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The Relevance of Expert Testimony to Claims of "Deliberate Indifference" Under the Eighth Amendment

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Abstract

Expert testimony is generally not relevant to establish "deliberate indifference" under the Eighth Amendment where the plaintiff's case "does not depend on technical determinations" or where the expert testimony can only prove medical malpractice. Expert testimony is, however, relevant where the expert is able to establish that the defendant's actions were taken with conscious disregard of danger to the plaintiff or where complex scientific issues are involved. Furthermore, the failure to set forth competing expert testimony can be fatal to a claim of "deliberate indifference" at the summary judgment stage. Therefore, if a defendant relies on an expert, the plaintiff should provide expert testimony, as a safeguard, to survive summary judgment even though the plaintiff's expert testimony may be insufficient to ultimately prevail at trial. Finally, while an expert may not testify to the ultimate legal issue of "deliberate indifference" or the defendant's subjective mental state, he or she may offer factual opinions on what the defendant should have done and what was reasonably expected, even when the expert's factual opinions embrace the ultimate legal question.

I. Introduction

Under 42 U.S.C.A. § 1983, to maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show "deliberate indifference to serious medical needs."[1] In federal courts, especially in the Ninth Circuit, the deliberate indifference inquiry therefore consists of two prongs. First, the plaintiff must show a "serious medical need"

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[1] *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' "[2]

Second, the plaintiff must prove that the defendant's response to the need was "deliberately indifferent."[3] This second prong may be satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need; and (b) harm caused by the indifference.[4] Indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care."[5] Mere negligence is not sufficient to establish deliberate indifference.[6]

II. FEDERAL COURTS DO NOT USUALLY CONSIDER EXPERT TESTIMONY RELEVANT TO ESTABLISH "DELIBERATE INDIFFERENCE"

Federal Courts, especially in the Ninth Circuit, do not consider expert testimony relevant to establish "deliberate indifference" when the plaintiff's case "does not depend on technical determinations" or where the expert testimony can only prove malpractice.[7] Expert testimony is relevant, however, where the expert is able to prove that the defendant's actions were taken with conscious disregard of danger to the plaintiff.[8] Moreover, expert testimony may be appropriate where complex scientific issues are involved, such as determining "what the concentration levels of environmental tobacco smoke . . . are in a prison and determining the health effects . . . on nonsmoking prisoners."[9]

A. Expert Testimony Is Neither Required nor Sufficient to Establish "Deliberate Indifference"

Expert testimony is not required to establish "deliberate indifference" in federal courts, especially in the Ninth Circuit. This is because a question of "deliberate indifference" to a plaintiff's condition, unlike

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[2] *McGuckin v. Smith*, 974 F.2d 1050, 1059, 23 Fed. R. Serv. 3d 922 (9th Cir. 1992) (overruled on other grounds by, ''WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 36 Fed. R. Serv. 3d 1042 (9th Cir. 1997)) (*en banc*).

[3] *Jett*, 439 F.3d at 1096 (citation omitted).

[4] *Jett*, 439 F.3d at 1096.

[5] *Jett*, 439 F.3d at 1096 (citation omitted).

[6] *Jett*, 439 F.3d at 1096 (citing *Estelle*, 429 U.S. at 105 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.")).

[7] *Salcido v. Zarek*, 237 Fed. Appx. 151, 153 (9th Cir. 2007); *Jamison v. Nielsen*, 32 Fed. Appx. 874, 877 (9th Cir. 2002).

[8] *Jamison*, 32 Fed. Appx. at 877.

