BY MATTHEW D. TAGGART

How to Prepare for and Manage the Depositions of Expert Witnesses

LAWSUITS ARE OFTEN WON OR LOST on the basis of expert witness testimony. The cases in which experts testify range from the very ordinary (such as traffic collisions) to truly extraordinary (such as the competitive effects of a proposed merger). Expert witnesses are plentiful, and the best of them distill complex material and connect with the jury. In criminal cases at least, jurors may suffer from the "*CSI* syndrome" and conclude from the exaggerated role of forensic science in television police dramas that clear scientific or technological answers exist for a trial's factual questions.[1] Prosecutors and civil lawyers alike lament that this growing misconception has unduly raised their burdens of proof.

But hiring an expert is not enough to resolve this issue. Counsel must carefully vet the expert and see him or her through discovery, and, in particular, deposition. Parties cannot simply rely on expert witnesses to win cases. Trial lawyers need to be adept at assessing the weight of expert testimony and assuring that the testimony clears evidentiary hurdles. To a large degree, the success of a lawyer in meeting these challenges will depend on how effectively the lawyer conducts the expert witness deposition. Both the novice and the seasoned practitioner benefit from staying abreast of the constantly evolving rules of practice and procedure relating to expert witness depositions and discovery.

Timing of Expert Discovery

Counsel must understand the procedures for expert discovery. Because this phase usually occurs close to trial, there is little room for error on counsel's part, and the federal and state rules differ.

Under the federal rules, once a party has identified an affirmative or rebuttal expert and issued the required expert report (90 days before trial for affirmative experts and 30 days for rebuttal experts), any party may take that expert witness's deposition.[2] In California, by contrast, expert disclosures are not mandatory, and written expert witness reports tend to be the exception rather than the rule. Under the Code of Civil Procedure, a party must formally demand expert discovery, using precise terminology and arcane procedures. Specifically, a party must propound a formal demand for exchange of expert witness information in order to obtain discovery of expert witness identities and the subject matter of testimony.[3] This demand also triggers the propounding party's obligation to make reciprocal disclosures, whether the other party has issued its own request or not. The expert demand must be made at least 10 days after the initial trial date is set or 70 days before the trial date, whichever is later.[4] In federal court, expert discovery may occur relatively early in a case, but in California there is no statutory right to serve a demand for expert witness information until the trial date is set.[5]

The expert witness information itself must be exchanged 20 days after service of the demand or 50 days before trial, whichever is later.[6] By contrast, rebuttal experts are disclosed via supplemental expert witness lists 20 days after the normal exchange of information occurs. Even more strange, in California the expert demand may, but need not, include a request for "the mutual and simultaneous production for inspection and copying of all discoverable reports and writings."[7] Although standard forms used by California counsel usually contain such requests, there is no obligation on the part of a designated expert witness to prepare and submit a written report. This anomaly of California law heightens the importance of the expert witness deposition, which is quite often the only avenue for opposing counsel to obtain detailed information about the expert's background and opinions.

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California's deadlines for taking expert depositions and discovery also vary significantly from the federal rules. Expert depositions are exempted from the normal "discovery cutoff" 30 days before trial. Parties may depose experts from the time they are identified up to 15 days before trial, and a motion to enforce discovery regarding expert

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depositions may be heard up to 10 days before trial, instead of the normal cutoff in existence for other, nonexpert discovery motions.[8]

Counsel should be aware that California law does grant the trial judge one avenue for requiring expert witnesses to sit for deposition earlier than the expert designation date. In one case, *St. Mary Medical Center v. Superior Court,*[9] the court of appeal determined that "under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert."[10] This case remains good law but seldom is invoked. Early depositions remain relatively rare in California practice. Regardless, if an expert declaration in summary judgment papers appears vulnerable to attack, counsel should consider immediately demanding a deposition of the declarant. This way, counsel may obtain evidence that can result in the striking of the expert declaration for lack of foundation.

