

Amendment to 01-04-03

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2034 to read as follows:

1 §2034

2 (a) After the setting of the initial trial date for the action, any party may obtain discovery by
3 demanding that all parties simultaneously exchange information concerning each other's expert trial
4 witnesses to the following extent:

5 (1) Any party may demand a mutual and simultaneous exchange by all parties of a list
6 containing the name and address of any natural person, including one who is a party, whose oral or
7 deposition testimony in the form of an expert opinion any party expects to offer in evidence at the
8 trial.

9 (2) If any expert designated by a party under paragraph (1) is a party or an employee of a
10 party, or has been retained by a party for the purpose of forming and expressing an opinion in
11 anticipation of the litigation or in preparation for the trial of the action, the designation of that
12 witness shall include or be accompanied by an expert witness declaration under paragraph (2) of
13 subdivision (f).

14 (3) Any party may also include a demand for the mutual and simultaneous production for
15 inspection and copying of all discoverable reports and writings, if any, made by any expert
16 described in paragraph (2) in the course of preparing that expert's opinion.

17 This section does not apply to exchanges of lists of experts and valuation data in eminent
18 domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.

19 (b) Any party may make a demand for an exchange of information concerning expert trial
20 witnesses without leave of court. A party shall make this demand no later than the 10th day after the
21 initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

22 (c) A demand for an exchange of information concerning expert trial witnesses shall be in
23 writing and shall identify, below the title of the case, the party making the demand. The demand
24 shall state that it is being made under this section.

25 The demand shall specify the date for the exchange of lists of expert trial witnesses, expert
26 witness declarations, and any demanded production of writings. The specified date of exchange
27 shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is
28 closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or
29 later date of exchange.

30 (d) The party demanding an exchange of information concerning expert trial witnesses shall
31 serve the demand on all parties who have appeared in the action.

32 (e) A party who has been served with a demand to exchange information concerning expert
33 trial witnesses may promptly move for a protective order. This motion shall be accompanied by a
34 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of
35 each issue presented by the motion.

36 The court, for good cause shown, may make any order that justice requires to protect any
37 party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The
38 protective order may include, but is not limited to, one or more of the following directions:

39 (1) That the demand be quashed because it was not timely served.

40 (2) That the date of exchange be earlier or later than that specified in the demand.

41 (3) That the exchange be made only on specified terms and conditions.

42 (4) That the production and exchange of any reports and writings of experts be made at a
43 different place or at a different time than specified in the demand.

44 (5) That some or all of the parties be divided into sides on the basis of their identity of
45 interest in the issues in the action, and that the designation of any experts as described in paragraph
46 (2) of subdivision (a) be made by any side so created.

47 (6) That a party or a side reduce the list of employed or retained experts designated by that
48 party or side under paragraph (2) of subdivision (a).

49 If the motion for a protective order is denied in whole or in part, the court may order that the
50 parties against whom the motion is brought, provide or permit the discovery against which the
51 protection was sought on those terms and conditions that are just.

52 The court shall impose a monetary sanction under Section 2023 against any party, person, or
53 attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that
54 the one subject to the sanction acted with substantial justification or that other circumstances make
55 the imposition of the sanction unjust.

56 (f) All parties who have appeared in the action shall exchange information concerning
57 expert witnesses in writing on or before the date of exchange specified in the demand. The exchange
58 of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or
59 before the date of exchange.

60 (1) The exchange of expert witness information shall include either of the following:

61 (A) A list setting forth the name and address of any person whose expert opinion that party
62 expects to offer in evidence at the trial.

63 (B) A statement that the party does not presently intend to offer the testimony of any expert
64 witness.

65 (2) If any witness on the list is an expert as described in paragraph (2) of subdivision (a), the
66 exchange shall also include or be accompanied by an expert witness declaration signed only by the
67 attorney for the party designating the expert, or by that party if that party has no attorney. This
68 declaration shall be under penalty of perjury and shall contain:

69 (A) A brief narrative statement of the qualifications of each expert.

