HOW TO SELECT AND PROPERLY USE EXPERTS

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I. What Kind Of Expert Might You Need

A. At this Point We Are Not Dealing With The Decision To Engage a Civil Engineer Versus a Structural Engineer, But Rather Are Focusing on the Overall Task to be Completed.

B. Investigating Experts

1. From a trial advocate's viewpoint, the "facts* are often the most important aspect of a case.

2. The principal responsibility of the investigating expert is to do the following:

a. Gather and organize facts.

b. Identify and locate witnesses.

c. Preserve evidence

(1) Obtain the actual evidence itself.

(2) Record important evidence through the use of photographs and/or video.

d. Identification (and perhaps recommendation) of the specific type of technical expert which may be additionally

e. Help to isolate the key issues and develop an initial strategy to accomplish the goals.

3. Special problems in connection with third party claims.

a. Often the trail is cold which cannot be helped since the institution of suit is often first notice.

b. If, however, the insurer obtains notice of a potential suit by the insured, it is often of critical importance to engage in the full investigation.

c. This often depends upon the nature of the event.

(1) Preservation of physical evidence in motor vehicle or product liability cases.

(2) Use of accident reconstructionist, metallurgist, to assist in developing the essential facts to evaluate and then defend or settle case.

(3) Should you consider the "Independent" medical exam?

(a) Why - Do you want to ratify plaintiffs claims;

(b) Review of records.

(1) Some firms have found it cost effective to hire a nurse or resident to perform this routine but essential task.

4. The proper use of an investigating expert can be of substantial economic benefit to the insurer.

a. It is vitally important to evaluate exposure as soon as possible. If a case should be settled, very often settlement can best be achieved early.

C. While a Proper Investigation Expert is Often Critical and Requires a Substantial Amount of Expertise, that Individual is Usually a "Fact" Witness, at Least for the Purposes of the Federal Rules of Civil Procedure.

1. As a fact witness he would almost always be subject to discovery by the opponent and therefore deposition.

a. But see, Fed. R.Civ.P. 26(b)(4)(B) can you "protect" him by not calling him?

2. The information that counsel provides him will also be discoverable.

D. Technical Experts

1. The principal function of a technical expert is to take the facts which have been developed by the investigating expert, to examine the evidence which has been preserved by the investigating expert and to analyze the facts and test the evidence in order to arrive at an opinion or conclusion as to the cause of a loss or injury.

2. In a third party situation, too many times the defense expert only rebuts the plaintiffs theory. It is my experience that unless the defense expert not only rebuts plaintiffs expert's theory, but also explains to the jury what caused the accident, changes of success are substantially reduced.

a. In other words, while a plaintiff in a third party action usually has the burden of proof, as a practical matter, I believe the defendant should act as if he does.

Often in a first party me, particularly where the insurer is relying upon an exception to coverage, the defendant insurer has the burden of proof.

II. What Is The Purpose Of The Expert

A. This Obviously Overlaps With The "Function" Discussed Above But Can Be Different.

B. All Claims Are either Settled (With or Without a Payment) or Tried.

C. The Purpose of Retaining an Expert May Well Be To Put The Case In a Posture Where The Matter Can be Settled (Including The Closing Of A File Without Payment)

1. A determination should be made whether the claim involves a realistic chance of settling.

a. This could be based on such factors as the size of the claim, the nature of the legal issue, the reputation of the attorney, or in a property context, the public adjuster.

2. Once this determination has been made, an expert can be retained with that particular objective foremost in mind.

3. This kind of expert can be specifically retained for the purpose of preparing an expert report and may not need to be the same type of expert who may be called upon to testify.

a. For example, if you know a doctor who is well respected and writes a great report but who, due to time problems or other factors, won't go to court, you could use him in this situation.

4. In this situation, you may decide to retain an expert who is closely associated with the insurer, or perhaps the insurance industry generally.

a. If the matter is tried you may not want to utilize that expert.

5. The danger in this approach is obvious. If the initial nation is wrong, and the case is not settled, what do you do?

D. To Prove Your Case At Trial

1. A determination should be made whether there is a significant likelihood that the matter will proceed to litigation if not to trial itself.

    a. This would depend on the same kind of factors noted above (C. 1.a.)

    b. In those instances the expert retained will be needed to testify in court or, at a minimum, be able to convince another attorney and/or his or her expert that your version of the cause is more likely to be accepted by a factfinder.

