In Memory of Bill Brockett

"Is there a way to practice law with dignity? I need to care less about winning the trivial battles, more about decency."

"I believe in living life to the fullest, or ten o'clock, whichever comes first."

William A. Brockett, Jr.

Bill Brockett's life and his contributions are so remarkable that I certainly cannot do them justice. But I can speak with admiration and respect for this extraordinary person. For it was my privilege to edit Bill's *Civil Litigation Reporter* columns.

Bill co-authored this book, Effective Direct and Cross-Examination, with John Keker. He was also a Contributing Editor in the area of Trial Practice for the *Civil Litigation Reporter* from May 1988 until a serious illness ended his masterful columns with the September 1995 issue. On June 15, 1996, Bill met an untimely death. But for seven years, Bill spun out columns and updates like clockwork. How he found the time for it, I'll never know. Many of Bill's columns for the Reporter are collected in the Update to this book.

Bill's writings recognized "the existential nature of the lawyer in trial: a human, with mere human skills, attempting to impose some order on an absurd and possibly meaningless world." His columns entered "the 'Twilight Zone'—the zone of trial practice containing questions that often have no answers, but offer intriguing possibilities for the imaginative trial lawyer." Brockett, *Trial Run*, 10 CEB Civ Litigation Rep 93 (May 1988). He had a gift for writing: "Sleep won't come. You are awake at 3:00 a.m., flat on your back staring at nothing. Trial is a week away, and you have no idea how you are going to put 127 documentary exhibits into evidence." Brockett, *Trial Run—Business as Usual?* 10 CEB Civ Litigation Rep 195 (Aug. 1988). Even a quote from boxing great Joe Louis ("He can run, but he can't hide") found its way into a column. Brockett, *Trial Run: The Evasive Witness*, 10 CEB Civ Litigation Rep 302 (Nov. 1988). An avid reader and lover of music, he would frequently jump-start his columns with quotes from notables such as Cole Porter, Joseph Conrad, and H. L. Mencken.

Certainly, one of his classic columns was *Trial Fear: Riding It Out*, 17 CEB Civ Litigation Rep 9 (Feb. 1995). Bill led off with the Woody Allen quote, "95% of life is just showing up." He then followed with mini-essays from an all-star lineup of trial lawyers: Cristina Arguedas, James Brosnahan, Barbara Caulfield, Joseph Cotchett, John Keker, Guy Kornblum, Brian Monaghan, James Penrod, and, of course, Bill Brockett. Bill stated, "As for myself, I find comfort in knowing that Bill Russell, an all-time NBA great, threw up in the locker room before every game. I share his queasy stomach."

Bill was such a gifted trial lawyer that he quickly seized on the latest innovation—laser disc technology—to help fashion a jury verdict of over $19 million. And, of course, he shared this newfound expertise with the readers of this update and the Reporter. See *Trial Run—The Videotape Revolution (Pretrial)*, 12 CEB Civ Litigation Rep 190 (Aug. 1990) and *Trial Run—The Videotape Revolution (Trial)*, 12 CEB Civ Litigation Rep 288 (Nov. 1990). Also, he was a frequent speaker for CEB and other organizations, always willing to share with others his expertise and his wonderful humor.

Bill was a force in improving the quality of the practice of law. Beyond this, Bill truly cared about people. He had a brilliant mind, and his heart was just as great. On behalf of CEB, thank you, Bill. We will miss you.

Michael L. Woods,
CEB Editor

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:

Update Editor

Continuing Education of the Bar—California

300 Frank H. Ogawa Plaza, Suite 410

Oakland, CA 94612

Norma Piatt was the project manager of this update. Andy Rosner provided legal research assistance. The index was updated by the Indexing staff. David Rosenberg handled copy editing and production. Composition was performed by CEB's Electronic Publishing staff.

Pamela J. Jester
Director

Selected Developments

EFFECTIVE DIRECT AND CROSS-EXAMINATION
November 2004 Update

Since Last Update: There have been several interesting developments in the area of privilege, confidentiality, and waiver. See Update §12.14A for new cases (inserted as Editor's Notes) on waiver of privilege through disclosure and the crime-fraud exception to privilege, as well as amendments to Bus & P C §6068(e). In addition, see that section for a recent case in which a court disqualified one party's legal team and its experts because that party's lawyers used documents they knew were clearly confidential work product of the other side in deposing the other side's expert.

Jury selection and voir dire issues were considered in a number of recent developments. See *People v Heard* (2003) 31 C4th 946, 966 n9, 4 CR3d 131, cited in Update §10.1 for a list of publications that are useful to counsel trying capital cases. *People v Stewart* (2004) 33 C4th 425, 15 CR3d 656, discussed in Update §10.9, analyzed the use of responses to jury questionnaires without further oral examination to exclude potential jurors from the panel.

There have been some developments in the area of jury selection and *Wheeler* motions. The California courts have spoken on the issue of when the appellate courts must give deference to the trial court's determination of a *Wheeler* motion and what kind of record the trial court must make to justify accepting explanations for peremptory challenges. See Update §10.14 for discussion of *People v Johnson* (2003) 30 C4th 1302, 1 CR3d 1, *People v Reynoso* (2003) 31 C4th 903, 3 CR3d 769, and *People v Allen* (2004) 115 CA4th 542, 9 CR3d 374.

The issue of self-incrimination came before both the Supreme Court and the California Supreme Court in recent case opinions. See *U.S. v Patane* (2004) ___ US ___, 159 L Ed 2d 667, 124 S Ct 2620, and *People v Neal* (2003) 31 C4th 63, 1 CR3d 650, discussed in Update §6.2.

See Update §7.15 for two recent cases on the admissibility of expert opinions in California.

Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

The Judicial Council released new civil jury instructions that are written in plain English. Citations to BAJI throughout the Book and Update have been replaced with citations to the Judicial Council California Civil Jury Instructions (CACI).

New editions of California Trial Objections (10th ed Cal CEB 2004), California Criminal Law Procedure and Practice (7th ed Cal CEB 2004), and California Civil Procedure Before Trial (4th ed Cal CEB 2004) have been published. Citations to each of them have been updated throughout the Book and Update.

All statutes and rules of court have been updated to reflect amendments, additions, and repeals. Matters previously handled at the pretrial conference are now handled in the course of case management conferences; see Update §13.1 for discussions of court rule changes.

Since Publication of the Book: The Ninth Circuit held that it is not an abuse of discretion or a denial of due process for a trial court to impose reasonable time limitations on cross-examination and to exclude rebuttal evidence based on a party's failure to conform to time limits as agreed on by the parties before the beginning of the trial. See Update §1.7.

Former Cal Rules of Prof Cond 7-103 was replaced by Cal Rules of Prof Cond 2-100, which makes clear that, for purposes of the prohibition against ex parte communication with a party represented by another attorney, "party" may include ordinary employees of corporate parties. However, a court of appeal held that it was permissible for an attorney to interview the former general manager of an adverse party because the former manager was not a member of the plaintiff's policy-making group. See Update §2.13.

The California Supreme Court has disapproved CALJIC 17.41.1, requiring jurors immediately to report any juror's refusal to deliberate or intent to disregard the law or to decide the case on an improper basis. The court reasoned that the instruction could induce jurors to reveal the content of their deliberations. *People v Engleman* (2002) 28 C4th 436, 121 CR2d 862. See Update §2.15.

An appellate court approved a trial court's practice of reviewing questions submitted by jurors before passing them on to counsel and allowing counsel to decide whether to ask the questions. See Update §2.15.

The California Supreme Court held that, in criminal cases, the "truth in evidence" provision of Proposition 8 (Cal Const art I, §28(d)) effectively repealed Evid C §787. See Update §§5.21, 6.2, 8.12, 12.17-12.18.

A court of appeal held that a defense witness could be impeached by evidence of failure to report to the police or the prosecution facts the witness understood tended to exculpate the defendant. See Update §5.30B.

There have been several developments related to the use of *Miranda* warnings. Most significantly, the United States Supreme Court has reaffirmed *Miranda v Arizona.* These developments, discussed in Update §6.2, include:

- *Chavez v Martinez* (2003) 538 US 760, 155 L Ed 2d 984, 123 S Ct 1994, in which the United States Supreme Court held 5-4 that a police officer could claim qualified immunity for an unMirandized, intensive interrogation of a seriously injured defendant when the defendant was never charged and his admissions were never used against him.

- The California Supreme Court deciding in *People v Storm* (2002) 28 C4th 1007, 124 CR2d 110, that a break in custody when the defendant has had a reasonable opportunity to contact his attorney dissolves an *Edwards* claim. See Update §6.2.

- The Ninth Circuit holding that statements induced in deliberate violation of *Miranda* may not be used to prove guilt, even though "admitted in the guise of impeachment" (*Henry v Kernan* (9th Cir 1999) 197 F3d 1021, 1024; *California Attorneys for Criminal Justice v Butts* (9th Cir 1999) 195 F3d 1039, 1047).

- The California Supreme Court holding that the intentional violation of a suspect's *Miranda* rights does not preclude the use of the resulting statement to impeach defendant's inconsistent testimony (*People v Macias* (1997) 16 C4th 739, 66 CR2d 659).

- A California appellate court holding that it was proper for the trial court to instruct the jury under CALJIC 2.03 that it could infer consciousness of guilt if it concluded defendant had made a willfully false statement about the crime, even though the statement was obtained in violation of *Miranda;* defendant himself testified to one of the statements on direct examination and the contradictory version was therefore admissible as impeachment (*People v Williams* (2000) 79 CA4th 1157, 94 CR2d 727).

Also in Update §6.2:

- In *Ohler v U.S.* (2000) 529 US 753, 146 L Ed 2d 826, 120 S Ct 1851, the United States Supreme Court held, 5-4, that by admitting a prior conviction on direct examination, a federal criminal defendant waived the right to challenge its admissibility on appeal (see also Update §11.2).

- Under the "Truth in Evidence" provision of the California Constitution (Cal Const art I, §28(f)), when a prior conviction is an element of a current offense, the defendant *may not,* by stipulating to the conviction, prevent the jury from learning of the fact of the conviction, but *may* prevent the jury from learning of its nature.

- · A court of appeal ruled that a nonresident witness served with a notice to appear under CCP §1987(b) is not required to appear at trial and bring requested documents.

Certain federal district courts, including those in California, elected to opt out of or modify the 1993 amendments to the Federal Rules of Civil Procedure. See Update §§7.9, 9.3.

In *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570, a court of appeal held that the testimony of any treating physician may be excluded if he or she has not been identified by name and address in the party's designation of expert witnesses; see Update §7.9 for discussion.

In *Domingo v T.K.* (9th Cir 2002) 289 F3d 600, the Ninth Circuit held that the trial court properly excluded expert evidence when there was too great an analytical gap between the data and the opinion offered. See Update §7.15.

A number of significant developments have taken place in the area of expert witnesses, with the result that the federal courts and California now use different standards and different procedures for determining the admissibility of expert testimony. Compare *Daubert v Merrell Dow Pharmaceuticals, Inc*. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, with *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663. These developments are analyzed in Update §7.15.

The December 2000 amendments to the Federal Rules of Evidence include the following revisions of the rules on the admissibility of opinion testimony:

- An amendment to Fed R Evid 701 that makes inadmissible the opinion testimony of a lay witness that comes within the scope of expert testimony (opinion based on scientific, technical, or other specialized knowledge) defined by Fed R Evid

702 (see Update §12.33).

- An amendment to Rule 702 that brings the rule into conformance with the foundational requirements for the admission of expert testimony set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc*. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (see Update §7.15).

- An amendment to Fed R Evid 703 provides that even when an expert's reliance on inadmissible information is reasonable, the material itself is not admissible unless the court determines that its probative value substantially outweighs its prejudicial effect (see Update §§7.8, 12.23).

In *Jaros v DuPont (In re Hanford Nuclear Reservation Litig.)* (9th Cir 2002) 292 F3d 1124, 1137, the Ninth Circuit held that the trial court's requiring plaintiffs to prove that they were exposed to a specific dose of radiation was reversible error, because "[r]adiation is capable of causing a broad range of illnesses, even at the lowest doses. This has been recognized by scientific and legal authority." See Update §7.15.

A 10th Circuit decision affirmed a district court's application of *Daubert v Merrell Dow Pharmaceuticals, supra*, in excluding plaintiffs' expert witness testimony in a products liability action as "guesswork." See *Hollander v Sandoz Pharmaceutical Corp.* (10th Cir 2002) 289 F3d 1193. See Update §7.15.

Two appellate decisions reversed trial court judgments, holding that police "expert" testimony on defendants' alleged gang membership should not have been admitted. See *People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876, citing Fed R Evid 702 and Evid C §352, and *People v Bojorquez* (2002) 104 CA4th 335, 128 CR2d 411, citing Evid C §352. See Update §§11.4, 12.6.

An appellate court held that a witness may not be impeached at trial by prior inconsistent statements made during a judicial arbitration on the same matter. See Update §8.5 for a discussion of *Jimena v Alesso* (1995) 36 CA4th 1028, 43 CR2d 18.

The United States Supreme Court held that if a document is a "public record," it may be considered by the jury without further authentication, even if it contains conclusions or opinions. See Update §8.9.

The California Supreme Court has held that a defendant's rap sheet is admissible under the official records exception to the hearsay rule to prove the fact of a prior conviction for the purpose of sentence enhancement. See Update §8.9A. The Federal Rules of Evidence have been amended to provide that the contents of a declarant's statement must be considered, but are not alone sufficient, to establish certain prerequisite facts to a determination that the statement is not hearsay. Fed R Evid 801(d)(2). See Update §§8.10, 12.10, 12.14, 12.34.

Federal Rules of Evidence 404(a)(1) was amended, effective December 1, 2000, to provide that when an accused attacks the character of an alleged victim under subdivision (a)(2), the door is opened to an attack on the same character trait of the accused. See Update §8.12.

Federal Rules of Civil Procedure 37 was tightened to make it more difficult to evade proper discovery. Amendments place limits on the number of depositions that may be taken by a party without court approval. A stipulation or a court order is no longer required before a deposition may be recorded by videotape under the amended Federal Rules of Civil Procedure. See Update §9.3.

Several federal cases have addressed the use and abuse of depositions, including a Ninth Circuit case that held that, if deposition corrections amount to fraud, appropriate sanctions may include dismissal of the entire action. See Update §9.8.

For discussion of relevancy in relation to constitutionally protected privacy issues arising in depositions, see *Tylo v Superior Court* (1997) 55 CA4th 1379, 64 CR2d 731, cited in Update §9.9.

There are divergent opinions among federal courts on the question of whether showing documents to a witness to refresh recollection waives the work product privilege, and, if so, to what extent. See Update §9.17.

In *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883, the California Supreme Court held that under CCP §2025(o) a deponent at a videotaped deposition can be compelled to perform a physical reenactment of an event. See Update §9.17.

Federal Rules of Civil Procedure 30(b)(2) was amended to permit any party to take a deposition by videotape without prior court order. See Update §9.21.

See Update §9.22 for discussion of the factors a court must consider in deciding the admissibility of a "Day in the Life" video. Proposition 115 amended the state constitution and made statutory changes affecting criminal trial practice. Changes include the prosecutorial right to discovery and limits on the defendant's right to discovery, use of hearsay testimony by law enforcement

officers at a preliminary hearing, new speedy trial requirements in felony cases, and limitations on voir dire in criminal cases. For discussion of changes in voir dire enacted by Proposition 115, see Update §10.1. For cases construing the hearsay preliminary hearing provision of Proposition 115, see Update §12.38.

The Ninth Circuit held that a party can still exercise a peremptory challenge to an alternate juror who was named to the panel after that party has accepted different alternates. See Update §10.5.

An appellate court held that a trial court's plan for requiring exercise of peremptory challenges in chambers violated the defendant's constitutional and statutory right to a public trial and was reversible error. See Update §10.12.

In *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, the United States Supreme Court held that the equal protection clause of the United States Constitution bars a prosecutor from race-based peremptory challenges of prospective jurors. The defendant may establish a prima facie case of discrimination with evidence of the prosecutor's challenges to African American jurors; the burden then shifts to the prosecutor to provide a neutral, relevant reason for excluding prospective jurors. The high court has subsequently extended the rule against exercising peremptory challenges for discriminatory reasons to *both* sides in civil and criminal cases and to challenges based on gender. See Update §§10.14-10.14A.

Other *Wheeler/Batson* developments discussed in Update §§10.14-10.14B include the following:

- In *Miller-El v Cockrell* (2003) 537 US 322, 154 L Ed 2d 931, 123 S Ct 1029, the United States Supreme Court reversed the procedural denial to a Texas inmate of his petition for writ of habeas corpus, which was based on multiple and egregious *Batson* error.

- The California Supreme Court expanded the remedies available to the trial courts when a *Wheeler* violation has occurred and offered possible alternatives to dismissing the jury venire. See discussion of *People v Willis* (2002) 27 C4th 811, 118 CR2d 301, in Update §10.14.

- The Ninth Circuit held that the standard California courts use to determine whether the moving party has made a prima facie showing that the adverse party is using peremptory challenges for improper reasons was "impermissibly stringent," concluding that California courts "have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." *Wade v Terhune* (9th Cir 2000) 202 F3d 1190.

- A California appellate court held that homosexuals comprise a "cognizable group" under *Wheeler* and their exclusion through the improper use of peremptory challenges violates Cal Const art I, §16. *People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339. See Update §§10.14A-10.14B.

- Another court of appeals reversed a defendant's conviction for *Wheeler/Batson* error in *People v McGee* (2003) 104 CA4th 559, 128 CR2d 309, because the trial court had improperly focused its analysis of the defendant's *Wheeler* and *Batson* motions on challenges to particular prospective jurors rather than evaluating whether the defendant's jury trial was drawn from a representative cross-section of the community.

An appellate court held that a trial court cannot strike a witness's testimony under Evid C §352 simply because it concludes that the witness is lying. *Vorse v Sarasy* (1997) 53 CA4th 998, 62 CR2d 164. See Update §§11.4, 12.6.

For recent trends on the admissibility of evidence under the business records exception to the hearsay rule, see Update §12.3.

The Evidence Code was amended to require that the affidavit of the custodian of records accompanying business records provide the identity of the records and a description of their mode of preparation. Evid C §1561(a)(4)-(5). See Update §12.3.

For state and federal cases discussing the scope of the hearsay exception for admissions by a party, see Update §12.10.

Disclosures made by a potential client after an attorney refuses representation are not protected by the attorney-client privilege. *People v Gionis* (1995) 9 C4th 1196, 40 CR2d 456.

In a joint prosecution agreement, one party could not waive the work product privilege without consent of the other. *Armenta v Superior Court* (2002) 101 CA4th 525, 124 CR2d 273. There is no protection of work product in a law enforcement investigation or criminal prosecution if the services of the attorney were obtained to enable someone to commit a crime or fraud, if the attorney is suspected of knowingly participating in the crime or fraud. CCP §2018(d). See Update §12.14A.

New rules of evidence provide sweeping exceptions to the long-standing rule prohibiting the use of evidence of other acts of misconduct to show propensity (see Update §12.18):

- In a state court criminal action in which the defendant is accused of a sexual offense, Evid C §1108 permits the

prosecution to introduce evidence that the defendant committed other sexual offenses to prove that the defendant committed the charged act.

- In a state court criminal action in which the defendant is charged with a domestic violence offense, as defined in Pen C §13700, Evid C §1109 allows the prosecution to introduce evidence of other domestic violence offenses that have occurred in the last ten years.

- In federal courts, evidence of other sexual offenses is admissible in a criminal case charging a sexual offense (Fed R Evid 413), and evidence of other acts of child molestation is admissible in a criminal case charging child molestation (Fed R Evid 414). Such evidence is also admissible in civil cases in which sexual offense or child molestation forms the crux of the complaint (Fed R Evid 415).

- But see, *e.g., Old Chief v U.S.* (1997) 519 US 172, 136 L Ed 2d 574, 117 S Ct 644 (reversible Rule 403 error for trial court to admit defendant's prior after defense offered to stipulate to conviction; Court held that there was no government right under Rule 403 to refuse offered stipulation); see also *Gallagher v City of West Covina* (CD Cal) 2002 US Dist LEXIS 14853, a 42 USC §1983 excessive force case (trial court, citing Fed R Evid 404(b), granted plaintiff's motion to preclude evidence of his prior convictions and prior bad acts, distinguishing *Perrin v Anderson* (10th Cir 1986) 784 F2d 1040, cited in Update §12.11, in which officers were claiming self defense and plaintiff's prior violence was therefore relevant).

Also discussed in Update §12.18:

- A California court of appeal has held that evidence of domestic abuse perpetrated by a defendant on a victim was admissible in civil wrongful death actions.

- A California appellate court has held that when identity is in question, other evidence of the act is not admissible on such issues as intent and motive, unless it meets the stringent modus operandi requirements that apply to the admission of such evidence to prove identity.

- The California Supreme Court affirmed prior holdings that require defendant to take the stand and testify to preserve the issue of impeachment by prior convictions.

- Writings, such as a personal telephone directory and a notebook with names, telephone numbers, and records of drug transactions, are admissible as "tools of the trade" to prove the existence of a conspiracy.

- Felony driving under the influence with three or more driving-under-the-influence convictions within seven years before the current offense is a crime involving moral turpitude.

Evidence Code §721(b) has been amended to allow an expert witness to be cross-examined on the content or tenor of any scientific, technical, or professional text—whether or not relied on by the expert in forming an opinion—if the publication has been established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. See Update §12.21.

Disagreeing with the Ninth Circuit, the Fourth Circuit Court of Appeals has held that the trial court may permit charts summarizing earlier testimony to be introduced in evidence under Fed R Evid 611(a). *U.S. v Johnson* (4th Cir 1995) 54 F3d 1150. See Update §12.22.

Although a criminal defendant may proffer any relevant evidence that raises a reasonable doubt about his guilt, including evidence of possible culpability by a third party, a defendant may be precluded from presenting such evidence if the proof consists of time-consuming hearsay and nonprobative character evidence. See Update §12.26A.

Prior consistent out-of-court statements introduced to rebut a charge of recent fabrication or improper influence or motive must be made *before* the alleged fabrication, influence, or motive arose. See Update §12.27.

In 1998 the Best Evidence Rule (Evid C §§1500-1511) was repealed. Under the new rules (Evid C §§1520-1523), properly authenticated secondary evidence may freely be used to prove the contents of a writing. See Update §12.29.

See Update §12.30 for a case in which a witness was found to be incompetent because she was hypnotized about events involved in the action.

Welfare and Institutions Code §355(c)(1)(b), which makes a child's out-of-court statements admissible in dependency proceedings even though the child is incompetent to testify, has been limited to preserve its constitutionality. See Update §12.30.

The Ninth Circuit Court of Appeals held that the co-conspirator exception to the hearsay rule applies even if the declarant has

been acquitted of conspiracy charges. See Update §12.34.

A prima facie showing of the existence of a conspiracy, a foundation requirement for the admission of statements of co-conspirators under the co-conspirator exception to the hearsay rule, is a preponderance of the evidence, according to a California court of appeal. See Update §12.34. Evidence Code §§1115-1128 have been added. In particular, see Evid C §1126 on inadmissibility of statements made during mediation. See Update §13.1.

The California Rules of Court now set forth new requirements for case management practices, eliminating previous requirements for at-issue memorandums and providing new requirements for case management conferences. See Update §13.1.

The Los Angeles County Bar Association has ruled that an attorney and client may contract for a fee discount contingent on the client's agreement not to require the attorney to enter into a confidential settlement that the attorney considers unconscionable. See Editor's Note, Update §13.1B.

Cutoff Dates

We completed legal editing on this update at the end of August 2004.

We reviewed case citations through these cutoffs:

- Shepard's California Citations at 32 C4th 958, 117 CA4th 999, 158 L Ed 2d 528, 362 F3d 1236, 305 F Supp 2d 1362.
- Shepard's United States Citations at 158 L Ed 2d 419, 362 F3d 736, 305 F Supp 2d 1362.
- Shepard's Federal Citations at 158 L Ed 2d 528, 363 F3d 1361, 307 F Supp 2d 1375.

We reviewed California statutes and federal statute citations for amendments and repeals through these cutoffs:

- Stats 2004, ch 782.
- 118 Stat 626.

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is completed, but you should not assume that all developments after the listed cutoff dates have been included.

1

Strategy and Tactics

STRATEGY

[§1.1] Theory of Case

To Main Book

Add to the list of case themes in Book §1.1:

13. Anyone could make this kind of mistake.

TACTICS

[§1.4] Case Atmosphere

To Main Book

Accentuate the positive. Two experienced former federal prosecutors have published a book that challenges the conventional wisdom of many trial lawyers. The book is Klonoff & Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (1990). The authors' theme is simple: "Accentuate the positive, eliminate the negative."

The authors' approach makes trials simpler. Rather than worrying about papering over the weak points in a case, the attorney should present only the strong points of the case and make the opponent pay the "costs" of attacking the weaknesses.

In summary:

1. If you have two strong points supporting a theory, and two weak points, omit the weak points entirely.

2. If you have five strong points supporting a theory, present only the top two.

3. If it takes extensive time or fancy footwork to explain away weaknesses in your case, don't bother.

4. Do not be fearful of aggressively attacking your opposition's case. The jury expects it.

What jurors like in attorneys. Jurors' perceptions about the litigators who appear before them can significantly affect the ultimate outcome at trial. The relationship an attorney establishes with jurors colors the way jurors perceive witnesses and, ultimately, the evidence. In an article originally published in 18 CEB Civ Litigation Rep 156 (May 1996), Constance Bernstein describes the results of two surveys that polled people's attitudes about attorneys and distills some suggestions for becoming a more charismatic litigator. The article is reproduced in Update App B.

The surveys, conducted in 1978 and 1990, revealed that people's attitudes about attorneys did not change significantly. People appreciated attorneys who were succinct, fair, honest, and respectful of others. The author interprets the survey results and concludes that a successful litigator is one who can project an image of being all things to all people. Litigators should dress according to the business attire of the community, and allow jurors to see the attorney as a multidimensional person, an ordinary person like the jurors, as well as the advocate for the client.

[§1.5] Making the Case Comprehensible

To Main Book

Complex cases that stretch out over weeks or months require innovative approaches to make the case comprehensible. Some possible approaches, discussed in Singleton & Kass, *Helping the Jury Understand Complex Cases*, 12 Litig 11 (Spring 1986), include the following:*

A. Include in the jury notebook (discussed in Update §1.6):

1. Blank pages, which can be used for note-taking.

2. The judge's preliminary instructions.

3. The names of plaintiffs, defendants, attorneys, and witnesses. List the witnesses' employment history. If you provide the list at the beginning of the trial, be sure to advise the jury that some listed witnesses may not testify, and that some witnesses not on the list may be called to testify.

4. A description of corporate parties, including the location of headquarters, the principal place of business, the description of the corporation, how the corporation relates to the suit, and, when corporations are related to each other, diagrams of the relationships of parent, subsidiary, and affiliated corporations.

5. A detailed description of technical information, with definitions of technical terms.

B. Provide the jury with tabbed notebooks containing all relevant exhibits. The jurors will be far better able to follow testimony from photocopies than from overhead projections or blowups.

C. Give the jury a roster of witnesses, including names and photographs. The best practice is to have the courtroom deputy provide a daily list of witnesses who have testified each day, and to provide the roster, with photographs, on a daily basis to jurors throughout the trial. To avoid disputes between parties, the roster photographs should be taken by a neutral photographer.

D. Ask the judge to charge the jury before final arguments and to provide the jurors with a written version of the final instructions for reference during deliberations.

E. Permit jurors to submit written questions during the course of the trial. This practice is controversial, but it need not clutter the trial if jurors are discouraged from submitting too many questions and if counsel are permitted to agree on the form of any answer given to the written questions. See Update §2.15 for a discussion of the law applicable to juror questions for witnesses.

PRACTICE TIP

If the weight of the evidence is against you, you may not want to take steps to make the evidence easier to comprehend for the jury. Certainly, counsel is ethically bound to present *true* evidence; there is no ethical requirement to present *lucid* evidence.

In preparing for trial, the litigator must decide how to present the evidence so that the jury understands the case from the client's perspective. See Jaquish & Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to "Think Like a Lawyer,"* 45 Stanford L Rev 1713 (July 1993), for suggestions challenging litigators to become "advocate educators" when working with jurors.

An article by William A. Brockett, *Timing is Everything,* originally published in 17 CEB Civ Litigation Rep 350 (Sept. 1995), is reproduced in Update App C. In it, the author discusses the importance of simplifying and summarizing cases for jurors.

[§1.6] Demonstrative Evidence

To Main Book

3. *Graphics.* The ever-increasing sophistication of electronic equipment is transforming the presentation of demonstrative evidence. A very useful device that requires little or no training to use is the document visualizer, which functions like an updated overhead projector. It consists of a video camera mounted on a lighted base and can be used to display documents and objects on a monitor or screen. They are produced by a number of manufacturers (*e.g.,* Canon, Sony, Toshiba). High-end document visualizers provide high resolution digital images and can easily be hooked up to your computer.

Using a laptop computer, a scanner, and readily available presentation software, an attorney can create computer files containing every document, photograph, chart, map, X ray, or film clip—the list is limited only by the attorney's budget, imagination, and computer skills—involved in the case and display them to the jury as appropriate. These computer-generated exhibits can be used during all phases of a trial.

Enthusiasts point out that using a computer, the attorney can instantly illustrate important points during opening statement and closing argument without the potentially distracting pauses that inevitably accompany the use of photographs and charts. Computer-generated exhibits used during direct examination can improve the jury's understanding of the testimony.

Software packages designed for litigators allow the examiner or the witness to highlight key parts of the exhibit during testimony, the exact location of plaintiff's injuries, for example, or the witness's position when he saw the accident. Zoom capabilities permit the attorney to give the jury an instant close-up of an important image. User-friendly coding capabilities in such software make it possible to locate the proper exhibit quickly by remote control. This can be useful in cross-examination, which is by its nature less susceptible to control than direct examination. The well-prepared attorney can, for example, quickly locate an inconsistent statement in the witness's deposition testimony, and show it simultaneously to the witness and the jury, highlighting or circling the discrepancy if desired. For an enthusiastic description of the uses of computer-generated exhibits in medical malpractice defense, see Pittoni, *Using Technology During Trial To Persuade the Jury: A Defense Perspective*, 30 The Brief 25 (Spring 2001).

If the computer is used simply as a tool for displaying items that are traditionally acceptable forms of demonstrative evidence, the admissibility of the resulting computer-generated exhibits should present no novel problems of admissibility. A photograph of the accident scene is still a photograph of the accident scene, whether snapshot size, blown up and mounted on a poster board, or displayed on a computer monitor. The only evidentiary issue involved in its admissibility is whether it accurately depicts what it purports to depict. The use of arrows and highlighting is akin to having the witness mark his or her position on a diagram.

Computers also lend themselves to the creation of charts and diagrams that can be used to summarize important testimony or other evidence. The use of charts to summarize a party's contentions is commonplace. Thus, computer-generated charts should be no different—if they are accurate and not unduly time-consuming or prejudicial, the fact that a chart has been generated by a computer, rather than with a magic marker and butcher paper, should be unimportant.

[**Editor's Note:** There is a split among the federal circuits about whether summary charts can be admitted into evidence. Compare *U.S. v Wood* (9th Cir 1991) 943 F2d 1048, 1053 (proper to allow use of chart, but error (albeit harmless) to admit it into evidence and allow jury to take it into jury room during deliberations), with *U.S. v Johnson* (4th Cir 1995) 54 F3d 1150 (no reason to distinguish between use of chart and introduction into evidence as long as trial court instructs jury on its proper use).]

In addition to static exhibits, sophisticated graphics and modeling programs can be employed to create animations, simulations, and reconstructions of events. Use of exhibits generated in these ways has been largely limited to high-profile and complex cases, but many practitioners expect to see the use of such evidence increase as the hardware and software necessary to produce it become more affordable. Animated exhibits, especially simulations and reconstructions, may draw more objections than still exhibits. An attorney who plans to use such exhibits should be prepared to face challenges from the opposing party on the reliability of the techniques used to create the simulation or recreation and the accuracy of the data involved in its creation.

People v Kelly (1976) 17 C3d 24, 30, 130 CR 144, sets forth the California standard governing the admissibility of evidence based on a novel scientific technique. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, sets forth the standard used in federal courts to judge the admissibility of expert testimony in general. See Update §7.15. Note, however, that in *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137, the first published California case to address an issue about the admissibility of computer-generated exhibits, the court of appeal held that a computer animation of a shooting was not subject to the *Kelly* rule, comparing the simulation to a drawing that an expert might use to illustrate her conclusions.

PRACTICE TIP

If you are planning to use a computer to present demonstrative evidence, it is important to let opposing counsel know well in advance of trial. This approach may defuse opposition to the evidence. At worst, it will give you time to plan alternate strategies.

Be sure to make arrangements in advance with the court clerk when using a computer to present demonstrative evidence. Although some courtrooms now have monitors available, and other courtrooms are very computer-friendly, you should be prepared to bring your own equipment, including document visualizer and screen. The equipment can be rented, although the attorney who plans to use computer-generated exhibits often may want to consider buying it.

For a discussion of computer-generated exhibits and the rules of evidence, see Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 Harv J Law & Tec 161 (Winter 2000). See California Trial Practice: Civil Procedure During Trial §13.108 (3d ed Cal CEB 1995) for a discussion of computer-generated simulations.

PRACTICE TIP

The computer hardware necessary to develop computer-generated graphics can be purchased from any reputable computer hardware vendor. Purchase graphics and audio cards capable of projecting in a courtroom environment. Make sure that the amount of memory in the laptop is sufficient, both to store the files and to display the evidence in a reasonable amount of time. Insufficient RAM can slow a presentation down so much that a court may decide against allowing the evidence. A laptop with a color display is a must for effective presentations. Presentation software is available from several different software companies, as is software specifically designed for use in litigation.

The World Wide Web is an excellent place to find out more about computer-generated courtroom graphics. Several vendors of software for litigators have websites, and dozens of graphic design firms specialize in creating computer-generated exhibits for lawyers.

8. *Wiretaps and Audio Tapes.* Before transcripts are used, they should be authenticated. Unless counsel will stipulate to their authenticity, proof of authentication should include testimony about the technique for preparation of the transcripts and the qualifications of the persons who prepared them. *U.S. v Carbone* (1st Cir 1986) 798 F2d 21.

In *People v Rodriguez* (1986) 42 C3d 730, 230 CR 667, the supreme court held that the trial court did not commit prejudicial error by excluding a tape recording of a pretrial interview of the chief prosecution witness, when offered by defense counsel. A transcript of the tape was provided to the jury, and there was no claim that it was inaccurate. The court held that defendant could not assert the best evidence objection (former Evid C §1500), because the transcript was accurate and because the jury had the chance to judge the witness's demeanor by observing her on the stand.

The official citation for *People v Kageler*, cited in Book §1.6, should be *People v Kageler* (1973) 32 CA3d 738, 108 CR 235.

9. *Jury Book.* In very complex cases, counsel should prepare a "jury book." A jury book is indexed and includes important contracts, charts, and evidence for frequent reference. If such evidence is not challenged and is likely to aid juror comprehension, the court may permit distribution of the jury book to each juror, in which case it should be given to each juror for the duration of the trial.

PRACTICE TIP

From experience, a jury book should not normally be used to present key documents or charts. The jury will pay more attention to key documents if they are blown up or projected onto a screen.

A jury book allows jurors to pay close attention to documents, dwelling on the parts of documents they consider significant. On the other hand, a jury book might distract jurors from other more important parts of the case.

PRACTICE TIP

A large flip-chart, used with crayons or stencil pencils, is a valuable aid. The chart brings dead cross-examinations to life and also serves as demonstrative evidence for detailed, complex transactions. Experiment with your chart before trial. Be sure that the marking pencils do not "bleed" through the paper (crayons can be used instead) and that you have enough sheets to carry you through the trial.

PRACTICE TIP

Because a sharp opponent might take your graphics and use them against you, remember to erase the blackboard when you finish using them in examining a witness.

If a blackboard diagram is important, you can take a Polaroid snapshot of it and preserve it for evidence. If you intend to use a chart as evidence, mark it with an exhibit number when you begin working with it, and refer to that exhibit number when examining the witness.

The following items should be added to the checklist on demonstrative evidence in Book §1.6:

See Corboy & Clifford, *Demonstrative Evidence*, 10 The Docket 3, p 5 (Summer 1986) (newsletter of National Institute for Trial Advocacy), for an excellent discussion of additional types of demonstrative evidence, including aerial photographs, photographic enlargements, videotaped experiments, scale models, impeaching a witness by overhead screenings of prior inconsistent statements, "day-in-the-life" films, anatomical models, summary charts, and enlargements of jury verdict forms with counsel's view of the evidence filled in.

PRACTICE TIP

Use exhibits dynamically. Direct witnesses to leave the stand to point out important information on exhibits. Pass smaller exhibits among the jurors during a pause in testimony.

Remember to introduce photographs and exhibits into the record so that they may be included in any appellate record. If you have drawn on chart paper during the trial and want these charts to be part of the record, you should have them marked as exhibits as well. Some courts will permit such exhibits to be placed into evidence and given to the jury during deliberations.

Don't pass up an opportunity to present an effective exhibit of demonstrative evidence. Jury research has shown that only about ten percent of information delivered verbally is remembered after three days. If a silent visual format is used, twice as much information is remembered after three days. When information is delivered both visually and verbally, however, 85 percent is remembered after three days. Strong, *Technology Tools in the Courtroom: How To Use them, and How To Oppose Them*, 11 The Practical Litigator 15 (Jan. 2000).

[§1.7] Logistics

To Main Book

The court has discretion to impose reasonable time limits on a trial, including the time allowed for presentation of evidence. See, *e.g.,* Pen C §1044 (criminal cases); *Eley v Curizon* (1953) 121 CA2d 280, 263 P2d 86 (limits on closing arguments are permissible). Evidence may be excluded to avoid delay or undue consumption of time. Evid C §352; Fed R Evid 403. Reasonable time limitations on cross-examination and exclusion of rebuttal evidence based on a party's inability to conform to time limits agreed on by the parties before trial are not an abuse of a court's discretion or a denial of due process. See *General Signal Corp. v MCI Telecommunications Corp.* (9th Cir 1995) 66 F3d 1500.

[§1.8] Scope of Rebuttal

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

Rebuttal and surrebuttal are presented after the defendant's case has been presented. The parties may offer only evidence rebutting the other side's evidence, unless the court, for good cause, permits them to offer evidence on their original case. CCP §§607(6), 631.7. Many counsel, believing that it is valuable to get the last word, attempt to present important parts of their case during rebuttal. A party does not have the right to withhold testimony from the case-in-chief merely to offer it more dramatically in rebuttal. *Lipman v Ashburn* (1951) 106 CA2d 616, 235 P2d 627. Theoretically, rebuttal evidence should only refute defendant's evidence. See Graham, Handbook of Federal Evidence §611.3 (5th ed 2001). Rebuttal evidence includes evidence to explain, repel, counteract, or disprove the evidence of the adverse party. *U.S. v Chrzanowski* (3d Cir 1974) 502 F2d 573.

Guessing incorrectly about the application of these principles could be costly. Plaintiff may be barred from presenting the proffered evidence, and defendant will seek to prevent admission of rebuttal evidence to stop plaintiff from gaining the advantage of having the last word.

The court has discretion on the scope of evidence that may be offered in rebuttal. *Ray v Jackson* (1963) 219 CA2d 445, 33 CR 339. Rebuttal will be barred if it relates to issues already raised by plaintiff or if the evidence merely presents a new interpretation of theories already presented in the case-in-chief. *Allen v Prince George's County* (4th Cir 1984) 737 F2d 1299.

An example of proper rebuttal evidence is evidence that attacks the credibility of defendant's witnesses, including evidence of prior inconsistent statements or prior bad acts. See Graham, Evidence §§608.1, 609.1, 613.1. Another example is evidence that rebuts new matters or theories that are raised by defendant's case and that surprise plaintiff or could not have been anticipated by plaintiff. *U.S. v Hunt* (4th Cir 1984) 749 F2d 1078 (when defendant challenged government's conduct of investigation, government was allowed to introduce rebuttal evidence, even if it was otherwise inadmissible as hearsay); *Frankel v Styer* (3d Cir 1967) 386 F2d 151 (rebuttal evidence by physician who performed autopsy that found that death was caused by suffocation was admissible when defense offered expert testimony that death was caused by severe arteriosclerotic heart disease).

Some federal circuits permit the use of evidence to rebut a defense theory that was known to plaintiff but was not relevant to plaintiff's case-in-chief. Since plaintiff has a right to select a theory supporting a prima facie case, plaintiff's proof relating to another theory relied on by defendant does not become relevant until rebuttal. See *Benedict v U.S.* (6th Cir 1987) 822 F2d 1426 (reversing district court for barring rebuttal evidence about epidemiological data in swine flu vaccine case); *Rodriguez v Olin Corp.* (5th Cir 1986) 780 F2d 491 (reversing district court for barring plaintiff's expert rebutting defense testimony about cause of cracked valve in poisonous gas wrongful death case); *Weiss v Chrysler Motors Corp.* (2d Cir 1975) 515 F2d 449 (plaintiff's expert allowed to rebut defendant's theory on cause of failure of mechanism when plaintiff had not used theory as part of her case). See generally 6 Wigmore on Evidence §1873 (Chadbourne rev ed 1981). A more detailed discussion of this issue may be found in the article from which the above analysis was summarized: Brand, Without Objection, 87 Fed Litigator 280 (Nov. 1987), vol 2, no. 9 (summarized here with permission of the Federal Litigator).

[§2.2] Presentation of Direct Testimony

To Main Book

A fact witness must have a clear set of rules for how to respond to each question. For specific suggestions on handling witnesses, see Gardner, *The Ten Commandments of Witness Prep*, 10 The Practical Litigator 7 (Sept. 1999).

Leading questions are often admissible with friendly witnesses, despite the reflex objection to such questions. For example, in the author's experience, counsel may lead a friendly witness if:

1. The witness has been cross-examined, and counsel must focus the witness on specific areas of cross-examination to correct misimpressions.

2. The leading question is proper as a "summary" of evidence under Evid C §1523(d) or Fed R Evid 1006.

3. The leading question does not *suggest* an answer, but simply capsulizes an already stated answer in a helpful fashion.

James McElhaney, in the article *Emphasis on Direct*, ABA J 116 (Nov. 1, 1987),* provides some commonsense suggestions for effective direct testimony:

The traditional way to introduce a new topic on direct examination is to ask a convoluted question in tortured legalese:

Q. Directing your attention to the evening of October 27, I ask you what, if anything, were you doing on that occasion?

Nothing that bleak is required. Instead, try using a headline. Tell the witness—and everyone else—what the new topic will be:

Q. I want to ask you about the evening of October 27. Tell us where you were at about 9:00 p.m.

People are in suspense when they know something is coming and want to find out what it is. While that definition seems obvious, it is the key to using suspense successfully. The jury will not be kept in suspense unless they know something important is on the way. Although letting them know that something is coming can be done by implication, probably the easiest way is to do it directly, right in front of everyone. In this example, the only extra preparation necessary is to tell your witness (who in this case is an orthopedic surgeon) not to give the plaintiff's prognosis until you ask for it directly. That lets you put it in suspense:

Q. Dr. Preston, one question before we get started. Will you be able to give us your professional evaluation of Joe Wilson's chances for ever getting out of his wheelchair?

A. Yes, I will.

Q. I want to go into your evaluation of Joe Wilson in just a minute, Doctor, but first I need to ask you some questions about your professional background.

Provided you are not appearing before one of those unfortunate judges who thinks it is important for lawyers to stay behind the lectern, purposeful movement helps break the monotony. (And if you are before one of the unfortunate judges who wants you to remain still, use an exhibit as a reason for moving at the right time.)

It is improper to repeat what the witness says in the hope that will help it sink in. Done to excess, it will bring an objection that should be sustained. Even if there is no objection, habitually echoing the witness annoys the jury. James W. Jeans has a marvelous suggestion for how to repeat the answer the right way in his book Trial Advocacy p 224 (West, 1975). When the witness uses a phrase that you want repeated, make that phrase part of your next question:

Q. Did you see the plaintiff before the accident occurred?

A. Yes, I saw her when she darted right in front of my car. (There's the magic phrase.)

Q. How fast were you traveling when this girl darted right in front of your car?

A. Approximately 20 miles per hour.

Q. And where in the street were you traveling when this girl darted right in front of your car?

A. About two feet from the center line.

Pictures, maps, diagrams, and sketches can often make points all on their own. Chosen well, they create their own emphasis. But they can also emphasize testimony. One particularly effective technique is to have the witness go through a segment of testimony *without* the demonstrative exhibit. Then, when the exhibit is introduced, you can have the witness go over the highlights again, this time using the exhibit.

If you start asking questions in the present tense, about four out of five witnesses will start answering in the present tense. The effect on the testimony is striking. Everything seems more alive, and it is, because the witness is reliving the event, and the jury is going through it with the witness. There is a cardinal rule to follow if you use this technique: Never tell the witness you are going to do it. Simply switch to the present tense when you come to the part you want to emphasize.

PRACTICE TIP

In conducting a direct examination, conscious use of pace can be an asset. Pace involves controlling the speed of the examination. The examiner should use pace to elicit the witness's testimony in small segments at the most advantageous rate. Pace can be used to slow the action down and present the occurrence step by step. In some situations, the attorney may want to convey the impression that an event happened very quickly, without time to deliberate or react. In those situations, pace can be used to speed the action up.

---

*Excerpts reprinted with permission of the ABA Journal, The Lawyer's Magazine.

[§2.5] Order of Witness Presentation

To Main Book

First impressions are important; choose your first witness carefully. The last witness is also important because the memory of her testimony will linger in the mind of the trier of fact. Some factors to consider in determining the sequence of witnesses include:

- Opening with a strong witness so as to put the case on the best possible footing.
- Telling the story chronologically so that it is easily comprehensible.
- Presenting an important witness at the end of the day or week to leave a lasting impression with the trier of fact.
- Placing weaker witnesses in the middle of the proceeding where they will do the least harm.
- Ending with a strong witness to create an impression that the trier of fact will remember.
- Presenting a witness whom the opponent has not prepared to cross-examine, thereby catching the opposing counsel off guard.
- Presenting witnesses early who can lay the foundation for documents and other important evidence about which later witnesses will testify.
- Presenting evidence of liability first, followed by expert testimony, and then evidence of damages.
- Calling adverse witnesses, if at all, after friendly witnesses have created a favorable impression.
- Not ending with an adverse witness, if possible.

[§2.6] Starting Direct Examination

To Main Book

Some judges will allow counsel a great deal of latitude in providing background. For example, a lawyer embroiled with a business partner in a real estate dispute is permitted to testify to his or her pro bono activities on behalf of blacks (who were represented on the jury). If such broad background testimony is permitted, opposing counsel should be permitted to ask otherwise impermissible questions. In the example given, it would be proper to inquire about the same attorney's representation of large corporations against individuals, the substantial legal fees the attorney collected from the attorney's paying clients, and the amount of legal fees he or she applied for in the pro bono litigation.

[§2.7] What Not to Do

To Main Book

The following article was originally published in 11 CEB Civ Litigation Rep 299 (Nov. 1989), and lists several rules of "what not to do":

Honey, I Shrunk the Client

by William A. Brockett

Have you always secretly wanted to cut your client down to size? Follow the rules below at trial, and your swaggering, self-assured client will be able to play handball off the curb after leaving the stand.

Best of all, most of the rules apply to *direct* examination, where you have near-complete control over the situation. No need for you to rely on someone else to do the job for you. Here are the surefire rules:

Rule No. 1: ***Familiarity Breeds Contempt.***

Do not take your client to visit the courtroom. Do not explain the purpose of objections, or the judge's quirks. This will ensure an endearing confusion in your client.

Rule No. 2: ***Don't Let Your Client Make Eye Contact With the Judge or Jury.***

Train your client to look beseechingly at you during direct, as if praying for inspiration. During cross, the client should look at your adversary with the demeanor of a mouse facing a hungry cat. Whatever happens, your client should not swivel and look the jury in the eye or turn to the judge when there are questions from the bench.

Rule No. 3: ***Disdain Preparing for Trick Questions.***

Trick questions have no place in the exalted search for truth. Therefore, do not stoop to preparing your client to answer such questions. For example, if your client is asked, "Have you discussed your case with anyone?" he should heatedly deny doing such a dastardly thing, and look shifty and guilty when the follow-up, "Not even your attorney?" is asked. Nor should you prepare your client to answer such questions as "Was your memory better when your deposition was given, or now?" or "This case means a great deal to you, doesn't it?"

Rule No. 4: ***Ignore Pop Psychology.***

So-called trial advisers don't know what it's really like in the trenches. Their observations about the influence of body language or dress on juries are beneath contempt. Have your client wear as much heavy gold jewelry as possible and sit with arms folded, eyes darting furtively about the courtroom. A nice touch is to have your client develop an irritating tic, such as picking obsessively at lint on a jacket sleeve.

Rule No. 5: ***Let the Client Sink or Swim on His Own.***

If the client gets in serious trouble during cross-examination, let him get out of it on his own. After all, it's his problem, not yours. If the client is nervous and has forgotten facts on direct, do not refresh recollection by asking leading questions, even though that is a proper basis for leading. If the client has had a serious attack of nerves, do not ask for a recess, make a small joke, or ask him about his nervousness to relax him. Do not show documents to your client to refresh his recollection. Again, it's "his" case and he should know the facts better than anyone.

Rule No. 6: ***Use Lawyers' Words.***

Use the same language in examination as you would in arguing an important constitutional issue to the United States Supreme Court. Avoid short declarative sentences and Anglo-Saxon words.

Note: Teaching cross-examination seminars, I have found that audiences are infuriated by being reminded that "The subject exited from the aforesaid vehicle" is better stated "Jones got out of the car." Although it is insulting to be reminded of this truism, we all continue to violate it.

Rule No. 7: ***Ask Leading Questions on Direct.***

The longer the better. If you lead your client enough on direct, you will end up doing all the testifying yourself. After all, you are far more believable than your client, right?

Rule No. 8: ***Shift Topics Without Signal.***

During your direct examination of the client, do not tell the jury when you are leaving one topic for another. Even though it is preferably permissible for you to say, *e.g.,* "Now Ms. Green, I want to turn to your reasons for deciding to write your three letters of complaint in February," eschew the opportunity. Make the jury *concentrate* by requiring them to figure out for themselves where you are headed.

Rule No. 9: ***Do Not Let Any of Your Opponent's Bad Deeds Go Unremarked.***

Have your client recount in excruciating detail every wrong done by the other side, petty or not. This way, you will not run the danger that the jury may try to form their *own* opinion on some of the issues. And your closing argument will be much shorter if your client has already done it for you.

Rule No. 10: ***The Client Should Always Avoid Answering "Yes" or "No."***

Why get pinned down by leading questions? Rather, your client should give rambling answers covering all theories of the case, and ignore the essence of each question.

Note: Reflect on this paradox: One of the most effective techniques in cross is to force a witness to answer "yes" or "no." But one of the best ways to *deflect* a rigorous cross-examination is to answer questions with a short "yes" or "no." Try it out in preparation with your client. A short "yes" or "no" answer often forces the examiner to ask the dreaded "why" question.

Rule No. 11: ***Be Spontaneous.***

Don't organize your questions by cause and effect or in chronological order. Jump around, keeping your client off guard and the jury puzzled.

Rule No. 12: ***Don't Let Your Client Get Stale.***

Do not take your client through a rigorous mock cross-examination. Who wants an overly glib witness? Your client's stumbling answers and confusion will impress the jury as badges of truthfulness.

Rule No. 13: ***Adopt Some Comfortable Habits.***

Trial work is a nerve-wracking business. If you develop the habit of saying "I see," or repeating your client's answers after every question, you will have additional time to think and be more relaxed.

Rule No. 14: ***Never Rehabilitate Your Client on Redirect Examination.***

So what if serious damage was done during cross-examination? If you take your client's errors and inconsistencies and explain them, or flat-out admit mistake, it will detract from the pace of the trial, and open the door up for more cross-examination. You intend to paint the picture of a *perfect* client—why detract from that by admitting error?

That's it in a nutshell. Follow these rules religiously and you may lose a few cases, but you will always come out of the courtroom taller than your client.

Note: For another helpful, though not so humorous, look at witness examination, see Bennett, *Direct Examination of the Defendant in a Wrongful Discharge Action*, 10 The Practical Litigator 35 (Sept. 1999).

