Opposing counsel's supplemental expert disclosures

When defense tries to use improper supplemental disclosures to its benefit, here's how to fight them

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Opposing counsel may attempt to improperly benefit from supplemental expert disclosures, so it is important to know when and how to protect yourself from inattentive, or even unscrupulous, behavior. Below are some issues to look for when faced with a supplemental expert disclosure.

What is allowed in a supplemental expert disclosure?

California Code of Civil Procedure section 2034.280(a) allows for the supplemental exchange of experts within 20 days of the initial exchange if three criteria are met: (1) the party participated in the initial exchange; (2) the supplemental expert will provide opinions on an issue "covered by an expert designated by an adverse party to the exchange"; and (3) the party disclosing the supplemental expert "has not previously retained an expert to testify on that subject." If those three criteria are not met, then the supplemental expert disclosure is improper. Examples may include altering an existing expert's scope, adding an expert who will opine on a subject not disclosed in plaintiff's disclosure, or replacing an existing expert with another in the same field. In those cases, defendant should have moved to amend or augment its expert disclosure instead of supplementing. (Code Civ. Proc., § 2034.620.)

Is the supplemental disclosure timely?

Was the supplemental designation within 20 days after the simultaneous exchange of experts? Defense counsel may attempt to wait longer than 20 days to see what your expert may or may not say in his or her report, production, or deposition.

Courts have repeatedly stated that an attorney's decision to ignore statutory requirements does not constitute mistake, inadvertence, surprise, or excusable neglect. (See, e.g., *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d

270, 276; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1129.) However, many courts are willing to overlook simple mistakes or calendaring errors, especially if there is no prejudice to you or your client. Outlining defense counsel's disregard for the rules and the prejudice to your client is important to excluding late experts.

Is the supplemental disclosure gamesmanship?

The next step is to determine whether defense counsel's supplemental disclosure was an unfair attempt to take advantage of supplemental disclosures. Does it appear that defense counsel was attempting to play games by not disclosing the experts originally?

Fairfax v. Lords (2006) 138 Cal.App.4th 1019 is helpful. There, a defendant doctor in a medical malpractice case unilaterally determined that the simultaneous exchange requirement of section 2034.210 did not apply to him. When the exchange date for expert witness disclosure arrived, the plaintiff designated a medical doctor as his expert on the standard of care. The defendant served a "designation" that identified no retained witnesses, but went on to state that he expressly reserved the right to "designate experts in rebuttal to [the plaintiff's] designations." Only after receiving the plaintiff's designation did the defendant serve a document entitled "Second Designation of Expert Witnesses" where he named his retained experts.

The trial court permitted the expert's testimony despite plaintiff's motions to exclude defendant's late-designated expert. On appeal, the defendant contended that his conduct was "prudent litigation defense practice" because he alleged that the defense could not reasonably anticipate the types of experts plaintiff would designate.

The court rejected this argument on two grounds. First, the court stated that the defendant's contention that he could not anticipate which types of experts may be required in a case was "simply untrue." The court noted that the complaint and discovery responses in a case provide a fertile field from which defendants and their lawyers can glean the claims in a case, which in turn determines the types of experts that should be designated. Second, regardless of whether it's "prudent," defendant blatantly ignored the express requirements of section 2034.210(a) that the parties simultaneously exchange expert disclosures.

The court remanded the case for a new trial, where the defendant would be limited to the experts in first designation.

Has the opposing party disclosed non-retained experts not disclosed during discovery?

For both initial and supplemental disclosures, a close look at defense counsel's non-retained expert list is warranted to ensure that defendant did not identify non-retained experts not disclosed in discovery.

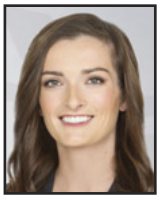
A retained expert is a witness who was hired for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772.) A non-retained expert is a percipient witness who also has expertise in some area that qualifies him or her as an expert.

The difference between a non-retained expert, e.g., a treating physician, who testifies as an expert, and a retained expert "is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the factual basis for the medical opinion." (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 33.) A "treating physician is not consulted for litigation purposes, but rather learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship." (*Easterby v. Clark* (2009) 171 Cal.App.4th 772.) This can be true of other so-called non-retained experts.

The identity of a non-retained expert is not privileged and therefore must be disclosed during discovery so there is no surprise to opposing party. (*Kalaba v. Gary* (2002) 95 Cal.App.4th 1416, 1421-1422.) If opposing counsel adds a "surprise" non-retained expert to its supplemental disclosure, review the discovery to see if his or her identity should have been revealed in response to discovery requests or deposition questions. If opposing counsel failed to reveal percipient witnesses that they now intend to call as non-retained experts, raise that issue with the court immediately and identify all the areas where each non-retained expert's identity should have been revealed.

What can you do if the supplemental disclosure is improper?

The *Fairfax* court held that a motion to strike under Code of Civil Procedure section 436 is proper to prevent the use of a deficient expert designation or supplemental disclosure. (*Fairfax*, *supra*, 138 Cal.App.4th at 1027-1028.) The best strategy is to go in ex parte for an order shortening time on a motion to strike. In addition to the issues described above, demonstrate that defendant's supplemental disclosure would prejudice your client (e.g., unnecessary and costly depositions, too many depositions with a looming trial date, etc.). If the court does not grant the motion to strike, then reiterate your arguments during motions in limine and, if necessary, on appeal.



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