

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Introductory Material

Handling Expert Witnesses in California Courts

Robert Aitken

**Judge's Perspective** Hon. Curtis E.A. Karnow,  
Superior Court of California, San Francisco County

May 2008

Scope of Guide

This Action Guide describes each step you need to take when working with expert witnesses, from selecting and retaining an expert, through exchange of expert witness information and depositions, to examination of your own and your opponent's expert at trial. The guide includes sample forms for designation of expert witnesses and checklists to help you work more effectively with expert witnesses.

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**Abbreviations**

Aitken, California	Aitken, California Practice, <i>California Evidentiary Objections</i> (1989)
Evidentiary Objections	
Civil Discovery	<a href="#"><u>California Civil Discovery Practice (4th ed Cal CEB 2006)</u></a>
Depositions	<a href="#"><u>Handling Depositions (Cal CEB Action Guide February 2007)</u></a>
Expert Witness	<a href="#"><u>California Expert Witness Guide (2d ed Cal CEB 1991)</u></a>
Hogan & Weber	Hogan & Weber, California Civil Discovery (2d ed 2005)
Laying a Foundation	<a href="#"><u>Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008)</u></a>
Obtaining Discovery	<a href="#"><u>Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007)</u></a>
Trial Objections	<a href="#"><u>California Trial Objections (11th ed Cal CEB 2006)</u></a>
2 Witkin, Evidence	2 Witkin, California Evidence (4th ed 2000)
8 Witkin, California Procedure, <i>Attack on Judgment</i>	8 Witkin, California Procedure, <i>Attack on Judgment in Trial Court</i> (4th ed 1997)

About the Authors

A 1958 graduate of the University of Michigan Law School, **Robert Aitken** resides in Palos Verdes Estates, California. He is a Fellow of the American College of Trial Lawyers and associate editor of *Litigation*, the journal of the ABA Litigation Section. He was chair of the Litigation Section of the State Bar of California and Editor-in-Chief of *California Litigation*, the journal of the State Bar Litigation Section. Mr. Aitken is the author of *California Evidentiary Objections* (West 1989). He edits the *Literary Trials* section and writes articles for the *Legal Lore* section of the ABA Litigation journal. He and his wife, Marilyn Aitken, recently published their collection of articles on the back-stories and highlights of landmark cases, *Law Makers, Law Breakers and Uncommon Trials* (ABA 2008).

**The Hon. Curtis E.A. Karnow** serves on the Superior Court of California, San Francisco County. He received his A.B. cum laude from Harvard University in 1974, and his J.D. from the University of Pennsylvania in 1977, where he was an editor of the *Law Review*. While in private practice, Judge Karnow specialized in antitrust, intellectual property, and computer and Internet law. Appointed by the Chief Justice to the California Judicial Council's Committee on Civil and Small Claims with jurisdiction over aspects of the state's civil litigation system, Judge Karnow completed his second 3-year term in 2005. He chaired the subcommittee on discovery and rules reform, and is a member of the Council's task force on temporary judges. He is currently on the Council's Court Technology Advisory Committee. He has assisted in the creation of rules on case management, discovery,

sealing records, summary judgment, and uniformity of local trial court rules. Judge Karnow has lectured widely, including for the University of Michigan Business School, Yale Law School, and the Haas School of Business at the University of California at Berkeley. He is the consulting editor on California Civil Discovery Practice (4th ed Cal CEB 2006) and the author of Future Codes: Essays in Advanced Computer Technology and the Law (Artech House 1997). Judge Karnow is also a contributory co-author of California Civil Procedure Before Trial (4th ed Cal CEB 2004); eBusiness and Insurance (CCH:2001); International eCommerce (CCH:2001); Network Security: The Complete Reference (McGraw-Hill 2004); and California Civil Procedure (West 1991). The subjects of Judge Karnow's law review articles range from summary judgment to legal education, game theory, bail, and artificial intelligences.

## Acknowledgments

CEB wishes to gratefully acknowledge the valuable contributions of **the Honorable Norman L. Epstein**, Associate Justice of the California Court of Appeal, who provided the judge's perspective for the previous edition of this Action Guide.

CEB also appreciates and gratefully acknowledges the contributions to previous editions of this Action Guide of the following consultants:

**The Honorable Roderic Duncan**, retired judge of the Alameda County Superior Court.

**Michael Overly**, a partner in the firm of Foley & Lardner, Los Angeles.

**Margaret J. Grover**, a partner in the firm of Haight, Brown & Bonesteel, LLP, San Francisco.

**Richard J. Mathias**, of Los Angeles.

**Michael D. Stein**, a partner in the firm of Tisdale & Nicholson, LLP, Los Angeles.

Special thanks to **Reginald D. Greene**, of Los Angeles, who contributed step 7 concerning inspections and examinations.

Francesca Bannerman, CEB attorney, was responsible for this Action Guide. Leslie Tenney handled production and copyediting. David Saunders was the legal editor. Enrique DeAnda and Andy Rosner provided legal research assistance.

## Cutoff Dates and CEB Citation

### Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of February 18, 2008, and monitored developments April 1, 2008.

### CEB Citation

Cite this publication as: *Handling Expert Witnesses in California Courts* (Cal CEB Action Guide May 2008).

This Action Guide supersedes *Handling Expert Witnesses in California Courts* (Cal CEB Action Guide May 2006).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Considering an Expert/STEP 1. ANALYZE EVIDENTIARY ISSUES TO DETERMINE WHETHER YOU NEED A CONSULTANT, AN EXPERT, OR BOTH

When Considering an Expert

STEP 1. ANALYZE EVIDENTIARY ISSUES TO DETERMINE WHETHER YOU NEED A CONSULTANT, AN EXPERT, OR BOTH

#### USING A CONSULTANT

##### CONSULTANT DEFINED

A consultant is an expert on a particular subject or issue who:

- a. Does not testify in court; and
- b. Is not subject to discovery under CCP §§2034.010-2034.730 (exchange of expert trial witness information).

##### NOTE

Remember that a consultant is an expert, even though he or she may not be an expert *witness* for trial purposes.

##### DISCOVERY ADVANTAGE

One advantage of using a consultant is that a consultant's knowledge, opinions, and reports qualify as attorney's work product, protectable from disclosure. CCP §§2018.010-2018.080; see step 8, below.

**Further Research:** See County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1458, 274 CR 712 (opinions of defendant physician are discoverable after defendant was designated as expert for trial).

##### WHEN SUBJECT TO DISCOVERY

Once consultant becomes an expert witness scheduled to testify at trial:

- a. Attorney's work product privilege terminates; and
- b. Expert's knowledge and opinions are subject to discovery and disclosure.

##### Summary Judgment

If opposing party brings a motion for summary judgment, you may need to submit an expert declaration to establish a triable issue of fact in opposition to motion:

- a. If you have a consultant, he or she can sign the declaration and protect the identity of the expert witness you intend to call at trial; but
- b. Expert who signs a declaration, whether a consultant or expert witness, will be subject to a deposition if opposing party raises a question regarding foundation for expert's opinion. See St. Mary Med. Ctr. v Superior Court (1996) 50 CA4th 1531, 58 CR2d 182.

##### NOTE

Motions for summary judgment are sometimes used as discovery tools by lawyers who want to discover who your expert is (or if you have one) without waiting to make a demand for exchange of expert witness information. Because this can happen early in the case, consider retaining consultant or expert before you file your complaint.

**Further Research:** See steps 8, 20, and 29, below; National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 487, 210 CR 535 (on dual capacity of expert); Powell v Kleinman (2007) 151 CA4th 112, 59 CR3d 618 (expert witness declaration in opposition to

summary judgment motion need not be as detailed as declaration in support of motion because plaintiff's expert's declarations are liberally construed and entitled to all favorable inferences).

## WHY USE A CONSULTANT?

Use a consultant to:

### Educate on Issues

Educate you on issues relevant to the case and recommend books, periodicals, articles, and websites that may help educate you —*e.g.*, a psychiatrist for an emotional distress claim, an accountant for a financial matter—even if you do not identify expert as someone who will testify at trial.

### Evaluate Case

Help you evaluate whether to pursue a claim, or whether you may successfully oppose a claim.

### Determine Method of Proof

Help you determine whether any elements of the action require proof by expert witnesses, rather than by lay witnesses.

**Example:** If you represent a client in a simple slip-and-fall case, you may not need an accident reconstruction expert to help prove your case. However, some slip-and-fall cases and other kinds of personal injury cases may require use of such an expert to analyze facts and advise you of proof needed in your case.

### Develop Evidence

Develop appropriate evidence for trial or settlement, *e.g.*, in a medical malpractice case, a consultant can inform you about standard hospital procedures and otherwise guide you to appropriate resources.

### Aid Discovery

Advise and assist you in the discovery phase concerning the particular elements of the case, *e.g.*:

- a. Drafting interrogatories and responses;
- b. Supplying you with questions you should consider asking at depositions;
- c. Preparing deponents and trial witnesses; and
- d. Advising you on what documents to seek from the other party through discovery.

### Advise on Discovery of Electronic Evidence

Advise on discovery of evidence stored in electronic form to advise on, *e.g.*:

- a. Preliminary discovery to locate data;
- b. Possible types of data; and
- c. Possible locations of data.

For additional suggestions on how an expert or consultant can assist in electronic discovery, see [Appendix J](#).

### Locate Other Experts

Help you locate an expert who will testify at trial if consultant is unable or unwilling to do so; *e.g.*, some consultants may have valuable expertise, but may not make a good impression in depositions or at trial.

USING AN EXPERT WITNESS

## EXPERT WITNESS DEFINED

An expert witness is an authority on a particular issue or subject matter who:

- a. Is willing and able to testify at trial; and
- b. Is identified through a demand for exchange of expert witness information under CCP §§2034.010-2034.730; or
- c. If there has been no demand, will nonetheless testify at trial as an expert witness.

#### NOTE

If no party has made a demand for exchange of expert witness information by *any of the parties*, CCP §§2034.010-2034.730 does not prohibit you, or opposing counsel, from having expert witnesses testify at trial.

#### TREATING PHYSICIAN AS EXPERT

Under CCP §2034.430(a)(2), a party must pay an expert witness fee to any treating physician, surgeon, or other treating health care practitioner if the witness is asked to express an opinion that:

- a. Includes an opinion or factual testimony regarding:
  - (1) Past or present diagnosis or prognosis made by practitioner; or
  - (2) Reasons for a particular treatment decision made by practitioner; but
- b. Does not include testimony requiring only the reading of words and symbols contained in the relevant medical record, or, if those words and symbols are not legible to deponent, the approximation by deponent of what those words or symbols are.

**Further Research:** See Schreiber v Estate of Kiser (1999) 22 C4th 31, 91 CR2d 293 (treating physician does not become "retained" expert within meaning of former CCP §2034 (now CCP §§2034.010-2034.730) simply because physician gives opinion testimony; expert witness declaration generally not required for treating physician).

#### IMPACT ON DISCOVERY

Opposing party can discover all reports and writings prepared by expert in the course of preparing his or her opinion under CCP §2034.210(c), including communications with counsel.

#### JUDGE'S PERSPECTIVE

Attorneys commonly err by assuming that because the witness offering expert opinion testimony is a percipient witness, or a "related" witness (client's agent or employee), counsel is not required to disclose him or her under CCP §§2034.010-2034.730.

If these witnesses will provide *any* expert opinion testimony, counsel must make full disclosure following the CCP §§2034.210-2034.280 demand, and such an expert must be paid expert witness fees. For a discussion of using an expert as a percipient witness, see step 15, below.

#### WHEN AN EXPERT IS REQUIRED

You *must* have an expert witness when (Evid C §801(a)):

- a. Explanation of events or a subject is "sufficiently beyond common experience"; and
- b. Expert witness's opinion would assist trier of fact in resolving evidence and making findings of fact.

**Further Research:** See California Expert Witness Guide §3.3 (2d ed Cal CEB 1991), referred to throughout this Action Guide as Expert Witness; Aitken, California Practice, California Evidentiary Objections §42 (1989), referred to throughout this Action Guide as Aitken, California Evidentiary Objections.

#### Examples

There is a variety of fact situations in which expert testimony may be required:

**Example 1:** Nature of injury plaintiff would have sustained if seat belts had been worn. Franklin v Gibson (1982) 138 CA3d 340, 343, 188 CR 23. See Lara v Nevitt (2004) 123 CA4th 454, 458, 19 CR3d 865 (expert testimony not necessary to support reasonable inference that plaintiff passenger would have suffered less injury if he had been wearing seat belt, but expert testimony admissible).

to distinguish which of plaintiff's particular injuries would have been less severe if he had been wearing seat belt).

**Example 2:** Value of unique parcels of real property in condemnation action. See Expert Witness §2.2; Redevelopment Agency v First Christian Church (1983) 140 CA3d 690, 699, 189 CR 749; People ex rel Dep't of Water Resources v Andresen (1987) 193 CA3d 1144, 1164, 238 CR 826.

**Example 3:** Violation of requisite standard of care in medical malpractice case. Stephenson v Kaiser Found. Hosp. (1962) 203 CA2d 631, 635, 21 CR 646.

**Example 4:** Psychological factors involved in accuracy of eyewitness identification. People v McDonald (1984) 37 C3d 351, 361, 208 CR 236; U.S. v Rincon (9th Cir 1994) 28 F3d 921; but see People v Sanders (1995) 11 C4th 475, 509, 46 CR2d 751 (expert testimony excluded because eyewitness identification was not the only evidence linking defendant to crime); People v Jones (2003) 30 C4th 1084, 1111, 135 CR2d 370 (same; follows Sanders); People v Bayer (2006) 38 C4th 412, 42 CR3d 677 (no error in the penalty phase of murder trial in which defendant's expert's opinion was impeached with medical reports).

**Example 5:** Likelihood that gang members will testify falsely to assist a neighbor not a member of the gang. People v Williams (1997) 16 C4th 153, 66 CR2d 123; People v Valdez (1997) 58 CA4th 494, 509, 68 CR2d 135 (expert may rely on hearsay in forming opinion); U.S. v Hankey (9th Cir 2000) 203 F3d 1160 (testimony of police gang expert on gang mores and behavior admissible); People v Ortega (2006) 145 CA4th 1344, 52 CR3d 535 (prosecution's expert's opinion about what constituted a criminal street gang admissible in murder trial).

**Example 6:** Standard of care in veterinary malpractice case, as in medical malpractice case. Williamson v Prada (1999) 75 CA4th 1417, 89 CR2d 868.

**Example 7:** Causation of accident due to separation of tread on tire. Stephen v Ford Motor Co. (2005) 134 CA4th 1363, 37 CR3d 9 (exclusion of plaintiff's tire expert's testimony for lack of foundation led to nonsuit of plaintiff's claim). See also Stilwell v Smith & Nephew, Inc. (9th Cir 2007) 482 F3d 1187 (expert's opinion in product liability case involving metallurgical issues did not establish required link between his opinion and defectiveness issue).

**Example 8:** Whether "intelligent design" was proper subject to be taught in Pennsylvania school district. Kitzmiller v Dover Area Sch. Dist. (MD Pa 2005) 400 F Supp 2d 707, 743.

**Example 9:** Expert opinion related to customs and practices of the music concert entertainment industry admissible because it was sufficiently beyond common experience. PM Group, Inc. v Stewart (2007) 154 CA4th 55, 64 CR3d 227.

## NOTE

Federal Rules of Evidence 702 incorporates the reliability standard established in Daubert v Merrell Dow Pharmaceuticals, Inc. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786.

## WHEN AN EXPERT IS NOT REQUIRED

- a. You are not required to present expert testimony to prove elements of your case that can be competently shown by lay testimony.
- b. Research and review cases similar to the fact situation in your case to determine whether to use or oppose expert witnesses being used in your situation.

## Examples

There is a variety of fact situations in which expert testimony is *not* required:

**Example 1:** To prove defective design or construction in situations within common experience of most people. Campbell v General Motors Corp. (1982) 32 C3d 112, 124, 184 CR 891 (jury held capable of deciding without expert testimony whether a bus was defectively designed because it lacked a grip within reach of plaintiff's seat); Soule v General Motors Corp. (1994) 8 C4th 548, 34 CR2d 607 ("crashworthiness" of a product may be within everyday experience of product's users, and jury could conclude that product's design violated minimum safety assumptions and thus was defective regardless of expert opinion about merits of design; however, use of consumer expectation test was error when complicated design considerations were at issue and expert testimony was necessary to illuminate these matters).

**Example 2:** To prove dangerous condition of public or private property in situations within common experience. Carson v Facilities Dev. Co. (1984) 36 C3d 830, 844, 206 CR 136 (proof of obstruction at intersection did not require expert testimony; no special expertise required to show that plaintiff would have had difficulty seeing oncoming traffic because of obstruction); Caloroso v

Hathaway (2004) 122 CA4th 922, 928, 19 CR3d 254 (no expert testimony needed to decide whether size or shape of crack in sidewalk made it dangerous; "trivial defect" improper subject of expert testimony); Kasparian v Avalonbay Communities, Inc. (2007) 156 CA4th 11, 66 CR3d 885 (summary judgment denied in premises liability case because plaintiff's expert witness's photographs created a factual issue concerning whether recessed drain was sufficiently obvious to require duty of care by landlord).

**Example 3:** To determine whether lack of visible seatbelts was proximate cause of taxicab passenger's injuries. McNeil v Yellow Cab Co. (1978) 85 CA3d 116, 118, 147 CR 733. See also Lara v Nevitt (2004) 123 CA4th 454, 458, 19 CR3d 865 (expert testimony not necessary to support reasonable inference that plaintiff passenger would have suffered less injury if he had been wearing seat belt, but admissible to distinguish which of plaintiff's particular injuries would have been less severe if he had been wearing seat belt).

**Example 4:** To determine value of real property; although value of real property often requires expert testimony, owner of real property is also permitted to offer his or her opinion regarding value. Evid C §813(a)(2)-(3).

**Example 5:** On a standard-of-care issue in which "want of care is so obvious as to render expert testimony unnecessary." Czubinsky v Doctors Hosp. (1983) 139 CA3d 361, 367, 188 CR 685.

**Example 6:** To determine value of enjoyment of life lost as a result of injury or death. Loth v Truck-A-Way Corp. (1998) 60 CA4th 757, 70 CR2d 571 (economic experts not allowed to opine on "hedonic damages"); but see McKinney v California Portland Cement Co. (2002) 96 CA4th 1214, 1229, 117 CR2d 849 (expert permitted to present "estimated value of an average provider's services in the home," such as home repair and maintenance, automobile maintenance, and shopping).

**Example 7:** To weigh psychiatric testimony on intimate partner battering (also known as battered women's syndrome) in deciding whether defendant actually believed it was necessary to kill in self-defense and whether that belief was reasonable. People v Humphrey (1996) 13 CA4th 1073, 56 CR2d 142. See also, e.g., People v Gadlin (2000) 78 CA4th 587, 92 CR2d 890 (properly qualified expert may testify on intimate partner battering when relevant to contested issue at trial other than whether defendant committed charged acts of domestic violence); In re HUDIE JOYCE WALKER on Habeas Corpus (2007) 147 CA4th 533, 54 CR3d 411 (petitioner who had been convicted of second degree murder was granted a new trial because an expert witness had not been retained to testify on her behalf concerning "intimate partner battering and its effects").

## WHEN NOT REQUIRED BUT USEFUL

You may use expert testimony, even if the fact situation does not actually require it, if it would be relevant and useful to jury (see Truman v Vargas (1969) 275 CA2d 976, 982, 80 CR 373):

- a. Analyze issues in your case involving common knowledge or experience to determine whether expert testimony on those issues would be more persuasive than lay testimony to convince jury that your evidence is the most credible.
- b. When in doubt about whether expert testimony would be useful under the circumstances, better to err on the side of having an expert testify if costs involved are not too high (for discussion of assessing potential result of using both consultant and expert witness, see below).
- c. Be careful to assess whether use of an expert may offend jury if issue involved is one within the common experience of most people.

## AVOID CUMULATIVE TESTIMONY

If you engage a number of experts who will testify regarding the same facts or issues:

- a. Before trial, opposing counsel may move to limit experts who can testify;
- b. At time of trial, opposing counsel may object and ask court to limit expert testimony; or
- c. At status conference or at trial, court may act on its own to limit which experts can testify.

**Further Research:** See Evid C §723 or §352; steps 17 and 30, below; South Bay Chevrolet v General Motors Acceptance Corp. (1999) 72 CA4th 861, 85 CR2d 301 (affirming trial court's limitation on number of experts because anticipated testimony was cumulative). See also Hogan & Weber, California Civil Discovery §10.4 (2d ed 2005), referred to throughout this Action Guide as Hogan & Weber.

## JUDGE'S PERSPECTIVE

Be careful about adding unnecessary expert witnesses if the situation clearly is within the experience of the average juror. You could weaken your case rather than provide the "finishing touches" to the "almost perfect" case. Further, the time and expense of

retaining the expert may be wasted if the judge refuses to allow the expert to testify.

Plaintiff's use of a highly paid expert may result in the jury's *loss* of sympathy rather than the expected identification with your client.

## USING BOTH A CONSULTANT AND AN EXPERT WITNESS

### WHEN TO USE BOTH

You may have to use both a consultant *and* an expert witness, *e.g.*, when a consultant:

- a. Has a vast knowledge of the field;
- b. Works at a reasonable pay rate; and
- c. Is willing to devote a large amount of time to your case; but
- d. Refuses to appear in court, or, *e.g.*, does not make an appealing witness.

### Advantage

The advantage of retaining a consultant who will not testify at trial is that the consultant's opinions and identity are not discoverable under the work product rule unless the opposing party shows good cause. CCP §§2018.030(b), 2018.040; see steps 8, 20, and 29, below.

**Further Research:** See *Scotsman Mfg. Co. v Superior Court* (1966) 242 CA2d 527, 531, 51 CR 511 (report from expert retained to assist in preparation of case protected by work product rules); *Grand Lake Drive-In, Inc. v Superior Court* (1960) 179 CA2d 122, 128, 3 CR 621; Aitken, California Evidentiary Objections §350.

### ASSESS POTENTIAL RESULT OF USING BOTH

Assess whether potential recovery, or potential judgment in a case, warrants cost of retaining both an expert and a consultant.

#### Plaintiff's Case

Unless the anticipated result is substantial, it may not be economical to use both a consultant and an expert:

- a. Recognize that your client may not be able to afford both a consultant and an expert; and
- b. Inform your client of anticipated costs.

#### Defendant's Case

If potential judgment is high, it might make good economic sense to use both a consultant and an expert, if using both will help you win your case.

#### Either Plaintiff's or Defendant's Case

For either plaintiff or defendant, costs involved may limit the total number of experts, or the number of experts on a particular topic.

#### You May Have to Advance Costs

Remember that if your fee is based on a contingency, you may have to advance the cost of a consultant or an expert, as set forth in your contingency fee agreement.

### CONSIDER OPPOSING PARTY'S USE OF EXPERTS

Consider the likelihood of opposing party using consultants or experts, or both.

- a. Usually, you will not learn whether opposing party is using an expert until there is a CCP §§2034.210-2034.240 demand for exchange of expert witness information (see step 12, below).

- b. If opposing party is going to use an expert, determine whether you can properly prove your case without expert assistance.
- c. Also, if bringing or opposing a summary judgment motion, expert declarations may be necessary. See, *e.g.*, *St. Mary Med. Ctr. v Superior Court* (1996) 50 CA4th 1531, 58 CR2d 182.

**Further Research:** See Evid C §§800-801; Expert Witness, chaps 2-6; California Trial Objections, chap 20 (11th ed Cal CEB 2006), referred to throughout this Action Guide as Trial Objections.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Considering an Expert/STEP 2. CONSIDER FEES INVOLVED

## STEP 2. CONSIDER FEES INVOLVED

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### GET ESTIMATE

Ask potential consultants or experts for a *realistic* estimate of amount he or she will bill. Ordinarily, estimate should be:

- a. Not substantially higher than expert's fees for similar cases;
- b. Within the range of fees customarily charged in the community; and
- c. Consistent with the time reasonably necessary to evaluate the case.

### MAKE COMPARISONS

- a. Talk with other attorneys regarding usual costs of experts within particular subject areas; and
- b. Compare costs among experts you contact to assess usual and customary fees.

### IF YOU FAIL TO GET ESTIMATE

If you fail to get an estimate and later discover that expert's fees are inordinately high:

- a. Be prepared to justify at trial why fees are so high through testimony by your expert; or
- b. Your expert may be subject to opposing counsel's attack that your expert's testimony has been purchased, as evidenced by his or her excessive rates.

### NOTE

Your client may also object because you failed to appropriately control costs.

***Further Research:*** See [step 26](#), below, concerning motion to set expert witness fees.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Considering an Expert/STEP 3. LOCATE POTENTIAL EXPERTS

STEP 3. LOCATE POTENTIAL EXPERTS

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CONTACT COLLEGES AND UNIVERSITIES

- a. Many experts can be found on faculties of colleges and universities and may be located through college catalogs available at most public libraries or online at [www.clas.ufl.edu/au/](http://www.clas.ufl.edu/au/); however,
- b. A professor may have good theoretical knowledge, but may not have as much practical experience as an expert who functions outside the academic setting.

CONTACT INDUSTRY SOURCES AND EXAMINE TRADE JOURNALS

- a. Often the most qualified experts are not in academia but are employed in industry or trade.
- b. Consult your client or trade journals to locate experts.

LOCATE SCHOLARLY PUBLICATIONS IN THE FIELD

- a. Authors of scholarly publications often are the most qualified experts.
- b. A consultant or your client may provide you with a list of relevant publications in the field involved in your case.
- c. The Index of Periodicals for the particular area in question, *e.g.*, engineering, biology, or medicine, is a valuable resource for identifying experts. Many indexes have been computerized and are available online for a fee. See, *e.g.*, The Dialog Corporation ([www.dialog.com](http://www.dialog.com)) and On Line Computer Library Center ([www.oclc.org/home](http://www.oclc.org/home)).

EXAMINE TRIAL VERDICT REPORTS

- a. Scan tables of contents of trial verdict reports (*e.g.*, Jury Verdicts Weekly, Inc. ([www.nlj.com](http://www.nlj.com)), Morelaw.com ([www.morelaw.com](http://www.morelaw.com))) for cases with similar facts or claims.
- b. If you find a case similar to yours, but experts are not listed, contact the attorney involved.
- c. Ask attorney about expert's performance in court and deposition, and if attorney would use that expert again.

NOTE

Judgments and jury verdicts are also available online through WestLaw and Lexis databases, which can be easily searched for experts used and their areas of testimony.

LOOK AT COURTS OF APPEAL DECISIONS

- a. You can see case law for no charge at Lexis One ([www.lexisone.com](http://www.lexisone.com)) or Findlaw ([www.findlaw.com](http://www.findlaw.com)) (retrospective or nationwide searches, however, will require a pay database such as Lexis or Westlaw);
- b. If you find a court of appeal case similar to yours, contact trial counsel for both sides and ask about their experts and whether they would recommend them to you; but
- c. Be aware that much time will have passed between trial and when an appellate decision is actually published.

SEEK OUT REFERRALS

Other Lawyers

- a. Talk to other lawyers who specialize in the type of litigation involved, because many attorneys keep résumé files.
- b. Ask them for their opinion about an expert's:

- (1) Ability to communicate;
- (2) Qualifications and experience as an expert;
- (3) Fees;
- (4) Demeanor; and
- (5) Appearance.

#### Bar Associations

Local bar associations may provide referrals. For example, the San Francisco Bar Association has an online directory of expert witnesses ([www.sfbar.org/register/results.aspx?](http://www.sfbar.org/register/results.aspx?)), as does the Los Angeles County Bar Association ([www.expert4law.org](http://www.expert4law.org)).

#### Professional Client

If your client is a professional, he or she may know outstanding authorities in the field.

#### Faculty Members

In addition to potentially serving as experts, college or university faculty members may be able to identify the best expert.

#### LOOK AT ADVERTISEMENTS

- a. Look at advertisements in local legal newspapers and journals; but
- b. Be aware that an expert who advertises may:
  - (1) Have a litigious background that may taint the impartiality you want; and
  - (2) Be viewed as "too professional" or as a "hired gun," *e.g.*, an expert may be cross-examined at trial about advertisements (including business cards, speaking engagements, periodical or newspaper advertisements), which may indicate a financial motive for being an expert.

#### Major California Legal Newspapers

Look in major legal newspapers, *e.g.*:

- a. Los Angeles Daily Journal;
- b. San Francisco Daily Journal;
- c. The Recorder (San Francisco);
- d. The Daily Transcript (San Diego).

#### Publications Containing Expert Witness Advertising

Look in publications for advertising, *e.g.*:

- a. The American Bar Association Journal;
- b. California Lawyer;
- c. Journals published by various legal associations, *e.g.*, Association of Defense Counsel, Defense Research Institute;
- d. Journals published by various bar associations, *e.g.*, Bar Association of San Francisco, Los Angeles Lawyer.

#### EXAMINE PROFESSIONAL DIRECTORIES

You will find names, addresses, and specialties of experts listed in:

- a. The Lawyer's Desk Reference;

- b. Books published by the Association of Trial Lawyers of America; and
- c. Books published by the Consumer Attorneys of California.

#### CONTACT EXPERT WITNESS SERVICES

There are also several commercial expert witness referral companies that maintain a database of professionals available to serve as expert witnesses, but they require attorneys to pay an additional fee to the referral company to retain that expert. See, *e.g.*, TASA (<http://www.tasanet.com>), the National Directory of Expert Witnesses ([www.claims.com](http://www.claims.com)) published by Claims Providers of America, Medquest ([www.medquestltd.com](http://www.medquestltd.com)), and ForensisGroup ([www.forensisgroup.com](http://www.forensisgroup.com)). Many of these services advertise in legal journals and newspapers. See discussion of advertisements, above.

#### SEARCH OTHER GEOGRAPHIC LOCATIONS

You may need to look in other geographic locations to find an expert if you are having difficulty engaging an expert for a trial located in your own geographic area.

##### Professional Liability Case

In a professional liability case, you may be more successful locating an expert in another geographical area, because a professional who may be reluctant to testify against a colleague in San Francisco may have no compunctions about testifying against a professional in Los Angeles.

##### Cost

Obviously, expenses are higher when your expert comes from another geographic area, so generally try to obtain an expert from your own area first.

