CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

Issue 1, 2020 | Volume 42, No. 1

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Expert Witness Discovery In Family Law Matters: Part I

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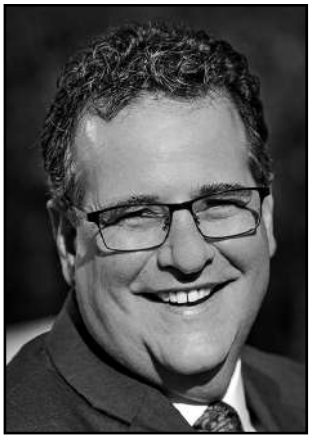

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I. Introduction

Most trial lawyers are familiar with the adage: *you should never ask a witness a question on cross-examination unless you already know the answer*. The rationale behind this adage is that by asking such a question, you are inviting the adverse witness to inform the court of something you do not know or to explain away a point you were trying to make in your cross-examination.

This adage rings particularly true with expert witnesses. Based on the expert's (presumably) superior subject matter knowledge and the sometimes technical nature of their opinions, allowing an opposing expert witness to hijack your cross-examination by "explaining" things to the judicial officer weakens your case and undermines the narrative you are trying to relate to the court.

For me, the most effective way to assume control over the cross-examination of an expert witness is to conduct expert witness discovery.

> [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]

Availing yourself of the expert witness discovery process is therefore a critical step in trial preparation.

That process begins by serving a demand for exchange of expert witness information after the initial trial date has been set. The process continues by deposing the expert witness before trial. And the process culminates in the effective cross-examination of the expert witness, which can include the use of a motion *in limine* to restrict the expert witness's trial testimony. This article will address the demand for exchange of expert witness information, complying with that demand and protective orders that may be sought relative to the demand, and exchange of expert witness information. Part II of this article – to be published in a subsequent issue - will address deposing the expert witness and seeking to limit expert witness testimony at the time of trial.

II. Applicability of Expert Witness Discovery In Family Law Matters

Expert witness discovery is set forth in California Code of Civil Procedure sections 2034.210, et seq., as part of the Civil Discovery Act. Under Family Code section 210, "... the rules of practice and procedure applicable to civil actions generally ... apply to, and constitute the rules of practice and procedure in, proceedings under this code." "Accordingly, the provisions of the Civil Discovery Act—including those provisions that govern the time for completion of discovery (Code Civ. Proc., § 2024.010 et seq.)—apply to [family law] proceedings."[2]

III. Making The Demand

A demand for exchange of expert witness information is made pursuant to Code of Civil Procedure section 2034.210. A demand "that all parties simultaneously exchange information concerning each other's expert trial witnesses ..." can be made by any party to the proceeding after the initial trial date has been set.[3] The information to be exchanged consists 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."[4]

The expert witness demand may (but is not required to) include a "demand for the mutual and simultaneous production" of all "discoverable reports and writings, if any, made by an expert ... in the course of preparing that expert's opinion."[5] As a practical matter, every witness demand should include a request for all "discoverable reports and writings."

The timing of the demand is strictly governed by code. The demand must be made "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."[6] It is not uncommon for the seventieth day before trial to fall on a weekend. Under Code of Civil Procedure section 2016.060, if the expert demand deadline falls on a weekend, "the time limit is extended until the next court day closer to the trial date." However, out of an abundance of caution, I have always made it my practice to calendar the deadlines for the preceding Friday to ensure I am not embroiled in a last-minute discovery dispute with opposing counsel.

The specific contents of the demand are also specified in the Civil Discovery Act. The demand must:

1. Be in writing;
2. Identify the party making the demand "below the title of the case";
3. State that the demand is being made "under this chapter"; and
4. "Specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings."[7]

The demand for exchange of expert witness information must be served "on all parties who have appeared in the action."[8] It is not filed with the court, but instead the original is to be retained by the demanding party.[9]

The exchange date "shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date...."[10] As noted above, Code of Civil Procedure section 2016.060 can extend the exchange date to the next court date if it falls on a Saturday, Sunday, or holiday.

IV. Exchange Of Expert Witness Information

The exchange of expert witness information can "occur at a meeting of the attorneys for the parties" or served on the other party as permitted under Code of Civil Procedure sections 1011 or 1013 "on or before the date of [the] exchange."[11] The exchange is to include either a list with the names and addresses of all witnesses from whom that party will elicit an expert opinion at the time of trial or a statement that the party does not "intend to offer the testimony of an expert witness" at trial.[12]

If an expert witness has been retained specifically for the purpose of forming and expressing an opinion at trial, an additional step is required. For retained experts, including expert witnesses who are normally employed by a party and will be offering expert opinions, an expert witness declaration signed by counsel must be provided.[13] The expert witness declaration must set forth:

- A statement regarding the expert witness's qualifications;
- "A brief narrative statement of the general substance of the testimony that the expert is expected to give";
- A representation the expert has agreed to testify at trial;
- "A representation the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including an opinion and its basis, that the expert is expected to give at trial."; and
- Information regarding the expert's hourly and daily fees for consulting and providing deposition testimony.[14]

If requested in the demand for exchange of expert witness information, the expert witness exchange should also include a production of "all discoverable reports and writings, if any, made by any designated expert...."[15] However, this obligation to produce reports and writings only extends to employed or retained expert witnesses, not to percipient witnesses.

