

Tactical Expert Containment

By Christopher B. Dolan

I. INTRODUCTION

In today's litigation, the "expert" has become the staple – the bread and water – of the defense case. To survive, and win, you must understand the tactical approach to expert witnesses at trial. Today's defense lawyers let the "experts" try their cases. This often happens because they know they lose on the facts. This spin has perverted our justice system. This article is a practical tool to be used by the serious litigator who is willing to take the experts head on. There is no reason to be a lawyer who does not even take expert depositions because they are too costly, or because you are intimidated to approach an "expert" in a field that you are unfamiliar with. Doing some homework and spending the extra money on the expert depositions can have substantial payoffs.

This material is culled from over thirty jury trials that I have tried employing experts. Often, I obtain such favorable deposition testimony from defense experts that I call them in my case-in-chief. The key is to build a "box" at deposition, committing the experts to generally "good" positions, and then use the deposition to keep them honest, and true, to the favorable testimony they have already given.

The expert deposition is an opportunity to accomplish several strategic objectives. The main goal, wherever possible, is to eliminate the expert or confine and restrict their opinions.

First, you want to construct the universe of materials from which experts may draw opinions at the time of trial. Second, you should lay the foundation for an Evidence Code § 402 challenge to their testimony. Third, you'll want to get any and all favorable testimony for your clients that the expert may have, carefully selecting ques-

tions to which the expert can only provide positive answers. Fourth, with medical experts (Defense Medical Examiners ["DME"]) you need to establish, at a minimum, that they agree that your client sustained *some* injury (for the purpose of a directed verdict in an admitted liability case). Fifth, you want to eliminate any surprise resulting from unanticipated changes in testimony at trial. Sixth, you want to get all the testimony you need for your motions in limine.

Perhaps most importantly, one thing I do not do is depose experts using the outdated formula of merely asking the qualifications of the expert and then asking them to state their opinions. You don't want to give defense lawyers an easy platform for their theories and opinions.

II. THE FIRST STEP IN EXPERT CONTAINMENT – CHOOSING YOUR OWN EXPERTS

The purpose of this article is not to discuss how to deal with your own experts. However, I would be remiss if I did not mention the importance of your experts, even when dealing with the other side's experts. Tactical containment of defense experts begins long before their depositions. It starts with your own expert selection. You must realize that even though a defense expert may be eliminated or contained at trial, you must have your own expert on critical areas of proof such as liability, causation and damages. Think about what experts you need to meet your burden in each of these three areas. In other words, even if every tactic in this article is successful, and you manage to exclude even most of the defense experts' testimony, you still need to be sure you have your own experts ready to testify on key elements.



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III. THE DEFENSE MEDICAL EXAM

Next, expert witness tactics are employed at the DME (which the defense calls "IME"). *Object to the DME* so as to preclude impermissible activity by the defense medical examiner. (See sidebar.) Also, *make sure to demand production of any report and/or test result/photo/X-ray*, etc. Once you do so, the defendants must produce that material or it can be the basis for an exclusionary motion in limine ("MIL") later on. *Go to the DME* (medical only – psych DMEs preclude attorney presence). Preclude a "second deposition" by objecting to improper questions. If the client's deposition has been taken, provide that to the doctor or tell the doctor to get it from defense counsel. [Editor's Note: See Howard Kapp, "Prohibiting Medical Histories During Defense Medical Exams and Other Fancy Stuff," *CAOC Forum*, March 2002.] Allow brief recitation of the facts of injury, but not the facts relating to liability. *Tape record any DME* (both medical and psychological/psychiatric – this is permitted under case law). It is amazing what doctors leave out of their reports and on the stand. I have cross-examined doctors who stated that the plaintiff expressed no difficulty or complaint only to have the tape played during trial where the plaintiff is complaining of pain, discomfort and limitation. It is an invaluable tool.

