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## 5 Ways To Ensure Your Injury Expert Doesn't Hurt Your Case

By **Y. Peter Kang**

Law360 (April 23, 2018, 5:28 PM EDT) -- An expert witness testifying in a personal injury case can seriously undermine its success if he or she is surprised at trial by materials that should have been provided, fails to disclose prior testimony in other cases or isn't aware of what communications are discoverable by the other side, attorneys say.

Because juries tend to punish attorneys who cross-examine likable plaintiffs or defendants too harshly, oftentimes expert witnesses serve as punching bags for opposing counsel, according to Alexander R. Wheeler of R. Rex Parris Law Firm.

"If you handle it right, you can take all your anger and all the energy that you would otherwise use to cross a party or other witness like a treating doctor, and you can eviscerate an expert without upsetting the jury," said the Southern California-based personal injury plaintiffs' attorney. "Every time you put an expert up there, the other side is liable to skewer them."

Here, Law360 offers five tips to help personal injury attorneys make sure an expert doesn't undermine a case.

### **Make Sure You Know the Expert's History**

An expert's resume and academic credentials may seem sparkling, but sometimes their past experience isn't a good fit for a case, said Tara R. Devine of Salvi Schostok & Pritchard PC in Chicago. If medical malpractice allegedly occurs in a doctor's office or other outpatient setting, putting up an expert who only has experience treating patients in a hospital setting would be unwise, she said.

"You have to do your own research and dig deeper into their qualifications to see if they are the right fit," Devine said. "You don't just match up specialties. They have to have the education, experience and training for whatever case you are handling."

Devine also noted the need to scour any publicly available information regarding an expert's academic papers published in peer-reviewed journals and elsewhere in order to prevent having an expert's past views on any given topic contradict testimony in the instant case.

"You shouldn't be finding out during his deposition that he wrote an article that supports the defense's theory in that case, and you would not want to find that out at trial or at a deposition," she said.

In the same vein, an attorney should also be well-versed in an expert's prior deposition and trial testimony so as to avoid contradicting the opinion he or she is giving in the instant case, according to Steven Vinick of Joseph Greenwald & Laake PA in Maryland.

As an example, Vinick said a medical expert who previously testifies that general anesthesia is required during a certain procedure will raise eyebrows if he or she later states that local anesthesia is called for under similar circumstances.

"If the expert is not consistent, they are going to look like they will say whatever the party wants them to say," the personal injury plaintiffs' attorney said. "Juries absolutely pick up on that."

Devine added that one should also be aware of how many times an expert has testified for one side or another, and what percentage of income is derived from expert work, as those issues often serve as fodder for opposing counsel.

### **Give the Expert Everything**

An attorney should also give an expert every important piece of information about the case despite the expense, said Wheeler, who says his rule of thumb for experts is to opt for "extreme overinclusion."

"The most effective cross of an expert is usually: What did they send you, what did they not send you? Who did you talk to, who did you not talk to?" he said.

Devine noted that the attorney handling the case is in the best position to know exactly what an expert needs to help prepare to give testimony.

"You're doing your client and expert a disservice if you don't give them the materials they need to formulate their opinions about the case," she said. "You've lived with the case, you know what depositions are important. If you want to make sure they don't hurt you, the last thing you want at a deposition or trial is an ill-prepared expert. There's nothing wrong with asking them, 'What do you want to see that we didn't provide you?' or asking about any depositions that we need to take."

She said while providing all the materials may be expensive, it's more expensive to lose a trial after an expert is left to figure things out.

### **Be Aware of Everything the Expert Has Received or Sent**

As most state courts allow for the discoverability of all communications between lawyers and their experts, it's imperative that all emails, text messages and other communications be carefully monitored.

"Look over every piece of paper and every email sent to your expert," Wheeler said. "Holy moly, I can tell you stories about bad things sent to experts. The rule is whatever you give to an expert the other side also gets. If you have a privileged memo sent to an expert, odds are that it's discoverable. I teach associates the rule: Whatever you're sending to an expert, you are sending to the defense lawyer, because it's the same thing."

Often, experts will provide testimony in different states or in federal court and are sometimes unaware of the state court's rules on discovery, according to Devine.

"An expert may not know that what they send you is discoverable," she said. "The last thing you

want is your expert to send you something that can be misinterpreted or harmful to your case. Some of the newer experts aren't told what the laws are as they relate to them and their communications. You don't want to do the opposing counsel's work for them."

### **Ask Your Expert the Tough Questions**

Before an expert is deposed, they should be subjected to rigorous questioning on the issues most likely to be raised by opposing counsel, Devine said.

"If you ask the difficult questions that you think the defense will ask, you can see how they handle it," she said. "They shouldn't be asked those questions for the first time during a deposition. You, as a hiring attorney, need to know how they will respond."

Playing the role of the opposing lawyer is one effective way to figure out how your expert will respond under pressure at trial, Vinick said.

"Press the expert on all of the points in your case that you think are weak or are very thin on evidence. Issues that aren't supported by a lot of evidence are subject to misunderstanding," he said. "You can test your own expert on hypotheticals that you are sure the other side will ask."

He added, "The goal is that the expert, at trial or even a deposition, will not be asked any questions that you haven't already prepared him for. He will be able to expect everything and there won't be any new questions."

### **Treat Depositions Like Trial Testimony**

Wheeler said some attorneys will fail to prep expert witnesses for depositions with the same intensity as they do before a trial, which is a mistake.

In California, deposition testimony has the same weight as trial testimony.

"People tend to slough off witness prep," Wheeler said. "At least in California, once that deposition begins, you might as well be testifying in front of a jury."

An attorney's likely excuse for failing to prepare an expert for a deposition is a lack of time, but this could come back to haunt counsel when deposition testimony given by a poorly-prepared expert is read at trial or the videotaped deposition is played for the jury, Wheeler said.

"That's devastating," he said. "The jury can see the same witness on the screen, see the juxtaposition with their eyes staring at them in court."

--Editing by Katherine Rautenberg and Alanna Weissman.