

FILED *J.H.*
8/16/2023
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No. SBC-23-O-30029-YDR
)	
JOHN CHARLES EASTMAN,)	ORDER RE OCTC'S MOTION IN
)	LIMINE NO. 6 TO EXCLUDE
State Bar No. 193726.)	RESPONDENT'S WITNESSES
)	BRIGGS, COLBECK, COX, JR.,
)	FINCHEM, HONEY, JUNO,
)	O'DONNELL, ROGERS, FRIED, AND
)	OLSEN

On June 22, 2023, the Office of Chief Trial Counsel of the State Bar of California (OCTC) filed Motion in Limine No. 6 to Exclude William M. Briggs, Patrick Colbeck, Anthony Cox, Jr., Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O'Donnell, Wendy Rogers, and Joseph Fried. Although not named in the motion's title, OCTC also seeks to exclude Kurt Olsen as a witness. On June 28, respondent John Charles Eastman filed a response in opposition.

By order dated March 2, 2023, trial in this case was set to commence on May 10, 2023. Thereafter, on April 5, 2023 the parties filed a joint motion to continue the trial, which the court granted and continued the trial to June 20, 2023. On June 5, 2023, the parties filed a joint pretrial statement where Respondent named 16 individuals as percipient witnesses.¹ Additionally, included in his list of expert witnesses was Joseph N. Fried.

¹ Ray Blehar, Jackie Deason, John Droz, Garland Favorito, Dr. Doug Frank, Michael Gableman, Bryan Geels, Kurt Hilbert, Linda Kerns, Hon. William Ligon, Doug Logan, Peter Navarro, Kurt Olsen, Joseph Oltmann, Russell J. Ramsland, Jr., and Jim Troupis.

On June 9, 2023, OCTC filed an Objection and Motion for Offer of Proof Re Respondent’s Witnesses. The subject matter of OCTC’s objection and motion was addressed during the June 12, pretrial conference. On June 13, the court issued an order granting OCTC’s objection and motion, “[g]iven the scant joint pretrial statement descriptions of the expert and percipient testimony to be offered by the sixteen percipient/non-retained experts provided by Respondent.” Respondent was directed to file an offer of proof for “each of the sixteen percipient/non-retained experts.” Instead, on June 16, Respondent filed an Offer of Proof Re Percipient/Non-Retained Witnesses for Trial that removed seven witnesses² previously identified in the joint pretrial statement and added seven other individuals³—prompting OCTC to file the instant motion in limine.

In his opposition, Respondent argues that exclusion of the outlined witnesses would deprive him of due process as exclusion is “an extreme and unwarranted sanction.” (Respondent’s Opposition at p. 4.) In support of his position, Respondent cites *Biles v. Exxon Mobil* (2004) 12 Cal.App.4th 1315, 1327.)⁴ In *Biles*, the defendant moved for summary judgment and the plaintiff responded in part with a declaration by a coworker. (*Ibid.*) The trial court excluded the coworker’s declaration on the ground that the coworker had not been identified in answer to an earlier interrogatory seeking the names of persons who had knowledge of plaintiff’s asbestos exposure on defendant’s premises. (*Ibid.*) The appellate court reversed, finding that the failure to identify the witness was not grounds for excluding his declaration, and

² Respondent removed as witnesses Kurt Hilbert, Linda Kerns, Hon. William Ligon, Douglas Logan, Peter Navarro, Russell J. Ramsland Jr., and Jim Troupis.

³ In addition to Respondent’s June 16, 2023 offer of proof, on June 20, Respondent filed a Notice of Intent to: (1) Call Patrick Colbeck as A Rebuttal Witness; (2) Call Joseph Fried as a Fact Witness in Light of His Exclusion as an Expert; and (3) Present Good Character Evidence from 16 New (19 Total) Character Witnesses.

⁴ Respondent also cites *Duran v. U.S. Bank Nat. Assn.* (2012) 203 Cal.App.4th 212, but *Duran* was superseded by the Supreme Court opinion in *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1.

holding that the improperly excluded declaration raised a triable issue of fact. (*Ibid.*) The *Biles* court pointed out that no cases have approved the imposition of evidence or issue sanctions absent violation of an order compelling discovery or other willful and flagrant discovery abuses. (*Biles, supra*, 124 Cal.App.4th at p. 1327 & fn. 8.)

The court does not find *Biles, supra*, persuasive. Unlike *Biles*, this case involves a pretrial order to disclose witnesses—an order Respondent violated. The parties were ordered to provide pretrial statements by June 5, 2023—statements to include a list of witnesses likely to be called at trial. Moreover, the court’s June 13 order directed Respondent to file an offer of proof for “each of the sixteen percipient/non-retained experts.” Eight of the witnesses OCTC seeks to exclude were not included in Respondent’s pretrial statement and were not the witnesses the court ordered Respondent to provide an offer of proof. (See *Biles, supra*, 124 Cal.App.4th at p. 1327 [general prerequisite for imposition of nonmonetary sanctions such as evidence sanction imposed: (1) absent unusual circumstances, there must be noncompliance with court order, and (2) noncompliance must be willful].)

Respondent also maintains that he was forced to replace certain witnesses because they declined to testify. Respondent’s argument is unconvincing as this was a self-inflicted hardship. Respondent should have determined before June 13, 2023, that certain witnesses refused to testify based on their concern about pending investigations against them or based on their counsel’s advice against testifying.

