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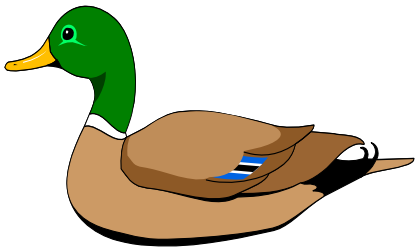

Do You Have All Your Ducks (Experts) in A Row?
By Katherine L. Gallo and Christopher E. Cobey

Code of Civil Procedure Section 2034 sets forth the requirements for disclosing experts. However, many civil practitioners are not taking this statute seriously enough and can get caught at trial with limitations on their expert's testimony or with no experts at all. Here are some typical scenarios that we have encountered:

Scenario #1: *It is the week before you have to disclose experts and you realize that you haven't retained anybody. You frantically talk to other attorneys in the office, make a series of phone calls to fellow lawyers and even possibly do a jury verdict check. After giving the matter a few hours of attention you compile a list of potential experts. You call the potential expert and speak to her for ten minutes. After giving her a thumbnail sketch of the case, she agrees to become your retained expert. You advise the expert you will contact her again in a couple of weeks and that you will be forwarding some material to her. You then prepare and serve your expert disclosure.*

According to C.C.P. Section 2034 (f)(2), the expert declaration requires counsel to state that each expert listed is familiar with the case and is ready to be deposed. This statute was an attempt to guarantee that, when an expert's deposition is taken, the expert is prepared to testify as fully then as he or she would be at trial. The way the statute reads, the expert should be ready to testify as to his trial testimony on the day the expert disclosure is served.

However, that is not how it happens in real life, as this scenario points out. Many of the strict requirements set forth in C.C.P. ' 2034 go by the wayside due to the practical realities of litigation--taking all depositions during a 25-day span, dealing with experts' schedules and the fact that one expert's opinion relies on another. In ***Stanchfield v. Hammer Toyota, Inc.*** (1995) 37 Cal. App. 4th 1495, the Court of Appeal dealt with the realties. The ***Stanchfield*** case addressed the situation of a defendant's expert who wasn't ready on the day he was scheduled to give deposition testimony. He testified during the deposition that he had not completely developed his opinions concerning plaintiff's damages, and needed approximately 16 hours to complete his work. The trial court denied plaintiff's motion to exclude the defense expert's testimony on the ground that plaintiff never raised the issue before trial with either the discovery referee or by means of a motion in limine. In dicta, the court also stated that the expert's "lack of readiness at the appointed hour was attributable

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not to gamesmanship, but to the brief time span between [plaintiff's expert's] deposition and his." ***Stanchfield*** at page 1504. This comment suggests the court's understanding that an expert's opinion may continue to evolve after the expert disclosure date.

Scenario #2: *Fifty days before trial, you serve your expert disclosure. You serve your list of experts setting forth your retained experts and non-retained experts, and you serve your expert witness declarations, which describe the retained expert's qualifications, the general substance of expected their testimony, the representation that they are ready to testify and the fees and costs of each retained expert. What is wrong with your disclosure?*

Your disclosure may not be in compliance with C.C.P. ' 2034. Case law and Weil and Brown, ***California Practice Guide: Civil Procedure Before Trial*** (TRG 1999) ' 8:1668a - 1668d state treating that physicians are regarded as percipient witnesses not persons "retained for the purpose" of giving expert testimony. Weil and Brown ***Civil Procedure Before Trial*** ' 8:1668a, citing ***Hurtado v. Western Medical Center*** (1990) 222 CA3d 1198, 1203. Therefore, "expert witness declarations are not required when treating physicians are expected to testify merely as to factual matters, or also to their expert opinions as to the patient's diagnosis and prognosis. Such opinions are based of facts personally observed by the treating physicians." Weil and Brown ***Civil Procedure Before Trial*** ' 8:1668b citing ***Huntley v. Foster*** (1995) 35 CA4th 753, 756. It is only when experts are asked about the standard of care are they treated as "retained . . . for the purpose of forming and expressing an opinion . . . in preparation for trial" do they become retained experts. Weil and Brown ***Civil Procedure Before Trial*** ' 8:1668c citing ***Plunkett v. Spaulding*** (1997) 52 CA4th 114, 199-120. For the last decade attorneys have been interpreting the word "retained" narrowly and have pretty much always listed the treating physician(s) as non-retained experts.

