



2019 Midwest Conference

June 20-21, 2019

Chicago, IL

**Utilizing Professionals as Consultants and Testifying Experts in a Product Liability Defective  
Machine Lawsuit**

**I. Case Study Overview**

This presentation will explore the role of a professional in product liability litigation, with specific reference to a lawsuit involving defective machinery in an industrial setting. We will use a case study involving an operator of a punch press with a bypassed guard, resulting in a hand amputation.

**II. Retention of Consultants and Testifying Experts in Machine Case**

During the discovery phase of litigation, attorneys will retain and consult with experts relevant to the facts and circumstances at issue in the matter. An expert is a person, who by reason or skill, training, education, or experience, possesses more knowledge than the average person. Before retention of an expert, an attorney will be interested in different areas of a professional's background, including their qualifications (i.e. education,

publications, professional experience, activities), familiarity with the noted issues, previous expert work and business conflicts of interest, nature of their professional practice, interest areas, and their availability. An attorney can consult with several different types of subject matter experts (i.e. industrial hygienists, professional engineers, economists, vocational counselors, etc.) to aid the attorney's understanding of the facts and circumstances at issue in the matter. In addition, a testifying expert can persuade the jury at trial to help win the case.

### **III. Roles of Professionals**

A defense attorney may rely upon a professional as a consultant to assist in the preparation of the defense of the case. An attorney may also want to utilize a testifying expert to develop opinions for use in affidavits, reports, and deposition and trial testimony. The identities of the testifying expert and the subject matter of their proposed testimony are discoverable through written interrogatories and oral depositions. It should be noted that a professional may be used in both capacities.

In addition, particular privileges protect the disclosure of certain thoughts and impressions, particularly when a professional serve in both capacities. Generally, courts will construe privileges narrowly since as assertion of privilege obstructs the truth-finding process of the discovery period. During the presentation, we will be examining several relevant privileges, including the attorney-client privilege and attorney work product doctrine.

The attorney-client privilege covers confidential communications between attorneys (including experts hired by an attorney to facilitate the rendering of legal services) and clients (can include corporations or persons authorized to speak on a corporation's behalf) during legal consultation. The privilege also includes experts hired by an attorney to facilitate the rendering of legal services. The amount of information which may be discoverable from a consulting expert is much smaller than the amount of discoverable information from a testifying expert. However, the privilege is inapplicable to objects, pre-existing documents, and public communications.

The attorney work product doctrine covers documents, tangible things prepared in anticipation of litigation for trial, mental impressions, opinion, and legal theories made by or for any party, attorney, agent, insurer, and consultant. This privilege is qualified, as the information is discoverable only if there is a substantial need for the information and the party is unable to obtain the substantial equivalent of the information without undue hardship. In addition, facts and opinions held by consulting experts are privileged under this doctrine as the expert is not expected to be called as a witness at trial.

#### **IV. Authoring Expert Reports**

The disclosure of expert testimony must be accompanied by a written report, which must be prepared and signed by the expert witness. An expert report must contain the following: the qualifications of the expert; a complete statement of all opinions the witness will express and the basis and reasons for them; facts or data considered by the witness in

forming them; a list of all other cases in which the witness testified as an expert at trial or by deposition; a list of all publications authored by the expert witness; and a statement of the compensation to be paid for the study and testimony in the case, and terms of the compensation. An expert's opinion should be crafted as supported conclusions stated to a reasonable degree of scientific certainty based on admitted facts or facts supported by the evidence. Further, experts should steer away from offering bare conclusions unsupported by factual evidence, unfounded speculation, and unquantified possibilities.

The importance of understanding jurisdictional distinctions in the standards which govern when and how an expert can develop an express an opinion in a defective machine case cannot be overstated. For example, New Jersey Court Rules note that discovery of attorney-expert communications is limited to the facts and information evaluated by the expert in producing the report. All other attorney-expert communications that are part of the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, are considered trial preparation materials.

Attorneys and experts must also be mindful of the differing standards governing the admissibility of expert opinions. Specifically, the two most popular state admissibility standards are the *Frye* and *Daubert* standards. A majority of states and the Federal Courts have adopted the *Daubert* standard, which lists a number of factors to be considered, including the following: whether the scientific theory can be, or at any time has been, tested; whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a "sine qua non"; whether there is any known or potential rate of error and whether there exist any standards for

maintaining or controlling the technique's operation; and whether there does exist a general acceptance in the scientific community about the scientific theory. A small portion of states follow the *Frye* test, which requires that for expert testimony to be admitted, it must have gained general acceptance in the field.

## **V. Impact on Insurance Industry**

This course will explore how the use of a professional – consultant or testifying expert – can assist with an insurance professional's preparation for trial of specifically a products liability machine case. Insurance professionals will learn how to best formulate steps to engage a professional in litigation support, including how to develop a cost vs. benefit analysis on the engagement of a consultant vs. testifying expert in the defense for the case. Using this cost vs. benefit analysis, insurance professionals will learn how to best oversee local counsel and assist attorneys in the successful defense of a products liability machine case.