#### DEVELOP EXPERT WITNESS FILE

Develop an expert witness file, and:

- a. Include the résumés of all experts you have used and that have been used against you;
- b. Encourage other attorneys in your office to give you names and addresses of experts they use for your file;
- c. Obtain copies of résumés from other attorneys you know for your file.

*Further Research:* See [Expert Witness §§7.6-7.15](#).

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When Selecting Your Expert

STEP 4. CONDUCT INITIAL INTERVIEW

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MAKE CAREFUL DETERMINATION

If you need an expert, spend the time (and money) needed to choose the most effective expert available in your budget range.

OBTAIN RÉSUMÉ

Ask expert to fax or mail his or her résumé and fee schedule.

NOTE

Consider obtaining and reading all articles or other scholarly publications listed in the résumé before you talk to the expert.

LOGISTICS OF INTERVIEW

Conduct the initial interview:

- a. Over the phone; or
- b. In expert's office.

NOTE

Meeting the expert in person is better than a telephone interview because it gives you the opportunity to see the expert's demeanor and appearance. You may also see books and/or periodicals in the expert's office that may help to educate you on the issues.

PRIOR MALPRACTICE SUITS

- a. Ask the expert whether he or she has ever been sued for malpractice, and, if the answer is yes, ask where, when, and by whom. You could be embarrassed at a deposition or at trial if you are not aware that your expert has been sued an inordinate number of times.
- b. If your expert has been sued, find out the facts through court records and by talking to the lawyers involved.
- c. If you become aware that an opposing expert has malpractice cases filed against him or her, subpoena the malpractice court records. There is always the possibility that prior acts of malpractice may get into the record. See Aitken, California Evidentiary Objections §145.

YOU MAY NEED TO PERSUADE EXPERT

If expert is someone who has never been involved in litigation, you may need to persuade him or her to act as an expert, which may be easier if you have a case with a cause.

JUDGE'S PERSPECTIVE

If the expert is simply unwilling to be subjected to a courtroom setting, you might consider obtaining a video-recorded deposition under CCP §§2025.220(a)(6), 2025.620(d) (discussed in step 22, below). If you meet the procedural requisites of that provision, the expert's recorded testimony may be presented at trial. This may also save you expert witness fees.

EXTRA PREPARATION MAY BE REQUIRED

If expert is a leading authority who has published a number of books or articles:

- a. Keep in mind that opposing counsel may try to impeach by cross-examining about any contradictions between expert's published writings and deposition or trial testimony; and
- b. Expect to spend time and money preparing expert, so that there are no inconsistencies between the opinions he or she has expressed in prior publications and testimony at deposition and at trial.

*Further Research:* See Evid C §§720, 1235.

## DETERMINE PREVIOUS INVOLVEMENT IN CASE

Determine whether expert has spoken to any other counsel in the action, because a law firm that retains an expert who was interviewed but not hired by another firm may be subject to disqualification. See *Shadow Traffic Network v Superior Court* (1994) 24 CA4th 1067, 29 CR2d 693; see also:

- a. *Sbandralina G v Homonchuk* (2007) 147 CA4th 395, 412, 54 CR3d 207 (rebuttable presumption of confidentiality of work product material did not apply to situation of witness originally retained by defendants as an expert but shifted to consultant status, who, as a consultant, was contacted by plaintiff's lawyer, but divulged no confidential work product information);
- b. *Collins v State* (2004) 121 CA4th 1112, 1129, 18 CR3d 112 (rebuttable presumption of *Shadow Traffic* inapplicable; disqualification of plaintiff's counsel unwarranted when expert previously retained by defendants did not disclose any privileged information to plaintiff's counsel and plaintiff's counsel discharged expert immediately on learning of dual retention);
- c. *Western Digital Corp. v Superior Court* (1998) 60 CA4th 1471, 71 CR2d 179 (retention of expert who had been interviewed by opposition and given confidential attorney-client information creates rebuttable presumption that confidential information was disclosed).

## REQUEST WRITINGS

Ask expert to:

- a. Identify by title, names of co-authors, date of publication, and name and address of publisher, any "writing" as defined in Evid C §250, including but not limited to books or articles he or she has written and whether the writing is part of a public record;
- b. Provide you with copies, or information on where to obtain copies, *before* the deposition, and, ideally, before the expert is declared.
- c. When seeking documents from either your opponent or a witness during discovery or at trial, consider using the phrase "writing as defined in Evid C §250." Evid C §250 states:

"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

## SUMMARIZE CASE

Orally give expert a concise summary of case, *i.e.*, describe:

- a. Nature and significance of issues involved;
- b. Why you need his or her opinion in your case;
- c. Facts of the case;
- d. Background of the party you represent; and
- e. Background of the opposing party.

## NOTE

Do not put summary in writing initially. If you put your summary in writing and give it to the expert, it is likely to be subject to discovery by opposing counsel.

## STATE YOUR EXPECTATIONS OF EXPERT

Tell expert what you expect, *e.g.*:

### Written Reports

- a. Explain that you have not yet decided whether a written report is appropriate and that you will advise expert when and if a written report is needed;
- b. Ask that, until you ask for one, expert prepare *no written report*.

## NOTE

If expert is a physician, you may be required to provide a written report under CCP §2032.610.

## Opinion

Explain subject area or kind of opinion you hope expert will provide, *e.g.*:

a. In a products liability case you may want an expert to:

- (1) Present statistical information; and/or
- (2) Interpret studies about the product.

b. In a personal injury case, you may want an expert to testify whether, *e.g.*, plaintiff would have received the injuries sustained if he or she had been wearing a safety helmet.

## NOTE

Do not confuse explaining the subject or kind of opinion with asking for a particular opinion. The expert should provide an independent assessment of the case so that you can realistically appraise the likelihood and extent of recovery and impact on settlement. Remember that any conversation you have with the expert is discoverable, and any attempt to obtain a favorable opinion may impair the expert's credibility. A good technique is to speak in the most general terms about one's case, then have the expert explain in depth his or her views and findings on the subject matter.

## Other Assistance

Explain that expert is to advise you about any additional issues and opinions he or she may formulate about the case.

## Testimony

Explain whether you expect expert to provide:

- a. Deposition testimony; and /or
- b. Trial testimony.

## Exhibits

State whether expert will need to prepare trial exhibits.

## COMPARE PHILOSOPHIES OF CASE

a. Explain your philosophy of the case and your client's goals;

b. Terminate relationship *before expert views case documents* if:

- (1) It seems that expert may refuse to become involved in case for philosophical reasons, *e.g.*, an epidemiologist may refuse to testify against a drug company; or
- (2) Initial interview indicates that expert's opinion will be markedly against your position in the case.

## OBTAIN FROM EXPERT

You should obtain from expert:

### Résumé (Curriculum Vitae)

- a. Expert's résumé, which should include a list of published works and works in progress;
- b. Date of last revision of résumé (and also ascertain whether there have been any additions to it since that date).

## NOTE

If you have not seen any of your expert's advertising, you should ask the expert whether he or she has ever advertised his or her expert services, and obtain copies of any such advertisements. After reviewing the advertisements, you may decide against retaining the expert because, for example, the expert may appear as "too professional" or as a "hired gun."

## Fee Schedule

Expert's fee schedule that specifies:

- a. Hourly rates;
- b. Deposition rates;

- c. Rates for time in court; and
- d. Any special rates, such as a minimum half-day rate, or special rates if travel is involved.

#### ASK ABOUT TRAVEL AVAILABILITY

Ask if expert is willing to travel for deposition and trial. See [step 23](#), below, concerning deposition location.

#### ASK ABOUT TRIAL AVAILABILITY

- a. Determine when your expert is available for trial before a trial date is set; you will be in an embarrassing position if your expert tells you that he or she will be unavailable after the trial date is set.
- b. Determine the expert's general availability for the entire period during which the trial is likely to be set or reset.

#### JUDGE'S PERSPECTIVE

Consider asking the court to appoint its own expert (at the expense of the parties) under [Evid C §730](#).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Selecting Your Expert/STEP 5. EVALUATE THE EXPERT'S STRENGTHS

STEP 5. EVALUATE THE EXPERT'S STRENGTHS

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DETERMINE WHETHER EXPERT IS PROPERLY QUALIFIED

Determine whether expert is qualified to provide the testimony you need:

Review Relevant Statutes

Check Business and Professions Code for requirements of potential expert's profession to:

- a. Educate yourself about background of members of that profession;
- b. Determine whether potential expert's credentials meet with standards of his or her profession; and
- c. Anticipate damaging cross-examination or impeachment of your expert, *e.g.*, if your expert failed a particular test to become certified in his or her profession one or more times.

NOTE

If the expert's testimony will involve interpretation of research, it is not necessary for him or her to have personally conducted similar studies or research. The primary measure of the expert's qualifications under these circumstances should be the ability to understand the factual material and interpret it for the jury. *People v Vu* (1991) 227 CA3d 810, 814, 278 CR 153.

Carefully Review Résumé

Carefully review expert's curriculum vitae for any exaggerations or inaccuracies that may be readily apparent or may be subtle; then, *e.g.*:

- a. Discuss with expert his or her educational background; and
- b. Discuss list of published articles and books that should be part of expert's curriculum vitae.

NOTE

Go through the same process as if you were preparing *your* cross-examination and possible impeachment of your opposing party's experts.

CONSIDER EXPERT'S PERSUASIVENESS

Evaluate whether expert's qualifications, education, experience, demeanor, and credibility will persuade the trier of fact.

Consider Whether Expert Will Testify Before Judge or Jury

Whether expert will testify before a judge or jury should influence your decision, *e.g.*, a judge may be less susceptible to being influenced by an expert's personality than a jury.

Determine Expert's Focus and Standing in the Field

Ask why expert is considered an expert in the field, and ask for a description of expert's specialized education, expertise, and experience.

Qualification to Testify in Field in Question

Determine whether any court or any tribunal of any nature whatsoever has ever ruled that the expert is not qualified in *this* field.

SEEK AN INDEPENDENT THINKER

An independent thinker will provide you with a critical analysis and point out the weaknesses of the case, so that you can better assess the real merit of the case and the possible settlement value.

NOTE

Even if you decide you cannot use the expert as a witness at trial because of the nature of his or her criticism of the case, the expert's independence may prove invaluable in assisting you as a consultant in preparing the weak portions of your case.

## DISCUSS EXPERT'S APPROACH TO EXPERT OPINION TESTIMONY

Determine from speaking with expert whether expert's approach to testifying about his or her opinions reflects the rules governing expert witness testimony and your own philosophy:

Explain "Reasonable Probability"

Expert should express opinion in the context of "reasonable probability" rather than "possibility":

a. "Reasonable probability" means that the result is more likely than not, *i.e.*, that there is at least a 51-percent chance that the result will occur;

b. Advise expert that under Evid C §801, expert's opinion does not have to be based on a scientific certainty. See People v Jackson (1971) 18 CA3d 504, 507, 95 CR 919; but see People v Jeff (1988) 204 CA3d 309, 337, 251 CR 135.

**Example:** Each element of a medical malpractice action must be proven to a *reasonable medical probability*, including negligence, causation, and damages. Dumas v Cooney (1991) 235 CA3d 1593, 1 CR2d 584 (rejecting "lost chance" of survival or better-result theory of discovery).

Discuss Reasonable Certainty

a. Ask if expert will testify that opinion is based on a reasonable *certainty*, which is more compelling testimony than reasonable probability.

b. Remember that an expert will almost never be willing to state that a particular result is *certain* to occur, because often there are conflicting views within a profession regarding the prevailing opinions about an issue or subject.

NEW SCIENTIFIC TECHNIQUE INVOLVED

## DETERMINE WHETHER EXPERT WILL USE METHOD GENERALLY ACCEPTED BY SCIENTIFIC COMMUNITY

If expert is using scientific methods that are generally accepted by the scientific community, expert testimony resulting from use of that method may be admissible without conducting an analysis to determine scientific reliability. See, *e.g.*, People v Hill (2001) 89 CA4th 48, 107 CR2d 110 (DNA testing using generally accepted methods need not be subject to *Kelly/Frye* analysis).

## DETERMINE WHETHER EXPERT WILL USE NEW SCIENTIFIC TECHNIQUE

If expert expects to use a new scientific technique or novel method in formulating an opinion, explain that before court will admit expert's testimony and opinion about results of using that technique, you may need to make a foundational showing that the technique satisfies the requirements of People v Kelly (1976) 17 C3d 24, 30, 130 CR 144, and its progeny, *i.e.*:

Technique or Methodology Is Sufficiently Established

Technique or methodology is sufficiently established to have gained general acceptance in its field;

Expert Is Properly Qualified

Testimony with respect to the technique or methodology and its application is offered by a properly qualified expert; and

Correct Procedures Followed

Correct scientific procedures were used in this case. See step 9, below, concerning *Kelly* Rule.

**Further Research:** See, *e.g.*, People v Farnam (2002) 28 C4th 107, 121 CR2d 106 (fingerprint identification based on computer results passes *Kelly* test); People v Nolan (2002) 95 CA4th 1210, 116 CR2d 331 (urinalysis passes *Kelly* test); People v Morris (1991) 53 C3d 152, 279 CR 720; People v Johnson (2006) 139 CA4th 1135, 43 CR3d 587 (DNA match admissible to identify defendant as possible suspect because it only provided an investigative tool and was not subject to the *Kelly-Frye* standard of admissibility), and other cases referenced in New Scientific Technique, Appendix I.

## MONITOR CASE LAW

Monitor case law and inform your expert of any scientific techniques or novel methods approved or disapproved that are relevant to your case. See step 9, below, concerning educating yourself about the field.

**Further Research:** See Expert Witness §§4.12, 4.27; Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008), referred to throughout this Action Guide as Laying a Foundation; Aitken, California Evidentiary Objections §44. See also Additional References, New Scientific Technique, Appendix I.

## THE RELUCTANT EXPERT

### JUDGE'S PERSPECTIVE

Keep in mind, when dealing with an expert who may be reluctant to testify, that prominent experts are increasingly unwilling to be involved in litigation because of the shabby treatment they often receive from lawyers at deposition and trial.

If you have a reluctant expert, consider video recording the deposition and showing it at trial:

- As long as you include your intent to make a video recording in your deposition notice (CCP §§2025.220(a)(5)-(6)), CCP §2025.620(d) does not prevent you from offering the witness's live testimony at trial if the expert has a change of heart; but
- If you decide to make a video recording of the deposition testimony *without* stating your intent to do so in the deposition notice, you cannot show the video recording at trial unless the witness truly is unavailable under Evid C §240.

See step 22, below, concerning video recording expert's deposition.

### MAY NOT BE ABLE TO COMPEL TESTIMONY

A percipient expert (*e.g.*, a treating physician) may be reluctant to testify, and cannot be *compelled* to offer expert testimony or present opinions absent disclosure under CCP §2034.260(c). County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1458, 274 CR 712 (discussing former CCP §2034). See step 15, below, concerning using an expert as a percipient witness.

**Further Research:** See Expert Witness §7.32.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Selecting Your Expert/STEP 6. AGREE ON FEE

STEP 6. AGREE ON FEE

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FOR DEPOSITION

Opposing Party

Party who is taking deposition of opposing party's expert pays for any time spent at deposition, calculated as (CCP §2034.430(b)):

- a. Beginning at the time:
  - (1) Noticed in deposition subpoena; or
  - (2) Expert arrives, if that is later than the time noticed in deposition; and
- b. Ending when expert is dismissed from deposition, whether or not expert is actually deposed.

**Further Research:** See step 25, below, concerning expert witness fees.

Retaining Party

Party designating expert is responsible for expert's fees for (CCP §2034.440):

- a. Travel time;
- b. Travel expenses; and
- c. Preparation.

NOTE

Remain in periodic contact with your retained expert or consultant, especially if he or she is located in another city or state. Your expert may change his or her address or become unable to assist you or testify because of illness or other reasons. If you do not remain in contact, your expert or consultant may not be available when you need him or her.

Amount of Fee

- a. Be aware that fee for testimony may be higher than for preparing and reviewing file (see Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878).
- b. Expert cannot charge opposing party an hourly or daily fee higher than that expert charges party who retained expert, unless party was not charged because expert donated his or her services to a charitable or nonprofit organization.

FOR COURT

Be aware that the rate for court appearances usually is per diem.

MAKE WRITTEN AGREEMENT

- a. Use a written, rather than oral, agreement.
- b. Consider specifying maximum amount expert can charge without your written approval.

NOTE

Not only is a written agreement important in a dispute with the expert, but it will almost certainly cause the court to disqualify the expert if he or she tries to testify for the opposing party.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/After Retaining an Expert/STEP 7. IF APPROPRIATE, HAVE EXPERT CONDUCT INSPECTIONS AND EXAMINATIONS

After Retaining an Expert

STEP 7. IF APPROPRIATE, HAVE EXPERT CONDUCT INSPECTIONS AND EXAMINATIONS

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WHEN APPROPRIATE

Having expert conduct inspections and examinations, and take photographs, is appropriate when condition of a product, person, property, or business is relevant to the dispute in your case.

WHY IMPORTANT

Having expert conduct inspections and examinations is important because it:

- a. Focuses your attention on the source of the dispute in your case; and
- b. Provides necessary and possibly unique information to aid your handling of case, *e.g.*, physical condition of an intersection may change before trial, or may not be adequately reflected in a photograph.

MOVE QUICKLY TO PROTECT EVIDENCE

Identify items that need to be inspected or examined, conduct inspection or examination, and, when appropriate, take photographs of product, injuries, and accident site as soon as possible, because, *e.g.*:

- a. Items, *e.g.*, a defective machine or business records, can be destroyed or changed;
- b. You will obtain information about the item closer to time of the incident, *e.g.*, intersection will not have been changed, facts will be relatively fresh in minds of witnesses; or
- c. Electronic files are routinely overwritten and back-up tapes may be routinely destroyed.

NOTE

Failure to secure key evidence can lead to dire results. See, *e.g.*, [Stephen v Ford Motor Co. \(2005\) 134 CA4th 1363, 37 CR3d 9](#) (plaintiff injured in accident when tire tread separated; tire was discarded and plaintiff's tire expert's testimony was excluded for lack of foundation; nonsuit granted because expert testimony was necessary to establish causation).

OBTAIN OR LOCATE PRODUCT, PROPERTY, OR DOCUMENTS

Identify product, property, person, or record that may need to be inspected, and its location.

From Your Client

Obtain information from your client that will help you obtain or locate item, *e.g.*, if client is claiming mishandling of a partnership business, he or she may also know what records exist and who has custody of them.

From Another Party

Another cooperative party may be willing to give you information about item, *e.g.*, opposing party may tell you where alleged defective product is located.

Other Methods

- a. Consider engaging an investigator to quickly locate evidence.
- b. Interview third parties who may have information about evidence, *e.g.*, mechanics who worked on a car.
- c. Although you probably do not want to wait for a response to a formal discovery demand, you can ask about physical evidence

in interrogatories served on other parties.

## CONSIDER RETAINING COMPUTER EXPERT

You may need to consult or retain computer expert to educate you on how:

- a. Electronic evidence is entered into computer;
- b. Computers generate and store electronic evidence; and
- c. Electronic evidence relates to the issues in your case.

**Cross-Reference:** See [step 1](#), above. On using a computer expert to aid in electronic discovery, see [Appendix J](#).

## ADVISE REGARDING SPOILIATION OF EVIDENCE

- a. Immediately advise those in possession, custody, or control of evidence, including the opposing party, not to alter or destroy it.
- b. Recall that you and your client are likely on notice as well that relevant documents, including electronic documents, must not be destroyed. See [California Civil Discovery Practice, chap 4 \(4th ed Cal CEB 2006\)](#), referred to throughout this Action Guide as Civil Discovery.

### No Tort Action

The tort of intentional spoliation of evidence has been eliminated, at least in cases in which the victim knew or should have known of the spoliation. See [Temple Community Hosp. v Superior Court \(1999\) 20 CA4th 464, 84 CR2d 852](#); [Cedars-Sinai Med. Ctr. v Superior Court \(1998\) 18 CA4th 1, 74 CR2d 248](#). See also:

- a. [Lueter v State \(2002\) 94 CA4th 1285, 115 CR2d 68](#) (no cause of action for negligent spoliation against public entity in case in which law enforcement employees discarded tire remnants from scene of crash);
- b. [Coprish v Superior Court \(2000\) 80 CA4th 1081, 95 CR2d 884](#) (based on reasoning of *Cedars-Sinai* and *Temple*, no tort cause of action for negligent spoliation of evidence).

### Other Remedies for Spoliation

However, other remedies are available to spoliation victims, including:

- a. Discovery sanctions, including monetary, issue, contempt, and terminating sanctions (*e.g.*, [CCP §§2020.240, 2023.030\(a\), 2025.430](#));
- b. Criminal sanctions ([Pen C §135](#));
- c. Possibly, breach-of-contract cause of action ([Coprish v Superior Court \(2000\) 80 CA4th 1081, 95 CR2d 884](#)); and
- d. Jury instructions that inference be drawn against parties that conceal or destroy evidence (see, *e.g.*, JC Cal Civ Jury Inst 204 (CACI), stating that trier of fact may consider party's willful suppression of evidence when deciding what inferences to draw from evidence).

## CONSIDER PRESERVATION OF ELECTRONIC EVIDENCE

It can be time-consuming and expensive to stop the routine destruction of documents, especially in large organizations. Because evidence stored electronically can be altered or destroyed easily, it is particularly important to preserve it at the outset of the litigation by, *e.g.*:

- a. Obtaining a preservation order (in the form of an injunction) from the court;
- b. Sending opposing counsel a letter requesting preservation of all evidence (see sample letter in [Appendix K](#)); or
- c. Moving rapidly on discovery by deposing the custodian of electronically stored evidence with a subpoena duces tecum requiring production of the evidence.

## CONSIDER INFORMAL INSPECTION OR EXAMINATION

## Things

Consider scheduling an early informal investigation of, *e.g.*, property, tangible items, and documents, if custodian is cooperative.

## NOTE

Opposing party is not required to be present at an informal inspection or examination, and the identity of your consultant/expert need not be disclosed; at a later formal inspection or examination, your expert's identity will probably be observed. See *Pullin v Superior Court* (2000) 81 CA4th 1161, 97 CR2d 447 (in slip-and-fall case, plaintiff was entitled to unilaterally conduct tests on floor of defendant's store during store hours; provided investigation is lawful, no formal discovery device is necessary).

## People

A medical examination often can be arranged informally with the parties' cooperation.

**Further Research:** See Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as Obtaining Discovery. See also CCP §§2032.010-2032.650 for requirements of that statute.

## OBTAIN FORMAL INSPECTION OR EXAMINATION

To obtain an inspection or examination:

### Things

Follow procedures in CCP §§2031.010-2031.510 to inspect:

- a. Documents;
- b. Tangible things;
- c. Real property;
- d. Computer systems;
- e. Electronic evidence.

### Electronic Evidence

For effective discovery of electronic evidence, you need to obtain information through formal document demands regarding opposing party's:

- a. Computer systems;
- b. File locations;
- c. Network topology; and
- d. Policies on file back-ups, archives, preservation, and destruction.

## NOTE

If you believe that formal discovery may be ineffective or that documents have been or are about to be deleted, consider notifying other side to:

- Preserve state of relevant hard drives or other storage media; and
- Produce them for inspection and possible retrieval of putatively deleted data.

## Considerations in Inspection of Electronic Evidence

A consultant or expert can advise whether inspection of actual media or drive is required, or whether a less intrusive and burdensome process, *e.g.*, "mirroring" (making a mirror image of the drive), is sufficient. When making demand for inspection of computer systems or electronic evidence on opposing party's premises, consider:

- a. Identifying and describing precisely the computer system you seek to inspect;
- b. Identifying and describing precisely the electronic evidence you seek; and
- c. Proposing a date and time that will not interfere with opposing party's normal business practices. Tailor your inspection demand so it will not intrude on opposing party's other customers' identities, business secrets, and possible attorney-client privileged communications.

#### People

Follow procedures in CCP §§2032.010-2032.650 to have a medical examination made of:

- a. Party;
- b. Agent of a party;
- c. Natural person in custody or under legal control of a party.

**Further Research:** See Obtaining Discovery, steps 41-4Z, concerning medical examinations.

#### PLAN SCOPE OF INSPECTION OR EXAMINATION

- a. Consider every possible issue and type of information that may become relevant during inspection, *e.g.*:
  - (1) Review all "writings" (as defined in Evid C §250) that you already have about product or document;
  - (2) Review trade, consumer, or other publications about product;
  - (3) Ask your expert about any issues he or she can anticipate.
- b. Decide what you want to accomplish through inspection or examination, and make sure expert understands this goal, *e.g.*, whether:
  - (1) A product was properly designed, cleaned, maintained, and operated;
  - (2) Accounting records were kept in accordance with generally accepted accounting principles.
- c. Budget permitting, try to re-create a scene or circumstances as closely as possible to what existed at the time of the incident.

#### IF YOU ARE PLANNING A RE-CREATION OR TEST

If you are planning a re-creation or test:

##### Original or Exemplar

- a. Make sure you have original product or records involved;
- b. If you do not have original:
  - (1) Acquire an exemplar, making sure you have the same model or series as product involved in your dispute;
  - (2) Have custodian or author of original identify copies and indicate whether copies vary from original.

##### Scientific Method

Discuss with your expert and make sure he or she conducts the test or re-creation following objective, scientific methods.

**Further Research:** See *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 389, 164 CR 343 (expert testimony concerning accident re-creation unreliable because of time delay and excessive variables).

#### PREPARE EXPERT FOR INSPECTION OR EXAMINATION

To prepare your expert for the inspection or examination:

##### Give Expert Information

Give your expert all materials and information that will enable him or her to work efficiently, *e.g.*:

- a. Pleadings and other documents that explain nature of problem with the item or person;
- b. Discovery responses, *e.g.*, copies of depositions, and answers to interrogatories listing physical complaints of plaintiff;
- c. Any other evidence, records, or photographs that might be helpful, *e.g.*, X-rays, CT scans, medical records, blueprints, accounting records, maps, photographs, appraisals, survey title reports.
- d. For a computer expert, all information needed to access and retrieve electronic evidence.

**Further Research:** See step 8, below, for a list of other materials to give your expert and how to treat those materials.

Allow Expert to Talk to Others

- a. If available, arrange for expert to speak directly with important witnesses, engineers, designers, and employees of the parties; but
- b. Remember that these conversations may be discoverable.

DECIDE WHETHER YOU WILL ATTEND

Give serious consideration to attending the inspection or examination with expert, because you can:

- a. Preserve evidence and ensure appropriate chain of custody (see *McGowan v City of Los Angeles* (1950) 100 CA2d 386, 223 P2d 862);
- b. Make sure no one injures or alters the item or conducts destructive tests (see *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248 (abolishing tort of spoliation of evidence, at least when victim knew or should have known of spoliation, and setting out other remedies available to spoliation victim));
- c. Ensure that your expert does not answer questions or voluntarily provide information to other parties;
- d. Answer questions from your expert that may not have been previously considered;
- e. Gain a better understanding of item in dispute in the case by observing it and having your expert explain technical aspects of the item;
- f. Focus your expert on the specific issues you have defined;
- g. Anticipate potential evidentiary foundation objections at trial, *e.g.*, if product or documents are not original, you might be able to determine whether original has been destroyed or altered.

RECORDING THE INSPECTION

During the inspection or examination you should arrange to:

Photographs and Video

Take photographs or video recordings of product, property, or inspection process, or photocopies of documents, making sure to:

- a. Take photographs from different angles and from varying distances;
- b. Photograph identifying information, *e.g.*, vehicle identification numbers, serial numbers, model numbers, manufacturer's plates.
- c. Have someone who can later testify about the circumstances of documentation take the photographs, rather than doing it yourself.

Diagrams

- a. Have expert make diagrams or charts to illustrate what he or she sees;

b. Monitor preparation of diagrams or charts so that they are accurate and you will understand how to use them with your expert during his or her testimony. Double check for misspellings or improper punctuation.

#### Notes

Take notes on what is observed, *e.g.*, abuse or misuse of products. Although the cause of action for spoliation of evidence has been eliminated, it is nevertheless advisable to carefully observe and record what you see, for:

- a. Purposes of other potentially available remedies (see *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248, and discussion of spoliation of evidence, above); and
- b. Your own information. Notes will help you refresh your recollection as the case goes on.

#### When Inspecting Electronic Media

If you obtain media such as a hard drive for inspection and possible retrieval of hidden, encrypted, or putatively deleted files, be sure you have a demonstrable chain of custody to show that the data obtained in fact came from the media provided by the opposing (or third) party. See Civil Discovery, chap 4.

#### NOTE

Chain of custody is usually shown by the expert's declaration outlining the steps he or she took, and by preserving copies of the intermediate forms of the data so that the retrieval of the ultimate data can be recreated.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/After Retaining an Expert/STEP 8. GIVE EXPERT APPROPRIATE MATERIAL

STEP 8. GIVE EXPERT APPROPRIATE MATERIAL

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WHAT TO PROVIDE

Provide expert with all material relevant to basis for opinion, including:

- a. Information obtained through discovery;
- b. Public record; or
- c. Material otherwise available to opposing lawyer.

Discovery Materials

Provide:

- a. Depositions;
- b. Exhibits to depositions;
- c. Answers to interrogatories;
- d. Responses to requests for admissions; and
- e. Responses to requests to produce.

Other Records, Reports, and Evidence

Provide:

- a. Medical records and physical evidence, *e.g.*, weapons;
- b. Police reports;
- c. Autopsy reports;
- d. X-rays;
- e. Other experts' reports;
- f. Handwriting exemplars; and
- g. Photographs

NOTE

Make sure that there are no notes on any materials that you give the expert that you would not want to reveal to opposing counsel. See below.

MATERIALS PROVIDED TO EXPERT SUBJECT TO EXAMINATION

Even if expert is a party, provide to expert only materials you want your opponent to discover, because:

- a. Opposing counsel may be able to examine material as part of expert witness's file by using a CCP §§2020.410-2020.510 deposition subpoena;
- b. If opposing counsel requests "entire file," expert must bring that to deposition, including any document that expert has received from you. See CCP §§2025.280(a), 2034.210-2034.270; steps 12 and 24, below, concerning how to request documents

from expert.

## NOTE

Be aware that once a defendant professional (such as a physician in a medical malpractice case) is designated as an expert witness to testify at trial, his or her present and previous opinions about the issues in the case are proper subjects of discovery, including any communications with counsel, retained experts, or other defendant professionals. County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1458, 274 CR 712.

