

Precluding the corporate defendant's in-house specialists from testifying as experts

Under the guise of employees, they will be called to proffer expert opinions

By Nina Shapirshteyn

The scenario plays out in this fashion. You are in trial against a defendant corporation. You have taken a dozen Person Most Qualified ("PMQ") depositions where the corporation designated its in-house food packaging specialists, mechanics, engineers, doctors, or quality assurance managers. You have deposed other professionals with specialized knowledge who are not employees, but are affiliated with the defendant company. Absent some stroke of luck or your superb cross-examination skills, the company employees and company-friendly affiliates stuck to the talking points the lawyers fed them and pushed the company agenda.

Then, usually after defense experts perform poorly on the stand, defendant calls the PMQs to testify to patch the holes in the experts' testimony. Appropriate? Absolutely not. Yet, the instinctive reaction for plaintiffs' attorneys is not to object and for the court to allow the testimony – after all, "Your Honor, these are company employees who worked on the product, managed the assembly line, created the mixture in the lab, and are called to show the background of what steps the company took to comply with … Oh, and plaintiffs have deposed all of them!" Translation: under the guise of employees, they are being called to proffer expert opinions. Do not allow this to happen.

Defense expert disclosure

Company employees cannot testify about their expert opinions unless the defense expert disclosure provided a declaration disclosing the substance of the employees' anticipated testimony and the expert was made available for deposition.

Check the defense expert disclosure. This key document should be at your fingertips every day in trial to hold defense accountable to their promises made in the expert declaration signed under penalty of perjury. Defense expert disclosure likely lists the company employees as non-retained experts and the defense will point to it and argue that that allows them to question the employees about their areas of expertise. Not so fast.

Code of Civil Procedure section 2034.210 (b) requires an expert witness declaration if a witness designated as an expert is "a party or an employee of a party" or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial. Surprisingly, the underlined phrase is too often overlooked by corporate defendants who only provide declarations for outside experts specifically hired by them to form and express an opinion at trial. Corporate employees are erroneously treated and listed as "non-retained experts," for whom no expert declarations are provided.

Yet, the rule is simple: if the defendant expects to offer its employees' testimony in the form of an expert opinion in trial, defendant must provide an expert witness declaration. The declaration must contain, among other things, the general substance of the testimony the expert is expected to give. (Code Civ. Proc. § 2034.260).

Absent the required declaration, the party's employees' expert testimony must be excluded. As long as the party objecting to the employee's expert testimony has timely complied with the expert disclosure rules, the trial court must exclude the expert opinion of any witness offered by the party who has unreasonably failed to list that witness as an expert, submit an expert witness declaration, or make the witness available for a deposition. (Code Civ. Proc. § 2034.300.)

The fact that the employee was deposed ad nauseam in his/her capacity as a PMQ and was asked questions on the same topic on which the defense now seeks to admit his or her expert opinion is irrelevant in ruling on admissibility of an expert opinion. No expert declaration of party or party employee = no expert opinion.

The only caveat to an automatic exclusion of expert opinion under these circumstances is if Defendant can somehow show that the failure to comply with expert disclosure requirements was not "unreasonable." This is a high burden to meet, considering that Defendant's employees are under their control, such that obtaining the required information from them is not problematic. Moreover, the act of defendants' actively designating

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their employees as non-retained experts signifies a calculated decision to use them as experts in trial and any failure to properly do so can hardly be reasonable. We have been successful in excluding party employee expert opinions at trial and are yet to see what defense excuse for failing to provide an expert declaration the courts would find reasonable.

Did defense transform their "non-retained expert" into a retained expert?

Depending on the size and nature of the work of the corporate defendant, some of the work on the defective product is done by third party companies and professionals. They are also sometimes designated as "non-retained experts." Do not take this designation at face value. It is possible that they have been transformed into retained experts, must be treated as such, and their expert opinion must be at least limited, if not excluded.

Most of the time, although not parties to the lawsuit, these witnesses are loyal to the Defendant corporation and are sympathetic to their cause. Defense attorneys had met with these "third-party witnesses" before their depositions and prepared them extensively, including sharing with them information about the case and documents they had not seen before litigation. What this also means is that these witnesses were likely given information during litigation that transformed them from non-retained to retained experts – the distinction that might just get their testimony excluded.