V. Percipient Expert Witnesses

Percipient expert witnesses must still be identified in your expert witness exchange. However, there is no requirement to produce an expert witness declaration for a percipient witness, nor to produce copies of their reports or writings.

A percipient expert witness would include, for example, a treating health care provider for a child of the parties from whom you want to elicit expert opinions regarding the child's medical diagnosis.

> Although a designation of retained experts must be accompanied by the 'expert witness declaration' described in Code of Civil Procedure section 2034, subdivision (f), no expert declaration is required for a treating physician who will be called to testify at trial as an expert witness. (Bonds v. Roy (1999) 20 Cal.4th 140, 83 Cal.Rptr.2d 289, 973 P.2d 66; Schreiber v. Estate of Kiser (1999) 22 Cal.4th 31, 91 Cal.Rptr.2d 293, 989 P.2d 720.) But the transformation from

> treating physician to expert does not occur unless the treating physician is identified by name and address in the proponent's designation, and it is not enough that a plaintiff has 'designated' as experts 'all past or present examining and/or treating physicians.'[16]

Other examples of non-retained percipient expert witnesses who could be called in a family law matter include a realtor who previously was involved in the sale or purchase of a community residence, the parties' accountant, or a peace officer who had prepared an incident report pertaining to an incident involving one or both of the parties.

VI. Supplemental Expert Witness Lists

Once the initial exchange of expert witness information occurs, any party who engaged in the exchange may supplement their expert witness list. A supplemental expert witness may only be designated by a party if they have not "previously retained an expert to testify on that subject."[17]

Two additional conditions are imposed:

- An expert witness declaration under Code of Civil Procedure section 2034.260(c) must be provided, along with any discoverable reports and writings; and
- The supplemental expert witness must be made available immediately for a deposition, and the deposition may be taken notwithstanding the expiration of the discovery cut-off.[18]

The supplemental exchange must be made within twenty days of the initial exchange.[19] Further, only a party who participated in the initial exchange may submit a supplemental exchange of expert witness information.[20]

VII. Augmenting Expert Witness Designations

If a party has timely exchanged expert witness information, they may seek leave from the court to allow them to augment or amend their expert witness list.[21] An expert witness list is "augmented" by adding the information for an expert witness retained after the expert witness exchange has occurred.[22] An expert witness list is amended to modify "general substance of the testimony that an expert previously designated is expected to give."[23]

One would expect a motion to augment where a previously designated expert witness is no longer available to testify at trial. A party could then seek to augment the designation to identify the new (replacement) expert witness who will testify in place of the previously designated expert witness. A motion to amend would be appropriate where, through the expert discovery process, the scope of a previously designated expert witness's testimony has changed. For example, upon exchange of expert witness information you learn that the opposing party's appraiser is also offering an opinion regarding the fair market rental value of the community residence in order to bolster a claim for a *Watts* charge.

Although no specific time limit is imposed on filing the motion to augment or amend an expert witness designation, the motion must be made so that sufficient time exists to complete discovery.[24] "Under exceptional circumstances, the court may permit the motion to be made at a later time."[25] A motion to augment or amend an expert witness designation must include a meet and confer declaration under Code of Civil Procedure section 2016.040.[26]

VIII. Motion to Submit Untimely Expert Witness Information

A non-compliant party may also request leave from the court to extend the time for exchange of expert witness information when they have failed to timely submit expert witness information.[27] Generally, the motion "shall be made a sufficient time in advance of the time limit for the completion of discovery ..." so the late-designated expert's deposition can be conducted in a timely manner.[28] A motion to submit untimely expert witness information must be accompanied by a meet and confer declaration under Code of Civil Procedure section 2016.040.[29]

The Code of Civil Procedure imposes very specific conditions for the granting of a motion to late-serve expert witness information, which are mandatory requirements for leave to be granted. First, the court must take into account the extent to which the opposing party has relied on the absence of a list of expert witnesses.[30] Second, the court must determine that any party opposing the motion will "not be prejudiced in maintaining that party's action or defense on the merits."[31] Third, the court must determine that the moving party:

- Failed to submit the information as the result of mistake, inadvertence, surprise, or excusable neglect;
- Promptly sought relief after learning of the mistake, inadvertence, surprise, or excusable neglect; and
- Promptly served a copy of their proposed expert witness information on all other parties.[32]

