



Preparing your retained-expert witness for deposition

INADEQUATELY PREPARED EXPERTS MAY END UP GIVING TESTIMONY THAT CAN DAMAGE YOUR CASE

Expert witnesses are important in most of our cases. Your entire case can come down to your expert. Experts who are not adequately prepared for deposition may end up giving testimony that can damage your case. Hence, having a prepared expert is critical, and the responsibility to ensure that the expert is fully prepared falls on you – the trial lawyer. To get your expert witness ready for battle, there are certain steps you should consider taking when preparing for deposition.

Avoid waiting until the last minute

In California, expert witnesses are designated pursuant to Code of Civil Procedure sections 2034.210-2034.310. Before you designate an expert, you will need to know if that expert is the right fit for your particular case. You will also want to know whether that expert will come across well at her deposition and especially at trial. Start preparing your experts early in the case so that they will be ready to testify persuasively when the time comes.

You may be tempted to wait until the last minute to prepare your expert for deposition because of the time and expense involved. Waiting until the last minute, however, can lead to disaster. Just as it was not a good idea to cram at the last minute for a big exam in college or law school, it's even more important that an attorney does not cram when it comes to preparing a witness for a deposition. As the retaining attorney, you will need to invest in preparation; preparation is key. No good can come out of your expert witness being unprepared for a deposition. If you wait until the last minute, your expert will not be thoroughly prepared. To prepare your expert to testify you must allow yourself sufficient time for the preparation; meeting with your expert a few minutes before the start of a deposition is insufficient.

An inexperienced vs. experienced expert witness

The amount of preparation time you will need with an expert will vary. You need to take into account whether you have an experienced expert witness or someone who is a novice. When dealing with an inexperienced expert witness, you should set aside additional time for deposition preparation. You will also need to consider whether you have a case with potentially huge damages or a much smaller case. Does your case involve difficult and convoluted issues or is it straightforward?

You should explain to your experts how their testimony will fit into the overall framework of the case and exactly what's expected of them in their depositions. This is true whether your expert is experienced as a witness or a novice. Even experts who have testified in a number of depositions must still be prepared to avoid making mistakes.

Doing your due diligence regarding your own expert

Does your expert witness have a tendency to volunteer information rather than answering the specific question? Is your expert evasive or do they offer speculative answers? It is worth your while to find out before the expert is deposed.

Review your expert's past deposition transcripts. A past deposition transcript can give you an idea of how well your expert handles difficult questions and explains his or her opinions. You can determine if there is a pattern in how your expert responds to certain areas of questioning and whether you find the answers to be thorough and sufficient.

If your firm has retained the same expert in the past, you can review the deposition transcripts from prior cases. Otherwise, you can obtain copies of past deposition transcripts directly from your

expert, from your colleagues who are outside of your firm, or from other sources such as databanks.

You can also find out about your expert's strengths and weaknesses at a deposition by speaking to your colleagues. CAALA's Listserv can be invaluable when preparing to defend your expert witness in a deposition.

Scheduling the deposition

Having your expert stay focused and alert during a deposition is important. Be sure to schedule the deposition on a date and time when your expert will be focused and able to concentrate. For example, it would be wise to avoid scheduling the deposition of a surgeon right after a long morning of surgery, or to schedule a nurse's deposition immediately after a long shift at the hospital.

Getting your retained expert ready for a deposition

What should your expert expect?

(1.) Deposition process

You may need to familiarize a novice expert with the basic deposition procedures – like waiting to answer until the question has been fully stated, and making sure not to answer any question they do not fully understand. Also, make clear that even though the expert can make changes to the deposition transcript, doing so can reflect badly on their credibility.

(2.) Legal standard

Your expert should be aware that the scope of discovery in California is very broad. The standard for permissible discovery is stated in section 2017.010 of Code of Civil Procedure:

[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter or appears reasonably calculated to lead to the discovery of admissible evidence.

See Hernandez, Next Page

The Supreme Court has held discovery rules are to be “*construed liberally*” in favor of disclosure and “only strong public policies weigh against disclosure.” (*Greyhound v. Superior Court* (1961) 56 Cal.2d 355, 365, 15 Cal.Rptr. 90, 104 (emphasis added).)

Your expert should understand that because of the very broad and liberal standard regarding the scope of discovery, the opposing counsel may ask a series of questions at the deposition that appear to be irrelevant, but which may arguably be “reasonably calculated to lead to the discovery of admissible evidence.” These may include how often the expert testifies at trial versus at depositions, and the percentage of income the expert receives from testifying as an expert witness.

(3.) Legal objections

Explaining the purpose of legal objections at a deposition is also a good idea. Your expert witness should know to carefully listen to your objections and understand why you are asserting certain objections.

You want to avoid your expert witness wondering why you are not asserting more objections. To avoid any frustration or confusion, you should explain at the pre-deposition conference when legal objections are permitted. (You should also explain that despite your objections, the expert will still need to answer the question unless instructed otherwise.)