IV. EXPERT DISCLOSURE AND DECLARATION

A. Using the Defense Designation as a Containment Tool

The next battleground is the expert disclosure and declaration. CCP § 2034 provides for expert witness exchange and supplementation of expert witnesses. The best advice I can give you is to read the damn things! People often file them away without realizing the tactical aspects available through the disclosure. The code requires an expert designation and a declaration by the attorney defining the scope of the expert testimony provided in a timely fashion. If the designation or declaration is not timely, object. This designation and declaration is the framework for the outer perimeter of your containment strategy. If your opponent's designation is defective or the declaration is absent, you have a right to seek to exclude that testimony. Indeed, the code is quite clear on this point.

Defendants often fail to include critical aspects of the scope of testimony such as the reasonableness of medical expenses, the issue of causation, prognosis, future care, etc. Take the position that the statute demands that the testimony be so limited unless the proponent has made application under CCP § 2034(k)(2). (See, *Roy v. Bonds* (1999) 20 Cal.4th 140.)

B. Supplemental Designation

If your opponent identifies an area of expert testimony that you have not thought of, act promptly to supplement your expert witness list. You have 20 days to do so (CCP § 2034 (h).) Likewise, if there is a scope of expert testimony which you have failed to include in your expert declaration, immediately submit a new declaration with that enhanced scope before the deposition and/or move under CCP § 2034(k)(2) to amend. This is technically only possible if you originally designated experts. If you did not do so, immediately file a motion for relief under CCP § 2034 (l). [Editor's Note: See also, Taylor and Ross, "Supplementing and Augmenting Expert Witness Designations" in this edition of *Forum*, for a fuller discussion of this issue.]

Example of an Objection to a DME

Plaintiff objects to the examination to be performed on as follows:

1. Plaintiff objects to any physical examination beyond the parts of the body which plaintiff has placed in controversy.
2. Plaintiff objects in that defendants have not specified, using specific medical names, the precise examination to be conducted.
3. Plaintiff objects to the scope of the examination to the extent defendants seek to determine causation of the injuries sustained by plaintiff due to defendant's negligence. Defendants are entitled to a medical examination and only information pertaining to plaintiff's physical condition will be provided.
4. Plaintiff objects to providing a medical history. This is not a deposition, plaintiff is not expected to remember or to specify with any complete degree of accuracy a medical history. Defendants have had the opportunity to elicit through discovery a complete medical history, prior treatment and to secure all relevant medical records. The Discovery Act does not provide for the taking of a medical history. See *City of Hayward v. United Public* (1976) 54 Cal.App.3d 761, 766, for the proposition that a court may not add to or detract from a statute's words to accomplish a purpose that does not appear on its face or from its legislative history.
5. Plaintiff objects to any additional X-rays as these are cumulative, intrusive, and harmful to the plaintiff. Plaintiff reserves the right to take additional X-rays if plaintiff feels these are needed.
6. Plaintiff objects to defendants' demand that plaintiff produce copies of all X-rays, MRI's and/or CT scans, as defendants have had ample opportunity to secure such information through the course of discovery and such demand improperly shifts the burden for defendants' retained medical examiner's competent examination to plaintiff.
7. Unless the examination starts within one-half hour of the scheduled starting time, plaintiff will leave.
8. The plaintiff will record the proceeding by audiotape recording or videotape recording.
9. By this Response, plaintiff hereby demands pursuant to CCP § 2032(h) a copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, conclusions of the examiner, and a copy of all reports of all earlier examinations of the same condition of the examinee made by that or any other examiner. Pursuant to said statute, defendants are reminded that the protection for work product under section 2018 is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony. All such reports pertaining to the examination shall be provided to plaintiff's counsel within THIRTY (30) days of the date of the examination.

V. YOUR NOTICE OF THE DEFENSE EXPERT'S DEPOSITION

The next critical step in containment is your notice for the expert deposition. CCP § 2034 provides for the orderly completion of expert depositions as follows:

- (d) Any party shall be entitled as a matter of right to complete discovery proceedings pertaining to a witness identified under Section 2034 on or

before the 15th day, and to have motions concerning that discovery heard on or before the 10th day, before the date initially set for the trial of the action.

