

Expert Witness Tactics, Cases, and Checklists

Proven advice for selecting, preparing, examining, excluding, and cross-examining expert witnesses

Perhaps no litigation task is more important than diluting the effect of the opposition's expert. This formidable challenge begins well before discovery and continues through settlement or trial.

Let Robert Clifford's *Qualifying & Attacking Expert Witnesses* help. This 570-pager is loaded with strategies, law, and forms for handling experts:

Selection

- Finding persuasive experts. §130
- Controlling expert witness costs. §151
- Cheap substitutes for experts. §152
- Avoiding conflicts of interest. §160

Discovery

- Deposition preparation. §202
- Deposition instructions for your expert. §211
- Disclosure of expert's work product. §242

Trial

- Sample voir dire questions. §301.1
- Qualification questions that keep the jury focused. §334
- Presentation checklist. §330

- Demonstrative evidence rules and considerations. §332
- Daubert tactics. §345.2
- Challenges to computer-generated information §346, government reports §346A, and industry standards §347
- Objections to cross-examination. §348

Attacking the expert

- Pretrial challenges to scientific expert testimony. §406
- Checklist for establishing unreliability. §415
- Preparing the expert witness trial binder. §422
- Checklist of bases for motion in limine. §423.1.4
- Grounds for disqualifying the opposing expert. §424 et seq



Over 500 pages of checklists, tactics, cases, and strategies. Book and CD for only \$99.

- Objections to direct testimony. §425
- Checklist for effective cross-examination. §431
- Fruitful areas of cross-examination. §433
- Tactics for showing lack of basis for opinion. §443
- Restricting demonstrative evidence. §470

Qualifying & Attacking Expert Witnesses devotes 200 pages to tactics, cases, and checklists specific to these experts:

Appraisers
Contractors
Criminologists
Doctors

Document examiners
Economists
Employment experts
Insurance experts

Linguists
Psychologists
Physical facts experts
Transportation engineers

Sample pages and table of contents inside...

Over 30 Forms and Checklists

Discovery

Motion to Appoint Independent Expert, Order, Motion to Quash Subpoena Duces Tecum, Order, Stipulation Regarding Admission of Documents

Trial

Voir Dire Questions for Complex Expert Testimony, Voir Dire Questions Defusing Expert Testimony

Checklist for Reviewing Transcripts, Motion for Production of Expert Report, Order, Checklist for Document Request, Pre-Deposition Checklist (Opposing Expert), Post-Deposition Checklist, Motion in Limine, Cross-Examination on Qualifications, Cross Examination re Establishing Authoritativeness, Complete Cross-Examination

Specific Experts

Medical: Checklist and Sample Questions for Qualification, for Presentation of

Testimony, Cross-Examination re Bias, re Lack of Qualification, re Inconsistent Statements, Questions re Exaggeration, Questioning re Lack of Basis for Opinion, Cross-Examination re Concessions

Psychological: Notice of Motion for Order Appointing Expert Psychiatric Witness, Declaration, Order, Questions re Qualification, Questioning re Psychological Damage, Questions re Intellectual Impairment, Foundational Requirements for Psychological Testimony

5-35

COMMONLY USED EXPERTS

8530

quote precisely the prior testimony which contradicts the doctor's present position).

If the inconsistency is a prior writing by the expert a question along the following lines might be appropriate after the doctor has testified contrary to an earlier position.

Q. Doctor, I show you a copy of an article you wrote for the *Journal of Therapeutic Medicine* in the July issue and call your attention to page 78 in which you stated—(Here quote the impeaching material).

The physician has the right to explain the inconsistency, but insist that before he offers his explanation that he admits that there is in fact a discrepancy between his present testimony and his prior inconsistent statement.

1. **Exaggeration.** Sometimes you may find that a treating physician in an effort to assist his patient may exaggerate the symptoms and rely upon the patient's subjective complaints in reaching the conclusion. Similarly a defense expert may minimize a patient's complaints. Questioning the expert on the use of objective tests or the patient's history may often be effective. For example, the following questions might be posed.