Preparing the Expert for Deposition

The starting point for defending expert depositions is for the lawyer to understand his or her role: to identify with precision what the expert's specific opinions are and to prepare the expert to explain those opinions without either being rattled or committing substantive errors. This may sound easy, but like all witnesses, experts—even the most experienced and highly paid ones—require careful preparation.

Most attorneys, especially big-firm attorneys, will get a crack at defending an expert long before they are entrusted with taking the expert's deposition. Besides, defending—or preparing—the expert is probably the more important skill, as expert failures in discovery are more often the result of inadequate preparation than cunning examination.

Experts know what they are there to do, and are usually already very good at it. Nearly always, highly paid experts, who often charge $500 an hour or more, have testified many times in complex and high-profile disputes and have been deposed at least as many times. They do not need an attorney to tell them how to do their job or to teach them about the substance of their field, even if an attorney could.

Rather than teach the expert about his or her area of expertise, a lawyer should help the expert with the task of being a witness. As with a lay witness, counsel should remind the expert that the most important rule of testifying is to tell the truth. This rule should be obvious to any lawyer, and experts are no exception. Problems relating to an expert's qualifications, methodology, or physical appearance are exacerbated if the expert tries to play cat-and-mouse with the examiner or, worse yet, shades the truth.

Counsel should also explain the deposition process to the expert, even if it seems unnecessary at first. Just as with a lay witness, counsel should cover logistics, up to and including where the expert will sit at the table, and answer any questions about the deposition. If the deposition will be videotaped, counsel should remind the expert especially to be cautious about tone and facial expressions, as jurors commonly are affected by such matters, however unimportant they may be to an intellectual titan. Further, in this age of YouTube, counsel should consider obtaining a protective order to prevent the video deposition from being posted on the Internet.[11] Acrimonious litigants will occasionally edit and post video depositions to harass and embarrass witnesses, even experts. Although it is possible to seek relief after a video deposition has been made public, the damage already done may be irreversible. Opposing counsel will usually agree to a protective order, since their own witnesses may be protected thereby as well.

Preparing an expert witness includes the normal advice counsel would give to any witness. The expert must listen to the question asked and answer only that question. Remind the expert to not guess, to go slowly enough that the court reporter does not become annoyed, and to speak in firm, assured, but not-too-eager tones. Opposing counsel will surely pose a few loaded, vague, misleading, or argumentative questions. If the expert cannot answer a question because some critical factual predicate or assumption is missing, the expert should either simply state that he or she is unable to answer the question as posed or supply the missing essential information needed to answer the question and answer the question as modified. What the expert must be careful never to do is to answer the question that he or she thinks the questioner meant to ask, or to answer the question that he or she thinks the questioner is about to but has not yet asked.

Before getting into the substance of the expert's testimony, counsel should ask if he or she has any questions, and before going into deposition, counsel should ask the witness whether there is anything counsel should know that the expert has not already told him or her. As witnesses begin to concentrate before giving testimony, they may remember something that they forgot to mention before. The expert may remember an article that he or she wrote years earlier that does not jibe with the expert's current testimony. The expert may remember a case in which he or she testified in which the client lost or a case from which the expert was excluded or disqualified. The expert may remember a learned treatise that contradicts his or her opinion. All such information will be crucial to the expert's credibility and to whether the judge or jury credits his or her opinions at trial. It is better to ask early than to find out when it is too late.

Especially with videotaped depositions, counsel should remind the expert about the importance of personal appearance and demeanor. Live testimony is the focus of trial. Video depositions are essentially trial proceedings, because some and perhaps all of the deposition may be admissible at trial. Because truth at trial is always subjective, the witness's credibility is the paramount concern for the trial lawyer. In an excellent trial treatise, author and lawyer R. Shane Read argues that jurors form an impression within minutes, and sometimes seconds, of seeing someone new; they also tend to absorb subsequent information in accordance with those powerful first impressions.[12]

Jurors find it hard to side with people they dislike, whether those people are rude, gruff, arrogant, or unmindful of courtroom decorum. The best witnesses are likeable and charismatic. Hence, in preparing an expert witness, counsel should resist the temptation to jump into the details of the expert's opinions and instead take the time to refocus the expert on the importance of the manner in which the expert comes across in testifying. Counsel should be mindful that many experts are impatient by nature, sometimes prone to lose their temper when their ideas are doubted by nonexperts. But, in the end, if an expert loses his or her temper in deposition, the client pays the price.

