

## **Hiring Insurance Expert Witnesses: Get Your Money's Worth!**

by Burl Daniel, CPCU, CIC, CRM

Insurance attorneys are busy people! No two cases are the same! Attorneys face weekly court filings, deposition schedules, and courthouse deadlines. Not to mention phone calls and counseling clients on a daily basis. As insurance expert witnesses, we find this equally true of both the plaintiff and defense trial lawyers who retain us. No secrets here.

Insurance litigators commonly retain their insurance expert witnesses to consult regarding insurance industry custom & practice, coverage and claims issues, and technicalities of certain coverages. Assuming you locate an expert well matched to your case below we offer some suggestions to obtain better value for those expert fees paid by you and your clients. Most importantly, using your expert's knowledge effectively should help you improve your position during litigation. While these remarks focus on insurance litigation, I believe they are just as applicable to other areas of litigation when experts are being considered.

### **Preparing for deposition or trial:**

We often receive attorney inquiries regarding our services shortly after initial depositions, long after depositions have been taken, discovery is closed, and a court date is imminent. Nearly always, expert witnesses have to read such depositions thoroughly to prepare a court-credible expert opinion letter. You may wish to consider using a "consulting expert" long before discovery and depositions begin. We are not attorneys providing legal advice. We do not practice law. We do not represent clients as their legal counsel. We cannot advocate for your client, we can only advocate for our opinion. Your expert can provide you a depth of technical insurance knowledge in their particular area of expertise. We can suggest deposition questions to improve the quality of your (potential) courtroom arguments. Conversely, we may suggest coverage or claim areas to avoid depending on insurance issues in question. We can serve as your sounding board for carrier custom & practices issues, insurance agency practices issues, claims issues, and very likely have seen numerous cases similar to yours.

I have read many depositions where the questions explored insurance issues having little or no bearing on the case at hand. In all these cases, a 15-30 minute discussion with their expert before deposition would have helped better focus the attorney's questions. When you have the luxury of any time, give your expert even a snapshot of case facts, basic case documents, and even a short bit of review time. They can usually help you focus deposition questions. Focused on the most applicable coverage parts, and focused to avoid areas not likely to help your client's case. If we simply confirm you are on track with your questions and arguments, it should bolster confidence as you prepare for deposition or trial.

We filter through technical insurance issues, thus freeing you to focus on case legal aspects and questioning strategy during deposition or trial preparation. As “consulting experts” we can help focus your deposition preparation in many areas. For example:

- Subtleties of coverage analysis
- Background of insurance agency operations
- Provide background on carrier claims procedures & standards
- Comparison of Claims-made vs. Occurrence forms
- Suggest additional insurance coverage areas which may apply.

*Case Study:* An attorney retained me to analyze a trucker’s cargo claim. His client hired a specialty trucking company to deliver a \$1,000,000 machine, 275 miles from the Port of Houston to north Texas. Even on a low-boy trailer, the machine was high clearance requiring bridge detours and special routing. The shipment proceeded without incident for 274 ½ miles, when the trucker ran the machine in to a bridge beam ½ mile from his client’s manufacturing facility. The machine was a total loss. Case analysis revealed multiple purchase orders, multiple bills of lading, 5 potential insurance carriers, a flurry of emails and letters, questionable FOB address, and overall confusion as to who was legally responsible for the damage. This case was early in discovery, thus my entire bill time was for 7 hours. The attorney later told me our research and discussions had focused his efforts on who best to pursue for payment of the claim. As important, I suggested who would likely be a waste of time to pursue for an insurance claim. Because they called me early in the process, we avoided hours and days of wasted legal effort. Attorneys are accustomed to nuances of the legal system. We are accustomed to nuances of the insurance industry.

### **Expert reports:**

Expert witnesses receive attorney calls needing expert reports or opinion letters within 3-7 days. I personally have been retained to review 500-1,000 pages of documents, do peripheral research, join conference calls with the attorney, the client, and other parties involved, and produce my expert report in 4 days. All this while unraveling 5 years of an insurance train wreck. Experts can and do provide such short-fuse reports. However, we simply cannot give you our best work trying to complete what is often a 40-60 hour project in 15-18 hours.

