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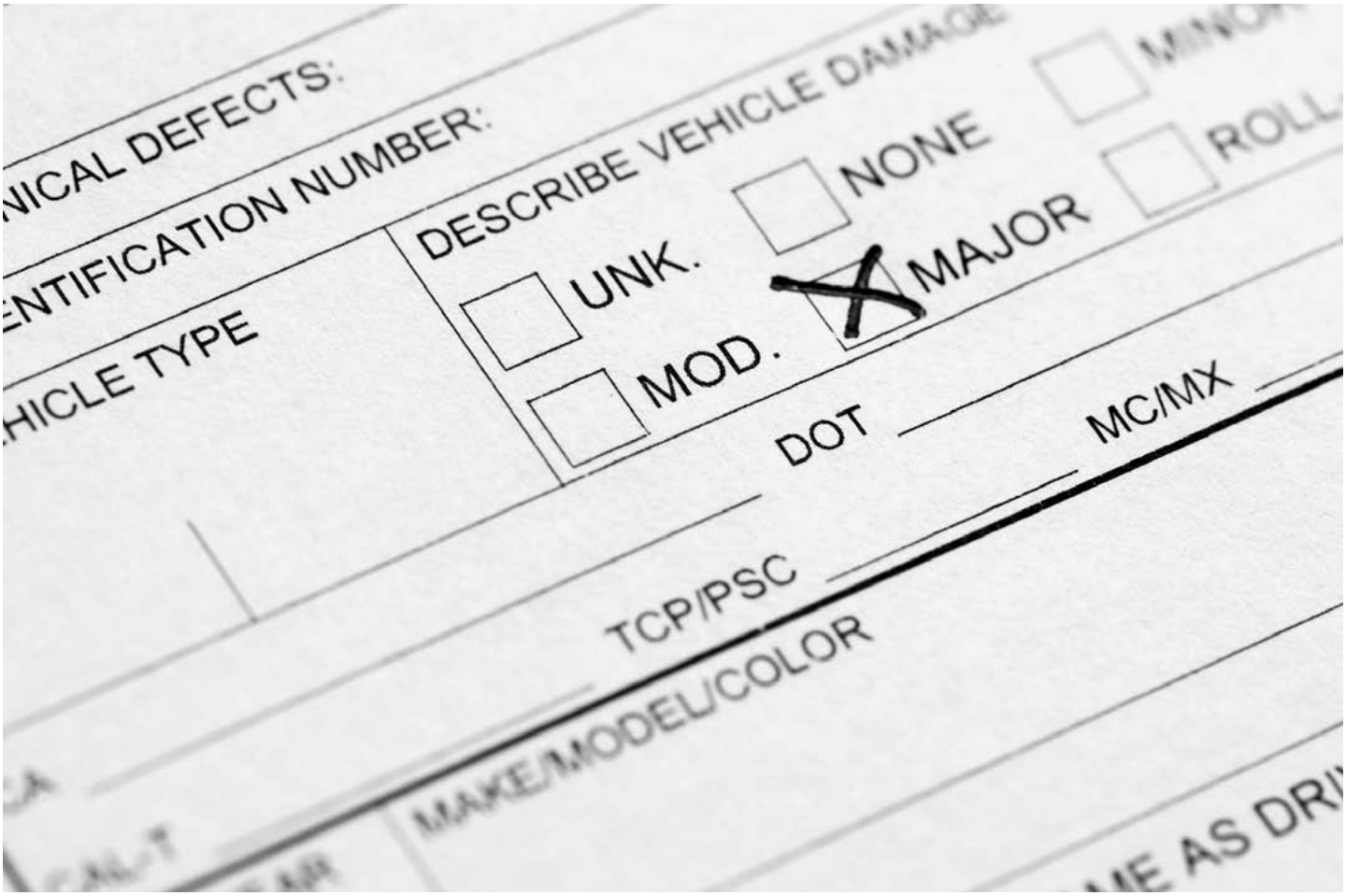

Common evidentiary issues in auto cases

WHAT TO GET IN AND HOW TO KEEP EVERYTHING ELSE OUT

Auto trials may seem straightforward, but we all know they can be extremely complicated. One of your goals at trial should be to bring the jury into your client's experience: the crunch of the vehicles colliding, the feeling of the vehicle spinning, her heart throbbing just after the collision sequence ends, is all useful for a jury to consider when they are deciding the outcome of the case. Unfortunately, one common defense tactic is to distract the jury from the issues on the verdict form and focus on evidence that is confusing or misleading.