70 (B) A brief narrative statement of the general substance of the testimony that the expert is
71 expected to give.

72 (C) A representation that the expert has agreed to testify at the trial.

73 (D) A representation that the expert will be sufficiently familiar with the pending action to
74 submit to a meaningful oral deposition concerning the specific testimony, including any opinion and
75 its basis, that the expert is expected to give at trial.

76 (E) A statement of the expert's hourly and daily fee for providing deposition testimony and
77 for consulting with the retaining attorney.

78 (g) If a demand for an exchange of information concerning expert trial witnesses includes a
79 demand for production of reports and writings as described in paragraph (3) of subdivision (a), all
80 parties shall produce and exchange, at the place and on the date specified in the demand, all
81 discoverable reports and writings, if any, made by any designated expert described in paragraph (2)
82 of subdivision (a).

83 (h) Within 20 days after the exchange described in subdivision (f), any party who engaged
84 in the exchange may submit a supplemental expert witness list containing the name and address of
85 any experts who will express an opinion on a subject to be covered by an expert designated by an
86 adverse party to the exchange, if the party supplementing an expert witness list has not previously
87 retained an expert to testify on that subject. This supplemental list shall be accompanied by an
88 expert witness declaration under paragraph (2) of subdivision (f) concerning those additional
89 experts, and by all discoverable reports and writings, if any, made by those additional experts. The
90 party shall also make those experts available immediately for a deposition under subdivision (i),
91 which deposition may be taken even though the time limit for discovery under Section 2024 has
92 expired.

93 (i) On receipt of an expert witness list from a party, any other party may take the deposition
94 of any person on the list. The procedures for taking oral and written depositions set forth in Sections
95 2025, 2026, 2027, and 2028 apply to a deposition of a listed trial expert witness except as follows:

96 (1) The deposition of any expert described in paragraph (2) of subdivision (a) shall be taken
97 at a place that is within 75 miles of the courthouse where the action is pending. However, on motion
98 for a protective order by the party designating an expert witness, and on a showing of exceptional
99 hardship, the court may order that the deposition be taken at a more distant place from the
100 courthouse.

101 (2) A party desiring to depose any expert witness, other than a party or employee of a party,
102 who is either (A) an expert described in paragraph (2) of subdivision (a) except one who is a party
103 or an employee of a party, (B) a treating physician and surgeon or other treating health care
104 practitioner who is to be asked during the deposition to express opinion testimony, including
105 opinion or factual testimony regarding the past or present diagnosis or prognosis made by the
106 practitioner or the reasons for a particular treatment decision made by the practitioner, but not
107 including testimony requiring only the reading of words and symbols contained in the relevant
108 medical record or, if those words and symbols are not legible to the deponent, the approximation by
109 the deponent of what those words or symbols are, or (C) an architect, professional engineer, or
110 licensed land surveyor, who was involved with the original project design or survey for which he or
111 she is asked to express an opinion within his or her expertise and relevant to the action or
112 proceeding, shall pay the expert's reasonable and customary hourly or daily fee for any time spent at
113 the deposition from the time noticed in the deposition subpoena or from the time of the arrival of the
114 expert witness should that time be later than the time noticed in the deposition subpoena, until the
115 time the expert witness is dismissed from the deposition, whether or not the expert is actually
116 deposed by any party attending the deposition. If any counsel representing the expert or a
117 nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee
118 for the time period determined from the time noticed in the deposition subpoena until the counsel's
119 late arrival, shall be paid by that tardy counsel. However, the hourly or daily fee shall not exceed the
120 fee charged the party who retained the expert except where the expert donated his or her services to
121 a charitable or other nonprofit organization. A daily fee shall only be charged for a full day of
122 attendance at a deposition or where the expert was required by the deposing party to be available for
123 a full day and the expert necessarily had to forego all business he or she would have otherwise
124 conducted that day but for the request that he or she be available all day for the scheduled
125 deposition. In a worker's compensation case arising under Division 4 (commencing with Section
126 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to
127 depose any expert on another party's expert witness list shall pay this fee.

