

A woman with dark hair and glasses is looking upwards and to the right. She is wearing a white collared shirt under a dark blazer. She is holding a large, light-colored folder or book in front of her. The background is blurred, showing what appears to be a modern building with large windows.

USING EXPERTS

TIPS FOR PROSECUTORS AND EXPERT WITNESSES

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and Gerald Fineman

Chapter 7
Investigation and Prosecution
of Strangulation Cases
2020

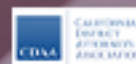


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Using Experts: Tips for Prosecutors and Expert Witnesses

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Editor's Note: Although CDAA always strives to be gender-neutral, strangulation is a very gendered crime. In an effort to not misrepresent this, victims in this manual are referred to as female, while the defendants are referred to as male unless otherwise noted.

I. Introduction

Expert testimony helps overcome the myths and misperceptions surrounding strangulation cases. Expert testimony explains the absence of external injury. It explains why even without external injury there can be a serious, life-threatening internal injury. Expert testimony explains why a victim can experience an episode of strangulation and still be able to breathe. The right expert can provide insight into a victim's reaction to the assault, which may include the impact of both trauma and the absence of oxygen to the brain on the victim's ability to perceive and recall. Experts provide essential testimony to help achieve a successful case outcome.

Evidence Code section 720(a) defines **expert** as a person “qualified to testify as an expert if he [or she] has special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which testimony relates.” The expert need not be a medical doctor. It can be anyone with sufficient knowledge, skill, experience, or education. In many jurisdictions, a medical doctor will not be available to testify on a regular basis. Law enforcement officers, paramedics, forensic nurses, and a host of other individuals have qualified as expert witnesses with sufficient knowledge to testify regarding strangulation cases. Expert witnesses can be used for various reasons, including educating the judge and jurors about medical, technical, or scientific principles. Experts may also be able to express an opinion after evaluating the significance of the facts of the case.¹ Lack of physical evidence and injury may lead a jury to handle a strangulation case as a minor incident rather than a serious life-threatening assault. Consequently, even when the victim has not received medical treatment, it is important to use an expert to educate the judge and jurors about the seriousness of strangulation. There are four main reasons to consider using an expert in a strangulation case:

1. The expert can explain that lack of visible evidence is common and should not be used to minimize either the forensic significance or the medical risk to life.
2. The expert can explain that adequate medical evaluation does not happen as often as it should because: (a) the victim does not think it is necessary or it will cost too much; (b) first responders do not appreciate the degree of medical risk, and therefore do not push for evaluation; and/or (c) emergency medicine physicians are not current regarding new information about the medical risk and appropriate testing, observation, and consultation regarding strangulation.
3. The medical expert can discuss the seriousness of *any* strangulation event and educate the jury regarding the interpretation of whatever data is available for the specific case.

1. Gael B. Strack and George McClane, *How to Improve Your Investigation and Prosecution of Strangulation Cases* (May 1999) National Center on Domestic and Sexual Violence <http://www.ncdsv.org/images/strangulation_article.pdf> (accessed Sep. 1, 2020).

4. An expert can advise a judge and jurors about facts, including: (1) strangulation can cause unconsciousness within seconds; (2) strangulation is one of the best predictors of the subsequent homicide of domestic violence victims;² and (3) most strangulation cases produce minor or no visible injuries; however, victims may suffer internal injuries and have symptoms that can be documented.³

II. Developing, Selecting, and Using Experts

Expert witnesses provide value at every stage of the proceedings. Do not overlook the possibility of using an expert at a bail hearing, trial, or sentencing hearing. These pre-trial and post-trial hearings provide excellent opportunities to acclimate your expert and your factfinder to the use of an expert. You must determine what kind of expert the case requires. To establish some basic principles surrounding strangulation, consider a law enforcement officer. If there are significant injuries, you may want the treating physician who can provide detailed descriptions of the victim's injuries. For a general discussion of medical issues, consider another medical expert such as a coroner, medical examiner, emergency room physician, forensic nurse, or a paramedic who has training and experience handling strangulation cases.⁴

In other cases, consider using a police officer or investigator trained in investigating strangulation cases as a part of their domestic violence, sexual assault, child abuse, or human trafficking investigation background. The Pennsylvania Virtual Training Network (PATVN) and the Pennsylvania Police Chiefs Association developed a 25-minute online training module and exam for police officers. Upon receiving a passing score, officers receive a certificate indicating that they have taken and passed the course.