Sample: Questions re Exaggeration

Q. Doctor, wouldn't your opinion as to the extent of the plaintiff's disability be modified if you were aware that tests showed he suffered severe back spasms for six months after the accident?

Q. Doctor, isn't it a fact that the patient's history is one of the medical profession's most important diagnostic tools and that you had not had an opportunity to review the history of Mr. [Name] the time you rendered your diagnosis?

Q. Would your opinion be the same if you

to examine the plaintiff over an extended period of time. Question the doctor on the reliability of the tests upon which he relied so that you are not directly attacking the expert, but the technicians who may have rendered the tests. Blood pressure results, electrocardiograms, computerized diagnostic tests, blood tests, for example, are generally performed by lab technicians or nurses and if they can't be trusted, the expert may concede that his opinion would be modified.

Sample: Questioning re Lack of Basis for Opinion

Q. Doctor, is it not true that if you had had an opportunity to treat and observe Mrs. Jones on a regular basis from the time of the accident until the present, your opinion as to her prognosis would necessarily be more reliable than an opinion based upon the two limited visits you actually had?

Q. Doctor, isn't it a fact that if you had observed her progress during the course of her treatment, personally performed various tests, observed the effects of medication, talked directly to her physiotherapist as to her progress, consulted with the x-ray technician and personally reviewed the reports of the laboratory technician you would have a clearer and more accurate basis upon which to form an opinion as to her prognosis?

6. **Obtain concessions.** Frequently during cross-examination you can obtain concessions that can be used during your summation. If the expert has relied upon the results of certain tests in arriving at his conclusion, you may be able to obtain his consent that the results of the test may vary with the focus taken by the patient—the time of

3-39

PRESENTING YOUR EXPERT AT TRIAL AND ARBITRATION

8333

Cases

In *Jones v. City of Los Angeles*, 20 Cal. App. 4th 436 (1993), the court held the admission of a videotape of a plaintiff's daily activities, holding that the probative value of the showing outweighed any prejudicial effect of the videotape. The foundation for the admission of the video was based on the testimony of a nurse, an "independent case management specialist" who was retained to assist the plaintiff with her recovery. She was to evaluate the plaintiff's condition and to design a plan for the plaintiff's rehabilitation. She was present during the videotaping and was asked not to act differently than any other day in which she visited the plaintiff. The plaintiff was also instructed to act naturally. The court held that the videotape represented the ordinary day-to-day activities and there was no evidence that the video depicted any exaggerations or self-serving behavior by the plaintiff. The court held that it is sufficient to authenticate a day in the life video if the proponent demonstrates that the video is an accurate portrayal of what it purports to show.

In *Apache Realty Mfg Co. v. Crowl*, 653 S.W.2d 79 (Tex. App. San Antonio 1983), the defendant objected to the admission in evidence of a twenty minute video of a day in the life of an injured child, contending that it was not relevant and that the inflammatory nature of the film's content so far outweighed its relevance that its admission probably resulted in the rendition of an improper verdict. The scenes of the silent videotape depicted the patient's rehabilitation treatments by physical and speech therapists showing the patient in a hospital bed, in a wheelchair and in other nursing care situations. The court admitted the video noting that a proper foundation showed that it accurately and correctly depicted the people and the scenes shown.

In *Bumiller v. Skolek*, 812 F.2d 1265 (10th Cir. 1987), the court noted certain concerns regarding the use of day in the life videos. First, does the video fairly represent the facts with respect to the plaintiff's day-to-day activities? The film should portray the plaintiff's ordinary daily activities. A second concern is whether the fact that the plaintiff is aware of being videotaped for the purpose of litigation will likely cause self-serving behavior, consciously or otherwise. Exaggerated difficulty in perform-

thus cannot cross-examine the plaintiff. However, ordinarily the plaintiff is not questioned regarding the events. The trial court concluded that the videotape of the daily life of the plaintiff. The court concluded that the trial court's decision of its discretion.

