Expert Testimony on Investigations, By the Experts
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Expert testimony relating to workplace investigations has become increasingly common. But, as an expert witness, how do you prepare your testimony so that it is admissible, helpful to your client and does not overreach? As an expert, how do you select your cases so that you can accomplish these goals? And, how do you help prepare counsel to present your testimony?

A. General Standard of Admissibility of Expert Testimony

Under Federal Rules of Evidence 702, a trial judge acts as a gatekeeper with regard to the admissibility of expert opinions. *Ralston v. Smith & Nephew Richards, Inc., 275* F. 3d 965, 969 (10th Cir. 2001). The court must determine whether a proffered witness is qualified, whether his/her testimony is reliable, and whether it is relevant to the issue at hand. *See,* Federal Rule of Evidence 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 592-593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). This analysis applies to technical as well as to scientific testimony. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). But the determination of the admissibility of an expert opinion is not subject to rigid criteria. It is case specific, allowing the court "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152.

In California, expert testimony is admissible only if it involves a subject beyond the experience of ordinary witnesses. Calif. Evid. Code § 801(a). Additionally, the testimony must: (1) help the trier of fact; (2) must be provided by a person with special knowledge, skill, experience, training, and education in the proffered topic; and (3) must be based on information that is considered to be reliable. Evid. Code §§ 702 (a), 801(a), and 801(b).

B. Admissibility of Expert Testimony on Investigation Issues

Generally, courts have allowed expert testimony on issues relating to workplace investigations and efforts to prevent harassment, discrimination or retaliation.

For example, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir., 2006), *cert. denied*, 549 U.S. 1323, 127 S.Ct. 1918, 167 L.Ed. 567 (2007), the Ninth Circuit upheld the propriety of expert witness testimony regarding an institution's investigation into plaintiff's complaints and the failure to take the requisite corrective action, including testimony as to the action taken by other, analogous institutions in similar situations. In *Freitag*, the court found that the information proffered by the expert was beyond the scope of the

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ordinary juror, who would not have information regarding the standard of care. Accordingly, the court ruled that the jurors might find such information useful in determining the propriety of the employer's conduct.

Similarly, in *EEOC v. Scolari Warehouse Markets*, 488 F. Supp. 2d 1117, 1134 (D. Nev. 2007), the court denied defendant's motion for summary judgment, in part, relying on the testimony of an expert witness on investigations. In so finding, the court wrote, "[T]his Court finds particularly instructive the expert['s] report." It also found the expert's report to be "rife with instances indicating a failure to exercise reasonable care in dealing with the instances of harassment." Furthermore, the expert's "background and experience" led the court to view him as a "reputable source of expert testimony."

In *Mendoza v. Western Medical Center of Santa Ana,* 166 Cal. Rptr. 3d 720 (2014); *rev. den*., 2014 Cal. LEXIS 3025 (2014) the court held that "substantial evidence supports the judgment" based, in part on testimony by plaintiff's expert witness. The witness testified that there were numerous shortcomings in the investigation conducted by defendants following the plaintiff's complaint. Regarding the relevance of such testimony, the court stated that an "inadequate investigation is evidence of pretext."[3]

In *Hirst v. City of Oceanside,* 236 Cal. App. 4th 774 (2015), both plaintiff and defendant presented expert testimony on whether the employer had fulfilled its legal duties in its workplace investigation.

In *Silva v. Lucky Food Stores*, Inc., 65 Cal. App. 4th 256, 263 (1998), the court remarked on the absence of such testimony as a deficiency of proof in the plaintiff's case. "[Plaintiff] did not include all of [the investigator's] deposition testimony or all of his investigative reports. He also did not present any expert witness testimony addressing the objective reasonableness of Lucky's factual determination of misconduct or whether Lucky conducted an appropriate investigation under the circumstances."[4]

C. Restrictions on Admissibility

1. *Kotla v. U.C. Regents,* 115 Cal. App. 4th 283 (2004). The Appellate Court reversed the trial court as it had improperly admitted a human resource expert to testify that certain facts in evidence were indicators of retaliation. The court said that it was not setting a general rule for the admission of the testimony of a human resource expert. But it then gave some guidance on the use of Human Resource experts saying that, on certain subjects, such testimony is "**clearly permissible**." [Emphasis added].

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[3] Also, on pretext see *Nazir v. United Airlines, Inc.,* 178 Cal.App.4th 243(2009). (An investigator "who at least inferentially had an axe to grind, assisted by someone who 'served' him. Such an investigation can itself be evidence of pretext.").

