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Expert witness testimony at trial: Practice and procedure

THE EFFECTIVE PRESENTATION OF LIABILITY AND DAMAGES THROUGH EXPERT TESTIMONY AND OPINION

To obtain a jury's verdict in favor of plaintiff, you must conduct exhaustive pre-trial preparation and then effectively present the evidence, including expert-opinion evidence. Your trial presentation is the culmination of your efforts that have been in progress on the case for years – from initial evaluation of the factual and legal issues, development and implementation of a well-considered discovery plan (often including motions to compel discovery from the defense), preparation of witnesses and documentary evidence, successful opposition of MSJ and MSA motions, assessment of evidentiary issues and preparation of well-crafted motions in limine.

In establishing liability, causation, and damages before the jury, the expert-witness testimony is among your most important tools. In many cases it will be the liability expert witnesses (i.e., accident reconstruction, biomechanical, automotive engineering, police practices, etc.) who will express to the jury their opinions – and more importantly, the evidentiary bases for those opinions – that comprise the essential reasons why the jury should find in plaintiff's favor on liability. Thus, the presentation of liability expert testimony is often the vehicle for linking together the evidence and opinions upon which the jury will rely to reach their verdict in plaintiff's favor.

This article focuses upon the practical, procedural and substantive elements required to present effective expert witness testimony at trial.

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The role of the expert witness

Even at the outset of a new case, you should carefully consider the expert witnesses who may testify on behalf of plaintiff at trial. As your discovery plan begins to generate the evidence in support of plaintiff's case, you appreciate that it will be the effective testimony and use of demonstrative evidence by your expert witnesses that will eventually 'make or break' your case before the jury. With this in mind, you should begin to consult with the experts you will rely upon very early in the case.

Bear in mind that expert testimony and opinion will be *required* whenever proof of an element of your cause of action, or an element of a defense, involves the determination of an issue that is outside the common experience of the trier of fact. (Evidence Code section 801.) For example, in *Miller v. Los Angeles County Flood Control District* (1973) 8 Cal.3d 689, an action for personal injury and wrongful death, plaintiffs sued home builder Noble Manors and the Los Angeles County Flood Control District after floodwaters decimated their home on Country Club Drive, in Burbank, causing severe injuries to Mr. Miller and drowning his wife.

At the close of plaintiffs' case-in-chief, the trial court granted nonsuit in favor of defendant Noble Manors because the plaintiffs had failed to present any expert testimony in support of their causes for negligence and strict liability against the home builder. This ruling was affirmed by the California Supreme Court: "If the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case. ¶ Applying the above principles to the instant case we are satisfied that it was not for non-expert minds to determine whether Noble Manors failed to exercise due care in the construction of the home. Building homes is a complicated activity." (*Id*., at 8 Cal.3d 702.)

Expert opinion is necessary in medical or legal-malpractice cases to establish that defendant's conduct fell below the standard of care in the community, as these matters are not within the common knowledge of the jury. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156.) In medical malpractice cases expert testimony on the standard of care will be excused only under circumstances – usually in res ipsa loquitor cases – in which the malpractice is 'blatantly obvious.' (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86 ["[S]cientific enlightenment is not essential for the determination of an obvious fact"].)

Whenever an issue in controversy is beyond common lay knowledge, a plaintiff who fails to present competent expert testimony on the issue fails to establish a prima facie case and a judgment of nonsuit or dismissal is proper. (*Stephen v. Ford Motor Company* (2005) 134 Cal.App.4th 1363, 1373-1374; *Gotshall v. Daley* (2002) 96 Cal.App.4th 479, 484.)

It has repeatedly been held that whenever the matter is beyond common lay knowledge, expert witness opinion is required on the essential issue of causation. (*Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569-1570 [whether cigarette in garbage can cause a house fire]; *Miranda v. Bomel Construction Company* (2010) 187 Cal.App.4th 1326, 1336 [whether plaintiff's Valley Fever was caused by construction debris on adjacent property]; *Stephen v. Ford Motor Company, supra*, at 134 Cal.App.4th 1373-1374 [whether a vehicle design defect caused loss of control after a tire detread]; *Visueta v. General Motors Corp*. (1991) 234 Cal.App.3d 1609, 1616 [whether vehicle design defect caused accident].)

