Spring 2019 Volume 3, Issue 2

CPCU SOCIETY

Coverage, Litigators, Educators & Witnesses Interest Group

CLEW NEWS

Message from the Chair

Christine Sulivan, CPCU

Welcome to the 2019 spring issue of "CLEW News:" the newsletter of the Coverage, Litigators, Educators and Witness Interest Group (CLEW).

This edition of the newsletter will focus on "Witnesses." You will find information, articles and reference materials pertinent to the effective techniques and practices that both expert witnesses and the lawyers that hire experts use. Whether you are currently an expert witness, thinking of becoming one in the future, or just wanting to know more about this type of work, we think you will find this newsletter both helpful and interesting.

As the newly appointed Chair of CLEW, I am looking forward to working with the talented group of volunteer members on the CLEW committee. I hope to support their efforts effectively so we can continue to provide you the type of technical education and resources that this interest group is known for. We can't do it alone though – so we welcome comments, suggestions and submissions for future articles from members of the CLEW IG and anyone interested in topics related to insurance coverage, litigation, education and witnesses. Please contact CLEW's news Editor-in-Chief, Michael Gay at: michael@michaelgayconsulting.com or CLEW chair at: casconsulting.llc@gmail.com

Christine Sullivan, CPCU
Chair, CLEW Interest Group Committee

INSIDE THIS ISSUE:

WRONGFUL DESIGNATION

ATTORNEY'S DESIGNATION OF A TESTIFYING EXPERT WITHOUT THE EXPERT'S KNOWLEDGE

By Thomas M. Braniff, JD, CPCU and Robert P. Gaddis, JD

At a recent annual conference of the American Association of Insurance Management Consultants ("AAIMCo"), the agenda included a session on an emerging issue which AAIMCo refers to as Wrongful Designation that expert witnesses may need to pay close attention to. Wrongful Designation is when an attorney designates an individual as a testifying expert without the expert's knowledge.

While some attorneys seem to see nothing wrong with designating an expert without the expert's knowledge, those attorneys are likely committing violations of the Code of Professional Conduct in their state. This conduct harms the expert with the obvious direct financial loss of withholding his or her expert witness fee, but the ramifications go well beyond that.

This article explores the known types of Wrongful Designation, the potential as well as actual harm to experts, opposing parties and their respective attorneys, and ways experts can address the problem both before it occurs and after it is discovered.

TYPES OF WRONGFUL DESIGNATION

At present, AAIMCo has identified two major categories of this conduct as reported by their members. The first category is as follows:

1. Without ever talking to the expert, the attorney makes a written designation identifying the expert as a testifying expert to the Court and/or opposing counsel, stating the opinion the expert is expected to give. The case settles before the expert is needed to provide a written report, or give a deposition, or trial testimony. Sometime later the expert first learns of his or her designation as an expert in the case.

   The most egregious scenario in this category is where the attorney does not know the expert, but has obtained the expert's information from the internet, from another attorney, or some other source. The attorney likely believes that the case is going to settle before the Wrongful Designation comes to light, so the attorney makes the designation without ever talking to the expert.

   Another scenario that exists in this category is where the attorney knows, and possibly has used, the expert witness in other cases. The attorney has such a comfort level from familiarity or prior working experience in other cases, that the attorney feels that the expert will not mind it if the attorney designates the expert, just in case he might need to later use the expert. So the attorney designates the expert without ever discussing the case with the expert.

The second major category of Wrongful Designation is as follows:

2. After talking to the expert to get the expert's initial thoughts, but before engaging the expert or providing any tangible information, the attorney makes a written designation to the Court and/or opposing counsel naming the expert as a testifying expert, and stating the expert's opinion to be that which the expert may have indicated in

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WRONGFUL DESIGNATION (continued)

the preliminary telephone conference. The case settles before the expert is needed to provide a report or give a deposition or trial testimony. Sometime later, the expert first learns that he or she was designated as an expert in the case.

One scenario under which this category develops is where the attorney has used the expert on prior cases and calls to get the expert's initial thoughts on the case, ending the conversation by telling the expert that the attorney needs to get engagement authorization from the client, and will then get back with the expert. Thereafter, the attorney designates the expert representing that the initial thoughts of the expert are the expert's opinion; or, even worse, the attorney modifies or misrepresents the expert's initial thoughts to support the attorney's position in the case. Usually the attorney believes that, if the case goes as far as needing to produce the expert for a report, or a deposition, or trial testimony, then the attorney can engage the expert at that time.

Another scenario in this major category is that the attorney has never dealt with the expert previously, but contacts the expert stating that the attorney needs to hire an expert, and wants to get the expert's initial thoughts on the case before recommending that his client engage the expert. After some discussion, wherein the expert gives his or her initial thoughts, the attorney tells the expert that the attorney is going to discuss it with his client to get authorization to engage the expert. At this stage, the expert has not been provided any tangible information. The attorney thereafter designates the expert using the expert's initial thoughts as the opinion. However, the attorney never tells the expert that he or she has been designated.

In virtually all jurisdictions, Court Rules are interpreted to prohibit any attorney in a lawsuit from contacting an expert that another attorney has designated as a testifying witness. Because of that strict prohibition, the attorney that made the Wrongful Designation is able to keep opposing counsel from possibly retaining the expert, or even learning the truth from the expert of his or her opinion. In addition, it prevents the expert from learning of the Wrongful Designation from the opposing counsel.