Only if all these conditions are satisfied can relief to serve an untimely expert witness designation be granted. Further, the order granting relief is conditioned on the party seeking relief making the untimely designated expert

immediately available for deposition.[33] The court can also impose "any other terms as may be just" including allowing an opposing party to designate additional expert witnesses or elicit different opinions than previously disclosed, awarding costs and litigation expenses or continuing the trial date for a reasonable period of time.[34]

IX. Protective Orders

In most cases, the appropriate response to a demand for exchange of expert witness information is to serve a response that identifies the expert witnesses to be called by the responding party. However, in cases where an untimely demand has been served, or where "justice requires," a protective order may be issued to protect a party from "unwarranted annoyance, embarrassment, oppression, or undue burden and expense."[35]

In *Boston v. Penny Lane Centers, Inc.*,[36] the court of appeal addressed in dicta circumstances that would warrant issuance of a protective order related to expert witness discovery. At the time of the expert witness information exchange, the plaintiff's experts had not yet generated their expert reports to be used at trial. The reports were subsequently produced (untimely) as soon as they were received from the experts. The opposing party elected not to depose the expert witnesses, even after they were offered the opportunity to do so after the production of the reports.

In affirming the trial court's decision permitting the expert witnesses to testify and offer opinions at trial, the court of appeal made the following comment: "Accordingly, on the motion of a party, a trial court may issue a protective order requiring that all expert reports and writings be created and produced by a specified exchange date."[37] This would be particularly true in instances where it appears there was a specific effort made to delay or suppress the expert's report so that it is not available on the date of the expert witness information exchange. In such an instance, the court could also exclude the expert's opinions at the time of trial.[38]

X. Conclusion

Demanding and participating in the exchange of expert witness information is just part of the expert witness discovery process. Perhaps the most important step is deposing the expert witness. Part II of this article will address deposing the expert witness, including what documents to seek from the expert witness. Part II will conclude with a discussion of ways to limit expert witness testimony at the time of trial based on a failure to exchange expert witness information or due to an inadequate exchange of expert witness information.

Endnotes

1 Bonds v. Roy, 20 Cal. 4th 140, 147 (1999), citing Hogan & Weber, Cal. Civil Discovery *Expert Witness Disclosure* § 10.1, p. 525 (1997).

2 *In re* Marriage of Boblitt, 223 Cal. App. 4th 1004, 1022 (2014).

3 Cal. Civ. Proc. Code § 2034.210.

4 Cal. Civ. Proc. Code § 2034.210(a).

5 *Id.*

6 Cal. Civ. Proc. Code § 2034.220.

7 Cal. Civ. Proc. Code § 2034.230.

8 Cal. Civ. Proc. Code § 2034.240.

9 Cal. Civ. Proc. Code § 2034.290.

10 Cal. Civ. Proc. Code § 2034.230(b).

11 Cal. Civ. Proc. Code § 2034.260(a).

12 Cal. Civ. Proc. Code § 2034.260(c).

13 Cal. Civ. Proc. Code § 2034.260(c).

14 Cal. Civ. Proc. Code § 2034.270.

15 Kalaba v. Gray, 95 Cal. App. 4th 1416, 1418 (2002).

16 Cal. Civ. Proc. Code § 2034.280(a).

17 Cal. Civ. Proc. Code §§ 2034.280(b), (c).

18 Cal. Civ. Proc. Code § 2034.280(a).

19 Cal. Civ. Proc. Code § 2034.280(a).

20 Cal. Civ. Proc. Code § 2034.610.

21 Cal. Civ. Proc. Code § 2034.610(a)(1).

22 Cal. Civ. Proc. Code § 2034.610(a)(2).

23 Cal. Civ. Proc. Code § 2034.610(b).

24 Cal. Civ. Proc. Code § 2034.610(b).

25 Cal. Civ. Proc. Code §2034.610(c).

26 Cal. Civ. Proc. Code §2034.710(a).

27 Cal. Civ. Proc. Code §2034.710(b).

28 Cal. Civ. Proc. Code § 2034.710(c).

29 Cal. Civ. Proc. Code § 2034.720(a).

30 Cal. Civ. Proc. Code § 2034.720(b).

31 Cal. Civ. Proc. Code § 2034.720(c).

32 Cal. Civ. Proc. Code § 2034.720(d).

33 Cal. Civ. Proc. Code § 2034.720(d).

34 Cal. Civ. Proc. Code § 2034.250(b).

35 Boston v. Penny Lane Ctr., Inc., 170 Cal. App. 4th 936 (2009).

36 *Id.* at 952.

37 Cal. Civ. Proc. Code § 2034.260(a).

38 *Id.*