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By David B. Parker, William K. Mills, and Jayesh Patel

Expert Grilling

To prevent experts in legal malpractice cases from wielding undue influence, counsel must crack their facade of impartiality and reliability

"I am the law!" This phrase—uttered prominently throughout the Sylvester Stallone movie *Judge Dredd*, which was based on a comic book character—is increasingly the watchword of experts in legal malpractice cases.

As witnesses, these so-called experts are required to confine their testimony to "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"[1]—but courts seldom enforce this requirement. In fact, legal malpractice cases are uniquely burdened by expert witnesses all too ready to captivate unwitting juries and passive trial judges with their command of the "essence" of the law. When all else fails, they can summon even the spirit of the law divined through their "expertise."

A recent exchange on the meaning of an ethical rule between a defense attorney and a retired appellate jurist who was deposed as a plaintiff's standard of care expert in a legal malpractice case is illustrative:

Q: What is the authority for that?
A: I am telling you that is what the rule is.
Q: Is that rule written down somewhere?
A: Well, a "member" of the State Bar encompasses a firm….
Q: Does it say that in the [Rules of Professional Conduct]?
A: I am telling you the answer…. You read the rules, and I am telling you what the rules mean, if that is where you are going.
Q: We will take it one step at a time. The question—
A: Yes. It does not say it in—other than the language you read.
Q: All right. So it doesn't say it in so many words, but you are what, reading between the lines?
A: No. I am telling you what any judge in the State of California would conclude.
Q: Including our trial judge?
A: Including anybody.[2]

Judge Dredd himself could hardly have been more emphatic.

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Legal malpractice experts not only seek to gain a reputation for effectiveness on behalf of those who hire them but they also wish to appear objective and impartial to the trier of fact—and an understandable tension exists between these two aims. The result is thinly disguised advocacy.

While the rules governing legal malpractice appear to be clear, their application is not always so simple. As juries are afforded greater authority to decide issues that were once the province of courts, expert opinions become significantly more important. The influence experts wield is a result of the experts' perceived stature and their purported knowledge and experience on technical matters. Courts and counsel are often challenged in their efforts to conform expert testimony to the general rules limiting what experts are permitted to say.

These realities dictate that the best way to counteract legal malpractice experts at trial is to start the process before trial begins. Thus counsel should take effective depositions which, in turn, will pave the way for 1) aggressive pretrial motion practice ranging from motions in limine to motions to bifurcate, 2) preinstruction of the jury, 3) judicial notice, and 4) preliminary hearings under Evidence Code Section 402.

A number of rules affect the approach to taking expert depositions in legal malpractice cases, as opposed to other types of matters.[3] The general rule involving professional negligence claims is that expert testimony is essential for a case to be submitted to a jury.[4] Moreover, as most practitioners are painfully aware, legal malpractice cases usually require the reconstruction of a "case within a case,"[5] because liability hinges on proof that the attorney's conduct was the "cause in fact" of the injury. That proof typically rests in retrying the underlying litigation matter or reconstructing the underlying transaction to determine whether a particular result would have occurred or been avoided but for the conduct of the lawyer.

Questions invariably arise regarding the governing law in the underlying matter in a legal malpractice case, including whether the relevant underlying issues would have been decided by a court or jury, and whether those issues become the exclusive province of the court or jury in the legal malpractice action. Expert testimony in trials involving a case within a case reveals the complex interplay between the application of Evidence Code Section 310, which relegates questions of law to the exclusive domain of the courts, and Evidence Code Section 805, which permits expert testimony that might embrace the ultimate issues to be decided by a jury under Section 312.

