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PERSPECTIVE

## Be wary of expert disclosure deadlines

By Dustin Bodaghi

Expert disclosures are due “50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date.” CCP Section 2034.230. A party who fails to timely comply risks the exclusion of their experts if the party challenging the untimely disclosure made its own complete and timely disclosure. CCP Section 2034.300. Still, it’s often unclear whether a court will exclude experts on timeliness grounds if the party makes a belated disclosure and offers their experts for depositions. Recent cases may help.

In *Cottini v. Enloe Medical Center*, 226 Cal. App. 4th 401 (2014), the 4th District Court of Appeal affirmed the exclusion of a party’s experts due to an untimely expert disclosure. Rather than disclosing the plaintiff’s expert information on the date specified in the defendant’s exchange demand, the plaintiff objected to the demand and moved to disqualify the firm representing the defendant. After an unsuccessful appeal on the issue, the plaintiff made his expert disclosure and moved the trial court to grant him relief from the tardy disclosure on the ground that the disqualification motion should have operated to stay the deadline. The Court of Appeal upheld the trial court’s decision to exclude the plaintiff’s experts, reasoning that if the plaintiff wished to not comply with the deadline pending a determination on the motion, he should have filed a motion for a protective order.

In a recent unpublished case from the 2nd District Court of Appeal, *In re Lockheed Litigation Cases*, B251864 (2015), an exclusion of a party’s experts was again affirmed. The trial court set a date for expert disclosures in a case management order, stating that “no extensions shall be permitted except by court order” and that “[o]rders granting extensions will be entered only upon a showing of good cause established by written motion or stipulation filed before the passing of the subject deadline.” Three days before the disclosure deadline, counsel for the plain-

tiffs emailed defense counsel and asked for a two-week extension. Defense counsel said he would have to ask his client but anticipated they would decline the request. On the deadline specified in the case management order, the defense made their expert disclosure but the plaintiffs did not. The defense then filed a motion to preclude the plaintiffs from offering an expert at trial on timeliness grounds, which was granted. The trial court denied the plaintiffs’ request to file a tardy submission observing that they had not made a showing of “mistake, inadvertence, surprise or excusable neglect,” “did not seek leave to submit the information promptly after learning of the mistake,” and did not promptly thereafter serve a copy of the proposed expert witness disclosure.

In another case, *Staub v. Kiley*, 226 Cal. App. 4th 1437 (2014), the defendants served a demand for the exchange of expert witness information. However, the date set for the exchange failed to provide for a five-day extension to account for service by mail. The defendants disclosed their experts on the incorrectly calculated date and the plaintiffs did not exchange expert witness information until two weeks after the date specified in the demand (making it one week late). Along with the plaintiff’s untimely disclosure, they also served a notice to the defendants. Due to a family emergency, plaintiffs’ counsel ended up being unavailable for two weeks and offered the plaintiffs’ experts for depositions the week after counsel returned. The defendants declined to take the plaintiffs’ experts’ depositions, resting on their objection that the disclosure of experts was untimely. The defendants then brought a motion to preclude the plaintiffs’ expert witnesses from testifying at trial, which was granted. The Court of Appeal reversed that decision, reasoning that the date set by the defendants did not provide for a five-day extension. As such, the defendants lacked standing to challenge the disclosures as untimely.

The *Staub* court held that the trial court erred in concluding that the plaintiffs acted unreasonably in disclosing their trial experts

after “a minor and nonprejudicial delay.” The Court of Appeal concluded that any unfairness arising from the plaintiffs’ tardy expert disclosure was exacerbated by the defendants’ refusal to depose the plaintiffs’ experts. See also *Stanchfield v. Hamer Toyota Inc.*, 37 Cal. App. 4th 1495, 1503 (1995) (finding that when expert was not fully prepared at deposition, but proponent offered to make expert available within one or two days, opponent acted unreasonably by failing to take any action until he moved for exclusion of the expert in the middle of trial); *Boston v. Penny Lane Centers Inc.*, 170 Cal. App. 4th 936 (2009) (denying motion to exclude experts because disclosure was untimely when party challenging untimely disclosure could have taken experts’ depositions but did not).

Attorneys confronting an untimely disclosure may consider objecting to it, refuse to take the depositions of the opposing party’s experts, and move to exclude those experts from testifying at trial. However, as these cases show, this approach carries risks as courts analyze the reasonableness of *both* parties’ behavior in deciding whether to exclude a party’s experts. Failure to comply with expert disclosure rules may be found to be “unreasonable” when a party’s conduct gives the appearance of gamesmanship. If any unfairness arising from the proffering party’s late or incomplete disclosure was exacerbated by the party seeking exclusion, the court will be less likely to find the conduct of the party offering the expert to be unreasonable. Attorneys would be wise to not exacerbate the opposing party’s delay in expert disclosure if they wish to successfully challenge it.



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