However, two recently "depublished" Fourth District Court of Appeal cases has broadly construed the word "retained" and has turned the expert disclosure requirements on its ear--***Schreiber v. Estate of Kiser*** (1998) 68 CA4th 119 and ***Paxton v. Stewart*** (1998) 68 CA4th 331. These courts held that if a treating physician offers opinion testimony on causation, that physician exceeds his or her "ordinary role" as a treating physician, and steps into the role of a retained expert. The ***Paxton*** court found that the following questions called for opinions and were beyond the doctor's percipient observation, -- (1) "Can you testify with a reasonable degree of medical probability that [Paxton's condition] that you saw with your own eyes on February 2, 1995 would not exist in the absence of negligence?" and (2) "Now, based upon these three causes that you have told us, if we assume that there is no hematoma and no infection, can you state with a reasonable

degree of medical probability that those muscles . . . were not properly repaired?" In ***Schreiber***, the court's rationale in expansively construing the word "retained" was threefold (1) ". . . any opinion testimony offered by the physician about causation is subject to the normal safeguards which the law otherwise affords an opponent faced with a causation expert," (2) plaintiff couldn't sandbag the defense and (3) wouldn't force litigants to depose every treating physician on the chance that the physician might be allowed to proffer opinion testimony.

Neither the ***Schreiber*** nor ***Paxton*** opinions may be cited, following the California Supreme Court grant of review of both cases on March 24, 1999. Oral arguments had not been scheduled as of October 1, 1999. A decision should be rendered within 90 days of oral argument. In the meantime, counsel should anticipate and plan for the Supreme Court's decision. It is doubtful that ***Schreiber*** or ***Paxton*** will be upheld or overturned in their entirety. Both the ***Schreiber*** and ***Paxton*** opinions brought up valid arguments as to why a party should disclose that a treating physician will be discussing causation and the standard of care. However, there is arguably a chilling effect on a party's case when the treating physician does not want to be labeled as a retained expert on the standard of care in the community and therefore won't agree to being a retained expert. The answer may be to create three categories of experts: Category 1--percipient witness experts (i.e., treating physicians) Category 2--non-retained percipient expert witnesses (i.e., treating physicians whom testimony will be asked about standard of care and causation) and Category 3--retained expert witnesses (i.e., "hired guns"). However, it may be up to the Legislature to make such a radical change in this area of law.

Scenario #3: *Opposing counsel has timely served his expert disclosure. He has named three experts--Dr. John Marsden, Dr. Philip Canton and Dr. Sarah Collins. The expert declaration for each of the experts state that each doctor will testify ". . . as to the causation for plaintiff=s injuries." What do you do?*

Subdivision (f)(2)(B) of section 2034 of the Code of Civil Procedure requires litigants, in response to a demand for an exchange of information concerning expert witnesses, to provide a "brief narrative statement of the general substance" of an expert's testimony. The point of the requirement is to give enough information to opposing counsel so they can decide whether or not they want to depose the expert and to prepare for cross-examination and rebuttal at trial. The answer to this scenario is governed by the California Supreme Court's contribution this year on C.C.P. ' 2034 in ***Bonds v. Roy*** (1999) 20 Cal. 4th 140, a medical malpractice case. During discovery, the defense disclosed as one of its experts a doctor who, the defense represented, would testify only to damages. At the doctor's

deposition, he did so, and specifically denied that he would provide an opinion on the appropriate standard of care. At trial, the defense called the doctor as the very last witness in the trial, and sought to present the doctor's opinion on the subject of standard of care. The trial court sustained the plaintiff's objection to the attempted introduction of such testimony as being outside the scope described in the defense expert witness disclosure. The jury found in plaintiff's favor, and the defense appealed.

The Supreme Court noted that "the very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." ***Id.***, at 146-47. The court concluded that the defense's failure to designate the topic of standard of care as an area of its expert's testimony doomed the party's effort to present such evidence at trial. ". . . [T]he statutory scheme as a whole envisions timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial so long as a party has submitted any expert witness declaration is inconsistent wit this purpose." ***Id.***, at 148. The defense's proffered evidence was properly excluded.

