Deposing Defense Experts. Or Not

By Howard A. Kapp

The use, and reasons for deposing, defense experts are well known. Indeed, in altogether too many cases we depose the defense experts for no reason other than habit or irrational fear. In fact, there are many valid reasons for not deposing the other side's experts even though you may have the right, and the instinct, to do so.

This article focuses on reasons not to depose these experts; of course, each of these items may, or may not, apply to a specific expert on a specific case. Each case, and expert, has to be considered on its merits including such factors as the size of the case, the complexity of the subject matter, trial counsels' relative level of experience and familiarity with the cases and your ability to do a cross-examination "on the fly."

I suggest that, in the hands of an experienced cross-examiner who is familiar with the case, the deposition of many defense experts may be counter-productive. Indeed, it is my judgment and experience that litigators on both sides feel compelled to depose the adverse experts "because they can" and "that's what we do" and not for any good purpose. This fallacy is demonstrably exposed every time the examiner cannot demonstrate a specific plan or agenda at the deposition. If you don't know why you want the deposition, or what you expect from it, don't do it.

Indeed, a recent trial provides a good example of the benefit of not deposing the defense expert. In that case, two different defense firms had disclosed the reports of two expert psychiatrists. One was to testify as to the mental status of the plaintiff; the other was to testify as to a defendant's mental status, both of which were relevant to different issues.

The first, very capable, defense counsel called a previously-undeposed psychiatrist/defense mental examiner to testify that the plaintiff had not suffered any significant mental distress as a result of the defendant's conduct. This highly-professional, polished and litigation-savvy expert testified to his own very specific criteria for legally unusable psychiatric testimony (his "pillars of testimony"). Co-defense counsel, who was not a particularly good trial lawyer, was thankfully in the hallway preparing his next witness – another undeposed psychiatrist to testify to highly relevant matters about his defendant's state of mind – and had left his largely clueless junior associate to babysit the first psychiatrist's testimony.

I thoroughly and repeatedly examined the first psychiatrist about his "pillars of testimony," fixing those firmly into everyone's mind while convincing everybody that I was perhaps suffering from an obsessive disorder. Even my own client – who was otherwise intensely involved in the case – had no idea why I had gone over this "pillars of testimony" subject over and over again.

When the second defense counsel called *his* psychiatrist – who, like his trial lawyer was totally ignorant of the "pillars of testimony" testimony of the first psychiatrist – the trap was sprung. The second psychiatrist's testimony was thoroughly trashed and undermined when we exposed that his testimony did not meet any of his slicker colleague's self-imposed "pillars of testimony." The jurors later reported that one of the most difficult moments of the 2½ week trial was to not to break out laughing at the second psychiatrist. None of this would have been possible if these experts had been deposed. And we had their fairly detailed reports also.

Howard A. Kapp is the principal of the Law Offices of Howard A. Kapp located in the mid-Wilshire area of Los Angeles. He practices in the area of significant tort litigation, with an emphasis on medical and legal malpractice and business torts.

He also handles appeals cases and has a number of reported decisions in his favor, notably *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, and *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801.

Much of this is a function of the reality that plaintiff's trial attorneys tend to know the gist of their cases better than their opponents. (The same is not true of the details; defense counsel commonly has an army of subordinate law clerks and associates running up many billable hours focusing on the details, especially those possibly containing nuggets of impeachment of the plaintiff.)

Moreover, in multi-party cases, and despite the obvious effort at a common defense, defense counsel jealously guard their workload and individual focuses. The plaintiffs' attorneys are simply less likely to split cases among different people and to keep management of their cases, and the responsibilities to attend to each appearance, to a single designated person, in large part motivated by an effort not to unnecessarily split fees or incur additional expenses. Thus, plaintiffs' attorneys, in my experience, tend to have a better appreciation for the overall forest – including the interrelation among experts – than defense counsel. We can, and should, use this division of authority and knowledge for our advantage.

The decision to depose, or not depose, a defense expert always requires consideration of other sources of information. These fall neatly into the following broad categories:

1. Get the expert's bill and case-related documents and billing records

There is *no* prohibition on subpoenaing these records. This can lead to a treasure trove of impeachment, including hidden reports, copies of previously undisclosed records and correspondence and, most importantly of all, the expert's billing records. Also subpoena the expert's current curriculum vitae and medical-legal billing sheet. There are few things more effective than showing that an expert is an overpaid hired gun who billed thousands and thousands of dollars for no apparent legitimate reason.

2. Determine the expert's historical bias or flaws through external sources

The best source of such impeachment materials is from other plaintiff's lawyers, list servers, deposition banks, professional colleagues or opposing experts, etc. Experts rarely testify to their own biases; indeed, the most biased experts tend to have stock, and misleading, answers to these lines of questions. If the expert has testified to excessive prior expert work in another case, that is plenty.

