

# THE Verdict

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Kathleen Balamuth

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### **Statement of Editorial Policy**

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A. Charles Dell'Ario

*We've been talking* about lack of lawyer civility for years, but is anything getting better? Judging from recent events, Congress certainly has not learned anything. The president of the ABA, Stephen N. Zack, recently addressed the association at the annual convention. Too often today, he said, the approach people take to political discussion and debate is characterized by an attitude that, as he described it, "*I disagree with you, and not only that, but you're a bum, and I'm going to yell so loud I can't hear what you're saying.*"

The courtroom isn't much better.

In my world of appellate practice, it's hard to tell because the appellate courts seem to be a bastion of civility. Appellate judges are less tolerant of unseemly behavior, perhaps. So I was surprised to receive a letter that could only be described as vituperative from a 30-year trial lawyer responding to a courtesy copy of a notice of appeal I sent her. It was spiced with threats of sanction (in a situation where none were available) and punctuated with underscored words and bold-faced type. I would have thought the letter silly, but for the antagonistic attack on me as well as on our position.

I suppose I should have been happy that my correspondence with my opponent did not descend to the depths traveled by two Florida lawyers who blasted

each other through email. One wrote that the other should look in the mirror to see signs of a disability. "Then check your children (if they are even yours. ... Better check the garbage man that comes by your trailer to make sure they don't look like him)." The attorney stated, after learning the former's son suffers from a birth defect: "While I am sorry to hear about your disabled child, that sort of thing is to be expected when a retard

*A good rule of thumb is to never put in a letter or email something you would not want to see in your opponent's declaration.*

reproduces." The Florida bar appropriately imposed disciplinary sanctions against them both.

Many reasons are advanced for the phenomenon of declining civility: technological innovations which intensify the pace and stress of practice; competition for clients; expansion of law firms, courts, and numbers of judges, thus reducing the incentive to maintain cordial relationships with other counsel because the lawyers may not meet again; the mushrooming of discovery, perhaps fostering discovery abuse and sanctions; the decline of men-

toring and apprenticeships in which older lawyers passed down a tradition of civility to younger lawyers; the inordinate pressure to bill hours, particularly in large firms; and the judge's tolerance of uncivil behavior. Whatever the cause, incivility can make the practice of law seem intolerable.

A lawyer's relationship with opposing counsel can set the tone for the case. For instance, when your first interaction with opposing counsel is civil, the case tends to go more smoothly for everyone, e.g.,

extensions are not unreasonably withheld, scheduling orders are stipulated, telephone calls and correspondence are promptly returned, etc. As a result, civil counsel save their clients time and money, and earn appreciation and respect from opposing counsel. However aggrieved we may feel, the better course is to always follow the high ground. A good rule of thumb is to never put in a letter or email something you would not want to see in your opponent's declaration. Save your adjectives for that blockbuster novel you're writing. ♦

— Chuck Dell'Ario graduated from Stanford and Hastings, where he founded the Hastings Constitutional Law Quarterly. He's practiced law in Oakland since 1974 and has been a certified appellate specialist since 1997. His resume includes million-dollar jury verdicts.

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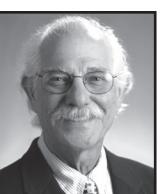
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- Since 1970 -

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## **The Verdict Editors are Looking for YOU!**

Are you funny? witty? The legal equivalent to Will Durst or Stephen Cobert? If so . . . *The Verdict* wants you for a new segment adding humor to the magazine through funny, witty commentary on current legal issues. Contact Suizi Lin at suizilaw@gmail.com - or - 510.689.1988.



This edition focuses on experts, which — in some cases — can be a necessary evil, as they may make or break your case. First off, we get tips from the masters about specific types of experts: Accident Reconstructions, by Lew Van Blois; Neuropsychologists, by Rick Simons; Physical Medicine and Rehabilitation Physicians, by Stan Casper and Nick Casper; Slip and Fall Industry Experts, by Steve Derby; and The Toxicology Expert, by Martin L. Jaspovice. The masters address who, what, and when, as well as what must be asked in the expert depositions. We also have an article by our President Charles Dell'Ario about expert issues in appeals, and an article by one of our board members, Jay Chafetz, on handling experts at trial.

We also introduce a new feature: "Just the Basics." This column will provide new lawyers with a basic understanding of a specific legal issue. In this edition, we address the basics of taking and defending expert depositions.

The final issue of the year will present articles concerning pre-litigation settlement via demand letters; mediation, arbitration and Kaiser arbitration. We expect to have this edition in your hands by January 2012.

If you are interested in authoring an article for an upcoming edition, or providing witticisms via your literary skills, please email Suizi Lin at suizilaw@gmail.com or call 510.689.1988. ♦



*Editor-in-Chief Suizi Lin represents the injured party in a myriad of personal injury claims. The principal of the Law Offices of Suizi Lin, she is also an independent contractor to Bay Area personal injury law firms.*

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# The Basics of Accident Reconstruction



by R. Lewis Van Blois

## *What is Accident Reconstruction?*

It is the process of analyzing the physical evidence and applying mathematics, physics, engineering, vehicle dynamics, photogrammetry, testing, and scientific evidence to demonstrate how an accident happened. It provides answers to how fast vehicles were travelling at impact, angles of collision, braking, and other vehicle dynamics.

## *Why do you need Accident Reconstruction?*

In any case in which the mechanism of the accident (auto, trip and fall, product liability, etc.) is disputed and you will need to explain it to the jury, you will need an expert in accident reconstruction to show the jury, using physical evidence, testimonial evidence, and science, why the evidence proves that the accident happened the way you contend it did.

## *When should you retain this expert?*

This expert should be retained and should inspect the location of the accident to

determine the existence of, and to evaluate, all physical evidence at the scene such as skid marks, gauge marks, debris, slippery surfaces, visual obstructions, etc. This must be done as soon as possible to avoid loss, modification, or destruction of such evidence. Vehicle inspection is necessary before any repairs are made. If two or more vehicles are involved, all vehicles must be inspected. Quantification of the vehicle crush profile and direction and extent of structural deformation and scrape marks provide crucial insight into collision dynamics. The plaintiff's vehicle should be purchased and preserved in its original post-accident condition and stored indoors.

## *Who is considered an accident reconstruction expert?*

Mechanical engineers and physicists usually provide this expertise. It is important to carefully review their education degrees, qualifications and experience. Their track record in trials should be explored since they will have to convince the jurors that

the accident happened in the way most favorable to the plaintiff. You find this expert by talking to other personal injury lawyers and by reviewing jury verdict publications of cases where they have testified. The cost of an accident reconstruction expert can be significant because of the number of hours needed to complete their analysis and to prepare for their depositions.

## *What information should the lawyer provide to the accident reconstruction expert?*

The lawyer needs to obtain the following: all police reports; police photographs (if any); emergency responder reports; witness statements; media accounts; emergency room records; autopsy reports in death cases; vehicle repair estimates; as well as provide access to the vehicles. All of this information must be carefully reviewed with the expert to learn what additional information is needed and what needs to be clarified. Prior to taking any depositions of the investigating police

officers, witnesses or parties, both the lawyer and expert need to determine what questions need to be answered and what facts need to be discovered or clarified. Essentially, you must learn what your expert needs in order to form solid helpful opinions.

### *What does the lawyer need to know before deposing the defense accident reconstruction expert?*

To prepare for taking the deposition of the opposing accident reconstruction expert: You should have a meeting with your expert to review his or her opinions, the bases for the opinions, and the reasoning behind them. Review the entire file including everything considered by the expert. Find out what the questionable areas are and what areas should be explored in the defense expert's deposition. Many accidents involve time, distance and location determinations. For example, in vehicular accidents, accident reconstruction often consists of an attempt to determine the speeds of vehicles, their pre-collision travel paths, the nature and directions of impacts, and their relative positions before and after the collision. Basic physics including formulas relating to conservation of momentum, location of center of gravity, velocity and velocity changes, coefficients of friction, etc. are applied to physical facts left from the accident including skid marks to determine speed. Speed can also be determined from damage to vehicles. Accident reconstruction is also needed in pedestrian accidents, slip and falls, and other types of accident. Human factors including perception and reaction time are important in accident reconstruction.

To take the opposing expert's deposition: The basic information to obtain at the deposition of the opposing expert includes obtaining complete information about their qualifications, what their assignment was, what their opinions are and the complete basis for each opinion, what they did consider and did not consider. You should copy their entire file, ask about further work anticipated, if any, and end on questions that pin down each and every opinion and that there are no other opinions.

### *What to be prepared for at trial*

Although the experts should have obtained everything necessary to form their opinions, many times there are additional facts, evidence, photographs, measurements, testing or other physical evidence that were not fully discovered and explored during expert depositions. If the expert at trial is not aware of new important evidence, he/she can be vulnerable to effective cross examination. The lawyer must be prepared at trial to object to any new opinions or additional work performed by the defense expert.