This article outlines evidentiary issues that frequently appear in auto trials. You can use these arguments to your advantage and have good control over the evidence at trial.

Memorize the basics

Having the basics down pat when discussing evidence with the judge will go a long way in gaining credibility with the court. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) However, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

The word "prejudice" in Evidence Code section 352 does not refer to evidence that will damage one party's case. It refers to an emotional bias against the party that has little to do with the issues. (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.) If the principal effect of the evidence is to arouse the passion of the jury and inflame the jurors against a party, then the evidence must be excluded. (*People v. Carter* (1957) 48 Cal.2d 737, 751.) Additionally, counsel

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must not be allowed to inject insinuations into a case for the purpose of appealing to any prejudices that may exist. (*Lowenthal v. Mortimer* (1954) 125 Cal.App.2d 636, 643.)

Use motions in limine to your advantage

Motions in limine and oppositions thereto are a fantastic opportunity to take your time and make an extremely clear record. Motions in limine can (but don't always) qualify as timely objections on the record pursuant to Evidence Code section 353. (*Schweitzer v. Westminster Investments* (2007) 157 Cal.App.4th 1195, 1251.) Motions in limine also give you the opportunity to introduce and explain complicated evidentiary issues to the court well before they become an issue in front of the jury.

"Motions in limine are . . . generally brought at the beginning of trial, although they may also be brought during trial when evidentiary issues are anticipated by the parties. In either event, they are argued by the parties, either orally or in writing or both, and ruled upon by the trial judge. The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party . . . The advantage of such motions is to avoid the obviously futile attempt to unring the bell in the event a motion to strike is granted in the proceedings before the jury . . . ." (*People v. Morris* (1991) 53 Cal.3d 152, 188 [disapproved of on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830] (internal citations and quotations omitted).) "The scope of such motion is any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451 (internal citation omitted).)

Even if the court rules on a particular motion in limine, be mindful that the ruling only applies to the specific evidence addressed in the ruling. If the evidence presented by a witness is substantially different from the evidence encompassed by the ruling, it becomes your responsibility to renew the objection at the appropriate time. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184-85.)

Get the good evidence in

Oppose vague motions in limine

Where "no factual support was presented in connection with the motion, [] the court would have to rule in a vacuum." (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670.) Even if the general nature of the evidence may be inadmissible, oppose a defense motion to keep a whole category of evidence out. You may later need evidence covered by a blanket motion in limine, and a seemingly appropriate ruling on an overly broad motion in limine could hurt you later on. It is an easy opposition to write and file.

Traffic-collision report diagrams

A traffic-collision report in its entirety is not admissible. However, in certain circumstances, portions of the police report can be admissible. For example, the use of "a diagram made by the officers at the scene of the accident and an enlarged photograph thereof . . . to illustrate [the officer's] testimony . . . and their admission into evidence solely to illustrate such testimony" is not improper. (*Robinson v. Cable* (1961) 55 Cal.2d 425, 429.) In your trial, a responding officer could rely on information contained in the diagram in the traffic- collision report to illustrate his testimony and the admission into evidence of the diagram to illustrate his testimony would be proper.

Body cam, surveillance footage, and dash cams

Technology has progressed in wonderful ways over the past few years and you should take advantage of it in telling your client's story to the jury. It is common now for people to mount cameras to their dashboards and helmets. Trucking companies require in-cab surveillance cameras of their drivers. Tesla vehicles have cameras that constantly record views from all angles. Many law-enforcement agencies require their responding officers to turn on their body cameras while interacting with the public. Homes and businesses install surveillance cameras and doorbells capable of capturing video footage. All these videos can be useful to your case if you take the time to find the footage and lay the foundation for it at trial.

