2019 Annual Conference
March 13 -15 2019
Orlando, FL

Use of Experts in Claims Litigation

I. Considering an Expert?

When insureds are sued, commonly referred to as "third party lawsuits," insurance defense counsel and insurers often see or use physicians, accident reconstructionists, safety experts, economists, accountants, engineers, architects, scientists and a host of other types of experts, depending on the subject matter of the lawsuit. In the context of "first party suits" against insurers, experts can appear in property or other first party litigated claims, coverage disputes and suits alleging "bad faith" claims handling practices and/or seeking extra-contractual damages.

Whether counsel and his client need to retain an expert is determined case-by-case. Amount in controversy or perceived "exposure" usually is a factor. Generally, the lower this amount, the less likely experts can be fitted into the litigation budget. A notable exception is when a claim was denied for fraud or arson and the insurer wants to make a point ("send a message") via the litigation outcome. Moreover, if a case could serve as important precedent, an expert might be desirable notwithstanding a relatively low amount in controversy in the litigation at hand. Whether opposing counsel has designated an expert can be a factor. Sometimes it is possible to see what an opposing expert says before deciding whether to retain a like-kind expert. E.g., plaintiff's expert economist produces a report supporting damages calculation defense counsel believes reasonable and not harmful to defense position. Defense counsel and his client may elect not to retain an economist expert. In the realm of accidents, liability facts may be undisputed, alleviating the need for an accident reconstructionist expert. Conversely, if percipient witnesses saw things differently, there is no police report or that report is unclear or questionable, then defense may opt for an accident reconstruction expert. In a bad faith case, if plaintiff's claims handling/industry standards expert "picks apart" handling of the subject file, putting unwarranted emphasis on inconsequential items, attempting to cast the insurance company in a very negative light, or attacks the

insurer's claims handling protocols and controls very broadly, countermeasures may be needed. Defense counsel and his client may wish to retain a seasoned, knowledgeable expert to speak to challenged claim handling practices and decisions and address industry standards.

A consulting expert can help counsel and his client understand and evaluate the case. A consulting expert might be retained where science will impact the litigation outcome. This type of expert can point defense counsel and the insurer in the right direction and educate them in terms of better understanding science or highly technical subject matters and issues. Generally, but not always, a consulting expert's communications with counsel are exempt from discovery. *E.g.,* Federal Rules of Civil Procedure (FRCP) 26(b)(4)(D) (providing that exceptions to this ordinarily applicable discovery exemption can apply). A consulting expert can be converted to a testifying expert, or counsel could choose a testifying expert other than the consulting expert, in effect retaining both for the same case. In the case of conversion, applicable law will determine whether the discovery exemption would no longer apply to the expert while in their consulting role.

II. Finding the Right Expert is Critical to Success

Experts can be found through a variety of means. Law firms often have databases. Generally speaking, the larger the law firm the more likely it will have a meaningful database with profiled experts. Lawyers often will simply query other lawyers asking if anyone has an expert fitting a particular criteria. Legal research can produce results. Reported case decisions, verdict reports and the like can reveal expert identifications and, potentially, effectiveness and impact on prior litigation outcomes. There are expert databases that exist which do not require an expert hourly rate "markup" if an attorney finds an expert through such a database. There is a business model wherein the business serves as a "go between" for lawyers looking for experts and experts looking to be hired by attorneys. The predominant business model here entails a markup over the hourly fee received by the expert. To have room for this markup, the expert receives less than his normal hourly rate, the attorney/his client pay more than the expert's normal rate, or some combination of both. Additionally, some bar organizations are friendly to expert searches. Simple internet researching can yield results as well. Lastly, there is simple networking/word of mouth.

Whatever means are employed to identify potential experts, it is recommended that different options be weighed, as an expert's impact on a case can be significant. An attorney can even screen multiple expert candidates by giving limited case information and acquiring preliminary feedback from each candidate. When working with insurance companies, it is important for defense counsel to realize some insurers (regardless of whether first-party or third-party litigation) want to be closely involved in the expert

vetting and selection process. If in doubt, defense counsel should ask the insurance company the level of involvement it wants to have.