3. Use the Internet

See if this expert has any publications or other information online that might be useful. In one non-injury case, for example, we deferred deposing an expert because he had published a book, directed to the lay reading public, which was pretty specific to his anticipated testimony. When I started to cross-examine him on his book (which almost caused my opponent to suffer a heart attack after her "beyond the scope" objections were shot down), he had to admit that my client's behavior had been well beyond that recommended, in plain ordinary English, in his own book; thus, he had to concede, in front of the jury, that my client's behavior was really beyond reproach, while the defendant's behavior was nothing more than sour grapes. The impact on my opponent's emotional state was clear and, frankly, gratifying. This was one of those great Perry Mason moments: and Perry never deposed anyone!

4. Use expert's errors

If the known information about the expert (such as reports) suggests that the witness is biased or applying erroneous standards, prepare to hit the expert, at trial, with the contrary information. But, of course, be careful and knowledgeable when you confront experts in their areas of expertise.

5. Be clever

For example, I recently confronted an economist who used his membership in a forensic economics group as a leading professional credential. I went to court armed with a print-out of the group's website and its membership qualifications (essentially, payment of a fee). When I pointed out that my cat[1] could join the organization, the "expert" had enough sense to reply, "But only if your cat has a credit card," which was very funny but rather unhelpful to the defense side. By the time I established that this expert, despite his degrees, had never taken a class in forensic economics or any related field and had learned his trade from another professional testifier, the ballgame was long over.

6. Always subpoena the experts' current materials to trial

Frequently, this can be done by a notice in lieu of subpoena to the defense. Be careful since you are directing that to the defendant itself and not the expert, so frame the requests carefully (e.g., ask for whatever billing information the defense has, not the experts' in-house daily worksheets). If desired, do both.

I suggest that the following matters should be considered before electing to depose selective defense experts:

1. Cost

This is an important consideration which we tend to dismiss as inconsistent with an aggressive representation of the client. It isn't: cost is a legitimate factor, especially if the attorney is paying the freight. If the client wants the attorney to depose marginal people, the client can pay for it.

2. Out of sight, out of mind

It is truly amazing how often an eyeball witness, or expert witness, who you worry about, apparently is just not on your opponent's radar. While our opponents clearly know their own obvious core experts, it is also very likely that many of the "secondary" experts – or to be more precise, the real significance of those "secondary" experts – are simply outside of your opponent's field of vision.

This is particularly true of medical malpractice cases, where the "secondary expert" might actually be highly relevant. The opposite is also true.

For example, it has been my experience that many defense lawyers have an impression that neurologists have an enormous scope of practice, to the exclusion of other doctors. Likewise, they tend to under-appreciate, or just dismiss, the importance of certain "obscure" areas of practice, including the wide range of non-physician ancillary professionals. But see *People v. Villarreal* (1985) 173 Cal.App.3d 1136, 1142, 219 Cal.Rptr. 371 and *Chadock v. Cohn* (1979) 96 Cal.App.3d 205, 157 Cal.Rptr. 640. If you don't depose these people, it may well be that your opponent will never really appreciate how they fit into the larger picture.

In one case, many years ago, we offered a pharmacist as an expert regarding the defendant's disastrous choice of medication. The defense laughed and ridiculed this "mere pharmacist" as being "just the guy who gives out pills at Thrifty"; however, we established that this pharmacist was an academic, hospital-based expert, with a string of reputable publications in this particular medication scheme and, indeed, his large teaching hospital *required* that he be consulted on this choice of medication because of his very specific knowledge. In this sense, this "mere pharmacist" literally had hundreds of experiences with this medication choice while the defendant and the other experts had few actual experiences among them and, with their limited experiences, could hardly talk about the standard of care. The point is that you may not want to depose this expert in the hope that the defense never realizes what they have.

3. Use the detailed written report

Especially with defense medical examiners, you may already have a good understanding of their anticipated testimony: If you have a detailed report, live with it. Don't waste your time deposing experts for your own general education.

Code of Civil Procedure § 2032.610(a)(1), requires that "a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner" be provided to the examined party. If the defense report is inadequate, then use this and see if the judge will bar "details" which were not included in this statutory "detailed written report." This is potentially a developing area of law.

4. Educating your opponents about your theory of the case

I presume that many of us have learned something about our case when our opponent deposes our experts. Never, ever forget that the defense is also learning about you, your experience, your knowledge, your abilities and your approach, when you are deposing their experts: why would you pay their expert to educate them? Do not assume that your opponent is not absorbing and learning information too, at your expense. Make a choice: is the gain worth the certainty of educating them?

5. Educating your opponents about the strength and weaknesses of their experts

The weaker the expert or the better your efforts at the deposition, the more likely the defense attorney is going to learn, and then attempt to fix, these flaws. Moreover, especially when the defense has some overlap or redundancy in their experts, this is a great opportunity for them, "on your dime," to pick the better expert. Don't assume that your opponent will do nothing from this experience: assume that they will take remedial action.

