

**HOW EXPERT WITNESSES CAN IMPROVE THEIR
RELATIONSHIP WITH BUSY TRIAL ATTORNEY**

PRESENTED BY FEWA SAN FRANCISCO CHAPTER

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Presentation Materials

Presentation Outline

Example Expert Witness Conflict Checklist

Example Expert Deposition Questions

**HOW EXPERT WITNESSES CAN IMPROVE THEIR RELATIONSHIP
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I. When is expert testimony admissible? (Evidence Code § 801)

A. General standards of admissibility

1. An expert is a person who provides opinion evidence on a subject which is beyond the common experience of the trier of fact when said opinion will assist the trier of fact.
2. An expert need not have personal knowledge of the facts, but draws conclusions from facts which are in evidence. Dina v. Dept. of Transportation (2007) 151 Cal.App.4th 1029; see also, McCoy v. Gustafson (2010) 180 Cal.App.4th 56.
3. Opinion on ultimate issue: expert opinion testimony may embrace the ultimate issue to be decided by the jury. Evid. Code § 805; Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal.3d 689.
4. Weight v. Admissibility: the admissibility of expert opinion is determined by the court as a matter of law, but the weight to be given expert opinion testimony is normally determined by the trier of fact (jury). Kastner v. Los Angeles Metropolitan Transit Auth. (1965) 63 Cal.2d 52.

C. Appropriate subjects for expert testimony.

1. Standard of conduct (fiduciary duties). Mirabito v. Liccardo (1992) 4 Cal.App.4th 41.
2. Standard of care of attorneys. Stanley v. Richmond (1995) 35 Cal.App.4th 1070.
3. Standard of care of real estate brokers. Padgett v. Phariss (1997) 54 Cal.App.4th 1270.
4. Standard of care of other professionals. Stonegate Homeowners Association v. Staben (2006) 144 Cal.App.4th 740.
5. Customs and practices in an industry. PM Group Inc. v. Stewart (2007) 154 Cal.App.4th 55.

6. Value of Real Property. Evidence Code §§ 810 to 824; Saunders v. Taylor (1996) 42 Cal.App.4th 1538.

D. Inappropriate subjects.

1. The law: Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863; Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155.
2. Conduct which is not a legal cause of damages. Ulloa v. McMillin Real Estate Mortgage (2007) 149 Cal.App.4th 333; Lazy Acres Market Inc. v. Tseng (2007) 152 Cal.App.4th 1431.
3. Subject not beyond common experience of jury.

II. The role of an expert.

- A. Consultant to advance knowledge of case and provide theme of case; work product privilege.
- B. Assistant with discovery, document evaluation, ADR and motion for summary judgment. Nardizzi v. Harbor Chrysler Plymouth Sales, Inc. (2006) 136 Cal.App.4th 1409; Johnson v. Superior Court (2006) 143 Cal.App.4th 297. WRI v. Cooper (2007) 154 Cal.App.4th 525.
- C. Tailor your testimony to your audience: deposition (attorneys) v. trial (jury).
- D. Expert as an advocate of his or her opinion.

III. What attorneys look for in an expert.

- A. Qualifications: an expert is a witness who has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. Evidence Code § 720(a).
- B. Cross-over experts. Mann v. Cracchiolo (1985) 38 Cal.3d 18.
- C. The conflict's trap: Western Digital Corp. v. Superior Court (1998) 60 Cal.App.4th 1471; Collins v. California (2004) 121 Cal.App.4th 1112; Shandralina v. Homonchuk (2007) 147 Cal.App.4th 395.

(See attached Conflicts Checklist as an example.)

- D. Credibility: A credible scenario has no major gaps in evidence or logic.
- E. Demeanor: Do not be mean or angry or arrogant or argumentative.
- F. Ability to communicate: The expert as a teacher.
- G. Independence and impartiality.
- H. Prior experience.

IV. What materials experts need from an attorney.

- A. Scope of assignment.
- B. Pleadings.
- C. Documents.
- D. Depositions; client interview (but see Evidence Code § 721, and Evidence Code § 952).
- E. Interrogatories, motions for summary judgment, mediation statements (but see Evidence Code § 1128).
- F. Use of opposing counsel's notes: Rico v. Mitsubishi Motors (2007) 42 Cal.4th 807.
- G. Discuss unfavorable aspects of the case.

V. Expert discovery.

- A. Timing of expert discovery
 - 1. Demand for exchange: 10 days after initial trial setting or 70 days before trial (C.C.P. § 2034.210).
 - 2. Exchange: 50 days before initial trial date (C.C.P. § 2034.230).
 - 3. Discovery cutoff: 15 days before initial trial date (C.C.P. § 2024.030).

B. Expert witness declaration (C.C.P. § 2034.260).

1. Disclose experts or state no experts (Fairfax v. Lords (2006) 138 Cal.App.4th 1019).
2. Non-retained or party experts; but see Evidence Code § 813.
3. Substance of Declaration

a. Qualifications: A brief statement of the expert's qualifications (C.C.P. § 2034.260(c)(1)).

b. General substance of intended testimony (C.C.P. § 2034.260(c)(2)).

c. Ready to testify: representation that the expert has agreed to testify at trial and will be sufficiently familiar with the pending action to provide a meaningful oral deposition (C.C.P. § 2034.260(c)(3) & (4)).

d. Costs and fees: a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney (C.C.P. § 2034.260(c)(5)).

4. Supplemental disclosure (C.C.P. § 2034.280).

C. Production of Discoverable Reports and Writings: if demand is made for reports and writings, parties are required to produce all discoverable reports and writings (C.C.P. § 2034.270).

1. Caution: handling communications with attorneys.
2. To prepare or not to prepare a written report.

D. Depositions.

1. The basic issues.

(a) Qualifications.