PARTY-WITNESSES

[§2.10] Use of Video

To Main Book

An excellent way to prepare witnesses for trial (and to give inexperienced attorneys some trial practice in examining witnesses) is to videotape the attorney's mock examination of the witness. For suggestions on witness preparation, see Carbone & Standard, *How to Train Associates and Prepare Witnesses at the Same Time*, 11 The Practical Litigator 39 (Jan. 2000).

[§2.11] Body Language; Visual Aids

To Main Book

There are a number of good resources available on body language. See, *e.g.,* Gobert & Jordan, Jury Selection, chap 12 (2d ed 1990); Kraus & Bonora, eds., Jurywork: Systematic Techniques, chap 11 (2d ed 1983). See also Effective Introduction of Evidence in California, chap 1 (2d ed Cal CEB 2000).

THIRD PARTY WITNESSES

[§2.13] Preparation

To Main Book

California Rules of Professional Conduct 2-100 (replacing former Rule 7-103, effective May 27, 1989) prohibits a member of the State Bar who is representing a client to have ex parte communication about the subject of the representation with a party known to be represented in the matter by another attorney, unless the State Bar member has the other attorney's consent. The current Rule 2-100 makes it explicit that a "party" includes members or employees of an association, a corporation, or a partnership, if the subject of the communication is an act or omission of the person that may be binding on or imputed to the organization for purposes of civil or criminal liability, or if the person's statement may constitute an admission on the part of the organization. Rule 2-100(B)(2). See also *Bobele v Superior Court* (1988) 199 CA3d 708, 714, 245 CR 144 (no ex parte contact with any current employees permitted under former Rule 7-103, whether or not they were members of the corporation's "control group"); *Mills Land & Water Co. v Golden W. Ref. Co.* (1986) 186 CA3d 116, 230 CR 461 (applying former Rule 7-103 that the "no direct contact" rule extends to *ordinary employees* of a corporate party).

On its face, Rule 2-100 appears to bar communications with *all former* employees who were employed at the time of the subject of the communication at issue. See Rule 2-100(B)(2). The official comments ("Discussion") following Rule 2-100, however, clarify that the prohibition against communications with a corporate party is intended to apply only to persons employed when the communication is made. *Bobele v Superior Court, supra*. In that case, the court, applying former Rule 7-103, held that the no-contact rule precluded ex parte contact with all *current* employees, but it did not preclude ex parte contact with former employees who are not and were not members of the corporation's "control group."

Citing the official comments to Rule 2-100 and *Bobele,* the court in *Nalian Truck Lines, Inc. v Nakano Warehouse & Transp. Corp.* (1992) 6 CA4th 1256, 1263, 8 CR2d 467, held that it was permissible for an attorney to interview the former general manager of an adverse party because, at the time of the communication at issue, the former manager was neither an employee nor a member of the adverse party's control group. The court held, however, that the former manager could not be questioned about any attorney-client privileged matters, including protected communications about trial strategy.

One federal court has hinted that even low-level corporate employees may not be interviewed by an adverse party's counsel if their statements might be used against their employer. See *Morrison v Brandeis Univ.* (D Mass 1989) 125 FRD 14, 17 (reviewing the ABA Code of Prof Resp and Fed R Evid 801(d)(2)(D); opinion also provides guidelines for interviewing high-ranking employees).

A case in Book §2.13 was cited incorrectly. The correct citation is *Warden v Kahn* (1979) 99 CA3d 805, 160 CR 471.

[§2.15] CRISIS CONTROL

To Main Book

5. *Questions From Jurors*

Sometimes the jurors may have unanswered questions that they want to have addressed. Direct questioning of witnesses by jurors has been disapproved. *People v Cummings* (1993) 4 C4th 1233, 1305, 18 CR2d 796. The court may ask questions submitted by jurors or pass those questions on to counsel to examine, make objections, and obtain rulings outside the jury's presence. *People v Cummings, supra; People v McAlister* (1985) 167 CA3d 633, 644, 213 CR 271.

A few judges now encourage jurors to take notes and to submit written questions to the court. Response from the bench and from counsel to jurors' questions has generally been favorable. See, *e.g.*, Thompson, "The Witness Will Please Answer the Jurors' Questions," Cal Law, "Edge," June 14, 1999.

The California Supreme Court has disapproved CALJIC 17.41.1, requiring jurors immediately to report any juror's refusal to deliberate or intent to disregard the law or to decide the case on an improper basis. The court reasoned that the instruction could induce jurors to reveal the content of their deliberations. *People v Engleman* (2002) 28 C4th 436, 121 CR2d 862.

3

Preparing To Cross-Examine

PREPARING FOR COMPLEX CROSS-EXAMINATION

[§3.4] Preparation for a Particular Witness

To Main Book

Requirements for service and filing of excerpts from discovery materials and exhibits and other documents to be used at trial found in former ND Cal Local R 235-8(c)-(d) are now contained in ND Cal Civ Local R 16-10(*7*) and (10). See also Fed R Civ P 16(c).

4

Time-Honored Rules of Cross-Examination—And When to Break Them

[§4.1] CONTROLLING THE WITNESS

To Main Book

For a brief article on whether leading questions should be used in cross-examination, see Melilli, *Cross-Examination: To Lead or Note to Lead*, 33 The Brief 66 (ABA Spring 2004).

[§4.10] IRRITATING THE JURY

To Main Book

Rule 9

Don't irritate the jury.

The consequences of irritating the jury are demonstrated by the following jury note given to the judge in a Carson City, Nevada, trial (reported in the CACJ Forum, Great Moments in Courtroom History (Jan.-Feb. 1989)):

We, the jury, in the interest of an expeditious trial, and for the general reduction of immaterial and repetitious questioning: Do hereby recommend that a shocking collar device be securely fastened to plaintiff's counsel. The control of said device shall be entrusted to a responsible member of the jury panel to be selected following the next recess. We thank you for your support.

Listen and learn.

5

Conducting Cross-Examination

[§5.2] PRINCIPLES OF CROSS-EXAMINATION

To Main Book

For a judicial perspective on and advice about becoming an effective cross-examiner, see *The Art of Cross-Examination*, 17 CEB Civ Litigation Rep 78 (Mar. 1995).

Model Cross-Examination

[§5.4] Beginning With Force

To Main Book

PRACTICE TIP

Go for the jugular. Don't dilute the impact with endless quibbling over detail and collateral matters. On cross-examination, *the attorney,* not the witness, should be the focal point.

[§5.15] Selective Memory

To Main Book

Here are some additional "trick" questions to test the memory of a witness claiming strong powers of recollection:

Q. Do you read the Sunday comics?

A. Yes I do.

Q. "Blondie" is one of my favorites. Do you read it?

A. Yes.

Q. How many years have you been reading "Blondie"?

A. Since I was a kid.

Q. Tell the jury the last name of the people who live next door to Dagwood and Blondie.

A. You know, I can't remember.

Q. How many nickels have you handled in your day?

A. What do you mean?

Q. Is it fair to say that you have used thousands of nickels in your lifetime?

A. I suppose so.

Q. Tell the jury the name of the man whose face appears on the nickel.

A. I can't remember.

If you think a witness is likely to claim a remarkable memory for long-ago details, consider starting the witness's testimony by showing a chart containing five names of people who have been mentioned in the trial (names not familiar to the witness). Ask if the witness can identify any of the names. Then, flip to a new page on the chart.

At the conclusion of the examination, ask the witness (who, by then, has claimed an excellent memory) to repeat the five names put on the chart at the beginning of testimony.

When a witness has a suspiciously clear memory of a specific crucial date, counsel can get copies of the front pages of a local or national newspaper for the date in question. These are readily available on microfilm in local libraries, and counsel can obtain a blow-up for a reasonable price. Then, counsel can test the witness's recollection of the headlines of the day. Very few witnesses will pass this test.

Should the witness complain that questions of this type are "unfair," counsel has an opportunity to make a speech, such as: "Yes, the question is unfair, but no more unfair than your testifying to a detailed conversation that took place one year ago, for which you made no notes and now claim a perfect memory."

See also Brockett, *Something for Nothing*, 15 CEB Civ Litigation Rep 343 (Sept. 1993), reproduced in Update §5.20.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/5 Conducting Cross-Examination/§5.20 Incomplete and Altered Notes; Destroyed Evidence

[§5.20] Incomplete and Altered Notes; Destroyed Evidence

To Main Book

The following is from an article that originally appeared in 15 CEB Civ Litigation Rep 343 (Sept. 1993):

Something for Nothing

by William A. Brockett

Yesterday, upon the stair

I met a man who wasn't there.

He wasn't there again today.

Oh, how I wish he'd go away.

… Children's Poem

Contrary to the poem, the alert trial lawyer welcomes "the man who wasn't there." Experienced litigators know that one of the safest ways to cross-examine is to attack an empty chair, an incomplete memorandum, or a missing piece of evidence.

In my posttrial discussions with juries, I am struck how consistently they focus on "the hole, not the doughnut," sometimes irrationally.

This column suggest ways to highlight "nothing."

Instructions

If the planets are in alignment, and the judge is in good humor, you may get an instruction about deficient evidence or missing witnesses. For example, JC Cal Civ Jury Inst 202 (CACI) (see also BAJI 2.02), based on Evid C §412, provides:

Failure to Produce Available Stronger Evidence

If weaker and less satisfactory evidence is offered by a party, when it was within such party's power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

See also O'Malley, Grenig & Lee, Federal Jury Practice and Instructions §14.14 (5th ed 2000), to the same effect (federal court); JC Cal Civ Jury Inst 204 (CACI) (see also BAJI 2.04), based on Evid C §413 (failure to deny or explain adverse evidence).

For instructions on missing witnesses in federal court, see Devitt & Blackmar, Jury Practice §14.15.

Absence of Witness

If it is peculiarly within the power of either the government or the defense to produce a witness who could give relevant testimony on an issue in the case, failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusion should be drawn by you, however, with regard to a witness who is equally available to both parties or where the testimony of that witness would be merely cumulative.

The jury must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Some courts explicitly disfavor the missing witness instruction. Manual of Criminal Modern Jury Instructions for the Ninth Circuit, Comment to Instruction 4.16 (2003). Before such instruction will be given, the proponent must leap two hurdles: (1) showing that a "missing witness" was not equally available to both sides (*U.S. v Kenney* (4th Cir 1974) 500 F2d 39, 40) and (2) showing that the testimony of the witness would be relevant and noncumulative (*U.S. v Mahone* (7th Cir 1976) 537 F2d 922, 927).

To avoid an adverse inference, a party may need to show that a potential witness was equally available both legally *and* practically.

Kean v Commissioner (9th Cir 1972) 469 F2d 1183, 1188. As a logical offshoot of this, a party with a burden of calling a witness may present proof of its unsuccessful efforts to produce that witness. *Miller v Rykoff-Sexton, Inc.* (9th Cir 1988) 845 F2d 209, 212.

In California civil actions, BAJI 2.02, 2.04 and Evid C §§412-413 apply when a witness is absent. See *Gonzalez v Southern Pac. Co.* (1958) 157 CA2d 733, 740, 321 P2d 865 (reasonableness of inference that diversion of shipment authorized by plaintiff strengthened by plaintiff's failure to call agent as witness; presumption that testimony would have been adverse to plaintiff). Note that former CCP §1963(6) contained a *presumption* that "higher evidence would be adverse from inferior being produced." This is no longer a mandatory presumption, but rather a permissible inference that the trier of fact may draw and on which the jury may be instructed. See Comment to Evid C §412; Comment to Evid C §600; 3 Witkin, California Evidence, *Presentation at Trial* §§114-116 (4th ed 2000).

In California criminal prosecutions, neither side is required to call all witnesses or produce all objects or documents mentioned or suggested by the evidence. CALJIC 2.11. No adverse inferences may be drawn against a criminal defendant who does not testify. *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229.

Testing Availability

Common sense factors are used by the courts in determining availability. Here are factual situations supporting an adverse inference if a witness is not called:

1. Failure to call an employee possessing firsthand information. *Heater v Chesapeake & Ohio Ry.* (7th Cir 1974) 497 F2d 1243, 1248 n2; *Shapiro v Equitable Life Assur. Soc'y* (1946) 76 CA2d 75, 93, 172 P2d 725.

2. Failure to call senior officers with firsthand information. *Polygram Records, Inc. v Buddy Buie Prods.* (SD NY 1981) 520 F Supp 248, 253.

3. Failure to call an accountant with superior knowledge who sat through trial. *Kean v Commissioner* (9th Cir 1972) 469 F2d 1183, 1187.

4. Failure to call party's attorney to explain typographical error in document. *Harris v Commissioner* (5th Cir 1972) 461 F2d 554.

What of the witness who evades testifying about key points? See 3 Sand, Siffert, Loughlin, Reiss & Batterman, Modern Federal Jury Instructions (Civil) ¶75.01 (1983-).

Proposed Instruction 75-6 suggests this language:

If you find that the defendant had knowledge of important facts which he failed to provide in response to plaintiff's questions, you are permitted, but not required, to infer that the withheld information would have been unfavorable to the defendant.

See *Local 167, Int'l Bhd. of Teamsters v U.S.* (1934) 291 US 293, 298, 78 L Ed 804, 809; *Transcontinental Gas Pipe Line Corp. v Mobile Drilling Barge* (5th Cir 1970) 424 F2d 684, 694.

Even if the court refuses to give a "weaker evidence" or "missing witness" instruction, you are free to argue to the fullest the significance of any missing witnesses or evidence. *Winkie v Turlock Irrig. Dist.* (1937) 24 CA2d 1, 7, 74 P2d 302 (counsel may comment on opposing party's failure to produce certain persons as witnesses, unless the witness is equally available to both parties). Your opponent may try to draw the sting from this argument by securing an instruction that "production of all available evidence is not required." See CALJIC 2.11; *Jackson v Barnett* (1958) 160 CA2d 167, 173, 324 P2d 643 (no BAJI 2.04 instruction under Evid C §413 (former CCP §2061(7)) for failure to produce merely cumulative evidence).

Applications

Situations in which you may capitalize on "the man who wasn't there" are unlimited. Note the following examples:

1. An expert, when initially retained, makes rough notes on the case, with his preliminary observations and opinions. The expert fails to include facts critical to his eventual opinion. Or, the expert's initial opinion leaves out important elements.

2. One lawyer writes a classic "threatening letter" to another lawyer, cataloging the dreadful things the second lawyer's client has done. That list leaves out reference to emotional distress or to supposed wrongs, which are the heart of a later formal complaint. See Fed R Evid 801(d)(2); *U.S. v GAF Corp.* (2d Cir 1991) 928 F2d 1253, 1259; *U.S. v Valencia* (2d Cir 1987) 826 F2d 169, 172; Evid C §1220; *Zelayeta v Pacific Greyhound Lines* (1951) 104 CA2d 716, 734, 232 P2d 572 (statements of counsel before trial can constitute admissions if reasonably intended to be an admission or reasonably construed by the other side as such). Of course, generally offers of compromise or statements made in compromise negotiations are not admissible. Fed R Evid 408; Evid C §1152.

3. Accountant workpapers do not show review of key financial documents.

4. The receiver of a corporation writes a letter to the shareholders, listing the reasons for a multimillion dollar loss. His list fails to mention the company's CPAs, who are later sued for negligence.

Sample Examinations

Here are two examinations focused on missing or omitted facts:

Missing Fact

Q. Mr. Smith, you prepared a report about this train accident one day after it happened, didn't you?

A. Yes.

Q. You interviewed the critical witnesses to that accident, correct?

A. Yes, I did.

Q. You have had special training as an investigator for the Railroad Company, haven't you?

A. Yes, I have.

Q. In that training, they teach you to prepare investigative reports completely and accurately, don't they?

A. Yes, that was part of the course.

Q. You knew that it might be over one year between the time of the report and any trial, didn't you?

A. Yes, I did.

Q. You knew that you might refer to the report, as you have done today, to refresh your recollection, didn't you?

A. That's one of the purposes of the report.

Q. When you wrote this report, you had just talked to the eyewitnesses to the accident, hadn't you?

A. Yes.

Q. Here is a copy of the report. You have told the jury that witness Green said, "The driver must have seen the red light flashing before the collision." Could you show the jury where that statement appears in your complete and accurate report of the interview with Mrs. Green?

A. It's not there.

Revised Facts

Q. Mr. Jones, you were assigned as an attorney to do an internal investigation of Acme Corporation's conduct before its stock dropped 30 points in one day, weren't you?

A. Yes. I was.

Q. I noticed that the report was dated five days after you did the interviews described in that report. Did you dictate the report?

A. Yes.

Q. I assume you were working from rough notes when you dictated the report. Is that correct?

A. Yes.

Q. You destroyed those rough notes?

A. Yes, I saw no reason to clutter my files.

Q. Because those notes were rough, you edited them when you dictated this new report, didn't you?

A. Yes, I did.

Q. You left out some things from the rough notes and you added some things, didn't you?

A. Probably.

Q. Because you didn't want to clutter up your files, we can never tell what you left out and what you put in, can we?

A. No, you can't.

Q. Is that fair?

Counsel: Objection.

Closing Argument

Here are several approaches during closing that point the jury to missing elements of a case:

1. If the court does provide a "missing witness" or "weaker evidence" instruction, blow it up and display it when you talk about the holes in your opponent's case.

2. (The following technique is especially effective when you have the burden of proof, and therefore both open and close during closing.) Throw down the gauntlet to your opponent and demand an explanation of why important parts of his or her case never saw the light of day. I like to use a flip chart, numbering or listing the items as I speak. If you pick your items carefully, this will require your adversary to alter arguments to counter your agenda; or it will allow you in rebuttal closing to argue that the other side could not answer the listed important questions.

3. As a variant of the second technique, list for the jury what would have been included in a "proper" case.

Finally, reciting the children's poem that begins this article provides a good rhetorical flourish when attacking an opponent unwilling to face up to missing facts or witnesses.

[§5.21] Prior Bad Act

To Main Book

Evidence Code §1101(a) prohibits evidence of bad acts to prove character. Evidence of specific bad acts is admissible, however, when relevant to prove some fact other than the person's disposition to commit such an act. Examples of "some fact" include being used to prove motive, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe the victim consented. Evid C §1101(b).

Bad acts may have occurred either before or after the conduct involved in the pending case. *People v Balcom* (1994) 7 C4th 414, 27 CR2d 666. Bad acts are admissible both in civil (*Andrews v City & County of San Francisco* (1988) 205 CA3d 938, 252 CR 716), and criminal (*People v Balcom, supra*) cases.

In criminal cases, Evid C §§1100-1104 were not eliminated by Cal Const art I, §28(d). *People v Perkins* (1984) 159 CA3d 646, 205 CR 625.

For further discussion of bad acts, see Jefferson's California Evidence Benchbook, chap 33 (3d ed CJA-CEB 1997); California Criminal Law Procedure and Practice §§24.52-24.55 (7th ed Cal CEB 2004).

[§5.30A] Examination to Focus on Prior Testimony

To Main Book

In a long trial, the jury may lose track of earlier testimony. You can remind them of earlier testimony (and emphasize it) by asking such questions as:

> Q. You were here when Jones testified that he never met Smith, weren't you? Do you agree with that testimony?
>
> Q. I remind you that Jones testified that he never met Smith. Was that testimony true?
>
> Q. Do you disagree with Jones's testimony two weeks ago that he never met Smith?
>
> Q. I represent to you that Jones testified two weeks ago that he never met Smith. As far as you know, is that true? Did Jones ever tell you that he never met Smith?

If you are opposing counsel and this technique is used against you, be sure that the question does not misstate earlier testimony. If it does, object promptly. Even if the characterization is accurate, you may properly object to the question as cumulative or irrelevant. ("What the witness remembers of earlier testimony has nothing to do with the issues we are here to resolve").

[§5.30B] Failure to Report Facts Tending to Demonstrate Criminal Defendant's Innocence

To Main Book

In a prosecution for stalking and disobeying a court protective order, three defense witnesses testified to amicable encounters between the defendant and the victim. The prosecution was allowed to impeach these witnesses with cross-examination concerning their failure to report these facts demonstrating the defendant's innocence to the police or the prosecution before trial. The court of appeal held that evidence of a witness's failure to present reported facts is relevant and admissible when the witness understood that the evidence tended to exculpate one who had been charged with a crime. *People v Tauber* (1996) 49 CA4th 518, 56 CR2d 656.

6

Preparing Favorable Witnesses for Cross-Examination

[§6.2] DECIDING TO HAVE CLIENT TESTIFY

To Main Book

Self-incrimination. The United States Supreme Court reaffirmed *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, in *Dickerson v U.S.* (2000) 530 US 428, 147 L Ed 2d 405, 120 S Ct 2326. It held that the *Miranda* advisements are constitutionally based and declared unconstitutional a federal statute (18 USC §3501) that had purported to overturn it. According to the Court, stare decisis weighed heavily against overruling *Miranda,* which has "become embedded in routine police practice." The Court also reaffirmed the decision's core rationale, rejecting the pre-*Miranda* "totality of the circumstances" or "voluntariness" test of 18 USC §3501 as too difficult for police to follow and for courts to apply consistently. *Miranda* and its progeny continue, therefore, to govern the admissibility of statements made during custodial interrogation in both federal and state courts. In *U.S. v Patane* (2004) ___ US ___, 159 L Ed 2d 667, 124 S Ct 2620, the Supreme Court held that failure to give a suspect complete *Miranda* warnings did not require suppression of a gun that was found as a result of the defendant's voluntary statements made as a result of incomplete *Miranda* warnings.

Although extrajudicial statements elicited in violation of *Miranda* are inadmissible in the prosecution's case-in-chief, they may be used for the limited purpose of impeaching defendant's trial testimony, as permitted under the federal rule set forth in *Harris v New York* (1971) 401 US 222, 28 L Ed 2d 1, 91 S Ct 643. *People v May* (1988) 44 C3d 309, 243 CR 369. In *May* the California Supreme Court held that Cal Const art I, §28(d) (the "truth in evidence" component of Proposition 8) abrogated the rule of *People v Disbrow* (1976) 16 C3d 101, 127 CR 360 (extrajudicial statements elicited in violation of *Miranda* inadmissible for all purposes under California Constitution).

See also *People v Macias* (1997) 16 C4th 739, 66 CR2d 659 (minor's statement to probation officer preparing recommendation for court in juvenile fitness hearing can be used for impeachment in subsequent adult criminal trial), and *People v Williams* (2000) 79 CA4th 1157, 94 CR2d 727 (when defendant's testimony about what he had told police officer at time of his arrest differed from officer's version, it was proper to call officer to impeach defendant with his version of defendant's unMirandized statement, *and* to give CALJIC 2.03, which allowed jury to infer "consciousness of guilt" if it found he had made willfully false and misleading statement about crime).

In *People v Storm* (2002) 28 C4th 1007, 124 CR2d 110, the California Supreme Court held that a break in custody during which the defendant has a reasonable opportunity to contact his attorney dissolves a *Miranda/Edwards* claim. In *Storm,* the defendant agreed to take a polygraph and waived his rights after receiving a Miranda warning, but then said he wished to speak with a lawyer before proceeding. Rather than stop questioning immediately, as *Miranda* and *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880, have required in a custodial setting, defendant was encouraged to continue speaking and subsequently made incriminating statements. Two days later defendant was contacted by the police and questioned in his home and made further incriminating statements. The trial court excluded the earlier statements but admitted the later statements made by the defendant in his home. The court found no police misconduct in the second interview with the defendant conducted two days later, thus rendering unnecessary any consideration of whether proof that the break in custody was "pretextual" would make the statement inadmissible at trial.

The supreme court distinguished *People v Storm, supra,* in *People v Neal* (2003) 31 C4th 63, 1 CR3d 650, holding that two confessions elicited after a detective continued questioning defendant in deliberate violation of *Miranda* were not admissible for any reason. After defendant invoked his right to an attorney and to remain silent, the *Neal* court found that the defendant had not been allowed to leave after termination of the first interview; in fact, defendant continued to be held in custody for many hours without food and water. Further, the detective who questioned defendant had made both threats and promises to the defendant, an inexperienced young man with little education and knowledge of the legal system. Given the totality of the circumstances, the court held that the defendant's confessions were involuntary. In concurring opinions several justices also voiced concern about the widespread use of intentional violations of *Miranda* as a "useful tool" for police interrogators.

See also *California Attorneys for Criminal Justice v Butts* (9th Cir 1999) 195 F3d 1039 (police officers who intentionally violate Miranda by continuing questioning after a suspect invokes his right to remain silent not entitled to qualified immunity as matter of law in subsequent civil rights action) and *Henry v Kernan* (9th Cir 1999) 197 F3d 1021 (continued interrogation in violation of *Miranda* presumptively coercive and inadmissible for any purpose). But see *Chavez v Martinez* (2003) 538 US 760, 155 L Ed 2d 984, 123 S Ct 1994, in which the United States Supreme Court held 5-4 that a police officer could claim qualified immunity for an

unMirandized, intensive interrogation of a seriously injured defendant when the defendant was never charged and his admissions were never used against him.

The defendant need not be advised of the constitutional right against self-incrimination before stipulating to evidentiary facts. *People v Adams* (1993) 6 CA4th 570, 24 CR2d 831. In *Adams,* the defendant's stipulation that he was on bail at the time of the charged offense was not an admission of every element necessary for the imposition of punishment under Pen C §12022.1; the §12022.1 enhancement applies only if the defendant is also convicted of the primary offense.

Impeachment. In Book §6.2, *People v Hall* (1980) 28 C3d 143, 167 CR 844, is cited for the proposition that when the fact of a prior conviction is an element of the charged offense, neither the fact nor the nature of a prior conviction can be revealed to the jury if an accused stipulates to the fact of conviction. Proposition 8, which added art I, §28(f) ("truth in evidence") to the California Constitution, abrogated that rule by providing that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." In *People v Valentine* (1986) 42 C3d 170, 228 CR 25, the California Supreme Court held that under Cal Const art I, §28(f), when a defendant accused of being an ex-felon in possession of a firearm, stipulates to his status as an ex-felon, the jury *must* be informed of the fact of the conviction, but *may not* be informed of its nature. See also *People v Wade* (1996) 48 CA4th 460, 465, 55 CR2d 855 (same); *People v Bouzas* (1991) 53 C3d 467, 476, 279 CR 847 (same result when defendant charged with petty theft with a prior). Admissibility of such evidence is subject only to the limitations on the use of character evidence imposed by Evid C §1101(b), and the limitations on the use of prejudicial, confusing, or time-consuming evidence imposed by Evid C §352. See Update §§12.17-12.18 on use of character evidence.

Thus, there is no impediment to using a defendant's prior felony convictions for impeachment purposes if he or she testifies at trial. *People v Castro* (1985) 38 C3d 301, 211 CR 719. If a court has denied a motion to exclude a prior felony, California courts (under Proposition 8), following *Luce v U.S.* (1984) 469 US 38, 83 L Ed 2d 443, 105 S Ct 460, require counsel to put the criminal defendant client on the stand to testify in order to preserve the issue of the admission of the prior felony on appeal. See generally *People v Collins* (1986) 42 C3d 378, 228 CR 899. See Update §12.18 on the use of prior convictions for impeachment.

In *Ohler v U.S.* (2000) 529 US 753, 146 L Ed 2d 826, 120 S Ct 1851, the United States Supreme Court held, 5-4, that a federal criminal defendant, who admitted to a prior conviction on direct examination before the prosecution could raise it, waived the right to challenge evidence of the conviction on appeal.

The reference in Book §6.2 to CCP §1987(8) should be to CCP §1987(b).

Refusal to cooperate in presenting perjured testimony. *Whiteside v Scurr* (8th Cir 1984) 744 F2d 1323, cited in Book §6.2, was reversed by the Supreme Court in *Nix v Whiteside* (1986) 475 US 157, 89 L Ed 2d 123, 106 S Ct 988. In *Nix* the Court held that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated by counsel's refusal to cooperate with the defendant in presenting perjured testimony at his or her trial. However, a "'lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.'… [C]ounsel's belief in their client's guilt certainly cannot create an ethical bar against introduction of exculpatory evidence." *Lord v Wood* (9th Cir 1999) 184 F3d 1083, 1095 n9.

Witnesses have absolute immunity from civil liability under 42 USC §1983 for giving perjured testimony at trial. *Briscoe v LaHue* (1983) 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108. The Ninth Circuit has held that a witness who conspired with another witness to present perjured testimony also has *Briscoe* immunity. *Franklin v Terr* (9th Cir 2000) 201 F3d 1098, aff'd sub nom *Franklin v Fox* (9th Cir 2002) 312 F3d 423.

The official citation for *People v Sumstine* should be (1984) 36 C3d 909, 206 CR 707.

[§6.6] INCREASING CLIENT CREDIBILITY

To Main Book

Add to the list of client credibility boosters in Book §6.6:

h. Not use the word "honestly" or the phrase "to tell you the truth" when he testifies.

[§6.7] AVOIDING TRICKS AND TRAPS

To Main Book

Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

Operative July 1, 1987, the reference in Book §6.7 to former CCP §2016 should be to CCP §2018.

[§6.9] MECHANICS OF PREPARATION

To Main Book

If a witness is "refreshed" by viewing his own videotape, can opposing counsel discover this fact and demand production of the videotape for cross-examination of the witness? Under Evid C §250, "writing" is broadly defined to include pictures and sound recordings, *e.g.,* videotape. Therefore, Evid C §771 apparently permits opposing counsel to demand production of the videotape for cross-examination purposes. Evid C §773.

APPENDIX

[§6.18A] Sample Pin-Down Letter to Witness

To Main Book

Dear Ms. Jones:

Thank you for taking the time yesterday to talk to me about the facts surrounding my client's purchase of the ABC Ranch.

I am gathering as much information as I can now, to show that the ACME Corporation is mistaken in suing my client for fraud in connection with purchase of the ranch.

From what you told me, I understand that [provide narrative description of the facts you have learned from the witness].

I am writing you this letter for two reasons:

(1) Should this case go to trial, you will be able to use the letter to refresh your recollection about these events.

(2) I want to be sure I have the facts straight, in order to make a proper evaluation of the case.

If my recounting of facts is inaccurate, or if you believe I have left out something important, please make corrections or additions on the extra copy of this letter I am sending you, and return those corrections or additions to me in the enclosed stamped envelope.

Thanks again for your useful information.

Sincerely,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

7

Experts

[§7.1] EXPERTS AS WITNESSES

To Main Book

California Expert Witness Guide (Cal CEB 1983) has been replaced by California Expert Witness Guide (2d ed Cal CEB 1991).

Expert witnesses may not be permitted to testify concerning questions of law. To do so usurps the trial court's responsibility to instruct the jury on the applicable law. *Summers v A. L. Gilbert Co.* (1999) 69 CA4th 1155, 82 CR2d 162.

For a useful guide on better communication for your expert witness, see Salman, *How to Be an Effective Expert Witness*, 10 The Practical Litigator *7* (Nov. 1999).

[§7.2] DIRECT EXAMINATION

To Main Book

For practical instructions on conducting direct examination of one's own expert, including judicial perspectives on the techniques, see Handling Expert Witnesses in California Courts, steps 31-37 (Cal CEB Action Guide Spring 2003).

[§7.8] Admitting Normally Inadmissible Evidence

To Main Book

Former Evid C §1509 has been repealed. Now see Evid C §1523(d).

Federal Rules of Evidence 703 was amended, effective December 1, 2000, to provide explicitly that inadmissible information relied on by the expert to form an opinion or inference is not made admissible by the admission of the expert's inference or opinion. The inadmissible facts or data may not be disclosed to the jury unless the court determines that their probative value substantially outweighs their prejudicial effect.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/7 Experts/§7.9 CROSS-EXAMINATION OF EXPERTS

[§7.9] CROSS-EXAMINATION OF EXPERTS

To Main Book

Federal Rules of Civil Procedure 26 was amended effective December 1, 1993, and again effective December 1, 2000. The 1993 amendments required disclosure of experts, their reports, and all information on which they relied at least 90 days before trial. Fed R Civ P 26(a)(2). In addition, evidence solely intended to rebut evidence identified by another party must be revealed within 30 days after learning of the new evidence. Fed R Civ P 26(a)(2)(C).

Federal Rules of Civil Procedure 26(b)(4) was amended to permit a party to depose anyone identified as a trial expert by the party's adversary. The rule also requires the party seeking discovery to pay "a reasonable fee for time spent in responding to discovery," permitting an expert to seek fees not only for time spent testifying in deposition but also for time spent preparing for the deposition.

Although the 1993 amendments provided for district courts to "opt out" of disclosure requirements, the 2000 amendments remove this option, establishing instead a nationally uniform practice of disclosure. Fed R Civ P 26(a)(1). The disclosure obligation is narrowed in scope to cover only information that the disclosing party may use to support its position. Eight specified categories of proceedings are exempted from initial disclosure (Fed R Civ P 26(a)(1)(E)), and a party who contends that disclosure is inappropriate may present its objections to the court for determination on whether disclosure should be made. Fed R Civ P 26(a)(1). The amendments also establish time limitations for disclosure at or within 14 days of the Fed R Civ P 26(f) conference, unless otherwise stipulated or ordered, or objected to as inappropriate. Parties served or joined after the Fed R Civ P 26(f) conference must make their disclosures within 30 days after joining the action, unless otherwise ordered or stipulated. Fed R Civ P 26(a)(1). For a summary of all amendments to Fed R Civ P 26, see 2000 US Code Cong & Admin News G177.

Federal Rules of Criminal Procedure 16 was amended to permit a defendant to request a written summary of expert testimony that the government intends to use at trial under Fed R Evid 702-703, 705. In return, the defendant must disclose similar information to the prosecution. Both summaries are to include the expert's opinion, the bases and reasons, and the witnesses' qualifications.

In a decision with an important positive impact on counsel's ability to prepare for cross-examination of experts, the California Supreme Court held that a trial court may preclude an expert witness from testifying at trial on a subject whose general substance was not previously disclosed in the party's expert witness declaration. *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289 (when party designated witness in CCP §2034 expert witness declaration as one whose testimony related to damages, witness cannot testify at trial regarding standard of care). See also *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216, affirming trial court's exclusion of plaintiff's expert witness's trial testimony when testimony went beyond opinions expressed by expert in deposition, and expert had stated that those opinions were all that he had.

The trial court may also exclude the testimony of any treating physicians who have not been identified by name and address in the party's designation of expert witnesses. *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570. The fact that plaintiff had identified the physicians in her discovery responses did not constitute substantial compliance with CCP §2034.

The references in Book §7.9 to former CCP §§2016(a) and 2037 should be to CCP §§2025(a) and 2034, respectively. Under CCP §2025(u)(4), any party may use a videotape deposition of a treating or consulting physician or of any expert witness, even if the deponent is available to testify, if the deposition notice reserved the right to do so and if that party has complied with CCP §2025(*l*)(2)(I).

Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

California Criminal Law Practice Series, *Discovery* (rev ed Cal CEB 1980), referred to in the Book, is now out of print, and the reader should not use it as a reference. For a current discussion of discovery in criminal cases, see California Criminal Law Procedure and Practice, chap 11 (7th ed Cal CEB 2004). For advice and a judicial perspective on cross-examination of the opponent's expert, see Handling Expert Witnesses in California Courts, steps 38-40 (Cal CEB Action Guide Spring 2003).

See Update App D for an adapted article on making effective use of expert discovery at trial.

The citation to *Walker* in Book §7.9 should be *Walker v Superior Court* (1957) 155 CA2d 134, 317 P2d 130.

[§7.12] Controlling the Witness

To Main Book

The Slippery Expert

Sometimes you can be sure in advance that a witness will be difficult to pin down. Experts (particularly deposed experts who have already proved to be slippery) fall into this category. If so, consider making a "bargain" with the expert at the outset of cross-examination:

Q. Ms. Jones, you have been hired by my opponents to help them in their case, haven't you?

A. I have been hired to render my expert opinion.

Q. In this connection, you have spent over 15 hours working with my opponent, haven't you?

A. That's correct.

Q. And you have been paid over $2000?

A. Approximately.

Q. I haven't had the chance to talk to you informally about the facts of this case, have I?

A. No, you haven't.

Q. I want to ask some focused questions, and I would like to get your agreement to a procedure which I hope will make certain things clear to the jury. After I ask you a question, I would like you to answer "yes," "no," or "I can't answer that question yes or no." Do you understand what I am asking?

A. Yes I do.

Q. Can you keep that bargain with me?

A. Yes, I think I can.

Then, if the expert begins to make speeches in response to your leading questions, nudge the witness with the reminder, "You remember our bargain, don't you Ms. Jones? Please try to keep it."

If the trial judge will not let you keep an expert on such a short leash, you should at least be able to get agreement (or direction from the court) that the witness will first answer "yes" or "no," and then give any explanation necessary to clarify the answer. Evid C §766. See Jefferson's California Evidence Benchbook §§27.58-27.62 (3d ed CJA-CEB 1997). See also Salman, *How to Be an Effective Expert Witness*, 10 The Practical Litigator 7 (Nov. 1999).

[§7.15] Scientific Basis for Opinion

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

Foundational Requirements—California Courts. Expert testimony is admissible in California if it (1) concerns a subject that is "sufficiently beyond common experience" that the expert's opinion will "assist the trier of fact" and (2) is based on matter of a type that experts in the field can reasonably rely on. Evid C §801. See, *e.g., Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 8 CR3d 898 (HR expert's opinion on "indicators" of retaliatory discharge was inadmissible as improperly invading jury's province to draw conclusions about party's motive); *People v Johnson* (1993) 19 CA4th 778, 23 CR2d 703 (trial court properly rejected expert testimony that prison inmate informants are likely to lie; proposition that prison inmates may lie is within common understanding of jurors and does not require expert testimony).

Additional foundational requirements apply to expert testimony based on the application of a novel scientific technique. For such evidence to be admissible, the proponent of the evidence must show, usually by expert testimony, that the technique has gained general acceptance within a typical cross-section of the relevant scientific community. *Frye v U.S.* (DC Cir 1923) 293 F 1013. See *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144 (adopting *Frye* for use in California courts). In *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the United States Supreme Court ruled that Fed R Evid 702 (expert testimony) did not incorporate the *Frye* standard, and instead adopted a more flexible approach to the admission of scientific opinion evidence for use in federal courts. In *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, the California Supreme Court reaffirmed its adherence to the *Kelly* standard (formerly referred to as *Kelly-Frye*), deciding not to adopt the *Daubert* approach in California.

Even though a scientific method or concept may have general acceptance in the relevant scientific community, it will not meet the *Kelly* threshold for admissibility if that community does not rely on it for the purpose for which a party seeks to use it at trial. See *People v Bledsoe* (1984) 36 C3d 236, 203 CR 450 (expert testimony that complaining witness suffered from rape trauma syndrome inadmissible to prove that witness was in fact raped because syndrome developed as therapeutic tool, not to prove rape had occurred). But see *People v Harlan* (1990) 222 CA3d 439, 449, 271 CR 653 (in prosecution for lewd act with child, licensed clinical social worker's testimony on reactions of child molestation victims, based on clinical experience and training in the area, not subject to *Frye* test).

The *Kelly* rule is applicable only if the expert testimony is based at least in part on a new scientific technique, device, procedure, or method not generally accepted in the relevant scientific community; mere disagreement with the conclusions an expert draws from accepted methods of scientific research is not sufficient. *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827.

The *Kelly* rule does not automatically apply to evidence that could be regarded as "scientific." California law distinguishes between expert medical opinion, which is not subject to the special admissibility rule of *Kelly,* and scientific evidence, which is. *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on another ground in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. For example, in *People v Rowland* (1992) 4 C4th 238, 14 CR2d 377, an expert was permitted to testify that the absence of genital trauma was not inconsistent with nonconsensual sexual intercourse. The court found that the testimony was primarily based on physical examination and was thus not subject to the rule.

Expert psychiatric or psychological testimony is considered medical testimony and does not need to meet the *Kelly* threshold for admissibility. *People v McDonald, supra*. In *McDonald,* the California Supreme Court held that testimony on psychological factors that affect the reliability of eyewitness identification is not subject to *Kelly-Frye*. 37 C3d at 372. See also *People v Stoll* (1989) 49 C3d 1136, 1155, 265 CR 111 (psychologist's opinion that defendants showed no obvious psychological or sexual problems admissible as circumstantial evidence that they did not commit charged sex offenses was without reference to *Kelly-Frye* rule); *People v Ward* (1999) 71 CA4th 368, 373, 83 CR2d 828 (*Kelly* inapplicable to psychologists' testimony in commitment proceeding under Sexually Violent Predators Act (Welf & I C §§6600-6609.3) that defendant likely to reoffend); *Wilson v Phillips* (1999) 73 CA4th 250, 86 CR2d 204 (memories recalled by witnesses on own accord, unlike memories induced by hypnotism or drugs, not subject to evaluation under *Kelly*). But see *People v Sandoval* (1994) 30 CA4th 1288, 1298, 36 CR2d 646 (testimony that lineups were unfair unnecessary because identifications amply corroborated and proposed testimony covered matter that was likely "to be fully known to or understood by the jury" without expert testimony). Note also that Pen C §29 prohibits expert psychiatric or psychological testimony about a defendant's mental state to negate the inference that defendant formed the mental state required for guilt of the offense with which he or she is charged. See *People v Rangel* (1992) 11 CA4th 291, 303, 14 CR2d 529.

In *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137, the court of appeal held that a computer animation of a shooting was not subject to the *Kelly* rule. The court of appeal viewed the animation as tantamount to drawings by an expert to illustrate his or her conclusions about how the crime occurred. The court found no danger that the jury would be "swept away" by a new scientific technique it could not understand and, therefore, would not challenge. 53 CA4th at 969. See also *People v Hill* (2001) 89 CA4th 48, 56, 107 CR2d 110 (new DNA test kit, applying standard DNA testing procedure (PCR (polymer chain reaction)) to new sites on DNA molecule, not subject to *Kelly* "general acceptance" requirement). In *Cooley v Superior Court* (2002) 29 C4th 228, 127 CR2d 177, the California Supreme Court reversed and remanded on other grounds a decision in which the court of appeal held, in a civil commitment proceeding under the Sexually Violent Predators Act, that a psychological instrument using an actuarial method to predict whether an individual was likely to reoffend did not have to satisfy the general acceptance prong of the *Kelly* test.

Foundational Requirements—Federal Courts. Three decisions of the United States Supreme Court (sometimes collectively dubbed the "*Daubert* trilogy") have substantially altered the foundational requirements in federal trial courts for the admission of expert testimony, defined in Fed R Evid 702 as testimony about "scientific, technical, or other specialized knowledge." In *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the Court held that the *Frye* rule was not incorporated in the Federal Rules of Evidence. Under *Daubert,* evidence that derives from scientific knowledge is admissible if "the reasoning or methodology underlying the testimony is scientifically valid and… can be applied to the facts in issue." 509 US at 592. To replace *Frye*'s exclusive reliance on general acceptance, *Daubert* focused on reliability, identifying four factors for the trial court to consider in determining the admissibility of expert testimony: (1) testing; (2) peer review and publication; (3) error rate and standards; and (4) general acceptance. 509 US at 594.

In the next case of *General Elec. Co. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512, the Court held that the trial court's determinations on the admissibility of expert testimony are discretionary rulings to be reviewed on appeal for abuse of discretion. Finally, in *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 147, 143 L Ed 2d 238, 119 S Ct 1167, the Court extended the trial court's general "gatekeeping" duty under *Daubert* to testimony based on "technical" and "other specialized" knowledge and clarified the scope of the trial court's discretion, explaining that the law grants a district court the same broad latitude in deciding *how* to determine reliability as in its ultimate reliability determination; thus, *Daubert*'s list of specific factors for consideration neither necessarily nor exclusively applies in every instance. 526 US at 149.

In 2000, Fed R Evid 702 was amended to apply the *Daubert-Kumho* standard to expert testimony in all these areas. Thus, to be admissible in federal court, expert testimony must be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) "applied… reliably to the facts of the case." Fed R Evid 702.

In a fourth, related decision, the United States Supreme Court held that a federal court of appeals, which reversed a judgment for the plaintiff on the ground that the plaintiff's expert testimony was inadmissible under *Daubert,* did not abuse its discretion under Fed R Civ P 50 when it ordered the trial court to enter judgment as a matter of law for the defendant, because the remaining evidence was insufficient to support the verdict. *Weisgram v Marley Co.* (2000) 528 US 440, 145 L Ed 2d 958, 120 S Ct 1011. The Court rejected plaintiff's argument that permitting the appellate court to order entry of judgment against the verdict winner was unfair to the party who relied on the trial court's ruling, explaining that the proponent of the challenged evidence would have notice at trial that there was a potential problem with the evidence and would therefore have an opportunity to bolster the case at trial and to argue for a new trial on appeal and in a petition for rehearing. 528 US at 454.

Daubert cited the "liberal thrust" of the Federal Rules of Evidence and their tendency to relax traditional barriers to admissibility as a ground for its conclusion that they do not incorporate the "austere" *Frye* standard. *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. The consensus among commentators, though, is that *Daubert* and its progeny have made it more difficult to gain admission for expert testimony in federal courts. See, *e.g.,* Smith, *No Escape from Science*, 86 ABAJ 60 (2000). This perception is borne out by a study published by the Federal Judicial Center, the research and education agency of the federal courts. In a survey of federal district court judges conducted in 1998, 59 percent of the respondents said they had allowed all proffered expert testimony in their most recent civil trial, as compared with 75 percent of the judges who responded to a similar question in 1991. Johnson, Krafka, & Cecile, Expert Testimony in Federal Civil Trials: A Preliminary Analysis, Federal Judicial Center, Washington, D.C. (2000). The admissibility of expert testimony was disputed in more than half of the trials included in the survey. Attorneys responding to a related survey indicated that they are more likely to make an in limine motion to exclude testimony by opposing experts than they were before *Daubert*. The study is available on the center's website at www.fjc.gov. But see *Idaho Rural Council v Bosma* (D Idaho 2001) 143 F Supp 2d 1169, 1184 (quoting *Daubert*'s statement about "liberal thrust" of Federal Rules of Evidence and their tendency to relax barriers to admission in support of conclusion that trial court properly admitted expert testimony).

PRACTICE TIP

In the post-*Daubert* federal courts, choosing the right expert can make or break a case, especially if proof of causation depends on expert testimony. No matter how persuasive your expert may be in front of a jury, if you cannot persuade the trial judge that her testimony is reliable and will be helpful to the jury, you may find yourself on the losing side of a motion for summary

judgment. It is therefore more important than ever to:

—Be thoroughly familiar with the facts of your case and the legal theories that support it;

—Be familiar enough with the field in which your expert will testify to know how the community in which the expert works assesses reliability;

—Rigorously evaluate your expert's credentials and methodologies;

—Whether supporting or opposing the admission of expert testimony, it is important to be selective in the materials you choose to present to the judge. A presentation that focuses the judge's attention on the crucial issues surrounding admissibility is more impressive than a mountain of photocopied materials.

Ninth Circuit cases applying *Daubert* include:

- *U.S. v Amador-Galvan* (9th Cir 1993) 9 F3d 1414. Expert testimony on the reliability of eyewitness identification must be evaluated under the *Daubert* standard; case remanded to the trial court to determine whether theories expressed about eyewitness identification were scientifically valid, helpful, and reliable.

- *U.S. v Rincon* (9th Cir 1994) 28 F3d 921. Applying the *Daubert* standard, the court of appeals held that the district court did not err in excluding expert testimony on eyewitness identification, because the appellant had not shown that the proposed testimony constituted scientific knowledge. The court emphasized that its decision was based on the facts of this case. It did not preclude admission of expert testimony on the reliability of eyewitness identification in a case in which the proffering party shows that the expert opinion is based on scientific knowledge that is reliable and helpful to the jury.

- *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311. On remand of *Daubert,* the court of appeals upheld the district court's grant of summary judgment under the new standard, finding that plaintiffs' experts' scientific testimony was not admissible to prove that morning sickness pills caused the plaintiffs' birth defects.

- *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225 (*Cordoba I*). The Ninth Circuit held that its per se rule excluding the admission of unstipulated polygraph evidence was effectively overruled by *Daubert*. Now the trial court must conduct a particularized inquiry consistent with *Daubert* to determine admissibility.

- *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226. When expert testimony is supported by "objective, verifiable evidence" that it is based on "'scientifically valid principles'" and that it will assist the trier of fact, it is admissible under *Daubert* even though the trial court may believe it deserves little or no weight; the weight of the evidence is for the trier of fact to assess.

- *U.S. v Cordoba* (9th Cir 1999) 194 F3d 1053 *(Cordoba II)*. The district court did not err in excluding polygraph evidence in view of the controversy in the relevant scientific community about its reliability and the risk of undue prejudice.

- *Jaros v DuPont (In re Hanford Nuclear Reservation Litig.)* (9th Cir 2002) 292 F3d 1124, 1137. The district court erred in requiring plaintiffs to prove that they were exposed to a specific dose of radiation, since "[r]adiation is capable of causing a broad range of illnesses, even at the lowest doses. This has been recognized by scientific and legal authority."

- *Domingo v T.K.* (9th Cir 2002) 289 F3d 600. The trial court may properly exclude expert testimony when it finds that there is too great an analytical gap between the data and the opinion offered. In *Domingo,* nothing but the "ipse dixit" of the expert linked his causal explanation to the events in question. 289 F3d at 607.

See also *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418 (expert testimony unreliable); *Diviero v Uniroyal Goodrich Tire Co.* (9th Cir 1997) 114 F3d 851 (expert testimony unreliable); *Brumbaugh v Sandoz Pharmaceutical Corp*. (D Mont 1999) 77 F Supp 2d 1153 (expert testimony "anecdotal" and "untested"). A 10th Circuit decision affirmed a district court's application of *Daubert* in excluding plaintiffs' expert witness testimony in a products liability action as "guesswork." See *Hollander v Sandoz Pharmaceutical Corp.* (10th Cir 2002) 289 F3d 1193.

8

Recurring Examinations

[§8.4] SELECTIVE MEMORY

To Main Book

When examining a witness (particularly a trained witness, such as a police officer) who has filed a written report, concentrate not on the doughnut, but on the hole. Do not repeat the witness's testimony about details. Do not repeat the correct details provided by the witness in the written report. Rather, examine as follows:

Q. Show the jury where you say John Smith seemed nervous when you questioned him.

A. It's not there.

Q. Point out the place in your report where you say that John Smith said, "I guess I'm in big trouble."

A. I left out that detail.

Q. You know the importance of including all details in your police reports, don't you?

A. Not all details.

Q. In fact, Officer Green, there's not a single statement by my client, John Smith, in your report which shows any sense of guilt on his part, is there?

A. Let me see the report, please. [Provide the report and wait, the longer the better.]

[§8.5] PRIOR INCONSISTENT STATEMENT

To Main Book

A witness's testimony at a judicial arbitration is not admissible as a prior inconsistent statement for impeachment purposes at a subsequent trial on the same matter. *Jimena v Alesso* (1995) 36 CA4th 1028, 43 CR2d 18. The court held that Cal Rules of Ct 1616(c), prohibiting any reference to evidence submitted during arbitration, takes precedence over Evidence Code provisions that permit an attack on a witness's credibility by use of prior inconsistent statements.

A court of appeal held in a questionable opinion that a witness could not be asked the general question: "Did you ever tell anyone that, unless Mr. Garcia gave you a certain amount of money, you would get him in trouble?" The court held that the proponent of a prior inconsistent statement must establish at least two of the "who, what, where, and when" foundations. *People v Garcia* (1990) 224 CA3d 297, 273 CR 666.

[§8.6] EMPLOYEE OF HOSTILE PARTY

To Main Book

Operative July 1, 1987, former CCP §2016(e)(2) was replaced by CCP §2025(u)(2).

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

[§8.7] REFRESHING RECOLLECTION

To Main Book

Book §8.7 suggested that counsel should attempt to read material to refresh the memory of a forgetful witness. This approach was criticized by the California Supreme Court in *People v Parks* (1971) 4 C3d 955, 95 CR 193 (if necessary to refresh witness's recollection, statement should be given to witness to read or be read by attorney outside presence of jury), and also in Jefferson's California Evidence Benchbook §27.79 (3d ed CJA-CEB 1997).

[§8.9] BUSINESS RECORD

To Main Book

In *U.S. v Childs* (9th Cir 1993) 5 F3d 1328, documents kept by automobile dealerships were allowed into evidence as business records, even though the dealerships did not create the documents and the custodians testifying were former, not current, employees. The court distinguished *NLRB v First Termite Control Co.* (9th Cir 1981) 646 F2d 424 (cited in Book §8.9), on the ground that the dealerships relied on those documents and therefore had an interest in their accuracy. The court further held that the business records witness did not have to be custodian of the documents offered into evidence to establish foundational requirements for the exception to the hearsay rule.