## HOW TO AVOID EXPOSING SENSITIVE MATERIAL

To avoid exposing sensitive material:

- a. Prepare summaries of your conversations with expert *in your own writing*, and keep them in your file; or
- b. If you conclude that your expert needs your summaries or other materials:
  - (1) Edit your summaries and give your expert *only what he or she needs to prepare his or her opinion*; or
  - (2) Be prepared to argue that the summaries are protected by CCP §§2018.010-2018.080 work product rules. See below; see also step 29, below, concerning your expert's deposition; Aitken, California Evidentiary Objections §350.

## EVALUATE EFFECT OF WORK PRODUCT RULES

If you are considering providing expert with material you want to protect from being revealed to opposing counsel, evaluate:

- a. Whether CCP §§2018.010-2018.080 work product protection applies; and
- b. What steps, if any, you must take to secure that protection.

## IDENTIFY MATERIAL ABSOLUTELY PROTECTED

Your written impressions, opinions, and legal theories are protected as work product and are *not* discoverable "under any circumstances" (CCP §2018.030(a); BP Alaska Exploration, Inc. v Superior Court (1988) 199 CA3d 1240, 1250, 245 CR 682; National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 487, 210 CR 535; Aitken, California Evidentiary Objections §§180-181).

## IDENTIFY MATERIAL CONDITIONALLY PROTECTED

Reports and other documents are protected as *conditional* work product and discoverable only if opposing counsel demonstrates "good cause" by showing "unfair prejudice"; *e.g.*, expert's report is the only source of available evidence on issue. See, *e.g.*, Armenta v Superior Court (2002) 101 CA4th 525, 124 CR2d 273 (written report prepared on behalf of two parties was protected under former CCP §2018 (now CCP §§2018.010-2018.080) as work product; qualified privilege could not be waived by one of the parties, which settled its claim); Kizer v Sulnick (1988) 202 CA3d 431, 440, 248 CR 712; Aitken, California Evidentiary Objections §350.

## HOW TO PROTECT

### In State Court

To keep opposing party from discovering your work product:

- a. Either (National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 487, 210 CR 535):
  - (1) Seek a protective order under CCP §2031.060 (see step 20, below); or
  - (2) Argue work product protection in defending a motion to compel disclosure under CCP §2034.300(c); and
- b. Request that court inspect documents in camera, or expect that opposing counsel may make the request. BP Alaska Exploration, Inc. v Superior Court (1988) 199 CA3d 1240, 1261, 245 CR 682; National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 488, 210 CR 535; see step 20, below.

### In Federal Court

- a. If you do not seek a protective order in federal court, you may have waived the objection.

b. It is not entirely clear whether an attorney's work product that has been disclosed to an expert is discoverable in federal court. See, e.g., *Bogosian v Gulf Oil Corp.* (3d Cir 1984) 738 F2d 587; *SiLite, Inc. v Creative Bath Prods.* (ND Ill 1993) 1993 US Dist Lexis 13521, 1993 WL 384562; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.* (CD Cal 1992) 143 FRD 229; *Intermedics, Inc. v Ventritex, Inc.* (ND Cal 1991) 139 FRD 384.

**Further Research:** Review additional cases listed in [Appendix I](#), concerning how to identify work product.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/After Retaining an Expert/STEP 9. EDUCATE YOURSELF ABOUT THE FIELD

STEP 9. EDUCATE YOURSELF ABOUT THE FIELD

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INDEPENDENTLY EDUCATE YOURSELF

Do not rely on expert's knowledge to learn about the field.

Discover Leading Articles and Textbooks

a. Examine expert's library when you are at expert's office:

- (1) Ask expert to recommend a good textbook or article;
- (2) If expert cannot do so, ask reference librarian at public library for recommendations;

b. Check Guide to Periodicals at public library for relevant recent articles (many libraries provide online access to the Guide);

c. Use the most helpful book or article as your guide for the case.

NOTE

You can use publications that are established as reliable authority when cross-examining opposing party's expert. See Evid C §721(b). You will need to establish, through the opposing expert or otherwise, that the publications are in fact reliable authority.

Use Specialized Libraries

Use medical or other specialized libraries if public library does not have what you want, *e.g.*, MEDLINE, U.S. National Library of Medicine ([www.nlm.nih.gov](http://www.nlm.nih.gov)).

Use Internet for Research

Search Internet sources related to the field by using search terms in a generic search engine such as [www.google.com](http://www.google.com).

Ask Client

If your client is a professional, or is employed in expert's field, ask client to suggest sources for relevant information and publications.

CHECK NEW CASES

Monitor new appellate decisions involving expert opinion, *e.g.*, admissibility of new scientific techniques or novel methods; see People v Kelly (1976) 17 C3d 24, 30, 130 CR 144, and progeny (including cases listed in Additional References, New Scientific Technique, Appendix I).

UNDERSTAND CALIFORNIA *KELLY* RULE

a. In *People v Kelly*, the California Supreme Court adopted the then-current federal court standards for admitting expert evidence of new scientific techniques set forth in *Frye v U.S.* (DC Cir 1923) 293 F 1013.

b. As discussed below, those federal standards have changed. *People v Kelly* and its progeny set forth the *Kelly/Frye* rule as followed in California (now known as the *Kelly* rule (People v Leaby (1994) 8 C4th 587, 34 CR2d 663)), which requires that:

- (1) The technique or method is sufficiently established to have gained general acceptance in its field;
- (2) Testimony with respect to the technique and its application is offered by a properly qualified expert; and
- (3) Correct scientific procedures were used in the case.

UNDERSTAND FEDERAL *DAUBERT* RULE

## Daubert "Scientific Knowledge" Rule

a. 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 rejected the test in *Frye v U.S.* (DC Cir 1923) 293 F 1013, for use of expert testimony under the Federal Rules of Civil Procedure (this decision does not affect California decisions concerning admissibility of expert testimony; see *People v Leaby* (1994) 8 CA4th 587, 34 CR2d 663, and *People v Johnson* (2006) 139 CA4th 1135, 43 CR3d 587 (DNA match admissible as an investigative tool; not subject to the *Kelly-Frye* standard of admissibility)).

b. When *Daubert* was remanded (*Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311), the Ninth Circuit stated that, under the Federal Rules of Civil Procedure, there are two parts to the test for scientific techniques:

- (1) Whether expert's testimony reflects "scientific knowledge" that was derived by the new scientific method; and
- (2) Whether expert's testimony logically advances a material aspect of proponent's case.

## Kumho Tire Factors

a. In *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167, the U.S. Supreme Court expanded the trial judge's gatekeeping function under *Daubert* to include not only:

- (1) "Scientific knowledge"; but also
- (2) "Technical" and "other specialized knowledge."

b. The trial court may consider five nonexclusive factors in determining whether an expert opinion is based on scientific methods or is merely "junk science." These factors include:

- (1) Whether the method is generally accepted in the scientific community;
- (2) Whether the method has been subject to peer review;
- (3) Whether the method has been or can be tested;
- (4) The potential or actual rate of error of the method; and
- (5) The existence and maintenance of standards and controls.

## Other Federal Factors

Courts have found other factors relevant, including whether:

- a. The opinion was developed specifically for the purpose of testifying or out of research conducted independent of the litigation (see *Daubert v Merrell Dow Pharmaceuticals, Inc.* (9th Cir 1995) 43 F3d 1311, 1317);
- b. The expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion (see *General Elec. v Joiner* (1997) 522 US 136, 139 L Ed 2d 508, 118 S Ct 512);
- c. The expert's field of expertise is known to reach reliable results for the type of opinion expert will give (see *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 151, 143 L Ed 2d 238, 119 S Ct 1167 (citing astrology and necromancy as examples of disciplines that lack reliability));
- d. The reliability determination is clear from the trial court's record (see *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 55 CR3d 551 (evidence of FDA's action or inaction was admissible in products liability case to determine whether or not there was a design defect)).

## NOTE

In its gatekeeping function, the trial court has broad latitude to make the reliability determination under *Daubert*, but "some ... reliability determination must be apparent from the record" before a trial court's decision will be upheld. *Mukhtar v California State Univ., Hayward* (9th Cir 2002) 299 F3d 1053, 1066.

## UNDERSTAND HOW KELLY RULE COMPARES TO DAUBERT/KUMHO

- a. The parameters of the *Daubert-Kumho* test are much more flexible than the requirements under the *Kelly* rule.

b. Although federal courts may be willing to consider a broader scope of expert testimony than state courts (see, e.g., *Metabolife Int'l, Inc. v Wornick* (9th Cir 2001) 264 F3d 832, 842 (federal district court's gatekeeper function required it to apply *Daubert* test to expert testimony about Asian animal studies; such studies "should be subjected to substantive analysis, just like other scientific evidence" and should not be excluded because they were performed outside United States)), it is not clear that there is any greater likelihood of expert testimony being admitted in federal court.

**Further Research:** See *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225 (expert testimony admissible to show modus operandi of drug traffickers); but see *Domingo v T.K., M.D.* (9th Cir 2002) 289 F3d 600 (expert testimony excluded in medical malpractice case; court determined that expert's unpublished theory lacked widespread acceptance, studies he relied on were not shown to apply to human operations, and his conclusion did not follow his analysis); *Jinro Am., Inc. v Secure Invs., Inc.* (9th Cir 2001) 266 F3d 993 (expert's testimony in trial involving Korean corporation was inadmissible because it was unreliable and included unduly prejudicial ethnic stereotyping); *U.S. v Diaz* (ND Cal, Sept. 19, 2006, No. CR 05-00167) 2006 US Dist Lexis 71123 (police officer's expert opinion interpreting the language of general street gang jargon was admissible, but his expert opinion interpreting the phrase "Down Below" used by street gangs was not). See Aitken, California Evidentiary Objections §44; Expert Witness, chap 4. Review cases listed in Appendix I concerning admissibility of a new scientific technique.

## JUDGE'S PERSPECTIVE

In today's "fast-track" atmosphere, lawyers frequently ignore the need to educate themselves in the area of their expert's knowledge. Avoid committing this serious mistake or you may be unable to evaluate competently the differences in opinions of the various experts. Reading an important article in the field may help you in both direct and cross-examination. Jurors can tell the difference between a lawyer who understands the expert's testimony and one who does not. If the lawyer does not seem to grasp it, the jury will not try to understand it either.

If your case involves new scientific technique:

- Review and monitor how the cases applying *Daubert* (in federal court) and *Kelly* (in state court) affect your expert's testimony, e.g., whether the testimony is in fact subject to the *Kelly* test. See, e.g., *People v Johnson* (2006) 139 CA4th 1135, 1141, 43 CR3d 587 ("cold hit" from DNA database is not subject to *Kelly* when used only to identify possible suspect); *Texaco Producing, Inc. v Kern County* (1998) 66 CA4th 1029, 78 CR2d 433 (tax assessor's expert's methods held to be neither new nor scientific technique, and thus not subject to *Kelly*).
- If the testimony is subject to the *Kelly* test, see whether the technique has been considered by any court. See Expert Witness §§4.13-4.35, 4.66-4.84.
- Do not ignore *Kelly* rulings simply because you are involved in civil litigation. The California Supreme Court has applied those principles to criminal and civil cases. See *Huntingdon v Crowley* (1966) 64 C2d 647, 653, 51 CR 254; Aitken, California Evidentiary Objections §44.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/After Retaining an Expert/STEP 10. DETERMINE WHETHER YOU NEED A WRITTEN REPORT

STEP 10. DETERMINE WHETHER YOU NEED A WRITTEN REPORT

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ORAL REPORT PREFERABLE

Ask expert to prepare an oral report because:

- a. You risk having a written report in your expert's file being exposed to opposing counsel under CCP §2034.210(c) (see step 13, below);
- b. If the report contains an erroneous opinion or a mistake of fact, and opposing counsel becomes aware of the error, expect counsel to use it to impeach your expert on cross-examination.

IF YOU WANT A WRITTEN REPORT

You may want a written report because:

- a. It grounds the expert's testimony;
- b. The issue may be complex and details in oral reports may be lost and forgotten;
- c. The discipline of writing may refine the opinion or reveal weaknesses in the case; or
- d. A favorable report may serve as persuasive evidence in a settlement conference or settlement negotiations.

NOTE

*Before* requesting a written report, ask the expert what the report will contain, to avoid getting an unfavorable report in writing.

A WRITTEN REPORT MAY BE NECESSARY

- a. Opposing counsel can require a written report if a physician examines a party under CCP §2032.610.
- b. A written report may be useful in some cases, *e.g.*:
  - (1) For scientific analysis of a chemical product;
  - (2) Numerical analysis and results; or
  - (3) In cases with complex facts or numerous documents in which reports may aid expert and avoid confusion.

NOTE

A written report might be conditionally protected as work product if it is given to you in an advisory capacity, and not as a record of the expert's opinion. See National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 488, 210 CR 535; see also Armenta v Superior Court (2002) 101 CA4th 525, 124 CR2d 273 (written report prepared on behalf of two parties was protected under former CCP §2018 (now CCP §§2018.010-2018.080) as work product; qualified privilege could not be waived by one of the parties, which settled its claim). See step 20, below.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 11. DETERMINE WHEN AND WHETHER YOU WANT TO DEMAND EXCHANGE OF EXPERT WITNESS INFORMATION

When Exchanging Expert Witness Information

STEP 11. DETERMINE WHEN AND WHETHER YOU WANT TO DEMAND EXCHANGE OF EXPERT WITNESS INFORMATION

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EXPERT WITNESS INFORMATION DEFINED

A party has a right to demand that all parties to the action exchange, without leave of court, information about expert witnesses that includes, *e.g.* (CCP §2034.210):

- a. Lists of expert witnesses that party expects to offer in evidence at trial (CCP §2034.210(a); see step 13, below);
- b. Expert witness declarations (CCP §2034.210(b); see step 13, below); and
- c. Production of writings and files. CCP §2034.210(c); see step 12, below.

DEMAND IS OPTIONAL

A demand for exchange of expert witness information is *optional*:

- a. If no party demands disclosure, you are precluded from *discovery* of experts, but not from presenting them at trial;
- b. Consider not making demand if you know that your opponent has not retained an expert, because if you do not make a demand, your opponent probably will not be aware of your expert's identity and will not seek to depose your expert.

NOTE

Be aware that CCP §§2034.010-2034.730 does not apply to an exchange of expert witness lists and valuation data in eminent domain proceedings. CCP §2034.010.

WHEN TO DEMAND EXCHANGE

Demand exchange of expert witness information in accordance with the following:

After Trial Date Is Set

Generally, the earliest you may demand exchange is after *initial* trial date is set, although you may request an earlier date (for discussion of before a trial date is set, see below). CCP §2034.210.

Deadline After Trial Date Is Set

The last day to demand exchange is whichever of the following dates is *closer* to *initial* trial date (CCP §2034.220):

- a. **10 days** *after* the day initial trial date is set; or
- b. **70 days** *before* initial trial date.

Effect of Local Rules

*Always* check your local rules. Some counties set dates of disclosure or have local rules that establish dates for exchange of expert witness information that may be different from the dates established under CCP §§2034.260-2034.280. But see Hernandez v Superior Court (2003) 112 CA4th 285, 299, 4 CR3d 883 (not within court's power to order unilateral disclosure of identity of each party's medical expert witnesses in contradiction of statute).

Effect of Scheduling Order

Some courts, particularly in single assignment cases, automatically schedule dates for exchange of expert witness information, which may be different from the dates established under CCP §§2034.260-2034.280.

Before a Trial Date Is Set

Before a trial date is set, you can request an earlier date for exchange of expert witness information on a motion for good cause.

CCP §2034.230(b).

## IF YOU MISS DEADLINE

You must demand the exchange within the timing requirements of CCP §2034.220; if you miss this deadline, the court may not be able to grant your motion for extending the time to serve the demand, even if you have good cause. See CCP §2034.220; Expert Witness §10.4.

## CONSIDER STRATEGY IN DEMANDING EXCHANGE

Some attorneys try to gain a tactical advantage by:

- a. Making the demand as soon as allowed;
- b. Seeking an *early* exchange date; and
- c. Deposing their *own* expert *immediately*, because then, if other counsel learn information after that deposition and want to depose expert again, they cannot take another deposition of that expert without seeking leave of court (CCP §2025.610); but be aware that in some areas, it is unheard of for any attorney to depose his or her *own* expert.

## JUDGE'S PERSPECTIVE

If you want to depose an expert who has already been deposed, and counsel will not agree to a subsequent deposition, move for relief from the CCP §2025.610 one-deposition rule.

- In a low-budget case, consider using CCP §96 provisions (limited civil cases) instead of CCP §§2034.010-2034.730. See Civil Discovery, chap 14.
- Ask opposing expert if he or she has testified to all opinions and whether he or she contemplates formulating any other opinions or doing any more work.
- Do not rely on another party's expert disclosure; if that party disappears from the case, the expert will likely disappear as well.

## MEET INITIAL DEADLINE

Complete all your expert witness discovery before the deadlines that are tied to the *initial* trial date (even if trial is continued).

### If You Miss Deadline to Demand Exchange

If trial date is continued and a demand was not made by any party under CCP §§2034.210-2034.240, the parties have waived the right to demand exchange of expert witness information.

### Stipulate to Obtain Subsequent Discovery

You and opposing counsel can stipulate to subsequent discovery under CCP §2024.060, and if all parties agree, you may still exchange expert witness information. See Expert Witness §10.4.

## EXCHANGE VERSUS INTERROGATORIES

- a. For disclosure of expert witness information, rely on CCP §§2034.010-2034.710 rather than on other discovery devices, *e.g.*, CCP §§2030.010-2030.410 interrogatories. *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1 (court relied on former CCP §2037, which was replaced by CCP §2034, and operative July 1, 2005, by CCP §§2034.010-2034.730).
- b. Expect an objection if you seek disclosure of expert witnesses by interrogatories.
- c. If you receive an interrogatory asking you to identify your expert witnesses, object on the ground that discovery relating to expert witnesses is covered by CCP §§2034.010-2034.730.

## Federal Court

a. Using interrogatories, you may discover:

- (1) Identity of expert witnesses;
- (2) Qualifications of expert witnesses, including their training, education, skill and experience;
- (3) Subject matter of their testimony;
- (4) Experts' opinions; and

(5) Bases for those opinions.

b. There is no priority in federal discovery.

c. Party deposing an expert witness must pay reasonable fees and expenses.

*Further Research:* See Fed R Civ P 26(b)(4)(A), 26(b)(4)(C), 26(d).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 12. DEMAND EXCHANGE OF EXPERT WITNESS INFORMATION

STEP 12. DEMAND EXCHANGE OF EXPERT WITNESS INFORMATION

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CALCULATE DATE OF EXCHANGE

If you or opposing counsel demand exchange of expert witness information, the exchange must occur by the date that is closer to the *initial* trial date (CCP §2034.230(b)), *i.e.*:

- a. **20 days** after you serve the demand; or
- b. **50 days** before *initial* trial date.

Exception

Court may order an earlier or later date if requested by you or opposing counsel, if good cause is shown, but be advised that such motions are not automatically granted. CCP §2034.230(b).

WHAT TO INCLUDE IN DEMAND TO EXCHANGE EXPERT INFORMATION

Prepare a written demand for a *simultaneous exchange* of expert witness information, that (CCP §2034.230):

- a. Identifies the party making the demand below the title of the case;
- b. States that the demand is being made under CCP §§2034.010-2034.730;
- c. States the specific date you have calculated (see discussion of calculating date of exchange, above), for exchange of:
  - (1) Lists of expert trial witnesses;
  - (2) Expert witness declarations; and
  - (3) Any demanded production of writings; and
- d. If appropriate, includes a demand for inspection and copying of all discoverable reports and writings made by an expert witness in the course of preparing an opinion. CCP §2034.210(c).

**Sample Form:** For a sample demand to exchange list of expert witnesses, see Appendix A.

JUDGE'S PERSPECTIVE

The judge usually assigns the dates for *both* the demand and the exchange of expert witness information at the status conference.

- After determining how much time all counsel need to complete expert discovery, the judge will set deadlines for the demand, the exchange, depositions, and any other discovery;
- You and other counsel cannot modify court-ordered dates, *even by stipulation*, unless the court approves; and
- If the trial date is continued, the deadlines will not be postponed without the court's approval.

NOTE

Be aware that Govt C §68616(f) provides that local rules may not set *shorter* times than those specified in CCP §§2016.010-2036.050 concerning discovery (except in arbitration proceedings).

INCLUDE REQUEST FOR REPORTS, WRITINGS, AND FILES

Include in your demand a request for:

Reports and Writings

Any discoverable reports and writings (to which you are entitled), made by any expert in the course of preparing his or her opinion. CCP §2034.210(c).

Entire File

Expert's entire file (if you want to review it), defined as all writings (see Evid C §250), time records, and all other physical

material that expert considered, referred to, relied on, or prepared in connection with the case (not just in developing opinion).

"Writings" Under Evid C §250

a. Under Evid C §250 the definition of a "writing" includes:

- (1) Photocopying;
- (2) Transmitting items by electronic mail or facsimile; and
- (3) Any record created by the listed means, "regardless of the manner in which the record has been stored."

b. Include a reference to Evid C §250 in any discovery you conduct involving an expert.

**Example:** In a subpoena for written records include the following language: "Any 'writing' of any nature whatsoever as defined in Cal. Evid C §250."

c. Although asking for all "writings" as defined by Evid C §250 may be legally sufficient to seek all forms of electronic documents, to avoid future disputes, specify in your demand:

(1) The specific types of files sought, *e.g.*:

- (a) Adobe pdf files;
- (b) Word files;
- (c) Excel spreadsheets;
- (d) Backup files and tapes; and
- (e) Report forms.

(2) The metadata (data about data) sought, *e.g.*:

- (a) Author name;
- (b) Date of preparation; and
- (c) E-mail headers.

#### CONSIDER WHETHER A SUBPOENA OR STIPULATION IS NECESSARY

In most cases, you will need only a demand to obtain exchange of discoverable reports and writings (CCP §2034.210(c)), but if you want expert's entire file:

Stipulation

- a. Supplement your demand with a proposed stipulation or letter agreement among all the parties to exchange each expert's entire file;
- b. Specify in stipulation or letter agreement that experts will produce their files at or before deposition and at trial.

Subpoena

- a. Serve a records-only deposition subpoena with a production date that will allow you time to review documents before deposition, if you want to inspect the documents before deposition.
- b. You may repeat request for records in notice of expert's deposition to be sure you obtain all reports and documents prepared before deposition. See step 24, below; see also Expert Witness §10.10.

#### SERVE DEMAND

- a. Serve a copy of written demand on all parties who have appeared in the action. CCP §2034.240; see also CCP §§1011-1013, 1015, regarding service.
- b. At time of service, complete proof of service and attach a copy of it to each copy of the demand served.

Retain Original

- a. Do not file original demand with court. CCP §2034.290(a).

b. Keep originals of demand and its proof of service, and all expert witness lists and declarations exchanged in response to the demand, until **6 months** after final disposition of the action. CCP §2034.290(b).

#### NOTE

You lodge the demand, and all expert witness lists and declarations exchanged in response to it, only when the contents become relevant to an issue in any pending matter in the action. CCP §2034.290(c).

#### EFFECT OF SERVICE

Once you have served the demand for exchange under CCP §§2034.210-2034.240, *all* parties must participate in a mutual and simultaneous exchange of documents setting forth specific information about expert witnesses.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 13. RESPOND TO A DEMAND FOR EXCHANGE OF EXPERT WITNESS INFORMATION

STEP 13. RESPOND TO A DEMAND FOR EXCHANGE OF EXPERT WITNESS INFORMATION

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IDENTIFY EXPERTS YOU MUST DESIGNATE

In response to a demand for exchange of expert witness information you will need to disclose the name and address of any person whose expert opinion you expect to offer in evidence at trial (CCP §2034.260(b)), *e.g.*:

Experts Described in CCP §2034.210(b)

- a. A party;
- b. An employee of a party;
- c. Someone retained by you to express an opinion in anticipation of the litigation or in preparation for trial. CCP §2034.210(b).

Treating Health Care Providers

The treating physician, surgeon, or other treating health care practitioner, if you plan to ask that witness to express opinion testimony, including an opinion or factual testimony regarding (CCP §2034.430(a)(2)); see Kalaba v Gray (2002) 95 CA4th 1416, 116 CR2d 570 (expert testimony of treating physicians excluded because they were not designated as expert witnesses):

- a. Past or present diagnosis or prognosis made by the practitioner; or
- b. Reasons for a particular treatment decision made by the practitioner.

NOTE

You do not need to disclose the health care provider to the extent that he or she only provides testimony requiring the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to deponent, the approximation by deponent of what those words or symbols are.

Percipient Witnesses

Any other percipient witness whom you expect to ask for his or her expert opinion, *e.g.*, a police officer who investigated a traffic accident or the architect involved in the design of a building that is the subject matter of the litigation. CCP §2034.430(a)(3).

JUDGE'S PERSPECTIVE

If you anticipate that you will elicit testimony from the witness beyond the limited scope of percipient evidence, you should probably disclose that witness as an expert.

Coparties' Experts

Consider designating all expert witnesses identified by your coparties to avoid being left without experts if coparties do not call experts at trial or settle before expert's depositions are taken:

- a. You will retain right to call expert; but
- b. You will have to file an expert witness declaration for each such expert witness.

NOTE

If you are cooperating with a coparty in the retention and designation of an expert, that party may give you the requisite information about that expert so you can designate the expert yourself.

PREPARE DESIGNATION OF EXPERTS

Prepare a designation that includes either (CCP §2034.260(b)):

- a. The expert witnesses you have identified above; or
- b. A statement that you do not presently intend to offer the testimony of any expert witness.

**Sample Form:** For sample plaintiff's designation of expert witnesses and declaration, see Appendix B.

## RESERVATION OF RIGHT TO CALL OTHER PARTIES' EXPERTS

It is not necessary to include a provision reserving your rights under CCP §2034.310 to call an expert not designated, because §2034.310 already provides that you can call the expert if the expert:

- a. Was designated by another party *and* thereafter deposed; or
- b. Is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial.

### NOTE

A statement in your designation that you "reserve the right to call expert witnesses designated by other parties" would probably be insufficient, because there would be no disclosure of the general substance of the testimony of the expert witness if your legal theory differs from that of opposing counsel. See Gallo v Peninsula Hosp. (1985) 164 CA3d 899, 903, 211 CR 27.

## JUDGE'S PERSPECTIVE

It may be advisable to designate an expert even if you are not entirely committed to offering expert testimony. Of course, you should be sure that the expert you designate meets the statutory requirements, including CCP §2034.260(c)(3)-(4) (expert has agreed to testify at trial and will be sufficiently familiar with case to submit meaningful deposition). If you do not designate anyone, CCP §2034.280 prevents you from designating expert witnesses later, unless you seek a court order. Protect your right to add an expert without having to depend on the court's generosity.

Be sure to check local rules in your particular area for comparable restrictions.

**Example:** Local Family Law Rules in Alameda County have a similar effect if you fail to list expert witnesses in a settlement conference statement. Alameda Ct R 11.0(5)(G)(9), (H).

## DETERMINE WHETHER YOU NEED AN EXPERT WITNESS DECLARATION

You will need an expert witness declaration *signed by you* (CCP §2034.260(c)) if any expert witness on your list is in a category identified in CCP §2034.210(b), *i.e.:*

- a. A party;
- b. An employee of a party; or
- c. Someone retained by you to express an opinion in anticipation of the litigation or in preparation for trial.

### When You Do Not Need Declaration

You do not need an expert declaration for an expert witness who is not in one of the categories of CCP §2034.210(b). CCP §2034.260.

### NOTE

A declaration is not necessary if the expert witness is a treating physician, because he or she is a "fact" witness as well as an "expert" witness. Be careful to include the physician's name on your designation, or he or she may not be permitted to give expert opinions. See Schreiber v Estate of Kiser (1999) 22 C4th 31, 91 CR2d 293 (former CCP §2034 (now CCP §§2034.010-2034.730) does not preclude treating physician, who was included on expert witness designation, from testifying that accident proximately caused patient's injuries, even though no expert witness declaration was submitted).

## PREPARE EXPERT WITNESS DECLARATION

Prepare a declaration that includes:

### Qualifications

A brief narrative statement of expert witness's qualifications—*e.g.*, "Dr. Smith is a physician licensed to practice in California, and he specializes in oncology" (see this step, below, concerning whether you should attach a copy of expert's résumé). CCP §2034.260(c)(1).

### Substance of Testimony

A brief narrative statement of the general substance of expert's testimony—*e.g.*, "Dr. Smith will testify, among other things, about the standard of practice in reference to defendant's failure to diagnose cancer in this case." Sprague v Equifax, Inc. (1985) 166 CA3d 1012, 1040, 213 CR 69; CCP §2034.260(c)(2).

### NOTE

Be sure to make your narrative as comprehensive as possible. The trial court can preclude an expert from testifying at trial on a subject the general substance of which was not described in the expert witness declaration. See *Bonds v Roy* (1999) 20 CA4th 140, 83 CR2d 289, and *DePalma v Rodriguez* (2007) 151 CA4th 159, 59 CR3d 479 (biomechanic's expert opinion at trial, which did not exceed his deposition testimony, that healthy person in a low-speed car accident normally would not be expected to incur knee or shoulder injuries, was admissible).

#### Statement That Expert Will Testify

A statement that expert witness has agreed to testify at trial. CCP §2034.260(c)(3).

#### Can Give Meaningful Deposition

A statement that expert witness will be familiar with the case and will give a meaningful oral deposition on (CCP §2034.260(c)(4)):

- a. The specific testimony;
- b. His or her opinions; and
- c. The basis for them.

#### Fees

A statement of expert witness's hourly and daily fees for the deposition testimony and for consulting with the retaining attorney. CCP §2034.260(c)(5).

#### CONSIDER WHETHER TO ATTACH RÉSUMÉ

Because you must set forth expert's qualifications (see Prepare Expert Witness Declaration, above), consider whether you want to simply attach a copy of expert's résumé as part of your declaration:

##### Cons

You may not want to attach a copy of the résumé, because:

- a. This gives your opponent an opportunity to study the résumé in detail and obtain copies of articles that expert has written before the deposition;
- b. This time for study may open up areas of interrogation you had not anticipated.

##### Pros

If you attach a copy of expert's résumé, your opponent will be better prepared and the deposition should proceed more quickly.