The Expert's Report

Another step in trial preparation is to review the expert's report with the expert. By the time the expert's report has been disclosed, the expert already should know exactly what opinions he or she is offering in the case, and the underlying methodology, documents, and facts supporting those opinions. The expert report is the road map for the expert's deposition, and the preparation can closely follow the report. Reviewing the report with the expert will enable counsel to determine the extent to which the expert is conversant with the facts.

In theory, by the time the expert has been retained, counsel should already be confident that the expert can testify competently and credibly about the specific opinions he or she will give in the case and the underlying reasons or methodologies supporting those opinions.

Federal Rule 26(a)(2), which was significantly amended in 2010, provides that the

report must contain:

- A complete statement of all opinions the witness will express and the basis and reasons for them.
- The facts or data considered by the witness in forming them.
- Any exhibits that will be used to summarize or support them.
- The witness's qualifications, including a list of all publications authored in the previous 10 years.
- A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
- A statement of the compensation to be paid for the study and testimony in the case.[13]

In California, the Code of Civil Procedure deals with the expert's report:

> If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings…all parties shall produce and exchange…all discoverable reports and writings….[14]

Additionally, the Code of Civil Procedure addresses "supplemental expert witness lists," or rebuttal experts. The statute does not separate the basic disclosures from the expert report but rather requires late-disclosed rebuttal experts to provide both at the time they are identified to the other parties.[15]

Experts and Privilege

The days of waiting to designate an expert until the eve of trial are over. Experts must be hired much earlier in the life of a case, especially if they are to be properly vetted and prepared. Those who wait until the last minute often make the mistake of designating their clients or a client's employee as testifying experts, for the sake of convenience or to save litigation funds. But this designation is extremely risky, as it may lead to a waiver of the attorney-client privilege as soon as any testimony is presented.[16] Generally, since an expert witness is not a client of the trial counsel, no privilege protects their communications. This rule has been extended to situations in which the designated expert happens to be the client or an employee of the client.[17] Many lawyers are not aware of this trap.

Counsel must also discuss the expert's prior testimony in other cases and, if possible, obtain transcripts of that prior testimony. This relates to the expert's report, since the expert is required to include cases in which he or she has testified in the last four years. At trial, the court will surely permit the other party to inquire as to any prior testimony by the expert in other cases involving similar issues.[18]

Counsel can either trust experts who say that their testimony in prior cases does not undermine their opinions in the instant case, or counsel may review the transcripts of the prior testimony to see what they reveal. If there is any prospect that the prior testimony may undercut the current opinion, counsel should obtain the transcript to be safe.

Before the advent of e-mail, the Internet, and electronic document repositories, it was standard practice for professional experts to discard deposition transcripts from prior engagements. Experts did so to prevent their testimony from coming back to haunt them. Today, transcripts are readily available from a variety of sources.

Even if the prior testimony does not directly undercut the expert's credibility in the current case or involves different legal issues, counsel should still read the transcripts to better understand the expert's style and tendencies when testifying and to fix bad habits if necessary. The transcripts will reveal ways in which the expert's current testimony can be improved.

Next, counsel should obtain copies of everything the expert has considered or reviewed in formulating his or her opinion. This step overlaps with the review of the expert report and is always necessitated under the Federal Rule of Civil Procedure 26(a)(2) and typically but not always under Code of Civil Procedure Section 2034.250.