### *Case examples of effective accident reconstruction*

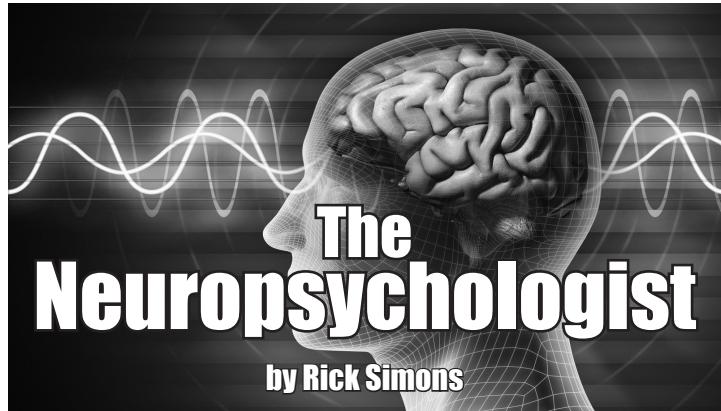
One of my cases provides two examples where our accident reconstruction expert's attention to details resulted in a multi-million dollar settlement at trial. A tractor-trailer made a left turn as our client's vehicle was passing it, resulting in a severe collision. The truck driver, who was not familiar with the tractor he was driving, claimed his left turn signal was on before our client started to pass. The left turn signal was off when the police arrived.

Our expert learned that the turn signal would not automatically go off during a turn, but had to be physically turned off on this tractor. At the truck driver's deposition, we had the driver describe everything he did before, during and after the collision. He did not include that he physically turned off the turn signal.

The second issue involved the air brake hose to the trailer which was unattached immediately after the accident. The defense expert testified the hose came off as a result of the collision and based his opinions on braking by both the tractor and the trailer. A careful review of the investigating officer's notes and testimony indicated there were no skid marks that could have been attributed to the trailer. Based on the absence of skid marks and the way the hose and its connectors were positioned, our expert testified that the air hose had not been properly connected by the truck driver before he began his trip and there had been no braking by the trailer.

Another example that occurred during one of my trials was the failure of the opposing expert to take into consideration subsequently discovered photographs of the collision vehicles, resulting in the jury not believing his version of the accident reconstruction. ♦

—R. Lewis Van Blois is an Oakland lawyer representing consumers with catastrophic injuries for over 40 years. He specializes in motor vehicle accidents, including rollover, roof crush, and ESC cases; defective products; truck accidents; dangerous roads; construction accidents; and medical malpractice. He is certified by the National Board of Trial Advocacy as a Civil Trial Specialist.



**Neuropsychologists:** *Experts who evaluate the function of the brain.* These psychologists (not MDs) evaluate things like memory, reasoning skill, attention and concentration, cognitive function, and motor skill levels. Nevertheless, the opinions of these experts may incorporate medical evidence, such as MRIs or CT scans showing head trauma, hemorrhage, or swelling in the brain. In large part, however, neuropsychologists base their opinions of impaired brain function on interpretation of the patient's performance during extensive standardized written and clinical tests. This in turn supports many elements of damage claims, such as an economic damage claim offered through an economist and vocational rehab expert to identify and calculate the nature and price of diminished ability to compete in the labor market or do one's job; the economic value of the inability to perform household services; the plaintiff's general damages; or the noneconomic loss of support and assistance in the maintenance of a household general damage claim in a spousal injury.

We use expert neuropsychologists in a head injury case to offer a scientific basis for the drop off in an injury victim's performance at work or at home. The expert must be provided with the deposition testimony or statements of the victim's family or co-workers who have observed that a plaintiff "doesn't seem the same" or has trouble doing daily tasks. The expert also needs the medical records of trauma, including CDs or films of the radiology

studies and school, employment, or pre-injury health care records from providers that form a baseline of function. If available, video of the plaintiff prior to injury assists in establishing this baseline as well. After the expert's own interview and testing is done, plaintiff's counsel can then ask the neuropsychologist to explain and identify what the specific functional post-traumatic differences are, how they are demonstrated by the prior function and testing, and how the trauma impaired the parts of the brain that control these functions. It is important to restrict the neuropsychologist to opinions that are within the scope of a psychologist who is explaining brain function and its relation to activities, and not cross the line into anatomical diagnosis or medical prognosis and diagnosis.

A risk exists that injudicious use of a neuropsychologist may inadvertently hurt the plaintiff's case by the suggestion of overreaching. Cross-examination will show that these expert's fees are quite high, and that there is a subjective element of the interpretation of many tests and in applying the results to an individual case. If there is no "objective" radiology to support a brain bleed or skull fracture, the lack of an MD license can make a neuropsychologist appear to be overstepping their boundaries and creating a "psychological" problem where there is no "real" injury. And most cases lack a complete set of pre-injury baseline tests, so the conclusion of changed level of function is not always clear or well documented. It is important to "pin down" the expert,

before the defense counsel does, as to the specific ways to correlate the injury to brain function and how the testing objectively demonstrates the disability. In addition, pinning down what functional loss is clearly attributable to organic brain injury, as opposed to a treatable or transient psychological condition, such as depression or PTSD, is essential.

A 62-year-old self-employed barber serving on jury duty was struck by a car in the crosswalk across the street from the courthouse. He hit his head on the pavement, and had a subdural hemorrhage. He claimed an inability to continue to work because he could no longer concentrate while cutting hair, and was losing customers, and was prone to anger, forgetting appointments, and having difficulty managing cash and money. The neuropsychologist was able to explain how the brain injury directly resulted in these disabilities, and defeat the defense argument that the barber was using the healed head injury as a way to achieve a personal choice of early retirement. ♦

— *Rick Simons, who specializes in personal injury and professional negligence, has practiced with Furtado, Jaspopovic & Simons in Hayward since 1977. A graduate of Boalt Hall, he was the 1998 President of the Consumer Attorneys of California and received the California Lawyer's Attorney of the Year Award in 2006.*



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# *Physical Medicine and the Rehabilitation Physician*



*by Stan Casper*



*and Nick Casper*

When handling a catastrophic injury case — particularly one involving a brain or spinal injury — the plaintiff's attorney must start thinking about how to capture all of the available damages at the earliest stages of representation. A logical place to start is the physical medicine and rehabilitation physician expert...

*Physical medicine and rehabilitation*, or physiatry, is the branch of medicine that focuses on restoring functional ability to those with physical impairments. Although patients with less severe impairments might consult with physical medicine doctors at some point in their course of treatment, the lion's share of these doctors' practices focus on individuals with debilitating injuries, such as traumatic brain or spinal injuries, strokes, or amputations. Physical medicine physicians specialize in a wide range of rehabilitation and physical therapy modalities, treatment, and medications; they are also experts in behavior modification, adaptive equipment, assistive devices, attendant care, and virtually any other medical or lifestyle requirement of the patient.

The physical medicine doctor's involvement should consist of a thorough review of *all* the client's medical records, a face-to-face evaluation, and in many cases, an in-person visit to the client's home environment to assess necessary modifications. The end-product of this process is the physical medicine and rehabilitation life care plan. This plan will be a clear delineation of all the client's future medical and rehabilitation needs, encompassing, *inter alia*, anticipated medications, therapies, re-hospitalizations, ER visits, medical tests and procedures, equipment, nursing/skilled needs, case management needs, home modifications, and life expectancy.

There are several reasons why retaining an expert in physical medicine at the nascent stages of a catastrophic injury case is advisable. From a practical, nuts-and-bolts standpoint, the physical medicine expert's opinions, particularly in formulating a life care plan, serves as the foundational building block for other experts in determining the value of future care. The

physical medicine doctor starts the process; without his or her opinions, no credible numbers are generated. Specifically, the physical medicine doctor creates the life care plan; a qualified vocational consultant takes the life care plan and costs it out; an economist then takes the qualified vocational specialist's number and renders it in present value form.

From a strategic standpoint, retaining a physical medicine expert at the case's inception can result in getting the 'jump' on the defense, and can even lead to the defense's adoption of your physical medicine expert's findings and opinions. Although there are a number of these experts in the Bay Area, there are surprisingly few that are board certified in physical medicine and rehabilitation. Ideally, the expert is also a certified life care planner, which adds luster to the expert's life care opinions. Also, the expert's evaluative task is arduous and time-consuming, requiring poring over voluminous medical records that are typically generated in catastrophic cases. Often times, the client is in a skilled nursing or rehabilitation facility, so the expert must also be willing to travel for the physical exam. Finding an expert with both certifications, and can meet the demanding requirements of the job, considerably narrows the pool of available experts to the defense.

When the defense does retain its own physical medicine expert, two large battles loom, and you must be ready to hone in on these areas at the defense expert's deposition. The first area is life expectancy, which is always cast in terms of percent reduction. A good physical medicine doctor will give a range rather than pinpoint a number, as it is more credible and provides more leeway to argue a value range.

You must be ready to question the defense expert on how they came up with their number, and a good place to start is determining what medical records were reviewed. Often, the defense review is incomplete.

The second battleground is the extent of necessary attendant care. Almost by definition with catastrophic brain or spinal injury cases, the plaintiff is on solid ground to assert 24/7 required care. Beyond that, what kind of attendant care? For example, if the client is in a vegetative state, he or she will need a lot more nursing care, which is more expensive than paid attendant care through an agency. Once again, the defense expert's opinions may suffer from inadequate review of the client's medical records.