Some jurisdictions and some Courts require that a written report, signed by the expert, accompany the expert designation. In those jurisdictions, Wrongful Designation is far less likely to occur, since the attorney would need to file a report from the expert with the designation.

IMPACT ON THE EXPERT WITNESS

Financial Impact

The first reaction many experts have is that they were cheated out of the fees that they were not paid. That is because there are two primary things that an expert has to offer:

1. Their knowledge.

2. Their reputation for being a credible witness.

Clearly, anytime an attorney uses an expert's name or purported opinion without compensating the expert, then the expert has had a direct monetary loss due to the attorney's conduct.

In addition to the direct financial loss of not being paid, the expert arguably has also suffered an indirect financial loss. Because of the prohibition barring communication between the expert and any other counsel in the case, when an attorney designates an individual as a testifying expert witness, the door is closed on the possibility of the expert being

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WRONGFUL DESIGNATION (continued)

engaged by any other attorney in that case; thus, losing the benefit of any corresponding income from such potential engagement.

Impact on Reputation

"It takes 20 years to build a reputation and only 5 minutes to ruin it."

Warren Buffet's statement above is also true for expert witnesses, when an attorney misstates an expert's opinion to the Court and/or opposing counsel. The degree of impact on the expert's reputation depends on how far removed the Wrongfully Designated expert's purported opinion is from both what the expert's real opinion would have been and what the consensus of other experts in the same industry reasonably could have been. In other words, if the designation states an opinion that is a wild variance from both what the expert would have testified to and from what one would expect that other industry experts would reasonably conclude, then the negative impact on the reputation of the Wrongfully Designated expert may be the greatest.

Bypassing Conflicts Check

Another problem that is created by an attorney's Wrongful Designation of an expert is that it prevents the expert from having the opportunity to complete a conflicts check. Experts normally inquire as to who all the parties and attorneys are in the case to determine whether or not they have a potential or actual conflict of interest. Experts are concerned about situations where they have either a legal conflict of interest; or where there is not a legal conflict, but because of who the other parties or attorneys may be, or for business or personal reasons, it is contrary to the expert's interest to testify on behalf of the particular client or the attorney that Wrongfully Designates the expert.

Impact on Opposing Counsel and Party

The expert witness is not the only one impacted by the designation or use of that expert's purported opinion without his or her knowledge. The Wrongful Designation is being done for the purpose of making the opposing counsel and his or her client believe that a respected and credible expert witness will testify against them if the case does not settle on terms that the attorney is advocating; and that great harm will befall the opposing counsel and client due to the Wrongfully Designated expert's purported testimony should the matter have to go all the way to trial. In those cases where the opposing counsel and client settle the case on terms less favorable than they would have had the expert's name and purported opinion not been used, then the Wrongful Designation has caused harm to the opposing counsel and client. This would particularly be true in a situation where there are only a limited number of properly qualified experts available.

What Can the Expert Do?

"An Ounce of Prevention Is Worth a Pound of Cure"

This time honored saying by Benjamin Franklin has never been more true. The nature of Wrongful Designation is one that regardless of how often it may occur, it will seldom come to light. That means that in order for the expert to minimize the possibility of its happening, experts should implement deterrence measures. A wide array of risk avoidance measures are not available; however, there are a few things an expert can do.

Since the first category of Wrongful Designation happens without any contact with the expert, practically speaking, very little preventative action can be taken to avoid being the victim of that type of Wrongful Designation. However, with

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WRONGFUL DESIGNATION (continued)

regard to the second type of Wrongful Designation, certain actions can be taken that will discourage an attorney from engaging in that conduct. Those actions will also document the expert's file in the event Wrongful Designation occurs and provide timely, reliable evidence should it be necessary to prove it occurred. As such, the prevention measures discussed below only apply to prevention of the second category of Wrongful Designation.

First, the expert should have a procedure for creating a file, noting the day and time a call is received from an attorney, identifying sufficient specifics in the event the notes need to be relied upon at a future date. The notes should include the names of all the parties to the case, the attorneys (including the firm name) for all parties to the case; the deadlines that are in place by a Court's Scheduling Order / Docket Control Order and other judicial deadlines. In addition, the notes should include the precise request of the attorney, as well as any initial thoughts the expert related to the attorney. Most importantly, however, is that it include whether or not an agreement was reached to be engaged by the attorney, and particulars on how and when that agreement would be memorialized.

If no engagement occurs from that conversation, and neither party intends on pursuing further discussions, the expert should specifically note such fact. If there was no engagement reached, but there is potential that one might be reached, depending on further discussions that are to occur in the future, then the expert should note who is to do what and when the follow up is expected.

It is also a good idea to ask the attorney whether or not the expert's initial report must be submitted at the time of the designation. If so, it will be difficult for the attorney to Wrongfully Designate the expert, because the expert's report will be due with the designation.

The above notes provide documentation and serve to enable the expert to set "action" deadlines with clarity and precision. From those notes, the expert should draft a written communication to the attorney that lays out the fact that the expert has not been engaged and the actions that are left to be done in order to be retained as an the expert.

If in a reasonable amount of time an agreement is not consummated, then a final written communication could go to the attorney stating that the expert has not received confirmation of engagement from the attorney, and is therefore closing his or her file. This is a particularly good idea if you believe there is a real possibility that you might be contacted by one of the other attorneys involved in the case.