128 The party taking the deposition shall either accompany the service of the deposition notice
129 with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at
130 the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party
131 designating the expert. If the deposition of the expert takes longer than anticipated, the party giving
132 notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an
133 itemized statement from the expert. The party designating the expert is responsible for any fee
134 charged by the expert for preparing for the deposition and for traveling to the place of the
135 deposition, as well as for any travel expenses of the expert.

136 (3) The service of a proper deposition notice accompanied by the tender of the expert
137 witness fee described in paragraph (2) is effective to require the party employing or retaining the
138 expert to produce the expert for the deposition, and, if the notice specifies with reasonable
139 particularity any materials or category of materials to be produced by the expert, to require the
140 expert to produce at the deposition any document or tangible thing for inspection and copying. If
141 the party noticing the deposition fails to tender the expert's fee under paragraph (2), the expert shall
142 not be deposed at that time unless the parties stipulate otherwise.

143 (4) If a party desiring to take the deposition of an expert witness under this subdivision
144 deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable,
145 that party may move for an order setting the compensation of that expert. This motion shall be
146 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an
147 informal resolution of each issue presented by the motion. Notice of this motion shall also be given
148 to the expert. In any such attempt at an informal resolution, either the party or the expert shall
149 provide the other with (A) proof of the ordinary and customary fee actually charged and received by
150 that expert for similar services provided outside the subject litigation, (B) the total number of times
151 the presently demanded fee has ever been charged and received by that expert, and (C) the
152 frequency and regularity with which the presently demanded fee has been charged and received by
153 that expert within the two-year period preceding the hearing on the motion.

154 In addition to any other facts or evidence, the expert or the party designating the expert shall
155 provide, and the court's determination as to the reasonableness of the fee shall be based upon (A)
156 proof of the ordinary and customary fee actually charged and received by that expert for similar
157 services provided outside the subject litigation, (B) the total number of times the presently
158 demanded fee has ever been charged and received by that expert, and (C) the frequency and
159 regularity with which the presently demanded fee has been charged and received by that expert
160 within the two-year period preceding the hearing on the motion. Provisions (B) and (C) shall apply
161 to actions filed after January 1, 1994. The court may also consider the ordinary and customary fees
162 charged by similar experts for similar services within the relevant community and any other factors
163 the court deems necessary or appropriate to make its determination.

164 Upon a determination that the fee demanded by that expert is unreasonable, and based upon
165 the evidence and factors considered, the court shall set the fee of the expert providing testimony.

166 The court shall impose a monetary sanction under Section 2023 against any party, person, or
167 attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds
168 that the one subject to the sanction acted with substantial justification or that other circumstances
169 make the imposition of the sanction unjust.

170 (j) Except as provided in subdivisions (k), (l), and (m), on objection of any party who has
171 made a complete and timely compliance with subdivision (f), the trial court shall exclude from
172 evidence the expert opinion of any witness that is offered by any party who has unreasonably failed
173 to do any of the following:

174 (1) List that witness as an expert under subdivision (f).

175 (2) Submit an expert witness declaration.

176 (3) Produce reports and writings of expert witnesses under subdivision (g).

177 (4) Make that expert available for a deposition under subdivision (i).

178 (5) Produce at that expert's deposition the materials or categories of materials specified in
179 the notice of the expert's deposition under subdivision (i).

180 (k) On motion of any party who has engaged in a timely exchange of expert witness
181 information, the court may grant leave to (1) augment that party's expert witness list and declaration
182 by adding the name and address of any expert witness whom that party has subsequently retained, or
183 (2) amend that party's expert witness declaration with respect to the general substance of the
184 testimony that an expert previously designated is expected to give. This motion shall be made at a
185 sufficient time in advance of the time limit for the completion of discovery under Section 2024 to
186 permit the deposition of any expert to whom the motion relates to be taken within that time limit.
187 However, under exceptional circumstances, the court may permit the motion to be made at a later
188 time. This motion shall be accompanied by a declaration stating facts showing a reasonable and
189 good faith attempt at an informal resolution of each issue presented by the motion. The demand, and
190 all expert witness lists and declarations exchanged in response to it, shall be lodged with the court
191 when their contents become relevant to an issue in any pending matter in the action. The court shall
192 grant leave to augment or amend an expert witness list or declaration only after taking into account