Complicating the analysis further is an emerging trend empowering juries to adjudicate most matters underlying a legal malpractice claim. This trend is based on the principle that causation usually is a factual determination, even if that determination first involves reaching a conclusion on the merits of the underlying matter.[6]

In *Piscitelli* v. *Friedenberg*, the Fourth District Court of Appeal overturned a large judgment based on the role of an expert witness in a legal malpractice claim.[7] In doing so, the court examined the convergence between the jury's role and its reliance on expert testimony in adjudicating the hypothetical outcome of an underlying securities arbitration.[8] The court concluded that when an expert carefully crafts an opinion in such a way that it does not embrace a conclusion of law, the expert's opinion may still be inadmissible "if it invades the province of the jury to decide a case."[9] Therefore, even a general belief expressed by an expert on how a case should be decided—whether the case is the malpractice action or the underlying matter—is inadmissible.[10]

The limitation against interpreting the law should rightly extend to interpreting statutes or the Rules of Professional Conduct, or to applying them to a given factual scenario to opine on possible transgressions.[11] Expert testimony in these areas tends to overstep the authority of the trial court to determine the law and to instruct the jury on it[12] and may indeed intrude on the jury's role, as experts seek to apply their legal conclusions to the facts they have determined or assumed.

In taking expert witness depositions, a thoughtful and systematic approach is key. Counsel should begin their examinations by exploring the expert's qualifications, followed by inquiries regarding the expert's engagement and work chronology, bias, due diligence, and opinions.

Qualifications

Intertwined with the substance of an expert's testimony is the element of the expert's qualifications to provide his or her opinion. While qualifications are often summarily reviewed and conventionally treated as stand-alone issues, they are often overlooked as a measure of the admissibility of the particular opinions an expert might posit.

The threshold test is whether the witness qualifies on the basis of special knowledge, skill, experience, training, or education sufficient to testify on the subject for which the expert is offered:[13]

> The competency of an expert is measured relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.[14]

The trial court has considerable latitude in determining the qualifications of an expert, and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.[15] The standard for qualifying a standard of care expert—as opposed to testing the substantive admissibility of the expert's opinions—traditionally has been set very low.[16] Qualification standards are difficult grounds on which to preclude an expert from testifying, given the presumptions usually surrounding the element of qualifications and the more generally accepted concept that expertise can be "learned."[17]

In approaching an expert's qualifications in advance of the deposition, it is critical to ensure production, by agreement or subpoena, of the witness's current resume if it is not attached to the designation.[18] Once obtained, the accuracy and completeness of the resume should be examined at deposition, including whether the witness uses a different resume when testifying in a different kind of case or for other purposes. Thorough research of published directories and public records might provide a basis for attacking an expert's credibility if it reveals differences from the resume provided.

The relevant qualifications of an expert that should be examined include: 1) education and training, 2) professional experience, particularly as a practicing attorney, 3) public and professional activities, 4) publications and public speaking, 5) honors, and 6) experience as an expert, both in a consulting and testimonial capacity.

In particular, a witness's professional experience should be tested against the maxim: "Don't judge a person unless you walk a mile in that person's shoes." Attorneys questioning the witness should focus on the principal factors of the case and elicit whether a witness who is also a practitioner has encountered those factors under the same or similar circumstances—and if so, how often.[19] Throughout the examination of the other side's expert, counsel should always think in comparative terms and consider the strengths of their own experts.

Of course, once it is determined that the expert has had similar experiences in one or more situations arguably comparable to the case at issue, the inquiry should focus on what the expert did or how the expert acted in those prior instances. For example, when the case revolves around the drafting or negotiating of transactional documents or settlement agreements, witnesses should be requested to produce, in advance of the deposition, their work product under similar cir-

cumstances and should be asked at the deposition about forms and form files, among other particulars. An effort should be made to test the materials of witnesses to determine whether, in their own practices, they follow the standards they now proffer as experts.

An expert's publications and public speaking activities may be a rich source of information regarding bias, due diligence, and the foundation for the expert's opinions. This area should be explored to determine if there is any material pertinent to the subject matter of the case.

An inquiry into the expert's experience consulting and/or testifying (the two are not the same)[20] is also important. Counsel should determine how many times the opposing side's expert has been engaged in either capacity. Moreover, counsel should find out how often the expert has previously testified or been deposed and how many times the expert has been designated as an expert. If any instances are discovered that are even remotely comparable, the examining attorney should inquire about the existence of documents related to the prior service, including transcripts as well as the names of the parties and counsel on both sides, the court in which the testimony was given, and the date. The most important items of information are the names of opposing lawyers, because they most likely had the same task with which the examining attorney is presently confronted and may prove to be a valuable resource. For so-called professional witnesses, additional effort should be expended to establish how much of their time is spent in serving as experts and how much of their income is derived from expert witness activities. These witnesses should also be asked how effective their advertising is in obtaining expert engagements.

