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Retaining a Workplace Safety Expert in California Injury Litigation: CCP Section 2034.260 and Labor Code Section 6304.5

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Attorneys in California workplace injury cases often bring in a safety expert after the trial date is set. The expert then has a few weeks to read an inspection file and several years of records, and the attorney has to sign a declaration about that expert's testimony. This article covers the expert witness exchange in Code of Civil Procedure sections 2034.210 through 2034.300, expert depositions beginning at Section 2034.410, Labor Code Section 6304.5, and what a safety or industrial hygiene expert reviews. It is informational and is not legal advice.

The Demand and the Exchange Date: Sections 2034.210 to 2034.280

Section 2034.210 allows any party, after the setting of the initial trial date, to demand that all parties simultaneously exchange information about their expert trial witnesses. Subdivision (a) covers a list of the name and address of each person whose expert opinion a party expects to offer at trial. Under subdivision (b), if the expert is a party, an employee of a party, or retained to form and express an opinion for the litigation, the designation must be accompanied by an expert witness declaration. Under subdivision (c), the demand may also call for all discoverable reports and writings that expert made in preparing the opinion.

The timing rules are:

- **Section 2034.220.** The demand is made without leave of court, no later than the 10th day after the initial trial date has been set or 70 days before that trial date, whichever is closer to the trial date.
- **Section 2034.230(b).** The demand specifies the date of exchange: 50 days before the initial trial date or 20 days after service of the demand, whichever is closer to the trial date, unless the court orders an earlier or later date for good cause.
- **Section 2034.280.** Within 20 days after the exchange, a party may submit a supplemental list of experts on a subject to be covered by an adverse party's expert, if it has not previously retained an expert on that subject.

What the Declaration Has to Say: Section 2034.260

Under Section 2034.260(a), the parties exchange expert information in writing on or before the date specified in the demand. For an expert described in Section 2034.210(b), Section 2034.260(c) requires

an expert witness declaration signed only by the attorney for the designating party, or by the party if unrepresented, under penalty of perjury. It must contain:

1. A brief narrative statement of the qualifications of each expert.
2. A brief narrative statement of the general substance of the testimony the expert is expected to give.
3. A representation that the expert has agreed to testify at the trial.
4. A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including an opinion and its basis, that the expert is expected to give at trial.
5. A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

Items 2 and 4 depend on the expert having read the file. Because the attorney signs under penalty of perjury, I expect to be asked to confirm all five items first.

If the demand included reports and writings, Section 2034.270 requires all parties to produce them at the place and on the date specified in the demand. Decide with the expert at the start whether a written report will be prepared.

Exclusion and the Expert Deposition

Under Section 2034.300, on objection of a party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude the expert opinion of a witness offered by a party who has unreasonably failed to list the witness, submit an expert witness declaration, produce reports and writings under Section 2034.270, or make the expert available for deposition. Section 2034.310 and Articles 4 and 5 of the chapter provide exceptions.

Section 2034.410 allows any other party to depose any person on an expert witness list. Section 2034.415 requires an expert described in Section 2034.210(b) whose deposition is noticed under Section 2025.220 to produce the materials called for by the deposition notice, including electronically stored information, no later than three business days before the deposition. Section 2034.420 places the deposition within 75 miles of the courthouse where the action is pending. Under Sections 2034.430 and 2034.440, the deposing party pays a retained expert's reasonable and customary hourly or daily fee for time at the deposition, and the designating party is responsible for preparation and travel fees.

Labor Code Section 6304.5 and Cal/OSHA Standards in Third-Party Actions

Civil cases arising from a workplace injury often name a party other than the worker's own employer, such as a general contractor or a property owner. Labor Code Section 6304.5, last amended effective January 1, 2000, governs how Cal/OSHA material is used in those actions. Three parts of the current text matter here:

- **Citations.** Neither the issuance of a citation by the Division nor the failure to issue one has any application to, may be considered in, or is admissible in evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer.

- **Standards.** Evidence Code Sections 452 and 669 apply to Division 5 of the Labor Code and to the occupational safety and health standards adopted under it in the same manner as any other statute, ordinance or regulation.
- **Division employees.** The testimony of employees of the Division is not admissible as expert opinion or with respect to the application of occupational safety and health standards.

Evidence Code Section 452(b) permits judicial notice of regulations issued by or under the authority of a public entity. Evidence Code Section 669(a) presumes a failure to exercise due care where a person violated a regulation of a public entity, the violation proximately caused the injury, the occurrence was of the nature the regulation was designed to prevent, and the injured person was in the class the regulation was adopted to protect. Section 669(b) provides for rebuttal. In *Elsner v. Uveges* (2004) 34 Cal.4th 915, the California Supreme Court concluded that the 1999 amendments allow use of Cal/OSHA provisions to establish standards and duties of care in negligence actions against private third parties.

For the expert, that text means the opinion is built on the Title 8 standard and the facts of the task. The citation is not evidence in an action against a third party, and the Division's inspector cannot give the opinion on how a standard applies. How the section applies to a particular defendant is a question for counsel.

What a Safety or Industrial Hygiene Expert Reviews

The technical review is the same whether the engagement comes from plaintiff's counsel or defense counsel. In a [litigation support](#) engagement I ask for the following:

- **The Cal/OSHA inspection file and citations.** I read the file for facts: measurements, photographs, equipment identification, interview notes and the documents the employer produced.
- **The IIPP and training records.** Title 8, Section 3203(a) lists what the written Injury and Illness Prevention Program must contain. Section 3203(b) requires inspection records and training documentation to be kept at least one year, subject to listed exceptions, so older records may no longer exist. On construction sites, Title 8, Section 1509 adds a written Code of Safe Practices and tailgate meetings at least every 10 working days.
- **The Title 8 standards that applied to the task.** I identify these from what the worker was doing and the equipment involved, and I check the regulatory history for amendments after the date of injury.
- **Exposure data.** I ask for air sampling and other monitoring results with the sampling and analytical methods. Title 8, Section 3204(d)(1)(B) requires employee exposure records to be preserved for at least 30 years, subject to listed exceptions.
- **Cal/OSHA Form 300 logs.** Title 8, Section 14300.29 provides for the Form 300 log, the Form 300A summary and the Form 301 incident report, with each recordable case entered within seven calendar days of learning of it. Title 8, Section 14300.33 requires those records to be saved for five years following the end of the calendar year they cover.

Where the equipment or the condition still exists, a site and equipment inspection comes before the opinion is settled.

What to Do This Week

- Calendar the last day to serve a demand under Section 2034.220 and the exchange date under Section 2034.230(b).
- Confirm with each retained expert the five items in Section 2034.260(c) before the declaration is signed.
- Send the expert the Cal/OSHA inspection file, the IIPP, training records, exposure data and the Form 300, 300A and 301 records, and list what has not been produced.
- Ask now for records subject to the one-year minimum in Section 3203(b).
- Decide with the expert whether a written report will be prepared, given Section 2034.270.
- Read the current text of Labor Code Section 6304.5 against the parties in your case.

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