Use & Misuse of Experts in Insurance Litigation

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INTRODUCTION

The decision of whether to use an "expert" in the context of insurance coverage or bad faith litigation raises a host of complex issues that can be a mine-field for even the most seasoned of practitioners. Among the myriad of questions that need to be explored before coming to a conclusion are the following:

1. ***Why***? What purpose is to be served by the expert? What are the particular issues in my case and what objective opinions can an expert render that will assist my client's position, the understanding of the judge or the resolution of the litigated claim by a jury?

2. ***What is the expert's role?*** Should I retain an expert who will work with me solely in a consulting capacity or do I need a testifying expert? How do I find someone who is equipped to change her role in the case if needed?

3. ***How do I best select an expert?*** Apart from fundamental issues of the expert's qualifications to render an opinion on the relevant subject matter, what qualities should I look for –or more importantly, look to avoid—in the selection process? Do I really want someone who is always on my client's side of the issues or would the client be better served by an expert who frequently offers opinions on behalf of both insurance companies and policyholders ("both sides of the V")?

4. ***Costs & Scheduling?*** How do I navigate the issues surrounding the client's desire to know what the likely tab will be for the expert's services with the expert's need to engage in a comprehensive review of all relevant facts, documents and issues in order to render an opinion? What does a "budget" mean in the context of an expert engagement? How do I deal with the complexities of scheduling the expert's work when a high-end expert is likely to have a host of competing cases and demands on her time?

5. ***The Expert Report?*** How can I have an appropriate level of input into the report the expert prepares without running afoul of the applicable rules of civil procedure? What lessons can be learned from recent decisions, such as the one issued by the United States District Court for the Northern District of California in the *Gilead Pharmaceuticals* matter, which wholesale struck a bevy of experts because a retaining attorney was overly-involved in the drafting of expert reports?

These complexities and others will be explored in our virtual discussion available during the Mid-Year Meeting. As with most everything that is related to the jurisdiction and venue in which you are practicing, the judge you are appearing before, the interests of the client

and a host of other factors that are too numerous to boil down into "sound bites" that would replace your considered judgment and experience. However, we hope that our discussion will provide you with some thoughtful insights and suggestions based on our experience thinking about these issues over the course of many decades. As always, we invite your input and questions during the Mid-Year Meeting and beyond. Messrs. Harding and Johnson could be contacted by any IADC member who wants to learn more about experting – Johnson wants to be clear … he is not soliciting expert engagements.

OVERVIEW OF SOME CRITICAL ISSUES

1. The "Why" Question

As a threshold matter, it is critically important to ask (and more importantly, answer) the question of "why" you think you need an expert in the first place. After all, while the world of insurance offers many complexities and challenging situations, it is not "rocket science" beyond the grasp of juries if a case is well-presented? As a general matter, most jurisdictions do not mandate that either the insured or a tort or statutory claimant in a "bad faith" situation provide expert testimony in order to sustain his/its burden of proof. Even if the plaintiff elects to retain such an expert, does it necessarily mean that the insurer "must" in all cases engage a competing expert rather than relying upon careful examination of the plaintiff's expert, perhaps with the assistance of a consulting expert who remains behind the curtain? Can your client be best served by seeking to exclude the plaintiff's insurance expert based on factors such as her qualifications, advocacy or to render the opinions/testimony, the lack of detail with which the expert has examined the record, or that the proposed opinion veers into the realm of an opinion on matters of law that are

reserved for the court, rather than on issues of customs and practices in the insurance industry or claims handling that would assist the trier of fact?

Arriving at the best answer to this question requires, at the most fundamental level, that you focus on and understand the ***specific*** issues that are critical to your case. If the case alleges "bad faith" claims handling, is the plaintiff predicating her claim on the lack of an investigation, failure to adhere to company guidelines and standards, deviation from industry norms, an erroneous evaluation of the exposure presented by the case, the tendering of "law ball" settlement offers, or all of the above or something else? Having a clear picture of the case be presented by the plaintiff if the case goes to trial is critical to determining whether an expert is necessary and can actually help bolster your position. This will necessarily depend on the facts of your case, the extent to which there are problematic documents, and the quality, veracity (and availability) of the people who were directly involved in the handling of the claim at the time when critical decisions were made. Specialists/experts and even the plaintiff's own witnesses and documents often times are factors, too. If you have really strong facts and reliable testimony from seasoned professionals who will make a compelling case on behalf of the company (possibly including a good 30(b)(6) witness), you may run the risk of the fact finder questioning why you would think you need to "bolster" you insurer client's conduct through an expert who was not there when the decisions now being placed under the microscope were made.

