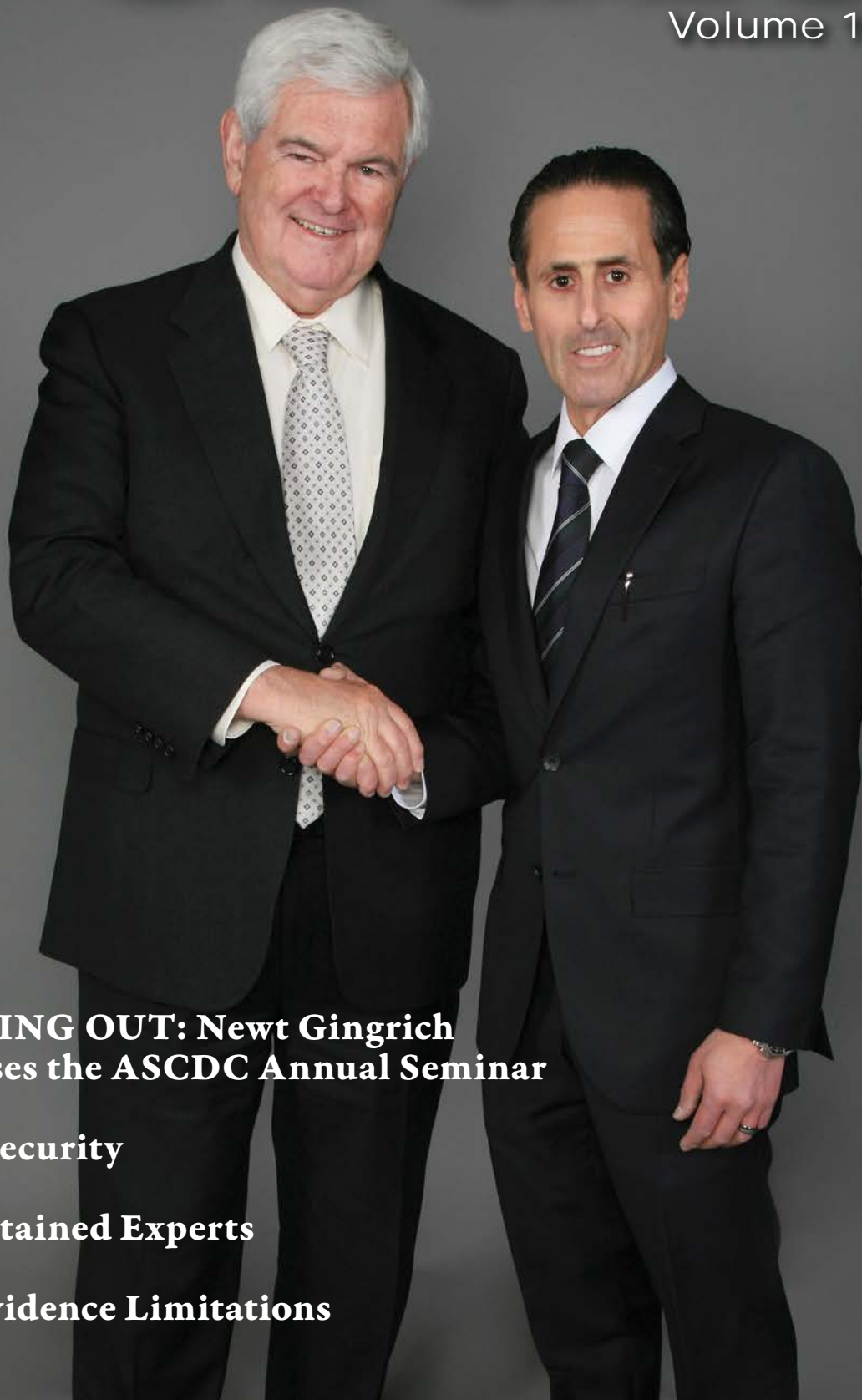


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- ♦ **SPEAKING OUT: Newt Gingrich
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- ♦ **Cyber Security**
- ♦ **Non-Retained Experts**
- ♦ **Trial Evidence Limitations**

Defending Against Non-Retained Experts

by Blythe Golay and
Angela S. Haskins



California is generally regarded as providing broad leeway for non-retained experts to testify on a range of matters. Several recent decisions, however, have narrowed the scope of permissible testimony for non-retained treating physician experts. Defense counsel, including those handling medical malpractice cases, should take advantage of these decisions in expert depositions, pre-trial motions, and Evidence Code 402 hearings, as the cases may be fatal to a plaintiff's claim.

Retained Versus Non-retained Experts

By statute in California, any party may demand a mutual and simultaneous exchange of information about all persons whose expert opinion the parties expect to offer at trial. Failure to timely exchange generally precludes the presentation of expert evidence at trial, which may result in crucial evidence being excluded. Each party must exchange a list setting forth the name and address of each person whose expert opinion the party expects to offer in evidence at trial. There are two types of physician experts, retained and non-retained. Non-retained experts, such as a plaintiff's treating physician, are percipient witnesses

who can be called upon to give their expert opinions based on their observations. Thus, although a treating physician is a percipient expert, that does not mean that his or her testimony is limited only to personal observations. A treating physician can provide opinion testimony based on the facts independently acquired and informed by the physician's training, skill, and experience.

