

# Expert Testimony continued from page 3

examined is stressful for even seasoned experts.

- ✓ Explain to your expert that they need to know their prior testimony exceedingly well. Opposing counsel, and opposing counsel's expert, will have read it several times!
- ✓ Advise them to think about their response carefully before they state it. Some of the most memorable testimony comes immediately after a thoughtful pause during cross-examination.
- ✓ Remind them it is best to use their own words in their answer, rather than adopting the words of the examiner.
- ✓ Give your expert a strategy for answering "yes" or "no" questions. The cross-examiner often tries to force the expert to respond with a simple yes or no, even when those answers cannot be an adequate response. If forced to do so, tell them to show their discomfort, and to be assured that you will clean it up on re-direct.
- ✓ Prepare them for the inflammatory questions. Tell your expert to stay poised and composed, to take their time in responding, and to be the most professional person in the room.
- ✓ Warn your expert of the rapid fire, machine gun questions. When faced with this approach, tell your expert to just stop

talking and take control of the pace.

- ✓ Make it very clear to your expert: do not bluff. If they do not know the answer to a question, or they did not consider something, they should say so. Jurors appreciate and respect the honest ignorance of a few details.
- ✓ Let them know that body language is extremely important.
- ✓ Remind your expert that cross-examination is meant to test resolve and accuracy and that preparation is the key to demonstrating confidence and accurate responses.

It is not unusual for reasonable minds and reasonable experts to have a difference of opinion. Part of your expert's job is to reconcile the differences of opinion that they have with the opposing expert. That will tend to elevate them in the eyes of the jurors. ■

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## Preserving A Nonsignatory's Right To Have The Court Determine Arbitrability by Monica Q. Vu

Under 9th Circuit and California law, a nonsignatory is entitled to have a court, not an arbitrator, determine whether they are required to arbitrate a dispute between signatories. However, since many arbitration rules authorize an arbitrator to determine whether an issue is subject to arbitration, many arbitrators believe they are empowered to determine whether a nonsignatory is subject to arbitration.

What do you do if your opponent tries to get the arbitrator to decide this issue and, for strategic reasons, you want the court to decide it instead?

The nonsignatory should object, making it clear they are contesting the arbitrator's jurisdiction and authority, and may also want to request that the arbitration proceed without them. They should file an action in the state or federal court that has jurisdiction and seek a determination of whether they can

be compelled to arbitrate.

For example, if the basis for mandating arbitration is an alter ego theory, the court would have to analyze numerous alter ego factors to determine whether it exists; an arbitrator, on the other hand, may simply look at one or two factors and may be quicker and/or less thorough in finding alter ego.

**It is much better to be cautious earlier on than be forced to litigate an uphill battle over a motion to vacate later.**

If the arbitrator still does not give up

authority to compel the nonsignatory to arbitration, the nonsignatory should file a motion in a court with jurisdiction to stay the arbitration proceedings pending the court's determination. The need for such precaution arises from the limited grounds a nonsignatory will have to challenge an arbitration award already issued and waiting to be confirmed. It is much better to be cautious earlier on than be forced to fight an uphill battle over a motion to vacate later. ■

*If you would like a copy of this article with citations, please send a request to [cj3@jmbm.com](mailto:cj3@jmbm.com).*

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