



# The use, abuse and cross-examination of the bicycle “expert”

## In cases where the victim was riding a bike, bike experts are often unnecessary and irrelevant

By J. KEVIN MORRISON

You represent a bicyclist who suffered serious injuries after she was struck by a car. The liability case seems excellent – a careless driver going the same direction as your client passed too close and struck her, running her over. Your client was wearing a high-visibility jersey and riding in the bike lane. Sure, your client had earbuds in, but how is that relevant? The case is going well and it's time for expert disclosure. The defense discloses a bicycle expert. His resume looks impressive: a former professional cyclist who has been retained dozens of times to testify by both plaintiffs and defendants. Your first instinct is to find another bike expert to

rebut whatever the defense bike expert says and to defend your client.

But let's pause and think this through. Why does this case require a bike expert? And does retaining another bike expert to rebut the defense expert improve your chances of winning? Or does it just increase costs and, worse, focus the jury's attention on your client's actions (and inactions)?

Expert witnesses are often necessary and important. However, they can also be overused and ignored by the jury. I am a big proponent of “less is more” and “keep it simple, stupid.” To me, trial is always a battle to cut through the weeds and distill and simplify. Jurors, like all of us, have short attention spans.

The fewer witnesses and documents, the better.

The first question to ask is whether a bicycle expert is required for your case. Evidence Code section 801 states: “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is *sufficiently beyond common experience that the opinion of an expert would assist the trier of fact*; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that if of a type that reasonably may be relied upon by an



expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." As one court has held, "the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole* (1956) 47 Cal.2d 99, 103; *Schauf v. Southern Calif. Edison Co.* (1966) 243 Cal.App.2d 450, 456.)

There are certainly some cases where a bicycle expert will have specialized knowledge that is sufficiently beyond the common experience of most jurors which would assist them in their deliberations. For example, in a products failure or negligent repair case, most jurors will not have familiarity with how a bicycle is manufactured, how it works or how it should be maintained. In a case where the injury took place during a competition, most jurors haven't raced competitively, so an expert could assist the jury.

However, in a typical personal injury or wrongful death case where the victim was riding a bicycle, is an expert in bicycle riding required to assist the jury? Is bicycling on a public road sufficiently beyond the jury's common experience that an opinion from an expert witness is required?

I would suggest that a jury does not need to hear from an expert witness in this situation. In a hypothetical case of a pedestrian struck by a car, is a "pedestrian expert" required for the jury? In a car crash case, do we hire professional drivers to testify? If a swimmer is run over by a boat and injured, is a swimming expert required? Riding a bicycle is well within a juror's common experience, like walking, running, driving a car, or swimming. There were 48.8 million Americans who bicycled in 2019. Riding a bicycle does

not require a special license or training. Any person capable of physically riding a bicycle can do so. Getting back to our hypothetical case where our cyclist was struck by a car passing too closely, any person on the jury can (and probably has) done the same activity the plaintiff was doing – ride a bicycle. Why is bicycling on a public road "sufficiently beyond the common experience" of the jury such that an expert is necessary? In cases of ordinary (not professional) negligence, expert opinion concerning the "standard of care" is not necessary. (*Mast v. Magpusao* (1986) 180 Cal.App.3d 775, 778-9.) Expert testimony from a former professional bicycle racer is irrelevant since the plaintiff was not engaged in competitive racing at the time of the incident. The standard of care that applies to the plaintiff is that of a reasonably prudent person – not a highly trained or experienced professional.

In our hypothetical case where the defense has disclosed a bicycle expert, I would suggest that once you have taken the expert's deposition, file a motion in limine preventing the expert from testifying on the grounds that bicycling is not beyond the common experience of the jury and therefore the bicycle expert's testimony will not assist the trier of fact.

### **Cross-examination of a bicycle expert**

Since you will not know the outcome of your motion in limine to preclude the defense bicycle expert from testifying until trial, you will still have to prepare for and take the deposition of the defense expert. The goals of the deposition should be (1) to maximize the chance of the trial judge excluding the expert from testifying at trial, and (2) to minimize the effectiveness of the defense expert's efforts to damage your case. In order to meet these goals, exquisite preparation is required. What follows are the steps our office takes before taking the defense expert's deposition.

A. Review CV in detail – most attorneys attach a copy of the curriculum vitae of each expert to their expert witness

disclosures. The CV is a potential treasure trove of information which must be mined exhaustively. A juror will assume that if something is on an expert's CV, it must be important, relevant, and true. Therefore, you must spend time thoroughly reviewing and following up on the details contained in the CV. Have the expert commit to the CV containing her education, training, and professional organizations relevant to the work in your case.

B. Confirm with the bicycle "expert" that no license or specialized training of any kind is required to ride a bicycle, and that any person physically capable of riding a bike can do exactly the activity that your client was doing at the time of the incident. Confirm with the professional bike expert that your client was not competing in a competition at the time of the incident and was not a professional cyclist. Obtain concessions that children as young as three years old and adults as old as 103 can and do ride bicycles down the same road that your client was riding at the time of the incident. Normalize bicycle riding so the judge can see that no expert testimony is required for the jury.