[4] *See*, "Why, How and What Now? Getting Your Expert Testimony Admitted." BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN. (November-December 2008), for a comprehensive list of cases in which such testimony was permitted. This article also is provided in the attendee materials.

So, a human resource expert cannot testify that certain facts in evidence were "indicators of retaliation" in a retaliation case. However, **following "proper standards"** in the discharge of an employee is "well within the professional expertise of a personnel management expert." *Kotla*, n. 5. [Emphasis added]. Also, evidence showing or negating that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or that an **employer "significantly deviated from its ordinary procedures"** are permissible topics. *Kotla*, n. 6. [Emphasis added].[5]

2. *Humphreys v. U.C. Regents,* 2006 U.S. Dist. LEXIS 47822 *(*N.D., Ca. 2006). Plaintiff claimed that her termination from the University of California, Berkeley, athletic department was the product of illegal gender discrimination and that it was in retaliation for her having engaged in protected activities. In support of her contentions, she sought to introduce the testimony of an expert witness to cover "best human resources management practices." The expert concluded that the University's treatment of plaintiff "was inconsistent with a number of those practices." The University sought to exclude this testimony. The court allowed some of the testimony, and excluded part.

In this regard, the court allowed the proposed testimony about the University's "deviation from good human resources practices." The court held that such testimony was "proper testimony under Rule [FRCP] 702. The University's failure to follow such practices is relevant to plaintiff's contention that the layoff was a pretext for gender discrimination or retaliation, and [the expert's] testimony will assist the jury because the average juror is unlikely to be familiar with human resources management policies and practices."

The court rejected some of the testimony. In this regard it agreed "with defendants that [the expert] could not testify that the University's failure to comply with good human resources practices is indicative of discrimination. While the jury may ultimately accept such an inference, [the expert's] testimony to that effect is unlikely to assist the jury and runs the risk that the jury will pay unwarranted deference to [the expert's] expertise."

Furthermore, based on the experts "experience, training and education" the court concluded that his testimony was "sufficiently reliable to satisfy the *Daubert* standard."

In the same case, defendants sought to introduce a rebuttal expert. However, the rebuttal expert's report was only three paragraphs long, and the entirety of his report was that he had read the opposing expert's report and disagreed with many of the opposing expert's conclusions. The rebuttal expert added that he felt the plaintiff's expert had "made a faulty analysis and/or otherwise

[5] *See also*, *Summers v. A. L. Gilbert Co*. 69 Cal.App.4th 1155, 1185 (1999): An expert cannot use his or her expertise to usurp the role of the jury in weighing evidence. They cannot testify on issues of law or how the case should ultimately be resolved. Id. at 1185-1186

improperly applied principles in [his] field attendant to the prevention of discrimination and/or retaliation in the context of the organizational reduction-in-force."

Rejecting this testimony, the court held that the rebuttal expert's "report fails to comply with the basic requirements of the Federal Rules of Civil Procedure [Rule 26], which requires, *inter alia,* 'a complete statement of all opinions to be expressed and the expert's basis and reasons therefor.'" Without more information, "Plaintiff is prevented from understanding the reason behind [the opposing expert's] opinion, and the court certainly is unable to determine whether [the opposing expert's] report meets the threshold of 'reliability.'" The court found that the defendants' "failed to comply with the most basic requirements of expert disclosure" and granted the motion to exclude the rebuttal expert.

3. *Holly D. v. Caltech*, 339 F.3d 1158 (9th Cir., 2003). Holly D. contended that Caltech's anti-harassment policy was unreasonably implemented and that Caltech failed to correct harassment promptly. She alleged that the University did not properly investigate her allegations once they were known. In support of this argument, she turned to an expert witness who attacked the University's efforts as "seriously flawed." The expert contended that during its initial investigation, Caltech should have interviewed particular witnesses who were not interviewed, reviewed certain documents that were not reviewed and "examined" [the alleged harasser's] "intimate areas" to corroborate Holly D.'s alleged knowledge of his anatomy.

   The Court held: "Even were we to assume that all of these additional steps were advisable, Caltech's failure to pursue all possible leads does not undermine the substantial showing in this case that its investigation was, in *toto*, both prompt and reasonable. On the evidence presented, therefore, we find that Holly D. has raised no genuine issue of material fact as to whether Caltech exercised reasonable care to prevent and correct sexual harassment." *Id*. at 1178.