When considering a potential expert candidate, counsel should know or come to know that candidate very well. That includes knowing the expert beyond what CV content. Counsel should come to know the expert's prior available reports and opinions and impacts on those cases. Would any of the expert's prior opinions or articles have a negative impact on the instant case? For many types of experts, it can be important to understand if the expert has served on both sides of the docket. For example, if an expert has always been hired by insurance companies and never opposed an insurer, then it is possible that the expert's objectivity could be challenged based upon that track record. It is also important to know how an expert would relate to a jury. If the venue likely will have a jury of "everyday folks" where high-level technical jargon from an expert would not be effective, then that should be considered very early on. Universally, counsel will want someone skilled at writing his own reports, giving testimony and good on their feet, who comes across as knowledgeable, relatable, and has a positive and steady presence.

An expert must qualify per applicable legal standards. Federal Rule of Evidence 702 states:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> **(b)** the testimony is based on sufficient facts or data;
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> **(c)** the testimony is the product of reliable principles and methods; and
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> **(d)** the expert has reliably applied the principles and methods to the facts of the case."

A federal rules advisory committee note states: "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness…."

In *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923), the "*Frye* rule" was stated to provide that an expert opinion based on scientific technique is inadmissible unless that technique is "generally accepted" as reliable in the relevant scientific community. Some have characterized the *Frye* rule as having the pertinent scientific community as the "gatekeeper" of determining admissibility of evidence. Fast forward 70 years, where the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), supplanted the Fry standard with a new standard no longer requiring general

acceptance. *Daubert* give judges more flexibility than *Frye* and gives judges gatekeeper responsibility. The *Daubert* standard can more easily allow unique, novel or new/emerging science to come in.

Although the *Daubert* standard is now the law in federal court and over half of the states, the *Frye* standard remains the law in some jurisdictions including California, Illinois, Maryland, Pennsylvania, and Washington. Some states are not strictly classified as *Daubert* or *Frye*.

Florida passed a bill to adopt the *Daubert* standard as its state court law, to take effect July 1, 2013. However, the Florida Supreme Court recently invalidated that legislative amendment to the Florida Evidence Code. On October 15, 2018, the Florida Supreme Court ended a period of uncertainty about the appropriate admissibility standard for expert opinions in Florida state courts. *DeLisle v. Crane Co., et al.,* No. SC16-2182. That high court said: "We recognize that *Frye* and *Daubert* are competing methods for a trial judge to determine the reliability of expert testimony before allowing it to be admitted into evidence. Both purport to provide a trial judge with the tools necessary to ensure that only reliable evidence is presented to the jury. *Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used. With our decision today, we reaffirm that *Frye*, not *Daubert*, is the appropriate test in Florida [state] courts." It added a practical note: "We have previously recognized that *Frye* is inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel scientific techniques." This case was closely watched. Course participants (attorneys and insurance professionals alike) are encouraged to read this opinion by the Florida Supreme Court, as it is recent and offers interesting analyses of the *Frye* and *Daubert* standards.

It behooves counsel to know of any jurisdiction-specific particulars (both statutory and decisional law) impacting qualifying of her expert. For example, in Tennessee state court, a medical expert must reside in Tennessee or a contiguous bordering state. This requirement can be waived by the court if it determines an appropriate witness is not available. Tenn. Code Ann. § 29-26-115. This "locality rule" furthers the notion that medical malpractice experts should be knowledgeable of the standard of professional care in the applicable community.

When considering an attorney as an expert in claims litigation, it could be important to know of any applicable case law that could limit or preclude what the attorney expert witness could say. In *Corinth Investor Holdings, LLC v. Evanston Insurance Company,* US District Court, Eastern District of Texas, Case No. 4:13-CV-00682, (December 15, 2014) it was determined a coverage attorney could not qualify as an expert as proffered. A medical center policyholder and its insurer were litigating coverage. In support of its coverage denial, insurer designated an insurance coverage attorney as an expert witness ("Coverage Attorney"). The court stated: "After considering the report of

[Coverage Attorney], the Court finds that his report invades on the province of both the Court in instructing the jury on the applicable law, and the jury in determining the facts to be applied to the law. To the extent [Coverage Attorney] purports to offer expert testimony regarding customs and practices in the insurance industry, the Court finds that his expert report does not do that. [Coverage Attorney] is an experienced insurance coverage attorney and advocate and is not a claims adjustor or former claims adjustor. His report is clearly legally-based, and his opinions are not formed from his experiences in the insurance industry but are formed from a legal analysis of his opinion of the applicable law." The expert report was stricken in its entirety.

