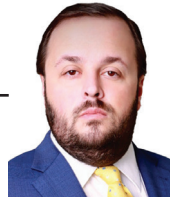




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The roles of expert witnesses in motor-vehicle-accident litigation

UNDERSTAND WHAT EACH TYPE OF EXPERT WITNESS BRINGS TO YOUR MOTOR-VEHICLE CASE

Expert witnesses are an integral part of any plaintiff's case, but especially when litigating a motor-vehicle collision. Experts for relevant medical specialties are just the beginning. An expert or experts for accident reconstruction and biomechanics may also be essential. From there you might consider a traffic engineer, a human factors expert, a trucking expert, a life-care planning expert and/or a billing expert depending on the specific facts of your case. Further, non-retained experts including treating physicians, police officers, first responders, and coroners may also be necessary.

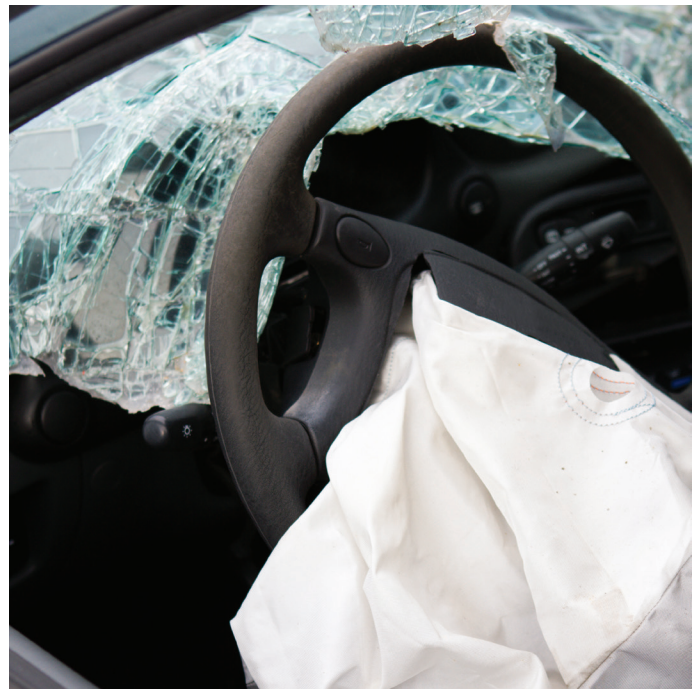
Choosing which experts and when they should get involved depends on the value and complexity of the case. Retaining and speaking with an expert early on can assist with complicated issues and assist with proving liability or ensuring proper care for your client. If your case is not particularly complicated, or the case cannot afford the cost of an expert that early, you may wait until expert designations are coming due.

To that end, always make sure to keep track of your expert-designation deadlines. Code of Civil Procedure section 2034.220 states that a demand for an exchange of expert trial witnesses shall be made no later than 70 days before the trial date. Section 2034.230, subdivision (b) states that the exchange of expert witness information shall be 50 days before trial. Section 2034.280 states that the supplemental expert exchange will be 20 days after the initial exchange.

As your expert-designation deadline gets closer, you should select your experts for all necessary specialties relevant to your case, if you have not already done so. Some you may designate initially, and some you will want to use for supplemental designations. Make sure to reach out to your desired expert in advance of your designation deadline to ensure they are not conflicted out, are able to testify at the time of trial, and can help your case. Having to find a last-minute replacement for an expert that doesn't fulfill these needs is a major stressor that should be avoided at all costs!

Exchanging expert information

The role of any expert in a case is ultimately determined by their specialty and the contents of your designation. Code of Civil Procedure section 2034.260 details the requirements of expert designation. The pertinent portion of subsection (b) states "The exchange of expert witness information shall include either



of the following: (1) A list setting forth the name and address of a person whose expert opinion that party expects to offer in evidence at the trial." Subsection (c) details the required information to be included in the declaration, to be signed by the attorney, that is to accompany your expert designation. "This declaration shall be under penalty of perjury and shall contain all of the following: (1) A brief narrative statement of the qualifications of each expert. (2) A brief narrative statement of the general substance of the testimony that the expert is expected to give. (3) A representation that the expert has agreed to testify at the trial. (4) 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 an opinion and its basis, that the expert is expected to give at trial. (5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney."

