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Witnesses: The Good, The Bad & The Ugly

I. Basic Information Regarding Expert Witnesses

Expert witnesses are individuals with specialized knowledge that are consulted in anticipation of litigation or in preparation for trial and who render opinions about the issues made the basis of a lawsuit.

II. Determining whether an Expert Witness is Required for a Case

At the beginning of any lawsuit, it is important for the attorney and claims adjuster/client to discuss how the lawsuit should be handled. One of the discussions that needs to take place is whether the particular lawsuit will require the services of an expert witness. In making this determination, relevant considerations include:

- What is the potential liability; and
- Are the costs associated with retaining an expert justified in the lawsuit?

A. Does the Potential Liability Warrant Retaining an Expert Witness?

One of the most fundamental discussions that should occur at the beginning of a lawsuit is what is the potential liability. Insurance companies have numerous tools at their disposal that can help assist with evaluating the potential liability in a lawsuit. Attorneys similarly can assist with determining the potential liability based on experience and knowledge of the jurisdiction where the lawsuit is filed.

As such, early communication with your Claims Adjuster and/or client will assist with determining whether the potential liability justifies retaining an expert witness.

- ##### **B. Are the costs associated with retaining an Expert Witness justified in the lawsuit?**

Most experts require a retainer and depending on their specialty, charge hundreds of dollars per hour to assist with a case. As such, the attorney and claims adjuster/client need to have open discussions to determine whether the case justifies the cost or whether those dollars could be better put to use attempting to resolve the lawsuit.

III. Finding an Expert in a World Full of Experts

A. Utilize Your Network

A great way to locate an expert, especially in an area that you have not previously retained an expert, is to utilize your network of colleagues, friends and/or contacts. It is always preferable to utilize an expert that someone you know and/or trust has utilized. Your network can openly and honestly give opinions (both positive and negative) regarding their experiences with a particular expert, whether the expert is qualified, whether the expert presents well, and whether the expert is a good fit for a particular case.

B. Utilize your claims adjuster or client

Another great resource that can be utilized when seeking to locate an appropriate expert witness is to speak to your adjuster and/or client and see if they know of anybody that they have utilized in the past that may be of assistance for a particular case. Many attorneys are hesitant to utilize this resource for fear of their claims adjuster or client losing faith in their ability to handle the case. However, claims adjusters and clients typically have vast resources and large networks, like CLM, that an attorney may not. At the end of the day, the most important thing is to make sure you have the right expert for the case. Many claims adjusters or clients deal with issues related to expert witnesses on a daily or weekly basis. Therefore, they have likely encountered an array of experts in a variety of areas. As such, it would be counterproductive to not at least ask the client or claims adjuster if they know of anybody that could assist or have a preference for the expert witness they would like to use.

Further, it is important to make sure the expert selected is acceptable to the adjuster or client. It is not a pleasant conversation to have designated or selected an expert witness that either the client or claims adjuster had a negative experience with. As such, make sure you get approval from your claims adjuster or client prior to retaining an expert witness.

C. Expert Witness Referral Services/Jury Verdict Searches

Another option is to utilize expert referral services. A simple Internet search will lead to a number of potential sources that are more than happy to assist with locating an

expert witness for you. They will set up a conference call with the expert, provide a CV for the expert witness, and have a large network to draw from.

The potential issues with expert witness referral services are that they are typically expensive and require large retainers. Depending on the particular company, customer service can be spotty, and it is sometimes difficult to determine whether the expert you are paired with is a good fit for the case. As such, while it is an option to utilize a referral service, it is one that should be utilized with care.

Additionally, both LexisNexis and Westlaw have jury verdict and expert research tools that allow you to locate experts that have had favorable results.

D. Internet Searches/Cold-Calling

This is the last option that should be utilized to try and locate a prospective expert. Everybody is an “expert” in something, particularly on the Internet. Further, many “experts” are in need of work and are more likely to tell you what you want to hear so that you will retain them. The same goes for cold-calling. It’s very difficult to sift through the “real” and fake experts using this method. With that said, if you are between a rock and a hard place, you and/or your client should do their due diligence. Interview the potential expert witness and make sure they have the requisite knowledge and experience to assist in the lawsuit. Possible areas of inquiry should include, but are not limited to:

- What experience does the expert have in the particular field;
- How long has the expert worked in the particular field;
- How many times has the individual served as an expert witness;
- Has he or she published articles or had their opinions reviewed by others in their industry;
- How many depositions has the expert given;
- How many times has the expert testified at trial;
- How many times has the expert’s opinions been challenged;
- Has the expert ever been struck or excluded;
- If the expert was struck or excluded, what were the reasons given, if any;
- Has the expert testified for both plaintiffs and defendants or just one side;
- How does the expert see the case and how does he or she intend to try and assist; and
- Research the expert’s name on LexisNexis or Westlaw to ascertain prior verdicts or depositions

If you don’t know anything about the expert, request deposition transcripts or trial testimony so you can see how the expert performs under examination. Although it’s not always practical, if possible, meet with a potential expert witness to help get a sense of

how they will present at trial. At the end of the day, you need to feel comfortable that who you selected will help advance your case.