[§8.9A] OFFICIAL RECORD

To Main Book

In *Lake v Reed* (1997) 16 C4th 448, 65 CR2d 860, the California Supreme Court considered the scope of California's public employee business record exception (Evid C §1280), holding that the unsworn report of a police officer who was present at the scene of a traffic accident was admissible under Evid C §1280 at an administrative license-suspension hearing held by the Department of Motor Vehicles, and that an admission by the driver that he had been behind the wheel, which was contained in the officer's report, was admissible because it came within another hearsay exception—Evid C §1220 (admission of a party). In an extension of *Lake,* the supreme court has held that the DMV may consider the unsworn report of an arresting officer that was made at the same time the officer made his sworn report and that contained a more detailed narrative than the sworn report because of space considerations. *MacDonald v Gutierrez* (2004) 32 C4th 150, 8 CR3d 48.

The California Supreme Court held in *People v Martinez* (2000) 22 C4th 106, 116, 91 CR2d 687, that a defendant's rap sheets—uncertified computer printouts of criminal history information compiled by the Los Angeles Police Department and the state Department of Justice—were admissible under the official records exception to the hearsay rule to prove the *fact* of his prior convictions (but not the nature or the circumstances of the underlying conduct) for the purpose of enhancing his sentence.

Under Fed R Evid 803(8)(C), if a document is a public record, it may be admitted into evidence and considered by the jury even if it contains conclusions or opinions. The conclusions or opinions must be factually based but are otherwise an exception to the hearsay rule. *Beech Aircraft Corp. v Rainey* (1988) 488 US 153, 102 L Ed 2d 445, 109 S Ct 439 (holding that Fed R Evid 803(8)(C) permitted admission of investigator's opinion of cause of airplane crash).

[§8.10] ESTABLISHING AGENCY

To Main Book

Federal Rules of Evidence 801(d)(2) has been amended, effective December 1, 1997, to provide that the contents of the declarant's statement must be considered, but are not alone sufficient, to establish the agency or employment relationship and its scope under Fed R Evid 801(d)(2)(D).

[§8.11] THE EVASIVE WITNESS

To Main Book

Why is it that some witnesses seem unable to give a simple answer to a simple question?

1. You are not asking a simple question. Be sure you have broken down complex questions into their simplest component parts so that confused answers are not due to your shortcomings.

2. The witness is embarrassed by a damning fact and is trying to avoid admitting it.

3. The witness has a speech he or she wishes to make, and chooses your question as the platform for that speech.

The evasive witness may be frustrating, but he or she provides an opportunity for you. If during the stress of trial you forget all else, remember one rule: Continue repeating your simple question until you get an answer. As a witness twists and turns, nonanswers will eventually grate on the jury like fingernails scraping across a blackboard.

Motions To Strike

Technically, any party may move to strike an answer as "unresponsive." Evid C §766. See Jefferson's California Evidence Benchbook §27.58 (3d ed CJA-CEB 1997). When the witness evades questions or volunteers information not specifically asked for, the questioner may move to strike the unresponsive answer. The questioner has the right to elicit testimony and to confine the scope of the examination as he or she sees fit. *In re Rosoto* (1974) 10 C3d 939, 112 CR 641.

Generally, the nonquestioning counsel should not make the motion. If the motion is sustained, the questioner has the option of following up with the question that calls for the previously unresponsive answer. The answer will be repeated again and will now be responsive, and the jury will have heard the answer twice. See California Trial Objections §§52.2-52.3, 52.15-52.16 (10th ed Cal CEB 2004).

Counsel's right to strike an answer includes the right to interrupt an unresponsive witness. Keep this in mind to cut off speeches by hostile witnesses. Use the motion to strike judiciously to avoid irritating the jury. For example:

> Excuse me for interrupting, Mr. Smith, but I asked you only what time you left the office. Your Honor, I move to strike as unresponsive Mr. Smith's testimony about the argument he had with Mr. Brown on April 13.

Clean-Up

Often, despite your best efforts to control a witness, you will feel unsatisfied near the end of the examination because the answers have not been crisp and comprehensible. There is no reason you should not be able to go back and concisely cover the main points you made in cross-examination.

Opposing counsel may (1) object in California state courts that the clean-up questions were "asked and answered" (see Evid C §§765, 774; Trial Objections, chap 11; Evidence Benchbook §27.3), or (2) request an exercise of the judge's discretion to put a stop to the questioning because it is "cumulative" (see Evid C §352; Fed R Evid 403) and a waste of time (see Evid C §352; Fed R Evid 611).

However, if a witness has not been giving clear answers to clear questions, you can argue forcefully that the objections should be overruled because the "cleanup" questions are designed to increase the jury's comprehension of the facts and issues. Remember: a witness once examined can be re-examined on the same matter with leave of a California state court (Evid C §774).

The state and federal evidence codes permit exclusion only if the probative value is "substantially" outweighed by "undue" delay, confusion of issues, undue prejudice, or misleading the jury (Evid C §352; Fed R Evid 403).

Here are some ways to clean up muddled testimony:

Q. I would like to clear up one point in your testimony. Is it true that … ?

Q. I suggest that XYZ is true. I would like to give you an opportunity to correct your prior testimony. Do you wish to do so?

Q. Let me know if I correctly summarize your testimony. [Summarize point by point, pausing and asking after each point: "Is that a fair summary?"]

Thus, the evasive witness gives you a chance to take a lemon and make lemonade. Properly approached, the "troublesome evasive witness" will help your case.

[§8.12] CHARACTER WITNESSES

To Main Book

Opinion evidence of a character trait is a limited basis for showing a party's good qualities. It is permissible in criminal cases only, under Evid C §1102 and Fed R Evid 404(a)(1). The Federal Rule permits evidence "of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."

Federal Rules of Evidence 404(a)(1) has been amended, effective December 1, 2000, to provide that when an accused attacks the character of an alleged victim under Rule 404(a)(2), the door is opened to an attack on the same character trait of the accused.

See Evid C §1102(a); *U.S. v Angelini* (1st Cir 1982) 678 F2d 380, overruled on other grounds by *U.S. v Brown* (1st Cir 1989) 770 F2d 241, 243 (reversible error to exclude defendant's character as "law abiding citizen"); Fed R Evid 404(a).

Press your "character trait" proffer if the trial court is skeptical, because it may be based on the novelty of your approach. Keep in mind the liberal definition of relevant evidence in both state and federal court. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed R Evid 401; Evid C §210 (slightly different language to the same effect).

Some cases that emphasize the slight showing that needs to be made for relevance, and the presumption that relevant evidence will be admitted, are *People v Hess* (1951) 104 CA2d 642, 234 P2d 65; *U.S. v Federico* (9th Cir 1981) 658 F2d 1337, 1342, overruled on other grounds by *U.S. v DeBright* (9th Cir 1984) 730 F2d 1255, 1259 ("any showing, however slight"); *U.S. v Cole* (11th Cir 1985) 755 F2d 748, 766. See Evid C §351.

If your proffer is rejected, be sure you have made a detailed record of what you would have proven.

Bad Character

"Devilish" character evidence (used to attack the character of an opposing witness or party) is admissible under the rules of evidence discussed above. In a criminal case, the confrontation clause provides a strong constitutional basis for permitting a "kitchen sink" attack on defendant's primary accusers. See, *e.g., Davis v Alaska* (1974) 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105 (state's interest in preserving confidentiality of juvenile proceedings must yield to criminal defendant's right to cross-examine key witness against him).

See also *In re Anthony P.* (1985) 167 CA3d 502, 512, 213 CR 424 (accused entitled to "wide latitude" in cross-examining state's witness); *U.S. v Willis* (9th Cir 1981) 647 F2d 54 (reversible error to bar cross-examination on narcotics officer's sexual relations with defendant's former girlfriend); and *U.S. v Ringwalt* (ED Pa 2002) 213 F Supp 2d 499, 511 (evidence of defendant's sexual relationship with employee/witness admissible to show witness's bias). But see *Walters v McCormick* (9th Cir 1997) 122 F3d 1172 (preventing defendant's cross-examination of child victim's mother regarding accusations of abuse mother had previously made against nondefendant was not violation of defendant's due process rights); *U.S. v Beardslee* (9th Cir 1999) 197 F3d 378 (trial court did not violate confrontation clause by barring cross-examination of government witnesses concerning probationary status and traffic citations).

In *People v Harris* (1989) 47 C3d 1047, 255 CR 352, the supreme court held that, in criminal cases, the "truth in evidence" provision of Proposition 8 (Cal Const art I, §28(d)) effectively repealed Evid C §787 (specific instances of conduct inadmissible to attack or support witness credibility). For further discussion of character evidence, see Update §§12.17-12.18.

9

Depositions

DEPOSITION ABUSES

[§9.2] Common Abuses

To Main Book

The California Civil Discovery Act of 1986 (CCP §§2016-2036), and amendments to that legislation (Stats 1987, ch 86) seek to control the abuses discussed in Book §9.2 by authorizing courts, on notice, to impose sanctions (CCP §2023(b)) for "misuses of the discovery process" defined by CCP §2023(a), including:

1. Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

3. Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression or undue burden and expense.

5. Making, without substantial justification, an unmeritorious objection to discovery.

See also CCP §2025(i) (protective orders and sanctions concerning oral depositions).

Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

Operative July 1, 1987, the reference to former CCP §2016 should be to CCP §2025(*l*)(1) ("[e]xamination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code").

[§9.3] Countering Abuses

To Main Book

Note: The "opt out" provision of Fed R Civ P 26(a)(1) has been deleted by amendments effective December 1, 2000. See Fed R Civ P 26 and the summary of amendments at 2000 US Code Cong & Admin News G177.

Federal court rules. Under 1993 amendments to the Federal Rules of Civil Procedure each side is limited to taking ten depositions (without leave of court) (Fed R Civ P 30) and 25 interrogatories, including "all discrete subparts" (Fed R Civ P 33). The party taking a deposition may designate in the notice the method by which the testimony shall be recorded, including by videotape, without obtaining a stipulation or court order as required by former Fed R Civ P 30(b)(4). Fed R Civ P 30(b)(2).

Under the 2000 amendments to Fed R Civ P 26(b), the court is more actively involved in regulating inappropriately broad discovery by determining whether discovery is relevant to claims or defenses and, if not, whether good cause exists for authorizing discovery relevant to the subject matter of the action. See 2000 US Code Cong & Admin News G184.

Federal Rules of Civil Procedure 37 has been tightened to make it easier to punish those who evade proper discovery:

1. For purposes of motions to compel and sanctions, an evasive or incomplete disclosure, answer, or response is to be treated as *failure* to disclose, answer, or respond. Fed R Civ P 37(a)(3).

2. The Notes of the Advisory Committee to the amendments to Rule 37 suggest that a nonresponsive party can be effectively sanctioned by *excluding* evidence not disclosed, as provided in Fed R Civ P 37(c)(1). Federal Rules of Civil Procedure 37(a)(2)(B) explicitly provides for a party taking a deposition either to complete or adjourn the examination after an answer has not been given to a proper question.

Federal Rules of Civil Procedure 30(d) codifies a salutary set of rules to prevent game-playing:

1. Objections must be stated concisely and in a nonargumentative and nonsuggestive manner.

2. A party may not instruct the deponent not to answer, unless preserving a privilege, enforcing a limitation on evidence as directed by the court, or presenting a motion that the examination is being conducted in bad faith or is being conducted to annoy, embarrass, or press a deponent or party.

3. The court by order or local rule may limit the time for a deposition, allowing additional time only if it is shown that the deponent or other party has impeded or delayed the examination.

Federal Rules of Civil Procedure 30 has been amended, effective December 1, 2000. Counsel's motion to terminate or limit deposition for bad faith or other deposition abuse may now be brought under Fed R Civ P 30(d)(4).

In *Cope v McPherson* (DC Cir 1985) 781 F2d 207, the appellate court approved a trial court's barring the plaintiff from testifying about specific incidents when plaintiff answered interrogatories unresponsively. By analogy, the same sanctions should apply to a witness who has testified unresponsively in a deposition.

In *Hanlin v Mitchelson* (SD NY 1985) 623 F Supp 452, aff'd and rev'd in part on other grounds (2d Cir 1986) 794 F2d 834, the court held that, even if counsel is harassing a party at deposition, counsel for the deponent should not unilaterally terminate the deposition, except as the basis for a motion for protective order under Fed R Civ P 30(d).

California rules. The California Civil Discovery Act of 1986 (CCP §§2016-2036), and amendments to that legislation (Stats 1987, ch 86, operative July 1, 1987), have replaced former CCP §§2016-2037.9.

Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

See Update §9.2 on some of the sanctionable abuses set out in new CCP §2023(a).

The reference to former CCP §2034(a) in Book §9.2 should now be to CCP §2025(m)(4); the reference to former CCP §2021(c)(2) should now be to CCP §2025(m)(2); and the reference to former CCP §2019 should now be to CCP §2025(*l*)(1).

The reference to former ND Cal Local R 230-4(e) should now be to ND Cal Local R 37-1(b).

Stamping out discovery abuse. The following is adapted from two articles by William A. Brockett: *Let the Punishment Fit the Crime: A Modest Proposal To Stamp Out Discovery Abuse*, originally appearing in 12 CEB Civ Litigation Rep 11 (Feb. 1990), and *Trial Run—Discovery Abuse: Ammunition for the Firing Squad*, originally appearing in 12 CEB Civ Litigation Rep 101 (May 1990):

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

Traditionally, judicial officers other than the trial judge handle discovery matters. In many jurisdictions, discovery rulings are made by a series of commissioners or magistrates who have not had an opportunity to develop continuity or feel for the case. Even if only one judge or commissioner supervises all discovery, that official may never learn much about the merits of the case, nor will the official have time to tackle anything but the immediate problem.

Paradoxically, the trial judge, who is in a perfect position to learn the case in depth, rarely has anything to do with supervising discovery. During trial, the judge usually works a full day on one case alone, and has a chance to size up counsel, hear key witnesses, and weigh their demeanor. Why shouldn't the trial judge attack discovery abuse?

It is proposed that trial judges should step in forcefully, using existing law and authority to sanction discovery abusers. Here is a list of available instructions, limits on proof, and other sanctions, ranked in rough order of increasing severity, along with citation to statutes, instructions, cases, and texts that directly or indirectly support the sanctions:

1. Give the jury instructions that counsel's interference with full and fair discovery permits them to presume that full and fair discovery would have provided evidence unfavorable to the obstructing party.

Judicial Council of California Civil Jury Instruction 202 (CACI) (see also BAJI 2.02) advises the jury to view evidence with distrust when a party offers weaker and less satisfactory evidence and it was within its power to produce stronger and more satisfactory evidence. Judicial Council of California Civil Jury Instruction 203 (CACI) (see also BAJI 2.03) deals with a party's willful suppression of evidence, and JC Cal Civ Jury Inst 202 (CACI) (see also BAJI 2.04) covers a party's failure to explain or deny evidence.

The combination of these (or similar tailor-made instructions) and the law and statutes on which they are based, including Evid C §§412-413, supports an instruction permitting a negative inference to be drawn from obstructive behavior by counsel. Any such instruction should direct the jury to determine first whether obstruction occurred. For analogous federal instructions, see Devitt & Blackmar, Federal Jury Practice and Instructions §§15.09, 15.15, 15.17, 72.16 (5th ed 2000) (failure to cooperate in facilitating identification after a crime may prove consciousness of guilt).

2. Instruct the jury that counsel has effectively made a witness "unavailable" by, *e.g.,* a barrage of speaking objections. Instruct the jury that they may presume that the witness's testimony would have been unfavorable to the obstructing party.

If a party fails to call a person possessing knowledge about the facts in issue who is reasonably available to the party and not equally available to the other party, jurors may infer that the person's testimony would have been unfavorable to the party who could have called the witness but did not. O'Malley, Grenig & Lee, Federal Jury Practice and Instructions §72.16 (5th ed 2000). Therefore, an attorney whose conduct makes a witness's testimony impossible to follow should suffer the consequences of a similar instruction. See generally *Kelly v GAF Corp.* (ED Pa 1987) 115 FRD 257 (ordering new trial after defense objections made videotape depositions ineffective at trial); *Barker v Bledsoe* (WD Okla 1979) 85 FRD 545 (rebuttable presumption that evidence would be unfavorable to party tampering with or destroying it). Holding a party responsible for attorney misconduct is discussed below, in item 4.

3. Declare witnesses who have been improperly coached retroactively "incompetent" to provide testimony.

A witness is incompetent if, among other things, the witness is incapable of expressing himself or herself understandably on the matter. Evid C §701; Fed R Evid 601. The late Professor Irving Younger suggested declaring the "retroactive incompetence" of witnesses who invoked the fifth amendment excessively in cross-examination or who showed themselves to have dim or inconsistent memories on examination. This suggestion has been picked up by several courts when witnesses, claiming their privilege against self-incrimination, have refused to answer. See, *e.g., Gallaher v Superior Court* (1980) 103 CA3d 666, 162 CR 389 (court must strike testimony of prosecution witness who invokes fifth amendment and refuses to testify further in midst of testimony); *Lawson v Murray* (4th Cir 1988) 837 F2d 653 (defense witness's entire testimony stricken when witness invoked fifth amendment concerning what he had been doing on night of crime). The trial court determines competence as it deals with ability to communicate. Evid C §§405, 701. Improper objections and frequent coaching by counsel may make it appropriate for the court to declare the witness incompetent.

See also *Kelly v GAF Corp., supra* (ordering new trial because defense counsel's numerous objections during videotaped deposition made it impossible to use videotape effectively at trial).

4. Instruct the jury that counsel's obstructive conduct may be taken as evidence of client's consciousness of wrongdoing.

Generally, in a civil case, evidence of destruction or suppression of evidence permits an inference of consciousness of the weakness of the whole case. *Thore v Boska* (1974) 38 CA3d 558, 567, 113 CR 296; 1 Witkin, California Evidence, *Hearsay* §111 (4th ed 2000). Evidence Code §413 specifically provides for the trier of fact to consider a party's willful suppression of evidence.

A party will be held responsible for conduct of an attorney with authority to represent the party if the attorney suppresses relevant evidence. See *People v Weiss* (1958) 50 C2d 535, 553, 327 P2d 527 (dictum). If an attorney's statements in unverified pleadings can be used against the client (see *Dolinar v Pedone* (1944) 63 CA2d 169, 146 P2d 237), the party should also suffer the consequences when the attorney thwarts discovery by a barrage of improper objections, coaching, and speeches that would never be tolerated at trial. See *Barker v Bledsoe, supra*.

5. Bar proof of an issue because full and fair discovery has not been permitted.

Code of Civil Procedure §2023(b) specifically contemplates issue preclusion, as well as other severe sanctions listed below. An argument can be made that this is an "exclusive" list of sanctions in state court. However, the milder steps described above are not true "sanctions" but are only exercises of the court's discretion to order proof. Existence of extreme sanctions (such as dismissing an action) certainly suggests that the court has power to proceed by ordering milder measures. Code of Civil Procedure §2023(b) does require notice and opportunity for hearing, with no specific guidelines.

Numerous cases support trial judges' barring testimony or proof of an issue because discovery has been impeded. Generally, these cases arise when one side fails to fully answer interrogatories or provide documents and then tries to prove at trial matters covered by those interrogatory answers or documents. See, *e.g., Marriage of Stallcup* (1979) 97 CA3d 294, 300, 158 CR 679 (financial evidence excluded when husband refused to supply it to court-appointed accountant before trial); *A & M Records, Inc. v Heilman* (1977) 75 CA3d 554, 566, 142 CR 390 (defendant who had earlier asserted self-incrimination privilege precluded from testifying on same subject matter at trial); *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 274, 105 CR 276 (testimony of witness barred when name was deliberately excluded in response to interrogatory); *Scott & Fetzer Co. v Dile* (9th Cir 1981) 643 F2d 670 (failure to supplement interrogatory answers bars new evidence at injunction hearing).

Note, however, that sanctions may not be imposed if the failure to answer is based on the privilege against self-incrimination and if the nonresponsive party did not willfully deprive an adversary of information or use obstructive discovery tactics that subjected the adversary to unfair surprise at trial. See *Pacers, Inc. v Superior Court* (1984) 162 CA3d 686, 689, 208 CR 743 (distinguishing *Thoren v Johnston & Washer, supra*).

Even if a party provides *some* information in response to discovery, if answers are significantly incomplete because of omissions or obstructive behavior, the court may bar evidence on the subject matter at trial. *Moody v Schwartz* (SD Tex 1983) 97 FRD 741. Improper objections and refusals to answer risk similar sanctions. *Weiner King, Inc. v Weiner King Corp.* (CCPA 1980) 615 F2d 512, 521 (objection to interrogatories, on grounds that information sought was matter of public record, limited testimony of objecting party).

6. Dismiss the complaint or bar proof in defense of the complaint.

The "death penalty" sanction finds substantial support in case law. However, this ultimate penalty is almost never imposed unless there has been a willful failure to comply with a court's prior discovery order. See *Duggan v Moss* (1979) 98 CA3d 735, 743, 159 CR 425 (useful checklist on determining degree of fault); *In re Rubin (Rubin v Belo Broadcasting Corp.)* (9th Cir 1985) 769 F2d 611 (answer should not have been struck without warning nonproducing party and indicating deficiencies in discovery responses). The dismissal sanction is proper for party misconduct, even if the attorneys were acting in good faith. *Calvert Fire Ins. Co. v Cropper* (1983) 141 CA3d 901, 190 CR 593.

Other cases supporting dismissal of complaint or answer for flagrant discovery violations include *Williams v Travelers Ins. Co.* (1975) 49 CA3d 805, 123 CR 83; *U.S. v DiMucci* (7th Cir 1989) 879 F2d 1488 (relatively early in case, if plaintiff is prejudiced by defendants' failure to comply with discovery orders, district court need not consider lesser sanctions before entering default); *Chism v National Heritage Life Ins. Co.* (9th Cir 1981) 637 F2d 1328 (failure to answer interrogatories and comply with local rules on pretrial conference); *Al Barnett & Son v Outboard Marine Corp.* (3d Cir 1979) 611 F2d 32 (dismissal for failure to extract relevant information from business records and other discovery violations).

Standing order for depositions. The following article originally appeared in 16 CEB Civ Litigation Rep 97 (Mar. 1994):

Infanticide: Strangling Deposition: Abuses in the Cradle

by William A. Brockett

I have a frequent vision during depositions. My opponent and I are swaddled in infant's clothes, sitting in giant high chairs. From this position, towering over the confused witness, we scream at each other, throw food, and pound our rattles on our trays.

Far too many depositions degenerate into intellectual food fights. Lawyers pontificate, witnesses are coached, the search for truth is balked.

If every judge would issue the standing order below—an order with ample support in experience, statute, and case law—the litigation world would be vastly improved.

Although depositions are theoretically to be taken "as permitted at trial" (CCP §2025(*l*)(1)), this is a rule honored in the breach. Because there is no judge present in depositions, counsel are checked only by their own consciences, and the off chance that egregious behavior *might* result in sanctions someday.

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

One solution used for fractious depositions is the appointment of a referee (state court) or the intervention of a magistrate judge (federal court). This can be expensive—and unnecessary if courts will issue prophylactic orders.

Proposing Standing Order

Federal district courts and state superior courts should issue a standing order in *all* cases as follows:*

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

2. All objections, except those which would be waived if not made at the deposition under CCP §2025(m)(2) [Fed R Civ P 32(d)(3)(B)] and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to CCP §2025(n) [Fed R Civ P 30(d)(3)], shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. Counsel shall not make objections or statements that might suggest an answer to a witness. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions (or during breaks or recesses), except for the purpose of deciding whether to assert a privilege.

6. Any conferences that occur pursuant to, or in violation of, guideline 5 are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences that occur pursuant to, or in violation of, guideline 5 shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

8. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

Authority

Because most of the skirmishing about depositions takes place in the trial courts, case law is primarily found in federal decisions. Note, however, the court's comment in *Marriage of Leman* (1980) 113 CA3d 769, 783, 170 CR 642: "[Counsel for deponent] used his objections to stifle discovery and to virtually bring the deposition to a grinding halt.… The opposition of [deponent and his counsel] to the motion to compel discovery was specious, replete with linguistic legerdemain, half truths and pettifoggery."

Code of Civil Procedure §2025(*l*)(1) requires: "Examination and cross-examination of the deponent shall proceed as permitted *at*

trial under the provisions of the Evidence Code." [Emphasis added.] This provision, standing alone, supports elimination of "obstructive" objections or "coaching" objections.

Code of Civil Procedure §2025(m)(3) provides that:

Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or the materials produced are unnecessary and are not waived by the failure to make them before or during the deposition.

Federal Rules of Civil Procedure 30 has been amended, effective December 1, 2000. Deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a court-ordered limitation, or to move, under Fed R Civ P 30(d)(4), that deposition be closed or limited for deposition abuses.

Federal opinions blasting attorneys for improperly instructing witnesses not to answer or for otherwise obstructive behavior are legion. See, *e.g., Ralston Purina Co. v McFarland* (4th Cir 1977) 550 F2d 967, 973 ("highly improper" to instruct the witness not to answer on grounds other than privilege); *Brignoli v Balch, Hardy & Sheinman, Inc.* (SD NY 1990) 735 F Supp 100 (sanctioning attorneys for excessive coaching and improper instructions not to answer); *Eggleston v Chicago Journeymen Plumbers' Local 130* (7th Cir 1981) 657 F2d 890, 903 (improper to instruct not to answer on basis other than privilege or irrelevant questions touching on sensitive areas such as race).

The U.S. District Court for the Eastern District of New York has issued a Standing Order on Effective Discovery in Civil Cases (effective Mar. 1, 1994), reported at 102 FRD 339, which forbids objections "which are used to suggest an answer" to the witness, and criticizes repeated directions to a witness not to answer questions for nonprivileged answers.

An order nearly identical to the proposed standing order in this article may be found at *Hall v Clifton Precision* (ED Pa 1993) 150 FRD 525, reported at 15 CEB Civ Litigation Rep 547 (Dec. 1993).

If an attorney objects to questions as "previously answered," the party objecting has the duty to point out specifically where the previous answers were given. *Fuss v Superior Court* (1969) 273 CA2d 807, 818, 78 CR 583.

Should an attorney defending a deposition find that questions are harassing or completely unlikely to lead to discoverable evidence, or numbingly repetitious, the remedy is not obstruction of the deposition. Rather, the deposition can be terminated and application made for a protective order pursuant to CCP §2025(i) or Fed R Civ P 26(c). Or trial judges can unilaterally punish improper behavior by exposing it to the jury's gaze. See Brockett, *Trial Run—Discovery Abuse: Ammunition for the Firing Squad*, 12 CEB Civ Litigation Rep 101 (May 1990).

Conclusion

Lawyers, send this article to your judges. Judges, consider applying some of the strictures suggested here *before* depositions degenerate into name-calling and discovery motions. A world without infantile depositions will be a better place:

1. Lawyers and their clients will spend less time at depositions.

2. Judges and commissioners will spend less time adjudicating often-petty deposition disputes.

3. Lawyers will be less cranky, which may lead to earlier settlements.

An ounce of prevention …

---

*Items 1 through 4 are the heart of this proposed standing order. Items 5 through 8 are optional, for cases that call for closer judicial control over deposition "game-playing."

Improper Objections and Proper Responses

[§9.4] Instruction Not to Answer Based on Form

The Los Angeles Law Department Policy Manual has been incorporated into other Los Angeles Superior Court Rules, and the substance of former Rule 316 was not carried forward.

Operative July 1, 1987, the reference in Book §9.4 to former CCP §2019(c) should be to CCP §2025(m)(2); the reference to former CCP §2034(a) should be to CCP §2025(o). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

Under new CCP §2025(o), if a deponent fails to answer any question, the deposing party may, within 60 days after completion of the record of the deposition, move the court for an order compelling an answer. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. The moving party still must lodge with the court a certified copy of any parts of the deposition that are relevant to the motion. Because of these changes, the practice tip in Book §9.4 no longer applies.

Federal Rules of Civil Procedure 30 has been amended, effective December 1, 2000. Deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a court-ordered limitation, or to move, under Fed R Civ P 30(d)(4), that deposition be closed or limited for deposition abuses. See Update §9.3.

If a witness is a nonparty, written notice and all papers regarding the motion must be served on the witness. Cal Rules of Ct 337.

California Civil Discovery Practice §§5.26, 5.30 (Cal CEB 1975) have been replaced by 1 California Civil Discovery Practice §§5.77-5.80, 5.53-5.57 (3d ed Cal CEB 1998).

The reference in Book §9.4 to Fed R Civ P 30(d) should be to Fed R Civ P 30(c).

[§9.5] Misleading

To Main Book

Operative July 1, 1987, the reference in Book §9.5 to former CCP §2019(d) should be to CCP §2025(n). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

The citation in Book §9.5 to *Fidelity Bankers Life Ins. Co. v Wedco, Inc.* (D Nev 1984) 102 FRD 41 is in error. The correct citation is *R.E. Linder Steel Erection Co. v U.S. Fire Ins. Co.* (D Md 1983) 102 FRD 39. The citation in Book §9.5 to *Dennis v BASF Wyandotte Corp.* (ED Pa 1983) 101 FRD 301 is also in error. The correct citation is *Lowe v Philadelphia Newspapers, Inc.* (ED Pa 1983) 101 FRD 296.

California Civil Discovery Practice §§2.31-2.33 (Cal CEB 1975) have been replaced by California Civil Discovery Practice §§5.118-5.120 (3d ed Cal CEB 1998).

[§9.6] Question Calls for Speculation

To Main Book

Operative July 1, 1987, the reference in Book §9.6 to former CCP §2016(b) should be to CCP §2017(a). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

[§9.8] Leading

To Main Book

In the author's experience, another important exception to the objection of "leading" is the practice of asking leading questions on redirect examination. It is almost impossible to conduct proper redirect examination without using leading questions to point the witness to the specific area of cross-examination you want to cover. For example:

> Q. I want to bring you back to the night of August 16, 1986. You said during cross-examination that you worked late that night, leaving the office when it was quite dark. Please search your memory: Did you leave late on August 16, 1986?
>
> A. I left late on August 18th. There were so many dates in this case that I got confused about that question on cross-examination.

Even though this question literally suggests an answer, there is no other practicable way to correct mistakes or distortions, short of having a recess and giving your friendly witness a script of corrections.

[§9.9] Irrelevant

To Main Book

Operative July 1, 1987, the reference in Book §9.9 to former CCP §2016(b) should be to CCP §2017(a). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

For discussion of relevancy in relation to constitutionally protected privacy issues arising in depositions, see *Tylo v Superior Court* (1997) 55 CA4th 1379, 64 CR2d 731.

[§9.10] Asks for a Legal Conclusion

To Main Book

California Trial Objections §§20.2-20.4 (2d ed Cal CEB 1984) have been replaced by California Trial Objections §§20.2-20.4 (10th ed Cal CEB 2004).

[§9.13] Improper, Except as the Subject of Interrogatories

To Main Book

Operative July 1, 1987, the reference in Book §9.13 to former CCP §2016(b) should be to CCP §2017(a). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

ORGANIZING, CONDUCTING, AND DEFENDING A DEPOSITION

[§9.15] Commencement

To Main Book

The original deposition transcript now *must* be mailed to the attorney taking the deposition, who must retain the original until at least six months after final disposition of the action. CCP §2025(s).

The California Civil Discovery Act of 1986 (Stats 1986, ch 1334), and amendments to that legislation (Stats 1987, ch 86, operative July 1, 1987), replaced former CCP §§2016-2037.9 with new CCP §§2016-2036. The references in Book §9.15 to former CCP §2019(e)(1) should now be to CCP §2025(q). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

As amended, Fed R Civ P 30(e) now provides in part that, "if requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them."

California Civil Procedure During Trial §5.30 (Cal CEB 1982) has been replaced by California Trial Practice: Civil Procedure During Trial §5.59 (3d ed Cal CEB 1995).

[§9.16] Taking Depositions

To Main Book

A fact witness must have a clear set of rules for how to respond to each question. For suggestions on witness preparation, see Gardner, *The Ten Commandments of Witness Prep*, 10 The Practical Litigator 7 (Sept. 1999).

Operative July 1, 1987, the reference in Book §9.16 to former CCP §2016(b) should be to CCP §2017(a). Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

4. The following phrases are effective in bringing a meandering witness back to home base or providing definition to vague testimony:

a. "In an effort to refresh our recollection, let me suggest …."

b. "I have reason to believe XYZ. Is it true?"

c. "I would like to clear up one point in your testimony. Is it true that … ?"

d. "I suggest that XYZ is true. I would like to give you an opportunity to correct your prior testimony. Do you wish to do so?"

e. "I represent that XYZ is true." [Then ask related question.]

f. "Let me know if I correctly summarize your testimony." [Summarize.] "Is that a fair summary?"

g. [Provide detailed fact statement.] "Is that correct?" [This is especially useful in recreating complex events or opinions.] If answer is no, ask: "What have I said that is wrong?"

[§9.17] Defending Depositions

To Main Book

22 Wright & Graham, Federal Practice and Procedure §5222 (1978) has been replaced by 8A Wright et al., Federal Practice and Procedure §2116 (4th ed 1998).

Both parties and nonparty witnesses have a right under Fed R Civ P 26(b)(3) to obtain copies of any statements they have made about the subject matter of the litigation *before* they are deposed. The holders of such statements can delay providing statements until after deposition only if they make a showing of good cause. It is not sufficient to simply state that the statements will lose impeachment value if provided in advance of deposition. *Sims v Lafayette Parish Sch. Bd.* (WD La 1992) 140 FRD 338.

PRACTICE TIP

Showing documents to a witness may waive the work product privilege on those documents, if they have refreshed the witness's recollection. Therefore, counsel should not show a deposition witness any document in preparation that the attorney is not prepared to have examined by the opponent and made an exhibit. Recently, a Nebraska federal court held that the waiver of privilege requires only *identifying* documents that inform the witness with regard to testimony given. See *Omaha Pub. Power Dist. v Foster Wheeler Corp*. (D Neb 1986) 109 FRD 615; *Sporck v Piel* (3d Cir 1985) 759 F2d 312 (construing Fed R Evid 612 as waiving the work product privilege for documents presented to witness preparing for deposition). See also *Derderian v Polaroid Corp.* (D Mass 1988) 121 FRD 13 (if documents used to refresh recollection before, rather than while, testifying at deposition, attorney-client privilege is waived under Rule 612 only if court finds that disclosure is necessary in interests of justice).

It is always good practice to remind your witnesses not to bring any documents to the deposition and confirm that they have no documents when they show up to testify. Conversely, a well-placed question to opposing counsel's witness about any documents he or she might have brought may offer surprising information that discovery had not previously yielded.

For a discussion of the tension between Fed R Evid 612 (refreshing recollection) and Fed R Civ P 26(b)(3), see Robinson, *Duet or Duel: Federal Rule of Evidence 612 and the Work Product Doctrine Codified in Civil Procedure Rule 26(b)(3)*, 69 U Cin L Rev (Fall 2000).

In *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883, the California Supreme Court held that CCP §2025(o), permitting a party to move for an order compelling a deponent "to answer any question" is not limited to verbal answers, but also includes nonverbal responses. In *Emerson,* plaintiff was asked during a videotaped deposition to diagram his position and that of the defendant's product, a radial arm saw, at the time of the accident. Overruling *Stermer v Superior Court* (1993) 20 CA4th 777, 24 CR2d 577, the court ruled that the language of CCP §2025(o) compelling a deponent "to answer any question" should be construed to include nonverbal as well as verbal responses at a videotaped deposition, in accordance with the "usual, ordinary" meaning of the words. 16 C4th at 1107. The court reasoned that construing §2025(o) to include nonverbal and verbal responses at a videotaped deposition harmonizes CCP §2025(o) with the CCP §2025(*l*)(1) requirement that "[e]xamination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code." CCP §2025(*l*)(1). The court noted that "[i]t is undisputed that at trial evidence may include a nonverbal answer to a question, including a physical demonstration or reenactment of an incident." CCP §2025(*l*)(1). The court concluded that refusing to comply with the trial court's order requiring the performance of a demonstration or reenactment is subject to discovery sanctions, at the court's discretion, and disobeying a court order may constitute misuse of the discovery process under CCP §2023(a)(7).

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

For advice and practice tips on defending a deposition, see Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, 21 GP Solo 32 (ABA Mar. 2004).

[§9.18] Other Deposition Considerations

To Main Book

The reference in the practice tip in Book §9.18 to former Fed R Civ P 45(e)(1) should now be to Fed R Civ P 45(b)(2).

The third sentence of the practice tip in Book §9.18 should be corrected to state: "You cannot force live testimony in a civil trial from any witness, party or not, if he or she resides out of state (unless the litigation is in federal district court, in which case an out-of-state witness who lives within 100 miles of the district can be compelled to testify). See CCP §1989; Fed R Civ P 45(e)(1)."

Sometimes counsel may be frustrated by deposing a series of party representatives who profess little knowledge about the issues of the case. The solution is easy: Subpoenas under CCP §2025(d)(6) or Fed R Civ P 30(b)(6) require the corporation, partnership, or agency to designate *and prepare* witnesses to fully testify on the topics designated in the notice of subpoena. See *FDIC v Butcher* (ED Tenn 1986) 116 FRD 196 (construing Fed R Civ P 30(b)(6)).

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

The practice of taking opposing counsel's deposition has become increasingly popular. But at least one federal court has viewed this development negatively and has limited such depositions to situations in which:

1. No other means exist to obtain the information than to depose opposing counsel;

2. The information sought is relevant and nonprivileged; and

3. The information is crucial to preparation of the case.

Shelton v American Motors Corp. (8th Cir 1986) 805 F2d 1323. The court further held that counsel being deposed need not describe whether specifically described documents exist, because doing so would indicate that counsel had reviewed the documents and might be relying on them in preparing the client's case. The court indicated that the work product rule applied and that the documents could have been obtained by other means. But see *In re Interactive Network, Inc.* (Bankr ND Cal 2000) 243 BR 766 (motion for protective order to quash deposition subpoenas denied in part; attorney who was fact witness could be deposed). See also *U.S. v Philip Morris Inc.* (DC Cir 2002) 209 FRD 13 (motion to quash depositions of defendants' in-house counsel denied when counsel were not litigation or trial counsel).

If deposition corrections amount to fraud, appropriate sanctions may include dismissal of the entire action. See *Combs v Rockwell Int'l Corp.* (9th Cir 1991) 927 F2d 486, in which plaintiff's counsel made 36 changes, many of which materially altered the substance of plaintiff's testimony. Plaintiff signed the revised deposition and swore under penalty of perjury that he had reviewed the transcript and had made the changes himself. The court held that dismissal of the action with prejudice was proper.

Another federal case suggests that a deposition may be reconvened to ask a witness about changes that directly contradict original deposition testimony. See *Willco Kuwait (Trading) S.A.K. v De Savary* (D RI 1986) 638 F Supp 846, 853. The original answers remain in the record and may be used for impeachment purposes. *Lugtig v Thomas* (ND Ill 1981) 89 FRD 639.

Failure to provide a statement explaining changes to a deposition (such a reason is virtually never presented) can result in the trial court's invalidating the changes. *Bongiovanni v N.V. Stoomvaart-Matts "Oostzee"* (SD NY 1978) 458 F Supp 602 (district court acknowledged right to ignore revisions but chose not to exercise it in this case).

The courts will protect high-ranking officials from being deposed unless the party taking the deposition can show that the official was personally involved in the lawsuit and that less intrusive discovery methods have been exhausted. *Liberty Mut. Ins. Co. v Superior Court* (1992) 10 CA4th 1282, 13 CR2d 363.

TAKING AND USING VIDEOTAPE DEPOSITIONS

[§9.21] Videotaping Depositions

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

See Update §9.17 for discussion of *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883, on videotaped depositions requiring demonstrations and reenactments.

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

Code of Civil Procedure §2025(k)(2)-(4) now requires that services and products offered to one party or its attorney attending a deposition (*e.g.*, deposition officer's notations or comments about a witness's demeanor) must be offered to all parties and their attorneys. Violation of this requirement may result in a fine of up to $5000. CCP §2025(v).

The following is adapted from an article that originally appeared in 12 CEB Civ Litigation Rep 190 (Aug. 1990).

Reasons for videotaping depositions are as follows:

- *Videotaping is an effective check on discovery abuse.* Attorneys are far less likely to bully witnesses, interpose foolish objections, adjourn repeatedly for consultation, or coach witnesses if they are being recorded on videotape.

- *Videotape, properly presented, is far more effective than a dry transcript reading at trial.* Depositions are usually read into evidence directly or by placing one attorney on the stand "acting" the witness, while another attorney reads questions from the lectern. This is no substitute for a videotape of the witness, presented in living color, warts and all. On the screen, short pauses in answering questions seem to stretch out to eternity. Evasiveness, facial tics, and inappropriate jokes are all magnified.

- *Friendly witnesses (especially experts) can surprise the opponent by giving trial testimony at deposition.* This topic is important and is dealt with separately below.

- *Videodisc excerpts spice up closing argument.* In our six-week trial, the trial judge permitted presentation of testimony on videodisc during closing. These videodisc excerpts were a powerful addition to oral argument.

State and federal courts have relaxed the rules on videotaping, making it less expensive and easier to do. In state court, you may videotape (while using a stenographic reporter) without a prior stipulation or court order. Code of Civil Procedure §2025(*l*)(1) permits a party to record testimony on videotape if the intention to do so is stated in the Notice of Deposition or if the parties agree. See California Civil Discovery Practice §2.100 (3d ed Cal CEB 1998). Simultaneous recording may also occur if any other party promptly (and in no event less than three calendar days before the date for which the deposition is scheduled) serves a written notice of this intention on all other parties and on a nonparty deponent. See Civil Discovery §2.102 for a sample form. If this notice is given as late as three calendar days before the deposition, notice must be given by personal service under CCP §1011.

Specific requirements for taking a videotape deposition are spelled out in CCP §2025(*l*)(2) and permit the operator of the videotape recording equipment to be an employee of the attorney taking the deposition. Most home cameras with a boom mike are sufficient to take satisfactory videotapes. Be sure that lighting is adequate and that the room is quiet.

Federal Rules of Civil Procedure 30(b)(2) has been amended to permit any party to take a deposition by videotape without prior court order. In addition, with prior notice to the deponent and other parties, a party not taking the deposition may designate videotaping, which must be done at that party's expense. Fed R Civ P 30(b)(3).

Surprise! You're on Candid Camera

In state court, the deposition of *anyone* may be used at trial if the deponent resides more than 150 miles from the place of trial or is

otherwise unavailable. CCP §2025(u)(3)(A)-(B).

This provision presents a surprising opportunity. It is possible to take the deposition of any witness residing more than 150 miles from the place of trial (more than 100 miles for federal court (Fed R Civ P 32(a)(3)) and convert the videotaped deposition into the *trial* testimony of the witness.

Imagine the surprise of an opponent who notices the deposition of your expert, who resides more than 150 miles from the place of trial.* Your adversary takes a normal discovery deposition. When discovery questions are finished, you ask a complete set of *trial* questions of your own expert.

If the expert performs well, you have no obligation to tender the expert live at trial, but you can use the videotaped deposition with little or no cross-examination by opposing counsel. If the expert bombs, bring the expert to trial. The tape will then provide a dress rehearsal, with good examples of things not to do.

The power of videotape thus changes dramatically the way in which depositions must be taken, as discussed immediately below.

Videotaping Depositions Demands: New Techniques

If your opponent serves a notice of a videotape deposition of any witness who lives more than 150 miles from the place of trial (100 miles in federal court), you must make yourself ready to take a full trial deposition, including searching cross-examination. If the witness resides close to the place of trial, you must still be aware that death, illness, or excused absence during trial may convert deposition testimony into trial testimony. Videotaped depositions of treating physicians or experts may be used at trial with prior notice, even if the witness is available.

Therefore, in addition to asking the usual discovery questions, you must be prepared to confront the witness with robust cross-examination. In many cases this will mean alerting the witness in advance to hard questions that you would normally reserve for trial.

The video camera normally focuses on the witness's head and shoulders. From time to time, the camera operator may pan back if counsel are asking long questions or arguing with one another. The witness should dress as though for trial. Lawyers should keep their coats on, and all concerned should assume they are being viewed by a jury on large television screens. Chewing gum, laughing at the wrong time, sparring with the cross-examiner, and using sarcastic tones of voice all come out badly on videotape.

If you are defending the deposition, try to pretest your witness on camera. Witnesses should look directly at the camera unless their mannerisms make them appear shifty if they do so. Witnesses should not take a long time to answer questions: Long pauses seem like an eternity on tape.

References to exhibits must be clear-cut. The questioner must be careful to identify all documents shown the witness by a descriptive title that the jury will understand.

Remember, the jury may see only short excerpts from many days of deposition. If you feel that an excerpt is important, you must be sure to ask questions that put the testimony in context. The question itself should let the jury know that you are asking about "the contract of November tenth," or "the day after your head-on collision."

Witnesses will often refer to earlier testimony in deposition. For example, if you ask a witness whether he has any document to back up a statement, the witness may reply "None, other than those I have referred to yesterday." That will not suffice for court use. You must follow up by saying "Please remind me of the documents you referred to yesterday." Otherwise, the testimony is incomprehensible in court.

If counsel peppers the videotape deposition with objections, the trial court may sanction counsel for making it difficult to use the tape at trial. *Kelly v GAF Corp.* (ED Pa 1987) 115 FRD 257 (court ordered new trial).

PRACTICE TIP

The intention to videotape should be stated clearly in any Notice of Deposition, even in federal proceedings.

Videotaping without a court reporter present raises problems. There is still no good way to rapidly review a videotape, edit it, or present it to the court for motions. In my opinion, videotaping should always be accompanied by a stenographic record.

Be sure the deposition room has proper lighting. Witnesses should dress in darker colors, avoid white shirts or blouses, and not wear prints or checks.

Copies of the tape should be made available promptly to opposing counsel, at cost.

Reduce as much as possible ambient noise, such as air conditioning or outside traffic, which is exaggerated on videotape.

Videotaping should begin before the oath is given, and the tape should run nonstop, even through recesses, to avoid the easy error of forgetting to turn the machine back on.

Some services provide a time clock and date in the corner of the screen. This is distracting to the jury at trial. After editing, the time clock and dates may jump around.

Find a good videotape service. The quality of the videotaping equipment is very important for jury presentation. Although three-quarter-inch tape provides the best picture, most courtrooms and law offices are equipped to show standard half-inch tape in VHS format.

See Civil Discovery §5.11 for a checklist of recording procedures.

---

[*] If you want to use a videotape of an expert who lives within 150 miles and is available, surprise is impermissible. For an available treating physician or any expert, videotape may be used at trial only if the notice of deposition reserves the right to use the deposition at trial. CCP §2025(u)(4). Note that if you intend to use at trial the testimony of a treating or consulting physician, or expert who is otherwise available, the operator must be a person authorized to administer oaths and must have no relationship of financial interest with any attorney or party. Parties attending the deposition may agree on the record to waive this requirement. See CCP §§2025(l)(2)(B), (u)(4).

[§9.22] Trial Use of Videotapes

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

"Day in the Life" videos are effective to show a jury the disabling effects of accidents. Such videos are admissible, in the discretion of the court, if they fairly represent the impact of injuries on the plaintiff's daily activities. Because they can show everyday problems in a way that oral testimony may not convey, these videos are not merely cumulative evidence. *Jones v City of Los Angeles* (1993) 20 CA4th 436, 24 CR2d 528. In *Jones,* the court noted that there was no showing of self-serving behavior or exaggerated difficulty in performing ordinary day-to-day tasks, and the subject of the film was available for cross-examination.

The following is from an article that originally appeared in 12 CEB Civ Litigation Rep 288 (Nov. 1990):

Trial Run: The Videotape Revolution (Trial)

by William A. Brockett

Setting the Stage

It is now relatively inexpensive and simple to show videotaped depositions. The cost to have an outside service arrange full video presentation of depositions and documents should range from $20,000 to $80,000, depending on the size and complexity of the case. This amount includes rental of necessary equipment. More economical alternatives are available.

In a recent trial, we provided the six-person federal jury (plus four alternates) with 25-inch monitors, one on each side of the jury box. The judge, witness, opposing counsel, and cross-examiner all had their own PC-sized color monitors. The equipment (which included two videodisc players and a VCR), and wiring fit easily into a standard federal courtroom. In a smaller-sized state courtroom, I would recommend projection TV, with one large screen shared by judge, jury, and all participants.

We used two large high-fidelity speakers from an organization providing equipment to litigators. Those two speakers alone were sufficient to broadcast the voices of all of the videotaped deponents to the entire courtroom. If it is important for courtroom spectators to hear clearly, I advise placing a second set of speakers in front of the spectators' seating area.

Even a 25-inch TV monitor will not enlarge a typewritten document enough for a single sheet to be read easily from the jury box. There are several ways to make written documents readable:

1. Use a close-up. The first thing the jury sees is the entire document; the second shot is a zoom-in close-up of the important sentence or paragraph.

2. Present the entire document on the screen, have it fade out, and present text of the important parts of the document on a black background with bold letters.

3. Best, show the entire document on the screen, and then have highlighted portions leap out in bold yellow or blue letters, superimposed on the original document. This was easy to do, and the trial judge in our case permitted it over objection, reasoning that it was no different from using yellow highlighter on a transparency, which is a common practice.

If you are running on a tight budget, you should present all documentary evidence by conventional methods (overhead projector and transparencies) and use simple videotape, edited as described below, to present depositions. This can usually be done for less than $5000. If your budget allows, it is far better to use the evolving videodisc technology, which has superior sound and picture quality and permits instant retrieval of desired segments instead of lengthy searches (analogous to the difference in locating tracks on LPs or CDs as opposed to audiotape). You will need a back-up PC and keyboard to retrieve documents in depositions. For primary retrieval, all extracts of depositions and all documents can be coded with a "bar code," similar to that printed on supermarket products. By passing a light wand (similar to a pen in shape and size) over the bar code, the examiner can retrieve any document or any deposition extract in half a second.

Editing Deposition Videotapes

It is important that all objections and colloquy of counsel be edited out. Most trial judges will allow the videotape to show no more than would be presented if depositions were read. Uniformly, attorneys reading depositions skip over objections and colloquy of counsel.

If depositions have been impeded by sham objections and unfair comments, you should consider coming to court with two versions, one edited and one unedited, and pressing the judge to permit the jury to see how the examination was hampered by improper tactics. See Update §9.3 for discussion of sanctions for discovery abuse.

In federal court, counsel typically must pose all objections to deposition testimony in advance of trial. The court hears from both sides and rules on the objections. If you are working with videotape alone, you need to press the court for early rulings so that you can edit out videotape segments that have been ruled inadmissible. In state court, you should use a pretrial motion in limine to clear this underbrush.

You will not face this editing problem if you work with videodisc. Laserdisc technology permits you to segment dozens of small extracts from a deposition, and pull up to the screen one segment at a time, ignoring those that have been ruled inadmissible.

Potential Use of Videotape at Trials

Videotape and videodisc presentations will be a brand-new phenomenon for most judges for years to come. Each judge will react differently, but it is possible to predict the kinds of limits that will be placed on trial use of videotape based on practice in conventional areas.

Below are suggested uses of videotape:

Opening Statement. Videotapes of witnesses' testimony will not be permitted. Charts or demonstrative evidence will be permitted, but only if they are cleared in advance with opposing counsel or the court, just as with blowups and proposed trial exhibits.

Unavailable Witnesses. Videotaped testimony of unavailable witnesses is admissible.

Impeachment. Videotape as impeaching material is admissible and may be the most powerful use of video technology; confronting the witness with contradictory testimony on a monitor only inches from the witness box can make an evasive witness visibly flinch.

Admissions. Videotaped admissions of a party, or of a party representative, without the need to allow the witness to explain the videotape, should be admissible. See, *e.g.,* Northern District of California Guidelines for Discovery, Motion Practice and Trial, p 9 (1981).

Closing Argument. Exhibits admitted into evidence and demonstrative charts shown to the jury during trial may be replayed on videotape. In addition, extracts of deposition testimony should be permitted on videotape. The jury only hears again evidence of deposition testimony in the exact form it heard the evidence during trial. This is no different from deposition testimony that is read to the jury during trial, and then read to them again during closing argument. This is a powerful way to remind the jury of key evidence in the trial.

Confrontation With Third Party Inconsistent Testimony. Confronting Witness A with Witness B's videotaped testimony is logically proper. If videotaped deposition testimony is otherwise admissible, the examiner should be permitted to impeach a witness, or attack credibility, by asking the witness to explain inconsistent videotaped testimony of another witness.

For discussion of demand for production of a videotape used by a witness to refresh memory, see Update §6.9.