#### SIGN DECLARATION

This declaration should be signed by (CCP §2034.260(c)):

- a. You, attorney for the party designating the expert; or
- b. The party designating the expert if that party has no attorney.

#### JUDGE'S PERSPECTIVE

Be aware that an increasing number of judges view multiple witnesses testifying on the same general subject as cumulative and a waste of judicial resources.

The judge may apply CCP §§2034.010-2034.730 (and Evid C §§723 and 352(a)) to limit the number of witnesses counsel may use at the hearing on a motion in limine, at the status conference, or at trial.

The judge is likely to question your expert list if you fail to show how each expert's area of expertise and expected testimony is distinct. The judge is unlikely to allow multiple experts by the same side on the same point.

#### ARRANGE FOR OTHER EXPERT INFORMATION, IF REQUESTED

Gather and review all discoverable reports and writings, if demanded, so that you are prepared to produce them on the date and at the place specified in the demand.

#### EXCHANGE INFORMATION

Serve expert witness response, declaration, and any reports or writings, plus a proof of service:

- a. By mail; or
- b. At a meeting of the attorneys.

#### WHEN TO EXCHANGE

Serve the expert information on or before the exchange date set in the demand. See step 12, above, for deadline to exchange expert witness information; CCP §2034.260.

#### If Served by Mail

Recognize that time for mailing required by CCP §1013 does not apply because exchange of lists and documents is *simultaneous*, regardless of form of service you and opposing counsel use. CCP §2034.010.

#### NOTE

This lack of additional time for mailing is not expressly stated in CCP §§2034.010-2034.730, but appears implicit because the exchange must occur on the date "specified in the demand." See CCP §2034.260(a).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 14. IF APPROPRIATE, PREPARE AND SUBMIT A SUPPLEMENTAL EXPERT WITNESS LIST

STEP 14. IF APPROPRIATE, PREPARE AND SUBMIT A SUPPLEMENTAL EXPERT WITNESS LIST

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#### WHEN APPROPRIATE

Use a supplemental expert witness list if (CCP §2034.280(a)):

- a. You engaged in the original exchange; and
- b. You did not retain an expert to testify on a subject, *i.e.*, you did not originally intend to cover that subject with expert testimony; but
- c. You want to add an additional expert witness to testify on that subject because you learn that opposing counsel is naming an expert witness to cover that subject.

#### WHAT TO SUBMIT

To add an expert to testify on the same subject as experts designated in the original exchange by opposing party, provide (CCP §2034.280(a)-(b)):

- a. Supplemental list of names and addresses of expert witnesses you are retaining to testify; plus
- b. Expert witness declarations (see step 13, above); and
- c. Discoverable reports and writings, if any, made by the additional experts.

#### WHAT NOT TO SUBMIT

You do *not* need to seek a motion.

#### WHEN TO SUBMIT

Submit the supplemental expert witness list within **20 days** after original exchange. CCP §2034.280(a).

#### ANTICIPATE DEPOSITION

Make the newly designated experts available *immediately* for depositions, even if the CCP §§2024.010-2024.060 time limit has expired. CCP §2034.280(c).

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 15. REVIEW CONSEQUENCES IF YOU FAIL TO DESIGNATE EXPERT WITNESSES

STEP 15. REVIEW CONSEQUENCES IF YOU FAIL TO DESIGNATE EXPERT WITNESSES

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COURT EXCLUDES YOUR EXPERTS

The court will exclude your expert's opinion if you unreasonably fail to *timely* (CCP §2034.300):

- a. List your expert witness;
- b. Submit your expert witness's declaration;
- c. Produce expert witness's discoverable reports and writings; or
- d. Make your expert witness available for deposition.

**Further Research:** See Expert Witness §10.25.

USING UNDISCLOSED EXPERT WITNESS AT TRIAL

If you have failed to comply with a demand to exchange expert witness information:

Inappropriate Testimony

You cannot call an undisclosed expert witness to:

- a. Give an opinion as an expert witness at trial, *e.g.*:
  - (1) Expert testimony of treating physicians excluded because they were not designated experts (Kalaba v Gray (2002) 95 CA4th 1416, 116 CR2d 570);
  - (2) Reversible error when expert who was not disclosed in discovery was permitted to testify at trial (Province v Center for Women's Health e<sup>3</sup> Family Birth (1993) 20 CA4th 1673, 25 CR2d 667); or
- b. Testify as a *rebuttal* witness to offer an opinion that contradicts another expert's opinion (CCP §2034.310(b)), *e.g.*:
  - (1) After opposing expert testified that smelling alcohol does not mean person has drunk significant amount of alcohol, undisclosed expert could not testify to opinion that only alcohol levels below .08 are not detectable by smell (Mizel v City of Santa Monica (2001) 93 CA4th 1059, 113 CR2d 649);
  - (2) Plaintiffs' expert's testimony contained a contradictory opinion on the permeability rate of the soil, but did not contain any foundational facts that would contradict those presented by defendants' experts (Fish v Guevara (1993) 12 CA4th 142, 145, 15 CR2d 329).

Appropriate Testimony

You still may use an undisclosed expert for impeachment purposes (CCP §2034.310(b)), *e.g.*, to testify:

- a. About the falsity or nonexistence of any fact that another party's expert witness uses as a foundation for opinion;
- b. About why the facts that another party's expert used as a foundation were not correct, *e.g.*:
  - (1) Undisclosed expert may not give expert opinion but may testify to existence or nonexistence of foundational facts (Howard Contracting, Inc. v G.A. MacDonald Constr. Co. (1998) 71 CA4th 38, 83 CR2d 590);
  - (2) Undisclosed expert may not testify for impeachment purposes because proposed testimony was contrary opinion, not contradiction of underlying factual foundation of opposing expert's testimony (Mizel v City of Santa Monica (2001) 93 CA4th 1059, 113 CR2d 649);
  - (3) Foundational facts should be strictly construed to prevent party from offering contrary expert opinion under "the guise of impeachment" (Kennemur v State (1982) 133 CA3d 907, 924, 184 CR 393); or

NOTE

Regarding another expert's inability to offer an opinion about a related subject, after that first expert attempted to testify on that subject, see *Kennemur v State, supra*.

## JUDGE'S PERSPECTIVE

Expect the court to *narrowly* restrict an undisclosed expert's testimony to impeachment only. Although former CCP §2034(m) (now CCP §2034.310) is based on *Kennemur v State, supra*, most judges tend to interpret the statute as narrowing the rule to pure impeachment in the strictest sense. See Hogan & Weber §10.3.

## YOU CANNOT USE A PARTY AS AN EXPERT

You cannot ask a party for an expert opinion unless you have designated the party as an expert and made the party available for deposition. *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1458, 274 CR 712.

## USE EXPERT DESIGNATED BY ANOTHER PARTY

If you failed to comply with a demand to exchange expert witness information (CCP §2034.300):

If Deposed

You may call to testify at trial an expert witness:

- a. Designated by another party;
- b. Who was *actually* deposed under CCP §§2034.410-2034.470 after the exchange of expert witness information.

If Not Deposed

You may not call to testify at trial an expert designated by another party who was *not* deposed.

## USE EXPERT AS PERCIPIENT WITNESS

You can call an expert witness *only* as a percipient witness, *e.g.*, a police officer who investigates a traffic accident or a physician who treats a plaintiff in a personal injury case.

### Cannot Give Expert Opinion

That percipient witness may not be deposed (or testify at trial) regarding his or her expert opinions until expert is first designated under CCP §§2034.010-2034.730. *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1458, 274 CR 712 (former CCP §2034).

### Definition of "Expert" Opinion

Under CCP §2034.430(a)(2), a party must pay an expert witness fee if, during a deposition of a treating physician, surgeon, or other treating health care practitioner, the witness is asked to express an opinion as defined in the statute. By analogy, the expert testimony of a percipient witness:

- a. Includes an opinion or factual testimony regarding:
  - (1) Past or present diagnosis or prognosis made by the practitioner; or
  - (2) Reasons for a particular treatment decision made by the practitioner; but
- b. Does not include testimony requiring only the reading of words and symbols contained in the relevant medical record, or, if those words and symbols are not legible to deponent, the approximation by deponent of what those words or symbols are.

### Expert Treated as Ordinary Witness

As a percipient witness, an "expert" is treated like an ordinary witness who can be interviewed and deposed by any party without complying with CCP §§2034.010-2034.730.

## NOTE

The better practice is to disclose this witness in your statement. See step 13, above.

**Example:** A physician who has conducted an independent medical examination under CCP §§2032.010-2032.650 when a party's mental or physical condition, or the blood relationship of the parties is at issue, should be disclosed under CCP §§2034.010-2034.730 if you decide to use that physician as an expert witness.

## JUDGE'S PERSPECTIVE

If you have failed to disclose the percipient witness as an expert, and the witness testifies beyond the limited scope of percipient evidence, you risk:

- A valid objection because you did not disclose the witness as an expert under CCP §2034.260; and
- An Evid C §352 objection because the jury will not draw a distinction between evidence of the diagnosis as notice, or as proof of the accuracy of the diagnosis.

*Example:* Dr. A, the treating physician, testifies that she wrote the diagnosis of malignancy and gave it to the plaintiff. That testimony is admissible to show that Dr. A gave notice to the plaintiff (relevant only in a limited number of cases). If you also ask Dr. A to explain how she knew it was a malignancy, the opposing party may object and the judge will probably sustain the objection.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Exchanging Expert Witness Information/STEP 16. MOVE TO EXCLUDE OPPONENT'S EXPERT WITNESSES IF OPPONENT FAILS TO PROPERLY DESIGNATE

STEP 16. MOVE TO EXCLUDE OPPONENT'S EXPERT WITNESSES IF OPPONENT FAILS TO PROPERLY DESIGNATE

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#### MOVE TO EXCLUDE OPPONENT'S EXPERTS

You may move to exclude the testimony of an opposing expert witness when all of the following conditions are met (CCP §2034.300):

You Complied

You have made a complete and timely exchange of expert witness information under CCP §2034.260.

Opposing Party Failed to Comply

Opposing party *unreasonably* failed to do any of the following:

- a. List that expert witness on or before the exchange date;
- b. State general substance of expert witness's testimony in expert witness declaration (see *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289 (trial court may preclude expert from testifying at trial on subject when general substance of subject was not disclosed in expert witness declaration));
- c. Produce reports and writings of that expert witness on or before the exchange date; or
- d. Make that expert witness available for deposition.

Prejudice Results

You can establish some prejudice as a result of opposing party failing to participate in the exchange.

#### NOTE

Even though a showing of prejudice is not expressly required by the language of CCP §2034.300, the court is unlikely to bar testimony unless prejudice would otherwise result.

#### WHEN TO MOVE

If you are entitled to bring a motion to exclude opposing party's expert, bring motion (CCP §2034.300):

Before Trial and Discovery Cutoff

Before discovery cutoff, recognizing that court must hear all motions on expert witness discovery **10 days** before *initial* trial date (CCP §2024.030), unless court grants a motion to extend the time. CCP §2024.050.

At Trial

During trial by:

- a. Making a motion in limine; or
- b. Objecting when expert witness is called to testify.

**Further Research:** See *Sprague v Equifax, Inc.* (1985) 166 CA3d 1012, 1039, 213 CR 69.

#### IF YOU WAIT UNTIL TRIAL

If you wait until trial to bring the motion:

- a. Opposing counsel may be unable to correct the omission, but you risk a claim of prejudice by opposing counsel; and
- b. Court may disfavor your late motion.

Motions Concerning Expert Information Exchange

STEP 17. MOVE TO LIMIT OPPONENT'S EXPERT WITNESSES IF LIST IS EXCESSIVE

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WHEN LIST IS EXCESSIVE

Expert witness lists generally are considered excessive if there is more than one witness testifying on the same subject. See Judge's Perspective, [step 13](#), above, under Determine Whether You Need an Expert Witness Declaration.

RECOGNIZE BASES OF MOTION

File a motion to reduce the number of expert witnesses designated by opposing party:

Before Discovery Cutoff

Under [CCP §2034.250\(b\)\(6\)](#) and [Evid C §§352](#) and [723](#), as a motion to protect your client from the "undue burden and expense" of cumulative testimony, *i.e.*, more than one expert testifying about an issue.

NOTE

If a long list of names also does not state the general substance of the anticipated testimony required by [CCP §2034.260\(c\)\(2\)](#), consider including this ground as an additional basis for your motion.

Before Trial

Under [Evid C §§352](#) and [723](#), to limit cumulative witnesses as excessive and prejudicial in that any probative value of their testimony is outweighed by prejudice to your client.

FILE MOTION EARLY

Do not either wait to file motion until trial or wait to object until opposing party puts cumulative witness on the stand, because you risk:

- a. Opposing counsel's claim of prejudice; and
- b. Court's possible disfavor of your late motion.

Before Discovery Cutoff

Recognize that court must hear all motions on expert witness discovery **10 days** before *initial* trial date ([CCP §2024.030](#)), unless court grants a motion to extend the time. [CCP §2024.050](#).

ANTICIPATE SANCTIONS

Be aware that if you bring this motion and lose, court is authorized to impose a monetary sanction under [CCP §§2023.010-2023.040](#), unless it finds that you acted with substantial justification. [CCP §2034.250\(d\)](#).

INCLUDE IN MOTION

Include in motion:

- a. Notice of motion;
- b. Memorandum of points and authorities;
- c. Your declaration in support of motion;

d. Opposing party's designation of expert witnesses and his or her expert witness declaration as an exhibit.

**Further Research:** See South Bay Chevrolet v General Motors Acceptance Corp. (1999) 72 CA4th 861, 85 CR2d 301 (trial court properly excluded testimony of expert whose anticipated testimony was cumulative of subject matter covered by another expert); Horn v General Motors Corp. (1976) 17 C3d 359, 371, 131 CR 78 (fifth expert witness not allowed to testify when counsel was unable to distinguish proposed testimony from that of other four experts); Scalere v Stenson (1989) 211 CA3d 1446, 1454, 260 CR 152; Canavin v PSA (1983) 148 CA3d 512, 537, 196 CR 82; Trial Objections §31.6; Hogan & Weber §10.4; Aitken, California Evidentiary Objections §§130, 132.

## JUDGE'S PERSPECTIVE

Most judges will find merit in your motion to limit the number of expert witnesses if opposing counsel's list includes apparent duplications.

Recognize also that in a nondirect calendar court a law and motion judge will be reluctant to bind another judge with a decision made before the case is assigned to a trial judge. This dynamic is different in a direct calendar or all-purpose assignment case.

If an early decision on limiting expert witnesses would *substantially* reduce the cost of discovery, consider making a motion in the master calendar department that the case be assigned to a trial judge early.

Alternatively, wait until the case is assigned under normal procedures and make an in limine motion *as soon as possible*, with a supporting declaration showing the costs of the various experts used by each party and the cumulative nature of the testimony.

## REVIEW LOCAL RULES

Check local rules for when to file a motion to limit the number of experts:

- a. If you have not taken an expert's deposition and you lose your motion, you face having to take a deposition during trial; but
- b. If you take an expert's deposition to avoid one during trial, opposing counsel may argue that there is no prejudice.

**Further Research:** See Expert Witness §§11.1-11.2.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Motions Concerning Expert Information Exchange/STEP 18. IF UNAVOIDABLE, MOVE TO SUBMIT LATE EXPERT WITNESS LIST

## STEP 18. IF UNAVOIDABLE, MOVE TO SUBMIT LATE EXPERT WITNESS LIST

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### WHEN APPROPRIATE

Move for leave to submit expert information if you (CCP §2034.710):

- a. Failed to submit your expert witness information on the date specified in a demand for the exchange; and
- b. Have made a reasonable and good faith attempt to resolve each issue presented by motion with opposing counsel.

**Sample Form:** For sample plaintiff's supplemental designation of expert witnesses, see Appendix C.

### DEADLINE

#### Before Discovery Cutoff

Recognize that court must hear all motions on expert witness discovery **10 days** before *initial* trial date (CCP §2024.030), unless court grants a motion to extend the time (CCP §2024.050).

#### To Allow Deposition

Move sufficiently before **15-day** CCP §2024.030 discovery cutoff to allow experts on the list to be deposed within that time limit. See step 21, below, regarding deposition timing. CCP §2034.710(b).

**Example:** Trial is scheduled to begin June 2, 2008. Discovery cutoff under CCP §2024.030 would be May 16, 2008. Deposition notices must be served by May 6, 2008, to allow experts' depositions to be completed by May 16, 2008. CCP §2025.270. Hearing on your motion to file late expert witness information must be before May 6, 2008. You must give personal notice of the motion by April 14, 2008. See CCP §§1005(b), 1013.

#### Exception

Under "exceptional circumstances," court may allow an even later motion. CCP §2034.710.

### INCLUDE IN MOTION

Include in motion:

- a. Notice of motion;
- b. Memorandum of points and authorities;
- c. Your declaration in support of motion, including facts showing that you (CCP §§2034.710-2034.720):
  - (1) Have made a reasonable and good faith attempt to resolve each issue presented by motion with opposing counsel;
  - (2) Failed to submit the information because of mistake, inadvertence, surprise, or excusable neglect;
  - (3) Promptly moved for relief to correct mistake once you discovered it; and
  - (4) Promptly served your proposed expert witness information on all other parties to the action.

### USE NEW THEORY OF CASE OR NEW INFORMATION AS BASIS

Your most persuasive argument may be that the theory of the case has changed or that new information was obtained after the deadline that requires new expert opinion so as to avoid prejudice to your client.

### ANTICIPATE DEPOSITION

Prepare to make experts available for depositions *immediately* after court grants your motion. CCP §2034.720(d).

## COURT'S RESPONSE

Court will allow you to submit late expert witness information only after:

### Weighs Prejudice

- a. Weighing the extent to which opposing party has relied on the absence of a list of expert witnesses; and
- b. Determining that opposing party will not be prejudiced in maintaining his or her action or defense on the merits.

### Conditions to Court's Ruling

Court may condition granting your motion on any terms that seem just, including, *e.g.*:

- a. Granting a continuance of the trial for a reasonable period of time;
- b. Allowing opposing counsel to designate additional expert witnesses or elicit additional opinions from previously designated experts;
- c. Awarding opposing party costs and other litigation expenses;
- d. Requiring that your expert witnesses be made *immediately* available for deposition.

## ANTICIPATE SANCTIONS

Be aware that if you bring this motion and lose, the court is authorized to impose a monetary sanction under CCP §§2023.010-2023.050, unless it finds that you acted with substantial justification. CCP §2034.730.

## JUDGE'S PERSPECTIVE

Do not count on the court granting a motion to submit a late expert witness list.

- A resourceful opposing counsel can make your showing of "no prejudice" very difficult.
- Be prepared to offer extraordinary concessions to allow opposing counsel to depose your expert, which may be done while trial is in progress or over a weekend.
- Being "too busy" because of the pressure of other matters does not constitute "excusable neglect."

## NEW TRIAL MOTION POSSIBLE

Be aware that if court grants your motion, opposing counsel may move for a new trial on the ground that he or she was deprived of a timely opportunity to prepare and rebut expert witness's testimony. See CCP §657; 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§25, 29 (4th ed 1997), referred to throughout this Action Guide as 8 Witkin, Procedure, *Attack Judgment*.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Motions Concerning Expert Information Exchange/STEP 19. IF NECESSARY, MOVE TO AUGMENT AND AMEND EXPERT WITNESS LIST

## STEP 19. IF NECESSARY, MOVE TO AUGMENT AND AMEND EXPERT WITNESS LIST

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### WHEN APPROPRIATE

Move to augment and amend your expert witness list when you (CCP §2034.610):

- a. Have made a timely exchange of information about your experts;
- b. Need to:
  - (1) Amend expert witness list to add names and addresses of expert witnesses and submit declarations of experts you have subsequently retained; or
  - (2) Amend expert witness declaration to change general substance of testimony that a previously disclosed expert is expected to give; and
- c. Have made a reasonable and good faith attempt to resolve each issue presented by motion with opposing counsel.

### EFFECT OF FAILURE TO MOVE

If you retain a new expert and fail to move to augment your expert witness information, the court will exclude your new expert. See *Richaud v Jennings* (1993) 16 CA4th 81, 90, 19 CR2d 790 (plaintiff told court and defendant that she was consulting a new witness to replace one she had designated in original expert exchange; court excluded witness because plaintiff had not made a motion, and dismissed medical malpractice case for failure to present an expert).

### DEADLINE

Move with enough time before CCP §§2024.010-2024.060 discovery cutoff to allow experts on the list to be deposed before cutoff. CCP §2034.610(b).

### Exception

Under "exceptional circumstances," court may allow an even later motion. CCP §2034.610(b).

### LODGE DEMAND WITH COURT

As soon as it becomes apparent that you need to amend or augment your expert witness list, lodge with the court the *original* demand and all expert witness lists and declarations exchanged in response to it. CCP §§2034.290(c), 2034.610, 2034.620.

### INCLUDE IN MOTION

Include in motion:

- a. Notice of motion;
- b. Memorandum of points and authorities;
- c. Your declaration in support of motion.

### INCLUDE IN DECLARATION

Include in your declaration in support of motion facts showing (CCP §§2034.610(c), 2034.620):

### Attempt to Resolve

That you have made a reasonable and good faith attempt to resolve each issue presented by motion with opposing counsel.

### Reason for Need to Augment or Amend

Either:

- a. That you failed to determine to call that witness or offer different or additional testimony from an expert because of mistake, inadvertence, surprise, or excusable neglect; or
- b. That you would not in the exercise of reasonable diligence have determined to call that expert or to offer the different testimony of that expert.

Acted Promptly

- a. That you promptly moved to augment when you decided to call expert or offer the different testimony; and
- b. That you promptly served your proposed expert witness information on all other parties to the action.

#### ANTICIPATE DEPOSITION

Prepare to make additional experts available for depositions *immediately* after court grants your motion.

#### COURT'S RESPONSE

Court will allow you to augment or amend an expert witness list or declaration only after (CCP §2034.620(b)):

Weighs Prejudice

- a. Weighing the extent to which opposing party has relied on the absence of the list of expert witnesses; and
- b. Determining that opposing party will not be prejudiced in maintaining his or her action or defense on the merits.

Conditions to Court's Ruling

Court may condition granting your motion on any terms that seem just, including, *e.g.* (CCP §2034.620(d)):

- a. Granting a continuance of the trial for a reasonable period of time;
- b. Allowing opposing counsel to designate additional expert witnesses or elicit additional opinions from previously designated experts;
- c. Awarding opposing party costs and other litigation expenses;
- d. Requiring that your expert witnesses be made *immediately* available for deposition.

#### ANTICIPATE SANCTIONS

Be aware that the court is authorized to impose sanctions under CCP §§2023.010-2023.040 against anyone who unsuccessfully makes or opposes a motion to augment or amend, unless (CCP §2034.630):

- a. That person acted with "substantial justification"; or
- b. Imposing sanctions is otherwise unjust.

#### NEW TRIAL MOTION POSSIBLE

If court grants your motion, be aware that opposing counsel may move for a new trial on the ground that he or she was deprived of a timely opportunity to prepare and rebut expert witness's testimony. See CCP §657; 8 Witkin, *Procedure, Attack Judgment* §25.

**Further Research:** See Expert Witness §§10.18-10.19.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Motions Concerning Expert Information Exchange/STEP 20. IF APPROPRIATE, MOVE FOR PROTECTIVE ORDER

STEP 20. IF APPROPRIATE, MOVE FOR PROTECTIVE ORDER

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WHEN APPROPRIATE

File and serve a motion for a protective order when (CCP §2034.250):

- a. Your client has been served with a demand to exchange expert information; and
- b. A court order is necessary to protect your client from "unwarranted annoyance, embarrassment, oppression, or undue burden and expense."

WHEN TO FILE

File promptly after receiving the demand for exchange. CCP §2034.250(a).

Before Discovery Cutoff

Court must hear all motions on expert witness discovery **10 days** before *initial* trial date (CCP §2024.030), unless court grants a motion to extend the time. CCP §2024.050.

INCLUDE IN MOTION

Include in motion:

- a. Notice of motion;
- b. Memorandum of points and authorities;
- c. Your declaration in support of motion, including facts showing that you have made a reasonable and good faith attempt with opposing counsel to resolve each issue presented by the motion. CCP §2034.250(a).

PRESENT FACTS SATISFYING THREE-PART TEST

If you claim that the material demanded is work product, ask court to conduct an in camera inspection in which you show that your documents meet the three-part test required by National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 489, 210 CR 535:

Part 1—Absolutely Privileged

- a. Show that the material is not discoverable because it reflects your impressions, conclusions, opinions, legal research, or theories. CCP §2018.030(a).
- b. If the court determines that the report contains portions that are *easily* severable and do not reflect your impressions and conclusions, it will move on to part 2 of the test.

Part 2—Conditionally Privileged

Show that even if the material is not absolutely protected, it is conditionally privileged because it includes advisory information, *e.g.*:

- a. Material is designed to help you prepare client's case or defense, *e.g.*, to:
  - (1) Prepare pleadings;
  - (2) Present proof;
  - (3) Cross-examine other expert witnesses.

b. Court will allow discovery of material that is *not advisory* and can be easily severable, *i.e.*, material designed to prepare expert to testify, *e.g.*, a report containing findings and opinions "that go to the establishment or denial of a principal fact in issue."

c. If court finds that material is *advisory*, it will move on to part 3 of the test.

### Part 3—Good Cause for Discovery

If court determines that material is advisory, opposing party seeking information must show good cause for production of material, *i.e.*, court can find that good cause exists when prejudice to a party occurs because party cannot gain access to documents at issue; prejudice then outweighs principles supporting the work product rule.

**Further Research:** Review the cases listed in [Appendix I](#), concerning identifying work product.

### NOTE

Be aware that when you call the expert to the stand, work product no longer applies to protect any matter that the expert *relied on or considered* in forming an opinion. *People v Milner* (1988) 45 C3d 227, 241, 246 CR 713. See [Evid C §§769, 770, 800-802](#); Aitken, California Evidentiary Objections §§180-181, 350.

### COURT'S RESPONSE

Court may issue a protective order, *including, but not limited to*, one or more of the following ([CCP §2034.250\(b\)](#)):

Quashes Demand

Quashing demand because it was not served on time;

New Exchange Date

Ordering an earlier or later date of exchange than that specified in demand;

New Exchange Time or Place

Providing for a different time or place for production and exchange of reports and writings of experts;

Imposes Conditions

Imposing certain terms and conditions on exchange;

Divides Multiple Parties Into Sides

Ordering that:

a. Some or all of the parties should be divided into sides based on their identity of interest in the action's issues; and

b. Any side so created make the designation of expert witnesses;

Reduces List

Ordering that a party or a side reduce the list of employed or retained experts designated by that party or side.

### ANTICIPATE SANCTIONS

Recognize that the court must impose monetary sanctions against the losing party, unless ([CCP §2034.250\(d\)](#)):

a. Judge finds substantial justification for making motion; or

b. Other circumstances make sanctions unjust.

When Deposing and Defending Expert Witness

STEP 21. TIME DEPOSITIONS PROPERLY

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TRY TO STIPULATE WITH ALL COUNSEL

Try to enter into written stipulations with counsel for all parties concerning expert deposition, because:

Time Is Short

You have a limited amount of time to complete all discovery after the exchange of expert information (see below).

Schedule Conflicts

If you have multiple parties or many experts, you will be more likely to avoid schedule conflicts if you stipulate with all other counsel.

Cooperation

If you cooperate to obtain deposition dates that are convenient to an expert who is normally busy with his or her own professional practice, your opponent will be more likely to accommodate your expert's schedule.

NOTE

If your opponent schedules your expert without considering inconvenience to the expert, you may find your expert reneging on his or her commitment to you and refusing to participate further in your case.

POSSIBLE STIPULATIONS

Counsel for all parties can make discovery concerning experts much easier by stipulating to:

- a. Take depositions without having to comply with notice requirements; *e.g.*, agree to deposition dates with fewer than 10 days' notice;
- b. Establish a discovery schedule to start before the statutory disclosure period begins; and
- c. Permit discovery to continue after CCP §2024.030 cutoff of **15 days** before initial trial date.

CONSIDER DISCOVERY TIME LIMITS

Develop a discovery plan that carefully considers time limits on deposing experts and time required to have court hear any motions related to that discovery.

Time to Complete Depositions

You normally have only **35 days** after you exchange expert witness lists to notice and complete deposition of a disclosed expert witness because:

- a. Cutoff date for exchange of expert witness lists under CCP §2034.230(b) is:
  - (1) **20 days** after service of the demand; or
  - (2) **50 days** before *initial* trial date (whichever is closer to trial date), unless court has set a different date; and
- b. You must complete discovery **15 days** before *initial* trial date, unless court alters the time limit. CCP §2024.030.

Time for Notice

Remember that within the **35-day period**, you have to give 10 days' notice of a deposition under CCP §2025.270, unless the court reduces the time; so, after serving the notice, you really have only **25 days** to depose all of the opposing experts (or **20 days** if you serve by mail)!

IF NOT ENOUGH TIME

If you have inadequate time to take deposition:

- a. Try to stipulate with opposing counsel to waive time or notice requirements; or
- b. If you are unable to stipulate, obtain court order under CCP §2034.230(b) by showing good cause for making date to exchange expert witness lists *earlier* than the statutory 20 days after serving the demand or the 50 days before the initial trial date, *whichever is later*.

#### BRING MOTION FOR RELIEF

If you are unable to stipulate and cannot complete expert discovery as required, *promptly* seek a court order:

- a. Altering exchange date;
- b. Continuing trial date; or
- c. Granting a protective order under CCP §2034.250.

#### NOTE

Although you should always check local rules, be aware that absent an agreement between counsel, a local rule or case management order cannot conflict with procedures specified by statute. *Hernandez v Superior Court* (2003) 112 CA4th 285, 299, 4 CR3d 883 (not within court's power to order unilateral disclosure of identity of each party's medical expert witnesses).

#### Before Discovery Cutoff

Recognize that court must hear all motions on expert witness discovery **10 days** before *initial* trial date (CCP §2024.030), unless court grants a motion to extend the time (CCP §2024.050).

#### JUDGE'S PERSPECTIVE

Seek court relief from the CCP §2025.610 one-deposition rule if:

- Opposing counsel notices its own expert's deposition for a date immediately after the exchange date in order to gain a tactical advantage over other counsel who may learn information after the deposition that he or she would have explored at the deposition; and
- Opposing counsel will not agree to a second deposition.