It bears emphasis that when an element of a defense is beyond common lay knowledge, the defendant must either advance expert opinion in support of the defense or waive the defense entirely. For example, when a defendant asserts a 'seat belt defense' the defendant must establish by expert testimony the nature and extent of injuries plaintiff would have sustained if plaintiff had used a seat belt. In the absence of such expert testimony, defendant may not assert a 'seat belt defense.' (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 982-984; *Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343.)

In those cases in which expert-witness testimony is not required to make a prima facie case, expert opinion is still "permissible" whenever the subject matter is sufficiently beyond lay experience that it will "assist the trier of fact" in deciding the issue in controversy. (Evid. Code § 801; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 125; *PM Group, Inc. v. Stewart* (2007) 154 CalApp.4th 55, 63-64.) 'Sufficiently beyond lay experience' to make expert opinion testimony admissible does not require that the trier of fact be entirely ignorant of the subject matter of the opinion. The testimony will be excluded only when it would add nothing to the jury's "common fund of information." (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1959, 1067-1068.)

Against this background, it is the rare case that will not include expert witness testimony during the liability, causation and damages portions of plaintiff's case-in-chief at trial.

Selection and payment of expert witnesses: a practical guide

•When to select your designated experts

In most cases, a demand for exchange of expert witness information must be served no later than 70 days before the initial trial date (Code Civ. Proc., § 2034.220), and mutual exchange of expert witness information must occur 50 days before the initial trial date. (*Id.*, § 2034.230(b).

Until an expert witness has been designated as an expert who will testify at trial, the identity and opinions of the expert are protected by the attorney work-product rule and are not discoverable. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297.) "The opinions of experts who have not been designated as trial witnesses are protected by the attorney work-product rule."

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(*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834-835). Their identity also remains privileged until they are designated as trial witnesses. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 37).

Of course, there are circumstances in which retention and disclosure of an expert witness will become necessary well in advance of the time for formal exchange of expert witness information under Code of Civil Procedure sections 2034.220 and 2034.230(b).

For example, a defense MSJ or MSA – often brought well in advance of the time for exchange of expert witness information – will often be supported by the declaration of a defense expert witness. This will give you the opportunity to depose the defense expert declarant to properly oppose the defense motion, and will almost certainly require that you also retain a plaintiff expert to prepare a declaration in support of your opposition. Under such circumstances, as in all cases, you will need to provide your expert witness with all discovery and other information that may be necessary to obtain a fully informed opinion and counter-declaration from your expert witness.

In all other cases expert witnesses should be retained, and provided with all necessary discovery and other evidence, within 90 to 100 days before the first trial date (i.e., 40 to 50 days prior to service of plaintiff's Designation of Expert Witnesses). This will allow you ample time to become familiar with the expert witnesses you intend to use at trial, and with their initial opinions concerning the case, well before you prepare and serve your Designation of Expert Witnesses 50 days before trial. By giving yourself this 'lead time' you will also have an opportunity to discern any problems that may exist with any of your retained expert witnesses, or any gaps in the discovery or evidence the experts will need to form and present their opinions at trial.

Is it worth hiring the experts?

At this stage, immediately before hiring retained expert witnesses, it is good practice to evaluate the settlement and verdict potential of the case. Your case is about to become significantly more expensive to prosecute through jury verdict. This is the moment to properly evaluate and handle the risks in a manner that will maximize the rewards in this particular case. Substantial discovery and evaluation of the issues have already been done. An objective and realistic assessment of the positive and negative aspects of your case is necessary at this stage. Every case is, of course, different. Is this a case in which you are confident of a plaintiff verdict on liability and a major verdict in favor of plaintiff on damages? In such cases it sometimes occurs that the defense has simply misread liability and damages, and a highly successful outcome for plaintiff at trial is probable. In a case such as this you can confidently retain and prepare all necessary expert witnesses to maximize plaintiff's recovery before the jury.

But what of the case in which liability may be clear but plaintiff's injuries have fully resolved and the verdict potential on damages is limited? In such a case will your client really benefit from incurring the substantial expert witness fees required to present expert opinions on the liability and damages issues at trial?

In other cases your client's testimony at deposition may have already been impeached by other accidents or incidents the client refused to disclose to you, thus rendering plaintiff an easy target for devastating impeachment at trial. As we all know, during the progression of any given case a myriad of evidentiary or factual issues may emerge that could drive the jury toward a defense verdict on liability, or severely constrict your client's recovery of damages. In such cases you should be very reluctant to incur expert witness fees that will not ultimately influence the outcome before the jury. Simply stated, if the jury has good reason to disfavor your client and his or her case, the most brilliant expert-witness presentation may be appreciated by the jury but will not prevent a result *adverse to plaintiff.*

The time for an honest assessment of the case is before the substantial costs of retaining expert witnesses have been incurred. If the value of the case does not warrant the expenditure of expert witness fees, then you should carefully consider efforts to resolve the case by settlement or divert the case to binding arbitration where you can better control and limit your expert fees and costs.