Miscellaneous Trial Tips

Because of logistics, expense, and changed circumstances, you will find yourself using videotape and videodisc at some times and typewritten deposition transcripts at others. Be sure someone logs in all segments that are presented by videotape. You will need to use the logs to establish a foundation for using those segments during closing argument. You may also want to demonstrate that segments proffered for rebuttal have not already been shown to the jury.

Videodiscs can hold large quantities of documents (up to 50,000 pages), but only one half hour of deposition testimony per disc. Do not marshal deposition testimony by topic; if you do, you will then have to jump from disc to disc with longer testimony of some witnesses. It is more effective to have all of the extracts for a given witness on a single "witness disc." Technology permits random access to two discs at once, which will give you a full hour of deposition extracts to play with, sufficient for complete cross-examination of most witnesses.

Most judges will want videotaped testimony of unavailable witnesses to be presented in chronological order. A strong argument can be made that a witness's testimony should be presented by topic, but you should anticipate the requirement that videotape extracts be played in the order testimony was given.

Do not place all your eggs in one basket. Have back-up transparencies for the documents and marked deposition transcripts to use instead of videotape or videodisc, if needed.

Do not hesitate to substitute reading a deposition in lieu of videotape if a witness is especially sympathetic.

Conclusion

Videotapes and videodisc technology add a new dimension to trials. For the first time, deposition evasion and demeanor can be vividly exposed to a trial jury.

The judge and jury will be impressed by intelligent use of video in the courtroom. And perhaps as important, you will have the fun of adding a new element to your tried-and-true trial techniques.

10

Examination of Jurors

OVERVIEW

[§10.1] Major Aims of Voir Dire

To Main Book

Proposition 115 (the Crime Victims Justice Reform Act), effective in 1990, created sharp differences between voir dire in criminal cases and voir dire in civil cases. In criminal cases, voir dire is limited to obtaining information supporting challenges for cause. A ten-year experiment with permitting counsel to question prospective jurors only on a showing of good cause ended in 2001 with an amendment to CCP §223 (Stats 2000, ch 192, §1), discussed below.

In civil cases, liberal counsel voir dire, formerly spelled out only in court rules, is now provided for by statute. CCP §222.5. As a result, certain tactical advice discussed in the book may no longer be applicable. These statutory changes are discussed in more detail below and in William A. Brockett's article, *Voir Dire Revisited: The Bull's Viewpoint,* reproduced in Update App F.

Criminal Cases

Under Proposition 115, former CCP §§223 and 223.5 were repealed and new CCP §223 was enacted effective June 6, 1990. That provision, as enacted, applied to criminal cases only and provided that the examination of jurors must be conducted by the court. Attorneys for the parties were permitted to supplement the court's examination on a showing of good cause. Code of Civil Procedure §223 was amended by Stats 2000, ch 192, §1 (effective January 1, 2001). It now provides that the court conducts an initial examination of prospective jurors, after which attorneys for each party have the right to examine potential jurors, subject to a time limitation imposed by the court in its discretion. See CCP §223. In addition:

- The examination of prospective jurors must be conducted only in aid of the exercise of challenges for cause;
- Voir dire of any prospective jurors must, when practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases (see discussion in Update §10.12); and
- The trial court's exercise of its discretion in the manner in which voir dire is conducted is not a ground for reversal of any conviction unless it has resulted in a miscarriage of justice, as specified in Cal Const art VI, §13.

California Rules of Court 4.200 (former Rule 228.1) provides for a pre-voir-dire conference for the court to determine various aspects of the case and procedures for deciding requests for excuse for hardship and challenges for cause and permits the court to require the parties to submit all proposed questions for prospective jurors to the court and opposing counsel in writing before the conference. Rule 4.201 (formerly Rule 228.2) was amended, effective January 1, 2001, to require the trial court to permit supplemental voir dire examination by counsel in criminal cases as mandated by CCP §223.

For a full discussion of jury selection in criminal cases, see California Criminal Law Procedure and Practice, chap 29 (7th ed Cal CEB 2004). For a list of publications that can assist trial counsel and courts in conducting voir dire in capital cases, see *People v Heard* (2003) 31 C4th 946, 966 n9, 4 CR3d 131.

Civil Cases

In 1990, CCP §222.5 was enacted, defining the parameters in civil jury trials of examination of prospective jurors by counsel after the judge's initial examination. That section provides that, to enable counsel to intelligently exercise both peremptory challenges and challenges for cause, the judge must permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The scope of the examination conducted by counsel must be within reasonable limits prescribed by the trial judge in his or her sound discretion, but specific unreasonable or arbitrary time limits may not be imposed. Prior submission of questions by counsel may not be required unless a particular counsel engages in improper questions. See Update §10.13 for definition of an "improper question." Written questionnaires should not be arbitrarily or unreasonably refused by the court. In addition, on stipulation by counsel for all the parties appearing in the action, the court may permit counsel to examine the prospective jurors outside a judge's presence.

California Rules of Court 228, which provides for liberal counsel voir dire similar to that in CCP §222.5, was amended in 1990 to

limit its applicability to civil cases only.

See Update App F for *Voir Dire Revisited: The Bull's Viewpoint,* adapted from an article by William A. Brockett that first appeared in 13 CEB Civ Litigation Rep 134 (June 1991). Based on his experience on the other side of voir dire as a juror, Brockett proposes that attorneys rethink how to handle voir dire. For an excellent discussion about the use of juror questionnaires, including practical suggestions for designing them, see Fineman & Beaton, *The Use of Juror Questionnaires in Civil Cases in California*, 18 CEB Civ Litigation Rep 87 (Mar. 1996).

PREPARATION FOR VOIR DIRE

[§10.5] Jury Selection: The Rules of the Game

To Main Book

As stated in Book §10.5, passing a peremptory challenge does not waive future challenges to someone who is not a member of the panel at the time the jury was accepted. The Ninth Circuit has applied this principle to peremptory challenges to jury alternates, holding that a party could still exercise a peremptory challenge to an alternate juror who was named to the panel after that party had accepted different alternates without exercising a peremptory challenge. *Medrano v City of Los Angeles* (9th Cir 1992) 973 F2d 1499.

If the court had advised each side of the total number of peremptory challenges they are allowed, the court may refuse to allow the use of an additional peremptory challenge that was not exercised inadvertently once the names of the jury members have been announced. *U.S. v Harper* (9th Cir 1994) 33 F3d 1143, 1145.

The Northern District of California has issued new local rules effective September 1, 1995. Former ND Cal Local R 245-1, 326-1 were not continued. California Civil Procedure During Trial §§7.35-7.45 (Cal CEB 1982) have been replaced by California Trial Practice: Civil Procedure During Trial §§8.54-8.72 (3d ed Cal CEB 1995).

For further discussion on methods of jury selection, see California Trial Objections §§6.11-6.13 (10th ed Cal CEB 2004). See also California Criminal Law Procedure and Practice §29.17 (7th ed Cal CEB 2004) (criminal cases).

STATE COURT

1-3. Effective January 1, 1989, former CCP §601 was repealed and replaced by CCP §234. Former CCP §605 was replaced by CCP §234. The number of permitted peremptory challenges remains the same.

4. The number of peremptory challenges in state capital or life imprisonment cases has been reduced from 26 to 20 for each side. CCP §231; former Pen C §1070 (repealed and replaced by CCP §231 effective January 1, 1989). Former Pen C §1070.5 was also repealed effective January 1, 1989.

California Civil Procedure During Trial §§7.35-7.45 (Cal CEB 1982) have been replaced by California Trial Practice: Civil Procedure During Trial §§8.54-8.72 (3d ed Cal CEB 1995).

[§§10.8, 10.10] Proposed Voir Dire; Preparing Voir Dire Questions

To Main Book

The references in Book §§10.8 and 10.10 to the Appendix to the Standards of Judicial Administration, Cal Rules of Ct 8 and 8.5, should be to the Appendix to the California Rules of Court, Division I, Standards of Judicial Administration, §§8, 8.5.

Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) has been replaced by O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, Civil and Criminal (5th ed 2000).

[§10.9] Jury Questionnaire

To Main Book

Exclusion of prospective jurors in a capital punishment case based solely on checked responses and written comments in a jury questionnaire was found to be error in *People v Stewart* (2004) 33 C4th 425, 15 CR3d 656. The court found that the language used in the questionnaire failed to address whether the jurors' views on the death penalty would impair their ability to perform their duties as jurors. The supreme court noted that an oral examination of the jurors would have clarified whether the jurors' opposition to the death penalty, as revealed in their answers and comments in the questionnaire, would have prevented them from following the law in the case.

For an excellent discussion about the use of juror questionnaires, including practical suggestions about designing them, see Fineman & Beaton, *The Use of Juror Questionnaires in Civil Cases in California*, 18 CEB Civ Litigation Rep 87 (Mar. 1996). See also California Trial Objections §6.10 (10th ed Cal CEB 2004).

PERTINENT LAW

[§10.11] Right to Complete Voir Dire

To Main Book

People v Terry (1964) 61 C2d 137, 147, 37 CR 605, cited in Book §10.11, was overruled on other grounds in *People v Laino* (2004) 32 C4th 878, 893, 11 CR3d 723.

Federal courts (traditionally) and state courts (increasingly) limit voir dire. However, recent cases that forbid discriminatory peremptory challenges in criminal or civil cases provide grounds for counsel to argue for a return to more comprehensive voir dire. For a survey of relevant cases concerning discriminatory peremptory challenges, see Update §10.14.

The argument for expanding voir dire is simple: In order for the moving party to establish that it is not making a challenge based on race, gender, or other forbidden grounds, it must be allowed to develop in detail other permissible reasons for the peremptory challenge.

Effective 2001, counsel voir dire in criminal cases is permitted as a matter of right, subject only to a time limitation as specified by the court in the exercise of its discretion. CCP §223. In civil cases, liberal counsel voir dire is now provided for by statute. See CCP §222.5. See Update §10.1 for discussion of changes in voir dire following enactment of Proposition 115.

The Ninth Circuit has made it clear that counsel cannot complain that specific questions were not asked in voir dire unless the attorney submitted the questions to the court in advance. *U.S. v Anzalone* (9th Cir 1989) 886 F2d 229, 234.

[§10.12] In Chambers Voir Dire

To Main Book

Code of Civil Procedure §222.5, enacted in 1990, provides that in civil cases the court may, on stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

By contrast, under CCP §223 (enacted by Proposition 115, effective June 6, 1990), in criminal cases, including death penalty cases, voir dire of any prospective jurors must, when practicable, occur in the presence of the other jurors. This provision abrogates the requirement imposed in *Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128 (cited in Book §10.12), for individualized, sequestered voir dire in capital cases when questioning prospective jurors about issues that involve death-qualification. *People v Cunningham* (2001) 25 C4th 926, 973, 108 CR2d 291.

See Update §10.1 for discussion of changes in voir dire following enactment of Proposition 115.

In *People v Harris* (1992) 10 CA4th 672, 684, 12 CR2d 758, the appellate court found that the trial court's plan for requiring exercise of peremptory challenges in chambers violated the defendant's constitutional and statutory right to a public trial and was reversible error. Both defense counsel and the prosecutor objected to the in-chambers voir dire.

[§10.13] Impermissible Questions

To Main Book

Code of Civil Procedure §222.5, enacted in 1990, provides that in civil cases the trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questions. For this purpose, an "improper question" is defined as one that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors on the pleadings or the applicable law.

See Update §10.1 for discussion of changes in voir dire following enactment of Proposition 115.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/10 Examination of Jurors/§10.14 Racial Prejudice

[§10.14] Racial Prejudice

To Main Book

***Wheeler* rule.** The rule barring discriminatory use of peremptory challenges (*People v Wheeler* (1978) 22 C3d 258, 148 CR 890, cited in Book §10.14) was extended to civil cases by the United States Supreme Court in *Edmonson v Leesville Concrete Co.* (1991) 500 US 614, 114 L Ed 2d 660, 111 S Ct 2077. It applies to both sides in civil cases. See *Di Donato v Santini* (1991) 232 CA3d 721, 283 CR 751 (neither plaintiff nor defendant may challenge jurors for racial, religious, ethnic, gender-based, or other improper grounds). *Wheeler* addressed discriminatory challenges against African-American jurors. Other groups that have been found "cognizable" for purposes of *Wheeler* motions are working-class people (*People v Turner, supra*), Spanish-surnamed individuals, (*People v Barber* (1988) 200 CA3d 378, 387, 245 CR 895), and homosexuals (*People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339).

An objection to discriminatory peremptories under *People v Wheeler, supra,* must be made during voir dire, or it is waived. *People v Thompson* (1990) 50 C3d 134, 179, 266 CR 309 (*Wheeler* motion made after jury sworn was too late); *People v Jackson* (1989) 49 C3d 1170, 1202, 264 CR 852. See also *People v Stankewitz* (1990) 51 C3d 72, 105, 270 CR 817 (failure to raise *Wheeler* objection to prosecutor's use of peremptory challenge against Native American juror or to establish prima facie discrimination left record barren for purposes of review).

The party asserting that the opponent is using peremptory challenges in a discriminatory fashion must first make a prima facie showing that the persons excluded are members of what has come to be known as a "cognizable group," and must "show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association." *People v Box* (2000) 23 C4th 1153, 1157, 99 CR2d 69. Compare *People v Trevino* (1997) 55 CA4th 396, 64 CR2d 61 (merely alluding to the fact that the prosecutor was striking Hispanic-surnamed jurors did not make prima facie case), with *People v Gray* (2001) 87 CA4th 781, 789, 104 CR2d 848 (counsel made prima facie case by showing that juror was member of cognizable group and that there was no apparent, legitimate reason to exclude him). If the moving party makes the requisite prima facie showing, the burden shifts to the party exercising the challenges to persuade the trial court that they were exercised on grounds that were reasonably relevant to the particular case being tried or to its parties and witnesses. *People v Chambie* (1987) 189 CA3d 149, 234 CR 308. See *People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848 (even when trial court believes that prima facie case has not been made, it should permit party exercising challenges to provide explanation to facilitate appellate review).

Considerable deference will be given to the trial court's determination of a *Wheeler* motion when the court has conducted a sincere and reasoned determination of the genuineness of the explanations for the peremptory challenges. *People v Silva* (2001) 25 C4th 345, 386, 106 CR2d 93; *People v Allen* (2004) 115 CA4th 542, 547, 9 CR3d 374. See, *e.g., People v Sanders* (1990) 51 C3d 471, 501, 273 CR 537 (affirming trial court's ruling that prosecutor's exercise of peremptory challenge to exclude all Spanish-surnamed persons from jury was not based on group bias). The court need not make detailed comments for the record to justify every instance of acceptance of the explanation for the challenges (*People v Reynoso* (2003) 31 C4th 903, 919, 3 CR3d 769), but the record must reflect that the court was fully apprised of the nature of the challenge to the peremptory challenges and that the reasons for exercising the challenges are not contradicted by the record nor appear to be inherently implausible. *People v Allen, supra*. But see *People v Ramos* (1997) 15 C4th 1133, 64 CR2d 892 (no prima facie showing of violation of right to jury trial drawn from representative cross-section of community). In *People v McGee* (2003) 104 CA4th 559, 128 CR2d 309, judgment was reversed and remanded with directions when the trial court, in analyzing the defendant's *Wheeler* and *Batson* motions, improperly focused its analysis on challenges to particular prospective jurors rather than evaluating whether the jury was drawn from a representative cross-section of community.

***Batson* rule.** The use of peremptory challenges to exclude blacks from a jury trying a black defendant, on the supposition that black jurors as a group in such a situation could not be impartial, is prima facie purposeful racial discrimination under the equal protection clause. *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712. However, use of peremptory challenges to exclude the only black person or persons from the jury for personal characteristics other than race may not be unconstitutional. *Batson* has been extended by the United States Supreme Court to permit defendants not in the group discriminated against to protest impaneling a jury that impermissibly excluded members on the basis of race. *Trevino v Texas* (1992) 503 US 562, 118 L Ed 2d 193, 112 S Ct 1547 (Hispanic defendants successfully claimed that exclusion of blacks for racial reasons was impermissible). See also *Miller-El v Cockrell* (2003) 537 US 322, 154 L Ed 2d 931, 123 S Ct 1029, in which the Court reversed the procedural denial to a Texas inmate of his petition for writ of habeas corpus; the petition was based on multiple and egregious *Batson* error.

The *Batson* rule has also been extended to bar white criminal defendants from peremptorily excluding black jurors without justifying the challenge on nonracial grounds. *Georgia v McCollum* (1992) 505 US 42, 120 L Ed 2d 33, 112 S Ct 2348. In *U.S. v De Gross* (9th Cir 1992) 960 F2d 1433, the Ninth Circuit extended the *Batson* rule to peremptory challenges improperly based on

gender and held that *Batson* applies to criminal defendants as well as prosecutors.

In *Wade v Terhune* (9th Cir 2000) 202 F3d 1190, 1196, the Ninth Circuit criticized the California Supreme Court's use of the *Wheeler* "strong likelihood" test to establish a prima facie showing of bias as "impermissibly stringent" in comparison to the *Batson* requirement that defendant must merely "raise an inference" that the prosecution has excluded venire members because of race. The court of appeals held that California courts "have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." Although ordinarily the Ninth Circuit deferentially reviews the trial court's ruling that the moving party has not made a prima facie case of improper use of peremptory challenges (*Tolbert v Page* (9th Cir 1999) 182 F3d 677), the court in *Cooperwood v Cambra* (2001) 245 F3d 1042, 1047, citing *Wade v Terhune, supra,* concluded it should review de novo a trial court's determination that no prima facie showing had been made when the court was using the "strong likelihood" test. The California Supreme Court has held that the "strong likelihood" and "reasonable inference" tests are synonymous and consistent with the federal test. *People v Johnson* (2003) 30 C4th 1302, 1 CR3d 1.

Burden of proof. The California Supreme Court in *People v Clair* (1992) 2 C4th 629, 7 CR2d 564, allocated burdens for *Wheeler* challenges. Initially, there is a presumption that the prosecutor has used peremptory challenges in a constitutional manner. The defendant bears the burden to show, prima facie, the presence of invidious discrimination. If defendant is successful, the burden shifts to the prosecutor to show the absence of such discrimination. If the prosecutor fails, defendant's prima facie showing becomes conclusive, and the presumption of constitutionality is rebutted.

In *Purkett v Elem* (1995) 514 US 765, 131 L Ed 2d 834, 115 S Ct 1769, the United States Supreme Court set out rules for challenging the discriminatory use of peremptory challenges that differ from those set out by the California Supreme Court in *People v Wheeler* (1978) 22 C3d 258, 148 CR 890. Under *Purkett,* the court must first determine whether a prima facie case of discrimination was established, then ascertain the reasons for the challenges. After reviewing the reasons for the challenges, the court must then determine whether the challenges were neutral. If the court finds that the reasons were neutral, then the court must determine whether the opponent has carried the burden of proving purposeful discrimination. In *People v McGee* (2003) 104 CA4th 559, 128 CR2d 309, judgment was reversed; the trial court had improperly focused its analysis of the defendant's *Wheeler* and *Batson* motions on challenges to particular prospective jurors rather than evaluating whether the defendant's jury trial was drawn from a representative cross-section of the community. For further discussion, see California Trial Objections §§6.27-6.32 (10th ed Cal CEB 2004); California Criminal Law Procedure and Practice §29.16 (7th ed Cal CEB 2004). See also, *e.g.,* Meyer, *Discriminatory Use of Peremptory Challenges: Recent Developments in the* Batson *Doctrine*, 22 CEB Civ Litigation Rep 155 (Aug. 2000).

Remedy for violation. In *People v Willis* (2002) 27 C4th 811, 118 CR2d 301, the supreme court expanded the remedies available to the trial court when a *Wheeler* violation has occurred. Justice Chin, speaking for a unanimous court, said the trial court should not be limited to the remedy of dismissal of the jury venire, but should have the discretion to fashion other remedies that do not have the effect of rewarding misconduct and trial delaying tactics. The court made waiver or consent by the aggrieved party a prerequisite to the consideration of an alternate remedy.

One suggested alternative remedy is to reseat any improperly discharged jurors, assuming that they are still available to serve. It was also suggested that the aggrieved party might be allowed additional peremptory challenges or that monetary sanctions "severe enough to guard against a repetition of the improper conduct" might be imposed. 27 CA4th at 824.

See Update §10.11 for discussion of more expansive voir dire based on cases forbidding discriminatory peremptory challenges.

[§10.14A] Gender Bias

To Main Book

The Supreme Court has extended the rule of *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (use of peremptory challenges to exclude jurors on basis of race is improper), to peremptory challenges improperly based on gender. *J.E.B. v Alabama* (1994) 511 US 127, 128 L Ed 2d 89, 114 S Ct 1419. See also *U.S. v De Gross* (9th Cir 1992) 960 F2d 1433. The Ninth Circuit has, however, declined to decide whether *Batson* encompasses challenges based on a combination of two categories, *e.g.,* race and gender. See *Cooperwood v Cambra* (2001) 245 F3d 1042, 1045.

An appellate court has held that homosexuals are a cognizable group and that their exclusion on the basis of group bias violates Cal Const art I, §16. *People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339.

[§10.14B] Religious Discrimination; Personal Values

To Main Book

In *People v Martin* (1998) 64 CA4th 378, 75 CR2d 147, the court of appeal addressed a defendant's claim that the prosecution had improperly exercised a peremptory challenge against a juror based solely on the juror's religion. The juror was a Jehovah's Witness. Noting that neither the California Supreme Court nor the United States Supreme Court had yet addressed the issue, the court in *Martin* described the issue as "apparently one of first impression in California." 64 CA4th at 381. The court reviewed three cases from other states, two involving Jehovah's Witnesses and one Pentecostals, that had permitted exclusion based on jurors' religious views. The *Martin* court noted that the California Supreme Court had indicated in *People v Wheeler* (1978) 22 C3d 258, 148 CR 890 (for further discussion, see Update §10.14), although in dictum, that the use of peremptory challenges to exclude jurors solely on the basis of religion would be unconstitutional. Consequently, the court declined to agree with the conclusions of two of those sister-state courts that the rule of *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (use of peremptory challenges to exclude blacks from jury trying black defendant, on supposition that black jurors as group in such situation could not be impartial, is prima facie purposeful racial discrimination under equal protection clause), does not extend to religious discrimination. Nevertheless, noting that the prosecutor in the case before it had perceived that the juror's religious beliefs might render her uncomfortable with sitting in judgment of another, the *Martin* court followed the reasoning of the sister-state courts, holding that "the peremptory challenge of a juror on the basis of the juror's relevant personal values is not improper even though those views may be founded in the juror's religious beliefs." 64 CA4th at 385. See also *People v Ervin* (2000) 22 C4th 48, 76, 91 CR2d 623 (excusing prospective jurors with religious bent or bias that would make it difficult for them to impose death penalty is proper, nondiscriminatory ground for challenge); *People v Cash* (2002) 28 C4th 703, 725, 122 CR2d 545 (prosecutor's challenge of black Jehovah's Witness upheld when prosecutor stated concern over possible religion-based anti-death penalty bias and also described prospective juror as "smart alecky").

A California appellate court has held that homosexuals are a cognizable group and that their exclusion on the basis of group bias violates Cal Const art I, §16. *People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339.

QUESTIONING AND SELECTION

[§10.16] Overview

To Main Book

In large-budget cases, counsel now use mock juries to help figure out the ideal juror profile and the best way to pitch issues to a prospective jury.

PRACTICE TIP

If a case justifies an expensive mock trial (the cost can easily be $10,000-$20,000 for a one-day trial with two or three mock juries):

1. Try to limit the mock trial to one day.

2. Presentation, for even a complicated case, would be as follows:

a. Counsel for each side ("opposing" counsel will generally be the trial second chair) gives a half-hour opening statement. The mock jury will be directed to view these statements (and closing arguments) as *evidence*.

b. Two or three primary witnesses should testify for each side. If depositions have been videotaped, the tapes of hostile witnesses or parties can be shown to the jury. Otherwise, someone can act out the part of the hostile witness, either live or on videotape.

c. A lawyer should play the role of judge. Instructions should be simple and provided in writing to the jurors.

d. Most services gathering mock juries will videotape jury deliberations. Generally, the "trial" should be presented simultaneously to two or three juries of six or more members who will then split up into separate deliberating bodies.

e. Counsel will have to pay an additional fee to have the jury gathering service analyze the data and make specific recommendations about the ideal juror profile and about the presentation of issues. This service is far less important to experienced attorneys than is the mock trial and videotaped deliberations with jury questionnaires giving detailed background on each mock juror.

For the results of a large-scale study of the correlation between demographics and juror stereotypes, see Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am Journal of Trial Advocacy (Fall 1995).

[§10.17] Selecting the Jury: Sample Questions

To Main Book

Q: To what magazines do you subscribe regularly?

This innocuous question often gives valuable insights into a juror's thinking. The juror who subscribes to *Soldier of Fortune* will probably have a different personality than one who subscribes to *The New Republic*.

Effective January 1, 1989, former CCP §602 was repealed. The bases for challenge for cause are now set forth in CCP §§225-229.

11

Objections

COMMON OBJECTIONS

[§11.1] Purposes

To Main Book

California Trial Objections, chap 51 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 52 (10th ed Cal CEB 2004).

[§11.2] Tactics

To Main Book

An in limine motion in federal court, if denied, will preserve the moving party's point for appeal, even without further objection in the presence of the jury. See *Palmerin v City of Riverside* (9th Cir 1986) 794 F2d 1409.

In state court, however, the "reiteration requirement" applies. If the trial court denies a motion in limine designed to exclude evidence, absent stipulation from opposing counsel or other exception, the party seeking exclusion must renew the objection at the time the evidence is actually offered at trial, or face possible waiver of the issue on appeal. *People v Morris* (1991) 53 C3d 152, 188, 279 CR 720, disapproved on another ground in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The main exception to this requirement occurs if an objection is directed to an identifiable body of evidence, if an objection is made when the court has the opportunity to see all the evidence relevant to the objection, and if no new evidence is introduced later that changes the relevant facts. In that event, a second objection is not required. *People v Morris, supra.* For further discussion of in limine motions, see California Criminal Law Procedure and Practice §31.8 (7th ed Cal CEB 2004) and California Trial Objections, chap 2 (10th ed Cal CEB 2004).

The trial court may refuse to rule on an in limine motion, putting defendant to the test. *People v Sandoval* (1992) 4 C4th 155, 178, 14 CR2d 342 (in murder case, no abuse of discretion to deny ruling in advance on whether defendant could be cross-examined about second alleged murder if he testified to self-defense). In state court criminal cases, to preserve for appeal the issue of impeachment of the defendant with prior convictions, it is necessary for the defendant to testify. *People v Sims* (1993) 5 C4th 405, 20 CR2d 537; *People v Collins* (1986) 42 C3d 378, 228 CR 899.

In *Ohler v U.S.* (2000) 529 US 753, 146 L Ed 2d 826, 120 S Ct 1851, the United States Supreme Court held, 5-4, that a federal criminal defendant, who admitted to a prior on direct examination before the prosecution could raise it, had waived the right to challenge evidence of the conviction on appeal. The dissent argued that a defendant who raises a prior merely in order to mitigate its effect on the jury does not thereby waive the right to challenge prosecution's use of the prior.

California Civil Procedure During Trial §14.83 (Cal CEB 1982) has been replaced by California Trial Practice: Civil Procedure During Trial §§16.134-16.135 (3d ed Cal CEB 1995).

California Trial Objections, chap 1 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 2 (10th ed Cal CEB 2004).

California Expert Witness Guide §10.7 (Cal CEB 1983) has been replaced by California Expert Witness Guide §14.5 (2d ed Cal CEB 1991).

Frequent Objections

[§11.4] Prejudice or Confusion Outweighs Probative Value

To Main Book

A court cannot strike a witness's testimony under Evid C §352 because it concludes the witness is lying. *Vorse v Sarasy* (1997) 53 CA4th 998, 62 CR2d 164. Evidence may be excluded under §352 only when it is of such nature as to inflame the emotions of the jurors and likely be used by them for an illegitimate purpose. 53 CA4th at 1009. Whether a witness is lying is for the jury, not the court, to determine. 53 CA4th at 1013.

In two recent decisions citing Evid C §352, appeals courts have found the admission of opinion testimony of "experts" on defendants' alleged gang membership to be prejudicial error. See *People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876; *People v Bojorquez* (2002) 104 CA4th 335, 128 CR2d 411.

California Trial Objections, chap 33 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 31 (10th ed Cal CEB 2004).

[§11.6] Leading

To Main Book

California Trial Objections, chap 19 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 13 (10th ed Cal CEB 2004).

[§11.7] Confusing

To Main Book

California Trial Objections, chap 7 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 7 (10th ed Cal CEB 2004).

[§11.8] Nonresponsive

To Main Book

The statement in Book §11.8 that only the questioner may move to strike an answer as "unresponsive" is incorrect. *Either* party may move to strike an answer as "unresponsive." Evid C §766. See California Trial Objections §§52.2-52.3 (10th ed Cal CEB 2004).

[§11.9] Beyond the Scope of Direct or Cross

To Main Book

California Trial Objections, chap 26 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 26 (10th ed Cal CEB 2004).

FREQUENTLY MADE IMPROPER OBJECTIONS

[§11.10] Best Evidence

To Main Book

See the discussion on best evidence in Update §12.35.

[§11.13] Assumes Facts Not in Evidence

To Main Book

California Trial Objections, chap 15 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 15 (10th ed Cal CEB 2004).

[§11.14] Misquotes Witness or Misstates Evidence

To Main Book

The reference to ABA Code of Prof Resp Rule 3.3 should be to ABA Rules of Prof Cond 3.3. ABA Rules of Prof Cond 3.3 further prohibits the knowing failure to correct a false statement of material fact or law.

Former Cal Rules of Prof Cond 7-105 was repealed and replaced by Cal Rules of Prof Cond 5-200. The full cite for *Berger v U.S.,* cited in Book §11.14, is *Berger v U.S.* (1935) 295 US 78, 79 L Ed 1314, 55 S Ct 629.

[§11.16] Asked and Answered

To Main Book

California Trial Objections, chap 11 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 11 (10th ed Cal CEB 2004).

[§11.17] Argumentative

To Main Book

California Trial Objections, chap 14 (2d ed Cal CEB 1984) has been replaced by California Trial Objections, chap 14 (10th ed Cal CEB 2004).

[§11.18] SPECIAL SITUATION OBJECTIONS

To Main Book

California Trial Objections, chaps 29, 52, 55 (2d ed Cal CEB 1984) have been replaced by California Trial Objections, chaps 29, 53, 56 (10th ed Cal CEB 2004).

[§11.19] OTHER OBJECTIONS

To Main Book

Operative July 1, 1987, the reference to former CCP §2016(b) in Book §11.19 should be to CCP §2018. Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

California Trial Objections §§35.1, 8.1-8.6, chap 21 (2d ed Cal CEB 1984) has been replaced by California Trial Objections §35.1, chaps 8, 21 (10th ed Cal CEB 2004).

12

Basic Evidence Rules

MOST COMMONLY NEEDED RULES

[§12.1] Preparation for Use of Evidence in Examination

To Main Book

It is useful to take to trial a "short form" summary of much-used evidentiary rules. See Update App G for a chart of evidentiary rules useful in trial, summarized from Brockett, *Evidence on the Run*, 14 CEB Civ Litigation Rep 331 (Sept. 1992). Other useful summaries appear in California Criminal Law Procedure and Practice §29.29 (7th ed Cal CEB 2004), and on a laminated card that comes with California Trial Objections (10th ed Cal CEB 2004).

California Civil Procedure During Trial (Cal CEB 1982) has been replaced by California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995).

California Trial Objections (2d ed Cal CEB 1984) has been replaced by California Trial Objections (10th ed Cal CEB 2004).

Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence (3d ed 1982) has been replaced by Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence (7th ed 1998).

California Search and Seizure Practice (2d ed Cal CEB 1977), referred to in the Book, is now out of print. For a current discussion of search and seizure practice, see California Judges Benchbook: Search & Seizure (2d ed CJER-CEB 2002). See also California Criminal Law Procedure and Practice, chap 16 (7th ed Cal CEB 2004).

Moore's Federal Rules Pamphlet, referred to in the Book, is published annually.

[§12.2] Tactics in Making Evidentiary Points

To Main Book

In *U.S. v Morris* (4th Cir 1993) 988 F2d 1335, the court held that it was reversible error for the prosecutor to cross-examine defendant's wife about her invocation of the spousal privilege when she was called to testify before a grand jury.

Recurring Evidentiary Points

[§12.3] Business Records

To Main Book

Under Evid C §1271(c), the business records exception to the hearsay rule, the custodian of a business record or "other qualified person" must testify to its identity and mode of preparation. There is nothing in the section or in its federal rules counterpart, Fed R Evid 803(6), that requires the custodian to have firsthand knowledge of the subject matter contained in the record. See *People v Matthews* (1991) 229 CA3d 930, 280 CR 134. Indeed, in *U.S. v Childs* (9th Cir 1993) 5 F3d 1328, 1333, the Ninth Circuit found properly admitted as business records of automobile dealerships several documents used to establish the identity of several automobiles even though the documents had been made by other entities. The court distinguished *NLRB v First Termite Control Co.* (9th Cir 1981) 646 F2d 424, cited in Book §12.3, which had rejected evidence authenticated by an entity that had not made the record because in *Childs* the dealerships relied on the records at issue and, therefore, had an interest in their accuracy. See also *Saks Int'l v M/V Export Champion* (2d Cir 1987) 817 F2d 1011 (custodian need not know identity of person whose firsthand knowledge was basis of the entries, as long as it is business entity's regular practice to get information from that person).

A strict view of the necessary foundation for a business record was adopted by one California court of appeal in *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 40 CR2d 56. The *Taggart* court held that a declaration executed by the custodian of records in response to a subpoena duces tecum was insufficient foundation for admission of a business record under Evid C §1271, even though it complied with the requirements for such a declaration imposed by Evid C §1561, because it did not show the identity or mode of preparation of the records. 33 CA4th at 1706. Subsequently, the legislature amended §1561 to require that the affidavit provide the identity of the records and a description of their mode of preparation. See Evid C §1561(a)(4)-(5).

For discussion of authentication of business records, see Update §12.35.

The full cite for *Palmer v Hoffman,* cited in Book §12.3, is *Palmer v Hoffman* (1943) 318 US 109, 87 L Ed 645, 63 S Ct 477.

[§12.5] Refreshing Recollection

To Main Book

Counsel should not read written material to a witness in the presence of the jury to refresh the witness's recollection. The California Supreme Court criticized such an attempt to put otherwise inadmissible material before the jury in *People v Parks* (1971) 4 C3d 955, 95 CR 193. See Jefferson's California Evidence Benchbook §27.79 (3d ed CJA-CEB 1997).

Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, pp 415-416 has been replaced by Saltzburg, Martin & Capra, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, p 972 (7th ed 1998).

[§12.6] Prejudice, Confusion, or Waste of Time

To Main Book

A court cannot strike a witness's testimony under Evid C §352 because it concludes the witness is lying. *Vorse v Sarady* (1997) 53 CA4th 998, 62 CR2d 164. Evidence may be excluded under §352 only when it is of such nature as to inflame the emotions of the jurors and likely be used by them for an illegitimate purpose. 53 CA4th at 1009. Whether a witness is lying is for the jury, not the court, to determine. 53 CA4th at 1013.

In two recent decisions citing Evid C §352, appeals courts have found the admission of opinion testimony of "experts" on defendants' alleged gang membership to be prejudicial error. See *People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876; *People v Bojorquez* (2002) 104 CA4th 335, 128 CR2d 411.

[§12.7] Hearsay and the State-of-Mind Exceptions

To Main Book

An extreme example of admitting a "generic threat" to show defendant's intent appeared in *People v Rodriguez* (1986) 42 C3d 730, 230 CR 667. The supreme court held that the trial court, in a prosecution for the shooting deaths of two highway patrol officers, properly admitted testimony that defendant had expressed contempt and hatred for police and declared that he would kill any officer who attempted to arrest him.

Unless counsel objects to inadmissible hearsay, it can become competent evidence. *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 236 CR 778.

Declarations against interest are an exception to the hearsay rule. Evid C §1230; Fed R Evid 804(b)(3). But see *LaGrand v Stewart* (9th Cir 1998) 133 F3d 1253, 1265 (codefendant's use of other codefendant's statement exculpating him inadmissible as statement against interest).

A victim's expression of fear of defendant's threats is inadmissible as a "state of mind" exception, unless the victim's state of mind or conduct is in issue. But see *People v Noguera* (1992) 4 C4th 599, 15 CR2d 400 (under facts of case, harmless error beyond reasonable doubt).

[§12.7A] Spontaneous Declaration

To Main Book

Statements made by someone shortly after a shocking event may be admitted as an exception to the hearsay rule. The declaration, however, must be truly "spontaneous": In *People v Pearch* (1991) 229 CA3d 1282, 280 CR 584, the court reversed defendant's second-degree murder conviction because a kidnap victim's "spontaneous declaration" was improperly admitted. The remarks were made 13 hours after the kidnapping, when the victim said during a phone conversation that he was "being hurt." The appellate court held that it was improper for the trial court to speculate that the victim was still under the effect of the event when he made the statement.

[§12.8] Limited Admissibility Evidence

To Main Book

In *U.S. v Crumby* (D Ariz 1995) 895 F Supp 1354, the court reevaluated the admissibility of polygraph evidence in the absence of a stipulation. The court held that evidence that the defendant had taken and passed a polygraph test was admissible for the limited purpose of corroborating defendant's credibility after impeachment. 895 F Supp at 1364. But see *U.S. v Cordoba* (9th Cir 1999) 194 F3d 1053 *(Cordoba II)* (district court did not abuse its discretion in excluding polygraph evidence in view of controversy over reliability in relevant scientific community and risk of undue prejudice).

Source: Civil Litigation/Effective Direct and Cross-Examination Update/12 Basic Evidence Rules/§12.9 Use of Depositions

[§12.9] Use of Depositions

To Main Book

Unavailable Witness

Whether a witness is "unavailable" depends on the nature of the case (civil or criminal) and whether the case is being tried in state or federal court.

Generally, the party trying to prove unavailability of a witness must either show diligent unsuccessful efforts to secure the presence of the witness, or rely on a list of categories in Evid C §240, *e.g.,* dead, absent and not subject to the court's process, disqualified or precluded from testifying because of privilege. See generally Jefferson's California Evidence Benchbook §§2.32-2.36 (3d ed CJA-CEB 1997).

A witness is *always* "unavailable" if the lawyer diligently tried to get the witness to the courthouse, but failed. A witness who invokes the privilege against self-incrimination is also unavailable. *People v Cudjo* (1993) 6 C4th 585, 25 CR2d 390 (court permitted the use of preliminary hearing testimony of a witness who invoked the privilege against self-incrimination at trial).

Note: Effective January 1, 1990, Evid C §1293 was added to provide special rules for former testimony of a minor against a parent or guardian.

A dead witness is unavailable, even to the most skilled attorney. Otherwise, the most common category of unavailability is that of the witness who is "beyond reach of the court's process." Here is a table spelling out the varying standards:

UNAVAILABLE WITNESS		
	CIVIL	CRIMINAL
STATE	LIVING OUT OF STATE or 150 MILES FROM TRIAL CCP §§1989, 2025(u)(3)(A)	OUT OF STATE or 150 MILES FROM TRIAL See Pen C §§1330, 1334-1334.6
FEDERAL	PARTY LIVING OUT OF STATE, OR NONPARTY SUFFERING HARDSHIP TO TRAVEL MORE THAN 100 MILES Fed R Civ P 45(c)(3)	
	OUT OF COUNTRY Fed R Civ P 45(b)(2)	OUT OF COUNTRY Fed R Crim P 17(e)(2)

One important category is the witness who is "beyond reach of the court's process" Various rules are:

1. In a state civil case, a declarant is unavailable if living out of the state. See CCP §1989. Even if a *party* is unavailable under these circumstances, his or her deposition in lieu of live testimony is permitted. See Evidence Benchbook §2.5. In addition, CCP §2025(u)(3)(A) states that a party may use the deposition of "any" person or organization, including any party to the action, for any purpose, if the deponent resides more than 150 miles from the place of trial. Justice Jefferson suggests that, if a party procures his or her own absence from the state during trial, Evid C §240(b) (eliminating unavailability if absence occurs because of "wrongdoing") might bar admission of the absent party's testimony.

2. In a state criminal case, a witness is not unavailable simply because the witness resides out of state. California's Uniform Act To Secure the Attendance of Witnesses From Without the State in Criminal Cases provides the process for securing an out-of-state witness. See Pen C §§1334-1334.6. The party attempting to prove unavailability must establish diligent efforts to secure a witness who resides out of state before that witness will be found to be unavailable. See Evid C §240(a)(5); *People v Linder* (1971)

5 C3d 342, 96 CR 26.

In *People v Frances* (1988) 200 CA3d 579, 245 CR 923, the court held that a witness was "unavailable" because he refused to testify at trial, even though he was physically available. Thus, it was proper to use the transcript of the witness's testimony at a preliminary hearing. Although *Frances* is a criminal case, its principle should apply to civil cases.

3. In a federal civil case, the situation is complicated by the 1991 amendment of Fed R Civ P 45. Although statewide service is permissible in California, under Fed R Civ P 45(b)(2) the court must quash subpoenas to persons living more than 100 miles from the place of trial unless the person is a party or an officer of a party or unless such travel is not a hardship. Fed R Civ P 45(c)(3). If the party issuing the subpoena can show that the need for testimony is material and cannot otherwise be met without undue hardship, and can assure that the person subpoenaed will be reasonably compensated, the court may order appearance or production on specified conditions. Fed R Civ P 45(c)(3)(B)(iii).

"A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28 USC §1783." Fed R Civ P 45(b)(2); Fed R Crim P 17(e)(2). Under 28 USC §1783, a federal district court orders the issuance of a subpoena requiring a witness's appearance if the witness is a

national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

4. In a federal *criminal* case, nationwide service is available. Fed R Crim P 17(e)(1). A witness is unavailable only if diligent efforts to subpoena the witness fail. See Fed R Evid 804(a)(5).

Prior Inconsistent Statements

Whether a witness is unavailable affects the permissible use of the witness's prior inconsistent statements. Whether a prior inconsistent statement is admissible for the truth of the matter asserted (rather than just for impeachment) differs in federal and state court. See the following table for a summary of whether a prior inconsistent statement of a hearsay declarant may be admitted at trial for impeachment purposes only or for the truth of the matter asserted.

PRIOR INCONSISTENT STATEMENTS IMPEACHMENT/SUBSTANTIVE		
	AVAILABLE	UNAVAILABLE
STATE	SUBSTANTIVE Evid C §1235	IMPEACH Evid C §1202
FEDERAL	SUBSTANTIVE *IF UNDER OATH* Fed R Evid 801(d)(1)	IMPEACH Fed R Evid 806

In state court, if the hearsay declarant is available for cross-examination, the prior inconsistent statement (whether given under oath or not) may be used for substantive purposes. *California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (US Const amend VI); *People v Chavez* (1980) 26 C3d 334, 161 CR 762 (Cal Const art I, §15). See Evid C §1235. If the hearsay declarant is not available to testify, the statement may be used only for impeachment. Evid C §1202.

In federal court, a prior inconsistent statement by a witness is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement. Fed R Evid 801(d)(1). This rule applies only to prior statements given *under oath*. Otherwise, prior inconsistent statements may be used to impeach the credibility of a hearsay declarant whose statement has been admitted into evidence. Fed R Evid 806.

In both federal and California courts, a party's prior inconsistent statement that is an *admission* may be used as substantive evidence. Fed R Evid 801(d)(2); Evid C §§1220-1225.

A similar rule applies to statements of a decedent that may be used against a wrongful death plaintiff. Evid C §1227. A similar rule also applies to statements by a minor child that may be used against parents of the child in an action on behalf of the child. Evid C §1226.

In a death penalty case, multilevel hearsay was found admissible because each level contained prior inconsistent statements, and the declarants were available for cross-examination at trial. Thus, the statements were substantive evidence. *People v Zapien* (1993)

4 C4th 929, 17 CR2d 122.

A witness who feigns memory loss may create the basis for examination on prior "inconsistent" statements. In *People v Hawthorne* (1992) 4 C4th 43, 14 CR2d 133, however, the court held that a finding of *genuine* memory loss barred examination on prior statements, because Evid C §1235 (prior inconsistent statement) did not apply. The court also held that the witness was not "unavailable" under Evid C §1291, which permits a defendant to use testimony previously recorded at a preliminary hearing. The court reached a different result in a similar case in *People v Alcala* (1992) 4 C4th 742, 15 CR2d 432. A witness who was found to have suffered genuine memory loss was ruled unavailable under Evid C §240(a)(3), and a transcript of the witness's testimony at a first trial was admitted.

In federal court, a witness who invokes the fifth amendment at trial, after testifying before a grand jury, may be unavailable. However, the United States Supreme Court has held that adversarial fairness does not require the grand jury transcript to be admitted at trial unless it can be shown that the prosecution had similar motives before the grand jury to develop testimony as it had at trial. See *U.S. v Salerno* (1992) 505 US 317, 120 L Ed 2d 255, 112 S Ct 2503.

These distinctions are lost on a jury. In the author's experience, a jury *never* pays much attention to limiting instructions. However, the distinctions are important for the appropriate motion that asks the judge to take the case away from the jury.

Use of Depositions

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

All trial lawyers quickly learn to use depositions of unavailable ordinary witnesses. But how about using the deposition of your own party at trial?

A *party* who lives out of state, who is ill or otherwise unable to attend (see definitions in Evid C §240) can submit his or her *own* deposition in lieu of live testimony. CCP §2025(u)(3)(B). If a party skips the state to create "unavailability," the provisions of §2025(u)(3)(B) and Evid C §240(b) might be invoked—disallowing unavailability created by "wrongdoing".

Under §2025(u)(3)(A), a deposition may be used for an in-state party-witness living more than 150 miles from trial (more than 100 miles from trial under Fed R Civ P 32(a)(3)).

Why on earth would you want your own party, the hero of your stage production, to testify by deposition?

Someday you will be confronted with a client so obnoxious, so timid, or so unable to withstand cross-examination that you will prefer the client to testify by deposition. And party-representatives of out-of-state corporations may come across better if their deposition testimony is read from the stand, especially if the deposition is desultory.

Remember, this door swings both ways. If your opponent has a terribly unconvincing out-of-state witness, you may wish to videotape the deposition of that witness to allow the jury to fully savor the testimony. Do not forget to take a "trial" deposition of such witnesses.

See CCP §2025(d)(5)-(6) (contents of deposition notice); CCP §2025(*l*)(1) (procedures for recording an oral deposition in California by audio- or videotape); CCP §2025(*l*)(2)(I) (procedures for offering audio- or videotape of deposition at trial under CCP §2025(u)); Fed R Civ P 30(b)(4) (deposition may be recorded by audio- or videotape in federal court in lieu of stenographic transcription). See California Civil Discovery Practice §§4.40-4.42, 5.9-5.12, 5.70, 5.113, 11.55, 12.27, 12.61, 12.63 (3d ed Cal CEB 1998).

PRACTICE TIP

One suggested procedure for handling the admission of deposition testimony of an unavailable witness at trial is as follows:

1. Advise the court which parts of the deposition transcript one party intends to read at trial;

2. Invite opposing counsel to designate additional passages from the transcript;

3. Ask the court to hear and determine all evidentiary objections in advance; and

4. Advise the court who will play the role of the witness and take the witness stand.

Out-of-State Records and Documents

Do not cruise into trial assuming that you will be able to notice the production of out-of-state documents under CCP §1987(c). Notice to a party-witness probably extends its effect *no further than a subpoena*. In a civil case, this means that you cannot easily demand that a corporation appear at trial with out-of-state documents.

The simplest solution is to secure those documents in advance of trial by taking custodial depositions out of state or by requesting production of documents. See CCP §§2026, 2028(a); Civil Discovery §§6.1-6.3, 6.48. Otherwise, you must serve a subpoena on a local office of the corporation and hope that the trial judge requires that office to secure out-of-state documents. If, after diligent efforts, you are unable to procure witnesses or evidence, see Book §12.26 on proving your efforts to secure missing evidence.

[§12.10] Admissions

To Main Book

An attorney's actions on behalf of a client may be an admission against interest of the client. In *U.S. v GAF Corp.* (2d Cir 1991) 928 F2d 1253, 1260, the prosecution refused to provide the jury with the bill of particulars provided to defendants before their first trial. That bill of particulars showed different allegations of fraud, and the court thus held that it was an admission against interest.

In *People v Silva* (1988) 45 C3d 604, 623, 247 CR 573, a statement made by an acquaintance of defendant describing the defendant's participation in a murder was held to be an adoptive admission by defendant because it was made in the presence of defendant, who smiled and did not protest the statement.

People v Richards (1976) 17 C3d 614, 131 CR 537, cited in Book §12.10, was disapproved on another ground in *People v Carbajal* (1995) 10 C4th 1114, 1126, 43 CR2d 681.

In a civil or criminal case in which government agencies have an interest (*e.g.,* Internal Revenue Service, Federal Bureau of Investigation, Department of Motor Vehicles), the hearsay exception for admissions by an agent or employee of a party should enable counsel to use helpful statements by agents or employees of the agencies about matters within the scope of their agency or employment made during the existence of the employment or agency relationship. See Evid C §1222; Fed R Evid 801(d)(2)(D). Counsel should note that the state rule covers only statements made by a person who has been "authorized by a party" to make such statements, but this standard has been loosely construed. *W.T. Grant Co. v Superior Court* (1972) 23 CA3d 284, 100 CR 179. For example, the authority of a declarant employee to make a statement for an employer can be implied as well as express. *O'Mary v Mitsubishi Elec., Inc.* (1997) 59 CA4th 563, 69 CR2d 389.

In some situations, statements that would be admissible under the federal rule but would not be admissible under the state rule, because the employer's agent was not authorized to talk about the subject (*e.g.,* an employee's hearsay statement about the cause of an accident), may be admissible under the hearsay exception of Evid C §1240 for spontaneous statements. To establish admissibility of the declaration of a party's agent against the party, under Fed R Evid 801(d)(2)(D) the proponent of the evidence must first establish an agency relationship whose scope includes the declaration in question. This relationship may be established by circumstantial evidence. Once established, the admission is not an *exception* to hearsay, it is *not* hearsay. *Pappas v Middle Earth Condominium Ass'n* (2d Cir 1992) 963 F2d 534.

Federal Rules of Evidence 801(d)(2) has been amended, effective December 1, 1997, to provide that the contents of the declarant's statement must be considered, but are not alone sufficient, to establish the agency or employment relationship and its scope under Fed R Evid 801(d)(2)(D) or the existence of a conspiracy, and the participation in it of the declarant and the party against whom the statement is offered, under Fed R Evid 801(d)(2)(E).

Publications of an entity may also be deemed admissions. In *U.S. v Van Griffin* (9th Cir 1989) 874 F2d 634, involving a criminal charge of drunk driving in a federal recreation area, the National Highway Traffic Safety Administration's publication on sobriety testing was held to be admissible as a party admission with regard to the defendant's defense that sobriety testing on him did not meet standards of reliability.

[§12.11] Habit, Custom, and Routine Procedure

To Main Book

The last fallbacks for proving a character trait are Evid C §1105 and Fed R Evid 406, governing "habit" or "routine practice." If a competent witness can testify that any of the actors in a lawsuit had a "customary manner of acting" relevant to the dispute, the testimony should be admitted. Strong, McCormick on Evidence §195 (5th ed 1999).

Webster's Third International Dictionary (1963) states that "habit" is

a settled tendency of behavior or normal manner of procedure… a behavior pattern acquired by frequent repetition… a developed mode of behavior or function that has become nearly or completely involuntary.

See *Perrin v Anderson* (10th Cir 1986) 784 F2d 1040, 1045 (in a 42 USC §1983 suit, victim's habit of reacting violently to uniformed police was admissible in his suit against police officers); *People v Memro* (1985) 38 C3d 658, 681, 214 CR 832 (evidence that interrogating officers had custom or habit of obtaining confessions by violence, force, threat, or unlawful aggressive behavior admissible on issue of whether confession was coerced).

"Habit" as a means of showing character is often properly rejected. There must be a sufficient number of instances to support a claim that the behavior was settled and consistent. See *Simplex, Inc. v Diversified Energy Sys.* (7th Cir 1988) 847 F2d 1290; *U.S. v Pinto* (10th Cir 1985) 755 F2d 150; *Dineau v Tamayose* (1982) 131 CA3d 780, 182 CR 855.

