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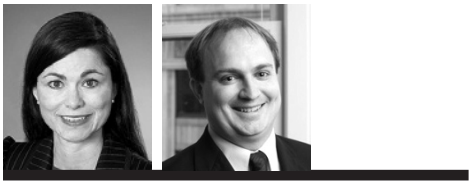
THE RECORDER

IN PRACTICE

Navigating expert disclosures

Tips for making the state court discovery process efficient and cost-effective



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Litigation

Most, if not all, complex litigation involves expert testimony. In California state courts, all the usual adages apply: spend as much time as necessary to vet and hire the most qualified expert witness, diligently pursue a manageable budget with your expert, respect the expert's time, and protect the record as much as possible. See generally, "Get the Most Out Of Your Expert," *The Recorder* (April 27, 2011). In addition to these important adages, California's rules governing expert witness disclosure and discovery create difficult timelines and choices. California law with respect to expert communications and documents is complicated and unsettled. Mistakes in the use of experts can result in significant costs, and possibly even lead to defeat. There are, however, a number of strategies that can help counsel effectively navigate these rocky waters.

START WITH CONSULTANTS

Most cases require expert evaluation even before filing. However, you may not wish to disclose what the initial expert concludes. If you designate an expert for testimony at trial, that expert's work will generally be discoverable. To avoid disclosure, you should consider first employing a consultant whom you do not intend to designate as an expert for trial. You may then need to make sure you have another expert lined up should the case proceed to trial.

ORGANIZE EVIDENCE EARLY

The schedule for expert discovery in state court is extremely compressed. Parties cannot be forced to exchange their lists of expert witnesses until 50 days before the initial trial date under Code of Civil Procedure §2034.230, and rebuttal witnesses can be disclosed 20 days later (30 days before trial) under CCP §2034.270. Expert witness discovery, however, closes 15 days before trial under CCP §2024.030. These dates are all keyed off the "initial" trial date, regardless of postponements.

In order to maximize the effectiveness of your expert and minimize costs, you need to provide your expert with the relevant evidence in the most organized manner and as early as possible. This means obtaining all the necessary documents from the opposing party during fact discovery as early as possible, before expert discovery begins. Factor in the time to move to compel.

The state court expert schedule also requires careful analysis of what documents to provide to your expert. This is a time-consuming process that will pay off in the end. Providing too little information can leave the expert vulnerable to attack on the witness stand. Flooding your expert with documents, however, increases the costs for your client and risks that the expert will not focus on the most important documents.

PREPARE FOR EXPERT WITNESS EXCHANGE

The earliest day you can require the opposing party to exchange expert witnesses is 50 days before the initial trial date. In order to ensure that this exchange happens on that 50th day before trial, you must serve the demand for exchange of expert witnesses at least 20 days before that deadline, or at least 70 days before trial. Missing this deadline will even further compress an already difficult timetable for completing expert discovery and preparing for trial.

Once the demand for the expert witness exchange has been served, be ready for the exchange. Counsel should have notices of deposition for the opposing party's experts ready, and serve them immediately after the exchange occurs. One strategy is to travel to opposing counsel's office with a blank notice of deposition and subpoena. Hand-write the name of the opposing party's expert into the notice the moment that person's name is disclosed and serve it. Then call your process server who will begin efforts to hand serve the expert with a subpoena, which must include a thorough document demand.

Serving the deposition notices first gives you priority in the scheduling of the expert depositions, which can be very helpful given the tight timeframes for expert discovery. Deposition priority will also allow your expert to know the opposing party's experts' opinions before being deposed.

CONTAIN YOUR COMMUNICATIONS

Under 2010 changes in federal law, communications between attorneys and experts are explicitly privileged under the new Rule

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26 of the Federal Rules of Civil Procedure. (Rule 26(b)(4)(C)). The changes were meant to "ensure that lawyers may interact with retained experts without fear of exposing ... communications to searching discovery." Adv. Cmte. Note.

The California Code of Civil Procedure, however, does not explicitly address communications between experts and attorneys. Case law is sparse and somewhat opaque. Given this lack of clarity, attorneys should use caution in communicating with their experts in writing. Experts are not parties to the case, and are not under the control of counsel. For that reason, lawyers should keep a complete file of every communication between the law firm and the expert. When the expert's deposition occurs, the expert likely will bring her file to the deposition room. Unprepared counsel may not have seen everything in that file before that day.

Some attorneys may choose to communicate with the expert only by telephone and in person. At a minimum, email communications between the attorney and the expert should not discuss weaknesses in the expert's report the opposing party could exploit if discovered. Experts may need to be reminded that anything they write in an email or in notes might have to be turned over to the opposing party. Experts who work primarily in federal court may not realize that the rules are less clear for state cases. And even under federal law, any facts provided to the expert by the lawyer are discoverable.

CONSIDER A WRITTEN REPORT

Unlike federal law, there is no explicit state court requirement that an expert produce a written report. There are several reasons why a written report may make sense. Particularly in a bench trial in a complicated or technical case, the court will likely appreciate having a clear and concise statement of the expert's opinion when the expert is no longer on the stand. A strong expert report also can send a compelling signal to the other party in settlement negotiations.

If your expert produces a written report, disclose it to the opposing party at or before the expert's deposition. Any changes made after that date should be disclosed to the opposing party as soon as possible. Waiting to produce the report until too late may cause your expert to be brought back for another deposition at your expense. Even worse, hiding your expert's written report runs the risk that the expert's testimony will be excluded at trial. *Boston v. Penny Lane Centers*, 09 C.D.O.S. 1152.

Another thorny issue is draft reports. As with communications between experts and attorneys, there is now a rule in federal law, Rule 26(b)(4)(B), protecting draft expert reports from discovery. There is no similar clarity in state law. One approach is to work with an expert who does not keep draft reports. Some attorneys travel to the expert's office; others use a technology solution which enables the expert and attorney to work on the report in the same environment. Still others spend hours speaking on the telephone regarding changes in the report. Again, you should make sure your expert and inexperienced associates or new lawyers understand the possibility that draft reports and all communications between the attorneys and the expert might have to be disclosed, and plan accordingly. One state court solution is for counsel to agree through stipulation that no drafts need to be disclosed or exchanged.

USE SUMMARY JUDGMENT WISELY

The timing of summary judgment motions in state court also affects decisions about how to deploy your expert. If you file a summary judgment motion and submit a written expert report or declaration in support of the motion, you may have to submit your expert to deposition before the motion is heard. The last day for the court to hear summary judgment motions is 30 days before trial, which means the summary judgment motion must be filed approximately 105 days before trial under Code of Civil Procedure §437c. This gives the opposing party a head start on your experts, given that you may not otherwise have to disclose your experts until 50 days before trial.

If you do take the deposition of an opposing party's expert, make sure you take it in time to have a certified copy of the transcript to submit in support of your summary judgment pleadings. If you want expert opinion to support your position on summary judgment, but want to wait to disclose your strongest expert, you can use one expert for summary judgment, and then designate a different expert for trial, although that approach is more expensive and less efficient.

In sum, even under the best-case scenario, expert discovery in state court is likely to be rushed and chaotic. It is therefore essential to plan out your strategy for expert witnesses early. If you wait too long to obtain and prepare key evidence, you will get caught in a mess of deadlines in the final days before trial, reducing your chances for a successful outcome.

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