Trial judges find it easy to allow a witness to testify by repeating the refrain, "It [the witness's testimony] goes to the weight." Once a witness is established as a qualified expert, the challenge is to determine whether the expert testimony goes to credibility or weight[21] or falls under some legal proscription.

Bias

Although presented to the trier of fact as independent and objective, experts are usually neither. The process of examining for bias begins with a careful inquiry about possible relationships between the expert and the parties, their lawyers, and other experts in the case. During the examination the witness should be asked to provide a chronology of events from the date the witness was first contacted as a potential expert to the date of the deposition. Billing records are crucial

MCLE Test No. 100

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HYPOTHETICAL 1

The plaintiff in a legal malpractice case retains Noah Awl as an expert witness on the standard of care. In the case, the legal malpractice claim arose before the plaintiff filed a Chapter 7 bankruptcy petition, but the legal malpractice claim was filed more than a year after the bankruptcy was closed. The plaintiff/debtor's ability to pursue certain claims in the bankruptcy allegedly were compromised because of the legal malpractice, and the plaintiff sued the lawyers to recover the damages that the plaintiff claims to have suffered. Awl is retained and designated by the plaintiff pursuant to a timely served Code of Civil Procedure Section 2034 notice. The designation indicates that Awl intends to testify on, among other things, "the meaning and application of 7 U.S.C. Section 362 (automatic bankruptcy stay) in the context of the legal malpractice claim" and "how the bankruptcy court judge would have ruled but for the legal malpractice."

1. Generally Awl, like any expert, may be permitted to express opinions on a subject sufficiently beyond the common experience to assist the trier of fact.
True.
False.

2. Legal malpractice cases generally require the testimony of expert witnesses on the standard of care.
True.
False.

3. Bankruptcy law and its impact on the applicable statute of limitations is a proper subject of Awl's expert testimony.
True.
False.

4. Is it proper for the judge to permit Awl to testify about how the bankruptcy judge in the underlying case would have ruled?
Yes.
No.

5. Expert witnesses in legal malpractice actions are permitted to offer opinions concerning the outcome of the case within a case.
True.
False.

6. A court may find that an expert witness is qualified based on the witness's research and study.
True.
False.

7. Before deposing an expert witness, should counsel obtain the expert's files and resume?
A. No, because experts usually bring these reports to the deposition.
B. Yes, because it is critical to test the expert's qualifications and opinions.
C. Yes, this is required by law.
D. None of the above.

8. Lawyers who previously deposed the expert:
A. May be valuable resources in exploring the expert's qualifications and opinions.
B. May participate in the deposition under Code of Civil Procedure Section 2034(d).
C. May submit letters rogatory to be answered by the expert at the deposition.
D. None of the above.

9. Expert witnesses are required to be independent and unbiased.
True.
False.

10. Establishing a chronology of events from the initial contact of the witness by opposing counsel to the date of the deposition is a useful mechanism to test an expert witness's bias.
True.
False.

11. In the deposition of an expert witness, counsel can probe for bias by examining:
A. The expert's billing records.
B. The expert's prior relationships with opposing counsel and client.
C. The expert's prior work for plaintiff or defense clients.
D. All of the above.

12. Juries tend to rely more on experts who perform their own due diligence.
True.
False.

13. Obtaining the expert witness's file by subpoena in advance of the deposition will make it more likely that documents will not be destroyed or lost.
True.
False.

14. During the deposition, the expert witness should be questioned about all oral or written communications relating to the legal malpractice case with:
A. The attorney who retained the expert and the attorney's staff.
B. The expert's staff.
C. The party for whom the expert was retained.
D. All of the above.

15. Counsel should question the expert witness whether he or she intends—or has been asked—to do additional work after the conclusion of the deposition and before the witness testifies at trial.
True.
False.