IV. Establishing Clear Billing Guidelines with Your Expert Witness

It is vitally important that the attorney, claims adjuster/client and expert be on the same page regarding billing guidelines. If you are not all on the same page, you will more likely than not run into billing issues. Experts are humans. If given the opportunity, expert witnesses may perform tasks that are not needed or charge for amounts that you did not anticipate.

For example, most experts want you to send them everything you have on a given case, including but not limited to pleadings, discovery responses, deposition transcripts, medical records, etc. so that they can understand the issues and be able to intelligently form opinions. You certainly want your expert to be knowledgeable about the case so that they can respond appropriately under questioning. However, you do not want your expert spending hours upon hours reviewing documents that don't need to be reviewed. As such, the attorney and claims adjuster/client should carefully consider what does the expert really need to review and what is an appropriate amount of time to be able to review the relevant information and documentation. Many times, simply picking up the telephone and having a discussion with an expert witness can greatly assist in understanding the issues without having to incur thousands of dollars in expenses while your expert combs through every detail of the file.

When utilizing an expert that you have not previously worked with, one option is to send them a simple agreement (which you can have the expert sign) asking the expert to consult with you and obtain your permission prior to spending more than a certain amount of time on a given task. For example, if the task is going to cost more than \$1,000.00, ask them to let you know in advance so that you can approve same or seek client approval. Certainly, you want to use tact when having these discussions, but you also don't want to get hit with a huge bill and be faced with either paying it or losing your expert.

Request rate sheets before agreeing to retain an expert witness and make sure the rates are acceptable to your claims adjuster and/or client. Some experts have a lower hourly rate but charge excessive fees for travel, copying, and other expenses. If your expert cannot provide you with a rate sheet that outlines what they charge for reviewing documents, travel time, etc., you and/or your client should prepare something and have the expert sign off on the agreed upon rates. Many times, the rates charged by experts differ for various tasks and you and your client/claims adjuster need to be aware of same before retaining the expert. Also, experts are sometimes willing to negotiate rates, especially for expenses. Therefore, if cost is an issue, see if the expert will work with you regarding rates.

Once you've developed a good working relationship with an expert, you may not need to have many of these safeguards, but it's better to be safe than sorry when it comes to billing.

V. **Preparing Expert Witnesses for Depositions and Trial/Keeping Your Witness from Being Struck at Trial**

You found your expert, you established clear billing guidelines, and now you need to prepare the expert to give a deposition or testify at trial. Practice is key to preparing your expert witness to give a deposition or testify at trial. If the expert witness has previously testified, obtain copies of the depositions or trial testimony and carefully review same. Determine the weaknesses, if any, of your expert and discuss in detail how the expert witness intends to handle these issues.

Meet with your expert witness in person and have mock question and answer sessions. Ask tough questions and have them answer questions just as they would in the deposition or at trial. There is no substitute for these practice sessions. While you may have the most brilliant expert witness in the world, if they can't (1) articulate their opinions in a manner that can be understood by a judge or jury, and (2) can't handle being questioned or challenged, they will not be very effective. As such, ask questions that get under their skin, and make sure they are ready to respond appropriately and professionally when challenged.

If your opponent seeks to strike your experts, be prepared to defend their opinions. If you have conducted your due diligence and the opinions are based on sound theories, then you should be able to defend your expert. If you are working in a field that is not as well developed, be prepared to have outside resources that agree with or defend what your expert has testified to or written in a report.

IV. **Standards for Admissibility of Expert Witness Testimony**

There are three standards for expert witness admissibility: (1) the qualification requirement meaning the witness has a sufficient background in an area of scientific, technical or other specialized knowledge; (2) the assistance requirement meaning the witness will assist the fact-finder in understanding the evidence or determining a fact at issue; and (3) the limited scope required meaning the witness will only testify within the scope of the expert's specialized knowledge. In Federal Court cases, these standards are codified in Federal Rule of Evidence 702, Daubert, and its progeny. Some states have not adopted Daubert. In those states, there is normally a landmark case that describes the standard set forth in Daubert. For example, in Nevada, the state court acting as the gatekeeper of evidence will apply the Hallmark standard and in California, state courts apply the Sargon standard.