These communications will document the non-engagement of the expert by that attorney, so that the attorney knows there is a paper trail of the non-engagement, which should have a chilling effect on the attorney's deciding to Wrongfully Designate the expert. It would further be documentation to use in the event the expert were to later choose to file a complaint with the State Bar Association.

The website of AAIMCo at www.aaimco.com>>Consulting Resources provides some suggested wording that can be included in the expert's confirmation to the attorney that the expert has not been engaged.

Report Attorney Misconduct to the State Bar Association

Every State has a Bar Association that prosecutes misconduct of attorneys. The American Bar Association ("ABA") has a Code of Professional Conduct ("Code") that every state's Bar Association can adopt, either identically, or with modifications. The references below to code sections refer to sections of the Code, with State Bar Association variances in content by the states footnoted. The provisions of the Code are enforced by each state's Bar Association. While many states have their own assigned Code and Rule numbers that differs from the Code, all 50 states, except one, have adopted the ABA's Code.[1]

James M. McCormack, served as General Counsel and Chief Disciplinary Counsel for the State Bar of Texas, and now is

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WRONGFUL DESIGNATION (continued)

in private practice in Austin, Texas concentrating in counseling major law firms on how to avoid the pitfalls that can lead to grievances being brought against them. When asked about whether or not the Texas State Bar Association has prosecuted any complaints based on Wrongful Designation, Mr. McCormack stated that he "could not confirm that any grievances or disciplinary actions have been pursued in Texas or other states against attorneys for wrongfully designating an expert; but the Bar Associations certainly should pursue a legitimate claim of that nature."

The Code has at least three Rules that can come into play relative to Wrongful Designation. Those are as follows:

1) Rule 3.4 Fairness to Opposing Party and Counsel[2]

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists

Rule 3.4(c) prohibits an attorney from knowingly disobeying an obligation under the rules of a tribunal. This would include any rules of the Court, including State Rules of Procedure that require that the attorney designate testifying exerts and provide a summary of the expert's opinion. In a case where an attorney gives that information to opposing counsel and/or the Court, a strong argument could be made that providing false designation information is tantamount to failing to make a designation as required by the Court rules.

2) Rule 4.1 Truthfulness In Statements to Others[3]

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person

Rule 4.1(a) states that the attorney shall not make a false statement of material fact or law to a third person. A third person, in this case, would be the Court or opposing counsel. So an attorney providing false information on his or her designation of testifying expert witness is very arguably making a false statement of material fact to a third person.

3) Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice

Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. It is difficult to believe that falsely designating a testifying expert witness would be anything but dishonesty, fraud, deceit or misrepresentation.

Rule 8.4(d) prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. The administration of justice contemplates that an attorney's designation of a testifying expert would be true and correct, so as not to mislead all others in the judicial arena. When an attorney falsifies testifying expert information, a strong argument exists that such falsification is prejudicial to the administration of justice.

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WRONGFUL DESIGNATION (continued)

The requirements of whom can press a state's Bar Association to prosecute a violation of the Code, and how it is done, can vary from state to state as virtually all Bar Associations have an established procedure for receiving complaints about attorneys. Should an expert learn of an attorney's engaging in Wrongful Designation, then the expert should consider contacting the Bar Association in the state where the incident occurred, to report the conduct of the attorney. At that time it would help if the expert had the above-mentioned Code sections to refer to when discussing the matter.

It would be preferable for the expert to first call the offending attorney to find out the facts as stated by the attorney. This contact may allow the expert to determine the validity of the information he or she received from another source, before deciding whether or not to report it to the Bar Association. Should the expert decide to report the attorney after talking to the attorney, then making the call to the attorney should give the expert's case greater credibility.

The expert should understand that his or her reporting the conduct to the Bar Association should not be done with the expectation that doing so will cause the Bar Association to act in a manner so as to help the expert collect a fee that the expert believes is owed. In fact, there is a cautiousness on the part of a Bar Association when they receive a complaint from a "vendor" to attorneys, since they do not want to be used as a collection device for vendors. In most states, if the Bar Association senses that they are being used to collect a fee (or at least leverage to aid the expert to collect a fee) then the Bar Association will not likely take the complaint to prosecution. So, the expert must understand that his or her status as a "vendor" to attorneys puts the expert in a category to make the Bar Association scrutinize his or her motives.

Not only can the expert's purpose of contacting the Bar Association not be for the purpose of scaring the attorney into paying the expert a fee; but the expert cannot even appear to have that idea, in the eyes of the Bar Association. And, under no circumstances, should the expert, in his or her telephone conversation with the attorney, threaten to file a grievance with the Bar Association if the attorney doesn't pay the expert a fee. Such comments could undermine any future pursuit of prosecution by the Bar Association.

Judicial Remedies

While this article does not attempt to explore the various legal options available to experts in the Civil Court system of the various states, suffice it to say that most states' laws are likely to enable an expert to recover a judgment against an attorney committing Wrongful Designation, depending on the facts on any given case. In order to accurately assess the availability of such a civil remedy, the expert should contact a qualified civil attorney licensed to practice law in that state.