**Further Research:** See Expert Witness §10.35.

#### CONSIDER PRIORITY

Party who notices opposing party's expert deposition first may have priority, *i.e.*, the other party must wait to conduct his or her own depositions:

- a. Priority is not available under the Civil Discovery Act unless:
  - (1) Local rule or uniform policy allows (CCP §2019.020(a)); or
  - (2) Judge determines that sequence of discovery should be regulated for convenience of parties or witnesses, or interests of justice. CCP §2019.020(b).
- b. If local rule or policy allows you to gain priority, recognize that because disclosure of each party's expert witness list is simultaneous, you will have to prepare and hand deliver deposition notices to complete depositions of opposing party's experts before your own experts' depositions.

#### NOTE

Taking opposing experts' depositions first, before your own experts are deposed, usually provides a tactical advantage, so notice their depositions as soon as you exchange lists. You can always continue the dates later, but noticing your opponent's experts' depositions first may give you priority to depose according to your preference.

#### JUDGE'S PERSPECTIVE

Recognize that CCP §2019.020 was enacted to avoid the problems resulting from the federal rule not allowing priority. See Fed R Civ P 26(d).

If the county where your case is pending has an informal policy, you should expect priority to be honored.



**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 22. CONSIDER MAKING VIDEO RECORDING OF EXPERT'S DEPOSITION

STEP 22. CONSIDER MAKING VIDEO RECORDING OF EXPERT'S DEPOSITION

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NOTIFY ALL PARTIES OF INTENT TO MAKE VIDEO RECORDING

a. If you want to make a video recording of the deposition, notify court and all parties in writing of your intention and, before offering it in evidence, of the parts of the deposition that will be offered, giving sufficient time for (CCP §2025.340(m)):

- (1) Objections to be made and resolved; and
- (2) Any editing of the recording.

b. If the deposition of an expert witness will be recorded by video technology for use at trial, be prepared to cross-examine the expert, because it may be your last opportunity to do so.

c. Use a subpoena to obtain discoverable writings before the deposition so that you will be fully prepared.

MAY USE VIDEO RECORDING AT TRIAL EVEN IF DEPONENT AVAILABLE

If your deposition notice reserves the right to use a video recording of a deposition at trial, you may introduce a video recording of the deposition testimony of an expert witness, or a treating or consulting physician, *even though the deponent is available to testify*. CCP §§2025.220(a)(5)-(6), 2025.620(d).

JUDGE'S PERSPECTIVE

As long as you include your intent to make a video recording of the deposition testimony in your deposition notice, CCP §§2025.220(a)(5)-(6) and 2025.620(d) do not prevent you from calling the expert to give live testimony at the time of trial.

ANTICIPATE MOTION FOR PROTECTIVE ORDER

a. If, however, you decide to make a video recording of deposition testimony *without* stating your intent to do so in the deposition notice, you may not be able to show the video recording at trial, because opposing party may seek a protective order postponing video recording of deposition testimony until party has had an opportunity to take a discovery deposition. CCP §2025.420(b)(3).

b. Make a reasonable and good faith attempt to resolve the matter; court can award monetary sanctions to prevailing party. CCP §2025.420(d).

CONSIDER WHETHER YOU WANT TO OFFER VIDEO RECORDING INTO EVIDENCE

Carefully consider whether you want to use a video-recorded deposition of your own expert witness at trial, because if you offer into evidence *part of the deposition*, any party may introduce any other portion. CCP §2025.620(e).

Disadvantages

Disadvantages of using a video recording of the deposition of your own expert witness include:

- a. Losing the spontaneity of an expert's personality;
- b. If expert is a good witness, the greater impact that a live presence will have on jury;
- c. Lack of availability of your expert to advise you or answer any additional questions that may arise during the trial or after depositions of other experts that are not covered in his or her deposition.

Advantages

Advantages of using a video recording of the deposition of your own expert witness include:

- a. Not having to accommodate testimony dates to a busy expert's schedule;
- b. Presumably, lower cost of showing the video recording rather than paying additional fees for your expert to appear at trial.

JUDGE'S PERSPECTIVE

Think about the mechanics of video recording the deposition, *e.g.*, acoustics, and using a professional videographer. Remember that the jury will have to listen to distractions such as shuffling papers, someone hitting the microphone, the noise of attendees

moving around, and off-camera voices.

Do not expect the judge to play the recording and determine what portions to edit:

- Expect the judge to ask you to edit the recording down to admissible material;
- If you and opposing counsel tell the judge that you cannot resolve the editing issue, expect the judge to tell you that you will have to work it out; and
- Make sure that a written transcript of the portions to be shown is available.

*Further Research:* See Expert Witness §§11.27-11.28.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 23. DETERMINE DEPOSITION LOCATION

STEP 23. DETERMINE DEPOSITION LOCATION

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REQUIRED LOCATION

You must depose an "employed" or "retained" expert at a location within 75 miles of the courthouse where the action is pending. CCP §2034.420.

Employed Expert Defined

An "employed expert" is an employee of the party designating him or her as an expert in the expert witness exchange. CCP §2034.210(b).

Retained Expert Defined

A "retained expert" is one retained by the party designating him or her as an expert in the expert witness exchange for the purpose of forming and expressing an opinion "in anticipation of" litigation or "in preparation for" trial. CCP §2034.210(b).

Exception

If *party designating his or her expert* moves for a protective order and shows "exceptional hardship," court can order a more distant place for the deposition. CCP §2034.420.

FINANCIAL IMPACT

Consider that the limitation on location will cause you additional expense if you have an out-of-town expert witness, because you will have to pay for his or her travel time and expenses.

NOTE

When you retain an expert, discuss travel requirements of attendance at deposition and trial. See step 4, above, concerning initial interview with expert.

CONSIDER STIPULATION

Consider stipulating to take depositions of experts at experts' offices despite the 75-mile limitation, because:

- a. It will save expert's travel time and avoid inconveniencing expert;
- b. If you require expert to travel to your office, opposing party may require your expert to travel also;
- c. If your expert is inconvenienced, expert may renege on his or her commitment to you and refuse to participate further in the case.

**Further Research:** See Expert Witness §10.37.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 24. PREPARE AND SERVE DEPOSITION NOTICE AND SUBPOENA, IF NECESSARY

STEP 24. PREPARE AND SERVE DEPOSITION NOTICE AND SUBPOENA, IF NECESSARY

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USE NOTICE

To take the deposition, you will need to serve a deposition notice on ([CCP §§2025.220, 2025.240](#)):

- a. Opposing counsel for *each* party; and
- b. Each unrepresented party.

DETERMINE WHETHER YOU NEED A SUBPOENA

You must use a deposition subpoena to compel:

Attendance

Expert to attend deposition, if expert is *not* ([Expert Witness §10.36](#)):

- a. A party;
- b. Employed by a party; or
- c. Retained and disclosed by a party.

**Example:** In *Hurtado v Western Med. Ctr.* (1990) 222 CA3d 1198, 1203, 272 CR 324, plaintiff designated three percipient experts, *i.e.*, treating doctors. Defendant sent deposition notices to plaintiff and argued that plaintiff had the burden of producing these experts for deposition. The court of appeal held that a deposition notice is not sufficient to compel attendance of an expert who is not retained by a party.

Deposition by Remote Electronic Means

a. Under [CCP §2025.310](#), you can depose a nonparty witness, including an expert witness, by telephone or other "remote electronic means."

b. However, this should be done only if it is absolutely necessary; taking a deposition by remote means:

- (1) Excludes you from the opportunity to meet and observe the expert personally; and
- (2) Prevents you from observing the interactions between the expert and opposing counsel who may be in the same location as the expert.

Production of Entire File

Use a deposition subpoena to require expert to bring the "entire file" to the deposition or to produce the documents at a records-only deposition, because:

a. [CCP §2034.210\(c\)](#) provides only for production of "discoverable" reports and writings, if any were made by any retained and designated expert "in the course of preparing that expert's opinion";

b. Although [CCP §2025.280\(a\)](#) requires parties and party-related witnesses to produce designated documents, it is not clear whether this would also require a retained expert to produce documents other than those described in [CCP §2034.210\(c\)](#). See [Expert Witness §10.10](#) and [Civil Discovery, chap 11](#).

USE NOTICE ONLY TO DEPOSE RETAINED EXPERT

To compel attendance of expert ([CCP §2034.460](#)):

- a. For notice purposes, a retained expert is treated like a party, *i.e.*, expert is required to attend without a subpoena;
- b. Serve proper notice and pay witness fees, and party retaining expert for litigation purposes must produce expert at deposition.

Must Tender Fees

If party noticing the deposition fails to pay expert's fee, expert cannot be deposed at that time, unless parties stipulate. [CCP §2034.460\(b\)](#).

## IF YOU REQUIRE EXPERT TO BRING DOCUMENTS

If you also want expert to bring his or her documents:

### Deposition Notice

Because a disclosed expert can be compelled under CCP §2025.280 by notice, list documents you want expert to bring to the deposition with reasonable particularity in the deposition notice. CCP §2025.280(a).

### Subpoena

As added insurance that expert will bring everything you request, or if expert is not a retained expert, use a subpoena requiring expert to bring entire file to the deposition. See below for description of Judicial Council deposition subpoena forms.

## INCLUDE IN NOTICE

Include in deposition notice (CCP §2025.220):

### Deposition Location

Address where you will take expert's deposition (see step 23, above, concerning deposition location);

### Date and Time

Date and time of deposition;

### Relevant Basic Information

- a. *Each* deponent's name; and
- b. Address and telephone number of any deponent who is not a party to the action;

### If Deponent Unknown

- a. If deponent's name is not known, a sufficient description to identify him or her; and
- b. If deponent is not a natural person, a sufficient description of the matter so that deponent can produce the officer, director, managing agent, employee, or agent who is most qualified to testify;

### Specific Materials

Description of the specific and particular materials that you want deponent to produce;

### If You Intend to Make Audio or Video Recording

A statement of your intention to (CCP §2025.220(a)(5)-(6)):

- a. Record expert witness's or a treating or consulting physician's testimony by audio or video technology;
- b. Record the testimony by stenographic method, through the instant visual display of the testimony;
- c. Reserve the right to use a video recording of the deposition of any expert witness or a treating or consulting physician at trial.

## NOTE

If you intend to conduct the deposition using instant visual display, you must give a copy of the deposition notice to the deposition officer. CCP §2025.220(a)(5).

**Sample Form:** For sample notice of deposition and request for production of documents, see Appendix D.

### Format

For format requirements, see Cal Rules of Ct 3.1110(b).

### Attach Subpoena

Attach subpoena and supporting documents to deposition notice. CCP §§2025.220, 2025.240(b).

## CHOOSE APPROPRIATE DEPOSITION SUBPOENA FORM

Depending on the deposition procedure you choose, select the appropriate Judicial Council Form:

- a. For both personal appearance and production of documents and things ([CCP §2020.510](#)), use Judicial Council Form 982(a)(15.4);
- b. For personal appearance *only* ([CCP §2020.310](#)), use Judicial Council Form 982(a)(15.3); or
- c. For business records *only* ([CCP §§2020.410-2020.440](#)), use Judicial Council Form 982(a)(15.2).

#### NOTE

The deposition subpoena for personal appearance and production of documents and things is no longer required to be accompanied by an affidavit or declaration. [CCP §2020.510\(b\)](#).

**Sample Form:** For a sample Deposition Subpoena for Personal Appearance and Production of Documents and Things, see [Appendix E](#); for a sample Deposition Subpoena for Personal Appearance, see [Appendix F](#); for a sample Deposition Subpoena for Production of Business Records, see [Appendix G](#).

**Further Research:** See [Handling Depositions, step 15 \(Cal CEB Action Guide February 2007\)](#), referred to throughout this Action Guide as Depositions.

#### WHEN TO SERVE

Serve the notice:

Personally

At least **10 days** before date of deposition. [CCP §2025.270](#).

By Mail

If service is by mail, under [CCP §1013\(a\)](#):

- a. Within California, **add 5 calendar days** to this 10-day notice period;
- b. In another state, **add 10 calendar days**;
- c. Outside the United States, **add 20 calendar days**.

Notice to Consumer

Some types of experts (particularly financial experts) may have received consumer records protected under [CCP §1985.3](#), in which case notice to the consumer is necessary and time limits must be adjusted accordingly.

To Waive Time Requirements

Parties may stipulate and waive these time requirements.

#### NOTE

Keep in mind that the court can alter time limits for good cause on motion with or without notice to other parties. Attempt to provide more notice than statutorily required, because experts' schedules may already be filled.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 25. ARRANGE TO PAY EXPERT WITNESS FEES

STEP 25. ARRANGE TO PAY EXPERT WITNESS FEES

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DETERMINE FEE

a. If you notice an expert's deposition, pay the reasonable and customary hourly or daily fee for time spent at the deposition calculated as (CCP §2034.430(b)):

(1) Beginning at the time:

(a) Noticed in the deposition subpoena; or

(b) Expert arrives, if that is later than the time noticed in the deposition; and

(2) Ending when expert is dismissed from the deposition, whether or not expert is actually deposed.

b. If any counsel representing expert or another party is late to the deposition, they must pay the fee for the time between the time noticed in the deposition subpoena and the counsel's late arrival.

Amount of Fee

a. Experts' fees normally should be consistent with fee schedule that CCP §2034.260(c)(5) requires counsel to state in expert witness declaration (see Govt C §68092.5 (providing that expert witness compensation for testifying at deposition is governed solely by CCP §§2034.010-2034.730)).

b. If you are deposing an opposing party's expert, hourly or daily fee cannot exceed fee charged party who retained expert, except when expert donated his or her services to a charitable or other nonprofit organization. CCP §2034.430(d).

c. An expert may charge a higher amount for testifying at deposition and trial than for investigating and reviewing materials. See Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878.

d. An expert should charge a daily fee only if he or she had to (CCP §2034.430(e)):

(1) Attend a full day of deposition; or

(2) Be available for the full day and had to forego all business he or she would have conducted if not for the deposition.

You Pay Your Own Expert's Preparation and Travel Fees

Be aware that whenever your expert is deposed, you are responsible for your expert's fees for (CCP §2034.440; Govt C §68092.5(a)):

a. Preparing for the deposition;

b. Travel time; and

c. Travel expenses.

WHO SHOULD NOT RECEIVE EXPERT WITNESS FEES

Do not pay expert witness fees to (CCP §2034.430(a)):

a. Party; or

b. Employees of a party (even if asked to give expert opinion).

WHO SHOULD RECEIVE EXPERT WITNESS FEES

Pay expert witness fees to an expert who (CCP §2034.430(a)-(b)):

Retained Expert

Has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or trial (see CCP §2034.210(b));

Percipient Witnesses

Is a treating physician and surgeon, or other treating health care practitioner and is asked to express an opinion during the deposition (CCP §2034.430(a)(2)), and such an opinion:

a. Includes an opinion or factual testimony regarding:

- (1) Past or present diagnosis or prognosis made by practitioner; or
- (2) Reasons for a particular treatment decision made by practitioner; but

b. Does not include testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to deponent, the approximation by deponent of what those words or symbols are;

Architects, Engineers, and Surveyors

Is an architect, professional engineer, or licensed land surveyor who was involved with the original project and is asked to express an opinion. CCP §2034.430(a)(3).

#### NOTE

Be aware that expert witness fees may not be awarded as costs unless the court appointed the expert witness under Evid C §730 or some other statutory authority. See Sanchez v Bay Shores Med. Group (1999) 75 CA4th 946, 89 CR2d 634 (trial court cost award modified to delete medical expert witness fees because experts were not ordered by court as required by CCP §1033.5).

#### ARRANGE FEE PAYMENT

To simplify paying expert witness fees, arrange the sum and manner of payment for such party's experts with opposing counsel before the attorneys arrive at the place where the deposition is to be conducted.

When to Pay Fee

a. Comply with CCP §2034.450(a)-(b) and Govt C §68092.5, and tender fee based on your estimate of deposition length either:

- (1) When subpoena or deposition notice is served; or
- (2) At the *beginning* of the deposition (see True v Shank (2000) 81 CA4th 1250, 97 CR2d 462).

b. If the deposition takes longer than anticipated, pay balance of fee within **5 days** after receiving expert witness's itemized statement. CCP §2034.450(c).

How to Pay Fee

Deliver expert witness's fee to counsel for party designating expert witness. CCP §2034.450(b).

If You Fail to Pay Fees

If you fail to pay expert witness fees when you serve the subpoena or deposition notice, or at the beginning of the deposition, expert does not have to be deposed at that time unless parties stipulate otherwise. CCP §2034.460(b).

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 26. IF FEES ARE UNREASONABLE, ASK COURT TO SET FEE

STEP 26. IF FEES ARE UNREASONABLE, ASK COURT TO SET FEE

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#### TRY TO RESOLVE INFORMALLY

If fees are unreasonable, first try to informally resolve difference with party and expert witness, including receiving from party or expert (CCP §2034.470(b)):

- a. Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided in other cases;
- b. Total number of times expert has charged and received the presently demanded fee; and
- c. Frequency and regularity with which expert has charged and received the presently demanded fee within the 2-year period preceding the hearing on the motion.

#### MOVE FOR COURT TO SET FEES

If you cannot resolve the matter informally, move for an order setting compensation, with a meet-and-confer declaration under CCP §2016.040 accompanying your motion. CCP §2034.470; Govt C §68092.5(c).

#### Include Declaration

Accompany motion with a declaration showing:

- a. Attempt to resolve informally each issue in motion;
- b. Reasons you believe fee is unreasonable, *e.g.*, ordinary and customary fees charged by similar experts for similar services are lower.

#### ANTICIPATE OPPOSING PARTY'S INFORMATION

Opposing party must provide (CCP §2034.470(c)-(d)):

##### For Any Case

Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided in other cases.

##### For Cases Filed After January 1, 1994

For cases filed after January 1, 1994 (CCP §2034.470(d)):

- a. Total number of times expert has charged and received the presently demanded fee; and
- b. Frequency and regularity with which expert has charged and received the presently demanded fee within the 2-year period preceding the hearing on the motion.

#### WHAT COURT CONSIDERS

Before deciding motion, court (CCP §2034.470(b)-(d)):

##### Mandatory

*Must* consider information provided by opposing party, *e.g.*, total number of times expert has charged and received the presently demanded fee (see above).

##### Discretionary

*May* also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors court deems necessary or appropriate to make its determination.

##### Sanctions

Considers:

- a. Whether to impose a monetary sanction under CCP §§2023.010-2023.040 because a party, person, or attorney unsuccessfully

made or opposed a motion to set expert witness fee without substantial justification; or

b. Whether circumstances would make imposition of sanction unjust. CCP §2034.470(g).

#### NOTE

If you do not prevail on a motion you bring, and you have not made a reasonable attempt to resolve the issues presented, the court may impose monetary sanctions against you.

#### COURT RULES

Court (CCP §2034.470(f)-(g)):

- a. Decides whether demanded fee is unreasonable;
- b. If so, sets fee of expert; and
- c. May award sanctions to party that prevails on the motion.

**Further Research:** See Expert Witness §§10.38-10.39, 10.45-10.46; see Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 27. PREPARE FOR DEPOSITION OF OPPONENT'S EXPERT

STEP 27. PREPARE FOR DEPOSITION OF OPPONENT'S EXPERT

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INVOLVE CONSULTANT AND TRIAL EXPERT

- a. Have your experts or consultants assist you in preparing for deposition examinations, *e.g.*, have them suggest questions to test opposing experts' opinions and conclusions.
- b. Work with your experts and consultants to develop valid hypothetical questions not susceptible to successful objections.
- c. Ask your experts or consultants to educate you on any remaining technical aspects you may need to know about for deposition.
- d. Use your experts or consultants to help you anticipate your opposing expert's preparation for deposition.
- e. Ask your experts and consultants for *reliable authority*:
  - (1) With which to impeach opposing expert; or
  - (2) To be endorsed by opposing expert.

REQUEST DEPONENT'S RÉSUMÉ IN ADVANCE

Ask opponent's counsel to provide you with a copy of expert's résumé, preferably in sufficient time to allow you to review it with your own expert before deposition.

OBTAIN ARTICLES AND PUBLICATIONS

Obtain copies of articles and publications listed in expert's résumé so that you can be familiar with them before deposition. See below concerning whether to use the writings as a prior inconsistent statement.

SEARCH INTERNET SOURCES

Search for materials about the opposing expert:

- a. Using a search engine such as Google or Yahoo!;
- b. On postings in chat rooms and blogs (web logs); and
- c. On websites with:
  - (1) Marketing material;
  - (2) Links to articles and other sources; and
  - (3) References to prior testimony in court or before commissions or other governmental bodies.

DETERMINE WHETHER TO MAKE RÉSUMÉ AN EXHIBIT

Consider whether to attach a copy of the résumé as an exhibit to deposition transcript:

If Expert Will Appear at Trial

You may want to use the résumé in cross-examining expert at trial; but:

If Opponent May Submit Deposition Testimony at Trial

If you suspect that your opponent will submit expert's deposition instead of calling expert to testify at trial, and expert's expertise has not been established in deposition:

- a. Do not attach the résumé to the deposition; and
- b. Retain the résumé for your own use so that you can move to exclude testimony at trial on the grounds that expert's qualifications have not been established.

**Further Research:** See Depositions.

## USE WRITINGS AS PRIOR INCONSISTENT STATEMENT

If expert is the author of an article, book, or other "writing" *and* his or her testimony varies from the article, book, or other writing, use the writing as a prior inconsistent statement to impeach credibility. See Evid C §§721, 769-770; Aitken, California Evidentiary Objections §§49, 54-55.

## NOTE

You can also cross-examine the expert in regard to a publication that is established as a reliable authority even though the expert has not relied on that publication. See Evid C §721(b).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 28. DEPOSE OPPONENT'S DISCLOSED EXPERTS

STEP 28. DEPOSE OPPONENT'S DISCLOSED EXPERTS

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FEE ARRANGEMENTS

Ask about expert's fee arrangements and how much he or she charges for each phase of the case, *e.g.*:

- a. Preparation;
- b. Discovery;
- c. Tests; and
- d. Trial testimony.

WHEN HIRED

Ask when expert was hired for this assignment.

SCOPE OF ASSIGNMENT

Ask expert to describe scope of assignment and how much time expert *actually spent* in preparing each phase of the case.

REQUEST MATERIAL USED

Ask expert to describe all material that expert has observed, read, or been told to use by opposing party in preparation for assignment, including, but not limited to:

- a. Medical records, *e.g.*, X-rays, blood specimens, urine specimens, CT scan films, magnetic resonance imaging films, electroencephalic tracings, billings;
- b. Accident reports;
- c. Police reports;
- d. Contracts, *e.g.*, drafts, memoranda, notes, correspondence, exhibits, attachments;
- e. Leases;
- f. Plans, specifications and information regarding places, structures, or products at issue, *e.g.*, ladder, heart valve, construction site, city sidewalk, respiratory ventilator, weapon, motorcycle, floor plans of a store;
- g. Deposition testimony plus all attached exhibits;
- h. Financial records, *e.g.*, balance sheets, profit-and-loss statements, ledger entries, income statements;
- i. Publications;
- j. Films;
- k. Photographs;
- l. Video recordings;
- m. Audio recordings;
- n. Websites, blogs, or other Internet or electronic sources; and
- o. If desired:
  - (1) Time records, bills, and invoices submitted to opposing party;
  - (2) Retainer agreement; and
  - (3) All correspondence between expert and opposing party or counsel.

## NOTE

Ask expert to explain the specific amounts of time spent for specific types of work, *e.g.*, how much time was spent observing, researching, preparing a report.

## REVIEW EVID C §250

Be familiar with and use Evid C §250 as a checklist of all writings that may have been given to expert, *i.e.*, "writing" means:

### Forms of Recording

Any means of recording on any tangible thing, *e.g.*:

- a. Handwriting;
- b. Typewriting;
- c. Printing;
- d. Photostating;
- e. Photographing;
- f. Photocopying;
- g. Transmissions by electronic mail or facsimile.

### Form of Communicating

- a. Any form of communication or representation, including:
  - (1) Letters;
  - (2) Words;
  - (3) Pictures;
  - (4) Sounds;
  - (5) Symbols; or
  - (6) Combinations thereof; and
- b. Any record created, regardless of the manner in which it has been stored.

## USE MATERIAL FOR CROSS-EXAMINATION

- a. You may want to use the list of material used by expert at trial to cross-examine expert about inadequacy of:
  - (1) Material used in expert's opinion; or
  - (2) Amount of time spent by expert in formulating opinion.
- b. Consider having copies of material expert witness relied on attached to expert's deposition as exhibits.
- c. If expert has based his or her opinion on any material that is not reliable because it is too speculative or irrelevant, the opinion will be inadmissible.
- d. Ask expert about material on which his or her opinion is based, even if it constitutes the hearsay opinion of another expert, because expert may base opinion on inadmissible evidence:
  - (1) *People v Valdez* (1997) 58 CA4th 494, 509, 68 CR2d 135 (expert may rely on hearsay in forming opinion);
  - (2) *People v Ortega* (2006) 145 CA4th 1344, 52 CR3d 535 (expert's opinion about what constituted a criminal street gang was admissible);
  - (3) *People v Prince* (2007) 40 C4th 1179, 57 CR3d 543 (FBI agents qualified to give expert opinions on crime scene analysis and "signature crimes" involving the linkage of six serial murders to the same perpetrator, but not regarding perpetrator's probable state of mind).
- e. Ask expert about any publication that you can establish as a reliable authority (*e.g.*, by your own expert's testimony or by

judicial notice). [Evid C §721\(b\)](#).

## NOTE

You may want to move to have the expert's opinion excluded by making a motion in limine, or by a voir dire hearing if the material on which the expert based his or her opinion is not reliable.

**Further Research:** See [Evid C §§800-802](#); review cases listed in [Appendix I](#), concerning admissibility of expert opinion based on material on which expert relied.

In Federal Court

- a. Be particularly aware in federal cases that if your expert reasonably relies on inadmissible information or data to form an opinion, the expert may not relate that underlying information or data to the jury absent an advance ruling from the trial court that the probative value of the information or data substantially outweighs its prejudicial effect. Fed R Evid 703.
- b. Rule 703 does not prevent opposing counsel from exploring the basis of an expert's opinion on cross-examination, but be aware that, depending on the nature of the questions asked, the cross-examination could open the door to the expert's reciting the inadmissible material, even if that material would not have been admitted initially under the balancing test.

## GIVE MATERIAL TO YOUR EXPERT

- a. You can give the material to *your* expert witness before your opposing expert testifies, so that your expert can help you prepare for possible impeachment of opposing expert at trial.
- b. Your expert may be able to establish a publication as a reliable authority during his or her direct testimony (see [Evid C §721\(b\)](#)).
- c. If you provide your expert with the material, opposing counsel can cross-examine your expert about it even if expert did not read, refer to, consider, or rely on it.

**Further Research:** See [Evid C §§403, 721\(b\)](#); see Additional References, Material Used by Expert to Prepare, [Appendix I](#).

## USE MATERIAL FOR FURTHER EDUCATION

You can educate yourself further by examining material used by your opposing expert.

## EXAMINE QUALIFICATIONS

Examine expert about his or her qualifications:

- a. If you have not received a copy of expert's résumé, ask to have one faxed to you before the deposition so you will have more time to study it (see [step 27](#), above, for discussion of deposition of opponent's expert).
- b. You can use the résumé at trial to cross-examine expert about his or her lack of credentials in a specialized area of expertise, or to argue that your expert is more qualified.

**Further Research:** See [Evid C §§720-721](#); Aitken, California Evidentiary Objections §42.

## ASK ABOUT PRIOR EXPERIENCE AS EXPERT

Information about expert's previous experience as an expert can be helpful in showing potential bias. If the expert has been retained in other cases, ask expert, *e.g.*:

- a. What percentage of work was for plaintiff and defendant, respectively;
- b. Whether previous cases have involved similar facts to this case;
- c. Whether expert has previously testified for the same party or law firm.

## NOTE

Although courts have acknowledged a party's right to information that indicates an expert witness's possible bias, there are limits on how much detail an expert may be required to reveal. See, *e.g.*, [Stony Brook I Homeowners Ass'n v Superior Court \(2000\) 84 CA4th 691, 101 CR2d 67](#) (trial court order excessively intruded on expert's privacy when order required him to open his files so that summary of his compensation for defense and plaintiffs' work could be produced); [Allen v Superior Court \(1984\) 151 CA3d 447, 198 CR 737](#).

## ASK FOR ALL OPINIONS AND CONCLUSIONS

- a. Ask expert to state all of the opinions and conclusions that expert has reached and their bases.
- b. Make sure to pin down whether expert intends to offer any opinions other than those expressed at the deposition. See Jones v Moore (2000) 80 CA4th 557, 95 CR2d 216 (trial court properly excluded expert's testimony that went beyond that offered at deposition, at which expert had stated that he had no further opinions).

#### ASK WHAT MORE SHOULD HAVE BEEN DONE

Ask expert about any work that he or she would have liked to undertake on the case but could not because of:

- a. Lack of time;
- b. Economic restrictions; or
- c. Your opponent's failure to provide expert with direction or materials.

#### DO NOT TRY TO IMPEACH AT DEPOSITION

Use deposition only to obtain information and not to impeach expert; if you impeach expert witness at deposition, you will alert opposing counsel and there will be no surprise when you cross-examine expert at trial.

#### NOTE

You may want to impeach the expert at the deposition if you want to promote settlement by showing your opponent how strong your case is and how weak the opponent's expert is, or if the expert's trial testimony will be provided by taped deposition.

**Further Research:** See Evid C §§721, 769-770. For a general discussion of deposing expert witnesses, see Expert Witness §§11.1-11.26.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/When Deposing and Defending Expert Witness/STEP 29. PREPARE FOR YOUR EXPERT'S DEPOSITION

STEP 29. PREPARE FOR YOUR EXPERT'S DEPOSITION

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DISCUSS DEPOSITION WITH YOUR EXPERT

- a. Review deposition procedures, if necessary, *e.g.*, if expert testifies infrequently;
- b. Review scope of probable examination;
- c. Review expert's testimony at prior depositions and in other matters;
- d. Discuss documents or other physical evidence;
- e. Advise your expert to maintain a neutral attitude when testifying and to avoid any appearance of partiality about the outcome.