•Give your expert witness the help he or she needs

Once you have retained an expert witness, give the expert copies of all discovery and evidence that must be reviewed in order to formulate an opinion.

If there is a discovery response or deposition testimony that is problematic to your case, then make sure that this information is given to your expert for consideration. It makes no sense to withhold information from your expert witness. Doing so only leads to your expert being impeached for not having considered information that is adverse to plaintiff and which very possibly contradicts the opinions your expert has expressed. To retain and pay an expert witness, while simultaneously facilitating impeachment of your own expert, leads to a monumental waste of time and money.

•Review all potential opinions, especially adverse ones

As the expert's work progresses, it is imperative that you discuss with the expert each of the opinions being formulated and the evidentiary bases for each opinion. At this stage it is often helpful to have your expert prepare a working draft of a bullet-point outline that reflects each opinion and the evidentiary basis for that opinion.

In unusual cases an expert retained on behalf of plaintiff may insist upon giving an opinion that is adverse to plaintiff's position. As long as the expert has not been deposed, that expert may be de-designated and treated as a consultant whose opinions are protected by the attorney work-product privilege. (*County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 656 ["a party may, indeed, enjoy the right to withdraw an expert witness at any time prior to disclosure of that witness' proposed testimony… and thereby re-establish the work-product privilege"].) Needless to say, it is

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important that any problematic opinions by a retained expert be identified in time to avoid designating that expert as a retained expert or, at least, in time to dedesignate the expert before they are deposed.

Designation of retained and non-retained expert witnesses

In regard to the retained experts set forth in your Designation of Expert Witnesses, your declaration must, among other things, provide a "…brief narrative statement of the general substance of the testimony the expert is expected to give." (Code Civ. Proc., § 2034.260(c)(1).)

For example, the "general substance of the testimony" of a retained liability expert in a product liability action might be set forth as follows:

> Mr. _____ will discuss liability issues as they relate to his knowledge, background, experience, education, training and evaluation of the evidence in this case. These areas include brake and throttle system design, testing, warnings, and alternate designs. Mr. _____will discuss the opinions of any other experts, plaintiff or defense, including responding to Defendants' experts' opinions, and will testify to any related issue as it relates to the facts of this case and his knowledge and expertise.

The "general substance of the testimony" of a retained medical expert may include the following:

> Dr. _____will discuss damages issues as they relate to his knowledge, background, experience, education, training and evaluation of the evidence in this case. These areas include endocrinology and internal medicine. Dr. _____will discuss the opinions of any other experts, plaintiff or defense, including responding to Defendants' experts' opinions, and will testify to any related issue as it relates to the facts of this case and his knowledge and expertise.

Of course, as to each retained expert set forth in your Designation of Expert Witnesses, your declaration must also include a brief narrative statement of his or her general qualifications, a representation that the retained expert has agreed to testify at trial, a representation that the retained expert will be sufficiently familiar with the case to give a meaningful deposition concerning his or her specific testimony that the expert is expected to give at trial, and the expert's hourly and daily fee for giving deposition testimony, and for consulting with the retaining attorney. (Code Civ. Proc., §§ 2034.260(c)(1) through (5).

All non-retained expert witnesses who may be called by plaintiff to give expert opinions at trial, such as treating physicians, must also be listed in the Designation of Expert Witnesses, although no declaration is required for non-retained experts.

Significantly, a treating physician testifying as a non-retained expert can properly give opinions at trial upon matters that include causation of the plaintiff's injuries. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39.) *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 139 ["A treating physician is a percipient expert, but that does not mean that his testimony is limited to only personal observations. Rather, like any other expert, he may provide both fact and opinion testimony"].)

Accordingly, in every case it is advisable to know in advance the testimony that each of plaintiff's treating physicians will give in regard to plaintiff's injuries, diagnoses, prognoses concerning residual deficits, and causation. In some cases your personal interviews with plaintiff's treating physicians may be similar to an audition through which you will select the treating physician who can best convey to the jury the testimony and opinions that will be most compelling to the jury. A jury will often place more weight upon the testimony of a treating physician who actually diagnosed and treated plaintiff than it will a retained medical expert who encountered plaintiff only for litigation purposes.