CONCLUSION

The problem of attorneys committing Wrongful Designation could have been going on for years and just recently has become known, or it may have only started occurring recently. Whichever is the case, it is conduct that the Code of Professional Responsibility prohibits. And, it can be very damaging to expert witnesses, and possibly parties and their attorneys on the opposite side in a case. For that reason, AAIMCo is continuing to gather information on occurrences from both its members, and non-member expert witnesses.

If you have any information about specific acts of this type conduct, AAIMCo would appreciate your notifying them at info@aaimco.com with the specifics of any such incidences. AAIMCo is not interested in the names of the attorneys or experts involved. They only want verifiable information on the type of incidences and frequency of Wrongful Designations that are occurring.

NOTES

[1]**California Bar Association** is the only Bar Association that did not adopt the ABA Code of Professional Conduct. California Bar Association has its own rules that include the following:

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WRONGFUL DESIGNATION (continued)

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member: (b) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.

[2]**New York City Bar Association** has a slight variance in its wording which is:

Rule 3.4: Fairness to Opposing Counsel

A lawyer shall not knowingly:

(a)(1) Suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.

[3]**New York State Bar Association** has a slight variance in its wording which is:

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Misrepresentation: [1] A lawyer is required to be truthful when dealing with others on a clients behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentation by a lawyer other than in the course of representing a client, see Rule 8.4.

About the Authors

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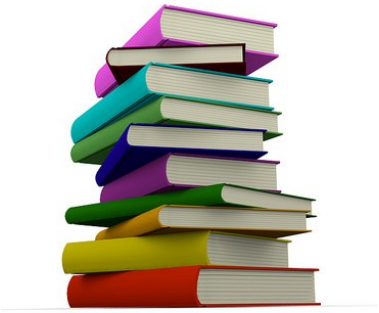
Special thanks to **Isabel G. Vaquera**, who at the time this article was written was a student in the College of Business at the University of Houston – Downtown, majoring in the Insurance & Risk Management degree program, for providing the research and organization associated with this article.

Mr. Braniff and **Mr. Gaddis** are members of the American Association of Insurance Management Consultants ("AAIMCo"), and association of consultants to the insurance industry, insurance companies, agents, brokers and their consumers. Information regarding AAIMCo may be found at www.aaimco.com.



The Essential Bookshelf for Expert Witnesses

By Kevin Quinley CPCU, ARM, AIC

Being an effective expert witness requires subject matter expertise, deep experience and communication skills. However, there are many individuals with deep insurance subject matter knowledge who are just not cut out to be expert witnesses. Depth of knowledge is simply the price of admission to the arena of expert witnessing. Many other skill sets — none of them innate — are essential.

Being an effective expert witness only starts with subject matter expertise. One must have the ability to analyze information, spot key issues, express themselves clearly in writing, communicate effectively with jurors, understand the performance art of deposition testimony, market their practices and manage their practice as a business. Whether you are a neophyte expert witness just starting out in the field or a grizzled veteran, let me offer twelve books that should be on every expert witnesses shelf. In no particular order:

Expert Witness Handbook: Tips and Techniques for the Litigation Consultant by Dan Poynter, Third Edition, 2005, Para Publishing, 263 pp. This is a good introductory book for those who are just getting into the profession of being an expert witness. It is not geared to *insurance* experts specifically, nor are any other books on this list.

How to Market Your Expert Witness Practice: Evidence-Based Best Practices by James Mangraviti Jr., Steven Babitsky and Alex Babitsky, 2011, SEAK Inc., 410 pp. You will see here multiple books published by SEAK on this list. It specializes in, among other things, publishing books for expert witnesses, especially physicians who augment their medical practices as experts or who serve as full-time experts. (Full disclosure: I have no financial interest in SEAK.) Nor do I necessarily agree with all their suggestions, such as being wary of writing articles and publishing. Nevertheless, this is an excellent (though not cheap) book on how to effectively spread the word regarding your expert witness practice. If this book's tips get you but one new engagement, the investment in purchasing the book will have more than paid for itself.

The Visible Expert: How to Create Industry Stars and Why Every Professional Service Firm Should Care by Lee Fredericksen, Elizabeth Harr and Sylvia Montgomery, 2014, Hinge Research Institute, 134 pp. Opposite of the SEAK philosophy of "don't publish", this book, focuses on content marketing. Establishing yourself as a thought leader within your realm of insurance is an excellent way to market yourself, much better than beating your breast about how wonderful you are as an expert. Personal opinion: the best marketing is not self-promotion but rather consistently generating value-added content that readers will find insightful and useful in their own jobs. Do it consistently, and business will gravitate toward you.

The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner by Rosalie Hamilton, 2003, Expert Communications, 253 pp. This book is packed with practical advice on tastefully marketing your expert witness practice. It does not go into the same exhaustive detail as SEAK's book on the same topic, nor is it as expensive. This book is a good introduction to marketing and promoting an expert witness practice.

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The Essential Bookshelf for Expert Witnesses (continued)

How to Write an Expert Witness Report by James Mangraviti Jr., Steven Babitsky and Nadine Donovan, 2014, SEAK, Inc., 563 pp. Many people are insurance experts but are not necessarily effective writers. Writing an expert witness report is a specialized type of writing. This book is also an encyclopedic resource from every angle on how to craft the expert report, particularly Rule 26 reports required in federal cases.

