

By Wendy L. Wilcox

# Making Preparations for Expert Witnesses

**The outcome of litigation often depends on expert testimony and how it is handled**

Since the introduction of the Discovery Act in 1957, an entire complex statute—namely, California Code of Civil Procedure Section 2034—has been devoted solely to expert discovery and testimony. The complexity of this statute may be appreciated by comparing it, for example, to Code of Civil Procedure Section 2025, which deals with percipient witnesses. The requirements for percipient witnesses are far less detailed than those for experts described in Section 2034(f)(2). Clearly, the importance of experts in litigation cannot be overemphasized, and the ability of counsel to understand the expert's expected testimony is an essential part of trial preparation.<sup>1</sup>

Courts have persistently stressed that litigation is not a game and that it is in the public interest that each party know as much as possible about the other's case in order to give each a fair turn at trial and maximize the chance of settlement.<sup>2</sup> Nevertheless, litigation remains adversarial, and the deposition of an opposing expert—which is usually quite expensive—is the only way for a party to know what that expert will opine at trial. As a result, it is essential for the attorney who is deposing the expert to consider several factors: the strengths and weaknesses of both sides of the case, the technical aspects of what the expert will cover, the points to cover on cross-examination at trial, the issues that the client's expert will cover to rebut or impeach, and the proper settlement position—which may depend in great part upon the testimony of the experts for both sides.

The great influence that expert testimony can have on litigation planning, litigation itself, and settlement is implicit in Section 2034(f). The first part of this section details the need for and content of the expert witness declaration, in which the nature of the expected testimony of the expert must be described. The second part concerns the deposition of the expert, during which the expert must state all the opinions he or she is expected to give at trial. Section 2034(f)(2)(D) further specifies that the expert witness declaration include a "representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis that the expert is expected to give at trial."<sup>3</sup>

## Surprises in Court

If the expert attempts to offer a new opinion at trial, the only effective remedy for the surprised party is to ask the court to exclude those opinions that the expert did not disclose in deposition.<sup>4</sup> This penalty is prescribed by the statute, and it is the only one that will accomplish justice. The party calling the expert can avoid this sanction by making sure that the expert discloses all opinions he or she may give at trial. Although an attorney typically does not like to disclose any part of the case to the other side, the courts and the legis-

lature have made it clear that pretrial disclosure of all the opinions that the expert intends to offer is required. Failure to do so will likely jeopardize the client's case.

With this in mind, counsel should keep certain pretrial and post-trial requirements and recommendations in mind when preparing, and preparing for, expert witnesses. First, a party's demand for exchange of expert information must be served 10 days after the initial trial date has been set or 70 days before that trial date, whichever is closer to the trial date.<sup>5</sup> Second, the parties to a suit must simultaneously serve their respective expert information 50 days before the initial trial date or 20 days after receipt of a party's demand, whichever is later.<sup>6</sup> A party may supplement its expert designation 20 days after the two sides have exchanged expert information.<sup>7</sup> A party should properly prepare the expert witness declaration to include the subject areas that the expert intends to cover at trial. The declaration should be broad enough to cover all opinions that the expert may express.<sup>8</sup>

Third, a party should notice the opposing expert's deposition at least 15 days before the initial trial date.<sup>9</sup> In the notice, the party should make a demand for the production of documents at the deposition. This demand should at least request the following: 1) the expert's credentials—typically, the expert's curriculum vitae; 2) the expert's complete file regarding the action; 3) all documents relating to any written or oral communications between the expert and any party to the action; 4) all documents relating to the expert's compensation regarding the action; 5) all deposition transcripts, trial transcripts, declarations, or record of testimony by the expert in any other similar matter, including but not limited to a list of the cases in which the expert testified; 6) all books, treatises, articles, essays, or other documents written by the expert regarding the subject matter of the action; and 7) all documents evidencing how much time the expert expended on the matter.

## At the Deposition

At the opposing expert's deposition, counsel should mark the expert's curriculum vitae and witness declaration as exhibits to the expert's deposition. Additionally, counsel should take the time to read into the record the section in the declaration regarding the subject areas of the testimony that the expert is expected to offer. This is done by carefully paraphrasing the statements in this



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section. Ask the expert for his or her assignment in the matter and for all the written and oral communications regarding this assignment. Ask the expert if he or she has testified to everything regarding that subject. Also ensure that the expert will notify opposing counsel if he or she arrives at any new opinions before trial. Finally, ask the expert how much he or she has been paid and what if any future work the expert intends to perform on the matter.

The deadline for expert discovery motions is 10 days before the initial trial date.<sup>10</sup> Specifically, pursuant to Section 2034(j), on objection of any party who complies with Section 2034(f), the court shall exclude from evidence the expert opinion of a witness who is offered by a party who has unreasonably failed to make the expert available for deposition.<sup>11</sup> The court also has the power to impose monetary, terminating, and evidentiary sanctions against the party and the party's counsel who has unreasonably failed to make the expert available to the opposing side for deposition.<sup>12</sup>

If the expert forms any new opinions between the time of deposition and trial, counsel should immediately make the expert available for a second deposition. If an agreement with opposing counsel cannot be reached quickly, the party should seek leave to amend the expert witness declaration under Section 2034(k). If counsel wants the expert to offer an opinion at trial that the expert did not offer in deposition, counsel should make an offer of proof as to what the expert will testify to if permitted to do so. Such an offer of proof is essential to the preservation of the point on appeal.<sup>13</sup>

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<sup>1</sup> HOGAN & WEBSTER, CAL. CIVIL DISCOVERY §10.1, at 525 (1997).

<sup>2</sup> See, e.g., Williams v. Volkswagen Aktiengesellschaft, 180 Cal. App. 3d 1244, 1255, 226 Cal. Rptr. 306 (1986) (stating that the Discovery Act was enacted in order to avoid turning litigation into "a game of blindman's bluff").

<sup>3</sup> *Id.*

<sup>4</sup> CODE CIV. PROC. §2034(j) (4).

<sup>5</sup> CODE CIV. PROC. §2034(b).

<sup>6</sup> CODE CIV. PROC. §2034(c), (f).

<sup>7</sup> CODE CIV. PROC. §2034(h).

<sup>8</sup> CODE CIV. PROC. §2034(f).

<sup>9</sup> CODE CIV. PROC. §2024(d).

<sup>10</sup> *Id.*

<sup>11</sup> CODE CIV. PROC. §2034(j) (4).

<sup>12</sup> CODE CIV. PROC. §§2023, 2025(j) (3), 2034.

<sup>13</sup> Ransom v. Ransom, 215 Cal. App. 2d 258, 264, 30 Cal. Rptr. 53 (1963):

The requirement of the offer of proof serves two practical purposes. First, it permits the trial court to reconsider and correct an erroneous exclusionary ruling in the light of all the facts. Second, it permits the appellate court to determine if the ruling was erroneous and, if so, whether it was sufficiently prejudicial to justify a reversal of the judgment....