1022, 1033 n10 (expert testimony excluded under Fed R Evid 403); U.S. v Ramirez-Robles (9th Cir 2004) 386 F3d 1234, 1245 (if evidence has been excluded under Rule 403, no other evidentiary rule can make that same evidence admissible).

Under Fed R Evid 703, a trial court properly excluded proffered expert testimony that was based solely on a laboratory report that was otherwise inadmissible hearsay that lacked foundation. *Turner v Burlington N. Santa Fe R.R. Co.* (9th Cir 2003) 338 F3d 1058, 1060 (expert intended to use report as substantive evidence of his ultimate conclusion, rather than merely as data on which it was reasonable to rely in forming opinion). The exclusion of expert testimony for lack of foundation after an untimely objection is improper if expert's party is unfairly denied an opportunity to lay a foundation. *Jerden v Amstutz* (9th Cir 2005) 430 F3d 1231, 1238, modified (9th Cir, Jan. 12, 2006, No. 04-35889) 2006 US App Lexis 673.

In *Stillwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187, the court held that the district court erred by mingling the analysis for the reliability and helpfulness of expert testimony under Rule 702 with the summary judgment analysis under Fed R Civ P 56. In excluding the testimony, the district court required that the expert's testimony establish not only the presence of an alleged defect, but also causation.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.27 Stating Reasons and Bases

[§1.27] Stating Reasons and Bases

 To Main Book

For discussion on how an expert can educate the jury about mental suffering, see Smith, *The Expert Witness: Maximizing Damages for Psychic Injury*, 18 Trial 51 (Apr. 1982). See also California Expert Witness Guide §13.8 (2d ed Cal CEB 1991).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.28 Using Hypothetical Questions

[§1.28] Using Hypothetical Questions

 To Main Book

The reference to the California Expert Witness Guide should now be to §§13.9-13.12 (2d ed Cal CEB 1991).

The reference to Witkin should now be to 3 Witkin, *California Evidence, Presentation at Trial* §§194-196 (4th ed 2000).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 220 where BAJI 2.42 is cited in Book §1.28.

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After an expert witness is called to give testimony, the attorney-client privilege and the work-product doctrine cannot protect from disclosure the matters relied on or considered in the formation of the expert's opinion. Evid C §721(a); People v Milner (1988) 45 C3d 227, 241, 246 CR 713. See Shooker v Superior Court (2003) 111 CA4th 923, 930, 4 CR3d 334 (no waiver of attorney-client privilege by designated party-expert who claimed privilege at his deposition without disclosing any confidential information or significant part of confidential communication).

In *Shooker*, the court noted that if the designation of a party as an expert trial witness is withdrawn before the party discloses a significant part of a privileged communication, the privilege is secure. On the other hand, if the party provides privileged documents or testifies as an expert (such as by stating an expert opinion in a declaration or at a deposition), the privilege is waived.

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/REFRESHING MEMORY/§1.32 Types of Writings Used to Refresh

REFRESHING MEMORY

[§1.32] Types of Writings Used to Refresh

 **To Main Book**

The reference to Witkin should now be to 3 Witkin, *California Evidence, Presentation at Trial* §§177-179 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/Before Testimony/§1.33 Writings

Before Testimony

[§1.33] Writings

 **To Main Book**

See discussion in Update §1.39 of *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241, in which the court held that a transcription of a client's tape-recorded interview with her attorney is not "discoverable" under Evid C §771 even though used by the client to refresh her memory before a deposition.

See *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 270, 129 CR 146 (fact that CHP officer used accident report to refresh memory before testifying did not make report itself admissible in evidence; see Book §9.9).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.34 Suggestion

[§1.34] Suggestion

 To Main Book

The holding in *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241 (discussed in Update §1.39) suggests that the conflict between former CCP §2016(g) and Evid C §771 should be resolved in favor of preserving the privacy of an attorney's work product and against giving a cross-examiner the opportunity to see all writings used to refresh a witness's memory.

Former CCP §2016(g), referred to above and in Book §1.34, was relettered as subdivision (h). Former §2016(h) was in turn repealed and replaced by CCP §2018(a), operative July 1, 1987. Former CCP §2018(a) was repealed and replaced by CCP §2018.020, operative July 1, 2005.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/During Testimony/§1.35 Writing Handed to Witness

During Testimony

[§1.35] Writing Handed to Witness

 **To Main Book**

If it is necessary to refresh a witness's memory with a prior recorded statement, counsel should not read the statement aloud in the jury's presence. Counsel should give it to the witness to read, or read it to him or her, outside the jury's presence. Statements having no independent basis of admissibility may not be introduced under the guise of refreshing memory. See *People v Parks* (1971) 4 C3d 955, 960, 95 CR 193.

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 To Main Book

It has been held that when a writing is used before trial to refresh a witness's memory under Evid C §771, that writing must be produced or the testimony will be stricken. *People v Goff* (1981) 127 CA3d 1039, 1045, 179 CR 190. In *Goff*, a summary that the witness compiled from hospital records and that he used to refresh his recollection was ruled not a sufficient production because the recollection was of the hospital records and the defendant's motion to produce them should have been granted.

See *Asell v Rodrigues* (1973) 32 CA3d 817, 826, 108 CR 566 (right to translation of writing in foreign language used by witness to refresh memory).

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.39 Request for Production as Discovery Device

[§1.39] Request for Production as Discovery Device

 To Main Book

The California Supreme Court held in *Morgan v Stubblefield* (1972) 6 C3d 606, 623, 100 CR 1, that absent an objection, a finding of error cannot rest on a trial court's refusal, based on confidentiality, to order production of report used by safety engineer to refresh his memory, even though the court also refused to strike the witness's testimony after establishing that he had an independent recollection of the accident.

Mize v Atchison, T. & S.F. Ry. (1975) 46 CA3d 436, 120 CR 787, held that neither the work-product privilege (considered inapplicable) nor the attorney-client privilege (held not properly raised) limited plaintiff's right to see part of a defense investigator's file used to refresh recollection.

The court in *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241, purported to distinguish *Kerns Constr. Co. v Superior Court*, cited in Book §1.39, and held that Evid C §771 does not entitle a party to production of a transcription of the other party's tape-recorded initial interview with her attorney, even though she used the transcription to refresh her memory before testifying at a deposition.

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/TACTICS AGAINST CROSS-EXAMINATION/§1.41 Objecting

TACTICS AGAINST CROSS-EXAMINATION

[§1.41] Objecting

 To Main Book

One reason to exercise restraint in raising objections was demonstrated in *Kessler v Gray* (1978) 77 CA3d 284, 143 CR 496. An attorney's objection to certain essential testimony was improperly granted, but the trial court decision went against the attorney's client anyway. An appeal claiming that the judgment was not supported by the evidence was rejected on the ground of invited error, because the improperly excluded testimony would have provided the missing support. The attorney could not benefit from his improper objection merely because it was granted.

Under Evid C §352, a trial judge may limit cross-examination designed to elicit testimony on a peripheral matter for the sole purpose of securing a witness's impeachment by contradictory evidence on that matter. *People v Lavergne* (1971) 4 C3d 735, 94 CR 405. See also *People v Thompson* (1988) 45 C3d 86, 110, 246 CR 245 (cross-examination allowed when defendant reopened subject).

Embarrassing or repetitive questions can often confuse children or reduce their ability to concentrate. When a witness is under the age of 14, the court must take special care to prevent undue harassment or embarrassment and to restrict unnecessary repetition of questions. Evid C §765(b). Effective January 1, 2005, Evid C §765(b) was amended to provide also that during questioning of a child under the age of 14 or a dependent person with a substantial cognitive impairment the court must take special care to ensure that questions are stated in a form that is appropriate to the age of the witness. On objection by a party, the court may forbid the asking of a question in a form that is not reasonably likely to be understood by a person of the witness's age or cognitive level. Evid C §765(b). See Update §1.14A.

See *Kadelbach v Amaral* (1973) 31 CA3d 814, 823, 107 CR 720 (counsel who called witness may be ordered not to talk to him or her during recess called for juror's benefit in midst of cross-examination).

The references in Book §1.41 to California Trial Objections, chaps 22 and 27 (Cal CEB 1967) should now be to California Trial Objections, chaps 22 and 26 (Cal CEB Annual).

Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/REDIRECT EXAMINATION/§1.43
Purposes; Limitations

REDIRECT EXAMINATION

[§1.43] Purposes; Limitations

 **To Main Book**

As noted in [Book §1.43](#), redirect examination may provide a party with an opportunity to respond to inferences that may be drawn from possibly harmful answers given, and statements made or read during cross-examination. On inferences that may be drawn from a party's failure to counteract unfavorable evidence, see [Update §2.1A](#).

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Source: Torts/California Personal Injury Proof Update/1 Examining Witnesses/§1.44 Showing Prior Consistent Statements

[§1.44] Showing Prior Consistent Statements

 To Main Book

A prior consistent statement may be excluded if it is connected only remotely with the testimony sought to be rehabilitated.
Morgan v Stubblefield (1972) 6 C3d 606, 622, 100 CR 1.

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A proposed expert witness, whose name was not disclosed before the trial through the procedure prescribed by CCP §§2034.210-2034.290 may be barred from giving rebuttal testimony that is merely an opinion that contradicts opinion testimony of witnesses called by the other side, although the undisclosed expert is permitted to impeach the testimony of opposing experts by testifying to the "falsity or nonexistence of any fact used as the foundation" of an opposing expert's opinion. CCP §2034.310. See *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329. See also *Collin v Connecticut Valley Arms, Inc.* (1982) 137 CA3d 815, 821, 187 CR 306, disapproved on other grounds in *Resch v Volkswagen of Am., Inc.* (1984) 36 C3d 676, 682, 205 CR 827; *Ellenberger v Karr* (1982) 127 CA3d 423, 427, 179 CR 583, 584. See Update §5.33 on the need to disclose expert witnesses.

The citation to CCP §607(b) on Book p 6 should be changed to CCP §607(6).

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Impeachment

[§2.1] Defined

[§2.1A] Suppression of Evidence

Grounds for Impeachment

[§2.2] Bias; Interest; Motive

[§2.3] Prior Settlement With Adversary

[§2.4] Faulty Perception or Recollection

[§2.5] Bad Character for Veracity

[§2.6] Prior Felony Conviction

[§2.7] Prior Inconsistent Statement

[§2.9] Not Confronting Witness With Statement

[§2.10] Confronting Witness With Statement

[§2.12] Introducing Extrinsic Evidence

[§2.13] Contradictory Facts; Introducing Otherwise Inadmissible Matter

[§2.14] Impeaching Experts

[§2.15] Qualifications

[§2.16A] Bias, Interest, Motive; Inconsistency

[§2.17] Subject of Testimony

[§2.19] Technical and Medical Publications

[§2.1] DEFINED



Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and the new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. Although the character of the reform is "nonsubstantive," all provisions of the 1986 Discovery Act have been renumbered, redundancies eliminated, and improvements made to grammar and clarity. The California Law Revision Commission recommended that long and complex passages of the discovery statute be divided into short sections, each with its own heading, to make provisions easier to locate and use, and to simplify the legislative process for amending the statute in the future. "To minimize disruption to courts and practitioners," the new provisions closely track preexisting language and sequencing and retain the same base number as the section from which they were derived, *e.g.*, the section on oral depositions in California (see CCP §2025) becomes Chapter 9, with the subdivisions grouped consecutively under six articles, as separate sections (see CCP §§2025.010-2025.570). See 33 Cal L Rev'n Comm'n Reports 789 (2003).

The impeachment testimony that may be given under CCP §2034.310 by an expert whose name was not disclosed to the opposing party, as is required by CCP §§2034.210-2034.280, is limited to facts that contradict the factual basis for another expert's opinion, but may not include testimony that contradicts the opinion. See cases noted in Update §1.45.

The reference in Book §2.1 to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§258-359 (4th ed 2000). The reference to California Trial Objections should now be to California Trial Objections §§22.7-22.11A (Cal CEB Annual).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 5004 where BAJI 2.20 is cited in Book §2.1.



"Impeachment" refers to attacks on the credibility of the testimony given by a witness. See Book §2.1. An opposing party's position may also be attacked, with the concomitant effect of attacking the party's credibility, by showing that the party willfully suppressed evidence, failed to explain or deny in testimony evidence against the party's position, or failed to produce stronger and more satisfactory evidence that was within the party's power to produce. See Evid C §§412-413. The jury may be instructed that if it finds a party willfully suppressed evidence, it may draw an inference that there was something damaging to the party's case in the evidence suppressed. See *Bibun v AT&T Info. Sys., Inc.* (1993) 13 CA4th 976, 992, 16 CR2d 787 (employer sued for sexual harassment failed to produce alleged harasser's personnel file), disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109. See also *Thor v Boska* (1974) 38 CA3d 558, 567, 113 CR 296 (doctor sued for malpractice failed to produce patient's original medical records). See the dissenting opinion in *Canales v City of Alviso* (1970) 3 C3d 118, 136, 89 CR 601, on the inferences that may be drawn under Evid C §§412-413 from a party's failure to produce evidence.

Source: Torts/California Personal Injury Proof Update/2 Impeachment/GROUNDS FOR IMPEACHMENT/§2.2 Bias; Interest; Motive

GROUNDS FOR IMPEACHMENT

[§2.2] Bias; Interest; Motive

 To Main Book

Evidence of bias that is too remote should be excluded. *Grudt v City of Los Angeles* (1970) 2 C3d 575, 588, 86 CR 465 (trial court should have rejected evidence of prior arrest records of witnesses for plaintiff when evidence was offered on theory it showed witnesses' bias against police officer defendants).

For further examples of the treatment of potential bias, see *Hart v Wielt* (1970) 4 CA3d 224, 231, 84 CR 220 (eliciting from defense witness that he had previously been an adjuster for same insurance company that employed defense counsel was not prejudicial error, especially since no objection was made at trial); *People v Peters* (1972) 23 CA3d 522, 532, 101 CR 403 (inquiry into possibility witness was testifying against party out of homosexual jealousy was proper although evidence of homosexuality is not admissible solely to make testimony suspect).

The reference in the Book to §§1229-1235 of Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§267-279 (4th ed 2000). The reference to §§374-375 should now be to 1 Witkin, California Evidence, *Circumstantial Evidence* §§133-135 (4th ed 2000).

The citation in the Book for *Moniz v Bettencourt* is *Moniz v Bettencourt* (1938) 24 CA2d 718, 76 P2d 535 (not 76 P2d 13).

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.3 Prior Settlement With Adversary

[§2.3] Prior Settlement With Adversary

 To Main Book

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 217 where BAJI 2.28 is cited in Book §2.3.

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.4 Faulty Perception or Recollection

[§2.4] Faulty Perception or Recollection



Evidence of a long history of alcoholism is not admissible to impeach credibility unless it is clearly shown that the witness was intoxicated at the time of the events about which he or she is testifying. *Springer v Reimers* (1970) 4 CA3d 325, 339, 84 CR 486.

Similarly, evidence that the witness had consumed narcotics just before the events to which he or she testified is not admissible to impeach the witness unless there is also expert testimony about the effects of narcotics use on the witness's perceptions. *People v Rocha* (1971) 3 C3d 893, 901, 92 CR 172. See also *People v Ortega* (1969) 2 CA3d 884, 902, 83 CR 260 (evidence of narcotic addiction).

The California Supreme Court has held that it is usually within the trial court's discretion to admit a psychologist's opinion testimony (offered to impeach an adverse witness) dealing with a person's ability to perceive, recall, and relate events accurately and with the distorting effects of excitement and fear on perception and recollection, noting that such evidence may assist the trier of fact in weighing the credibility of eyewitness testimony. See *People v McDonald* (1984) 37 C3d 351, 377, 208 CR 236, 254, disapproved on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431 (*McDonald* court held that trial court's exclusion of psychologist's opinion testimony was prejudicial error in criminal prosecution because eyewitness's identification of defendant was not corroborated by evidence giving it independent reliability; misidentification was main line of defense, and such testimony would have assisted trier of fact).

More recent cases, however, have questioned the usefulness of expert testimony about perception and recollection. In *People v Sanders* (1995) 11 C4th 475, 46 CR2d 751, the California Supreme Court upheld the trial court's exclusion of defendant's proffered expert witness testimony on the unreliability of eyewitness testimony. Distinguishing *People v McDonald*, *supra*, the *Sanders* court noted that the eyewitness testimony was not the only evidence linking the defendant to the crime. The *Sanders* court also reaffirmed that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion. Similarly, in *People v Sandoval* (1994) 30 CA4th 1288, 1297, 36 CR2d 646, the higher court upheld eyewitness testimony against a *McDonald* objection when identity was corroborated by the defendant's own admissions and the jury saw several videotapes of defendant from surveillance cameras. See also *People v Alcalá* (1992) 4 C4th 742, 787, 15 CR2d 432 (no abuse of discretion in rejecting psychologist's testimony on brainwashing, suggestibility, and false memory); *People v Johnson* (1993) 19 CA4th 778, 786, 23 CR2d 703 (no error in rejecting testimony from sociologist and from former convict that prison inmates frequently lied). For discussion of *McDonald*, see *People v Jones* (2003) 30 C4th 1084, 1112, 135 CR2d 370 (following and explaining *McDonald*; exclusion of expert testimony on eyewitness identification, however, "is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability"). See also *People v Brown* (1985) 40 C3d 512, 230 CR 834, rev'd on other grounds in *California v Brown* (1987) 479 US 538, 93 L Ed 2d 934, 107 S Ct 837.

See also Anno, 33 ALR3d 1405 (1970) (nonexpert's opinion on speed based on sound alone).

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§265-266 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.5 Bad Character for Veracity

[§2.5] Bad Character for Veracity

 To Main Book

It has been held improper to introduce evidence of a decedent's bad moral character, even on a damages issue in a wrongful death action. See *Carr v Pacific Tel. Co.* (1972) 26 CA3d 537, 544, 103 CR 120.

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§280-291 (4th ed 2000).

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The passage of Cal Const art I, §28 in June 1982 (as Proposition 8) changed the rules on admissibility of evidence of prior convictions in *criminal* cases, but §28 does not apply to *civil* cases. In civil cases, under *Robbins v Wong* (1994) 27 CA4th 261, 274, 32 CR2d 337:

- Evidence Code §788 remains the controlling statute;
- The trial judge—when there is objection to impeachment by prior felony conviction—should weigh, under Evid C §352, the probative value of the offered impeaching evidence against its prejudicial effect, and in doing so may look to guidelines suggested in criminal cases; and
- The prior conviction need not have been for a crime involving moral turpitude.

It is beyond the scope of this Book to collect or summarize the many criminal prosecution cases in which appellate courts have considered the use of prior conviction evidence to impeach. See, e.g., *People v Wheeler* (1992) 4 C4th 284, 290, 14 CR2d 418 (record must show that trial judge actually weighed, under Evid C §352, probative value of evidence with respect to witness's credibility against risk of undue prejudice), superseded by statute on other grounds as stated in *People v Duran* (2002) 97 CA4th 1448, 119 CR2d 272.

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 211 where BAJI 2.24 is cited in Book §2.6.

Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.7 Prior Inconsistent Statement

[§2.7] Prior Inconsistent Statement



The rule that a prior inconsistent statement may be received in evidence under the Evid C §1235 hearsay exception does not require a trial judge to admit the entire document in which the inconsistent statement is found. See Benson v Honda Motor Co., Ltd. (1994) 26 CA4th 1337, 1349, 32 CR2d 322 (parts of papers co-authored by opposing expert that were not inconsistent with his testimony were excludable as hearsay).

A prior inconsistent statement can be received, under Evid C §1235, as substantive evidence of the truth of the matter stated in criminal as well as in civil cases. California v Green (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930, overruling People v Johnson, cited in Book §2.7. A witness's trial testimony, however, that he does not remember what others said to him on a particular occasion, if the loss of memory is genuine, does not justify the introduction under Evid C §1235 of a prior statement by the witness about what the others said. See People v Hawthorne (1992) 4 C4th 43, 55, 14 CR2d 133 (prior statement not inconsistent with testimony).

Normally, a witness's testimony that he or she does not remember an event is not "inconsistent" with the witness's prior statement describing the event. However, when a witness's testimony goes beyond not remembering, evidence of that witness's prior statements should be received not only to impeach his or her credibility, but also to prove the truth of the matter stated. Clifton v Ullis (1976) 17 C3d 99, 130 CR 155 (when witness's testimony out of jury's presence that her husband had not fallen asleep at the wheel was read to jury, other witnesses should have been permitted to testify about contrary statements in telephone calls made by the witness shortly after accident). Moreover, a witness's testimony that he or she does not remember may be inconsistent in effect, if not in express terms, when the witness's absence of memory is not credible. People v Green (1971) 3 C3d 981, 988, 92 CR 494. See also People v Wheeler (1971) 23 CA3d 290, 309, 100 CR 198 (claimed absence of memory not credible); People v Newton (1970) 8 CA3d 359, 384, 87 CR 394 (witness's grand jury testimony not admissible after trial testimony that he did not remember); O'Gan v King City Joint Union High Sch. Dist. (1970) 3 CA3d 641, 644, 83 CR 795 (letter containing witness's accident description not admissible because deposition testimony indicated she did not know details of accident).

The reference to Witkin should now be to 3 Witkin, California Evidence, Presentation at Trial §§328-331 (4th ed 2000).

See CACI 212 where BAJI 2.25 is cited in Book §2.7.

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.9 Not Confronting Witness With Statement

[§2.9] Not Confronting Witness With Statement

 To Main Book

Although there is no need to reveal a prior inconsistent statement to a witness before or while cross-examining him or her, opposing counsel may be entitled to see (or hear) the statement before cross-examination begins. See *Kadelbach v Amaral* (1973) 31 CA3d 814, 821, 107 CR 720 (tape-recorded statement of witness could not be withheld as work product).

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.10 Confronting Witness With Statement

[§2.10] Confronting Witness With Statement

 To Main Book

The references to Witkin in Book §2.10 should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§341, 352-354 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.12 Introducing Extrinsic Evidence

[§2.12] Introducing Extrinsic Evidence

 To Main Book

A recording of a prior inconsistent statement can be used to impeach a witness. See *People v Brown* (1971) 14 CA3d 334, 338, 92 CR 370.

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§332-333 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.13 Contradictory Facts; Introducing Otherwise Inadmissible Matter

[§2.13] Contradictory Facts; Introducing Otherwise Inadmissible Matter

 To Main Book

The court in *Morehouse v Taubman Co.* (1970) 5 CA3d 548, 555, 85 CR 308, held that testimony that guardrails were installed after a construction site injury, although not admissible to prove negligence (Evid C §1151), was properly received for the limited purpose of showing defendant's control of the premises. See Anno, 15 ALR5th 119 (1993) (admissibility of evidence of repairs, change of conditions, or precautions taken after accident).

See CACI 206 where BAJI 2.05 is cited in Book §2.13.

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[§2.14] IMPEACHING EXPERTS



An expert who has testified in a product liability lawsuit that the design of the product "was safe and competent," or "generally safe," may be impeachable by evidence that the expert knew of other accidents involving the product, even if those accidents occurred in dissimilar circumstances. See *Cooper v Firestone Tire & Rubber Co.* (9th Cir 1991) 945 F2d 1103 (expert could avoid such impeachment by restricting testimony to product's safety with respect to particular type of incident or by acknowledging on direct examination that accidents had occurred in distinguishable circumstances).

See *Allen v Superior Court* (1984) 151 CA3d 447, 198 CR 737, cited in Update §13.6, for limitations on discovery for impeachment purposes.

See Anno, 11 ALR5th 1 (1993) (propriety of questioning expert witness about specific incidents or allegations of expert's professional negligence or unprofessional conduct).

The reference to Witkin should now be to 3 Witkin, *California Evidence, Presentation at Trial* §§250-255 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.15 Qualifications

[§2.15] Qualifications

 To Main Book

Even though a witness has been qualified as an expert on one aspect of a subject (*e.g.*, fabrication and use of a particular kind of catheter), he or she may be prevented from testifying as an expert on another aspect of that subject (*e.g.*, the chemical composition or tensile strength of the tubing and whether a defect in its walls caused it to "kink"). See *Putensen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1080, 91 CR 319.

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §189 (4th ed 2000).

See CACI 219, 221 where BAJI 2.40-2.41 is cited in Book §2.7.

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Like any witness's testimony, an expert witness's can be impeached during cross-examination by questions that seek to show bias. See Book and Update §2.2 and Book §2.16. In addition, an expert who has testified in other cases about the same subject can be confronted with inconsistencies between that testimony and the testimony given in the present case. See People v Zambrano (2007) 41 C4th 1082, 1164, 63 CR3d 29Z, disapproved on other grounds in People v Doolin (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (prison expert testifying about defendant's risk to prison staff or inmates); People v Sandoval (1992) 4 C4th 155, 179, 14 CR2d 342, aff'd on other grounds sub nom Victor v Nebraska (1994) 509 US 954, 127 L Ed 2d 789, 114 S Ct 40 (forensic scientist testifying about effect of PCP and alcohol on victim's mental state).

EXAMPLE: The court in *People v Sandoval*, a criminal prosecution, saw no reversible error in the trial judge's permitting questions such as the following to be addressed to an opposing expert on cross-examination (the questions have been modified to fit a personal injury case):

Q. Did you testify as an expert for [e.g., the defendant] in the [name of case] case?

A. Yes.

Q. And in that case, did you express the view, as your expert opinion, that [*succinctly stated, opinion given in other case*]?

A. I did.

Q. Would you agree that your opinion in that case coincided with the position being maintained by the party that retained you in that case?

A.

Q. When you testify in a lawsuit, do you want the outcome of the case to be consistent with your testimony?

A.

Q. Before you took the stand today, had you had discussions with [*opposing counsel*] about the testimony that you would be asked to give?

A. Yes.

Q. In those discussions, did you discuss with the attorneys what questions they should ask, and how they should phrase their questions, so as to maintain the interest of the jury and so that your answers would have the most dramatic effect?

A.

Q. You have testified in how many cases, would you estimate, that have involved the same general matters about which you testified today?

A.

Q. Given your experience in the field, were you even able to suggest to [*opposing counsel*] questions and phrasings that would help to dispel any idea that you might be biased in their favor?

A.

Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.17 Subject of Testimony

[§2.17] Subject of Testimony

 To Main Book

Neither the attorney-client privilege nor the work-product doctrine can protect matters relied on or considered in the formation of an expert's opinion in light of Evid C §721(a) (allowing full cross-examination of the basis of an expert's opinions). *People v Milner* (1988) 45 C3d 227, 241, 246 CR 713, 722.

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Source: Torts/California Personal Injury Proof Update/2 Impeachment/§2.19 Technical and Medical Publications

[§2.19] Technical and Medical Publications

 To Main Book

Evidence Code §721 permits cross-examination of an expert concerning the content or tenor of scientific, technical, or professional publications, including publications not produced for public reference. *McGarity v Department of Transp.* (1992) 8 CA4th 677, 10 CR2d 344. Effective January 1, 1998, Evid C §721 was amended to expand the scope of cross-examination of expert witnesses. An expert may now be cross-examined on material that has been established as a "reliable authority" by the testimony or admission of the expert, by other expert testimony, or by judicial notice. Once the material has been admitted into evidence, the relevant portions may be read into evidence but may not be received as exhibits. Evid C §721(b)(3).

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §255 (4th ed 2000).

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Plaintiff

Personal Background

[§3.5] Family Status

Liability Testimony

[§3.10] Destination; Route; Purpose

[§3.16] Defendant's Admissions; Insurance

[§3.17] Habit or Custom

[§3.18] Plaintiff's Other Accidents

[§3.19] Injury Testimony

Health Before Accident

[§3.22] Aggravation of Prior Condition; Predisposition to Injury

[§3.25] Pain

[§3.26] Disability Generally; Impairment of Normal Life

[§3.29] Mental Suffering

[§3.30] Impaired Earning Capacity

[§3.32] Plaintiff's Testimony on Loss of Earnings

[§3.33] Plaintiff's Testimony as Expert

Source: Torts/California Personal Injury Proof Update/3 Plaintiff/PERSONAL BACKGROUND/§3.5 Family Status

PERSONAL BACKGROUND

[§3.5] Family Status

 To Main Book

On the admissibility of evidence concerning a plaintiff's marital status in a wrongful death action, see [California Tort Damages §3.44 \(2d ed Cal CEB 2002\)](#).

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Source: Torts/California Personal Injury Proof Update/3 Plaintiff/LIABILITY TESTIMONY/§3.10 Destination; Route; Purpose

LIABILITY TESTIMONY

[§3.10] Destination; Route; Purpose

 To Main Book

Testimony about a decedent's statements concerning compensation paid for a ride in which decedent was killed can sometimes be received under the hearsay exception for statements of an existing state of mind (Evid C §1250), and if the evidence is offered to prove or explain acts or conduct of declarant. See Smith v Slifer (1969) 1 CA3d 748, 81 CR 871.

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A good illustration of the foundational requirements necessary to admit a hearsay statement as an authorized admission under Evid C §1222 can be found in *O'Mary v Mitsubishi Elec. Am., Inc.* (1997) 59 CA4th 563, 570, 69 CR2d 389.

Evidence of a statement showing bias or motive of a witness is admissible even though its introduction discloses that defendant was insured, if the probative value as impeachment outweighs the prejudice inherent in mentioning insurance. See *Brainard v Cotner* (1976) 59 CA3d 790, 130 CR 915 (plaintiff should have been permitted to testify that defendant admitted that her statement to police concerning plaintiff's fault was made "because I was fearful of my insurance").

Although it is improper for plaintiff's attorney to ask a question that elicits testimony that defendant is insured, if the witness mentions insurance unexpectedly and unresponsively, the impropriety may be cured by admonishing the jury. See *Hart v Wielt* (1970) 4 CA3d 224, 230, 84 CR 220, 224. However, defendant's passing references to his or her insurance coverage do not justify plaintiff's attorney asking defendant about the limits of his or her policy to indicate that a verdict against another defendant is necessary if plaintiff is to be fully compensated. See *Self v General Motors Corp.* (1974) 42 CA3d 1, 12, 116 CR 575, 582, overruled on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607 (new trial justified despite admonition to disregard).

The reference to Witkin §500 and §§374-375 should now be to 1 Witkin, California Evidence, *Opinion Evidence* §§59, 133-137 (4th ed 2000), respectively.

Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.17 Habit or Custom

[§3.17] Habit or Custom

 To Main Book

The reference to Witkin should now be to 1 Witkin, California Evidence, *Circumstantial Evidence* §§67-73 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.18 Plaintiff's Other Accidents

[§3.18] Plaintiff's Other Accidents

 To Main Book

It has been held to be reversible error to permit cross-examination of a plaintiff-driver about a prior accident. See *Downing v Barrett Mobile Home Transp., Inc.* (1974) 38 CA3d 519, 113 CR 277.

