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An expert witness can make or break a case. A good expert grabs the jury's attention and offers the moral authority of a saint. A bad expert can turn the tide against the hiring party and torpedo a case.

This crucial aspect of a case starts, and sometimes ends, with the disclosure of expert witnesses pursuant to California Code of Civil Procedure § 2034. The California Legislature created a detailed process for compelling parties to identify experts and to conduct discovery regarding their opinions.

[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] ... [¶] ... the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions. (1 Hogan & Weber, Cal. Civil Discovery (1997) Expert Witness Disclosure, § 10.1, p. 525.)

However, as this article will discuss, California Code of Civil Procedure § 2034 provides the practitioner with several loopholes that can frustrate the general purpose of expert disclosures. While section 2034 clearly was intended to take the game-playing out of planning for expert witness opinions at trial, it creates plenty of room for new game-playing on all sides.

A. RIGHT TO DEMAND EXPERTS

Any party has the right to demand a simultaneous exchange of expert witness information. Many offices routinely do this demand at the last possible moment, which is generally is no later than 70 days before trial. (See Code Civ. Proc. § 2034(b).) Rather than waiting until the last minute and potentially losing your right to obtain expert disclosures from the other side, demanding expert disclosure as soon as the case is set for trial avoids the problem. Good office policy suggests sending a demand for disclosure as soon as the trial date is set. This way you never have to worry about missing the deadline.

B. DISCLOSURE OF EXPERTS

Upon the demand of any party, all the other parties must exchange expert witness information. (Code Civ. Proc. § 2034(f).) This disclosure requires you to provide the name and address of any experts you intend to call at trial, and you must provide a declaration identifying the "general substance" of the expert's testimony for particular types of experts. (Code Civ. Proc. § 2034(f)(2)(B).)

This section also requires that the designating attorney make the affirmative representation that the "expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition." (Code Civ. Proc. § 2034(f)(2)(D).) In a perfect world, the expert disclosure would accurately describe all experts intended to be called by one side and give the other party fair notice as to all opinions of these experts. However, living in an imperfect world, this is rarely the case.

The first game that is often played involves nominating many more experts than you reasonably intend to call. This game is often played by counsel who believe it will intimidate their opponents if they designate fifteen experts on a slip and fall case. Fear of incurring the expense of taking all the expert depositions, they reason, will cause the case to settle. Whether this has ever worked is unknown, but the practice still continues. While the other party has a right to bring a motion for protective order seeking exclusion of cumulative testimony, this is a time-consuming and costly procedure that is unlikely to occur right before a trial. (Code Civ. Proc. § 2034(E)(6).)

C. SUPPLEMENTAL DISCLOSURES

The second game that is often played regarding the disclosure of expert witnesses involves the invocation of the rule allowing a party to provide a statement that the party "does not presently intend to offer the testimony of any expert witness." (Code Civ. Proc. § 2034(f)(B).) Does this mean the party has no intention of rebutting the other experts at trial? Normally the answer is no. The party simply wants to wait until all others have disclosed experts, and then supplementally disclose their own experts 20 days later. (Code Civ. Proc. § 2034(h).) This can give tactical advantages concerning priority in depositions.1

While "[l]ate disclosure of experts ... frustrates the very purposes of the discovery statutes ..." there unfortunately appears to be no prohibition against such a practice. (See Kennedy & Martin, Cal. Expert Witness Guide (Cont. Ed. Bar 1998) § 10.18, at p. 268.)

Under subdivision (h), the only limitations on the right to supplemental disclosure are (1) that the party originally engaged in the disclosure, even by way of a "no experts" statement, and (2) that testimony of the supplemental expert relates to a subject matter identified by the other side in its designation. (Code Civ. Proc. § 2034(h).) Therefore, if a party fails to do any disclosure at all, that party can be prohibited from doing the supplemental disclosure. However, if the party served a

document indicating no intention to call any expert witnesses at that time, that party apparently has the right to supplement this document with a whole list of experts to give opinions in the subject matters disclosed in the opposing parties' lists.

This procedure is most unfair to plaintiffs because they must disclose experts to meet their burden of proof. However, it can also work to the defendant's disadvantage since the defendant can only disclose experts covering the areas of anticipated opinion offered by the other side and may, therefore, be precluded from submitting expert testimony on some defenses.