The distinction between retained and non-retained experts lies in the manner in which such experts learn of the facts of the case. A retained expert is one "retained by a party for the purpose of forming an opinion in anticipation of the litigation or in preparation for the trial of the action," while a non-retained expert learns of the facts and forms an opinion through a non-litigation relationship. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34-35.) A non-retained expert is not given information by the employing party, but acquires it from personal observation, through his or her natural course of employment.

A familiar example of a non-retained expert is the treating physician. A treating physician forms his or her opinion based upon the party's medical history, examination, etc. A treating physician is not hired to testify regarding the party's injuries, but to simply evaluate and/or treat. In this context, a treating physician is a non-retained expert.

But a treating physician is transformed to a retained expert if the physician is enlisted by the party's attorney to examine other documents and deposition testimony to form opinions outside the realm of a treating physician, such as if he or she is asked to comment on the other party's expert opinion. Once that happens, the attorney must list that physician as a retained expert or limit the scope of the testimony. (See *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1521.) In *Dozier,* plaintiff's counsel transformed a treating physician into a retained expert by giving him additional information and asking him to testify at trial to opinions formed on the basis of that additional information. The court did not allow such testimony because plaintiff failed to designate the physician as a retained expert and disclose the substance of his anticipated testimony.

On the other hand, in *Ochoa v. Dorado,* trial court erroneously precluded plaintiff's treating physicians from testifying on the reasonable value of their services provided to plaintiffs despite finding that the doctor acted as a treating physician at all times and never acted as an expert retained for purposes of litigation. (See *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 140-141.) The Court of Appeal reversed, concluding that plaintiffs were entitled to present testimony by any non-retained treating physician on the reasonable value of medical services that he or she provided or became familiar with as a treating physician, as long as such testimony is based on facts acquired in the physician-patient relationship or otherwise acquired independently of litigation or in preparation for trial. (*Ibid.*)

Ask yourself: How and when did the witness obtain her knowledge about the facts she intends to opine? Would she have these same facts but for the lawsuit? If the answer to the last question is "no," you likely have an expert that was transformed into a retained expert.

If transformed into a "retained expert," testimony must be excluded

Often, defendants will simply list every witness who is not a professional expert witness as a non-retained expert. They then try to get that witness to testify about newly learned information in litigation, having never provided an expert declaration.

Once the witness is transformed into a "retained expert," an expert witness declaration is required for that witness to offer expert opinions. (See *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120.) This means that if the expert became familiar with the facts of the lawsuit for the purpose of forming and expressing an opinion in anticipation of litigation or in preparation for trial, he is acting as a retained expert and such opinions are inadmissible absent a declaration. Any opinion testimony formed in preparation for litigation exceeds the proper scope of the third party witnesses' expert testimony as non-retained experts and is inadmissible.

Keep in mind that the witness's opinions based on facts acquired independently of the litigation are still admissible without an expert declaration. (*Ochoa, supra,* 228 Cal.App.4th 120, 140.)

Discovery Code limits when a party may call as a witness at trial an expert not previously designated

Code of Civil Procedure Section 2034.310 lays out when a party may call

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unlisted experts: (a) if the expert has been designated by another party and has thereafter been deposed under Section 2034.410 (procedural requirements for expert depositions), or (b) the expert is called as a witness to impeach the testimony of another party's expert. The impeachment testimony may include the falsity or nonexistence of any fact used as the foundation for any opinion by another party's expert witness, but it may not contradict that opinion.

The court may exclude the testimony of unlisted experts when their testimony is offered as contrary opinion and not for the purpose of contradicting a foundational fact. (*Howard Contracting, Inc. v. G.A. MacDonald Constr. Co*. (1998) 71 Cal.App.4th 38, 52-54).

Conclusion

Do not allow defense non-retained experts or employees to contradict your expert's opinion – remind the court that their impeachment testimony must be limited to the foundational facts.

Finally, do not wait for the defense witnesses to take the stand before asking the court to preclude expert opinion testimony. The court will not appreciate you rushing a major decision to exclude expert opinion for the minutes before the jury walks in. Keep your eyes peeled for an army of defendant's employees in the "non-retained experts" section – it is a red flag for the backdoor expert opinion testimony. File a motion in limine citing your compliance with the expert disclosure requirements and defendant's failure to comply with the same for their employees or associated witnesses who have been transformed into retained experts.



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