The reference to Witkin should now be to 1 Witkin, California Evidence, *Circumstantial Evidence* §40 (4th ed 2000).

Sbmatovich v New Sonoma Creamery, cited in Book §3.18, was disapproved on other grounds in *Prichard v Veterans Cab Co.* (1965) 63 C2d 727, 732, 47 CR 904.

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A plaintiff is competent to testify that he suffered the injuries he describes; no expert testimony is needed. *Windeler v Scheers Jewelers* (1970) 8 CA3d 844, 853, 88 CR 39, 45 (injuries to nervous system).

A plaintiff may also testify as to his or her present pain and suffering. *In re Emilie A.* (1992) 9 CA4th 1695, 12 CR2d 294.

A defendant may present evidence that another person aggravated the plaintiff's original injuries. In *Marina Emergency Med. Group v Superior Court* (2000) 84 CA4th 435, 100 CR2d 866, an emergency room doctor's negligence was allegedly aggravated by the subsequent negligence of the patient's personal doctor. The Second District Court of Appeal held that the emergency room doctor is entitled to present evidence of the subsequent negligence and to have the jury allocate fault between the two doctors. CC §1431.2(a) (Proposition 51).

If the jury finds that the emergency room doctor is liable to the patient, he or she is jointly and severally liable for all economic damages, but only severally liable for his or her allocated share of the noneconomic damages. See *Evangelatos v Superior Court* (1988) 44 C3d 1188, 1192, 246 CR 629; *Henry v Superior Court* (2008) 160 CA4th 440, 455, 72 CR3d 808 (defendant may introduce evidence of physician's later malpractice to limit noneconomic damages).

Source: Torts/California Personal Injury Proof Update/3 Plaintiff/Health Before Accident/§3.22 Aggravation of Prior Condition; Predisposition to Injury

Health Before Accident

[§3.22] Aggravation of Prior Condition; Predisposition to Injury

 **To Main Book**

See California Tort Damages §1.88 (2d ed Cal CEB 2002) for information on damages for aggravation of a prior condition and Tort Damages §1.87 on damages for susceptibility to future injury.

The reference to Witkin should now be to 1 Witkin, California Evidence, *Circumstantial Evidence* §§67-73 (4th ed 2000).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 3927-3928 where BAJI 14.65 is cited in Book §3.22.

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Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.25 Pain

[§3.25] Pain



The testimony of plaintiff or of another lay witness can be the basis of damages for pain and suffering; medical testimony about pain is not needed. *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 895, 103 CR 856, 860; *In re Emilye A.* (1992) 9 CA4th 1695, 12 CR2d 294.

The rule applicable to an administrative law judge ruling on a disability insurance benefits claim is not inconsistent with the above rule: that the judge cannot, without a clearly stated and convincing reason, reject the claimant's testimony about his or her own pain, if there is medical evidence that establishes an objective basis for some degree of pain and related symptoms, and if there is no affirmative evidence of malingering. See *Dodrill v Shalala* (9th Cir 1993) 12 F3d 915.

Damages for "pain, suffering, inconvenience, mental suffering, emotional distress... injury to reputation and humiliation" are all "non-economic damages" under CC §1431.2(b)(2). For discussion of issues that arise under CC §1431.2, which is part of the Fair Responsibility Act of 1986 (also known as Proposition 51), see California Tort Damages §§15.8, 15.10 (2d ed Cal CEB 2002). See also Peyrat, *Joint and Several Liability, Comparative Fault, and the Fair Responsibility Act of 1986 in Joint & Several Liability* (CEB Program Handbook June/July 1993).

For information on damages for pain and suffering, see generally California Tort Damages §§1.70-1.81 (2d ed Cal CEB 2002).

See CACI 3905A where BAJI 14.13 is cited in Book §3.25.

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Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.26 Disability Generally; Impairment of Normal Life

[§3.26] Disability Generally; Impairment of Normal Life

 To Main Book

For information on damages for disability and impairment of normal life, see generally California Tort Damages §§1.85-1.86 (2d ed Cal CEB 2002).

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Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.29 Mental Suffering

[§3.29] Mental Suffering

 To Main Book

On "noneconomic damages" under CC §1431.2(b)(2), see Update §3.25.

For information on damages for mental suffering and emotional distress, see generally California Tort Damages §§1.73-1.74, 6.1-6.24 (2d ed Cal CEB 2002).

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[§3.30] IMPAIRED EARNING CAPACITY



There is no requirement that future earning capacity be established by expert testimony. Loss of earning power may be inferred from the nature of the injury, with or without proof of actual earnings or income either before or after the injury. *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 1280, 78 CR2d 557.

A plaintiff who claims damages for impairment of self-employment earnings but offers no records to substantiate preinjury earnings may be required to state whether he or she filed income tax returns. The claim for damages waives the privilege against self-incrimination. *Newson v City of Oakland* (1974) 37 CA3d 1050, 112 CR 890.

Evidence of after-tax earnings is inadmissible, unless the court instructs the jurors to use the discount rate of a tax-free investment when reducing an award based on net earnings to present value. See *Canavin v Pacific S.W. Airlines* (1983) 148 CA3d 512, 522, 196 CR 82, 87 (effect of income tax on earnings is speculative and irrelevant to damages issue). See also BAJI 14.12, Comment; BAJI 14.70.

For information on damages for impaired earning capacity, see generally California Tort Damages §§1.41-1.65 (2d ed Cal CEB 2002).

See CACI 3903C-3903D where BAJI 14.11-14.12 and the Comment to BAJI 14.12 are cited, and see CACI 3904 where BAJI 14.70 is cited, in Book §3.30.

Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.32 Plaintiff's Testimony on Loss of Earnings

[§3.32] Plaintiff's Testimony on Loss of Earnings



A doctor, hospital, or other health care provider sued for professional negligence (medical malpractice) may introduce evidence of collateral source benefits received by a plaintiff under some circumstances. See CC §3333.1. But evidence of the tax-free status of any collateral source benefits is inadmissible. Cox v Superior Court (2002) 98 CA4th 670, 674, 120 CR2d 45.

In McKinney v California Portland Cement Co. (2002) 96 CA4th 1214, 1220, 1224, 117 CR2d 849, the collateral source rule precluded defendants from introducing evidence of survivor benefits that the plaintiff widow received after her husband's death even though her benefits were from the same sources and nearly identical to the decedent's pension and Social Security income received while he was alive. Evidence of the latter was not barred by the collateral source rule and was admissible to establish his past and future lost benefits. However, Rotolo Chevrolet v Superior Court (2003) 105 CA4th 242, 129 CR2d 283, held that the trial court had erred in granting plaintiff's motion in limine to exclude under the collateral source rule any evidence of disability retirement benefits that he had been paid and would receive in the future. Although the plaintiff had relied primarily on *McKinney*, the court of appeal in *Rotolo* found that case to be distinguishable and inapplicable:

[I]n *McKinney*, the collateral source rule was applied to Social Security benefits which replaced benefits that had stopped, and to pension payments which had been constructively paid for, thus triggering the classic rationale for the rule. Here, however, [plaintiff]'s disability pension payments do not replace anything; they are alternative payments to a regular pension.

105 CA4th at 248.

In assessing loss of earning capacity, the jury may be instructed when circumstances warrant in a lawsuit under the Federal Employers' Liability Act (FELA) (45 USC §§51-60) that the plaintiff does *not* have a right to workers' compensation benefits. Lund v San Joaquin Valley R.R. (2003) 31 C4th 1, 13, 1 CR3d 412.

For further discussion of the collateral source rule, see Update §§7.8, 14.9.

Civil Code §3333.1(a) has been upheld against a challenge that it unconstitutionally denies due process and equal protection. See Fein v Permanente Med. Group (1985) 38 C3d 137, 166, 211 CR 368, 388.

Source: Torts/California Personal Injury Proof Update/3 Plaintiff/§3.33 Plaintiff's Testimony as Expert

[§3.33] Plaintiff's Testimony as Expert

This section was added to this chapter since the publication of the book. Click to return to the book.

 [To Main Book](#)

A plaintiff is not precluded from testifying as an expert if he or she is so qualified. See *Douglas v Ostermeier* (1991) 1 CA4th 729, 2 CR2d 594 (plaintiff testified as to value of defendant's commercial real property for purposes of supporting an award of punitive damages in case involving fraud in sale of vehicle). See also *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1455, 274 CR 712, 718, discussed in Update §5.33.

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Police Officers

Preparation

Reviewing Accident

[§§4.3-4.4] Sample California Highway Patrol Vehicle Accident Report; Code for Interpreting California Highway Patrol Accident Reports

Compelling Attendance at Trial

[§4.12] Using Subpoena

[§4.13] Range of Subpoena

[§4.14] Depositing Fees; Reimbursing Police Agency

[§4.17] **Qualifying the Officer**

Using Report to Aid Testimony

[§4.22] Refreshing Memory

Activities and Observations at Accident Scene

Drivers; Passengers; Pedestrians

[§4.36] Intoxication

Statements of Parties and Witnesses

[§4.42] Admissibility Under Hearsay Exceptions

[§4.44] Adoptive Admissions

[§4.46] Spontaneous Statements

[§4.46A] Statements Reported by Qualified Law Enforcement Officer at Preliminary Hearing

[§4.47] Statements About Liability Insurance

[§4.48] Conviction; Plea of Guilty or Nolo Contendere

[§4.49] **Officer as Expert**

Subjects of Expert Testimony

[§4.53] Point of Impact

[§4.56] Safe Speed Under the Conditions

[§4.57] Speed Before Collision

[§4.58] Influence of Narcotics

Source: Torts/California Personal Injury Proof Update/4 Police Officers/PREPARATION/§§4.3-4.4 Sample California Highway Patrol Vehicle Accident Report; Code for Interpreting California Highway Patrol Accident Reports

PREPARATION

Reviewing Accident

[§§4.3-4.4] Sample California Highway Patrol Vehicle Accident Report; Code for Interpreting California Highway Patrol Accident Reports

 [To Main Book](#)

According to the records department of the California Highway Patrol, the codes referred to in Book §§4.3-4.4 are no longer used. The accident report form set forth in Book §4.3 has been replaced with the following form:

 [Print](#)

STATE OF CALIFORNIA
TRAFFIC COLLISION REPORT
 CHP 555 Page 1 (Rev.7-03) OPI 061

SPECIAL CONDITIONS		NUMBER INJURED	HIT & RUN FELONY	CITY		JUDICIAL DISTRICT		LOCAL REPORT NUMBER				
		NUMBER KILLED	HIT & RUN MISDEMEANOR	COUNTY		REPORTING DISTRICT		BEAT				
LOCATION	COLLISION OCCURRED ON					MO.	DAY	YEAR	TIME (2400)	NCIC #	OFFICER I.D.	
	MILEPOST INFORMATION					DAY OF WEEK			TOW AWAY	PHOTOGRAPHS BY: <input type="checkbox"/> NONE		
	FEET/MILES OF					S M T W T F S			<input type="checkbox"/> YES <input type="checkbox"/> NO	STATE HWY REL. <input type="checkbox"/> YES <input type="checkbox"/> NO		
AT INTERSECTION WITH												
OR: FEET/MILES OF												
PARTY 1	DRIVER'S LICENSE NUMBER		STATE	CLASS	AIR BAG	SAFETY EQUIP.	VEH. YEAR	MAKE/MODEL/COLOR		LICENSE NUMBER	STATE	
	DRIVER NAME (FIRST, MIDDLE, LAST)											
	STREET ADDRESS											
	CITY/STATE/ZIP											
	SEX	HAIR	EYES	HEIGHT	WEIGHT	BIRTHDATE	RACE	DISPOSITION OF VEHICLE ON ORDERS OF: <input type="checkbox"/> OFFICER <input type="checkbox"/> DRIVER <input type="checkbox"/> OTHER				
	HOME PHONE						BUSINESS PHONE					
	INSURANCE CARRIER						POLICY NUMBER					
	DIR OF TRAVEL ON STREET OR HIGHWAY						SPEED LIMIT					
	VEHICLE IDENTIFICATION NUMBER:											
	VEHICLE TYPE DESCRIBE VEHICLE DAMAGE SHADE IN DAMAGED AREA											
<input type="checkbox"/> UNK <input type="checkbox"/> NONE <input type="checkbox"/> MINOR <input type="checkbox"/> MOD. <input type="checkbox"/> MAJOR <input type="checkbox"/> ROLL-OVER												
CA _____ DOT _____ CAL-T _____ TCP/PSC _____ MC/MX _____												
PARTY 2	DRIVER'S LICENSE NUMBER		STATE	CLASS	AIR BAG	SAFETY EQUIP.	VEH. YEAR	MAKE/MODEL/COLOR		LICENSE NUMBER	STATE	
	DRIVER NAME (FIRST, MIDDLE, LAST)											
	STREET ADDRESS											
	CITY/STATE/ZIP											
	SEX	HAIR	EYES	HEIGHT	WEIGHT	BIRTHDATE	RACE	DISPOSITION OF VEHICLE ON ORDERS OF: <input type="checkbox"/> OFFICER <input type="checkbox"/> DRIVER <input type="checkbox"/> OTHER				
	HOME PHONE						BUSINESS PHONE					
	INSURANCE CARRIER						POLICY NUMBER					
	DIR OF TRAVEL ON STREET OR HIGHWAY						SPEED LIMIT					
	VEHICLE IDENTIFICATION NUMBER:											
	VEHICLE TYPE DESCRIBE VEHICLE DAMAGE SHADE IN DAMAGED AREA											
<input type="checkbox"/> UNK <input type="checkbox"/> NONE <input type="checkbox"/> MINOR <input type="checkbox"/> MOD. <input type="checkbox"/> MAJOR <input type="checkbox"/> ROLL-OVER												
CA _____ DOT _____ CAL-T _____ TCP/PSC _____ MC/MX _____												
PARTY 3	DRIVER'S LICENSE NUMBER		STATE	CLASS	AIR BAG	SAFETY EQUIP.	VEH. YEAR	MAKE/MODEL/COLOR		LICENSE NUMBER	STATE	
	DRIVER NAME (FIRST, MIDDLE, LAST)											
	STREET ADDRESS											
	CITY/STATE/ZIP											
	SEX	HAIR	EYES	HEIGHT	WEIGHT	BIRTHDATE	RACE	DISPOSITION OF VEHICLE ON ORDERS OF: <input type="checkbox"/> OFFICER <input type="checkbox"/> DRIVER <input type="checkbox"/> OTHER				
	HOME PHONE						BUSINESS PHONE					
	INSURANCE CARRIER						POLICY NUMBER					
	DIR OF TRAVEL ON STREET OR HIGHWAY						SPEED LIMIT					
	VEHICLE IDENTIFICATION NUMBER:											
	VEHICLE TYPE DESCRIBE VEHICLE DAMAGE SHADE IN DAMAGED AREA											
<input type="checkbox"/> UNK <input type="checkbox"/> NONE <input type="checkbox"/> MINOR <input type="checkbox"/> MOD. <input type="checkbox"/> MAJOR <input type="checkbox"/> ROLL-OVER												
CA _____ DOT _____ CAL-T _____ TCP/PSC _____ MC/MX _____												
PREPARER'S NAME			DISPATCH NOTIFIED			REVIEWER'S NAME			DATE REVIEWED			
			<input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> N/A									

STATE OF CALIFORNIA
TRAFFIC COLLISION CODING
CHP 555 Page 2 (Rev. 7-03) OPI 061

DATE OF COLLISION (MO. DAY YEAR) TIME (2400) NOIC # OFFICER I.D. NUMBER

OWNER'S NAME OWNER'S ADDRESS NOTIFIED YES NO
PROPERTY DAMAGE DESCRIPTION OF DAMAGE

SEATING POSITION OCCUPANTS SAFETY EQUIPMENT M/C BICYCLE HELMET INATTENTION CODES
1- DRIVER 2 TO 6 - PASSENGERS 7 - STATION WAGON REAR 8 - REAR OCC. TRK. OR VAN 9 - POSITION UNKNOWN 0 - OTHER
A - NONE IN VEHICLE B - UNKNOWN C - LAP BELT USED D - LAP BELT NOT USED E - SHOULDER HARNESS USED F - SHOULDER HARNESS NOT USED G - LAP/SHOULDER HARNESS USED H - LAP/SHOULDER HARNESS NOT USED I - PASSIVE RESTRAINT USED K - PASSIVE RESTRAINT NOT USED
L - AIR BAG DEPLOYED M - AIR BAG NOT DEPLOYED N - OTHER P - NOT REQUIRED
Q - IN VEHICLE USED R - IN VEHICLE NOT USED S - IN VEHICLE USE UNKNOWN T - IN VEHICLE IMPROPER USE U - NONE IN VEHICLE
DRIVER PASSENGER V - NO X - NO W - YES Y - YES
EJECTED FROM VEHICLE 0 - NOT EJECTED 1 - FULLY EJECTED 2 - PARTIALLY EJECTED 3 - UNKNOWN
A - CELLPHONE HANDHELD B - CELLPHONE HANDSFREE C - ELECTRONIC EQUIPMENT D - RADIO / CD E - SMOKING F - EATING G - CHILDREN H - ANIMALS I - PERSONAL HYGIENE J - READING K - OTHER



ITEMS MARKED BELOW FOLLOWED BY AN ASTERISK (*) SHOULD BE EXPLAINED IN THE NARRATIVE.

Table with columns for PRIMARY COLLISION FACTOR, TRAFFIC CONTROL DEVICES, SPECIAL INFORMATION, and MOVEMENT PRECEDING COLLISION. Rows include categories like WEATHER, LIGHTING, ROADWAY SURFACE, ROADWAY CONDITION(S), PEDESTRIAN'S ACTIONS, and SOBERITY - DRUG PHYSICAL.

SKETCH area with a circle and the text 'INDICATE NORTH'. MISCELLANEOUS section for additional notes.

STATE OF CALIFORNIA
INJURED / WITNESS / PASSENGERS
CHP 555 Page 3 (Rev. 8-97) OPI 042

DATE OF COLLISION (MO. DAY YEAR)				TIME (2400)	NCIC #				OFFICER I.D.					NUMBER				
WITNESS ONLY	PASSENGER ONLY	AGE	SEX	EXTENT OF INJURY ("X" ONE)				INJURED WAS ("X" ONE)					PARTY NUMBER	SEAT POS.	SAFETY EQUIP.	EJECTED		
				FATAL INJURY	SEVERE INJURY	OTHER VISIBLE INJURY	COMPLAINT OF PAIN	DRIVER	PASS.	PED.	BICYCLIST	OTHER						
<input type="checkbox"/> #	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>						
NAME / D. O. B. / ADDRESS												TELEPHONE						
(INJURED ONLY) TRANSPORTED BY:								TAKEN TO:										
DESCRIBE INJURIES																		
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Source: Torts/California Personal Injury Proof Update/4 Police Officers/Compelling Attendance at Trial/§4.12 Using Subpoena

Compelling Attendance at Trial

[§4.12] Using Subpoena

 To Main Book

Government Code §68097.1 has been amended to provide that a peace officer (firefighter, state employee, or other specified person) may be subpoenaed by serving a copy of the subpoena on the officer personally or by delivering two copies to the officer's immediate superior or that superior's agent designated "to receive that service."

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.13 Range of Subpoena

[§4.13] Range of Subpoena

 **To Main Book**

Code of Civil Procedure §1989 now permits subpoenaing any witness who "is a resident within the state at the time of service."

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.14 Depositing Fees; Reimbursing Police Agency

[§4.14] Depositing Fees; Reimbursing Police Agency

 To Main Book

The amount of the fee that must be tendered together with the subpoena to the public entity has been changed to \$150 for each day of attendance as a witness required of a peace officer employed by that entity. Govt C §68097.2. The earlier requirement to deposit the fee with the court clerk has been eliminated. The requirement includes firefighters, marshals, deputy marshals, peace officers from the Justice Department or fire marshal's office, and Justice Department technical analysts as well as members of the California Highway Patrol, sheriffs, deputy sheriffs, city policemen, and other state employees. Govt C §§68097-68097.10.

The party requesting the subpoena must reimburse the officer's employer for the actual cost of the officer's pay, travel expenses, and other expenses of the officer's attendance. If the cost proves to be less than the amount deposited, the excess must be refunded; if more, the party must pay the difference. Govt C §68097.2.

The same fee as initially tendered must be tendered to the public entity employing the witness before the witness can be ordered to return to court beyond the original subpoena date. Govt C §68097.5.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.17 Qualifying the Officer

[§4.17] Qualifying the Officer

 To Main Book

The officer training course mentioned in Book §4.17 is now 22 weeks long.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/USING REPORT TO AID TESTIMONY/§4.22 Refreshing Memory

USING REPORT TO AID TESTIMONY

[§4.22] Refreshing Memory

 **To Main Book**

Robinson v Cable, cited in Book §4.22, was overruled in part on other grounds by *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/ACTIVITIES AND OBSERVATIONS AT ACCIDENT SCENE/Drivers; Passengers; Pedestrians/§4.36 Intoxication

ACTIVITIES AND OBSERVATIONS AT ACCIDENT SCENE

Drivers; Passengers; Pedestrians

[§4.36] Intoxication

 **To Main Book**

A police officer may testify about observations indicating intoxication—*e.g.*, the motorist's face was flushed, his eyes were red and watery, his speech was slurred, his balance was unsteady, and he exuded an odor of alcohol—but the officer should not be permitted to testify that the subject failed a horizontal gaze nystagmus (HGN) field sobriety test administered by the officer until the trial judge, after a *Kelly* (formerly *Kelly/Frye*) hearing, has determined that the HGN test has general acceptance within the relevant scientific community. *People v Leaby* (1994) 8 C4th 587, 34 CR2d 663. See Update §5.62 on the continued applicability of the *Kelly* standard in California state courts and the new *Daubert* standard for federal courts.

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §12 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/STATEMENTS OF PARTIES AND WITNESSES/§4.42 Admissibility Under Hearsay Exceptions

STATEMENTS OF PARTIES AND WITNESSES

[§4.42] Admissibility Under Hearsay Exceptions

 **To Main Book**

Evidence of a statement that is "an identification of a party or another as a person who participated in a crime or other occurrence" may be received under a specific exception to the hearsay rule. See Evid C §1238. Under Fed R Evid 801(d)(1)(C), a prior statement is not hearsay if it is one "of identification of a person made after perceiving the person," and the witness testifies at the trial and is subject to cross-examination concerning the statement.

It is beyond the scope of this Book to cite the many state and federal cases that have applied hearsay exceptions in criminal prosecutions. See, *e.g.*, *U.S. v Owens* (1988) 484 US 554, 98 L Ed 2d 951, 108 S Ct 838.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.44 Adoptive Admissions

[§4.44] Adoptive Admissions

 To Main Book

It is beyond the scope of this Book to cite the many state and federal cases that have ruled on the admissibility of adoptive admissions in criminal prosecutions. See, *e.g.*, *People v Medina* (1990) 51 C3d 870, 891, 274 CR 849 (testimony of accused murderer's silence in response to his sister's question, "Why did you have to shoot those three poor boys?").

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It is beyond the scope of this Book to cite the many state and federal cases that have ruled on the admissibility of spontaneous statements in criminal prosecutions. See, *e.g.*, *People v Raley* (1992) 2 C4th 870, 8 CR2d 678 (statements made 18 hours after a criminal attack could still qualify as spontaneous); *People v Poggi* (1988) 45 C3d 306, 319, 246 CR 886 (statements by wounded victim were spontaneous even though made in response to policeman's questions 30 minutes after incident); *People v Trimble* (1992) 5 CA4th 1225, 7 CR2d 450 (statement made by 2½-year-old witness one day after murder qualified as spontaneous statement).

Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.46A Statements Reported by Qualified Law Enforcement Officer at Preliminary Hearing

[§4.46A] Statements Reported by Qualified Law Enforcement Officer at Preliminary Hearing

 To Main Book

Special rules apply to the admission of hearsay evidence at a preliminary hearing in a criminal case. Proposition 115, adopted by voters in 1990, added language to the state constitution "to protect victims and witnesses in criminal cases." Cal Const art I, §30(b). The measure also included statutory provisions, one of which directed that at a preliminary hearing the finding of probable cause necessary to hold a person for trial "may be based in whole or in part on the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." Pen C §872(b).

This statutory exception to the hearsay rule applies only to a law enforcement officer (or an honorably retired law enforcement officer, effective January 1, 2006) testifying at the preliminary hearing who meets certain qualifications, *e.g.*, has 5 years' experience in law enforcement. Pen C §872(b). The hearsay exception under §872 is viable even when someone at the scene of the crime translates the victim's statement. *Correa v Superior Court* (2002) 27 C4th 444, 463, 117 CR2d 27 (contemporaneously translated statement is attributable to declarant not to translator, and does not add impermissible layer of hearsay). Only a single layer of hearsay is involved when an officer testifies at the preliminary hearing about what declarant said through her translator, and such testimony is admissible under Proposition 115. 27 C4th at 464.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.47 Statements About Liability Insurance

[§4.47] Statements About Liability Insurance

 **To Main Book**

The reference to Witkin should now be to 1 Witkin, California Evidence, *Circumstantial Evidence* §§133-137 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.48 Conviction; Plea of Guilty or Nolo Contendere

[§4.48] Conviction; Plea of Guilty or Nolo Contendere

 To Main Book

Penal Code §1016 now provides that, for a crime punishable as a felony, the legal effect of a plea of nolo contendere is the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, neither a plea of nolo contendere nor an admission required by a court during an inquiry into the voluntariness of and factual basis for a plea may be used against a pleader as an admission in a civil action based on or growing out of the same act as in the criminal prosecution. Pen C §1016.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.49 OFFICER AS EXPERT

[§4.49] OFFICER AS EXPERT

 To Main Book

Traffic officers whose duties include automobile accident investigations may be qualified as experts and give opinion testimony based on their own observations concerning factors included in an accident. *Hart v Wielt* (1970) 4 CA3d 224, 229, 84 CR 220; see Update §4.56.

In *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 274, 129 CR 146, the court held that accident reconstruction is a proper subject for expert testimony, and that the CHP officer, who devoted 18 years to accident analysis, investigated over 5000 accidents, and wrote books on the subject was qualified to testify as an expert on the trajectory of a motorcycle after a collision.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/Subjects of Expert Testimony/§4.53 Point of Impact

Subjects of Expert Testimony

[§4.53] Point of Impact



The court in *Arellano v Moreno* (1973) 33 CA3d 877, 883, 109 CR 421, held that it was not error to receive a police officer's opinion on the point of impact. The fact that the opinion was based on the driver's statements rather than physical evidence went to the weight, not admissibility, of the evidence.

Consistent with the *Arellano* holding is *People v Miller* (1994) 25 CA4th 913, 918, 31 CR2d 423 (expert may rely on reports, statements, and other information that might not be admissible evidence). *Miller* did not involve motor vehicles or personal injuries, but pointed out that the 1967 adoption of the Evidence Code contradicted the broad statement, "Opinion evidence based on hearsay is inadmissible" (*Kastner v Los Angeles Metro. Transit Auth.* (1965) 63 C2d 52, 45 CR 129, a case cited in Book §4.53 regarding a police officer's opinion about point of impact). See also *People v Campos* (1995) 32 CA4th 304, 38 CR2d 113, in which the court held that while an expert may rely on a probation report in rendering an opinion, the probation report itself is hearsay and inadmissible. An expert may not adopt an underlying report wholesale, however. Under Fed R Evid 703, the trial court properly excluded proffered expert testimony that was based solely on a laboratory report that was otherwise inadmissible hearsay that lacked foundation. *Turner v Burlington N. Santa Fe R.R. Co.* (9th Cir 2003) 338 F3d 1058, 1060, 1062 (expert intended to use report as substantive evidence of his ultimate conclusion, rather than merely as data on which it was reasonable to rely in forming opinion).

Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.56 Safe Speed Under the Conditions

[§4.56] Safe Speed Under the Conditions

 To Main Book

The court in *Hart v Wielt* (1970) 4 CA3d 224, 228, 84 CR 220, held that a highway patrol officer was qualified to give an opinion on the safe speed for an automobile at a highway curve under both normal and icy conditions.

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Source: Torts/California Personal Injury Proof Update/4 Police Officers/§4.57 Speed Before Collision

[§4.57] Speed Before Collision

 To Main Book

The court in *Neumann v Bishop* (1976) 59 CA3d 451, 459, 130 CR 786, held that it was not error to receive into evidence the investigating officer's testimony that there was no evidence of excessive speed on plaintiff's part.

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The California Supreme Court in *People v Williams* (1988) 44 C3d 883, 245 CR 336, observed that it had never considered the admissibility of a 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 85Z. See also *People v Newberry* (1962) 204 CA2d 4, 9, 22 CR 23 (point waived by failure to object, but court stated that it "is doubtful whether testimony that a person is under the influence of a narcotic requires expert qualifications on the part of the witness"). In *People v Williams, supra*, the court held that, because defendant's expert used the term "strung out," defendant had waived any imprecision of the term or prejudice resulting from its use by two prosecution witnesses in rebuttal. The court also noted that defendant had not presented any basis on which to distinguish evidence of drug-induced intoxication from evidence of alcohol-induced intoxication.

Technical Experts

Reasons for Using

[§5.1] Before and at Trial

[§5.2] Examples in Personal Injury Cases

Determining Appropriate Specialty: Checklists

[§5.4] Vehicle and Carrier Accidents

[§5.22] **Criteria for Selecting Expert**

[§5.27] Cost

Locating Experts

[§5.31] Universities

[§5.32] Articles; Books; Research Services

Preparing to Examine

[§5.33] When to Employ Expert; Discovery Considerations

Qualifications

Sufficiency

[§5.36] To Permit Admission of Opinion Testimony

Particular Items: Checklist

[§5.41] Registration and Licenses

Eliciting Opinion Testimony

[§5.58] Admissibility

[§5.60] Stating Bases of Opinions

[§5.61] Facts in Evidence

[§5.62] Expert's Perceptions; Tests; Analyses

[§5.66] Standards Set by Statute and Official Regulation

[§5.66A] Hearsay and Other Inadmissible Matter

Source: Torts/California Personal Injury Proof Update/5 Technical Experts/REASONS FOR USING/§5.1 Before and at Trial

REASONS FOR USING

[§5.1] Before and at Trial

 To Main Book

When an action is based on failure of an engineer or other technician to meet the standards of care that apply to his or her profession, testimony of experts, in that field, is needed to establish the standard and whether there was a breach, unless the conduct involved is within the common knowledge of laypersons. *Allied Props. v John A. Blume & Assoc.* (1972) 25 CA3d 848, 857, 102 CR 259.