In *People v Humphries* (1986) 185 CA3d 1315, 230 CR 536, the appellate court held that it was harmless error for the trial court to refuse to allow evidence that the prosecution's leading witness was a frequent user of the drug PCP. The crime charged was murder, and the defense's theory was that the prosecution's leading witness was the real murderer. Evidence about PCP use would have shown that the witness was violence-prone on the date in question.

A 1989 federal opinion holds that a series of individual acts does not establish "habit" under Fed R Evid 406. In *Weil v Seltzer* (DC Cir 1989) 873 F2d 1453, 1460, the court stated that patients who were prescribed steroids by a doctor could not testify to the doctor's "habit" of prescribing steroids, because they did not know how the doctor treated patients other than themselves. Furthermore, the court said that "habit evidence" should establish that the conduct in question was reflexive or almost instinctive in nature.

[§12.13] Scope of Examination

To Main Book

In *U.S. v Crockett* (4th Cir 1987) 813 F2d 1310, the Fourth Circuit adhered to prior decisions in holding that the trial court had discretion to bar a defendant from cross-examining his codefendant when the codefendant's testimony did not incriminate defendant. The court observed that the right of confrontation does not give defendants a right to elicit friendly testimony and does not arise merely from the status of the witness as a codefendant. *Crockett* lists different standards in the federal circuits for determining what degree of inculpation is necessary before cross-examination *must* be permitted.

In *People v Williams* (1997) 16 C4th 153, 66 CR2d 123, the California Supreme Court held that the trial court did not err when it limited defense counsel's cross-examination of a jailhouse informant concerning his means of financial support to periods of time that the witness was housed by the government.

See Update App H for *Impeachment: Last Refuge of a Scoundrel,* adapted from an article by William A. Brockett, which first appeared in 15 CEB Civ Litigation Rep 75 (Mar. 1993).

[§12.14] Lack of Foundation

To Main Book

Federal Rules of Evidence 801(d)(2) has been amended, effective December 1, 1997, to provide that the contents of the declarant's statement must be considered, but are not alone sufficient, to establish the agency or employment relationship and its scope under Fed R Evid 801(d)(2)(D) or the existence of a conspiracy, and the participation in it of the declarant and the party against whom the statement is offered, under Fed R Evid 801(d)(2)(E).

Evidence of third party culpability is barred unless there is direct or circumstantial evidence linking the third person to the actual perpetration of the crime. Evidence Code §352 (probative value of evidence may not be substantially outweighed by prejudicial effect) applies. *People v Kaurish* (1990) 52 C3d 648, 684, 276 CR 788, citing *People v Hall* (1986) 41 C3d 826, 226 CR 112. In *Kaurish,* the court held that mere evidence that the third party had a motive to murder the victim was not enough to justify presenting such testimony. See Update §12.26A for a discussion of third party culpability.

The complete citation for *Zenith Radio Corp.,* cited in Book §12.14, is *Zenith Radio Corp. v Matsushita Elec. Co.* (ED Pa 1980) 505 F Supp 1190, 1240, rev'd on other grounds (3d Cir 1986) 723 F2d 238, rev'd in *Matsushita Elec. Indus. v Zenith Radio Corp.* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348.

[§12.14A] Attorney-Client and Work Product Privileges

To Main Book

Lawyer privileges are frequently invoked in deposition, written discovery, and trial. The following adapted article, which covers both attorney-client and work product privileges in some detail, originally appeared in 16 CEB Civ Litigation Rep 400, 468 (Sept., Nov. 1994).

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

Lawyer Privileges: Do You Know Them When You See Them?

by William A. Brockett

What men value in this world is not rights but privileges.

—H. L. Mencken

Part One

As fish swim through water, litigators swim through privileges. But, just as fish do not know the chemical composition of the water they swim through, many attorneys do not understand the attorney-client and work product privileges they invoke regularly.

The core information about attorney-client and work product privileges is brief: Evid C §§950-962 (attorney-client); CCP §2018 (work product); Fed R Evid 501 (federal attorney-client privilege); Fed R Civ P 26(b)(3) (federal work product).

Nor is the case law extensive. Here is an overview:

How Are the Privileges Created?

California Law

Attorney-Client Privilege. The attorney-client privilege arises whenever a client consults an attorney for the purpose of obtaining legal advice, of retaining the attorney (regardless of whether retention occurs). The privilege exists *regardless of whether litigation is threatened*. *Roberts v City of Palmdale* (1993) 5 C4th 363, 371, 20 CR2d 330. The privilege does not apply, however, to disclosures made after the attorney refuses to accept the representation. *People v Gionis* (1995) 9 C4th 1196, 40 CR2d 456.

[**Editor's note:** Operative July 1, 2004, there is no privilege if an attorney reasonably believes that disclosure of a client's confidence is necessary to prevent a criminal act likely to result in the death of or substantial bodily harm to another. Evid C §956.5.]

A "legal opinion" is protected whether or not impressions and conclusions are communicated. Evid C §952; *Benge v Superior Court* (1982) 131 CA3d 336, 345, 182 CR 275.

Work Product Rule. The work product privilege (often blurred with the attorney-client privilege by the courts) includes an *absolute* bar for attorney writings containing the attorney's impressions, conclusions, opinions, legal research, or theories. CCP §2018(c). A *conditional* privilege exists for other work accomplished by or commissioned by the attorney that could not be revealed without creating unfair prejudice or injustice. CCP §2018(b).

[**Editor's Note:** There is no protection of work product in a law enforcement investigation or criminal prosecution if the services of the attorney were obtained to enable someone to commit a crime or fraud, if the attorney is suspected of knowingly participating in the crime or fraud. CCP §2018(d).]

The work product privilege normally applies only to information gathered by an attorney and the attorney's employees or agents. *Wilson v Superior Court* (1964) 226 CA2d 715, 724, 38 CR 255.

In a joint prosecution agreement, one party could not waive the work product privilege without consent of the other. *Armenta v Superior Court* (2002) 101 CA4th 525, 124 CR2d 273.

The *absolute* work product privilege applies to nonlitigation situations. *Rumac, Inc. v Bottomley* (1983) 143 CA3d 810, 813, 192 CR 104; *Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 478, 200 CR 471. Because CCP §2018(a) refers to the work product privilege covering work done "in preparation for trial," there is no clear cut rule protecting *conditional* work product privilege. See Jefferson's California Evidence Benchbook §§41.1-41.7 (3d ed CJA-CEB 1997). Justice Jefferson states that the privilege applies when

- The work product consists of materials of any writing that reflects the attorney's impressions, conclusions, opinions, or legal research or theories, generated in his capacity as an attorney counselor or litigator doing legal work for a client (the *absolute* part of the rule); or

- The work product consists of materials of a derivative or interpretative nature obtained or produced in preparation for trial… the *conditional* part of the privilege. Evidence Benchbook §41.1.

Federal Law

When a claim or defense is based on federal law, federal privilege law applies. Under Fed R Evid 501

the privilege of a witness… shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The federal privilege is designed "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v U.S.* (1981) 449 US 383, 389, 66 L Ed 2d 584, 591, 101 S Ct 677. See 8 Wright et al., Federal Practice and Procedure, §2017 (4th ed 1998).

In federal court, work product materials are protected only if prepared in anticipation of trial. The *prospect of litigation* is enough. *Kent Corp. v NLRB* (5th Cir 1976) 530 F2d 612, 623. To test whether litigation is anticipated, a court will examine (1) whether the party claiming the protection has a "unilateral belief" that litigation will result, and (2) whether that belief is reasonable. *Martin v Bally's Park Place Hotel & Casino* (3d Cir 1993) 983 F2d 1252, 1260. See *Reavis v Metropolitan Prop. & Liab. Ins. Co.* (SD Cal 1987) 117 FRD 160 (documents reflecting continuous negotiations between parties in effort to avoid anticipated litigation and files prepared after litigation was commenced had qualified immunity under work product doctrine); 8 Wright et al., Federal Practice and Procedure §2024 (4th ed 1998).

Who Holds the Privileges?

The client (or the client's representative) is the holder of the attorney-client privilege. Evid C §953. The client's lawyer must exercise the privilege on behalf of the client unless there is a waiver. Evid C §955.

In contrast, the work product protection is held only by the attorney. *Lohman v Superior Court* (1978) 81 CA3d 90, 100, 146 CR 171. An attorney can waive this protection even if the client objects. 81 CA3d at 101. The *Lohman* opinion, however, has been criticized in *Fellows v Superior Court* (1980) 108 CA3d 55, 64, 166 CR 274. Justice Jefferson in *Fellows* said that the client may claim work product protection and argued that the *Lohman* court had misread *Mack v Superior Court* (1968) 259 CA2d 7, 10, 66 CR 280. *Mack* does not stand for the proposition that a client is the holder of the work product privilege; rather, in the attorney's absence, the client may assert the protection on the attorney's behalf, even though the attorney is the only holder of the privilege.

If a corporation holding the attorney-client privilege goes bankrupt, is taken over, and merges with another corporation, the successor becomes the holder of the privilege. Evid C §953(d); *Dickerson v Superior Court* (1982) 135 CA3d 93, 98, 185 CR 97.

How Broad Are the Privileges?

Work done by investigators is not normally covered by the attorney-client privilege. If any privilege applies to an investigator's work, it is work product. *Suezaki v Superior Court* (1962) 58 C2d 166, 177, 23 CR 368.

The attorney-client privilege does not cover business advice given by an attorney. If an attorney wears "two hats" (business advisor and legal counsel), the courts will look to the dominant purpose of the advice; if business purposes dominate, no privilege will apply. *Montebello Rose Co. v Agricultural Labor Relations Bd.* (1981) 119 CA3d 1, 32, 173 CR 856.

The attorney-client privilege attaches to reports prepared for an attorney, even if that attorney is not yet employed. *Gene Compton's Corp. v Superior Court* (1962) 205 CA2d 365, 374, 23 CR 250. The attorney-client privilege also protects observations

made *as a result of* privileged communication. *People v Meredith* (1981) 29 C3d 682, 693, 175 CR 612 (finding privilege lost in criminal case because attorney moved and altered evidence). Except in unusual circumstances, the attorney-client privilege does not apply to a client's identity. *Hays v Wood* (1979) 25 C3d 772, 785, 160 CR 102 (fee arrangements); *Willis v Superior Court* (1980) 112 CA3d 277, 291, 169 CR 301.

The attorney-client privilege may protect even against revelation of *the subject* of an attorney's communication with a client. *Mitchell v Superior Court* (1984) 37 C3d 591, 601, 208 CR 886 (client did not need to answer questions about warnings her attorney had given her about dangers of toxic substance).

The opinion in *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 203 CR 752, is instructive, covering issues that come up often:

(1) A corporate representative who speaks to an attorney can claim the attorney-client privilege (in this case, the vice president and general counsel speaking to outside counsel).

(2) The attorney-client privilege applies to the corporate representative's basis for verifying answers to interrogatories.

(3) The attorney-client privilege does not protect the identity of investigators hired by the corporation.

(4) The attorney-client privilege does not protect questions unrelated to the *content* of the communications (*e.g.,* "When did you see the document?" "Did you read Exhibit 2?" "What is Alpha Beta's policy regarding release of personnel information?").

See also, *e.g.,* Lundberg & Soni, *Avoiding the Forced Surrender of Attorney-Client Communications: Minimizing Your Corporate Client's Risk*, 22 CEB Civ Litigation Rep 41 (Mar. 2000).

The work product rule is *broader* than the attorney-client privilege in one respect: There are no such statutory exceptions to work product protection (such as client crime-fraud). *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1249, 245 CR 682 (holding "opinion" work product absolutely privileged, despite federal law to contrary); see also *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 273, 218 CR 205.

The *Lasky* case has a somewhat surprising conclusion: An attorney can assert the work product privilege against his former client as long as it does not hurt the former client and might help a present client. 172 CA3d at 278. Consistent with this holding, the court held in *BP Alaska Exploration, Inc. v Superior Court* (1988) 199 CA3d 1240, 1260, 245 CR 682, that third parties cannot get writings created by an attorney, even if the client does not object. If the client is suing the lawyer for a breach of duty, however, the work product privilege evaporates. CCP §2018(f).

[**Editor's Note:** There is no protection of work product in a law enforcement investigation or criminal prosecution if the services of the attorney were obtained to enable someone to commit a crime or fraud, if the attorney is suspected of knowingly participating in the crime or fraud. CCP §2018(d); *Jasmine Networks, Inc. v Marvell Semiconductor, Inc.* (review granted July 21, 2004, S124914; superseded opinion at 117 CA4th 794, 12 CR3d 123) (voicemail inadvertently left on opponent's telephone system raised prima facie case of fraud).]

Work product "derivative materials" are protected by the privilege, but nonderivative materials are not. Put another way, the *facts of a case* are not privileged (no matter how an attorney obtained those facts). The attorney's *opinions* or comments on those facts are privileged. *Southern Pac. Co. v Superior Court* (1969) 3 CA3d 195, 199, 83 CR 231; *Mack v Superior Court* (1968) 259 CA2d 7, 10, 66 CR 280 (finding trial diagrams, audits, and opinions to be derivative and protected).

The derivative/nonderivative distinction protects a list of *trial witnesses* but not a request for "all witnesses" to an event. *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 76, 134 CR 468. The work product privilege for trial witness lists falls away when a pretrial order directs such a list to be exchanged. *In re Jeanette H.* (1990) 225 CA3d 25, 35, 275 CR 9.

Some federal cases suggest that an attorney's selection of key documents supporting contentions may be work product privileged. See, *e.g., U.S. v Horn* (D NH 1992) 811 F Supp 739 (work product protected identity of key documents adversary selected from mass of 10,000 documents). Note that *U.S. v Horn* was reversed in part (on unrelated grounds) in *U.S. v Horn* (1st Cir 1994) 29 F3d 754.

Are Investigators' Reports and Other Reports of Agents Protected?

As noted above, work done by investigators and other agents is normally not protected by the attorney-client privilege, although it will be protected if the investigator acts as a conduit of information from the client to the attorney, or vice versa. *D.I. Chadbourne Inc. v Superior Court* (1964) 60 C2d 723, 737, 36 CR 468. If a corporate employee makes a report that is passed on by the corporation to its counsel, however, the report does not become privileged by that fact alone, unless the privilege was intended when the report was made (*i.e.,* the *corporate employee* must know that his or her statement is sought on a confidential basis and

intend the statement to be confidential). 60 C2d at 737. See also 22 CEB Civ Litigation Rep 41. But see *Sierra Vista Hosp. v Superior Court* (1967) 248 CA2d 359, 368, 56 CR 387, holding that a report made by an employee for the corporation's insurer with the intent that it be used by counsel is covered by the attorney-client privilege.

In deciding whether the attorney-client privilege should apply to interviews with corporate employees, the courts try to determine whether the "dominant purpose" is for communication to counsel. *D.I. Chadbourne Inc. v Superior Court, supra.* The "dominant purpose" test is applied to interviews of corporate employees, but not to interviews of independent witnesses by corporate employees, which are normally unprivileged. *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 397, 15 CR 90; 22 CEB Civ Litigation Rep 41.

If an attorney selects publicly available information and transmits it to his clients, the attorney-client privilege applies. *In re Jordan* (1974) 12 C3d 575, 580, 116 CR 371; *Mitchell v Superior Court* (1984) 37 C3d 591, 600, 208 CR 886.

Are investigators' reports protected if commissioned by an attorney? The frequently cited case of *Southern Pac. Co. v Superior Court* (1969) 3 CA3d 195, 198, 83 CR 231, hints that they are, since they are derivative materials. *Kadelbach v Amaral* (1973) 31 CA3d 814, 823, 107 CR 720, criticizes the dicta in *Southern Pac.* and specifically disapproves it, holding that statements of witnesses are *not* protected derivative material. See also *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647, 151 CR 399. *Rodriguez* and *Kadelbach* both establish the principle that witnesses' statements intertwined with an investigator's comments are partly protected work product and partly unprotected.

A thorough discussion of the work product doctrine may be found at Anno, *Development, Since Hickman v Taylor, Of Attorney's "Work Product" Doctrine*, 35 ALR3d 412. The federal courts, applying *Hickman,* generally find that witnesses' statements *taken by an attorney* are work product. See, *e.g., Harper & Row Publishers, Inc. v Decker* (7th Cir 1970) 423 F2d 487 (attorneys' debriefing memoranda of testimony of grand jury witnesses), aff'd *Decker v Harper & Row Publishers, Inc.* (1971) 400 US 348, 27 L Ed 2d 433, 91 S Ct 479. See also *Alltmont v U.S.* (3d Cir 1949) 177 F2d 971 (work product privilege applies to statements taken by *agents of attorney*); *Sersted v American Can Co.* (ED Wis 1982) 535 F Supp 1072 (work product protection for statements obtained by attorney's investigators from eyewitnesses to industrial accident).

[**Editor's Note:** *Front Royal Ins. Co. v. Gold Players, Inc.* (WD Va 1999) 187 FRD 252, 258 (following *Alltmont*) (discusses applicability of work product privilege to variety of information gathered by insurance company and its agents during course of investigating claim).]

Part Two

How May Privileges Be Waived?

The holder of a privilege must assert it at the first opportunity, or risk waiver. *Sheets v Superior Court* (1967) 257 CA2d 1, 8, 64 CR 753 (failure to raise work product protection in response to interrogatories waives protection).

Does an otherwise privileged document lose its character if used to refresh a witness's recollection? Compare *Kearns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 413, 72 CR 74 (refreshing witness's recollection with confidential reports about conditions surrounding an accident waives the privilege), with *Sullivan v Superior Court* (1972) 29 CA3d 64, 73, 105 CR 241 (transcription of client's original discussion with her attorney concerning accident is not a "writing" under Evid C §771; thus, showing transcriptions to refresh recollection did not waive attorney-client privilege).

The waiver by one joint client of the attorney-client privilege is not a waiver by other clients. Evid C §912(b).

[**Editor's Note:** The target of a government investigation that turned over to the government documents that the target claimed were protected by the attorney-client and attorney work product privileges effected a waiver of both privileges. *McKesson HBOC, Inc. v Superior Court* (2004) 115 CA4th 1229, 9 CR3d 812.

Privilege issues between insurer and insured are complex. Generally, the privilege does not apply if there is litigation between a carrier and its insured (Evid C §962), but otherwise attaches.

The presence of a third party reasonably necessary to further the interest of the client does not strip away the privilege. Evid C §952; *Cooke v Superior Court* (1978) 83 CA3d 582, 588, 147 CR 915. Such third parties include interpreters, relatives, and co-officers of a corporation.

If the client tenders information gained through otherwise privileged communications with her attorney, advice of counsel may no longer be privileged. *Mitchell v Superior Court* (1984) 37 C3d 591, 609, 208 CR 886 (no waiver under facts at bar); *Merritt v Superior Court* (1970) 9 CA3d 721, 730, 88 CR 337 (plaintiff's case relied on mental state of own counsel; privilege waived). A good summary of the law on implied waivers is contained in *Transamerica Title Ins. Co. v Superior Court* (1987) 188 CA3d 1047, 1053, 233 CR 825:

Generally, implied waivers are limited to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters.… Generally, too, the deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice.

If an insurance company receives advice of counsel and the company then relies on facts *independent of that advice* in rejecting coverage, there is no waiver. 188 CA3d at 1053 (attorney-client privilege). But see *U.S. v Bilzerian* (2d Cir 1991) 926 F2d 1285, 1291 (witness testified he believed in good faith he was complying with securities laws based on advice of counsel; attorney-client privilege waived).

Mere denial of an issue does not waive a privilege. *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 502, 165 CR 748 (denial of malicious prosecution; no waiver of work product).

California courts of appeal disagree about whether the work product privilege applies at trial. Compare *Jasper Constr. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 16, 153 CR 767 (doubtful that work product privilege applies at trial), with *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 648, 151 CR 399.

On the issue of inadvertent disclosure of privileged documents, the federal courts have often been surprisingly unkind to attorneys who inadvertently turn over critical privileged documents. See, *e.g., Underwater Storage, Inc. v U.S. Rubber Co.* (D DC 1970) 314 F Supp 546, 549 (any disclosure constitutes automatic waiver). An opposing view focuses solely on the client's subjective intent to actually waive the privilege through disclosure. See, *e.g., Mendenhall v Barber-Greene Co.* (ND Ill 1982) 531 F Supp 951. See also *KL Group v Case, Kay & Lynch* (9th Cir 1987) 829 F2d 909, 919 (applying California and Hawaii law). The Southern District of New York attempted to steer a middle course between these views in *Lois Sportswear, Inc. v Levi Strauss & Co.* (SD NY 1985) 104 FRD 103, 105. *Lois* used an "evaluation of circumstances" approach to determine the issue.

Regarding inadvertent disclosures of privileged documents in California, Justice Jefferson takes the view that Evid C §952 "defines a 'confidential communication between client and lawyer' in such a way to make abundantly clear that the lawyer-client privilege is not lost through an accidental or unauthorized out-of-court disclosure." Evidence Benchbook §40.1. The Second District Court of Appeal attempted to follow the *Lois Sportswear* "evaluation of circumstances" approach, discussed above, in *Kanter v Superior Court* (ordered not published Mar. 16, 1989; former opinion at 206 CA3d 803, 253 CR 810). *Kanter* involved both the attorney-client privilege and the work product protection doctrine. Although *Kanter* cannot be cited or relied on by a court or a party in any other action or proceeding (see Cal Rules of Ct 977), the former opinion nevertheless offers useful guidelines in determining whether documents will be returned, assuming the court steers the middle course between no waiver and automatic waiver. See Brockett, *Whoops! Living With Inevitable Error*, 11 CEB Civ Litigation Rep 191 (Aug. 1989).

Partial disclosure of some privileged items does not waive the entire privilege if the inadvertent disclosure does not reveal a significant part of the communications sought. *Owens v Palos Verdes Monaco* (1983) 142 CA3d 855, 870, 191 CR 381, disapproved on other grounds in *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 521 n10, 28 CR2d 475 (voluntary disclosure of documents).

Answers providing the *foundation* of privileged communication do not constitute a waiver. *Travelers Ins. Co. v Superior Court* (1983) 143 CA3d 436, 444, 191 CR 871. Likewise, disclosure of the fact of an attorney consultation, and the conclusions of the consultation, do not waive the actual communication. *Southern Cal. Gas Co. v PUC* (1990) 50 C3d 31, 46, 265 CR 801 (disclosure that counsel had advised that his client could not unilaterally terminate a contract without liability was not waiver of entire communication).

Closely related to waiver are *exceptions* to the attorney-client privilege. These are often created by statute:

(1) The crime-fraud exception. Communications designed to further a fraud or crime are not privileged. Evid C §956; *U.S. v Laurins* (9th Cir 1988) 857 F2d 529, 540. The American Bar Association has approved amendments to its Model Rules of Professional Conduct that require attorneys to report a corporate officer's conduct to the corporation's upper management and would allow attorneys, in certain circumstances, to breach the attorney-client privilege in order to stop a client from committing financial crime or fraud.

[**Editor's Note:** For an example of a case discussing the crime-fraud exception, see *Jasmine Networks, Inc. v Marvell Semiconductor, Inc.* (review granted July 21, 2004, S124914; superseded opinion at 117 CA4th 794, 12 CR3d 123) (voicemail inadvertently left on opponent's telephone system raised prima facie case of fraud).]

(2) Prevention of a criminal act likely to result in death or substantial bodily harm. Evid C §956.5.

[**Editor's Note:** Business and Professions Code §6068(e) (attorney's duty to maintain client's confidences) has been amended to permit an attorney to reveal a client's confidential information to the extent the attorney believes the disclosure is necessary to

prevent a criminal act that is reasonably likely to result in death or substantial bodily harm.]

(3) Various exceptions related to wills and testators. Evid C §§957, 960-961.

(4) Communications relevant to the issue of the breach of duty by the attorney (malpractice). Evid C §958.

Partnerships often end up in litigation. Evidence Code §962 provides that there is no privilege between joint claimants in dispute with one another who share the same lawyer. This exception permits one partner to get information prepared by a lawyer representing the partnership. *McCain v Phoenix Resources, Inc.* (1986) 185 CA3d 575, 230 CR 25 (general partner may not bar limited partners from information relating to partnership prepared by partnership lawyer); *Wortham & Van Liew v Superior Court* (1987) 188 CA3d 927, 932, 233 CR 725; *Hecht v Superior Court* (1987) 192 CA3d 560, 567, 237 CR 528 (privilege can apply to *"purely private or personal interests"* of one of the partners).

What About Expert Opinions?

The facts obtained by an expert, and the mental opinions and calculations of that expert are normally not attorney-client privileged. *Oceanside Union Sch. Dist. v Superior Court* (1962) 58 C2d 180, 188, 23 CR 375; *San Diego Prof. Ass'n v Superior Court* (1962) 58 C2d 194, 202, 23 CR 384. The mere fact that a consultant speaks to an attorney does not create any privilege. *Jasper Constr. v Foothill Jr. College Dist.* (1979) 91 CA3d 1, 17, 153 CR 767.

If, however, an expert is required to examine the client, the client's personal affairs, property, and mental impressions, and relay that information to the attorney, the attorney-client privilege should apply. See *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 234, 231 P2d 26; *Rodriguez v Superior Court*(1993) 14 CA4th 1260, 1266, 18 CR2d 120. Both of these cases state that "when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed." *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 237, 231 P2d 26; *Rodriguez v Superior Court, supra*.

Expert opinions and reports normally are covered by the work product privilege. A good starting point for determining the applicability of the work product protection to experts, plus a full analysis of the interaction between CCP §2034 and the work product protection is in California Expert Witness Guide, chaps 8, 10 (2d ed Cal CEB 1991), concerning, respectively, counsel's own expert and discovering identity and depositions. This practice book contains an excellent discussion of two key cases, *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888, and *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 490, 210 CR 535.

[**Editor's Note:** In *Rico v Mitsubisho Motors Corp.* (review granted June 9, 2004, S123808; superseded opinion at 116 CA4th 51, 10 CR3d 601), plaintiff's counsel inadvertently received documents that summarized privileged communications between defense counsel and their experts. Rather than notify defense counsel, plaintiff's counsel used the clearly confidential work product information to impeach defense experts during deposition. As a result of plaintiff's counsel's ethical breach, the court disqualified plaintiff's legal team and experts.]

In *National Steel*, the court considered whether a report of a designated expert witness, prepared when the expert was a consultant in another case, was discoverable. *National Steel* announced a three-step in-camera inspection process: (1) Determine whether the report reflects the attorney's impressions, conclusions, opinions, or legal research or theories; if so, the report is absolutely privileged (CCP §2018(c)); (2) determine whether the report is advisory and, thus, treated as conditional work product; and (3) for the advisory portions, decide whether good cause for discovery outweighs the policies underlying the privilege. See Expert Witness §§8.16, 8.18.

If an expert witness is also a percipient witness, counsel's analysis of the percipient portion of the witness's testimony is absolutely privileged. Further, the witness need not be produced under CCP §2034, except insofar as the witness is also a designated expert. *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 1203, 272 CR 324.

Conclusion

Many of us have mumbled the phrase "objections, work-product, attorney-client, instruct not to answer." Case law suggest that the privileges are distinct and nuanced. Understanding them will make you a stronger swimmer.

LESS COMMONLY NEEDED RULES

[§12.17] Character Witnesses

To Main Book

Character traits. In California courts, the credibility of any witness may be proved by opinion or reputation evidence on the witness's truthfulness or untruthfulness. See Evid C §§780, 786, 1100. Under Evid C §787, evidence of specific instances of conduct that only tends to prove a trait of a witness's character is inadmissible to attack or support that witness's credibility. However, in *People v Harris* (1989) 47 C3d 1047, 255 CR 352, the supreme court held that in criminal cases the "truth in evidence" provision of Proposition 8 (Cal Const art I, §28(d)) effectively repealed Evid C §787. See also *People v Adams* (1988) 198 CA3d 10, 243 CR 580 (in criminal cases, Evid C §787 abrogated by Cal Const art I, §28(d)). Subject to the restrictions of Evid C §352, *Harris* should permit either side in a criminal case to present any trait of any witness's character, if that trait is relevant to the case. There is an exception to that rule: Evid C §1101 remains viable after Proposition 8. *People v Perkins* (1984) 159 CA3d 646, 649, 205 CR 625. Section 1101 does not allow character evidence to be admitted to prove conduct on a specified occasion unless relevant to prove some fact such as identity or intent. For further discussion, see Update §12.18. See also Jefferson's California Evidence Benchbook, chap 33 (3d ed CJA-CEB 1997); California Criminal Law Procedure and Practice §§24.52-24.55 (7th ed Cal CEB 2004).

In federal courts, the rule is similar to Evid C §787, but it allows the court discretion to permit examination of specific instances of conduct on cross-examination of a witness about the propensity for truthfulness or untruthfulness of the witness or another witness about whose character the witness has testified. Fed R Evid 608(b). If a person's character is an essential element of a charge, claim, or defense, evidence of specific instances of the person's conduct may be admitted. Fed R Evid 405(b).

As stated in *U.S. v Mason* (4th Cir 1993) 993 F2d 406, the vast majority of federal circuits condemn cross-examination of character witnesses by hypothetical questions that assume the defendant's guilt, regardless of whether the witness is testifying to reputation or opinion.

Evidence Code §1100 provides in part that, except as otherwise provided by statute, evidence of specific instances of a person's conduct is admissible to prove a person's character or a trait of the person's character. In a civil case, however, Evid C §1101 provides that *any* evidence of character to prove conduct on a specified occasion is inadmissible. In a criminal case, opinion or reputation evidence of the defendant's character may be offered by the defendant, or it may be used by the prosecution to rebut such evidence. Evid C §1102. Defendants must avoid opening the door to wide-ranging character impeachment through presenting evidence of their own good character. For example, in *People v Raley* (1992) 2 C4th 870, 8 CR2d 678, in the penalty phase of a capital murder prosecution, defendant proffered evidence that he was gentle, shy, and retiring with women. This testimony permitted the prosecution to present rebuttal evidence of harassment and nonviolent pestering conduct toward women and pornographic photographs of women in bondage that had been seized from defendant.

In federal courts, a witness's credibility may be attacked or supported by opinion or reputation evidence, subject to the following limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked by opinion or reputation evidence or otherwise. Fed R Evid 608(a).

If no rebuttal evidence of specific conduct or character is offered after the opposing party has offered character witness evidence, counsel proving character should be able to comment on the *absence* of evidence to the contrary in closing argument.

Counsel should be permitted to prove specific acts reflecting good character, such as "helpfulness," "trusting nature," and "hardworking."

Use and misuse of character evidence. The following article originally appeared in 16 CEB Civ Litigation Rep 234 (June 1994):

A Question of Character: Use and Misuse of Character Evidence

by William A. Brockett

Hypotheticals

1. An eminent lawyer has taken the stand as a party in his own lawsuit. In his "preliminary" narrative of his background, the

witness describes in detail the good deeds he has done over the years—the charitable foundations he has established, the impoverished minorities he has helped by pro bono efforts. How can you interrupt this self-eulogy without seeming boorish?

2. The first of two coplaintiffs takes the stand and testifies at length about the fraud your client has worked on his business partner and himself. You know that the coplaintiffs have had a falling out, and distrust one another. How do you take advantage of this?

3. Your client is a truck driver, whose vehicle rolled out of control, killing two pedestrians. You have called a character witness who testified that, in her opinion, your client was an extremely conscientious driver who carefully checked the safety of his truck before taking to the road. On cross-examination, your adversary asks the witness to assume that the facts of the complaint were true—that your client failed to take the truck in for required safety inspections for the past six months, and had drunk ten beers before driving. "Would that change your opinion?" asks your opponent sneeringly. What is the objection?

4. Your character witness has just testified that your client is an upright and honest person. Can she be impeached by asking her if she knew that your client's ex-wife had charged him with being a pathological liar in their divorce? Does it matter *what kind* of character evidence your witness gave?

5. Opposing counsel has just finished direct of a witness who testifies that your adversary has the reputation of being scrupulously honest in all aspects of his life, including business transactions. How can you cross-examine on the nebulous concept "reputation"?

The answers to these questions and many more are found in the concentrated dose of evidence presented in Evid C §§780, 786-787, 790, 1100-1105, and Fed R Evid 404-405, 608. (There are different rules governing proof of character in criminal cases. Those rules may generally be found in the same sections cited in this article).

Let's see how these rules apply to our hypotheticals:

Hypothetical 1. The "self-eulogy" of your opponent is designed to persuade the jury that he is an honest and wonderful person, deserving of their sympathy. Without seeming too mean-spirited, you can properly object as follows:

"Your honor, this witness is improperly serving as his own character witness, in an effort to prove his truthfulness *before it has been attacked*. His speech about his other fine characteristics is completely inadmissible character testimony on traits other than honesty or truthfulness."

Evidence Code §790 and Fed R Evid 608 both bar evidence of good character "unless evidence of… bad character has been admitted for the purpose of attacking… credibility" (quoting Evid C §790).

Proof of character traits other than honesty is normally barred unless it goes to an "ultimate fact in dispute" in the action. Comment to Evid C §1100; see also Evid C §1101; to similar effect, see Fed R Evid 405(b). See, *e.g., Murphy v Davis* (1919) 181 C 706, 717, 186 P 143 (in malicious prosecution action, plaintiff's good reputation has direct bearing on the question of probable cause and may be proven in case in chief, especially when such reputation is known to defendant); *Pugh v See's Candies, Inc.* (1988) 203 CA3d 743, 757, 250 CR 195 (in wrongful discharge action when former employee's character or personality in the workplace is in issue, specific acts of misconduct are admissible to show the employee is unfit for the job); *Feist v Feist* (1965) 236 CA2d 433, 435, 46 CR 93 (in child custody modification proceeding, plaintiff may prove course of conduct tending to demonstrate defendant's poor moral character); 1 Witkin, California Evidence, *Circumstantial Evidence* §45 (4th ed 2000).

Finally, any witness testifying about his good deeds runs afoul of Evid C §787, which forbids use of specific instances of conduct to attack or support the credibility of a witness. However, specific instances of conduct can be used to attack or support an "ultimate fact" character trait. Evid C §1100. Similarly, Fed R Evid 405(b) permits proof of specific instances of conduct to support an "essential element" character trait.

In federal court, witnesses who puff their own good character put themselves in peril—they may be cross-examined on *specific instances* of bad conduct. Fed R Evid 405(a). In state court, except for use of prior felony convictions, specific instances of conduct are not permissible to attack or support the credibility of a witness. Evid C §§787, 788, 1101.

Hypothetical 2. There is a simple, easy-to-remember rule about character evidence: You may ask any witness about any other witness's honesty, if you believe the answer may be negative. Evid C §780(e) and Fed R Evid 608(a). In our example, you know the coplaintiffs had a falling out, so questioning one party about the honesty of a coparty is potentially powerful. The witness may recognize the dilemma, and reluctantly vouch for the honesty of the business partner, but hesitation or lukewarm support will speak volumes to the jury.

Hypothetical 3. It is arguably improper for you to present evidence that your truck driver had the character of being conscientious, therefore leaving one to believe that he was careful on the occasion of his accident. Evidence Code §1104

specifically bars evidence of a "trait of a person's character with respect to care or skill… to prove the quality of his conduct on a specified occasion." The Federal Rules of Evidence have no analogous bar. You could argue that your client's character for driving carefully is an "ultimate fact," but a discriminating judge will reject the argument as an effort to avoid the proscriptions of Evid C §1104. Or, you might successfully introduce the evidence as "habit or custom" under Evid C §1105 or Fed R Evid 406.

Cross-examining by asking the character witness to assume the facts of a complaint is improper. There is a solid body of case law (developed from federal criminal cases, but logically applicable to civil cases) holding that it is impermissible to ask a witness to assume that a party has committed the acts charged in a complaint. See, *e.g., U.S. v Mason* (4th Cir 1993) 993 F2d 406 (providing authority from other circuits).

In addition, impeaching a character witness by asking about specific instances of conduct raises other problems. See Evid C §787, discussed below.

Hypothetical 4. Unless the inquiry relates to an "ultimate fact in dispute" or a prior felony conviction, Evid C §787 forbids proving specific instances of a witness's misconduct to attack a witness's credibility, or to show conduct and conformity with a character trait. Federal Rules of Evidence 405(b), in contrast, specifically admits proof of specific instances of conduct for "essential element" character traits.

Witnesses testifying to their opinion of good character traits can be impeached with questions about hearing of specific instances. Thus, it should make a difference if a witness is asked to express an opinion, as opposed to give testimony on reputation for good character.

An opinion witness can be impeached by questions such as "have you heard [never "do you know" for opinion testimony] that Sam's ex-wife called him a pathological liar? Would that change your opinion?" The question must be asked in good faith. See *People v Marsh* (1962) 58 C2d 732, 745, 26 CR 300. Both Jefferson (see Jefferson's California Evidence Benchbook §§28.86-28.90 (3d ed CJA-CEB 1997)), and the *Marsh* opinion would permit "have you heard…" as proper impeachment both for reputation and opinion witnesses. But logically, in my opinion, such examination should not be appropriate to impeach reputation testimony. If the judge is inclined to bar "have you heard" questions of a reputation witness, the daring examiner could then solicit the witness's personal opinion, which is likely to be glowing. Once personal opinion is given, "have you heard" questions (in good faith) are inarguably appropriate.

Hypothetical 5. Many attorneys treat "reputation" and "opinion" evidence of character as interchangeable. This is certainly not true for the cross-examiner. It is difficult or impossible to confront reputation witnesses with their knowledge of specific bad acts (because it is not *their* opinion at issue). On the other hand, the unprepared reputation witness can often be stopped short by this line of examination:

Q. You testified that Sam Jones has an excellent reputation for truthfulness?

A. Yes, that's right.

Q. Name three people you've discussed Mr. Jones' reputation with over the past six months.

A. [confusion or inability to answer]

If the witness is able to provide a name or two, further questions about specific conversations, where they occurred, and who was there often skewer such claims.

The careful lawyer who plans to present reputation evidence instructs reputation witnesses to canvass the community to get specific glowing testimonials about the client's good character.

Many experienced lawyers view character evidence as, at most, a make-weight, and at worst, as a waste of time, with dangerous risks. I disagree—character evidence properly presented can bolster any case. However, the interlinking rules are confusing (and twice as complex in a criminal case). In preparation for any trial involving character witnesses, I strongly suggest photocopying the few relevant rules and memorizing them—you will be leagues ahead of the average attorney faced with a "question of character."

Source: Civil Litigation/Effective Direct and Cross-Examination Update/12 Basic Evidence Rules/§12.18 Prior Bad Acts, Criminal Convictions

[§12.18] Prior Bad Acts, Criminal Convictions

To Main Book

California law on bad acts. The California legislature has created two new exceptions to the rule that evidence of other bad acts is inadmissible to show that the defendant is predisposed to commit such acts. Evidence Code §1108 provides that in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense may be admitted as evidence supporting the conclusion that defendant committed the charged act or acts. The only limitation on admissibility is Evid C §352 (trial court must balance prejudice against probative value). The prosecution must disclose the evidence it intends to introduce at least 30 days before the date of trial, or later as allowed by the court for good cause. Evid C §1108(b). The statute defines sexual offense in Evid C §1108(d).

An analogous exception for evidence of domestic violence offenses, as defined by Pen C §13700, is applicable in a criminal action in which the defendant is accused of a domestic violence offense. Evid C §1109. Evidence of domestic violence offenses that occurred more than ten years ago is inadmissible, except as determined by the court in the interests of justice. Evid C §1109(e). Evidence Code §1109 also provides that evidence of a prior offense of an elder or dependent adult is admissible with the exception of evidence of findings of administrative agencies regulating licensed health facilities. Effective January 1, 2005, the definition of "domestic violence" contained in Evid C §1109 has been expanded to include the meaning set out in Fam C §6211, subject to a hearing under Evid C §352.

In *People v Falsetta* (1999) 21 C4th 903, 89 CR2d 847, the California Supreme Court upheld Evid C §1108 against a due process challenge. Although the court acknowledged that the provision is a deviation from the historical practice of excluding propensity evidence, the preservation of trial court discretion to exclude the evidence under Evid C §352 if it is unduly prejudicial "saves section 1108 from defendant's due process challenge." 21 C4th at 917.

Bad acts may also be admissible to show modus operandi, and hence to prove identity, but only when the past crimes are so similar to the present charged crimes as to create a criminal signature or fingerprint. See *People v Ewoldt* (1994) 7 C4th 380, 398 n2, 27 CR2d 646. See also *People v Felix* (1993) 14 CA4th 997, 18 CR2d 113 (in robbery prosecution, admission of prior conviction of same defendants for robbery in another county was error, albeit harmless). The degree of similarity required for uncharged misconduct when offered to show common design or plan is less than that required to prove identity. The evidence must show the existence of a plan rather than a series of spontaneous acts. *People v Ewoldt* (1994) 7 C4th 380, 402, 27 CR2d 646. The least degree of similarity is required to prove intent: The uncharged misconduct must be sufficiently similar to support the inference that the defendant probably had the same intent on both occasions. 7 C4th at 402. In *Hasoldt v Patrick Media Group, Inc.* (2000) 84 CA4th 153, 166, 100 CR2d 662, the Second District Court of Appeal (Division Three) interpreted *Ewoldt* to mean that when the identity of the actor is unknown, evidence of uncharged bad acts is not admissible "on such issues as intent, motive, or lack of mistake or accident"—issues that presume the identity of the perpetrator is known—unless it meets the stringent standards set forth in *Ewoldt* for proof of identity. But see *People v Linkenauger* (1995) 32 CA4th 1603, 38 CR2d 868 (when defendant charged with violent crime has prior relationship with victim, prior assaults on same victim admissible to establish intent, motive, or identity, without need for exhaustive analysis of similarities between charged and uncharged act). See also *Rufo v Simpson* (2001) 86 CA4th 573, 595, 103 CR2d 492 (in joined wrongful death-survivor actions, defendant's abuse of victim admissible on issues of motive, intent, and identity).

For further discussion on evidence of bad acts, see Update §5.21.

California law on impeachment using priors. In *People v Wheeler* (1992) 4 C4th 284, 291, 14 CR2d 418, the California Supreme Court held that because, under Proposition 8 (Cal Const art I, §28(f)), the limitations on the use of prior conduct for impeachment purposes imposed by Evid C §§787 and 788 no longer apply in criminal cases, "relevant misdemeanor conduct" is admissible to impeach any witness testifying in a criminal case. Only the conduct, however, is admissible. The court held further that any nonfelony conduct involving moral turpitude is relevant to the witness's credibility, because it "may suggest a willingness to lie." 4 C4th at 295. The fact of a misdemeanor is not itself admissible, because it is hearsay, and there is no hearsay exception for misdemeanor convictions comparable to Evid C §1300, which creates a hearsay exception for felony convictions. 4 C4th at 297. The court of appeal held in *People v Steele* (2000) 83 CA4th 212, 99 CR2d 458, that the trial court erred in preventing defense counsel from inquiring of a prosecution witness whether she had ever lied to police. Counsel's questions, based on the witness's rap sheet, were appropriate; although the rap sheet itself was inadmissible under *Wheeler*, it supported a good faith belief that the witness had a prior conviction for lying to a police officer. 83 CA4th at 223. See also *People v Rodriguez* (1986) 42 C3d 730, 230 CR 667 (harmless error for trial court to exclude evidence impeaching chief prosecution witness with drug connections, details of immunity agreement, psychiatric treatment, and two additional robberies she admitted committing with defendant); *People v Duran*

(2002) 97 CA4th 1448, 119 CR2d 272 (in defendant and co-defendant's sentencing with street gang enhancements, certified minute order documenting third gang member's conviction of predicate offense was not inadmissible hearsay). Article I, §28(f) of the California Constitution does not relieve the trial court of its duty to exercise its discretion under Evid C §352 to exclude prior convictions involving moral turpitude if their probative value is outweighed by the risk of undue prejudice. *People v Collins* (1986) 42 C3d 378, 228 CR 899; *People v Castro* (1985) 38 C3d 301, 211 CR 719; *People v Dillingham* (1986) 186 CA3d 688, 231 CR 20. See also *People v Turner* (1990) 50 C3d 668, 268 CR 706 (because of unforeseeable change in law after defendant's trial as a result of decision in *People v Castro,* failure to object to introduction of prior convictions at time of trial did not waive challenge).

The courts have defined moral turpitude as a general willingness to do evil, *i.e.,* an act of baseness, violence, or depravity in the private or social duties that a man owes. *People v Sanders* (1992) 10 CA4th 1268, 13 CR2d 205 (child endangerment does not qualify as moral turpitude offense; in determining moral turpitude, court must look at "least adjudicated elements" of crime, not facts of particular case). 10 CA4th at 1272. *People v Ballard* (1993) 13 CA4th 687, 16 CR2d 624, held that the felony of indecent exposure was a crime of moral turpitude and thus admissible without limitation under Proposition 8. Felony driving under the influence with three or more DUI convictions within seven years before the current offense is a crime involving moral turpitude under *People v Castro* (1985) 38 C3d 301, 211 CR 719. *People v Forster* (1994) 29 CA4th 1746, 35 CR2d 705.

When a prior conviction is an element of an offense and the defendant stipulates to the fact of the conviction, the jury must be told of the conviction, but may not be informed of the nature of the offense. *People v Bouzas* (1991) 53 C3d 467, 476, 279 CR 847 (petty theft with a prior); *People v Valentine* (1986) 42 C3d 170, 173, 228 CR 25 (possession of firearm by ex-felon). See also *People v Hopkins* (1992) 10 CA4th 1699, 13 CR2d 451 (improper to read language in charging document referring to prior conviction of "violent felony").

A defendant must take the stand and actually suffer impeachment with a prior conviction in order to complain on appeal that he was improperly impeached. *People v Collins* (1986) 42 C3d 378, 228 CR 899. See also *People v Hovey* (1988) 44 C3d 543, 568, 244 CR 121; *People v Rowland* (1992) 4 C4th 238, 258, 14 CR2d 377 (*Collins* requirement applicable even though trial court ruled in limine that impeachment precluded).

Federal law on bad acts. Provisions similar to Evid C §§1108 and 1109 were added to the Federal Rules of Evidence in 1994. Under Fed R Evid 413, in prosecutions for sex offenses, evidence of other sex offenses is admissible to show propensity. Federal Rule of Evidence 414 permits the introduction of evidence of other acts of child molestation as propensity evidence in prosecutions for child molestation. In addition, Fed R Evid 415 permits the use of such evidence in civil cases involving sexual misconduct or child molestation. In *U.S. v LeMay* (2001) 260 F3d 1018, the Ninth Circuit upheld the constitutionality of Fed R Evid 414. Holding that Rule 414 implicitly incorporates the balancing test of Fed R Evid 403 (analogous to Evid C §352), the court concluded that Rule 403, "if conscientiously applied, will protect defendants from propensity evidence so inflammatory as to jeopardize their right to a fair trial." 260 F3d at 1022. See, *e.g., Old Chief v U.S.* (1997) 519 US 172, 136 L Ed 2d 574, 117 S Ct 644 (reversible Rule 403 error for trial court to admit defendant's prior after defense offered to stipulate to conviction; Court held that there was no government right under Rule 403 to refuse offered stipulation).

In *Huddleston v U.S.* (1988) 485 US 681, 99 L Ed 2d 771, 108 S Ct 1496, the Supreme Court overruled decisions in a majority of federal courts of appeals requiring the prosecution to prove the defendant's commission of uncharged "similar acts" by a preponderance of the evidence or by clear and convincing evidence before it could introduce evidence of such acts at trial. The high court held that Rule 404(b) evidence is admissible on a preliminary showing that "the jury can reasonably conclude that the act occurred and that defendant was the actor." 485 US at 689.

The Ninth Circuit Court of Appeals has applied Fed R Evid 404(b) to third parties as well as parties. In *U.S. v McCourt* (9th Cir 1991) 925 F2d 1229, the court held that Rule 404(b) barred defendant from proving that the government's chief witness was a convicted felon for the purpose of showing the witness's propensity to behave criminally.

Testimony about a defendant's drug usage to show his financial motive for robbing a bank was found to be improper under Fed R Evid 404(b) in *U.S. v Madden* (4th Cir 1994) 38 F3d 747. Drug use may provide a motive for committing bank robbery, but the prosecution failed to establish that the defendant had a significant drug habit or addiction and that he lacked the financial means to support his habit. See also *Gallagher v City of West Covina* (CD Cal) 2002 US Dist LEXIS 14853, a 42 USC §1983 excessive force case (trial court, citing Fed R Evid 404(b), granted plaintiff's motion to preclude evidence of his prior convictions and prior bad acts, distinguishing *Perrin v Anderson* (10th Cir 1986) 784 F2d 1040, cited in Update §12.11, in which officers were claiming self defense and plaintiff's prior violence was therefore relevant).

On request by the defendant, Rule 404(b) requires the prosecution in a criminal case to provide pretrial notice of the "general nature" of evidence of other crimes, wrongs, or acts it intends to introduce at trial. The court may excuse pretrial notice on a showing of good cause. An ingenious prosecutor can usually portray virtually any wrongful act of the defendant as relevant to proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Because of the inherently prejudicial nature of other crimes evidence, defense counsel should vigorously oppose its admission at a hearing outside the presence of the jury. See Fed R Evid 404(b) advisory committee note (1991 amendment) ("[n]othing in [Rule 404(b)]

precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial").

A personal telephone directory and a notebook with names, telephone numbers, and records of drug transactions were held admissible as "tools of the trade" because they were relevant to proving the existence of a conspiracy and the defendant's involvement in it. *U.S. v Nava-Salazar* (7th Cir 1994) 30 F3d 788. The court refused to distinguish between physical objects (such as drug scales) and the writings involved in this case. The records were not hearsay, because they were not offered to prove the information they contained but were significant by their existence alone.

Prior acts of fraud may be admissible to show present intent to defraud. *Turley v State Farm Mut. Auto Ins. Co.* (10th Cir 1991) 944 F2d 669 (prior insurance fraud admitted at trial to show that representations to insurance company in civil case were intended to defraud).

Federal law on impeachment using priors. Like California courts, federal courts require a balancing of probative value against prejudice in determining whether prior acts should be admitted. Fed R Evid 403; *Old Chief v U.S.* (1997) 519 US 172, 136 L Ed 2d 574, 117 S Ct 644 (reversible Rule 403 error for trial court to admit defendant's prior after defense offered to stipulate to conviction; Court held there was no government right under Rule 403 to refuse defendant's offered stipulation); *U.S. v Breitkreutz* (9th Cir 1993) 8 F3d 688 (reversible error for court to admit evidence of three prior convictions when only one was necessary to support conviction for being felon in possession of firearm); *U.S. v Miller* (9th Cir 1989) 874 F2d 1255, 1268 (prior sale of documents by defendant to FBI informant too prejudicial to be admitted in espionage trial). The Seventh Circuit has stated that the trial court has discretion on whether to instruct the jury about its need to find that by a preponderance of evidence defendant committed the prior act before the jury can consider it as evidence of identity or intent. *U.S. v Hudson* (7th Cir 1989) 884 F2d 1016.

Federal Rules of Evidence 609 was amended as of December 1, 1990, to clarify the circumstances under which use of prior convictions may be used to impeach witnesses. The rule provides that:

1. Evidence that *any witness* (including an accused) has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

2. Evidence that an *accused* has been convicted of a crime shall be admitted only if the court determines that the probative value of admitting the evidence outweighs its prejudice to the accused.

3. Evidence that any witness *other than an accused* has been convicted of a crime shall be admitted if the crime is a felony and if the court determines under Fed R Evid 403 that its probative value is not *substantially* outweighed by the danger of unfair prejudice, confusion, or waste of time.

A defendant who claims that he did not commit the charged acts may not be impeached by admission of evidence of his prior similar crimes to show "intent" or "knowledge." *U.S. v Jenkins* (8th Cir 1993) 7 F3d 803 (construing Fed R Evid 404(b), and relying in part on the Ninth Circuit Court of Appeals decision in *U.S. v Palmer* (9th Cir 1993) 3 F3d 300 (statement of past involvement in marijuana distribution inadmissible to prove motive in prosecution for manufacturing marijuana plants when motive does not establish material element of any charged offense)).

Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, p 124 has been replaced by Saltzburg, Martin & Capra, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, p 214 (7th ed 1998).

[§12.19] Sample Questions Attacking Character for Truthfulness

To Main Book

In rare cases, a witness may have earlier expressed his or her willingness to lie under oath. For example, a party may have said "off the record" at a social occasion that, if necessary, he or she would lie in a trial because that is the only way to get justice. There are no clear-cut evidentiary rules permitting examination on such a statement. Cases supporting cross-examination about willingness to swear falsely are collected at 3A Wigmore on Evidence §957 (Chadbourne rev ed 1981).