2. The Expert's Role

Assuming that you have decided to go down the "expert" road, that is only the first step in the process. It remains essential as early in the process as you can to determine whether

your expert is going to be a "consulting expert" or a "testifying expert" or, perhaps, both. A major advantage of the "consulting" route is that, as a general matter, under the Federal Rules of Civil Procedure the expert's identity does not need to be disclosed to opposing counsel. Instead, the expert can remain "in the wings," providing privileged analysis, direction and guidance. The corresponding downside, of course, is that the expert will not be testifying at deposition or at trial to bolster the case with the imprimatur of an expert opinion that can (hopefully) be credited by the judge or the jury.

Which path you go down can often be driven by the point in time at which you get an expert involved in the case. Whether because of time constraints or client-imposed budgetary restrictions—who may be hoping to resolve the matter either by summary judgment or settlement—the retention of an expert is far too often left to the proverbial 11th hour. As a general proposition, this is a mistake profoundly impacting the case. A really good expert who has the benefit of seeing the claim through other than a strictly legal prism, may well identify strengths and weaknesses addressable during discovery. The expert will likely isolate salient facts from the pre-suit documentary record that the attorney may miss or not realize are important. The expert's guidance can assist the attorney in developing the over-arching strategy for the case as well as identifying facts that need to be confirmed or refuted during the fact discovery period. If the expert is not retained until after the period for fact discovery is closed, an opportunity to gather evidence that will support a motion for summary judgment or be critical to the strategy at trial could be lost.

Too often, we have seen counsel who fail to focus on the need for an expert until the date for designating an expert under Fed.R.Civ.P. 26(b) is looming. This can be detrimental in many respects. First (and foremost) it can put enormous pressure on the

expert to distill a mountain of material in a short window of time. Remember that you may have lived with the case during several years of discovery and possibly even before. The expert will usually be coming in "cold," while also juggling other matters with conflicting dates, and it is unreasonable to expect even the most astute of experts to assimilate all of the nuances of a complex claim file on a first pass through the documents. This can be particularly problematic if the expert must generate a detailed report per the strictures of Fed.R.Civ.P. 26 on a short turn-around.

Perhaps more importantly, not involving the expert at the early stages of the case deprives the attorney and the client of the ability to make a reasoned decision as to whether the case would be best served by keeping the expert's role in the box of non-testifying. Because some judges are understandably wary of insurance experts (particularly attorneys with no direct industry experience) appearing to usurp the role of the judge with respect to matters of law, the decision on whether to retain an expert solely in a consulting role is more complex than in a case that involves issues relating to hard science or technical engineering expertise. Getting an expert on board early can be critical to shaping the case and making an informed determination of whether you really need someone to provide a formal report and testimony at deposition or trial. Starting early will maximize your options with respect to the role that the expert will play in the development and disposition of the case.

3. **Selection**

More important than getting an expert with the loftiest credentials is finding a person who both understands and has direct competence in the specific issues of your case. Law

school professors or renowned lawyers may, at first blush, appear to be great resources who would impress a judge or a jury. But even a cursory review of cases where such experts have been challenged reveals a graveyard littered with many impressive resumes but whose opinions never saw the light of day in a courtroom. Why? Because, under the controlling *Daubert* and *Kumho Tire* standards in federal practice (and have largely been adopted by state courts) the central question the court has to decide is whether the expert's proffered testimony is a "fit" for the specific issues in the case and will appropriatetely assist the fact finder. This inquiry is determined only in part by the expert's paper credentials. The remainder of the inquiry has be answered based on the expert's experience in the real world of handling and resolving complex claims and holding adjusting staffs accountable in the proper adjustment of claims.

