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Do you *really* need an expert?

A look at the importance of this question, selecting necessary experts and the basics of working with them

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As with most things in life, the use of experts has been a swinging of the pendulum. When I first started practicing law we had few experts, there was limited discovery, and you presented your case in a simple fashion and received a verdict.

And then there came a period of time when jurors really required a "show," which was a result of their viewing so many TV legal dramas and investigative reporting shows.

With the diminished resources now available to the courts in California, it is a requirement that you give serious thought as to whether expert testimony will be advisable and/or necessary to prove the elements of your case. Alternatively, is it better for you to put on as simple, efficient and foreshortened a trial as possible?

The right questions

The three questions you must ask yourself:
1) Is this expert necessary?
2) Is the use of the expert cost effective?
3) Is the use of the expert worthy of the time taken by the testimony?

By *necessary*, I mean: is the issue of such a nature that someone with extraordinary knowledge, training and experience will be best able to explain to the jury what is beyond their common sense knowledge? Additionally, does the potential recovery in your case justify spending your money to advance the cost of the expert's fees and the reduction of that fee from your client's ultimate compensation? Finally, today's jurors are reluctant to serve and will the presence of an expert unduly lengthen the trial and their reluctant jury experience?

The time to start thinking about the question of using experts is at the intake of your case. It is important and I always look at the CACI jury instructions that are appropriate to the facts and circumstances of my case in deciding which issues will need expert testimony. Also, try to estimate a budget for your case in light of the issues involved. You can then proceed with a degree of confidence and it helps you to consider the best expert for the issue in question. That often means

you do not need an automotive engineer, but a simple auto mechanic to best describe and explain in detail an issue.

Often, the need for an expert is on the issue of causation of the nature and extent of your client's injury and damages. In considering these issues you should give careful thought as to the medical experts necessary to completely describe the plaintiff's injuries. Don't engage in overkill! Having too many experts can unnecessarily extend the length of the trial and can be a problem. Multiple providers increase the risk that there will be some contradiction of opinions or extension into areas beyond the subject.

Be sure that your experts communicate to ensure a smooth flow of testimony and the avoidance of a duplication of testimony to which an objection will apply.

The sequence of experts is important to allow the jury to easily follow the thought process of the experts. It may be that the foundation laid by one expert is necessary to allow the testimony of a second expert.

Be sure that your expert has been provided with all favorable and unfavorable information in your case before forming his or her opinion, and most certainly before his or her testimony at either deposition or trial. Often the most devastating cross-examination simply reveals the fact that some unfavorable medical record, deposition testimony, radiograph, etc., has not been provided to your expert; the seed of doubt has now been placed in the mind of a jury and your expert's opinion is going to be given less weight.

Before selecting a particular expert, find out his or her reputation, credentials, extent of testifying experience, reputation in the community, demeanor on the stand, and ability to understand and respond to cross-examination, etc. You may end up selecting that individual to be a consultant only and never intend for him or her to be a retained expert. This person's value is to provide information for discovery, investigation, witness selection, etc.

Quite often the intelligent, knowledgeable and analytical experts do not have the ability to testify effectively or they may not have a favorable demeanor on the stand. Their linguistic skills may be lacking or their physical appearance or mannerisms will not allow them to successfully communicate to a jury or they may not be persuasive or attractive to the jury. Thus, you may pick an expert to be a consultant or to appear or be used for a mediation or settlement conference, but not to be used at trial.

You should be comfortable in communicating openly and as often as necessary with your expert. You need an expert who you are confident will take the time and make the effort necessary to carefully and thoroughly review the material upon which his or her opinion is based. Unfortunately, I have dealt with experts who are overconfident and feel it is not necessary for them to do the mundane review work necessary to give effective testimony. It has been my experience that when this is not done properly the expert either does not give effective direct testimony or is "eaten alive" during cross-examination. Too often, the excuse for a shoddy review is "to save you money by not incurring additional fees required for a full review." This false saving would be detrimental to your case and a direct benefit to your opponent.

In completing your Code of Civil Procedure section 2034 Expert Designation, be sure to include everything about which you intend your expert to testify. It is better to be overly cautious and include things that *may* be discussed. Omitting a topic might cause it to be excluded and prevent that witness from testifying at trial. Be sure to include things such as treating physicians in that expert exchange, even though these physicians may not have been retained experts. Additionally, you may be required to classify a treating physician as a "retained expert" if you are asking him or her medical or other opinions which would not be limited to and/or go beyond their percipient status. This could be an error that may be costly at trial, especially in something relating to causation of the injury. If that were to happen, he or she will be precluded from testifying to anything that is not based solely on their observation.

Carefully go over the *curriculum vitae* of your expert to ensure there isn't something in their past experience, knowledge or training which could contradict their present testimony or be detrimental to him or her. I've had situations where an individual has falsified his or her claimed credentials and has claimed honors, degrees, certifications, etc., which he or she did not actually have. Once this is exposed to a jury, the expert's testimony becomes virtually worthless. Even something as simple as an inaccurate office address or location can become devastating.

Safeguards and resources

Videotape the depositions of your experts, especially when there is the slightest possibility that he or she may not be available for trial. In the present circumstances of the Los Angeles Superior Court, you can never be sure of the venue of your case or to which judge you will be assigned. On that basis, you may have difficulty convincing the expert to come to that particular location, especially if it is a distant place from his or her office. Additionally, having a deposition video allows you to show it to other experts, which is especially important if there is a reliance by another expert on the initial expert's opinions, observations, testing, etc.

As to the issue of your expert's qualifications to testify on a subject, or the propriety of allowing that subject itself to be introduced at trial, the essence of this issue is to be sure your expert can withstand a *Daubert* and/or *Frye* challenges.

Avoid socializing or having any extra-professional involvement with your experts. Often I will refer a client to a particular medical expert who has also treated me, but that involves a health-care relationship rather than a personal relationship. In other words, avoid anything which could give even the appearance of

your expert showing some favoritism or slanting of his or her testimony based on anything other than the facts and circumstances of the case and the knowledge, training, and experience he or she has.

Academic institutions, especially in cases of medical negligence, are good sources when seeking out experts. These individuals often have cutting-edge knowledge that will be helpful in explaining the case to a jury and have additional or extensive knowledge about a particular type of injury or damage.

Other alternatives include searching the Web for experts (although this can be time-consuming and fruitless), searching jury verdict reporters, or utilizing the myriad expert referral services that will locate the type of medical or technical expert that you need; some of these charge you for their services and others charge the expert who you retain.

Don't attempt to have one expert cover too many issues. In other words, have your expert's opinions stay clearly within his or her field of expertise and do not try to stretch their opinions to cover issues where his or her credentials are questionable.

Prepare your witness for his or her deposition. I know this seems like something so elementary that it should not be mentioned, but you would be amazed how often adequate preparation is not given. This preparation should include sharing with your expert his or her designation statement so that it does not come as any surprise when a question regarding same is asked at deposition. I often have my expert write or type his or her opinion so that there is no doubt or ambiguity as to what will be stated in the testimony. My thinking is: "If you can say it, you can write it."


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