The California Supreme Court in *Schreiber v. Kiser* (1999) 22 Cal.4th 31 officially recognized the use of physicians as a classic example of non-retained experts. The Court noted, "A treating physician is a *percipient expert*, but that does not mean that his testimony is limited only to personal observations. Rather, like any other expert, he may provide both fact and opinion testimony.... [W]hat distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries ... which form the factual basis for the medical opinion." (*Id.* at pp. 35-36 (emphasis added).)

As noted by the *Schreiber* Court, the key to determining whether an expert has been retained is not just a question of whether the expert was paid, but rather, whether the expert's opinion is based entirely on his or

her own personal observations or whether it is based on facts of the case with which he or she is not personally familiar.

Treating physicians are frequently used in medical malpractice cases for a number of reasons, but mainly because plaintiff's counsel can avoid costly expert fees and declaration requirements. A treating physician may also lend credibility as a percipient witness. Because plaintiffs frequently utilize treating physicians as non-retained experts, it is crucial for defense counsel to know the limits on their testimony.

Tools for the Defense

If a plaintiff fails to designate his or her treating physician as a non-retained expert, the defense can often preclude that treating physician from offering opinion testimony at trial. That is, the non-retained treating physician must be listed as an expert to give opinion testimony. An expert witness declaration, however, is not required because the physician is not retained for purposes of forming and expressing an opinion, as held by the California Supreme Court in *Schreiber*.

continued on page 24

Non-Retained Experts – continued from page 23

Again, a treating physician is not consulted for litigation purposes, but learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship. Moreover, as held in *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, it is not enough to simply "designate" as experts "all past or present examining and/or treating physicians." The physician and his or her address must be specifically identified. Thus, the case law is clear that a party who intends to call a treating physician as an expert for opinion testimony must identify that physician in the designation of experts. But if the party fails to do so, may the physician still testify about nonexpert, percipient testimony (i.e., nonopinion testimony)? Probably yes. However, there is very little, if any, published California case law that addresses whether a treating physician can testify as a non-expert, percipient witness.

An unpublished opinion handed down last year by the California Fourth Appellate District, Division Two (Riverside) addressed this issue. In *Soto v. Knight Transportation* (E056536, 9/18/2014), the court held that the trial court did not abuse its discretion in excluding experts as to whom plaintiff failed to serve a timely designation of expert witnesses. However, the court further held a treating physician, who was not identified as an expert, should have been allowed to testify as a percipient, non-expert witness, but only as to the treating physician's observations within the physician's personal knowledge. Any opinion testimony derived from those observations or personally known facts is inadmissible. The *Soto* court based its decision on related California case law and persuasive federal decisions. Specifically, the court analyzed a California medical malpractice case where a physician was permitted to testify regarding a hospital's policy and personal knowledge of that policy. Thus, the *Soto* court permitted the treating physicians' non-expert, factual testimony (observations, treatment, diagnoses, prognoses, and billing) despite the failure to provide a timely expert designation.

Because the decision is not published, *Soto* is not citable as precedent in California trial or appellate courts, but it offers some insight into how an appellate court may

approach this issue. One point of interest in the opinion is that, after finding error in excluding the physician's percipient, non-expert testimony, the court held that error was harmless and did not warrant reversal of the defense judgment on nonsuit. The lay witness testimony, if admitted, would have been insufficient to meet the plaintiff's burden of proving that his injuries were caused by the accident.

In short, *Schreiber*, *Kalaba*, and *Soto* make clear that if the injured party does not designate the individual's treating physician to testify at trial, by listing the physician by name and address, the physician cannot offer any opinions at trial. The physician may be able to testify as to observations within the physician's personal knowledge, however, the utility of that evidence is questionable, and any opinion testimony derived from those observations or personally known facts is inadmissible.

Another important decision limiting a treating physician's testimony is *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509. There, the court of appeal held that the trial court was justified in barring the plaintiff's treating physician from testifying on the issue of standard of care, and then dismissing the entire medical malpractice action. The treating physician had testified at his deposition that he was unable to determine

whether the defendant surgeon's treatment fell below the standard of care. Further, the plaintiff's counsel never informed defense counsel about the treating physician's post-deposition change in testimony.

On appeal, the plaintiff argued that the treating physician was not *asked* whether he had an opinion as to whether defendant complied with applicable standard of care. The court was not persuaded, however, because at deposition, plaintiff's counsel objected to questioning on the grounds that the treating physician was not being deposed as an expert, and the questions went beyond the care and treatment of plaintiff and into expert opinion. The treating physician also testified that he had not been retained as an expert and all his opinions were based on his treatment of plaintiff, as well as experience and qualifications. Plaintiff's counsel further stated on the record that defendant could redepose the treating physician if he was later designated. One year after the deposition, the treating physician was asked to be an expert witness, and he then received the defendant surgeon's medical records and deposition transcript. Plaintiff argued that it was not until this time that the treating physician was able to formulate an opinion as to whether defendant's treatment met the standard of care. Plaintiff failed, however, to

continued on page 25



Non-Retained Experts – continued from page 24

designate or identify the treating physician as a witness whose testimony would be offered as a retained expert on the standard of care issue. The court held that by failing to disclose the substance of the treating physician's anticipated opinion testimony, and that his opinions would be based on information received after his deposition and not wholly from his status as the plaintiff's treating physician, plaintiff did not substantially comply with Code of Civil Procedure requirements for expert witness designation.