This free training is available at <https://www.strangulationtraininginstitute.com/training/online-strangulation-training/>. You can also develop advocate experts who work in the district attorney's office or at a community-based organization. While they may not be able to discuss in great detail the medical ramifications of strangulation, they can incorporate their specialized training and experience working with strangulation victims. Further, they can discuss the dynamic of strangulation in the context of intimate partner battering. Remember, experts do not necessarily have to have a long list of degrees—they just need to have relevant training and experience.

Once the category of expert has been decided, the next step is to locate the right one. The best course of action involves developing experts within your own jurisdiction. The California District Attorneys Association maintains an expert witness library that can be searched by topic or name of the expert.⁵ Prosecutors should check references and the background of any expert. The Training Institute on Strangulation Prevention also has resources regarding experts, their qualifications, and transcripts.⁶ Whatever experts you use, they need to stay within their area of expertise. No one is a true “strangulation expert.” They are expert witnesses in their own fields who possess specialized knowledge, training, education, and experience in the area of strangulation. Every expert comes with strengths and weaknesses. Try to select an expert who will most benefit your case.

2. Gael Strack and Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude* (Fall 2011) 26 Criminal Justice 3 <<https://bit.ly/2JVP5VH>> (accessed Sep. 1, 2020).

3. *Id.*

4. *Id.*

5. <<https://www.cdaa.org/prosecutor-resources/expert-witness-library>> [member login required] (accessed Sep. 1, 2020). Non-members interested in inquiring about an expert witness should contact Senior Paralegal Regan Steele at rsteele@cdaa.org.

6. <<https://www.strangulationtraininginstitute.com>> (accessed Sep. 1, 2020).

III. Motions

There are two hurdles to introducing expert testimony: establishing the relevance of the testimony and proving that it is sufficiently beyond common experience such that the opinion of the expert would assist the trier of fact.⁷ A written pre-trial motion sets the stage for admissibility of the expert testimony and alerts the court to particular issues in the case. Incorporating some of the myths and misperceptions surrounding strangulation into your motion helps to overcome both hurdles. (*Note:* This motion is for a medical expert, but it can be easily modified to support the arguments for other types of expert witnesses, such as law enforcement or advocates.). Expert witness testimony does not call for new scientific testimony, it only involves basic principles of first aid, airway, breathing, and circulation.

IV. Preparing the Expert

Pre-trial preparation of even the most seasoned expert is essential. You should not call the expert, and the expert should not testify, if the two of you do not meet before trial. Even when you have previously worked with the expert, such a meeting is critical to making certain you are both in sync for the presentation of testimony. Preparing the expert also requires that the prosecutor have at least some basic knowledge surrounding strangulation as a mechanism of injury and the corresponding myths and misperceptions.

A. Qualifications

First, review with your expert their curriculum vitae (CV) and ensure that it is current. Make certain you have provided the defense with a current copy and there are no errors in the document. For example, an expert who lists membership in a professional organization should ensure all memberships are current. Often, experts possess special skills that set them apart from others in their field. A law enforcement officer who spent several years as a paramedic prior to becoming a police officer might be one example. A medical doctor who used to compete in Jiu-Jitsu before learning about strangulation would be another example. Prepare the expert for any challenges to his or her qualifications. The prosecution should never stipulate to the qualifications of the expert. You want the jury to hear about all the education, training, and experience that qualifies the expert to testify. For an expert who has never previously testified, see *People v. Montes*.⁸ This case allowed testimony of a police officer gang expert, even though the witness had not previously testified as such an expert.

B. Subject Matter/Case-Specific

Pre-trial preparation includes a discussion about the subject matter on which the prosecutor seeks to offer the witness as an expert.⁹ Meet with the expert to review the purpose and focus of the expert's direct testimony. Experts tend to fall into two categories: general and case-specific. A general expert may be coming in without any knowledge about your victim. This expert will

7. Evid. Code §§ 201 and 801.2.

8. *People v. Montes* (2014) 58 Cal.4th 809.

9. NDAA, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, p. 35 <<https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1040>> (accessed Sep. 1, 2020).

discuss the general myths and misperceptions surrounding strangulation and will not render an opinion on the actual facts of your case. This expert may say something is consistent or inconsistent with a given set of hypothetical questions. A case-specific expert has either had direct contact with your victim (e.g., a treating paramedic) or has reviewed parts of the case to render an opinion.

C. Questions for the Expert

For your guidance, we have assembled a list of potential questions. These are not exhaustive and only serve as a starting point for prosecutors.