193 the extent to which the opposing party has relied on the list of expert witnesses, and after
194 determining that any party opposing the motion will not be prejudiced in maintaining that party's
195 action or defense on the merits, and that the moving party either (1) would not in the exercise of
196 reasonable diligence have determined to call that expert witness or have decided to offer the
197 different or additional testimony of that expert witness, or (2) failed to determine to call that expert
198 witness, or to offer the different or additional testimony of that expert witness as a result of mistake,
199 inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to
200 augment or amend promptly after deciding to call the expert witness or to offer the different or
201 additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness
202 information concerning the expert or the testimony described in subdivision (f) on all other parties
203 who have appeared in the action. Leave shall be conditioned on the moving party making the expert
204 available immediately for a deposition under subdivision (i), and on such other terms as may be just,
205 including, but not limited to, leave to any party opposing the motion to designate additional expert
206 witnesses or to elicit additional opinions from those previously designated, a continuance of the trial
207 for a reasonable period of time, and the awarding of costs and litigation expenses to any party
208 opposing the motion.

209 The court shall impose a monetary sanction under Section 2023 against any party, person, or
210 attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness
211 information, unless it finds that the one subject to the sanction acted with substantial justification or
212 that other circumstances made the imposition of the sanction unjust.

213 (l) On motion of any party who has failed to submit expert witness information on the date
214 specified in a demand for that exchange, the court may grant leave to submit that information on a
215 later date. This motion shall be made a sufficient time in advance of the time limit for the
216 completion of discovery under Section 2024 to permit the deposition of any expert to whom the
217 motion relates to be taken within that time limit. However, under exceptional circumstances, the
218 court may permit the motion to be made at a later time. This motion shall be accompanied by a
219 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of
220 each issue presented by the motion.

221 The court shall grant leave to submit tardy expert witness information only after taking into
222 account the extent to which the opposing party has relied on the absence of a list of expert
223 witnesses, and determining that any party opposing the motion will not be prejudiced in maintaining
224 that party's action or defense on the merits, and that the moving party (1) failed to submit that
225 information as the result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that
226 leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and (3)
227 has promptly thereafter served a copy of the proposed expert witness information described in
228 subdivision (f) on all other parties who have appeared in the action. This order shall be conditioned
229 on the moving party making that expert available immediately for a deposition under subdivision (i),
230 and on such other terms as may be just, including, but not limited to, leave to any party opposing the
231 motion to designate additional expert witnesses or to elicit additional opinions from those previously
232 designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and
233 litigation expenses to any party opposing the motion.

234 The court shall impose a monetary sanction under Section 2023 against any party, person, or
235 attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information,
236 unless it finds that the one subject to the sanction acted with substantial justification or that other
237 circumstances make the imposition of the sanction unjust.

238 (m) A party may call as a witness at trial an expert not previously designated by that party
239 if: (1) that expert has been designated by another party and has thereafter been deposed under
240 subdivision (i), or (2) that expert is called as a witness to impeach the testimony of an expert witness
241 offered by any other party at the trial. This impeachment may include testimony to the falsity or

242 nonexistence of any fact used as the foundation for any opinion by any other party's expert witness,
243 but may not include testimony that contradicts the opinion.

244 (n) The demand for an exchange of information concerning expert trial witnesses, and any
245 expert witness lists and declarations exchanged shall not be filed with the court. The party
246 demanding the exchange shall retain both the original of the demand, with the original proof of
247 service affixed, and the original of all expert witness lists and declarations exchanged in response to
248 the demand until six months after final disposition of the action. At that time, all originals may be
249 destroyed unless the court, on motion of any party and for good cause shown, orders that the
250 originals be preserved for a longer period.

(Proposed new language underlined; language to be deleted stricken.)