In sum, retaining a qualified physical medicine and rehabilitation expert to do a comprehensive consultation and review can help seize control of the damages battle from the outset, and dictate the tenor of negotiations. ♦

— Stan Casper graduated from Boalt Hall, University of California, Berkeley in 1973. Stan is a past President of the Contra Costa County Bar Association and is Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy. He was formally an instructor in "Trial Practice" at Boalt Hall and continues to lecture to practicing attorneys. He is a founding partner of Casper, Meadows, Schwartz & Cook. ♦ As an associate with Casper, Meadows, Schwartz & Cook since 2007, Nick Casper has been actively involved in litigating many of the firm's largest cases involving catastrophic injury, wrongful death, medical malpractice, employment discrimination/harassment, civil rights violations, and child sexual abuse. In the last year, Nick has also taken several of the firm's cases to jury trial.

# Use and Mis-Use of Experts in Slip and Fall Cases



by Steven L. Derby

*This article will briefly cover some of the issues and strategies for the use of experts in so-called "slip and fall" cases. In a true "slip and fall" case, a person is injured by slipping on a type of floor surface and falling. To determine what experts to use and what to ask them, you need to explore more than just the obvious or immediate cause of the fall.*

## CAUSES OF FALLS

A fall can be caused by a substance on the floor. The substance may be something that does not belong like water, cooking oil, shampoo or soda. It can also be something that was put there intentionally by the building owner or an employee to make the floor look clean and shiny like wax, glazing or epoxy paint. Slip and falls can also occur by a failure to maintain a floor surface that was once slip-resistant but is no longer. These three sources of "slipperiness" can even work together. For example, a marble floor with a slip-resistant finish, but has worn off over time. As the finish wears off, the building owner<sup>1</sup>

may apply wax to it to make it look "shiny" again. To make matters worse, the floor may be wet from outside rain or a spilled drink.

## INITIAL INVESTIGATION

Early on in the case, have the floor tested for its co-efficient of friction. If your client slipped on a foreign substance, be sure to have your expert test the floor in both its "dry" and "wet" conditions. Moreover, establish a safety perimeter and/or closing off the area completely when testing its "wet" condition.

You also want to establish as early as possible whether any surveillance cameras

covered the area. If so, review the surveillance footage and perhaps hire an expert in video surveillance imagery. For a detailed discussion of this topic, see my article *The Candid, Candid Camera* published in *Trial and Forum*, May 1999.

## WHAT TYPE OF EXPERT DO I NEED?

The type and number of experts needed depends on the sources of "slipperiness" identified above. If you have an otherwise slip-resistant floor (based upon your expert's "dry" co-efficient of friction testing), then focus on the substance and how it got there. You may need an industry expert in safe cleaning practices if the

substance is water that may have been left behind by an employee cleaning the floor. It may have been caused by leaking equipment such as refrigerated display cases.

Even if water came from the shoes of a customer, there are still industry-specific standards for preventing those types of recognized hazards. For example, grocery stores are required to place floor mats in front of all entrances on rainy days to absorb the water from the shoes of customers coming from outside. Mats are also required to catch fruit (such as grapes) falling in the produce section. An expert in retail safety practices could tell a jury about those “*Rules of the Road*.<sup>2</sup>

If the floor is not slip-resistant in “dry” testing, then there are other sources of “slipperiness” that may require other experts. The manufacturers of high-end commercial flooring such as marble, teak and bamboo provide detailed instructions on how to care for their floors to protect the slip-resistant finish and to keep them clean. An expert in the care and maintenance of the particular type of floor on which your client slipped may be necessary, but in this internet age, almost all of that information is available online. If an industry expert is not available, then a commercial architect familiar with the flooring may be able to help you.

## **PREPARING FOR EXPERT DEPOSITIONS**

Whether you are preparing your own experts, or preparing to depose opposing experts, the key is to use the expert to identify the hazard and what could have been done to prevent it. Make sure you have identified the hazard completely, including all of its causes. For example, the defense will identify the hazard as “water”, but your expert must expand on that simplistic definition to embrace all of its causes.

In a case where water was left on the floor by a janitor who was using water instead of the soap solution recommended by the manufacturer and failed to mop it up thoroughly before she moved on to the rest of the floor, it is best to go beyond the “forgetfulness” of the janitor and focus on the deliberate choices of her corporate employer. “Frame” the hazard in a comprehensive way right from the outset so the corporate wrong-doer does not escape its responsibility for giving the janitor too much work, giving the janitor the wrong tools and training for the job and failing to supervise the janitor. Jurors are much more likely to forgive a forgetful janitor than they are a corporate employer that chose to disregard the manufacturer’s recommendations, chose to improperly staff its building maintenance department and chose not to supervise its workers.

In the world of slip and fall, there are very few true “accidents.” Most all hazards could have been avoided and you will have to deal with the “unavoidable accident” defense. The key to defeating this defense is to focus on prevention.

When you depose the opposing expert (or prepare your expert for cross-examination) focus on the basic principles of Safety Engineering. When a hazard is known, the proper response in order of preference is to:

- 1) eliminate the hazard
- 2) guard people from the hazard
- 3) warn against the hazard.

For example, water on the floor caused by a tenant’s wet umbrella. The defense will focus on the tenant’s behavior and ask why their client should be held responsible for that behavior. However, the building owner cannot stop people from entering the building with their umbrellas, but there are a number of ways to

keep the water from the umbrellas off the floor. You can use an umbrella stand to prevent people from taking wet umbrellas into the building; provide umbrella bags at the front entrance; or use floor mats at the entrances and run them from the entrance to the elevators. Explore all these options with your experts and opposing experts to show that the building owner had many realistic options to keep its visitors safe, but made the conscious choice not to eliminate the known hazard.

## **CONCLUSION**

Experts, when used wisely and judiciously, can help you answer the two key questions in any “slip and fall” case:

- 1) What is the hazard?
- 2) How could it have been avoided?

Experts can help you move beyond the immediate cause of a fall (i.e. water on the floor) to the larger confluence of choices that lead to that fall. In the process, it will help you pin the blame as high up the corporate ladder as possible to increase your chances of success in holding corporate wrong-doers responsible for their choices. ♦

—Steve Derby is a trial attorney who practices in Walnut Creek. He specializes in premises liability cases such as slip and falls and injuries to disabled persons due to a failure to provide access. He is a frequent author and lecturer on subjects including trial practice, experts and liens. He is a past president of the Alameda Contra Costa Trial Lawyers Association.

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<sup>1</sup>Remember a building owner has a non-delegable duty to keep its premises safe even if it is leased to someone else and even if an outside contractor is used as a janitorial service. *Sribong v. Total Investment Co.* (1994) 23 Cal. App.4th 721, 725-726

<sup>2</sup>This is a reference to an excellent book written by trial lawyer, author and lecturer Rick Friedman, which I highly recommend.



# The Toxicology Expert

By Martin L. Jaspovice

*In cases where the defendant or an adverse witness is likely to have been under the influence of drugs or alcohol at the time of an accident, it is beneficial to hire the services of an expert in toxicology. In automobile accident cases where liability is clear, the defense often admits fault in an effort to keep the jury from hearing testimony about the defendant's behavior. This is especially true in cases where the defendant was under the influence. However, if you are able to plead a sound cause of action for punitive damages based upon the defendant's intoxication, the defense will be unable to admit fault, as doing so would subject their client to the punitive damages being claimed. This allows the plaintiff's practitioner to present the aggravated liability facts to a jury and, because no juror is sympathetic to those who drink or use drugs and drive, an enhanced verdict value is likely.*

There are a number of toxicologists available to give expert testimony. Most, if not all, of these toxicological experts testify regularly in the criminal courts. It is important to explain the difference in standard of proof in a civil case to these experts so that they know they are on solid ground when giving opinions that have the greater probability of truth in your civil case. You should always be certain to interview a number of candidates and review their CVs and their experience with the civil justice system before deciding who is best to retain. If the toxicologist you are considering has had experience in the civil arena, it is of course best if they have represented both plaintiffs and defendants, and can therefore be

established as a "neutral" expert. If you have difficulty locating a toxicologist by speaking to other civil attorneys, contact attorneys who practice in the criminal courts as virtually all of them have had some interaction with toxicology experts in drunk driving cases. You can also review Jury Verdict publications to find the names of toxicology experts who have testified.

It is critical that you provide your toxicology expert with all relevant information in the case. This includes the depositions of the involved parties, the traffic collision report, all testing information pertaining to blood, breath, or urine samples, as well as all records regarding a defendant's criminal history with drugs and alcohol. The defendant's history is important as it may bear on his or her tolerance levels and give the expert some insight into the expected behavior of a defendant or witness given the amount of substance ingested.

If a police agency has harvested a blood, breath, or urine sample, it would be best to obtain the sample for testing to confirm the results. Toxicologists frequently have to work backwards as samples of blood, breath, or urine are taken after the injury causing event has occurred. They are able to reconstruct the intoxication levels at the precise time of the event using established scientific methods.

If the sample is unavailable, the testing results will need to be interpreted by your expert. Toxicologists have the ability to testify about the effects of intoxicating substances in general and more specifically when they have some reliable information

about the amount used (determined from the sample or the testing data), the user's background with respect to use of similar substances, and some general information such as body weight. The toxicologist is able to give opinions about whether exhibited behavior is consistent with that of an intoxicated person where it assists the jury in making a reasonable determination whether a defendant was intoxicated at the time of the important events of the case.