1. Questions About the Expert's Qualifications

1. Name.
2. Title.
3. Education.
4. Licenses.
5. Certificates.
6. Professional organizations.
7. Teaching experience (if applicable).
8. Any experience in local policy development regarding the evaluation or care of strangled patients?
9. Published writings (if applicable).
10. Pertinent presentations at professional meetings.
11. Previously qualified as an expert witness? How many times?
12. Testified for the prosecution?
13. Testified for the defense?
14. Current employer.
15. Current duties.
16. Years employed in current position.
17. Prior work experience.
18. Medical training (if applicable) including board or sub-specialty board certification(s)?
19. Law enforcement training (if applicable)?
20. Strangulation training?
21. Examined patients who have reported being strangled (if applicable)?
22. How many patients have you examined as a treating physician (if applicable)?

23. For academic physicians (medical schools or teaching hospitals), ask additional questions about experience and responsibilities for teaching doctors in training about evaluating and managing a strangled patient.

2. Questions Related to a Non-Fatal Strangulation Case

1. Define choking.
2. Define strangulation.
3. What is the difference between choking and strangulation?
4. Describe the three methods of strangulation? In this case, is the strangulation manual or ligature? If manual, one hand, two hands, or other body part?
5. Define asphyxia. [Asphyxia is specific to a lack of oxygen for brain cells; hypoxia is a generic lack of oxygen in the blood. So, asphyxia is brain hypoxia.]
6. Define hypoxia.
7. In strangulation, what causes hypoxia? [Impaired respiration, impaired blood flow to the brain, or both?]
8. What happens to the brain when there is a lack of oxygen after 10 seconds? 20 seconds? 30 seconds? 1 minute? 2 minutes? 3 minutes? 4 minutes?
9. What is hypoxic encephalopathy?
10. What is the difference between hypoxia and asphyxia?
11. What happens to the brain when there is asphyxia or an interruption of oxygenation?
12. Can a lack of oxygen to the brain result in either temporary or permanent brain injury?
13. Other than unconsciousness, are there other signs of temporary hypoxia or asphyxia?
14. What do you mean by behavioral changes? Please discuss the difference between “acute” changes while oxygen starvation of the brain is occurring and “delayed” changes that may surface later.
15. How much external pressure and time does it take to cause unconsciousness? Please discuss the spectrum of “altered” consciousness beginning with light-headedness and dizziness to the other extreme of death. What are some of the variables?
16. What are the signs or symptoms of unconsciousness?
17. How long does it take a strangled victim to regain consciousness after unconsciousness? What are the variables?
18. How much external pressure must be applied before death occurs? What are some of the variables?
19. Aside from unconsciousness or behavioral disorders, are there other signs and symptoms of strangulation?

20. Would a chart help you explain those signs and symptoms? Did you bring a chart with you today?
21. Please describe the external signs of strangulation.
22. Where would you find visible findings such as redness or scratch marks?
23. Impression marks, claw marks?
24. What is petechiae?
25. How does it look?
26. Where can it be seen on victims after strangulation has occurred?
27. How long does it last?
28. Are there other causes for it?
29. Why would there be swelling to the neck from strangulation?
30. Are there other internal injuries associated with strangulation?
31. Are there internal injuries associated with hypoxia?
32. What would cause the tongue to swell?
33. What are some of the symptoms of strangulation?
34. Can strangulation cause voice changes?
35. Can strangulation cause changes in swallowing?
36. Do some victims of strangulation vomit or feel like vomiting?
37. Do some victims of strangulation urinate or defecate? [During the event, all survivors will do both eventually.]
38. Is there a way to tell how close a strangulation victim has come to death?
39. Are all strangulation cases serious?
40. What information and/or documents did you review in this case prior to testifying (if applicable)? [Remember, it is not necessary for your expert to review any documents in your case.]
41. From your review, what are the signs and symptoms the victim exhibited?
42. In your opinion, are those signs and symptoms consistent with someone who has been strangled?

3. Questions to Dispel Strangulation Myths and Misperceptions

1. If MMA fighters and law enforcement use strangulation, is it safe?
2. Can you be strangled and still breathe?
3. Can you be strangled and still speak or yell during the episode?
4. Can you be strangled and not have any recollection or limited recollection?
5. If there are no marks left behind, is there is no injury and/or no serious injury?

6. Once the marks subside, are there long-term consequences of strangulation?
7. In some of the studies, victims lost consciousness after only a few seconds. If the victim in this case states she maintained consciousness for an extended period of time, does that mean she was not strangled?

D. Exhibits for the Expert

Exhibits help the expert explain the misunderstood aspects of strangulation. For example, diagrams of the internal workings of the neck assist the expert in explaining the anatomy of the neck area.

