

PROFESSIONAL PRACTICES FOR INSURANCE EXPERTS: How To Prepare And Give Expert Testimony

Presented by

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A. Who is an “expert” or expert witness?

1. Refer to federal and state civil procedure and evidence codes for specific rules for each jurisdiction (see *Frye v. United States*, 293 Fed. 1013); FRCP 26(a)(2); FRE 401, 402, 702, 703, 704(a), 705, 801, 802.
2. Generally: Anyone who qualifies, at the discretion of the court (i.e., the judge), by virtue of special knowledge, skill, experience, training or education, to give opinions about the issues before the court that exceed the knowledge of a layman. (see *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). See also *Kumho Tire Company, Ltd., v. Patrick Carmichael* 526 U.S. 137 (1991)).
3. Experts may be retained and used by plaintiffs, defendants or the court.

B. Why do lawyers use experts?

1. To educate the attorney who hires you in insurance industry customs and practices, and in insurance contracts (attorneys, although trained in contract law, often do not understand the structure of insurance policies and basic principles of insurance contract analysis). Often the expert will contribute information that may lead to filing new causes of action or discovery of additional damages. Experts are especially valuable early in discovery, to help identify types and sources of documents that should be requested.
2. To educate the trier of fact (judge and/or jury) about any subject in which a layman does not have sufficient knowledge or experience to judge the merit of issues that caused the alleged injury to the plaintiff.

3. To present technical evidence, or explain the significance of evidence introduced by other witnesses.
 4. To describe customs and practices in a business or industry, so that the trier of fact can reach a conclusion on the merits of the case and responsibility for the cause of the plaintiff's alleged injuries.
- C. What role is the expert expected to play in the case? Your job is to educate the judge and/or jury, to be a teacher and explain the technical nature of the matter in language that the judge/jury can understand.
1. To answer all questions truthfully under oath.
 2. To give OPINIONS or explanations about CUSTOMS AND PRACTICES in the expert's field, within the boundaries of the subject(s) specified by the retaining attorney.
 3. To explain whether one of the parties to litigation met or violated the standard of care required of one practicing in the witness' field of expertise.
 4. To be more credible (believable) than the opposing attorney's expert.
 5. After reviewing relevant facts and documents about the case, if the expert's opinions do not favor the retaining attorney's client, the expert still may be retained as a CONSULTANT, but not disclosed and declared as an expert to the opposing counsel. Experts also may be withdrawn after disclosure, but opposing counsel then may attempt to discover the reason for the withdrawal.
- D. What types of issues or disputes require the use of insurance experts?
1. Insurance coverage: Only with respect to CUSTOMS, PRACTICES or REASONABLE EXPECTATIONS of the parties with respect to coverage; actual policy INTERPRETATION (i.e., interpretation of the contract) is the prerogative of the court (although the expert may be permitted and asked to opine on this ultimate issue, it is usually characterized as the customary understanding or interpretation of coverage commonly believed to apply by particular parties, e.g. underwriters, claims professionals, insureds, etc.). Note: "Reasonable expectations" are only relevant in contract interpretation when there is an ambiguity in the contract terms.
 2. Rating plans and premium determination practices of insurers, e.g.
 - manual rating procedures.
 - retrospective rating plans.
 - composite rating.
 - workers' compensation dividend programs.
 - experience and schedule rating.

3. Industry operations customs and practices, e.g.
 - how coverage is purchased.
 - differences between direct writers and agency/brokerage marketing.
 - insurance company operations.
 - underwriting practices.
 - admitted vs. nonadmitted insurers (domestic, foreign or alien).
 - how coverage is negotiated.
 - availability of coverage or specific types of policies.
4. Technical underwriting issues, e.g.
 - fortuity of loss.
 - criteria for insurability of risks.
 - market cycles and their impact on risk selection or insurability criteria.
5. Claim handling practices, duties of insurance claims personnel and bad faith.
6. Duties of insurance agents and brokers
 - to the public and their clients.
 - to insurers.
7. Amount and classification of damages to the appropriate coverage, damage valuation or defense of unreasonable damage claims.
8. Bad faith issues:
 - Unfair claim practices.
 - Duties of insurers to the insured.
 - Duties of insurers to the public.
 - Duties of insurers to co-insurers or excess insurers.
 - Duties of insurers to reinsurers.
9. Reinsurance issues and commutations.
10. Actuarial valuation of reserves.
11. Public testimony in hearings before insurance regulators or legislative hearings.

