2017 CLM & Business Insurance Construction Conference
October 9-11, 2017
San Diego, CA

# Experts: Their Care and Feeding to Make Sure They Don't Bite!

## I. Understanding Key Issues concerning the Selection, Care and Feeding of Experts

One of the first issue a claim's professional, attorney and insured face early in any litigation are the following questions:

- Does an expert need to be retained?
- If so, what expert(s) do we need?
- How do we select the right expert(s)?
- Where do we go to get the "right" expert(s)?

There is no simple answer to the questions other that possibly the first one. Generally speaking, by the time any matter gets to the point where a case is filed, a consultant will need to be retained in virtually every type of litigation but especially in construction litigation. So, assuming that the answer to the first bullet point is "yes", let's review some considerations and information on the remainder of the bulleted questions above and how to best deal with each of these issues.

**IMPORTANT CONSIDERATIONS FOR WHICH EXPERTS ARE NEEDED AND WHEN TO RETAIN THEM**

**Case Value** - Selection of the experts is a task that should not be taken lightly. First, you must consider the facts of the case. What is alleged and the players in the case? You must immediately consider what is at stake in terms of the dollar value of the claim. Is it a $25,000 dispute involving a back yard pool and some landscaping problems or is it $4.4M claim involving delay and disruption on a college campus where the project took 2 years longer than it should have and there were over $6M in change orders. Case value is probably the first issue that must be considered as it will drive the analysis and potential resolution and whether there is possible excess exposure or if the claim appears to be well within limits as well as everything in between in terms of case value.

**Venue** - Another early consideration is venue. Is it proper and by the time you are seriously looking into expert retention, the venue is likely fixed. In fact, only rarely is venue contested as more often than not, when an action is filed, it is filed in the correct venue. Assuming that it is filed in the correct venue, geographic considerations must be made. As a general rule in virtually all jurisdictions, the standard of care is defined as what a reasonable Architect would do on a similar project at about the same time and in the same general location. Therefore, the geography could be a key issue to at least be considered. Further on this point, hiring an out of town expert can carry the stigma of the "hired gun" and can also play negatively into the very definition of the standard of care in that how would the out of town expert know how we do things here in Omaha, for example.

**Timing** - When is the right time to get the expert on board? Many considerations exist. Is this type of project so unique that it is well known in the community that there are only a handful of experts in the community that are qualified to speak to the issues at hand? If so, the claims professional and the attorney need to conference early on and along with the insured make a decision to retain that expert immediately. On the other hand, when representing design professionals, in most cases there is are ready made expert already on board so to speak and that is the client.

**Flavor** - In many cases, most significantly personal injury matters, you may need an entire panel of experts. You could need an economist, an orthopedist, a standard of care expert, a human factors expert and the list goes on and on. Once there is a basic understanding of what the defense of the case will require in terms of flavor of experts then the selection process needs to begin but timing is still a factor. There is little sense in retaining early on an entire panel of experts with their resulting costs and expense if there is a reasonable expectation that the case can be settled early on for a reasonable value. This is where an early dialogue amongst the claims professional, insured and counsel is critical.

**Case Type** – In many situations, most commonly professional negligence claims, as indicated above, the insured is a ready-made expert. In a medical malpractice action or a claim against an Architect, Engineer, Surveyor or Accountant for that matter, the insured is likely a registered professional and as such can likely respond to many of the basic questions that the claims professional will have in evaluating the claim.

Likewise, if the carrier is going to assign counsel in a matter, it is a good idea to retain an attorney that has experience in the jurisdiction (venue) where the action will likely be filed and to pick an attorney or firm that has experience in the subject matter at issue. While it certainly can be a benefit to have a ready-made expert in your insured, sometimes the insured can be a bit too defensive and passionate about how they did nothing wrong to objectively focus on the negative aspects of whether they met the standard of care or not. In any preliminary analysis and throughout the pendency of any claim for that matter, the claims representative and counsel must remain as objective as possible and it is very rare circumstance where the ready-made expert/insured can remain as objective as the claims representative or the assigned attorney.