Send an investigator into the neighborhood to look for surveillance cameras on homes and businesses, and then request footage from them. Include a specific request in your subpoena to the emergency responders for body cam footage. For example, an officer may write a two-sentence summary of a defendant's statement in the report, but the body cam footage will show the entire five-minute explanation of what the defendant thought happened just after it occurred. A truck driver may say he had his eyes on the road the whole time, but the cabin footage may show him steering as he reaches for his cigarettes that fell onto the passenger side floorboard.

Don't give up – get the video and lay the foundation at trial so the jury can see the evidence for themselves.

Accident reconstruction animations and simulations

Your accident reconstructionist will likely have an animation or simulation of the collision dynamics. If defense counsel moves to exclude it, be prepared to explain to the court why it should be used to aid the accident reconstructionist while testifying to the jury. "Distinct from photographs of actual persons or things, but admissible under similar principles, are prepared diagrams, maps, models, or computer animations designed to give visual effect to testimony. Their use as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method." (2 Witkin, Cal. Evid. 5th Demo Evid § 25 (2012).)

"Animation is merely used to illustrate an expert's testimony while

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simulations contain scientific or physical principles requiring validation. Animations do not draw conclusions; they attempt to re-create a scene or process, thus they are treated like demonstrative aids. Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion . . . In other words, a computer animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence. . . a computer simulation, by contrast, is itself substantive evidence . . . Courts have compared computer animations to classic forms of demonstrative evidence such as charts or diagrams that illustrate expert testimony . . . A computer animation is admissible if it is a fair and accurate representation of the evidence to which it relates . . . A computer simulation, by contrast, is admissible only after a preliminary showing that any new scientific technique used to develop the simulation has gained general acceptance ... in the relevant scientific community." (*People v. Duenas* (2012) 55 Cal.4th 1, 20-21 (internal citations and quotations omitted).)

Severity of collision evidence on an admitted-liability case

Part of understanding why the plaintiff is injured is understanding the dynamics of the collision. If the defendant admits he was negligent, even if he does not admit the negligence was a substantial factor in causing the plaintiff's harm, the defense will likely file a motion in limine to exclude your accident reconstructionist and all evidence of the severity of the collision. Oppose this motion vigorously.

"[I]f an issue has been removed from a case by an admission in the answer, it is error to receive evidence which is material solely to the excluded matter. This, of course, does not mean that an admission of liability precludes a plaintiff from showing how an accident happened if such evidence is material to the issue of damages. In an action for personal injuries, where liability is admitted and the only issue to be tried is the amount of damage, the force of the impact and the surrounding circumstances may be relevant and material to indicate the extent of plaintiff's injuries." (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 5.) In other words, unless the defendant stipulates that the collision caused all of the harm alleged and the only fight at trial is over the reasonable cost of the medical care, then the evidence regarding the severity of the collision is relevant and admissible.

Keep the bad evidence out

Everyone has a history. Before their depositions are taken, I have a frank conversation with my clients about how the defense may use their own history to the defendant's advantage. I give them examples of information that I may need to move to exclude and keep a list of it so I can file motions in limine before trial because "[a]nything unfavorable to Plaintiff may be excluded if irrelevant to the issues in the case. For example, such things as plaintiff's criminal record; traffic citation received in accident (without a guilty plea or conviction); . . . drinking, drug use or sex habits if not relevant to injuries or other issues in the case . . . ." (William Wegner, *et al.*, *California Practice Guide: Civil Trials and Evidence* (2014) § 4:245 [citing Evid. Code § 350].) It is incredibly important, though, that your client also understands that lying about this information creates a window of admissibility to attack their credibility. If they are going to answer questions on these topics, they need to answer completely honestly.