The Elements of Legal Style, Second Edition, by Brian Garner, 2002, Oxford University Press, 268 pp. This book is not written for expert witnesses but rather for attorneys. That said, I found it an extremely effective guide for tightening up one's writing and improving the written work product that is the heart and soul of being an expert witness. You may not be called the trial very often. Most cases settle. You may give a deposition on only a minority of cases. However, it is likely that on most cases you will have to produce some written work product. Garner's book is accessible to non-attorneys and adaptable to clean, clear writing that distinguishes effective expert witness reports.

Typography for Lawyers: Essential Tools for Polished & Persuasive Documents, 2nd Second Edition by Matthew Butterick, Thomson Reuters, 2018, 240 pp. You want your reports to be not only substantively strong but look good too, right? This book is packed with practical tips on how to make your reports not only effective, but aesthetically appealing from a design standpoint. No detail is overlooked by author Matthew Butterick.

How to Excel During Depositions: Techniques for Experts That Work by Steven Babitsky and James Mangraviti, Jr., SEAK, Inc., 1999, 284 pp. The rubber hits the road when you get that Notice of Deposition. Now, all of your analysis and your written opinions will be put to the test. Cases may not be won at deposition but many of them are lost at that stage. This book provides specific examples of how to be an effective deponent and parry the gamut of tricks that opposing counsel may try to use to make you look inconsistent and foolish.

How to Become a Dangerous Expert Witness: Advanced Techniques and Strategies by Steven Babitsky and James Mangraviti Jr., 2005, SEAK Inc., 433 pp. Experts are conditioned to play defense during deposition. Answer the question and only the question. Do not volunteer information! This book suggests tips and techniques to counterpunch during depositions to advance your opinions and to render opposing counsel wary of opening the door to damaging testimony.

Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success by Kenneth R. Berman, American Bar Association, 2018, 250 pp., $64.95. A paradigm shifting perspective that challenges the conventional notion that deponents should answer the question and only the question, not volunteer information and in general "play defense" rather than play offense.

How to Draft Bills Clients Rush to Pay by Mark Robertson and J. Harris Morgan, American Bar Association, 2019, 112 pp. Every expert wants to get paid, right? As soon as possible, too! This book's target audience is attorneys. Nevertheless, this book holds many tips that are adaptable by experts to achieve clarity in billing and explain the value-added to the case by each billing entry.

Manage Your Day-to-Day: Build Your Routine, Find Your Focus & Sharpen Your Creative Mind by Jocelyn Glei, 2013, Behance Publishing, 253 pp. Much of being an effective expert witness involves project planning and management. This book is a treasure trove of tips on managing your time in order to maximize your performance as an expert witness.

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The Essential Bookshelf for Expert Witnesses (continued)

Some final thoughts. As you will see, many of these books are not inexpensive. However, as a self-confessed book-aholic (just ask my long-suffering wife), I urge you to view these books as not just expenses but as *investments*. Often, you can find used copies at deep discounts on Amazon.com. In addition, they likely qualify as a legitimate business expense for tax purposes. If these books help you get one new assignment, improve your written work product, upgrade your testimonial performance, get bills paid faster and manage your caseload better, the expenditures will have more than paid for themselves!

About the Author

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CPCU Professional Commitment

As a Chartered Property Casualty Underwriter ...
I shall strive at all times ... to live by the highest standards of professional conduct ...
I shall strive to ascertain and understand the needs of others ... and place their interests above my own ...
And I shall strive to maintain and uphold .. a standard of honor and integrity ... that will reflect credit on my profession ... and on the CPCU designation.

The 411 on Becoming an Expert Witnesses

By Elise M. Farnham, CPCU, ARM, AIM, CPIW

It's not infrequent that someone comes up to me and queries me on how to become an expert. This is a difficult question to answer and requires something more than the proverbial 'elevator speech.'

An expert witness needs to have many different skills as well as a deep understanding of the subject. Here are 5 tips for anyone wanting to pursue a career as an expert witness.

Develop a deep understanding of the business of insurance. This requires learning how other insurance professionals do their jobs. My own work history is in the claims arena, yet, I've developed a good understanding of how underwriters conduct their reviews of risk exposures, how agents and brokers assess risk and submit applications, and how loss control specialists improve a risk. Learn how these individuals create opportunities for their employers and develop an appreciation for the challenges they face. Obtaining this knowledge will require that you attend industry events with a diverse audience – talk to people in other job functions and listen to what they have to say. Develop an appreciation for other specialties in insurance and how they work together to create effective risk management solutions for consumers.

Focus on a specific aspect of insurance. Once you've gained broad knowledge of the industry, then focus on the area that you are most interested in pursuing. This will ensure that you have the depth of knowledge necessary to testify with confidence. You should not only be an expert, but be *perceived* as an expert.

Formalize your knowledge through attainment of recognizable and respected designations. While experience plays a significant role in qualifying an expert, formal education is also necessary. Don't settle for the easy ones either. Gain highly respected and highly recognized designations that are not easy to attain. The gold standard is the CPCU designation, but if you are reluctant to begin that challenge, start with another educational track to a different designation offered by The Institutes – Associate in Risk Management (ARM), Associate in Claims (AIC), Associate in Underwriting (AU) – to name a few that can begin to open doors and give you good practice before tackling your CPCU courses.