There is even more difference of opinion about whether counsel should be permitted to prove a witness's *conduct* indicating a disposition, habit, or general scheme to make false charges or claims. 3A Wigmore §963.

Witnesses have absolute immunity from civil liability under 42 USC §1983 for giving perjured testimony at trial. *Briscoe v LaHue* (1983) 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108. The Ninth Circuit has held that a witness conspiring with another witness to present perjured testimony also has *Briscoe* immunity. *Franklin v Terr* (9th Cir 2000) 201 F3d 1098.

[§12.21] Professional Texts (Expert Witness)

To Main Book

Evidence Code §721(b) has been amended to allow an expert witness to be cross-examined on the content or tenor of any scientific, technical, or professional text—whether or not relied on by the expert in forming an opinion—if the publication has been established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits. Evid C §721(b).

In *McGarity v Department of Transp.* (1992) 8 CA4th 677, 10 CR2d 344, it was held improper to cross-examine an expert on an unpublished General Motors crash test report with which the expert had no familiarity, on which he did not rely in forming his opinion, and which had not been admitted into evidence.

The Federal Rules of Evidence permit a far more extensive use of learned treatises than do state rules. Under Fed R Evid 803(18), an expert may be cross-examined about a learned treatise, even if the expert has not relied on or even referred to it. It is only necessary that the learned treatise has been established as authoritative by the evidence of another expert or by judicial notice.

The excellent McElhaney's Trial Notebook, chap 14 (3d ed 1994) points out the opportunities and pitfalls of this rule. In particular:

1. Counsel should pick an understandable treatise on cross-examination. A hostile witness cannot be expected to translate jargon into understandable English.

2. Try to frame questions from the treatise, using its very words if possible.

3. Do not be unfairly selective. If you change the meaning by taking something out of context, the missing context can be read into evidence simultaneously with the part you offered.

4. Counsel should read the treatise out loud, rather than rely on the witness, who will probably do a bad job of it. A safe examination consists of simply reading the impeaching parts of the treatise to the witness, while the witness follows with a copy, followed by the question "Did I read that correctly?"

5. Pick something that matters. Do not impeach the witness on a peripheral point.

6. Counsel should pick unimpeachable treatises. Once the treatise is offered as evidence, the author's credibility can be attacked just as if the author had testified as a witness. Fed R Evid 806.

Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, p 617 has been replaced by Saltzburg, Martin & Capra, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence, p 1543 (7th ed 1998).

[§12.22] Summaries

To Main Book

In a complex and lengthy federal drug conspiracy case, the court properly permitted the prosecution to present both testimony and a chart summarizing earlier lengthy testimony of co-conspirators about the structure of a drug organization. *U.S. v Johnson* (4th Cir 1995) 54 F3d 1150. The court in *Johnson* found the summaries admissible as evidence under Fed R Evid 611(a) (trial court has discretion to control presentation of evidence to assist jury in ascertaining truth and to avoid wasting time). Although the appellate court found no abuse of discretion, it noted that in the ordinary case, the use of summaries is best saved for closing argument. 54 F3d at 1162. Note that the Ninth Circuit does not permit summaries of testimony to be received as evidence. *U.S. v Wood* (9th Cir 1991) 943 F2d 1048, 1053 (charts summarizing testimony or documents are "pedagogical devices" and should not be admitted into evidence or given to jury during deliberations).

Former Evid C §1509 has been repealed. Now see Evid C §1523(d).

[§12.23] Bases for Expert Opinion

To Main Book

Federal Rules of Evidence 703 has been amended, effective December 1, 2000, to provide that when an expert relies on inadmissible information to form an opinion or inference, that material is not itself admissible unless the court determines that its probative value substantially outweighs its prejudicial effect. See also Carlson, *Is Revised Expert Witness Rule a Critical Modernization for the New Century?* 52 Fla L Rev 715 (Sept. 2000).

For an in-depth discussion covering California's limitations on what kind of material an expert can reasonably rely on and the admissibility of materials underlying an expert's opinion, see *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833 (details of informal survey expert conducted and relied on in formation of opinion not admissible).

Federal Rules of Evidence 702 was amended, effective December 1, 2000, to conform to *Daubert*. It now requires expert testimony to be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) "applied… reliably to the facts of the case." For discussion of *Daubert* and its progeny, see Update §7.15.

The following is from an article that originally appeared in 13 CEB Civ Litigation Rep 6 (Feb. 1991):

Experts: What Goes In, What Stays Out—Pop Quiz

by William A. Brockett

You have qualified your expert and are exploring the basis of the expert's opinion. For the following experts, can the jury see or hear the evidence described below? Can the jury review the evidence in deliberations?

1. *Accident Reconstruction Expert:* Photographs of skid marks and bent railings, taken by someone other than the expert.

2. *DNA "Fingerprint" Expert:* Two pages of comments by an authority in the field, printed in a forensic trade journal.

3. *Economic Damages Expert:* Two pages of charts, with boxes, arrows, and numbers, summarizing a six-month audit of a large financial corporation.

4. *Psychiatric Expert:* A three-page report of a nontestifying psychiatrist, concluding that defendant in a criminal case is sane.

The law is muddy on many of these issues, but the answers are important: the best experts can determine the outcome of close cases.

If you are the proponent of an expert, you want to make sure that "the melody lingers on." If you are the opponent of an expert, you want to prevent harmful material from being presented to the jury. If it is presented, you want to prevent the evidence from being marked as an exhibit and sent to the jury room.

Admissibility of Material Relied on by Expert

Experts are often hired guns who shoot indiscriminately from ivory towers. But, once an expert has been qualified, the expert has virtual free rein to testify about his or her expert opinion. The expert may rely on inadmissible evidence "of a type reasonably relied upon by experts in the particular field in forming opinions." Fed R Evid 703; Evid C §801(b) (containing similar language).

Can an expert present such inadmissible evidence to a jury by testifying to the *basis* for an expert opinion? Maybe. Federal Rules of Evidence 705 and Evid C §802 permit an expert to state on direct examination reasons for the expert's opinion. And, as we have seen, those reasons may include inadmissible testimony.

[**Editor's Note:** Federal Rules of Evidence 703 has been amended to provide explicitly that inadmissible matter forming the basis for an expert's opinion is not admissible unless its probative value substantially outweighs its potential for prejudice.]

This situation has the potential for mischief. Expert Doctor A, testifying that a criminal defendant is sane, could read into the record Doctor B's lengthy report coming to the same conclusion, even though Doctor B was not available for cross-examination. This occurrence is precisely what was approved in *Kelley v Bailey* (1961) 189 CA2d 728, 737, 11 CR 448 (personal injury action in

which defense witness read into evidence opinion of another doctor regarding plaintiff's condition; admissible as part of information on which defense expert based diagnosis of moderate whiplash syndrome). On the other hand, in *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348, the court found that an expert had not been allowed to read hearsay matters relied on in forming his opinion and noted that an expert "may not under the guise of reasons [for his opinion] bring before the jury incompetent hearsay evidence." 119 CA3d at 789. However, the *Grimshaw* court permitted the witness to testify to a summary of the out-of-court reports and documents relied on.

In *West v Johnson & Johnson Prods.* (1985) 174 CA3d 831, 859, 220 CR 437, an expert was allowed to describe the nature of consumer complaints and to read excerpts from pertinent ones (although after a conference in chambers the trial court ruled that the written consumer complaints would not be admitted into evidence and that the witness should refrain from reading the complaints verbatim).

In contrast, see *People v Coleman* (1985) 38 C3d 69, 92, 211 CR 102 (improper to read murder victim's poignant letters describing defendant's threats and victim's fear of future violence even though expert psychiatrists considered the letters in deciding defendant's sanity); *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 860, 236 CR 778 (improper for expert to testify on direct examination to six other experts' opinion buttressing his own).

PRACTICE TIP

Both state and federal law give the court discretion to allow a *cross-examiner* to inquire into the underlying facts or data of the expert opinion. Fed R Evid 705; Evid C §802 (requiring such questioning to take the form of a voir dire before the opinion is given). Virtually all courts permit such cross-examination. If you wish to get the otherwise inadmissible basis for your expert opinion into evidence, instruct your expert to be alert to the opportunity to present such evidence on cross-examination. And, if your expert is attacked on some aspects of the basis for the opinion, it seems proper to present otherwise inadmissible material on redirect for "rehabilitation."

Other cases *excluding* reports of a nontestifying expert relied on by the testifying expert include *State v Towne* (Vt 1982) 453 A2d 1133 (reversible error for psychiatrist to testify that the "man who wrote the book" on psychosexual disorders agreed with him that defendant was sane) and *Rose Hall, Ltd. v Chase Manhattan Overseas Banking Corp.* (D Del 1983) 576 F Supp 107, 158, aff'd without a published opinion (3d Cir 1984) 740 F2d 958 (proper to exclude testimony of hearsay telephone conversation as partial basis of property valuation). See also *Department of Corrections v Williams* (Fla Ct App 1989) 549 So2d 1071 (expert should not be conduit for inadmissible evidence; proper to exclude contents of affidavit by accident witness).

Cases permitting an expert to provide ordinarily inadmissible damaging details as the basis of an expert opinion include *U.S. v Blood* (4th Cir 1986) 806 F2d 1218, 1222 (prior tax court decision to which defendant was a party); *Wilmington Trust Co. v Manufacturers Life Ins. Co.* (11th Cir 1985) 749 F2d 694, 698 (previous consideration of possibility that insured's death was homicide).

Authorities generally support limiting *testimony* about otherwise inadmissible material in the guise of providing the basis of an opinion. Carlson, *Getting a Grip on Experts*, 16 Litig 36 (Summer 1990); Proposed Rules by the ABA Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence (1987) 120 FRD 299, 369 (proposing an amendment to Fed R Evid 703 to disallow facts and data underlying an expert's opinion unless they are independently admissible, with judicial discretion to admit the evidence in certain cases).

[**Editor's Note:** Federal Rules of Evidence 703 was amended, effective December 1, 2000, to provide: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." See also Carlson, *Is Revised Expert Witness Rule a Critical Modernization for the New Century?* 52 Fla L Rev 715 (Sept. 2000).]

If all else fails, the opponent of "basis testimony" can call on the court's traditional discretion to bar evidence if its probative value is outweighed by the danger of prejudice. Fed R Evid 403; Evid C §352.

Finally, the opponent of expert testimony should be alert to the attempted use of unreliable hearsay. Such hearsay is not a proper basis for an expert's opinion, and it should therefore be ruled inadmissible for all purposes. Fed R Evid 703; *Ricciardi v Children's Hosp. Med. Ctr.* (1st Cir 1987) 811 F2d 18, 24 (expert barred from relying on doctor's handwritten note concerning cause of patient's injuries; doctor who prepared note had no personal knowledge of event described and could not recall source of information; moreover, note was not type of fact on which an expert would rely in forming opinion); Evid C §801(b); *People v Odom* (1980) 108 CA3d 100, 115, 166 CR 283 (psychiatrist barred from testifying to defendant's mental condition based in part on hearsay reports from drug manufacturers).

Making Expert Testimony a Jury Exhibit

If inadmissible evidence is presented to the jury as the basis of an expert opinion, it should be *read* into the record. However, it does not normally become an exhibit for later jury perusal. Jefferson's California Evidence Benchbook §29.89 (3d ed CJA-CEB 1997).

PRACTICE TIP

If the court permits the expert to testify to inadmissible facts as the basis for an opinion, have a court reporter prepare a daily transcript of the testimony. You can then read the testimony word for word to the jury during closing argument. With luck, a jury may even request a rereading during its deliberations.

Learned Writings. In federal court, learned writings may be read into evidence by an expert if they were relied on, and are vouched for by the expert as "a reliable authority." Fed R Evid 803(18). Once read, the text may *not* be marked as an exhibit and received in evidence.

In California state courts, an expert can be cross-examined only about learned treatises that the expert "referred to, considered, or relied upon" in arriving at his or her opinion or that have been admitted into evidence. See Evid C §721(b); California Expert Witness Guide §§12.12, 12.38 (2d ed Cal CEB 1991). The expert need not have relied on the treatise for cross-examination: it is sufficient to have considered it. *People v Kozel* (1982) 133 CA3d 507, 535, 184 CR 208. The right to cross-examine on a document does not imply the right to introduce the document into evidence. *Finn v G.D. Searle & Co.* (1984) 35 C3d 691, 704, 200 CR 870.

Finally, in state court only scientific facts of such "general notoriety" that they are practically subject to judicial notice are independently admissible. Evid C §1341; Evidence Benchbook §18.16.

Summary Charts. Many civil lawsuits (and a growing number of federal criminal cases) revolve around complex financial transactions that can only be unraveled by an expert accountant. The accountant often relies on business records, which are independently admissible. Can an attorney mark as an exhibit and present to a jury synopsis spreadsheets or other chart summaries of the accountant's work product?

A lay jury needs comprehensible charts or summaries to make sense of difficult financial transactions. The "open sesame" for summary charts is Fed R Evid 1006 and its parallel, Evid C §1509. Both provide for the admissibility of charts or summaries if there are voluminous writings, etc., that cannot conveniently be examined in court. Putting together these provisions with my earlier discussion of "expert basis" testimony, an attorney might argue for admission of a chart summary of expert testimony that is based in part on otherwise inadmissible material, so long as the material is reasonably relied on by like experts.

Though many courts may not buy this last suggestion, all courts should be receptive to charts or other summaries that are based on business records. *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 605, 128 CR 697 (accountant's one-page "Fire Cost Report" summarizing individual records of fire crew properly admitted); *Vanguard Recording Soc'y v Fantasy Records, Inc.* (1972) 24 CA3d 410, 418, 100 CR 826 (written summary of 50,000 sales invoices properly introduced).

Opponents of chart summaries can complain that prejudice outweighs probative value, citing *Holland v U.S.* (1954) 348 US 121, 99 L Ed 150, 75 S Ct 127, in which the Supreme Court cautioned that charts and summaries "have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." 348 US at 128, 99 L Ed at 160. The *Holland* court's caution has been echoed by later courts, particularly in deciding whether summaries should go to the jury as an exhibit. *U.S. v Poschwatta* (9th Cir 1987) 829 F2d 1477, 1481 (charts of defendant's income properly admitted; better practice may have been to allow charts as testimonial aids only). See also *Gomez v Great Lakes Steel Div. Nat'l Steel Corp.* (6th Cir 1986) 803 F2d 250, 257 (abuse of discretion to admit chart summarizing damages without proper limiting instruction informing jury of summary's purpose and that it does not itself constitute evidence).

Cases apparently permitting summaries to go to the jury include *U.S. v Robinson* (8th Cir 1985) 774 F2d 261, 275 (13-page summary of loans to 105 clients); *U.S. v Radseck* (7th Cir 1983) 718 F2d 233, 237 (summaries of evidence showing that defendant had unpaid tax liability; proper limiting instruction given). [See Update §12.22 for discussion of case in which the use of charts and summaries of earlier co-conspirator testimony was allowed.]

Answers to Pop Quiz

1. Photographs of skid marks and bent railings taken by someone other than accident reconstruction expert are admissible during testimony as partial basis of the expert's opinion. They are admissible as an exhibit for jury deliberations because the photographs

are independent evidence of the "scene of the accident."

2. In federal court, the comments by an authority in the field printed in a forensic trade journal may be read to the jury if authenticated by the expert. In state court, the comments are inadmissible, except under cross-examination if the expert has relied on, considered, or referred to them, or unless the comments are of such general notoriety as to be subject to judicial notice.

3. The charts summarizing the audit may be shown to the jury. Courts vary on whether charts should go to the jury for deliberations. If they do go the jury, proper limiting instructions must be given.

4. The report of the nontestifying psychiatrist concluding that the defendant is sane should neither be read to the jury nor go to the jury for deliberations. Permitting selective reading of such reports to the jury would not be an abuse of discretion under California law.

[§12.23A] Scope of Expert Opinion

To Main Book

Although Fed R Evid 704 permits an expert to testify to the ultimate issue in a case, there are limits. In *U.S. v Scop* (2d Cir 1988) 846 F2d 135, the court reversed convictions for mail fraud, securities fraud, and conspiracy. The court disallowed testimony of an expert who continually used the phraseology of statutes and regulations in rendering his opinion. The expert further improperly relied on assessing other witnesses' credibility. On rehearing, the court also reversed the remaining convictions of perjury on the same grounds. *U.S. v Scop* (2d Cir 1988) 856 F2d 5. See also *U.S. v Castillo* (2d Cir 1991) 924 F2d 1227 (court barred expert testimony that drug dealers often force buyers to snort cocaine to flush out undercover officers, because of concern that jury might confuse such testimony with facts of case under scrutiny); *Specht v Jensen* (10th Cir 1988) 853 F2d 805 (experts improperly testified about whether a search was unconstitutional). But see *Luna v Massachusetts* (D Mass 2002) 224 F Supp 2d 302 (habeas petition; prosecutor allowed to testify as expert witness; court held that case involved Massachusetts, not federal, rules of evidence, and federal rules preclude expert's opinion on ultimate issue only as to state of mind, which was not in dispute).

The Second Circuit Court of Appeals held that a police officer was not precluded under Fed R Evid 704(b) from testifying that the facts and circumstances indicated that drugs found on the defendant were possessed for distribution, not personal consumption. The court cautioned that an expert must be careful to testify that his or her opinion is based on personal knowledge of common criminal practices and not on some special knowledge of a defendant's mental processes. *U.S. v Lipscomb* (2d Cir 1994) 14 F3d 1236.

[§12.24] Judicial Notice

To Main Book

The contents of former Fed R Evid 803(24) have been transferred to a new Fed R Evid 807.

[§12.25A] Periodicals

To Main Book

Effective January 1, 1988, Evid C §645.1 creates a statutory presumption that newspapers or periodicals are authentic if regularly issued at average intervals not exceeding three months.

[§12.26] Missing Evidence

To Main Book

The "best evidence rule" and related provisions (former Evid C §§1500-1511; see in particular former Evid C §1500) have been replaced by the "secondary evidence rule" and related provisions (Evid C §1520-1523; see in particular Evid C §1521). See generally Update §12.29.

Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) has been replaced by O'Malley, Grenig, & Lee, Federal Jury Practice and Instructions, Civil and Criminal (5th ed 2000).

The reference to BAJI 2.02 in Book §12.26 should now be to JC Cal Civ Jury Inst 203 (CACI).

[§12.26A] Third Party Guilt

To Main Book

A criminal defendant may proffer any relevant evidence that raises a reasonable doubt about his guilt, including evidence of possible culpability by a third party. *People v Hall* (1986) 41 C3d 826, 226 CR 112. There is no requirement, however, that any third party culpability evidence, no matter how remote, be admitted. *People v Clark* (1992) 3 C4th 41, 10 CR2d 554. A defendant may be precluded from presenting evidence of another's culpability if the proof consists of time-consuming hearsay and nonprobative character evidence. *People v Jones* (1998) 17 C4th 279, 305, 70 CR2d 793.

The court of appeal in *People v Jackson* (1991) 235 CA3d 1670, 1 CR2d 778, reversed the defendant's conviction in a murder case because the trial court improperly barred evidence that defendant's friend fired the fatal shots. The court found that the evidence would have substantially corroborated the factual defense, and error was cumulated by the prosecution's improper withholding of information that a witness had told the police that the friend had shot the victim.

[§12.27] Prior Consistent Statements

To Main Book

Under Fed R Evid 801(d)(1)(B), prior consistent out-of-court statements introduced to rebut a charge of recent fabrication or improper influence or motive must be made *before* the alleged fabrication, influence, or motive. *Tome v U.S.* (1995) 513 US 150, 130 L Ed 2d 574, 115 S Ct 696. Once admitted, such statements may be used for substantive purposes under Rule 801(d)(1)(B). Prior consistent statements may not be offered to rebut claims of a "tricky" or faulty memory, or to bolster a discredited witness. The *Tome* holding overrules by implication cases like *U.S. v Payne* (9th Cir 1991) 944 F2d 1458 (prior consistent statements may be admitted to rehabilitate witness's credibility, even if witness had motive to fabricate) and *U.S. v Montague* (DC Cir 1992) 958 F2d 1094 (prior consistent statement may be used to rehabilitate even if made after motive to lie arose, once witness's truthfulness challenged by showing motive to falsify).

The court in *U.S. v Vest* (1st Cir 1988) 842 F2d 1319 upheld an elastic standard for admitting prior consistent statements, saying that they were admissible as long as they were "sufficiently" consistent with in-court testimony and made at a time when there was no motive to fabricate and as long as the declarant was available for cross-examination.

It is an abuse of discretion for a trial court to permit an attorney to provide a witness's prior consistent statements before the witness is impeached. Such anticipatory rehabilitation resulted in reversal of conviction in *U.S. v Bolick* (4th Cir 1990) 917 F2d 135, 140.

The full cite for *California v Green,* cited in Book §12.27, is *California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930.

[§12.27A] Spontaneous Declarations

To Main Book

Evidence Code §1240 and Fed R Evid 803(2) permit evidence of spontaneous statements made under nervous excitement and near the time of the event that triggered the declaration. The court cannot speculate about the predicate facts required to find a spontaneous declaration. In *People v Pearch* (1991) 229 CA3d 1282, 280 CR 584, a kidnap victim's brother was allowed to testify that the victim had stated that he was being hurt. The statement was made during a telephone conversation while he was being held by the kidnappers. The court of appeal held that admission of the statement was error because the court could not speculate about what event was being described and whether the victim was still under the effect of the event at the time of the phone call.

[§12.28] Exercise of Privilege Before Jury

To Main Book

The court in *U.S. v Morris* (4th Cir 1993) 988 F2d 1335 held that it was reversible error for the prosecutor to cross-examine the defendant's wife in trial about her invocation of the spousal privilege when she was called to testify before a grand jury.

2 Witkin, California Evidence §917 (2d ed 1966) has been replaced by 2 Witkin, California Evidence, *Witnesses* §§446-447 (4th ed 2000).

[§12.29] Best Evidence Rule

To Main Book

Effective January 1, 1999, the legislature repealed the longstanding "best evidence rule" (see former Evid C §1500) and replaced it with the "secondary evidence rule" (see Evid C §1521). The best evidence rule required the content of a writing to be proved by the original of the writing itself unless a statute authorized admission of secondary evidence. The secondary evidence rule, on the other hand, generally allows the content of a writing to be proved with secondary evidence. See generally Evid C §§1520-1523, replacing repealed former Evid C §§1500-1511. According to the drafters of §§1520-1523:

Because of the breadth of the exceptions to the Best Evidence Rule, this reform is not a major departure from former law, but primarily a matter of clarification and simplification.

Comment to Evid C §1521.

[§12.30] Incompetence

To Main Book

A witness who has been hypnotized to recall events that are the subject of the witness's testimony may be found to be incompetent to testify at trial. See *Schall v Lockheed Missiles & Space Co.* (1995) 37 CA4th 1485, 44 CR2d 191.

A judge may strike the testimony of a witness who continues to give nonresponsive and argumentative answers after warning. See *Magyar v United Fire Ins. Co.* (9th Cir 1987) 811 F2d 1330.

Welfare and Institutions Code §355(c)(1)(b) contains a far-reaching hearsay exception for the out-of-court statements of a child who is the subject of a dependency proceeding. See *In re Lucero L.* (2000) 22 C4th 1227, 96 CR2d 56 (adopting limiting construction of Welf & I C §355(c)(1)(b) to avoid due process problems).

[§12.31] Otherwise Trustworthy Hearsay

To Main Book

The Eleventh Circuit Court of Appeals held Panamanian bank deposit slips admissible under the catchall hearsay exception of former Fed R Evid 804(b)(5) (now Fed R Evid 807), finding the slips to be probative, material, and reliable in connecting defendant to a drug crime. *U.S. v Munoz* (11th Cir 1994) 16 F3d 1116. See also *U.S. v Deeb* (11th Cir 1994) 13 F3d 1532, permitting use of former trial testimony of a co-conspirator under former Fed R Evid 804(b)(5), even though the defendant was not present and had no opportunity to cross-examine at the earlier trial. The court found that the cross-examination of the witness by counsel for other defendants was the "functional equivalent" of cross-examination by defendant, which gave the former testimony the guarantees of trustworthiness required under former Rule 804(b)(5) and the confrontation clause of the Constitution.

Prior inconsistent statements were properly admitted under the catchall exception to the hearsay rule of former Fed R Evid 803(24) (now Fed R Evid 807) even though the statements were not admissible as prior inconsistent statements under Fed R Evid 801(d)(1)(A). *U.S. v Valdez-Soto* (9th Cir 1994) 31 F3d 1467. The statements possessed substantial indicia of reliability because they were made by a cooperative witness to an FBI agent shortly after arrest and were consistent with the physical evidence. The trial court had considerable latitude in deciding whether to admit the statements under the catchall exception because the declarant was present in court and subject to cross-examination (a cooperating witness, who changed his story at trial).

Note that the contents of former Fed R Evid 803(24) and former Fed R Evid 804(b)(5) have been combined and transferred to a new Fed R Evid 807.

[§12.33] Lay Opinion

To Main Book

The following is from an article that was published in 13 CEB Civ Litigation Rep 250 (Sept. 1991):

Everybody's Got an Opinion

by William A. Brockett

In olden days a glimpse of stocking was looked on as something shocking. Now heaven knows, anything goes.

—Cole Porter, Anything Goes

In not-so-olden days, a witness's expression of opinion was often viewed as shocking by the courts. As judges said in the last century (and sometimes still do), "That is mere opinion; we want what you *know,* not what you *think* or *believe*." 7 Wigmore on Evidence §1917, p 2 (Chadbourne rev ed 1981). Professor Wigmore, in a characteristically droll and brilliant tour of the "opinion rule" as it existed in the last century, concluded that the rule was outmoded and so unpredictable that "[i]t has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling." 7 Wigmore §1917, p 39.

Professor Wigmore would be pleased were he alive today. Now, "anything goes," or, at least, anything encompassed by the nearly identical language of Fed R Evid 701 and Evid C §800:

§800. Opinion Testimony By Lay Witness.

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

As discussed below, Evid C §800 permits the imaginative attorney wide latitude:

(1) Experts can give opinions based on personal observation, even though not disclosed in the pretrial phase as experts.

(2) Parties can testify to the value of their own property or businesses.

(3) Long-winded or confusing narratives can be made short and clear.

(4) Nonexperts can testify as quasi-experts on a wide variety of topics.

[**Editor's Note:** Federal Rules of Evidence 701 has been amended, effective December 1, 2000, to add an additional limitation on opinion or inference testimony by a lay witness. Lay opinion testimony may *not* be based on scientific, technical, or other specialized knowledge within the scope of Rule 702. This amendment is to prevent what is essentially expert testimony from being entered in the guise of lay testimony.]

The "Surprise" Expert

Percipient witnesses, even though they have expert qualifications, have been allowed to give expert opinions, even when they have not been designated pretrial as experts. The best discussion of this can be found in *Teen-Ed, Inc. v Kimball Int'l* (3d Cir 1980) 620 F2d 399, 403. The *Teen-Ed* court reversed the trial judge who barred expert testimony on damages in a breach of contract action because the tendered witnesses were not identified in the pretrial order. Since those witnesses, the plaintiff's accountant and bookkeeper, had firsthand knowledge of lost profits and other bookkeeping matters, they were not "experts" in the sense of Fed R Evid 702-703. The court made it clear that there were limitations on the testimony of "percipient experts" (620 F2d at 404):

The essential difference, however, is that a qualified expert may answer hypothetical questions. *See* Fed. R. Evid. 703 and accompanying Notes of Advisory Committee. Thus, an expert may not only testify from "facts or data… perceived by" him, but also from what is "made known to him at or before the hearing."

Fed R Evid 703.

See also Fed R Evid 701. California courts have taken a similar approach. See *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 272 CR 324, reported at 12 CEB Civ Litigation Rep 264 (Sept. 1990) (plaintiff not obligated to produce for deposition without subpoena treating physicians who had been designated as experts but not retained to provide opinions; they were only fact witnesses). See also *U.S. v Aiello* (2d Cir 1988) 864 F2d 257, 265 (undercover detective properly testified to criminal import of certain statements made to him by one of defendant's associates, even though detective was not qualified as expert witness); *Lubecki v Omega Logging, Inc.* (WD Pa 1987) 674 F Supp 501, 509 ("consulting forester" allowed to testify about timber site he had personally inspected, even though he had not filed an "expert report" as required by local rules of court).

Valuation Testimony

Evidence Code §§813-814 allow the owner or spouse of an owner of real property or business (or the knowledgeable designee of a corporation or partnership) to testify to the value of the property. *Barragan v Banco BCH* (1986) 188 CA3d 283, 302, 232 CR 758 (wife competent to testify about value of lost business and residence).

In theory, the owner of property is supposed to rely only on factors used by an expert in forming the opinion about the property's value. Evid C §814; *Sacramento & San Joaquin Drainage Dist. v Goehring* (1970) 13 CA3d 58, 91 CR 375. In the real world, it is unlikely that an owner will be able to use those factors or that a court will insist on them. Jefferson's California Evidence Benchbook §§29.1-29.3 (3d ed CJA-CEB 1997).

The federal rules have no counterpart to Evid C §§813-814, but have taken a similar approach. *In re Merritt Logan, Inc.* (3d Cir 1990) 901 F2d 349, 360 (plaintiff's principal shareholder allowed to testify to lost profits); *U.S. v Ranney* (1st Cir 1983) 719 F2d 1183, 1189 n11 (defrauded investors allowed to testify on value of investment to them).

[**Editor's Note:** In *Saracho v Custom Food Mach., Inc.* (9th Cir 2000) 206 F3d 874, 879, the Ninth Circuit, relying on Fed R Evid 703, held that in a fraud action, it was reasonable for plaintiffs' expert to calculate the amount due from the terms of loan agreements and promissory notes.]

Opinion as Shorthand

Permitting lay opinion is often the best way to permit a witness to tell an effective story. From an epistemological viewpoint, every observation is an "opinion." When a witness says he saw a "chair," a sophist would point out that it is only an "opinion" that the object with a back, a seat, and four legs was a chair.

Opinion is an appropriate shorthand for condensing descriptions of objects more ambiguous than chairs. As Learned Hand wrote about unnecessary limits on lay opinion:

Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

Central R. Co. v Monahan (2d Cir 1926) 11 F2d 212, 214.

Courts now routinely permit a wide variety of lay opinion, as long as it is based on an ascertainable perception. Opinions are commonly permitted on:

(1) Identity of a person;

(2) A witness's own intent, motive, emotion, or other state of mind;

(3) Speed, distance, size, or other measurement;

(4) A person's appearance;

(5) State of intoxication;

(6) Elements of a person's health, including illness or injury;

(7) A person's age; and

(8) Sounds and their emanating directions.

Evidence Benchbook §29.1, p 976.

Examples of opinion testimony approved by the courts abound: *People v Pena* (1972) 25 CA3d 414, 431 n8, 101 CR 804, disapproved on another ground in *People v Duran* (1976) 16 C3d 282, 292, 127 CR 618 ("Do you see someone who appears to look like the person that wielded the knife on you…?" Witness then points to defendant); *People v Garcia* (1972) 27 CA3d 639, 643, 104 CR 69 (defendant was drunk); *People v Harris* (1969) 270 CA2d 863, 872, 76 CR 130 (defendant was trying to break up fight).

The last example is an excellent instance of a witness honestly trying to describe facts in a conclusionary manner. For the witness to try to break out the various factors, subtle or not so subtle, that led to his opinion about defendant breaking up a fight would be nearly impossible.

Federal examples include *U.S. v Wright* (8th Cir 1990) 904 F2d 403, 405 (witnesses identified person in bank surveillance photograph as defendant); *U.S. v McCullah* (6th Cir 1984) 745 F2d 350, 352 (stolen tractor was "hidden"); *Durst v Newby* (SD Ga 1988) 685 F Supp 250, 251 (cow belonged to defendant).

The Quasi-Expert

Many "lay opinion" cases seem to permit testimony that verges on the expert. For example: *Samples v City of Atlanta* (11th Cir 1988) 846 F2d 1328 (police officer's opinion that Atlanta Police Department had a policy of encouraging police brutality); *Soden v Freightliner Corp.* (5th Cir 1983) 714 F2d 498, 510 (witness with 18 years' experience in repair and maintenance of trucks testified that truck design was dangerous and defective); *U.S. v Johnson* (5th Cir 1978) 575 F2d 1347, 1360 (lay witness allowed to testify that marijuana was of Colombian origin, based on his experience in dealing with marijuana and as a smoker); *In re Lipetzky* (Bankr D Mont 1986) 66 BR 648, 650 (appraiser allowed to testify as lay witness about property valuation of bankrupt); *People v Williams* (1988) 44 C3d 883, 914, 245 CR 336, 356 (opinion on drug-induced intoxication); *U.S. v Hankey* (9th Cir 2000) 203 F3d 1160 (*Daubert* factors not applicable to police gang expert's testimony). See also Fed R Evid 701.

Two recent California appellate decisions reversed trial court judgments, holding that police "expert" testimony on defendants' alleged gang membership should not have been admitted. See *People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876, citing Fed R Evid 702 and Evid C §352, and *People v Bojorquez* (2002) 104 CA4th 335, 128 CR2d 411.

Not Quite Anything Goes

Although the opinion rule has been relaxed, there are still *some* standards. The key question is whether the witness's opinion is rationally based on the witness's perceptions.

In *People v Melton* (1988) 44 C3d 713, 744, 244 CR 867, it was held improper for the prosecutor to seek a witness's opinion that another witness was not telling the truth. In *People v Hernandez* (1977) 70 CA3d 271, 280, 138 CR 675, the trial court was held to have improperly permitted a so-called expert on narcotics to testify that the equivocal actions of the defendant and others were a narcotics transaction.

Generally speaking, if the witness's narrative testimony can easily put the jury into a position of "equal opinion," the witness should not usurp the jury's opportunity to form its own opinion. *U.S. v Skeet* (9th Cir 1982) 665 F2d 983, 985 (lay opinion that shooting was "accidental" properly excluded). But see *U.S. v Stanley* (10th Cir 1990) 896 F2d 450, 451 (postal inspector in child pornography case permitted to testify that children in photograph were under age 18).

Other cases rejecting lay opinion include *Schultz v Thomas* (7th Cir 1987) 832 F2d 108, 110 (improper for trial judge in disorderly conduct case to testify about credibility of certain trial witnesses in later civil rights trial); *Gorby v Schneider Tank Lines, Inc.* (7th Cir 1984) 741 F2d 1015, 1020 (trial judge properly excluded lay witness's testimony that defendant did everything he could to avoid accident; witness was not in either car, but observing from another lane of traffic); *C. Itoh & Co. v M/V Hans Leonhardt* (ED La 1989) 719 F Supp 514 (witnesses could not testify to negligent loading practices based on their view of a photograph of 13-inch crack; insufficient "personal knowledge").

The frequent opinion question, "Is X possible?" has been ruled objectionable by the California courts of appeal. In *People v Glancy* (1956) 142 CA2d 669, 680, 299 P2d 18, the question, "Is it possible, Miss Smith, that there could have been other meetings?" was held improper as calling for speculation.

See also Fed R Evid 701.

Trivial Pursuit

Finally, if you want to be a true trivia expert in the area of opinion, familiarize yourself with Com C §1205(6). Section 1205(6) bars evidence of "relevant usage of trade" until or unless the offering party has given the other party such notice "as the court finds sufficient to prevent unfair surprise to the latter." Although §1205(6) has been criticized by commentators, there is no case

law, and it has remained in effect for nearly 30 years. If you intend to prove custom and usage—an area wide open for lay witness quasi-expert testimony—be sure to provide sufficient notice in advance of trial.

Conclusion

It is reassuring from time to time to discover that the law has made progress since the days of trial by combat. Loosening up the requirements for opinion evidence is progress, and all competent attorneys should be aware of the wide variety of evidence permitted as "opinion."

In *MCI Telecommunications Corp. v Wanzer* (4th Cir 1990) 897 F2d 703, the court held that a bookkeeper with personal knowledge of facts on which calculations are based may testify as a lay opinion witness and should not be precluded from testifying because she was not on the pretrial list of expert witnesses.

Keep in mind the following distinctions between lay opinion and expert opinion:

1. The lay witness must have personal knowledge of facts, while an expert may form an opinion based on other types of facts; and

2. Lay opinion is admissible only if it aids the understanding of the witness's testimony, while expert opinion is admissible only if it assists the trier of fact in making findings.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/12 Basic Evidence Rules/§12.34 Co-Conspirator Hearsay

[§12.34] Co-Conspirator Hearsay

To Main Book

People v Earnest (1975) 53 CA3d 734, 126 CR 107, cited at Book §12.34, stated that the foundational requirements for admission of an out-of-court statement by a co-conspirator "may be met without establishing a conspiracy beyond a reasonable doubt or even by a preponderance of the evidence; only prima facie evidence of the fact is required." 53 CA3d at 741. *People v Herrera* (2000) 83 CA4th 46, 62, 98 CR2d 911, rejected the assumption underlying this statement that a prima facie showing is less than a preponderance of the evidence, pointing out that under the Evidence Code, when the admissibility of evidence depends on establishing a preliminary fact, the proponent must produce "evidence sufficient to sustain a finding of the existence of the preliminary fact." Evid C §403(a). The court in *Herrera* explained that because Evid Code §403(a) does not specify a standard of proof, Evid C §115 (establishing preponderance of the evidence as the default standard of proof in California) applies; thus a prima facie showing of the existence of the conspiracy is a preponderance of the evidence. 83 CA4th at 62.

The co-conspiracy exception to the hearsay rule applies even if the declarant has been acquitted of conspiracy charges. *U.S. v Peralta* (9th Cir 1991) 941 F2d 1003.

The United States Supreme Court has provided detailed guidelines for admissibility of co-conspirator hearsay under the Federal Rules of Evidence in *Bourjaily v U.S.* (1987) 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775. The Court ruled that:

1. Counsel proffering the hearsay need prove the conspiracy only by a preponderance of the evidence.

2. The trial court may consider the proffered hearsay in determining whether a conspiracy existed. See Fed R Evid 801(d)(2)(E).

3. The trial court need not make any independent inquiry into the reliability of the hearsay statement.

Federal Rules of Evidence 801(d)(2) has been amended, effective December 1, 1997, to provide that the contents of declarant's statement must be considered, but are not alone sufficient, to establish the existence of a conspiracy, and the participation in it of the declarant and the party against whom the statement is offered, under Fed R Evid 801(d)(2)(E). The Committee Note states that Fed R Evid 801(d)(2) was amended to respond to issues raised by *Bourjaily v U.S., supra*.

In some circumstances, the trial court may permit statements of nontestifying co-conspirators to be presented to the jury before making findings that a conspiracy existed, if the statements were made in furtherance of that conspiracy. *U.S. v Fragoso* (5th Cir 1992) 978 F2d 896.

See also *U.S. v Deeb* (11th Cir 1994) 13 F3d 1532, permitting use of former trial testimony of a co-conspirator under former Fed R Evid 804(b)(5), even though the defendant was not present and did not have the opportunity to cross-examine at the earlier trial. The court found that the cross-examination of the witness by counsel for other defendants was the "functional equivalent" of cross-examination by defendant, which gave the former testimony the guarantees of trustworthiness required under Rule 804(b)(5) and the confrontation clause of the Constitution. Note that the contents of former Fed R Evid 804(b)(5) have been transferred to a new Fed R Evid 807.

Although the general rule is that a conspiracy ends when the substantive crime for which the co-conspirators are being tried is either attained or defeated, it can still be ongoing at the time of trial if the conspiracy's goal has not been attained. See *People v Hardy* (1992) 2 C4th 86, 5 CR2d 796 (co-conspirator testimony obtained after murder committed, but before trial of murder suspect, held admissible because conspiracy's primary goal—receipt of insurance benefits—still unattained at time of trial). See also *People v Humphries* (1986) 185 CA3d 1315, 230 CR 536, in which the appellate court found that a husband's statements bragging to defendant (who allegedly murdered the husband's wife in return for insurance proceeds) about how well he had feigned grief when identifying his wife's body were admissible under the co-conspirator exception to the hearsay rule. The court noted that, because the objective of the alleged conspiracy was to collect the insurance proceeds, the declarant's arrest for the substantive underlying offense (the murder) did not automatically terminate the conspiracy.

In another situation, the court found in *People v Noguera* (1992) 4 C4th 599, 15 CR2d 400, that the trial court had erred in admitting supposed co-conspirator hearsay. The trial court had permitted the prosecutor to admit a hearsay statement by the victim's daughter (who allegedly conspired with defendant to murder her mother) that she removed her makeup every night before going to bed. This statement was contrary to the daughter's version of the murder. She testified that she was awakened by sounds of a struggle from her mother's bedroom. There was evidence, however, that the daughter was still wearing her makeup

after the murder, and the supreme court found that admitting the hearsay statement was harmless.

Witnesses have absolute immunity from civil liability under 42 USC §1983 for giving perjured testimony at trial. *Briscoe v LaHue* (1983) 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108. The Ninth Circuit has held that a witness conspiring with another witness to present perjured testimony also has *Briscoe* immunity. *Franklin v Terr* (9th Cir 2000) 201 F3d 1098.

[§12.35] Authentication

To Main Book

The best evidence rule (former Evid C §§1500-1511) has been repealed and replaced with a set of provisions that allow the use of copies to prove the contents of documents unless there is a genuine dispute about the terms of the document that requires exclusion of the proffered copy or admission of the copy would be unfair. Evid C §1521.

[§12.36] Impeaching One's Own Witness

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

In both state and federal court, the old rule that attorneys could not impeach their own witness is no longer effective. Evid C §785; Fed R Evid 607. However, the Ninth Circuit has recently clarified that this does not open the door to a party calling a "straw man" witness and then knocking down that witness to score points for its own case. *U.S. v Gomez-Gallardo* (9th Cir 1990) 915 F2d 553 (plain error for prosecutor to call witness who exculpated defendant, who was then impeached by the prosecutor and was called an obvious liar during prosecution's closing argument).

[§12.37] Circumstantial Evidence Versus Hearsay

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

In *People v Williams* (1992) 3 CA4th 1535, 1541, 5 CR2d 372, the court held that utility bills and paychecks found during a search could be used by defendant to establish his standing to object to the search. The court found that the documents, which contained defendant's name, were not hearsay but circumstantial evidence that one resides where one keeps bills, fishing licenses, paychecks, and similar documents.

[§12.38] Preliminary Hearing Hearsay

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

Proposition 115 (Cal Const art I, §30(b)) permits the admission of hearsay testimony by a properly qualified investigating officer at a criminal defendant's preliminary hearing. The testifying officer, however, cannot testify to multiple hearsay. See *Montez v Superior Court* (1992) 4 CA4th 577, 584, 5 CR2d 723 (police detective improperly testified to hearsay statements from witnesses not personally interviewed by him).

A correctional officer with eight years experience is a law enforcement officer within the meaning of Pen C §872(b) for purposes of testifying to hearsay at a preliminary hearing. *People v Silver* (1995) 35 CA4th 1023, 1026, 41 CR2d 379.

A qualified law enforcement officer may testify, under Pen C §872(b), at a preliminary hearing concerning hearsay declarations even if the declarant is not found competent to testify. *People v Daily* (1996) 49 CA4th 543, 56 CR2d 787.

13

Appendix: Organizing for Trial

[§13.1] MECHANICS OF GETTING TO TRIAL

To Main Book

California Civil Procedure During Trial, chap 2 (Cal CEB 1982) has been replaced by California Trial Practice: Civil Procedure During Trial, chap 3 (3d ed Cal CEB 1995).

The reference in Book §13.1 to 2 California Civil Procedure Before Trial, chap 33 (Cal CEB 1978) should now read California Civil Procedure Before Trial, chaps 46-50 (4th ed Cal CEB 2004).

At-Issue Memorandum

Former California Rules of Court 209, which provided requirements for the at-issue memorandum, was repealed effective July 1, 2002, to reflect modern case management practices. After that date, the main rule on case management is Cal Rules of Ct 212. For further discussion, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004).

Former California Rules of Court 377, which described procedures for requesting a jury trial on equitable issues, was repealed effective January 1, 2003, as obsolete and containing unduly burdensome procedures. According to the Advisory Committee Comments, a party may still request, and the court may approve, the use of an advisory jury.

The reference in Book §13.1 to 7 Witkin, California Procedure, *Trial* §§70-75 (3d ed 1985) should now read 7 Witkin, California Procedure, *Trial* §§38-75 (4th ed 1996).

Trial Setting/Status Conferences

The Trial Court Delay Reduction Act (Govt C §§68600-68620) became fully operational on July 1, 1992. Govt C §§68605.5, 68620(a). As a result, most trial courts now hold a single conference, sometimes called a case management conference (see, *e.g.*, Los Angeles Super Ct R 7.9), instead of separate trial setting, pretrial, and status conferences, as was the former practice. For a detailed discussion of pretrial conferences, see California Civil Procedure Before Trial, chap 40 (4th ed Cal CEB 2004).

Former California Rules of Court 216-221 have been repealed effective July 1, 2002. See Cal Rules of Ct 212 regarding case management conference and meet-and-confer requirements. For further discussion, see California Civil Procedure Before Trial, chap 40 (4th ed Cal CEB 2004).

The reference in Book §13.1 to former Cal Rules of Ct 1600-1617 should now be to Cal Rules of Ct 1600-1618.

Certificate of Readiness

The references in Book §13.1 to former CCP §§583 and 583.110-583.160 should now be to CCP §§583.110-583.161.

Pretrial Conference

Former Cal Rules of Ct 211, cited in Book §13.1, has been repealed. Matters formerly handled at the pretrial conference are now handled in the course of case management conferences. See Cal Rules of Ct 212-214.

Mediation

Evidence Code §§1115-1128 (mediation and confidentiality) have been added, effective January 1, 1998. In particular, see Evid C §1126 for inadmissibility of statements made during mediation. See California Trial Objections §§33.3A, 34.10A (10th ed Cal CEB 2004) for discussion of confidentiality in the context of mediation and the potential for waiver of the attorney-client privilege by disclosures made in the course of mediation.

Settlement

See *Singer Co. v Superior Court* (1986) 179 CA3d 875, 225 CR 159, on the right to seek contribution or partial indemnity from a nonparty joint tortfeasor even after a CCP §877.6 settlement.

Former Cal Rules of Prof Cond 5-105 was repealed and replaced by Cal Rules of Prof Cond 3-510 without substantial change.

The provisions of CCP §§877 and 877.6 (governing good faith settlements) have been extended by statute to cover contributions to co-obligors under contract or otherwise. Existing law covered only multiple tortfeasors. The amended sections include CC §§1432 and 1543, along with CCP §§877 and 877.6.

Riverside Steel Constr. Co. v William H. Simpson Constr. Co., cited in Book §13.1, was granted review by the supreme court and transferred to the court of appeal. The resulting court of appeal opinion was ordered not published. *Riverside Steel Constr. Co. v William H. Simpson Constr. Co.* (ordered not published June 23, 1988; former opinion at 199 CA3d 1051, 245 CR 477).

Fisher & Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981) has been replaced by Fisher & Ury, Getting to Yes: Negotiating Agreement Without Giving In (2d ed 1991).

[§13.1A] Trial Organization: An Overview

To Main Book

The following is from an article that appeared in 14 CEB Civ Litigation Rep 203 (June 1992):

Trial Run: Trial Organization in a Speeded-Up World

by William A. Brockett

Yield to the destructive element.

—Joseph Conrad

[**Editor's Note:** The case management rules of the federal district court for the Northern District of California have been amended since the original publication of this article. The current rule numbers and contents are noted in the text where relevant.]

Litigation in a fast-track world is like the Space Mountain ride at Disneyworld—we whirl with dizzying speed through a giant dark space, lit by occasional celestial phenomena, stomachs churning, holding on for dear life. The fast-track program has come in for its share of brickbats. This article, surprisingly, does not add yet another brickbat (whatever that is), but suggests that the attorney who "goes with the flow" can profit from modern court demands.

State courts, with their various fast-track plans, are adopting processes that have been in place for years in federal courts. See Govt C §§68605.5, 68620(a) (requiring all California superior, municipal, and justice courts to adopt fast-track programs starting July 1, 1992); Govt C §68616 (providing that delay reduction programs may not impose, for cases filed on or after January 1, 1991, time requirements shorter than certain specified minimums). The Case Management Conference Reports routinely required in larger counties are similar to [case management statements required by] federal local rules. See, *e.g.,* San Francisco Super Ct R 3.0; ND Cal Civ Local R 16-8.

[**Editor's Note:** Requirements for case management statements are now found in ND Cal Civ Local R 16-9.]

Single assignment judges require pretrial conferences that borrow heavily from federal practice. See, *e.g.,* San Francisco Super Ct R 3.5; ND Cal Civ Local R 16-9.

[**Editor's Note:** Procedures for case management conferences are now found at ND Cal Civ Local R 16-10.]

Now, after 20-plus years decrying the tyranny of "trying cases on paper" in federal court, I have seen the light. The organization required of an attorney by the federal courts pays off. The actual trials become simpler: simpler for the trial attorney, and simpler for the jury. I now *voluntarily* follow federal trial organization in state court. Why?

A typical federal pretrial order (ND Cal Civ Local R 16-9(c)) requires that parties one week in advance of trial:

[**Editor's Note:** The required and discretionary contents of federal case management orders are now found at ND Cal Civ Local R 16-10(b).]

1. Serve and file briefs on all significant issues of law, including procedural and evidentiary issues.

BENEFIT: If you haven't thought out the key legal and evidentiary issues in advance of trial, you are unlikely to have much luck sorting them out and advancing them articulately in the feverish atmosphere of trial. Obviously, there is no reason to serve or file these briefs if it is not required. But there is good reason to have reduced the issues and your arguments to writing in advance of trial.

2. Serve and file proposed voir dire questions, jury instructions, and forms of verdict.

BENEFIT: While legal requirements for submission of voir dire questions, instructions, and forms of verdict vary depending on whether you are in federal or state court and on local rules, preparing your questions, instructions, and forms of verdict in advance will be enormously helpful to you in framing your argument and examinations. E. M. Forster said, "How can I know what I think until I see what I say?"

You *do not* want to discover weeks into trial that contributory negligence is an important defense to your action, or that you cannot recover compensatory damages from unnamed individual partners. You *do* want to know before voir dire or opening statement what the elements of your claim are, who will have the burden of proof on key issues, and whether key preliminary issues will be decided by the court alone. You therefore have to bite the bullet and prepare instructions in advance.

Written voir dire questions *are* required in most federal courts, but not in state court civil trials. In the latter, "[t]he trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning.… A court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel." CCP §222.5. See also Cal Rules of Ct 228. Regarding instructions, CCP §607a requires that all proposed jury instructions be delivered to the trial judge and served on opposing counsel before the first witness is sworn. Local rules vary on when instructions must be submitted.

3. Exchange copies of all exhibits to be offered, and all charts, etc., to be offered at trial, except for impeachment or rebuttal.

BENEFIT: In state court, you may not want to exchange all exhibits, but you should have all exhibits in a "ready to exchange" state in advance of trial for the same old reasons. You wouldn't attempt to organize your personal files while your house is burning down, so don't try to figure out which exhibits will prove your case while trying that very case.

The very act of organizing the exhibits in advance is guaranteed to push certain issues to the forefront, others to the back. Difficult evidentiary questions will emerge. Ideas about simplifying proof through the use of summaries (see Evid C §1509; Fed R Evid 1006), diagrams, and expert testimony will materialize.

[**Editor's Note:** A computer and a scanner make it easy to organize exhibits and keep them accessible. A computer can also be a powerful tool for livening up the presentation of demonstrative evidence at trial. See Update §1.6.]

Trial Presentation

When the stage is set, how should you prepare your evidence for fast-paced, fumble-free presentation? Here is the outline I use for moderately complex federal trials. You can "dumb down" for shorter cases, or make the preparation even more detailed for very complex cases.

Depositions

- Four complete sets at trial, and a set for reference back at the office:
- One set for your own use; original for the court; copy for the witness (only if you are going to impeach—admissions of a party-witness need not be shown to the witness (Evid C §§1220-1222; Fed R Evid 801(d)(2)); and a copy for opposing counsel (so you don't have to wait for your adversary to grope for his or her copy).
- The originals will be in the hands of the deposition-taker (CCP §2025(s)). Bring your own originals, and write to the holders of others, demanding they bring theirs. Be sure you have noted all corrections in the original and each copy.