Lack of a driver's license

The defense often wants to conflate the lack of a driver's license with the lack of training or experience operating a motor vehicle. A plaintiff can be very experienced in operating a motor vehicle and lack a license. If your client lacks a driver's license, draw a distinction between these two issues, and deprive the defense of the opportunity to precondition the jury that your client must have been comparatively negligent because they were unlicensed. A "[l]ack of a driver's license is not evidence of the negligence of the driver, and except in special situations, it is error to permit proof of the absence of a license." (*Shmatovich v. New Sonoma Creamery* (1960) 187 Cal.App.2d 342, 344 [disapproved of on other grounds by *Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727].) Also, "a restricted license is material to the issue of negligence only in the event that there is a causal connection between the fact of such restriction and the happening of the accident." ((1954) 42 Cal.2d 448, 459.) "No record of the suspension or revocation of the privilege to operate a motor vehicle by the department, nor any testimony of or concerning or produced at the hearing terminating in the suspension or revocation, shall be admissible as evidence in any court in any civil action." (Veh. Code, § 40832.)

Driving infractions

"Misdemeanor convictions are inadmissible in civil cases under Evidence Code section 788." (Bernard S. Jefferson, Jefferson's California Evidence Benchbook (2015) § 23.10.) Furthermore, in civil actions, evidence of prior acts is not admissible to prove negligence in a particular case. (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916.) While "[f]or the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . section 787 expressly precludes attaching a witness' credibility by showing prior arrests for misdemeanors, or felonies, or prior misdemeanor convictions." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d. 575, 591.) Also, "[i]t is not previous arrest or 'trouble with police' that may be used as the basis of impeachment of a witness, but only the previous conviction of a felony may be shown." (*People v. Duvernay* (1941) 43 Cal.App.2d 823, 827.)

Thus, even if the plaintiff was a negligent driver on other occasions, and even if the plaintiff had been convicted of misdemeanor driving offenses in the past, those past acts cannot be used to prove negligence at the time of the collision.

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Unless your client lies about this information, it will be hard for the defense to admit it at trial.

Intoxication

"[E]vidence of a long history of intoxication is inadmissible for the purpose of impeaching credibility unless it is clearly shown that the intoxication occurred contemporaneously with the events about which the witness is testifying." (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 339.)

A history of intoxication is also inadmissible to prove that the plaintiff was intoxicated at the time of the collision. "A person's character or character trait is an emotional, mental or personal fact constituting a disposition or propensity to engage in a certain type of conduct." (Bernard S. Jefferson, Jefferson's California Evidence Benchbook (2015) § 35.1, 35.2, 35.3 [citing Evid. Code §§ 1100-1109, 780-791].) "Relevant character evidence is admissible in civil cases, except in those situations where it is offered to prove conduct, or quality of conduct, on a specific occasion . . . Evidence of a person's character or a trait of his character is relevant in three situations: (1) When offered on the issue of his credibility as a witness; (2) when offered as circumstantial evidence of his conduct in conformity with such character or trait of character; and (3) when his character or a trait of his character is an ultimate fact in dispute in the action." (*Carr v. Pacific Tel. Co.* (1972) 26 Cal.App.3d 537, 544 [citing Evid. Code, §§ 1100, 1101, 1104].)

Even if there is evidence that at some point close in time the plaintiff ingested drugs or alcohol, the defense needs to present competent expert testimony to explain the intoxication's effect on the plaintiff's ability to perceive, react, and remember sufficiently. That analysis is beyond the knowledge of a lay person and so expert testimony is required to explain it. Even then, "*when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise.*" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (emphasis added).) "[A]ny material that forms the basis of an expert's opinion testimony must be reliable." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 [disapproved of on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665].) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.)

"[W]here the *facts* underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923-24 (emphasis in original).) "[A]n expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

Specifically, "an expert's opinion based on assumptions of fact without evidentiary support or on speculative or conjectural factors has no evidentiary value and may be excluded from evidence." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

Don't let the defense run roughshod over your client's right to have only competent evidence admitted. It is inappropriate for defense counsel to refer to drug or alcohol use (by referencing a toxicology report from the emergency room that came back positive for marijuana, for example), or to illicit information about it from a lay witness without having a reasonable expectation that there will be a competent expert witness to explain the evidence to a jury.