Failing to identify the right expert whose education, background, training and experience is the right "fit" for the task at hand can be detrimental if not downright disastrous. For example, the authors of this piece are aware of a New England case where the central allegations are that the insurer failed to settle a case or make reasonable offers to do so once liability and damages had become "reasonably clear." Plaintiff retained a California real estate attorney who, on the face of her CV, appeared to have little real world experience in handling complex liability claims. Instead, while she clearly had expertise in several areas, they were largely not in the realm that was material to the claim at hand. Nevertheless, she produced an expert report in which she broadly opined that a third-party claims administrator had violated every rule in the book in terms of claims handling standards. She was subsequently tendered for deposition, apparently without much in the way of preparation as a cost-cutting measure. During this deposition, she admitted several

of the main points that were being argued by the defendants and was forced to concede the limited nature of her experience with claims that in any way resembled the one at issue. Shortly after the deposition, the plaintiff was forced to withdraw the expert and the time to designate anyone else had long since passed. In this instance, the weakness was not in the plaintiff's case (as the judge subsequently ruled that the insurers were not entitled to summary judgment), but rather because the expert selected was not a "fit" for the particular claim at hand. An interesting issue is whether a withdrawn expert can have his/her report or testimony introduced at trial by an opposing litigant.

The process of finding an expert who has the right expertise is far from a scientific process. Certainly, recommendations from trusted colleagues can often be a good starting point. Information publicly available on-line, including through PACER, can also be incredibly helpful. Any expert worth her salt will no doubt disclose up front if she has ever been excluded or had her testimony limited in a court proceeding. Public filings are a good check on the accuracy of such a representation. As a general matter, it is also preferable to find someone who takes cases because they genuinely agree with a party's position and not just because they may receive a handsome fee. Be particularly wary of experts who appear to have received 90% of their assignments from one insurance company or one law firm or who work almost exclusively for insurers. Locating an expert who has testified for both policyholders and insurers can also be a good test of an expert's mettle since it helps avoid the inference that the expert is a "hired gun" for only one side or one point of view. An expert is not an advocate – with one exception – her opinions.

The expert's communication skills are also of great importance. Not only in how she might ultimately present an opinion, but in how she communicates with counsel. Is the

expert open and direct? Does she offer her honest opinion of the case (warts and all) or simply try to say what she thinks the retaining party wants to hear. The true value of an expert can often be that they tell you and the client the God's honest truth about your case, which can lead to reaching a settlement rather than walking headlong and headstrong into a disastrous result from a judge or a jury. You should want the expert to tell you everything that is right with your position as well as everything that is wrong.

From the perspective of both counsel and the expert, the key ingredient is finding the right "fit" or "match" between the issues in the case and the expert you are selecting. Hiring an electrician when you really need a plumber is not going to get you very far. Insist on getting the granular details of the expert's background not just in experting, but in the real word of claims handling before she became a consultant and expert. Will the expert be able to testify that she has first-hand experience in the direct handling of claims of the type at issue as well as in developing and enforcing claims-handling practices for a significant insurer or third-party claims administrator. Has the expert been in the shoes of the people who will be the company's witnesses at trial and (if you want the best), had people in those roles under her command when in industry? While there is no guarantee that you will always find the right person, knowing what to look for and what questions to ask can go a long way in ensuring that you find the person who is the best "fit" for the task at hand.

4. Scheduling & Cost Issues

As the say, "the devil is in the details" and that is certainly true when it comes to considerations of scheduling and costs. As noted earlier, there may be a natural tendency not to retain an expert right out of the gate, whether based on considerations of cost or the hope that something may

happen such that you will never get to the point of needing an expert. Such an approach can be a ticking time bomb since most upper-echelon insurance experts are national and have multiple engagements on their plate at any one time, including fixed deadlines for the submissions of expert reports, depositions or trials. Assuming that an expert can always fit in one more matter can be a very costly assumption. Moreover, the type of high stakes "bad faith" and other cases that are the ones where an expert is most likely to be required usually involve a complex set of facts to be understood, tested and explored before the expert can be in a position to offer a meaningful opinion. Just think about the level of detail that can often be in hundreds or thousands of pages of claims notes spanning several years before the underlying case resulted in a settlement or judgment or a property claim went into suit. Often, these cases involve multiple layers of authority or interactions between parties such as a TPA, independent adjuster, engineer, forensic accountant, *et al.,* and the carrier that need to be understood and taken into account. Expecting any expert to delve into a file containing thousands of pages and being prepared to render an opinion that will hold under vigorous cross-examination is simply not realistic. Equally important is to be realistic and accurate with the expert about the deadlines in the case and your ability to control them. If the case is on a fast track to trial because years have already been spent in discovery and the judge is tired of the delays, that needs to be communicated to the expert so she can go into the assignment with her eyes wide open and can give you a commitment as to whether the deadlines mesh with her schedule.