If you retain a medical expert for your case but fail to list in their designation that they will be testifying as to the plaintiff's need for future medical care or as to causation, then they will likely not be allowed to testify on those matters. Your expert designation is your roadmap for the expert's opinions and testimony. Make sure it is complete. For your medical experts, make sure to include causation, reasonableness and necessity of treatment both past and future, physical and occupational restrictions, and reasonableness and necessity of the costs of treatment (if your expert agrees to do so). For an accident reconstruction specialist, matters for opinion and testimony can and should include liability, accident reconstruction, weather conditions, lighting, speeds, visibility, signage/warnings and collision causation. These are just some of the topics you may want to consider; this is not an exhaustive list. Make sure to customize your expert designation to the specifics of your case.

The expert's ability to explain complex issues

Despite all the technicalities above, never lose sight that an expert's responsibility is to express and explain complex issues to the jury. Most experts are good at expressing complex issues, but few are skilled at explaining them. When selecting your expert witness, make sure they can explain the nuances of their field to a lay person, so that your jury can easily digest the information.

Now, while experts may be needed to establish the facts necessary for you to prove liability and damages in your case, be aware that they are prohibited from offering pure legal opinions. For example, for a motor-vehicle collision, experts are not permitted to testify on ultimate fault or the effect of California statutes, (*Palmieri v. State Personnel Bd.* (2018) 28 Cal.5th 845, 860 [effect of California statutes presents purely legal questions]), duty of care and legality of truck hauling practices, (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.4th 1155

[admission of expert testimony containing numerous legal opinions on duty of care and legality of truck hauling practices was reversible error]), or how a reasonably prudent person would have acted, (*N.G. v. County of San Diego* (2020) 59 Cal.5th 63, 77 [trial court was not required to rely on expert's opinion on the ultimate issue of whether plaintiff acted the way reasonably prudent person would have acted under same circumstances]).

The liability experts

In a disputed motor-vehicle collision case, your main liability expert will specialize in accident reconstruction. This expert's opinions will be based on the inspection of vehicles, EDR data, photographs, traffic collision reports, video of the collision, written discovery, and depositions. With that information an accident reconstruction expert can re-create the crash and lead the jury to the conclusion that the defendant caused it. Your accident reconstruction expert will take all of that data and explain to the jury what it says about how the collision occurred.

While not always necessary, you will do your client a great disservice if you do not have your expert make a computer re-creation of the collision, as this will be much more compelling, and easier to understand, than a simple description of the mathematical variables involved.

Additionally, multiple animations of the collision with differing variables can show how the incident could not have happened had the defendant driven slower, applied the brakes sooner, or tried to avoid the collision altogether.

From there, your accident reconstruction expert will also help you establish and argue how the actions or inactions of the defendant were a direct cause of the collision and how, had the defendant refrained from breaching their duty of care, the collision would not have occurred.

In cases where the defendant is claiming the plaintiff could have or should have avoided the collision, the same opinions and animations can be

used to show how no other reasonable actions on the part of the plaintiff could have altered the course of events.

In cases where the defendant is operating a truck, acceleration, stopping distance, blind spots, and various other aspects unique to said vehicle and business practice must be considered. Utilizing a trucking expert to explain these matters and any potential heightened duty of care is important. Further, a trucking expert can and will be able to address the requirements for driving a truck including, but not limited to, duration of drive time to rest time and compliance with Federal Motor Carrier Safety Regulations or other state regulations.

Supplemental experts

While sometimes helpful, it is generally recommended that you wait and supplement with a human-factors expert if the defendant designates one first. Read the section regarding supplemental expert disclosure very carefully, as you are only allowed to supplement with an expert you have not previously designated and which opposing counsel did. Supplemental expert designation is not a mechanism for you to correct your mistakes in designation; it is used to ensure the parties are able to rebut the testimony of an expert they did not initially anticipate the need for.

So, if you fail to designate experts entirely, you are prohibited from supplementing regardless of who the defendant designates. The declaration for the newly supplemented experts follows the same rules and requirements as previously discussed and detailed under subdivision (c) of section 2034.260.

A human-factors expert can testify to matters concerning perception, reaction time, attention, and/or distraction in a quantifiable way, with your accident-reconstruction expert's findings, to address how the human participants to the crash could have experienced it: Could or should the defendant have reacted sooner; if so, by how much; how

much time would the plaintiff have had to avoid the collision, and what actions would have been reasonable to take given the circumstances? A human-factors expert can create depth to a simple reconstruction and provide the jury with a better understanding of how both parties acted or could have acted as they experienced the collision.

