

Survival Checklist for Forensic Experts

The following material was revised from an original article, “Survival Checklist for Medical Experts,” written by Deputy District Attorney Michele McKay-McCoy, Solano County District Attorney’s Office. With her permission, it was revised for forensic experts by Deputy District Attorney Michael S. Groch, San Diego County District Attorney’s Office, and Deputy Attorney General Robert M. Morgester, California Department of Justice.

“I’m No Expert”; Yes, You Are

Evidence Code Section 720 defines an expert as someone who has “special knowledge, skill, experience, training or education” on a particular subject.

The Hearsay Preliminary Examination is Your Friend

Penal Code Section 872 allows a law enforcement officer to testify at the preliminary examination about his or her interview of you. This means you need not appear to testify in court at the preliminary examination. The typical interview covers: 1) your curriculum vitae, 2) your connection with the case, 3) your opinion, 4) the reason for your opinion, and 5) for bonus points, why the defense theory is wrong.

Preparing to Testify at Trial

Make sure you have everything the prosecutor has — all the police reports, forensic records, photos, transcripts, etc. Ask for any materials provided to the prosecutor by the defense. There usually won’t be any, but ask anyway.

Contact by the Defense

You may be contacted by the defense attorney or a defense investigator. If you are, immediately call the prosecutors to discuss the matter. It is best to talk with the prosecutor prior to talking to the defense attorney so the prosecutor can give you insight into what to expect from the defense attorney. If you are unsure of the investigator’s identity, ask for photo identification of the investigator and identification of the party the investigator represents. You are entitled to ask, according to Penal Code Section 1054.8.

Pretrial Hearings

Before you testify, you may be asked to take the stand for a hearing outside the presence of the jury (this is called a “402 hearing” after the Evidence Code Section that requires it). At the 402 hearing, you will be asked by both the prosecutor and the defense counsel about your qualifications, and you may be asked other questions relating to your testimony. Following the 402 hearing, you will testify to the jury about your qualifications, your opinion, and the reasons for your opinion.

The judge may limit the scope and nature of your testimony. Listen carefully to what the judge orders and comply with those orders. If you have questions, make sure you ask them.

Direct Examination

Talk with the prosecutor ahead of time. What questions will she ask? What questions should she ask? What exhibits will you be using? What are your audio-visual equipment needs? Your input is important and can help expedite your testimony at trial. Bring your file with you. Any writing you rely on to refresh your memory before testifying *must* be produced at the hearing and made available to the defense or your testimony will be stricken pursuant to Evidence Code Section 771. If there is a particular article or text you relied on, that should be part of your file.

Translate all forensic and technical terms as you go. Example: “I ran an MD-5 hash algorithm against the forensic image and the hash values had not changed. This means that every file on the copy was identical to the file on the original.”

Look at the jurors when you testify. They are the ones you need to persuade, not the attorneys.

Be yourself, but check your ego at the door first.

Cross-Examination

Never be cross on cross. It alienates the jury and weakens your effectiveness. Pause before answering. This will give the prosecutor time to object to the question. If the objection is sustained, don’t answer the question.

Here are some favorite defense tactics and the appropriate responses:

1. Leading questions that call for a yes or no answer only. “Isn’t it true that you waited until three days after receiving the computer to book it into a secure evidence room?” “Yes, and I can explain my answer if you like.”

2. Questions that get the facts wrong. “Do you remember telling Officer Jones that there wasn’t kiddie porn on the computer?” “I never told her that.” (Not, “No.”)
3. Misquoting legitimate scientific authority or quoting it out of context. Ask to see the text. If the defense can’t produce it and you can’t answer until you see the text, say so. If the defense does produce it, take all the time you need to read it and make sure of your answer.
4. Questions about obscure, dated, and/or anecdotal “authority” to impeach your opinion. Wait for the prosecutor to object. Under Evidence Code Section 721, you cannot be questioned about a text unless you either relied on it or it is established as “reliable authority” by your testimony, other expert testimony, or by judicial notice. Repeat after me: “I don’t consider this article reliable authority because . . .” If the judge allows the question anyway, state on the record that you’ve never seen this text before (large hint to the jury that the defense is playing hide the ball), and ask for a brief recess so you can read it. If you are familiar with it and *didn’t* rely on it, explain why the study is flawed.
5. Questions that begin, “Isn’t it possible that . . . [the data could have been modified]?” “Yes, of course. Anything is possible, but I don’t think that’s what happened in this case.” (Not, “Yes.”)

Rebuttal

Sometimes the defense calls its own expert. Defense experts are generally either professionals with legitimate forensic practices who have not been given all the information by the defense or people with no forensic practices who make their living by being professional defense witnesses. After this witness testifies, it is possible you will be called back to refute his or her testimony. Keep in touch with the prosecutor!