Equally complicated is the entire question of what it could cost for an expert to analyze a matter and provide an opinion, including in the form required by Fed.R.Civ.P. 26(b). Whether it is an insurer or a policyholder that is retaining the expert, the client always wants to know how much it is going to cost to get from point A to point B. When asked "what is it going to cost," the truthful

expert's answer would usually be that she does not know. While that answer may not be very satisfying, it is the reality. While most experts can provide some metrics based on the volume of pages of a claims file, deposition transcript and other materials to be reviewed, such "averages" are far from certain and are highly dependent upon the density of the material to be examined. For example, a 4-hour deposition could take a speedy expert 3 hours to analyze or, if laden with 1000 pages of exhibits never before seen by the expert, a multiple of the those 3 hours. At the very most, a "ballpark" estimate of costs may be established, which can be adjusted as the review progresses. Many sophisticated experts refuse to submit a "budget" or maximum. They understand that it could lead to poor optics. Your defense budget for the insurer is just that – yours. The best practice is for you to not inform the expert of your expert cost piece of that budget – that is privileged information and should not be shared with a disclosed expert. An inept and unprofessional way to alienate your disclosed expert is to try to turn <u>your</u> good faith estimate to your client into an expert "budget" that cannot be exceeded and hammer your own expert. (Similarly, if you are inaccessible to your expert, that is not best for a good working relationship). Importantly, do you really want to create a situation where the expert is not permitted to review all of the necessary materials due to budget constraints? Such a scenario can lead to some very embarrassing and detrimental situations if the expert is confronted at a deposition or trial with information that she did not consider and has to admit that she did not review it because the client would not authorize the time that was necessary for her to get the complete picture. Your expert is just that – an expert – you are not the expert. Only the expert best knows what materials and facts will be relevant to his opinion. Having an open dialogue with the expert while the case is in progress regarding the time and costs being incurred is appropriate. Such communications can be appropriately used or can be misused. No one on either end likes a surprise and a seasoned expert should be able to keep the client apprised

of her progress and the time that will be required to get across the goal line so that there is no misunderstanding regarding the cost of the expert's services.

5. **Perils of Expert Reports**

The "rules of the road" governing the preparation of an expert report are specific and well-defined in Fed.R.Civ.P. 26(b). In particular, the rules require that the **expert** (not a team of ghost-writers) actually **prepare** the report. When does the work by the attorney to guide or help shape the expert's scope and ensuing work product veer over into improper conduct that can cause the train to derail?

While there are not set answers, the decision last year by the United States District Court for the District of Northern California in *Holley v. Gilead Sciences. Inc.*, 2023 U.S. Dist. LEXIS 42278, 2023 WL 240237 (N.D. Cal. March 9, 2023) illustrates the perils that the overly-involved attorney can face to the grave detriment of his client. The plaintiff in the case moved to exclude a bevy of nephrologists and infectious disease experts for a variety of reasons, including that the testimony failed to meet the standards for admission set forth in *Daubert v. Merrell Dow Phamaceuticls, Inc.*, 509 U.S. 579 (1993). Of interest for the purpose of the current discussion is that the district court judge never reached the *Daubert* issues. Instead, the judge determined that all of the experts should be excluded for failure to comply with the expert report requirements of Fed.R.Civ.P. 26(b) and as a sanction under Fed.R.Civ.P. 37. In effect, the ruling left the defendant without an ability to present any expert evidence whatsoever.