I recall a specific instance where we deposed a then-defendant who had given a documented "hallway consult" about a hospitalized patient. The documented note implied that this defendant, a truly renown expert, had merely "suggested" the approach which we were claiming was required by the standard of care. The defendant/expert testified that this was not casual "suggestion," but that, in part due to his renown status, he expected that this would be followed as a "recommendation." Based on this great testimony and my strong impression that I had locked him into this testimony, I dismissed him from the case. When he later appeared, at the behest of the other doctors (all of whom were colleagues), his testimony was very cleverly repackaged to disguise this clear testimony. This was clever lawyering on their part with a now very willing witness.

6. Allows co-defense counsel to coordinate their experts and smooth over any material differences

This is specific to multi-defendant cases. While you should always assume that the defendants coordinate their defenses, do not assume that they are trading detailed information about their experts or the basis for their opinions. Their best opportunity to see their co-counsel's expert is at the deposition at your expense.

7. Allowing defense counsel and their experts to bond

This is simple human nature: once two people with a common business purpose and opponent are compelled to meet face-to-face, they will work better together. Why help them bond?

8. Educating defense counsel about gaps in their knowledge of the case and/or their defenses

One of the greatest human failings is not knowing what you don't know; even defense lawyers suffer from this. Since, unlike most plaintiff's firms, defense firms tend to split up work among their staff and the trial lawyer tends to focus on the case very late, why give them the opportunity to learn about these flaws in time to fix them?

9. Allowing defense counsel to expand the experts' testimony beyond the scope of the description in their designation of experts

There has been considerable discussion on this subject (see, e.g., *Bonds v. Roy* (1999) 20 Cal.4th 140, 147, 83 Cal.Rptr.2d 289 and Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶¶ 8:1677 and 8:1717.1 et seq.). Many defense firms are frankly sloppy in their expert witness disclosure and rely upon their experts' depositions to fix their mistakes. If you elect not to depose the witness, you are much more likely to show (and actually suffer) prejudice and to thus limit that expert to the four corners of the disclosure.

10. Prematurely disclosing lines of potential impeachment

Again, make an informed decision: do I have enough, right now, to damage this witness at trial? Is it worth the risk and the expense to squeeze out a bit more value at the deposition?

11. Educating inexperienced experts about legal proceedings

While the defense tends to recycle the same professional experts in case after case, they sometimes use neophyte experts who have never experienced the battle and may still be in psychological denial about their real role as an advocate. Why help them train their expert?

12. May cause the expert to overreach before the jury

We have all seen defense experts offer the most ridiculous testimony in deposition. Invariably, smart defense counsel will try to smooth this over and keep the expert from failing "the laugh test." The best place to expose a defense expert to overreaching is in front of the jury, when it is too late to massage the testimony to conform to common sense.

13. May cause plaintiffs' counsel to feel compelled to disclose much of their reasoning and/or evidentiary strategies in motions in limine

Again, we are all slaves to the motion in limine process, hoping that the judge will be fair and strike out half of the defense case. (See *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 56 Cal.Rptr.2d 803 [re use and misuse of motions in limine].) Yet, consider that the most effective use of all of that research may be when the defense expert arrives and/or is in the middle of testimony. Imagine the satisfaction of handing the trial judge a short "pocket brief" showing a legal flaw in the proposed testimony, and having the judge's ruling essentially stop this witness in their tracks.

14. Allows the defense to "clean up" testimony which varies from the governing jury instructions

Most experts have no idea about the legal requirements for testimony (the rules of evidence) or the substantive law applicable to their testimony. If the expert

testifies to standards other than those in the jury instructions, the expert has self-destructed.

For example, product liability case experts may frame their testimony in terms of "negligence" (which is certainly a standard appreciated by lay people) and not "defect." If so, you may be able to have the entire testimony stricken or rendered irrelevant just because the expert used the wrong buzz words.

15. Allows defense counsel to work with their experts to coordinate their testimony and eliminate any obvious inconsistencies

This applies both to single- and multi-defendant cases. Defense experts may offer differing themes or approaches that will undermine another expert in the case. As the earlier example of the two psychiatrists demonstrates, this can happen and be exploited to great effect, unless, of course, the experts and their lawyers are given the opportunity to finesse or eliminate the inconsistencies.

16. Experts may be subject to preclusion

The experts will be subject to preclusion if defense counsel does not comply with notices in lieu of subpoena and/or the expert does not comply with a subpoena for records.

Conclusion

We have all been raised in the adversarial world where, especially as we approach trial, we are hesitant to concede even a meaningless "tactical advantage" to our opponents. How many hours, for example, have we lost arguing over whose expert goes first, as if there is some objective reason to assume that first is better?

The kneejerk deposing of every defense expert falls within the same fallacy: don't just react, think about what you are doing. And stop worrying that every tactical choice you make may lead to a legal malpractice action against you. It won't. And if it still bothers you, document your file showing your reasoning for your reasoned decision not to depose and that should be enough. ■

[1] I don't even have a cat. If I did, I would call it "Kitty Kapp."