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

Exhibits

- Four sets at trial, and a set for reference back at the office:
- In tabbed books for counsel, judge, *and* witness.
- Oversized exhibits should have a page describing the exhibit. Especially lengthy exhibits should have the first page and the most relevant later pages.
- Include Exhibit Index at the front of each exhibit book and have copies squirreled away in convenient places.
- Arrange chronologically, including neutral description of exhibit.
- Identify author and recipient of each document.
- Your personal copy of the Exhibit Index should have additional data: (1) source of document; (2) deposition exhibit

number; (3) notation for each exhibit that has a transparency or blowup; (4) code for "hot" (sensitive or key) documents; (5) key Evidence Code references when appropriate; and (6) if typed or printed document has handwriting, note probable author on index (or actual exhibit).

- Separate book for demonstrative and expert exhibits (charts primarily), four copies in court, one copy in office.
- Complaints and pleadings can go in here also.
- Group exhibits: four copies in court, one in office.
- Group exhibits arranged to allow testimony by summary.
- Index for each group.
- Use paralegal to testify in summary about grouped exhibits.
- Witness should have a list of all exhibits relied on for summary, must be admissible and either in evidence or available for inspection (Evid C §1509; Fed R Evid 1006).

Witness Book

- One copy only.
- Examination questions in as much detail as needed.
- Key deposition pages with phrases underlined, placed in book contiguous to related questions.
- Make sure pages have the name of deponent, date, and volume number at the top. The court reporter will do this automatically if requested.
- Key exhibits, contiguous to related questions.

Whew! Does this seem hopelessly ambitious? Ask yourself these questions:

1. Will I *eventually* be using exhibits, depositions, interrogatory extracts, and charts?

2. Is the photocopy cost for all of the proposals, perhaps $500-$3000 for most cases, onerous in relation to other costs and the stakes of the case?

If you have to do it eventually, do it earlier. Don't use cost as an excuse. If you get into the habit, you will be far more ready to try your case and you will not be discomfited when the Fast-Track Big Brother makes you do it anyway.

[§13.1B] Short Summary of Useful Ethical Opinions

To Main Book

The following summaries of ethical opinions useful in trial preparation are from an article that originally appeared in 17 CEB Civ Litigation Rep 212 (June 1995):

Trial Run: You Could Look It Up: Ethics for Fun and Profit

by William A. Brockett

The loveliest roses have the sharpest thorns. This is certainly true for ethical opinions, which are treasure troves of *practical information*. Unfortunately, those opinions are stored in a treasure chest with a rusty lock. Ethics opinions issued by the American Bar Association, the California State Bar, and city bar associations can be retrieved only from the Indexes from Hell.

Ethical opinions often summarize—far better than case law—principles that lawyers need to apply on a daily basis. In this column, I try to gather these principles together by very briefly summarizing opinions that have real world value.

The article provides a compressed summary of the opinion and the opinion number. With the number in hand, you can quickly find the full text opinion by looking it up in the California Compendium on Professional Responsibility, a three-volume work containing opinions of the State Bar and the bars of several major metropolitan areas, or the ABA/BNA Lawyer's Manual on Professional Conduct, containing ABA Rules and Opinions of the ABA and selected opinions from all states.

This column does not summarize another great source of practical material: the State Bar Rules of Professional Conduct.

The Rules are brief, and most of us have a copy on or near our desks. Although the court of appeal has stated that conduct of California attorneys is governed by the California Rules of Professional Conduct and not the American Bar Association's Code (*People v Ballard* (1980) 104 CA3d 757, 761, 164 CR 81 (dictum)), the California courts continue to rely on the ABA Model Code in addressing issues not covered by the Rules of Professional Conduct. See *Securities Investor Protection Co. v Vigman* (CD Cal 1984) 587 F Supp 1358, 1363. The ABA Model Rules do not *supersede* the Rules of Professional Conduct. Cal 1983-71 (1983); Cal Rules of Prof Cond 1-100(A) ("[other] standards… may also be considered").*

Finally, the State Bar (using nonlawyers), and at least Los Angeles and San Francisco (using expert lawyers on a rotating basis), have Ethics "Hot Lines" to answer specific questions. Call the main line at the State Bar or the city bars for referral.

The opinions, grouped by area of conduct, are:

Investigation

A lawyer may contact *former* employees of an opposing corporate party, including executives or officers, being careful not to violate privileges. Cal Rules of Prof Cond 2-100; ABA 91-359 (1991). See also SF 1973-4, concerning contacting employees of an opposing hospital.

Counsel for an individual suing a corporation may not communicate with a dissident director without receiving consent from corporate counsel. Cal 1991-125 (1991).

Discovery

ABA Model Rules do not prohibit *ex parte* contact with opposing party's expert witness. However, such contact is improper if jurisdiction is in federal court or in a jurisdiction adopting federal expert discovery rules. ABA 93-378 (1993). California case law explicitly forbids an opposing party from communicating with a party's expert. *County of Los Angeles v Superior Court (Hernandez)* (1990) 222 CA3d 647, 657, 271 CR 698.

A lawyer receiving on an unauthorized basis materials of an adverse party that are privileged or confidential should refrain from reviewing the materials (except to determine how to proceed). The lawyer should notify his or her adversary, and follow the adversary's instructions concerning disposition of the materials (or refrain from using the materials until court direction can be provided). ABA 94-382 (1994). See also SD 1987-3 (1987), barring attorneys from examining and copying records mistakenly delivered to them, except as necessary to determine what should be done with the records.

A lawyer receiving inadvertently disclosed confidential materials must not examine the materials, must notify the sending lawyer, and must abide by the instructions of the lawyer who sent them. ABA 92-368 (1992). A California court of appeal has held that there is no "clear statutory, regulatory or decisional authority imposing a duty of immediate disclosure of the independent receipt of privileged information." *Aerojet-General Corp. v Transport Indem. Ins.* (1993) 18 CA4th 996, 1006, 22 CR2d 862.

Representation

A defendant may not limit the right of plaintiff's counsel to represent present and future claimants against defendant as part of a global settlement. ABA 93-371 (1993). See also Cal Rules of Prof Cond 1-500.

It is impermissible to prohibit outside or inside counsel for a corporation from representing anyone against the corporation in the future. ABA 94-381 (1994). See also Cal 1988-104 (1988).

An attorney selected by an insurer to represent the insured may not continue to represent the insured after the insured client elects to be represented by independent counsel because of a "reservation of rights" letter received from the insurer, unless there is no foreseeable likelihood that confidential material might be used to the detriment of the insured. SD 1987-1 (1987). See also Cal Rules of Prof Cond 3-310.

After an attorney has served as an expert witness for law firm A, he may represent a client whose adversary is also represented by law firm A. The attorney should disclose to the client the earlier expert representation. SD 1989-4 (1989). See also Cal Rules of Prof Cond 3-310.

Neither a lawyer nor a firm should undertake representation of a client in a matter in which the lawyer has to testify unless refusal of representation would work a substantial hardship on the client. LA 367 (1977). See also Cal Rules of Prof Cond 5-210.

Communications

A lawyer may not inquire of the opposing *party* whether it has received the settlement offer. A lawyer *may,* however, urge his or her own client to communicate with the adverse party about the matter in controversy. ABA 92-362 (1992). See Cal 1993-131, discussing the same problem in a dissolution action. See also Cal Rules of Prof Cond 2-100, 3-500, 3-510.

An attorney may communicate with the president, managing partner, or board of directors of an adverse organization, provided this is done in writing, with delivery made through adverse counsel. LA 472 (1994). See also Cal Rules of Prof Cond 2-100.

An attorney need not attempt to prevent a client from reaching compromise by direct communication with the adverse party, provided that the attorney is not, through the client, communicating indirectly with the adverse party. LA 375 (1978).

An attorney may not threaten to have criminal, administrative, or disciplinary charges brought against an adversary to obtain an advantage in a legal dispute. LA 469 (1993). See also Cal Rules of Prof Cond 5-100.

Civil-Criminal Interface

A lawyer may, in proper circumstances, threaten criminal charges to gain civil relief for a client. Likewise, a lawyer can agree to refrain from pressing charges as part of a settlement agreement unless the agreement violates applicable law. ABA 92-363 (1992). But Cal Rules of Prof Cond 5-100 specifically forbids a member threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

A prosecutor may not condition the dismissal of a criminal action on the defendant's stipulation that there was probable cause for arrest, relieving the police of potential civil liability. Cal 1989-106 (1989).

An attorney who reasonably believes that the cash received for fees were actual bills used in the alleged crime must turn the cash over to law enforcement or the prosecution without request. LA 466 (1993).

Attorney-Client Relations

A law firm may bill for services of law clerks and legal assistants, if itemized bills are provided. Secretarial services may not be billed as attorney time. LA 391 (1981).

Hourly billing must reflect actual time, except for rounding up to a minimum time period. Overhead should be billed to the client at cost. ABA 93-379 (1993). See also Cal Rules of Prof Cond 4-200.

An attorney-client retainer agreement may include a provision for mandatory binding arbitration of potential malpractice claims against the attorney. Cal 1989-116 (1989). See also Cal Rules of Prof Cond 3-400.

[**Editor's Note:** The Los Angeles County Bar Association has issued an ethics opinion approving a provision in an attorney fee agreement making a fee discount contingent on the client's agreement not to require the attorney to enter into a confidential settlement that the attorney considers unconscionable. LA 505 (2001).]

An attorney may charge interest for service fees on unpaid client bills. SF 1970-1 (1970). (See also SD 1983-1.) The attorney should be sensitive to the tests for unconscionability of fees spelled out in Cal Rules of Prof Cond 4-200.

An attorney must make the client's office file available to the client, even though the attorney is still owed legal fees. SF 1973-12 (1973). See also SF 1975-4 (barring an attorney from retaining client property for any reason) and Cal Rules of Prof Cond 3-700.

A dissolved law firm should not destroy its clients' papers without making its best efforts to contact the former clients and give them an opportunity to retrieve the files. Counsel should try to arrive at an agreement with current clients concerning the handling of case files. LA 475 (1994). See also Cal Rules of Prof Cond 3-700, 4-100.

Evidence Code §956.5 removes any privilege for disclosure of confidential communications necessary to prevent a client from committing a criminal act likely to result in death or substantial bodily harm. Section 956.5 supersedes a 1990 San Diego opinion providing a privilege in these circumstances. Under the superseded San Diego opinion, an attorney whose client says that he or she is going to kill a cooperating witness, and shows the attorney a handgun, could *not,* even if the attorney believes the client intends to seriously injure or kill the informant, advise authorities of the apparent danger. SD 1990-1 (1990).

Without the client's informed consent, counsel may not disclose to the lawyer of a noninsurance indemnifying third party information contained in bills about specific work performed, time spent on the client's matter, and fees and costs incurred. LA 456 (1990).

If the sole issue is whether an attorney has committed malpractice, the attorney may withhold uncommunicated work product from a client, but may not ethically withhold other client materials. SF 1990-1 (1990). But see Cal Rules of Prof Cond 3-700(D)(1); CCP §2018(e); and lengthy analysis in *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 269, 218 CR 205 (finding that work product protection is held by attorney, but refusing to decide whether attorney could withhold uncommunicated work product in dispute with client).

Sexual relations with a client is a bad idea, but not forbidden per se. ABA 92-364 (1992). See also Cal 1987-92 and detailed rule and Official Discussion in Cal Rules of Prof Cond 3-120.

Fraud/Perjury

A lawyer with reason to believe that his or her services or work product will be used by the client to perpetrate fraud must withdraw and disaffirm documents prepared by the lawyer that might be used for fraud, even though a "noisy" withdrawal may inferentially reveal client confidences. If the lawyer's services have been used in past fraud, but the fraud has ceased, withdrawal is permissive, and a "noisy" withdrawal is not permitted. ABA 92-366 (1992). See also Cal Rules of Prof Cond 3-700.

An attorney in a civil nonjury trial has no duty to advise the court if a client commits perjury. However, the attorney must pursue remedial action, and withdraw if that action is not successful. Cal 1983-74 (1983).

A lawyer in a civil case discovering that a client has lied in discovery must take all reasonable steps to rectify fraud, which may include withdrawal, disaffirmation of work product, disclosure to present counsel, or disclosure to the court. ABA 93-375 (1993).

If an attorney, in the course of discovery, finds that the opposition may have engaged in tax fraud, the attorney need not report this fact to the IRS. SF 1975-2 (1975).

An attorney need not disclose the unethical conduct of another attorney, but it may be a better course of action to do so. SF 1977-1 (1977).

An attorney has a duty to disclose altered evidence. SD 1983-8 (1983).

An attorney must disclose to the court the fact that a nonparty witness has committed perjury, after first trying to rehabilitate or impeach the witness. SD 1983-3 (1983).

If an attorney for a fiduciary becomes aware of the fiduciary's misfeasance or malfeasance, the attorney must urge correction of the misfeasance or malfeasance, and withdraw. SD 1983-10 (1983).

If an attorney who learns that another attorney has violated the Rules of Professional Conduct in a manner that raises a substantial question regarding the violating attorney's honesty, trustworthiness, or fitness as an attorney, the attorney is not

obligated to report the violation to the State Bar. SD 1992-2 (1992).

An attorney need not report ethical violations to the State Bar, although reporting such violations is consistent with an attorney's ethical obligations. LA 440 (1986).

An attorney may not disclose confidential information learned through an attorney-client relationship (without client consent) even if the client is determined to follow a course of conduct that would result in receiving money to which the client is not entitled. LA 417 (1983). (See also LA 414 (1983) (ethical obligation to retain confidential communications as secret unless attorney is convinced beyond a reasonable doubt of client's intent to commit crime in future).)

An attorney who learns that a former client had committed perjury need not call on the client to rectify it, and may *not* disclose the perjury to the client's present counsel, the court, opposing counsel, or the State Bar. A client's present attorney who learns of perjury should call on the client to rectify the perjury, but may not disclose it to the court or opposing counsel. LA 386 (1981).

Conflicts

A lawyer who, while representing client A, must examine another client as an adverse witness, will likely face disqualification in the absence of client consent. ABA 92-367 (1992). See also SF 1973-15; Cal Rules of Prof Cond 3-310.

A lawyer should not undertake a second representation in the same jurisdiction that would require taking a substantial legal position directly contrary to a position already being urged in that jurisdiction on behalf of another client, without permission from both clients. If the two matters are not being litigated in the same jurisdiction, and there is no substantial risk that one representation will be adversely affected by the other, both representations may be undertaken. ABA 93-377 (1993). (See also Cal 1989-108; Cal Rules of Prof Cond 3-310.)

An attorney may represent a client in a proceeding adverse to a person who consulted the attorney in connection with another matter, as long as confidential information is not being used to the disadvantage of the person consulting the attorney. Cal 1984-84 (1984). See generally *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537 (discussing in detail duties of lawyer to existing client and potential formation of attorney-client relationship during intake interview).

A single attorney representing the insurer and insured may not apportion costs and fees between issues in which coverage is conceded and issues in which coverage is disputed. LA 424 (1984).

An attorney may represent a client in a dispute with a former client no longer represented by the attorney, as long as the attorney obtained no confidential information as a result of the earlier representation relating to the new matter, provided the present client gives written consent after being informed. LA 406 (1982).

If a client knowingly consents to continued representation, the lawyer is not required to withdraw because the lawyer intends to call a former associate as a witness. LA 399 (1982).

Judges/Arbitrators

Without informed client consent, a lawyer should not reveal to the settlement judge limits of settlement authority or the lawyer's recommended settlement. The settlement judge may inquire about settlement authority or advice, but should not require the lawyer to make such a disclosure if it would reveal attorney-client material and the lawyer does not have authority from the client to make the disclosure. ABA 93-370 (1993).

An attorney currently representing a client on other legal matters may serve as an arbitrator designated by the client in contractual tripartite (*partisan*) arbitration. Cal 1984-80 (1984).

A lawyer has no duty to disclose to his or her adversary contributions made to elect the judge presiding over litigation between the two attorneys. LA 387 (1981).

Pleadings/Trial/Appeal

It is ethically improper to cite an unpublished opinion to the court when the forum court has a specific rule prohibiting such citations. ABA 94-386 (1994). California specifically forbids citation of unpublished opinions, except in very limited circumstances. See Cal Rules of Ct 977.

[**Author's Note:** In the wake of widely available unpublished opinions through WESTLAW and LEXIS, some jurisdictions are weakening such prohibitions.]

A lawyer need not inform an adversary in negotiations that the statute of limitations has run on an adversary client's claim. If

opposing counsel are unaware of the statute's running, a lawyer may not discontinue negotiations based on this ground without the client's permission. A lawyer may file suit to enforce a time-barred claim, unless barred by rules of the jurisdiction. ABA 94-387 (1994). This opinion arguably collides with Cal Rules of Prof Cond 3-200(B).

Trial counsel may disclose to jurors after the trial is concluded evidence that was excluded at trial, unless the intent is to harass or embarrass the jurors or influence them about future jury service. Cal 1987-95 (1987).

An attorney may not hire an expert on a contingent fee basis, or allow his or her client to do so. SD 1984-4 (1984); Cal Rules of Prof Cond 5-310. For an opinion that surveys ethical considerations for attorneys who consider representing clients entering into contractual arrangements for contingent fee medical expert consultations and expert testimony, see Cal 1984-79 (1984).

If attorney A cannot agree with attorney B about the form of a proposed order, it is improper for attorney A to send his own proposed order as well as the opponent's proposed order to the court, along with a letter arguing for his order, delivering the proposed order to the court by hand and to opposing counsel by mail (the court adopted A's proposed order before B received the correspondence). SD 1989-1 (1989).

For an opinion that surveys ethical issues arising from structured settlements, see Cal 1987-94 (1987).

Partnership Law

If a client follows an attorney to a new firm, the prior law firm may retain files until it receives written notice from the client (providing that files are made available to the departing attorney in the interim). The prior firm may copy files before transmitting them. It is improper for the departing attorney to remove client files before written notification to the prior firm by the client. LA 405 (1982); see Cal Rules of Prof Cond 3-700.

Generally, a lawyer representing a partnership represents the entity rather than individual partners. Confidential information received by the lawyer while representing the partnership is "information relating to the representation" of the partnership and normally may not be withheld from the individual partners. ABA 91-361 (1991); see Cal Rules of Prof Cond 3-600.

For an opinion spelling out ethical requirements and prescriptions relating to client solicitation or contact when private law firms dissolve or one or more attorneys withdraw, see Cal 1985-86 (1985). The opinion strongly encourages joint letters to affected clients. THIS IS AN EXTREMELY IMPORTANT OPINION, AND SHOULD BE CONSULTED WHENEVER ATTORNEYS LEAVE A FIRM.

---

*Here are the abbreviations for the opinions:

ABA = ABA Formal Opinions Cal = Formal Opinions of the State Bar of California LA = Formal Opinions of the Bar Association of Los Angeles SD = Formal Opinions of the Bar Association of San Diego SF = Formal Opinions of the Bar Association of San Francisco

PROCEDURE PRIOR TO TRIAL

[§13.2] Motions to Consider in Final Preparation

To Main Book

The reference in Book §13.2 to 2 California Civil Procedure Before Trial, chap 29 (Cal CEB 1978) should now read California Civil Procedure Before Trial, chaps 42-44 (4th ed Cal CEB 2004).

The reference to former Cal Rules of Ct 375(b) (motion to advance trial date) in Book §13.2 should now be to Cal Rules of Ct 375.1.

Former Cal Rules of Ct 333 has been repealed.

The California Civil Discovery Act of 1986 (CCP §§2016-2036), and amendments to that legislation (Stats 1987, ch 86, operative July 1, 1987), have replaced former CCP §§2016-2037.9. Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

The reference to former CCP §2037 in Book §13.2 should now be to CCP §2034; the reference to former CCP §2033 should now be to CCP §2024(a) (responses to interrogatories must be due before a date 30 days before the date initially set for trial); the reference to former CCP §§2037-2037.9 should now be to CCP §2034; and the reference to former CCP §2016 should now be to CCP §2025(u).

The "best evidence rule" and related provisions (former Evid C §§1500-1511; see in particular former Evid C §1500) have been replaced by the "secondary evidence rule" and related provisions (Evid C §§1520-1523; see in particular Evid C §1521). See generally Update §12.29.

The supreme court has held that in case of retrial following a mistrial, order granting new trial, or reversal of judgment on appeal, the last date for completing discovery under CCP §2024 is 15 days before the date initially set for new trial. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/13 Appendix: Organizing for Trial/§13.3 Preparing the Case for Trial

[§13.3] Preparing the Case for Trial

To Main Book

The California Civil Discovery Act of 1986 (CCP §§2016-2036), and subsequent amendments to that legislation, have replaced former CCP §§2016-2037.9, cited in the Book. Operative July 1, 2005, however, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998). See also Update App A of this update for a summary of oral depositions.

Documentary Evidence

The "best evidence rule" and related provisions (former Evid C §§1500-1511; see in particular former Evid C §1500) have been replaced by the "secondary evidence rule" and related provisions (Evid C §§1520-1523; see in particular Evid C §1521). See generally Update §12.29.

Oral Testimony

The reference in Book §13.3 to former CCP §2016 should now be to CCP §2025(u).

The reference in Book §13.3 to Govt C §68097.2 should be to Govt C §68097.1.

Discovery for Use at Trial

The reference to former CCP §2019 in Book §13.3 should now be to CCP §2025(s) (transcript of deposition no longer filed with court); former CCP §2030 is now CCP §2030(j) (interrogatories and response not filed with court); CCP §2033 is now CCP §2033(j) (requests for admissions and responses not filed with court).

Jury Trial

Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) has been replaced by O'Malley, Grenig, & Lee, Federal Jury Practice and Instructions, Civil and Criminal (5th ed 2000).

Effective January 1, 1989, former CCP §196 was repealed and replaced by CCP §215.

If a party posts inadequate jury fees, it is not an irrevocable waiver of the right to jury trial. See *Wharton v Superior Court* (1991) 231 CA3d 100, 282 CR 349 (abuse of discretion to deny jury trial to attorney who mistakenly posted $100 less in jury fees than was required, when there was no prejudice to either party or to court).

United Farm Workers of Am. v Superior Court (1980) 111 CA3d 1009, 169 CR 94, cited in Book §13.4, was disapproved on another point in *Resch v Volkwagen of Am., Inc.* (1984) 36 C3d 676, 205 CR 827.

Borns v Butts (1979) 98 CA3d 208, 159 CR 400, cited in Book §13.4, was disapproved on the point for which it was cited in the Book in *Juarez v Superior Court* (1982) 31 C3d 759, 769, 183 CR 852.

Motions in Anticipation of Trial

The reference in Book §13.3 to 2 Jefferson California Evidence Benchbook §47.4 (2d ed CJA-CEB 1982) should now read Jefferson's California Evidence Benchbook, chap 47 (3d ed CJA-CEB 1997) (judicial notice information).

Selecting the Court

Arnold, California Courts and Judges Handbook (4th ed 1985) has been replaced several times. The latest edition is Arnold, California Courts and Judges Handbook (8th ed 1996).

Miscellaneous Concerns

Former Santa Clara Sup Ct Rule 10 has been repealed. Santa Clara Court Rules 1(B) (criminal) and 6(C) (civil) now cover the same material. Former San Francisco Court Rule 2.8 was replaced by Rule 6.1.

[§13.4] Time-Line Checklist

To Main Book

The California Civil Discovery Act of 1986 (CCP §§2016-2036), and amendments to that legislation (Stats 1987, ch 86, operative July 1, 1987), have replaced former CCP §§2016-2037.9. Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).

100 Days

Former Cal Rules of Ct 333 has been repealed. Under CCP §2024(a), discovery must be completed on or before the 30th day before the date initially set for trial, and motions concerning discovery must be heard on or before the 15th day before the date initially set for trial. If that date falls on a Saturday, Sunday, or holiday, then it falls to the next court day. CCP §2024(a).

75 Days

The reference to former CCP §2037 should now be to CCP §2034. Under CCP §2034(c), a demand for an exchange of information concerning expert witnesses must specify a date for the exchange of information that is 50 days before the trial date, or 20 days after service of the demand, whichever is closer to the trial date. Under CCP §2024(d), discovery pertaining to expert witnesses identified under CCP §2034 must be completed on or before the 15th day before the date initially set for trial, and motions concerning that discovery must be completed on or before the 10th day initially set for trial. If that date falls on a Saturday, Sunday, or holiday, then it falls to the next court day. CCP §2024(a).

15 Days

The supreme court has held that in case of retrial following a mistrial, order granting new trial, or reversal of judgment on appeal, the last date for completing discovery under CCP §2024 is 15 days before the date initially set for new trial. *Fairmont Ins. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70. If that date falls on a Saturday, Sunday, or holiday, then it falls to the next court day. CCP §2024(a).

CIVIL TRIAL FILE ORGANIZATION

[§13.9] Publications and Other Materials for Trial

To Main Book

Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) has been replaced by O'Malley, Grenig, & Lee, Federal Jury Practice and Instructions, Civil and Criminal (5th ed 2000).

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Appendix A Oral Depositions Under the Discovery Act of 1986 (as Amended by Stats 1987, ch 86)

Appendix A

Oral Depositions Under the Discovery Act of 1986 (as Amended by Stats 1987, ch 86)

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

Definitions

Pending action. Self-executing procedure for examination under oath of party or witness for discovery or as evidence. CCP §§2020(a), 2025(a).

Taken in another state or country for use in California. Procedure for examination under oath of out-of-state party or witness for use in an action pending in California. CCP §§2026-2027.

Taken in California for use in another state or country. Procedure for examination under oath of party or witness in California for use in an out-of-state action. CCP §2029.

To perpetuate testimony. Self-executing procedure for examination under oath of an expected party or witness before filing suit or of party or witness pending appeal. CCP §§2035-2036.

Advantages

Permits (1) evaluation of demeanor and potential courtroom impact of deponent, (2) probing follow-up of responses, (3) deponent spontaneity, (4) minimization of role of opposing counsel, (5) discovery on ten days' notice (CCP §2025(f)).

Testimony may be used (1) by any party to impeach or contradict deponent; as substantial evidence if deponent is unavailable or exceptional circumstances exist, or if another party has already introduced a portion of the deposition, or if taken in an earlier action involving same subject matter and parties, and (2) by adverse party for any purpose. Deposition may be used against any party present or represented at the deposition or who had due notice of the deposition. CCP §2025(u).

Disadvantages

(1) Expensive, (2) time consuming, (3) elicits only facts within deponent's personal knowledge, (4) may preserve testimony damaging to examining party.

Against Whom Available

Any person, including a natural person or an organization. Person may be a party, party-related witness, or nonparty witness. CCP §§2020(a), 2025(a), (d). Person may be in California (CCP §2025(a)) or out of state (CCP §§2026(a), 2027(a)) if action is pending in California. Any person in California if action is pending out of state and foreign requirements are met. CCP §2029.

Any person for perpetuation of testimony if necessary to prevent failure or delay of justice. CCP §§2035-2036.

When Proponent Can Initiate

If action is pending, defendant may serve notice any time after service of summons or appearance of that defendant, whichever occurs first. Leave of court required if notice to be served by plaintiff within 20 days after service or appearance by any defendant. CCP §2025(b)(1). See also CCP §§2026(a), 2027(a), 2029. Court order required for subsequent deposition of person, including party, already deposed. CCP §2025(t).

If perpetuation of testimony is sought prior to bringing action, prior to taking appeal, and during pendency of appeal. CCP §§2035(a), 2036(a).

Proponent's Procedures To Initiate

Personally serve deposition subpoena on nonparty witness a sufficient time in advance of deposition to provide reasonable time "to travel to place of deposition" (CCP §2020(f)-(g)) or serve deposition notice on party deponent (CCP §2025(c)). Serve party deponent and all other parties who have appeared with copy of deposition notice and any deposition subpoena at least ten days

before deposition date. CCP §2025(d), (f). Subpoena or notice must state intention to record by audio- or videotape in addition to stenographic recording. CCP §§2020(c), 2025(d)(5).

Commission, letters of request, or letters rogatory may be necessary to initiate out-of-state depositions.

To perpetuate testimony before filing action, file and serve verified petition and notice of motion on each expected adverse party at least 20 days before hearing date. CCP §2035(c), (e). To perpetuate testimony pending appeal, file motion with court that entered judgment; same service requirements as any notice of motion in pending action. CCP §2036(c).

Opponent's Responses

Appear and testify; if three calendar days before deposition, personally serve written objections that notice does not comply with CCP §2025(b)-(f) deposing party and all other parties on whom deposition notice was served (may serve by mail if more than three days before deposition); move for order to stay or quash (CCP §2025(g)); move for protective order and sanctions (CCP §2025(i)); appear, testify, and make specific objections based on privilege, work product, and errors and irregularities that can be cured if promptly presented (CCP §2025(m)).

Proponent's Remedies for Failure or Refusal

(1) Order compelling attendance and testimony, or answers, and for monetary sanction (CCP §2025(j)(3), (m)(4), (o)); (2) finding of contempt (CCP §2025(o)); (3) just orders, including issue, evidence, terminating, and/or monetary sanctions for failure to obey order to compel (CCP §2025(j), (o)).

Appendix B

Qualities Jurors Like in a Litigator

by Constance Bernstein

One of the most significant factors in winning in the courtroom is the relationship you, the attorney, establish with your jurors. Basically, the relationship the jurors have with you colors the way they perceive your witnesses, and ultimately, the evidence.

This brings us to the key question: What kind of litigator do jurors like?

The California Court Study

The last survey the Administrative Office of the California Courts conducted that polled people's attitudes about attorneys was in 1978. Administrative Office of the Courts, Commission to Study Court Congestion, Summary of Responses to Jury Service Questionnaire: Los Angeles County Superior Court and Los Angeles Municipal Court (1978). The survey polled 5000 people who came through the court system, asking them to comment on the court personnel they encountered. Their comments were instructive, if not surprising.

What Respondents Did Not Like About Attorneys

Respondents were most impressed with judges and least impressed—by a 5-1 margin—with lawyers. So what didn't respondents like? They didn't like attorneys who:

Engaged in theatrics	19%
Were not prepared	15%
Repeated themselves too much	14%
Harassed the jurors and witnesses	12%
Talked too much	10%
Were dishonest	8%

This study differentiated between those who complained that attorneys repeated themselves too much and those who complained that attorneys talked too much. When we combine those complaints—after all, the end result is the same—we find that the primary complaint respondents had against attorneys was that they talk too much. Almost one out of four respondents held that opinion. One might hesitate to add the unspoken message here, *i.e.,* they talk too much "and listen too little."

As one respondent commented: "They did not know how to ask cogent and pertinent questions… because they were not listening or they did not want to change the approach they started."

The second behavior that respondents did not like about attorneys was their "theatrics." Almost one out of every five respondents mentioned this problem, characterizing it as showmanship, oratorical embellishment, overdramatization, cheap gamesmanship, and false courtesy.

The third most stated complaint was that attorneys harassed jurors and witnesses; specifically, this meant badgering and bullying witnesses, trying to confuse them, patronizing jurors, being rude or ridiculing, appearing to be sharp or cunning, and engaging in behavior that would be considered haranguing, arrogant, and abusive. Almost one out of every eight respondents who had experience with the court system perceived that attorneys harassed jurors and witnesses!

Lastly, one out of every 12 respondents complained about attorneys being dishonest. Telling lies was dishonest, but so was avoiding the whole truth by revealing just a part of it through yes/no questions.

What Respondents Liked About Attorneys

On the other hand, respondents *did* like attorneys who were:

Prepared	40%
Effective	18%
Dedicated to the client	16%
Fair and truthful	14%
Knowledgeable and experienced in the law	10%

Being prepared was the attribute respondents liked most in an attorney. By this, they meant being organized, sticking to relevant materials, and presenting the facts clearly, concisely, and logically. This result related to the respondents' previous perception, *i.e.,* that attorneys repeated themselves and talked too much. Their responses suggested that an attorney who was prepared could expedite the trial quickly and not waste jurors' time with excessive verbiage and repetition.

Secondly, they liked attorneys who evidenced the old and tried and true values of dedication, fairness, and truthfulness. Thirty percent of the respondents pointed out how important these traits were. In fact—and this is significant—three times more respondents mentioned that they like a dedicated, fair attorney than mentioned that they liked an attorney who had knowledge and experience of the law. This finding hints at an important point, *i.e.,* that given the choice, people prefer nice attorneys to brilliant ones.

The Synchronics Group Study

What Jurors Liked About the Winning Attorney

In 1990, The Synchronics Group—a trial consulting company in San Francisco—interviewed 44 jurors, all of whom had sat on cases tried and won by the same litigator. Jurors were asked what they liked about the winning attorney; they said they liked him primarily because he was *well-mannered and well-spoken.* Specifically, they mentioned that he was friendly, articulate, polite, human, humorous, and helpful; he had good eye contact, a good voice, and could talk on any level.

Secondly, they liked him because they perceived him to be *cool*. By cool, they meant he never raised his voice or got excited. He was calm, smooth, in control, confident, even-toned, rolled with the punches, didn't let little things bother him, and wasn't easily shaken.

Thirdly, they liked him because he was *direct—i.e.,* concise, "no bull," precise, straightforward, focused, not repetitious, and not forgetful.

And finally, they liked him because he was *sharp*. By sharp, they meant intelligent, professional, thorough, well-prepared, experienced, impressive, and a go-getter.

The Significance of the Two Surveys

In both surveys, respondents applauded the verbal skills of succinctness, conciseness, and directness. In both surveys, respondents honored the human values of fairness, honesty, sincerity, politeness, and friendliness. In both surveys, respondents preferred "cool" attorneys to "hot" ones—*i.e.,* they felt more comfortable with a calm, even-toned, controlled presentation than one that seemed exaggerated and overly dramatic.

Most important, respondents from both surveys believed that "who a litigator is" was more important than "what a litigator knows." Knowing the law and having experience in it was of less importance than the more human qualities of being dedicated to a client, for instance, or treating the jurors and witnesses with respect, or being fair and honest. This finding reinforces the idea that yes, indeed, being a nice person in the courtroom will get you further with the jurors than being a brilliant polemicist.

The results of these two surveys are interesting, but somewhat counterintuitive. When we think of the consummate communicator in the courtroom, we think of someone larger-than-life—dramatic, spell-binding, hypnotic. But the respondents seemed to be saying that those larger-than-life qualities can be perceived as theatrical, and they prefer the cool, calm, "regular nice guy" litigator, with the down-home values of politeness, friendliness, and sincerity, to the more flamboyant, fiery litigator.

The Vanna White Effect

So what's going on here? Why is the ordinary more appealing—and less suspect—than the extraordinary? That question can be answered by looking at a phenomenon that this writer characterizes as the *Vanna White Effect*. Everyone knows of Vanna White; she reached stardom by never opening her mouth. She simply came out on stage and turned cards. And yet, she is one of the most famous people in America! How did this happen?

She has achieved such fame—and admiration!—*because* she doesn't say anything. She is America's image of the "beautiful woman," the specifics of which her audience can fill in themselves. People can paint her to be anything they want a woman to be: sweet or sassy, sexy or demure, average or brilliant. Everybody loves Vanna because she is all things to all people.

Perhaps the key to your success as a courtroom litigator is to utilize the Vanna White Effect and present yourself as the universal image of *Everyman—i.e.,* the girl next door, the neighbor down the street, somebody's brother-in-law—whose individuality can be defined by the jurors. In this position as the archetypal figure, your power comes from the jurors projecting onto you their hopes, values, and aspirations, thus coloring you like them.

Naturally, during the course of a trial, jurors will get to know you as an individual. Unique characteristics will become apparent. The point is to expand the presentation of yourself to make room for more blank spaces for the jurors to "fill in." For instance, you are not only an attorney—a role that few if any of your jurors share—but you are also a father, mother, son, daughter, sibling, etc. —roles that all your jurors will share in one way or the other. Your expertise is not only in law, but perhaps gardening as well. Your forte is not just logic, but maybe you, like many people, cannot balance a checkbook either. Your tastes are not all sophisticated; you might even love some kinds of junk food. And if the truth be known, you watch television sometimes, too. The more broadly you define yourself, the more opportunity your jurors have to identify with you. More importantly, the more broadly you *think* of yourself, the more you will be able to identify with them.

The most immediate way to establish rapport with jurors is physically. Savvy attorneys dress according to the business attire or church dress of their jurors, communicating the message: "I dress like you, so we are alike." When selecting a jury, they notice subtle physical similarities that might connect them, and their client, to a juror—*i.e.,* a similar height, weight, age, hair style, fashion style, facial hair, colors, accessories. Similar brands of watches, for instance, are an immediate connection. So even if you are a different age, sex, race, or culture from most of the jurors, there are still ways to establish a physical rapport. Here, the more common the style, the broader the identification.

In this respect, the Vanna Effect has something powerful to teach litigators: Instead of clinging to a narrow definition of who you are, expand those potentialities; broaden your appeal by reflecting a variety of aspects of the human personality; be a multifaceted looking glass for your jurors, mirroring back who they see themselves to be—*i.e.,* nice, well-mannered, unassuming, engaged, friendly, open, and capable folk.

Expanding your presence, letting go of narrow definitions of who you are, and opening yourself to reflecting your jurors is difficult—demanding great skill, self-confidence, and courage—because it means shifting the focus from what you say to what your jurors hear, and taking responsibility for what they miss. Being *Everyman* means letting go of judgmental attitudes that shut others out, being ready to act from your heart as well as your head, and embracing your empathetic sensitivities. Being *Everyman* means freeing yourself from the posturing and getting real.

At the same time you are striving for synchrony with your jurors, you are at war with your opponents and have to be ever vigilant to protect yourself against their attacks. Maintaining the constantly shifting balance between your adversarial role as a general on the battlefield and your fair, polite, and helpful role as a nice person is difficult. But you are both a nice person and a general. The challenge is to keep both parts of you operational; too often, the nice person gets lost in the courtroom, overwhelmed by the immediate demands of the general. Success is keeping the balance.

One word of warning! Expanding your presence to encompass the aspirations of your jurors demands a heightened consciousness; it is a state of mind and cannot be put on like a suit jacket. The way you present yourself before the jurors has to be grounded in sincerity and lack of guile; otherwise, the jurors will perceive you as two-faced, false, and theatrical.

The truly humble attorney, who is aware of his vulnerabilities; who is scared of losing, but believes in the case, speaks from the heart, and is ready to put everything he/she has into winning; who not only respects those whose responsibility it is to judge him, but feels connected to them—that is the real charismatic litigator.

Appendix C

Timing Is Everything

by William A. Brockett

I believe that there are two cornerstones in trying a good case: (1) asking questions that call for a "yes" or "no" answer (and insisting on an answer) and (2) pacing.

This column addresses the second: keeping the trial moving along at a brisk pace.

One of the many lessons to be learned from the O.J. Simpson trial is that the lawyer who proves everything proves nothing. It is imperative that your case be pared down to its essential elements and presented in a concise fashion.

Here (concisely) are some ideas:

Summaries of Writings

I once vowed that I would never try a case that I couldn't carry into court under one arm. Now, sad to say, many of my cases are in "forklift territory."

As a general rule of thumb, any element of proof that requires more than ten documents to prove should be summarized. Fed R Evid 1006 and Evid C §1509 authorize use of summaries.

[**Editor's Note:** Former Evidence Code §1500, the best evidence rule, and the exceptions to that rule (of which former Evid Code §1509 was one) have been repealed. Presumably, Evid Code §1521, which makes reliable secondary evidence admissible to prove the contents of a document, authorizes the use of written summaries of voluminous writings. Section 1523(d) permits the use of oral evidence to summarize such writings.]

All you need to do is to make the underlying documents available to your opponent (they need not even be put into evidence) and then you are off to the races. You can:

- have a witness (usually your most presentable paralegal) provide an oral summary. *U.S. v Ashford* (7th Cir 1991) 924 F2d 1416, 1421 (summary testimony stricken when government refused to turn over underlying files after testimony).
- prepare summary charts and admit them into evidence. *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 128 CR 697 (one-page summary of costs for putting out fire).

In a recent federal case, an imaginative prosecutor presented as the last government witness an agent who summarized the testimony and documentary evidence presented *in the trial.* This was upheld on appeal (though the court of appeals noted that whether this is proper depends on the facts of each case). *U.S. v Johnson* (4th Cir 1995) 54 F3d 1150.

There is one additional fillip to the state rule: Evidence Code §1509 permits summaries of numerous accounts, but also *less-than-numerous* other writings that would cause a great loss of time if they were required to be produced and examined in court.

The use of Rule 1006 and §1509 is only limited by the imagination of counsel. Generally, if you find in discovery and trial rehearsal that any of your case bogs down because there are too many documents, figure out a way to summarize them for the jury. And remember, your written summaries are admissible into evidence and can go into the jury room.

Limit What You Prove

A week before trial, as I deposed an expert, opposing counsel handed me two orders, granting summary judgment against my client on two of the three causes of action of my case. Looking nonchalant on the outside, while dying on the inside, I went forward with the deposition.

As it turned out, the rulings were a blessing in disguise. They allowed me (and the jury) to focus on the real meat of the case, without being distracted by ancillary causes of action.

Paring down your case has two good effects:

- The jury will be grateful.

- If your ancillary causes of action were weaker than your main cause of action, you may avoid losing credibility with the jury by coupling a strong claim with weaker claims.

There is a fascinating (because it's contrarian) book I have touted before (Klonoff & Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (1990)) whose thesis is that a lawyer should never waste time proving weak claims, should never waste time using weak proof to buttress his or her claims, and should not anticipate opposing counsel's case by disproving it in advance.

The doctrine can be taken too far, however. Klonoff and Colby, for example, suggest that defense counsel should not tackle and explain their client's prior convictions, but let the prosecutor spring them on the jury first.

On the other hand, turn again to the O.J. Simpson case (will we never be rid of this case as a constant example of all that is wrong in jury trials?). Right-thinking observers agree that the prosecution has seriously undercut its case by anticipating defenses and laboriously disproving them in advance.

Organize Your Documents

The longest five minutes in the world is the five minutes you spend looking for a hard-to-find document in the presence of the jury. The solution is hardly unique: get yourself organized in advance of the trial. Others have written volumes on this topic (one of my columns is devoted to trial organization—*Trial Organization in a Speeded-Up World*, 14 CEB Civ Litigation R 203 (June 1992).

Organization boils down to one cardinal rule: In advance of trial, list in writing all your proposed exhibits (premark them, if *the court permits*) and arrange them chronologically. Have an original and four copies in court, with easy-to-list tabs, not forgetting to keep one copy back in the office.

To summarize (how appropriate):

- Use Fed R Evid 1006 or Evid C §1509 to summarize *any* clunky group of documents.
- Do not overprove your case, or waste time in "anticipatory rebuttal."
- Organize your exhibits in advance chronologically.

Appendix D

Expertise on Expertise

by William A. Brockett

The following is adapted from an article that originally appeared in 14 CEB Civ Litigation Rep 469 (Dec. 1992):

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

The weeks before trial focus on expert discovery. Simple, you think—merely look at the portmanteau statute, CCP §2034, telling you "everything you ever wanted to know about expert discovery."

Unfortunately, CCP §2034 was written by a blackbelt on bureaucratese (or more likely, a committee of blackbelts)—it is easy to lose your way in the thicket of paragraphs, subparagraphs, and sub-subparagraphs. I know, because I have done so recently.

It is unfortunate that many of our discovery statutes (CCP §2025 also comes to mind) require an attorney to play "Where's Waldo?" with important rules. Below, I cover the opportunities and dangers most frequently encountered during expert discovery.

Demand for Exchange of Expert Information

Timing. Although any party can demand an exchange of information about expert trial witnesses without leave of court (CCP §2034(b)), the demand cannot be initiated until a trial date is set. CCP §2034(a). Usually, the demand is due 70 days before the trial date. (A party shall make the demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date. CCP §2034(b).)

The requirements for the contents of the written demand are in CCP §2034(c). For a sample form, see California Expert Witness Guide §10.62 (2d ed Cal CEB 1991), hereafter referred to as "Expert Witness."

PRACTICE TIP

What if you inadvertently serve a demand *before* the dates authorized and fail to discover that mistake until after the last proper date to do so has passed? On a proper showing of good cause, CCP §473 may be your salvation. See *Zellerino v Brown* (1991) 235 CA3d 1097, 1104, 1 CR2d 222, 225; Expert Witness §10.4A.

PRACTICE TIP

In many cases I recommend not demanding an exchange of expert information, hoping the other side will follow suit, or will miss the deadline. If you are confident that you can handle your opponent's experts "cold" better than the opponent can handle yours, eliminating extensive pretrial expert discovery will provide valuable additional time to focus on the merits of the case.

Service. The demand must be served on all parties. CCP §2034(d). There is no requirement that this demand be served by hand. Thus, do not assume that no demand has been made simply because you do not receive the demand on the 70th day before trial.

Demand for Production of Reports and Writings

As discussed below, the demand for "discoverable reports and writings" does not encompass the universe of writings you want to get from the hostile expert at or prior to deposition.

Exchange of Information

Determining the Date. The exchange normally takes place on the 50th day before trial. See CCP §2034(c), providing for the exchange 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date.

PRACTICE TIP

Since naming experts is often a chess game (*i.e.,* you may want to name an expert on questioned documents only if they do), if your opponent serves you by hand you may have time to edit your expert information list and put it in the mail timely the same day.

Time and Manner of Exchange. As with the demand, the exchange need not be served by hand, but can be mailed. See CCP §2034(f), permitting the exchange by either a meeting of the attorneys, or mailing on or before the exchange date.

Naming Client as an Expert. The cautious attorney will name his own client as an expert, insofar as formal expert opinion will be offered by the client. Code of Civil Procedure §2034(a)(1) contemplates including the name of *parties* whose expert opinions may be offered in evidence at trial.

PRACTICE TIP

The downside of naming your client is that it exposes that client to another full-fledged deposition on expert topics that may reopen areas better left untouched. Often, client opinions (such as an evaluation of their own business) are not "expert" in the true sense. You can gamble successfully that the trial judge will permit such opinions without prior designation. For discussion of "nonexpert" opinion, see Brockett, *Trial Run: Everybody's Got an Opinion*, 13 CEB Civ Litigation Rep 250 (Sept. 1991). [**Editor's Note:** This article is reproduced in Update §12.33.]

Do not forget that you need to provide two documents for your exchange of information: a list containing the names and address of the prospective experts (CCP §2034(f)(1)(A)), and an expert witness *declaration* signed by the attorney, containing information set forth in CCP §2034(f)(2). See Expert Witness §§10.11, 10.63 (sample forms).

List of Supplemental Witnesses. If you are reluctant to name experts, unless you think that experts are necessary to rebut an opponent's experts, take advantage of the CCP §2034(h) "safety net." Twenty days after the exchange (described above), you may submit a supplemental expert list (that must automatically include the "discoverable reports" described above), listing the name and address of any experts on any subject covered by an expert designated by your opponent, *if* you have "not previously retained an expert to testify on that subject." Presumably the phrase "previously retained … to testify on that subject" means retained as an expert to testify *before* the initial §2034(f) exchange takes place. It appears to be permissible to designate an expert in a supplemental list if that expert was retained to be a consultant and not retained to testify on that subject. Note that during the legislative process, AB 1334, from which §2034 was enacted, was amended to substitute the word "retained" for "designated" in §2034(h). See Expert Witness §10.16. Along with the supplemental expert list, you must also submit an expert witness declaration.

Use of Undisclosed Impeachment Expert. There is one other opportunity for sandbagging with experts—use of "rebuttal" experts, permitted by the law *only* to testify to the falsity or nonexistence of *facts* used as the foundation for any opinion by your opponent's experts, not to contradict the actual opinion. No prior disclosure of such experts is required. CCP §2034(m)(2). See Expert Witness §10.22. If you determine that your adversary's expert has built an opinion based on cloud-cuckoo-land facts, this is a nifty way to legitimately present surprise testimony at trial.

Deposition of Experts. After receipt of an expert witness list, any party may take the deposition of any other person on the list. CCP §2034(i). See Expert Witness §§10.35-10.42, 10.64 (civil subpoena duces tecum), Expert Witness §10.65 (civil deposition subpoena—personal appearance), Expert Witness §10.66 (civil deposition subpoena for production of business records), Expert Witness §10.67 (notice of deposition of disclosed expert; demand for production of documents at deposition). Code of Civil Procedure §2034(i) allows an attorney to set up the deposition of retained experts (not third party percipient witness experts) by simply providing deposition notice and a tender of the expert witness fee. Remember to tender the expert witness fee, *or else the notice alone will be ineffective.*

This is a simple method to set up expert depositions—too simple. It is also the wrong method.

The problem with a simple notice is that it will not compel the hostile expert to come to the deposition with *all* documents you want to review. Code of Civil Procedure §2034(i) states that the procedures for taking depositions set forth in §2025 apply "except as follows: … (3) The Service of a proper deposition notice." Section 2025(d)(4), regarding the contents of the deposition notice, provides for "the specification with reasonable particularity of any materials or category of materials to be produced by the

deponent." Thus, the specification language in §2025(d)(4) is excepted by §2034(i).

And CCP §2025(h)(1) makes a deposition notice effective to require the presence of *only* a "party to the action or an officer, director, managing agent, or employee of a party." Most experts are in none of these categories. Kennedy and Martin recommend using a subpoena duces tecum to obtain the expert's file before deposition. Expert Witness §10.10. They also recommend having an opposing CCP §2034(a)(2) expert served with a subpoena to produce documents at the deposition in addition to serving the expert with a deposition notice. Expert Witness §§10.10, 10.41. Unless you can arrive at a stipulation, you should subpoena the expert witness (with no need to provide them expert fees with the subpoena) and demand in that subpoena "all documents generated by, reviewed by, or referred to by the expert, whether or not such documents were relied on in arriving at the expert's opinion" I normally also demand a laundry list of documents, including timesheets, billing statements, all correspondence between the expert and the attorney retaining the expert, and all written communications with third parties.*

Contrast the scope of this demand with the "discoverable reports and writings" you may secure by the demand for exchanges. See CCP §2034(g). An expert who has reviewed a document that *contradicts* the expert's opinion can put that document aside in responding to the §2034 demand for expert information. They must *provide* that document in response to a properly inclusive subpoena duces tecum.

Videotaping Expert's Deposition. If you intend to record the testimony by videotape or audiotape in addition to the required stenographic recording, the deposition notice or deposition subpoena must so state or the parties may agree. CCP §§2025(d)(5), (*l*)(1), 2020(c). See Brockett, *Trial Run: The Videotape Revolution (Pretrial)*, and *Trial Run: The Videotape Revolution (Trial)*, 12 CEB Civ Litigation Rep 190, 288 (Aug., Nov. 1990); Expert Witness §10.40.

[**Editor's Note:** These articles are reproduced in Update §9.3.]

Tender of Expert Fees. A party taking the deposition of an expert must tender the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition. See CCP §2034(i)(2); Expert Witness §10.38. Note that §2034(i)(2) has been amended, effective January 1, 1993. See Stats 1992, ch 1301 (AB 2913 (Mays)). The existing statute applied to the deposition of any expert. The revision makes §2034(i)(2) applicable only to experts designated in an exchange of information.

Under the amended CCP §2034(i)(2), the amount to be paid is the expert's reasonable and customary hourly or daily fee for

any time spent at the deposition from the time noticed in the deposition subpoena or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, whether or not the expert is actually deposed by any party attending the deposition. If any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel.

If you wish an orderly exploration of expert testimony, rather than taking advantage of the opportunities afforded by the fine print of §2034, consider entering into a stipulation with your opposite number, similar to the stipulation that I had advised in federal court without a detailed Pretrial Order, including in any such stipulation a provision for complete production of all relevant documents several days *in advance* of an expert deposition, which permits meaningful review of documents prior to deposition.

Good luck!!

---

*Case law supports holding back reports and writings prepared by the expert while still a "trial" consultant, before designation to be a trial witness. *National Steel Prods. Co. v Superior Court* (1985) 164 CA3d 476, 488, 210 CR 535, 542. However, if an expert's opinion necessarily relies on materials reviewed while still a "consultant," the candid attorney will provide those materials also. I believe in the homily that "honesty is the best policy," and recommend complete disclosure.

Appendix E

Blinded by Science

[**Note:** This article has been deleted. Since the publication of the book, the law has changed significantly. See Update chap 7.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Appendix F Voir Dire Revisited: The Bull's Viewpoint

Appendix F

Voir Dire Revisited: The Bull's Viewpoint

by William A. Brockett

The following is adapted from an article that originally appeared in 13 CEB Civ Litigation Rep 134 (June 1991):

The toreador and the bull have a different opinion of the bull fight.

—old Spanish saying

Recently, I was called to serve as a juror in Superior Court. I was herded into a shabby, overlighted room, my home for two boring days. Eventually, I joined 35 other jurors being voir dired in a felony burglary case. My reactions:

- I was ill-tempered by the time voir dire began.
- My fellow jurors were in the dark about why they were kept waiting, and what their role was *before* voir dire.
- Many of the jurors doubted whether the case we were assigned to was worth the bother of a jury trial.