12. Related fields:

- Accounting (e.g., lost profits, extra expenses or damage cost allocations).
- Net worth of insurers (GAAP or statutory).
- Forensic reconstruction of evidence or facts (e.g., for fidelity losses).

E. What services should the expert perform to prepare to testify?

1. Review pleadings, deposition testimony and discovery documents related to the issues, as provided by the retaining attorney. If there are documents you need that have not been provided, request them from the retaining attorney.
2. Perform research on industry publications and related fields that may impact the expert's opinions or lend support and credibility to the opinions.
3. Reach an understanding with the attorney about the scope of testimony the expert will give (i.e., determine the ultimate issues about which expert opinions are required).
4. Prepare written reports, affidavits or declarations about the issues or your opinions, but only if instructed by the attorney.
5. Testify under oath in a deposition, in which the opposing attorney is entitled to inquire into your background and qualifications, what you have done to prepare to testify, everything you reviewed or relied on to form your opinions, to whom you have spoken and what was said, everything you have written, and your actual opinions about the issues. (Note: You are not required to give testimony about any issue or matter which is outside the scope of your retention.)
6. Testify under oath as a witness at trial.

F. How do you give effective testimony?

1. Keep the setting and the roles of the participants in perspective:

- Litigation is high drama, like a liturgy.

Courts have different rules, just like churches have different liturgies or orders of worship. After you are retained, inquire about any unique local rules of the court.

- In a courtroom, the judge is GOD and the lawyers are his priests.

All of the witnesses, the lawyers and the judge play set parts in the courtroom liturgical drama. Live sacrifice of expert witnesses is permitted, and is always attempted by opposing counsel, for the amusement of the jury!

- The outcome of the litigation depends, at least in part, on the believability,

credibility, and likeability of the players, not just on the “facts” alone.

If you know where you fit into the drama, you will be less likely to become arrogant about your role. False humility looks phony on the stand, but true humility can be flattering and help make you believable.

2. Appearance

- Dress conservatively.
- Relax; maintain your composure without appearing nervous, insecure or unsure of yourself.
- Be aware of, and control, all of your nervous gestures or distracting motions.
- Be mentally alert.
- Men should wear a white shirt; keep your coat on, if possible, during depositions.
- Expect depositions to be videotaped; portions could be played during the trial, so look the way you want to appear to the jury.

3. Articulation

- Speak clearly; loudly enough to be heard, and not in a monotone.
- Use good grammar (especially simple, complete sentences). Use language the jury understands, stay away from terms like “subsequent” or other lawyerly terminology and above all, avoid appearing to be condescending.
- Pause while mentally composing your answer; don't use audible, inarticulate space fillers (“uhh,” “ahh,” “you know,” etc.).
- Avoid using jargon; if you must use a word with a special meaning, define it.
- Be sincere. Don't be arrogant, flippant, evasive, smug or coy. Maintain eye contact with the jury whenever possible. If there is no jury, maintain as much eye contact as you are able with the judge, especially if the judge asks you questions.
- Stay calm; maintain absolute control over your emotions so that you do not become angry, impatient or argumentative.

4. Objectivity

- Be truthful at all times; perjury is a felony.
- Do your own research, to verify facts, assumptions, or insurance industry

conditions about which you will testify. Don't rely on your memory or anyone else's version of the case alone. In particular, do not accept without question ANY attorney's version of the facts or interpretation of a policy or industry conditions. You are not a parrot for any attorney's opinion of the case!

