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# Tips for Examining Experts at Deposition & Trial From the Plaintiff, Defendant, & Judge Perspectives

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**Reference Materials**

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# Tips for Examining Experts at Deposition & Trial from the Plaintiff, Defendant & Judge Perspectives

## About the Speakers

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**JUDGE STEPHEN P. FRECCERO**, Superior Court of California, County of Marin, was appointed to the bench in 2015. Prior to his appointment, Judge Freccero was a partner at the San Francisco office of Morrison & Foerster LLP. In 1989, Judge Freccero left Morrison & Foerster and joined the U.S. Attorney's Office for the Northern District of California, where his long and distinguished term of service included an array of high profile and high stakes cases. Judge Freccero earned his bachelor's degree from Wesleyan University, and his law degree from the University of California, Berkeley, School of Law.



**EUGENE G. ILLOVSKY**, Illovsky Law Office, Oakland, is a nationally-recognized former prosecutor with decades of broad experience. He has tried many criminal and civil cases before juries and judges and has argued more than a dozen cases before the U.S. Court of Appeals. He has conducted internal investigations for companies and boards in matters involving securities violations, accounting irregularities, stock option backdating, intellectual property theft, export controls, and antitrust issues. Eugene has represented executives at all levels in corporate internal investigations, as well as in grand jury and SEC investigations. Before spending over 15 years as a partner in the major international law firm of Morrison & Foerster LLP, Eugene served as an Assistant United States Attorney for the Eastern District of California (Sacramento) from 1992-1998, where he investigated and prosecuted a wide array of white-collar crimes, including investment frauds, money laundering, political corruption, intellectual property crimes, and tax evasion. He received his J.D. from Yale Law School.



**STUART C. PLUNKETT**, Baker Botts, San Francisco, is a partner with over 19 years of experience representing clients in complex antitrust and commercial litigation matters across the country. His clients include companies and individuals in a broad range of industries, including high tech, financial services, energy, and healthcare. Mr. Plunkett also has significant experience in consumer and financial services class actions, securities fraud litigation, and intellectual property matters, including trademark and trade dress disputes. He regularly speaks and writes on these topics. Mr. Plunkett received his J.D. from Northwestern University School of Law.

**Tips for Examining Experts at Deposition & Trial from the Plaintiff,  
Defendant & Judge Perspectives**

Hon. Stephen P. Freccero, Marin County Superior Court  
Stuart Plunkett, Baker Botts LLP  
Eugene Illovsky, Illovsky Law Office

March 2018



# EXPERT WITNESSES

## Tips and Tactics

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## FOCUS OF PROGRAM

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- Selecting and Retaining the Right Expert for Your Case
- Federal vs. State Expert Witness Practice
- Expert Deposition Preparation
- Expert Deposition Testimony: Taking/Defending
- Trial Preparation
- Expert Trial Testimony: Direct/Cross

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## Selecting and Retaining the Right Expert

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- Consulting vs. Testifying expert
- Conflicts - actual and apparent
- Determining and communicating the precise area of expertise needed
  - What is Your Theory of the Case; what will be the expert's role in it?
- Experienced Testifier or Novice?
- Prestige isn't everything ...
  - Specific experience (academic vs. practical)
  - Checkered past? (exclusions, damaging statements)
  - Support staff, time, availability
  - Age, proximity

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# Federal vs. State Expert Witness Practice

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- **(1) Disclosure Issues**
  - "Demand for Exchange" in California: CCP § 2034.010 et seq.
  - Compare federal court practice: FRCP 26(a)(2)
- **(2) Discovery Issues**
  - Scope of discovery
  - Work product protection
- **(3) Admissibility Issues**
  - Federal = Daubert
  - California = Frye
  - Hearsay - *Sanchez* Case (Cal. S. Ct.)

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# Expert Deposition Preparation

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- Preparing the Expert For Testimony
  - Importance of Preparation!
  - What Materials Will You Give Your Expert?
  - Is There a Report?
  - Obviating the Daubert/Frye Challenge
  - Anticipating the Hypotheticals

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## Expert Deposition Preparation

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- Preparing Yourself for Direct/Cross
  - If preparation was thorough, this is the easy part
  - General rule: stay out of expert's way
  - Main job: objections to preserve the record
  - Whether to cross-examine
    - If needed to clarify statements that may require more context
    - If needed to elicit additional facts to diminish damaging testimony
    - May be needed to avoid summary judgment

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## Expert Deposition Testimony: Taking/Defending

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- Tips for Taking an Expert Deposition – 3 objectives:
  - **1. Identify and Evaluate Qualifications**
    - e.g. "Have you ever been qualified by a court to provide expert testimony in this field?"  
"Please identify the court, date and case name"
  - **2. Identify, Define and Limit Opinions**
    - e.g. "Please identify everything the physician did that you say fell below the standard of care" "Have you told me every act or omission that was below the standard of care?"
  - **3. Identify and Evaluate Grounds for *Daubert* or *Frye* challenge**
    - e.g. "What is the potential error rate of this technique?"

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## Expert Deposition Testimony: Taking/Defending

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- Setting Up Daubert/Frye Challenge
- Looking for clues: what is the basis for the opinion?
  - *Prior experience: qualified by a court v. retained by a party*
  - *Scientific/professional literature: peer-reviewed journals v. anecdotal evidence*
  - *Support in record: documents and testimony v. assumptions*
- Cross-examine at deposition to create a record for a motion:
  - *“You are **assuming** the business will be more profitable in the future...”*
  - *“There is no **objective** way your theory can be tested...”*
  - *“There is no published industry standard that requires that action...”*
  - **if denial, then** *“tell me precisely [fact, test, standard] you are relying on”*

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## Expert Deposition Testimony: Taking/Defending

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- Tips for Defending
  - Your Work Was (Mostly) Done During Preparation!
  - Learn from Your Opponent’s Questions
  - Be Ready to Object to Hypotheticals
  - Will You Ever Ask a Question?

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# Trial Preparation

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- **Preparing the Expert for Direct/Cross**
  - Do Not Shortchange Your Preparation Time!
  - Make Sure Your Expert Understands Your Case Theory at Trial
  - Be Sure Your Expert Knows Relevant Prior Trial Developments
  - Anticipate the Cross-Examination

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# Expert Trial Testimony: Direct/Cross

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- **3 Basic Tips for Effective Direct**
  1. Don't rush through qualifications. You must give the jury reasons to trust the expert
  2. Give the details, but organize the opinions around non-technical, easy to remember conclusions
    - "The math doesn't work"*
    - "Garbage in – garbage out"*
  3. Use Demonstratives and summarize conclusions
    - Show the jury, don't just tell them*

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## Expert Trial Testimony: Direct/Cross

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- **3 Basic Tips for Effective Cross**
- 1. The expert is the most dangerous witness on cross - stick to the **incontrovertible**, such as the expert's own writings or facts established at the expert deposition
- 2. The expert's **credibility** is **the** central issue, more important than the opinions themselves
  - *"Isn't it true that more than 80% of your work is acting as an expert in litigation?"*
  - *"In the more than 20 cases where you have testified as an expert you have always found that the doctor met the standard of care"*
- 3. What the expert **failed** to do or consider is often more important than what he or she did do or consider
  - *"you did not: conduct any tests/independently verify results/interview witnesses"*

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## Questions?

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