Expand your network. They can't hire you if they don't know you, so get busy and create a network that will want to help you to succeed. Join the CLEW IG committee which will give you the opportunity to meet a variety of experienced, knowledgeable individuals who can offer advice and referrals. Speak at conventions and industry meetings by submitting proposed topics to their planning committees. Write articles for publication in Society magazines and newsletters and other industry publications. You need to get out there, front and center. To succeed, you must toot your own horn and let others know how much you know.

Develop the ability to explain complex concepts clearly and concisely. The most important role of an expert witness is to educate the jury on the topic at issue. Insurance products are complex, the relationships between the parties are complex, and the contractual issues are complex. Being able to describe them to people who have never studied anything having to do with insurance and who have probably never even read their own insurance policies can be a challenge. Learn how to be a teacher. Try teaching your own family members

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The 411 on Becoming an Expert Witnesses (continued)

about insurance concepts, it's a great place to start. Also look for opportunities to speak about insurance at schools or in front of community groups. Become a mentor to someone new to the industry. All of these activities will hone your skills as a teacher.

These are just a few tips to help you on your way. Good luck and reach out for assistance whenever you need it.

About the Author

Elise Farnham CPCU, ARM, AIM, CPIW/M has 40+ years of experience in the risk management and insurance industry including multi-line adjuster, branch manager, regional manager, and senior executive for TPA and independent adjusting firms. As owner of Illumine Consulting, she provides expert testimony, professional development and continuing education programs. Past President of the Atlanta CPCU Chapter and the International Association of Insurance Professionals, she currently serves as a director for the Society of Registered Professional Adjusters. Elise has been recognized for her service to the industry and is a guest author for many industry publications.

CPCU Society Mission CPCU Statement

We are committed to providing resources, educational programs and leadership opportunities that attract talent and enable individuals to expand their technical insurance skills and business capabilities in order to improve the overall performance of the insurance industry while adhering to the highest ethical standards.

Working as an Expert Witnesses

By Douglas R. Emerick

Performing expert witness services can be an exciting, rewarding and educational endeavor. I spent just short of two decades working within the insurance industry and the remaining three decades providing consulting and expert witness services.

The following article contains guidance for insurance industry veterans thinking about expert witness work and those others who may have started to do this type of work and are still unsure of the best practices. Also, for those litigating attorneys reading this, hopefully, you will find some nuggets of information that will help you get the best expert, and the best out of experts you retain.

It is not unusual for commentators on expert witness work to call it litigation support or even consulting. Make no mistake, when consulting with an attorney on a case, the work is at that attorney's direction, and there should be no concern about expert rules and the guidelines provided here. However, if retained as an expert, there are rules to follow and consequences if they are not adhered to strictly.

Expert witnessing is adversarial. The attorneys on the opposing side will look for mistakes and errors, try to exclude part or all of the opinion(s) and possibly seek to have the court exclude the expert from the judge or jury's consideration. These can be accomplished through "motions in limine" and "Daubert Challenges". The expert's job is to educate the "trier-of-fact" (Judge or Jury) and convince them that your opinion illuminates the issues better than the opposing side can do. The expert needs to be objective and not automatically adopt the retaining attorney's position and thoughts. An insurance expert witness provides expert opinions on issues pertaining to his specific area of expertise. It is very different from consulting in which tasks are performed for the benefit of the attorney or client.

The Federal Rules of Civil Procedure (V.26.2 (B)) and the Federal Rules of Evidence (Rules 702, 703, & 705) can be used as guiding principles for expert witness work and, in fact, are the rules that must be complied with by every expert when the case for which services are being rendered are venued in Federal District courts. Most state and local courts have adopted these rules in whole or in part. Keep in mind the reporting requirements will differ between different local State and Federal courts. The retaining attorney will be able to give you the appropriate guidance as to what report or work product is necessary for that particular case.

The attorney you are working with will let you know if the other side institutes "Daubert Challenges" or files "motions in limine." Each of these is an attempt to have all or part of your expert work excluded from the case or you as the expert declared unqualified to opine on the issues. The latter, if successful, could eliminate or severely limit future expert work as attorneys are reluctant to retain experts with such decisions in the expert's history.

Reports and testimony (e.g., depositions) constitute the sources for an expert's opinions. Best practices dictate that your report should be organized and deliberate. Planning your report is best and outlining helps with that. Sectioning your report based on the Federal Rules is useful:

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Working as an Expert Witnesses (continued)

- Expert Qualifications
  - ◊ List of Cases expert provided testimony (4 years)
  - ◊ Publications by Expert (last 10 years)
- Complete Statement of Opinions • Facts or data used to formulate the opinion(s)
- Exhibits used for support

If an expert is inexperienced at writing expert reports, it would be prudent to take a professional writing course. There are organizations that specialize in expert training, and even some referral services will provide this type of guidance.

Depositions are a type of "testimony" that an expert may provide in their expert work. The retaining attorney may very well "prepare" the expert usually the day before the deposition. Be sure to be prepared for the deposition before the attorney provides the preparation. Be sure to satisfy any questions and to fully understand how and if there have been any case development that will or will not affect your opinions.