E. To Educate the Insurer And The Attorney Retained By The Insurer

1. See III. D. below.

III. What Should Be The General Criteria For The Retention Of A Particular Expert -- The Qualities Of A Good Expert

A. To a Certain Extent, It Depends Upon What I have Previously Referred To As The Principal Purpose, That Is To Settle Or Try The Case

1. When in doubt, one should assume that litigation and perhaps trial will be necessary.

B. A Reputation For Veracity

1. I feel this is the single most important criteria because without this, the overall purpose of retaining an expert described above cannot be achieved.

    a. If the purpose is to settle the case an opponent will not accept the opinion of the expert, either before suit or during the course of litigation.

    b. Due to the modest requirements to qualify as an expert (see infra) the fact finder will almost always be the final arbitor of the believability of the expert witness.

    c. The one thing a jury does perhaps better than anything else is to ascertain the credibility or veracity of a witness. Once a jury believes that a witness or expert is not being candid of a fact is not believable, the insurer and the attorney has lost the battle and probably the war.

2. This criteria is equally important for all experts regardless of the "purpose", regardless of the "function" and regardless of whether the expert is being utilized to analyze the draw conclusions as to the cause of the event or perform the more technical testing of evidence.

3. If the other side uses an "expert from its stable", should you "fight fire with fire"?

C. The Ability To Communicate Effectively

1. I believe that the whole art of trial advocacy is really a matter of effective communication.

    a. Knowledge uncommunicated, or communicated poorly, is no knowledge at all.

2. The most important thing to communicate is not the opinion -- but the "why" of the opinion.

    a. In other words, its usually not difficult to state the opinion, but great care should be taken to make sure that the reasons for the opinion are fully and effectively explained.

3. Often the more technical the subject matter, the more difficult it is to effectively communicate to a jury.

4. One of the most important things a trial attorney can do is, by the nature, order and design of his direct examination, and the use of appropriate demonstrative evidence, facilitate the expert in the communication process.

5. However, it is my experience that some experts simply do not communicate well to a jury.

    a. I would rather have someone somewhat" less qualified who can communicate well to a jury then to have the world's most renown expert in a narrow area who is not able to communicate well.

    b. While the expert may not communicate well to the fact-finder, he can nevertheless still pay a critical role in the advocacy process.

        (1) He can be intimately involved in the investigation and development of the facts of the case.

        (2) He can serve as a catalyst to the thinking process of other experts better equipped to testify at trial.

        (3) The "expert' as a "consultant".

            (a) No need to disclose. See Fed. R.Civ.P. 26B(4)(B).

6. While prior testifying experience is helpful, it certainly is no guarantee.

a. If at all possible, the attorney should speak to other attorneys who have utilized the expert in court.

7. General appearance and demeanor.

a. Since it is critical to communicate well and to be perceived as truthful, these factors, while admittedly subjective, are important

(1) Certainly the jury will consider these factors in evaluating the weight to give the expert opinion.

D. The Ability To Work With The Selected Counsel

1. Availability.

a. One of the principal roles of an expert is to educate the attorney.

b. This requires a willingness to commit both time and energy to the project, often working around an attorney's erratic schedule.

c. A "great expert" who is not available to consult with the attorney in order to assist in -

(1) The preparation of appropriate discovery directed to your opponent.

(2) Research of potentially applicable codes, rule, regulations, relevant medical articles, etc.

(3) The evaluation on a timely basis of materials obtained in discovery and forwarded to the expert by the attorney.

(4) Meeting with the attorney to prepare him for the deposition of critical fact and/or expert witnesses of the other side.

(5) Suggest and perhaps prepare demonstrative evidence which would be helpful in making his testimony more persuasive.

(a) Make sure the expert is as good at preparing the exhibit, chart, etc., as he is a testifier.

(6) Meet with and spend whatever time is necessary to prepare for direct examination of the expert for trial.

(7) Meet with the attorney and spend whatever time is necessary to assist counsel with the cross-examination of your opponent's fact and expert witnesses at trial.

is an ineffective expert.

d. The problem of "overusing" an expert, even a good one, is that soon his unavailability exceeds his availability.

e. Age and health.

(1) In large metropolitan area where it may take 5 to 7 years for a case to reach trial, these items should at least be factored in.

E. Understanding The Attorney's Role, The Judicial Process, And the Role Of The Expert In That Process.

1. While the role of the expert involves the education of the attorney, the expert is not the attorney.

a. An expert who tells the attorney what is "discoverable", how to try the "case" and about his wonderful relationship with judges, should be avoided.