Scenario #4: *You are plaintiff's counsel in a motor vehicle accident case in which is a disputed issue. All parties properly disclosed experts 50 days before trial. Experts' depositions have been going for the last few weeks and it is now less then four weeks before trial. It becomes obvious that you need a biomechanics expert. You retain a biomechanics expert who is ready, willing and able to testify anytime in the next few weeks. However, defense counsel refuses to consent to the late submission.*

C.C.P. ' 2034(l) allows a party to bring a motion for belated submission. The moving party needs to demonstrate in his moving papers: (1) "mistake, inadvertence, surprise or excusable neglect," (2) that the expert is immediately available for deposition and (3) that there has been no prejudice to the opposing party. The motion must also be brought immediately. See ***Martinez v. City of Poway*** (1993) 12 CA4th 42 (held that it wasn't abuse of discretion for the court not grant the motion for belated submission when the moving party knew for two weeks about the need to bring such a motion and didn't bring the motion until two weeks before trial. Disapproved on other grounds in ***Bonds v. Roy***) However, if you're the party bringing the motion, it would behoove you to offer to opposing counsel some compromises such as (1) you'll pay the experts fees; (2) you'll pay the expedited transcript and/or (3) you'll agree to a short continuance of the trial. With these

compromises offered as conditions, a Law and Motion judge would be more likely to grant the request for leave to allow belated submission with one or all of the compromises. See also ***California Civil Discovery Practice*** (CEB1999), ' 11.58, p. 979.

If you are opposing this motion remember that excluding an expert at trial is an appealable issue. Also, the expert may still be able to testify as a rebuttal witness under C.C.P. ' 2034(m). Thus, you may not want to take an absolutist position opposing the late submission. At least if he is deposed, you will know what he is going to say, and you may have solid grounds for a motion in limine excluding his testimony. See ***Howard Contracting, Inc. v. G.A. MacDonald Construction Co.*** (1998) 71 Cal. App. 4th 38, 52-54 (undisclosed expert may only testify to impeachment of a foundational fact forming the basis of a prior expert's opinion; he may not testify as to his own opinion).

Scenario #5: *You are representing one of two defendants in a pending lawsuit. You and your fellow defense counsel have gotten along well and have shared information. In your expert disclosure you state "We hereby incorporate by reference all other parties' experts and reserve the right to call those experts at trial." At the mandatory settlement conference the other defendant settles with the plaintiff and a good faith motion is eventually granted. During trial you call Dr. Smith who was a designated expert by the settling defendant. Plaintiff counsel objects.*

You are in trouble here. The case of ***Zellerino v. Brown*** (1991) 235 CA3d 1097, 1116 the Court of Appeal held that an expert witness declaration is required for each expert "retained by a party" Therefore, if the designated party intends to rely on experts retained by other parties, he must furnish an expert witness declaration for those experts.

In this situation defense counsel should look to C.C.P. ' 2034(l) (motions for belated submission) and C.C.P. ' 2034(m) (rebuttal witnesses). If the expert has not been deposed, then a motion for belated submission may be granted as there is no real prejudice to opposing counsel. If the expert has been deposed, then you may call the expert under C.C.P. ' 2034(m) See ***California Civil Discovery Practice*** (CEB 1998) ' 11.61, citing ***Powell v. Superior Court*** (1989) 211 CA3d 441 and ***Alef v. Alta Bates Hospital*** (1992) 5 CA4th 208.

If the expert has not been deposed, and your motion for belated submission is denied, you still may call the expert as a rebuttal expert. Code of Civil Procedure ' 2034(m) states that at the time of trial, a party may call an expert not previously designated if "that expert is called as a witness to the falsity or nonexistence of any fact used as the foundation for any

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opinion by any expert witness called by any other party at the trial." However, the undesignated expert witness is not allowed to contradict the opinion itself. See ***California Civil Discovery Practice*** (CEB 1998) ' 11.62, citing ***Fish v. Guevara*** (1993) 12 CA4th 142.

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