It is likely that the defense will hire a toxicologist in an effort to rebut information presented by your expert. However, all the defense accomplishes is keeping this issue in the forefront of the jury's mind as there will be two professional witnesses testifying about intoxication during trial. You should consult with your own expert before deposing the defendant's toxicologist and before approaching your trial examination of that expert. However, it is rarely harmful to cross-examine the defense toxicologist, as by carefully constructing your questions, you can refocus the jury's attention on the intoxication and how it affects one's ability to operate a motor vehicle or to perceive the events surrounding an accident. ♦

— Martin Jaspovice is a 1972 graduate of Boalt Hall Law School. He has practiced with Furtado, Jaspovice & Simons since 1973. An experienced trial attorney, mediator, and negotiator, Martin has won substantial verdicts in wrongful death, car accident, and on-the-job injury cases.



# *Fourth Annual* Spring Cocktail Reception



Hon. Cheryl Mills



ACCTLA President-Elect  
Lyle Calvin



Contra Costa County Trial Judge  
of the Year - Hon. Barry Goode

Justice James Marchiano and  
ACCTLA President Chuck Dell'Ario



Brad Wahrlich and  
ACCTLA Board Member Ryan Otis



Hon. Yvonne Gonzalez Rogers, Hon. Barry Goode, Hon. Steve Brick  
and Hon. Norman Spellberg (Ret.)



Hon. Mo Sabraw (Ret), Hon. Bonnie Sabraw (Ret) and Kerry Gough

To view other pictures from this event, or to  
order any pictures from the photographer, go to <http://www.shutterfly.com/pro/oasiiphotos/2009>

# Handling an Expert at Trial

by Jay Chafetz

*The following are some personal observations on handling experts at trial.  
I stress personal because other attorneys may have different points of view.*

## DIRECT EXAMINATION

If you are dealing with well-known and well-qualified experts, you may be able to gloss over some of the strictly formal types of questions and procedure. I have done several trials where no one has said "I hereby offer Dr. Smith as an expert in orthopedic surgery" or "Doctor, have you formed any opinions regarding this case?" before directly asking for the opinions.

Follow the same strictures on direct examination of an expert as you would regarding any other witness. Bring out any vulnerabilities on direct, so they have less impact on cross. Cover the expert's charges, how often you have used the expert before, and whether the expert typically testifies only for one side.

## STIPULATING TO THE EXPERT'S CREDENTIALS

In a jury trial, I have never had a defense attorney accept my stipulation regarding the expert's credentials. You should not accept their stipulation either.

## USE OF CVS

A curriculum vitae is hearsay and inadmissible over objection. I have always objected to admission of a curriculum vitae. I might consider otherwise if my expert's curriculum vitae were far more impressive than that of the defense expert.

## TO LEAD OR NOT TO LEAD

Evidence Code section 767 states that "Except under special circumstances where

the interests of justice otherwise require: (1) A leading question may not be asked of a witness on direct or redirect examination." The Comment to this section states that "The exception stated at the beginning of the section continues the present law that permits leading questions on direct examination where there is little danger of improper suggestion. . . . This would permit leading questions on direct examination for . . . expert witnesses." Therefore, some judges may permit you to lead your expert. Other judges may still sustain an objection to a leading question.

## CROSS-EXAMINATION OF EXPERTS

We are prone to overdo things at trial — going on longer than is necessary to make our point. Cross-examining experts is difficult. They are experienced witnesses, often having participated in far more trials than we have, and generally know far more about their field than we do. Therefore short, tightly focused cross-examination is generally best. Make your point and get the expert off the stand. The longer he or she is on the stand the greater the chance that any significant point you make will be explained away or lost in a subsequent barrage of explanations and backtracking. Also, the attorney doing the direct examination may have forgotten to ask something important. The fewer the questions you ask on cross the less opportunity that particular attorney has to sneak back in something that he overlooked.

## CREATE A THEME

Think of experts as falling into one of three categories:

- Biased and not credible
- Credible but making concessions
- Irrelevant

Juries seem skeptical of many experts. Perhaps it is because they cannot relate to the exorbitant fees that experts charge. On direct or cross always bring out what the expert charges, and if the expert's charges are really exorbitant, even among his peers, stress that.

*"Doctor, you said you charge \$7,000 per day to be here? And that is whether you are here 7 minutes or 7 hours?"*

*"Doctor, what is the greatest amount you earn per hour from treating a patient? And the least?"*

*"So you make far more testifying than you do practicing medicine?"*

*"Doctor, you have testified that the plaintiff has testified the way he has about being seriously injured because he stands to gain financially from this lawsuit?"*

*"So people who stand to gain from their testimony should be distrusted?"*

*"Doctor, do you stand to gain a lot by your testimony?"*

*"Doctor do you realize that you are charging more than any other expert in this case? And you have the least amount of experience?"*

## **GETTING AT THE MONEY**

During their depositions, experts are often evasive regarding how much money they make from litigation work, claiming not to separate that out from their other income. There are various ways to get at that information.

You will want to get transcripts from other depositions the expert has given, where another attorney may have been successful in obtaining this information.

Sometimes you can put together the information from a lot of little clues.

Ask in deposition what the expert did the prior week; how many litigation cases he has ongoing at any one time; what, on average, is the least amount he makes on a litigation case; and what percentage of his time is spent on litigation. If the expert says he works 50 hours per week and 10% of his time is spent on litigation, that is 5 hours per week or 250 hours per 50-week year. At \$500 per hour, that comes to \$125,000 — for 10% of his time. The jury may not relate well to a person who seems to be admitting he makes over \$1 million per year.

The question about how much a doctor is paid for treating patients can be very useful if the doctor is vague about what he earns from litigation, for he may know the former figure to the penny, thus making his denial of knowledge about what he makes from litigation incredible.

Your whole cross-examination may consist of questions like this without ever taking on the expert on substance. The jury gets the point. If they decide the expert should not be believed because he is paid a lot of money to give biased testimony or because he is deliberately evasive on the subject of his compensation, they will probably discount other aspects of his testimony.

## **CREDIBLE, BUT MAKES CONCESSIONS**

If the expert is likeable and believable it is harder to attack him. But an honest expert will make obvious concessions:

*"Doctor isn't it true that any preexisting condition shown on my client's x-ray may not have produced any pain before the accident?"*

*"And that the accident may have lit up this condition, causing it to become painful?"*

*"Isn't it true that an intervertebral disk could be injured by sneezing or stepping off a curb?"*

*"So an accident that caused this much property damage (show photo) could also injure a disk under the right conditions, or cause it to become symptomatic when it was not symptomatic before?"*

## **IRRELEVANT**

Sometimes the best tactic is simply to dismiss the opposing expert as irrelevant.

*"Doctor, isn't it true that you are simply a radiologist?"*

*"Most of the time you just sit in a room and look at films?"*

*"You don't actually speak to the patients, tell them their diagnosis or tell them how to treat their condition?"*

*"Most of the time they never even meet you?"*

## **CROSS EXAMINING AN EXPERT ON SCIENTIFIC LITERATURE**

Scientific literature is a fertile ground from cross-examination, because you may be able to find a paper that favors whatever position you want.

You may cross-examine an expert on any text, treatise, journal or similar publication that the expert referred to, considered, or relied upon in arriving at or forming his opinion, that has been admitted into evidence, or that has been established as

a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. Evid. C. §721 (b). A thorough deposition is key to being able to cross-examine an expert on literature. Ask the expert in deposition, what the key treatises and textbooks are in his field and whether they are "reliable authorities," as well as what journals he subscribes to and reads. If you are in his office, take note of what is in his library. Ask if he has reviewed any literature on the subject of his testimony whether in yours or a prior case; and if he denies this, the basis for his various statements, which may often lead back to things he has read over the years.

## **WHEN TO STOP**

Some jurors like only so much acrimony. So I am not always sure it is necessary to hound the expert until he finally concedes what you want. At some point the examination degenerates into bickering, and the jury may end up being just as upset with the attorney as with the expert. So one approach is to stay behind the emotions of the jury and not assume they are as outraged as you are. Consider treating the expert with respect until you are sure the jury thinks he does not deserve it. Stop once you are sure the jury has concluded that the expert is not to be believed, rather than engaging in inconclusive arguing.

Try to end on a high point. Be careful not to ask one too many questions. If the next question is really an argument and represents a point you can safely make in your closing, be wary of asking it. You may only be giving the expert the chance of getting off the hook. ♦