Tactics

Your expert should testify that the fact accurately portrays the day activities and that the difficulty encountered in performing tasks is the direct result of the plaintiff. It is true that the plaintiff. However, video is frequently used in conjunction with live testimony. If your expert can demonstrate that the film correctly depicted the day-to-day activities of the plaintiff the fact that they are presented by video should not be a basis for exclusion.

If a day in the life video is to be presented, in addition to your expert, the plaintiff should be present to testify that the activities were typical and that the difficulties being shown were not exaggerated. The presence of the plaintiff and his availability for cross-examination eliminates one of the objections to the use of a video.

§333 Cross-Examination of Your Expert

Cross-examination often presents an exceptional opportunity, that is not available during direct examination, for your expert to expand and amplify his position. The testimony of your expert in response to cross-examination questioning can be more convincing than the direct testimony.

Do not limit the preparation of your expert to your

2-9

DISCOVERY AND YOUR EXPERT

§202

preserve evidence for another party's use against a third party. The plaintiff alleged that an insurance company and its claim service failed to preserve evidence possessed by its insured. However, the defendant never had possession or control over the evidence and was not the one who destroyed it. The destroyed evidence was necessary for the claim against a third party, and plaintiffs did not allege that the evidence was relevant to a suit against the defendant insurer or its insureds. The court concluded that there was no compelling justification for such a broad expansion of potential liability.

§202 The Discovery Process

Describe and explain the discovery process to your expert, including the rights of the opposing side as well as your own discovery plans. Impress upon him that there are rules relating to the timeliness of reacting to the opposing side's requests; he should be aware of the sanctions that may be imposed if there has been a failure to respond timely to interrogatories or requests for admissions. If he is retained as a consultant as opposed to a potential testifying witness explain the distinction and the varying rights of the discovery of his opinion.

Explain the rules of your jurisdiction concerning the need for updating the discovery as the case progresses, and the fact that modifications in his opinion or basis for this conclusion must be disclosed. Unless the rules for continued discovery are complied with, his later opinions or experiments might be excluded at trial.

§202.1 Deposition Preparation Checklist

1. Explain the nature and purpose of the deposition to your expert. Often the importance of the deposition is not fully appreciated by the expert, and consequently he is sometimes inadequately prepared. Emphasize the formality of the deposi-

2. Although he will have an opportunity to read the deposition transcript and correct any errors, it is important that he understands that his testimony be as accurate as possible and that he will be closely questioned if he makes any significant modifications to his deposition testimony.

3. Schedule deposition drills. Advise the expert that you will require a substantial amount of his time to make certain he is properly prepared. Consider the use of a video during predeposition drills so he can correct any irritating mannerisms that he may not have been aware of.

4. Particularly if the expert has had limited experience as a witness, carefully explain his function at the deposition. His responses are to be precise, accurate and generally brief. The deposition is not the time to give long, rambling explanations. His function at the deposition is to respond to questions, not to volunteer information that has not been requested.

5. Make certain that he is aware of pertinent discovery that might affect his testimony. Advise him of all relevant witness statements, reports, experiments or tests that have been performed.

6. Review any demonstrative evidence that he intends to use and notes, treatises or documents that he will rely on.

7. Make certain that your expert is prepared to render an opinion. For example, before his deposition he should have performed the requisite tests, visited the scene, inspected the proponent, reviewed the appropriate treatises. He should not testify that he has more work to do or that he is unprepared to give his opinion. Not only does this appear unprofessional, but some jurisdictions require that the expert be fully prepared at the deposition and if the expert is not prepared at the deposition he is precluded from testify-

or treatises which he has reviewed in his conclusion. Make

3-25

PRESENTING YOUR EXPERT AT TRIAL AND ARBITRATION

§332

of laser disks containing trial exhibits, \$9,916 for a graphics communications system, \$11,983 for a technician to facilitate the presentation of material to the jury, \$35,652 for videotaped depositions called for presentation of the testimony to the jury were disallowed. The court commented that it was troubled by a case in which a party incurred over \$2 million in expenses to engage in high-tech litigation resulting in the recovery of only \$1 million in damages. The court commented that if a party unwise chooses to expend money in trial presentation in excess of the value of the case, utilizing advanced methods of information storage, retrieval and display, when more conventional if less impressive methods are available, the party must stand his or her own costs.