## II. KNOWLEDGE + TRAINING + EXPERIENCE = THE RIGHT EXPERT –

- **"K" IS FOR KNOWLEDGE**

  Having dealt with whether an expert is needed or not, it is now time to turn our attention to getting the right expert(s). As a general rule any professional can find someone in a field of expertise that is willing to testify for a price. It has been said that the definition of an expert is "Someone from out of town who charges a lot of money to tell a story." In trying to choose an expert, the first consideration is do they have the requisite knowledge. Simply put, do they have the intellectual horsepower to handle the rigors of thinking/talking on their feet aka from the witness stand or deposition hot seat. There are plenty of experts in academia or otherwise practicing professionals on any given subject that, while well respected and recognized in their field, would easily wilt under the stress of deposition or trial when examined/grilled by opposing counsel. One expert once said that if he had known that a particularly skillful plaintiff's attorney was involved in a case, he would never have taken the assignment. And this was out of the mouth of a very skilled/experienced accident reconstruction expert! We ended up defensing that case but the very skilled plaintiff's attorney did indeed grill the expert intensely. It is just proof of how intense the heat can get but if the expert has the knowledge to stick with the themes developed in the litigation, stay in their comfort zone and not go out on a limb only to watch the opposing attorney saw it off, then the case presentation should be sufficient to carry the day with the jury or at least give your side of the case a fighting chance in the jury room.

- **"T" IS FOR TRAINING**

  A significant part of Training is the educational background of an expert. Does the expert have the right education to properly handle the assignment and if not, you need to more onto another expert. In any given community there are those certain known experts for any given discipline. For example, there are known forensic architects or engineers.

  While the analysis starts with education that is only part of inquiry. Does the expert have the requisite credentials and training to take on an assignment and testify credibly? Will the judge, arbitrator or jury find that their training is sufficiently aligned with the type of project at issue that they will be found credible? For example, in California and in many other states, there are many things that a civil engineer can do that can also be done by a structural engineer. It is also true that all structural engineers are civil engineers too but in order for a civil engineer to become a structural engineer, there is additional training and testing that are required. There as certain types of projects too where a structural engineer is required by law. Those projects include public schools and hospitals because we, as a society, have determined that we place special value on making sure that our schools and hospitals will not fall down in an earthquake. In order to select the right expert, one should also consider not just the technical credentialing of the expert from a licensing standpoint but on would prefer to not retain an engineer on a project where that expert has never had any training.

Training is not something that comes from a classroom and while it certainly starts in a classroom, the real "education" does not start until the professional starts working in their chose career/profession. One would not want to retain as a consulting expert witness on a museum project for example, an engineer who spent their entire career designing pole barn in some rural area of the state. So much of this common sense but it never ceases to amaze when opponents retain the wrong person for the assignment. It has been said that while experts don't win the case for one side or the other, a bad expert can indeed sink your case or your opponent's case. As a general rule based on a great deal of anecdotal evidence, experts sort of cancel each other out. The exception to this rule is when one expert is particularly bad or did not have the requisite training so make them credible.

- **"E" IS FOR EXPERIENCE**

There is no substitute for experience. Experience is the sum total off any expert's entire career and ties together and takes into consideration both that expert's knowledge and training. How to approach any particular assignment by the expert will necessarily involve input of both the claims professional and attorney who will need to dictate the precise role of the expert or otherwise set the tone of the engagement. One must be careful to not be too dictatorial in laying out the directions to the expert as putting "blinders" on any expert can come back to haunt the practitioner in the event that this is exposed at deposition of trial. There have been many instances where it was learned that some critical fact or document was not shared with the expert and this can have a devastating effect on the case.

Likewise, there is a school of thought that says that continuing to retain the same expert and using that individual over and over and over again can be detrimental to the optics of the independent nature of the retention of the expert. As a general proposition, an expert is being retained because the subject matter on which the expert is being retained to opine is beyond the knowledge of lay people. More often than not the reality is that a particular expert, with a wink and a nod, is being retained because they are good or will say what the retaining party wants them to say. In some instances it can be quite blatant and in others, more subtle. Experience has shown that there are number of very well respected attorneys, particularly on the plaintiff side, that will retain the same forensic expert or expert firm over and over and over again and the lawyer doing the retaining does not seem to care that hiring the same expert in sort of a "frequent flyer" manner can create a weakness in the credibility department. Trials are about the facts but to a large degree, they are also a credibility test. Those that are most credible stand the best chance to win. Hiring the same expert over and over may, at some point, diminish that expert's credibility as well as the credibility in the eyes of the trier of fact whether that is an arbitrator, judge or jury. To some extent, if is probably less of a problem in the eyes of an arbitrator or judge than it would be to a jury if the opposing attorney is able to successfully get the jury to understand that there is such a close connection between the expert and the attorney that the expert has become an extension of the lawyer's office and an advocate as opposed to truly independent.