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   It is to be noted here that the Court did not hold that the testimony of the expert witness was inadmissible, but rather that the court was not persuaded by such testimony that Caltech should have acted differently.

D. Practical Guidelines

1. Select your cases wisely.
   a. Conduct a conflict check. Make sure none of the parties, counsel, experts, witnesses, judge, arbitrator or other principles in the case present an actual or apparent conflict for you.
   b. Inquire as to what subjects you are being asked to give your expert opinions, and be sure that you are qualified in those areas.
   c. Assess the case based on your initial contacts with counsel to ascertain whether you have a reasonable belief that you will be able

to provide favorable testimony.

d. Recognize the fact that there is a potential that your communications between yourself and counsel may be subject to disclosure if you are called as a witness unless you are in federal court and the communication is not relied upon you in your opinion.
e. Include in your retainer agreement a provision that acknowledges you can make no guarantees that upon completion of your review of the relevant evidence that your testimony will in whole or part be favorable to the party hiring you. It is up to the party to decide upon the completion of your analysis whether to use or withdraw you as their expert.
f. The retainer agreement should also provide that up until the time you are actually called to testify as their expert, you are being retained as a consultant with all attendant attorney-client and work product privileges.
g. Your agreement also should state that you are not being hired to perform work as an attorney.
h. Be sure that you will be given access to all evidence you believe will be necessary to formulate an informed, credible and trustworthy opinion.
i. Ask for the expert witness report, if any, provided by the opposing side.

2. If the facts as described by the attorney who hired you do not match what you discover when reviewing the materials and if that affects your opinion in a significantly negative way, withdraw from the case.

3. Review all documents necessary to form your opinions.
    a. Do not hesitate to request additional documentation.
    b. Do not rely on summaries provided by counsel.

4. Documents should include policies (employee handbooks, supervisory manuals, investigation policies), training materials, all relevant complaints, responses to complaints, all investigation materials (notes, conclusions, reports, documents, communications to the parties). In addition, make sure that you review all relevant depositions.

5. Obtain documents, deposition transcripts, written discovery, etc., well in advance.

6. Fully comply with FRCP Rule 26 (or similar rules in states outside California).

7. Do not provide legal opinions (e.g., "the actions constituted retaliation").

8. Do not provide "disguised" legal opinions (e.g., "the facts or actions are indicators of retaliation").
    a. However, it is permissible to opine on ultimate issues (e.g., "the employer failed to take steps necessary to prevent harassment from

occurring").

b. Allowing such testimony is within the court's discretion. *See*, California Evidence Code §805 and FRCP Rule 704.[6]

9. Do not accept a disputed version of the facts as the basis of your testimony as you are not in a position to determine credibility.
   a. If there are two versions of the facts, your analysis should consider each one.
   b. For example, if plaintiff says she complained about harassment to her supervisor and her supervisor says she did not complain, analyze it from both points of view.

10. Do not rely on any "facts" given to you by counsel. Corroborate all such facts before using them as a basis for your expert opinion.

11. Testify about "standard practices" and the employer's adherence to or deviation from those practices. "Best practices" or what the employer could have done better, is not the test.

12. Base standard practices on more than just your own views and experience. Include:
   a. Seminars you have attended and materials at those seminars.
   b. Books and articles on workplace investigations.
   c. The EEOC Guidance-- *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 1999*), as updated and modified March 29, 2010.
   d. The *AWI-Guiding-Principles*- 2nd revision.[7]
   e. *DFEH-Workplace-Harassment-Guide*.
   f. Be sure that any written standards that you rely upon were in existence at relevant times in the case.

13. Similarly, testify about the employer's deviation from, or adherence to, its own policies and procedures. This information can be obtained from the employer's policies and procedures but also from the testimony of The Employer's Human Resource Professionals and/or a PMQ/PMK.

14. Do not overreach. Related to this, stay within your expertise.

15. Be consistent in your testimony. Do not contradict your testimony from other cases or from your writings or presentations.

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[6] *E.g., People v. Glass*, 266 Cal. App. 2d 222 (1968) (Where an expert testified that signage and construction in the area of an accident were not in accordance with accepted standards even though it involved an opinion on an ultimate issue). See also, *Neal v. Farmers Insurance*, 21 Cal. 3d 910 (1978) (Expert testified that insurance carrier's conduct constituted bad faith).

