

THE EIGHT CASES YOU MUST KNOW TO BE

A SUCCESSFUL TRIAL ATTORNEY

***Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659**

This is a case wherein defense counsel was sharply criticized for filing motions in limine that were “fake” motions in limine. This case has an excellent discussion of how motions in limine are to be utilized. The court held that it was a misuse of an in limine motion to compel a party to testify in conformity with his or in this case, her, deposition testimony. Two gals were riding in an elevator that apparently stalled and they were injured when exiting the elevator. At deposition, they testified they were injured in the smaller of two possible culprit elevators, and the defense sought to keep out all evidence suggesting the larger elevator may have malfunctioned, or any evidence whatsoever about the larger elevator. The defense also sought in limine to exclude the testimony of plaintiffs’ expert in any capacity, since his opinions at deposition were focused solely at the larger elevator and he had no criticism or opinions about the smaller elevator. In analyzing this case, the Appellate Court noted that improper motions included an attempt by the defense to exclude any evidence by the plaintiffs that was “speculative,” and limiting plaintiffs’ experts to those opinions they proffered during deposition. (The sky is blue motions in limine.) There were 28 motions in all. The bottom line is this: a motion in limine should aid the court in precluding inadmissible evidence that is not merely declarative of existing law, but rather, provides meaningful guidance for the witnesses or parties. A motion in limine can also serve in certain circumstances as a motion to exclude under Evidence Code section 353—but not always, as it can be difficult to exclude evidence prior to the offering at trial. Matters of professional courtesy and trial logistics are inappropriate uses of a motion in limine.

***Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31**

This case is a must-read prior to designating experts for trial. The case highlights the advantage that plaintiffs have in the ability to designate treating physicians as experts on causation, damages and standard of care—without having to disclose the same information as required with retained experts. In *Schreiber*, plaintiff’s counsel designated plaintiff’s treating physicians as experts, but did not include expert witness designations for them. The defense argued that these percipient witnesses were going to testify about expert matters, requiring an expert witness declaration. The Court of Appeal agreed—but the Supreme Court did not. The High Court determined that a treating physician is a percipient expert, but his or her testimony is not limited to merely personal observations. “As the legislative history clarifies, what distinguishes the treating physician from an expert witness is not the content of the testimony, but the context in which he became familiar with the plaintiff’s injuries that were ultimately the subject of litigation which form the actual basis for the medical opinion.”

***Allen v. Superior Court* (1984) 151 Cal.App.3d 447**

A precursor to *Stony Brook*, *Allen* also helps to define the parameters of expert witness discovery. This case involved a plaintiff who sought the records of a doctor relating to his medical-legal experience and any other work for insurance companies for a five-year time frame, and the doctor moved for a protective order. The court determined that on balance, the doctor's privacy interests were more important than those of the plaintiff, because the plaintiff failed to show that the records and information sought could have been gathered through less intrusive means. The plaintiff's right to unfettered access to his records. However, the court did order that at deposition the doctor had to divulge the percentage of his practice involving defense medical examinations and the amount of compensation he received from defense work. But, the court further noted that to show bias, the party seeking the information does not need to learn all of the details of the doctor's billing and accounting and the "specifics of his prior testimony and depositions."

***Stony Brook I Homeowners Ass'n. v. Superior Court* (2000) 84 Cal.App.4th 691**

This case holds that a litigant's right to evidence of an expert's potential bias is not absolute. In this personal injury action against a homeowner's association, the plaintiff wanted to find out as much information as possible about the orthopedic specialist that was hired by the defense to evaluate the plaintiff's injuries. Prior to the doctor's deposition, the trial court ordered that the physician provide a breakdown showing his total compensation for defense work and total compensation for plaintiff's cases during a four-year period. The doctor argued that if he was required to produce such a summary it would be overly burdensome, in that it would consume over 90 hours of labor from his staff, and significantly disrupt his practice. The Appellate Court in *Stony Brook* recognized that there is a limit to the amount of detail an expert must be compelled to disclose, and if an order requires extensive financial disclosure, it can operate to exclude the expert's testimony altogether, which a trial court should avoid. Therefore, the court determined that the expert should be required to provide a description of his or her practice sufficient to "permit a fact finder to determine whether his opinions in this case had been influenced by any bias in favor of lawyers or parties who have retained his services." In sum, an expert should be able to provide a numerical estimate of plaintiff versus defense medical-legal work, and the amount of income generated from such litigation-based work. If it is too burdensome on the expert to compile this information, a third party can do so, with the costs to be borne by the requesting party.

***Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006**

Stewart is a case worth reading for the comments by the trial court on page 1011. Judge Murphy chastised the defense attorney who instructed a witness not to answer questions in a deposition because he objected that the questions were not relevant. The judge pointed out that the correct procedure would have been for counsel objecting to the questions to adjourn the deposition and seek a protective order. "You don't assume the role of a judge and instruct a witness not to answer a question in a deposition.

That is a huge no no.” The court said the attorney could rightfully only object to a question that would elicit information that was privileged. Remember, for discovery purposes, admissibility is not the definitive test; information is discoverable unless it is privileged, or if there is no way that the evidence is calculated to lead to admissible evidence at trial. Never make an objection in a deposition that a question seeks information that is irrelevant—it is improper.

***Kennemer v. State of California* (1982) 133 Cal.App.3d 907**

This case involves a tort claims act action wherein a husband and wife sued the state for an alleged dangerous condition of a state roadway (ice) which caused the wife to “put an excessive amount of left steer into the vehicle.” Of note is that Justice Kenneth Andreen weighed in on this case for the Court of Appeal, Fifth District. This accident occurred on State Road 41 between Oakhurst and Corsgold. The wife was driving a Volkswagen Beetle. The Beetle hit a 1975 Mustang when it crossed over the center line directly into the path of the Mustang. Unfortunately, the wife suffered severe permanent injuries including brain stem damage, she was comatose for 3 and ½ years post-accident and a quadriplegic. The plaintiff attempted to utilize an expert that had been disclosed to testify about the Volkswagen to rebut testimony as to the defense expert’s opinion regarding accident reconstruction. The plaintiff’s expert was deposed three times and all three times indicated that his testimony was limited to the Volkswagen vehicle itself, and not to the accident reconstruction. However, at trial, plaintiff’s attorney attempted to use the Beetle expert to rebut the defense traffic reconstruction expert’s opinion. The court prohibited it. The court surmised that if the plaintiff’s expert had disclosed an opinion in his deposition about the tire track marks of the Volkswagen, the non-compliance with the statute as to this part of his testimony would have been harmless error, since the defense would have had an opportunity to prepare for cross-examination and rebuttal of plaintiff’s experts opinion. (In fact, the defense expert had not disclosed in his expert witness declaration that he was going to testify that the tire tracks belonged to the Volkswagen, but he did state the reasons to support that opinion at his deposition, so plaintiff’s counsel had an opportunity to prepare for cross-examination.) Interestingly, the plaintiff’s expert was disclosed as an accident reconstruction expert; however, he did not offer that testimony at his deposition. After the defense rested, however, the plaintiff offered her expert for deposition on this issue, but the trial court denied the continuance for deposition purposes. The Appellate Court determined that a trial court should permit a party to call an unlisted expert to testify that a fact relied upon by the opponent’s expert was incorrect or non-existent. But, “an alert trial judge, however, will be quick to sustain an objection to any question going beyond the contradiction of the foundation of fact and into the realm of general rebuttal of the opinion of the expert being impeached.” Since the plaintiff did not offer her expert witness for the purpose of contradicting the foundational facts upon which the defense expert’s opinions were based, the trial court correctly excluded the impeachment question.

***Jones v. Moore* (2000) 80 Cal.App.4th 557**

The issue in this case involves exclusion of expert testimony that went beyond the opinions the expert expressed in his deposition. This legal malpractice action was filed by a divorced wife against the attorney who represented her in the marital dissolution action. The attorney prevailed on a jury verdict in the action, and the plaintiff claimed the court erred in excluding certain trial testimony of her expert witness on the applicable standard of care in legal malpractice actions. The wife's expert testified that he would limit his testimony to certain opinions, and that if he generated other opinions in his trial preparation he would notify defense counsel. The appellate court determined that when an expert deponent testifies as to specific opinions, and affirmatively states that those are the only opinions to be offered at trial, it is grossly unfair and prejudicial to permit an expert to offer additional opinions at trial. Further, there was no warning that the plaintiff intended to illicit different opinions from the expert than those he expressed at his deposition. The court made it clear that the true purpose of the expert discovery statute is to ensure the parties are properly prepared for trial, and unexpected expert testimony is contrary to that purpose.