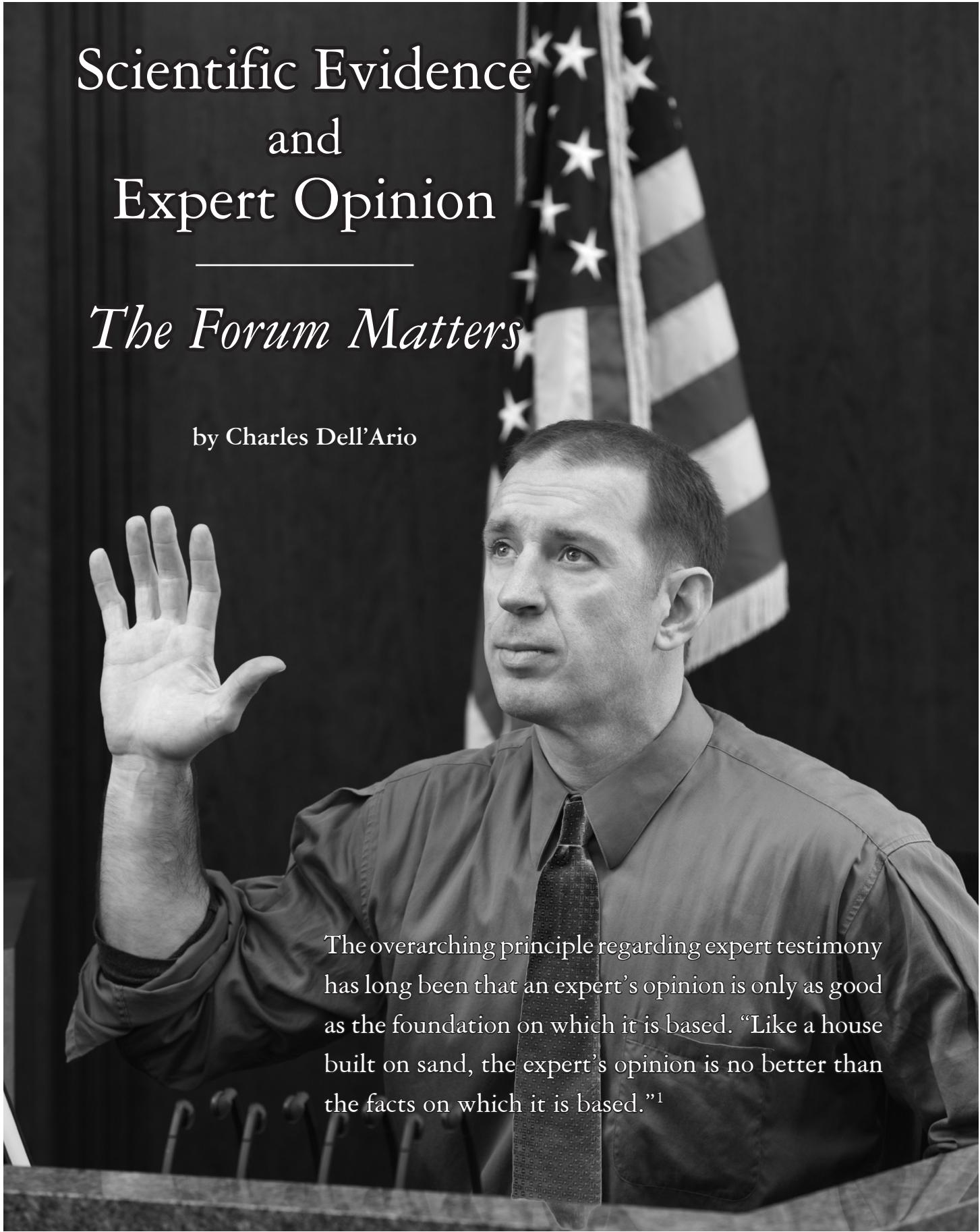
— Jay Chafetz, of The Law Offices of Jay Chafetz, practices in Walnut Creek.

# Scientific Evidence and Expert Opinion

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## *The Forum Matters*

by Charles Dell'Ario



The overarching principle regarding expert testimony has long been that an expert's opinion is only as good as the foundation on which it is based. "Like a house built on sand, the expert's opinion is no better than the facts on which it is based."<sup>1</sup>

*In California courts*, expert testimony must be “[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.”<sup>2</sup> In Federal courts, on the other hand, an expert may offer opinion testimony “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>3</sup> In both situations, the trial judge determines whether the foundations for the expert opinions have been met. As the bare language statute and rule reflect the Federal Rules assign the judges a much greater gatekeeper role than the Evidence Code accords their California counterparts. Federal judges weigh the foundational facts of expert testimony as a condition of admitting it; once the preliminary reliability criteria are established, California juries are entitled to weigh the expert testimony’s probative value. Knowing this distinction, particularly where the subject of an expert’s opinion is not one on which uniformity exists in the scientific community, makes forum selection extremely important.

#### CALIFORNIA LAW – THRESHOLD RELIABILITY

“California law permits a person with ‘special knowledge, skill, experience, training, or education’ in a particular field to qualify as an expert witness and to give testimony in the form of an opinion.”<sup>4</sup> “Evidence Code section 801 limits expert opinion testimony to an opinion that is “[b]ased on matter . . . perceived by or personally known to the witness or made

known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .”<sup>5</sup>

Thus, as Evidence Code section 801 reflects, “the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion.”<sup>6</sup> Put quite simply: “An expert opinion has no value if its basis is unsound.”<sup>7</sup>

But, “[s]o long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert’s opinion testimony. And because Evidence Code section 802 allows an expert witness to “state on direct examination the reasons for his opinion and the matter . . . upon which it is based, an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion.”<sup>8</sup>

In California, the trial judge “has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.”<sup>9</sup> The trial court also has discretion “to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.”<sup>10</sup>

California law requires “substantial agreement and consensus in the scientific community” regarding the reliability of a new or novel scientific process before evidence derived from the new or novel process may be admitted at trial.<sup>11</sup> But

California law does not require absolute consensus among scientists as a prerequisite for recognizing a causal link. As one court explained, “[a]n expert may always give his opinion as to the cause of a particular injury or condition, and lack of absolute scientific certainty does not constitute a basis for excluding the opinion.”<sup>12</sup> Lack of unanimity in the scientific community or inconsistencies in the expert’s analysis are matters that go to the weight the jury should accord the opinion. When competent experts present opposing opinions, the jury must decide “[w]hich expert opinion [i]s correct.”<sup>13</sup>

#### FEDERAL LAW – ARE THE OPINIONS SOUND?

Federal Rule of Evidence 702 gives district courts a “gatekeeping role” in screening the reliability of expert testimony.<sup>14</sup> Federal judges are expected to differentiate “sound science” from that which is not. In 2000, Rule 702 was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>15</sup> and to the many cases applying it. In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court later clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court’s role and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are: (1) whether the expert’s tech-

nique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.<sup>16</sup>

While later opinions have made clear that scientific or expert opinion need not be unanimous to be admissible, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. The trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case.<sup>17</sup>

What this all means is that federal judges roll up their sleeves and evaluate the reliability of expert testimony as a matter of preliminary fact under F.R.E. 104 while the California courts are more willing to let the juries do the weighing. Two recent cases illustrate.

In *Tamraz v. Lincoln Elec. Co.*,<sup>18</sup> the Sixth Circuit reversed a judgment in favor of a welder who claimed he contracted Parkinson's Disease as a result of contact with manganese in welding materials furnished by the defendants during his career as a welder. "Every doctor to examine Jeff Tamraz has reached a different conclusion about where his case fits into this puzzle."<sup>19</sup> Not surprisingly, the defense experts ex-

cluded their clients' products as a cause of the disease. Plaintiff's expert, on the other hand, attributed his condition to the manganese exposure. Even though the trial judge admitted the testimony (meaning a deferential standard of review applied) and even though the well-qualified doctor-expert attested his opinion to a "reasonable degree of medical certainty," the appellate court majority ruled the opinion should not have been admitted and reversed the \$20M judgment.<sup>20</sup> In effect, the appellate court applied de novo review to conduct its own analysis of the science.

*Shelby v. SeaRiver Maritime, Inc.*,<sup>21</sup> a case I handled on appeal, highlights the California view. Shelby contracted kidney cancer following 17 years of service aboard defendant's oil tankers. The evidence established that during his service, Shelby was

## *California law does not require absolute consensus among scientists as a prerequisite for recognizing a causal link.*

exposed to significant levels of benzene fumes, often exceeding Coast-Guard-permissible limits. Benzene, long known as a carcinogenic agent for leukemia, has not been universally recognized as causing kidney cancer. Yet Shelby's expert, a triple-board-certified doctor, opined, based on his examination of Shelby, the history of his exposure and medical literature, that Shelby's benzene exposure aboard the tankers caused his cancer. SeaRiver's expert opined that benzene could not have caused the cancer at the levels to which Shelby had been exposed. The jury sided with Shelby and awarded him \$8M in damages.

In the trial court and on appeal, SeaRiver argued that the opinions of Dr. Nelson Avery, Shelby's expert, should

not be admitted because the medical literature on which he relied was inconclusive on whether benzene caused kidney cancer and because there was no evidence of Shelby's exact exposure levels. Both the trial judge and court of appeal disagreed.

"SeaRiver claims Dr. Avery's reliance on [several] studies was unreasonable because of the overall lack of consensus in the scientific community regarding benzene's relationship to kidney cancer. However, California law does not require absolute consensus among scientists as a prerequisite for recognizing a causal link."<sup>22</sup> "California law requires "substantial agreement and consensus in the scientific community" regarding the reliability of a new or novel scientific process before evidence derived from the new or novel process may be admitted at trial. (Citation<sup>23</sup>). However, there is nothing new or novel about the process employed by Dr. Avery in this case — to wit, relying on scientific literature to support a medical diagnosis. As such, substantial agreement and consensus in the scientific community was not a prerequisite for admitting his testimony."<sup>24</sup>

"Ultimately, the fact that other peer-reviewed studies reach contrary conclusions, call for further research, or were conducted under circumstances in certain ways distinguishable from those at hand, does not render an expert opinion speculative or baseless. Rather, these facts are relevant to the probative weight of the opinion, which remains a matter for the jury rather than this court."<sup>25</sup> To the extent any of [the] isolated pieces of plaintiff's medical history undermined Dr. Avery's overall opinion that, to a reasonable degree of medical probability, benzene caused his kidney cancer, the issue was for the jury to decide.<sup>26</sup>

In other words, California law provides its juries with a far greater role in assessing the probative value of expert, particularly scientific expert, testimony than does Federal law. In the Federal courts, according to the U.S. Supreme Court and now the Federal Rules of Evidence, the judges are to evaluate the strength of the science before admitting expert testimony based on it. The issue is one of degree — reading the competing Federal and California opinions, one might not see a great deal of difference in the actual language used. But what is many instances lip-service in the Federal cases is the actual practice in California. For a plaintiff, this is just one more reason to prefer state court over Federal. ♦

— Chuck Dell'Ario has practiced law in Oakland since 1974 and has been a certified appellate specialist since 1997.