- **CONSULTANT VS. EXPERT – HOW/WHEN TO USE EACH – BEST PRACTICES**

  There are times when the claims person, client and counsel have decided that it is important to retain a consultant early on for any one of a number of reasons. In most jurisdictions, a consultant does not become an "expert" until so designated and usually it is very shortly before trial. There are times when a recognized expert in the field and one who you suspect might become adverse if not retained early should be consulted quickly in order to figure out how bad things might be from a liability or damage perspective. Then again, a side benefit could be that by retaining that adverse consultant early on, you have effectively "iced" him or her from ever being retained by another party to the litigation. I have heard of major corporations doing this for the sole purpose of icing out an expert that has done particularly well against their legal team especially in the product liability area. This also happens in the construction litigation arena.

- **DEVIL IS IN THE DETAILS AND SOMETIMES THIS CAN LEAD TO TERMINATING AN EXPERT OR "YOU'RE FIRED"!**

  It is a good idea to have an early discussion during retention about what kind of budget is expected so that expectations are set early on as to what will be involved in the scope of the retention. Most often this is a function of the size of the claim and just how complicated are the facts and circumstances involved in the claim.

  What happens if at some point down the road there becomes a serious disagreement on what the consultant is seeing and what he or she will say if they are designated formally as an expert? On occasion this can lead to a very tough decision to terminate the services of the consultant. In practice this can be much more difficult than it would appear at first blush. Once the carrier has invested substantial money in the consultant as well as the time and expense incurred by the insured and counsel, most practitioners are reluctant to part ways with the consultant. Many situations do not call for outright termination but the situation can be better handled by way of some sort of a corrective action plan. However, none of this should be in writing for obvious reasons. As indicated above, such a plan should be delivered over the phone or even better yet, it should be handled face to face in a meeting.

- **WHAT HAPPENS TO INSURANCE RATES FOR CONSTRUCTION PROFESSIONALS WHEN THERE IS NO CONSTRUCTION?**

  Simple answer to this question is since there is much less exposure to E&O claims, the claims count should go over time leading to lower insurance rates. Any architect or engineer that does planning, expert work, studies – none of which involve actually building anything - will, on balance, pay less when all other things are equal (size of firm, gross revenue, practice area, geographic location, claims history, etc.) so that doing expert work can save the firm money on insurance rates over time. This is not to say that doing expert work is risk free as some might think but it is certainly a class of business with much lower claims experience.

- **DOING FORENSIC WORK CAN INCREASE THE LITIGATION IQ OF ANY PROFESSIONAL**

  It has been said that "doing" is a better lesson than can be learned by "teaching". It simply does not hit home with as much effect when one reads about a litigation war story with an unhappy ending. But if the forensic consultant actually becomes a player in that war story, the lessons learned create a strong imprint in the mind of the forensic professional that is still a practitioner. Litigation Intelligent Quotient (IQ) is something that is best earned/learned and not taught or read about in books. You can read about these stories over and over but until you are tested in battle, it is only then that one can speak from true experience with the lesson learned burned into their senses.

  From the perspective of a claims professional, working with a seasoned professional as the insured has certain benefits as well as one or more possible drawbacks. On the benefit side of the equation, the "hand-holding" of an insured that has never been sued is unnecessary. The explanation of how a lawsuit works, how a mediation or deposition will work, etc. is all virtually unnecessary. On the other hand, there is the potential problem of getting the "know-it-all" insured. The type that cannot be persuaded that they did anything wrong and because they think they know it all. In such situations, it can become difficult to persuade them that they have exposure and ought to settle instead of fighting the action. They also may have a bit of hubris thrown in if they are concerned not only about their reputation in the community of architects or engineers but also in and amongst their peers in the forensic world of professional witnesses. Since it can be a major problem in the larger metropolitan areas, one can only imagine how bad it could be in some smaller markets where there may only be a small handful of forensic experts in that geographic region.

- **CONCLUSION**

  The care and feeding of expert witnesses is an extremely important consideration in virtually any claim except for the very smallest ones and in those matters, these smaller cases settle or are otherwise disposed of many times before litigation is filed or any experts are retained. This is especially true in the world of construction litigation. For anyone that has ever had an expert "choke" in deposition, the only thing worse by a factor of 100 is if the expert "chokes" on the stand in front of the judge, arbitrator or jury. This can be devastating to your case and while it is not typically going to kill your case, it can destroy the credibility of your side of the case and when that happens, the entire team loses credibility with devastating results to the client, claims representative (carrier) and attorney. Proper selection and preparation of your experts can better position your case so that your expert does not bite!