[7] The Association of Workplace Investigators (AWI).

16. If you are going to testify about workplace investigation issues, only do so if you're actually qualified to conduct workplace investigations. Under California Business & Professions Code §§ 7520-7539, this means that you are:
    a. A Private Investigator or being supervised by a Private Investigator.
    b. An attorney or being supervised by an attorney.[8]
    c. An employee of the organization which you are investigating.[9]

17. If you're going to testify about workplace investigations, make sure that you actually have conducted workplace investigations in the (relatively) recent past.

18. Collect the writings and testimony of other experts who you have encountered.

19. When testifying in a case in which there is an opposing expert, attempt to find his or her publications or prior testimony to see if they differ from his or her testimony in this case.

20. When testifying for a plaintiff, see if you can discover publications by the defense firm relating to proper methods for conducting an investigation. Then, in part, rely on those publications.

21. When testifying for a defendant, see if you can discover publications by the plaintiff's firm relating to the issues at hand and whether they will be useful sources upon which you can rely.

22. Search the Internet. Check out websites of the parties, Google their names, to see if there is anything helpful or harmful to your opinion.

23. It is unlikely that the employer did everything right or everything wrong. So, when testifying for the plaintiff, be prepared to testify about what the employer did right. When testifying for the employer, be prepared to testify about what the employer did wrong.

24. In deposition, do not express opinions beyond those you are qualified to make or beyond those which you have been asked to make.

25. Similarly, if, in deposition, counsel asks you something that is a legal opinion, do not rely on the attorney who hired you to object. Instead say something like, "It seems to me that you are asking for a legal opinion. I do not believe it would be appropriate for me to provide a legal opinion nor have I been asked to do so. Similarly, I do not intend to offer legal opinions at trial." Don't agree to give one even if counsel agrees to waive the impropriety.

26. Similarly, if, at trial, counsel asks you for legal opinion, say something like, "Are you asking for my legal opinion?"

[8] Similar to a paralegal conducting a litigation -related investigation at the direction/supervision of an attorney.
[9] Like an internal Human Resources Professional.

27. If you are served with a subpoena or notice of deposition, read it carefully and well in advance. Ensure that timely objections are made where appropriate. Otherwise, fully comply with the notice or subpoena. Usually, you will be asked to provide your file, all your notes, and all material you relied upon, so don't wait until the last minute to gather the document production. Remember that the California CCP §2025.220 requires that the requested documents be provided three work days in advance of your deposition. The Federal Rules do not require this.

28. If you have not already read the testimony of the opposing expert, if at the end of your deposition you are asked whether you intend to provide any additional opinions or do any additional work, make sure to say that you intend to review the opinions of the opposing expert and that, as a result, you may provide your own views as to that person's opinion.

29. In most cases (particularly if you're testifying for the plaintiff), the other side will file a *Motion in Limine* in an attempt to exclude your testimony. Do not rely on the counsel who retained you to oppose this motion by him or herself. This paper, as well as the article referenced in FN 2, contains helpful legal authority for the admission of your testimony. Be sure to share these materials with the counsel who retained you.

30. Make sure to work with counsel in advance to "prepare you" for your testimony.

31. At trial, do not bring any documents into the courtroom which you feel you do not need for your testimony. Otherwise, there is a chance that the court may require you to produce them, and unless you'd like them to be produced and admitted, such as your expert witness report.

32. At trial, judges tend to give expert witnesses a reasonable amount of leeway. So, attempt to fully explain your answers not letting counsel "trap" you into a yes or no answer.

33. At trial, remember that you are not an advocate. So, do not advocate.

34. Remember, an expert may rely upon "reliable hearsay" in forming his or her opinion.[10]

35. Do not testify about what the outcome of the investigation would have been if it had been conducted that way you believe it should have been investigated – in other words consistent with standard practices and the employer's own

[10] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. (In re Fields (1990) 51 Cal. 3d 1063, 1070 [275 Cal. Rptr. 384, 800 P.2d 862] [expert witness can base "opinion on reliable hearsay, including out-of- court declarations of other persons"]; see Fed. Rules Evid. Rule 703, 28 U.S.C.; 2 McCormick on Evidence, supra, § 324.3, pp. 372-373.)" *People v. Gardeley*, 14 Cal. 4th 605, 927 P.2d 713, 59 Cal.Rptr.2d 356 (1996).

policies and procedures. You simply aren't in a position to know what the outcome would have been.