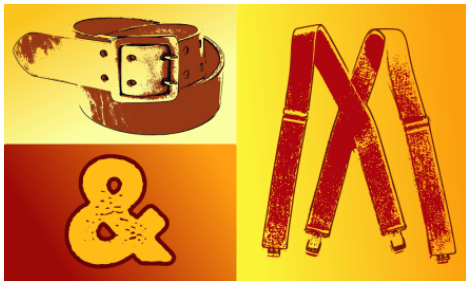
For the deposition, one of the most challenging adjustments an expert has to make is to respond under deposition questioning adequately. Remain calm and professional no matter how worked up the questioning attorney gets. Listen to the question asked and answer only that question. Do not pontificate or bring up related matters. If the retaining attorney objects to a question asked, do not answer the question unless told to do so.

For attorneys reading this article, experts understand fully that the attorney's purview is the law. The expert's field is the insurance industry. As there are many areas of law, a single lawyer likely will not know and practice in all areas of the law, different areas of the insurance industry exist, and one expert will not know all areas of the industry. An expert well credentialed in agent/broker responsibilities is likely not qualified to address underwriting or claim questions. As an expert, I have been asked to provide supporting information for a motion in limine. My attorney needed to exclude the opposing agent expert's opinions on what was clearly a complicated underwriting matter.

Using an insurance expert early in the discovery can assist an attorney with interrogatories and provide insurance industry-specific information to circumvent potential objections and force the opposing side to provide relevant supporting documentation for the expert's opinion. Please remember that the right expert for a case is not necessarily the expert that is next door.

About the Author

Douglas R. Emerick is a former senior executive of an insurance company and is an active expert witness on specialty lines of insurance such as Fidelity, Surety, Directors & Officers, and Specialty E&O. Mr. Emerick is the General Manager of Insurance Expert Network, LLC (IEN); (215) 736-2980;



Belts and Suspenders

"Be Careful What You DON'T Ask For"

By Bill Wilson, CPCU, ARM, AIM, AAM

Last week, I presented two seminars in Michigan entitled "When Words Collide: Resolving Insurance Coverage and Claims Disputes" and "Finding & Fixing Coverage Gaps." Within two days of returning home, I was contacted by an attorney looking for an expert witness in a case that was exactly on point with one of the main premises of these seminars, that the best way to fix a coverage gap or resolve a claim dispute was to prevent the gap from occurring.

A property management company was being sued for carbon monoxide poisoning from a faulty heating unit. The claim was denied because the company's CGL policy included the CG 21 49 - Total Pollution Exclusion Endorsement, which also governed coverage (or lack thereof) on the umbrella policy.

So, of course, the next suit being considered was against the agent, the reason being that the carrier under the prior agent had attached the less onerous CG 21 65 - Total Pollution Exclusion With A Building Heating, Cooling And Dehumidifying Equipment Exception And A Hostile Fire Exception endorsement. The question to me was whether there was a viable E&O claim against the current agent for "allowing" the total pollution exclusion endorsement (CG 21 49) to be attached. I'll return to this issue momentarily.

In the aforementioned seminars, I contend that the three primary sources of coverage gaps that lead to claim disputes are:

1. Failure to identify and/or quantify exposures
2. Failure to insure or risk manage known exposures
3. Failure to quality control policy deliverables and risk information

Even if steps 1 and 2 above are properly carried out, the agent's job is not over until the policy deliverables have been quality controlled. The agent will, of course, make sure that requested policy forms are included or, if not, forms of equal or better relevance have been provided. But the agent must also be vigilant by *reviewing forms that were not requested*.

It is not uncommon for carriers to add numerous exclusionary or limiting endorsements to policies. Some of the endorsements may be mandated by the Commercial Lines Manual or other underwriting guides. For example, any ISO CG 21 xx endorsement that shows up on a CGL policy will not be good for the insured. The agent may then see if the carrier will remove the endorsement or substitute a less restrictive form. This is sometime accomplished simply by asking and may involve no or minimal additional premium.

So, the question to the expert witness is, does the current agent have potential liability for failure to have, if possible, the CG 21 49 endorsement removed or at least replaced by the CG 21 65 endorsement that was on the prior policy? Such legal liability rests on whether the current agent had an obligation to proactively do anything and that depends on the standard of care for that jurisdiction, the facts of the case, and how a "reasonable" agent would have handled the matter. Whether or not the insured asked for "the same or better coverage" than he had previously might also be material.

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"Be Careful What You DON'T Ask For" (continued)

Good agents do the right things, though legally that doesn't necessarily mean that the failure to do so is legally actionable against agents whose agency motto is "We're No Worse Than Anybody Else!" We're all familiar with the adage, "Be careful what you ask for." The learning point here for agents is, "Be careful what you DON'T ask for."

About the Author

Bill Wilson, CPCU, ARM, AIM, AAM is the founder and CEO of InsuranceCommentary.com and the author of "When Words Collide: Resolving Insurance Coverage and Claims Disputes" which is available on Amazon or at www.WhenWordsCollideBook.com.

Meet CLEW Committee Member
Christine A. Sullivan, CPCU, AIM

Chris Sullivan began her insurance career in 1976 as an adjuster in New Hampshire and Vermont for the Allstate Insurance Company. Committed to continuing education, Chris earned her AIM designation in 1982, receiving the distinguished graduate award from the Institutes. Chris received her CPCU in 1989. Next came an MBA degree, with concentrations in Finance and Marketing in 1998 from the University of Illinois at Chicago. In September 2004, Chris was named Claims Professional of the Year by the Editorial Advisory Board of Claims Magazine.