RESOLUTION 1-04-03

DIGEST

Expert Witness Discovery: Production of Documents

Amends Code of Civil Procedure section 2034 to allow a party noticing the deposition of an expert witness to require the expert to produce documents at the deposition via that notice.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 2034 to allow a party noticing the deposition of an expert witness to require the expert to produce documents at the deposition via that notice. This resolution should be disapproved because may remove the opposing party's ability to compel documents from an expert witness.

This resolution seeks to put into law what is often practiced: requesting an expert's documents, by agreement with opposing counsel, via a notice of deposition without further recourse to a subpoena duces tecum. However, as drafted, this resolution does not provide any enforcement mechanism for production under such notice. Currently, only the documents of parties and "party-affiliated" persons may be obtained by serving a notice of deposition with an attached list of documents and tangible things to be produced. (Code of Civ. Proc. § 2025, subd. (d).) If a party does not attend and produce the requesting party can bring a motion to compel and the non-producing party may suffer sanctions ranging from monetary to issue preclusion to termination of the case. (§ 2025, subd. (j)(1).) Experts, in contrast, are summoned to attend a deposition via a notice of deposition and compelled to produce documents at the deposition via a subpoena duces tecum. (§ 2034, subs. (i), (i)(3).) A subpoena is issued under authority of the court and failure to comply is punishable as contempt of court. (§ 2020, subs. (f), (h).) Thus, under section 2034 as currently written, if an expert does not appear at his or her deposition, the party is punished but if the expert fails to collect and bring all the documents subpoenaed, the *expert* is punished.

This resolution would allow the requesting party to issue a deposition notice "to require the expert to produce at the deposition any document or tangible thing for inspection and copying." However, this resolution does not expressly provide any enforcement mechanism aimed at the expert. Section 2025 would remain the only means of enforcing a "deposition notice" and that section only provides for sanctions against the *party*. While the reality is that the party pays the expert and, by threat of non-payment, could ensure the expert produced some documents, this is not sufficient to reach all the requested documents. Generally, it is the expert who initially gathers his or her documents responsive to the request. Only the expert knows whether he or she has gathered and produced "all relevant" requested documents. As a proper motivation to do a thorough search, it is the expert, not the party, who should be held legally responsible for failure to produce. Section 2034, as currently written, provides that motivation.

At best, this resolution will shift the legal consequences of an expert not producing his or her documents onto the party. At worst, if a court holds that the party cannot be held responsible for failing to force an independent expert to go through all of his or her files and produce documents, this resolution will leave requesting parties with no way to enforce the document request.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2034 to read as follows:

1 §2034

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3 demanding that all parties simultaneously exchange information concerning each other's expert trial
4 witnesses to the following extent:

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6 containing the name and address of any natural person, including one who is a party, whose oral or
7 deposition testimony in the form of an expert opinion any party expects to offer in evidence at the
8 trial.

9 (2) If any expert designated by a party under paragraph (1) is a party or an employee of a
10 party, or has been retained by a party for the purpose of forming and expressing an opinion in
11 anticipation of the litigation or in preparation for the trial of the action, the designation of that
12 witness shall include or be accompanied by an expert witness declaration under paragraph (2) of
13 subdivision (f).

14 (3) Any party may also include a demand for the mutual and simultaneous production for
15 inspection and copying of all discoverable reports and writings, if any, made by any expert described
16 in paragraph (2) in the course of preparing that expert's opinion.

17 This section does not apply to exchanges of lists of experts and valuation data in eminent
18 domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.

19 (b) Any party may make a demand for an exchange of information concerning expert trial
20 witnesses without leave of court. A party shall make this demand no later than the 10th day after the
21 initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

22 (c) A demand for an exchange of information concerning expert trial witnesses shall be in
23 writing and shall identify, below the title of the case, the party making the demand. The demand
24 shall state that it is being made under this section.

25 The demand shall specify the date for the exchange of lists of expert trial witnesses, expert
26 witness declarations, and any demanded production of writings. The specified date of exchange shall
27 be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to
28 the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date
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31 serve the demand on all parties who have appeared in the action.