Naturally, an expert's credentials are vitally important. Indeed, that is often the only thing to which the jurors will pay attention once the court permits an expert to testify. But credentials alone are not enough. Counsel must be familiar with the factual foundation for the expert's opinion. Counsel must be satisfied that there is sufficient factual support for the opinion and, in the language of Federal Rules of Evidence, that "the witness has applied the principles and methods reliably to the facts of the case."[19]

From the perspective of the examiner, the expert deposition may be conceived in terms of a physical structure, such as the tower in a game of Jenga.[20] Like a player in a Jenga game, the examiner will try to remove the factual blocks that make up the structure of the expert's opinion, hoping ultimately that once the underlying factual blocks are removed, the entire structure will topple over.

Trial consultant David Malone recommends that counsel have the expert clarify the core concepts—or pillars—supporting the expert's opinion.[21] If the challenge does not threaten the structural support for the opinion, the expert can simply testify that the challenge does not affect his or her opinion. This will help the expert from being rattled by immaterial lines of questioning and to sidestep irrelevant attacks.

Counsel cannot fully understand the strengths and weaknesses of the expert's testimony without assessing the underlying factual support. Even if collateral questioning in deposition does not technically undermine the expert's opinion, counsel cannot hope to effectively defuse such questioning on redirect without mastery of all the underlying support for the opinion.

Counsel must show the retained expert witness only those documents that counsel is prepared to show the other side. While many young attorneys take it as an article of faith that a lawyer can hand a document to a friendly witness without that document ever becoming discoverable, because of an unspecified "privilege," federal and California courts have squarely rejected this theory. Federal courts construe Rule of Evidence 612 (regarding refreshing a witness's recollection) to require the production of any documents that are used in deposition preparation "to refresh memory for the purpose of testifying."[22]

Among the most complex issues in deposition preparation is how to balance the need to familiarize deponents with the many technical issues in the case, specifically including documentary evidence, without creating discoverable material for the other side. This complexity derives from the tension between the protection afforded to the attorney's strategy under the work product doctrine and the evidentiary rules requiring production of materials used to refresh the witness's recollection. The federal rules codify the Supreme Court's decision in *Hickman v. Taylor* stating that a party may not discover documents and tangible things prepared in anticipation of litigation or for trial by an attorney and his or her agents without a showing by the party seeking the discovery that it has a "substantial need" for the materials and cannot obtain them by other means without undue hardship.[23]

The present doctrine of refreshed recollection, codified at Federal Rule of Evidence 612, provides that materials used to refresh a witness's recollection regarding events concerning which the witness once had knowledge but has had a lapse of memory must be produced to the other side.[24] Failure to produce may result in the witness's testimony being stricken.[25]

Courts have held that although selection of documents to prepare a witness implicates the attorney's theory and mental impressions of the case—referred to as "core" work product—the doctrine must yield to the opposing party's fundamental right to cross-examine adverse witnesses.[26] This issue is illustrated by *International Insurance Company v. Montrose Chemical Corporation*. In this California case, two insurance companies were in litigation over indemnity obligations for hazardous waste pollution in several cites.[27] The plaintiff, International Insurance, appealed a sanctions order against it for discovery abuse.

Richard Power, an independent claims adjuster, had analyzed Monsanto's claim on International's behalf.[28] According to Montrose, his initial communication with International acknowledged coverage. At his deposition, Power was represented by International's attorney at International's expense.[29] During the deposition it became apparent that International's attorney had shown him documents to refresh his recollection.[30] After establishing that Powers had spent one to two hours reviewing International's documents in preparation for his deposition, Montrose asked International to produce the documents he had reviewed. International refused, and Power was a no-show on the third day of his deposition. Montrose moved to compel production of the documents that Power had reviewed.