C. Confirm with the bicycle expert that there are many benefits to riding a bike. It is an excellent way to keep healthy, fit, enjoy the outdoors and get endorphins. Regardless of whether jurors themselves ride bikes regularly, almost all of them will view bike-riding as something that is a good thing. It is a great way to exercise and get around with zero carbon emissions. The expert will agree and the jurors will appreciate that your client was doing something healthy. This will also be helpful in showing that your client was in relatively good physical condition before her injury and when the injuries interfere or prevent your client from cycling in the future, there is a significant loss of enjoyment of life.

D. Review the expert's website. Many experts have websites to market themselves. These, like their CVs, usually contain extensive material for



cross-examination. For example, the website (and CV) is likely to contain the names of bicycling organizations to which the expert belongs. The expert will likely testify that these organizations are reliable authorities in the field. The organizations themselves almost always have websites as well as brochures and video. For example, the League of American Bicyclists has many articles, tips and videos on safe cycling. Depending on the circumstances of your case, use these to show that your client was following the rules when she was struck. The expert's website may also discuss the expert's philosophy, reasons he got into forensic work, and references to interviews or articles about the expert. These can all be useful. For example, a well-known former professional bicyclist who now testifies as an expert regularly, was quoted in an article that he was involved with a couple of accidents with "reckless drivers." When asked about the details of the accident, it was clear that one of them was remarkably similar to the one he was hired to defend. When asked whether the driver in our case was reckless, the expert (no surprise) waffled. This is not a good look at trial.

E. Obtain prior deposition transcripts and trial testimony – use TrialSmith and your local trial lawyer's organization's list serve to obtain prior transcripts of the expert. Read them. You will see patterns in how the expert answers questions. While it is true that every case is different, you are likely to see an opinion which is inconsistent with the opinion in your case. There could be rules or standards the expert agreed to in other cases which help you in your case. You can also see how often the expert testifies for the defense.

F. Find out whether the expert has been excluded by other courts. There are services that research experts and can determine if a court has excluded

or limited the expert before. Expert Institute is one such service. In a recent case, an expert was precluded from testifying altogether by two different courts. We then obtained the motions to exclude in those cases and cited them in our motion in limine to preclude the expert from testifying in our case. Generally, judges will be more open to excluding an expert if other judges have excluded him.

G. Obtain agreements from the expert about all the things your client was doing that were safe and reasonable. If your client was wearing a helmet, riding as far to the right side of the road as possible, riding a properly maintained bike, had proper equipment, was riding on a road he was allowed to ride, these are all things that any person, including a bike expert, would agree are safe and prudent.

H. Obtain and confirm all of the expert's opinions – especially the most mundane and the most extreme. In a recent case, one of the opinions that the defense bicycle expert held was that "while we do not know the behavior of the bicyclist" prior to the collision, "it is the duty and responsibility of the bicyclist" to keep a safe and proper lookout around him. No kidding. As my 15-year-old son told me as I was prepping for the deposition, you don't need to be a pro cyclist to know that you are supposed to pay attention when bicycling. This "opinion" is helpful in showing the trial judge that bicycle-riding is not a subject sufficiently beyond the common experience of the jury. Another opinion from the expert was that trucks are noisy and that our client bicyclist should have been able to tell that he was about to be passed by a truck. The expert performed no tests or studies to determine how much noise the truck made, nor when the bicyclist should have heard the truck. How is this an expert opinion? Every juror knows that trucks are noisy.

Again, this can provide more evidence for your motion in limine to exclude the expert from testifying altogether.

In personal injury and wrongful death cases where the victim was riding a bike, bike experts are often unnecessary and irrelevant. Bicycling is popular and became more so with the pandemic. In many cases, the type of bicycling at issue is not a topic that is sufficiently beyond the common experience of a juror, which requires an expert's guidance. If the defense discloses one anyway, prepare for and take a deposition with the goal of excluding the expert altogether or, if the judge does not exclude, minimize the expert's effectiveness.

*Kevin is a partner at Altair Law in San Francisco. He exclusively represents people who are injured, or are the survivors of someone who was killed, as a result of the negligence of another. He has more than 25 years' experience in handling cases involving cars (including "rideshare" vehicles), big rig and truck crashes, bicycle incidents, pedestrian injuries, construction site incidents, MUNI crashes, defective products and mass shootings. Kevin's peers and adversaries have recognized him as a leader in the field of personal injury and wrongful death litigation. He is an officer of the SF chapter of ABOTA, Martindale-Hubbell AV Peer Review Rated, and is a recognized Super Lawyer. He often speaks and writes on trial techniques as well as civility in litigation. He can be reached by email at [kmorrison@altairlaw.us](mailto:kmorrison@altairlaw.us).*



Morrison

## Endnotes

<sup>1</sup> I was a juror in a bad faith trial. During deliberations, the jury, a smart, sophisticated, group, could not remember which expert was hired by which side and largely ignored their opinions as "hired guns."

<sup>2</sup> [www.statista.com/topics/1686/cycling/](https://www.statista.com/topics/1686/cycling/)