NOTE

An attorney who fails to adequately prepare an expert to testify may be subject to an indemnity suit if the attorney's dissatisfied client sues the expert for professional malpractice. See *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 29 CR3d 622 (expert alleged that retaining law firm inadequately prepared him, failed to properly defend him at his deposition, and failed to provide accurate portrayal of product liability law in summary judgment motion that clients lost because of inadequate expert declaration).

DISCUSS POTENTIAL WORK PRODUCT ISSUES

- a. Advise your expert to expect that if opposing counsel asks him or her at deposition about matters protected by the work product doctrine, you will object and direct him or her not to answer (see CCP §§2018.010-2018.080; Aitken, California Evidentiary Objections §§180, 350).
- b. Work product protection is analogous to a privilege, and your failure to invoke it may result in a waiver. See Evid C §912(a); *Schaff v Superior Court* (1983) 146 CA3d 921, 924, 194 CR 546; Aitken, California Evidentiary Objections §§180-181, 350.

Prepare to Argue Protection

- a. Recognize that adept trial counsel can use work product legal principles to successfully protect his or her expert's materials and to gain discovery of an opposing expert's materials.
- b. Be sure to research and monitor this area of the law *thoroughly*.

**Further Research:** See Civil Discovery §§3.59-3.61; Jefferson's California Evidence Benchbook, chap 41 (3d ed CJA-CEB 1997); 2 Witkin, California Evidence, *Witnesses* §145 (4th ed 2000), referred to throughout this Action Guide as Witkin, Evidence; Aitken, California Evidentiary Objections §§180-181, 350; Hogan & Weber §§13.13-13.15. See Additional References, Work Product, Appendix I.

ASK FOUNDATIONAL QUESTIONS IF DEPOSITION IS VIDEO RECORDED

If you are reasonably sure that your expert will be unavailable at trial *and* you are not planning to use another expert to testify on the same subject, prepare and ask foundational questions for:

- a. Expert's opinions (see Evid C §§720, 870, 1415); and
- b. Exhibits you would have introduced through expert if expert were testifying at trial. See Evid C §§403, 405, 1401, 1410; see also step 33, below.

**Further Research:** For how to lay this foundation, see Laying a Foundation. See Expert Witness §§11.27-11.36. On foundational requirements for exhibits, see *Culpepper v Volkswagen, Inc.* (1973) 33 CA3d 510, 521, 109 CR 110 (factual showing required before court admitted film showing simulated car speed and turning). See Additional References, Foundation for Exhibits and Demonstrative Evidence, Appendix I.

Before Trial

STEP 30. DETERMINE WHETHER MOTION IN LIMINE IS APPROPRIATE

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TO EXCLUDE TESTIMONY

a. If you fear that opposing party will present expert testimony that is inadmissible or prejudicial, *e.g.*, testimony that is speculative, based on improper theories of recovery, irrelevant, or outside expert's area of expertise, make a motion in limine to exclude the testimony:

- (1) Before trial; or
- (2) As soon as you learn about such testimony.

b. A motion in limine also may be appropriate if expert intends to give opinions not previously disclosed in pretrial discovery, *e.g.*, in the following circumstances:

- (1) Trial court could preclude expert from testifying at trial on subject general substance of which was not disclosed in expert witness declaration (*Bonds v Roy* (1999) 20 CA4th 140, 83 CR2d 289);
- (2) Expert witness testimony exceeding deposition testimony was properly excluded because expert stated at deposition that he had no opinions beyond those expressed at deposition (*Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216).

**Further Research:** See *Kennemur v State* (1982) 133 CA3d 907, 184 CR 393, for a discussion concerning requirement of disclosure of proposed testimony.

HOW TO PROCEED

To make the motion (see *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 337, 145 CR 47):

- a. Ordinarily, present it orally or in writing;
- b. No advance notice is required.

Local Rules

Check local rules for motion in limine procedure, *e.g.*, see Los Angeles Ct R 8.92.

**Further Research:** See Expert Witness §§14.2-14.3.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Before Trial/STEP 31.  
CONSIDER HOW TO PRESENT YOUR EXPERT AT TRIAL

STEP 31. CONSIDER HOW TO PRESENT YOUR EXPERT AT TRIAL

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PREPARE OUTLINE

Prepare an outline of your expert witness's testimony for your use as a checklist. This will help you remember all the points you want to cover with your expert.

MORE THAN ONE EXPERT

If you want more than one expert to give cumulative testimony on the same issue, be aware that the court will likely restrict you (depending on local practice) to using only one expert on each issue.

Use Best Expert First

- a. Use your best expert first;
- b. If your first expert makes an excellent impression, you probably should not use another to offer cumulative evidence, even if court allows you to do so, because:
  - (1) With cumulative testimony, you risk possible inconsistencies in your experts' testimony, which will weaken your case; and
  - (2) You can expect opposing counsel to exploit any inconsistencies in his or her final argument.

**Further Research:** See South Bay Chevrolet v General Motors Acceptance Corp. (1999) 72 CA4th 861, 85 CR2d 301 (trial court properly excluded testimony of expert whose anticipated testimony was cumulative of subject matter covered by another expert); Horn v General Motors Corp. (1976) 17 C3d 359, 371, 131 CR 78 (five experts held cumulative); People v Buckley (1986) 185 CA3d 512, 228 CR 329 (court has wide discretion to preclude time-consuming duplication of inquiry); Aitken, California Evidentiary Objections §§130, 132.

OBTAIN CURRENT RÉSUMÉ

Obtain your expert's *updated, complete* résumé before you prepare testimony:

- a. Have copies of your expert's résumé for each member of jury and additional copies for alternates, court, and opposing counsel;
- b. Consider asking court, on basis of résumé, to declare your expert witness qualified so as to further impress jury with your expert's qualifications.

NOTE

Many judges prefer to qualify an expert outside of the jury's presence.

CONSIDER DEMONSTRATIVE EVIDENCE

- a. Work with your expert to prepare and obtain diagrams, charts, blow-ups, and photographs to illustrate points for jury (see Laying a Foundation);
- b. Do *not* rely on a blackboard; opposing counsel will probably erase it.

**Further Research:** See Additional References, Foundation for Exhibits and Demonstrative Evidence, Appendix I; People v Hood (1997) 53 CA4th 965, 62 CR2d 137 (admissibility of computer animations for limited purpose of illustrating expert's testimony).

JUDGE'S PERSPECTIVE

If your case is worth the cost of using well-prepared computer-simulated evidence narrated by your expert (and you lay a proper foundation to introduce it into evidence), it may be very persuasive to the jury (and the judge).

By tying together all the previous expert testimony, the computer simulation should significantly increase the expert's

persuasiveness.

**Further Research:** See Evid C §1271; *Huber, Hunt & Nichols, Inc. v Moore* (1977) 67 CA3d 278, 295, 136 CR 603 (potentially confusing print-out inadmissible under Evid C §352 because there was no explanatory testimony); Aitken, California Evidentiary Objections §97.

PREPARE FINAL ARGUMENT

Consider how you will use your expert in your final argument. See Expert Witness §13.2.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Before Trial/STEP 32. PREPARE YOUR EXPERT FOR TRIAL

STEP 32. PREPARE YOUR EXPERT FOR TRIAL

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ADVISE ABOUT APPEARANCE

Because expert witnesses who have little or no trial experience may not realize the effect their appearance may have on a jury:

a. Advise your expert witness to dress conservatively and to avoid:

- (1) Jewelry;
- (2) Emblems;
- (3) Tinted glasses;
- (4) Casual clothes;
- (5) Hats;
- (6) Scarves;
- (7) Boots; and
- (8) Chewing gum.

b. Make arrangements to meet with your expert on the day that he or she is scheduled to testify, but before courtroom testimony, to check his or her appearance.

LIMIT TECHNICAL LANGUAGE

a. Remind your expert witness to avoid technical terms or terms of art, because jurors will usually not be familiar with them, and ask expert to tell you what words he or she will use to explain difficult concepts, because expert will be of no value to you if jury does not understand him or her;

b. At the same time, caution your expert not to "speak down" to jury, and to provide an intelligible explanation of opinions;

c. Remind expert to speak slowly, distinctly, and loud enough to be heard clearly by all jurors.

DISCUSS CROSS-EXAMINATION

Discuss with your expert the process of being cross-examined by opposing counsel.

Avoid Arguments

Warn expert not to be antagonistic or argumentative.

Avoid Interruptions

Remind expert not to begin answering a question until the question has been completed. There should be no talkovers!

Concede the Obvious

Advise your expert to concede the obvious—*and the unimportant*.

Give One-Word Answers

a. Explain that expert should answer questions with "yes" or "no" whenever possible, without attempting to explain.

b. Tell expert that he or she will have an opportunity to explain answers when you conduct your redirect.

- c. Caution expert that attempts to explain may make him or her appear too partisan.

#### Anticipate Questions

Tell your expert what questions you anticipate on cross-examination, so that there will be no surprises. See step 2, above, regarding possible questions about expert witness fees.

#### Adverse Literature

Make sure that your expert knows about any adverse literature:

- a. Advise expert to read it so that he or she will not be surprised;
- b. If your expert does not read adverse literature and is asked about it on cross-examination, jury may consider your expert unprepared and not as knowledgeable as opposing expert.
- c. Even if your expert does not read adverse literature, opposing counsel may cross-examine concerning a publication that has been established as a reliable authority. See Evid C §721(b).

#### Material Expert Relied On

Advise your expert that opposing counsel may obtain materials that expert relied on and may examine expert concerning these materials on cross-examination. See step 28, above, regarding requesting materials used by opponent's expert. See Additional References, Material Used by Expert to Prepare, Appendix I.

#### NOTE

Be particularly aware in federal cases that if your expert reasonably relies on inadmissible information or data to form an opinion, the expert may not relate that underlying information or data to the jury absent an advance ruling from the trial court that the probative value of the information or data substantially outweighs its prejudicial effect. Fed R Evid 703. See step 28, above, regarding requesting materials used by opponent's expert.

*Further Research:* See Evid C §721 on cross-examination generally.

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Handling Direct Examination of *Your* Expert Witness

STEP 33. DETERMINE YOUR EXPERT'S QUALIFICATIONS

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CONSIDER ASKING OPINION FIRST

Consider starting your expert witness's testimony by asking whether expert has formed any opinions, and then ask about qualifications, because:

- a. It may stimulate the jurors' interest; and
- b. Jurors may follow expert's testimony about his or her qualifications more closely.

ASK QUESTIONS TO DEMONSTRATE QUALIFICATIONS

a. Ask questions that demonstrate to court (and jury, if a jury trial) that:

- (1) Your expert is more qualified on the subject than opposing experts; and
- (2) Your expert's opinions are more credible and valid.

b. Your purpose in qualifying expert is to allow court to find expert competent to testify as an expert witness (see Evid C §§720, 870, 1418).

**Further Research:** See Additional References, Qualifications of Expert, Appendix I.

What You Show

Show that your expert is qualified to testify by asking questions revealing his or her "special knowledge, skill, experience, training, or education." Evid C §720(a); Aitken, California Evidentiary Objections §41.42.

College Degree

Keep in mind that a college degree is *not* necessary to satisfy Evid C §720(a). Aitken, California Evidentiary Objections §42.

IMPRESS JURY WITH YOUR EXPERT'S QUALIFICATIONS

Take advantage of the opportunity to impress jury with your expert's extensive qualifications by asking very detailed questions, because:

- a. Jurors are likely to compare your expert's qualifications with opposing expert's;
- b. If you show that your expert is better qualified than opposing expert, jury may consider your expert more credible, even when opposing expert offers equally credible testimony.

NEVER STIPULATE

Generally, you should not stipulate to your expert's qualifications, even if you try to stipulate to opposing experts' qualifications (unless those experts are vulnerable to attack on their qualifications).

NOTE

Be aware that *in federal court* an expert witness must convince the court that the expert is qualified before being allowed to testify. Fed R Evid 104(a).

JUDGE'S PERSPECTIVE

Counsel frequently move the court to "certify" an expert. Judges generally consider this practice to be bad form and will not agree to counsel's request. If the witness is an undeclared expert, it is more appropriate to ask the court for permission to question the witness as an expert.

If there is some question about the expert's qualifications, expect the judge to hold a sidebar discussion on whether to conduct an Evid C §405 preliminary fact hearing. See Laying a Foundation; Trial Objections, chap 20; Aitken, California Evidentiary Objections §§42, 123.

## LEADING QUESTIONS

You can ask leading questions to establish all of your expert's qualifications:

- a. In all aspects of your expert's testimony; but
- b. Select questions with caution because it generally is better not to lead the expert.

**Further Research:** See Comment to Evid C §767; People v Campbell (1965) 233 CA2d 38, 44, 43 CR 237; Chula v Superior Court (1952) 109 CA2d 24, 38, 240 P2d 398; Aitken, California Evidentiary Objections §§14-15.

## USE THE RÉSUMÉ

Use your expert's current résumé to ask questions that develop qualifications *very carefully, e.g.,* ask about:

- a. Date of birth;
- b. Place of birth;
- c. Civil status;
- d. Address;
- e. Degrees;
- f. License to practice;
- g. Certification;
- h. Teaching positions;
- i. Special training;
- j. Organizations;
- k. Honors;
- l. Publications;
- m. Papers in progress;
- n. Speaking engagements;
- o. Awards;
- p. Activities and offices;
- q. Research;
- r. Work done for legislative or congressional committees.

If a Physician

In addition to the above, if expert is a physician, also ask about:

- a. Internship training;

- b. Residencies;
- c. Hospital affiliations; and
- d. Committees.

#### EXPLAIN DETAILS OF QUALIFICATIONS

Ask your expert to explain details of qualifications, *e.g.*:

- a. Why expert received a particular honor; and
- b. What requirements had to be met before expert could become a member of a particular profession.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Direct Examination of Your Expert Witness/STEP 34. HAVE EXPERT EXPLAIN HIS OR HER OPINIONS

STEP 34. HAVE EXPERT EXPLAIN HIS OR HER OPINIONS

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EXPLAIN TERMINOLOGY

Ask expert witness to explain and define all terminology that expert uses so jury will understand testimony.

USE ANALOGIES

Request that your expert use analogies to everyday experiences to educate jury without appearing to be condescending.

USE OPEN-ENDED QUESTIONS

Use open-ended questions to develop the facts in your direct examination, *i.e.*:

- a. What;
- b. Why;
- c. Where;
- d. When; and
- e. How.

USE PHYSICAL EVIDENCE WHEN POSSIBLE

Use demonstrative and real evidence whenever possible:

How to Introduce

- a. If you are asking expert to provide evidence of an experiment or to reenact an event, you must show through foundational questions that the conditions reflected in the evidence you are offering are "substantially similar" to conditions existing at the time of the disputed fact or event (see *Culpepper v Volkswagen, Inc.* (1973) 33 CA3d 510, 521, 109 CR 110; 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§38-39).
- b. If scientific testing is involved, establish that the particular technique is generally accepted (see step 5, above, concerning whether your expert will use a new scientific technique).
- c. Ask court's permission to conduct the demonstration or to display its results.
- d. If display includes tangible evidence, *e.g.*, photographs, motion pictures, treat it as an exhibit and offer it into evidence (see Laying a Foundation).
- e. Make a record by testimonial description or physical recording of *both* the substance and result of the demonstrative evidence. For example, if an expert points to something in a model, photograph, or diagram, mark the spot with an "X," identify it by exhibit number and state: "Let the record reflect that the expert witness has just pointed to a yellow 1927 Ford."

**Further Research:** See Additional References, Foundation for Exhibits and Demonstrative Evidence, Appendix I.

Be Sure Exhibits Are Accurate

Examine any exhibits that your expert prepares to show jury, such as charts or diagrams, for proper spelling, syntax, grammar, and punctuation. If there is any error, it should be corrected before trial, or it will diminish your expert's prestige with jury.

IF EXPERTISE IS NOT REQUIRED

If your expert offers an opinion *not* requiring expert knowledge (Evid C §800), be careful that there is a proper basis for that opinion; otherwise, court can exclude it under Evid C §803. See Aitken, California Evidentiary Objections §§38-40.

## ASK FOR YOUR EXPERT'S OPINION

Ask your expert to give an opinion on an issue in the case, then ask questions about the facts on which expert bases that opinion.

### NOTE

Your expert can use material not in evidence in reaching an opinion, but material must be reliable under Evid C §801(b). *Kelley v Bailey* (1961) 189 CA2d 728, 737, 11 CR 448.

## CONSIDER ASKING FOR OPINION ON ULTIMATE ISSUE

You can ask your expert to give an opinion on the ultimate issue in the case under Evid C §805, but expert cannot give an opinion on how jury should vote. See Evid C §805.

**Further Research:** See Additional References, Ultimate Issue, Appendix I. See Aitken, California Evidentiary Objections §48.

## LIMIT QUESTIONS TO ESSENTIALS

- a. Avoid presenting to jury everything that you have learned from your expert witness.
- b. Present only what is significant to the case in the simplest manner possible so jury will understand it.

### NOTE

Be careful that your questions do not require your expert to go beyond testimony given at deposition, if the expert stated during deposition that he or she had no further opinions; such testimony may be inadmissible. See *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216 (court excluded expert's testimony that went beyond opinions expressed at deposition, at which expert stated he had no further opinions and would notify counsel if he did). But see *DePalma v Rodriguez* (2007) 151 CA4th 159, 165, 59 CR3d 479 (court allowed testimony that expanded description and interpretation of deposition testimony).

## JUDGE'S PERSPECTIVE

Avoid a situation in which your expert was deposed and you represented that he or she would testify about certain areas, and then at trial you try to elicit testimony in a *new* area. If opposing counsel objects or makes an in limine motion, the court may not allow the testimony. See *Jones v Moore, supra*.

If you counter by making your expert available immediately for a new deposition, expect the judge to be wary of your offer unless you show that the testimony relates to a minor point or there is some other very good reason for allowing the deposition and the testimony.

**Further Research:** See Expert Witness §13.8.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Direct Examination of Your Expert Witness/STEP 35. USE HYPOTHETICALS

## STEP 35. USE HYPOTHETICALS

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### HYPOTHETICAL QUESTIONS DEFINED

Hypothetical questions are those in which expert witness is asked to assume that facts and other matters testified to by other witnesses are correct, and to state an opinion based on those assumptions. See Evid C §801; Rosenberg v Goldstein (1966) 247 CA2d 25, 30, 55 CR 306; see also Aitken, California Evidentiary Objections §45.

### ADVANTAGE OF HYPOTHETICALS

Sound hypothetical questions posed to your expert allow you to argue your case to the jury with each question.

#### Base on Reasonable Inferences

You may base a hypothetical on "any reasonable inference" from the evidence. Sullivan v City & County of San Francisco (1950) 95 CA2d 745, 762, 214 P2d 82; see Aitken, California Evidentiary Objections §§43, 45.

#### May Assume Disputed Facts

a. You can assume *disputed* facts in a hypothetical if they are (Guardianship of Jacobson (1947) 30 C2d 312, 323, 182 P2d 537):

- (1) Within the "possible or probable range of the evidence"; and
- (2) Not "unfair or misleading."

b. Do *not* assume facts not in evidence or inconsistent with facts in evidence. Am-Cal Inv. Co. v Sbarlyn Estates, Inc. (1967) 255 CA2d 526, 544, 63 CR 518.

**Further Research:** See Aitken, California Evidentiary Objections §45.

#### May Use Inadmissible Evidence

You can use hearsay statements and other inadmissible evidence as part of the assumed facts in a hypothetical, as long as your expert may reasonably rely on that evidence. See Evid C §801(b); see Aitken, California Evidentiary Objections §§43, 45.

### DRAFTING PRECAUTIONS

Be careful in drafting a hypothetical so that it is not vulnerable to objections for lack of foundation. See Laying a Foundation; Trial Objections §§20.19-20.20; Additional References, Hypotheticals, Appendix I.

### GIVE COPIES TO JURY

Provide jurors with copies of hypothetical.

### ANTICIPATE JURY INSTRUCTION

Anticipate that jurors will be instructed that if a fact in the hypothetical is not established by the evidence, they should weigh the omission's effect on the opinion's value. JC Cal Civ Jury Inst 220 (CACI).

### ANTICIPATE OBJECTIONS

- a. Anticipate opposing counsel's objections to an improper hypothetical.
- b. Counsel may object to preserve the right to raise the issue on appeal, even if the objection is overruled at trial (see Waller v Southern Pac. Co. (1967) 66 C2d 201, 210, 57 CR 353).
- c. Be prepared to state on the record why the hypothetical is proper.

*Further Research:* See Expert Witness §§13.9-13.12; Aitken, California Evidentiary Objections §45.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Direct Examination of Your Expert Witness/STEP 36. USE EXPERT OPINION ON STANDARD OF PRACTICE

STEP 36. USE EXPERT OPINION ON STANDARD OF PRACTICE

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WHEN TO USE EXPERT OPINION ON STANDARD OF PRACTICE

Use expert's opinion on standard of practice in a *professional liability* case.

**Example:** In a medical malpractice action against an emergency room physician, plaintiff failed to present an expert with emergency room experience to prove the standard of practice. Court sustained objection that non-emergency room doctor was not qualified, and granted a nonsuit. See Health & S C §1799.110(c); Zavala v Board of Trustees (1993) 16 CA4th 1755, 1762, 20 CR2d 768.

HAVE EXPERT DESCRIBE STANDARD

Expert testifying on this issue can testify about:

Experience

The standard of practice based on his or her experience.

Research

- a. What expert has read on the issue; and
- b. Conversations expert has had with other practitioners in the field concerning the standard of practice.

NOTE

If the professional defendant practices in an urban area, your expert can describe the standard of practice even if he or she is from another urban area, because the standard of practice is usually the same in most urban areas (see Evans v Obanesian (1974) 39 CA3d 121, 128, 112 CR 236; Aitken, California Evidentiary Objections §42). In rural areas, the standard of practice may vary.

TESTIMONY IS CONCLUSIVE IF UNCONTRADICTED

If your case involves medical, legal, or architectural malpractice, your expert's testimony on the standard of practice will be conclusive *if it is uncontradicted*. See Engelking v Carlson (1939) 13 C2d 216, 221, 88 P2d 695 (disapproved on another issue in Siverson v Weber (1962) 57 C2d 834, 22 CR 337, and Seneris v Haas (1955) 45 C2d 811, 824, 291 P2d 915); see also Allied Prop. v John A. Blume & Assocs. (1972) 25 CA3d 848, 858, 102 CR 259; Lysick v Walcom (1968) 258 CA2d 136, 156, 65 CR 406.

NOTE

If expert testimony about standard of practice is contradicted by evidence of universal practice, the court *may* disregard the expert testimony. See Osborn v Irwin Mem. Blood Bank (1992) 5 CA4th 234, 277, 7 CR2d 101, distinguishing Engelking v Carlson (1939) 13 C2d 216, 221, 88 P2d 695 (experts' testimony outweighed by fact that defendant was meeting or exceeding national blood bank standards). See also Howard v Owens Corning (1999) 72 CA4th 621, 85 CR2d 386 (jury not required to accept uncontroverted expert witness testimony; such testimony is conclusive only if it involves standard of care in professional malpractice case).

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Direct Examination of Your Expert Witness/STEP 37. USE EXHIBITS AND DEMONSTRATIONS

STEP 37. USE EXHIBITS AND DEMONSTRATIONS

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LAY ADEQUATE FOUNDATION

- a. If you prepare an exhibit, lay an adequate foundation for use of the exhibit or demonstration at trial.
- b. If the foundation is inadequate, opposing counsel can successfully object that the exhibit or demonstration is inadmissible, *i.e.*, a complex and expensive model may be inadmissible because you have failed to lay an adequate foundation. See Laying a Foundation.

**Further Research:** See Additional References, Foundation for Exhibits and Demonstrative Evidence, Appendix I.

EVALUATE ALL ASPECTS OF EXHIBIT

Evaluate exhibit by determining whether:

- a. Information in the exhibit is inaccurate or misleading;
- b. Exhibit is informative or merely cumulative of prior testimony;
- c. Scale is inaccurate or misleading;
- d. Any captions you have used are prejudicial;
- e. Any colors you have used are prejudicial;
- f. Expert witness is able to testify that:
  - (1) He or she is familiar with the information in the exhibit and the exhibit in general (see Aitken, California Evidentiary Objections §§121-122, 124-125); and
  - (2) The exhibit accurately depicts what it purports to depict; and
- g. Set up exhibit in an empty courtroom before trial so you will know how to present it properly. See Laying a Foundation.

PREVIEW THE DEMONSTRATION

If expert is going to give a demonstration, be sure you conduct a run-through of the demonstration in advance so that you can remedy any problems:

In Courtroom

If possible, conduct demonstration in courtroom where trial is taking place when courtroom is empty.

Jurors' View

Make sure jury will be able to adequately see and hear the demonstration.

Other Issues

Make sure:

- a. That you have an electrical wall outlet that is close enough, *e.g.*, if an electrical machine is being tested;
- b. That there are blinds that block sunlight and lights that can be turned off, *e.g.*, if you are showing a film or video;
- c. That the courtroom door is wide enough to admit the demonstration, *e.g.*, a plastic model of an airplane; and

d. That you can move the exhibit into the courthouse and into the courtroom, *e.g.*, there is a freight elevator to move a motorcycle from parking lot to courtroom.

#### JUDGE'S PERSPECTIVE

Always assume that your technology will fail at the critical moment. Bring extension cords, extra light bulbs, and other materials. Always have a nontechnological back-up plan, such as papers to hand out. Practice the presentation repeatedly, especially if more than one person is needed, for example, when a second person must press a button on a computer or projector.

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Handling Opponent's Expert at Trial

STEP 38. CONSIDER WHETHER YOU SHOULD USE VOIR DIRE WITH OPPONENT'S EXPERT

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USE VOIR DIRE SELECTIVELY

After opposing counsel attempts to qualify an expert witness, decide whether to ask court to allow you to use voir dire with expert to determine whether expert should be allowed to testify under Evid C §720(b).

Avoid Alerting Opposing Counsel

Selectively use voir dire so as to avoid irritating court and jury, and educating opposing counsel about your cross-examination of experts.

Evaluate Effectiveness

- a. Consider using voir dire when expert may not be qualified on a very narrow issue involved in your case, although highly qualified in the subject generally (*Putenwen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1081, 91 CR 319); but
- b. Question of degree of expert's knowledge and expertise goes to weight of his or her testimony, *not* its admissibility, so voir dire to exclude an expert's testimony rarely will prove fruitful. See *Brown v Colm* (1974) 11 C3d 639, 642, 114 CR 128; *Chaddock v Cohn* (1979) 96 CA3d 205, 208, 157 CR 640.

**Further Research:** See Aitken, California Evidentiary Objections §§42, 123.

DETERMINE WHETHER TO USE VOIR DIRE WITH JURY PRESENT

Decide whether to conduct voir dire in or out of jury's presence (either is allowed under Evid C §402), based on your goal regarding the witness. See Aitken, California Evidentiary Objections §124.

Outside Jury's Presence

- a. If not conducted in jury's presence, voir dire may give you the opportunity to hear expert's testimony before jury hears it.
- b. You generally want to avoid allowing jury to hear questions relating to evidence you hope to exclude.
- c. If jurors are present, you risk that they will interpret a ruling by the judge admitting expert's opinion as endorsing it.

JUDGE'S PERSPECTIVE

In a case in which there has been substantial discovery, judges sometimes are reluctant to allow you to use voir dire with an opposing expert unless you represent that it will undermine a basis for the expert's opinion. But, if you so represent, you had better be able to undermine that basis! See Expert Witness §13.6.

**Further Research:** See Expert Witness §§14.4-14.7.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Opponent's Expert at Trial/STEP 39. OBJECT TO OPPONENT'S EXPERT

STEP 39. OBJECT TO OPPONENT'S EXPERT

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OBJECT TO EVIDENCE NOT IN THE RECORD

- a. Consider objecting to a hypothetical or opinion if the underlying evidence is not in the record.
- b. If you do not object, argue later in summation that the hypothetical was not based on any evidence in the record.
- c. Opposing counsel cannot correct an error by rewording the hypothetical or opinion.

**Further Research:** See Aitken, California Evidentiary Objections §§43, 45.

Not Qualified on Subject

Consider objecting if expert witness has not been qualified on the *specific* subject covered by a question. See Aitken, California Evidentiary Objections §41.

Subject Within Common Experience

You may want to object if expert witness expresses an opinion on a subject not "sufficiently beyond common experience" to warrant an expert opinion under Evid C §801(a). See Aitken, California Evidentiary Objections §41.

When Based on Opinion in Medical Record

Consider objecting if an expert witness's opinion is based on an opinion in a medical record that is inadmissible. People v Reyes (1974) 12 C3d 486, 503, 116 CR 217; People v Young (1987) 189 CA3d 891, 911, 234 CR 819; Aitken, California Evidentiary Objections §97; Aitken, *Opinions in Business Records: Are They Admissible?*, 2 Litigation in Brief 2 (Spring 1985).

OBJECT IF DIFFERENT OPINION

Object if expert is asked to give an opinion when he or she did not give the same opinion at deposition (see Jones v Moore (2000) 80 CA4th 557, 95 CR2d 216 (trial court properly excluded expert's testimony that went beyond that offered at deposition, at which expert had stated that he had no further opinions)), and:

- a. Request a conference in chambers to determine whether court is going to permit the opinion;
- b. Consider asking for a recess so you can take expert's deposition again on basis of the new opinion.

INADEQUATE FOUNDATION

Object if there is not an adequate foundation for expert witness to express an opinion, *i.e.*, expert witness:

- a. Did not directly perceive the subject matter of testimony, *e.g.*, treating physician;
- b. Was not given any information during his or her testimony, *e.g.*, hypothetical question;
- c. Was not given any information before his or her testimony, *e.g.*, medical charts.

**Further Research:** See Heiner v Kmart Corp. (2000) 84 CA4th 335, 100 CR2d 854 (trial court did not err in admitting expert testimony, in part because defendant failed to object at time evidence was introduced at trial). See Trial Objections, chap 21; Additional References, Appendix I.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/Handling Opponent's Expert at Trial/STEP 40. CROSS-EXAMINE OPPONENT'S EXPERT

STEP 40. CROSS-EXAMINE OPPONENT'S EXPERT

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PERMISSIBLE SCOPE OF CROSS-EXAMINATION

You may cross-examine an expert witness as you would any other witness, and you may also cross-examine an expert witness regarding:

- a. Qualifications;
- b. Subject to which expert testimony relates; and
- c. Matters on which expert bases his or her opinion and reasons for the opinion.