An expert witness who testifies in a civil lawsuit, or in the course of a private, contractual arbitration proceeding, is immunized by the "litigation privilege" in CC §47(b) from civil liability for testifying falsely. *Moore v Conliffe* (1994) 7 C4th 634, 29 CR2d 152 (arbitration in medical negligence suit by Kaiser Foundation Health Plan member). However, an expert witness "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), citing *Budwin v American Psychological Ass'n* (1994) 24 CA4th 875, 881, 29 CR2d 453. See also *Lambert v Carneghi* (2008) 158 CA4th 1120, 1137, 70 CR3d 626 (CC §47(b) does not prevent party from suing own expert witness for negligence).

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Whether expert testimony is required on the effect of impact if seat belts are worn (see *Truman v Vargas* (1969) 275 CA2d 976, 982, 80 CR 373, discussed in Book §5.2) was considered in *Franklin v Gibson* (1982) 138 CA3d 340, 188 CR 23. The court held that lay testimony would not be allowed on this question and that the defendants had the burden of proving, through expert testimony, what injuries plaintiffs would have sustained if they had worn seat belts available to them. 138 CA3d at 344, 188 CR at 25. See also *De Palma v Rodriguez* (2007) 151 CA4th 159, 59 CR3d 479 (testimony of biomechanical expert that low speeds involved in rear-end collision were unlikely to have caused injuries supported jury finding that defendant's negligence not substantial factor in causing harm to driver); *Lara v Nevitt* (2004) 123 CA4th 454, 458, 19 CR3d 865 (no expert testimony necessary to support reasonable inference that plaintiff would have suffered less injury if he had been wearing seat belt, but expert testimony may be needed to distinguish injuries which could have been prevented by use of seat belt).

In *Branco v Kearny Moto Park, Inc.* (1995) 37 CA4th 184, 43 CR2d 392, to determine if a triable issue of material fact existed, expert opinion concerning whether the design of a motocross bicycle race course jump created an extreme risk of injury was allowed. But see *Campbell v General Motors Corp.* (1982) 32 C3d 112, 124, 184 CR 891, in which lay testimony was permitted to establish preliminarily that lack of a safety rail or bar on the bus caused plaintiff's injuries. See also *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 118, 147 CR 733 (lay testimony allowed to establish that plaintiff's injuries were proximately caused by defendant's failure to make seat belts available).

No expert testimony was needed to decide whether the size or shape of a crack in a sidewalk made it dangerous. *Caloroso v Hathaway* (2004) 122 CA4th 922, 928, 19 CR3d 254.

Source: Torts/California Personal Injury Proof Update/5 Technical Experts/DETERMINING APPROPRIATE SPECIALTY: CHECKLISTS/§5.4 Vehicle and Carrier Accidents

DETERMINING APPROPRIATE SPECIALTY: CHECKLISTS

[§5.4] Vehicle and Carrier Accidents

 To Main Book

A nontreating expert witness who is listed as described in CCP §2034.210(b) may be excluded from testifying at trial on a subject whose general substance was not previously disclosed in the expert witness declaration because the declaration must provide the opposition with fair notice of the substantive areas that the expert will address at trial. *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289. *Bonds* disapproved *Martinez v City of Poway* (1993) 12 CA4th 425, 15 CR2d 644, which was cited in previous updates.

See discussion of *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 129 CR 146, in Update §4.49, on testimony by a CHP officer as an accident reconstruction expert.

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.22 CRITERIA FOR SELECTING EXPERT

[§5.22] CRITERIA FOR SELECTING EXPERT

 To Main Book

The use of a human-factors expert in products liability cases is explored in Messina, *The Human Factors Expert in Tort Litigation*, 20 Trial 38 (Jan. 1984).

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.27 Cost

[§5.27] Cost

 To Main Book

An expert may charge more for testimonial services (in discovery and courtroom testimony) than he or she charges for ordinary services and technical consultation. *Rancho Bernardo Dev. Co. v Superior Court* (1992) 2 CA4th 358, 2 CR2d 878.

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/LOCATING EXPERTS/§5.31 Universities

LOCATING EXPERTS

[§5.31] Universities

 **To Main Book**

The Engineer's Council for Professional Development, referred to in Book §5.31, is now called the Accredital Board for Engineering and Technology, Inc. The current list of California accredited programs is contained in a booklet entitled "Accreditation Yearbook," available for a small charge. The Board's telephone number is now (410) 347-7700.

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.32 Articles; Books; Research Services

[§5.32] Articles; Books; Research Services

 To Main Book

For information on how to find and retain the best expert, see California Expert Witness Guide, chap 7 (2d ed Cal CEB 1991).

The "Lawyer's Desk Reference," referred to in Book §5.32, is now Philo, Lawyer's Desk Reference (8th ed 1993).

Jury Verdicts Weekly, now published by California Jury Verdicts Weekly, NLJ Litigation Services Network, 128 Carleton Ave., East Islip, NY 11730 (telephone (800) 832-1900), can furnish current subscription rates and describe other services.

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/PREPARING TO EXAMINE/§5.33 When to Employ Expert; Discovery Considerations

PREPARING TO EXAMINE

[§5.33] When to Employ Expert; Discovery Considerations

 To Main Book

Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Civil Discovery Act amends the prior Act in a nonsubstantive manner but also completely renumbers it.

The opinion testimony of a particular expert may be excluded at trial, if the opposing party objects, when the party offering the testimony failed to comply with the disclosure requirements of CCP §§2034.210-2034.280, CCP §2034.300; Fairfax v Lords (2006) 138 CA4th 1019, 1025, 41 CR3d 850 (former CCP §2034(a)(1) (now CCP §2034.210(a)) requires "mutual and simultaneous exchange" of expert witness information; party cannot delay its disclosure of experts until after opponent's timely disclosure); Province v Center for Women's Health e³ Family Birth (1993) 20 CA4th 1673, 25 CR2d 667 (trial judge, who had ruled that pathologist never listed by defense could testify only to "impressions," erred by later permitting him to state opinions about cause of plaintiff's injury). See Kalaba v Gray (2002) 95 CA4th 1416, 116 CR2d 570 (although former CCP §2034 does not require expert declarations for plaintiff's treating physicians, party offering expert opinions of treating physicians at trial must identify their names and addresses in plaintiff's §2034(f) expert disclosure list). The expert witness declaration required under former CCP §2034(f) (now CCP §2034.260) must provide the opposition with fair notice of the substantive areas that the expert will address at trial.

In Bonds v Roy (1999) 20 CA4th 140, 83 CR2d 289, the California Supreme Court held that a trial court may preclude an expert witness from testifying at trial under former CCP §2034(j) (now CCP §2034.300) on a subject whose general substance was not previously described in the expert witness declaration. See also Jones v Moore (2000) 80 CA4th 557, 95 CR2d 216 (trial court properly excluded expert testimony that went beyond opinions that expert expressed at deposition; expert testified at deposition that opinions were his only opinions, but that if he formed others he would notify defense counsel, which he never did). But see Easterby v Clark (2009) 171 CA4th 772, 780, 90 CR3d 81 (trial court improperly excluded expert witness testimony after plaintiff explicitly notified defense that expert would testify beyond original deposition testimony and defense had opportunity to depose expert again).

For discussion of the requirements CCP §§2034.010-2034.290, the procedure that must be followed, and the exclusion of testimony at trial, see California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006). See also California Expert Witness Guide §§8.1-8.24 (2d ed Cal CEB 1991). On the use of an undisclosed expert on rebuttal to impeach the testimony of an opposing expert, see Update §1.45.

NOTE: If a case is reversed on appeal, discovery is automatically reopened and the initial trial date is reset. A party must again demand the exchange of expert witness information under CCP §2034.260. See Hirano v Hirano (2007) 158 CA4th 1, 69 CR3d 646.

Designation of an expert trial witness, whether a party or a nonparty, is conditional and may be withdrawn before the designated witness is deposed. Shooker v Superior Court (2003) 111 CA4th 923, 928, 4 CR3d 334 (no waiver of attorney-client privilege by party-expert who claimed privilege at his deposition without disclosing any confidential information). After an expert witness has given expert testimony or disclosed a significant part of a privileged communication, the attorney-client privilege and the work-product doctrine do not protect matters relied on or considered in the formation of the expert's opinion. Under Evid C §721(a), full cross-examination on the bases of expert's opinions is permissible. 111 CA4th at 930. See County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1455, 274 CR 712 (attorney-client privilege does not shield conversations about medical opinions when defendant physician serves as party expert witness in case). An expert who supplies a declaration supporting or opposing summary judgment or summary adjudication motion may be deposed when there is a legitimate question about the foundation of the expert's opinion. The discovery provisions of former CCP §2034 (now CCP §§2034.410-2034.470) do not bar the expert's deposition even though the simultaneous exchange of expert witness information has not yet occurred. St. Mary Med. Ctr. v Superior Court (1996) 50 CA4th 1531, 58 CR2d 182.

An attorney retaining an expert to testify must declare under penalty of perjury that the expert will be sufficiently familiar with the case to provide a meaningful oral deposition on the specific testimony, including any opinion and its basis. CCP §2034.260(c)(4). If an expert witness is unprepared for the deposition, opposing counsel should consider making a motion to limit the witness's direct testimony at trial to the opinions stated at the deposition unless further information is supplied to counsel

within a reasonable time specified by the court.

Listing an expert as a witness before the value of that expert's testimony is fully determined is dangerous because any other party may call that expert after he or she has been deposed. CCP §2034.310. See *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 200 CR 387 (error to deny plaintiff right to call defendant's expert witness at trial, after deposition was favorable to plaintiff). However, a party may withdraw a previously designated expert witness who has not yet been deposed and then continue to use the expert as a consultant and bar the expert's communication with or use by the opposing party. *County of Los Angeles v Superior Court* (1990) 222 CA3d 647, 271 CR 698. See also *Dickison v Howen* (1990) 220 CA3d 1471, 270 CR 188 (party choosing not to use expert due to party's "surprise" at expert's testimony in deposition may augment expert list with replacement expert).

Former CCP §2016 has been repealed and replaced first by former CCP §2018 and now by CCP §§2018.010-2018.080, operative July 1, 2005, which states the intention not to alter existing law concerning discovery of work product. CCP §2018.040.

The reference in the Book to Witkin should now be to 2 Witkin, California Evidence, *Witnesses* §§137-152 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/QUALIFICATIONS/Sufficiency/§5.36 to Permit Admission of Opinion Testimony

QUALIFICATIONS

Sufficiency

[§5.36] to Permit Admission of Opinion Testimony

 **To Main Book**

For examples of rulings on admissibility of opinion testimony, see *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 700, 106 CR 1 (within trial judge's discretion to preclude mechanical engineer, who testified he was not familiar with building practices, from expressing opinion on whether reasonable builder would have used retaining wall under the circumstances); *Hyman v Gordon* (1973) 35 CA3d 769, 774, 111 CR 262 (city fireman was qualified to give opinion testimony that placement of water heater in new house was fire hazard).

The trial court has broad discretion to hold a separate pretrial hearing, outside the jury's presence, to assess preliminary questions of relevance and reliability of testimony. *U.S. v Alatorre* (9th Cir 2000) 222 F3d 1098. In *Domingo v T.K., M.D.* (9th Cir 2002) 276 F3d 1083, modified (9th Cir 2002) 289 F3d 600, 606, the Ninth Circuit affirmed a district court's exclusion of a plaintiff's expert's testimony under *Daubert* and Fed R Evid 702, following such a pretrial hearing. See *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1366, 37 CR3d 9 (motion in limine used to (1) exclude testimony of plaintiff's tire expert and (2) substantially limit testimony of her directional stability expert for lack of foundation concerning alleged design defect and causation).

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/Particular Items: Checklist/§5.41 Registration and Licenses

Particular Items: Checklist

[§5.41] Registration and Licenses

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The "California State Board of Registration for Professional Engineers" referred to in the Book is now the "Board for Professional Engineers and Land Surveyors." See [Bus & P C §6710](#).

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ELICITING OPINION TESTIMONY

[§5.58] Admissibility

 To Main Book

A qualified expert can testify to the existence of a custom or usage in a business (*e.g.*, electrical contracting) even though his or her testimony embraces the ultimate issue to be decided by the trier of fact (Evid C §805). *Ecco-Phoenix Elec. Corp. v Howard J. White, Inc.* (1969) 1 C3d 266, 271, 81 CR 849. See also *Mittelman v Seifert* (1971) 17 CA3d 51, 69, 94 CR 654 (expert testimony showing pilot's willful misconduct). Although an expert may give an opinion on ultimate issues of fact, however, experts are prohibited from giving an opinion on questions of law. *Summers v A.L. Gilbert Co.* (1999) 69 CA4th 1155, 82 CR2d 162; *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568 (court may not receive expert evidence on the ultimate legal issues of inherent risk and duty). An expert witness may testify about other accidents involving the same product alleged to be defective if the circumstances of the other accidents are similar and not too remote. *Ault v International Harvester Co.* (1974) 13 C3d 113, 121, 117 CR 812; *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1371, 37 CR3d 9 (affirming trial court's discretionary finding of insufficient similarity with other tire failure accidents on which expert relied), citing *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 185 CR 654. See also *Aguayo v Crompton & Knowles Corp.* (1986) 183 CA3d 1032, 228 CR 768 (*Ault* permits introduction of such evidence subject to rules of admission of evidence generally). See Anno, 15 ALR5th 119 (1993) (admissibility of evidence on repairs, change of conditions, or precautions taken after accident).

A witness may testify about the *absence* of similar accidents involving a company's product, on a showing that the witness is qualified to review and analyze the company's safety records relating to the product and has done so, and that the records are complete and accurate. See *Benson v Honda Motor Co., Ltd.* (1994) 26 CA4th 1337, 32 CR2d 322 (testimony that computerized records showed no previous instance of front seat of given model having struck rear seat passenger after rear-end collision). On absence of similar accidents, see *Effective Introduction of Evidence in California*, chap 8 (2d ed Cal CEB 2000).

Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.60 Stating Bases of Opinions

[§5.60] Stating Bases of Opinions

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Cases on what items may properly be relied on by an expert in forming an opinion are noted in [Update §1.26](#).

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In a difficult accident reconstruction case in which evidence of liability is limited (*e.g.*, an airplane crash case), the expert may be allowed more latitude on the sources of information he or she uses to form an opinion. *Buckwalter v Airline Training Ctr.* (1982) 134 CA3d 547, 553, 184 CR 659 (under Evid C §801(b) expert allowed to rely on pilots' training records in explaining his conclusion that they became confused after deciding to switch runways for landing).

Experts may properly rely on hearsay in forming their opinions, but may not relate the out-of-court statements of another as independent proof of the facts. Admission of hearsay in the expert's testimony is prejudicial if it is admitted in connection with proof of the truth of the matter asserted. If it is admitted solely as the basis of the expert's opinion, however, prejudice is likely to be limited. *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833. See also *People v Nicolaus* (1991) 54 C3d 551, 286 CR 628 (trial court need not admit documentary evidence that is the basis of the expert's opinion).



State Courts

In California state courts, evidence obtained through the use of scientific techniques can only be admitted in the courtroom if the *Kelly* foundational standard (formerly referred to as the *Kelly/Frye* rule) is met. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; *Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014. Under the *Kelly* standard, a trial judge should not, over objection, permit an expert to testify about, or to state an opinion based on, "a new scientific technique" unless the judge has first determined, on the basis of foundational evidence, that the technique is generally accepted within the relevant scientific community. *People v Leaby* (1994) 8 C4th 587, 34 CR2d 663 (trial court should not have received police officer's opinion testimony, based on "horizontal gaze nystagmus field sobriety test," that person was driving under the influence of alcohol without having conducted a *Kelly* hearing).

In a design defect action, expert witness testimony on plaintiff's proffered epidemiological study was rejected by the trial court. The appellate court held that the study was not based on a new scientific technique and therefore was admissible under *Kelly*. *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1398, 55 CR3d 551 (trial court had allowed plaintiffs sufficient opportunity to promote and defend study, so no undue prejudice in allowing expert witnesses to critique study's methodology). In *Ramona v Superior Court* (1997) 57 CA4th 107, 66 CR2d 766, the trial court erred in denying defendant's summary judgment motion when plaintiff's only evidence of defendant's sexual molestation was the plaintiff's testimony of memories recalled after interviews under the influence of sodium amytal. Under the *Kelly* standard, the lack of general acceptance in the relevant scientific community regarding use of sodium amytal to retrieve repressed memories barred plaintiff's testimony.

DNA evidence derived from the PCR matching technique was held to be admissible under the *Kelly* standard because this technique has gained general acceptance in the scientific community. *People v Wright* (1998) 62 CA4th 31, 41, 72 CR2d 246. In *People v Wright*, the court made the distinction that the *Kelly* rule tests the fundamental validity of a new scientific method, whereas careless or improper laboratory procedures when using a valid scientific method affect the weight of the evidence but do not affect its admissibility. 62 CA4th at 42.

A trial judge should have excluded as speculative the testimony of an expert that asbestos levels in the air at a plant some 40 years earlier exceeded permissible safety standards, when the opinion was deduced from the "messy" appearance of the plant at that earlier time as shown in old photographs. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 93, 37 CR2d 457, disapproved in part on other grounds by *Camarago v Tjaarda Dairy* (2001) 25 C4th 1235, 108 CR2d 617. See also *Dee v PCS Prop. Mgmt., Inc.* (2009) 174 CA4th 390, 403, 94 CR3d 456 (trial court properly excluded expert opinion that plaintiff's exposure to mold caused susceptibility to cancer because there was no evidence that plaintiff was exposed to mycotoxins); *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191 (hypnotically restored testimony precluded under *Kelly* standard, although exceptions exist for admitting such testimony when related to other events before hypnotic session).

The court may reject the expert's findings in an accident reconstruction case if the number of variables involved produces an opinion based primarily on conjecture and speculation. In *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 164 CR 343, an accident reconstruction specialist conducted an experiment more than 2 years after the accident to determine whether plaintiff was within the crosswalk at the time she was struck by defendant's vehicle. The specialist also used photographs of the vehicle and of plaintiff's body that were taken immediately after the accident. The court's rejections of the expert's findings centered on the following: (1) the length of time between the accident and the experiment; (2) substantial differences in weather and time of day, and in the vehicle's mechanical condition, between the time of the accident and that of the experiment; and (3) unwarranted reliance on photographs as showing points of rest. 105 CA3d at 390, 164 CR at 347.

California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. In *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 901, 6 CR3d 827, the court of appeal reversed the trial court's exclusion of expert testimony on pesticide exposure as the cause of the plaintiff's autism. The *Roberti* court held that the *Kelly* admissibility test does not apply to experts who offer a new theory of medical causation, because that opinion is not based on any new scientific technique, device, or procedure that may or may not have gained general acceptance in the scientific community. 113 CA4th at 903.

Federal Courts

In response to *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, and its progeny, including *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, Fed R Evid 702 was amended in December

2000 to affirm the trial court's role as gatekeeper in excluding unreliable expert testimony. See Committee Note to Fed R Evid 702. Significantly, however, when "a district court has already excluded testimony under one evidentiary rule, no *Daubert* hearing, which is used to assess the scientific validity of an expert's underlying reasoning or methodology, is required." *U.S. v Verduzco* (9th Cir 2004) 373 F3d 1022, 1033 n10; *U.S. v Ramirez-Robles* (9th Cir 2004) 386 F3d 1234, 1245 (if evidence excluded under Rule 403, no other evidentiary rule can make that same evidence admissible).

The 2000 amendment to Rule 702 provides some general standards that the trial court must use to assess the reliability and sufficiency of the basis for the expert's testimony. For a good discussion of the factors which the trial court *may* consider in assessing the reliability of expert testimony, see Committee Note to Rule 702.

The specific factors explicated by the *Daubert* Court are:

- Whether the expert's technique or theory can be or has been tested, *i.e.*, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
- Whether the technique or theory has been subject to peer review and publication;
- The known or potential rate of error of the technique or theory when applied;
- The existence and maintenance of standards and controls; and
- Whether the technique or theory has been generally accepted in the scientific community.

Depending on "the particular circumstance of the particular case at issue," the *Kumho* Court held that *Daubert* factors might also be applicable in assessing the reliability of nonscientific expert testimony. 143 L Ed 2d at 251.

Courts both before and after *Daubert* have found other factors that are also relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

- Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1317.
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *General Elec. Co. v Joiner* (1997) 522 US 136, 146, 139 L Ed 2d 508, 518, 118 S Ct 512 (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); *Domingo v T.K., M.D.* (9th Cir 2002) 276 F3d 1083, modified (9th Cir 2002) 289 F3d 600, 606 (exclusion of plaintiff expert's proposed testimony under *Daubert* and Fed R Evid 702, because expert's opinions on causation were unsupported by any scientific study, did not have widespread scientific acceptance, and there was no evidence expert had followed accepted scientific methods in developing his opinions).
- Whether the expert has adequately accounted for obvious alternative explanations. *Claar v Burlington N. R.R.* (9th Cir 1994) 29 F3d 499 (testimony excluded when expert failed to consider other obvious causes for plaintiff's condition). Compare *Claar* with *Ambrosini v Labarraque* (DC Cir 1996) 101 F3d 129 (possibility of some uneliminated causes presents a question of weight, as long as most obvious causes have been considered and reasonably ruled out by expert).
- Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v Daily Racing Form, Inc.* (7th Cir 1997) 104 F3d 940, 942. See *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 252, 119 S Ct 1167 (*Daubert* requires trial court to assure itself that expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *Kumho Tire Co. v Carmichael, supra* (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v Ashland Chem., Inc.* (5th Cir 1998) 151 F3d 269 (en banc) (clinical doctor was properly precluded from testifying to toxicological cause of plaintiff's respiratory problem, where doctor's opinion was not sufficiently grounded in scientific methodology); *Sterling v Velvicol Chem. Corp.* (6th Cir 1988) 855 F2d 1188 (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.66 Standards Set by Statute and Official Regulation

[§5.66] Standards Set by Statute and Official Regulation

 To Main Book

A statute forbidding certain regulations from being considered in a personal injury or wrongful death action may preclude expert witnesses from basing opinions about the safety of conditions on those regulations. See, *e.g.*, *Spencer v G.A. MacDonald Constr. Co.* (1976) 63 CA3d 836, 134 CR 78 (former Lab C §6304.5 precluded evidence of or reference to construction safety orders). The California Administrative Code has been redesignated the California Code of Regulations.

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Source: Torts/California Personal Injury Proof Update/5 Technical Experts/§5.66A Hearsay and Other Inadmissible Matter

[§5.66A] Hearsay and Other Inadmissible Matter



Since the January 1, 1967, adoption of the Evidence Code, a trial judge may permit an expert to state an opinion based on reports, statements, and other information that might not be admissible evidence. See *People v Miller* (1994) 25 CA4th 913, 918, 31 CR2d 423 (prison psychiatrist relied on probation report). See also discussion of *Arellano v Moreno* (1973) 33 CA3d 877, 883, 109 CR 421, in Update §4.53. *Arellano* held that it was not error to receive a police officer's opinion on the point of impact even though that opinion was based on the driver's statements rather than physical evidence; questions about the basis of the opinion go to its weight, not its admissibility. See also *People v Campos* (1995) 32 CA4th 304, 38 CR2d 113, in which the court held that while an expert may rely on a probation report in rendering an opinion, the probation report itself is hearsay and inadmissible; *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1375, 37 CR3d 9 (expert could not read expert opinions of another into record at trial, although those opinions could serve as a basis for his own expert testimony), citing *Whitfield v Roth* (1974) 10 C3d 874, 895, 112 CR 540, discussed in Update §6.56.

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Medical Experts

[§6.1] Reasons for Calling Medical Experts

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[§6.37] Symptoms; Subjective Signs

[§6.51] Special Diagnostic Procedures

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[§6.64] Admissibility

[§6.65] Proper Bases

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[§6.67] Procedures for Showing Bases and Reasons

[§6.68] Diagnosis: Nature and Extent of Injuries

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[§6.71] Cause of Injuries

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[§6.74] Form of Testimony

[§6.75] Prognosis: Continuing, Permanent, and Future Injuries

[§6.76] Admissibility

[§6.77] Reasonable Medical Certainty

[§6.78] Continuing Conditions; Permanency

[§6.79] Future Conditions

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.1 REASONS FOR CALLING MEDICAL EXPERTS

[§6.1] REASONS FOR CALLING MEDICAL EXPERTS



Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the current Act in a nonsubstantive manner but also completely renumbers it.

There are four general categories of medical experts: (1) the plaintiff's treating physician, (2) the plaintiff's chosen medical-legal expert who examines the plaintiff to be able to provide opinion testimony, (3) the defense medical examiner (DME) who examines the plaintiff to be able to advise defense counsel and to provide opinion testimony, and (4) the independent medical examiner (IME) named by stipulation or court order as in workers' compensation cases or, on rare occasions, an agreed medical examiner (AME). The plaintiff's and defendant's nontreating medical-legal experts must be disclosed under the simultaneous exchange of expert information procedures of CCP §§2034.210-2034.300 and may be deposed in accordance with the procedures of CCP §§2034.410-2034.470. However, CCP §§2034.410-2034.470 does not bar an expert's deposition despite the expert witness exchange not yet having occurred when the expert supplies a declaration supporting or opposing a summary judgment or summary adjudication motion and when there is a legitimate question about the foundation of the expert's opinion. St. Mary Med. Ctr. v Superior Court (1996) 50 CA4th 1531, 58 CR2d 182. See Update §§5.33 and 6.31.

A nontreating expert witness who is listed as described in CCP §2034.210(b) may be excluded from testifying at trial on a subject whose general substance was not previously disclosed in the expert witness declaration because the declaration must provide the opposition with fair notice of the substantive areas that the expert will address at trial. Bonds v Roy (1999) 20 CA4th 140, 83 CR2d 289. See Fairfax v Lords (2006) 138 CA4th 1019, 1025, 41 CR3d 850 (former CCP §2034(a)(1) (now CCP §2034.210(a)) requires "mutual and simultaneous exchange" of expert witness information; party cannot delay its disclosure of experts until after opponent's timely disclosure).

A treating physician is not a retained expert for purposes of CCP §2034.260(c), and does not require an expert declaration under CCP §2034.210(b). Schreiber v Estate of Kiser (1999) 22 CA4th 31, 91 CR2d 293. However, the treating physician must be listed as an expert under CCP §2034.210(a), and the testimony may include both fact and opinion testimony, including opinion testimony on causation and the standard of care. 22 CA4th at 35; Kalaba v Gray (2002) 95 CA4th 1416, 116 CR2d 570 (although former CCP §2034 does not require expert declarations for plaintiff's treating physicians, party offering expert opinions of treating physicians at trial must identify their names and addresses in plaintiff's former §2034(f) (now CCP §2034.260) expert disclosure list). In contrast to an expert who is retained for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for trial, a treating physician is an expert percipient witness who acquires knowledge of relevant facts independently of the litigation. As a practical matter, however, counsel rarely question a treating physician without eliciting some opinions and treating physicians are entitled to expert witness fees. CCP §2034.430(a). See also Baker-Hoey v Lockheed Martin Corp. (2003) 111 CA4th 592, 602, 3 CR3d 593.

At the option of the party taking the deposition, the expert's fee may be tendered at the start of the deposition or at the time the deposition notice is delivered to the attorney for the party designating the expert. CCP §2034.450(a). True v Shank (2000) 81 CA4th 1250, 1256, 97 CR2d 462. In addition to the deposition notice served on the parties, counsel must use a deposition subpoena to compel the attendance of a party's treating physician. Hurtado v Western Med. Ctr. (1990) 222 CA3d 1198, 272 CR 324 (plaintiff had no burden to produce her treating physicians for deposition when they were to testify as percipient witnesses, not as retained experts under former CCP §2034(a)(2) (now CCP §2034.210(b)). It is good practice to subpoena an expert to produce documents at the deposition, including all files and notes, and—if the expert was retained for the litigation and has provided a report—any additional writings about treatises in the field and copies of the expert's bills for time spent on the case.

A doctor charged with malpractice cannot be questioned or used as an expert by the injured party unless he or she is listed as an expert under CCP §§2034.210-2034.280. County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1455, 274 CR 712 (discussing former CCP §2034).

A doctor who testifies in a civil lawsuit, or in the course of a private, contractual arbitration proceeding, is immunized by the "litigation privilege" in CC §47(b) from civil liability for testifying falsely. Moore v Conliffe (1994) 7 CA4th 634, 29 CR2d 152 (arbitration in medical negligence suit by Kaiser Foundation Health Plan member). However, an expert witness "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), citing Budwin v American Psychological Ass'n (1994) 24 CA4th 875, 881, 29 CR2d 453. See also Lambert v Carnegie (2008) 158 CA4th 1120, 1144, 70 CR3d 626 (CC §47(b) does not prevent party from suing own expert witness for negligence).

EVIDENTIARY PRIVILEGES

[§6.3] Attorney-Client



Designation of an expert trial witness, whether a party or a nonparty, is conditional and may be withdrawn before the designated witness is deposed. *Shooker v Superior Court* (2003) 111 CA4th 923, 930, 4 CR3d 334 (no waiver of attorney-client privilege by party-expert who claimed privilege at his deposition without disclosing any confidential information or significant part of confidential communication). After an expert witness has given expert testimony or disclosed a significant part of a privileged communication, the attorney-client privilege and the work-product doctrine are waived concerning matters relied on or considered in the formation of the expert's opinion. Under Evid C §721(a), full cross-examination on the bases of expert's opinions is permissible. 111 CA4th at 930. See *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1455, 274 CR 712 (attorney-client privilege does not shield conversations about medical opinions when defendant physician serves as party expert witness in case); *People v Milner* (1988) 45 C3d 227, 241, 246 CR 713 (transcripts of psychiatric interviews including defendant's discussion of trial strategy admitted over privilege objection).

For general discussion of the attorney-client privilege, see California Trial Objections §§35.1-35.6 (Cal CEB Annual).

NOTE: *City of San Francisco v Superior Court* (1951) 37 C2d 227, 234, 231 P2d 26 (cited in Book §6.3 as *San Francisco v Superior Court*) is cited favorably in *People v Caro* (1988) 46 C3d 1035, 1060 n11, 251 CR 757 (attorney-client privilege exists for psychiatrist assisting client's attorney even if client's mental state is at issue at trial, if psychiatrist is not called to testify for client).

A party may withdraw a previously designated expert witness who has not yet been deposed and then continue to use the expert as a consultant and bar the expert's communication with or use by the opposing party. *County of Los Angeles v Superior Court* (1990) 222 CA3d 647, 271 CR 698. See also *Dickson v Howen* (1990) 220 CA3d 1471, 270 CR 188 (party choosing not to use expert due to party's "surprise" at expert's testimony in deposition may augment expert list with replacement expert). The inadvertent retention of an opposing party's expert witness will not cause counsel's automatic disqualification. *Collins v State* (2004) 121 CA4th 1112, 1129, 18 CR3d 112 (disqualification of plaintiff's counsel unwarranted when expert previously retained by defendants did not disclose any privileged information to plaintiff's counsel and plaintiff's counsel discharged expert immediately upon learning of dual retention).