- Tell your client (attorney) the bad news along with the good; don't change the truth to fit the case. Prepare yourself and your client for the hard questions that may have answers they do not want to hear; assume that the opposing counsel will ask them!
- Remember your role: You are not an advocate and you are not responsible for the outcome of the case; you are only responsible for the truthfulness of your answers to questions under oath, or the accuracy of information you give the attorney as a consultant. Attorneys are expected to be advocates, and use rhetoric to argue for any point that may favor their client.
- Don't confuse facts (or "assumed" facts, as presented by an advocate) with opinions (see H.S. Geneen's memo, "Facts").
- If possible, try out your opinions on a respected colleague to verify that you have not lost your professional perspective and objectivity.

5. Personal and Technical knowledge

- Know thyself: know who you are, what you have done professionally, and when. Maintain a current curriculum vitae.
- Be prepared to describe your background, education and experience in detail, in layman's terms, and with appropriate emphasis on relevant training, experience and professional credentials.
- Never "pad your resume" (exaggerate) when describing your background or accomplishments – you will eventually be found out!
- Prepare before you opine about the case; review testimony, documents and understand the issues.
- Don't rely on your memory of the industry or events; perform research and use outside sources to support your opinions, to add credibility and factual accuracy to your testimony. Develop an extensive library, or know where to find one.
- Insist on correct use of insurance terminology when attorneys misuse key words and phrases during questioning.
- Stick to your own field of expertise; never hesitate to say "I don't know," "I was not retained to opine about that subject," or "That's not my field," if questions go beyond the issues or subjects for which you were retained and in which you are qualified.

6. The Main Event — When You Are Testifying:

- Determine the precise points the lawyer needs to establish to prove his case (if necessary, review the elements of proof required in court to prove negligence, higher standard of care or duties, bad faith, etc.).
- Review the lawyer's questions and your answers together before you testify at trial; try answering alternative forms of the question, to learn how the impact of the testimony can change when words are changed.
- Listen to the complete question; pause long enough for your attorney to object or instruct you not to answer, if appropriate.
- Don't anticipate questions or interrupt before framing the answer.
- Never answer if you do not understand or did not hear a question; ask to have it repeated or rephrased.
- Know precisely what documents you reviewed; you should have a list.
- Be sure of the facts; review documents again if necessary, before or during testimony.
- Be alert for subtle misstatements or omissions of facts by the opposing attorney; correct his terminology, or ask to have the question restated, before you answer. He isn't stupid; he misused that insurance term for a reason – and it was probably to attempt to impeach you!
- Whenever the attorney asks you questions about the contents of a document, look at the document again before you answer (ask for a copy of the trial exhibit, if necessary, and then check to be sure it is the same as any previous document you think you may have reviewed).
- Do not volunteer information; **answer only the question that was asked.**
- Opposing counsel is not your friend. Do not engage in a “conversation” with him/her when you are testifying under oath. Continue to limit your answers to the question that was asked and no more.
- Beware of hypothetical questions and all underlying assumptions; be alert for sandbagging by the opposing attorney (learn to recognize fallacies of logical thinking; e.g., review Stuart Chase's fallacies of logical thinking). Do not try to reframe the hypothetical to fit your worldview of the case. Remember, you can answer a hypothetical question as framed, even if it seems to go against the client's case.
- Be sure your opinions and explanations are supportable, to prepare for the inevitable challenge to your credibility or even your integrity.

- Never become emotional, indignant, defensive, argumentative or self-righteous. Theatrics, histrionics or belligerence by the opposing attorney are no excuse for unprofessional behavior by the expert witness.
- Believe in yourself and in your answers; insincerity always destroys your effectiveness.
- Look at the jury when answering; if there is no jury, at the judge; don't look at the attorney all of the time. Don't look at your attorney before answering the opposing counsel's questions; it gives the appearance of seeking approval, as if you were coached and did not develop your opinions independently.
- Watch your own body language.
- Final warning: **Answer only the question that was asked! Then shut up!**

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