**Further Research:** See Evid C §721(a); Additional References, Appendix I.

DETERMINE WHETHER OPINION LACKS EVIDENTIARY VALUE

Determine whether opinion lacks evidentiary value. An opinion lacks evidentiary value if based on:

- a. Assumptions not supported by the record;
- b. Matters not reasonably relied on by other experts; or
- c. Factors that are:
  - (1) Remote;
  - (2) Speculative; or
  - (3) Conjectural.

**Further Research:** See Wanland v Los Gatos Lodge, Inc. (1991) 230 CA3d 1507, 1518, 281 CR 890.

USE HYPOTHETICAL

You may use hypothetical(s) to cross-examine opposing experts, *even if the assumed facts are not supported by the evidence*. Evid C §801; Dincau v Tamayo (1982) 131 CA3d 780, 798, 182 CR 855; Aitken, California Evidentiary Objections §45. See Additional References, Hypotheticals, Appendix I.

PROCEED WITH CAUTION

Proceed cautiously, remembering that expert knows far more than you do about the field (and even if expert doesn't, jury may believe that he or she does), *i.e.*:

- a. Remember that asking open-ended questions or directly attacking expert's credibility could prove disastrous for your case; and
- b. Anticipate that expert will probably be unwilling to make concessions and may be able to use your questions to further educate jury and harm your case. Expert Witness §15.1.

USE PERIPHERAL QUESTIONS TO IMPEACH

Impeach an expert in the same way you impeach a lay witness, *i.e.*:

- a. Prior inconsistent statements;
- b. Prior felony convictions;
- c. Bias, prejudice;

- d. Interest;
- e. Community reputation; and
- f. Lack of perception and recollection.

**Further Research:** See Expert Witness §5.7. See also Evid C §§403, 702, 761, 769-770, 773, 778, 788, 1100, 1324; Aitken, California Evidentiary Objections §§32, 54, 145.

#### Question Experience in Subject Area

If expert is a specialist, but the issue requires a different area of specialization:

- a. Emphasize that even though expert may have outstanding credentials, those credentials may not apply to the narrow area of expertise involved in the case; and
- b. Use this approach in final argument by comparing your expert's qualifications with opposing expert's qualifications. See Expert Witness §15.15.

#### Explore Bias

Cross-examine expert about the number of times he or she has testified for plaintiffs or defendants, or for the opposing law firm, if you know or suspect it has been excessive. See Expert Witness §15.16.

#### Explore Prior Inconsistent Testimony

If expert has been a frequent witness, ask if expert has offered opinions at other trials that are at odds with present opinion.

#### Determine Whether Hired Gun

If expert was retained only shortly before trial, argue that expert was not asked for an opinion before the case began, but hired only to confirm what party's lawyer wanted expert to say.

#### Look at Expert's Preparation

If, before rendering an opinion, expert has not seen all material possessed by or available to opposing counsel, stress this lack of preparation:

- a. Be sure that before examining witness you have reviewed all possible material that expert should have seen, *e.g.*:
  - (1) Depositions;
  - (2) If appropriate:
    - (a) Answers to interrogatories;
    - (b) Responses to requests for production; and
    - (c) Responses to requests for admissions;
  - (3) Traffic accident reports;
  - (4) Plans and specifications;
  - (5) Medical records and autopsy reports;
  - (6) Title reports;
  - (7) Accounting records;
  - (8) Real estate appraisals;
  - (9) Photographs;

(10) Maps;

(11) Handwriting exemplars;

(12) Weapons; or

(13) Other written material or tangible physical evidence, *e.g.*, products, vehicles, soil samples, blood specimens.

b. Show in your closing argument that your expert was better prepared to render an opinion, so that testimony may be given greater weight because it is based on more information and a more careful analysis.

c. Challenge basis of opposing party's expert's opinion by exploring exactly what materials were used by expert in formulating the opinion.

## JUDGE'S PERSPECTIVE

There is another reason that the attorney should be intimately familiar with all of the records in the case: A well-prepared attorney can cause an expert to lose his or her credibility when the attorney asks about a record that the expert saw, but did not study as carefully as did the attorney. Examine the extent to which the expert relied on opinions and research of others—each of those sources may be attacked.

### Review Errors and Inconsistencies in Reports

Carefully review any written findings or reports:

a. If expert has examined plaintiff under CCP §§2032.010-2032.650, a report can be required (see CCP §2032.610);

b. Any errors (including spelling, grammar, and syntax) tend to taint expert's reputation for exactness and thoroughness;

c. Seek to establish that the expert spent very little time on key tasks.

## JUDGE'S PERSPECTIVE

Adept counsel will find inconsistencies in the reports and will *always* use them as a wedge to impeach the expert.

### Call Into Question Lack of Written Notes

If expert has not made any written entries or notes, ask how expert can recall all the facts on which the opinion was based without having committed them to writing. See Expert Witness §15.13.

### Use Prior Inconsistent Testimony

If expert has given inconsistent testimony in prior depositions or in court in other cases in which expert has testified, use copies of those depositions and transcripts to impeach. See Evid C §769; Aitken, California Evidentiary Objections §§54-55.

## NOTE

You can also impeach an expert on an inconsistent statement in a publication that he or she wrote. See Expert Witness §15.25.

### Look at Interest of Corporate Employee

If expert works for a corporate party, you can cross-examine about employment to show a biased interest in outcome of the case. See Expert Witness §15.17.

### Imply That Corporation Could Not Get Employee to Testify

If expert does *not* work for a corporate party, you can imply through cross-examination that the party was unable to get an employee to testify. See Expert Witness §15.18.

### Look at Opinions Historically

If expert has testified about the same problem for the same side in many other cases, you can show expert's bias by asking if he or she has given the same opinion in those cases, *e.g.*, that in every case in which expert has testified, he or she has given an opinion that the physician acted within standard of care. See Expert Witness §15.19.

## Ask for Concession About Leading Authority

- a. If your expert witness is a leading authority in the field, ask opposing expert witness to concede it.
- b. Opposing expert may look foolish if he or she refuses to concede your expert's authority, which will enhance jury's perception of your expert witness's qualifications.

## NOTE

Consider trying to get this concession in the expert's deposition.

## Be Careful About Compensation Questions

Be careful when asking questions about compensation, because your expert is also being paid, and unless you already know that opposing expert is being excessively compensated and you can use that information to reduce expert's credibility before the jury, you risk similar questions being directed to your expert.

## SELECTIVELY ASK DIRECT QUESTIONS

Consider using direct questions selectively in the following situations:

### Testimony Is Inconsistent With Evidence

Cross-examination of expert about testimony inconsistent with *judicially noticed evidence*, *e.g.*:

- a. Government decisions;
- b. Statutes;
- c. Rules; and
- d. Laws.

**Further Research:** See Evid C §452; Expert Witness §15.25.

### Testimony Is Inconsistent With Publication in Field

Cross-examination of expert about technical, scientific, or professional text, or other publications in field that may be inconsistent with his or her testimony (see Evid C §§403, 721(b)), *e.g.*:

- a. That expert witness referred to, considered, or relied on in forming his or her expert opinion (see Additional References, Material Used by Expert to Prepare, Appendix I);
- b. If the publication has been admitted in evidence; or
- c. If you can establish that the publication is a reliable authority, *e.g.*, by getting opposing expert to admit that publication is a reliable authority, by your own expert's testimony, or by judicial notice.

## NOTE

Recognize that the expert may be reluctant to deny that he or she considered material in a leading treatise on the subject or in a college textbook that the expert used in his or her education. See Expert Witness §15.24.

## Hypothetical Questions

If expert answered a hypothetical question on direct with results unfavorable to you, pose the hypothetical with different facts favorable to your party and try to get expert to change his or her opinion based on *your* facts. See Evid C §801; Dincau v Tamayose (1982) 131 CA3d 780, 182 CR 855. Aitken, California Evidentiary Objections §49. See Additional References, Hypotheticals, Appendix I.

**Further Research:** See Expert Witness §§15.7-15.24, 15.29.

## STEP 41. APPEALS

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### CREATE APPELLATE RECORD DURING TRIAL

Cases are often decided on the opinions of expert witnesses. Create an adequate appellate record during the trial in case either you or your opponent decides to appeal. Remember that:

- a. Any issue you plan to raise on appeal must first have been submitted to the trial court; and
- b. Anything that does not make it into the record in the trial court never happened for purposes of appeal.

#### Record Should Reflect Your Expert's Qualifications

When creating a record for appeal on an expert witness issue, remember that the record should reflect the qualifications of your expert witness. You may want the appellate court to read those qualifications.

#### Record Should Reflect Your Objections and Offers of Proof

The record should also reflect your specific objections and offers of proof, and that you stated reasons supporting:

- a. Admissibility of expert witnesses' testimony;
- b. Scope of expert witnesses' testimony;
- c. Lack of foundation for opposing expert witnesses' testimony;
- d. All motions concerning any aspect of expert testimony (in writing); and
- e. All motions to have exhibits introduced into evidence.

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX A Sample Demand to Exchange List of Expert Witness

APPENDIX A  
Sample Demand to Exchange List of Expert Witness

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Attorneys for plaintiff

EDGAR ALLEN POE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EDGAR ALLEN POE,	)	No. 520642
	)	
Plaintiff,	)	DEMAND FOR EXCHANGE
	)	OF EXPERT TRIAL WITNESS
	)	INFORMATION UNDER <u>CCP</u>
	)	<u>§§2034.010-2034.730</u> AND
	)	<u>2034.210(c)</u>
vs.	)	Trial Date: June 18, 2008
	)	
A. RAVEN, et al.,	)	
	)	
Defendant(s)	)	
	)	
	)	

DEMANDING PARTY: PLAINTIFF EDGAR ALLEN POE

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

You are hereby requested to serve a list of expert witnesses, accompanied by expert witness declarations, in compliance with §§2034.010-2034.730 of the Code of Civil Procedure, not later than the date of exchange stated below. Except as otherwise provided in that section, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses at the trial.

You are also requested to produce for inspection and copying, at the time and place set forth below, all discoverable reports and writings of each identified expert witness's proposed testimony and preparations to testify.

The exchange of information and production of reports shall take place on May 19, 2008, at 10 a.m., at the office of Robert Aitken, 2437 Via Sonoma, Palos Verdes Estates, California 90274.

Dated: April 21, 2008

\_\_\_\_\_  
Robert Aitken

Attorney for Plaintiff

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX B Sample Plaintiff's Designation of Expert Witnesses

APPENDIX B  
Sample Plaintiff's Designation of Expert Witnesses

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Attorneys for Plaintiff

EDGAR ALLEN POE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EDGAR ALLEN POE

)

No. 510642

)

PLAINTIFF'S DESIGNATION OF  
EXPERT WITNESSES;  
DECLARATION OF ROBERT  
AITKEN (CCP §2034.260(c))

Plaintiff,

)

)

vs.

)

)

A. RAVEN, et al.,

)

)

Defendant(s)

)

)

)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff Edgar Allen Poe intends to call the following expert witnesses at trial:

1. William Safire, M.D.  
92 Frost Street  
San Diego, California 92123  
(619) 534-9424
2. Dylan Thomas, M.D.  
UCI Medical Center  
101 City Drive, Building 30  
Orange, California 92668  
(714) 846-2876

Plaintiff also designates every expert designated by other parties to this action and incorporates by reference the designations of the other parties.

Plaintiff reserves the right to submit the names of additional expert witnesses for the purpose of expressing an opinion on a subject to be covered by experts designated by any other party in this matter. CCP §2034.280.

Plaintiff further reserves the right to augment this expert witness designation and declaration by adding the name and address of any expert witness plaintiff has subsequently retained. CCP §2034.610(a)(1).

Plaintiff further reserves the right to amend the Declaration of Robert Aitken with respect to the general substance of the anticipated testimony of all designated expert witnesses. CCP §2034.610(a)(2).

Plaintiff further reserves the right to call at trial any expert witness, regardless of whether the expert has been previously designated by any party, to impeach the testimony of an expert witness offered by any other party at trial. CCP §2034.310(b).

Plaintiff's designated experts will be made available for deposition at a time and date mutually convenient to all parties.

Dated: May 19, 2008

Robert Aitken  
Attorney for Plaintiff

#### DECLARATION OF ROBERT AITKEN

I, Robert Aitken, declare:

1. I am an attorney at law admitted to practice before all courts of the State of California, and I am the attorney for plaintiff Edgar Allen Poe. I have personal knowledge of the following facts and if called as a witness I could and would competently testify to them.

2. This declaration is in compliance with California Code of Civil Procedure §2034.260(c).

3. Each person named in Plaintiff's Designation of Expert Witnesses has agreed to testify at trial.

4. Each expert will be sufficiently familiar with this case to submit to a meaningful deposition, including any opinion and its basis that the person will testify to at trial.

(a) William Safire, M.D. Dr. Safire is a board-certified pediatric neurologist and is expected to testify regarding the standard of care and the subjects of liability, causation, and damages. Dr. Safire's fee for deposition is \$450 per hour. Dr. Safire's curriculum vitae is attached. There is no report at this time by Dr. Safire.

(b) Dylan Thomas, M.D. Dr. Thomas is a board-certified pediatric otologist and is expected to testify regarding the standard of care and the subjects of liability, causation, and damages. Dr. Thomas's fee for deposition is \$350 per hour. Dr. Thomas's curriculum vitae is attached. Dr. Thomas's report is also attached.

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

Dated: May 19, 2008

Robert Aitken

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX C Sample Plaintiff's Supplemental Designation of Expert Witnesses

APPENDIX C  
Sample Plaintiff's Supplemental Designation of Expert Witnesses

ROBERT AITKEN, SBN 31610

2437 Via Sonoma

Palos Verdes Estates, California 90274

(310) 378-3464

Attorneys for Plaintiff

EDGAR ALLEN POE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

EDGAR ALLEN POE,	)	No. 510642
	)	
Plaintiff,	)	PLAINTIFF'S SUPPLEMENTAL
	)	DESIGNATION OF EXPERT
	)	WITNESSES; DECLARATION OF
	)	ROBERT AITKEN ( <u>CCP §2034.280</u> )
vs.	)	
	)	
A. RAVEN, et al.,	)	
	)	
Defendant(s)	)	
	)	
	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to Code of Civil Procedure §2034.280, Plaintiff Edgar Allen Poe submits the following supplemental list of expert witnesses:

1. Milton L. Davis, M.D., F.A.P.A.  
3727 West Stewart Drive  
Orange, California 92668  
(714) 826-3279

Plaintiff reserves the right to augment this supplemental expert witness designation and declaration by adding the name and address of any expert witness plaintiff has subsequently retained. CCP §2034.610(a)(1).

Plaintiff further reserves the right to amend the Declaration of Robert Aitken with respect to the general substance of the anticipated testimony of all designated expert witnesses. CCP §2034.610(a)(2).

Plaintiff further reserves the right to call at trial any expert witness, regardless of whether the expert has been previously designated by any party, to impeach the testimony of an expert witness offered by any other party at trial. CCP §2034.310(b).

Plaintiff's designated experts will be made available for deposition at a time and date mutually convenient to all parties.

Dated: May 29, 2008

Robert Aitken  
Attorney for Plaintiff

---

DECLARATION OF ROBERT AITKEN

I, Robert Aitken, declare:

1. I am an attorney at law admitted to practice before all courts of the State of California, and I am the attorney for plaintiff Edgar Allen Poe. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify to them.

2. This declaration is in compliance with California Code of Civil Procedure §2034.280.

3. Each person named in plaintiff's Supplemental Designation of Expert Witnesses has agreed to testify at trial.

4. Each supplemental expert will be sufficiently familiar with this case to submit to a meaningful deposition, including any opinion and its basis that the person will testify to at trial.

(a) Milton L. Davis, M.D. F.A.P.A. Dr. Davis is a board-certified psychiatrist and is expected to testify on the issue of the nature and extent of plaintiff's psychological damages and on the issue of causation. Dr. Davis's fee for deposition is \$350 per hour. Dr. Davis's curriculum vitae is attached. There is no report at this time by Dr. Davis.

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

Dated: May 29, 2008

---

Robert Aitken

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX D Sample Notice of Deposition and Request for Production of Documents

APPENDIX D  
Sample Notice of Deposition and Request for Production of Documents

ROBERT AITKEN, SBN 31610

2437 Via Sonoma

Palos Verdes Estates, California 90274

(310) 378-3464

Attorneys for Defendant

ANNE HATHAWAY, LTD.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OLD GLOBE THEATRE, INC.	)	No. 520269
	)	
Plaintiff,	)	NOTICE OF DEPOSITION AND
	)	REQUEST FOR PRODUCTION OF
	)	DOCUMENTS OF WILLIAM
	)	SHAKESPEARE ( <u>CCP §2034.410</u> )
vs.	)	
	)	
ANNE HATHAWAY, LTD., et al.,	)	
	)	
Defendant(s)	)	
	)	
	)	
	)	

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Anne Hathaway, Ltd., will take the deposition of expert witness William Shakespeare (deponent), under oath and before a qualified court reporter, beginning at 9 a.m., on June 23, 2008, at the office of Robert Aitken, 2437 Via Sonoma, Palos Verdes Estates, California 90274 (310) 378-3464. If the deposition is not completed on that date, it will be continued, if necessary, from day to day, excluding Sundays and holidays, until completed.

NOTICE IS FURTHER GIVEN that the deponent is requested to bring with him to the deposition the documents which are described or fall within the categories listed below that are in deponent's possession, custody, or control, or in the possession, custody, or control of deponent's agents, attorneys, employees, and/or representatives.

DOCUMENTS REQUESTED

The documents or writings to be identified and produced under this demand are as follows:

All correspondence, notes, memoranda, and reports that William Shakespeare has prepared as part of his expert retention in this matter and all records and documents reviewed by him, including, but not limited to, time records and all other physical material considered, referred to, relied on, or prepared in connection with this case.

Dated: May 19, 2008

---

Robert Aitken

Attorney for Defendant

Anne Hathaway, Ltd.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX E Deposition Subpoena for Personal Appearance and Production of Documents and Things

APPENDIX E

Deposition Subpoena for Personal Appearance and Production of Documents and Things



**SUBP-020**

ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name, State Bar number, and address</i> ):  TELEPHONE NO.: _____ FAX NO. ( <i>Optional</i> ): _____ E-MAIL ADDRESS ( <i>Optional</i> ): _____ ATTORNEY FOR ( <i>Name</i> ): _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
PLAINTIFF/PETITIONER: _____ DEFENDANT/RESPONDENT: _____	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS	CASE NUMBER: _____

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name, address, and telephone number of deponent, if known*):

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date:	Time:	Address:
-------	-------	----------

- a.  As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
  - b.  You are ordered to produce the documents and things described in item 3.
  - c.  This deposition will be recorded stenographically  through the instant visual display of testimony and by  audiotape  videotape.
  - d.  This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:

Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

Continued on Attachment 4.

5. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

6. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued: \_\_\_\_\_

\_\_\_\_\_  
 (SIGNATURE OF PERSON ISSUING SUBPOENA)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS**

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees and mileage both ways (*check one*):
  - (1)  were paid. Amount ..... \$ \_\_\_\_\_
  - (2)  were not paid.
  - (3)  were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): ..... \$ \_\_\_\_\_
- f. Fee for service: ..... \$ \_\_\_\_\_

2. I received this subpoena for service on (*date*):

- 3. Person serving:
  - a.  Not a registered California process server
  - b.  California sheriff or marshal
  - c.  Registered California process server
  - d.  Employee or independent contractor of a registered California process server
  - e.  Exempt from registration under Business and Professions Code section 22350(b)
  - f.  Registered professional photocopier
  - g.  Exempt from registration under Business and Professions Code section 22451
  - h. Name, address, telephone number, and, if applicable, county of registration and number:

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

(For California sheriff or marshal use only)  
I certify that the foregoing is true and correct.

Date:

Date:

\_\_\_\_\_  
(SIGNATURE)

\_\_\_\_\_  
(SIGNATURE)

**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX F Deposition Subpoena for Personal Appearance

APPENDIX F  
Deposition Subpoena for Personal Appearance



**SUBP-015**

ATTORNEY OR PARTY WITHOUT ATTORNEY ( <i>Name, State Bar number, and address</i> )  TELEPHONE NO.: _____ FAX NO. ( <i>Optional</i> ): _____ E-MAIL ADDRESS ( <i>Optional</i> ): _____ ATTORNEY FOR ( <i>Name</i> ): _____	FOR COURT USE ONLY          CASE NUMBER: _____
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
PLAINTIFF/ PETITIONER: _____ DEFENDANT/ RESPONDENT: _____	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE	

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name, address, and telephone number of deponent, if known*):

**1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date: _____	Time: _____	Address: _____
-------------	-------------	----------------

- a.  As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.230.)
  - b.  This deposition will be recorded stenographically  through the instant visual display of testimony and by  audiotape  videotape.
  - c.  This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2.  If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

_____ (TYPE OR PRINT NAME)	▶	_____ (SIGNATURE OF PERSON ISSUING SUBPOENA)
		_____ (TITLE)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this *Deposition Subpoena for Personal Appearance* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees and mileage both ways (*check one*):
  - (1)  were paid. Amount: ..... \$ \_\_\_\_\_
  - (2)  were not paid.
  - (3)  were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): ..... \$ \_\_\_\_\_
- f. Fee for service: ..... \$ \_\_\_\_\_

2. I received this subpoena for service on (*date*):

3. Person serving:

- a.  Not a registered California process server
- b.  California sheriff or marshal
- c.  Registered California process server
- d.  Employee or independent contractor of a registered California process server
- e.  Exempt from registration under Business and Professions Code section 22350(b)
- f.  Registered professional photocopier
- g.  Exempt from registration under Business and Professions Code section 22451
- h. Name, address, telephone number, and, if applicable, county of registration and number:

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

(For California sheriff or marshal use only)  
I certify that the foregoing is true and correct.

Date:

Date:

\_\_\_\_\_  
(SIGNATURE)

\_\_\_\_\_  
(SIGNATURE)

APPENDIX G  
Deposition Subpoena for Production of Business Records



**SUBP-010**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	<b>FOR COURT USE ONLY</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
<b>DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS</b>	

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):**

**1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:**

To (name of deposition officer):		
On (date):		At (time):
Location (address):		
<b>Do not release the requested records to the deposition officer prior to the date and time stated above.</b>		

- a.  by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
  - b.  by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
  - c.  by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. *The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*
3. **The records to be produced are described as follows:**

Continued on Attachment 3.

**4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

\_\_\_\_\_  
(TYPE OR PRINT NAME)



\_\_\_\_\_  
(SIGNATURE OF PERSON ISSUING SUBPOENA)

(Proof of service on reverse)

(TITLE)

Page 1 of 2

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

**PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS**

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:

a. Person served (*name*):

b. Address where served:

c. Date of delivery:

d. Time of delivery:

e. (1)  Witness fees were paid.

Amount: ..... \$ \_\_\_\_\_

(2)  Copying fees were paid.

Amount: ..... \$ \_\_\_\_\_

f. Fee for service: ..... \$ \_\_\_\_\_

2. I received this subpoena for service on (*date*):

3. Person serving:

- a.  Not a registered California process server.
- b.  California sheriff or marshal.
- c.  Registered California process server.
- d.  Employee or independent contractor of a registered California process server.
- e.  Exempt from registration under Business and Professions Code section 22350(b).
- f.  Registered professional photocopier.
- g.  Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

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

Date:

\_\_\_\_\_  
(SIGNATURE)

(For California sheriff or marshal use only)  
I certify that the foregoing is true and correct.

Date:

\_\_\_\_\_  
(SIGNATURE)

## APPENDIX H

Code of Civil Procedure §§2034.010-2034.730  
Exchanges of Expert Trial Witness Information

*Note: Headings have been added by CEB for your convenience.*

### 2034.010; EMINENT DOMAIN

This chapter does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.

### 2034.210; DEMAND FOR SIMULTANEOUS EXCHANGE

After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

- (a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.
- (b) If any expert designated by a party under subdivision (a) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under Section 2034.260.
- (c) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in subdivision (b) in the course of preparing that expert's opinion.

### 2034.220; WHO MAKES DEMAND AND WHEN

Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this 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.

### 2034.230; FORM AND CONTENT OF DEMAND

- (a) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this chapter.
- (b) The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange.

### 2034.240; SERVICE OF DEMAND

The party demanding an exchange of information concerning expert trial witnesses shall serve the demand on all parties who have appeared in the action.

### 2034.250; MOTION FOR PROTECTIVE ORDER

- (a) A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. This motion shall be accompanied by a declaration meet and confer declaration under Section 2016.040.
- (b) The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The protective order may include, but is not limited to, one or more of the following directions:
  - (1) That the demand be quashed because it was not timely served.
  - (2) That the date of exchange be earlier or later than that specified in the demand.
  - (3) That the exchange be made only on specified terms and conditions.
  - (4) That the production and exchange of any reports and writings of experts be made at a different place or at a different time

than specified in the demand.

(5) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of any experts as described in subdivision (b) of section 2034.210 be made by any side so created.

(6) That a party or a side reduce the list of employed or retained experts designated by that party or side under subdivision (b) of section 2034.210.

(c) If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just.

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

#### 2034.260; EXCHANGE OF INFORMATION

(a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(b) The exchange of expert witness information shall include either of the following:

(1) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(2) A statement that the party does not presently intend to offer the testimony of any expert witness.

(c) If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(1) A brief narrative statement of the qualifications of each expert.

(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(3) A representation that the expert has agreed to testify at the trial.

(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

#### 2034.270; PRODUCTION OF REPORTS AND WRITINGS

If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210.

#### 2034.280; SUPPLEMENTAL EXPERT WITNESS INFORMATION

(a) Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject.

(b) This supplemental list shall be accompanied by an expert witness declaration under subdivision (c) of Section 2034.260 concerning those additional experts, and by all discoverable reports and writings, if any, made by those additional experts.

(c) The party shall also make those experts available immediately for a deposition under Article 3 (commencing with Section 2034.410), which deposition may be taken even though the time limit for discovery under Chapter 8 (commencing with Section 2024.010) has expired.

#### 2034.290; RETENTION OF DOCUMENTS

(a) A demand for an exchange of information concerning expert trial witnesses, and any expert witness lists and declarations exchanged shall not be filed with the court.

(b) The party demanding the exchange shall retain both the original of the demand, with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged in response to the demand until six months after final disposition of the action. At that time, all originals may be destroyed unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

(c) Notwithstanding subdivisions (a) and (b), a demand for exchange of information concerning expert trial witnesses, and all expert witness lists and declarations exchanged in response to it, shall be lodged with the court when their contents become relevant to an issue in any pending matter in the action.

#### 2034.300; EXCLUSION OF EXPERT TESTIMONY

Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

- (a) List that witness as an expert under Section 2034.260
- (b) Submit an expert witness declaration.
- (c) Produce reports and writings of expert witnesses under Section 2034.270.
- (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).

#### 2034.310; UNDESIGNATED EXPERTS

A party may call as a witness at trial an expert not previously designated by that party if either of the following conditions is satisfied:

- (a) That expert has been designated by another party and has thereafter been deposed under Article 3 (commencing with Section 2034.410).
- (b) That expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion.

#### 2034.410; DEPOSITION OF LISTED EXPERTS

On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Chapters 9 (commencing with Section 2025.010), 10 (commencing with Section 2026.010), and 11 (commencing with Section 2028.010) apply to a deposition of a listed trial expert witness except as provided in this article.

#### 2034.420; PLACE OF DEPOSITION

The deposition of any expert described in subdivision (b) of Section 2034.260 shall be taken at a place that is within 75 miles of the courthouse where the action is pending. On motion for a protective order by the party designating an expert witness, and on a showing of exceptional hardship, the court may order that the deposition be taken at a more distant place from the courthouse.

#### 2034.430; EXPERT'S DEPOSITION FEES

(a) Except as provided in subdivision (f), this section applies to an expert witness, other than a party or employee of a party, who is any of the following:

- (1) An expert described in subdivision (b) of Section 2034.260.
  - (2) A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words or symbols are.
  - (3) An architect, professional engineer, or licensed land surveyor, who was involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding.
- (b) A party desiring to depose an expert witness described in subdivision (a) shall pay 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.

(c) 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.

(d) Notwithstanding subdivision (c), the hourly or daily fee charged to the tardy counsel shall not exceed the fee charged to the party who retained the expert, except where the expert donated services to a charitable or other nonprofit organization.

(e) A daily fee shall only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business that the expert would have otherwise conducted that day but for the request that the expert be available all day for the scheduled deposition.

(f) In a worker's compensation case arising under Division 4 (commencing with [Section 3201](#)) or Division 4.5 (commencing with [Section 6100](#)) of the [Labor Code](#), a party desiring to depose any expert on another party's expert witness list shall pay the fee under this section.

#### 2034.440; EXPENSES AND TRAVEL

The party designating an expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

#### 2034.450; PAYING FEES

(a) The party taking the deposition of an expert witness shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition.

(b) The expert's fee shall be delivered to the attorney for the party designating the expert.

(c) If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert.

#### 2034.460; SERVICE OF NOTICE

(a) The service of a proper deposition notice accompanied by the tender of the expert witness fee described in [Section 2034.430](#) is effective to require the party employing or retaining the expert to produce the expert for the deposition.

(b) If the party noticing the deposition fails to tender the expert's fee under [Section 2034.430](#), the expert shall not be deposed at that time unless the parties stipulate otherwise.

#### 2034.470; DISPUTED FEE

(a) If a party desiring to take the deposition of an expert witness under this article deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. Notice of this motion shall also be given to the expert.

(b) A motion under subdivision (a) shall be accompanied by a meet and confer declaration under [Section 2016.040](#). In any attempt at an informal resolution under [Section 2016.040](#), either the party or the expert shall provide the other with all of the following:

(1) Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation,

(2) The total number of times the presently demanded fee has ever been charged and received by that expert.

(3) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(c) In addition to any other facts or evidence, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall be based on, proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.

(d) In an action filed after January 1, 1994, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall also be based on, both of the following:

(1) The total number of times the presently demanded fee has ever been charged and received by that expert.

(2) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(e) The court may also consider the ordinary and customary fees charged by similar experts for similar services within the

relevant community and any other factors the court deems necessary or appropriate to make its determination.

