



When the defendant complains to the court that you have too many experts

In highly technical cases like products liability, issues often arise about multiple experts in overlapping areas of expertise



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You have prepared your case. You did your discovery. You figured out what experts were necessary. You thought long and hard about what was needed to prove your case and how much it was going to cost. You did the wise thing and hired all the experts you determined to be necessary. You provided these experts with all the discovery material for their review, made sure they were prepared and disclosed them timely. You spent the money and feel confident you did the right thing – then you get defendant’s motion in limine, or at trial, requesting the court to limit the number of experts you may use. Do not despair, this usually means the other side is worried.

Experts are not “cumulative”

Experts are not “cumulative” where they cover different factual areas or provide different opinions as to the same factual issues. Evidence Code section 801(a) provides that expert testimony is presented for the purpose of offering opinions as to “a subject that is sufficiently beyond common experience that the opinion of an expert would assist the *trier of fact*.” (Evid. Code, § 801, emphasis added.) Where there are multiple areas beyond the experience of the trier of fact, multiple experts are helpful to the jury to explain the different factual issues and topic areas for expert opinion. As the California Practice Guide, Civil Trials and Evidence states, “Retaining more than one expert is certainly proper where no single person is qualified on all of the issues involved.” (Cal. Prac. Guide, Civ. Trials & Evid. Ch. 1-C §217, emphasis added.)

Don’t let the defense bully you into choosing just one expert per area of expertise.

The court has the discretion to accept experts as offered by a party, or to limit them under Evidence Code section 723. However, courts will allow testimony from multiple witnesses where each expert testifies as to a different factual aspect of the case.

In *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, plaintiff presented eight physician experts testifying as to different aspects of plaintiff’s medical care. On appeal, defendant complained that these experts were cumulative. The Court of Appeal held that the eight physician experts were not cumulative, stating:

It is also asserted that the testimony of eight doctors was unnecessarily cumulative. The assertion is without merit. Each doctor called by the plaintiffs testified in substantial part to different aspects of the medical care that had been provided from the



time of the accident to time of trial.

That testimony, too, was highly relevant on the issue of damages.

(*Id.* at 663, emphasis added.)

Therefore, if plaintiff can demonstrate that the experts have different expertise, different opinions or address different factual issues, there should be no need to limit the number of experts presented at trial.

Limiting an expert's testimony

A court should limit an expert's testimony, rather than excluding the expert, but only if the court finds testimony to be cumulative. Defendants often cite the case of *Scalere v. Stenson* (1989) 211 Cal.App.3d 1446, for the proposition that the court should limit the number of experts that a plaintiff is permitted to use to prevent cumulative testimony. In that case, the trial court prevented cumulative testimony, but *did not exclude the expert* who offered the cumulative testimony. Instead, the court asked the expert to testify as to any "area that hasn't been gone into." (*Id.* at 1454.) Thus, *Scalere* does not support a defendant's motion to limit the number of plaintiff's experts on a particular topic as is often asserted by defense counsel. Instead, *Scalere* points out that there is *no need to exclude the experts themselves*, as the Court has the power to prevent cumulative testimony as that testimony arises during the proceedings.

Also, a defendant may cite the case of *Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371, for the proposition that the court should limit the number of experts that a party can offer on a specific topic. There, the defendant General Motors offered testimony from four experts

on the same topic, and sought testimony from a fifth expert. The trial court rejected the fifth expert on that topic, and the Court of Appeal affirmed:

Defendants called four experts who gave their opinions as to the movements plaintiff's body must have taken upon impact and uniformly concluded that she could not have struck the center area of the wheel. The trial court refused to allow defendants to introduce the same expert opinion evidence by a fifth expert, an employee of defendant General Motors. It is clear that this testimony was cumulative on the point.

(*Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371)

It should be noted that the court in *Horn* permitted *four experts* on the single issue of plaintiff's body movements, before refusing the fifth expert. Seldom does a plaintiff offer three let alone four or five experts on the same topic; courts usually find it helpful to mention that the number at issue is far less than what was permitted the defendant in the *Horn* case.

Demonstrating to the court the exact topics that each witness/expert will testify about and how the testimony is not cumulative or duplicative, but rather necessary for a proper understanding of the case should satisfy the court. As a fallback position, it is important to emphasize that the court has the ability to prevent any duplicative testimony while the witnesses are on the stand testifying in order to insure the proper presentation of the evidence. Thus, if the Court were to find that plaintiff's experts are offering testimony it considers cumulative, the court has the power to instruct the expert to move on to another area, as the court did in *Scalere*.

A proper explanation of the facts and analysis of the law should provide ample justification for why you retained the experts and spent the money necessary to have them prepared to testify at trial. If the court understands what factual issues they will address and why their testimony is relevant and necessary, you should prevail. On the other hand, if you did not consider this thoroughly when you hired the expert and cannot explain it when you oppose defendant's motion, perhaps you should not have retained the expert in the first place – lesson learned.



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