HYPOTHETICAL 2

Awl is deposed by the defendants' counsel, Jester Tryun. Tryun obtains in advance by subpoena Awl's complete working file on the case, including Awl's report to the plaintiff's counsel, which includes a list of opinions. Tryun asks about each of the opinions contained in Awl's report. Tryun does not ask about any additional opinions that Awl formulated but are not contained in the report—and Awl does not volunteer this information. Weeks later, at trial, in response to direct examination by the plaintiff's counsel, Awl testifies to all his opinions, including those not revealed in his deposition. On cross-examination, Tryun asks, "Why did you not give me those opinions during your deposition?" Awl responds, "You never asked me."

16. What is the best way for Tryun to mitigate being surprised at trial?
A. Making a motion to strike and instructing the jury to disregard the testimony.
B. Confirming, before the deposition was concluded, that Awl had discussed all his opinions.
C. Making a motion in limine to limit the testimony of the expert to the testimony at the expert's deposition.
D. None of the above.

17. Tryun's failure to obtain the opinions prior to trial:
A. Was foreseeable.
B. Was preventable.
C. Reflects on Tryun's lack of diligence.
D. All of the above.

18. Once an expert witness's opinions are obtained, it is essential to determine the factual and legal foundation for each of the opinions.
True.
False.

19. The standard of care in legal malpractice cases is based on prevailing standards in the local community. These can be found by:
A. Attending professional meetings, and working and interacting with colleagues on the subject matter about which the expert is testifying.
B. Teaching and attending continuing legal education courses.
C. Reading professional publications.
D. All of the above.

20. For an expert witness retained in a legal malpractice case, who is the client?
A. The attorney who retained the expert.
B. The party for whom the expert was retained.
C. No one, since the retention of the expert is not an engagement for which legal services are provided.
D. None of the above.

MCLE Answer Sheet #100

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14.	☐ A	☐ B	☐ C	☐ D
15.	☐ True	☐ False		
16.	☐ A	☐ B	☐ C	☐ D
17.	☐ A	☐ B	☐ C	☐ D
18.	☐ True	☐ False		
19.	☐ A	☐ B	☐ C	☐ D
20.	☐ A	☐ B	☐ C	☐ D

documents to obtain before or at the time of the deposition because the dates on the records will provide a means for testing the witness's recollection and the records will establish a baseline for the witness's due diligence activity.

An inquiry into an expert's possible bias is often best approached casually through a matter-of-fact examination of the chronology. Bias may be reflected in personal relationships and may also involve philosophical interests and good old-fashioned greed. Indeed, experts might reveal their greed in a variety of ways, such as incurring large receivables, not receiving any payments, or acting without a retainer agreement—all signs that the expert's compensation may be keyed to the result in the case. Philosophical bias usually involves testifying only for plaintiffs or defendants and not both.

The identity of the employer of an expert is a proper basis for questioning because the identity of the employer can demonstrate bias. Examining attorneys should be aware that some defense experts are recommended and employed by malpractice insurers. Therefore it is permissible to inquire whether an insurance company either recommended the expert or hired and paid for the expert. Counsel should ask whether an insurer recommended or paid for each of the witness's prior engagements as a witness. Also, counsel should probe for the insurer's identity and whether the insurer accepted responsibility and paid for the expert witness fees. These inquiries could have the collateral benefit (or risk) of alerting a jury to otherwise inadmissible evidence of insurance or at least raise an inference when limiting instructions by the court could emphasize the issue favorably for one side over the other.

Once a nerve relating to bias based on personal relationships is struck, the examiner should dig deeply into the expert's professional and social contacts. An important inquiry will delineate if there is a history of referrals between the opposing side's counsel or party and the expert as well as any prior retention of the expert by the opposition or a former client relationship between the expert and opposing counsel. The question of whether the expert has ever been sued for malpractice is also significant.

An interesting challenge to an expert's bias and preparedness is the question: "Who is your client?" At a minimum this tests the expert's retainer agreement with opposing counsel. Many experts have never thought about the question and will struggle (or at least pause) when it is asked—and some will give surprising responses. Typically the answer is the party for whom they are engaged or, with equal frequency, the counsel who designated them as experts. Most experts realize that they are engaged by the lawyer for attorney work-product purposes and will give that answer. The third and best answer is "I have no client," because the expert's work, pursuant to Code of Civil Procedure Section 2034, is not an engagement involving the performance of professional services for others. Juries do not know what to make of the question either. Experts who identify their clients as the counsel or parties who engage them create a link that might imply bias, however subtly.

