

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

MOVING TO EXCLUDE EXPERT TESTIMONY

- I. Disqualification v. Exclusion
 - A. Disqualification is disfavored
 - B. Exclusion may be obtained for part or all of an expert's testimony based on numerous factors
- II. Disqualification
 - A. Disqualification not specifically provided for under federal or state law, but case law permits disqualification to avoid compromise of integrity of legal system
 - B. Basis for disqualification:
 - 1. Conflict of interest – opponent's past relationship with expert (employer, physician-patient)
 - a) No "bright line" rule, but generally an actual breach of confidence required
 - b) Existence of contract may not be sufficient
 - 2. Confidential information disclosed to the expert
 - C. Motions for disqualification in most reported decisions have been denied, and granted on unique facts presented

III. Exclusion of Expert Testimony

A. Numerous bases for exclusion:

1. Not a proper subject for expert testimony
 - a) Appropriate for expert: beyond common experience
 - b) Questions of law to be decided by court
 - c) Ultimate question to be decided by jury
2. Unqualified expert
 - a) Court has broad discretion to determine qualification based on based on knowledge, skill, education, and experience
 - b) Potentially relevant: Educational background; licenses and certifications; experience and personal research; teaching experience; professional organizations; books and articles; awards; previous expert testimony
3. Reliability of methodology, scientific techniques
 - a) State Court *People v. Kelly* (1976) 17 Cal.3d 24
 - b) Federal Court *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579
4. Failure to comply with procedural disclosure obligations
5. Retained / non-retained
6. Prejudicial / cumulative evidence

B. Making the objection:

1. Noticed motion
2. Motion in Limine
3. After start of trial

C. Failure to Make the Objection

1. Must make a proper and timely objection, or grounds for objection are not preserved for appeal
2. Trial court not required to exclude testimony absent an objection

3. If you do not test the basis or foundation for opinion and expert's credibility during expert's testimony, you may not challenge admissibility of testimony later

IV. Mock Hearing