The Second District Court of Appeal rejected International's argument that in order to obtain production of the documents Montrose had to establish which "particular writing" the witness had used to refresh his recollection on a "particular subject" included in the witness's actual testimony:

> Evidence Code Section 771 requires the production of documents used to refresh [the witness's] memory with respect to any matter about which he testifies, no more and no less. After testifying that he had no specific recollection about how he learned that International would pay for an attorney to represent him in these proceedings, [the witness] was asked by Montrose's attorney whether, in preparation for the deposition, [the witness] had looked at documents to assist him in remembering events that took place in the past. [The witness] answered affirmatively, explaining that he spent one or two hours reviewing documents and that, after his review, he had a "fresher recollection of what had taken place" than he had prior to the session. [The witness] also explained that, without all of the documents in front of him, he could not recall which ones actually refreshed his recollection and which did not, and that "anything [he] looked at probably gave [him] some benefit of refreshing [his] recollection."[31]

On the other hand, truly privileged documents that are shown to a client or other person covered by the attorney-client privilege do not lose their protection merely because they are used to prepare that person for his or her deposition.[32]

The risk of disclosure of documents used in deposition preparation is precisely why experienced lawyers commonly eschew written communications with their experts. As trial expert Michael Schwartz once said, although one must always produce discoverable material, one need not create it. Counsel can avoid doing so in one of two ways. First, counsel may choose to consult the otherwise nondiscoverable documents themselves and question the witness based upon the documents' contents, without referring the witness to the document.

Second, perhaps more commonly, counsel may decide not to exchange documents with the expert at all, other than the documents counsel plans to produce to the other side. This way, counsel may communicate orally with the expert, but discovery is narrowly circumscribed to the expert disclosures and whatever materials the expert reviewed on his or her own, independent from counsel (which are not privileged anyway), thereby limiting documentary discovery.

Note that in 2010, the federal rules were substantially amended to expand work product protection for certain types of communications between an attorney and a testifying expert. Before the amendment, Rule 26(a)(2)(B)(ii) required disclosure of "the data or other information" that the expert considered in forming his or her opinion, leading opposing counsel to insist on obtain-

ing attorney-expert communications and draft reports.[33] The new language—"facts or data"—clarifies that the report need only include the factual materials relied upon by the expert, not communications with counsel and draft reports. The new rule protects any form of communication between an attorney and an expert except communications that 1) relate to expert compensation, 2) identify facts or data that the attorney provided and that the expert consulted in forming the opinion, or 3) identify assumptions that the attorney provided and that the expert relied upon in forming the opinion.[34]

After counsel has reviewed the expert's opinion in detail, counsel should consider conducting a mock cross-examination. Having already spent a great deal of time preparing his or her opinion and going through that opinion with counsel in preparation for his or her deposition, the expert may not wish to participate in so-called murder boards. However experienced an expert is, expert and attorney will not be able to fully understand what needs more preparation without the test of a mock cross-examination.

In some instances, counsel can simply examine the expert briefly throughout the stages of preparation, asking a few tough questions at the conclusion of each stage. In other instances, however, particularly in a large and complex case in which the expert will testify for many hours or even days, a full simulated cross-examination is essential. Jury consultants or mock juries may be included in the process if sufficient dollars are involved, such as in a large class action case. The expert is being well compensated, so counsel should not let a desire to please the expert prejudice the client's case by skipping this crucial final step.

At the Deposition

Any party may depose any designated expert, and the general rules governing depositions apply equally to experts. If the witness is well prepared, defending the deposition will be easy. The main responsibility will be to object to improper questions to preserve the record for trial and possible appeal.

The following three steps will help the client to get the most out of an expert's deposition testimony. First, an attorney should prevent the expert from being an advocate. Advocacy is the attorney's job, not the expert's. Remind the expert immediately before the deposition to appear neutral and to avoid openly advocating for the client. The expert cannot be credible while favoring one side. It is counsel's role to present the expert's testimony by sequencing examination effectively. The witness's role is merely to answer the questions and not try and narrate why the client should win.

Second, the attorney should get out of the way once the deposition starts. The attorney has already picked a qualified expert, who in turn has carefully considered the facts. The attorney has diligently prepared the expert for deposition, including with a grilling in a mock cross-examination. Once the deposition begins, however, the attorney will not help the expert or the client by interrupting.

Third, counsel must decide whether to cross-examine the expert. As an attorney would normally do on redirect at trial, the expert's attorney should give the expert an opportunity to flesh out statements that may have been taken out of context or to cover additional facts that diminish the damaging testimony that the noticing party elicited.