D. DEPOSITION OF EXPERTS

1. Location and Cost of Depositions

If one side discloses an expert who is "specially retained" or a party or an employee of a party, the designating party must produce that expert for deposition within 75 miles of the courthouse. (Code Civ. Proc. § 2034(i)(1).) The noticing party need only pay the expert a reasonable hourly rate for actual deposition time. Therefore, the cost of hiring out-of-town experts can add up quickly. The party retaining those experts must pay the cost of travel to and from the deposition location. This can be an important consideration, depending on the size of the case.

2. Document Request With Deposition Notice.

California Code of Civil Procedure § 2034 makes clear what documents may be requested of an expert witness at deposition. The Code requires that the parties exchange "all discoverable reports and writings" that are "made in the course of preparing that expert's opinions" when a party includes that request in the demand for exchange of expert information. (Code Civ. Proc. §§ 2034(a)(2) and (g).) The Code does not specify any documents other than these that may be compelled for inspection or production through the deposition notice alone. Some expert deposition notices provide a laundry list of documents including requests for any prior articles on the subject, papers, lectures and many other items that were not "made in the course of preparing that expert's opinions." Such requests should be objected to. Those documents, however, can be obtained through the service of a subpoena on the expert. (See, Weil & Brown, California Practice Guide: Civil Procedure Before Trial (Rutter 2001) ¶ 8:1695.1.)

E. PREPARATION FOR EXPERT DEPOSITIONS

1. Not Providing Sufficient Information Concerning an Expert

Probably the most frequently-violated provision regarding the designation of experts concerns the representation of the counsel under oath that the expert will

be sufficiently familiar with the case for deposition. Litigation practice generally consists of running around shortly before a disclosure is due and finding experts needed for the case. Often, preparation of the experts takes place shortly before the deposition when the expert is handed five inches of documents one hour before a deposition and is expected to immediately know the case inside and out.

While experts are sometimes hired early on and have months to develop their theories, in the real world of litigation more often than not, experts do not have all the information necessary before a deposition. This lack of preparation could be fatal to a case.

Recent case law confirms the obvious: if an expert declaration does not give warning that the expert will testify as to a specific area or topic, and the expert does not testify regarding that topic at deposition, the expert will likely be precluded from rendering any opinion on that topic at trial.

The Supreme Court in Bonds v. Roy (1999) 20 Cal.4th 140 [83 Cal.Rptr.2d 289] came down firmly on the side of giving the other party fair notice of the subject matter of the experts' opinions. In Bonds, the Supreme Court upheld the trial court's ruling precluding an expert from testifying at trial as to the standard of care of a physician defendant because the plaintiff's expert declaration said the expert would address only the issue of damages.

Jones v. Moore (2000) 80 Cal.App.4th 557 [95 Cal.Rptr.2d 216] extended the rationale of Bonds to the situation where the declaration was arguably broad enough to cover testimony concerning a breach of the standard of care. However, the expert was specifically asked if he had any additional opinions and stated he did not, having never rendered any opinion at deposition related to standard of care issues. The court held this failure to raise the opinion at the expert deposition – when asked – precluded the expert from testifying as to any additional opinions.

Therefore, the risk of under-preparing your experts is clear: possible preclusion of necessary opinions at trial.

2. Providing Too Much Information Concerning an Expert

Clearly, any expert must be provided basic information sufficient to render an opinion concerning the case. As mentioned before, any documents relied upon or given to the expert are discoverable. There is a common practice among some attorneys to provide an expert with every document produced in the case on the theory that surely in that stack of materials the expert will find the perfect theory of liability or defense of the case. The burden and expense resulting from this practice is generally compounded by the same expert adding reams of their own materials to the file, such as books and articles. While the sheer size may overwhelm some opponents the risks of this practice have to be considered.

The risk results from the Evidence Code. If another party's expert testifies that hearsay evidence, such as books or articles, was "referred to, considered, or relied upon," in forming the opinion, the opposing party may read any portion of that document during cross examination of the expert. (See Evid. Code § 721(b)(2).)

Therefore, the large stack of materials becomes a weapon for the other side, without any real benefit to the party that hired the expert. The expert cannot explain the details contained in the hearsay documents, yet can be cross-examined without limitation by the other side if any document contains items that are not helpful to the expert's opinions.

Do be sure, however, to give your expert all the relevant documents. There is nothing worse than having your expert express a definitive opinion in deposition and then be confronted with a document that undercuts that opinion which the expert has never seen – although you have.