Generally speaking, biomechanics is another specialty where you are better to supplement with this expert, in response to the defendant designating one, rather than initially designating one yourself. This is because you should already have your client and the physicians to give you causation. Further, should you designate a biomechanic, we recommend that you have separate experts for accident reconstruction and biomechanics, as the findings of the accident reconstruction expert will inform the findings of the biomechanic expert, and this reduces any arguments of bias that the findings of one are tailored to the desired results of the other.

The nature, severity, and direction of the forces your client experienced will be the link between the collision and the findings of your biomechanic expert. The former topics will come from your accident reconstruction expert, specifically things like the forces involved in the collision such as delta-v, lateral and longitudinal acceleration, and g-force to name a few. These calculations are important as they detail the specific forces your client was exposed to as a result of the collision, the same forces which caused your client's injuries.

While most accident-reconstruction experts are engineers and good with math, they likely do not have the foundation to explain how the collision can affect the human body. This is where biomechanics can help. This expert will translate the inspection findings and measurements, delta-v speeds, directional acceleration, and photographic/video evidence, to provide an assessment of what forces your client would likely have experienced in the crash, where, and injury probability as a result.

Your biomechanic expert won't testify to the specific forces your client actually experienced, but the likely effects on a similar person in similar circumstances. This is because the exact circumstances your actual client experienced are due to multiple factors that were not measured at the time of impact. A vehicle might have an EDR system, but your client and their human tissue and body does not.

Medical experts and proving damages

Your primary experts in proving damages will be your medical experts. Regardless of specialty, you will need to ensure their testimony is able: 1) explain to the jury what injuries your client sustained and what treatment your client had to undergo as a result of those injuries, 2) establish to a reasonable degree of medical probability that those injuries were caused by the collision, 3) establish to a reasonable degree of medical probability that the treatment provided was medically necessary and reasonable, and 4) establish to a reasonable degree of medical probability that any future treatment recommended to your client is reasonable and necessary. Depending on the situation, you will also want your medical experts to testify to the reasonableness and necessity of the costs of medical treatment, both past and future.

When selecting your medical experts, again, make sure they are able to explain the findings, not just express them. Make sure that your experts have the foundation to do so and demonstrative evidence to show a jury what they are speaking about. A doctor manipulating a replica spine on the stand or narrating an animation of a surgery is much more compelling than having your expert trying to explain those points just by speaking to the jury.

For significant-injury cases that have substantial future care recommendations, a life-care planner may prove important. Your client's future expenses are more than just their future surgeries. What care will they need, what accommodations will be required for the rest of their lives, what

alterations to their home or daily life can they expect on an ongoing basis are topics this expert can testify to. If you have a life-care plan, you remove some potential uncertainty for future care in the juror's minds and it allows them to rely on clear line-item recommendations and values.

If your medical experts are willing and able to testify to the reasonable costs of your client's treatment, both past and future, then you will generally want to hold off on initially designating a bill-review expert, and only designate if the defendant does. If they do not designate a bill-review expert, you will rely on your medical experts for testimony on this matter, and if opposing counsel completely fails to include reasonable costs of treatment in their designation descriptions, then they have no way to refute costs and should be dead in the water. If opposing counsel designates a bill-review expert, then you can supplement in order to address the issue more directly.

You want to do this because generally a medical expert will testify to the reasonable costs of treatment based on their own experiences with those procedures and the costs they have previously seen and reviewed. A bill-review expert will usually utilize a much wider range of data to support their conclusions. These factors make it difficult for your medical expert to go toe to toe with a bill-review expert.

Preparation with the experts

Once you have selected and designated your retained experts, make sure they are fully prepared to provide the most compelling and unassailable testimony possible. This starts with their expert file. Each will need to be provided the pertinent information from your case. If they don't have it, they cannot lay the necessary foundation to support their testimony and any missing information will create opportunities for the defense to damage or destroy your expert's credibility.

While not exhaustive, your accident reconstruction expert should do an

inspection of the site of the collision and, if possible, the vehicles. They will also need deposition testimony, photos of the scene and vehicles, and any other data related to the collision. Your biomechanic will need your accident reconstructionist's data and the medical reports from your treating physicians.

Your medical experts will need all the relevant medical records. Records are not limited to reports; make sure they have actual diagnostic films, billing records, lab/testing data, and the opportunity to personally examine your client. Don't forget to talk to each expert and ask whether there is any other information they want or need for their opinion, then work to get it.