[9] *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir. 1991), *vacated on other grounds*, *Helling v. McKinney*, 502 U.S. 903, 112 S. Ct. 291, 116 L. Ed. 2d 236 (1991).

whether the defendants are guilty of medical malpractice, "is not so complicated and difficult that an expert is required to present or prove the case."[10] A trier-of-fact does not need a medical expert to determine that a plaintiff's alleged condition constitutes a serious medical condition.[11] A plaintiff is usually able to prove this by use of medical records and by questioning the defendant at trial.[12]

For example, in a case where a plaintiff was denied extra pain medication by prison officials, the plaintiff appealed the district court's decision not to appoint an expert witness.[13] The court held that because the plaintiff's case "does not depend on technical determinations but instead hinges on the intent of the prison administrators, the [district] court's conclusion that it did not need to appoint an expert witness was clearly within its discretion."[14] Similarly, in *Jamison v. Nielsen*, the court held that a woman who claimed deliberate indifference to her medical needs relating to a miscarriage she suffered in jail was not entitled to an expert witness.[15] The court further stated that expert medical testimony in the case could at most aid in proving medical malpractice; it would not, however, show that the defendants' actions were taken with conscious disregard of danger to Jamison.[16]

Conversely, in a case where a plaintiff did hire an expert witness, the plaintiff in fact did not prevail because "[d]eliberate indifference is a high legal standard. A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment."[17] Moreover, expert testimony leading to "[a] difference of opinion between . . . medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference."[18] Therefore, expert testimony as to the appropriate standard of care is not sufficient to establish "deliberate indifference."

District courts have also generally held that expert testimony is neither required nor sufficient to establish "deliberate indifference" to

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[10] *Krause v. Whitley*, 985 F.2d 573 (9th Cir. 1993).

[11] *Williams v. MacArthur, No. 06-0180*, 2007 U.S. Dist. LEXIS 1738, at *7 (D. Nev. Jan. 8, 2007).

[12] *Williams*, 2007 U.S. Dist. LEXIS 1738, at *7.

[13] *Salcido*, 237 F. App'x at 152.

[14] *Salcido*, 237 F. App'x at 153.

[15] *Jamison*, 32 F. App'x at 877.

[16] *Jamison*, 32 F. App'x at 877.

[17] *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); see also *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) ("Mere medical malpractice does not constitute cruel and unusual punishment." (citation omitted)); *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (stating that even gross negligence is insufficient to establish a constitutional violation).

[18] *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)).

prisoner medical care. While several cases have involved expert testimony, it is neither required nor usual. For example, in a recent "deliberate indifference" case in the Northern District of California, the defendants argued that the plaintiff's lay testimony was insufficient to prove causation.[19] The defendants asserted that "in a personal injury action, causation must be proven, within a reasonable medical probability based upon competent expert testimony."[20] However, the court ruled that the plaintiff was not required to have an expert testify as to causation.[21]

B. Expert Testimony Can Help the Plaintiff Defeat the Defendant's Summary Judgment Motion

Although expert testimony is neither required nor sufficient to ultimately prove "deliberate indifference," it can create a triable issue of fact at summary judgment. For example, in a district court in the Ninth Circuit, where the plaintiff brought claims of "deliberate indifference" against two physicians, Dr. Beck and Dr. Reddy, for surgically removing the plaintiff's left kidney based on an incorrect diagnosis of kidney cancer, expert testimony helped the plaintiff prevail on defendant Dr. Beck's summary judgment motion.[22] The opinion of the plaintiff's expert supported an inference that Dr. Beck was "deliberately indifferent" to the plaintiff's serious medical needs because his treatment of the plaintiff "was so substantially outside the standard of care and opposite of reasonable medical judgment, that Dr. Beck would have needed to disregard the substantial body of medical evidence at his disposal to come to his diagnosis and treatment plan."[23] The expert's opinion showed that Dr. Beck knew of the excessive risks to the plaintiff, because they would have been obvious to a reasonable urologist, and disregarded those risks.[24] Therefore, the plaintiff demonstrated triable issues of fact concerning whether Dr. Beck's course of treating him was "medically unacceptable under the circumstances," or "in conscious disregard of an excessive risk to plaintiff's health."[25]

However, in *Elliot v. Reddy*, the plaintiff's expert did not address the

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[19]*Doe v. City of San Mateo*, 2011 WL 500203 (N.D. Cal. 2011), aff'd on other grounds, 554 Fed. Appx. 560 (9th Cir. 2014), opinion withdrawn and superseded on denial of reh'g, 582 Fed. Appx. 753 (9th Cir. 2014) and aff'd on other grounds, 582 Fed. Appx. 753 (9th Cir. 2014).