Finally, Respondent argues that OCTC will not be prejudiced by allowing the witnesses unidentified in the joint pretrial statement to testify since OCTC would have the opportunity to prepare for the witnesses while the trial was in recess for almost two months. However, rule

5.101 of the Rules of Procedure of the State Bar⁵ (pretrial statement requirements) does not provide for an exception regarding the late disclosure of trial witnesses due to a hiatus in the proceedings. Moreover, permitting the untimely disclosure of witnesses flies in the face of efficient trial management—a party need only delay a trial to belatedly designate witnesses that it was ordered to designate months earlier.

In deciding motion in limine No. 6, the court considers rule 5.101(C)(8). The rule requires the pretrial statement to include a “list of all witnesses likely to be called at trial, together with a statement following each name describing the substance of the testimony to be given. . . .” In Respondent’s June 16, 2023 offer of proof and June 20 notice, Respondent added the following individuals as witnesses: William M. Briggs, Anthony Cox, Jr., Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O’Donnell, Wendy Rogers, Patrick Colbeck and Joseph Fried. With the exception of Joseph Fried, none of these witnesses were identified in the joint pretrial statement.

The court has broad inherent authority to exercise reasonable control over disciplinary proceedings. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 287.) Pretrial statements are a crucial tool for conducting an efficient multi-count trial. Their primary purpose is “to simplify and define the issues and determine how the trial may proceed most expeditiously.” (*Trickey v. Superior Ct.* (1967) 252 Cal.App.2d 650, 653.) “Unexcused failure to comply with an order requiring a pretrial statement in compliance with [rule 5.101] should not be treated lightly. [Citations.]” (*In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559, 564 fn. 3, citing *Link v. Wabash R.R. Co.* (1962) 370 U.S. 626 [dismissal for failure to appear at pretrial conference]; *Admiral Theatre Corp. v. Douglas Theatre* (8th Cir.1978) 585 F.2d 877 [court had discretion to exclude exhibits or refuse to permit the testimony of a witness not listed

⁵ Unless otherwise indicated, all further references to rules are to the Rules of Procedure of the State Bar.

prior to trial in contravention of pretrial order].) Indeed, the pretrial statement is an important tool to aid the hearing judge in managing trials, and it benefits both the court and counsel by focusing on the evidence to be offered at trial and in avoiding surprise and needless consumption of time at trial.

The court notes that its June 16, 2023 order granting OCTC’s request for offer of proof was not an invitation for Respondent to revise his witness list and add witnesses for trial. The order directed Respondent to file an offer of proof for “each of the sixteen percipient/non-retained experts.” Respondent’s June 16 offer of proof is not in compliance with the court’s order, and by identifying as witnesses William M. Briggs, Anthony Cox, Jr., Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O’Donnell, Wendy Rogers, and Patrick Colbeck less than one court day before trial—the first day of trial in the case of Patrick Colbeck—Respondent failed to comply with his disclosure obligations.

As to Joseph Fried, although Respondent listed him as an expert witness rather than a percipient witness, OCTC had notice of Fried as a potential witness. The court will permit Fried to testify as a percipient witness.

Respondent intends to call Colbeck as a rebuttal witness. ““The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.]”” (*Green v. Healthcare Services, Inc.* (2021) 68 Cal.App.5th 407, 420.) Although Colbeck was not identified until the first day of trial, it would be premature to exclude Colbeck as a rebuttal witness. (See *id.* at pp. 420-421 [percipient witness permitted to testify to impeach and rebut testimony of opposing party’s witness].) Nevertheless, Colbeck’s testimony will be limited to rebuttal testimony as a percipient witness, and he will be prohibited from testifying as an expert (Respondent’s June 20, 2023 Notice, p. 2) as he was never designated as such. (*Ibid.*)

Finally, Kurt Olsen was listed as a percipient witness on the joint pretrial statement and is permitted to testify as a percipient witness as specified on page 64 of the joint pretrial statement regarding his involvement with the *Texas v. Pennsylvania* case.

Accordingly, after consideration of the motion and opposition, the court issues the following orders:

1. OCTC's motion in limine No. 6 is **GRANTED**, in part and **DENIED**, in part. Motion in limine No. 6 is **GRANTED** as to the following witnesses who are excluded from testifying at trial: William M. Briggs, Anthony Cox, Jr., Mark Finchem, Heather Honey, Sandy Juno, Jeffrey O'Donnell, and Wendy Rogers.

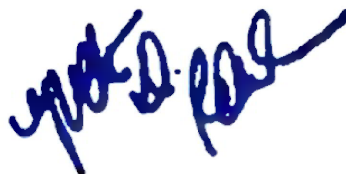
2. OCTC's request to exclude the testimony of Joseph Fried is **DENIED**. Joseph Fried may testify as a percipient witness—excluding any expert opinion testimony.

3. OCTC's request to exclude the testimony of Patrick Colbeck is **DENIED**. Patrick Colbeck may testify as a percipient rebuttal witness—excluding any expert opinion testimony.

4. OCTC's request to exclude the testimony of Kurt Olsen is **DENIED**. Kurt Olsen may testify as a percipient witness as specified on page 64 of the June 5, 2023 joint pretrial statement regarding his involvement with the *Texas v. Pennsylvania* case—excluding any expert opinion testimony.

IT IS SO ORDERED.

Dated: August 16, 2023



YVETTE D. ROLAND
Judge of the State Bar Court