(b) Expert must state all opinions which she intends to give at trial Jones v. Moore (2000) 80 Cal.App.4th 557; DePalma v. Rodriguez (2007) 151 Cal.App.4th 159.

- (i) Opinions withheld at deposition inadmissible. Jones v. Moore (2000) 80 Cal.App.4th 557.
- (ii) Expansion on opinions offered at deposition admissible. DePalma v. Rodriguez (2007) 151 Cal.App.4th 159.
- (iii) Changed opinions may be admissible. Easterby v. Clark (2009) 171 Cal.App.4th 772.

(c) Hearsay

(i) An expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. Evid. Code § 802; People v. Catlin (2001) 26 Cal.4th 81.

(ii) The opinion may be based on matters "perceived by ... the witness ... before the hearing, whether or not admissible" if of a type that experts reasonably rely upon in forming such opinions. Evid. Code § 801(b); Catlin, 26 Cal.4th at 137.

(iii) Nonetheless, the hearsay generally does not become admissible. Ibid.; see also, People v. Archuleta (2011) 202 Cal.App.4th 493 (setting forth guidelines for trial court's treatment of hearsay relied upon by experts).

(d) Secondary sources and parties.

(e) Additional work.

2. Cross-examination issues (Evidence Code § 721).

(a) Bias toward litigation work and/or plaintiff's or defense side. Stony Brook I Homeowners v. Sup. Ct. (2000) 84 Cal.App.4th 691.

(b) Matters referred to, considered or relied upon.

(c) Books admitted to be a reliable authority.

(d) Basis for opinions.

- (e) Hypothetical questions: looking for the major gap in facts or logic.
- (f) Criticisms of opposing expert.
- (g) The top ten questions attorneys (should) ask you in deposition (see attached Expert Deposition Outline).

3. Deposition particulars.

The general rules for depositions apply to expert depositions (C.C.P. § 2034.410), with the exception of the following:

- a. Location of deposition: within 75 miles of the courthouse where the action is pending (C.C.P. § 2034.420).
- b. Compensation for deposition.
 - (i) Party taking deposition shall pay "the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed ... until the expert is dismissed (C.C.P. § 2034.430(b)).
 - (ii) "The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition" (C.C.P. § 2034.440).
 - (iii) "The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition ... If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert" (C.C.P. 2034.450).

VI. Trial Testimony

- A. Bringing the expert up-to-date.
- B. Evidence Code Section 402 hearing on qualifications. Avivi v. Centro Medico Urgente Medical Center (2008) 159 Cal.App.4th 463.
- C. Motions in limine to exclude expert testimony. AmTower v. Photon Dynamics (2008) 158 Cal.App.4th 1582.

Common bases to move to exclude expert or expert testimony:

- Testimony irrelevant. (Evid. Code § 350);
 - Witness not qualified as expert on particular subject to which opinion relates (Evid. Code § 801(a));
 - Opinion not likely to assist jury (not "sufficiently beyond common experience") (Evid. Code § 801(a));
 - Opinion not based on reliable facts or data (not matters "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject") (Evid. Code § 801(b));
 - Opinion based on speculation, conjecture or other "improper matter" (e.g., no admissible evidence of assumed facts) (Evid. Code § 803);
 - Opinion as to a matter of law (Summers v. Al. Gilbert Co. (1999) 69 Cal.App.4th 1155);
 - Opinion likely to prejudice, confuse or mislead jury ("probative value substantially outweighed") (Evid. Code § 352).
- D. Limitations on impeachment by non-disclosed expert. Fish v. Guevara (1953) 12 Cal.App.4th 142.
- E. Direct Examination
 - 1. Qualifying the Expert
 - a. Before expert opinion testimony may be offered, the expert must be shown to have "special knowledge, skill, experience, training, or education" about the subject involved. Evid. Code § 720(a); People v. Loker (2008) 44 Cal.4th 691.
 - b. Testimony in this area generally includes discussion of the following qualifications:

- Education, including degrees and honors received.
- Certification, licensing and/or registration obtained.
- Professional membership in expert's field or expertise.
- Publications.
- Teaching experience.
- Professional experience.
- Prior experience as an expert.
- Any other professional accomplishments related to area of expertise.

c. Optional - "Your Honor, I would offer Mr./Mrs. _____ as an expert on the standard of care of _____."

Practice tip: expert should prepare and provide attorney with a detailed C.V. or summary of foregoing information.

2. Eliciting the Expert Opinion: after qualification, the expert will be asked to express an opinion on matters within his or her expertise. An expert's opinion testimony is usually elicited either by:

- Asking expert to describe assignment;
- Hypothetical questions (see generally, People v. Vang (2011) 52 Cal.4th 1038); or
- Questions based on courtroom observations.

The foregoing serve as segues to ask the following critical questions:

- Question: What is your opinion as to ... ?
- Question: What is your basis for that opinion?

F. Cross-Examination

"Once an expert offers his opinion ... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of the factual witness. The expert ... may be subjected to the most rigid cross-examination concerning his qualifications, and his opinion and its sources." Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d at 757.

1. Common proper areas of cross-examination include:

- Expert qualifications;
- Subject matter of the expert testimony;
- Matters on which the expert opinion is based;
- Reasons for the opinion;
- Bias;
- Prior inconsistent statements;
- Qualifications of opposing expert;
- Altering assumptions/hypotheticals;
- Limited factual basis;
- Compensation.

See generally, Evid. Code § 721.

2. Common materials to cross-examine expert include:

- Expert's own deposition;
- Depositions of key witnesses;
- Textbooks, rules and regulations, and other secondary sources;
- Documents utilized in relation to the litigation;
- Discovery responses; and
- Information provided by opposing expert.