Chris' career at Allstate spanned over 35 years, holding varying technical and leadership position in both education and claims. In 2000, Chris became a Vice President in Claims with responsibility for liability and injury claim handling practices and procedures on a countrywide basis. In 2009, Chris became the Chief Claim Compliance Officer overseeing compliance with statutes, regulations and internal control processes countrywide. As an Officer in the Claims Department, Chris provided testimony on behalf of the company on various litigation and regulatory matters countrywide. She retired from Allstate in 2011.

Chris started her consulting firm, CAS Consulting, LLC in 2011, providing expert witness support for claims handling practices and procedures for both personal lines and commercial lines claims. She also provides training programs and best practices consulting for companies providing software and other services to insurers. Chris is a faculty member at the Lake Forest Graduate School of Management in Illinois where she teaches courses in Corporate Finance, Healthcare Finance, Economics and Strategic Thinking in the MBA program. She is also adjunct faculty at Illinois State University where she teaches courses in Risk Management/Insurance and Commercial Liability.

As a CPCU, Chris was a member of the New York Chapter (1989 – 1993), a member and an officer of the Chicago Northwest Suburban Chapter (1993-2014) and is current a member of the Chicago Chapter. She has held national positions as part of the Claims Interest Group, Regulatory and Legislative Interest Group and the CPCU Nominating Committee prior to being named Chair of the CLEW IG. She has served on the former INS, AIC and CPCU advisory boards at the Institutes and has been a contributing author to API, AIC and CPCU texts. Chris was also on the advisory board of the Insurance Research Council form 2004 to 2011, and served as the Chair from 2009-2011.

Chris currently resides in Chicago Illinois. She is volunteer mentor at Menttium, volunteer consultant with Executive Service Corps and the treasurer for the nonprofit Literacy Works.

Congratulations to Our 2018 Gottheimer Malecki Memorial Award Recipient:

Jack Gibson

Jack Gibson was presented with the 2018 Gottheimer Malecki Memorial Award by CLEW Committee Member Elise Farnham on February 19, 2019 at the meeting of the Dallas CPCU Chapter

The CLEW Interest Group is pleased to announce its presentation of the 2018 Gottheimer Malecki Memorial Award to Jack Gibson, CPCU, CLU, CRIS, and President and CEO of IRMI (International Risk Management Institute). Over the course of his lengthy career at IRMI, Mr. Gibson has become a leading educator in the insurance and risk management industry. Today many professionals in our industry turn for guidance to one of 11 insurance and risk management reference works he coauthored.

When he first became involved in educating insurance professionals, Jack Gibson quickly displayed the ability and passion to persevere and focus on challenges our industry faced even as those same Challenges dramatically changed over the years. At same time, as a CPCU Society member, Mr. Gibson served on many committees and accepted many officer positions. Our Dallas Chapter has enjoyed having Mr. Gibson serve as its President while the International CPCU Society's Board of Directors has benefited from Mr. Gibson's service as a board member.

Even in his spare time, Jack Gibson donates his expertise and enduring commitment to our industry. He serves on the board of the Insurance Industry Charitable Foundation (IICF), Texas – Southeast Division, and is the chairman of the Texas Risk & Insurance Professionals Society (TRIIPS), which supports university risk management and insurance academic programs in Texas.

By his efforts, Jack Gibson has clearly demonstrated his dedication, excellence and lasting service to our industry for the duration of his career. As insurance and risk management professionals, we will continue to reap the benefits of Mr. Gibson's enduring career. Thank you for inviting us on that career path, Jack Gibson!

The **Gottheimer Malecki Memorial Award** is presented by the Coverage, Litigators, Educators & Witnesses (CLEW) Interest Group to a CPCU Society member who has made an outstanding contribution to the field(s) of insurance, risk management consulting or education, insurance litigation or service as an expert witness as well as involvement in and support of the CPCU Society and the CPCU designation.

The award is named for George M. Gottheimer, CPCU, CLU, ARe and Donald S. Malecki, CPCU. Both George and Don had distinguished careers in the insurance industry including considerable service to the CPCU community. The CLEW Interest Group celebrates the achievements of George and Don by honoring others with this prestigious award.

Upcoming Society Events

2019 CPCU Society Leadership Summit

Sheraton Denver
Downtown Hotel
Denver, Colorado

April 4 — 6, 2019

2019 CPCU Society Annual Meeting and Seminars

Hilton New Orleans Riverside
New Orleans , Louisiana

September 21— 24, 2019

Information about the CLEW IG is available at our website:

https://clews.ig.cpcusociety.org/

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Interest Group Power Point Presentation

Who We Are and How to Get Involved

Please contact Elise Farnham at: elisefarnham@gmail.com

...for an electronic copy.

Our thanks to CLEW Committee Member Elise Farnham for her work on the presentation.

Articles Wanted!

Share your knowledge, experience and writing skills with your CPCU colleagues by authoring an article for a future issue of ***CLEW NEWS***. CLEW News is published quarterly. Topics of interest to CPCU consultants, litigators, expert witnesses and educators will be considered.

Also, if you learn of an article in another publication that may be of interest to CLEW members let us know and we will investigate the possibility of a reprint.

Please Contact *CLEW News* Editor-in-Chief, Michael Gay at michael@michaelgayconsulting.com, or CLEW Chair Christine Sullivan at casconsulting.llc@gmail.com.

Information about the CLEW IG is available at our website: https://clews.ig.cpcusociety.org/