A party does not waive the attorney-client privilege by testifying merely that he or she discussed a matter with his or her attorney. See *Mitchell v Superior Court* (1984) 37 C3d 591, 208 CR 886 (plaintiff did not disclose any significant part of the communication and thus did not raise an issue). Nor does a client's discussion with an attorney concerning a fee arrangement with the client's former attorney fall within the litigation exception to the privilege under Evid C §958. *Brockway v State Bar* (1991) 53 C3d 51, 278 CR 836 (proceeding against the client's attorney for professional wrongdoing).

The references to Witkin should now be to 2 Witkin, California Evidence, *Witnesses* §§122-123, 128-129 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.4 Physician-Patient; Patient-Litigant Exception

[§6.4] Physician-Patient; Patient-Litigant Exception

 To Main Book

When a patient tenders his or her mental and emotional condition as a specific damages issue, the patient waives the psychotherapist-patient privilege ([Evid C §1014](#)) because of the patient-litigant exception ([Evid C §1016](#)) to that privilege. The psychiatrist has no constitutional right to refuse to answer questions directly relevant to the nature of the specific mental and emotional condition tendered by the patient in his or her pleadings, or to refuse to answer discovery inquiries. See [Vinson v Superior Court \(1987\) 43 C3d 833, 239 CR 292](#), in which, however, it was held that the plaintiff, by filing a sexual harassment and emotional distress suit, did not waive her right to privacy with regard to her sexual history when no good cause under former CCP §2036.1 (now see [CCP §2017.200](#)) was shown for discovery of that part of plaintiff's life. In [Gonzalez v Superior Court \(1995\) 33 CA4th 1539, 39 CR2d 896](#), plaintiff was required to answer interrogatories about the source of photographs that were relevant to plaintiff's sexual harassment claim and that had been appropriated from police sergeant's file cabinet because plaintiff was not able to articulate cognizable privilege. See also [In re Lifschutz \(1970\) 2 C3d 415, 85 CR 829](#); [Caesar v Mountanos \(9th Cir 1976\) 542 F2d 1064](#) (psychiatrist in contempt for refusal to obey order to answer questions about former patient). See [CCP §§2032.310-2032.320](#) (discovery by physical or mental examination by order of court).

For general discussion of the physician-patient and psychotherapist-patient privileges, see [California Trial Objections §§36.1-36.4, 37.1-37.4 \(Cal CEB Annual\)](#).

If the lawsuit itself "tenders" the issue of the patient's mental condition, disclosure of the patient's psychiatric records is proper. See [Patterson v Superior Court \(1983\) 147 CA3d 927, 193 CR 99](#) (son's prior psychiatric history at issue in parents' wrongful death action against facility where son had committed suicide).

However, merely demanding personal injury damages, some component of which may be mental pain and suffering, does not put in issue psychiatric complaints unrelated to the injuries for which redress is claimed. Thus, the psychotherapist-patient privilege may be invoked by the patient to prevent production of psychiatric treatment records not directly relevant to a mental condition placed in issue. [Roberts v Superior Court \(1973\) 9 C3d 330, 336, 107 CR 309](#). Similarly, the fact that an heir files a claim for death benefits under an insurance policy is not a waiver of the psychotherapist-patient privilege that may be asserted to prevent deposing decedent's psychiatrist or discovery of his or her records. See [Grey v Superior Court \(1976\) 62 CA3d 698, 133 CR 318](#). See also [Acoota v Tenneco Oil Co. \(5th Cir 1990\) 913 F2d 205, 208](#) (suing employer for age discrimination does not put plaintiff's mental condition in issue).

Under the mutual discovery provisions of former CCP §2032 (now [CCP §§2032.610-2032.650](#)) a plaintiff who requests and obtains a copy of a report made by a defense medical examiner (DME) may not assert a privilege to prevent defendant from obtaining reports of plaintiff's doctors or from examining these doctors as witnesses free from restrictions of privilege. [Queen of Angels Hosp. v Superior Court \(1976\) 57 CA3d 370, 129 CR 282](#).

A concern to protect an individual's right of privacy is shown in [Britt v Superior Court \(1978\) 20 C3d 844, 143 CR 695](#), in which the court held that plaintiffs who sought damages for both physical and mental injuries did not have to disclose to defendant their entire lifetime medical or psychiatric histories without a showing that the requested disclosures related to specific physical or mental conditions placed in issue by plaintiffs. See [Hallendorf v Superior Court \(1978\) 85 CA3d 553, 149 CR 564](#) (plaintiff successfully prevented discovery of his entire medical history by asserting that claim was for injury only to specific part of body). See also [Jones v Superior Court \(1981\) 119 CA3d 534, 545, 174 CR 148](#) (patient-litigant exception in [Evid C §996\(b\)-\(c\)](#) inapplicable to privilege of mother whose daughter sues for injuries from mother's ingestion of drugs during pregnancy); [Boling v Superior Court \(1980\) 105 CA3d 430, 437, 164 CR 432](#) (wrongful death action).

Communications with other participants in group therapy sessions are necessary for psychotherapy and thus come under the psychotherapist-patient privilege. [Lovett v Superior Court \(1988\) 203 CA3d 521, 527, 250 CR 25](#) (defendant sought names of persons in victim's therapy group to whom she had spoken of defendant's sexual attacks on her).

A patient who sues physicians for malpractice cannot use the physician-patient privilege to bar the testimony of another physician (a vascular specialist) who, some years earlier, had reviewed tests performed on the patient and prepared a report on plaintiff's (heart) condition. See [Torres v Superior Court \(1990\) 221 CA3d 181, 270 CR 401](#) (vascular surgeon was to testify on matters concerning liability, causation, and damages, and not on information included in confidential communications).

[Government Code §68092.5](#) now provides, in part, that a party requiring testimony from a treating physician and surgeon or

other treating health care practitioner who is to be asked to express an opinion during an action or procedure must pay the expert the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by any party attending the action or proceeding. The hourly or daily fee must 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.

Under Evid C §912(a), the privilege for medical or psychiatric records may be waived by a patient who fails properly to object to a subpoena served on the physician or psychotherapist. See Inabnit v Berkson (1988) 199 CA3d 1230, 1239, 245 CR 525 (psychotherapist-patient privilege).

Defendant's Use of Physician-Patient Privilege

The statement in the second paragraph of Book §6.4 that defendants sued for negligence can use the physician-patient privilege to prevent the introduction of medical evidence of their own physical or mental condition (or that of a person for whose conduct they are vicariously liable) must be read in the light of Evid C §999. This section permits a party, on a showing of good cause for disclosure, to discover and introduce medical records and communications concerning a patient's condition in a proceeding to recover damages "on account of" the patient's conduct. This exception to the physician-patient privilege appears to authorize introduction of evidence of bad eyesight, intoxication, or other physical conditions of a defendant or nonparty that might have contributed to the accident, even though the evidence would not, as noted in Book §6.4, come within the patient-litigant exception to the privilege. The requirement that good cause be shown enables courts to protect parties from "fishing expeditions" into medical records. See Official Comment to Evid C §999.

Evidence Code §999 is not an exception to the psychotherapist-patient privilege. Moreover, Evid C §999 does not appear to authorize inquiry into a plaintiff's condition. See discussion in Book §6.4 concerning whether the patient-litigant exception permits evidence about plaintiff's conditions other than that for which damages are being sought.

On the use of the physician-patient privilege by the personal representative of a deceased alleged tortfeasor, see Hale v Superior Court (1994) 28 CA4th 1421, 34 CR2d 279 (plaintiffs not allowed to contact decedent's physicians, but estate could).

A physician and a hospital, defendants in a malpractice action, can invoke the physician-patient privilege to avoid revealing the names of patients who received the same tests as plaintiff, including the names of patients who developed complications from the testing. Marcus v Superior Court (1971) 18 CA3d 22, 95 CR 545. See also Rudnick v Superior Court (1974) 11 C3d 924, 114 CR 603 (drug company can invoke privilege to avoid producing reports of drug-related injuries suffered by other patients, unless it is shown that other patients waived privilege).

Updated References

The reference to Witkin should now be to 2 Witkin, California Evidence, *Witnesses* §§204-205, 223 (4th ed 2000).

Correction

The correct citation for Carlton v Superior Court (1968) is 261 CA2d 282, 67 CR 568.

QUALIFICATIONS

Sufficiency

[§6.6] Licensed Doctors



Qualifications to Testify on Medical Malpractice

Additional cases include *Brown v Colm* (1974) 11 C3d 639, 114 CR 128 (witness had not entered practice until several years after subject operation was performed, but should have been permitted to testify on basis of medical literature and his training and experience); *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 71 CR3d 707 (foreign physician who has not practiced in particular location may provide expert testimony on standard of care in that location); *Miller v Silver* (1986) 181 CA3d 652, 226 CR 479 (lack of occupational experience by physician-witness in defendant-physician's specialty did not bar expert testimony of witness on standard of care); *Evans v Obanesian* (1974) 39 CA3d 121, 112 CR 236 (general dental practitioner and dental specialist, both from Los Angeles County, should have been permitted to testify against an Orange County dentist); *Cline v Lund* (1973) 31 CA3d 755, 766, 107 CR 629 (pathologist who was neither a gynecologist nor a surgeon, but had gained knowledge of the standard of care applicable to gynecological surgery, was competent to testify about gynecological procedures). See also *Salasquevara v Wyeth Labs., Inc.* (1990) 222 CA3d 379, 271 CR 780 (treating physician not qualified to testify on esoteric issue of causation of injury by vaccine).

Because a blood bank sued for negligent failure to safeguard its blood supply is subject to a professional standard of care (that degree of care ordinarily exercised by other blood banks under similar circumstances), a physician who can testify to the practice in a similar community is a qualified expert witness. *Wilson v Irwin Mem. Blood Bank* (1993) 14 CA4th 1315, 1326, 18 CR2d 517.

A podiatrist was held qualified to testify as an expert witness in a medical malpractice action against an orthopedic surgeon in *Chadock v Cohn* (1979) 96 CA3d 205, 208, 215, 157 CR 640, 641 (trial court reversed on issue). Counsel should find useful the transcript of the examination to qualify the podiatrist included in *Chadock*. 96 CA3d at 209, 157 CR at 642.

In *Sigala v Goldfarb* (1990) 222 CA3d 1450, 266 CR 96, the court found a nationally recognized expert on trauma care unqualified to testify under Health & S C §1799.110(c) because he had not met the statutory limitation requiring substantial experience in a trauma care unit within the last 5 years. See also *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73, 35 CR2d 372 (standard of duty for emergency room physician under Health & S C §1799.110(c) may be established only by physicians who have had substantial emergency room experience; split in various appellate divisions exists over interpretation of this subdivision).

In *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 1094, 15 CR3d 64, the Fourth District Court of Appeal held that an expert with substantial emergency room experience within 5 years of the date of the alleged malpractice may testify at trial because the applicable standard of care is that which existed on the date the alleged medical malpractice occurred.

A medical expert may be qualified to testify on the standard of care for a medical field outside his or her own specialty. See *Mann v Cracchiolo* (1985) 38 C3d 18, 210 CR 762 (neurosurgeon allowed to testify concerning the standard of care for reading and diagnosing X rays).

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§191-193 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.7 Nondoctors

[§6.7] Nondoctors

 To Main Book

A vocational rehabilitation expert is not a physician to whom a plaintiff may be referred for examination under Fed R Civ P 35 (which permits a court to order a physical, mental, or blood examination when mental or physical condition is in controversy, and which is similar to CCP §2032.020(a), even if the defense is the plaintiff's failure to mitigate damages. See *Acosta v Tenneco Oil Co.* (5th Cir 1990) 913 F2d 205, 209.

The reference to Witkin in Book §6.7 should now be to 1 Witkin, *California Evidence, Opinion Evidence* §§38-41, 43, 488 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/USING MEDICAL RECORDS, REPORTS, AND EXHIBITS/§6.27 Types

USING MEDICAL RECORDS, REPORTS, AND EXHIBITS

[§6.27] Types

 To Main Book

A medical report does not constitute substantial evidence in a workers' compensation proceeding if it is based on an incorrect legal theory and is devoid of a relevant factual basis. *Ballard v WCAB* (1971) 3 C3d 832, 839, 92 CR 1. See also *Turner v WCAB* (1974) 42 CA3d 1036, 1043, 117 CR 358 (expert's opinion based on incomplete data cannot by itself support a finding or decision).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.29 OCCASION FOR SEEING PATIENT: PROFESSIONAL RELATIONSHIP

[§6.29] OCCASION FOR SEEING PATIENT: PROFESSIONAL RELATIONSHIP

 To Main Book

In *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570, the court of appeal held that, although former CCP §2034 does not require expert declarations for plaintiff's treating physicians, a party offering the expert opinions of treating physicians at trial must identify their names and addresses in the plaintiff's former §2034(f) (now CCP §2034.260) expert disclosure list.

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The procedure to obtain a medical examination of an opposing party is set out in CCP §§2032.010-2036.650. For discussion of the procedure and its uses and limitations, see California Civil Discovery Practice, chap 10 (4th ed Cal CEB 2006). An examination of the plaintiff under this procedure is termed "the defense medical exam," and the plaintiff should be careful that it is not referred to as an "independent medical exam." The defense does not need to call its examiner as a witness unless the testimony would be favorable to the defense, and may even bar the plaintiff from using the defense examiner if the findings were to favor plaintiff. See County of Los Angeles v Superior Court (1990) 222 CA3d 647, 271 CR 698, and Dickison v Howen (1990) 220 CA3d 1471, 270 CR 188, discussed in Update §6.3. Some plaintiff's attorneys routinely include in their motions in limine a motion forbidding any use before the jury of the term "independent medical examination."

Counsel should pay careful attention to the procedures and substance of the examination in order to be able to cross-examine the physician effectively at trial. The party being examined is allowed to have an attorney or attorney's representative present at a physical examination (CCP §2032.510(a), (b)), but not at a mental examination (Vinson v Superior Court (1987) 43 C3d 833, 844, 239 CR 292); Golfland Entertainment Ctrs., Inc. v Superior Court (2003) 108 CA4th 739, 747, 133 CR2d 828 (same, but noting that in exceptional cases, trial courts have discretion to permit counsel's presence during mental examinations). See CCP §2032.520(b). During a mental examination, the examining physician generally has wide latitude in questioning the examinee, although the trial court has discretion to protect the examinee from repetitive, abusive, or otherwise inappropriate questions. Golfland Entertainment Ctrs., Inc. v Superior Court (2003) 108 CA4th 739, 746, 133 CR2d 828 (examiner could question injured individual about facts and circumstances of accident to extent person had not already discussed them in his deposition or with prior physician).

The examining physician occasionally makes comments that are helpful to the examinee's case or that conflict with later written reports. The attorney or attorney's representative may record a physical examination stenographically or by audio technology. CCP §2032.510(a). Using a stenographic reporter or an audio recorder avoids the need for an observing attorney to testify about any irregularity or disparity between what happened or was said and the examiner's report. Under CCP §2032.530(a), the examining physician and the party being examined are entitled to have the entire mental examination recorded, not merely the examinee's responses, but only using audio technology, not by any other method. Golfland Entertainment Ctrs., Inc. v Superior Court (2003) 108 CA4th 739, 750, 133 CR2d 828.

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/PATIENT'S MEDICAL HISTORY/Admissibility/
§6.34 Under Hearsay Rule Exceptions

PATIENT'S MEDICAL HISTORY

Admissibility

[§6.34] Under Hearsay Rule Exceptions

 **To Main Book**

Former CCP §377, cited in Book §6.34, has been repealed and replaced by CCP §§377.10-377.62.

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.35 Solely to Show Basis of Opinion

[§6.35] Solely to Show Basis of Opinion

 To Main Book

See generally *Springer v Reimers* (1970) 4 CA3d 325, 337, 84 CR 486 (doctor-witness read from medical history recorded by consultant-doctor to whom witness had referred patient).

On the use in a criminal prosecution of a medical witness's testimony about a victim's statements during an examination to show the basis for the examiner's opinion that a physical assault of a particular kind had occurred, see *People v Bunyard* (1988) 45 C3d 1189, 1205 n4, 249 CR 71. See also Update §6.71.

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §§30-36 (4th ed 2000).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 218 where BAJI 2.43 is cited in Book §6.35.

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.37 Symptoms; Subjective Signs

[§6.37] Symptoms; Subjective Signs

 To Main Book

The reference to Witkin in Book §6.37 should now be to 1 Witkin, California Evidence, *Hearsay* §195 (4th ed 2000).

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New diagnostic procedures are useful in personal injury cases. The CT scan (Computerized Tomography) and MRI (Magnetic Resonance Imaging) provide enhanced views of soft-tissue injuries and can confirm fractures and other abnormalities that could not otherwise be confirmed without an invasive procedure such as a myelogram. Thermography is another enhancement tool that uses the increase in bodily heat around an injury site to demonstrate that injury exists. This is especially useful in soft-tissue injuries. For discussion of the standards applicable to the admissibility of evidence of new scientific procedures, see Update §5.62.

See generally California Expert Witness Guide §§4.12-4.35 (2d ed Cal CEB 1991) and Effective Introduction of Evidence in California, chap 23 (2d ed Cal CEB 2000) on scientific tests that have and have not been approved for use in court.

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.52 Admissibility

[§6.52] Admissibility

 To Main Book

The reference to Witkin in Book §6.52 should now be to 2 Witkin, *California Evidence, Demonstrative, Experimental, and Scientific Evidence* §§42-47 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.53 Extent of Testimony

[§6.53] Extent of Testimony

 To Main Book

The reference to Witkin in Book §6.53 should now be to 2 Witkin, *California Evidence, Demonstrative, Experimental, and Scientific Evidence* §§23, 42-47 (4th ed 2000).

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[§6.54] REPORTS FROM OTHER EXAMINERS

 To Main Book

Reports from other examiners can be used as a basis for expert opinion testimony if it was relied on for the patient's diagnosis or treatment as discussed in Update §6.56. Under CCP §§2032.610-2032.650, a party may request a copy of the opposing medical-legal examiner's report but in return is required to provide reports by all of his or her own examining or treating physicians, psychologists, and licensed health care practitioners.

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/Admissibility/§6.56 to Show Basis of Referring Doctor's Opinions

Admissibility

[§6.56] to Show Basis of Referring Doctor's Opinions

 To Main Book

The rule that a physician can testify about other physicians' opinions for the limited purpose of showing part of the basis for his or her own opinion testimony (based on *Kelley v Bailey*, cited in Book §6.56) applies only if the other physicians' opinions were used by the testifying physician in the patient's diagnosis or treatment. *Whitfield v Roth* (1974) 10 C3d 874, 895, 112 CR 540. See *Springer v Reimers* (1970) 4 CA3d 325, 337, 84 CR 486 (physician-witness had based opinions recorded in hospital records on report from consultant); *People v Reyes* (1974) 12 C3d 486, 503, 116 CR 217 (20-year-old psychiatric record that was insignificant part, if any, of basis for testifying doctor's opinion was properly excluded).

See CACI 218 where BAJI 2.43 is cited in Book §6.56.

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.57 Extent of Showing

[§6.57] Extent of Showing

 To Main Book

For information on *Kelley v Bailey*, cited in Book §6.57, see discussion of *Whitfield v Roth* (1974) 10 C3d 874, 112 CR 540, in Update §6.56 (limitations on doctor's testimony about nontestifying doctors' opinions). *Kostick v Swain*, cited in Book §6.57, was disapproved on other grounds in *Casey v Proctor* (1963) 59 C2d 97, 112, 28 CR 307.

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MEDICAL OPINION TESTIMONY

[§6.64] Admissibility



Application of the law to particular facts is a legal question and is not subject to expert opinion. *Ferreira v WCAB* (1974) 38 CA3d 120, 126, 112 CR 232 (doctor's statement in report that hernia was not industrially related injury was inadmissible legal conclusion—not medical opinion—and did not constitute substantial evidence). See *California Expert Witness Guide §5.3* (2d ed Cal CEB 1991).

Civil cases have rarely considered the admissibility of expert medical testimony on such conditions as "rape trauma syndrome," "battered child syndrome," and "child sexual abuse accommodation syndrome." In *Wilson v Phillips* (1999) 73 CA4th 250, 86 CR2d 204, however, the court admitted evidence on the phenomenon of "repressed memory" by a psychologist specializing in the field of child abuse, without holding a hearing to determine whether the theory of "repressed memory" is generally accepted in the scientific community. The basis for the court's decision was that expert medical opinion is not subject to the *Kelly* standard, which involves novel devices or processes. In the *Wilson* case, the psychologist's testimony did not rely on a scientific device or procedure, but rather on her opinion as a psychologist. Thus there was little danger that a jury would perceive the expert testimony as an "infallible" scientific process or experiment. On limitations on the use of such testimony in criminal prosecutions, see cases such as *People v Bledsoe* (1984) 36 C3d 236, 251, 203 CR 450; *People v Bowker* (1988) 203 CA3d 385, 249 CR 886; *People v Brown* (2004) 33 C4th 892, 16 CR3d 447. See also *People v Aris* (1989) 215 CA3d 1178, 264 CR 167, disapproved in part on other grounds in *People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 (*Aris* court held that battered woman's perception of danger can be subject of expert testimony). For discussion of the *Kelly* standard, see Update §5.62.

For information on the admissibility of opinion testimony on the existence and severity of a patient's pain, see Anno, 11 ALR3d 1249 (1967). See also *Willoughby v Zylstra* (1935) 5 CA2d 297, 300, 42 P2d 685; Johns, *California Damages: Law and Proof* (5th ed 1996).

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.65 Proper Bases

[§6.65] Proper Bases



Whether particular information constitutes a proper basis for the medical opinion offered is a question of fact for the trial court to determine using the "reasonable reliability" test of Evid C §801(b). Board of Educ. v Haas (1978) 82 CA3d 278, 282, 147 CR 88. In *Haas*, a panel of psychiatrists properly relied on information in the personnel file of a teacher suspended from employment because of mental illness when the information was used to assist the psychiatrists in their determination, which was made after they had also examined her.

In Continental Airlines, Inc. v McDonnell Douglas Corp. (1989) 216 CA3d 388, 264 CR 779, the court did not allow an expert to testify on the details of a report prepared by subordinates because it was inadmissible hearsay, but the expert's testimony that he relied on the report to arrive at an opinion on the cost of an airplane repair was admissible; to have admitted the details of the report would have deprived the adversary party of an opportunity to cross-examine the authors of the report. See also Whitfield v Roth (1974) 10 C3d 874, 895, 112 CR 540, discussed in Update §6.56.

See California Expert Witness Guide §5.3 (2d ed Cal CEB 1991).

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An expert's opinion must not be based on assumptions of fact or on speculative matters unsupported by the evidence. *Jennings v Palomar Pomarado Health Sys., Inc.* (2003) 114 CA4th 1108, 1116, 8 CR3d 363. An expert testifying about the theoretical possibility that the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation. Instead, the plaintiff must offer an expert opinion that contains a reasoned explanation illustrating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* that the negligent act was a cause-in-fact of the plaintiff's injury. 114 CA4th at 1118. See California Expert Witness Guide §5.3 (2d ed Cal CEB 1991).

People v Luis, cited in Book §6.66, was disapproved in part on other grounds in *Correa v Superior Court* (2002) 27 C4th 444, 463 n4, 117 CR2d 27.

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.67 Procedures for Showing Bases and Reasons

[§6.67] Procedures for Showing Bases and Reasons

 To Main Book

On the admissibility of hearsay relied on by the expert, see *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833, discussed in Update §5.61.

For discussion on how an expert can educate the jury about mental suffering, see *People v Page* (1991) 2 CA4th 161, 2 CR2d 898 (expert can so well educate the jury on pertinent general principles that jury can answer factual issues as well as an expert, and no further expert opinion is necessary).

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 To Main Book

"Differential diagnosis" is a standard scientific technique used to identify the cause of a medical problem by eliminating likely causes until the most probable one is isolated; this is generally accomplished by determining the possible causes of the patient's symptoms and eliminating each of the potential causes until one cannot be ruled out, or one cannot be excluded because it is the most likely. *Clawson v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, 1057. By systematically comparing clinical findings, a determination can be made of two or more diseases, with similar symptoms, that the patient may be suffering from. See also *People v Jackson* (1971) 18 CA3d 504, 95 CR 919, discussed in Update §6.74.



To be admissible in the Ninth Circuit, a "differential diagnosis" (see §6.68) must be reliable and comply with the factors of *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. *Clausen v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, 1060 (lack of specific scholarly support does not prevent admission of differential diagnosis testimony, even if cause-effect relationship has not been conclusively established).

On *Kelley v Bailey*, cited in Book §6.69, see discussion of *Whitfield v Roth* (1974) 10 C3d 874, 112 CR 540, in Update §6.56 (limitations on doctor's testimony about nontestifying doctors' opinions).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §§45-46 (4th ed 2000).



In a criminal assault prosecution, a medical expert who examined the victim may be permitted to give opinion testimony that a particular kind of assault had occurred and even the number of times it had occurred. See, e.g., People v Newlan (1991) 227 CA3d 1590, 1602, 278 CR 550 (from physical examination physician formed opinion on number of prior assaults); People v Fair (1988) 203 CA3d 1303, 1311, 250 CR 486 (doctor based opinion, in part, on statement made by child victim during taking of history); In re Cheryl H. (1984) 153 CA3d 1098, 200 CR 789, disapproved in part on other grounds in People v Brown (1994) 8 C4th 746, 763, 35 CR2d 407 (sexual abuse opinion based on observation of postinjury behavior).

California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. See People v Kelly (1976) 17 C3d 24, 30, 130 CR 144; Frye v U.S. (DC Cir 1923) 293 F 1013, 1014. In Roberti v Andy's Termite & Pest Control, Inc. (2003) 113 CA4th 893, 901, 6 CR3d 827, the court of appeal reversed the trial court's exclusion of expert testimony on pesticide exposure as the cause of the plaintiff's autism. The *Roberti* court held that the *Kelly* admissibility test does not apply to experts who offer a new theory of medical causation, because that opinion is not based on any new scientific technique, device, or procedure that may or may not have gained general acceptance in the scientific community. 113 CA4th at 903.



See *Ruiz v Minnesota Mining & Mfg. Co.* (1971) 15 CA3d 462, 467, 93 CR 270 (doctor who had done research on physical and psychological effects of glue sniffing connected plaintiff's symptoms of tremors and numbness to ingredient in defendant's product); *Sparks v Owens-Illinois, Inc.* (1995) 32 CA4th 461, 477, 38 CR2d 739 (testimony of plaintiff's medical experts clearly sufficient to support jury finding that defendants' product was more likely than not the source of asbestos fibers that caused plaintiff's mesothelioma); *Jones v John Crane, Inc.* (2005) 132 CA4th 990, 994, 35 CR3d 144 (same). But see *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 92, 37 CR2d 45Z, disapproved in part on other grounds by *Camargo v Tjaarda Dairy* (2001) 25 CA4th 1235, 108 CR2d 61Z (*Smith* court erred in admitting expert testimony extrapolating excessive asbestos concentration levels from photographs of unspecified PG&E work sites).

For an excellent discussion of the distinction between the legal requirements for proof of generic and individual causation in mass tort cases based on expert testimony on toxic exposure, see *In re Hanford Nuclear Reservation Litig.* (9th Cir 2002) 292 F3d 1124, 1135 (error for district court to dismiss plaintiff's claims based on its adoption of "doubling of the risk" standard to establish generic causation from exposure to threshold levels of radiation released from federal nuclear weapons facility).

In *Lust v Merrell Dow Pharm., Inc.* (9th Cir 1996) 89 F3d 594, the court found expert opinion evidence on causation to be unreliable, and therefore inadmissible, in a product liability action in which ingestion of a fertility drug allegedly caused plaintiff's birth defect. In applying the *Daubert* standard for admissibility, the court found that the expert had not subjected any of his research to peer review. Additionally, the court was not satisfied that the expert had reached his conclusions and opinions through objective and scientific methods, as practiced by at least a recognized minority of scientists in his field. The district court's ruling followed an in limine hearing under Federal Rule of Evidence 104(a) to determine whether the expert's opinion was admissible under Federal Rule of Evidence 702.

For discussion of the federal *Daubert* standard for admissibility of expert opinion based on scientific evidence, and the stricter *Kelly* standard in California courts, see Update §5.62.

Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.73 Admissibility

[§6.73] Admissibility

 To Main Book

An expert medical witness may state his or her opinion on the means used to inflict a particular injury, based on his or her deduction from the appearance of the injury itself. *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919, 921. See also *Estate of Rowley* (1967) 257 CA2d 324, 65 CR 139 (opinion from injuries that death was instantaneous).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §§45-46 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.74 Form of Testimony

[§6.74] Form of Testimony

 To Main Book

A medical diagnosis based on probability is admissible; scientific certainty is not necessary. *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919, 921 (battered child syndrome). See *Schneer v Boldrey* (1971) 22 CA3d 478, 484, 99 CR 404, 408 (although doctor used such terms as "conjecture," "possibility," and "theoretical," context and totality of his testimony showed he was testifying about medical probabilities).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.75 Prognosis: Continuing, Permanent, and Future Injuries

[§6.75] Prognosis: Continuing, Permanent, and Future Injuries

 **To Main Book**

See Anno, 86 ALR4th 1135 (1991) (admissibility of evidence of injured person's use of intoxicants or illegal drugs on issue of life expectancy).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.76 Admissibility

[§6.76] Admissibility

 To Main Book

On *Kelley v Bailey*, cited in Book §6.76, see discussion of *Whitfield v Roth* (1974) 10 C3d 874, 112 CR 540, in Update §6.56 (limitations on doctor's testimony about nontestifying doctors' opinions).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Opinion Evidence* §§45-46 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.77 Reasonable Medical Certainty

[§6.77] Reasonable Medical Certainty

 To Main Book

See Anno, 75 ALR3d 9 (1977) (admissibility of expert medical testimony concerning injury's future consequences when expressed in terms of probability or possibility).

Bauman v San Francisco, cited in Book §6.77, was superseded by statute on other grounds as stated in *Bonanno v Central Contra Costa Transit Auth.* (2003) 30 C4th 139, 150 n3, 132 CR2d 341.

See CACI 3903A, 3905A where BAJI 14.10, 14.13 are cited, and see CACI 3903C-3903D where BAJI 14.12 is cited, in Book §6.77.

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.78 Continuing Conditions; Permanency

[§6.78] Continuing Conditions; Permanency

 [To Main Book](#)

See Anno, 20 ALR5th 1 (1994) (need for expert testimony on issue of permanence of injury and future pain and suffering).

