

Expert Witnesses: Prep, Depos, Exam and Cross Skills - How to Get it Right
May 23, 2013 9:00 a.m. – 4:45 p.m.
Los Angeles Athletic Club

PREPARING EFFECTIVE EXPERT WITNESS REPORTS AND EXHIBITS

- I. Federal v. State Court – Expert Report Requirements (civil litigation)
 - A. State Court: Expert Discovery governed by CCP §§ 20334.010 – 2034.730 and Evidence Code §§ 720-723, 801
 1. Expert identity must be disclosed, but report not required
 2. Specific demand for reports and writings should be included in demand for expert witness list. CCP § 2034.210(c)
 - B. Federal Court: Expert Discovery governed by FRCP 26 and FRE 701-706
 1. Expert reports must be prepared and produced before trial. FRCP 26(a)(2)
 2. Report must contain (FRCP 26(a)(2)(B)):
 - a) a complete statement of all opinions the witness will express and the basis and reasons for them;
 - b) the facts or data considered by the witness in forming them;
 - c) any exhibits that will be used to summarize or support them;
 - d) the witness's qualifications, including a list of all publications authored in the previous 10 years;
 - e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
 - f) a statement of the compensation to be paid for the study and testimony in the case.

II. What Makes an Expert Report Effective?

- A. Written by the expert – not the lawyer!
- B. Truthful and credible
- C. Logical presentation
 - a) Follow the "scientific method"
 - b) Physical observation and testing v. untested hypothesis
 - c) Direct observation of evidence and witnesses
- D. Plain language and presentation
 - a) Effective Graphs, charts, spreadsheets, diagrams
 - b) Avoid redlining your expert's report and avoid legalese
 - c) Expert will have to defend report in deposition

III. Making the Report Impeachment-Proof

- A. Defendable position; "test" your expert's conclusions before finalizing report
- B. Internal consistency and accuracy
- C. Consistency with prior positions in unrelated matters

IV. Use Care in Communications with Testifying Experts

- A. Attorneys must not "instruct" the expert
- B. Drafts
 - 1. Can be discoverable (but see 2010 amendment to FRCP); use care
 - 2. Make sure expert marks draft as draft and confidential and privileged
- C. Documents and evidence provided to expert
 - 1. Make sure your expert has all relevant material; avoid deposition surprises
 - 2. Make sure your expert does NOT receive or rely on work product or privileged material

D. Emails

1. Communications with experts may be discoverable
2. Use discretion and use the phone!

V. Conclusions

- A. Whether or not required, expert report can be a powerful tool in litigation
- B. Report is only as good as the expert and expert's ability to defend