[20]*Doe v. City of San Mateo*, 2011 WL 500203 *5 (N.D. Cal. 2011).

[21]*Doe v. City of San Mateo*, 2011 WL 500203 *6 (N.D. Cal. 2011).

[22]*Elliot v. Reddy*, 2014 WL 1877566 *1 (E.D. Cal. 2014).

[23]*Elliot v. Reddy*, 2014 WL 1877566 *20 (E.D. Cal. 2014).

[24]*Elliot v. Reddy*, 2014 WL 1877566 *20 (E.D. Cal. 2014).

[25]*Elliot v. Reddy*, 2014 WL 1877566 *25 (E.D. Cal. 2014). (citing *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)) (citations and internal quotation marks omitted).

second defendant Dr. Reddy's medical care of the plaintiff.[26] In the absence of contradicting expert testimony, the court relied on the opinion of Dr. Reddy's expert who opined that Dr. Reddy followed the appropriate standard of care in referring the plaintiff to a urologist.[27] Because the plaintiff failed to demonstrate a material factual dispute challenging the defendant's expert opinion that Dr. Reddy's treatment of the plaintiff met the appropriate standard of care, Dr. Reddy's summary judgment motion was granted.[28] The failure to set forth expert testimony can therefore be fatal to a claim of "deliberate indifference" while the court is evaluating a motion for summary judgment.

Similarly, in *Kamakeeaina v. City & County of Honolulu*, the defendant prevailed on summary judgment because the plaintiff lacked expert testimony.[29] The plaintiff alleged that he notified the defendant physician of his longstanding mental health issues and diagnoses and requested specific mental health care, including antipsychotic medication and therapy, but the physician denied his requests.[30] However, the plaintiff provided no expert witness statements at summary judgment refute the defendant physician's conclusion that the plaintiff exhibited no psychosis, PTSD, depression, or bipolar disorder when he examined him and was an unsuitable candidate for medication.[31] The court found that the plaintiff had presented no evidence that the defendant's care was medically unacceptable, or that he acted with a "sufficiently culpable state of mind."[32] Because the plaintiff had not raised a genuine issue for trial with respect to "deliberate indifference," the defendant's motion for summary judgment was granted.[33]

Hence, although neither necessary nor sufficient to ultimately prove "deliberate indifference," expert testimony can tilt the scales at summary judgment. If a defendant relies on an expert, the plaintiff should provide expert testimony, as a safeguard, to survive summary judgment even though the plaintiff's expert testimony may be insufficient to ultimately prevail at trial.

C. Expert Testimony Can Be Helpful to the Court in Cases of Systematic Constitutional Violations

While courts must not confuse professional standards with

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[26] *Elliot v. Reddy*, 2014 WL 1877566 *26 (E.D. Cal. 2014).

[27] *Elliot v. Reddy*, 2014 WL 1877566 *26 (E.D. Cal. 2014).

[28] *Elliot v. Reddy*, 2014 WL 1877566 *26–27 (E.D. Cal. 2014).

[29] *Kamakeeaina v. City & County of Honolulu, No. 11-00770*, 2014 U.S. Dist. LEXIS 59004, at *60–61 (D. Haw. Apr. 28, 2014) (not available on Westlaw).

[30] *Kamakeeaina*, 2014 U.S. Dist. LEXIS 59004, at *5.

[31] *Kamakeeaina*, 2014 U.S. Dist. LEXIS 59004, at *57.

[32] *Kamakeeaina*, 2014 U.S. Dist. LEXIS 59004, at *61 (citations omitted).