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Source: Torts/California Personal Injury Proof Update/6 Medical Experts/§6.79 Future Conditions

[§6.79] Future Conditions

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Bauman v San Francisco, cited in Book §6.79, was superseded by statute on other grounds as stated in *Bonanno v Central Contra Costa Transit Auth.* (2003) 30 C4th 139, 150 n3, 132 CR2d 341.

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Other Witnesses on Damages

[§7.1] Lay Witnesses Generally

Family Members

[§7.4] Suffering and Disability

[§7.5] Nursing Services

[§7.8] Employer; Personnel Manager

[§7.9] Economists; Statisticians; Appraisers of Impaired Earning Capacity

[§7.10] Basis of Testimony

[§7.12] Topics of Testimony

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Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/§7.1 LAY WITNESSES
GENERALLY

[§7.1] LAY WITNESSES GENERALLY



Lay testimony alone can provide sufficient basis for an award for pain and suffering. Capelouto v Kaiser Found. Hosps. (1972) 7 C3d 889, 895, 103 CR 856 (parents' testimony about infant's suffering); In re Emilie A. (1992) 9 CA4th 1695, 12 CR2d 294 (person can testify as to his or her own pain and suffering).

The value of supplemental lay testimony on the issue of damages (discussed in Book §7.1) is illustrated by Foss v Anthony Indus. (1983) 139 CA3d 794, 189 CR 31. In a wrongful death action, testimony that the decedent intended to find employment after he retired from the Navy was held relevant under Evid C §1250 on the issue of damages following expert testimony that the decedent's children would have received additional financial support if the decedent had been employed when he died. 139 CA3d at 800, 189 CR at 35.

On the use of lay witness testimony to support a disability insurance benefits claim, see Dodrill v Shalala (9th Cir 1993) 12 F3d 915 (grandson, husband, and friend, in position to observe claimant's daily activities, may testify even though their conclusions that she was disabled and not malingering were based to some extent on what she said to them).

The reference to Witkin should now be to 1 Witkin, California Evidence, Hearsay §195 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/Family Members/§7.4 Suffering and Disability

Family Members

[§7.4] Suffering and Disability



An injured person's spouse can testify about both (1) the injury's effects on the injured person, and (2) detriment the spouse suffered as the result of an injury (*e.g.*, the spouse's loss of consortium). See *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 115 CR 765 (loss of consortium includes loss of conjugal fellowship, love, companionship, affection, society, sexual relations, and solace). But a loss of consortium claim cannot be based on a premarital injury, no matter when the plaintiff first learned of the injury, before or after the marriage. *Zwicker v Altamont Emergency Room Physicians Med. Group* (2002) 98 CA4th 26, 35, 118 CR2d 912.

On the effect of CC §1431.2 (the Fair Responsibility Act of 1986) (also known as Proposition 51), which characterizes loss of consortium damages as "non-economic," see Update §3.25. See generally California Tort Damages §§2.17 (2d ed Cal CEB 2002).

Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/§7.5 Nursing Services

[§7.5] Nursing Services

 To Main Book

For information on damages for nursing services, see [California Tort Damages §§1.25, 1.69 \(2d ed Cal CEB 2002\)](#).

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Comment: The collateral source rule—which generally prevents a defendant from introducing evidence that the plaintiff received sick leave pay, insurance, union welfare, or other benefits—applies to public entities as well as to other defendants. See *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 14, 84 CR 173.

A jury may award plaintiff damages for lost earning capacity, even though the employer had gratuitously paid the victim-plaintiff for time lost from work. The rationale of the collateral source rule favors sheltering gratuitous gifts of money or services intended to benefit tort victims, just as it favors the distribution of insurance payments—from coverage that claimants had already arranged—without that distribution benefiting the tortfeasor. *Arambula v Wells* (1999) 72 CA4th 1006, 85 CR2d 584.

A doctor, hospital, or other health care provider sued for professional negligence (*i.e.*, medical malpractice) may introduce evidence of collateral source benefits received by a plaintiff under some circumstances. See CC §3333.1. But evidence of the tax-free status of any collateral source benefits is inadmissible. *Cox v Superior Court* (2002) 98 CA4th 670, 674, 120 CR2d 45.

In *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1220, 1224, 117 CR2d 849, the collateral source rule precluded defendants from introducing evidence of survivor benefits that the plaintiff widow received after her husband's death even though her benefits were from the same sources and nearly identical to the decedent's pension and Social Security income received while he was alive. Evidence of the latter was not barred by the collateral source rule and was admissible to establish his past and future lost benefits. However, *Rotolo Chevrolet v Superior Court* (2003) 105 CA4th 242, 129 CR2d 283, held that the trial court had erred in granting plaintiff's motion in limine to exclude, under the collateral source rule, any evidence of disability retirement benefits that he had been paid and would receive in the future. Although plaintiff relied primarily on *McKinney*, the court of appeal in *Rotolo* found that case to be distinguishable and inapplicable:

[I]n *McKinney*, the collateral source rule was applied to Social Security benefits which replaced benefits that had stopped, and to pension payments which had been constructively paid for, thus triggering the classic rationale for the rule. Here, however, [plaintiff]'s disability pension payments do not replace anything; they are alternative payments to a regular pension.

105 CA4th at 248.

In assessing loss of earning capacity, the jury may be instructed when circumstances warrant in a lawsuit under the Federal Employers' Liability Act (FELA) (45 USC §§51-60) that the plaintiff does *not* have a right to workers' compensation benefits. *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 13, 1 CR3d 412. For further discussion of the collateral source rule, see Update §§3.32 and 14.9.

The constitutionality of CC §3333.1(a) has been upheld against a challenge that it denies due process and equal protection. See *Fein v Permanente Med. Group* (1985) 38 C3d 137, 166, 211 CR 368.

For information on damages for impairment of earning capacity, see generally California Tort Damages §§1.41-1.65 (2d ed Cal CEB 2002).

Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/§7.9 ECONOMISTS; STATISTICIANS; APPRAISERS OF IMPAIRED EARNING CAPACITY

[§7.9] ECONOMISTS; STATISTICIANS; APPRAISERS OF IMPAIRED EARNING CAPACITY

 To Main Book

Normally, a plaintiff will want to use the testimony of economists, statisticians, and appraisers to show both (1) the amount the injury has impaired the plaintiff's earning capacity, and (2) that the plaintiff's losses fall within the definition of "economic damages" in CC §1431.2(b)(1) as "objectively verifiable monetary losses including... loss of earnings, ... loss of employment and loss of business opportunities." Under CC §3333.2 (a part of MICRA, the Medical Injury Claims Reform Act of 1975), the effort to characterize damages for impairment of earning capacity as "economic" also avoids a \$250,000 cap on noneconomic damages. For discussion of the effect of these code sections on damages recoveries, see California Tort Damages §§15.8, 15.10, 15.41-15.42 (2d ed Cal CEB 2002). Cases applying MICRA limitations are discussed in California Tort Guide §§9.80-9.84 (3d ed Cal CEB 1996). For more on CC §1431.2, see Peyrat, *Joint and Several Liability, Comparative Fault, and the Fair Responsibility Act of 1986 in Joint & Several Liability* (CEB Program Handbook June/July 1993).

An economist can make use of governmental and private statistical publications to show losses of earning capacity, even for persons who have not entered the labor pool. For an extended discussion of the proof of economic damages resulting from the death of a person not in the labor force, see 14 Am Jur Proof of Facts 2d 311 (1977). If any portion of the economic damages is taxable to the recipient, the expert should also testify to the additional damages required to pay the taxes. But see Gargir v B'Nei Akiva (1998) 66 CA4th 1269, 1280, 78 CR2d 557 (no requirement that future earning capacity be established by expert testimony; loss of earning power may be inferred from nature of injury, with or without proof of actual earnings or income either before or after the injury). See BAJI 14.12; Canavin v Pacific S.W. Airlines (1983) 148 CA3d 512, 196 CR 82, both of which are cited in Update §§3.30, 7.10, and 11.22.

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Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/§7.10 Basis of Testimony

[§7.10] Basis of Testimony

 To Main Book

See *Wilson v Gilbert* (1972) 25 CA3d 607, 613, 102 CR 31 (use of jury instruction (BAJI 14.70) on present value tables). But see *Howard v Global Marine, Inc.* (1972) 28 CA3d 809, 105 CR 50 (not error for trial judge to refuse to give present value table to jury).

See *Canavin v Pacific S.W. Airlines* (1983) 148 CA3d 512, 196 CR 82. See also *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 1280, 78 CR2d 557 (no requirement that future earning capacity be established by expert testimony; loss of earning power may be inferred from nature of injury, with or without proof of actual earnings or income either before or after the injury); BAJI 14.12, Comment; BAJI 14.70, cited in Book §3.30.

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 3903C-3903D where Comment to BAJI 14.12 is cited, see CACI 3904 where BAJI 14.70 is cited, and see CACI 3932 where BAJI 14.69 is cited, in Book §7.10.

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Source: Torts/California Personal Injury Proof Update/7 Other Witnesses on Damages/§7.12 Topics of Testimony

[§7.12] Topics of Testimony

 To Main Book

(3) See *Neumann v Bishop* (1976) 59 CA3d 451, 463, 130 CR 786, 794 (not abuse of discretion to receive economist's testimony about plaintiff's accrued and prospective earnings loss).

(8) The present value of the loss suffered in a wrongful death by deceased's heirs, *e.g.*, economic contributions, personal service, advice, or training that probably would have been given; and society, comfort, care, protection, and companionship. *Krouwe v Graham* (1977) 19 C3d 59, 67, 137 CR 863; *Fox v Pacific S.W. Airlines* (1982) 133 CA3d 565, 569, 184 CR 87.

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Handling Exhibits and Demonstrations

[§8.3] Offering Exhibits in Evidence: Checklist

[§8.6] Custody; Release to Owner; Form

[§8.7] Inspection by Adverse Counsel

Laying Foundation

[§8.10] Relevance

[§8.11] Authentication

[§8.12] Secondary Evidence Rule

[§8.13] Hearsay Exception

Presenting to Jury

[§8.18] Using Viewing Aids

Admission by Agreement

[§8.22] Requests for Admission: Form

[§8.23] Pretrial Order: Form

[§8.25] Writings as Past Recollection Recorded

[§8.35] Viewing Scenes and Objects Outside Courtroom

[§8.36] Demonstrations and Experiments

Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.3 OFFERING EXHIBITS IN EVIDENCE: CHECKLIST

[§8.3] OFFERING EXHIBITS IN EVIDENCE: CHECKLIST

 To Main Book

For other discussions on how to present evidence at trial, see [Laying a Foundation to Introduce Evidence \(Preparing and Using Evidence at Trial\) \(Cal CEB Action Guide Winter 2002\)](#); [California Trial Practice: Civil Procedure During Trial, chap 13 \(3d ed Cal CEB 1995\)](#); and [Effective Introduction of Evidence in California \(2d ed Cal CEB 2000\)](#).

See also [California Expert Witness Guide, chap 9 \(2d ed Cal CEB 1991\)](#).

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.6 Custody; Release to Owner; Form

[§8.6] Custody; Release to Owner; Form

 **To Main Book**

California Rules of Court 2.400(c)(2), cited in Book §8.6, now also provides for the custody of exhibits when a case is tried to a temporary judge or referee outside court facilities. California Rules of Court 531, cited in Book §8.6, was repealed, effective January 1, 2001.

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.7 Inspection by Adverse Counsel

[§8.7] Inspection by Adverse Counsel

 To Main Book

The reference to Witkin should now be to 2 Witkin, *California Evidence, Demonstrative, Experimental, and Scientific Evidence* §§9-13 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/Laying Foundation/§8.10 Relevance

Laying Foundation

[§8.10] Relevance

 To Main Book

For an example of the treatment of relevance, see *Winfred D. v Michelin N. Am., Inc.* (2008) 165 CA4th 1011, 1026, 81 CR3d 756 (evidence of plaintiff's private life should have been excluded as unduly prejudicial under Evid C §352); *Celli v Sports Car Club of Am., Inc.* (1972) 29 CA3d 511, 521, 105 CR 904 (under Evid C §352, excluding admission passes containing statements purporting to release defendants from liability is no abuse of discretion).

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The need for authentication is illustrated in *Fraijo v Hartland Hosp.* (1979) 99 CA3d 331, 344, 160 CR 246. Plaintiff unsuccessfully attempted to impeach a medical witness's testimony by introducing a brochure containing warnings about use of a drug administered by the witness to plaintiff. Unfortunately, plaintiff did not first authenticate the brochure by introducing evidence establishing that the brochure had been included in the drug's packaging and had been distributed to its purchasers. This authentication was necessary because the purpose of the cross-examination was to show that the witness knew of the brochure's contents, *i.e.*, its warning. 99 CA3d at 345; Evid C §1401(a). See also *Interinsurance Exch. v Velji* (1975) 44 CA3d 310, 318, 118 CR 596 (trial judge's conclusion that handwriting on back of documents was same as admittedly authentic writing on front was sufficient authentication of back).

The reference to Witkin should now be to 2 Witkin, California Evidence, *Documentary Evidence* §§3-25 (4th ed 2000). See also *Effective Introduction of Evidence in California*, chap 11 (2d ed Cal CEB 2000).

Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.12 Secondary Evidence Rule

[§8.12] Secondary Evidence Rule



Former Evid C §§1500-1511, which had set forth California's "best evidence" rule, were repealed. Effective January 1, 1999, these sections have been replaced by [Evid C §§1520-1523](#) and [1552-1553](#).

The content of a writing may now be proved by an otherwise admissible original ([Evid C §1520](#)) or by "secondary evidence" ([Evid C §1521](#)). The court may exclude secondary evidence if it determines that (1) a genuine dispute exists concerning material terms of the writing and justice requires its exclusion, or (2) admitting the secondary evidence would be unfair. [Evid C §1521\(a\)](#). [Section 1521\(c\)](#) makes clear that "secondary evidence" must still be authenticated in accordance with [Evid C §1401](#).

[Evidence Code §1522](#) sets forth additional grounds for excluding secondary evidence in criminal cases.

The new provisions generally prohibit oral testimony to prove the content of a writing. [Evid C §1523](#). Oral testimony is admissible, however, if the proponent of the evidence does not have possession or control over the original or a copy and (1) the original has been lost or destroyed without fraudulent intent on the part of the proponent; (2) the original was not reasonably procurable; or (3) the document is collateral to the controlling issues, and it would be inexpedient to require production of the original. [Evid C §1523\(b\)-\(c\)](#).

Oral testimony is also permissible when the writing consists of numerous accounts or other writings that cannot be examined in court without a great loss of time, and the evidence to be presented is "only the general result of the whole." [Evid C §1523\(d\)](#).

Two other new Evidence Code provisions address technological advances. [Section 1552](#) allows a computer printout to represent the computer information or computer program that it purports to represent. If a party introduces evidence that a computer printout is unreliable, the burden shifts to the party introducing the printout to prove, by a preponderance of the evidence, that the printout is an accurate representation. [Evid C §1552](#). [Section 1553](#) provides that a "printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to convey." If a party introduces evidence that the printed representation is unreliable, the burden shifts to the party introducing the images to prove, by a preponderance of the evidence, that the printed representation is an accurate representation of the images it purports to represent. [Evid C §1553](#).

The 1998 Law Revision Commission Comments accompanying the changes indicate that they were not intended to create "a major departure" from the former law, but primarily to clarify and simplify the method of proof of the content of a writing. Cases interpreting former Evid C §1511 may be relied on for guidance in interpreting [Evid C §1521\(a\)\(1\)-\(2\)](#). Law Revision Commission Comments 1998. For example, duplicates of an original writing constitute "secondary evidence" of the content of a writing. [People v Bizieff \(1991\) 226 CA3d 1689, 1697, 277 CR 678](#). ("Duplicate" is defined under [Evid C §260](#).) The secondary evidence rule does not change the provision that, when statutory production procedures are followed, copies of business records may be used in lieu of originals. [Evid C §1562](#).

The reference to Witkin should now be to 2 Witkin, California Evidence, *Documentary Evidence* §§27-55 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.13 Hearsay Exception

[§8.13] Hearsay Exception

 To Main Book

The reference to Witkin should now be to 1 Witkin, California Evidence, *Hearsay* §§194-297 (4th ed 2000). In *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 1703, 40 CR2d 56, the court held that helmet safety test reports were inadmissible under the business records exception because of insufficient foundation. Even though the custodian's declaration conformed to the requirements of Evid C §§1560 and 1561, it was inadequate to establish the foundational requirements of Evid C §1271, because it provided no assurance of competency, reliability, or trustworthiness. 33 CA4th at 1708. See also *Garibay v Hemmat* (2008) 161 CA4th 735, 742, 74 CR3d 715 (declaration of medical expert witness had no foundation because it was not based on facts from medical records admitted under business records exception).

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/Presenting to Jury/§8.18
Using Viewing Aids

Presenting to Jury

[§8.18] Using Viewing Aids

 To Main Book

Use of a magnifying glass by jurors to view an exhibit does not constitute an unauthorized experiment or the introduction of new evidence; it is merely an extension of the jurors' sense of sight and the glass need not be marked or introduced in evidence. *People v Turner* (1971) 22 CA3d 174, 182, 99 CR 186.

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/ADMISSION BY AGREEMENT/§8.22 Requests for Admission: Form

ADMISSION BY AGREEMENT

[§8.22] Requests for Admission: Form

 [To Main Book](#)

Replace the form in [Book §8.22](#) with the following:

 [Print](#)

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i> TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
<div style="text-align: center;">REQUESTS FOR ADMISSION</div> <input type="checkbox"/> Truth of Facts <input type="checkbox"/> Genuineness of Documents Requesting Party: Answering Party: Set No.:	CASE NUMBER:

INSTRUCTIONS

Requests for admission are written requests by a party to an action requiring that any other party to the action either admit or deny, under oath, the truth of certain facts or the genuineness of certain documents. For information on timing, the number of admissions a party may request from any other party, service of requests and responses, restrictions on the style, format, and scope of requests for admission and responses to requests, and other details, see Code of Civil Procedure sections 94–95, 1013, and 2033.010–2033.420 and the case law relating to those sections.

An answering party should consider carefully whether to admit or deny the truth of facts or the genuineness of documents. With limited exceptions, an answering party will not be allowed to change an answer to a request for admission. There may be penalties if an answering party fails to admit the truth of any fact or the genuineness of any document when requested to do so and the requesting party later proves that the fact is true or that the document is genuine. These penalties may include, among other things, payment of the requesting party’s attorney’s fees incurred in making that proof.

Unless there is an agreement or a court order providing otherwise, the answering party must respond in writing to requests for admission within 30 days after they are served, or within 5 days after service in an unlawful detainer action. There may be significant penalties if an answering party fails to provide a timely written response to each request for admission. These penalties may include, among other things, an order that the facts in issue are deemed true or that the documents in issue are deemed genuine for purposes of the case.

Answers to *Requests for Admission* must be given under oath. The answering party should use the following language at the end of the responses:

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE)

(SIGNATURE)

These instructions are only a summary and are not intended to provide complete information about requests for admission. This *Requests for Admission* form does not change existing law relating to requests for admissions, nor does it affect an answering party’s right to assert any privilege or to make any objection.

REQUESTS FOR ADMISSION

You are requested to admit within 30 days after service, or within 5 days after service in an unlawful detainer action, of this *Requests for Admission* that:

1. Each of the following facts is true *(if more than one, number each fact consecutively)*:

Continued on Attachment 1

2. The original of each of the following documents, copies of which are attached, is genuine *(if more than one, number each document consecutively)*:

Continued on Attachment 2

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Comment: Operative July 1, 1987, former CCP §2033 was repealed and replaced by former CCP §2033 which was replaced by

CCP §§2033.010-2033.420, operative July 1, 2005. The discussion in Book §8.22 about the possible limited effect of admitting the "genuineness" of a document may have been invalidated by the amended statute. Failure to respond within 30 days after service of a request for admissions may result in the matter about which the admission was requested being deemed admitted, unless on motion of the requesting party the court has shortened the time for response or on motion of the responding party the court has extended the time, or unless the parties have agreed to extend the time. CCP §§2033.250-2033.260, 2033.280. The revised CCP §2033.280, however, does not provide for automatic admissions when a party fails to respond to requests for admissions. If a party does not respond to an order compelling response, the court, on motion, must order matters deemed admitted and award sanctions unless the admissions are answered before the hearing. CCP §2033.280. By failing to make a timely response, a party also waives any objection to the requests unless on motion the court relieves the party from this waiver on determination that the party has later served a response that is in substantial compliance with CCP §§2033.210-2033.230 and that the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. CCP §2033.280(a). Under former CCP §2033, a propounding party's motion for summary judgment could be granted after the statute's procedural requirements were met. See Billings v Edwards (1981) 120 CA3d 238, 174 CR 722. Under CCP §2033.280(b), (c), a court order deeming the matters admitted will be required.

Attorney verification of responses to request for admissions is insufficient; CCP §2033.240 requires that a party verify the responses.

Admissions or deemed admissions obtained by one party may be used by another party in the action. Swedberg v Christiana Community Builders (1985) 175 CA3d 138, 220 CR 544. Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under CCP §2033.300, CCP §2033.410(a); New Albertsons, Inc. v Superior Court (2008) 168 CA4th 1403, 86 CR3d 457 (court must resolve any doubts in ruling on motion to withdraw or amend admission in favor of moving party).

Code of Civil Procedure §2033.250 requires the responding party to serve the original responses on the party serving the request. The latter party must retain the original request, the original proof of service, and the original responses for at least 6 months after the judgment becomes final. CCP §2033.270(b).

The number of requests for admissions now is limited to 35 except when related to genuineness of documents. The requesting party may request a greater number by attaching a specified supporting declaration stating that the greater number is warranted by the complexity or the quantity of the existing and potential issues in the case. If the responding party seeks a protective order on the ground that the number of requests for admission is unwarranted, the requesting party has the burden of justifying the greater number. CCP §§2033.030-2033.040.

Code of Civil Procedure §§2033.030-2033.060 provides detailed requirements for the form of the requests for admissions; CCP §§2033.210-2033.230 governs form of answers or objections.

For a more detailed discussion of requests for admission, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.23 Pretrial Order: Form

[§8.23] Pretrial Order: Form

 To Main Book

Although former Cal Rules of Ct 214(a)(1)(ii) has been repealed, the discussion in [Book §8.23](#) may still have some applicability. Under [Cal Rules of Ct 3.721, 3.722\(a\)](#), the court must set an initial case management conference in every general civil case, and conduct the conference in the manner provided by local rule. The issues considered at that conference include whether the case should be assigned to, or whether the parties will stipulate to, alternative dispute resolution. [Cal Rules of Ct 3.722\(a\)](#), [Cal Rules of Ct 3.726, 3.727\(6\)](#). When appropriate, the case management order may include the date, time, and place of any further case management conferences and the final case management conference before trial. [Cal Rules of Ct 3.723, Cal Rules of Ct 3.728\(11\)-\(12\)](#). Most counties also have local rules providing for conferences with the trial judge, the purpose of which is to expedite the trial. It is customary at these conferences for the judge and counsel to address general housekeeping matters, such as the premarking of exhibits and the parties' submission of trial witness lists and jury instructions, as well as substantive hearings on the record concerning the evidence that may be admitted or excluded during the trial. For example, in limine motions may ask the judge to make preliminary fact findings on foundational matters under [Evid C §§402-405](#). For further discussion on pretrial conferences and in limine motions, see [California Trial Practice: Civil Procedure During Trial, chaps 6-7 \(3d ed Cal CEB 1995\)](#). See also [Effective Introduction of Evidence in California, chaps 3-4 \(2d ed Cal CEB 2000\)](#). The CEB treatise referred to in [Book §8.23](#) is no longer in print. Now see [California Civil Procedure Before Trial \(4th ed Cal CEB 2004\)](#).

The reference (in the form) to 2 California Civil Procedure Forms Manual 303 (Cal CEB 1966) should now be to California Civil Litigation Forms Manual §43 (Cal CEB 1980).

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.25 WRITINGS AS PAST RECOLLECTION RECORDED

[§8.25] WRITINGS AS PAST RECOLLECTION RECORDED

 To Main Book

See Note, *Admitting Recorded Hearsay: A Comparison of Past Recollection Recorded and Business Records*, 9 UCD L Rev 147 (1976).

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Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.35 VIEWING SCENES AND OBJECTS OUTSIDE COURTROOM

[§8.35] VIEWING SCENES AND OBJECTS OUTSIDE COURTROOM



Former CCP §610, cited and discussed in [Book §8.35](#), has been repealed and replaced by [CCP §651](#). [Section 651](#) provides that a trial judge who finds that a view would be proper and would aid the trier of fact (*i.e.*, the jury or the judge if sitting without a jury) in determining a case may order a view of:

- (1) The property that is the subject of litigation;
- (2) The place where a relevant event occurred; and/or
- (3) An object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case, and which cannot with reasonable convenience be viewed in the courtroom.

The entire court (*i.e.*, judge, jury, court reporter, and other officers) proceeds to the place, property, or object. Court is in session throughout the view, and the judge may permit witnesses to testify. Proceedings are recorded to the same extent as in the courtroom. [CCP §651\(b\)](#). Under [CCP §632](#), any statement of decision by the court must explain the factual and legal basis for its decision for each of the principal controverted issues at trial. Thus, if the factual basis for the court's decision is supported primarily by evidence obtained at the view, the statement of decision should state the observations at the view supporting the finding.

The reference to Witkin should now be to 2 Witkin, *California Evidence, Demonstrative, Experimental, and Scientific Evidence* §§29-30 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/8 Handling Exhibits and Demonstrations/§8.36
DEMONSTRATIONS AND EXPERIMENTS

[§8.36] DEMONSTRATIONS AND EXPERIMENTS

 To Main Book

Under CCP §2025, the court may order a deponent to perform a physical demonstration or a reenactment of an incident at a deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883. The *Emerson* court held that former CCP §2025(o) (now CCP §2025.480(a)), permitting a party to move for an order compelling a deponent to "answer any question," includes both verbal and nonverbal responses. Sanctions may be imposed, including exclusion of evidence, for failure to comply with an order compelling such a response. The *Emerson* court thus disapproved *Stermer v Superior Court* (1993) 20 CA4th 777, 24 CR2d 577, which had held that only verbal responses were required at a deposition.

For a case discussing testimony about experiments using a driverless car to prove a product defect, see *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 520, 109 CR 110.

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Police Accident Reports

Value

[§9.2] Uses

Obtaining Report

[§9.3] For Investigative Use

[§9.4] Request and Declaration: Form

For Use at Trial

[§9.7] Subpoena Duces Tecum

[§9.8] Form: Declaration for Subpoena Duces Tecum

Admission as Exhibit

[§9.9] Admissibility

[§9.10] By Stipulation

Objections to Admission

[§9.11] Privilege

[§9.12] Hearsay

[§9.14] Secondary Evidence

[§9.15] Offering Report in Evidence

Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/VALUE/§9.2 Uses

VALUE

[§9.2] Uses

 To Main Book

In addition to using police accident reports, lawyers may find uses at trial for police training and tactical manuals. See, *e.g.*, *Grudt v City of Los Angeles* (1970) 2 C3d 575, 587, 86 CR 465 (police tactical manual on use of firearms was relevant and admissible in action for wrongful death of man shot by officers, on same basis as an employer's safety rules, to help show what due care was required in circumstances).

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/OBTAINING REPORT/§9.3 For Investigative Use

OBTAINING REPORT

[§9.3] For Investigative Use

 To Main Book

Generally, anyone who has a "proper interest" in a police accident report may obtain a copy by paying a fee. See Book §9.3. A person accused of a crime arising from an accident may establish a proper interest in obtaining reports of other accidents at the same location. See State ex rel Dep't of Transp. v Superior Court (1985) 37 C3d 847, 210 CR 219. However, even if a party does not have a proper interest, discovery of information obtained from reports of other accidents at the same location is permitted *if* the information does not disclose the identities of the reporting parties or compromise the privacy interests of the reporting parties. See Davies v Superior Court (1984) 36 C3d 291, 300, 204 CR 154 (allowing discovery of computerized accident data from the Traffic Accident Surveillance Analysis System (TASAS)). But see 23 USC §409, which precludes the admission of evidence from TASAS in any action for damages arising from an alleged dangerous condition at the location to which the report refers.

In Department of Transp. v Superior Court (1996) 47 CA4th 852, 55 CR2d 2, however, the federal discovery privilege found in 23 USC §409 precluding discovery of information compiled for the evaluation of hazardous roadways was narrowly construed and the burden of proof placed on the government entity claiming protection. Because the Department of Transportation failed to demonstrate that the information requested was compiled or collected under a "hazardous roadway elimination program," the information was properly discoverable.

See also Nelson v Superior Court (1986) 184 CA3d 444, 229 CR 94 (CHP reports not divulged since no showing of relevancy or similarity to plaintiff's case). See Anno, 84 ALR4th 15 (1991) (discoverability of traffic accident reports and derivative information).

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.4 Request and Declaration: Form

[§9.4] Request and Declaration: Form

 To Main Book

If the declaration will be signed outside of California, the final line of text in the form in Book §9.4 should be changed to read: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct." CCP §2015.5.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/For Use at Trial/§9.7 Subpoena Duces Tecum

For Use at Trial

[§9.7] Subpoena Duces Tecum

 **To Main Book**

See Update §11.8 on obtaining copies of business records. An attorney of record now may sign and issue a subpoena duces tecum. CCP §1985.

Government Code §68097.2 provides that payment of required fees must be made to peace officers, firefighters, marshals, deputy marshals, foresters, or fire control members of the Department of Forestry, Department of Justice technical analysts, and other state employees who have been directed, by a subpoena issued under Govt C §68097.1, to attend a proceeding as a witness.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.8 Form: Declaration for Subpoena Duces Tecum

[§9.8] Form: Declaration for Subpoena Duces Tecum

 To Main Book

Whether the declaration is executed within or outside California, the place of execution need not be stated if the declaration reads: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct." See [CCP §2015.5](#). If the action is filed in small claims court, the Judicial Council form of Declaration for Subpoena Duces Tecum for use in small claims court only should be used.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/ADMISSION AS EXHIBIT/§9.9 Admissibility

ADMISSION AS EXHIBIT

[§9.9] Admissibility

 To Main Book

The court in *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 270, 129 CR 146, held that neither a CHP accident report nor a diagram in that report was admissible in evidence, even under Evid C §771, after the officer used it to refresh his memory before testifying.

See Anno, 77 ALR3d 115 (1977) (admissibility in state court proceedings of police reports as business records).

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.10 By Stipulation

[§9.10] By Stipulation

 To Main Book

The reference to Witkin should now be to 1 Witkin, California Procedure, *Attorneys* §§263-284 (5th ed 2009).

