

## RESOLUTION 08-02-2016

### DIGEST

Expert Discovery: Production of Expert Documents Pursuant to Notice of Deposition  
Amends Code of Civil Procedure section 2034.460 to require expert witnesses produce documents pursuant to deposition notice.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2034.460 to read as follows:

§2034.460

1 (a) The service of a proper deposition notice accompanied by the tender of the expert  
2 witness fee described in Section 2034.430 is effective to require the party employing or retaining  
3 the expert to produce the expert for the deposition as well as to produce any document,  
4 electronically stored information, or tangible thing for inspection and copying, pursuant with  
5 Section 2025.280(a).

6 (b) If the party noticing the deposition fails to tender the expert's fee under Section  
7 2034.430, the expert shall not be deposed at that time unless the parties stipulate otherwise.

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

**PROPONENT:** Orange County Bar Association

### STATEMENT OF REASONS

The Problem: Pursuant with CCP § 2034.210(c), demands for expert witness information may include a demand for discoverable reports and writings made by the expert in the course of preparing that expert's opinion. However, CCP §2034.210(c) does not expressly obligate parties to produce any other documents which may be in the expert's file, or any evidence examined or considered, but not "made by" the expert.

CCP §2034.460 permits parties to utilize a notice of deposition to compel another party to produce their retained expert for deposition. However, CCP §2034.460 does not expressly address whether this includes the ability to require production of documents/evidence at such a deposition. There is a strong implication that the right to require production was intended, in that CCP §2034.410 states that the "procedures for taking oral and written depositions" "apply to a deposition of a listed trial expert witness." By citing to CCP §2025.010 et seq., it appears that the legislature intended to permit parties to use notices of deposition to not only require retained expert to appear, but also to produce documents/evidence.

While some counsel are cooperative and willing to have their experts voluntarily produce their entire files, gamesmanship and sandbagging remain a common practice. This often leads to a battle as to whether the party noticing the deposition was obligated to personally serve a subpoena on the retained expert to require the production of relevant documents/evidence.

The purpose of expert witness discovery is to give fair notice of what an expert will say at trial. *Bonds v. Roy* (1999) 20 Cal. 4th 140, 146. The need for pretrial discovery is greater with respect to expert witnesses, because the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. *Bonds*, 20 Cal. 4th at 147.

The California courts lump together experts “who are parties, employees of parties, or are ‘retained by a party for the purpose of forming and expressing an opinion.’” *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1421. It would therefore make no sense to treat retained experts as a party controlled witness for the purpose of compelling them to appear for deposition, while simultaneously treating them like independent witness when it comes to compelling them to produce documents/evidence at that same deposition.

The Solution: This resolution is meant to clarify the obligation of parties to not merely produce their retained experts for deposition, but also relevant documents/evidence in the expert’s possession, through a notice of deposition, without a separate subpoena. The added language ***precisely mirrors*** CCP §2025.280(a), to create consistency with the obligations which apply to other party controlled witnesses. The proposed additional language also complies with CCP §2034.410, which declares that the “procedures for taking oral and written depositions” set forth in CCP §2025.010 et seq. (which include the ability to require production of documents/evidence at a deposition), are meant to “apply to a deposition of a listed trial expert witness....”

#### **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule, other than those identified above.

#### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Jason E. Turner

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#### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 2034.460 to require expert witnesses produce documents pursuant to deposition notice. This resolution should be approved in

principle because it reduces the ability and incentive for attorneys to practice gamesmanship when responding to expert witness disclosures and depositions.

The fact that the California Practice Guide: Civil Procedure Before Trial (“the Rutter Guide”) addresses the exact question of whether a subpoena is necessary, indicates the proponent has accurately identified a real issue. As the Rutter Guide states, “[i]t is unclear whether a notice to depose the retained expert may be coupled with a demand the expert produce documents, or whether a subpoena is necessary.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 8:1695.1.)

The Rutter Guide also says that Code of Civil Procedure section 2034.300, subdivision (c), provides for exclusion of an expert’s testimony from trial if a party unreasonably fails to produce reports and writings of expert witnesses, because the party who retains the expert arguably has control of the expert’s documents. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 8:1695.1.) This seems to be an additional protection mechanism that ensures that no “gamesmanship and sandbagging” occur – if a party wants to use an expert’s testimony, the party will voluntarily produce reports even without the resolution’s suggested language, for fear that the testimony will be thrown out altogether. Nonetheless, the Rutter Guide suggests, “until this issue is clarified, serve a deposition subpoena to obtain the expert’s documents unless the party who retained the expert agreed to make them available.” (Ibid.)