In reaching this result, the court applied the text of Rule 26(a)(2)(B), which mandates that the disclosure of an expert witness "must be accompanied by a written report—prepared and signed by the witness." Failure to comply with these requirements results in exclusion of the report unless the court finds that the failure to comply was "harmless." Moreover, the burden is on the party facing the request for exclusion to prove that any failure to comply was, in fact, harmless. While counsel are certainly not prohibited from being involved in the process of drafting the expert report, "counsel's help generally is limited to ensuring that Rule 26's formal requirements are satisfied. The Rule does not permit a party to prepare the report for the witness." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 467 (9th Cir. 2021).

Easier said than done, however, is the question of what type and quantum of proof will be required to establish that the expert did not prepare her own report and arrive at her own opinions. The court recognized that determining whether counsel has crossed the line is highly fact-specific. The central question to be answered is whether counsel's participation so exceeds the bounds of

legitimate assistance so as to negate the possibility that the expert actually prepared her own report. For example, in the *Optronic Techs* case, the expert conceded that the attorney had written approximately 60% of the report. Nevertheless, it was not excluded because the sections prepared by the attorney were strictly background information and a summary of the data that had been used and did not touch upon the expert's methodology or conclusions. Similarly, if the expert is the one who prepares the analysis and opinions expressed in his report, certain wording choices made by the attorney will not automatically result in exclusion of the report.

By way of illustration, if a federal court expert has access to a thorough joint statement of facts in the docket where both sides agreed on facts extensively, your authors see no problem in an expert's utilizing such statements of facts, perhaps with the expert's "fact checking" or validating even what all the attorneys agreed to even is accepted by the judge.

In the *Gilead* case, the plaintiffs submitted detailed charts comparing the reports of the two sets of experts (8 in total) that were at issue in the motions. While the reports were not identical, they did follow the same structure and had many elements in common. Many passages were virtually verbatim from one report to another. This lead the court to conclude that counsel had exceeded the boundaries contained in the rule. Although all of the experts testified in deposition that they stood by the opinions contained in the reports, the judge concluded that this was not sufficient to establish that Rule 26 had been followed. The judge was also influenced by the fact that counsel had instructed the experts not to testify during their depositions about the drafting and preparation of the reports. For example, the witness was instructed not to answer questions as to who had selected the primary scientific studies or wrote the most important points contained in the report. Having instructed the witnesses not to answer these fundamental issue regarding the drafting process, counsel for Gilead had the temerity to offer declarations from the experts in opposition to the motions seeking to provide exactly this type of information. Moreover, while the experts each testified that they had not reviewed the reports of the other experts, the court found that Gilead's explanation that the experts independently drafted their own reports simply was not credible.

The court went on to compare many of the granular details of the reports to reach its conclusion that the reports had been largely drafted by the attorneys. For example, it seemed simply too much of a coincidence that the experts had consulted certain databases on the very same date. This was bolstered by the fact that one of the expert's billing records did not reflect any work being performed on that date. Other portions of the reports describing the history of the AIDS epidemic and early HIV treatments were also so close that they indicated a pervasive author—the attorneys. And while certain of the information might be considered to be background" facts—rather than core opinions—the background facts were of an entirely scientific nature and not the type of background facts that might be supplied by attorneys working on the case. Thus, the rationale of the *Optronics* case was not sufficient to save the reports from exclusion. Other portions of the reports that were overlapping went directly to the key issues in the case, providing

a further grounds for excluding them. Moreover, none of these similarities could be regarded as being "harmless" since, if they were extracted from the reports, virtually nothing would be left.

The defense of the *Gilead* case was handled by nationally recognized firms who were very experienced in handling cases of this type. The fact that they went off the rails in this matter demonstrates the inherent problems involved in drawing the line between fair assistance by counsel and veering into the exclusive realm of the expert. The moral of the story: when in doubt have your expert do it.

Counsel who passively or actively have experts disqualified on their watch, with no opportunity to "replace" a disqualified expert, may not be immune from professional liability claims from their clients. That is a topic for another day but is something to be mindful of when using experts.

Other perils include reports (or testimony) of lawyer-type advocacy, citing textbooks to compensate for lack of actual knowledge, not agreeing to basic, agreeable principles, asserting a disputed fact is clearly an undisputed fact, providing legal analysis beyond that normally seen with adjusting staffs who apply coverage or know basics of certain tort laws or otherwise invading the provinces of the judge or fact finder.