Here, you have to make the decision: obtain a stipulation to waive 2034 (d) and conduct depositions up to the time of trial, or use it as a sword and get your depositions noticed promptly and, if your opponent does not, deny them access to your experts. Often notices will be sent for

expert depositions for a time prior to the cut-off and an agreement regarding scheduling will be reached allowing the depositions to take place after the fifteen day cut-off. The timeframe for motions (ten days before trial) cannot be waived by the parties.

Your deposition notice is critical. (See sidebar.) You must structure it with the tactical goal of asking for everything that the defense might throw at you at trial. If they do not bring it to the deposition, move to exclude it. This is another wall of your containment box.

Many experts do not show up with the records, X-rays, depositions, or other materials that they relied upon or referred to. They cite articles that they do not produce at the depositions. They quote from studies that are not provided. Let's face it: they make stuff up. It is our right to cross-examine them. We cannot do so if the material is not present. The fact that this may be "customary" does not change the fact that you can use the rules and your requests for production as bases to challenge testimony, and a sitting judge is unlikely to be as cavalier about the rules of civil procedure as defense counsel is.

When experts do have the material, they often have deposition summaries prepared by the defendant's counsel. They have memoranda of law provided by counsel. They have instructions which state what the defendant is looking for as opinions. If they do not produce the materials relating to the communications they had with counsel, move to compel and use the notice of deposition as ammunition to get production of the materials and sanctions including free expert time in future depositions as well as having the defendant pay for the reporter.

But think strategically. Do not compel everything. Some things are better left untouched. *If they do not provide materials that they claim to have reviewed to support their opinions, move to exclude the opinions based on these materials.* Based on my experience, these motions are successful.

VI. TAKING THE DEFENSE EXPERT'S DEPOSITION

A. The Start – Getting Agreement on General Points

Start by asking the expert to agree on certain generalized points. In an injury case, get them to agree that they believe that your client sustained some degree of injury. That is critical. If you have an admission of liability, or prove some liability on the part of the defendant at trial, you can move for a directed verdict on liability *and* causation. It is then a question of damages for the jury. I prefer to pitch a pure damages case any day.

If you have a pre-existing condition or injury, get the expert to agree that a certain segment of the population is predisposed to injury and that prior injury can make people more susceptible to greater harm from subsequent injury. In essence, get them to agree to the CACI "eggshell plaintiff" instruction. (CACI No. 3927.) I often ask them if they recognize that some people are more fragile, like an eggshell, than others. They have to agree or they look foolish. If it is a case where there is evidence of degeneration in the spine or congenital defects like nodes, etc., I get them to admit that these people are often predisposed to greater injury or pain from an injury-producing event.

Ask the doctor if people experience pain differently. Some people have a greater threshold for pain than others. They have to agree. Get the doctor to admit that there is no precise measurement of pain. Get them to admit that your client experienced pain following the injury and that patients of theirs have complained of pain for varying periods after an event like the one your client sustained. Be careful: doctors use words like "healed" to mean that, architecturally, the body has reached maximum medical improvement. Many doctors will admit that symptoms, such as pain, last long after the body has "healed." Focus on symptoms rather than injuries or healing. You will be amazed if you ask the right questions.

By using these general types of questions early in the deposition, you will be able to commit the expert to positions that not only serve your case, but may well stop that expert from making wild claims later on.

B. Keeping the Expert's Testimony in the Box

Defense experts will often testify on matters on which they are simply not qualified to offer testimony. A common one is testimony on "malingering." This presents a good example on how you can limit a defense expert's testimony and keep it "inside the box."

If the physician starts stating that the client is a malingerer, or advancing secondary gain, get them to admit that these are diagnoses under the DSM IV or DSM IV-R. Have a copy of the DSM criteria for malingerer and ask the doctor to tell you what they are. They cannot. Get them to admit that they are not licensed to do psychology, that they are not practicing as psychologists or psychiatrists and/or that they refer their patients to professionals in psychology/psychiatry if they think that they need such treatment. This demonstrates that they are not licensed in that field and, therefore, lack the qualifications to provide testimony on those subjects. Have them admit that they did not perform a psychological examination, psycho-social history and/or did not conduct the battery of psychological tests such as the MMPI or MMCI. This shows that they lack a foundation upon which to provide testimony as to a psychological diagnosis. Remember your



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deposition is as much about limiting the scope of testimony as it is about knowing what that testimony might be. File a motion in limine to preclude that testimony.