(4.) Opposing counsel’s tactics and demeanor

Is opposing counsel difficult, aggressive, impatient or friendly? If you are familiar with opposing counsel’s deposition tactics, then it will help to let your expert witness know what to expect. If you have no personal knowledge of opposing counsel’s deposition tactics, then find out about them from your colleagues or other sources.

Also, if opposing counsel routinely tends to be impatient, difficult or combative at depositions, then tell your experts so that they can be mentally prepared.

(5.) Your expert’s demeanor at the deposition

Regardless of whether opposing counsel is difficult or aggressive at the deposition, your expert needs to remain

calm and get his or her point across without arguing with opposing counsel. You need to make this point very clear during depo preparation. It may help to role-play, with you taking a particularly aggressive approach, just to let the expert get a feel for how intense the questioning can be.

(6.) Opposing counsel’s strategies

Introduce your expert witness to what opposing counsel’s likely goals and strategies will be at the deposition. Some goals include discrediting your expert. Some strategies involve getting your expert to commit to answering certain questions in a way that will leave your expert with very little wiggle room. For example, opposing counsel will want to know all of your expert’s opinions at the deposition. If your experts know that you will be providing them with further documentation or with the deposition transcript of the other side’s experts, then there’s the possibility that they may have additional opinions based on further information. Therefore, it would be important for your experts to clarify at the deposition that those are all of their opinions “at this time,” and if they are provided with further documentation or information, then their opinions may change or they may develop additional opinions. (Should this happen, you should notify opposition counsel and offer to allow the expert to be deposed concerning any new opinions. Otherwise, the expert may not be allowed to offer them at trial.)

(7.) Areas of questioning by opposing counsel

Your expert needs to know about the types of questions and the area of questioning that opposing counsel will likely cover at the deposition. Even if your expert is a seasoned witness, it will be worth your time to cover the areas of potential questioning. When it comes to our clients or other lay witnesses, we spend time covering with them the types of questions that will be asked at their depositions. A similar process should apply when it comes to preparing your expert for deposition. Your expert will already have in mind some likely questions that opposing counsel will ask at the deposition. However, you should still go

over the areas of questioning. You should also focus on some key questions that are pivotal to your client’s case to ensure that your expert is well-prepared to effectively answer them.

Is your expert really prepared?

One of opposing counsel’s main goals will be to size up your experts as witnesses and determine how well they will come across to a jury at trial. You want your expert to make a strong and lasting impression on opposing counsel. Making sure your expert is adequately prepared is a step in the right direction.

(1.) Has your expert set aside enough time to prepare?

When scheduling the pre-deposition conference, leave yourself a cushion of time before the actual deposition. If you discover at the pre-deposition conference that your expert needs to put in more time to prepare, then that time will be available. If you hold the pre-deposition conference one hour before the start of the actual deposition, then there will be no further time for your expert to prepare, in case that time is needed.

(2.) Clear explanation regarding area of expertise

Will your experts be able to explain their area of expertise clearly to opposing counsel? Convoluted explanations don’t help. If opposing counsel is not able to understand your expert, then how will a jury? During your pre-deposition conference make sure that your expert can give you a clear explanation.

(3.) Understanding the issues involved in your case

Opposing counsel will try to narrow down the opinions of your expert as much as possible. Make sure you and your experts are on the same page about why you retained them in the first place. There is no room for doubt. Also, your experts should be aware of the causes of action involved in the case, and be very clear about which elements of which claims they will be asked to offer opinions about.

(4.) The facts of the case and the key players

Does your expert have a complete

See Hernandez, Next Page

mastery of the important facts of the case? Which facts does your expert think are most important? Are there any facts the expert seems to have left out? You will know the facts cold; your expert should too. You want the expert to recognize when opposing counsel's questions are not based in fact. Your expert will only be able to have that recognition by being thoroughly versed in the facts.

Knowing the facts cold also means knowing the key players. You want to avoid having your expert be embarrassed at deposition and losing credibility by confusing the facts and the key players.

(5.) Important dates

In addition to accurately knowing the facts and the key players, your expert should also know the important dates in the case, such as the date of the incident, the dates of treatment, or surgeries, etc. Experts are typically asked questions about when they were first contacted by trial counsel, when they were retained, when they had communications with you (via phone, correspondence, email, text or in person), when they received and reviewed documents, when they formed their opinions, and the date when they prepared any written reports, to name a few. Also, if your expert performed any tests or did research, then opposing counsel will want to know the dates and details.

(6.) The expert's opinions

At the deposition, your expert needs to express his opinions in a legally sufficient manner along with effectively explaining the bases for those opinions. During the pre-deposition conference, you should discuss each opinion with your expert as well as the bases for each of those opinions, all conclusions, and have the expert identify all material, documents, literature, treatises on which he or she relied and found authoritative. You should review that documentation well before the deposition and leave enough time to discuss any questions you may have about the literature, journals, treatises, etc.