(1) If he seems to be a pompous know-it-all to you, how will be look to the jury?

b. On the other hand, the attorney should not feel that he has the right to push the expert into reaching certain conclusions.

c. The relationship and roles may become strained during case preparation, but that is to be expected and, if handled properly, can be helpful preparation for the actual trial.

(1) One important role an expert can play is to educate the attorney on any weaknesses in the case.

2. The expert must understand what qualifies as an "opinion" in the judicial setting and must understand the difference between something which is "more likely to occur" than not.

a. Total certainly is not required.

3. The expert must understand the need to use "magic" words.

a. The expert should understand the concept of what constitutes a reasonable degree of scientific and/or medical certainty.

b. The expert must understand that "could have" is usually a legally insufficient basis upon which to render an opinion.

c. This is less of a problem now since under Fed. R. Evid. 702, the expert can be asked the question directly.

(1) However, be careful to prepare your expert for cross-examination on this point.

F. The Expert Must Be An Advocate For Your Client's Position But An Impartial" One.

1. The expert must be sure of his opinion and willing to defend that opinion.

a. Almost the absolute worst thing that can happen to a trial attorney is for the expert to be "wishy-washy* in connection with his opinion.

(1) The worst thing is for the expert (or any other witness) to appear dishonest.

b. The expert must present his opinion firmly and authoritatively.

(1) The expression "I might be wrong but never in doubt comes to mind as applicable.

c. The expert must be willing to concede obvious facts and/or other opinions where appropriate.

2. The expert must have the ability to present facts and opinions clearly and concisely in direct examination.

a. The question/answer format is unique and creates special problems.

b. This is often the most single important part of the trial.

(1) If the direct examination of your expert goes poorly, you are obviously in big trouble.

c. The expert must be able to effectively communicate his or her opinion as well as the rebuttal of the opponent's opinion.

(1) As stated above, the reasoning behind the opinion is the most critical part.

d. Must walk the line between being carefully prepared and looking rehearsed.

3. Must have the ability to handle cross-examination.

    a. The trial attorney's role certainly includes preparation of an expert for cross-examination but, in fact, the attorney can do only so much.

    b. The expert must have the ability to listen and understand the question posed by the opponent.

        (1) He must be alert for often unstated major premises built into the questioning, which may not be consistent with the evidence.

    c. Must have the ability to turn "loose' cross-examination into another opportunity to repeat and further explain his opinion.

        (1) If your opponent is not using leading questions, the expert should be enough of an advocate to take advantage of this.

    d. Be patient --do not fight with opposing counsel and/or the judge, but do not be led submissively down the primrose path.

        (1) The expert should be firm in his opinion, but not appear ridiculous.

    e. Be able to think under pressure.

        (1) The expert cannot answer a leading and damaging questions with a simple "yes" when there is a helpful explanation.

        (2) Could the design be improved? Yes - anything can be improved but, etc.

IV. What Expert Should Be Selected -- The Specific Criteria -- The Qualifications Of A Good Expert

A. In Addition To The General Criteria Related Above, The Nature Of The Case And/Or Issue Presents Specific Needs Related To That Particular Case.

B. The Expert Should Be A Competent Expert In The Specific Subject Matter And/Or Field At Issue.

1. Under the Federal Rules of Evidence and rules in almost every state, the minimum standards to qualify as an expert are not hard to meet.

2. Usually anyone who has any specialized knowledge in an area can qualify as an expert.

a. See, e.g., Fed. R. Evid. 702 which indicates that one qualifies as an expert through 'knowledge, skill, experience, training or education."

3. I suggest that the fact that someone may 'qualify' as an expert is not the end of the inquiry for the trial attorney, but rather the beginning of the inquiry.

4. Generally, the court, as a preliminary matter, will determine if a witness qualifies as an expert.

a. See e.g., Fed. R. Evid. 104(a)

5. In certain kinds of cases, depending upon the facts, a "generalist" may be acceptable and even preferred.

a. However, my experience is that today's litigation has, to a large degree, passed by the "generalist".

b. The expert who testifies that everything was caused by an "undefined electrical malfunction* is often no longer of substantial help to an attorney.

6. Be particularly carefully of the expert who is an expert in everything

a. I love to get an expert's resume from my opponent where the expert lists 100 areas of expertise.