The *Dozier* court spelled out what is *not* required of a witness testifying as a treating physician: an expert witness declaration under Code of Civil Procedure section 2034. This is true even if the testimony will include opinions with respect to subjects such as causation and standard of care. Thus, "the information required by the expert witness declaration 'is unnecessary for treating physicians who remain *in their traditional role*.'" (*Dozier, supra*, 199 Cal.App.4th at p. 1521 (emphasis added).) But when the

treating physician receives, for example, additional materials to enable him or her to testify to opinions on a subject on which he or she had formed no opinions in connection with the physician-patient relationship, the role turns to that of a retained expert, which requires an expert witness declaration. The *Dozier* court concluded that the record showed that at the time of deposition, the treating physician had not formulated an opinion on the subject of the defendant's adherence to the standard of care, and his later-formulated opinions were based on information counsel provided to him after deposition for purposes of the lawsuit, rather than on the basis of the physician-patient relationship. The court found that the trial court therefore correctly determined that the trial testimony on standard of care would be that of retained expert, rather than merely treating physician, and as such, was properly excluded.

Dozier is a crucial case for defense counsel. The general takeaway is that a party's expert may not offer testimony at trial that exceeds

the scope of deposition testimony if the opposing party has no notice or expectation that the expert will offer the new testimony.

ASCDC appeared as amicus curiae in the case to request publication of the opinion that was originally designated to be unpublished. Publication allows counsel to rely on *Dozier's* sound and explicit statement of law, which has been effective in cutting back on the gamesmanship in expert disclosure that occurs with treating physicians in medical malpractice cases. *Dozier* is strong support for a motion in limine to limit a treating physician to testimony on opinions formulated at the time of deposition

Conclusion

The cases discussed above reflect the purpose of the expert witness discovery statute – "to give fair notice of what an expert will say at trial." (*Bonds v. Roy* (1999) 20 Cal.4th

continued on page 26

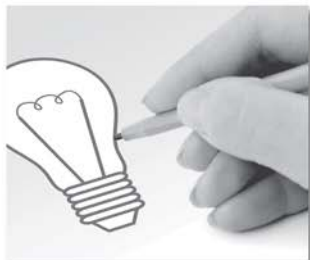


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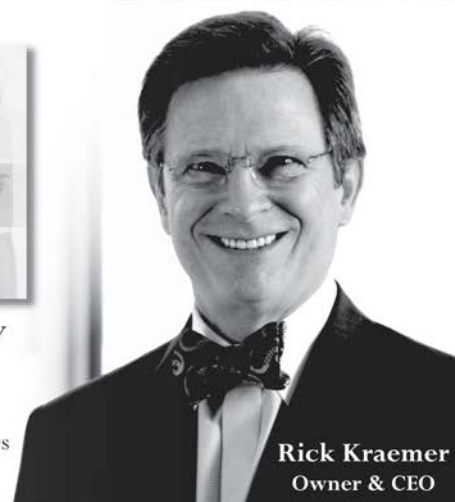
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Non-Retained Experts – continued from page 25

140, 146.) They also demonstrate the importance for defense counsel of having a clear record at deposition as to whether a plaintiff's treating physician is retained as an expert, whether the treating physician holds any opinions (particularly on standard of care and causation), the facts on which those opinions are based, and what observations and conclusions support the plaintiff's allegations. Note that questions on opinion may obligate deposing counsel to pay an expert witness fee to the treating physician. Note also that non-retained treating physicians must be subpoenaed for deposition because the designating party is not obligated to produce them for deposition. Even prior to expert depositions, however, defense counsel should closely examine a plaintiff's witness designation list to determine whether the statutory requirements have been met. Written discovery is another tool for counsel to elicit the plaintiff's contentions, as the identities and opinions of treating physicians are not subject to special discovery restrictions. ♣



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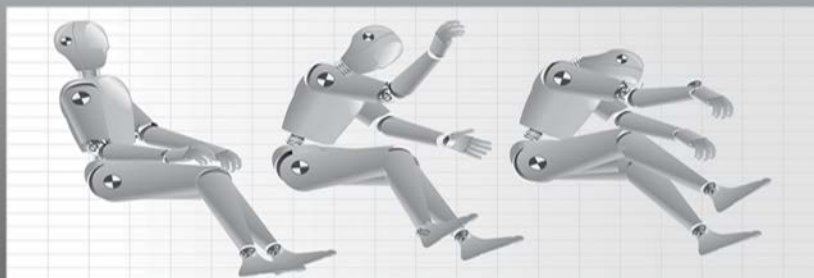
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