

Chapter 2

Discovery and Your Expert

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§200 *Introduction*

Once you have selected an expert, arrange a meeting to define the expert's role and the division of labor between you and the expert, explain the nature of the case and determine what is expected of each party and what the limitations are of the expert.

Your expert should educate you concerning technicalities and idiosyncrasies of his area of expertise. Make sure he is forthright in explaining any limitations he may have in testifying to the desired ultimate opinion. Any doubts he may have about your theory or the manner in which the opinion is to be presented must be expressed at this stage of the case. It is essential that you are aware of his reluctance now rather than after the case has progressed—when you might be committed to a theory.

It is equally important that the expert is aware of the peculiarities of the legal profession and how his testimony relates to your overall litigation plan. If your witness is inexperienced as an expert and unfamiliar with the process of litigation, the time you spend with him at an early stage of the case will prove especially beneficial. Acquaint the expert with the vocabulary of the law as it bears upon his testimony, the constraints that are imposed upon expert testimony, the time limitations, the nature of the discovery process, trial procedures (if the expert is expected to testify at trial) and how he fits into the litigation process.

§201 *The Expert's Role in Litigation*

The expert should be made aware of the nature of the case in detail so that he is fully aware of his role in the overall litigation plan. Explain the theories of liability and defense to him, and give him pertinent pleadings and documents. Just as you might be unfamiliar with his field and will have to seek information from him during the course of the trial preparation, encourage him to ask questions concerning the legal process throughout the litigation.

Consider using the expert's conclusions early in the litigation. Statistics vary, but over 90 percent of cases filed are settled without trial. Settlement frequently occurs within a month of trial after substantial sums have been expended in preparing and responding to discovery and pretrial motions. If settlement can be accomplished early in the proceedings, the same result often is reached at a fraction of the cost. To facilitate an early settlement, consider providing the opposing party with your expert's conclusions and the basis for those conclusions early in the litigation. With expanded and liberalized discovery, your expert's opinion will be known to the opposing party before trial anyway.

§201.1 Preservation of Evidence

At the onset of the retention, instruct your expert that evidence should not be destroyed; the evidence that forms the basis of the expert's opinion should be preserved. This may seem obvious but experts who are unfamiliar with the litigation process may be unaware of the importance of preserving the evidence after he or she has completed the tests or experiments and rendered an opinion. The spoliation of evidence and the resultant lack of opportunity of the opposing side to inspect the evidence may result in the exclusion of your expert's testimony. Even though the destruction of the evidence may be completely innocent and not in violation of any court order, in most jurisdictions a court has the inherent power to make discovery and evidentiary rulings conducive to the conduct of a fair trial. If the opposing expert has been deprived of the opportunity to inspect and report on the evidence, a court may deem the fact that the expert was foreclosed prejudicial and a deprivation of the right to a fair trial and therefore preclude the presentation of your expert's opinion.

It is particularly important that both sides have access to evidence in product liability claims when the success or failure of the case may hinge on which expert the trier of fact accepts. Clearly if one side has been deprived of the chance to present expert testimony unfairness results.

Spoliation of evidence encompasses the loss, destruction or material alteration of an object. Your expert must be made aware of the significance of spoliation and avoid destruction of essential evidence. The degree of fault varies from innocent to negligent to intentional destruction of evidence. Courts have the inherent power to impose sanctions against a party responsible for the loss or alteration of evidence. The sanctions can be severe and depend upon the degree of prejudice to the opposing party and the degree of culpability of the spoliator. For example, alteration or destruction after the expert has performed tests on an object at issue in a product liability case can result in substantial prejudice when the opposing expert is deprived of an opportunity to examine and test the object. Also instruct your client not to destroy documents that may be required by the opposing expert in order to render an opinion.

A trial court has discretion to impose sanctions under its inherent disciplinary powers. The appropriate sanction against a litigant who destroys evidence and is on notice or should have known that the evidence was relevant to potential litigation depends primarily upon the degree of fault and the degree of prejudice to the opposing party. The severity of the sanction is primarily a question within the discretion of the trial court and is seldom disturbed on appeal. The trial judge is in the best position to determine the degree of fault of the spoliator and the prejudice caused to the opposing party.

The destruction of relevant evidence occurs along a continuum of fault—ranging from innocence through degrees of negligence to intentional, outrageous behavior. The resulting sanctions vary accordingly. Sanctions range in severity from the dismissal of the action, the exclusion of the guilty party's expert testimony, or the "spoliation inference," which consists of an instruction to the jury that the destroyed or altered evidence would have been unfavorable to the offending party. In many cases, the exclusion of the offending party's expert is tantamount to dismissal of the case when the case is entirely dependent upon expert testimony to establish negligence or causation.

One difficulty in assessing the penalty for the destruction of evidence is the uncertainty of the detriment, if any, caused by the spoliation, as in most cases there is no way of determining what the evidence would have shown.

In California, the Supreme Court has held that there is no separate tort cause of action for intentional spoliation committed by a party to the underlying lawsuit, at least when the spoliation is or should have been discovered before the conclusion of that lawsuit. *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal 4th 1, 4 Cal. Rptr. 2d (1998). The court agreed that the intentional spoliation of evidence should be condemned but not to the extent of holding the perpetrators liable in tort. As an alternative to finding a separate tort, the court suggested other sanctions, such as an inference that could be drawn against the responsible party or discipline against an attorney who participates in the spoliation.

In addition, the California Supreme Court in *Temple Community Hosp. v. Superior Court*, 20 Cal. 4th 464, 84 Cal. Rptr. 2d 852 (1999), held that no tort liability exists for the intentional spoliation of evidence by a third party. The court observed that the injury in the case of spoliation is speculative; a litigant's expectancy in the outcome of litigation is uncertain. Whether interference with the prospective advantage of prevailing in a lawsuit is committed by a party to the litigation or instead by a stranger to the litigation is equally speculative. The court commented that the victim of third party spoliation is not entirely helpless, as discovery sanctions are available to punish third party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence. The court concluded that the benefits of recognizing a tort cause of action in order to deter third party spoliation of evidence and compensate victims of such misconduct are outweighed by the cost of promoting onerous record and evidence retention policies and the burden to litigants, witnesses, and the judicial system that would be imposed by potentially endless litigation over a speculative loss.

Where the evidence consists of documents of the party or the expert, it is often difficult to determine if the opposing side has been guilty of spoliation of evidence and is producing only documents that are favorable to his