C. Close the Box

Make sure to, at some point, close the box. *You must ask the experts at some point what opinions they intend to offer at trial.* I usually do it last. Often, after questioning the expert, I will confirm that we have covered all the opinions that they intend to offer at trial. Great, I got what I wanted, how I wanted it. I make sure to ask “are there any other opinions that you intend to offer at the time of trial?” Often the expert states, “Well, I don’t know what I might be asked.” State that the code and deposition notice demand that they tell you all of the opinions that they have prepared for trial *now*, without you having to guess what they might be. If they have no further opinions, *the box is closed*. Make sure to get that critical answer to the question, “Have you now told me all of the opinions that you intend to offer at the time of trial in this matter? Yes.”

VII. KEEPING THE BOX CLOSED – MOTIONS IN LIMINE

The next section of this article presents authority to use in preparing motions in limine to exclude experts or limit their testimony. The key to success in these motions is to use the depositions you have taken, and make the motions testimony-driven and precise as to the testimony to be excluded. Judges see generic motions in limine all the time. Make yours *exact*. For each motion that you file, quote from the deposition, showing that the expert is not an expert on that area of testimony, that they have no foundation for opinion, that their opinions invade the province of the jury and are not reliable, that they were unprepared and unable to offer opinions and/or that they have offered only limited opinions (to prevent surprise at trial with new opinions). [Editor’s Note: See Chase and Raphael, “Recognizing and Handling Improper Expert Witness Opinion” in this edition of *Forum* for general bases for exclusion of expert testimony.]

Beyond the “usual” motions in limine as discussed in the Chase/Raphael article,

there are other areas of expert testimony that might warrant a motion in limine:

- A motion in limine should be filed to exclude any documents or materials not produced at the deposition. California Code of Civil Procedure § 2034, subdivision (f)(2)(D) requires that an expert, at the deposition, be familiar with the case and able to provide a “meaningful oral deposition.” (*Id.*) The trial court can exclude documents or other physical evidence at trial that has not been produced during discovery or that would cause “unfair surprise at trial.” (*Deeter v. Angus* (1986) 179 Cal.App.3d 241; C.C.P. § 2031). Similarly, move to exclude the opinions which are based on the documents that weren’t provided.
- Along those same lines, California Code of Civil Procedure § 2034, subdivision (j)(4) provides that on objection of any party who has complied with the requirement of serving expert witness declarations, a trial court must exclude from evidence the expert opinion of any witness offered by a party who



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has unreasonably failed to make that expert available for a deposition. *This has been held to exclude testimony regarding opinions of experts that they assured they did not hold at the time of deposition.* (See, *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.) A motion in limine should be filed to prevent any opinions formed after the deposition has been taken and/or any reference to any materials not disclosed and presented at the expert deposition. Often the expert may not have reviewed all of the records. Too bad. It is their obligation to be prepared.

If your expert reviews something after the deposition that changes or adds to their testimony, be sure to alert your opponent, in writing, and tell them what was reviewed and how that affects your expert's testimony. Offer them the opportunity to conduct further deposition on that issue or you may be precluded at the time of trial from introducing that evidence.

- You should also move to exclude cumulative experts. According to Evidence Code § 723, the court may exclude the testimony of cumulative experts. The court has discretion to exclude testimony from experts on the grounds the testimony is cumulative. Many courts enforce a "one expert per field" rule and will not entertain testimony from an expert who will testify about issues or opinions already given by a separately-designated expert. (See, *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 906.)

The court has further discretion under Evidence Code § 352 to exclude the cumulative expert testimony. Where the probative value of the evidence is substantially outweighed by the probability its admission will "(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury," the court has the discretion to exclude it. (CCP § 352.)