Preparing experts for deposition

To maximize the persuasive impact that your expert witness will have on the jury, you have selected experts who have jury appeal, an ability to 'connect' with the jury by explaining concepts in commonly understood and 'teachable' language, and forensic experience enabling them to withstand vigorous cross-examination.

The effective presentation of your expert witness testimony begins at deposition, for which considerable preparation time is necessary.

Section 2034.260(c)(4) expressly requires that, at deposition, your expert witness provide "…specific testimony, including any opinion and its basis, that the expert is expected to give at trial." To enable your expert to maximize the effective presentation of their opinions at deposition, the following factors are essential:

- Meet with your expert witness (multiple times if necessary) to assure that your expert articulates to you, and that you thoroughly understand, every opinion that your expert will give during deposition, *and the bases* for each opinion. This collaborative effort is critical, and it underscores that you and your expert are working together as a team to maximize the benefit of the expert's testimony to your client. In some cases the nuance of how an opinion is expressed may be extremely important. In many cases you will find yourself pointing out to your expert additional facts that support an opinion your expert will give. There may be problematic deposition testimony or other evidence that your expert will certainly need to address. This is the time to strategize the precise manner in which your expert will distinguish or otherwise 'deal with' such evidence. Simply stated, prior to the deposition of your expert, all matters concerning your expert's opinions and their bases, along with any potentially harmful evidence, must be clearly understood and addressed between you and your expert.
- Review with the expert all materials in the expert's file that will be produced at deposition. This will not only reacquaint you and your expert with the key evidence in support of your expert's opinions, it will also allow the expert to make a judgment about which materials should properly be in his or her file.

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Materials in your expert's file that are wholly unrelated to the issues in controversy (e.g., your expert's Ph.D. dissertation on an entirely unrelated topic), or that were mistakenly placed in the file (e.g., an invitation to the piano recital of your expert's child), or that are non-responsive to the request for production of documents at deposition, will needlessly create confusion and waste time.

• Discuss with your expert the attorneys, represented parties and matters at issue between other parties who will be represented at the deposition. In some cases, a co-defendant party will be asserting fault on the part of the defendant who has scheduled your expert's deposition. It will assist your expert to know in advance whether he or she is being interrogated by an attorney who is adverse to plaintiff, or by an attorney whose client has a common interest with plaintiff on some issues. Make certain your expert is informed about who the 'players' are and what their motivations will be during the deposition.

• It is not unusual that your expert will have been deposed on prior occasions by the same defense attorney, in other cases, and is thus familiar with the defense attorney's style and interrogation techniques during deposition. When your expert does not have prior experience with the defense attorneys, prepare your expert for the style and techniques that he or she can expect during deposition:

Does the defense attorney adhere religiously to a pre-packaged outline of questions? Is the style of the defense attorney needlessly confrontational in an effort to intimidate? Does the defense attorney 'load' questions with hypothetical 'facts' that are not, and never will be, in the record? Can your expert anticipate that you will need to make numerous objections to the form of defense counsel's questions, and that defense counsel will become argumentative during the deposition?

It will be helpful to discuss these matters with your expert in advance of the deposition.

It is probable that your expert's deposition will be videotaped, and this should be discussed with your expert. Obviously, your expert will need to dress and present themselves in a professional manner. If the defense is videotaping the deposition, then it is the hope of the defense that your expert will display anger or argumentative behavior during the deposition, providing to the defense a video clip that the defense will show to the jury during opening statement. Make certain your expert knows, prior to any videotaped deposition, that the defense attorney may attempt to 'bait' them into an expression of anger, or into argumentative or untoward behavior for precisely that purpose. Your expert will then be well armed to avoid those traps at all costs.

The time spent preparing your expert for deposition will always pay dividends. This is the time to distill and refine the precise opinions that your expert will give at trial, as well as the precise evidence that will provide the bases for your expert's opinions. In some cases, the deposition testimony of your well-prepared expert will itself generate a defense offer of settlement that may lead to resolving the case prior to trial. In every case, the preparation and presentation of your expert's testimony at deposition will be the essential foundation for the testimony that your expert will give before the jury at trial.