<sup>1</sup>*People v. Gardeley* (1996) 14 Cal.4th 605, 618.

<sup>2</sup>Evid. Code, §801, subd. (b).

<sup>3</sup>Fed. Rules Evid. 702.

<sup>4</sup>*People v. Gardeley, supra*, 14 Cal.4th at p. 617

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Lockheed Litigation Cases* (2004) 1125 Cal.App.4th 558, 564.

<sup>8</sup>*People v. Gardeley, supra*, 14 Cal.4th at p. 617.

<sup>9</sup>*People v. Price* (1991) 1 Cal.4th 324, 416.

<sup>10</sup>*People v. Coleman* (1985) 38 Cal.3d 69, 91.

<sup>11</sup>*People v. Kelly* (1976) 17 Cal.3d 24, 31.

<sup>12</sup>*People v. Cegers* (1992) 7 Cal.App.4th 988, 998.

<sup>13</sup>*Kelly v. Trunk* (1998) 66 Cal.App.4th 519, 524.

<sup>14</sup>*Tammar v. Lincoln Elec. Co.* (6th Cir. 2010) 620 F.3d 665, 668.

<sup>15</sup>(1993) 509 U.S. 579.

<sup>16</sup>509 U.S. at pp. 593-594.

<sup>17</sup>*In re Paoli R.R. Yard PCB Litig.* (3d Cir. 1994) 35 F.3d 717, 745.

<sup>18</sup>(6th Cir. 2010) 620 F.3d 665.

<sup>19</sup>620 F.3d at p. 669.

<sup>20</sup>620 F.3d at pp. 675, 678.

<sup>21</sup>(2011) 2011 WL 576569 (unpub. opn).

<sup>22</sup>*Id.*, 2011 WL 576569 at \*10.

<sup>23</sup>*People v. Kelly* (1976) 17 Cal.3d 24, 31.

<sup>24</sup>2011 WL 576569 at \*10 fn.14.

<sup>25</sup>2011 WL 576569 at \*10 citing *Kelley v. Trunk* (1998)

66 Cal.App.4th 519, 524.

<sup>26</sup>2011 WL 576569 at \*13.

# Battle of the Bay!

On June 17, 2011, the New Lawyers Divisions of ACCTLA, CAOC and AAJ joined forces and rooted for their respective Bay Area teams at the A's-Giants "Battle of the Bay" game in Oakland. The A's defeated Tim Lincecum and the Giants, 5-2.



Suizi Lin, Joseph Bent, P. Bobby Shukla, Chris Dolan, and Christopher Nolan



Nick Casper, Allison Elgart and Sarah London

# Just the Basics



## THE BASICS OF TAKING AN EXPERT'S DEPOSITION

by Rica Cruz Santo

You are taking your first expert deposition and you wonder, "Where do I start?" You start by thinking about your goal — what you are trying to obtain from this expert witness in this deposition. You know this witness' trial testimony is aimed at weakening your client's case, the standard of care, and/or your client's damages. So your goal at deposition is to discover all the opinions he/she intends to offer at trial and the basis for all his/her opinions, and discover if there are any means to discredit this expert's opinion.

First, ask for the expert's CV and go through his/her background and qualifications. This establishes whether the expert is qualified to provide an opinion in this area. A few questions to ask are: where he/she attended school; degrees earned; whether he/she has any special expertise or training in the area; whether he/she has any certifications; is he/she in any memberships related to his/her area of practice; his/her current employer and position and if he/she is published in this area.

Second, ascertain any biases the expert may in favor of the defense to cast a shadow on his/her credibility. There are experts that work primarily in forensic matters and these experts are predominantly retained by the defense. Pin down what percentage of the expert's

work is dedicated to litigation matters; the percentage of time they are retained as an expert for the plaintiff versus the defendant; what percentage of his/her income is related to litigation matters; and whether the expert has been previously retained by the firm/attorney and if so, how many times and on what matters. Furthermore, find out how much the expert charges for work performed, the amount of hours the expert has spent working on the case, and a breakdown of those hours, such as reading depositions, speaking with the defense attorney, writing a report, and speaking to other experts or peers. If expert has been paid an exorbitant amount of money, it may be helpful to share this information with the jury.

Third, determine the nature of the expert's assignment and role in the case. This informs you of the matters the expert will cover and the defense attorney's goal. Find out when the expert was first contacted and what he/she was told is the nature of their assignment; whether the expert's assignment or role has changed since he/she was first contacted; the documents the expert was provided to review; whether the expert was told to pay special attention to specific information; what additional documents and information the expert requested and the significance of it; any research performed by the expert, including speaking to other experts in the case, literature, or any other sources; and whether the defense attorney asked the expert to testify a certain way. Remember, all discussions

between the expert and defense attorney are not protected by the attorney-client privilege — they are all discoverable. All documents provided by defense attorney to the expert are discoverable, even those that may have been protected by attorney-client privilege or attorney-work product.

Fourth, now it's time to get into the meat of the deposition — the expert's opinions and the basis for his/her opinions. Ask the expert for each opinion and then follow up with questions delving into each opinion, such as, what documents and records, information, facts, literature, and other sources he/she relied on to form the opinion. There may be instances where you want to ask about the significance of the source relied on, such as literature or a calculation. The expert's testimony may be weakened if the source relied on is not commonly used by the scientific community. Find out whether the expert has written a report, and whether he/she will be making changes to the report. If your expert has written a report, ask the defense expert whether he/she has reviewed the plaintiff's expert's report, his/her criticisms of the plaintiff's expert's opinions and basis of the opinions, and how the opinions differ.

Last, end the deposition with the question: "Have you provided me with all the opinions you intend to offer at trial and the basis of that opinion." Invariably the expert will say yes, even though he/she may later try to change or add to his/her opinion. It will help you

if you need to do a motion in limine to limit the expert to the opinions he/she offered at deposition, especially as experts must have finished their assignments to provide a meaningful deposition on the opinions they intend to offer at trial.

Keep in mind your goal is to identify each and every opinion the expert has and the basis for each opinion. The more thorough your questioning, the more information will be revealed, and thus, more likely to find weaknesses with the expert's opinion. If you have retained an expert to rebut the defense expert witness's opinions, consult with him/her and go over key pieces of information you should obtain and anything else you need to watch out for.

— *Managing Editor Rica Cruz Santo, an associate at the firm of Kathleen K. Reeves & Associates, practices all aspects of divorce and legal separation, child custody, support and visitation.*



## THE BEST DEFENSE IS A GOOD OFFENSE

### Defending your expert at deposition

by Suizi Lin

Effectively defending your expert at deposition (and ultimately trial) begins by preparing yourself and your expert from day one. If during your expert deposition you find yourself wanting, needing, and strategizing creative objections to opposing counsel's questions, then you have not done your job.

#### The Deposition

First, the purpose of expert witness discovery is to give parties notice of what an expert will testify to at trial (see article above) and avoid surprises. (CCP §2034.020 *et seq.*) At deposition, opposing counsel will ask questions into relevant subject areas, ask for all opinions your expert intends to offer at trial and the basis of each opinion, and try to find ways to undermine your expert's opinion at trial. After the deposition, opposing counsel will most likely use your

expert disclosure and deposition to file motions in limine to limit your expert's trial testimony to the general areas of testimony identified in the expert witness designation, and the specific opinions offered at deposition. (*Kennemur v. State of California* (1982) 133 Cal. App.3d 907.)

Second, the only valid objections at an expert deposition are: (1) to the form of the question — vague and ambiguous, compound, argumentative, calls for speculation, assumes facts not in evidence and calls for narrative. (CCP §2025.460(b).) You do not have to object to this type of defect as they are not waived. You cannot instruct the expert witness not to answer. (*Stewart v. Colonial FY Agency* (2001) 87 Cal. App. 4<sup>th</sup> 1006, 1015) and (2) to the incomplete hypothetical or to assuming facts not proven during discovery. You *must* object to this type of defect to preserve your objection. You cannot instruct the expert witness not to answer. (CCP §20205.460(b).)

There is no attorney-client privilege because you do not represent the expert; you cannot instruct the expert not to answer. However, experts are still private citizens so if opposing counsel's questions impermissibly intrude into the expert's own medical condition and financial information that have no relevancy to the matter, you may suggest to the witness to assert their own constitutional right to privacy. You cannot instruct the expert not to answer.

#### The Preparation

Once you understand what will happen at deposition and what objections are permissible at deposition, it becomes easier to prepare yourself and your expert.

*Selection of expert.* You must thoroughly vet your own expert as if you were opposing counsel. Opposing counsel will seek to discredit your expert as unqualified to testify on the subject matter. Therefore, you should inquire into the expert's education, experience, publications, prior depositions and prior in court testimony, and prior work as a retained expert. Get a feel for this expert: how will this expert present at trial? Is this expert someone the jurors will find credible? Is this expert able to relay scientific testimony in a manner that is easily understandable?