Similarly, in 2013, a Colorado federal court excluded certain proposed expert testimony of an attorney designated as an expert by an insurer in a coverage suit. *Bagher, d/b/a/ Cherry Creek Oriental Rugs v. Auto-Owners Insurance Co.*, Case no. 1:12-CV-00980, District of Colorado, (Sept. 6, 2013). The federal court stated: "Allowing [Attorney Expert] to testify to opinions of this type would usurp the court's role as the sole source of the legal principles governing this case and would direct the jury as to how they should find with regard to these issues. To allow [Attorney Expert] to determine the applicable law and to apply that law to the facts of this case is not permissible…. *Okland Oil Co. v. Conoco Inc*., 144 F.3d 1308, 1328 (10th Cir. 1998) ("Generally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts.")."

Time permitting, during this course presentation examples of other noteworthy statutes and case law impacting use of experts in claims litigation will be given by the panel.

III. Cultivating the Relationship

It is important that counsel define for the chosen expert – in unmistakable terms – the scope of engagement. This includes advising the expert of the specifics of materials to be reviewed and issues to be addressed by the expert. Counsel may wish to ask the expert if the expert has any questions or ideas about the scope; this sometimes makes sense and can lead to betterment as counsel is not an expert in expert's area of expertise. Counsel might wish to ask their expert what questions could be useful to pose to the opposing expert or other witnesses. At the end of the day, counsel sets the parameters for the expert's engagement. Expected deadlines for deliverables should be communicated early on. If applicable, counsel should discuss with their expert anticipated billings from expert. It is very common for defense counsel hired by insurers to submit defense budgets. That can translate into estimated expert costs, a part of a defense budget, being an appropriate topic for front-end discussion between counsel and expert.

If a written retention agreement is desired, common provisions include: specifying parties to the agreement (expert, attorney, attorney's client); compensation (hourly rate); handling of expenses and travel rate, invoicing (including format, level of detail and frequency) and whether attorney or attorney's client pays expert, ownership of work product and client materials, confidentiality, acknowledgments, termination and dispute resolution. Counsel and expert may wish to have provisions confirming that the expert is not "guaranteeing" certain opinions will be provided (at time of agreement execution, expert has not reviewed all materials) and that expert will be paid in full regardless of his opinions or outcome of the matter. Many experts and attorneys prefer written agreements over "handshakes" or even reliance solely on prior dealings between the two.

Experts are commonly compensated via hourly rates rather than contingency agreements. An expert compensated with an outcome-based contingency fee would be motivated toward bias, clearly something to avoid.

Counsel should be aware of whether communications with their testifying expert, the expert's notes, any draft reports, etc., are discoverable and should inform the expert appropriately. If in federal court, counsel should have a command of FRCP 26. FRCP 26(b)(4)(B) addresses trial-preparation protection for draft reports or disclosures, protecting reports drafts and certain disclosures. FRCP 26(b)(4)(C) addresses communications between counsel and the expert, stating:

> "Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
>
> (i) relate to compensation for the expert's study or testimony;
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, (relating back to 26(a)(2)(B)) or
> (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed."

Paragraphs (B) and (C) to Rule 26(b)(4) also apply to "all forms of discovery" with respect to any expert materials, not just depositions and transcripts. As pointed out in a federal rules Committee Note, Rule subparts 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. It is worth noting that communications the expert has with others besides the attorney are discoverable. In addition, attorneys are free to question expert witnesses about alternative testing methods, trials, or approaches to the issues on which they are testifying, whether or not they were considered by the expert in forming the opinions offered in the testimony.

Counsel should keep their expert updated. If a key date impacting an expert's work changes, the expert should be informed immediately. Similarly, if the case settles, inform expert immediately to stop any work in progress. Counsel will not get their expert's best work if the expert is kept in the dark or given last-minute requests when more time could have been provided.