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33 trial witnesses may promptly move for a protective order. This motion shall be accompanied by a
34 declaration stating facts showing a reasonable and good faith attempt at an informal resolution of
35 each issue presented by the motion.

36 The court, for good cause shown, may make any order that justice requires to protect any
37 party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The
38 protective order may include, but is not limited to, one or more of the following directions:

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46 (2) of subdivision (a) be made by any side so created.

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48 party or side under paragraph (2) of subdivision (a).

49 If the motion for a protective order is denied in whole or in part, the court may order that the
50 parties against whom the motion is brought, provide or permit the discovery against which the
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66 exchange shall also include or be accompanied by an expert witness declaration signed only by the
67 attorney for the party designating the expert, or by that party if that party has no attorney. This
68 declaration shall be under penalty of perjury and shall contain:

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72 (C) A representation that the expert has agreed to testify at the trial.

73 (D) A representation that the expert will be sufficiently familiar with the pending action to
74 submit to a meaningful oral deposition concerning the specific testimony, including any opinion and
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76 (E) A statement of the expert's hourly and daily fee for providing deposition testimony and
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81 discoverable reports and writings, if any, made by any designated expert described in paragraph (2)
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84 the exchange may submit a supplemental expert witness list containing the name and address of any
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86 party to the exchange, if the party supplementing an expert witness list has not previously retained an
87 expert to testify on that subject. This supplemental list shall be accompanied by an expert witness
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102 an employee of a party, (B) a treating physician and surgeon or other treating health care practitioner
103 who is to be asked during the deposition to express opinion testimony, including opinion or factual
104 testimony regarding the past or present diagnosis or prognosis made by the practitioner or the
105 reasons for a particular treatment decision made by the practitioner, but not including testimony
106 requiring only the reading of words and symbols contained in the relevant medical record or, if those
107 words and symbols are not legible to the deponent, the approximation by the deponent of what those
108 words or symbols are, or (C) an architect, professional engineer, or licensed land surveyor, who was
109 involved with the original project design or survey for which he or she is asked to express an opinion
110 within his or her expertise and relevant to the action or proceeding, shall pay the expert's reasonable
111 and customary hourly or daily fee for any time spent at the deposition from the time noticed in the
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120 fee shall only be charged for a full day of attendance at a deposition or where the expert was required
121 by the deposing party to be available for a full day and the expert necessarily had to forego all
122 business he or she would have otherwise conducted that day but for the request that he or she be
123 available all day for the scheduled deposition. In a worker's compensation case arising under
124 Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the
125 Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay this
126 fee.

127 The party taking the deposition shall either accompany the service of the deposition notice
128 with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at
129 the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party
130 designating the expert. If the deposition of the expert takes longer than anticipated, the party giving
131 notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an
132 itemized statement from the expert. The party designating the expert is responsible for any fee
133 charged by the expert for preparing for the deposition and for traveling to the place of the deposition,
134 as well as for any travel expenses of the expert.

135 (3) The service of a proper deposition notice accompanied by the tender of the expert
136 witness fee described in paragraph (2) is effective to require the party employing or retaining the
137 expert to produce the expert for the deposition, and to require the expert to produce at the deposition
138 any document or tangible thing for inspection and copying. If the party noticing the deposition fails
139 to tender the expert's fee under paragraph (2), the expert shall not be deposed at that time unless the
140 parties stipulate otherwise.

141 (4) If a party desiring to take the deposition of an expert witness under this subdivision
142 deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable,
143 that party may move for an order setting the compensation of that expert. This motion shall be
144 accompanied by a declaration stating facts showing a reasonable and good faith attempt at an
145 informal resolution of each issue presented by the motion. Notice of this motion shall also be given
146 to the expert. In any such attempt at an informal resolution, either the party or the expert shall
147 provide the other with (A) proof of the ordinary and customary fee actually charged and received by
148 that expert for similar services provided outside the subject litigation, (B) the total number of times
149 the presently demanded fee has ever been charged and received by that expert, and (C) the frequency

150 and regularity with which the presently demanded fee has been charged and received by that expert
151 within the two-year period preceding the hearing on the motion.