The landscape of voir dire is altering substantially and permanently. Proposition 115 (CCP §223) (slashing the right of attorneys to conduct voir dire in criminal cases), redrafted CCP §222.5 (affirming the generous right of attorneys to conduct voir dire in civil cases), liberal use of juror questionnaires, and shifting attitudes of federal courts (many now permitting limited attorney voir dire) are all features of this new landscape.

[**Editor's Note:** Code of Civil Procedure §223 was amended by Stats 2000, ch 192, §1, effective January 1, 2001, which restores the right of voir dire to the parties' attorneys, subject to a time limitation imposed by the court. For discussion of this amendment, see Update §10.11.]

Attorneys should rethink voir dire. Here are some proposals:

- Don't educate a jury about your case—it's a waste of time, sounds stilted, irritates the judge, and violates CCP §222.5 (civil cases). Precondition jurors in your opening statement, not during voir dire.
- Spend no voir dire time warning the jury about the weaknesses in your own case. A convincing new book, Klonoff & Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (1990), pounds home the lesson that an attorney loses points by "pulling the sting" from weaknesses in his own case.
- Give the jury a chance to express their frustration with jury duty.
- Be a good conversationalist: Ask open-ended questions. Let the jurors speak, rather than monopolizing the conversation yourself.
- Ask "reverse-spin" leading questions to expose sensitive prejudices (racism, fear of crime).
- Insist that the jury make promises to you, promises you can "call in" during closing argument.
- Use jury questionnaires.

Don't Use Voir Dire To Educate the Jury

Code of Civil Procedure §222.5, permitting liberal voir dire by attorneys in civil cases (in contrast to Proposition 115's limits on criminal voir dire), forbids an attorney to ask jurors questions whose dominant purpose is to "precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law." Efforts to educate the jury are effectively dead. This is a good thing.

Use voir dire to determine the *attitudes* of prospective jurors about the main issues of the case. This is best done by open-ended questions, discussed below. Don't make voir dire a seminar about the merits of your case. If your voir dire begins to sound like closing argument, punctuated only by a juror's occasional monosyllabic "yes" or "no," two bad things happen: (1) you stifle

conversational give-and-take (the key to discovering juror personality and prejudices) and (2) you risk alienating the judge. The already awkward process of having a meaningful conversation with a room full of strangers, one by one, is made impossible if you are struggling against an irked judge.

To illustrate the difference between *education* and *exploration,* note these alternative questions:

> Q: We will prove to you during the trial that my client, George Smith, quit his job after being harassed by his supervisor for over six months, both through insults and continual requests that he illegally ignore bribes paid by the company. Is there any feature of this anticipated proof that will make it difficult for you to be an impartial juror? [Improper question under CCP §222.5; effort to "indoctrinate the jury."]
>
> Q: Have you or any of your friends ever been asked to do anything illegal by a job supervisor? What happened? What do you think an employee should do if asked by his supervisor to do something illegal? [An open-ended effort to explore the juror's attitude toward an important issue in the case.]

If you—like me—find voir dire the hardest part of a trial, lower your sights. You can relax a bit, and practice a sort of "Zen voir dire"—observing with an attentive, uncluttered mind. In fact, I will go even further. Give up the conceit that you should be forcing jurors to "incriminate themselves" by showing their true colors (leading to challenge for cause), and focus on asking questions that will allow you to make intelligent peremptory challenges.* Voir dire will become almost a pleasure, your juries will be better-constituted, and you will not risk being summarily cut off from further questions under CCP §222.5.

Do Not Waste Time Educating the Jury About Weaknesses in Your Own Case

It is conventional wisdom that a lawyer must warn the jury early about unpleasant surprises. For example, if you represent a plaintiff in a personal injury action who has three prior felony convictions for grand theft, you should let the jury know as soon as possible that proof will show that your client has the three convictions (assuming they are admissible at trial). This rule has common-sense appeal. I have scrupulously followed it over the years.

The "turn your weakest cards face up early" approach is called into serious question by a new, impressively documented book, Sponsorship Strategy. The book's thesis is simple: Jurors expect each side to present the strongest possible case, glossing over weaknesses and emphasizing strong points. If attorneys spend time lingering on the weak points of their own case, the jury will draw two conclusions: they will strictly rely on all concessions made by an attorney, and will *never* draw conclusions more favorable than those concessions. And, they will give concessions of fact *more weight,* than if presented by the opposing attorney, who is expected to concentrate on the weaknesses of the opponent's case.

What of the theory that an attorney gains credibility by confessing weak points in his case early? To quote Sponsorship Strategy: "As long as the jury knows that an advocate will never confess that he should lose the case, it will be skeptical of his attempts to gain credibility by exposing weaknesses." This approach, if adopted, would work almost a Copernican revolution on trials. It warrants further study and comment, but it is a powerful new way to test all aspects of a trial.

Allow Jurors To Vent Frustration About the Jury Process

As a juror, I discovered myself bored, frustrated, and baffled. I was not alone, judging by sarcastic and grumbling remarks made by my fellow jurors.

If a case requires lengthy voir dire, counsel should let jurors express dissatisfaction. Here are sample questions:

> Q: How long have you been waiting in the jury room? What was it like? Has anyone told you why you have been kept there for two days? [Explain the need to have a jury pool on standby to force settlements in the numerous cases that are being brought before trial courts.]
>
> Q: If you could be King for a Day, would you keep our jury system? Why? How would you change it?
>
> Q: Do you know what the most common phobia is? [Explain that it is fear of public speaking, and sympathize with the jurors for being singled out to answer complicated questions. Explain that you, too, are nervous.]
>
> Q: If you were me, how much time would you take up asking voir dire questions of the prospective jurors? Why do you think I am asking you these questions? Am I asking too many questions?

Be a Good Conversationalist

Jurors, like red wine, should be allowed to "breathe." You cannot pick a jury with discrimination unless you get to know them. Unfortunately, good voir dire runs contrary to much of what we learn as trial lawyers. We work hard on *controlling*.

With a jury, you should shift gears. Here, for example only, are open-ended questions that explore the juror's personality, a juror's attitudes towards issues in a specific civil case, and the juror's predilection.

> Q: Are you ever wrong? Tell me about what kinds of mistakes you make most often. Is your spouse ever wrong? How do you two settle disagreements about facts?
>
> Q: Have you ever had any unpleasant experiences with a large corporation? Tell me about them. What conclusions did you draw from those experiences?
>
> Q: Who do you admire most in public life? [This may yield party affiliation, normally a barred question.] If you were not working in your present job, what would you like to do? Why?

Asking open-ended questions is no more (and no less) difficult than making small talk at a cocktail party—only your conversational partner cannot excuse himself to get a drink.

What about the juror who will not be drawn out, or is at a loss for words when asked creative questions? Simply sympathize with the juror ("I know you didn't expect to be on Donahue today"), and move on to another juror who has had time to think of answers to the questions you've been asking, promising to come back to the tongue-tied juror.

Reverse-Spin Leading Questions To Expose Prejudice

All jurors have personal characteristics they are reluctant to admit, *e.g.,* racial prejudice, reluctance to presume an accused criminal is innocent until proven guilty. How can you get these attitudes into the open, so that the jury confronts them, and can be questioned about them?

I suggest the "reverse-spin leading question." Assume that the jury as a whole shares certain undesirable traits, and require the jurors to take initiative if they wish to *refute* the assumption. Here are some examples:

> Q: Assume you find yourself in a deserted area downtown at midnight in a strange town. You see three young men approaching you. If I were you, I would be made more nervous if the three young men were black. Is there anyone on this jury who would not react the same way? [If anyone raises their hand, including minority jurors, quiz them about their reaction.]
>
> Q: Loud portable radios are often called "boom boxes." Is there anyone on the jury who has never been annoyed by a boom box playing in public? Is there anyone on the jury who does not associate boom boxes with young black males?
>
> Q: My client has been charged with armed robbery. Is there anyone on the jury who thinks that he was charged for no reason at all? If you had to vote on innocence or guilt now, without receiving any more evidence, is there anyone who would vote not guilty? [A good starting point for a discussion of the presumption of innocence.] Why did you react that way?

This approach violates the "no leading questions" rule, and borders on education. But it provides a springboard for uncovering racial assumptions and other prejudices.

Obtain Promises From the Jury To Use During Closing Argument

One of the easiest parts of voir dire is seldom mentioned in standard texts. During deliberations, jurors will be asked to do some things that do not come naturally. For example: to ignore evidence which has been successfully objected to; to presume that a person accused of a serious crime by the state is innocent; to treat an individual and a corporation with equal lack of sympathy.

Many of these demands, even in a perfect world, will be only partially met. You can do your part by getting promises from the

jury panel and reminding them of those promises during your closing.

Typical "promise" questions include:

> Q: Will each of you promise me that you will uphold your sworn duty to disregard race in coming to a verdict? Raise your hand if you cannot keep this promise.
>
> Q: Will each of you promise that you will presume my client to be innocent unless you find that the prosecutor has proved his guilt beyond a reasonable doubt? Tell me now if you cannot do this.
>
> Q: Do you all promise that you will give no additional weight to the word of any witness just because the witness works in law enforcement? Do any of you have the slightest problem with this.

By the time you reach closing argument, you should know accurately what problem areas exist in your case. If, for instance, the case comes down to the word of a police officer against your client, *remind* the jury of their promise. Jurors should be asked to remind each other of their group promises if the deliberations veer toward the forbidden.

Use Jury Questionnaires

There are fashions in trial law. Jury questionnaires are definitely "in fashion" now. Code of Civil Procedure §222.5 forbids barring jury questionnaires without good reason.

Some counties have even institutionalized wide-ranging and intrusive jury questionnaires. In federal court (where voir dire is very limited) and perhaps in state criminal cases, the jury questionnaire may be the best way to get a good read on a panel.

A recent Sacramento County jury questionnaire contains over 76 probing questions. Judges seem willing to allow lawyers to frame intrusive questions in questionnaires, even though they would forbid similar questions during live voir dire.

Below are sample questions asked in questionnaires in two recent trials, one a state civil case, another a federal criminal case:

1. Are you active in any political organizations or campaigns?

Yes ____ No ____

If "Yes," please describe. _____
_____

2. What do you like to do in your spare time? (participate in sports, watch sports events, read, watch TV, etc.)

3. Would you describe yourself as a leader?

Infrequently ___ Occasionally ___ Frequently ___

4. What are your occupational goals? _____
_____

5. Do you feel there are flaws in the criminal justice system in California?

Yes, many ___ Some ___ Not many ___ None ___

If "Yes, many" or "Some," please state what they are. _____
_____

6. Do you support or belong to any organization which has taken a position regarding ownership and/or control of handguns?

Yes ____ No ____

If "Yes," please describe the organization and your role in it.

7. If you've ever had any personal experience with psychiatrists or psychologists, how did this experience impress you?

Favorably ___ Unfavorably ___ Does not apply ___

8. Please list all groups or organizations in which you participate or are a member. For example: service clubs, church or church groups, unions or professional organizations, volunteer activities, educational or political groups:

_____
_____
_____

9. What organizations do you support financially?

_____
_____
_____

10. What is your political party affiliation?

____ Democrat

____ Republican

____ American Independent

____ Independent

____ Other: _____

[Please specify]

11. Do you believe that American companies are disadvantaged when laws prohibit certain acts in furtherance of the offer or payment of bribes in connection with a company's business?

Yes ____ No ____

12. American companies frequently pay money to Latin American government officials to obtain government contracts.

Agree strongly ____ Disagree somewhat ____

Agree somewhat ____ Disagree strongly ____

13. In general, what do you think of the United States foreign policy toward Colombia?

14. Are you aware of any situations where you think favoritism or corruption resulted in a dishonest business deal?

Yes ____ No ____

If "Yes," please describe the circumstances: _____
_____

15. For each statement listed below, please indicate whether you (1) *agree strongly,* (2) *agree somewhat,* (3) *disagree somewhat,* or (4) *disagree strongly* with it. Please circle your choice.

AGREE STRONGLY	AGREE SOMEWHAT	DISAGREE SOMEWHAT	DISAGREE STRONGLY

a. When the prosecution goes to the trouble of bringing someone to trial, that person is probably guilty.

1…….. 2…… 3…… 4

b. It is better for society to let some guilty people go free than risk convicting an innocent person.

1…… 2…… 3…… 4

c. Regardless of what the law says, a defendant in a criminal trial should be required to testify.

1…… 2…… 3…… 4

d. Obedience and respect for authority are the most important virtues children should learn.

1…… 2…… 3…… 4

e. The U.S. Attorney would only bring charges against a company and its employees for bribing foreign officials if the charges were true.

1..... 2..... 3..... *4*

f. All laws should be strictly enforced no matter what the results.

1..... 2..... 3..... *4*

In addition to imaginative questions, a typical jury questionnaire contains exhaustive probing of the conventional kind into education, family, prior jury experience, etc.

Conclusion

In the wake of CCP §222.5 and Proposition 115, we must all reexamine our voir dire techniques. Give the bull a meaningful role in the drama of voir dire.

---

[*] Technically, in criminal cases this would violate former CCP §223, permitting criminal voir dire "only in aid of the exercise of challenges for cause." I challenge any court to distinguish well-thought-out voir dire geared to intelligent exercise of peremptories from voir dire for "cause" challenges.

Appendix G

Rules of Evidence in State and Federal Court

The following summary of frequently used evidence rules is derived from Brockett, *Evidence on the Run*, 14 CEB Civ Litigation Rep 331 (Sept. 1992):

[**Editor's Note:** The tables have been updated to reflect changes in the Evidence Code.]

EVIDENCE IN CALIFORNIA COURTS

Authority	*Description*	*Comments*
Evid C §352	Time-consuming, prejudicial, confusing, or misleading evidence	Court may exclude if probative value outweighed by any of these factors.
Evid C §355	Admissibility for limited purposes	Good "shoehorn" for getting in evidence inadmissible on most grounds, but admissible on one theory. If opposing admission, be sure to get limiting instruction for jury —whatever that's worth.
Evid C §356	Full context rule	Gives nonquestioning attorney right to put adverse evidence (especially deposition testimony) in context by reading contrary testimony into record. Most judges will allow this to be done immediately after opponent reads original evidence into record. If not, the jury will have difficulty placing original evidence in context. Rule applies to "an act, declaration, conversation or writing." Compare with Fed R Evid 106, limited to writing or recorded statement only.
Evid C §402	Procedure for determining foundational and other preliminary facts	Provides grounds for urging hearing out of jury's presence.
Evid C §412	Weaker evidence distrusted	Must be within party's power to introduce stronger evidence. Basis for instruction to jury and argument.
Evid C §§450-457	Judicial notice	Provisions may be used flexibly to bring in such facts as almanacs, weather reports, mortality tables, effectiveness of auto seatbelts, street location in "business district," and danger of working in silica

		dust. 9 Wigmore on Evidence §2580 (rev ed 1981). If you give adverse party sufficient notice and furnish court with sufficient information, it must take judicial notice of items in Evid C §452, including "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."
Evid C §721	Cross-examining expert	You may cross-examine an expert about any publication established as reliable authority in the field, even if the expert has not referred to, considered, or relied on the publication.
Evid C §769	Inconsistent statement or conduct	Examiner need not disclose information to witness about inconsistent statement or conduct before questioning witness about inconsistency (abrogating rule in *The Queen's Case* (1820) 129 Eng Rep 976).
Evid C §770	Use of prior inconsistent statement	Inconsistent statement as substantive evidence, not just impeachment under Evid C §1235. Inconsistent statement excluded unless (1) witness examined about statement while testifying, which gives witness chance to explain or deny, or (2) witness not yet excused.
Evid C §771	Refreshing memory	Writing used to refresh recollection must be produced on request of adverse party, and opponent can introduce into evidence.
Evid C §777	Exclusion of witnesses	Discretionary; parties and party representatives may not be excluded.
Evid C §§780-790	Credibility and impeachment	General sections.
Evid C §786	Character evidence	Witness's credibility may not be attacked or supported by evidence of character traits other than honesty or veracity.
Evid C §788	Prior felony convictions	Admissible to attack witness's credibility with certain exceptions (*e.g.,* pardon based on innocence or certificate of

		rehabilitation).
Evid C §790	Good character	Witness's good character admissible only to rehabilitate after evidence of bad character admitted.
Evid C §791	Use of prior consistent statement	Generally barred, but allowed if (1) evidence of inconsistent statement admitted and consistent statement was made before inconsistent statement or (2) there is express or "implied" charge that testimony has improper motive and consistent statement was made before motive is alleged to have arisen.
Evid C §800	Opinion testimony by lay witnesses	Inference must be "helpful" to trier of fact.
Evid C §801	Opinion testimony by experts	Evidence relying on novel scientific technique must meet threshold requirements of *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144.
Evid C §913	Exercise of privilege	No adverse comment or presumption from any witness's refusal to testify based on privilege. Urge hearing out of jury's presence under Evid C §402 if supporting privilege.
Evid C §1100	Character	Provable by opinion, reputation, or evidence of specific instances of conduct.
Evid C §1101	Character evidence	Generally inadmissible to prove conduct on particular occasion. Other act evidence may be admitted if relevant to something other than disposition. Evid C §1101(b). Major issue in many criminal cases.
Evid C §1105	Habit or custom	Admissible to prove conduct on a specific occasion (often used to avoid limitations on character evidence set forth in Evid C §1101).
Evid C §1108	Other acts—sexual misconduct	Admissible in prosecution for sex offense subject to Evid C §352 balancing test.
Evid C §1109	Other acts—domestic violence	Admissible in prosecution for offense involving domestic violence subject to Evid C §352 balancing test.
Evid C §1220	Admissions of a party	Extremely valuable catchall, making admissible virtually everything said by

		opponent or opponent's representatives.
Evid C §1223	Admission of co-conspirator	Admissible after, or subject to, sufficient proof of conspiracy.
Evid C §1237	Past recollection recorded	Written statement must be recorded contemporaneously, and after witness testifies he or she cannot testify fully and accurately from present memory. Recording can be read into evidence only, not offered (unless offered by adverse party).
Evid C §1240	Spontaneous statement	Part of "res gestae" exception; also called "excited utterance."
Evid C §1241	Contemporaneous statement	Part of "res gestae" exception; statement accompanying ambiguous conduct may be used to explain it.
Evid C §§1250-1252	State of mind	These exceptions to hearsay rule include statements of current mental or physical state and statements of present intent to prove subsequent action; see famous case of *Mutual Life Ins. Co. v Hillmon* (1892) 145 US 285, 36 L Ed 706, 12 S Ct 909.
Evid C §§1270-1272	Business records	Writing must be in regular course of business, near event in question, and should be trustworthy (ask custodian if business depends on accuracy).
Evid C §§1400-1421	Rules of authentication	Proof that a paper is what proponent claims. Documents may be self-authenticating by their content. Evid C §1421.
Evid C §1521	Secondary evidence rule (replaces best evidence rule (former Evid C §1500))	Codifies the numerous exceptions to the best evidence rule: secondary evidence generally admissible to prove contents of writing. Authentication still required.
Evid C §1523	Oral evidence of contents of a writing	Evid C §1523(d) permits a witness to summarize any lengthy evidence for jury.
Evid C §§1530-1532	Official writings and certification	Exceptions to best evidence rule and authentication rules for official writings.

EVIDENCE IN FEDERAL COURT

Authority	*Description*	*Comments*
Fed R Evid 103(c)	Evidentiary rulings	Encourages hearings

		involving inadmissible evidence to be held out of jury's presence.
Fed R Evid 104	Preliminary questions	Encourages hearings on preliminary matters to be held out of jury's presence when interests of justice require, or when accused is witness and makes such request, or whenever admissibility of confession is being considered.
Fed R Evid 105	Admissibility for limited purpose	Good "shoehorn" for getting in evidence inadmissible on most grounds, but admissible on one theory. If opposing admission, be sure to get limiting instruction for jury —whatever that's worth.
Fed R Evid 106	Full context rule	Gives nonquestioning attorney right to put any evidence, especially reading of deposition, in context by reading contrary testimony into record. Most judges will allow this to be done immediately after opponent reads original evidence into record; otherwise, jury may have difficulty placing original evidence in context. Limited to writing or recorded statement only, unlike more expansive state rule (Evid C §356).
Fed R Evid 201	Judicial notice	Limited to adjudicative facts. Provisions may be used flexibly to bring in such facts as almanacs, weather reports, mortality tables, effectiveness of seatbelts, street location in "business district," and danger of working in silica dust. 9 Wigmore §2580. Court may take judicial notice even if not requested. On request, court furnished with sufficient information must take judicial notice of items, including facts not reasonably disputable and readily determinable by resort to sources whose accuracy cannot reasonably be questioned. Parties entitled, on timely request, to opportunity to be heard on issue. Absent prior

		notice, request may be after judicial notice taken.
Fed R Evid 403	Time-consuming, prejudicial, confusing, or misleading evidence	Court may exclude if probative value outweighed by any of these factors.
Fed R Evid 404	Character evidence	Limitations on use of character evidence. Generally inadmissible to prove conduct on particular occasion. May be offered by criminal defendant against victim of crime if pertinent, but introduction opens door to similar evidence about defendant. Rule 404(b), permitting proof of other acts to show identity, plan, intent, absence of mistake, etc., is major battleground in criminal cases.
Fed R Evid 405	Methods of proving character	Testimony on reputation or in form of opinion permissible; inquiry into specific instances of conduct permissible only in cross-examination, or if trait or character of person is essential element of charge, claim, or defense.
Fed R Evid 406	Habit and routine	Evidence of habit or routine of person or organization relevant to prove specific conduct; potential exception to Rule 404, barring character evidence.
Fed R Evid 413	Other acts—sexual assault	Admissible in sexual assault prosecutions.
Fed R Evid 414	Other acts—child molestation	Admissible in child molestation prosecutions.
Fed R Evid 415	Other acts—sexual assault/child molestation	Admissible in civil actions in which complaint alleges sexual assault or child molestation.
Fed R Evid 501	Privileges	A catchall general rule adopting federal common law in nondiversity cases, and state law in diversity cases; very complicated area.
Fed R Evid 608	Witness character and conduct	Credibility of witness may be attacked only by evidence of truthfulness or untruthfulness; evidence of truthful character admissible only in rebuttal after truthfulness attacked. Specific conduct may be proved by extrinsic

		evidence only if court finds it would be probative on truthfulness, and then may be inquired into only in cross.
Fed R Evid 609	Conviction of crime	Limitation on impeachment by evidence of conviction of crime. Crime must be felony or involve dishonesty or generally will not admit crimes over 10 years old (10 years after conviction or release from confinement, whichever is later), and must decide if probative value outweighs prejudice. Written notice to adverse party required for evidence of conviction more than 10 years old. Remember to consider effect of pardon, annulment, or certificate of rehabilitation.
Fed R Evid 612	Writing to refresh memory	Adverse party has right to examine writing, inspect it, cross-examine witness on it, and introduce relevant portions into evidence.
Fed R Evid 613	Use of prior inconsistent statements	Witness need not be shown statement when questions asked about it; on request, statements must be shown or disclosed to opposing counsel. Extrinsic evidence of prior inconsistent statement impermissible unless witness offered opportunity to explain or deny and opposing question witness. Rule does not apply to party-opponent.
Fed R Evid 615	Exclusion of witnesses	Party may request exclusion, except for opposing party or party-representative or person "essential to the presentation of the party's cause" (generally an expert).
Fed R Evid 701	Opinion testimony by lay witness	Lay opinion testimony limited to matters not covered by Fed R Evid 702 (expert testimony).
Fed R Evid 702	Expert testimony	December 2000 amendments codify foundational requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786.

Fed R Evid 703	Bases of expert opinion testimony	Facts and data in a case on which an expert relies to form an opinion need not be admissible for the expert's opinion to be admitted. Inadmissible facts and data should not be disclosed to the jury unless the court determines that their probative value outweighs their prejudicial effect.
Fed R Evid 801	Hearsay	A catchall definition, excluding prior inconsistent statements, certain prior consistent statements, and admissions of party. Similar to state rules (also covers co-conspirator statements, which can be used in civil as well as criminal case).
Fed R Evid 803	Exceptions to hearsay rule	Applicable whether or not declarant available. Includes subsections: (3) then-existing mental, emotional, or physical condition, including intent; (5) past recollection recorded (recorded contemporaneously and witness can no longer testify fully and accurately); (6) business records (business must rely on information recorded); (18) learned treatises (must be called to expert's attention on cross-examination or relied on by expert in direct examination and must be established as reliable authority by witness's testimony or by other expert testimony or judicial notice); (24) catchall exception, for being "generally trustworthy," but requires adequate advance notice.
Fed R Evid 804	Hearsay exceptions when declarant unavailable	Includes declaration against interest and statement with "guarantees of trustworthiness," which requires adequate advance notice to adverse party.
Fed R Evid 806	Attack and support of hearsay statements	Hearsay may be used to attack hearsay, *i.e.*, any evidence admissible that would have been admissible had declarant testified. Inconsistent statement or conduct not subject to

		requirement that declarant be given opportunity to deny or explain.
Fed R Evid 901-903	Authentication and identification	Includes self-authentication for official publications or newspapers and periodicals.
Fed R Evid 1002	Best evidence rule	Original writing required to prove content.
Fed R Evid 1006	Use of summaries	Voluminous writings may be summarized; valuable rule permitting synopsis of lengthy evidence.

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Appendix H Impeachment: Last Refuge of a Scoundrel?

Appendix H

Impeachment: Last Refuge of a Scoundrel?

by William A. Brockett

Over the years, civil and criminal practices have increasingly incorporated "full disclosure" into their discovery regimens. There is one last refuge for the attorney who wishes to try a case from ambush impeachment.

Both federal and state courts, to a limited degree, allow holding back information about witnesses and evidence that would impeach an adversary. Closely related to trial by impeachment is the practice of including the juiciest tidbits of evidence in "rebuttal."

The following section answers these questions: How much "critical impeaching" information can an attorney hold back during discovery? What are the consequences of nonproduction? How can you distinguish between impeachment and simple stealth?

What Is Impeachment?

The late Professor Irving Younger stated in his usual categorical way that there are only nine categories of impeachment. The first group relates to competence:

1. The ability to appreciate the gravity of the oath [archaic].

2. Perception.

3. Memory.

4. Ability to communicate what has been seen and remembered.

The second group requires a factual basis. In some cases the proponent must prove the extrinsic impeaching material is not collateral to the case:

1. Bias, prejudice, or corruption.

2. Prior conviction.

3. Prior bad acts (usually collateral).

4. Prior inconsistent statements (if important, not collateral; if unimportant, usually found to be collateral).

The final category is a witness's character and honesty. Generally, any witness can be impeached as dishonest by an "anti-character" witness. Evid C §786; Fed R Evid 608(a).

Professor Younger did *not* list one of the most-used and most-contended impeaching items (from the laundry list of credibility factors set forth in Evid C §780): "The existence or nonexistence of any fact testified to by [the witness]." Evid C §780(i). Generally, as you will see below, it is dangerous to hold back such evidence.

Impeachment From Ambush

By common practice, and increasingly by terms of pretrial orders, attorneys in civil cases may hold back the names of witnesses to be used for impeachment or rebuttal. CD Cal Civ Local R 16-2.4; Schwarzer, Tashima & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, pp 15-37 (1989) (sample pretrial conference order (form 15:B) stating that: "Except for good cause shown only the witnesses identified in the lists will be permitted to testify (other than for impeachment or rebuttal)").

Counsel must be very cautious about holding back impeaching or rebuttal discovery. The consequences of doing so can be fatal. *Campbell Indus. v M/V Gemini* (9th Cir 1980) 619 F2d 24, 27 (barring testimony of witnesses not contained on pretrial list); *A & M Records, Inc. v Heilman* (1977) 75 CA3d 554, 566, 142 CR 390 (precluding testimony at trial from defendant who had earlier asserted privilege against self-incrimination in discovery on the same topic).

Two consistent guidelines emerge in the cases:

1. Never say "never." A witness who says "I *never* used heroin/cheated anyone/drove over the speed limit" is fair game for impeachment without pretrial disclosure. *People v Schumacher* (1967) 256 CA2d 858, 864, 64 CR 494 (proper to impeach defendant who said he did not know what heroin looked like by proving earlier sale); *People v Asher* (1969) 273 CA2d 876, 909, 78 CR 885 (codefendant said he had not seen shotgun for two days, then was impeached by evidence of earlier holdup of a bar).

2. Do not withhold important portions of your case-in-chief intending to present them later as "impeachment." The danger of this practice is discussed immediately below in examination of the proper scope of rebuttal.

Proper Scope of Rebuttal

The "antiphonal" (Wigmore's word) order of proof demands that parties put all relevant parts of their case-in-chief into evidence during the initial presentation, leaving the proper scope of rebuttal only "to *meet the new facts* put in by the opponent in his case in reply." 6 Wigmore on Evidence §1873 (1976) discusses this time-honored rule as follows:

The rule upon this subject is a familiar one. When, by the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his case. He cannot, as said by Lord Ellenborough, go into half his case and reserve the remainder. The same rule applies to the defense.

See cases cited in 6 Wigmore §1873 at p 676, quoting *Hathaway v Hemingway* (1850) 20 Conn 191, 195.

The trial court has inherent, broad power to control the scope of rebuttal evidence. *Geders v U.S.* (1976) 425 US 80, 86, 47 L Ed 2d 592, 597, 96 S Ct 1330. It is reversible error for the prosecution in a criminal trial to introduce so-called rebuttal evidence when the defense has not raised the issues purportedly being rebutted. *Courtney v U.S.* (9th Cir 1968) 390 F2d 521, 528.

Codified in Pen C §1093(d) (formerly Pen C §1093(4)), the California Supreme Court cogently expressed reasons for restricting rebuttal evidence:

The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.

People v Golden (1961) 55 C2d 358, 371, 11 CR 80. See *People v Carter* (1957) 48 C2d 737, 754, 312 P2d 665 (defendant denied killing victim and leaving a red cap near the scene of the crime; prosecution improperly introduced the red cap in rebuttal). But see *People v Orabuena* (1976) 56 CA3d 540, 543, 128 CR 474 (if defendant presents alibi, prosecution may rebut it, even if rebuttal material could have been part of case-in-chief).

Similar rules apply in civil cases. See *Malone v Los Angeles R.R.* (1925) 72 CA 736, 739, 238 P 110; *Lipman v Ashburn* (1951) 106 CA2d 616, 620, 235 P2d 627; *Bates v Newman* (1953) 121 CA2d 800, 806, 264 P2d 197. But an exception to the rule may be made in the interest of expediting a trial. See *Stoddard v Ling-Temco-Vought, Inc.* (CD Cal 1980) 513 F Supp 314, 322. In *Stoddard,* 14 wrongful death actions involving an air crash were consolidated for trial. The court structured presentation of the evidence to require the parties to present all evidence based on res ipsa loquitur despite defendants' contention that plaintiffs may not withhold affirmative evidence until after defendants have presented their case-in-chief.

A pertinacious attorney, anticipating improper rebuttal (or improper impeachment) by an opponent, would be wise to file a preemptive "guidelines" brief spelling out the principles of proper impeachment and rebuttal, and asking the court to keep the opponent honest.

Surveillance Movies and Similar Impeachment

There is tension between the goal of complete pretrial discovery and a search for truth, which may be buttressed by "surprise" confrontation of a witness at trial with devastating impeachment evidence. This tension is boldly illustrated in cases of surveillance evidence.

A plaintiff claims that he has suffered near-crippling back injuries; defendant surreptitiously films him bowling 30 frames at the local alley. What is the response of the courts in this example if plaintiff issues a discovery request for "any surveillance evidence?" The federal courts have spelled out three approaches:

1. Allow the defendant to elect whether to use the evidence substantively or for impeachment. If for impeachment, it is immune

from discovery. *Bogatay v Montour R.R.* (WD Pa 1959) 177 F Supp 269, 270 (local rule protected impeaching matter).

2. Require the defendant to submit the evidence to the court in camera at pretrial. If the judge makes an independent determination that it is impeachment, it need not be disclosed. *Leach v Chesapeake & Ohio R.R.* (WD Mich 1964) 35 FRD 9, 11; *Ralph v Harry Zubik Co.* (WD Pa 1963) 214 F Supp 145, 147.

3. Permit a defendant to disclose the evidence just before trial, after pinning plaintiff down. *Romero v Chiles Offshore Corp.* (WD La 1992) 140 FRD 336; Cooper, *Work Product of the Rulesmakers*, 53 Minn L Rev 1269, 1318 (1969).

Rule 26(b)(3) of the Federal Rules of Civil Procedure codifies the teaching of most case law as follows: The statement of a party, even if intended for use as impeachment by showing inconsistency, is always discoverable. See generally discussion of the competing policy issues in 8 Wright et al., Federal Practice and Procedure §2015 (4th ed 1998).

State courts have been schizophrenic about whether it is necessary to produce statements impeaching a witness *before* a pretrial deposition of the witness can be taken. They have supported delay of a party's deposition until the party-deponent can obtain and inspect prior tape-recorded statements made by the party-deponent that are in the opposing party's possession. *Rosemont v Superior Court* (1964) 60 C2d 709, 712, 36 CR 439. On the other hand, if the party delays seeking production of such statements until well after learning of their existence, the court may be justified in refusing to defer the deposition until after the statements have been produced. 60 C2d at 715. See also *Suezaki v Superior Court* (1962) 58 C2d 166, 23 CR 368. In *Suezaki,* the supreme court stated that surveillance motion pictures are not attorney-client privileged, but are work product. The court remanded for a trial court determination of whether the pictures are discoverable, stating "it would appear that inspection of the films should be permitted." 58 C2d at 179.

Whatever the courts of appeal hold, practical experience teaches that courts love to catch someone red-handed and are generally ready to permit clear impeachment by strong evidence that has been withheld. The more devastating the evidence, the more likely it is that the proponent will succeed in putting it on, despite prior nondisclosure.

Some Impeachment Problems in Criminal Cases

Years ago, the U.S. Supreme Court established the right of a cross-examiner to range broadly in cross-examination. In *Alford v U.S.* (1931) 282 US 687, 692, 75 L Ed 624, 627, the Court stated:

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.

[**Editor's Note:** *Davis v Alaska* (1974) 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105, is the seminal case on the constitutional basis for a broad right of impeachment in criminal cases (error for court to bar defendant from questioning prosecution witness about juvenile burglary record when that record might have influenced witness's testimony). The right to impeach prosecution witnesses is not, however, unlimited. The trial court retains discretion to curb impeachment that is only marginally relevant. *U.S. v Beardslee* (9th Cir 1999) 197 F3d 378, 384.]

Similar principles are spelled out in state court. *People v Allen* (1978) 77 CA3d 924, 933, 144 CR 6 (defendant should have been allowed to examine state's witness about pending juvenile robbery charges, which might have given motive to fabricate in hope for leniency). But see *McDonald v Price* (1947) 80 CA2d 150, 152, 181 P2d 115 (wrongful death action in which defense counsel asked questions over objection with respect to criminal activities of decedent years before his death; court stated that counsel should not be allowed to assume facts not in evidence that might inflame jury if facts could not be proved). See also *Fairfield Scientific Corp. v U.S.* (Ct Cl 1979) 611 F2d 854 (relying on *Alford* and holding that a cross-examiner need not make offer of proof or establish foundation, or even establish that the question will necessarily bring forth favorable testimony). Both state and federal courts permit impeachment for certain types of criminal *convictions.* Evid C §788; Fed R Evid 609. Prior bad acts may be used to prove motive, opportunity, absence of mistake, and the like. Evid C §1101; Fed R Evid 404(b).

Recently, *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418, targeted criminal defendants by permitting impeachment for misconduct less than a felony. In *Wheeler,* evidence of a defense witness's misdemeanor grand theft conviction was admitted through her admission—the defendant waived any hearsay claim by failing to object. Clever defense counsel have taken this principle for their own, and are now using it to attack *prosecution* informers for misconduct not amounting to a felony.

Criminal defense attorneys rely on the central discovery case *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. *Brady* requires the prosecution to turn over to the defense evidence "favorable to an accused upon request." 373 US at 87. There have been many and diverse cases on whether "mere" impeaching evidence must be turned over. The critical test is in *U.S. v Bagley* (1985) 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375, building on *U.S. v Agurs* (1976) 427 US 97, 49 L Ed 2d 342, 96 S Ct 2392.

Bagley holds that a *specific* request for impeaching material increases the possibility of reversal for improper withholding of that material. 473 US at 682. *Bagley* also holds that impeachment and exculpatory evidence are equally producible under *Brady* and *Agurs*. 473 US at 676. Thus, defense counsel must scour cases for every conceivable type of impeaching evidence and demand such evidence specifically.

In state courts, *Brady* has survived Proposition 115, and prosecutors must disclose all substantial material favorable to the accused, whether requested or not. *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231. See also Pen C §1054.1(e) requiring the prosecutor to turn over "exculpatory" evidence.

Both state and federal courts now require some degree of reciprocal discovery from defendants to prosecutors, and despite the fifth amendment, such discovery may be required even if impeaching (on the theory that, when a defendant requests discovery from prosecutors, he or she has given a limited waiver of self-incrimination rights). *Izazaga v Superior Court* (1991) 54 C3d 356, 365, 285 CR 231 (upholding Pen C §1054.3).

Note: Penal Code §1054.1 arguably exempts from disclosure *impeaching* statements taken from *prosecution* witnesses. In federal courts, see Fed R Crim P 16; *U.S. v Nobles* (1975) 422 US 225, 233, 45 L Ed 2d 141, 95 S Ct 2160.

Miscellaneous Impeachment Issues

Here is a grab bag of impeachment-related rules:

1. Once counsel puts on a "good character" witness, the opponent may ask in good faith about *any* specific instances of wrongful misconduct by the vouched-for party that is inconsistent with the good character attributed to him or her. *People v Thomas* (1962) 58 C2d 121, 132, 23 CR 161, disapproved on other grounds in *People v Barriclo* (1962) 33 C3d 115, 135 n9, 187 CR 716. Federal courts have ruled that a character witness may *not* be impeached by being asked hypothetically whether the damning facts alleged in the case would change the witness's opinion if true. *U.S. v Oshatz* (2d Cir 1990) 912 F2d 534, 539.

[**Editor's Note:** Federal Rules of Evidence 404(a)(1) has been amended, effective December 1, 2000. When an accused attacks the character of an alleged victim under Rule 404(a)(2), for example, with evidence that the alleged victim of an assault had been convicted of assault, it opens the door for an attack on the same character trait of the accused.]

2. In California under CCP §2034(m) an impeaching expert, not previously disclosed in any fashion, may be called for the limited purpose of contradicting "foundational facts" testified to by an adverse party's expert. *Fish v Guevara* (1993) 12 CA4th 142, 15 CR2d 329.

[**Editor's Note:** Operative July 1, 2005, the Discovery Act has been completely renumbered by Stats 2004, ch 182. According to the comments of the California Law Revision Commission, the renumbering merely effects nonsubstantive reform. For more information on the amendments, see California Civil Discovery Practice (3d ed Cal CEB 1998).]

3. A party seeking expert discovery under Fed R Civ P 26 should be permitted to secure materials that an expert reviews and *disregards* in forming the opinion, as relevant to impeachment of that witness. *In re Air Crash Disaster at Stapleton Int'l Airport* (D Colo 1988) 720 F Supp 1442. This type of discovery is not covered by the normal provisions of CCP §2034; it should be subpoenaed if desired.

4. There is no bar to impeaching one's own witness. Evid C §785; Fed R Evid 607. You cannot, however, create a straw man and knock it down by calling a witness who exculpates a defendant, destroying that witness with otherwise inadmissible evidence, and then pointing to the witness as a liar during closing argument. *U.S. v Gomez-Gallardo* (9th Cir 1990) 915 F2d 553.

Conclusion

1. Never say never.

2. Do not hold back part of your case-in-chief to present as impeachment.

3. Consider filing a guidelines brief if your opponent is likely to sandbag you with impeachment or rebuttal.

4. Demand surveillance information in appropriate civil cases. Ask for detailed and specific impeaching material early in criminal cases.

Table of Statutes and Rules

CALIFORNIA

Constitution

Statutes

BUSINESS AND PROFESSIONS CODE

CIVIL CODE

CODE OF CIVIL PROCEDURE

2021(c)(2) (former): §9.3

2023(a): §§9.2-9.3

2023(a)(7): §9.17

2023(b): §§9.2-9.3

2024: §§13.2, 13.4

2024(a): §§13.2, 13.4

2024(d): §13.4

2025: App D

2025(a): §7.9, App A

2025(b)-(f): App A

2025(b)(1): App A

2025(c): App A

2025(d): App A

2025(d)(4): App D

2025(d)(5): App A, App D

2025(d)(5)-(6): §12.9

2025(d)(6): §9.18

2025(f): App A

2025(g): App A

2025(h)(1): App D

2025(i): §§9.2-9.3, App A

2025(j): App A

2025(j)(3): App A

2025(k)(2)-(4): §9.21

2025(*l*)(1): §§9.2-9.3, 9.17, 9.21, 12.9, App D

2025(*l*)(2): §9.21

2025(*l*)(2)(B): §9.21

2025(*l*)(2)(I): §§7.9, 12.9

2025(m): App A

2025(m)(2): §§9.3-9.4

2025(m)(3): §9.3

2025(m)(4): §9.3, App A

405: §9.3

412: §5.20, App G

Comment: §5.20

412-413: §§5.20, 9.3

413: §§5.20, 9.3

450-457: App G

452: App G

600

Comment: §5.20

645.1: §12.25A

701: §9.3

721: App G

721(b): §§12.21, 12.23

765: §8.11

766: §§7.12, 8.11, 11.8

769: App G

770: App G

771: §§6.9, 12.14A, App G

773: §6.9

774: §8.11

777: App G

780: §12.17, App H

780-790: App G

780(e): §12.17

780(i): App H

785: §12.36, App H

786: §12.17, Apps G-H

786-787: §12.17

787: §§8.12, 12.17-12.18

788: §§12.17-12.18, Apps G-H

790: §12.17, App G

791: App G

800: §12.33, App G

801: §7.15, App G

801(b): §12.23

802: §12.23

813-814: §12.33

814: §12.33

912(b): §12.14A

913: App G

950-962: §12.14A

952: §12.14A

953: §12.14A

953(d): §12.14A

955: §12.14A

956: §12.14A

956.5: §§12.14A, 13.1B

957: §12.14A

958: §12.14A

960-961: §12.14A

962: §12.14A

1100: §12.17, App G

Comment: §12.17

1100-1104: §5.21

1100-1105: §12.17

1101: §12.17, Apps G-H

1101(a): §5.21

1101(b): §§5.21, 6.2, App G

1102: §§8.12, 12.17

1102(a): §8.12

1104: §12.17

1105: §§12.11, 12.17, App G

1108: §12.18, App G

1108(b): §12.18

1108(d): §12.18

1109: §12.18, App G

1109(e): §12.18

1115-1128: §13.1

1126: §13.1

1152: §5.20

1202: §12.9

1220: §§5.20, 8.9A, App G

1220-1222: §13.1A

1220-1225: §12.9

1222: §12.10

1223: App G

1226: §12.9

1227: §12.9

1230: §12.7

1235: §12.9, App G

1237: App G

1240: §§12.10, 12.27A, App G

1241: App G

1250-1252: App G

1270-1272: App G

1271: §12.3

1271(c): §12.3

1280: §8.9A

1291: §12.9

1293: §12.9

1300: §12.18

1341: §12.23

1400-1421: App G

1421: App G

1500 (former): §§1.6, 12.26, 12.29, 13.2-13.3, App C, App G

1500-1511 (former): §§12.26, 12.29, 12.35, 13.2-13.3

1509: §§12.23, 13.1A, App C

1509 (former): §§7.8, 12.22, App C

1520-1523: §§12.26, 12.29, 13.2-13.3

1521: §§12.26, 12.29, 12.35, 13.2-13.3, App C, App G

Comment: §12.29

1523: App G

1523(d): §§2.2, 7.8, 12.22, App C, App G

1530-1532: App G

1561: §12.3

1561(a)(4)-(5): §12.3

FAMILY CODE

6211: §12.18

GOVERNMENT CODE

68097.1: §13.3

68097.2: §13.3

68600-68620: §13.1

68605.5: §§13.1-13.1A

68616: §13.1A

68620(a): §§13.1-13.1A

PENAL CODE

29: §7.15

872(b): §12.38

1044: §1.7

1054.1: App H

1054.1(e): App H

1054.3: App H

1070 (former): §10.5

1070.5 (former): §10.5

1093(4) (former): App H

1093(d): App H

1330: §12.9

1334-1334.6: §12.9

12022.1: §6.2

13700: §12.18

5-200: §11.14

5-210: §13.1B

5-310: §13.1B

7-103 (former): §2.13

7-105 (former): §11.14

LOS ANGELES COURT RULES

7.9: §13.1

316 (former): §9.4

SAN FRANCISCO COURT RULES

2.8 (former): §13.3

3.0: §13.1A

3.5: §13.1A

6.1: §13.3

SANTA CLARA COURT RULES

1(B): §13.3

6(C): §13.3

10 (former): §13.3

JUDICIAL COUNCIL OF CALIFORNIA JURY INSTRUCTIONS, CIVIL (CACI)

202: §§5.20, 9.3

203: §§9.3, 12.26

204: §5.20

CALIFORNIA JURY INSTRUCTIONS, CIVIL (BAJI)

2.02: §§5.20, 9.3, 12.26

2.03: §9.3

2.04: §§5.20, 9.3

CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC)

2.03: §6.2

2.11: §5.20

17.41.1: §2.15

Ethics

CALIFORNIA FORMAL BAR OPINIONS

1983-71 (1983): §13.1B

1983-74 (1983): §13.1B

1984-79 (1984): §13.1B

1984-80 (1984): §13.1B

1984-84 (1984): §13.1B

1985-86 (1985): §13.1B

1987-92 (1987): §13.1B

1987-94 (1987): §13.1B

1987-95 (1987): §13.1B

1988-104: (1988): §13.1B

1989-106 (1989): §13.1B

1989-108 (1989): §13.1B

1989-116 (1989): §13.1B

1991-125 (1991): §13.1B

1993-131 (1993): §13.1B

LOS ANGELES FORMAL BAR OPINIONS

367 (1977): §13.1B

375 (1978): §13.1B

386 (1981): §13.1B

387 (1981): §13.1B

391 (1981): §13.1B

399 (1982): §13.1B

405 (1982): §13.1B

406 (1982): §13.1B

414 (1983): §13.1B

417 (1983): §13.1B

424 (1984): §13.1B

440 (1986): §13.1B

456 (1990): §13.1B

466 (1993): §13.1B

469 (1993): §13.1B

472 (1994): §13.1B

475 (1994): §13.1B

505 (2001): §13.1B

Rules

FEDERAL RULES OF CIVIL PROCEDURE

501: §12.14A, App G

601: §9.3

607: §12.36, App H

608: §12.17, App G

608(a): §12.17, App H

608(b): §12.17

609: §12.18, App G, App H

611: §8.11

611(a): §12.22

612: §9.17, App G

613: App G

615: App G

701: §12.33, App G

702: §§7.15, 12.23, 12.33, App G

702-703: §§7.9, 12.33

703: §§7.8, 12.23, 12.33, App G

704: §12.23A

704(b): §12.23A

705: §§7.9, 12.23

801: App G

801(d)(1): §12.9

801(d)(1)(A): §12.31

801(d)(1)(B): §12.27

801(d)(2): §§5.20, 8.10, 12.9-12.10, 12.14, 12.34, 13.1A

801(d)(2)(D): §§2.13, 8.10, 12.10, 12.14

801(d)(2)(E): §§12.10, 12.14, 12.34

803: App G

803(2): §12.27A

803(6): §12.3

803(8)(C): §8.9A

803(18): §§12.21, 12.23

803(24) (former): §§12.24, 12.31

92-363 (1992): §13.1B

92-364 (1992): §13.1B

92-366 (1992): §13.1B

92-367 (1992): §13.1B

92-368 (1992): §13.1B

93-370 (1993): §13.1B

93-371 (1993): §13.1B

93-375 (1993): §13.1B

93-377 (1993): §13.1B

93-378 (1993): §13.1B

93-379 (1993): §13.1B

94-381 (1994): §13.1B

94-382 (1994): §13.1B

94-386 (1994): §13.1B

94-387 (1994): §13.1B

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Table of Cases

Table of Cases

A

B

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Table of References

Table of References

Administrative Office of the Courts. Commission to Study Court Congestion, Summary of Responses to Jury Service Questionnaire, Los Angeles County Superior Court and Los Angeles Municipal Court (1978): App B

Arnold, Kenneth James. California Courts and Judges Handbook. Costa Mesa, James Publishing, 8th ed 1996: §13.3

California Civil Discovery Practice. 2 vols (3d ed Cal CEB 1998): §§6.7, 7.9, 8.6, 9.2-9.6, 9.9, 9.13, 9.15-9.18, 9.21, App A, App D, App H

California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§13.1-13.1A, 13.2

California Criminal Law Practice Series, Discovery (rev ed Cal CEB 1980): §7.9

California Criminal Law Procedure and Practice (7th ed Cal CEB 2004): §§5.21, 7.9, 10.14

California Evidence Benchbook. 2 vols (3d ed CJA-CEB 1997): §8.11

California Expert Witness Guide. 4 vols (2d ed Cal CEB 1991): §7.1, App D

California Trial Objections (10th ed Cal CEB 2004): §§8.11, 9.10, 13.1

California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995): §§1.6, 9.15, 13.1

Effective Introduction of Evidence in California (2d ed Cal CEB 2000): §2.11

Fisher, Roger & William Ury. Getting to Yes: Negotiating Agreement Without Giving In. Boston, Houghton Mifflin, 2d ed 1991: §13.1

Gobert, James J. & Walter E. Jordan. Jury Selection. Colorado Springs, Shephard's/McGraw-Hill, 2d ed 1990: §2.11

Graham, Michael H. Handbook of Federal Evidence. St. Paul, Minn., West Publishing, 5th ed 2001: §1.8

Jefferson's California Evidence Benchbook. 2 vols (3d ed CJA-CEB 1997): §§5.21, 7.12, 8.7, 8.11, 13.3

Johnson, Molly, Carole Krafka, & Joe Cecile. Expert Testimony in Federal Civil Trials: A Preliminary Analysis. Federal Judicial Center, Washington, D.C., 2000: §7.15

Klonoff, Robert H. & Paul L. Colby. Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials. Charlottesville, Va., Michie, 1990: §1.4, App C, App F

Kraus, Elissa & Beth Bonora, eds. Jurywork: Systematic Techniques. New York, Clark, Boardman, Callaghan, 2d ed 1983: §2.11

McElhaney, James W. McElhaney's Trial Notebook. Chicago, Section of Litigation, American Bar Association, 3d ed 1994: §12.21

O'Malley, Kevin, Jay E. Grenig, & William C. Lee. Federal Jury Practice and Instructions. St. Paul, Minn., West Group, 5th ed 2000: §§5.20, 9.3, 10.8, 10.10, 12.26, 13.3-13.4

Saltzburg, Stephen A., Michael M. Martin, & Daniel J. Capra. Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence. 3 vols. Charlottesville, Va., Michie, 7th ed 1998: §§12.1, 12.5, 12.18, 12.21

Sand, Leonard B., John S. Siffert, Walter P. Loughlin, Steven H. Reiss, & Nancy Batterman. Modern Federal Jury Instructions (Civil). 5 vols. New York, Matthew Bender, 1993: §5.20

Schwarzer, William W., Wallace Tashima, & James M. Wagstaffe. California Practice Guide: Federal Civil Procedure Before Trial. Encino, Rutter, 1993: App H

Strong, John William. McCormick on Evidence. St. Paul, Minn., West Publishing, 5th ed 1999: §12.11

Wigmore, John Henry. Wigmore on Evidence. Chadbourne, rev ed 1981: §§1.8, 12.19, 12.33, Apps G-H

Witkin, B. E. California Evidence. 6 vols. San Francisco, Bancroft-Whitney, 4th ed 2000: §§5.20, 9.3, 12.17, 12.28, 13.1

_____. California Procedure. San Francisco, Bancroft-Whitney, 4th ed 1996: §13.1

Wright, Charles Alan, Arthur R. Miller, & Mary Kay Kane. Federal Practice and Procedure. 28 vols. St. Paul, Minn., West Publishing, 4th ed 1998: §§9.17, 12.14A, App H

Source: Civil Litigation/Effective Direct and Cross-Examination Update/Index

Index