It is also important to make sure that each of your experts has all the findings and materials of your other experts on similar topics, to ensure that the testimony from each is consistent. You will also want to provide each of your experts with the information from the defendant's counter-experts, both to provide you with any insight regarding weaknesses or issues to exploit during examination, and to ensure that your expert knows what matters they will need to rebut so they can adequately prepare.

Make sure you and your expert are both on the same page regarding their testimony. Make sure your expert is not blindsided by a question you intend to ask, and make sure you know what testimony your expert will give before they give it. You never want to be surprised at time of trial or deposition, as such surprises are usually never good for your case. Before you step foot into court, or deposition, make sure both you and your retained experts are fully prepared.

Non-retained experts

Depending on the facts of your case, there may be additional experts that are relevant, but in most motor vehicle accident cases, this list is fairly comprehensive, at least with regards to retained experts. Don't forget to utilize your non-retained experts to the fullest. Police officers, treating physicians, first

responders, etc. are also experts on your case even if they are not retained. Other than treating physicians, it is generally best practice to have a police officer or EMT testify in person if they can help your case. An officer or EMT in full uniform testifying in court is very compelling to a jury.

When done properly, your use of non-retained experts can provide you and your client with a significant advantage over defendant. Don't discount the impact that your non-retained experts can have on your case.

To take full advantage of this, make sure your depositions of your non-retained experts lay out all necessary foundation for their opinions, confirms that their opinions are to a reasonable degree of medical probability, and make sure to establish that they have personally assessed your client and the diagnostics in the case; otherwise, you may be prevented from using those opinions at time of trial due to lack of foundation.

Video-recording depositions

Regarding your treating physicians, when preparing for trial, one of the best ways to ensure a strong case is to make sure to notice the depositions of all your major treating physicians directly. Treat each and every one of these depositions as direct trial examination. Make sure to include Code of Civil Procedure sections 2025.220, 2025.340, and 2025.620 in your deposition notice and have the depositions video-recorded. If defense counsel gets the jump on you and notices these depositions first, make sure to file a notice of joinder and cite all the necessary code sections.

Code of Civil Procedure section 2025.220 states in pertinent part, "(a) A party desiring to take the oral deposition of any person shall give notice in writing. The deposition notice shall state all of the following, ... (5) Any intention by the party noticing the deposition to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method ... (6) Any intention to reserve the right to use at

trial a video recording of the deposition testimony of a treating or consulting physician or of an expert witness under subdivision (d) of section 2025.620."

Code of Civil Procedure section 2025.340 states in pertinent part, "If a deposition is being recorded by means of audio or video technology by, or at the direction of, any party, the following procedure shall be observed: ... (c) If a video recording of deposition testimony is to be used under subdivision (d) of Section 2025.620, the operator of the recording equipment shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions. ... (m) A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered."

Finally, Code of Civil Procedure section 2025.620 states in pertinent part, "(d) Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340."

The result of the proper use of these three Code sections allows you to conduct your treating physician trial examinations while in deposition, and simply use clips of said depositions at any time during trial. Not only can this catch the defendant flat footed, but it saves your client tens of thousands of dollars in trial-witness costs. If defense counsel fails to realize the importance of these depositions, when day of trial comes, and you do not call any of these individuals to the stand, defense counsel is either required to subpoena

their attendance directly and incur the costs or forgo a proper cross-examination at trial and instead merely designate the clips they wish to play.

Lock down expert opinions in deposition

When deposing opposing counsel's experts, make sure to "Kennemur them out" so you do not get ambushed with new opinions at time of trial. *Kennemur v. State of California* (1982) 133 Cal.App.3d 907 was a seminal case that established that a party's experts may not offer testimony at trial that exceeds the scope of their designations and/or deposition testimony if the opposing party has no expectation or notice that the expert will offer new testimony.

Accordingly, make sure to inquire whether the opposing expert has discussed all of their opinions or intends to testify as to anything else at time of trial.

Conclusion

Experts, both retained and non-retained, are integral to any and all litigation, and motor vehicle collision cases are no exception. The more complex the case, the more important your experts are, and the more of them you are likely to need. Just remember that when selecting an expert, deposing an expert, or examining an expert on the stand, there is a very important difference between expressing an opinion and explaining an opinion. There is no benefit in having an

expert on your case if the jury can't understand what they are speaking about. If your expert gets too complicated and technical, step back and ask them to explain what they meant so the jury can understand. Help your jurors to be on the right side of your verdict!

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