*Basis of Opinion:* You should provide your expert with all the facts and evidence, even those that may be in opposing party's favor. The last thing you want is for your expert to be confronted with an admissible fact that undermines his opinion. Have the expert deal with it head on. Remember, because there is no attorney-client privilege and opposing counsel has the right to inquire into the basis of an expert's opinion, all communications — conversations, even those during the deposition breaks; emails; faxes; letters, etc. — that you have with your expert are discoverable. Make sure the facts and evidence you provide that become part of the expert's discoverable file are facts and evidence that are not protected by the attorney-client privilege or attorney-work product.

*Pre-Deposition Preparation:* Prepare your expert as if you are taking the deposition. Ask the questions opposing counsel will ask and hear your expert's testimony in its entirety. Make sure you know all the opinions the expert intends to offer at trial and the basis of those opinions. Ask your expert what facts, if changed, would impact his opinion and determine how the change in fact and expert opinion impacts your client's case. Evaluate the credibility of the change in facts. Your expert's opinions are only as credible as the basis upon which he forms that opinion. Provide your expert with the name of opposing counsel's expert. Find out if your expert defers to opposing counsel's expert. Prepare your expert to concede undisputed facts when necessary and to address why any conceded facts do not impact the expert's opinion.

Just like trial, where surprises are not appreciated, surprises in an expert deposition should be minimized. As the attorney, you should walk into your expert deposition knowing what opposing counsel will ask and knowing to what your expert will testify. You do not want to be surprised by either. The only way to do so is to prepare. The best defense is a good offense. ♦

— *Editor-in-Chief Suizi Lin represents the injured party in a myriad of personal injury claims. The principal of the Law Offices of Suizi Lin, she is also an independent contractor to Bay Area personal injury law firms.*



# MEMBER news



## AWARDS

### Hinton Alfert Sumner & Kaufmann

In July 2011, ACCTLA past-presidents Peter J. Hinton and Elise R. Sanguinetti were honored at the American Association for Justice (AAJ) Annual Convention in New York. During the annual convention, AAJ honored members who have made outstanding contributions to the association, their communities, and the legal profession. Ms. Sanguinetti and Mr. Hinton were given special recognition. Ms. Sanguinetti was recognized and awarded the *Distinguished Service Award*. Given each year by AAJ's outgoing president, this award is presented to members of the Board of Governors who provided exceptional support and assistance throughout his or her term. Mr. Hinton was awarded the *Howard Twiggs Commitment to Justice Award*. This award is presented to trial lawyers who have made outstanding contributions to the safety and protection of American consumers and our civil justice system. Additionally,

on July 14, 2011, the Board of Governors for AAJ elected Ms. Sanguinetti to the Executive Committee of the organization for a third consecutive one year term.

**Alan Charles Dell'Ario PC** has moved to 1970 Broadway, Suite 1200, Oakland, CA 94612; (510) 763-7700, [charles@dellario.org](mailto:charles@dellario.org).

## Liberty Law Office

On July 21, 2011, California State Senator Joel Anderson passed Members Resolution No. 994 in honor of Micha Star Liberty commending her on her "extraordinary contributions to the principles of justice, equality, and fairness" as well as for her "outstanding record of leadership with the State Bar of California."

## SETTLEMENT

### Auto v. Auto

*Knapp v. Rinehart*

Sonoma County Superior Court

Settlement: \$600,000.00

Attorney: Joe Tomaszik

Plaintiff, a 57-year-old heavy equipment operator, was rear-ended in Ukiah when another vehicle was pushed into his vehicle, causing \$3,000 in property damage. The Traffic Collision Report did not list Plaintiff as being injured, but he went to the doctor the next day with neck and intrascapular pain. Plaintiff eventually underwent a cervical fusion and initially had a good recovery, but several months later developed symptoms in his hands and scapular region. Plaintiff's expert contended that Plaintiff had Thoracic Outlet Syndrome, but defense argued that Plaintiff had carpal tunnel syndrome unrelated to the collision. The case settled at Mandatory Settlement Conference a week before trial for \$600,000.

## Got News?

If you have some member news that you'd like to share, please email it to:  
[suzilaw@gmail.com](mailto:suzilaw@gmail.com) – or – [rcsanto44@gmail.com](mailto:rcsanto44@gmail.com)

**Medical Malpractice**  
**Failure to Treat Stroke**  
**Doe Plaintiff v. Roe Defendant**

Settlement: \$975,000

Attorney: Stan Casper, Casper, Meadows, Schwartz & Cook, Walnut Creek

Experts: *ER Medicine* – Dr. Mather Neill, San Rafael; *Interventional Neuroradiology* – Dr. David Goldberg, Walnut Creek; *Neurology* – Dr. Richard Rubenstein, Richmond

A 51-year-old male was taken to the emergency room with complaints of having developed left arm and hand weakness and difficulty in fully controlling his legs. A CT scan of his head revealed no hemorrhage.

Plaintiff was discharged home with a diagnosis of wrist nerve neuropathy. Within approximately 15 hours, plaintiff went on to develop a full-blown ischemic stroke involving the right cerebral artery. The plaintiff suffered left hemiparesis with left-side sensory loss, and contended that he should have been admitted to the hospital, monitored and provided further diagnostic testing and endovascular intervention.

Special damages claimed were as follows: medicals, none in evidence, in light of Civil Code §3333.1; loss of income, none in light of plaintiff being unemployed at the time, and life care plan: \$2.2 million.

**Failure to Monitor ICU Patient**

**Doe Plaintiff v. Roe Defendant**

Settlement: \$1,600,000

Attorney: Stan Casper, Casper, Meadows, Schwartz & Cook, Walnut Creek

A 61-year-old female was assigned to the ICU after the surgical placement of a tracheostomy, for which she was totally dependent upon for her oxygen intake. Although she had shown earlier signs of ►

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**UPCOMING EVENTS**

**- ACCTLA's Annual Judges' Night -**

Tuesday, January 17, 2012

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*(see page 11 for further information)*



**- ACCTLA's Annual What's New in Tort & Trial -**

Tuesday, January 31, 2012

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agitation, she was not restrained. During a shift change, she tried to get out of her bed and dislodged her trache. Before her airway could be reestablished, she suffered an anoxic brain injury.

Plaintiff contended that she should have been restrained or more closely monitored. Defendant countered that the applicable nursing standard of care had been met. There were no medical special damages in light of Civil Code §3333.1. There was no loss of income claim since Plaintiff was retired. The future cost of care was disputed.

### ***Special Relationship***

*Mehdavi v. Fremont Police Department*  
Alameda County Superior Court  
Settlement: \$1,075,000  
Attorneys: Lew Van Blois and Tim Knowles

In 2008, Omid Mehdavi, a 27-year-old pet store employee, suffered traumatic brain injuries as well as other serious injuries when he fell 15 feet from the roof of the Mowry East Shopping Center where the store was located. He had been sent up onto the roof by a Fremont Police Officer to investigate the point of entry of a burglary. While on a canopy where skylights were located above the sidewalk, the police officer asked him to bring up another ladder so she could climb to a higher part of the roof. As he was pulling up a ladder, he was walking backward and fell through a skylight to the pavement below. Although she watched him bring up the ladder while walking backwards toward the skylights, the officer never warned him that he was backing toward a skylight.

Plaintiff contended that the police officer failed to exercise ordinary care when she directed the citizen to inspect the roof for her and when she told him to bring a

ladder up on the canopy and the officer established a “special relationship” with plaintiff, when she made him an active participant in her investigation and therefore was responsible for the foreseeable risk of harm to the citizen.

The owners of the shopping center contributed \$375,000 while the City of Fremont paid \$700,000.

### ***VERDICTS***

*Criminal Defense – Domestic Violence*  
*People v. Doe Defendant*  
Alameda County Superior Court  
Verdict: Not Guilty  
Attorney: Annie Beles

A complaining witness alleged battery and criminal threats in a domestic violence case in Alameda County. Ms. Beles cross-examined with a lack of physical evidence, inconsistent statements and a motive to fabricate charges against the defendant, the witness’ long-term boyfriend. Ms. Beles presented no witnesses. The jury deliberated for over a day and brought back not guilty verdicts on both counts.

*Dangerous Condition of Public Property*  
*Fore v. State of California, et al*  
Contra Costa County Superior Court  
Verdict: \$1,554,000  
Attorneys: Plaintiff – Peter W. Alfert, Law Offices of Hinton Alfert Sumner & Kaufmann; Defendants – Dennis F. Moriarty, Cesari Werner and Moriarty, San Francisco (*State of California*); Christopher J. Beeman, Clapp Moroney | Bellagamba Vucinich | Beeman Scheley, Pleasanton (*Farwest Safety Inc., Leo Campbell*); William B. Waterman, Joseph Costella & Associates, Walnut Creek (*Steiny & Company*); Philip R. Bonotto, Rushford & Bonotto, LLP, Sacramento (*HNTB Corporation*)

On July 27, 2007, plaintiff Merald Fore, 57 years old and employed as an Operation Supervisor for BART, was driving eastbound on Interstate 80 after working a graveyard shift. Around 5:20 a.m., Fore collided with a truck owned and operated by Farwest Safety Inc., stopped in the last lane near a construction site on the freeway. Due to the collision, plaintiff incurred life-altering injuries to his left leg and ankle, left elbow, left thumb and hand, and left shoulder. Fore sued defendants Farwest, the construction project’s retained safety subcontractor, and Farwest employee Leo Campbell; the State of California, as owner of the freeway; Steiny & Company, the project’s general contractor; and HNTB Corporation, the construction management company. Plaintiff contended that the lane closures violated Caltrans standards in that the cones, advance warning signs and first arrowboard were either absent or improperly positioned. Plaintiff claimed that the State of California was liable for a dangerous condition of public property; that Steiny was liable for peculiar risk of harm due to its subcontractor Farwest’s failure to follow Caltrans standards for lane closures; Farwest Safety was liable for failure to follow Caltrans standards, and HNTB Corporation, the construction management company, was liable for failure to ensure that Farwest followed the Caltrans standards for freeway lane closures.