[33] *Kamakeeaina*, 2014 U.S. Dist. LEXIS 59004, at *61.

constitutional requirements under the Eighth Amendment,[34] expert testimony can be helpful in cases of systematic constitutional violations that involve complex, scientific matters or judgment on professional standards. For example, in *Brown v. Plata*, numerous experts testified that systematic prison overcrowding was the primary cause of the "deliberate indifference" violations related to the constitutionally inadequate medical and mental health care provided.[35] When the Plata defendants claimed that the expert witnesses' testimony expressed their policy preferences rather than their views on the constitutional violation at issue, the court stated that "when expert opinion is addressed to the question of how to remedy constitutional violations . . . federal judges can give it *considerable weight*."[36] Moreover, "courts are not required to disregard expert opinion solely because it adopts or accords with professional standards. Professional standards may be 'helpful and relevant with respect to some questions.' "[37]

D. Some Circuits Are More Favorable to Expert Witness Testimony Regarding Deliberate Indifference

The Eighth Circuit has held that expert testimony is required to prove causation in certain, more complex, deliberate indifference cases. In *Alberson v. Norris*, a prisoner died after being treated by doctors who failed to diagnose him with Goodpasture Syndrome, "a rare autoimmune disease that is difficult to diagnose."[38] The court held that "[w]here the complaint involves treatment of a prisoner's sophisticated medical condition, expert testimony is required to show proof of causation."[39] The holding was the same in *Gibson v. Weber*,[40] where an inmate with diabetes challenged a treatment plan. And the holding was the same in *Robinson v. Hager*,[41] where an inmate argued that the "plaintiff's lapse in hypertension medication" caused him to

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[34] *Rhodes v. Chapman*, 452 U.S. 337, 376 n.8, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981).

[35] *Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910, 1919, 179 L. Ed. 2d 969 (2011).

[36] *Brown*, 131 S. Ct. at 1945 (emphasis added). In this class action on systematic prison abuses, numerous experts testified on prison reform and prison medical systems. See *Brown*, 131 S. Ct. at 1945. In that regard, Plata is an exceptional case that may be difficult to generalize to actions such as ours involving a single plaintiff.

[37] *Brown*, 131 S. Ct. at 1945 (quoting *Rhodes*, 452 U.S. at 376 n.8). The *Rhodes* court noted that "public health, medical, psychiatric, psychological, penological, architectural, structural, and other experts have proved useful to the lower courts in observing and interpreting prison conditions." *Rhodes*, 452 U.S. at 363.

[38] *Alberson v. Norris*, 458 F.3d 762, 764–65 (8th Cir. 2006).

[39] *Alberson*, 458 F.3d at 765–66.

[40] *Gibson v. Weber*, 433 F.3d 642, 646 (8th Cir. 2006).

[41] *Robinson v. Hager*, 292 F.3d 560, 564, 59 Fed. R. Evid. Serv. 244 (8th Cir. 2002).

have a stroke. The Eighth Circuit contrasted these cases with those where "a visible injury or a sudden onset of an injury occurs," in which case a "causal connection between an event and an injury may be inferred" by a layperson.[42]

However, the three Eight Circuit cases above involved plaintiffs with sophisticated medical conditions. Moreover, the Seventh Circuit has specifically warned district courts not to demand expert testimony in deliberate indifference cases, except "in the rare instance."[43] In *Gayton*, the Seventh Circuit stated that the district court should not have been so quick to assume that expert testimony was required to prove causation: "Proximate cause is a question to be decided by a jury . . . [e]xpert testimony is not always necessary to establish causation in a case where an inmate alleged that prison employees violated his due process rights by failing to provide him with adequate medical care."[44]

III. AN EXPERT WITNESS MAY NOT TESTIFY TO THE ULTIMATE LEGAL QUESTION IN A CLAIM OF "DELIBERATE INDIFFERENCE" BUT CAN TESTIFY TO PREDICATE ISSUES