C. Educational Background Versus Practical Knowledge

1. Obviously, to the extent possible, the attorney would prefer to have an expert who has both.

a. As an example, in a recently tied case, the plaintiffs metallurgical expert had substantial metallurgical qualifications but no prior actual experience in the subject matter of the law suit, orthopedic implants. The defense metallurgist had the Sam academic qualifications and, additionally, was a member of the appropriate ASTM Committees for surgical implants and had spent a substantial portion of his working life in the of implants.

b. Trial counsel was confronted with a decision concerning potential bias since obviously not many metallurgists have that kind of practical background, and this expert had served as an expert for the defendant on prior occasions.

2. The nature of the case and the particular issue often dictates the importance of educational background versus practical knowledge.

a. The medical malpractice claim versus the automobile maintenance claim.

(1) When is it appropriate to use a teaching-hospital specialist in a case involving a general practitioner.

(a) Causation - yes

(b) Standard of care - no

(2) The backyard mechanic versus the automotive engineer.

3. This decision may well depend upon where you are trying the case.

a. Geographical location.

(1) If you are in a major metropolitan area, the jury will probably expect your expert to have the formal educational background readily available in that area.

(2) If you are trying a case in a more rural area, the jury may well prefer and respect the practical, hands-on expert versus the "schooled" expert.

b. The forum where the case will be tied.

(1) If you are trying the case in AAA Construction Arbitration, your arbitrators will probably be engineers and/or contractors, rather than lay persons.

(a) In those circumstances, in is extremely important that your expert talk the language of the arbitrators.

(b) in this situation, since the fact-finders are "experts" in the area, the expert who may not be effective before a jury may well be the perfect expert.

(2) DRI Insurance Litigation.

(a) If you are trying a primary/excess case in DRI Arbitration, the arbitrators will be knowledgeable in the insurance area and this may permit the use of an expert not satisfactory in a jury trial setting.

D. The Conglomerate.

1. The field of forensic expertise is a lucrative field.

2. We are more and more seeing "conglomerates being created rather than individual experts with particular area of knowledge working independently.

3. There is obviously strength in becoming familiar with a conglomerate in terms of the wide-spread areas of expertise that may be available to the conglomerate.

4. There is also a substantial risk since you are not hiring the individual expert but rather the conglomerate.

    a. I recommend before any such retention, that there be at least one personal meeting between the attorney and the proposed individual expert to make sure that that individual expert meets the general and specific criteria outlined above.

V. Who Should Select The Expert

A. This Probably Depends Upon Whether The Principal Purpose Is To Try To Settle The Claim Or Whether 7bere Is A Substantial Likelihood That The Matter Will Involve Litigation And Potential Trial.

B. I feel Very Strongly That If I Am Going To Try The Case, I Want To Be Involved In The Selection Process.

1. We have all had files sent to us for the defense of an insured where the expert has already been chosen and, perhaps, has already rendered his opinion by way of a report.

    a. Almost invariably, this creates problems for the attorney.

2. There is no question in my mind that a certain chemistry between the expert and the attorney is essential for the effective communication of the client's position.

C. Even In Those Situations Where The Insurer Generally Retains The Expert Before The Retention Of Counsel, Potential Problems Can Be Minimized.

1. I suggest that insurers and their counsel regularly meet and review experts retained.

2. Them should be candid discussions of the strengths and weaknesses of the experts.

3. I recognize that potential problems exist.

    a. Long time relationships.

b. Personal friends.

c. Sources of business.

VI. Cost

A. Experts -Particularly Good Experts Are Expensive.

1. The expense incurred initially often pays dividends later.

B. Be Careful Of Open-Ended Assignments And Huge Bills.

1. Make the assignment and scope of retention clear.

2. Consider an initial budget.

3. Ask for status reports and invoices.

Appendix Of Articles

Baum, "Enter the Expert", The Art of Advocacy - Preparation of the Case , Chapter 9.

Habush, "Introduction to Cross-Examination of Non-Medical Experts, "The Art of Advocacy - Cross Examination of Non-Medical Expert, Chapter 1.

The Expert Witness in Litigation, 1983 DR MONOGRAPH, No. 3 containing the following article

Pemberton & Hirsch, "The Defense Lawyer and the Expert," 1983 DRI MONOGRAPH No. 3, Chapter 1, at 2.

Younger, "Practical Approach to the Use of Experts Testimony," 31 Clev. State L. Rev. 1 (1982).

Gleeson, "Effective Use of Expert Witnesses in Toxic Tort Litigation," FOR THE DEFENSE, Vol. 28 at 11 (Aug. 1986).

Lane, "Goldstein Trial Technique," Opinion, Evidence and Expert Witnesses, Vol. 2, Chapter 14 (3d ed. 1985).

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