Reasonable lead time helps us ask you better questions, better analyze your data, seek additional information, and provide you the best report possible. No different than when attorneys prepare a case for mediation or trial. Attorneys know proper preparation improves your (and your client’s) overall case presentation to the mediator, arbitrators, jury, or judge. Expert witnesses understand attorneys live and die by turnaround time. We merely suggest that given moderate lead time, we can reduce your expert cost and help improve your odds at the courthouse. My experience is that delaying expert searches until the last minute results from two realities of the legal profession:

- Attorney time pressure.
- Controlling cost given >95% of cases settle before trial (before an expert is necessary).

If you think your case “might need” an expert(s), you will have to qualify several prospective experts in any event. Suggestion: A preliminary expert search provides you several advantages. Most experts will visit with you initially for 20-40 minutes at no cost. These short “chats” with several experts may help you uncover additional avenues to pursue with your case. When a given case does go to trial, your expert search is well down the road.

*Case study:* An attorney called me one Monday morning facing a Federal expert report filing deadline Friday at 4pm. Her expert witness had withdrawn the previous Friday admitting she wasn't up to the litigation process. I received case documents Tuesday morning. The case facts involved a large explosion and fire, 2 death claims, 10 destroyed homes, and multiple carriers pursuing subrogation claims against the plaintiff and their general liability carrier. This attorney simply had no luxury of time.

She was defending an insurance agent against alleged professional negligence. Since I had just finished 2 other cases, I was able to dedicate the next 3 ½ days entirely to producing her report, which was e-filed perhaps 90 minutes before the filing deadline. While I produced the best report I could, there was simply no opportunity to offer the normal level of in depth analysis, documentation, or suggestions to our attorneys for which we pride ourselves. Given the complexity of this litigation, I would have confirmed certain of my assumptions with industry colleagues, performed a more in depth coverage analysis, and possibly offered the attorney some pointed “insurance” questions for further discovery, deposition and trial.

### **Who pays the freight?**

Plaintiff attorneys often front litigation costs and may only be repaid if their client prevails. Defense attorneys normally bill hourly fees, court costs, and other legal costs (including expert fees) to the insurance carrier or insured. No secrets here.

The worst scenarios I have seen are when one party has very difficult facts to prove, even weaker insurance arguments, and virtually no chance to prevail in litigation. But doesn't know it, and they believes their case is bulletproof. This is after spending hundreds of hours, many thousands of dollars, and now heading to almost certain defeat in court. Any competent expert witness knows full well never to presume the final decision mediators, arbitrators, juries, or judges might make. However, your expert has likely seen a case (or cases) similar to yours. A short telephone call early in the game might suggest whether:

- Additional coverage may be available
- Your client simply does not have coverage
- Your client might have coverage under some other policy
- An agent “did/did not” perform prudent service in analyzing client needs
- Opposing counsel may be confused as to the “insurance coverage” facts
- The carrier is/is not acting in bad faith

*Case Study:* I was retained by an insured whose agent had done a pathetic job of managing his insurance needs for several years. The agent's negligence involved coverage structure, market placement, and general apathy in servicing the account. My client's attorney was concerned about substantiating the agent's incompetence.

The case eventually involved some 50 hours of my time to reconstruct 4 years of insurance history. It took no time to see a pattern of apathy and neglect by this agent (and agency) in regards to this insured. We were able to establish that the agent's incompetence had cost this man's company between \$325,000 and \$435,000 in insurance premiums over 4 years (regardless of market conditions).

After 30+ years as an insurance agent it was not difficult for me to establish that a minimal amount of attention from his agent would have greatly improved this man's insurance program over the previous 4 years. I was able to help the client and his attorney focus on several neglected coverage's not previously pursued. Experts with different backgrounds offer specific skills in analyzing other areas such as claims practices, loss reserve analysis, workers compensation modifiers, products liability, etc. My background happened to fit this case.

In this case, the client was "paying the freight". This particular case left me with a good feeling of having provided value for the client by the consultation process. As always, the end goal was to improve their knowledge before going to mediation or the courthouse.

There are many other common sense things you and your legal team can do to "help your expert help you and your case". Hopefully, a few of the above ideas will help you streamline the process, and maximize value for the expert fees you pay.

*Burl Daniel, CPCU, CIC, CRM entered the insurance industry in 1973. He was an insurance agent and agency principal from 1979-2004. Since 2004 his practice has been limited to Insurance Expert Witness engagements on Property & Casualty matters. You can contact him at [burl@burldaniel.com](mailto:burl@burldaniel.com) / [www.burldaniel.com](http://www.burldaniel.com) or (817) 980-4897.*