***Emerson Electric v. Superior Court* (1997) 16 Cal.4th 1101**

When you videotape a deposition, remember to make the witness reenact how an incident occurred. That's what happened in *Emerson*. The plaintiff in the underlying action bought a radial arm saw at Sears and suffered an injury while using it. At his deposition, he was asked to diagram his position at the time of the accident and the location of the saw. His attorney refused to allow him to do so. The California Supreme Court ruled that to answer a question also includes "to act in response to a request." Thus, an answer to a question includes a verbal as well as a non-verbal response in a videotaped deposition, since at trial, reenactments are routinely allowed, the Court reasoned. By allowing a non-verbal, demonstrative response, it served to further educate the parties during the discovery process, eliminating the "gamesmanship" element. There is a great discussion of the legislative intent behind the purpose of videotaped depositions in this case.

HONORABLE MENTION CASES:

***Nacht & Lewis Architects, Inc. et al v. Superior Court* (1996) 47 Cal.App.4th 214**

This case is one that all of us cite in response to discovery requests. Essentially the holding is this: if you prepare a list of witnesses who have provided you with independently prepared statements that have no tendency to reveal your evaluation of the case, such a list does not constitute qualified work product. However, if the list of potential witnesses interviewed by you tends to reveal your evaluation of the case by identifying persons whom you claim have knowledge of the incident, and you feel important enough to obtain statements from, the list of witnesses would be protected by the absolute work product privilege because it would reveal your "impressions, conclusions, opinions, or legal research or theories" within the meaning of Code of Civil Procedure section 2018(c).

***Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255**

Legal contention questions are entirely appropriate for interrogatories, but entirely inappropriate for a deposition when a party is represented by counsel. This case involved attorneys fighting over money. Rifkind was represented by counsel when he was asked legal contention questions at his deposition, requesting that he state all facts, list all witnesses, and identify all documents that supported the affirmative defenses he asserted in his answer to the lawsuit. The trial court determined that Rifkind was required to list the information as requested. Upon a writ to the Appellate Court, the trial court was ordered to vacate its previous order imposing sanctions against Rifkind for refusing to answer contention questions at his deposition, and directing the Superior Court to deny the motion in its entirety. The Appellate Court made it clear that it was not addressing its ruling to questions asked at a deposition that query the deponent about the basis for information about a factual conclusion or assertion; legal contention questions request the basis for a legal conclusion, and those are improper at a deposition.

***Bonds v. Roy* (1999) 20 Cal.App.4th 140**

When a party submits an expert declaration that fails to properly disclose the substance of the testimony to be elicited at trial, any testimony beyond the scope of the declaration must be excluded, unless the party moves to amend the declaration.

***Cassandra Province v. Women's Health Care Centers, Inc.* (1993) 20 Cal.App.4th 1673
(review den.)**

Jim Duenow was the plaintiff's attorney in this case involving a girl who suffered severe brain damage at birth. The Appellate Court held that testimony of an undisclosed medical expert should be limited to his or her percipient observations. This case also has language prohibiting improper ex parte conduct between defense counsel and physicians.

***Whitfield v. Roth* (1974) 10 Cal.3d 874**

This medical malpractice action is significant because the defense, through its experts, attempted to bring in the hearsay opinions of other doctors who did not treat the patient, 54 of them, to prove that there was nothing on an x-ray in taken in 1961 to suggest the patient was suffering from an organic condition. If you want to bring in the testimony of a physician who is not testifying, you can do so if the physician sent the patient to another physician and then relied upon the findings. (See also *Kelly v. Bailey* (1961) 189 Cal.App.2d 728.)

***Clement v. Alegre* (2009) 177 Cal.App.4th 1277**

One of the best things about this recent case is that it provides a helpful overview of the background and intent of the Civil Discovery Act of 1986, which was geared towards self-executing discovery, less bickering among counsel, and ideally, less court intervention. “This case illustrates once again the truth of (*Townsend v. Superior Ct.* (1998) 61 Cal.App.4th 1431)* ... as well as highlighting the lengths to which some counsel and clients will go to avoid providing discovery (in this case by responding to straightforward interrogatories with nitpicking and meritless objections), resulting in delaying proceedings, impeding the self-executing operation of discovery, and wasting the time of the court, the discovery referee, the opposing party, and his counsel.” Read this case if you have any questions regarding what constitutes evasive discovery responses, the meet and confer process, and monetary sanctions for misusing the discovery process. (**Townsend* was penned by Justice Stone, and addresses the same issues, in his usual colorful prose.)