- Be careful to contain hearsay evidence relied on by an expert. In addition to the issues addressed in the Chase/Raphael article, specific issues are raised with respect to medical and

psychological experts. Although it is appropriate for a physician to base their opinion in part upon the opinion of another physician (*People v. Campos* (1995) 32 Cal.App.4th 304, 308; see also *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895; Cal. Law Revision Com., 29B Pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 801, p. 19 ["A physician may ... rely on reports and opinions of other physicians"]), it generally is *not* appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion. (*People v. Campos, supra*, 32 Cal.App.4th at p. 308; see *People v. Coleman* (1985) 38 Cal.3d 69, 92; *Whitfield v. Roth, supra*, 10 Cal.3d at pp. 894-895; *1 Jefferson, Cal. Evidence Benchbook* (3d ed.1997) §§ 29.42-29.43, pp. 597-598; Méndez, *supra*, Cal. Evidence, § 16.03, pp. 312-313; Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 1999) ¶ 8.763.); *People v. Catlin* (2001) 26 Cal 4th 81.)

Psychiatrists, like other expert witnesses, are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion concerning a patient's mental state. (Evid.Code § 801, subd. (b); *People v. Young* (1987) 189 Cal.App.3d 891, 913; *In re Torres* (1986) 180 Cal.App.3d 1159, 1163; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525; see also *People v. Miller* (1994) 25 Cal.App.4th 913, 917-919.) But they, like physicians, should also be precluded from recounting the details of another's report or expression of opinion.

On direct examination, the expert witness may state the reasons for the opinion, and testify that reports prepared by other experts were a basis for that opinion. (*People v. Coleman* (1985) 38 Cal.3d 69, 92.) But again, the testimony should be limited to this.

An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by non-testifying experts. "The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse." (*Whitfield v. Roth* (1974)

10 Cal.3d 874, 894; see also *People v. Reyes* (1974) 12 Cal.3d 486, 503.)

But this rule does not preclude the cross-examination of an expert witness on the content of such reports. As the court noted in *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 864, "[p]rocedurally, if an expert does rely in part upon the opinions of others, the expert may be cross-examined as to the content of those opinions. It is improper, however, to solicit the information on direct examination if the statements are inadmissible. [Citations.]"

- Often experts disregard everything but the self-serving statements of the defendant they represent. In *Stuart v. Dotts* (1949) 89 Cal.App.2d 683, a police officer based his opinion on the defendant's statement, which was a self-serving declaration and inadmissible under the hearsay evidence rule. Admission of this testimony was later ruled reversible error. In *Ribble v. Cook* (1952) 111 Cal.App.2d 903, 245 P.2d 593, the police officer's opinion was held to lack proper foundation because it was based on the self-serving declaration of the defendant and the statement of a witness who did not see the impact, which evidence was clearly hearsay. The officer's testimony was adjudged almost worthless because it depended on the credibility of persons other than himself. In *Kalfus v. Frazee* (1955) 136 Cal.App.2d 415, the police officer based his opinion on conversations with the defendant and another witness at the scene of the accident. Evidence of the defendant's self-serving declaration and the witness' statement were both inadmissible under the hearsay evidence rule. Be sure to move to preclude any opinions based on such self-serving hearsay.
- You should also move to exclude reenactments, experiments, reconstructions and models. The burden is on the proponent of experimental evidence to establish that the experiment was conducted under "substantially similar" conditions. Any significant difference is ground for exclusion of the experiment. (*People v. Bonin*, (1989) *supra*, 47 Cal.3d 808, 847.) Videotape reconstruction should be excluded if it

contradicts established evidence. (*Ehrhardt v. Brunswick, Inc.* (1986) 186 Cal.App.3d 734.)

- You should move to preclude accident reconstruction where there are insufficient objective facts. Improper accident reconstruction testimony most often arises in automobile accident cases, and the vast majority of California law in this area has arisen in that context. This section of the article will, therefore, focus on accident reconstruction in automobile cases. However, the courts have made some broad rulings in this area, using strong language, which should allow you to apply this precedent to other types of cases, as well.