Exploring the nature and timing of the due diligence that the expert performed in arriving at the opinions for which the expert was retained is important and underscores the interrelationship between the elements of the expert's qualifications, bias, and the substance of the expert's opinions.

Due Diligence

Exploring the nature and timing of the due diligence that the expert performed in arriving at the opinions for which the expert was retained is important and underscores the interrelationship between the elements of the expert's qualifications, bias, and the substance of the expert's opinions. In legal malpractice cases, due diligence can be legal and factual. Legal due diligence includes research—a word that can be as broadly defined as possible. Most experts conduct very little research because they already know the area of law for which their testimony is sought and the data they use is supplied by the counsel who engaged them. (Counsel engaging the expert may consider themselves to be well qualified to supply all the information necessary for the expert and may do this as a means of saving the client money.) Often counsel has already formulated a strategy that merely needs articulation through a qualified voice at trial—but jurors' response to this tactic make it one that is best avoided.

Experts who fail to perform independent research risk appearing presumptuous and pretentious. Juries are more likely to rely on an expert who checks or ensures the accuracy of his or her information, from whatever source. A missed step, once discovered, may be an important piece of information that should be held for use at trial and not exposed in a deposition.

Factual due diligence is divided between documents and people. Sources of documents include those 1) obtained from counsel, 2) already in the expert's possession, and 3) independently obtained through the expert's own research efforts. If documents were obtained but are no longer in the expert's possession, the examining attorney should explore what happened to them and why. Experts who receive summaries or compilations of depositions or cases by opposing counsel present an opportunity not to be missed. Aside from the potential for raising issues about a waiver of the work-product privilege, these documents provide a means by which the examiner might gain a useful glimpse into the opposing counsel's mental impressions, especially if the summaries include the opponent's commentary.

After all of the expert's documents, including e-mail, are obtained in advance, during the deposition the examining attorney can inquire about the expert's use of the documents. By carefully reviewing and working through the documents upon which the witness relies, the expert's factual assumptions can be verified, identified, and tested.

Some experts might utilize documents other than those they receive directly from the attorneys who engage them. The documents on which experts rely also can be created by the experts themselves, and the prime example of these documents are expert's notes.

The expert may have been instructed not to take notes or to destroy them before the deposition. Issuing a subpoena to obtain the expert's files minimizes the risk of their destruction, and the unexplained loss of the information could be used to infer obstruction of justice or spoliation.

Factual due diligence involves gleaning information from appropriate people. Indeed, this type of due diligence leads directly to the attorney that engaged the expert and that attorney's coworkers, including secretaries, assistants, associates, and partners. Other persons that the expert might consult are parties, witnesses, other experts, and even the expert's colleagues. While counsel employing the expert is generally the principal contact for the expert, it is critical for opposing counsel to examine carefully all communications relating to the malpractice case, whether oral or written, that occurred between the expert and any person prior to the expert's deposition. These communications may be useful in analyzing the expert's opinions and conclusions and may be probative as well.

Also, it is important to inquire about additional work, if any, the expert expects to perform between the conclusion of the deposition and the trial. An effective tactic is to limit the scope of the expert's opinion so that if the expert goes beyond it or raises new information or opinions at trial, opposing counsel can argue that, based on the prior examination, the expert was intentionally misleading or evasive, or simply improperly or inadequately prepared for deposition. It is not unusual for the deposition examination to highlight gaps in the expert's approach. The expert may not be prepared to admit to these flaws during the deposition but may work to eliminate them before taking the stand at trial. A deposition inquiry has the potential to reveal those areas in which the expert has developed doubts and may provide the basis for a ringing admission of the expert's lack of due diligence in the first place.