§332.6 Demonstrative Evidence in the Form of Summaries

Evidentiary summaries are permissible where a case involves voluminous writings which cannot be conveniently examined in court may be presented in the form of a chart, summary, or calculation. See Fed. R. Evid. 1006. A proper foundation for such a summary can be laid through the testimony of the witness who supervised preparation of the exhibit. See *U.S. v. Bowers*, 689 F.2d 154, 161-62 (10th Cir. 1982), where the court found that the authenticity of the pre-trials summarized by a chart admitted into evidence was adequately established. The court noted that the determination of the admissibility of the foundation for the admission of evidence, and the admission or rejection of evidence is left to the discretion of the trial court. Citing *United States v. Carrasco*, 551 F.2d 1197, 1199-2000 (10th Cir. 1977).

The court also rejected the claim that the chart size was prejudicial. The purpose of the chart was to aid the jury in organizing the evidence, and the summary accurately reflected the underlying prescriptions. Size alone does not render inadmissible an exhibit containing otherwise unobjectionable objective evidence.

ticated photography. In addition, there are firms which specialize in preparing films—both still and motion pictures—that can aid your expert.

• Have the expert who will testify, rather than an associate, perform all tests or experiments. The expert can testify as to the results rather than relying on the associate's hearsay.

• Use the demonstrative evidence in your summation to the jury, effective final argument using the expert's demonstrative material can reinforce the expert's testimony.

• Be very cautious in permitting the expert to perform an experiment in the jury's presence. If the experiment fails or does not work out the way the expert anticipated, no explanation can remedy the damage that the failed experiment might cause. The chance of the experiment's failure before the jury, even if it is a minimal chance, can be disastrous to your case.

• Not only should you be involved in the determination of what demonstrative evidence your expert will use, you should also be present at any experiment that the expert is going to undertake. Attendance will help you learn the basis for the experiment as well as what the expert is attempting to demonstrate. It is helpful for you to be present in the expert's laboratory where any experiment is to take place.

• If photographs or motion pictures are to be used, know the conditions that were used by the photographer; the lighting, the time of day and the weather conditions can all affect the ultimate opinion and the impression that is left with the jury.

• If there are documents that are important in your expert's testimony, such as letters, insurance policies or contracts, consider using overhead transmittal calculations by an economist and provide better in of easily understood, similarly, physical tests has given his fact if the jury has

Pattern questions. Methods of attack specific to type of expert are illustrated with Q&A.

Checklists. Much of the book's advice is boiled down into step-by-step checklists.

Recent cases.

Key points are well-supported with relevant cases, which in turn are fully detailed.

Tactics.

Bulleted lists of practice-proven strategies are found every few pages.

Abbreviated Contents

1. Selecting Your Expert

Preliminary Considerations, Types of Experts, Attributes of the Expert, Locating the Expert, Initial Conference, Compensation, Conflict of Interest, Liability of Expert for Negligence, Court Appointed Experts

2. Discovery and Your Expert

The Discovery Process, Deposition, Interrogatories and Requests for Admissions, Protective Orders, Your Expert's Documents

3. Presenting Your Expert at Trial and Arbitration

Organizing Your Trial Preparation, Preparing Your Expert to Testify, Qualifying Your

Expert in Trial, Presenting Your Expert's Opinions, Basis of the Expert's Opinion, Expert Testimony in Final Argument, Experts in Alternative Dispute Resolution and Settlement

4. Attacking the Expert

Pretrial Attack: Identification of Opposing Expert, Consulting with Your Client and Expert, Locating Prior Testimony, Motion for Summary Judgment, Pretrial Challenges, Proceeding with Discovery, Establishing a Discovery Plan, Timing of Discovery, Document Production, Interrogatories, Deposition of Opposing Expert

Attack at Trial: Preparing the Expert Witness Binder, Preliminary Motions, Disqualifying the Opposing Expert, Objections to Direct Testimony