In California, courts look with disfavor upon expert testimony reconstructing automobile collisions from physical and mathematical facts on the ground that complete knowledge of exact speed, course of wind, and force of impact, is impossible, and that reaction of human minds under a certain set of circumstances cannot be established. (*Moniz v. Bettencourt* (1938) 24 Cal.App.2d 718.) For example, it is well-settled that an expert on automobile accidents may not rely on extrajudicial statements of others as a partial basis for an opinion as to the point of impact, whether or not the statements would be admissible evidence. (*Hodges*

v. Severns (1962) 201 Cal.App.2d 99; see also *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697 [report of fire ranger as to cause of fire held inadmissible because it was based primarily upon statements made to him by other persons].) The *Behr* court recognized that although the statements of bystanders as to the cause of a fire may be considered reliable for some purposes by an investigator of the fire, the courts have determined this to be an improper basis for an opinion since the trier of fact is as capable as the expert of evaluating such statements in light of the physical facts as interpreted by the expert. (*Id.*)

Other courts have similarly refused to admit into evidence expert opinions in traffic accident cases where the factors involved are too varying and indefinite to constitute the basis of an opinion as, for example, where the opinion sought to be elicited dealt with the probable course of the cars after impact (see *Fishman v. Silva* (1931) 116 Cal.App. 1, 8-9), or with the speeds of the vehicles and the manner in which the accident occurred (see *Johnston v. Peairs* (1931) 117 Cal.App. 208, 213-16), or with the nature, points of application, magnitude and effect of forces involved in the collision of automobiles. (See *Rudat v. Carithers* (1934) 137 Cal.App. 92, 95-97.) The rationale of

these decisions is that in this particular area, there are too many indefinite factors, including the behavior and reactions of the drivers involved, to permit a conclusion to be reached after the fact with any quantum of certainty. (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 114-115.) As the court stated in *Burch v. Valley Motor Lines, Inc.*, (1947) 78 Cal.App.2d 834, 844, the foregoing cases represent unsuccessful attempts “to reconstruct what had happened, by persons who were not eyewitnesses and with nothing on which to base their opinions but the position of the cars after they had come to rest.”

Fishman v. Silva involved a collision between two automobiles on a wet highway where the defendant tendered as an expert witness an experienced garage man and mechanic who had cleared away many wrecks, and whose opinion was sought “concerning the probable course the respective cars would take after the impact.” (*Fishman v. Silva* (1931) 116 Cal.App. 1, 8-9.) The court said that “experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one,
(continued on page 29)

RETAIL INDUSTRY EXPERT WITNESS

EVALUATE ALL ISSUES OF INDUSTRY STANDARDS OF CARE IN:

- | | | |
|--------------------|------------------------------|-----------------------------|
| * SUPERMARKETS | * GENERAL MERCHANDISE STORES | * HOME IMPROVEMENT CENTERS |
| * RESTAURANTS | * FAST FOOD OPERATIONS | * WAREHOUSE STORES |
| * SPECIALTY STORES | * CONVENIENCE STORES | * SMALL BUSINESS OPERATIONS |

INDUSTRY STANDARDS ISSUES INCLUDE:

- | | | |
|----------------------------|---------------------------------------|------------------------|
| * Slip/Trip and Fall | * Floor Care & Maintenance Procedures | * Store Security |
| * ADA Compliance | * Merchandising Procedures | * Loss Prevention |
| * Food Handling Procedures | * Internal Operation Procedures | * Wrongful Termination |

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Example of a Tactical Deposition Request

It is expected that the deponent 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 deponent is expected to give at trial. If the deponent is unable or unwilling to do so *the defendant is hereby notified that the plaintiff will seek to exclude any and all opinions not presented at the deposition and, furthermore, that the plaintiff will seek to preclude the deponent from referencing, relying upon, or offering opinions based on any of the above-referenced materials that were not present at the time of the deposition including, but not limited to, medical records, studies, articles, data, X-rays, MRIs, CT scans, reports of other experts, depositions of witnesses, parties and/or other experts and demonstrative materials.*

The following writings, as that term is defined under Evidence Code § 250, are required to be produced at the deposition. The reports of the deponent should be produced *before* the deposition pursuant to CCP § 2034.