Plaintiff settled with co-defendants State, Steiny, Leo Campbell, and Farwest, prior to trial, for \$1 million. Plaintiff went to trial against defendant HNTB. The jury returned a verdict of \$1,554,000, finding that HNTB was 40% responsible for the plaintiff’s damages. Costs of suit and pre-judgment interest totaled an additional \$135,293.71. Including settlement, net verdict award, cost and pre-judgment interest, plaintiff’s recovery was \$1,756,293.71.

## *Dangerous Condition of Public Road*

*Hutchinson v. Caltrans*

Solano County Superior Court

Verdict: \$29.2 Million

Attorneys: Richard Bennett, Bennett & Johnson, LLP in Oakland, and Thomas Brandi of San Francisco

In November 2006, on Highway 12 in Solano County, defendant driver crossed the center line of the two-lane highway and crashed head on into a vehicle driven by plaintiff Regina Jackson and occupied by three young sons of plaintiff Kenya Hutchinson. Two of the boys were killed in the crash. The third suffered a severe head injury, was in a coma for a month and is paralyzed from the waist down. Ms. Jackson suffered brain damage and catastrophic orthopedic injuries. The jury found Caltrans 35% at fault for the accident because it failed to place a median barrier on the road in spite of a long history of cross-over accidents on the roadway, including 46 fatalities between 1991 and 2006. More than 10 years before the subject accident, Caltrans was advised by the Solano County Transit Authority that remedial work, including installing a median barrier, widening the roadway shoulders and increasing the drivers' sight

lines would make the road safer and reduce litigation costs. Caltrans argued that the accident history was below average for similar roadways in the state system and that median barriers are not generally placed on two-lane rural roadways and, as such, never modified or upgraded Highway 12 prior to the subject accident in the area where the accident occurred. The defendant driver had a minimal insurance policy of \$100,000; thus, Caltrans is legally responsible for all of the special damages, and 35% of the general damages, yielding a net recovery of over \$21.5 million, plus interest and costs. This was the largest verdict ever in Solano County for this type of civil case.

Prior to trial, the plaintiffs also settled for an undisclosed amount with Google, Bon Appetit and San Jose Ice Company on the theory that the defendant driver had been exposed to excessive amounts of dry ice (CO<sub>2</sub>) at work, which impaired his judgment and vision while driving.

## *FELA*

*Cook v. UPRR*

Washoe County Superior Court

Verdict: \$2,323,000

Attorney: Anthony S. Petru, Hildebrand McLeod & Nelson LLP

On April 12, 2008, plaintiff Jonathan E. Cook, an engineer on a Union Pacific Railroad freight train, slipped and fell in crater grease, which apparently had been wiped off of someone's shoe on the bull nose of the top step inside a locomotive cab. Mr. Cook sustained a head injury, loss of consciousness, visual problems, post concussive syndrome, mild traumatic brain injury, low back pain, and injury to his neck resulting in a three-level cervical fusion. Mr. Cook was unable to continue working as a locomotive engineer. Evidence presented at trial established that the existence of crater grease in the walkway was a strict liability violation of the Federal Locomotive Inspection Act (LIA) (49 U.S.C. §§20701), the Federal Railroad Locomotive Safety Standards (FRLSS) (49 CFR §229.119(c)), and negligence under the Federal Employers' Liability Act (FELA) (45 U.S.C. §§51 et seq). The LIA allows a railroad to use a locomotive only when the locomotive, its parts and appurtenances are in proper condition and safe to operate without unnecessary danger of personal injury. The FRLSS prohibits the existence of a slipping hazard in a locomotive walkway. It is well established that a foreign substance, such as crater grease, left in a walkway on a locomotive is a ►

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violation of the LIA and the FRLSS. Documents produced in discovery indicate that the locomotive had been serviced by UPRR mechanical forces in Stockton on April 10 or 11, 2008. Crater grease is specifically used to lubricate locomotive traction motors, and is on and around the ground of locomotive facilities. UPRR was forced to admit under cross-examination that the substance in the locomotive was crater grease.

*Meyers v. BNSF Railway Company*  
San Joaquin County Superior Court  
Verdict: \$1,180,201.55  
Attorneys: Kristoffer S. Mayfield & Victor A. Russo, Hildebrand McLeod & Nelson, LLP

On May 1, 2003, switchman James R. Meyers suffered disabling injuries to his neck and low back when he fell to the ground due to hazardous footing conditions along the lead switching track at BNSF Railway Company's Riverbank Yard in Riverbank, California. As Mr. Meyers was engaged in "kicking" railcars down the lead track, he pivoted to step away from the track after releasing a cutting lever and stepped on ballast that was left on top of asphalt near a carman's crossing. His feet suddenly went out from under him and he fell face-first to the ground alongside the track. The ballast was scattered onto the asphalt the day before by a yard cleaner (a track cleaning machine). Evidence at trial established that BNSF was negligent for, among other things, failing to provide safe footing conditions along the switching lead, failing to clean up after the yard cleaner, and failing to warn Mr. Meyers of the footing hazard.

Mr. Meyers was almost 45 years old on the date of the accident. He was declared disabled from railroad work by

his physicians following a functional capacity exam, and struggled to hold several non-railroad jobs. At the time of trial, he was working part-time as a commission-only orthopedic shoe salesman to the elderly. He underwent extensive treatment for his neck and low back, including numerous trigger point injections and epidurals. He continues to have chronic and disabling neck and low back pain.

This was a hard-fought case and took a long time to get to trial because the railroad succeeded with a motion for summary judgment earlier in the case. Mr. Meyers fought the railroad through the appellate court and ultimately triumphed on appeal, thus getting his case remanded to the trial court for this jury trial.

*The jury found that defendant store was 100% negligent, and awarded plaintiff \$1,077,063.00, with several jurors indicating they wanted to award significantly more.*

#### *Negligence*

*Curiel v. SSA Marine*  
Los Angeles County Superior Court  
Verdict: \$13.9 Million  
Attorneys: Brian Panish (*trial*) and A. Charles Dell'Ario (*defended against motion for new trial*)

Plaintiff, a teamster, was picking up a container in the Port of Long Beach when terminal operators dropped the container on the cab of Plaintiff's truck (passenger side), crushing it to the point where plaintiff's head made a dent in the cab. He

survived but is barely ambulatory, and faces a life of pain. After the \$13.9 million verdict, defendants moved for a new trial based on claims of improper exclusion of the defense sub-rosa surveillance tapes, juror misconduct, counsel misconduct and excessive damages. No appeal is expected.

#### *Premises Liability*

*Jong v. Welcome Market, Inc.*  
Alameda County Superior Court  
Verdict: \$1,077,063.00  
Attorneys: Joe Tomasik and Annie Tomasik Sahhar

Plaintiff, a 68-year-old retired travel agent, slipped and fell on a liquid that was on the floor of the Dublin 99 Ranch Market, and fractured the head of her right femur. She underwent surgery to insert three cannulated screws, and initially had a good recovery. More than a year later, she developed necrosis in her right hip, and underwent a total hip replacement, with total meds of \$224,000. Plaintiff contended that the coefficient of friction of the floor tile was inadequate, that visual inspections of floors were inadequate, and that the area had not been inspected as the sweep logs had claimed. Defendant argued that they had inspected the area 10 minutes before the incident, that the coefficient of friction was not unsafe, and that Plaintiff was comparatively negligent for talking on a cell phone, not wearing her distance eyeglasses, and for wearing clear plastic sandals with three inch heels.

Defendant also contended the necrosis was not related to the incident. The jury found that defendant store was 100% negligent, and awarded plaintiff \$1,077,063.00, with several jurors indicating they wanted to award significantly more. Defendant has filed a Motion for a new trial.

## APPEALS

### Employment Law – Harassment

John T. Schreiber is pleased to announce that the decision of *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, reversing summary judgment entered in the employer's favor in the trial court, just became final. Mr. Schreiber represented an apprentice ironworker who was harassed in the first instance on the jobsite by his supervisor and co-workers who questioned his sexual identity (he is straight), then was harassed on numerous later jobsites he was transferred to after he complained to supervisors about the harassment. The appellate court reversed summary judgment on the grounds that there were triable issues of material facts that the later harassment comprised retaliation under FEHA after he complained about his initial treatment. His good faith belief that the initial harassment was wrongful comprised protected activity, and the observations of Conco supervisors of such harassment, and the client's continued complaints about the continuing harassment provided triable issues of material fact that Conco knew of the continuing harassment but failed to take reasonable steps to prevent it. ♦

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