Parties often move for summary judgment or summary adjudication based upon deficient expert testimony, especially in mass torts, products liability, Proposition 65, and large personal injury actions. Deposition testimony may be essential to create the genuine issue of material fact that are needed to avoid or overcome this type of motion and spare the client's precious resources.

In complex litigation, clients demand high-level performance from their legal coun-

sel and retained expert witnesses. All too often, counsel hire expert witnesses with minimal vetting or strategizing. This is risky. A good opposing lawyer can do serious damage at the expert deposition stage, and the damage may be irreversible. Knowledge of the complex rules of expert depositions and intensive preparation before the deposition can minimize, if not altogether nullify, the risks inherent in the expert deposition process. ■

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[1] *See, e.g.*, Katherine Ramsland, The CSI Syndrome, http://www.trutv.com/library/crime/criminal_mind/psychology/csi_effect/1_index.html (last visited June 14, 2012).
[2] *See* FED. R. CIV. P. 26(b)(4)(A), (a)(4)(B).
[3] CODE CIV. PROC. §§2034.010 *et seq.*, §2034.230(a).
[4] CODE CIV. PROC. §2034.220; *see also* CODE CIV. PROC. §2016.060.
[5] CODE CIV. PROC. §2034.210.
[6] CODE CIV. PROC. §2034.230(b). The deadlines are extended by 2, 5, or 10 days depending upon whether service is by express mail, regular mail, or is out of state.
[7] CODE CIV. PROC. §2034.210(c).
[8] CODE CIV. PROC. §2034.030. Experts disclosed on a so-called supplemental expert witness list may be deposed even beyond the deadline. CODE CIV. PROC. §2034.280(c).
[9] St. Mary Medical Ctr. v. Superior Court, 50 Cal. App. 4th 1531 (1996).
[10] *Id.* at 1540.
[11] Paisley Park Enters. v. Uptown Prods., 54 F. Supp. 2d 347 (S.D. N.Y. 1999) (video deposition of musician Prince ordered subject to strict controls over dissemination).
[12] R. SHANE READ, WINNING AT TRIAL 4-5 (NITA 2007) (citing Jeffrey Zaslow, *First Impressions Get Faster*, WALL STREET J., Feb. 16, 2006, at D4).
[13] FED. R. CIV. PROC. 26(a)(2).
[14] CODE CIV. PROC. §2034.270. *See also* CODE CIV. PROC. §2034.210(c).
[15] CODE CIV. PROC. §2034.280(a).
[16] Shooker v. Superior Court, 111 Cal. App. 4th 923 (2003).
[17] *Id.*
[18] Braun v. Lorillard, Inc., 84 F. 3d 230, 238 (7th Cir. 1996). *See* Fed. R. Civ. P. 26(a)(2)(B)(v), advisory committee's notes to 1993 amendments.
[19] FED. R. EVID. 702(3).
[20] *See* Chalais v. Milton Bradley Co., 1996 WL 312218 (S.D. N.Y. 1996) (description of Jenga game and its noninfringement of plaintiff's patent).
[21] DAVID M. MALONE, DEPOSITION RULES 83 (2005).
[22] FED. R. EVID. §612(b).
[23] FED. R. CIV. P. 26(b)(3). *See generally* Hickman v. Taylor, 329 U.S. 495 (1947) (Information obtained or prepared by or for attorneys for use in litigation is protected from discovery under the work product doctrine.).
[24] FED. R. EVID. §612.
[25] EVID. CODE §771.
[26] *See, e.g.*, International Ins. Co. v. Montrose Chem. Corp., 231 Cal. App. 1367, 1372 (1991).
[27] *Id.* at 1370.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1372.
[32] *See, e.g.*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 68 (1972).
[33] FED. R. CIV. P. 26(a)(2)(B)(ii), (b)(4), advisory committee's notes to 2010 amendments.
[34] FED. R. CIV. P. 26(b)(4)(C).