Substantive Bases of Opinions and Conclusions

The most important, obvious, and sometimes overlooked aspect of expert witness examination is actually to obtain the expert's opinions. It is critical to get the expert's opinions on the record so there will be no surprises and, in doing so, verify that the witness will vouch for the accuracy and veracity of counsel's representations in the declaration describing the witness's proposed areas of testimony. Failing to obtain all of the expert's opinions could be disastrous later at trial.

The first question should be something like: "Describe for me all the opinions you have formed and that you expect to give at trial, as well as the factual and legal bases for your opinions." That approach, one sip of coffee into the deposition, is relatively disarming but can prove quite insightful; there is a certain intangible value to that kind of question, especially for a witness who expects the examiner to first ask how to spell the witness's name.

In trying to limit the scope of the expert's opinions as much as possible, the examining attorney should always inquire whether the expert will not be testifying about damages, causation, or any other element of the legal malpractice claim. The attorney should also press the expert to determine if he or she intends to interpret law.

The examiner must connect every one of the expert's opinions to each foundational fact for that opinion. In other words, the examiner should ask: "What facts are you relying upon in forming and expressing that opinion?" It is obviously important to determine whether the foundational facts are those that the expert has discerned from due diligence or that the expert was asked to assume by counsel.

It is also essential to determine the expert's rationale in rendering a particular opinion. The expert should be made to explain why the expert's proffered conclusion is more compelling than any other that might be reached on the basis of the same facts or assumptions, and whether and why certain facts or witnesses were more important than others.

A fertile area of deposition examination that crosses the border between due diligence and opinions has to do with the standard of care. The standard of care is generally defined in BAJI as reasonable conduct measured against a community standard.[22] Experts generally concede that fact. But a witness should be asked whether he or she agrees with the BAJI instructions. Though the witness will likely agree, further questions should aim at determining the manner in which the expert defines the standard of care on which the expert's testimony is based.

Defense experts tend toward a lower standard of care while plaintiffs' experts sometimes confuse their own higher standards with those they would impose upon their colleagues. Discovering the prevailing standards in the community involves attending professional gatherings and continuing legal education courses, teaching, reading professional publications, and working and interacting with other colleagues and opposing counsel on a daily basis. Many experts are ill equipped to define the standard, let alone to deal with questions about it.

After the examining attorney elicits all the expert's opinions, the expert should identify whether those opinions have been expressed to anyone orally or in writing. Often the expert will have prepared a letter or a memorandum. Sometimes the counsel engaging the expert is not aware of this—and the existence of an expert's letter or memorandum comes as a rude surprise. The expert may have expressed his or her opinions in a different manner to third parties, but these communications are an infrequent source for contradicting an expert.

One strategy that yields interesting results is asking the expert to consider the areas about which an opposing expert will testify and inquiring whether the expert agrees with his or her counterpart on the other side. This approach can be valuable if opposing counsel, sensing areas of weakness in their case, have been very careful about circumscribing the scope of their expert's testimony. If potential areas of testimony have been removed from consideration because they are beyond the scope of the expert's designation, opposing counsel who probe into that territory may draw an objection but, at the same time, the questions will reveal a raw nerve requiring further exploration.

Expert witnesses are intended to aid the trier of fact with insight into specialized knowledge, training, and experience. The law prohibits expert witnesses from defining the law. Nevertheless, aggressive counsel and their affable experts, echoing Judge Dredd's melodramatic declarations, refuse to acknowledge that reality, short of a court order.

Through a disciplined and methodical approach, lawyers faced with the sometimes daunting task of piercing the seemingly impenetrable aura surrounding legal malpractice experts will be better prepared to ensure proper presentation of truly admissible expert opinion testimony at trial. ■

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[1] EVID. CODE §801(a).

[2] Deposition on file with the authors.

[3] In California, the applicable standards that govern the ethical duties of attorneys are conclusively established by the Rules of Professional Conduct. Testimony to the contrary is disregarded and a legal expert's testimony cannot change these standards. David Welch Co. v. Erskine & Tully, 203 Cal. App. 3d 884, 892 (1988). When the content of the testimony involves the interpretation of law, the court should exercise its exclusive prerogative, make the determination of law, and give appropriate instructions.