1. Any and all writings as defined by Section 250 of the California Evidence Code which have at *any time* been provided to the deponent by or on behalf of defendant or defendant's counsel or anyone else regarding the case for which the expert has been designated.
2. Any and all writings as defined by Section 250 of the California Evidence Code which *were reviewed or relied upon* by the deponent in forming an expert opinion on any issue in this case.
3. Any and all writings as defined by Section 250 of the California Evidence Code which were prepared by, on behalf of, or at the direction of, the deponent in connection with any issue in this case.
4. A current copy of the deponent's curriculum vitae or resume.
5. All records of time expended by deponent in discussion, and/or reviewing and/or researching, and/or in performing any activity relating to this case.
6. All documents setting forth the compensation agreement between deponent and defendant and/or defendant's counsel.
7. All documents used or relied on to establish the deponent's expert qualification for trial purposes.
8. All records, notes, memoranda, reports, documents, writings, diagrams, models and photographs, whether in hard copy or electronic form, which the deponent has prepared or caused to be prepared relating to this case.
9. All records, notes, memoranda, reports, documents, writings, diagrams, models and photographs, whether in hard copy or electronic form, which the deponent has received, and/or reviewed, and/or read, and/or discussed relating to this case.
10. All articles or other professional literature deponent has read, reviewed, consulted, used or referred to with respect to the deponent's involvement with this case.
11. Deponent's entire file and all records, documents, writings, diagrams, models and photographs relating to this case.
12. Any and all other materials or documents that deponent will be relying upon at trial and/or demonstrative evidence that the deponent intends to use to illustrate any opinions at trial.
13. Copies of any and all licenses, permits, memberships in any professional associations, board certifications, credentials for and/or privileges at any hospital, accreditations of facilities and/or ability to perform procedures held by the expert. Failure to produce this material will lead to a motion to disqualify the expert based on lack of capacity. Defendant has the burden of proving the qualification of this expert.
14. Any and all documents reflecting any disciplinary action, suspension, and/or reprimand from any licensing authority, professional association, medical board, nursing board, board of psychology, board of accreditation, board certification authority, health care facility, hospital, department of quality assurance, with respect to the deponent.
15. Any and all complaints made by any current or former patient, regarding the professional services provided at any time by the expert including but not limited to CCP § 364 letters, demand letters, and/or complaints filed with any state or federal court, administrative agency, the medical board, the department of consumer affairs, local, and/or county or State Department of Health.
16. Any and all documentation relating to, referring to, reflecting or memorializing any complaint, disagreement, dispute, or conflict with any individual, entity, organization, law firm, insurance company and/or expert referral or locator service regarding the deponent's expert services, billings, billing practices and/or services provided and/or testimony rendered as an expert for the past ten years.
17. Any and all documents relating to, referring to, reflecting or memorializing any denial of privilege, denial of board certification or association membership, denial of certification or accreditation regarding the deponent's medical facility's ability to conduct procedures, outpatient surgery centers, anesthesia permits etc.
18. Documents showing any and all work performed for the defendant's attorneys, their law firm, and/or insurance company for the past five years. **THIS REQUEST REQUIRES DEFENDANT AND DEFENDANT'S COUNSEL TO PROVIDE THIS INFORMATION AT THE DEPOSITION.**
19. Any documents showing communications with the defendant's insurance company, insurance adjusters, lawyers representing the defendant, and/or any expert witness locator service used to retain the services of the deponent in this matter including but not limited to any documents that demonstrate that the deponent has been approved for use as an expert, is listed as a preferred expert provider, approved expert provider, or

Example of a Tactical Deposition Request (continued)

recommended expert provider, by the insurance defendant's insurance company. THIS REQUEST REQUIRES DEFENDANT AND DEFENDANT'S COUNSEL TO PROVIDE THIS INFORMATION AT THE DEPOSITION.