A. *An Expert Witness Cannot Testify that the Defendant Subjectively Knew of the Plaintiff's Condition But Can Offer Opinions that Might Support Such a Finding*

There appears to be only one case in the Ninth Circuit addressing whether an expert witness may testify to the ultimate legal question of "deliberate indifference" in the specific situation where medical care of a prisoner is at issue. In *Cotton v. City of Eureka*, a district court in the Ninth Circuit stated that an expert witness may not testify to the ultimate legal question in a claim of "deliberate indifference" but may testify to objective issues predicate to that question.[45] Therefore, the Ninth Circuit will allow factual opinions addressing the prongs of the "deliberate indifference" test—whether the plaintiff had a serious medical need and the appropriate standard of practice—such that a jury may find "deliberate indifference."[46] But an expert cannot testify that the defendant had subjective knowledge of the plaintiff's condition.[47]

In *Cotton*, the family of a decedent who died in police custody brought an action against county officers for "deliberate indifference"

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[42] *Robinson*, 292 F.3d at 564 (internal quotation marks omitted).

[43] See *Gayton v. McCoy*, 593 F.3d 610, 624, 81 Fed. R. Evid. Serv. 538 (7th Cir. 2010).

[44] *Gayton*, 593 F.3d at 624–25 (citation omitted).

[45] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 (N.D. Cal. 2010), on reconsideration, 2011 WL 4047490 (N.D. Cal. 2011).

[46] *Cotton*, 2010 WL 5154945 *17–19 (N.D. Cal. 2010).

[47] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *2–5 (N.D.Cal., 2011).

to his serious medical needs.[48] When the defendants sought to preclude the plaintiffs' expert from offering opinions that would constitute legal conclusions, the court ruled that "[w]hether [defendants] had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that [defendants] knew of a substantial risk from the very fact that the risk was obvious."[49] Expert testimony was inappropriate to establish the defendants' subjective awareness of the decedent's serious medical needs.[50]

In addition, the plaintiffs' expert was not allowed to offer legal conclusions that defendants were "deliberately indifferent" or speculative factual conclusions that their conduct was "intentional, reckless and dangerous" or "reflected a callous disregard for the life and safety of Mr. Cotton."[51] Such determinations are "the province of the trier of fact, based on its assessment of the evidence and testimony presented."[52]

However, the expert in *Cotton* could testify to the correctional facility's policies and professional standards of practice and whether those required the defendants to medically assess the decedent and to provide him with immediate medical treatment under the circumstances presented.[53] Such expert testimony constituted circumstantial evidence, which, if credited by the jury, could cast doubt on the defendants' claim that they were subjectively unaware of the decedent's medical need.[54] The Cotton court further quoted *Lolli v. County of Orange*, which stated that "[T]he officers' indifference to

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[48] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *1 (N.D.Cal., 2011).

[49] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *2 (N.D.Cal., 2011) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

[50] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *2 (N.D.Cal., 2011) (quoting *Gobert v. Caldwell*, 463 F.3d 339, 348 n.29 (5th Cir. 2006) ("As we must focus on [the defendant's] subjective knowledge, expert testimony cannot create a question of fact as to what [defendant] actually knew.").

[51] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *2 (N.D.Cal., 2011).

[52] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *2 (N.D.Cal., 2011) (citing *Farmer*, 511 U.S. at 837).

[53] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *3 (N.D.Cal., 2011).

[54] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *3 (N.D.Cal., 2011) (citing *Watson v. Torruella*, 2009 WL 3246805 (E.D. Cal. 2009) (finding that expert testimony that the defendant physician failed to follow standard diagnostic procedures could provide the jury with circumstantial evidence that the physician was subjectively aware of the risk his treatment caused)).