IV. Expert Report

The expert's report is extremely important. Counsel should not be surprised by the report. It is common for an expert to provide a verbal overview of the report prior to retaining counsel's receipt of the written report. Depending on the needs or instructions of counsel's client, the client may wish to know the upshot of the report at the time expert provides this verbal communication.

If a written report from expert to counsel turns out not to be the final and draft reports are not exempt from discovery, then counsel should have a communicated plan to address any issues around a draft being different than the final produced to opposing counsel.

Besides conclusions supporting counsel's position, there are other considerations for the report content. Tone can be important. Professional and measured is a tried and true approach. Overly-critical or use of sharply and personally insulting or condescending phraseology in the report can be counter-productive.

The report, and the expert's subsequent testimony, can reflect advocacy – but only "advocacy" of the expert's methodology, statements and opinion. A report that comes across as "hired gun" or client advocacy can make it assailable and can reduce effectiveness of the expert during deposition and trial testimony.

Very importantly, key material in the report should be prepared by the expert only after the expert has reviewed all pertinent information. Counsel and their client do not want to have an expert who "arrived at a conclusion" long before reviewing provided material.

Good qualities of an expert report include: content aligning to applicable legal/admissibility standards and scope determined by retaining counsel; stated linkage between expert's experience and the matters addressed; professionalism; understandability, cohesiveness, clarity of findings and opinions supported by references to the litigation record, literature, publications, studies and the like; if applicable, compliance with Federal Rule of Civil Procedure 26(a)(2)(B).

Problematic reports include those with: unsupported rhetoric or overly-sweeping statements; argumentative and dismissive tone; “tunnel vision” which can be unawareness or disregard of opposing views; a report prepared with an expert or not knowing enough about overall context of facts and litigated issues; reports which are difficult to read or follow; reports not prepared by the expert (Fed. R. Civ. Proc. 26(a)(2)(B) provides that the report must be prepared by the expert witness.)

V. Testimony – Deposition & Trial

Many of the same principles for preparing non-expert witnesses for deposition and trial apply to experts as well. Expert should be prepared to discuss their professional history and items in their CV and, obviously, the content of their report, all under cross-examination circumstances. Some attorneys have very conservative guidelines for preparing witnesses they have never worked with. One seasoned attorney believes counsel should spend up to two hours of prep time for every anticipated hour of deposition time when he has not worked with a witness previously. Excellent preparation means during actual cross examination not one important question was asked of the witness that was not anticipated through vigorous attorney-witness prepping.

Some testimony pointers many practitioners would agree with are: experts should be sincere and professional in dress and overall appearance; if dictated by a question, provide context or background for benefit of jurors prior to launching into an answer; speak directly to the question and be consistent throughout; project knowledge and objectivity; make eye contact with jury; demonstrate self-awareness of body language; strike a balance between credibility and consistently supporting expert’s conclusions on the one hand versus, on the other hand, turning off jurors as a “hired gun” who would say what the party hiring expert wants the expert to say.

If the expert deposition was via video, there may be an opportunity to review the video as part of prepping for trial testimony. If any new information pertinent to expert’s prior opinion arrives prior to trial, it will be important address such new information in trial testimony preparation.

Often, exactly when the expert will appear live at trial is fluid. It’s important that counsel covers pertinent logistics with their expert, no matter how busy the attorney/legal team.

VI. Summary

For potential expert engagements, it is important to analyze whether there is a need. Not every opposing expert needs to be countered with a like-kind expert. If an expert is needed, it can be very advantageous to conduct a wide and thorough search, using more than one of the various search means described above, and interview and vet more than one candidate. Counsel must know applicable expert legal standards (e.g., *Daubert*, *Frye*, federal or state court rules). The expert engagement is a managed and dynamic relationship, involving determining agreement terms, clearly communicating engagement scope, time-lines and other expectations, and pro-active, frequent communications among counsel, their client and expert throughout the engagement. Not all expert reports are created equal. Effectiveness of a report varies, depending on several factors. Make sure expectations are set for a technically sound report with appropriate tone and professionalism. Even for experts who have provided volumes of testimony, prep for the case and testimony at hand should not be under-emphasized. Lastly, defense counsel retained by an insurer should satisfy insurer's requirements regarding: (i) deciding need for and selection of an expert, and (ii) assessing and communicating any impact of expert opinion or testimony on case strategy or evaluation.