Robinson v Cable, cited in Book §9.10, was overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/Objections to Admission/§9.11 Privilege

Objections to Admission

[§9.11] Privilege

 **To Main Book**

See *State ex rel Dep't of Transp. v Superior Court* (1985) 37 C3d 847, 210 CR 219, and *Davies v Superior Court* (1984) 36 C3d 291, 298, 204 CR 154, cited in Update §9.3 on who may obtain accident report data.

Robinson v Cable, cited in Book §9.11, was overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.12 Hearsay

[§9.12] Hearsay

 To Main Book

An arresting officer's report containing the statement that the arrestee had said he was driving the vehicle is admissible in a driver's license suspension hearing over a hearsay objection; the report is a business record and the driver's statement is an admission against interest. See *Jackson v Department of Motor Vehicles* (1994) 22 CA4th 730, 27 CR2d 712.

The citation in the Book for *Taylor v Centennial Bowl* is *Taylor v Centennial Bowl* (1966) 65 C2d 114, 126, 52 CR 561 (not 56 CR 561, 568).

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.14 Secondary Evidence

[§9.14] Secondary Evidence

 To Main Book

Former Evid C §§1500-1511, which had set forth California's "best evidence" rule, were repealed. Effective January 1, 1999, these sections have been replaced by Evid C §§1520-1523 and 1552-1553. The content of a writing may now be proved by an otherwise admissible original (Evid C §1520) or by "secondary evidence" (Evid C §1521). See Update §8.12.

As suggested in the Book, a police accident report may be admitted into evidence if attested to or certified as a copy of an official writing in the custody of a public entity. Evid C §§1530-1531.

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Source: Torts/California Personal Injury Proof Update/9 Police Accident Reports/§9.15 Offering Report in Evidence

[§9.15] Offering Report in Evidence

 To Main Book

Robinson v Cable, cited in Book §9.15, was overruled in part on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607.

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10

Discovery Documents

[§10.2] Depositions

Uses at Trial

To Refresh Memory

[§10.4] Of Own Witness

[§10.5] Of Adverse Witness

To Show Prior Inconsistent Statement

[§10.7] By Adverse Witness

[§10.8] When Deponent Becomes Own Witness

As Substitute Testimony

[§10.15] When Witness Unavailable

[§10.16] In Interests of Justice

[§10.17] When Deposition Is of Adverse Party, Agent, or Witness

[§10.18] Objections to Admission

[§10.19] Substitution of Parties and Supplemental Proceedings

[§10.20] Presentation at Trial

[§10.20A] Video Recorded Depositions

[§10.20B] Duties of Deposition Officer

[§10.21] Availability to Jury During Deliberations

Interrogatories

[§10.22] Uses

[§10.23] Restrictions on Use

Other Discovery Documents

[§10.24] Request for Admission

[§10.25] Motions for Production and Inspection and for Examination by Physicians



Effective January 1, 2007, the California Rules of Court were reorganized and renumbered by the Judicial Council. All citations to the rules have been updated in this chapter. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the current Act in a nonsubstantive manner but also completely renumbers it.

Code of Civil Procedure §2025.330(c) permits a deposition to be video or audio recorded, if the notice of the deposition so advises. The video recording of deposition testimony and the use of the video at trial is discussed in Update §10.20A.

In implementing former CCP §2025(h)(3), the Judicial Council provided procedures in Cal Rules of Ct 3.1010 by which a person may take or participate in a deposition by telephone, video conference, or other remote electronic means. The noticing party must make all arrangements for any other party to participate by remote means and give notice that the deposition will be taken in that manner. Cal Rules of Ct 3.1010(a). Other parties must pay their share of the expenses incurred if they choose to attend by remote electronic means, or they may appear at the deposition personally without giving prior notice. Except for a party deponent, who must appear at the deposition in person and be in the presence of the deposition officer, any other party may give written notice of an appearance by remote electronic means as long as that notice is served by facsimile or personal delivery at least 3 court days before the deposition, and the party makes all arrangements and pays for all expenses incurred for the remote electronic appearance. Cal Rules of Ct 3.1010(b)-(c). The court may permit a *nonparty deponent* to appear at his or her deposition by telephone, if it finds there is good cause and no prejudice to any party. Cal Rules of Ct 3.823.

Deposition transcripts from settled cases against a government entity are subject to discovery under the Public Records Act (Govt C §§6250-6270). City of Los Angeles v Superior Court (1995) 40 CA4th 593, 46 CR2d 805.

For a detailed discussion of procedures for scheduling and taking depositions, including forms, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006). Reproducible forms are in California Civil Litigation Forms Manual (Cal CEB 1980).

The reference to Witkin in the Book should now be to 2 Witkin, California Evidence, *Discovery* §§29-86 (4th ed 2000).

Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/Uses at Trial/To Refresh Memory/§10.4 Of Own Witness

Uses at Trial

To Refresh Memory

[§10.4] Of Own Witness

 **To Main Book**

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

A deposition may be used at trial even though it is not signed by the deponent (or, in the case of a recording, if it is identified in an accompanying writing as the deposition of a deponent), if the deponent is given notice of its transcription (or, in the case of a recording, of its availability for review) and 30 days thereafter to correct, approve, or disapprove it. CCP §§2025.520(f), 2025.620. The reference in Book §10.4 to former CCP §2016(d)(1) should now be to CCP §2025.620(a).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 208 where BAJI 2.06 is cited in Book §10.4.

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.5 Of Adverse Witness

[§10.5] Of Adverse Witness

 To Main Book

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

The reference in Book §10.5 to former CCP §2016(d)(1) should now be to CCP §2025.620(a), (b).

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/To Show Prior Inconsistent Statement/
§10.7 By Adverse Witness

To Show Prior Inconsistent Statement

[§10.7] By Adverse Witness

 To Main Book

As noted in the second *Comment* in Book p 307, the final question in the dialogue is sometimes objected to as argumentative. For a discussion of this question, see Goff, *Argumentative Questions: Counsel, Protect Your Witness*, 49 Cal SBJ 140, 192 (1974).

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

Under the revised discovery statutes, any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness. CCP §2025.620(a). An adverse party may use for any purpose a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee of a party under CCP §2025.230. CCP §2025.620(b).

See CACI 107 where BAJI 2.21 is cited in Book §10.Z.

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.8 When Deponent Becomes Own Witness

[§10.8] When Deponent Becomes Own Witness

 To Main Book

See Update §10.7 on renumbering of discovery provisions. There is no provision under the revised discovery statutes corresponding to former CCP §2016(f), cited in Book §10.8.

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/As Substitute Testimony/§10.15 When Witness Unavailable

As Substitute Testimony

[§10.15] When Witness Unavailable

 **To Main Book**

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

Any party may use the deposition of an unavailable witness or of a deponent who resides more than 150 miles from the location of the trial or other hearing. CCP §2025.620(c). Unavailability is now defined in that section and not by reference to the Evidence Code.

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.16 In Interests of Justice

[§10.16] In Interests of Justice

 To Main Book

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

The citation in Book §10.16 to former CCP §2016(d)(3)(ii) should now be to CCP §2025.620(c).

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.17 When Deposition Is of Adverse Party, Agent, or Witness

[§10.17] When Deposition Is of Adverse Party, Agent, or Witness

 To Main Book

The citation in Book §10.17 to former CCP §2016(d)(2) should now be to CCP §2025.620(b).

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §153 (4th ed 2000).

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Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

There is no new corresponding section to former CCP §2016(e) (relettered subsequently as former CCP §2016(f)), cited in Book §10.18. Reading, signing, and changes in depositions are now covered by CCP §2025.520. The citation in Book §10.18 to former CCP §2021(c) should now be to CCP §2025.460. Under CCP §2025.460(c), 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 and are not waived by failure to make them before or during the deposition.

The citation in the third paragraph of Book §10.18 to the best evidence rule embodied in former Evid C §1500 should now be to Evid C §1523(d), which permits oral testimony of the content of a writing "if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." Former Evid C §§1500-1511, which had set forth California's best evidence rule, were repealed. Effective January 1, 1999, these sections have been replaced by Evid C §§1520-1523 and 1552-1553. See Update §8.12.

The last paragraph of Book §10.18 states that a deposition cannot be admitted in evidence if the deponent dies without reading and signing it. Code of Civil Procedure §2025.520(f), (g) provides that an unsigned deposition (or, in the case of a recording, one that is unaccompanied by a signed writing identifying it as the deponent's) has the same force and effect as though it had been read, corrected, and signed by the deponent unless a successful motion to suppress can be filed rejecting all or part of the deposition. Perhaps a valid reason for granting the motion would be that the deponent died (a) before having been given notice that a transcript of the deposition testimony had been prepared and was available to be signed, or (b) before 30 days had elapsed after having been given the notice. Arguably, the deponent's inaction during the 30-day period prescribed by CCP §2025.520 is a kind of validation of the accuracy of the transcript. A separate argument is that the deposition transcript may be used as evidence of a prior consistent or inconsistent statement of the witness even if the witness had no opportunity to review it.

When the witness was unavailable and there was no prejudice to either party, the use of an unsigned deposition was permitted, even when the parties had stipulated to a separate procedure for signing it before a foreign notary (thus stipulating away the provisions of former CCP §2019(e)(1) (see now CCP §2025.520(a) for unsigned deposition) and the deponent was not given notice of the opportunity to correct and read it. Chavez v Zapata Ocean Resources, Inc. (1984) 155 CA3d 115, 201 CR 887 (deponent was a transient seaman). Voorheis v Hawthorne-Michaels Co. (1957) 151 CA2d 688, 312 P2d 51, cited in Book §10.18, and other pre-1976 cases are based on outdated law and are no longer authority on the admissibility of unsigned depositions. See Chavez v Zapata Ocean Resources, Inc. (1984) 155 CA3d 115, 120 n3, 201 CR 887. This point discussed in *Chavez* appears to be unaffected by the 1987 law.

Notarized photocopies of depositions do not meet the authentication requirements of CCP §273. Certified copies or duplicate originals are required. Wablgren v Coleco Indus. (1984) 151 CA3d 543, 198 CR 715. Also, the rough draft transcripts of official reporters or official reporters pro tempore of any court cannot be certified or used as the official certified transcript of the proceedings or be used to rebut the official certified transcript. CCP §273(b).

Video and audio recordings are certified by the deposition officer in an accompanying writing as outlined in CCP §2025.540.

Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.19 Substitution of Parties and Supplemental Proceedings

[§10.19] Substitution of Parties and Supplemental Proceedings



Evidence Code §§1290-1292 now specify the situations in which depositions taken in former actions or proceedings are not made inadmissible by the hearsay rule.

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

Former CCP §2016(d)(4), cited in Book §10.19, has been replaced by CCP §2025.620(f)-(g). Citations in Book §10.19 to former CCP §§2017(a)(4) and 2017(b) on depositions to perpetuate testimony now should be to CCP §§2035.010-2035.060.

The reference to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §157 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.20 Presentation at Trial

[§10.20] Presentation at Trial

 To Main Book

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

Former CCP §2016(d)(4), cited in Book §10.20, was relettered §2016(e)(4); it now has been replaced by CCP §2025.620(e).

The references to Witkin should now be to 3 Witkin, California Evidence, *Presentation at Trial* §§158-160 (4th ed 2000).

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A video recording of the deposition of any witness, made in accordance with procedures set forth in CCP §2025.330(c), and noticed in compliance with CCP §2025.220(a)(5), (a)(6), may be used at trial by any party in the ways specified in CCP §2025.620 after written notice to the court and all parties that complies with CCP §2025.340(m). Any party may use the video deposition of a treating or consulting physician, or any expert witness, even though the deponent is available to testify, if the deposition notice under CCP §2025.220 reserved the right to use the deposition at trial, and if that party gave the court and parties the written notice required by CCP §2025.340(m). CCP §2025.620(d). The stenographic transcript of the deposition remains the official record for purposes of trial and appeal. CCP §2025.510(g). The parties, however, can stipulate to: (1) recording or filming a deposition even though notice was not given; (2) dispensing with a stenographic record and transcript; and (3) sharing the costs of making and showing the recording. See *Bailey v Superior Court* (1977) 19 C3d 970, 140 CR 669. For discussion of procedures for video recording depositions, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006).

The cost of making the video recording is a recoverable court cost unless it appears to the court that either the deposition or its video was unnecessary. CCP §1033.5(a)(3). Note that the cost of audio recording is not specifically listed in CCP §1033.5 as a recoverable cost, but such costs arguably are recoverable if the audio recording is of a "necessary deposition."

Video records the deponent's appearance and demeanor as well as the deponent's words. Presenting the deponent's testimony at trial by showing a video recording usually gains more attention from the trier of fact than does reading it from a transcript. An attorney who anticipates that a favorable witness may not be available at time of trial should consider video recording the witness's deposition. Of course, all of the prerequisites of unavailability as set out in CCP §2025.620(c)(2) first must be met, unless the deponent was a treating or consulting physician or an expert witness and the party has complied with CCP §2025.620(d).

A party that wishes to use the video deposition of his or her own expert should notice the deposition so that any direct testimony and testimony on qualifications is presented first for the party calling the expert, just as it would be done at trial.

Occasionally, although rarely, it may be useful to use a video of a deposition to impeach a witness (*i.e.*, if a witness denies that he or she made a statement that is recorded in the written transcript of the deposition and states that the stenographer transcribed his or her answer incorrectly). A video deposition then can be used to impeach in the same manner as a written transcript.

Video recording is particularly helpful when reference to visual aids or operation of mechanical devices is necessary. An opposing witness may be required to perform a demonstration or reenactment of an incident during a deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883. See Update §8.36.

A video recording can reveal physical reactions that bear on credibility but are not easily recorded stenographically, such as long pauses after questions or facial and other nonverbal expressions. Video recording also serves to impress the witness and counsel with the seriousness of the occasion, which may encourage veracity and may curb coaching or other improper activity by a witness's counsel.

There may be circumstances in which an attorney could obtain a court order that a second camera be focused on opposing counsel during a video deposition. See *Green v GTE Cal., Inc.* (1994) 29 CA4th 407, 34 CR2d 517, in which, however, a court imposed sanctions on an attorney who had—without court approval or notice to the attorney that had scheduled the deposition—brought his own video camera to a deposition for the avowed purpose of recording any "intimidation tactics" that the opposing attorney might employ, such as "facial expressions and gestures," that would not be recorded in the deposition transcript or in the deposition reporter's video.

Code of Civil Procedure §2025.340 establishes the procedure for taking a video or audio recorded deposition. The operator of the recording equipment may be an employee of the attorney taking the deposition unless the operator is also the deposition officer; the operator must be competent to operate the equipment. CCP §2025.340(b).

If, however, a video recording of a deposition of an expert or treating or consulting physician is to be used at trial under CCP §2025.620(d), the camera operator 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 any attorney of any of the parties, unless all parties waive these qualifications and restrictions on the record. CCP §2025.340(c). The deposition must be recorded in an area that is suitably large,

adequately lighted, and reasonably quiet. CCP §2025.340(a). The operator may not use camera or sound recording techniques to distort the demeanor or appearance of the participants. CCP §2025.340(g).

A deposition recorded by video or audio technology must begin with an oral or written statement that includes the name and business address of the operator and of the operator's employer; the date, time, and place of the recording; the case caption; names of the deponent and of the party on whose behalf the recorded deposition is being made; and any stipulations by the parties. CCP §2025.340(h). Counsel for the parties must identify themselves on camera or on the audio recording, and the oath must be administered to the deponent on camera or on the audio recording. CCP §2025.340(i), (j). If more than one unit of tape or electronic storage is used, the end of each unit and beginning of each succeeding unit must be announced on camera or on the audio recording. CCP §2025.340(k). A statement indicating the conclusion of the deposition must be made on camera or on the audio recording, along with a statement indicating any stipulations concerning custody of the recording and any exhibits or other pertinent matters. CCP §2025.340(l).

A party that intends to offer a recorded deposition in evidence must notify the court and all parties in writing of that intent and of the parts of the recording to be offered within enough time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing. The court may order that parts of a recording that are objected to or not offered be suppressed, or that an edited version be made for use at trial. CCP §2025.340(m). The original version must be preserved unaltered. CCP §2025.340(m). A system of identifying the objections should be worked out with opposing counsel. One possible method is to identify the objection by page and line numbers in the transcript and, *e.g.*, the corresponding counter numbers on a tape recording, although counters on different recording and playback machines may differ and may not be accurate.

A deponent may not sign or correct a video or audio deposition as he or she could a written transcript. CCP §2025.520 regulates the procedure for submission of a recorded deposition to the deponent for review. If no stenographic transcription is made of a recorded deposition, the deposition officer must notify the deponent and parties that the recording is available for review, unless they have waived such review on the record. The deponent then has 30 days (plus 5 calendar days when service is by mail if the place of address and the place of mailing is within California, or 2 court days when service is by overnight mail or fax; see CCP §1013) to change the substance of an answer. The changes may be made in person or by signed letter to the deposition officer. CCP §2025.520(a)-(d).

The deposition officer then sets forth any changes in a writing that accompanies the recorded deposition. The officer must also set forth in writing the deponent's signature identifying the recording as his or her deposition, or a statement of the deponent's failure to supply the signature or to contact the deposition officer. When the deponent refuses to identify the deposition by signature or fails to contact the deposition officer, the recording is given the same effect as if it were signed. However, a seasonable motion to suppress accompanied by a declaration showing a reasonable and good faith effort to resolve informally any issue presented by the motion may cause the court to determine that reasons given for a refusal to sign a writing identifying the recorded deposition require rejection of the deposition in whole or in part. The court may impose a monetary sanction under CCP §§2023.010-2023.410 for an unsuccessful motion or unsuccessful opposition to the motion to suppress. CCP §2025.520(e)-(h).

Under CCP §2025.560(a), a recorded deposition and accompanying certificate of authenticity from the deposition officer prepared under CCP §2025.540(a) are not lodged with the court. Instead, the operator who made the recording retains custody, and must store the recording under conditions that protect against loss, destruction, or tampering and that preserve the quality of the recording and the integrity of the testimony and of any recorded images.

Because a recording is physically different from a written transcript, an attorney who wants to use a video deposition should seek a prior agreement from all parties that covers questions that are not specifically delineated in the Code of Civil Procedure, such as:

- (1) Whose examination and questions concerning qualifications of an expert witness will occur first (usually the plaintiff should establish plaintiff's own expert's qualifications before any defense questions);
- (2) Details of the procedure for stating corrections to the recording;
- (3) Details of the procedure for explaining objections or deletions that appear on the recording; and
- (4) Whether all matters under CCP §2025.460(b) concerning errors and irregularities at the deposition are waived.

The following is a possible dialogue regarding the showing of the video recording:

Proponent: Your Honor, we wish to offer into evidence the video recording of the deposition of witness X. We have established the foundational facts to allow this deposition into evidence due to the unavailability of this witness. We believe that the video recording will allow the jury to better evaluate the demeanor and credibility of this witness.

Opponent: Your Honor, I believe there are certain questions and answers that are objectionable under Evid C §352.

To overcome any objections on undue prejudice in allowing a video deposition to come in, the court should be referred to BAJI 2.20, which provides that the jury is the sole judge of the credibility of any lay or expert witness and that the demeanor of a witness is one of the elements that the jury can take into consideration in evaluating testimony. It is clear that the demeanor of a witness is revealed through a video recording.

Counsel should ensure that the person who prepared the original video or audio recording of the deposition is available at trial if no stipulation is entered into in case there are any foundational problems that would require court testimony.

For further discussion on the use of video depositions at trial, see California Trial Practice: Civil Procedure During Trial §§12.16-12.31, 12.78-12.88 (3d ed Cal CEB 1995).

See CACI 5004 where BAJI 2.20 is cited above.

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.20B Duties of Deposition Officer

[§10.20B] Duties of Deposition Officer

 To Main Book

The services and products offered or provided by the deposition officer or the entity providing the services of the deposition officer must be made equally available to all parties, attorneys, or third parties attending the deposition. CCP §2025.320(b). But the deposition officer must not provide any product or service consisting of notes or comments on the demeanor of any witness, party, or attorney present at the deposition, nor collect and provide any personal identifying information about the witness. CCP §§2025.320(c), 2025.340(e).

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.21 Availability to Jury During Deliberations

[§10.21] Availability to Jury During Deliberations

 To Main Book

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 208 where BAJI 2.06 is cited in Book §10.21.

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INTERROGATORIES

[§10.22] Uses



An answer given to interrogatories may be the basis for precluding the party from introducing evidence at trial. See *Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 104 CR 752 (admitting evidence of wage loss after plaintiff said in sworn answer to interrogatory that she was making no claim for wage or earnings loss was error). But see *LeGrand v Yellow Cab Co.* (1970) 8 CA3d 125, 87 CR 292 (paper entitled "answers to interrogatories" signed by a witness could not be used at trial as prior inconsistent statement because it was unsworn, drafted by his attorney, and not read by him when he signed it).

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

Rules governing trial use of interrogatories and their answers, cited in Book §10.22 as former CCP §2030(b), are now set forth at CCP §2030.410. Former CCP §2016(b), providing protection for attorneys' work product, has been replaced by CCP §§2018.010-2018.080. Former CCP §2016(d), which was later redesignated as §2016(e), has been replaced by CCP §2025.620.

For a detailed discussion of forms and procedures for submitting and answering written interrogatories, see California Civil Discovery Practice, chap 7 (4th ed Cal CEB 2006), and California Civil Litigation Forms Manual (Cal CEB 1980). On using interrogatories at trial, see California Trial Practice: Civil Procedure During Trial §§12.98-12.121 (3d ed Cal CEB 1995).



Interrogatories may be used as evidence at trial only against the party supplying the answer; such use is not limited by the responding party's presence at trial or by the fact that he or she has testified or will testify at trial. CCP §2030.410. See Castaline v City of Los Angeles (1975) 47 CA3d 580, 587, 121 CR 786 (use was error, but not prejudicial); Rimmele v Northridge Hosp. Found. (1975) 46 CA3d 123, 128, 120 CR 39 (interrogatory answer by hospital properly excluded as evidence against doctor); Shoei Kako Co. v Superior Court (1973) 33 CA3d 808, 813, 109 CR 402.

A party may not use interrogatories to learn the identities of lay witnesses who will testify at trial, or to learn the nature of their anticipated testimony. City of Long Beach v Superior Court (1976) 64 CA3d 65, 134 CR 468 (witnesses' names are qualified work product under former CCP §2016(b) and disclosure cannot be compelled without showing that unfair prejudice and injustice will result to propounding party; testimony is absolutely protected under former CCP §2016(b) (now CCP §§2018.010-2018.080) as a writing reflecting the attorney's impressions, conclusions, and opinions). See also In re Ashworth, Inc. Sec. Litig. (SD Cal 2002) 213 FRD 385, 389 (lay witnesses' identities are qualified work product under Fed R Civ P 26(b)(3)). However, discovery "may be obtained of the identity and location of persons having knowledge of any discoverable matter." CCP §2017.010. This should include any eyewitnesses to either the event or the party's condition. See also CCP §96 (request for statement identifying witnesses and evidence in economic litigation for limited civil cases).

In Knacht c³ Lewis Architects, Inc. v Superior Court (1996) 47 CA4th 214, 54 CR2d 575, the court held that Judicial Council Form Interrogatory 12.2, requiring disclosure of a list of potential witnesses interviewed by opposing counsel, was exempt from discovery under the work-product doctrine of former CCP §2018 (now CCP §§2018.010-2018.080). Although the court found Judicial Council Form Interrogatory 12.1, asking for the names of persons who had witnessed the incident, to be proper, it reasoned that compelled production of a list of potential witnesses whom opposing counsel had interviewed would necessarily reflect counsel's evaluation of the case by revealing which persons with knowledge of the incident counsel had deemed important enough to interview. Similarly, in In re Ashworth, Inc. Sec. Litig., *supra*, the court denied the defendant's motion to compel further responses to special interrogatories seeking the identities of persons and the specific information they had provided that formed the basis of any of the plaintiff's allegations. Such disclosure might enable the defendant to determine who the plaintiff's attorney had interviewed during pretrial investigation—information that is protected by the attorney work product doctrine under Fed R Civ P 26(b)(3).

Using interrogatories to discover defendant's sexual history and HIV status, seeking both information about when defendant first became aware that he was HIV positive and an admission that he had engaged in unprotected sex with men before and during their marriage, was held to comport with the statutory requirement that discovery be limited to information that is relevant to the subject matter of the litigation or reasonably calculated to lead to the discovery of admissible evidence. CCP §2017.010. John B. v Superior Court (2006) 38 C4th 1177, 45 CR3d 316.

Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/OTHER DISCOVERY DOCUMENTS/
§10.24 Request for Admission

OTHER DISCOVERY DOCUMENTS

[§10.24] Request for Admission

 To Main Book

Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of CCP §§2016-2036. Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) was repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

See Update §8.22 for current request for admissions form, and for discussion of new CCP §§2033.010-2033.420. Former CCP §2034(c), cited in Book §10.24, has been replaced by CCP §2033.420, which provides that if a party *fails to admit* the genuineness of a document or the truth of a matter of fact in a request for admissions and that document or fact is proved at trial, the party may be assessed the cost of proof, including attorney fees.

Requests for admissions can be a powerful tool for all parties in a lawsuit. Requests for admissions may be used against the answering party by a party other than the party that made the request for admissions. See CCP §2033.410; *Swedberg v Christiana Community Builders* (1985) 175 CA3d 138, 144, 220 CR 544 (under prior law, nonrequesting party obtained default judgment against party that failed to make timely answer to request for admissions).

For detailed discussion of preparation, submission, and answering of requests for admission, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

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Source: Torts/California Personal Injury Proof Update/10 Discovery Documents/§10.25 Motions for Production and Inspection and for Examination by Physicians

[§10.25] Motions for Production and Inspection and for Examination by Physicians



Former CCP §§2016-2037.9 were repealed and replaced by the Civil Discovery Act of 1986, effective July 1, 1987, now encompassed by the provisions of [CCP §§2016-2036](#). Effective July 1, 2005, the Civil Discovery Act of 1986 ([CCP §§2016-2036](#)) was repealed and a new Civil Discovery Act ([CCP §§2016.010-2036.050](#)) became operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

[Code of Civil Procedure §2031.010](#) allows a party to obtain discovery by inspecting, copying, testing or sampling documents, tangible items, property or electronically stored information in the possession, custody or control of another party. Effective July 1, 1981, [CCP §1985.3](#) was enacted to govern procedures for obtaining the production of a consumer's personal records. Effective January 1, 2006, the notice to the consumer, and delivery of other documents specified in [§1985.3\(b\)](#), is not required if the consumer is (1) the subpoenaing party and (2) the only subject of the subpoenaed records. [CCP §1985.3\(l\)](#).

A demand that a party seeking recovery for personal injuries submit to one physical examination by a physician is permitted without a court order. [CCP §2032.220\(b\)](#). If the party fails to object to a demand for the physical examination within 20 days, any objection to the demand is waived. [CCP §§2032.230, 2032.240\(a\)](#). The party who was examined is entitled, on request, to a copy of a written report of the examination, but has a reciprocal obligation to provide his or her own physicians' reports to the examining party. [CCP §§2032.610, 2032.640, 2032.650](#). See *Kennedy v Superior Court* (1998) 64 CA4th 674, 678, 75 CR2d 373 (a party who withdraws a medical expert who previously conducted an independent medical examination is still required to provide a written report when requested under former CCP §2032(h) (now [CCP §2032.610](#)), and the withdrawn expert may also be deposed about the physical examination that was conducted).

Any other physical exam, or any mental exam, must be by court order, and a mental exam will not be allowed if no psychological claim is made beyond normal emotional distress resulting from an accident, unless exceptional circumstances are shown. [CCP §§2032.310-2032.320](#). See, e.g., *Doyle v Superior Court* (1996) 50 CA4th 1878, 58 CR2d 476, which held that the plaintiff in a sexual harassment suit alleging only past—and not ongoing—emotional distress, did not place mental condition "in controversy" within the meaning of former CCP §2032(a) (now [CCP §2032.020\(a\)](#)). Accordingly, the trial court erred in granting defendant's motion to compel plaintiff Doyle to submit to a mental examination.

The plaintiff's attorney or designated representative may attend and record stenographically or by audio recording the words spoken to or by the plaintiff during a physical examination. [CCP §2032.510\(a\)](#). The defense attorney is not authorized to record a physical examination. However, both the examiner and the plaintiff have the right to record the entirety of a mental examination, not merely the examinee's responses, by audio technology. [CCP §2032.530\(a\)](#); *Goffland Entertainment Ctrs., Inc. v Superior Court* (2003) 108 CA4th 739, 750, 133 CR2d 828. Video recording of physical examinations is not authorized, even if the plaintiff requests a video recording. See *Ramirez v MacAdam* (1993) 13 CA4th 1638, 16 CR2d 911. See also [CCP §2032.510\(a\)](#), which authorizes only stenographic and audio records of any words spoken to or by the examinee during any phase of the examination. On video depositions, see [Update §10.20A](#).

Physical and mental examinations are discussed further in [Update §6.31](#). For a detailed discussion on production and inspection of documents, including depositions for production of a consumer's personal records, and motions for physical and mental examinations, including forms, see [California Civil Discovery Practice, chaps 5, 8, 10 \(4th ed Cal CEB 2006\)](#).

Business Records

[§11.1] Defined; Uses at Trial

[§11.1A] Privilege

Admission in Evidence

By Laying Foundation

[§11.6] Admissible Secondary Evidence

[§11.7] Hearsay

[§11.8] By Subpoenaed Copy Delivered With Custodian's Affidavit

[§11.9] Issuance and Service of Subpoena

[§11.10] Supporting Declaration: Form

[§11.12] Custodian's Declaration: Form

By Custodian's Testimony

[§11.15] Clause Requiring Personal Attendance of Custodian With Original Records

[§11.16] Using Wage Record to Show Earnings Loss

[§11.22] Content of Record

Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.1 DEFINED; USES AT TRIAL

[§11.1] DEFINED; USES AT TRIAL

 To Main Book

A witness's testimony may be based on a reading of the records of a business if it is shown that the witness is capable of understanding and analyzing them and that the records are accurate. See *Benson v Honda Motor Co., Ltd.* (1994) 26 CA4th 1337, 1343, 32 CR2d 322, in which an automobile company's records of customer complaints, claims, and lawsuits provided its products analysis engineer a basis for testifying that there had been no previous instance of the kind of product defect claimed by the plaintiff.