3. The Expert Testimony That Will Not Die

If an expert deposition goes badly for one side, they have more to fear than simply having no expert to rely on with respect to that subject matter at trial. Pursuant to subdivision (m) of the California Code of Civil Procedure § 2034, at trial any party has the right to offer the opinion testimony of any expert whose deposition is taken prior to trial. Therefore, if an expert is unprepared for deposition, and "gives away the store," any party has a right to call that expert at trial to express those opinions. If that expert cannot be located or is out of state, the opposing party has the right to simply read the deposition at trial. (See Code Civ. Proc. § 2025(u)(3)(B).)

F. EXPERT OPINIONS NOT REVEALED IN THE DISCLOSURE DECLARATION

1. Distinction Between "Retained" and "Non-Retained"

Evidence Code § 800 generally holds that any person not testifying as an expert is limited in testifying to those opinions that are "[r]ationally based on the perception of the witness." This is generally related to issues such as the speed a car was traveling or similar opinions within common knowledge. Normally, if the additional information concerning a witness is not disclosed in the declaration portion of the expert designation, that witness is limited to opinions as identified in Evidence Code § 800 and cannot give "expert" opinion.

However, California Code of Civil Procedure § 2034 as interpreted by the Supreme Court allows an exception that is quite large in its scope. In Schreiber v. Kiser (1999) 22 Cal.4th 31 [91 Cal.Rptr.2d 293], the California Supreme Court addressed the following question: If a treating physician is identified as a "non-

retained" expert witness, but no expert declaration is provided describing the anticipated testimony, may that expert testify as to expert opinions at trial beyond the limitations of Evidence Code § 800?

Although California Code of Civil Procedure § 2034 only implicitly, but not explicitly, makes a distinction between "retained" and "non-retained" experts, the practice of identifying experts in this manner has existed for years. (See Hurtado v. Western Medical Center (1990) 222 Cal.App.3d 1198 [272 Cal.Rptr. 324].) The Court in Schreiber examined the practice and determined that, at least as to treating doctors, they are not "retained" in the traditional sense and that no attorney's declaration in the expert disclosure statement is necessary. The Court concluded that:

[T]o the extent a [treating] physician acquires personal knowledge of the relevant facts independently of the litigation, his identity and opinions based on those facts are not privileged in litigation presenting "an issue concerning the condition of the patient." [Citations.] For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work. (Schreiber, supra, 22 Cal.4th at 39.)

Therefore, any treating doctor who is identified as a non-retained expert witness by any party has the right to testify at trial concerning any expert opinions even in the absence of any expert declaration. The recent Second District opinion in Kalaba v. Gray (2002) 95 Cal.App.4th 1416 [116 Cal.Rptr.2d 570], confirms that parties intending to offer the opinion testimony of a "non-retained" expert witnesses at trial must "list" each such witness as is required by subdivision (f)(1) of Code of Civil Procedure § 2034, even though there is no requirement that the attorney's declaration portion of the designation include information about those non-retained experts. The Kalaba court rejected the use of a generic phrase attempting to designate "all past or present examining and/or treating physicians," and rejected the plaintiff's argument that her answers to interrogatories supplied enough information that they should be considered to be in substantial compliance with the requirements of subdivision (f)(1).

2. Impeachment Experts

The other manner in which non-disclosed experts may testify is for impeachment – but the expert is limited to testifying that a foundational fact relied upon by a prior expert is either incorrect or nonexistent. (See Code Civ. Proc. § 2034(m); Howard Contracting, Inc. v. G. A. MacDonald Construction Co. (1998) 71 Cal.App.4th 38, 53 [83 Cal.Rptr.2d 590]; Fish v. Guevara (1993) 12 Cal.App.4th 142 [15 Cal.Rptr.2d 329].) This exception is interpreted very narrowly by the courts. Although the distinction between "fact" and "opinion" may be difficult to

determine, trial courts are to strictly construe the term "foundational fact" so as to "prevent a party from offering a contrary opinion of his expert under the guise of impeachment." (Kennemur v. State of California (1982) 133 Cal.App.3d 907, 924 [184 Cal.Rptr. 393].) Based on this admonition, attempting to introduce expert witness testimony into evidence by way of subdivision (m) is a risky business, to say the least.

F. CONCLUSION

In conclusion, no statute can remove all the gamesmanship from expert witness testimony. However, California has, all in all, a workable system that does allow each side to be prepared for expert witness testimony.

1 Basham v. Babcock (1996) 44 Cal.App.4th 1717 [52 Cal.Rptr.2d 456], however, prevents the supplemental disclosure of another expert to replace one who was previously designated. In other words, a party cannot name one expert, then withdraw that expert only to supplementally disclose another expert on the same subject.