[plaintiff]'s extreme behavior, his obviously sickly appearance and his explicit statements that he needed food because he was a diabetic could easily lead a jury to find that the officers consciously disregarded a serious risk to [plaintiff]'s health. Much like recklessness in criminal law, deliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm."[55]

Although the jury could find from the evidence presented whether the defendants followed the applicable procedures and legal requirements, that did "not foreclose [the expert] offering opinions that Defendants deviated from such requirements."[56] Next, the defendants objected to the expert's testimony that their failure to conduct a mental health assessment amounted to a violation of "policy and law."[57] The defendants asserted that the alleged failure to conduct such an assessment showed only negligence and "lack[ed] relevance" to a § 1983 claim.[58] However, the court ruled that because the plaintiffs' "deliberate indifference" claim was based on the defendants' failure to tend to the decedent's serious and allegedly obvious injuries, the expert testimony was relevant to, and could properly be considered by the jury in assessing, whether the defendants were "deliberately indifferent" to the decedent's medical needs.[59] While the expert was not allowed to opine that the defendants violated the decedent's constitutional rights, he was permitted to offer opinions that might ultimately support such a finding.[60]

B. In a Non-Eighth Amendment Case, an Expert Cannot State an Opinion as to His or Her Legal Conclusion But Can Give Factual Opinions Regarding Predicate Issues

Non-Eighth Amendment cases also assert that, in general, parties are precluded from presenting any opinion testimony regarding whether or not defendants were "deliberately indifferent." For example, in the context of discrimination against disabled persons, under the Rehabilitation Act,[61] a plaintiff must prove "deliberate indifference" on

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[55] *Cotton ex rel. McClure v. v. City of Eureka*, 2011 WL 4047490, at *3 (N.D.Cal., 2011) (quoting *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003)).

[56] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 *19 (N.D. Cal. 2010).

[57] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 *19 (N.D. Cal. 2010) (citation omitted).

[58] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 *19 (N.D. Cal. 2010).

[59] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 *19 (N.D. Cal. 2010).

[60] *Cotton v. City of Eureka, Cal.*, 2010 WL 5154945 *19 (N.D. Cal. 2010) (citing *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)).

[61] 29 U.S.C.A. § 794.

the part of the defendant.[62] On the question of whether expert testimony is relevant to such a violation, federal courts have stated that "the parties are precluded from presenting any opinion testimony regarding whether or not Defendants were deliberately indifferent."[63] However, in such cases, a party's expert may testify as to his or her factual opinions, even where the opinions embrace the ultimate issue.[64] Assuming that the offering party lays the proper foundation, an expert may testify as to what defendants should have done and what would have been reasonable and expected.[65]

Conclusion

The use of an expert witness is neither required nor usual to establish "deliberate indifference" unless complex, scientific issues are involved. Establishing "deliberate indifference" requires the presence of a serious medical need and a purposeful act by the defendant to deny the plaintiff medical care, beyond gross negligence. Both prongs of the standard may be readily established by lay testimony since the standard of medical care is not at issue. However, when a defendant has an expert witness, he or she may prevail at summary judgment if the plaintiff cannot produce expert testimony to contradict him or her. Therefore, expert testimony for the plaintiff is recommended at the summary judgment stage. Finally, although experts may not testify to the ultimate legal question of "deliberate indifference," they may testify to their factual opinions on what the defendants should have done and what was reasonably expected, even when their factual opinions embrace issues predicate to the ultimate legal question.

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[62] *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138, 12 A.D. Cas. (BNA) 148, 12 A.D. Cas. (BNA) 558 (9th Cir. 2001), as amended on denial of reh'g, (Oct. 11, 2001).

[63] *Mark H. v. Hamamoto*, 2012 WL 3444138, at *3 (D.Hawaii, 2012) (quoting *U.S. v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007) ("an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law")).

[64] *Mark H. v. Hamamoto*, 2012 WL 3444138, at *3 (D.Hawaii, 2012) (citing Fed. R. Evid. 704(a)).

[65] *Mark H. v. Hamamoto,* 2012 WL 3444138, at *3 (D.Hawaii, 2012).