(f) Upon a determination that the fee demanded by that expert is unreasonable, and based upon the evidence and factors considered, the court shall set the fee of the expert providing testimony.

(g) The court shall impose a monetary sanction under Chapter 7 (commencing with [Section 2023.010](#)) against any party, person, or attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

#### 2034.610; AUGMENT OR AMEND EXPERT WITNESS LIST

(a) On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to do either or both of the following:

(1) Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained.

(2) Amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give.

(b) A motion under subdivision (a) shall be made at a sufficient time in advance of the time limit for the completion of discovery under Chapter 8 (commencing with [Section 2024.010](#)) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time.

(c) The motion shall be accompanied by a meet and confer declaration under [Section 2016.040](#).

#### 2034.620; INFORMATION THE COURT CONSIDERS

The court shall grant leave to augment or amend an expert witness list or declaration only if all of the following conditions are satisfied:

(a) The court has taken into account the extent to which the opposing party has relied on the list of expert witnesses.

(b) The court has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

(c) The court has determined either of the following:

(1) The moving party would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness.

(2) The moving party failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, and the moving party has done both of the following:

(A) Sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony.

(B) Promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in [Section 2034.260](#) on all other parties who have appeared in the action.

(d) Leave to augment or amend is conditioned on the moving party making the expert available immediately for a deposition under Article 3 (commencing with [Section 2034.410](#)), and on any other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion.

#### 2034.630; SANCTIONS

The court shall impose a monetary sanction under Chapter 7 (commencing with [Section 2023.010](#)) against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust.

#### 2034.710; SUBMIT TARDY LIST

(a) On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date.

(b) A motion under subdivision (a) shall be made a sufficient time in advance of the time limit for the completion of discovery

under Chapter 8 (commencing with [Section 2024.010](#)) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time.

(c) The motion shall be accompanied by a meet and confer declaration under [Section 2016.040](#).

#### 2034.720; INFORMATION THE COURT CONSIDERS

The court shall grant leave to submit tardy expert witness information only if all of the following conditions are satisfied:

(a) The court has taken into account the extent to which the opposing party has relied on the absence of a list of expert witnesses.

(b) The court has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

(c) The court has determined that the moving party did all of the following:

(1) Failed to submit that information as the result of mistake, inadvertence, surprise, or excusable neglect.

(2) Sought leave to submit the information promptly after learning of the mistake, inadvertence, surprise, or excusable neglect.

(3) Promptly thereafter served a copy of the proposed expert witness information described in [Section 2034.260](#) on all other parties who have appeared in the action.

(d) The order is conditioned on the moving party making the expert available immediately for a deposition under Article 3 (commencing with [Section 2034.410](#)), and on any other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion.

#### 2034.730; SANCTIONS

The court shall impose a monetary sanction under Chapter 7 (commencing with [Section 2023.010](#)) against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX I Additional References

APPENDIX I  
Additional References

The references below are listed by topic and alphabetized under each heading. The numbered steps refer to the steps of this Action Guide.

**ADMISSIBILITY OF EXPERT OPINION BECAUSE OF MATERIAL ON WHICH EXPERT RELIED** (steps 28, 39-40)

Evid C §403 (preliminary facts), §721 (cross-examination of expert witnesses), §§769-770 (inconsistent statements).

**Inadmissible:**

Isaacs v Huntington Memorial Hosp. (1985) 38 C3d 112, 211 CR 356 (expert testimony stricken because expert relied on unreliable material).

Roscoe Moss Co. v Jenkins (1942) 55 CA2d 369, 130 P2d 477 (expert opinion inadmissible because material evaluated was not comparable).

Solis v Southern Cal. Rapid Transit Dist. (1980) 105 CA3d 382, 389, 164 CR 343 (expert testimony concerning accident re-creation unreliable because of time delay and excessive variables).

Williams v Volkswagenwerk Aktiengesellschaft (1986) 180 CA3d 1244, 1262, 226 CR 306 (expert testimony inadmissible when speculative, and expert not sufficiently qualified).

**Admissible:**

People ex rel Dep't of Transp. v Clouser/Wells Partnership (2002) 95 CA4th 1066, 116 CR2d 240 (finding reasonableness of expert's reliance on books, courses, other individuals in field, and his own interviews to be matter for trier of fact).

Pan Asia Venture Capital Corp. v Hearst Corp. (1999) 74 CA4th 424, 88 CR2d 118 (trial court erroneously excluded expert's cost calculation model).

People v Beeler (1995) 9 CA4th 953, 39 CR2d 607 (opinion in autopsy report concerning circumstances of death admissible because it was based on personal observation).

Aitken, California Evidentiary Objections §43.

**FOUNDATION FOR EXHIBITS AND DEMONSTRATIVE EVIDENCE** (steps 29, 34, 37)

Evid C §§403, 405, 1401, 1410.

Brake v Beech Aircraft Corp. (1986) 184 CA3d 930, 229 CR 336 (memoranda and publications of governmental agency inadmissible because of lack of similarity between accidents discussed and accident in which decedent died).

Collin v Connecticut Valley Arms, Inc. (1982) 137 CA3d 815, 187 CR 306 (experimental evidence inadmissible only if court abused its discretion).

Culpepper v Volkswagen, Inc. (1973) 33 CA3d 510, 521, 109 CR 110 (factual showing required before court admits film showing car speed and turning).

DiRosario v Havens (1987) 196 CA3d 1224, 242 CR 423 (videotape re-creating accident admissible when conditions on videotape were substantially similar to those encountered by defendant).

Ehrhardt v Brunswick, Inc. (1986) 186 CA3d 734, 231 CR 60 (videotape demonstration of water skiing accident inadmissible because it was inconsistent with the testimony of four eyewitnesses).

PG&E v Hacienda Mobile Home Park (1975) 45 CA3d 519, 119 CR 559 (photographs inadmissible because they failed to depict a similar situation).

Pasha v Board of Medical Quality Assur. (1985) 174 CA3d 439, 219 CR 778 (letter in medical disciplinary proceeding inadmissible because it was not authenticated).

People v Fudge (1994) 7 C4th 1075, 31 CR2d 321 (polygraph evidence inadmissible without foundation that it is scientifically reliable).

Aitken, California Evidentiary Objections §§121-126.

### **HYPOTHETICALS** (steps 35, 40)

Evid C §801.

Am-Cal Inv. Co. v Sharlyn Estates, Inc. (1967) 255 CA2d 526, 544, 63 CR 518 (facts not in evidence or inconsistent with facts in evidence should not be assumed in a hypothetical).

Barajas v USA Petroleum Corp. (1986) 184 CA3d 974, 229 CR 513 (trial court has discretion to determine whether there is sufficient evidence for the hypothetical question and resulting opinion).

Box v California Date Growers Ass'n (1976) 57 CA3d 266, 274, 129 CR 146 (accident report used to refresh officer's recollection inadmissible because it was privileged under Veh C §20013).

Dincau v Tamayose (1982) 131 CA3d 780, 182 CR 855 (hypotheticals appropriate in questioning expert's credibility).

Marriage of S. (1985) 171 CA3d 738, 217 CR 561 (hypothetical question can contain disputed facts).

People v Busch (1961) 56 C2d 868, 16 CR 898 (hypothetical question asked of expert witness on cross-examination may assume facts not in evidence when purpose is to test expert on his or her accuracy or competency).

People v Clark (1980) 109 CA3d 88, 93, 167 CR 51 (answer to hypothetical question might be excluded as too prejudicial under Evid C §352).

Aitken, California Evidentiary Objections §45.

### **MATERIAL USED BY EXPERT TO PREPARE** (steps 28, 32)

Lockheed Litig. Cases (2004) 115 CA4th 558, 10 CR3d 34 (no abuse of discretion to exclude expert witness's declaration because expert opinion based on speculation).

Luque v McLean (1972) 8 C3d 136, 104 CR 443 (articles and surveys inadmissible because expert did not consider, refer to, or rely on them).

Notrica v State Compensation Ins. Fund (1999) 70 CA4th 911, 83 CR2d 89 (expert could rely on technical trade publication addressing matters of interest in the industry because it was reasonably relied on by experts in field).

People v Kozel (1982) 133 CA3d 507, 184 CR 208 (manual permitted to be used in cross-examination when expert considered manual in forming opinion).

Pullin v Superior Court (2000) 81 CA4th 1161, 97 CR2d 447 (investigative results admissible even though not obtained through formal discovery under Civil Discovery Act).

Salgo v Leland Stanford Jr. Univ. Bd. of Trustees (1957) 154 CA2d 560, 317 P2d 170 (on direct examination, in malpractice case, medical texts are not admissible; on cross-examination they are admissible if expert witness has based his or her opinion either generally or specifically on the medical text).

Southland Sod Farms v Stover Seed Co. (9th Cir 1997) 108 F3d 1134 (trial court erroneously excluded expert witness testimony based in part on reliable data collected by third parties; it did not matter that expert had not personally carried out tests on which he relied).

McDonough, *The California Evidence Code: A Precis*, 18 Hastings LJ 89, 100 (1966).

Aitken, California Evidentiary Objections §§49, 54-55.

### **QUALIFICATIONS OF EXPERT** (steps 33, 39)

Evid C §§405, 720, 870, 1415.

Brown v Colm (1974) 11 C3d 639, 114 CR 128 (expert's qualifications addressed to discretion of trial court).

City of Monterey v Hansen (1963) 214 CA2d 794, 29 CR 863 (expert's testimony stricken because he was not qualified to give opinion).

Evans v Ohanesian (1974) 39 CA3d 121, 112 CR 236 (general practitioner's expert testimony admissible even though he was not a specialist, because he had knowledge of the subject).

Huffman v Lindquist (1951) 37 C2d 465, 234 P2d 34 (medical expert not qualified unless familiar with standards required of physicians under similar circumstances).

Kitzmiller v Dover Area Sch. Dist. (MD Pa 2005) 400 F Supp 2d 707, 743 (biology professors, theologians, philosophers testified as experts in case deciding whether "intelligent design" was proper subject to be taught in Pennsylvania school district).

Naples Restaurant, Inc. v Coberly Ford (1968) 259 CA2d 881, 66 CR 835 (expert's qualifications include his background concerning the subject and his access to reliable information involving it).

Petrou v South Coast Emer. Group (2004) 119 CA4th 1090, 15 CR3d 64 (in malpractice suit against emergency room physician, expert with emergency room experience within 5 years of alleged malpractice may testify).

Sinaiko v Superior Court (2004) 122 CA4th 1133, 19 CR3d 371 (disqualification of all petitioner's experts rendered medical board proceedings unfair as matter of law).

Aitken, California Evidentiary Objections §§42, 123-124, 126.

#### **NEW SCIENTIFIC TECHNIQUE (steps 5, 9)**

Frye v U.S. (DC Cir 1923) 293 F 1013, 1014; Daubert v Merrell Dow Pharmaceuticals, Inc. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786.

#### **Inadmissible:**

Cabrera v Cordis Corp. (9th Cir 1998) 134 F3d 1418 (plaintiff's experts' testimony regarding her reaction to silicone components in brain shunt was not sufficiently reliable to support admission under *Daubert*).

Domingo v T.K., M.D. (9th Cir 2002) 289 F3d 600 (expert testimony excluded in medical malpractice case because court determined that expert's unpublished theory lacked widespread acceptance, studies he relied on were not shown to apply to human operations, and his conclusion did not follow his analysis).

Habecker v Clark Equip. Co. (3rd Cir 1994) 36 F3d 278 (experts' accident simulation inadmissible in product liability case because it was unreliable under *Daubert v Merrell Dow Pharmaceuticals, Inc. (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786*).

Jinro Am., Inc. v Secure Invs., Inc. (9th Cir 2001) 266 F3d 993 (expert's testimony in trial involving Korean corporation was inadmissible because it was unreliable and included unduly prejudicial ethnic stereotyping).

People v Kelly (1976) 17 C3d 24, 30, 130 CR 144 (testimony of head of voiceprint unit did not establish that voiceprinting was a scientific technique generally accepted in relevant scientific community).

People v Leaby (1994) 8 C4th 587, 34 CR2d 663 (expert opinion regarding a horizontal gaze nystagmus test in DUI case inadmissible because there was no evidence that test had achieved general acceptance in scientific community).

People v Morris (1991) 53 C3d 152, 279 CR 720 (party must show that polygraph is accepted in scientific community as a reliable technique, or evidence is presumptively unreliable and inadmissible).

People v Sandoval (1994) 30 CA4th 1288, 36 CR2d 646 (psychologist's testimony that police lineup was unfair inadmissible).

People v Shirley (1982) 31 C3d 18, 40, 181 CR 243 (hypnotically induced testimony inadmissible).

Ramona v Superior Court (1997) 57 CA4th 107, 66 CR2d 766 (witness whose memory regarding incidents of sexual abuse was refreshed using sodium amytal could not testify, because truth of her recollections—prompted by the sodium amytal interviews—had not gained general acceptance in scientific community).

*Sorenson v Shaklee Corp.* (8th Cir 1994) 31 F3d 638 (*Daubert* test not met in products liability case involving drugs).

*U.S. v Cordoba* (9th Cir 1999) 194 F3d 1053 (district court did not abuse discretion in finding polygraph test inadmissible under *Daubert*).

*U.S. v Rincon* (9th Cir 1994) 28 F3d 921 (eyewitness identification testimony inadmissible under *Daubert*).

*U.S. v Scholl* (9th Cir 1999) 166 F3d 964 (testimony of gambling addiction expert restricted because it was unreliable and had tendency to mislead jury).

*Vadala v Teledyne Indus., Inc.* (1st Cir 1995) 44 F3d 36 (expert testimony that airplane engine failure was caused by polymerization of engine damper inadmissible under *Daubert*).

#### **Admissible:**

*Chapple v Ganger* (ED Wash 1994) 851 F Supp 1481 (neurosurgeon and neurologist's testimony admissible under *Daubert*).

*City of Tuscaloosa v Harcross Chemicals* (11th Cir 1998) 158 F3d 548, 563 (testimony of CPA admissible).

*Collin v Connecticut Valley Arms, Inc.* (1982) 137 CA3d 815, 187 CR 306 (experimental evidence inadmissible only if court abused its discretion).

*Dorn v Burlington Northern Santa Fe R.R. Co.* (9th Cir 2005) 397 F3d 1183 (error to bar defendant's expert's testimony on hedonic damages).

*In re Amber B.* (1987) 191 CA3d 682, 236 CR 623 (new scientific methodology admissible if generally accepted as reliable in scientific community).

*In re Robert B.* (1985) 172 CA3d 763, 218 CR 337 (marijuana analysis admissible because it is generally accepted in scientific community).

*Lappe v American Honda Motor Co.* (ND NY 1994) 857 F Supp 222 (expert engineering testimony in products liability case involving car accident admissible under *Daubert*).

*Metabolife Int'l, Inc. v Wornick* (9th Cir 2001) 264 F3d 832 (district court's gatekeeper function required it to apply *Daubert* test to expert testimony about Asian animal studies).

*O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1397, 55 CR3d 551 (expert testimony about proper methodology for case control study not subject to *Kelly-Frye* analysis).

*Padillas v Stork-Gamco, Inc.* (3d Cir 1999) 186 F3d 412, 417 (vacating trial court's ruling excluding report).

*People v Brown* (2001) 91 CA4th 623, 110 CR2d 750 (evaluating whether DNA evidence was properly admitted against defendant; question of whether adequate scientific procedures were followed in DNA profiling is reviewed for abuse of discretion).

*People v Farnam* (2002) 28 CA4th 107, 121 CR2d 106 (fingerprint identification based on computer results passes *Kelly* test).

*People v Gadlin* (2000) 78 CA4th 587, 92 CR2d 890 (expert testimony on intimate partner battering, otherwise known as battered women's syndrome, admissible).

*People v Hill* (2001) 89 CA4th 48, 107 CR2d 110 (DNA testing using generally accepted methods need not be subject to *Kelly-Frye* analysis to determine its scientific reliability).

*People v Killebrew* (2002) 103 CA4th 644, 126 CR2d 876 (expert witness testimony regarding gang behavior is admissible).

*People v Gonzalez* (2006) 38 CA4th 932, 44 CR3d 237 (gang expert's opinion admissible in murder trial and *People v Killebrew* interpreted as only "prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.>").

*People v Nolan* (2002) 95 CA4th 1210, 116 CR2d 331 (urinalysis passes *Kelly* test).

*People v Reeves* (2001) 91 CA4th 14, 109 CR2d 728 (polymerase chain reaction (PCR) testing has received general acceptance in scientific community; such acceptance validates use of product rule in calculating PCR profile frequencies).

People v Reilly (1987) 196 CA3d 1127, 242 CR 496 (electrophoretic testing of dried bloodstains generally accepted in scientific community).

People v Soto (1999) 21 C4th 512, 88 CR2d 34 (unmodified product rule, as applied in DNA forensic analysis, generally accepted in relevant scientific community, and calculations made using rule are admissible).

People v Stoll (1989) 49 C3d 1136, 265 CR 111 (psychologist's expert opinion testimony (based on standardized personality tests and an interview) that defendants were not sexually deviant was not a new scientific technique of unproven reliability, and therefore was admissible).

People v Ward (1999) 71 CA4th 368, 83 CR2d 828 (expert witness's medical testimony based on psychological evaluation admissible).

People v Wash (1993) 6 C4th 215, 24 CR2d 421 (expert testimony regarding electrophoretic testing of semen admissible under *Kelly*).

People v Webb (1993) 6 C4th 494, 24 CR2d 779 (expert testimony regarding laser analysis of fingerprints admissible under *Kelly*).

People v Williams (2000) 78 CA4th 1118, 93 CR2d 356 (expert testimony about intimate partner battering, otherwise known as battered women's syndrome, admissible even though no pattern of abuse shown).

*Stilwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187, 1192 (metallurgist's testimony about nail in medical device admissible to show that device was poorly manufactured and could have been designed to last longer).

Texaco Producing, Inc. v Kern County (1998) 66 CA4th 1029, 78 CR2d 433 (expert testimony of tax assessor's experts based on technique that was neither scientific nor new, and therefore was admissible).

*U.S. v Hankey* (9th Cir 2000) 203 F3d 1160 (testimony of police gang expert on gang mores and behavior admissible under *Daubert*).

*Zuchowicz v U.S.* (D Conn 1994) 870 F Supp 15 (expert testimony on pulmonary hypertension, pharmacology, and toxicology admissible under *Daubert* in medical malpractice case).

Aitken, California Evidentiary Objections §44.

#### ULTIMATE ISSUE (step 34)

Evid C §805.

Chateau Chamberay Homeowners Ass'n v Associated Int'l Ins. Co. (2001) 90 CA4th 335, 108 CR2d 776 (expert opinion on ultimate question of whether insurer had proper cause to contest insured's claim was improper; whether there was genuine issue was for court, not jury).

Downer v Bramet (1984) 152 CA3d 837, 199 CR 830 (attorney incompetent as expert concerning whether property was community or separate because it was the ultimate issue).

Ecco-Phoenix Elec. Corp. v Howard J. White, Inc. (1969) 1 C3d 266, 81 CR 849.

Kinney v County of Contra Costa (1970) 8 CA3d 761, 87 CR 638.

Kotla v Regents of Univ. of Cal. (2004) 115 CA4th 283, 9 CR3d 898 (expert testimony that employer was substantially motivated by discriminatory bias circumvented fact-finder's decision-making process).

Paez v Alcoholic Beverage Control Appeals Bd. (1990) 222 CA3d 1025, 272 CR 272.

Piscitelli v Friedenberq (2001) 87 CA4th 953, 105 CR2d 88 (in legal malpractice action, expert could not opine on ultimate issue of what would have happened in underlying arbitration had it taken place).

People v Brown (1981) 116 CA3d 820, 828, 172 CR 221.

People v Rocha (1996) 48 CA4th 1060, 56 CR2d 212 (expert can testify on ultimate issue, but cannot give pure legal opinions).

People v Wilson (1944) 25 C2d 341, 153 P2d 720 (expert can be asked question coinciding with ultimate issue).

DBJJI, Inc. v National City Bank (2004) 123 CA4th 530, 541, 19 CR3d 904 (expert testimony on meaning of Uniform Customs and Practices for Documentary Credits (UCP)).

Self v General Motors Corp. (1974) 42 CA3d 1, 9, 116 CR 575.

Wells Truckways v Cebrian (1954) 122 CA2d 666, 265 P2d 557 (expert opinion admissible when it involves ultimate facts).

Aitken, California Evidentiary Objections §48.

## **WORK PRODUCT** (steps 8, 20, 29)

CCP §§2018.010-2018.080.

Armenta v Superior Court (2002) 101 CA4th 525, 124 CR2d 273 (written report prepared on behalf of two parties was protected under former CCP §2018 (now CCP §§2018.010-2018.080) as work product; qualified privilege could not be waived by one of the parties, which settled its claim).

National Steel Prods. Co. v Superior Court (1985) 164 CA3d 476, 210 CR 535 (three-part in camera procedure for determining whether work product).

Kizer v Sulnick (1988) 202 CA3d 431, 248 CR 712.

## **Not Work Product**

Jasper Constr., Inc. v Foothill Jr. College Dist. (1979) 91 CA3d 1, 16, 153 CR 767 (material obtained or prepared by retaining a lawyer not work product).

Shepherd v Superior Court (1976) 17 C3d 107, 130 CR 257 (work product privilege does not protect criminal investigation result in subsequent civil action).

## **Work Product**

Aetna Cas. & Sur. Co. v Superior Court (1984) 153 CA3d 467, 200 CR 471 (files of attorney for insurance company might be protected by work product rules in action by insured against insurer for bad faith denial of insurance coverage).

City of Long Beach v Superior Court (1976) 64 CA3d 65, 80, 134 CR 468 (interrogatory seeking names of witnesses proper, but names of witnesses who will be called to testify at trial nondiscoverable because privileged work product).

Fellows v Superior Court (1980) 108 CA3d 55, 63, 166 CR 274 (work product privilege does not terminate simply because litigation or matter in which attorney's work product was created has come to an end).

Greyhound Corp. v Superior Court (1961) 56 C2d 355, 15 CR 90 (witness statements discoverable on a showing of good cause).

GT Inc. v Superior Court (1984) 151 CA3d 748, 198 CR 892 (trial court can impose protective order specifying that documents of defendant obtained through discovery be produced to plaintiff's counsel only—not to plaintiff).

H & M Assocs. v City of El Centro (1980) 109 CA3d 399, 167 CR 392 (public disclosure of private facts might violate constitutional right to privacy).

Lasky, Haas, Cobler & Munter v Superior Court (1985) 172 CA3d 264, 218 CR 205 (communications between lawyers in firm protected as lawyer's work product if in writing and not communicated outside firm).

Popelka v Superior Court (1980) 107 CA3d 496, 165 CR 748 (in an action for malicious prosecution, attorney's writings absolutely privileged as work product even though defense was probable cause).

Roberts v Gulf Oil (1983) 147 CA3d 770, 195 CR 393 (oil company did not have standing to assert right to privacy under California Constitution; corporations do not have fundamental rights of privacy).

Rodriguez v McDonnell Douglas Corp. (1978) 87 CA3d 626, 648, 151 CR 399 (attorney's investigator's notes inadmissible as impeachment evidence when opposing party sought to introduce them, because parties should be precluded from taking "unfair advantage" of opponent's work product at trial as well as in discovery).

Rumac, Inc. v Bottomley (1983) 143 CA3d 810, 192 CR 104 (work product privilege absolutely protects attorney's writing while acting in a nonlitigation legal capacity, such as business negotiations).

Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 123 CR 283 (contentions subject to discovery, but not legal theory behind contention).

Suezaki v Superior Court (1962) 58 C2d 166, 178, 23 CR 368 (if material sought is work product, court must consider that before allowing discovery).

Travelers Ins. Cos. v Superior Court (1983) 143 CA3d 436, 453, 191 CR 871 (in a legal malpractice action, court would have to conduct an in camera inspection of attorney's insurer's file, compiled while he was still representing plaintiff, to determine whether it contained work product).

Aitken, California's Right to Privacy: Six Discovery Objections, California Litigation (1989).

Aitken, California Evidentiary Objections §§180-181, 350.

#### **ADDITIONAL RESOURCES:**

Babcock & Bloom, Getting Your Message Across: Visual Aids and Demonstrative Exhibits in the Courtroom, 27 Litigation 41 (Spring 2001).

Brown & Weiner, *Digital Dangers: A Primer on Electronic Evidence*, 30 Litigation 24 (Fall 2003).

Brunet, *Experts in Summary Judgment Motions*, 16 Litigation 36 (Spring 1990).

Carlson, *Getting a Grip on Experts*, 16 Litigation 36 (Summer 1990).

Corless, *The Case for Early Expert Disclosure*, 18 California Litigation (2005).

Hewitt, *Preserving and Assembling the Record for Appeal*, 15 Litigation 8 (Spring 1989).

Levy, *Scientific Evidence After Daubert*, 22 Litigation 48 (Fall 1995).

Michaels, *The Expert Who Walked Off Angry*, 17 Litigation 27 (Summer 1991).

Pannill, *Appeals: The Classic Guide*, 25 Litigation 6 (Winter 1999).

Pilkington, Handling Testimony on Computerized Records, 15 Litigation 13 (Summer 1989).

Rylaarsdam, *Making a Record on Appeal*, 9 California Litigation (Winter 1996).

Shaughnessy, *Daubert After a Decade*, 30 Litigation 19 (Fall 2003).

Suplee & Woodruff, Talking with Experts, 19 Litigation 8 (Fall 1992).

Walbot & Landy, Pointers on Preserving the Record, 25 Litigation 31 (Winter 1999).

Wawro, *Effective Presentation of Experts*, 19 Litigation 3 (Spring 1993).

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX J Checklist: Expert Assistance on E-Discovery

APPENDIX J

Checklist: Expert Assistance on E-Discovery

In discovery of evidence stored in electronic form, use an expert to advise on:

- Preliminary discovery to locate data, including crafting questions on:
  - locations of file;
  - custodians;
  - archival and record destruction policies; and
  - identity of Information Technology Manager.
- Possible types of data such as:
  - text;
  - graphics (including those that do not normally print);
  - server logs;
  - metadata, such as author, date edited;
  - e-mail headers; and
  - routing information.
- Possible types of files, including:
  - txt;
  - pdf;
  - rtf;
  - Word; and
  - various proprietary formats.
- Possible location of media, including:
  - hard drives;
  - zip drives;
  - portable USB drives;
  - floppy drives;
  - lap tops;
  - personal computers;
  - cell phones;
  - servers;
  - back ups;

- third party locations such as:
- offsite storage;
- banks; and
- telecommunications providers.
- Determining existence of, scope, and arrangement of data (including deleted data);
- Searching for and retrieving data, including hidden or deleted data;
- Means by which data (including metadata) can be forged;
- Decryption of data;
- Sufficiency of discovery responses, including:
  - gaps in data; and
  - legitimacy of opposing party's objections of undue burden.

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX K Sample Letter Requesting Preservation of Electronic Evidence

APPENDIX K  
Sample Letter Requesting Preservation of Electronic Evidence

Dear Counsel,

I am advised that you have custody, control, and/or possession of electronically stored evidence, including, but not limited to, all invoices, receipts, bills of lading, and memoranda involving the commercial transaction which occurred between Frankenstein and Dracula on July 1, 2, 3, and 7, 2008, in the above entitled case.

This electronically stored evidence constitutes "writings" under Section 250, Evidence Code. Do not delete, modify, change, move, transfer, or alter in any manner whatsoever any of these "writings" and do not move or transfer any of these "writings" to any disk during the pendency of this action. Retain all electronically stored evidence in a safe place.

Very truly yours,

\_\_[Signature]\_\_

\_\_[Typed name]\_\_  
Attorney for \_\_[name]\_\_

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**Source:** Civil Litigation/Handling Expert Witnesses in California Courts (Action Guide)/APPENDIX L Electronic Discovery Resources and Cases

APPENDIX L

Electronic Discovery Resources and Cases

**RESOURCES**

Best, *E-Discovery Basics*, 18 California Litigation 28 (2004); <http://californiadiscovery.findlaw.com/index.htm>

National Center for State Courts, <http://www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=ElDisc> (electronic discovery reports and recommendations)

<http://www.thesedonaconference.org/> (links to principles in managing e-discovery, glossary, and advice on retaining experts in the field; Sedona guidelines)

<http://www.abanet.org/lpm/lpt/articles/ftr07043.html> (on vetting e-discovery vendors, July 2004, on website of ABA's law practice management section)

<http://www.discoveryresources.org/> (information, resources, and news about electronic discovery with national focus)

<http://www.abanet.org/lpm/lpt/articles/ftr07041.html> (article on "roundtable" among electronic discovery experts, July 2004, on website of ABA's law practice management section)

[http://www.abanet.org/litigation/issuecenter/issue\\_ediscovery.html](http://www.abanet.org/litigation/issuecenter/issue_ediscovery.html) (ABA Report)

Many larger law firms have useful materials and recent case summaries on their web sites; see, *e.g.*, <http://www.ediscoverylaw.com/>

**CASES**

*Anti-Monopoly v Hasbro, Inc.* (SD NY 1995) 1995 US Dist Lexis 16355 (both hard copy and electronic version of documents discoverable)

*AdvantaCare Health Partners v Access IV, Inc.* (ND Cal 2005) 2005 US Dist Lexis 12794 (computer forensics and spoliation; case noted as "Not for citation")

*Columbia Valley Regional Med. Ctr. v Bannert* (Tex App 2003) 112 SW3d 193 (using computer expert to determine source of electronic evidence)

*Dodge, Warren & Peters Ins. Serv., Inc. v Riley* (2003) 105 CA4th 1414, 130 CR2d 385 (injunction ordered requiring preservation of electronic evidence pending discovery)

*In re Bristol-Myers Squibb Sec. Litig.* (D NJ 2002) 205 FRD 437 (both hard copy and electronic version of documents discoverable)

*Toshiba America Electronics Components, Inc. v Superior Court* (2004) 124 CA4th 762, 21 CR3d 532 (shifting cost of producing electronic discovery to demanding party)

*U.S. v Philip Morris USA Inc.* (D DC 2004) 327 F Supp2d 21 (monetary and evidentiary sanctions for failure to preserve electronic evidence)

*Zubulake v Warburg* (SD NY 2003) 220 FRD 212 (sanctions for failure to preserve electronic evidence)

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