[4] Wilkinson v. Rives, 116 Cal. App. 3d 641 (1981); Alhino v. Starr, 112 Cal. App. 3d 158 (1980); Conley v. Lieber, 97 Cal. App. 3d 646 (1979); Lipscomb v. Krause, 87 Cal. App. 3d 970 (1978); Wright v. Williams, 47 Cal. App. 3d 802 (1975).

[5] *See generally* Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820 (1997). *But see* Viner v. Sweet, 2001 Cal. App. LEXIS 767 (Sept. 28, 2001) (case within a case not required in a transaction-based legal malpractice case).

[6] *See* Ceriale v. Superior Court, 48 Cal. App. 4th 1629 (1996). In this case, a legal malpractice claim arising out of a marriage dissolution proceeding, the Second District Court of Appeal concluded that even though the underlying proceeding involved the law of equity and would have resulted in a bench trial, a jury must try the underlying issue in a case within a case as part of the legal malpractice claim. The authors' firm represented the plaintiff in *Ceriale*.

[7] Piscitelli v. Friedenberg, 87 Cal. App. 4th 953 (2001). The court found "a constitutional right to a jury trial in [the] professional negligence action, including its trial within a trial aspect, because it is a civil action at law." *Id*. at 969. The reasoning turned on the principle that causation is a jury question. *Id*. at 970-71 (citing Kurinij v. Hanna & Morton, 55 Cal. App. 4th 853, 864 (1997) ("[T]he question about what would have happened had [the lawyer] acted otherwise," is a question of fact unless reasonable minds could not differ as to the legal effect of the evidence presented.)). It should be noted, however, that there are instances in which the malpractice claim can only be decided by the trial judge. *Kurinij* involved, among other things, a failure to appeal, and the nonexistent appeal's lack of merit was resolved via the granting of a motion for summary judgment that was affirmed on appeal in spite of the causation analysis by the *Kurinij* court.

[8] When asked about the "relative probability" of Piscitelli prevailing in the underlying arbitration, Piscitelli's expert opined, "Piscitelli would very likely have prevailed in getting both monetary relief as well as having his [stockbroker's permanent record] improved had the [New York Stock Exchange] arbitration gone to completion." Piscitelli, 87 Cal. App. 4th at 972.

[9] *Id.* (citing Summers v. A.L. Gilbert Co., 69 Cal. App. 4th 1155, 1178 (1999)).

[10] *Id.* at 972-73.

[11] *See*, *e.g.*, Stanley v. Richmond, 35 Cal. App. 4th 1070, 1086 (1995).

[12] EVID. CODE §310; California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 67 (1985); Staten v. Superior Court, 45 Cal. App. 4th 1628, 1635 (1996). *See* Summers, 69 Cal. App. 4th at 1178 ("[T]he admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes.... [T]here are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law.").

[13] EVID. CODE §720(a).

[14] People v. Kelly, 17 Cal. 3d 24, 39 (1976) (citing People v. King, 266 Cal. App. 2d 437, 445 (1968)).

[15] Kelly, 17 Cal. 3d at 39; King, 266 Cal. App. 2d at 443; Pfingsten v. Westenhaver, 39 Cal. 2d 12, 19 (1952).

[16] *See*, *e.g.*, Jeffer, Mangels, Butler & Marmaro v. Superior Court, 234 Cal. App. 3d 1432 (1991).

[17] The Evidence Code provides for "training" as grounds for qualification. EVID. CODE §720. Trial courts may interpret that statute as permitting a lawyer expert to acquire the necessary expertise from research and learning instead of practical experience.

[18] CODE CIV. PROC. §2034(a).

[19] The defending attorney may object on the basis of privilege. However, agreeing to allow the witness to avoid the use of client names or identifying details should suffice. Forcing the assertion of the privilege can be a valuable tactic, however, and to avoid surprise, counsel should protect the record to ensure that the expert cannot waive the privilege at trial.

[20] Consulting experts generally are experts who are retained but not designated. CODE CIV. PROC. §2034.

[21] EVID. CODE §722.

[22] *See* BAJI 2.40 and 6.37 *et seq.*; *see also* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (5th ed. 2000) §19.2, at 66-68.