One party's introduction of part of a report about automobile crash tests does not necessarily, despite Evid C §356, require the trial judge to permit another party to obtain the admission in evidence of the rest of the report. 26 CA4th at 1349 (defendant had used one photograph from report; plaintiff failed to show that introduction of other parts of report was necessary to make photograph understood).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Hearsay* §228 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.1A Privilege

[§11.1A] Privilege



A business sometimes may invoke an evidentiary privilege to prevent a party from obtaining or introducing its records. See *Rudnick v Superior Court* (1974) 11 C3d 924, 114 CR 603 (drug company may invoke physician-patient privilege (see [Update §6.4](#)) to avoid producing reports of drug-related injuries suffered by other patients, unless shown that other patients waived privilege).

An accident report prepared by an employee of a business may sometimes be protected from discovery by the attorney-client privilege. See *Payless Drug Stores, Inc. v Superior Court* (1976) 54 CA3d 988, 127 CR 4 (report of slip-and-fall accident made on printed form supplied by store's insurer and intended to be for confidential use by attorneys defending store). See [Update §1.39](#) on requirement that such reports be produced if used by a witness to refresh his or her memory.

If a party attempts to discover or admit into evidence information that is a trade secret, the holder of the trade secret has the burden of proving the existence of the secret. Evid C §405. The party seeking discovery then must make a prima facie showing that the information is necessary and relevant to a material element of a cause of action, and that the information is essential to the fair resolution of the action. Either party may propose that the court make a protective or less intrusive alternative to disclosure, but the burden is on the secret holder to show that the protective order or alternative is not unduly burdensome on the other party, and that the same fair balance in the litigation will be achieved that would have been achieved by disclosure of the secret. *Bridgestone/Firestone, Inc. v Superior Court* (1992) 7 CA4th 1384, 9 CR2d 709.

In *Raymond Handling Concepts Corp. v Superior Court* (1995) 39 CA4th 584, 45 CR2d 885, the appellate court approved the issuance of a protective order for plaintiff's counsel to disclose confidential discovery, designated as trade secret or other confidential information, to counsel in other similar litigation. The order permitting disclosure required that counsel in the other litigation agree to be bound by the same protective order as plaintiff's counsel. Such an order accommodates the public interest in allowing the sharing of information with litigants in similar cases, as well as defendant's interest in protecting confidential information and trade secrets from disclosure to its competitors.

A party's constitutional right to privacy may also be invoked to limit the discovery or admission into evidence of business records. See *Davis v Superior Court* (1992) 7 CA4th 1008, 9 CR2d 331 (plaintiff in injury action had not put her mental and emotional condition into issue, and did not claim mental and emotional distress (other than pain and suffering associated with injuries); thus defendant was precluded from entering business records of women's clinic that had treated plaintiff for drug or alcohol problems). The court also said that those records would have been protected from disclosure by psychotherapist-patient privilege, even though the plaintiff had failed to properly establish that relationship.

Source: Torts/California Personal Injury Proof Update/11 Business Records/ADMISSION IN EVIDENCE/By Laying Foundation/§11.6 Admissible Secondary Evidence

ADMISSION IN EVIDENCE

By Laying Foundation

[§11.6] Admissible Secondary Evidence

 **To Main Book**

The first sentence of Book §11.6 should no longer refer to the best evidence rule. Former Evid C §§1500-1511, which had set forth California's best evidence rule, were repealed. Effective January 1, 1999, these sections have been replaced by Evid C §§1520-1523 and 1552-1553. The content of a writing may now be proved by an otherwise admissible original (Evid C §1520) or by admissible "secondary evidence" (Evid C §1521). The secondary evidence rule does not change the provision that, when statutory production procedures are followed, copies of business records may be used in lieu of originals. Evid C §1562. See also Evid C §§1550, 1560-1561. See Update §8.12.

The reference to Witkin should now be to 1-2 Witkin, California Evidence, *Hearsay* §227, *Documentary Evidence* §45 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.7 Hearsay

[§11.7] Hearsay



Evidence of the mode of preparation of a business record is needed to bring it within the business record exception to the hearsay rule. See *Rodwin Metals, Inc. v Western Non-Ferrous Metals, Inc.* (1970) 10 CA3d 219, 224, 88 CR 778.

The qualified witness discussed in Book §11.7 may be the custodian of records of the business receiving the information, as well as the custodian in the business that originates the material. The key to bringing the record within the exception to the hearsay rule is reliable testimony explaining how the records are prepared and kept. *NLRB v First Termite Control Co.* (9th Cir 1981) 646 F2d 424 (evidence of origin of shipment excluded because bookkeeper of company receiving freight bill was unfamiliar with its preparation and could not testify on its accuracy relating to origin of shipment). See also *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 40 CR2d 56 (court held helmet safety test reports inadmissible under business records exception because of insufficient foundation; even though custodian's declaration conformed to requirements of Evid C §§1560 and 1561, it was inadequate to establish foundational requirements of Evid C §1271, because it provided no assurance of competency, reliability, or trustworthiness).

The reference to Witkin should now be to 1 Witkin, California Evidence, *Hearsay* §226 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.8 By Subpoenaed Copy Delivered With Custodian's Affidavit

[§11.8] By Subpoenaed Copy Delivered With Custodian's Affidavit

 To Main Book

When the nonoccurrence of an act or event, or the nonexistence of a condition, is to be proved under Evid C §1272 by showing that there is no account of the event or condition in the records of a business, the custodian of the records should bring the originals to trial and testify about the circumstances of their preparation. In a criminal case, at least, the nonoccurrence or nonexistence cannot be shown merely by producing a copy of the records accompanied by the custodian's affidavit or declaration. See People v Dickinson (1976) 59 CA3d 314, 130 CR 561 (prosecution for alleged false testimony in civil action about witness's qualifications as an expert).

Effective July 1, 1981, CCP §1985.3 was enacted to govern procedures for obtaining the production of a consumer's personal records. Effective January 1, 2006, the notice to the consumer, and delivery of other documents specified in §1985.3(b), is not required if the consumer is (1) the subpoenaing party and (2) the only subject of the subpoenaed records. CCP §1985.3(l). See California Civil Discovery Practice §§5.108-5.131 (4th ed Cal CEB 2006).

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If the business records sought are those of a party of record in the lawsuit, rather than serving a subpoena duces tecum on the party's custodian of records, the attorney may serve on the attorney for that party (or for one of the persons described in CCP §1987(b) to whom the term "party-related" may be applied) a written notice to attend as a witness and to bring specified books, documents, and other things. CCP §1987(b)-(c). The notice of production must state the "exact materials or things desired" and that the opposing party has them in his or her possession or under his or her control. It must be served at least 20 days before the trial. The party may object to the notice within 5 days of its service. CCP §1987(c).

Under CCP §1987.3—which declares CCP §1989 inapplicable to subpoenas duces tecum served on a custodian of records (or other qualified person) under the procedure in Evid C §§1560-1566, unless the subpoena requires the custodian's personal attendance (see Book §11.15)—it appears that records can be subpoenaed from businesses located outside, as well as within, California.

Code of Civil Procedure §1989 was amended in 1981 to provide that a witness (including a party or "party-related" witness under CCP §1987(b)) does not have to attend as a witness unless he or she is a "resident and within the state at the time of service." There is, of course, a question of what enforcement steps could be taken against the custodian of an out-of-state business who declined to respond to a subpoena duces tecum issued by a California court.

When a subpoena requires attendance or production of books, documents, and other things, CCP §§1987.1-1987.2 allow for motions to quash or modify a subpoena, to direct compliance with it on such terms and conditions as the court declares, including protective orders, and to award expenses and attorney fees if a subpoena is oppressive or if a motion is made or opposed in bad faith.

Witness and mileage fees in connection with the production of business records are set forth in Evid C §1563. Govt C §68093 was amended in 1981 to raise witness fees from \$12 per day to \$35 per day and mileage fees from 20 cents per mile for one way traveled to 20 cents per mile for both ways traveled. Under Evid C §1563(c), a custodian of records who personally appears is entitled to the same fees plus any additional costs incurred as provided by Evid C §1563(b) (costs of producing the records).

A subpoena duces tecum regarding deposition commanding only the production of documents for copying under CCP §§2020.410-2020.440 is no longer subject to restrictions in CCP §1987.5.

Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.10 Supporting Declaration: Form

[§11.10] Supporting Declaration: Form

 To Main Book

Whether the declaration is executed within or outside California, the place of execution need not be stated if the declaration reads: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct." See CCP §2015.5. If the action is filed in small claims court, the Judicial Council form of Declaration for Subpoena Duces Tecum for use in small claims court only should be used.

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.12 Custodian's Declaration: Form

[§11.12] Custodian's Declaration: Form



Evidence Code §1561 was amended to require that the affidavit in support of production of business records include the identity of the records and a description of the mode of preparation of the records. The law also revised the requirement that a custodian, as well as "other qualified witnesses," may provide a declaration for the admission of copies as a substitute for originals of the business records produced under this section.

The form in Book §11.12 should be replaced with the following form:

DECLARATION

(Under Evidence Code §1561 and Code of Civil Procedure §2015.5)

Title of action:

Number of action:

Date of subpoena:

Name of party obtaining subpoena:

Name of business:

The undersigned declares:

1. I am the duly authorized custodian of the records of the above-named business. *[If declarant is not the custodian, state facts qualifying declarant to certify the records]* .

2. I have authority to certify those records.

3. (Check one of the following)

The copy transmitted is a true copy of all the original records described in the subpoena.

Under Evidence Code section 1560(e), I made the subpoenaed records available for inspection and copying by the representative of the subpoenaing party's attorney at my place of business.

No copies or records are transmitted, because the business has none of the records described in the subpoena.

The copy transmitted is a true copy of part of the original records described in the subpoena. The business does not have any other of the described records.

4. The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

5. The records are identified as .

6. The records were prepared by , and the procedures for their preparation and maintenance were as follows:

Executed on __[date]__.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sign here: _____

Print name: _____

Comment: If the subpoena duces tecum has, under Evid C §1560(e), directed the custodian to deliver the records to the attorney or attorney's representative for copying (in above form, see second box in item 3), the copy of the records must be accompanied by both the above declaration *and* the attorney's or representative's declaration that the copy is a true copy of all the records delivered to him or her.

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Source: Torts/California Personal Injury Proof Update/11 Business Records/By Custodian's Testimony/§11.15 Clause Requiring Personal Attendance of Custodian With Original Records

By Custodian's Testimony

[§11.15] Clause Requiring Personal Attendance of Custodian With Original Records

 **To Main Book**

The records custodian of a business can only be required to attend as a witness if he or she is "a resident within the state at the time of service" of the subpoena. CCP §1989. See discussion of CCP §§1987.3 and 1989 in Update §11.9.

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.16 USING WAGE RECORD TO SHOW EARNINGS LOSS

[§11.16] USING WAGE RECORD TO SHOW EARNINGS LOSS

 To Main Book

See Lab C §1198.5 on a nonpublic employee's right to see personnel files concerning his or her employment qualifications, promotion, additional compensation, or termination or other disciplinary action.

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Source: Torts/California Personal Injury Proof Update/11 Business Records/§11.22 Content of Record

[§11.22] Content of Record

 To Main Book

See *Canavin v Pacific S.W. Airlines* (1983) 148 CA3d 512, 196 CR 82. See also *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 1280, 78 CR2d 557 (no requirement that future earning capacity be established by expert testimony; loss of earning power may be inferred from nature of injury, with or without proof of actual earnings or income either before or after the injury); BAJI 14.12, Comment; and BAJI 14.70, cited in Book §3.30, on the admissibility of evidence of after-tax earnings.

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 2.1050(a), (e). Accordingly, see CACI 3903C-3903D where the Comment to BAJI 14.12 is cited, and see CACI 3904 where BAJI 14.70 is cited, in Book §11.22.

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Official Records

[§12.1] Admissibility

[§12.3] By Custodian's Affidavit as Business Record

[§12.4] By Judicial Notice and Independent Evidence of Trustworthiness

Particular Records

[§12.6] Laying Foundation for Plaintiff's Public School Records

[§12.7] Vital Statistics



The best evidence rule, embodied by former Evid C §§1500-1511, has been replaced by the secondary evidence rule, set forth in Evid C §§1520-1523 and 1552-1553. See Update §8.12. The citation in the last paragraph of Book §12.1 former Evid C §§1506-1508 is without substantive effect on copies that may be offered in evidence under Evid C §§1530-1564. See 1998 Law Revision Commission Comments repealing former Evid C §§1506-1508.

The California Supreme Court held in Haft v Lone Palm Hotel (1970) 3 C3d 756, 778, 91 CR 745, that Department of Health inspection reports showing the absence of required safety equipment for a swimming pool should have been received in evidence on the issue of a motel operator's willful and wanton misconduct.

On statutory privileges that may be asserted to prevent disclosure of certain official records, see State ex rel Div. of Indus. Safety v Superior Court (1974) 43 CA3d 778, 117 CR 726 (personal injury and wrongful death actions following collapse of bridge under construction). See also Williams v Superior Court (1993) 5 CA4th 337, 19 CR2d 882 (county sheriff's records of proceedings against two deputies); City of Richmond v Superior Court (1995) 32 CA4th 1430, 38 CR2d 632 (peace officer personnel records; restrictions in Pen C §832.7); City of County of San Francisco v Superior Court (1993) 21 CA4th 1031, 27 CR2d 201 (plaintiff alleging police use of excessive force; restrictions on discoverability under Evid C §§1040-1047 of official records of investigation into police conduct).

A report compiled by a retired judge, retained by the county on a one-time basis to act as special counsel and make policy recommendations on practices and procedures in the sheriff's department, was not a party's authorized admission under Evid C §1222(a). The trial court had discretion to exclude the report as evidence because the retired judge who compiled the report did not have "actual authority to speak on behalf of the organization." Thompson v County of Los Angeles (2006) 142 CA4th 154, 169, 47 CR3d 702. The court noted that although Fed R Evid 803(8)(c) allows a hearsay exception for "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth... in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," there is no parallel provision in the California Evidence Code. Thus, no statutory basis existed for allowing the report, and it was correctly excluded.

A police recording of a citizen's "911" call is a public record, but under Fed R Evid 803(8)(B), to be admissible, the caller's recorded statements must meet the requirements of some hearsay rule exception other than the one for public records, inasmuch as the caller is not under a "duty to report." See Bemis v Edwards (9th Cir 1995) 45 F3d 1369.

Source: Torts/California Personal Injury Proof Update/12 Official Records/§12.3 By Custodian's Affidavit as Business Record

[§12.3] By Custodian's Affidavit as Business Record

 To Main Book

Under Evid C §1560(b), the custodian of records now has 15 days from the receipt of the subpoena to deliver the records unless the parties agree to a different timetable for their delivery.

When the records are produced for inspection or photocopying at the witness's place of business, fees for complying with the subpoena may not exceed \$15 plus actual costs of retrieval and return of the records held off-site by a third person and any reasonable cost of microfilm retrieval. Evid C §1563(b)(6). A custodian who personally appears is entitled to witness fees of \$35 a day, actual mileage at the rate of 20 cents a mile, and any additional costs incurred as provided by Evid C §1563(b) (production costs). Evid C §1563(c).

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Source: Torts/California Personal Injury Proof Update/12 Official Records/§12.4 By Judicial Notice and Independent Evidence of Trustworthiness

[§12.4] By Judicial Notice and Independent Evidence of Trustworthiness

 To Main Book

On admission of engineering and traffic surveys, see *People v Flaxman* (1977) 74 CA3d Supp 16, 141 CR 799.

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Source: Torts/California Personal Injury Proof Update/12 Official Records/PARTICULAR RECORDS/§12.6 Laying Foundation for Plaintiff's Public School Records

PARTICULAR RECORDS

[§12.6] Laying Foundation for Plaintiff's Public School Records

 To Main Book

A proponent of evidence offered under the public records exception of Evid C §1280 must establish that the record was made by an official under a government duty and was based on the observation of an informant with a duty to observe and report. *People v Ramos* (1997) 15 C4th 1133, 64 CR2d 892 (trial court properly sustained hearsay objections to mitigating evidence including the defendant's public school records).

The reference to Witkin in Book §12.6 should now be to 1 Witkin, California Evidence, *Hearsay* §249 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/12 Official Records/§12.7 Vital Statistics

[§12.7] Vital Statistics

 **To Main Book**

Former Health & S C §10577 was repealed in 1995, and was reenacted as Health & S C §103550 (any birth, fetal death, death, or marriage record registered within 1 year from the event is prima facie evidence of facts stated in it).

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Hospital and Medical Records

[§13.3] Obtaining Copy of Client's Record Before Suit

[§13.4] Form: Letter Requesting Medical Records

[§13.5] Form: Authorization

[§13.6] Admissibility

Foundational Requirements

[§13.9] Admissible Secondary Evidence

[§13.10] Hearsay

[§13.11] Physician-Patient Privilege

Procedures for Securing Admission as Exhibit

Delivery of Subpoenaed Copy With Custodian's Affidavit

[§13.15] Form: Supporting Declaration

Particular Entries: Admissibility; Interpretation

Medical History

[§13.27] Past and Family History

[§13.35] Medical Opinions

[§13.36] Diagnosis

Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.3 OBTAINING COPY OF CLIENT'S RECORD BEFORE SUIT

[§13.3] OBTAINING COPY OF CLIENT'S RECORD BEFORE SUIT



An attorney's request for inspection or copying of medical, laboratory, or pharmaceutical records may now be made any time before a defendant's appearance in an action (*e.g.*, even after an action has been filed), and the written authorization, or a copy that must accompany the request, may be signed by "an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient..." Evid C §1158. For discussion of this statute's purpose, see *National Football League Mgmt. Council v Superior Court* (1983) 138 CA3d 895, 903, 188 CR 337.

Civil Code §56.28 appears to exempt requests made under Evid C §1158 from the proscriptions of the Confidentiality of Medical Information Act (CC §§56-56.37), but time can be saved and custodian resistance avoided by using an authorization form that satisfies the requirements of CC §56.11. See form in Update §13.5.

Disclosure of patient medical information to third parties, including medical information not relevant to the claim, is allowed under CCP §56.10(c)(4). *California Consumer Health Care Council v Kaiser Found. Health Plan, Inc.* (2006) 142 CA4th 21, 47 CR3d 593. In a medical malpractice action, plaintiff objected to disclosure of his entire medical file to his physician's attorney, claiming a privacy expectation under CCP §56.10(a). The court held the plaintiff-patient did not have a reasonable expectation of privacy for medical records after making known his intention to bring a malpractice claim. 142 CA4th 32.

Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.4 Form: Letter Requesting Medical Records

[§13.4] Form: Letter Requesting Medical Records

 To Main Book

Comment: Some attorneys add to the form letter set out in the Book the phrase "within 5 days" after the phrase "please send to this office." See Evid C §1158. Others set out in the letter all or part of Evid C §1158, or attach a copy of the section, to encourage prompt compliance by the hospital or doctor's office.

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.5 Form: Authorization

[§13.5] Form: Authorization

 To Main Book

The book's form of authorization for the release of medical information should be replaced with one that complies with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC §§1320d-5–1320d-8), regulations for which are issued and found at 45 CFR 160.500-160.534.

Sample medical authorization forms may be found at http://www.calhipaa.com/main/hipaa_products1.shtml.

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Evidence Code §1157 exempts from discovery the proceedings and records of certain health care staff review committees that have the responsibility of evaluation and improvement of the quality of care. See County of Los Angeles v Superior Court (2006) 139 CA4th 8, 42 CR3d 390 (peer review committee in county correctional treatment center qualifies under Evid C §1157 exemption); Alexander v Superior Court (1993) 5 C4th 1218, 1223, 23 CR2d 397, disapproved on other grounds by Hassan v Mercy Am. River Hosp. (2003) 31 C4th 709, 724 n4, 3 CR3d 623 (hospital and physicians sued for medical malpractice may invoke Evid C §1157 as basis for declining to disclose records of physicians' applications and reapplications for staff privileges); Willits v Superior Court (1993) 20 CA4th 90, 24 CR2d 348 (hospital employees, here nurse who tested HIV positive after "needle stick injury," may be barred by Evid C §1157 as are patients; but many records kept by hospitals are discoverable); Matchett v Superior Court (1974) 40 CA3d 623, 115 CR 317 (patient who sued hospital for negligence in granting staff privileges to certain doctor may discover hospital administration files). See also Schulz v Superior Court (1977) 66 CA3d 440, 136 CR 67 (Evid C §1157 precludes discovery in medical malpractice action of reports to or by hospital medical advisory committee); County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 274 CR 712 (whole department staff, including nurses, may be protected committee under Evid C §1157).

Evidence Code §1157 does not prevent voluntary testimony of what transpired at a hospital medical staff committee meeting by a person in attendance at the meeting. West Covina Hosp. v Superior Court (1986) 41 C3d 846, 226 CR 132. However, Evid C §1157 does, in a medical malpractice lawsuit, shield from discovery the names or identities of members of medical staff review committees who may have evaluated the staff privileges held by the defendant physicians. Cedars-Sinai Medical Ctr. v Superior Court (1993) 12 CA4th 579, 16 CR2d 253.

Compare Roseville Community Hosp. v Superior Court (1977) 70 CA3d 809, 139 CR 170 (plaintiffs-doctors who were dismissed as a result of staff committee meeting may discover and use record of the meeting) with Henry Mayo Newhall Mem. Hosp. v Superior Court (1978) 81 CA3d 626, 146 CR 542 (filing transcript of staff committee hearing in administrative mandamus action contesting doctor's dismissal did not waive privilege for purposes of malpractice action).

Prohibitions against discovery or use as evidence of hospital, medical, or medical-dental review committee records (Evid C §§1156-1157) have been extended to cover proceedings or records of committees of medical societies that help review health care services. Evid C §1157.5.

Discovery of the records of a medical expert to show bias is not unlimited. The trial court should weigh the burden on the expert of producing the records against the need for the specific type of discovery. See Allen v Superior Court (1984) 151 CA3d 447, 198 CR 737 (trial court abused its discretion by not limiting discovery to a less intrusive form; specific data on the number of cases and amounts of compensation was unnecessary to show bias).

Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/Foundational Requirements/
§13.9 Admissible Secondary Evidence

Foundational Requirements

[§13.9] Admissible Secondary Evidence

 **To Main Book**

The reference in Book §13.9 to the best evidence rule, which was repealed effective January 1, 1999, is now outdated. The change is without substantive effect on the admissibility of business records under Evid C §§1560-1562. See 1998 Law Revision Commission Comments repealing former Evid C §§1500-1511. The best evidence rule has been replaced by the secondary evidence rule (Evid C §§1520-1523 and 1552-1553). See Update §8.12.

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.10 Hearsay

[§13.10] Hearsay

 To Main Book

The references to Witkin in Book §13.10 should now be to 1 Witkin, California Evidence, *Hearsay* §§232, 238, 242-243 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.11 Physician-Patient Privilege

[§13.11] Physician-Patient Privilege

 To Main Book

Unless the plaintiff in a personal injury action puts his or her mental and emotional condition into issue by claiming damages for mental and emotional distress, the defendant does not have the right to discovery of a clinic's medical records relating to plaintiff's mental and emotional condition, as those records would be protected both by the constitutional right to privacy, and by psychotherapist-patient privilege. See *Davis v Superior Court* (1992) 7 CA4th 1008, 9 CR2d 331.

The bringing of a prenatal injury lawsuit against a health care provider by (and on behalf of) a minor may activate the patient-litigant exception to the physician-patient privilege for the mother's medical records covering the pregnancy. See *Palay v Superior Court* (1993) 18 CA4th 919, 22 CR2d 839.

See discussion of Evid C §999 in Update §6.4.

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/PROCEDURES FOR SECURING ADMISSION AS EXHIBIT/Delivery of Subpoenaed Copy With Custodian's Affidavit/§13.15 Form: Supporting Declaration

PROCEDURES FOR SECURING ADMISSION AS EXHIBIT

Delivery of Subpoenaed Copy With Custodian's Affidavit

[§13.15] Form: Supporting Declaration

 **To Main Book**

If the declaration will be signed outside of California, the final line of text in the form in Book §13.15 should be changed to read: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct." CCP §2015.5. If the action is filed in small claims court, the Judicial Council form of Declaration for Subpoena Duces Tecum for use in small claims court only must be used instead.

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/PARTICULAR ENTRIES: ADMISSIBILITY; INTERPRETATION/Medical History/§13.27 Past and Family History

PARTICULAR ENTRIES: ADMISSIBILITY; INTERPRETATION

Medical History

[§13.27] Past and Family History

 **To Main Book**

For an example of the treatment of personal history, see generally *Springer v Reimers* (1970) 4 CA3d 325, 338, 84 CR 486 (report in hospital record from consultant-doctor that contained history showing patient's chronic alcoholism and delirium tremens was admissible on damages issues, but not to impeach patient's testimony).

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.35 Medical Opinions

[§13.35] Medical Opinions

 To Main Book

On *Kelley v Bailey*, cited in Book §13.35, see discussion of *Whitfield v Roth* (1974) 10 C3d 874, 112 CR 540, in Update §6.56 (limitations on doctor's testimony about nontestifying doctors' opinions).

For a further example of the supreme court's limitations on admission of medical opinions, see *People v Reyes* (1974) 12 C3d 486, 502, 116 CR 217, 227 (20-year-old record of psychiatrist's diagnostic impression held too remote, not in compliance with Evid C §1271 requirement that a business record must be of "an act, condition or event," and not sufficiently relied on by medical witness at trial to be admissible as part of basis for his opinion testimony).

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Source: Torts/California Personal Injury Proof Update/13 Hospital and Medical Records/§13.36 Diagnosis

[§13.36] Diagnosis

 To Main Book

See the discussion of *People v Reyes* (1974) 12 C3d 486, 116 CR 217, in [Update §13.35](#) on the use of old diagnostic impressions in forming a current opinion.

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Medical Bills

[§14.1] Preliminary Considerations

[§14.2] Admissibility

By Foundational Testimony

[§14.4] Identifying Bills; Plaintiff's Testimony

[§14.9] Showing Payment; Collateral Source Rule

[§14.11] By Defendant

[§14.12] By Workers' Compensation Carrier

Source: Torts/California Personal Injury Proof Update/14 Medical Bills/§14.1 PRELIMINARY CONSIDERATIONS

[§14.1] PRELIMINARY CONSIDERATIONS

 To Main Book

For information on damages for the reasonable value of medical services and supplies, see generally [California Tort Damages §§1.20-1.40 \(2d ed Cal CEB 2002\)](#).

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Source: Torts/California Personal Injury Proof Update/14 Medical Bills/§14.2 ADMISSIBILITY

[§14.2] ADMISSIBILITY

 To Main Book

The reference to the best evidence rule (former Evid C §1500) in the first paragraph of Book §14.2 should be replaced with Evid C §§1520-1523 and 1552-1553. Effective January 1, 1999, secondary evidence may be admitted into evidence to prove the content of a writing. Evid C §1521. See Update §8.12.

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Source: Torts/California Personal Injury Proof Update/14 Medical Bills/By Foundational Testimony/§14.4 Identifying Bills; Plaintiff's Testimony

By Foundational Testimony

[§14.4] Identifying Bills; Plaintiff's Testimony

 **To Main Book**

The citation to former Evid C §1500 in Book §14.4 is no longer correct. Effective January 1, 1999, the best evidence rule (former Evid C §§1500-1511) was replaced by the secondary evidence rule (Evid C §1520-1523 and 1552-1553). See Update §8.12.

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Source: Torts/California Personal Injury Proof Update/14 Medical Bills/§14.9 SHOWING PAYMENT; COLLATERAL SOURCE RULE

[§14.9] SHOWING PAYMENT; COLLATERAL SOURCE RULE



The collateral source rule now applies to public entities as well as to other defendants. *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 14, 84 CR 173.

A doctor, hospital, or other health care provider sued for professional negligence (*i.e.*, medical malpractice) may introduce evidence that plaintiff received medical care or payments from a collateral source. See CC §3333.1. But evidence of the tax-free status of any collateral source benefits is inadmissible. *Cox v Superior Court* (2002) 98 CA4th 670, 674, 120 CR2d 45.

In *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1220, 1224, 117 CR2d 849, the collateral source rule precluded defendants from introducing evidence of survivor benefits that the plaintiff widow received after her husband's death even though her benefits were from the same sources and nearly identical to the decedent's pension and Social Security income received while he was alive. Evidence of the latter was not barred by the collateral source rule and was admissible to establish his past and future lost benefits. However, *Rotolo Chevrolet v Superior Court* (2003) 105 CA4th 242, 129 CR2d 283, held that the trial court had erred in granting plaintiff's motion in limine to exclude, under the collateral source rule, any evidence of disability retirement benefits that he had been paid and would receive in the future. Although the plaintiff had relied primarily on *McKinney*, the court of appeal in *Rotolo* found that case to be distinguishable and inapplicable:

[I]n *McKinney*, the collateral source rule was applied to Social Security benefits which replaced benefits that had stopped, and to pension payments which had been constructively paid for, thus triggering the classic rationale for the rule. Here, however, [plaintiff]'s disability pension payments do not replace anything; they are alternative payments to a regular pension.

105 CA4th at 248.

In assessing loss of earning capacity, the jury may be instructed when circumstances warrant in a lawsuit under the Federal Employers' Liability Act (FELA) (45 USC §§51-60) that the plaintiff does *not* have a right to workers' compensation benefits. *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 13, 1 CR3d 412.

For further discussion of the collateral source rule, see Update §§3.32 and 7.8.

The constitutionality of CC §3333.1(a) has been upheld against a challenge that it denies due process and equal protection. See *Fein v Permanente Med. Group* (1985) 38 C3d 137, 166, 211 CR 368.

Civil Code §3333.1 also bars employers from pursuing their statutory subrogation rights for workers' compensation payments under Lab C §3852 because the later-enacted CC §3333.1 has the underlying purpose of not only preventing double recovery by plaintiffs but also reducing overall medical malpractice insurance costs. *Miller v Sciaroni* (1985) 172 CA3d 306, 314, 218 CR 219. For further discussion, see California Workers' Damages Practice §3.56 (2d ed Cal CEB 2001).

Source: Torts/California Personal Injury Proof Update/14 Medical Bills/§14.11 By Defendant

[§14.11] By Defendant

 To Main Book

Absent an arbitrator's finding that medical expenses had been paid by the defendant (or a defendant-related source), it would be error for a judge asked to render a judgment on the award (or a satisfaction of judgment) to deduct the claimed medical expense payment from the award.

See *Schumacher v Ayerve* (1992) 9 CA4th 1860, 12 CR2d 417.

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Source: Torts/California Personal Injury Proof Update/14 Medical Bills/§14.12 By Workers' Compensation Carrier

[§14.12] By Workers' Compensation Carrier

 To Main Book

For detailed discussion of actions involving injured workers, their employers, and third parties, see [California Workers' Damages Practice \(2d ed Cal CEB 2001\)](#).