152 In addition to any other facts or evidence, the expert or the party designating the expert shall
153 provide, and the court's determination as to the reasonableness of the fee shall be based upon (A)
154 proof of the ordinary and customary fee actually charged and received by that expert for similar
155 services provided outside the subject litigation, (B) the total number of times the presently demanded
156 fee has ever been charged and received by that expert, and (C) the frequency and regularity with
157 which the presently demanded fee has been charged and received by that expert within the two-year
158 period preceding the hearing on the motion. Provisions (B) and (C) shall apply to actions filed after
159 January 1, 1994. The court may also consider the ordinary and customary fees charged by similar
160 experts for similar services within the relevant community and any other factors the court deems
161 necessary or appropriate to make its determination.

162 Upon a determination that the fee demanded by that expert is unreasonable, and based upon
163 the evidence and factors considered, the court shall set the fee of the expert providing testimony.

164 The court shall impose a monetary sanction under Section 2023 against any party, person, or
165 attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds
166 that the one subject to the sanction acted with substantial justification or that other circumstances
167 make the imposition of the sanction unjust.

168 (j) Except as provided in subdivisions (k), (l), and (m), on objection of any party who has
169 made a complete and timely compliance with subdivision (f), the trial court shall exclude from
170 evidence the expert opinion of any witness that is offered by any party who has unreasonably failed
171 to do any of the following:

172 (1) List that witness as an expert under subdivision (f).

173 (2) Submit an expert witness declaration.

174 (3) Produce reports and writings of expert witnesses under subdivision (g).

175 (4) Make that expert available for a deposition under subdivision (i).

176 (k) On motion of any party who has engaged in a timely exchange of expert witness
177 information, the court may grant leave to (1) augment that party's expert witness list and declaration
178 by adding the name and address of any expert witness whom that party has subsequently retained, or
179 (2) amend that party's expert witness declaration with respect to the general substance of the
180 testimony that an expert previously designated is expected to give. This motion shall be made at a
181 sufficient time in advance of the time limit for the completion of discovery under Section 2024 to
182 permit the deposition of any expert to whom the motion relates to be taken within that time limit.
183 However, under exceptional circumstances, the court may permit the motion to be made at a later
184 time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good
185 faith attempt at an informal resolution of each issue presented by the motion. The demand, and all
186 expert witness lists and declarations exchanged in response to it, shall be lodged with the court when
187 their contents become relevant to an issue in any pending matter in the action. The court shall grant
188 leave to augment or amend an expert witness list or declaration only after taking into account the
189 extent to which the opposing party has relied on the list of expert witnesses, and after determining
190 that any party opposing the motion will not be prejudiced in maintaining that party's action or
191 defense on the merits, and that the moving party either (1) would not in the exercise of reasonable
192 diligence have determined to call that expert witness or have decided to offer the different or
193 additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to
194 offer the different or additional testimony of that expert witness as a result of mistake, inadvertence,
195 surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or
196 amend promptly after deciding to call the expert witness or to offer the different or additional
197 testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information
198 concerning the expert or the testimony described in subdivision (f) on all other parties who have
199 appeared in the action. Leave shall be conditioned on the moving party making the expert available
200 immediately for a deposition under subdivision (i), and on such other terms as may be just,

201 including, but not limited to, leave to any party opposing the motion to designate additional expert
202 witnesses or to elicit additional opinions from those previously designated, a continuance of the trial
203 for a reasonable period of time, and the awarding of costs and litigation expenses to any party
204 opposing the motion.

205 The court shall impose a monetary sanction under Section 2023 against any party, person, or
206 attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness
207 information, unless it finds that the one subject to the sanction acted with substantial justification or
208 that other circumstances made the imposition of the sanction unjust.