V. Deposing the Expert Witness to Exclude their Testimony

There are several areas of inquiry at the expert deposition necessary to draft a successful motion in limine excluding an expert. Prior to the deposition, you need to make sure you have the expert witness's entire file including the expert's CV, testimony history, invoices, notes, evaluation or reports, and all case materials. In some states, the failure to provide the entire file in a timely manner is a separate basis to exclude the expert witness. If the entire file is not produced, you also need to make a record and reserve the right to depose the witness a second time after production of the entire file.

Before reviewing the opinions of the witness, explore the testimony history of the witness focusing on whether the witness has been excluded for any reason by any court. Additionally, discuss the frequency of the expert's testimony including the percentage of time he or she testifies for the plaintiff's side, as well as the number of times he or she has testified for the client, the plaintiff's attorney, and the plaintiff's firm. Ensure that you have performed legal research on the expert in advance to ascertain the expert's background and any prior court rulings excluding the expert. Discuss these rulings with the expert.

To explore the qualification requirement, ask the witness about his or her background, training and experience or lack thereof. If you suspect they are not qualified, ask if they have performed any independent research, relied on any periodicals, or industry standards in forming his or her opinions. If the witness has not, it is essential that you ask the witness to describe whether any industry standards exist, as well as the evidentiary foundations for the opinions. Basically, you need to examine the witness to determine whether the witness actually has any expertise on the subject matter he or she is opining on.

Once you have considered the qualification requirement, examine the expert witness on the assistance requirement. Consider whether each opinion of the expert will confuse or assist the fact-finder. For each opinion, inquire about the personalized case facts in the witness's file that were relied upon. Did he or she interview the Plaintiff? Did he or she discuss or rely on other Plaintiff's expert opinions? The goal of the expert deposition is not only to discover all of the expert's opinions, but also how these opinions were formed. The key inquiry is whether there is an adequate factual basis personalized to the facts of the case in support of the opinion. Additionally, the second inquiry is whether the expert's opinion was formed based on the application of a generally recognized industry standard or reliable research in support of the opinion? Finally, if the expert witness performed a test or experiment, it is important to explore the facts of the test or experiment to determine whether they were substantially similar to the case facts. Additionally, the expert should be asked about the error rate of the test, and whether the experiment can be replicated.

In covering every opinion and its factual basis, examine the witness with the goal of getting them to admit they are speculating or that their opinions lack foundation. Expert witnesses often testify that they are relying on “their background, training and experience” as the basis for their opinion. The inquiry should not stop there. For example, has the expert ever actually worked or had any schooling on the standard he or she is opining on? The expert should then be examined on the specific “experience,” “background” or “education” they are referring to. Additionally, it is important to discuss with the expert the defense expert’s contrary opinions. Inquire as to whether the defense expert has a good reputation in the industry, and why the expert disagrees with the defense expert’s opinion. Finally, ask the plaintiff’s expert whether his or her opinions are final, whether the expert will be performing additional work on the case, preparing exhibits and testifying at trial, and whether he or she holds the opinions to a reasonable degree of probability and/or certainty.

VI. Filing and Arguing the Motion in Limine to Exclude the Expert

The goal of the motion in limine is to convince the judge that the plaintiff’s expert’s opinions will confuse the jury, are unreliable, and are based on mere speculation and conjecture. To do so, you need to analyze the opinions to show that they are not individualized or substantially similar to the case facts or supported by any generally recognized standard of care. It is essential that the motion is drafted in a manner that convinces the judge that the order granting the motion will not be reversed. This means the motion will need to cite all the relevant facts and apply it to the applicable law. The facts section of the argument should include citations to the deposition transcripts, which are attached and highlighted for the judge. The argument section of the motion should discuss the relevant standard for excluding expert testimony in the particular venue. If the expert has ever been excluded by other courts, be sure to include those case citations and rulings in the legal analysis section of the motion. Every motion in limine to exclude the expert should also affirmatively request an evidentiary hearing.

In the reply to the plaintiff’s opposition to the motion, any inaccurate facts should be corrected, every legal argument made by the Plaintiff’s attorney should be discussed and distinguished, and the strongest arguments in the motion in limine should be reiterated. Drafting a successful motion takes time and effort but excluding an expert can result in the resolution of a case or a verdict in favor of the defense.