A photograph of the victim where signs of strangulation were present assist the expert in explaining those injuries. A chart listing the signs and symptoms experienced by the victim may also be used, as well as mannequin heads, anatomical models, and other physical exhibits. Expert witnesses typically develop more authority in the eyes of the factfinder when they are teaching using an anatomical model, not lecturing.¹⁰ Hoses can be used to illustrate the flow of blood to and from the brain. Balloons can explain the increase of pressure causing petechiae. Medical records that reflect victim injuries or symptoms provide corroboration for expert testimony as do audio recordings, including the 911 dispatch tape. The expert can discuss that voice change, hoarseness, and shortness of breath are consistent with injury during an assault involving strangulation. Recordings of the victim's voice over a period of time will often demonstrate changes and resolution of injuries after the assault.

V. Anticipated Cross-Examination Questions

There are four areas that are typically attacked during the cross-examination of an expert witness: qualifications; basis of opinion; substance of opinion; and bias, motive, or prejudice.

A. Qualifications

The defense may or may not choose to attack all or some of these areas. Expect less experienced experts to be challenged on their background, education, and experience. For example, the defense typically tries to attack nurses because they are not doctors. Remind your expert to never exaggerate experience. Encourage experts to be well versed with their CV. Actual experience working with strangled victims—especially following or managing them over time—provides the most significant qualification for an expert. This often is inadequately captured on the CV.

B. Basis of Opinion

The defense may question prosecution experts about reports, studies, or evidence they have not reviewed. If your expert relies upon reports or studies, they should have reviewed the reports prior to testimony.

10. CDAA maintains an anatomical model lending library for prosecutors. For a complete listing of available anatomical models, visit <<https://www.cdAA.org/prosecutor-resources/models>> [member login required] (accessed Sep. 1, 2020).

C. Substance of Opinion

This is the area where defense counsel may attempt to gain concessions from the expert. Defense counsel may attempt to get experts to concede facts that are consistent with the defense theory. (*Note:* It is always very helpful for the expert to have some understanding ahead of time about the anticipated defense theory.) A good expert will answer these questions truthfully. Experts are not there to help one side over the other. They are there to provide their specialized knowledge, training, education, experience. Good experts willingly concede the limitations of their opinions.

D. Bias/Motive/Prejudice

Questions in this area include how the expert is being compensated for his or her testimony, whether the expert has ever testified for the defense, and what percentage of the expert's income, if any, is derived from courtroom testimony. In general, remember if the question posed contains incorrect information about the expert's testimony (or incorrect assumptions that become agreement if the expert answers without clarification), the expert needs to correct that information before answering the question. Experts may be asked the same questions in different ways and they will want to make every effort to be consistent in their answers. Experts should be alert for compound questions, and they should be sure to clarify what part of the question they are answering. If there are other possible conclusions, experts need to be willing to acknowledge they exist.

For example, a medical expert might be asked, "Are there other causes of petechiae other than strangulation?" Even if the expert knows that the other possibilities are ridiculous, he or she must acknowledge all possibilities, with an answer such as, "I was not aware the patient was in active labor when she was strangled."

VI. Tips for the Testifying Expert

Quality courtroom testimony starts with pre-trial preparation.

A. Pre-Trial

Beyond the pre-trial preparation previously discussed, potential experts should:

1. Be familiar with any publications in their area of expertise if the article(s) form the basis for their opinions.
2. Know the qualifications or requirements for any member organizations they belong.
3. Know the ethical obligations or protocols that govern their profession or practice.
4. Watch other experts testify, if possible.
5. Participate in a mock trial.
6. Review any available transcripts of respected transcripts, if they have testified in the past.

B. In Court

1. Dress professionally.
2. Act professionally at all times in the courthouse—jurors may observe you outside of the courtroom.
3. Do not be afraid to look at the jury when testifying—make eye contact. This is especially important for “explain” questions.
4. Listen to the question asked and answer that question. Do not supply additional information that was not requested unless it is essential for jury comprehension.
5. When an objection is made, stop talking. It is often helpful to pause for a second or two after the question to allow for an objection.
6. Listen carefully to the judge regarding objections and rulings.
7. Ask for clarification on any question not fully understood.
8. During cross-examination remain poised and respectful—do not spar or argue with the defense.
9. Rely on the prosecutor to make objections to improper questions and poor treatment of you by the defense.
10. Never overstate the facts or your opinion.
11. Never exceed the scope of your experience or your expertise.
12. Avoid conclusory statements.
13. After the case concludes, seek feedback from the proponent of your testimony.
14. *Always tell the truth.*

ABOUT THE AUTHOR

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