Cross-Examination: Should the Expert Be Cross-Examined? Selected Areas of Cross-Examination, Inconsistencies

Lack of Basis for Opinions: Lack of Training or Research, Lack of Research, Reliance on Others, Lack of Proper Basis for Opinions, Presentation of Summaries of Documents

Hypothetical Questions, Rebuttal, Restricting Demonstrative Evidence

5. Commonly Used Experts

Document Examiners, Appraisers, Construction, Medical, Transportation, Economic, Physical Facts, Engineering, Insurance, Psychological, Criminal, Employment, Linguistic, Legal Malpractice

About the Author

Robert C. Clifford serves as a consultant to law firms and as an arbitrator and mediator in insurance and litigation matters. He resides in Carmel, California.

He has been the senior partner of an Oakland, California, law firm where he specialized in general litigation, including real property disputes, personal

injury litigation, insurance matters, contract disputes, will contests, and estate matters.

About the Book and CD

Qualifying & Attacking Expert Witnesses contains 570 letter-sized pages in a sturdy and tabbed 3-ring binder. You receive pattern questions, checklists, tactics, and case law for working with experts in general, and specific advice for medical, psychological, economic, physical facts, engineering, construction, insurance, employment, linguistic, document examination, legal malpractice, and criminal experts.

Included at no extra charge is an intuitive, full-text CD which requires no installation before use. It may be searched by key word, case name, topic, or form. You may also open and modify any of the CD's forms simply by using your favorite word processor; you need not work with the CD's search program.

\$99 buys the book and CD. The book is updated annually for \$69 with replacement pages and a new CD. Both the book and its update are sold on a 30-day trial basis, and may be returned if not to your liking. The update service may be cancelled at any time.

(800) 440-4780 or
www.JamesPublishing.com

We give a portion of revenues to needy youth.

Qualifying & Attacking Expert Witnesses

Yes, send me one copy of Robert Clifford's *Qualifying & Attacking Expert Witnesses* and its CD with an invoice for \$99 plus tax and shipping. If not satisfied, I may return the book and CD within 30 days. Send the \$69 annual supplements on the same 30-day review basis. I may cancel the update service at any time.

Copyright © 2009 James Publishing

Four Easy Ways to Order...

QAX7b

MAIL: James Publishing, Inc. / P.O. Box 25202 / Santa Ana, CA 92799-5202 PHONE: 800-440-4780 FAX: 714-751-2709 INTERNET: www.jamespublishing.com

Prepay and save \$7.98 shipping

Check enclosed for \$99 (CA residents add \$8.17 sales tax / Make check payable to James Publishing / U.S. funds only)

Charge \$99 to my credit card: Visa Mastercard AMEX



Invoice option

(I do not wish to take advantage of the free shipping offer)

Bill firm \$106.98 (shipping included / CA residents add \$8.17 sales tax)

Bill me the same

Card #: _____ Exp. Date: _____ 3(or 4)-digit security code: _____

Please complete all blanks, providing a street address for your office.

Printed Name: _____

Firm Name: _____

Office Address: _____ Suite: _____
(not residence)

City, State, Zip: _____

Telephone: (____) _____ Fax: (____) _____

Bar #: _____ E-mail: _____

Signature: _____

PRSR STD
U.S. Postage
Paid
James Publishing

How to Attack Expert Witnesses

Reduce the credibility and effectiveness of your opponent's expert

Proficiency studies for many types of expert analysis show a disturbingly large number of mistakes. Intelligent probing can uncover many of these mistakes.

Let Robert Clifford's *Qualifying & Attacking Expert Witnesses* show you how to dig deep for unreliable testimony, no matter how sterling the expert's credentials. The book details dozens of high-potential attacks, including:

- Failure to consider other causes
- Subjective testing
- Anecdotal evidence
- Temporal relationship
- Erroneous extrapolation
- Research prepared for litigation

Any many others. See inside for details.



Complete coverage — from selection and cost control to disqualification and cross-examination.
\$99 for book and full-text CD.

Sample pages and table of contents inside...