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15

Photographs

[§15.1] Value As Evidence

[§15.2] Admissibility

[§15.4] By Authentication

Qualifying Authenticating Witness

[§15.7] Amateur Photographers

Authenticating Particular Photographs

[§15.8] Scene of Accident

[§15.11] Damaged Vehicles

[§15.13] Objections to Admission

[§15.15] Misrepresentative or Misleading; Credibility versus Admissibility

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Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.1 VALUE AS EVIDENCE

[§15.1] VALUE AS EVIDENCE

 To Main Book

Postaccident amateur photographs of a car are not a substitute for a qualified expert's tire examination, and thus do not provide a proper foundation for expert opinion. *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1371, 37 CR3d 9.

On summary judgment or appeal from summary judgment, the court should examine the photographs of the alleged trivial defect and consider factors such as the photograph's subject; the view of the subject; the photograph's perspective; the use of any plain-view altering devices; the characteristics of the photograph; and whether the photograph was taken under substantially similar circumstances. *Kasparian v Avalonbay Communities, Inc.* (2007) 156 CA4th 11, 24, 66 CR3d 885 (defense expert's photographic evidence of recessed drain in walkway where plaintiff tripped and fell was not conclusive).

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Evidence Code §255 provides that a negative and any print made from it are original writings. See *People v Slow* (1973) 34 CA3d 74, 86, 109 CR 583 (expert who viewed photograph with five-power magnifier was permitted to testify that object shown was marijuana cigarette).

In the rare case in which testimony is offered to prove the content of a photograph that is not itself offered in evidence, the requirements of admissible secondary evidence under Evid C §1521 should be met; the photograph is a "writing" under Evid C §250. See *People v Enskat* (1971) 20 CA3d Supp 1, 3, 98 CR 646 (prosecution for showing obscene motion picture; decided under former Evid C §1500).

Generally, photographs are not excludable as "cumulative" unless they duplicate what is shown in other photographic evidence of the same kind; that is, a video showing a plaintiff's activities will not be regarded as cumulative of testimony about those activities or of what may be shown in still photographs. See *Jones v City of Los Angeles* (1993) 20 CA4th 436, 445, 24 CR2d 528 (20-minute "day in the life" video of paraplegic plaintiff authenticated by testimony of nurse who was caring for plaintiff as video was being made). See further discussion in Update §17.25.

Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.4 By Authentication

[§15.4] By Authentication

 To Main Book

The authentication of photographs purporting to show working conditions at a plant, particularly the amount of asbestos dust in the air, can be made by persons who worked in the plant at the same time as the plaintiff even though none of them testified to the exact dates and places shown. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 92, 37 CR2d 457, disapproved in part on other grounds by *Camargo v Tjaarda Dairy* (2001) 25 C4th 1235, 108 CR2d 617 (*Smith* court did not abuse discretion in admitting photographs as illustrative evidence; but see discussion of this case in Update §5.62).

The reference to Witkin should now be to 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§16-17 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/15 Photographs/Qualifying Authenticating Witness/§15.7 Amateur Photographers

Qualifying Authenticating Witness

[§15.7] Amateur Photographers

 To Main Book

Postaccident amateur photographs of a car are not a substitute for a qualified expert's tire examination, and thus do not provide a proper foundation for expert opinion. *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1371, 37 CR3d 9.

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Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.8 Scene of Accident

Authenticating Particular Photographs

[§15.8] Scene of Accident

 **To Main Book**

In *Kublmann v Pascal & Ludwig* (1970) 5 CA3d 144, 153, 85 CR 199, photographs of a downed fence, over which plaintiff had tripped, were held relevant even though they showed the fence at a point away from the place of injury.

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Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.11 Damaged Vehicles

[§15.11] Damaged Vehicles

 To Main Book

Postaccident amateur photographs of a car are not a substitute for a qualified expert's tire examination, and thus do not provide a proper foundation for expert opinion. *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1371, 37 CR3d 9.

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Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.13 Objections to Admission

[§15.13] Objections to Admission

 To Main Book

The reference in Book §15.13 to the best evidence rule is now outdated. Effective January 1, 1999, former Evid C §§1500-1511 were repealed and replaced with the secondary evidence rule, embodied in Evid C §§1520-1523 and 1552-1553. See Update §8.12.

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Source: Torts/California Personal Injury Proof Update/15 Photographs/§15.15 Misrepresentative or Misleading; Credibility versus Admissibility

[§15.15] Misrepresentative or Misleading; Credibility versus Admissibility

 **To Main Book**

The reference to Witkin should now be to 2 Witkin, *California Evidence, Demonstrative, Experimental, and Scientific Evidence* §19 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/16 X-Ray Films/Chapter Outline

16

X-Ray Films

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Source: Torts/California Personal Injury Proof Update/16 X-Ray Films/ADMISSIBILITY/§16.1 Value as Evidence

ADMISSIBILITY

[§16.1] Value as Evidence

 To Main Book

A plaintiff who, suing for soft-tissue injury to particular areas of the body, refuses to let defendant's medical examiner X ray those areas during discovery may be subject to a monetary sanction. See *Ghanooni v Super Shuttle* (1993) 20 CA4th 256, 24 CR2d 501 (generalized fear of exposure to radiation not sufficient justification for refusing to obey discovery order).

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Source: Torts/California Personal Injury Proof Update/16 X-Ray Films/§16.16 X-Ray Report

[§16.16] X-Ray Report

 To Main Book

On *Kelley v Bailey*, cited in Book §16.16, see discussion of *Whitfield v Roth* (1974) 10 C3d 874, 112 CR 540, in Update §6.56 (limitations on doctor's testimony about nontestifying doctors' opinions).

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Motion Pictures, Video Recordings, and Computer Animation

Value as Evidence

[§17.1] Visual Impact

[§17.2] Common Uses

[§17.3] Dangers

[§17.4] Admissibility

[§17.5] Relevance

[§17.6] Authentication

Particular Motion Pictures and Video Recordings

[§17.17] Surveillance

[§17.18] Authentication

[§17.19] Cross-Examination

[§17.22] Reenactment of Event

[§17.23] Experiments

[§17.25] Activity After Injury

Presenting to Jury

[§17.26] Equipment and Facilities in Courtroom

Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/VALUE AS EVIDENCE/§17.1 Visual Impact

VALUE AS EVIDENCE

[§17.1] Visual Impact

 To Main Book

A video presentation provides a visual impact that is inexpensive and versatile. Video recordings can be conveniently shown in a courtroom simply by providing standard TV monitors for the jury, judge, and counsel. Because television today is a common news medium, a video presentation may be more credible than one that depends on a darkened room and a movie screen. Computer animation can be used alone or in combination with a video presentation to depict events graphically. Computer animation is especially useful in accident reconstruction. Note that the *Kelly* standard does not apply to the use of computer animation to illustrate testimony of an expert witness. *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137. On *Kelly* standard in state court, see Update §5.62.

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.2 Common Uses

[§17.2] Common Uses

 To Main Book

Computer animation uses computer-generated graphics to reenact an accident or to show how various technical data can be calculated to obtain results favorable to one party. Information compiled on a particular case and presented as a computer reconstruction on a television monitor is very effective in achieving jury comprehension of a particular version of an incident.

An appellate court is not bound to base an opinion or draw inferences from the video recording of a trial which showed, for example, how briefly the trial judge—as trier of fact—examined documentary exhibits presented by a party. See *Moustakas v. Dashevsky* (1994) 25 CA4th 752, 30 CR2d 753.

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.3 DANGERS

[§17.3] DANGERS

 To Main Book

The reference to Witkin in Book §17.3 should now be to 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§20-22 (4th ed 2000).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.4 ADMISSIBILITY

[§17.4] ADMISSIBILITY



Effective July 1, 2005, the Civil Discovery Act of 1986 (CCP §§2016-2036) is repealed and a new Civil Discovery Act (CCP §§2016.010-2036.050) becomes operative. The new Discovery Act amends the 1986 Act in a nonsubstantive manner but also completely renumbers it.

The use of video presentations has been advanced by CCP §2025.620(c)-(d), which provides that at trial any party may use video depositions of experts, treating and consulting physicians, and unavailable witnesses, when properly prepared and noticed for trial use. See Update §10.20, discussing CCP §§2025.010-2025.570. See also People v Perry (1976) 60 CA3d 608, 131 CR 629 (lay witnesses permitted to give opinion testimony that person shown in surveillance film was defendant), and People v Ingle (1986) 178 CA3d 505, 223 CR 723 (applying *Perry*). See Update §15.2.

To admit a videotaped reenactment of events, a trial court must determine whether the videotape is a reasonable representation of what it alleges to portray, and whether it would mislead jurors or assist them in determining the facts of the case. The reenactment must also have been made under conditions substantially similar to those of the actual occurrence. People v Pedroza (2007) 147 CA4th 784, 795, 54 CR3d 636. See Effective Introduction of Evidence in California §11.2 (2d ed Cal CEB 2000).

Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.5 Relevance

[§17.5] Relevance

 To Main Book

On the subject of the relevance of motion picture evidence, see *Christofferson v Kaiser Found. Hosps.* (1971) 15 CA3d 75, 80, 92 CR 825 (motion picture illustrating skin disease for which drug had been prescribed was relevant in defense of medical malpractice action for injury from harmful side effects of the drug).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.6 Authentication

[§17.6] Authentication

 To Main Book

The reference to Witkin in Book §17.6 should now be to 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §20 (4th ed 2000). See California Trial Practice: Civil Procedure During Trial §§13.91-13.98, 13.107-13.108 (3d ed Cal CEB 1995).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/PARTICULAR MOTION PICTURES AND VIDEO RECORDINGS/§17.17 Surveillance

PARTICULAR MOTION PICTURES AND VIDEO RECORDINGS

[§17.17] Surveillance

 **To Main Book**

Motion pictures or video recordings of activities that a plaintiff or claimant was deceitfully induced to undertake should be excluded from evidence. *Redner v WCAB* (1971) 5 C3d 83, 94, 95 CR 447 (private investigator induced applicant's intoxication and horseback ride). See also *Unrub v Truck Ins. Exch.* (1972) 7 C3d 616, 630, 102 CR 815 (compensation insurer loses immunity from liability to workers' compensation claimant when insurer goes beyond proper investigative role by having investigator induce claimant to engage in physical activities that could be filmed). Further, recording or taping any confidential communication without the participants' permission is prohibited by Pen C §632.

Despite the above-mentioned disincentives, practitioners have indicated that the "rope job," as described in the last paragraph of Book §17.17, is alive and well.

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.18 Authentication

[§17.18] Authentication

 To Main Book

An attorney who wants to introduce a surveillance film may wish to ask a few questions of the cinematographer to dispel any implication that plaintiff was deceitfully induced to undertake the activities shown on the film. For example:

Q. Did you or anyone that you know cause that tire to be flat?

A. No.

Authenticating a surveillance film requires truthfulness from both the witness and the attorney who is eliciting the foundational testimony. See, *e.g.*, *In re Buzan* (1978) 43 CCC 789 In that case the Workers' Compensation Appeals Board suspended an attorney for conducting an examination that left the impression that the witness had taken the motion picture that was offered in evidence, when the attorney knew that another person had taken it. The witness, an investigator, was found in contempt of the Board and fined in the same proceeding. See California Trial Practice: Civil Procedure During Trial §13.96 (3d ed Cal CEB 1995).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.19 Cross-Examination

[§17.19] Cross-Examination

 [To Main Book](#)

See [Update §17.17](#) on the excludability of filmed recordings of activities that a plaintiff or claimant was deceitfully induced to undertake.

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.22 Reenactment of Event

[§17.22] Reenactment of Event

 To Main Book

Under CCP §2025, the court may order a deponent to perform a physical demonstration or a reenactment of an incident at a deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883. The *Emerson* court held that former CCP §2025(o) (now CCP §2025.480(a)), permitting a party to move for an order compelling a deponent to "answer any question," includes both verbal and nonverbal responses. Sanctions may be imposed, including exclusion of evidence, for failure to comply with an order compelling such a response. The *Emerson* court thus disapproved *Stermer v Superior Court* (1993) 20 CA4th 777, 24 CR2d 577, which had held that only verbal responses were required at a deposition.

The reference to Wigmore, Evidence, should now be to §798a (4th ed 1983).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.23 Experiments

[§17.23] Experiments

 To Main Book

For a case in which a plaintiff, trying to show that automobile seats were defective in design, was permitted to show films of federally mandated rear-end crash tests of a car of the same make and year, see *Benson v Honda Motor Co., Ltd.* (1994) 26 CA4th 1337, 1349, 32 CR2d 322 (plaintiff injured when her sedan was rear-ended by a pickup truck going 30 to 35 miles per hour; films showed mannequins being thrown into rear seat when car was hit at 30 miles per hour by a 4000-pound basher).

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Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/
§17.25 Activity After Injury

[§17.25] Activity After Injury



In a serious injury case, it is effective to show the jury a video recording of a "day in the life" of the injured plaintiff. The video recording should show, at a minimum, the eating, bathing, bowel care, physical therapy, special van transportation, and the wheelchair needs of the plaintiff. The video usually begins with the subject's first waking and proceeds chronologically through a normal day to depict graphically a disabled person's difficulties that are often unknown or forgotten by jurors not so afflicted. Live audio may accompany the video recording, or the video may be silent with voice-over narration by the injured party. The latter is very effective if the injured party is a good witness. Having the plaintiff narrate the video also allows the recording to be stopped at certain points for special emphasis. A video with a simultaneous audio recording must be made carefully to avoid improper comments by any of the persons shown in the video. The video should run for 15 to 20 minutes; a longer period may risk losing the jury's attention.

Under the Evidence Code, a video recording is the equivalent of a "writing" and is authenticated for showing at trial by testimony that it is an accurate portrayal of what it purports to be. *Jones v City of Los Angeles* (1993) 20 CA4th 436, 440 n5, 24 CR2d 528 (20-minute "day in the life" videotape of paraplegic plaintiff authenticated by testimony of nurse who was caring for plaintiff as video was being made). The *Jones* court held that the video was relevant on the issue of the extent of plaintiff's medical needs, pain, and suffering, and there was no error in the trial judge's ruling that the video could be shown to the jury over objections that its prejudicial effect outweighed its probative value, it was inflammatory, and merely cumulative of the nurse's testimony about the daily difficulties experienced by the plaintiff. Generally, however, photographic evidence is only cumulative of other photographic evidence, but a video will not be regarded as cumulative of what may be shown in still photographs. 20 CA4th at 445, 24 CR2d at 533. See [Update §15.2](#).

Source: Torts/California Personal Injury Proof Update/17 Motion Pictures, Video Recordings, and Computer Animation/PRESENTING TO JURY/§17.26 Equipment and Facilities in Courtroom

PRESENTING TO JURY

[§17.26] Equipment and Facilities in Courtroom

 [To Main Book](#)

When a video will be presented at trial, it is a common practice for counsel to rent several television or large computer monitors. Depending on the layout of the courtroom, one monitor is usually adequate for the judge, counsel, and other trial participants, while two monitors are often used for the jurors.

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Source: Torts/California Personal Injury Proof Update/18 Models/Chapter Outline

18

Models

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Source: Torts/California Personal Injury Proof Update/18 Models/SCALE MODELS/§18.1 Value as Evidence

SCALE MODELS

[§18.1] Value as Evidence

 **To Main Book**

People v Kynette (1940) 15 C2d 731, 104 P2d 794, cited in Book §18.1, was overruled on other grounds in *People v Snyder* (1958) 50 C2d 190, 197, 324 P2d 1.

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Source: Torts/California Personal Injury Proof Update/18 Models/§18.4 Admissibility

[§18.4] Admissibility

 To Main Book

The reference in Book §18.4 to the best evidence rule is now outdated. Effective January 1, 1999, former Evid C §§1500-1511 were repealed and replaced with the secondary evidence rule, embodied in Evid C §§1520-1523 and 1552-1553. See Update §8.12.

People v Kynette (1940) 15 C2d 731, 104 P2d 794, cited in Book §18.4, was overruled on other grounds in People v Snyder (1958) 50 C2d 190, 197, 324 P2d 1.

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Source: Torts/California Personal Injury Proof Update/19 Maps and Diagrams/§19.2 Stock Maps

[§19.2] Stock Maps

 **To Main Book**

The Division of Highways and the Bridge Division of the California Department of Public Works are now known as the Department of Transportation.

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Source: Torts/California Personal Injury Proof Update/19 Maps and Diagrams/§19.5 Police Accident Report Diagrams

[§19.5] Police Accident Report Diagrams

 To Main Book

On the admissibility of evidence, see discussion of *Box v California Date Growers Ass'n* (1976) 57 CA3d 266, 129 CR 146, in Update §9.9.

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Source: Torts/California Personal Injury Proof Update/19 Maps and Diagrams/ADMISSIBILITY/§19.8 Authentication

ADMISSIBILITY

[§19.8] Authentication

 **To Main Book**

People v Kynette (1940) 15 C2d 731, 104 P2d 794, cited in Book §19.8, was overruled on other grounds in *People v Snyder* (1958) 50 C2d 190, 197, 324 P2d 1.

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Source: Torts/California Personal Injury Proof Update/19 Maps and Diagrams/§19.9 Relevance; Changes in Scene

[§19.9] Relevance; Changes in Scene

 **To Main Book**

The California Department of Public Works is now known as the Department of Transportation.

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Source: Torts/California Personal Injury Proof Update/19 Maps and Diagrams/§19.15 Judicial Notice of Official Maps

[§19.15] Judicial Notice of Official Maps

 To Main Book

United Transp. Co. v Sacramento County, cited in Book §19.15, was superseded by statute on other grounds, as stated in *Western Aggregates, Inc. v County of Yuba* (2002) 101 CA4th 278, 297, 130 CR2d 436.

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Judicial Notice

Matter Noticed

Mandatory and Permissive Notice

[§20.3] Mandatory

Matters of Law

[§20.8] Federal and State Law: Chart

Facts and Propositions

[§20.11] Evidence Code Distinctions

[§20.12] Facts Noticed Before Evidence Code: Examples

Procedures to Obtain Notice

When to Make Request

[§20.14] On Demurrer: Form

[§20.16] During Pretrial Proceedings

Furnishing Information to Judge

[§20.30] Maps; Atlases; Gazetteers

[§20.35] Rules; Regulations; Orders

[§20.36] California Code of Regulations

[§20.38] Miscellaneous "Official Acts"

[§20.39] Court Files and Records

[§20.40] Rules of Court

[§20.41] Mortality Tables

[§20.42] Government Documents: List of Depositories

[§20.44] Weather Bureau Reports

[§20.46] Cost of Living Indexes

Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/MATTER NOTICED/Mandatory and Permissive Notice/§20.3 Mandatory

MATTER NOTICED

Mandatory and Permissive Notice

[§20.3] Mandatory

 **To Main Book**

A court need not judicially notice an item that is not relevant to an issue in the litigation, or the probative value of which, under Evid C §352, is outweighed by the risk of prejudice, even if the item meets the criteria in Evid C §451 for mandatory judicial notice. When courts take judicial notice of the existence of official acts and public records, they do not thereby take notice of the truth of matters stated in them. Mangini v R.J. Reynolds Tobacco Co. (1994) 7 C4th 1057, 1063, 31 CR2d 358, overruled on other grounds in In Re Tobacco Cases II (2007) 41 C4th 1257, 1275, 63 CR3d 483. See California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/Matters of Law/§20.8 Federal and State Law: Chart

Matters of Law

[§20.8] Federal and State Law: Chart

 To Main Book

In the chart on Book p 472, the sixth entry in the "California" column (which reads Cal Const art XI, §§7-1/2, 8) should be changed to read Cal Const art XI, §§3-5. See Evid C §451(a).

New entries should be added to the chart for the true signification of English words, phrases, and legal expressions (which must be judicially noticed; Evid C §451(e)), and facts and propositions so universally known that they are not reasonably subject to dispute (which also must be judicially noticed; Evid C §451(f)).

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/Facts and Propositions/§20.11 Evidence Code Distinctions

Facts and Propositions

[§20.11] Evidence Code Distinctions



Though a court may take judicial notice of a court record that a judge made certain decisions or findings of fact, judicial notice may not be taken of the truth of the ultimate facts found by the judge to be true in that decision or those findings of fact. *Sosinsky v Grant* (1992) 6 CA4th 1548, 8 CR2d 552.

A court sitting in a particular locality "may take judicial notice of the existence and the location of streets, their character and relation to each other, the congestion of pedestrian or vehicular traffic, etc." *McGarvey v PG&E* (1971) 18 CA3d 555, 560, 95 CR 894.

For examples of matters of which the court may take judicial notice, see *Schwalbe v Jones* (1976) 16 C3d 514, 521 n9, 128 CR 321 (court took judicial notice as matter of generalized knowledge (Evid C §451(b)) that substantially all automobile liability insurance policies presently contain exclusions precluding owner from recovering under owner's liability policy); *Matchett v Superior Court* (1974) 40 CA3d 623, 627, 115 CR 317 (in considering discoverability of various hospital records, appellate court took judicial notice under Evid C §452(h) of two publications by the Joint Commission on Accredited Hospitals: (1) Accreditation Manual for Hospitals and (2) Guidelines for the Formulation of Medical Staff Bylaws, Rules, and Regulations, Departmentalized Hospitals (1971)); *Marocco v Ford Motor Co.* (1970) 7 CA3d 84, 88, 86 CR 526 (although trial court properly took judicial notice of publication that was record of congressional hearing on traffic safety and automobile equipment failure, parts of that publication noting defects in defendant's automobiles that were unrelated to the one allegedly causing accident should have been excluded); and *Comings v State Bd. of Educ.* (1972) 23 CA3d 94, 102, 100 CR 73 (court would not take judicial notice under Evid C §451(f), §452(g) or §452(h) that marijuana use was harmless and common).

The existence of a contract between private parties cannot be established by judicial notice under Evid C §452(h). *Gould v Maryland Sound Indus., Inc.* (1995) 31 CA4th 1137, 37 CR2d 718 (when plaintiff sued for wrongful termination of employment under oral contract, demurrer could not be based on purported written contract).

Schwalbe v Jones, cited in Book §20.11, was overruled in part on other grounds in *Cooper v Bray* (1978) 21 C3d 841, 855, 148 CR 148.

Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.12 Facts Noticed Before Evidence Code: Examples

[§20.12] Facts Noticed Before Evidence Code: Examples

 To Main Book

Correction: The citation for *King v Ludlow* in "b." is *King v Ludlow* (1958) 165 CA2d 620, 332 P2d 345 (not 156 CA2d). The citation for *People v Ford* is *People v Ford* (1965) 234 CA2d 480, 44 CR 556 (not 34 CA2d 480).

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/PROCEDURES TO OBTAIN NOTICE/When to Make Request/§20.14 On Demurrer: Form

PROCEDURES TO OBTAIN NOTICE

When to Make Request

[§20.14] On Demurrer: Form



Any one ground for demurrer listed in CCP §430.10 or §430.20 may be raised if the ground appears from a matter of which the court may or must take judicial notice or appears on the face of the pleading. CCP §430.30. See *Pacific Employer Ins. Co. v State* (1970) 3 C3d 573, 575 n1, 91 CR 273. When the basis of a demurrer is a matter of which a court may take judicial notice under Evid C §452 or §453, the matter must be specified in the demurrer or in supporting points and authorities except as the court may otherwise permit. CCP §430.70.

See generally California Civil Procedure Before Trial §23.18 (4th ed Cal CEB 2004) (specifying matter to be judicially noticed).

The reference to Witkin in Book §20.14 should now be to 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §100 (4th ed 2000).

Former CCP §430(6), cited in Book §20.14, has been repealed and reenacted as CCP §430.10(e).

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.16 During Pretrial Proceedings

[§20.16] During Pretrial Proceedings

 **To Main Book**

The discussion in Book §20.16 does not reflect changes in the Rules of Court. On case management conferences, see Cal Rules of Ct 212.

The California Pretrial and Settlement Procedures Book and its Supplement, referred to in Book §20.16, are no longer in print. On court management of civil cases, see California Civil Procedure Before Trial, chap 40 (4th ed Cal CEB 2004).

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/Furnishing Information to Judge/§20.30 Maps; Atlases; Gazetteers

Furnishing Information to Judge

[§20.30] Maps; Atlases; Gazetteers

 **To Main Book**

United Transp. Co. v Sacramento County, cited in Book §19.15, was superseded by statute on other grounds, as stated in *Western Aggregates, Inc. v County of Yuba* (2002) 101 CA4th 278, 297, 130 CR2d 436.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.35 Rules; Regulations; Orders

[§20.35] Rules; Regulations; Orders

 To Main Book

The California Administrative Code has been redesignated as the California Code of Regulations, and the California Administrative Code Supplement has been redesignated as the California Regulatory Code Supplement.

The reference in Evid C §451(b) to 44 USC §307 has been corrected to 44 USC §1507.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.36 California Code of Regulations

[§20.36] California Code of Regulations

 **To Main Book**

See Update §5.66 on admissibility of safety orders in certain personal injury and wrongful death cases.

The California Administrative Code has been redesignated as the California Code of Regulations, and the California Administrative Code Supplement has been redesignated as the California Regulatory Code Supplement.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.38 Miscellaneous 'Official Acts'

[§20.38] Miscellaneous "Official Acts"

 To Main Book

The following should be added to the list in Book §20.38:

i. Administrative agency's bulletin of penalties schedule (see *Harris v Alcoholic Beverage Control Appeals Bd.* (1965) 62 C2d 589, 595, 43 CR 633, in which Department of Alcoholic Beverage Control's bulletin was judicially noticed as guide in determining whether license revocation was abuse of agency's discretion).

A self-serving declaration of an official of a government agency is not an "official act." See *Childs v State* (1983) 144 CA3d 155, 192 CR 526 (official of State Board of Control had no personal knowledge of the actual mailing of rejection notices; trial court improperly took judicial notice of self-serving hearsay).

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In *Day v Sharp* (1975) 50 CA3d 904, 914, 123 CR 918, 924, the court held that a court may take judicial notice that certain documents exist in the file of another court proceeding, but should not take judicial notice of the truth of matters stated either on information and belief or in unverified documents. See *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1405, 55 CR3d 551 (judicial notice of another court's action allowed, but not available to prove truth of factual determination made in another court's decision; *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 271 CR 1 (court could take judicial notice of complaint allegations in prior case against defendant concerning structural defects to show that defendant had notice of defects but not that defects in fact existed). See also Update §20.3.

Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.40 Rules of Court

[§20.40] Rules of Court

 To Main Book

The State of California Documents Section, referred to in Book §20.40, is now the Department of General Services, Office of State Publishing, 344 North Seventh Street, Sacramento, CA 95814, (800) 963-7860. However, the Department no longer publishes a volume of the California Rules of Court.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.41 Mortality Tables

[§20.41] Mortality Tables

 To Main Book

Appendixes A and B of the eighth edition of BAJI (1994) contain a Life Expectancy Table and a Present Value Table.

Metropolitan Life Insurance Company now charges \$50 per year (four issues) for a subscription to their statistical bulletin. Inquiries may be made to Editor of Statistical Bulletin, Metropolitan Life Insurance Co., 1 Madison Avenue, New York, NY 10010 (telephone (212) 578-5675).

See Anno, 86 ALR4th 1135 (1991) (admissibility of evidence of injured person's use of intoxicants or illegal drugs on issue of life expectancy).

Effective September 1, 2003, the California jury instructions "approved by the Judicial Council are the official instructions for use in the state of California," and their use "is strongly encouraged." Cal Rules of Ct 855(a), (e). Accordingly, see CACI 3932 where BAJI 14.69 is cited in Book §20.41.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.42 Government Documents: List of Depositories

[§20.42] Government Documents: List of Depositories

 To Main Book

A trial court may take judicial notice of a publication that is a record of a congressional hearing, but the official character of the document does not make otherwise inadmissible material in it admissible. See *Marocco v Ford Motor Co.* (1970) 7 CA3d 84, 88, 86 CR 526 (record of hearing on traffic safety and automobile equipment failure showed defects in defendant's automobiles unrelated to one allegedly causing plaintiff's injuries).

Note that although the information in the chart in Book §20.42 has not been kept up to date, most of that information remains valid. Counsel can determine whether any given library is a government depository by placing a telephone call to the reference librarian.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.44 Weather Bureau Reports

[§20.44] Weather Bureau Reports

 To Main Book

The National Weather Record Center is now the National Climatic Data Center, 151 Patton Avenue, Room 120, Ashville, NC 28801-5001 (telephone (828) 271-4800; fax (828) 271-4876). Certified copies of weather reports may now be obtained from that office. The telephone number stated in Book §20.44 for the Weather Bureau in San Francisco is no longer in service. Unofficial copies pertaining to San Francisco and Oakland airports may be obtained for a small charge from the National Weather Service San Francisco Bay Area Forecast Office, 21 Grace Hopper Ave., Stop 5, Monterey, CA 93943-5505, (831) 656-1725.

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Source: Torts/California Personal Injury Proof Update/20 Judicial Notice/§20.46 Cost of Living Indexes

[§20.46] Cost of Living Indexes

 To Main Book

Copies of Consumer Price Indexes now may be obtained from the Bureau of Labor Statistics, U.S. Government Online Bookstore, <http://bookstore.gpo.gov>. More specific detailed surveys may be obtained by written request for "CPI Detailed Report" from the Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7954; (telephone (202) 512-1800).

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Source: Torts/California Personal Injury Proof Update/Table of Statutes, Regulations, and Rules

Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I, §28: [§2.6](#)

Art I, §30(b): [§4.46A](#)

Art XI, §§3-5: [§20.8](#)

Art XI, §7½: [§20.8](#)

Art XI, §8: [§20.8](#)

Statutes

BUSINESS AND PROFESSIONS CODE

6710: [§5.41](#)

CIVIL CODE

47(b): [§§5.1, 6.1](#)

56-56.37: [§13.3](#)

56.11: [§13.3](#)

56.28: [§13.3](#)

1431.2: [§§3.25, 7.4, 7.9](#)

1431.2(a): [§3.19](#)

1431.2(b)(1): [§7.9](#)

1431.2(b)(2): [§§3.25, 3.29](#)

3333.1: [§§3.32, 7.8, 14.9](#)

3333.1(a): [§§3.32, 7.8, 14.9](#)

3333.2: [§7.9](#)

CODE OF CIVIL PROCEDURE

56.10(a): [§13.3](#)

56.10(c)(4): [§13.3](#)

96: [§10.23](#)

273: [§10.18](#)

273(b): [§10.18](#)

335.1: [§1.1](#)

377 (former): [§6.34](#)

377.10-377.62: [§6.34](#)

430(6) (former): [§20.14](#)

430.10: [§20.14](#)

430.10(e): [§20.14](#)

430.20: §20.14

430.30: §20.14

430.70: §20.14

607(6): §1.45

607(b): §1.45

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