209 (l) On motion of any party who has failed to submit expert witness information on the date
210 specified in a demand for that exchange, the court may grant leave to submit that information on a
211 later date. This motion shall be made a sufficient time in advance of the time limit for the completion
212 of discovery under Section 2024 to permit the deposition of any expert to whom the motion relates to
213 be taken within that time limit. However, under exceptional circumstances, the court may permit the
214 motion to be made at a later time. This motion shall be accompanied by a declaration stating facts
215 showing a reasonable and good faith attempt at an informal resolution of each issue presented by the
216 motion.

217 The court shall grant leave to submit tardy expert witness information only after taking into
218 account the extent to which the opposing party has relied on the absence of a list of expert witnesses,
219 and determining that any party opposing the motion will not be prejudiced in maintaining that party's
220 action or defense on the merits, and that the moving party (1) failed to submit that information as the
221 result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after
222 learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter
223 served a copy of the proposed expert witness information described in subdivision (f) on all other
224 parties who have appeared in the action. This order shall be conditioned on the moving party making
225 that expert available immediately for a deposition under subdivision (i), and on such other terms as
226 may be just, including, but not limited to, leave to any party opposing the motion to designate
227 additional expert witnesses or to elicit additional opinions from those previously designated, a
228 continuance of the trial for a reasonable period of time, and the awarding of costs and litigation
229 expenses to any party opposing the motion.

230 The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney
231 who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it
232 finds that the one subject to the sanction acted with substantial justification or that other
233 circumstances make the imposition of the sanction unjust.

234 (m) A party may call as a witness at trial an expert not previously designated by that party if:
235 (1) that expert has been designated by another party and has thereafter been deposed under
236 subdivision (i), or (2) that expert is called as a witness to impeach the testimony of an expert witness
237 offered by any other party at the trial. This impeachment may include testimony to the falsity or
238 nonexistence of any fact used as the foundation for any opinion by any other party's expert witness,
239 but may not include testimony that contradicts the opinion.

240 (n) The demand for an exchange of information concerning expert trial witnesses, and any
241 expert witness lists and declarations exchanged shall not be filed with the court. The party
242 demanding the exchange shall retain both the original of the demand, with the original proof of
243 service affixed, and the original of all expert witness lists and declarations exchanged in response to
244 the demand until six months after final disposition of the action. At that time, all originals may be
245 destroyed unless the court, on motion of any party and for good cause shown, orders that the
246 originals be preserved for a longer period.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Requires parties to produce their retained expert witnesses for deposition upon service of a notice of deposition, but does not require a retained expert witness to produce documents and tangible things unless the expert is personally served with a deposition subpoena. See, Weil and Brown, Cal. Pract. Guide: Civ. Pro. Before Trial (Rutter Group 2003), §8:1695.1.

This Resolution: Requires a party's retained expert witnesses to produce at deposition those documents and tangible things set forth in a notice of deposition. Although the language which the resolution proposes to insert in the statute appears at first blush to require production of all requested documents without any limitations, in actuality the proposed language is identical to the language of Code of Civil Procedure section 2025, subdivision (h)(1), which requires parties and party-affiliated witnesses to attend depositions and produce documents upon service of a deposition notice without the necessity for a subpoena. Pursuant to Code of Civil Procedure section 2034, subdivision (i), the procedures of Section 2025 apply generally to expert depositions, and the deponent and the parties have the right under Section 2025 to object to the requested documents or, where appropriate, to move for a protective order as with all other depositions.

The Problem: In virtually all cases, a party seeking to depose an opponent's expert witness wants to require the expert to produce documents at the deposition, including, but not necessarily limited to, the expert's entire file concerning the matter. The deposing party frequently also wants the expert to produce additional documents. While in some cases, counsel may reach an agreement to have their respective experts produce documents without the necessity of a subpoena, in the absence of such an agreement the parties must cause the opponent's expert to be personally served with a subpoena in order to require the production of the expert's documents. There is no sensible reason to require service of a subpoena on an opposing party's retained expert, and the current law adds an unnecessary cost to the already high cost of litigation. As is the case with parties, and with officers, directors, managing agents, and employees of parties, a service on counsel of a notice of deposition should be sufficient to require both attendance at the deposition and production of requested documents.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

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