In order to express opinions in a legally sufficient manner, your expert should be aware of key language that should be used. In a wrongful-death

action based on medical negligence, an expert who merely states that the decedent "*could have* survived the stroke" if the defendants had not deviated from the standard of care will create problems for you. "*Mere possibility alone is insufficient to establish a prima facie case.*" (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403, 209 Cal.Rptr. 456, 460 (emphasis added).) "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action.* This is the outer limit of inference upon which an issue may be submitted to the jury." (*Id.* at p. 403, italics added.) You should review the causes of action, elements, and any other information in CACI ahead of time so that key language that needs to be used by your expert is clear.

Also, opposing counsel may try to ask your experts for opinions that are beyond their expertise. Your experts should be prepared and feel comfortable telling the opposing counsel that those questions are beyond their expertise.

You will also need to find out if your experts have everything they need to offer their opinions, or whether additional information is requested or required.

Written materials

(1.) Production of your retained expert's file before deposition

Opposing counsel will specify in the deposition notice the materials or category of materials she wants your retained expert to produce before the deposition. Prior to January 1, 2017, a defending attorney could show up just before the start of a deposition and produce voluminous materials and documents in an unorganized fashion. As a result, the deposing attorney would need to spend time during the deposition going through the expert's materials. To encourage more efficient expert depositions and to reduce the costs, the

California Legislature added Section 2034.415 to the Code of Civil Procedure, which says:

An expert described in subdivision (b) of Section 2034.210 whose deposition is noticed pursuant to Section 2025.220 shall, no later than three business days before his or her deposition, produce any materials or category of materials, including any electronically stored information, called for by the deposition notice.

Since opposing counsel will have more time to review your expert's materials, he or she will likely be very prepared to take your expert's deposition. As a result, you need to thoroughly review your expert's file before the three-business-day deadline. You should allow enough time to receive your expert's file, review it, and hold either a conference call or have a meeting about the materials. You need to make sure that you notify your experts of the deadline.

Make sure you obtain your expert's file and materials well before the production deadline so you have sufficient time to review them. You do not want to run into a time crunch when it comes to receiving your expert's file and materials.

Also, when scheduling your expert's deposition, keep in mind the day of the week. If you allow your expert to be deposed early in the week, then opposing counsel will get additional time over the weekend to review the documents requested in the deposition notice. Remember section 2034.210 specifies *three business days, not calendar days*, when it comes to producing your expert's materials before the deposition date.

(2.) Your expert's file

Familiarize yourself with your expert's file at the pre-deposition conference or before. Be meticulous in reviewing the file with the expert. Remember that the written materials will need to be produced so it is crucial that you know what your expert's notes mean. You should also take an inventory of what is in your expert's file. Did they highlight any records, materials or excerpts? If yes, find out why.

See Hernandez, Next Page

It will also be very helpful for you and your expert at the deposition if the file is well organized.

(3.) Does your expert have a written report?

If your expert prepared a written report, then the two of you must be thoroughly familiar with it prior to the deposition. In fact, your expert needs to know the report cold. Carefully go over the report with your expert before the deposition. Find out if the report contains all of the opinions the expert plans to give at trial. Is there any information your expert considered that is not identified or included in the report? You need to know the answer to that question.

(4.) Declarations

As plaintiff's attorneys, we are routinely faced with opposing motions for summary judgment or for summary adjudication. We often need experts to provide declarations to successfully oppose these motions. These declarations are usually drafted and filed with the court before experts are designated in the case. If the expert who prepared the declaration is the same expert you designated in your case pursuant

to Code of Civil Procedure section 2034.260, then you want to pay particular attention to the content of the declaration. You can count on opposing counsel and opposing counsel's expert putting your expert's declaration under a microscope.

(5.) Fees and billing

Prepare your expert to discuss all fees and billing in your case. In particular, the expert should know how much has been billed to date. At the deposition, your experts will also be asked to give a percentage regarding income that they generated from legal matters. They will also be asked to give a breakdown regarding the percentage of work that they do for the plaintiff's side versus the defense side.

(6.) Curriculum vitae

Your experts will need to clearly explain why they are qualified to give opinions in your client's case. They must be aware of everything stated in their curriculum vitae ("CV"), particularly their experience in the relevant field, whether that experience relates to the issues in your client's case, and any publications they authored and any research

they performed involving the same issues in your client's case.

The expert should also make sure all of the information in the CV is accurate. At deposition, your expert should be prepared to point out any new or changed information that has yet to be included in his or her CV.

Conclusion

A successful case often depends on strong expert witness testimony. Thorough preparation is essential for an expert to perform well in a deposition and at trial. The attorney and expert should leave themselves enough time to prepare for the expert's deposition. Taking the necessary time will be well worth it.

Elizabeth A. Hernandez is a senior associate at the Law Offices of Michels & Lew in Los Angeles. Her areas of practice include medical malpractice, catastrophic personal injury, and sexual abuse litigation. She has been a speaker at various seminars and legal conventions, and has published articles in CAOC's Forum and CAALA's Advocate magazines.