20. Any and all documents that demonstrate the percentage of work performed by the deponent as an expert versus the percentage of work the deponent does as a private practitioner in the field of specialty that the deponent is designated in. This includes, but is not limited to, any financial documentation, billing information, financial statements, or materials showing the amount of revenue that the deponent has gained from providing expert services as well as the number and type of cases which the deponent has acted in as an expert. This request is for a five-year period prior to the deponent's deposition.

21. A list of all cases in which this deponent has provided testimony at deposition and/or trial for the past five years, identifying the case name, venue, name of attorney who retained the deponent, and the type of case and subject matter of the expert testimony.

22. All DME reports of any individual conducted by the expert on the same area of the body, or in the same area of specialty, for the past five years, redacted so as to protect any applicable privacy rights of the examinee.

These materials are designed to fully explore the opinions, foundation for those opinions, opportunity of the expert to formulate opinions, as well as the credibility and bias of the witness. *Note: failure to present these materials at the deposition will lead to a motion in limine to exclude and/or limit the testimony of the witness at trial.*

(continued from page 27)

and the balance or equilibrium of each car at the time of impact.” (*Id.*) The court boldly concluded that no expert “can even venture an opinion as to what two different people might do in the management of a car in an emergency.” (See also *Holt v. Yellow Cab Co.* (1932) 124 Cal.App. 385, 388 [stating “too many factors enter into an automobile collision to give certainty to such a conclusion”]; *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229 [stating traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to various factors involved in accidents, based upon their own observations].) These statements clearly show the reasons why this type of tendered testimony is held improper under California law.

In *Francis*, the court addressed the issue of whether a police officer's opinion as to the order of impact for a three-car collision may be based upon his observations at the scene of the accident. (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 114-115.) The court held that the officer's opinion as to the point of impact is not admissible when it is based on what witnesses told him rather than what he himself observed from the inspection of the physical evidence at the scene of the accident. (*Id.* at 114.) The court reasoned that the general tenor of precedents in California indicates a disapproval of expert testimony designed

to reconstruct what occurred in a traffic accident. Due to the “varying” and “indefinite” factors involved in automobile accidents, the court concluded that the officer's testimony should not have been admitted because the officer did not actually witness the accident and he could not, therefore, reconstruct the accident. (*Id.* at 115.)

An expert trained and experienced in the investigation of traffic accidents and in the rendering of official reports on the facts and causes of the same, may give expert testimony as to the point of impact when the opinion is based on a personal inspection of the *physical evidence* at the scene of the accident. (*People v. Haeussler* (1953) 41 Cal.2d 252, cert. denied 347 U.S. 931, emphasis added.) However, an expert's opinion as to the point of impact is not admissible when it is based on what witnesses told the expert rather than what the expert personally observed. (See *Ribble v. Cook* (1952) 111 Cal.App.2d 903; see also *Stuart v. Dotts* (1949) 89 Cal.App.2d 683, 686-687.)

Thus, applicable California case law does not allow expert testimony based upon accident reconstruction unless specific factors are witnessed or measured. As such, accident reconstruction expert testimony is not generally accepted in the scientific community under *People v. Kelly* (1976) 17 Cal.3d 24, to allow its admission when it is based upon the probable course of the cars after impact, or with the speeds of the

vehicles and the manner in which the accident occurred, or with the nature, points of application, magnitude and effect of forces involved in the collision of automobiles.

- Also move to preclude doctors from testifying outside their field of license or expertise. Under Evidence Code § 803, the court may “exclude testimony in the form of an opinion that is based in whole or in significant part on a matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for the opinion, then state the opinion after excluding from consideration the matter determined to be improper.” Evidence Code § 801(b) provides that any expert opinion must be based upon the witness' special knowledge, skill, experience, training, and education. For example, if a medical doctor tries to testify about chiropractics, its benefits, the length of appropriate care, costs, etc, exclude them. They are not licensed to practice chiropractics, have not studied chiropractics, and an expert should not give testimony in a field that it would be illegal for them to practice in given the limits of their license.

VIII. CONCLUSION

Strategic expert management can make or break a case. Think outside the box to keep the defendant's expert safely contained within. ■