A common example in auto trials is the emergency-room physician who is not designated as a retained expert. This witness, while a physician, is not automatically an expert. Even if designated as a nonretained expert, the physician is not automatically qualified to offer opinions about the effect of intoxication on a driver. Use a motion in limine to educate the judge about this high standard of admissibility and consider arguing that the witness is not qualified to offer opinions about the effect of intoxication on the plaintiff's ability to operate the vehicle.

Seatbelt use during the collision

Another common defense tactic is to refer to the plaintiff's failure to wear a seat belt as the cause of the plaintiff's harm. In reality, the plaintiff's failure to wear a seat belt could be comparative negligence. Remember, though, that the defendant has the burden of proving comparative negligence. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.) "Where the defendant raises the issue of the contributory negligence of the plaintiff for his failure to use available seat belts, expert testimony is necessary to establish the nature of the injuries the plaintiff would have sustained if he had used seat belts." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343.)

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him 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 his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801.) Unless the defense offers expert opinion about the effect the lack of a seat belt had on the

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plaintiff, then the plaintiff's failure to wear a seat belt is not relevant.

Defendant's feelings about what plaintiff must have been doing

We've all seen it: a defendant is convinced that the plaintiff must have been texting, or must have been drunk, or must have done something to cause the collision. If the defense offers deposition testimony in support of a theory about what the plaintiff must have done, consider filing a motion in limine to exclude it. The testimony of a witness concerning a particular matter is inadmissible unless the witness has personal knowledge of the matter. (Evid. Code, § 702, subd. (a).) "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness's own senses. (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720 [abrogated by *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63].) Unless the defendant saw the plaintiff texting, or smelled alcohol on his breath at the scene, for example, the defendant's thoughts and feelings on what the plaintiff must have been doing are inadmissible.

Emergency responders did not respond to the scene

Often, the defense insinuates that the fact that emergency responders did not go to the scene means that the collision did not occur or that it was not severe enough to hurt the plaintiff. File a motion in limine to preclude the defense from making that insinuation. Unless the plaintiff specifically confirms that they did not call the police because the collision was not bad, or because they had no pain whatsoever, then the reason the police did not respond is probably irrelevant.

Conclusions as to fault in the traffic-collision report

An officer's conclusions about who is at fault for the collision are not admissible. "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." (Evid. Code, § 800.) Furthermore, it is proper for a court to exclude a police officer's opinion regarding the cause of a collision when his opinion is formed only through interviews with witnesses at the scene, rather than his own personal observations of the incident. (*Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 165.)

In addition, "accident reports, especially those compiled by police at the scene of an accident – based on statements of participants, bystanders, measurements, deductions and conclusions of their own fail to qualify as admissible official records or business records." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 705.) "By permitting the accident report itself to be introduced into evidence there is a danger that it would be considered by the jury as 'official,' and thus be given more weight than that to which it fairly is entitled. Accident reports are printed on forms with a standard heading, insignia and title designating their 'official' character. Not only is the report an 'official' document per se, but it even looks "official." And therein lies the danger." (*Sherrell v. Kelso* (1981) 16 Cal.App.3d Supp. 22, 31.)

When all else fails

Make an offer of proof

If the court sustains an objection to your evidence, request the opportunity to make an offer of proof. The offer of proof must include the "substance, purpose, and relevance" of the evidence. (Evid. Code, § 354.) This offer of proof can be made in an Evidence Code section 402 hearing outside the presence of the jury so it can be explained on the record what the evidence would have shown had it been admitted. Remember that if you fail to make an offer of proof, you waive your client's right to a new trial or appeal based on the exclusion. (Evid. Code, § 354.)

Request a limiting instruction

"When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request *shall* restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355 (emphasis added).) "[W]hile an objection to such evidence may not be effective to *exclude* the evidence, it is hardly futile. If understood as a request to limit the scope of the evidence, the objection prevents consideration of the evidence for broader purposes." (*Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1061 (citing Evid. Code, § 355; internal citations and quotations omitted).)

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