Preparing your expert for trial

The preparation of your expert's testimony for trial always involves certain fundamental steps that cannot be overlooked. Your expert will need to re-read the transcript of his or her deposition, perhaps several times, to ensure that trial testimony is not needlessly impeached from the deposition transcript. Also, the full array of evidence will be considered so that the most illustrative photographs, test results, graphs, and demonstrative evidence can be selected to best enhance and support your expert's opinions and testimony.

Before developing a strategy to prepare your expert's trial testimony, it is important to consider the factors that will influence how your expert witness will be perceived by the jury. Our debriefing of jurors post-verdict, as well as studies of the jury deliberation process, disclose that many jurors assume that both sides can buy 'hired gun' experts to give any opinion that will support the side that hired them. This tends to lead, in the minds of jurors, to a battle of paid experts in which the plaintiff and defense expert witnesses essentially cancel out one another. The net result of this dynamic is that after an enormous amount of time and expense devoted to expert witness testimony, neither the plaintiff nor the defense experts drive the ultimate verdict of the jury.

The question is how to best prepare and present the testimony of your expert witnesses in this rather cynical environment. By implementing each of the following approaches you can greatly enhance the probability that the jury will find the testimony of your expert witness to be credible and persuasive.

• During voir dire and opening statement don't refer to your "expert witness," which the jurors hear as the "guy we hired to testify." Instead, use descriptive terms that enhance objectivity: "To test this theory, we consulted with an outside engineer who has years of training and experience in reconstructing how an accident took place. That engineer, Mr. _____, will come to court during trial to explain to you his findings and conclusions." Then, at least, the jury's first impression of your expert is cast in terms of outside objectivity.

• On one hand, jurors are skeptical of the "battle of the experts." On the other hand, the jury truly does appreciate hearing the testimony of a highly educated and well-informed witness who can credibly explain to them the complicated or technical aspects of the case in a way that makes sense to them. From this standpoint your expert is a "teacher" who will explain to the jury his or her findings in language that is commonly understood by all jurors.

• By the time you are preparing your expert's trial testimony, all of the demonstrative evidence (i.e., carefully selected blow-ups of photographs, or

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of select pages of medical or other records) is ready for reference to be weaved into your questions and the answers of your expert. During preparation you will role play the direct examination with your expert so that his or her opinions, and the evidentiary bases for the opinions, are seamlessly presented to the jury in the most efficient and effective manner possible.

• The answers of your expert on direct examination should be precisely responsive to the question, and should not be in the form of lengthy narratives that go vastly outside the call of the question. There is nothing worse than having your expert bury a key opinion under a mountain of pointless narrative. Furthermore, an expert who rambles well beyond the scope of the question communicates to the jury that he or she is attempting to give vacant quantity instead of quality – a practice the jury will soon read as desperate and non-credible.

•To keep the attention of the jury, and to maximize the persuasive power of his or her testimony, your expert will need to be prepared to: (1) give answers that are fully responsive and informative in direct response to the call of the question (but not beyond); (2) speak in 'everyman' terms that will be readily understood by the jurors; (3) be fluent in responding to your questions that direct your expert with some frequency to exhibits or demonstrative evidence (i.e., new data) that will keep the attention of the jury; (4) speak in a tone that is calmly confident and authoritative; (5) look from time to time to the jury to speak directly to the jurors.

•The ultimate objective of your expert witness is to 'teach' the jury in everyday language the reasons why each of his or her opinions is well supported by the evidence, and to do so in a way that projects knowledge, confidence, trustworthiness and likability.

•In every case the defense will present expert opinions that are contrary to those of your expert. Thus, on direct examination your expert must be prepared to testify that he or she has considered each of the pertinent defense opinions, and to explain to the jury why the defense opinions are flawed and untrustworthy.

•In addition, of course, you must prepare your expert for a vigorous cross-examination by the defense at trial. During cross-examination your expert must never become emotional, angry or argumentative with defense counsel. In preparation for trial, encourage your expert to always remain direct, polite, confident and steadfast in his or her opinions during cross-examination. The polite confidence projected by an expert during cross-examination is seen by jurors as the witness being confident because he or she is correct.

Jury trials are won by placing small plusses on top of small plusses from voir dire through closing argument and, at the end of the trial, the plusses in favor of your client will hopefully outweigh the minuses and you will prevail before the jury.

There is no question that your presentation of expert testimony to the jury offers the opportunity to gain many critical plusses in favor of your client, potentially so many plusses that they cannot possibly be overcome by the defense.

Editor's Note: This article was first presented at the 2016 CAALA CONVENTION in Las Vegas.

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