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Get the most out of your experts while maintaining cost control

Experts are essential to most cases, but so is knowing when to incur the cost of the expert

In almost all tort cases today, an expert witness is required, either as a liability expert or as a damages expert or both. Many times, we need multiple experts to cover both liability and damages. In a typical automobile accident case, one should at least retain an accident reconstruction expert early-on in the case.

You can keep expenses down by using initially only the police report which should contain witness statements as well as investigating officer observations, photos, diagrams and calculations. Usually, one does not need to pay the expense of the expert going to the scene of the accident until down the road in the litigation. There are obviously exceptions to this, one being the situation where there may be a piece of evidence at the scene that might be altered or destroyed. In those cases, getting the expert out to the scene early-on is imperative.

The attorney can go to the scene of the accident himself and take digital photographs that can be sent to the reconstruction expert in the case. This costs your client nothing and provides the expert with basic information for preliminary expert analysis. If it turns out that the defense does not contest liability, you have saved your client a substantial cost. If liability is contested, then obviously you will have to pay to your expert reconstructionist to conduct a site inspection.

In the typical road-design case, a traffic engineer must be retained to investigate if in fact there is a viable dangerous condition theory available. Be mindful of the design immunities that apply and take a realistic approach to your ability to get around these immunities. The road-design case requires the filing of a timely government tort claim

which needs to include many theories of liability. The retention of a traffic engineer early-on in the case can help the attorney to devise a strategy as far as the different theories of dangerous condition that are available to plaintiffs. Once litigation is commenced, many times you may be able to get the defense to provide you with accident history of a particular intersection and/or roadway. This information can be sent to your traffic engineer for evaluation to see whether or not you can find an exception to the design immunity rule for that intersection or roadway. The requests in discovery for this information cost your client nothing as opposed to hiring an expert to obtain the information which would be a cost incurred by your client.

In the typical non-auto products liability case, you must retain some type of design and/or safety engineer to assess any design and/or safety engineering issues concerning the product. The attorney or client can and should go out and buy exemplar products on their own and provide these to the expert witness. This may save your client time and money as opposed to having the expert go out and find and purchase exemplars.

Additional liability experts, such as biomechanical engineers, human factors engineers, etc. can be added to your case after you have a better analysis of the viability of your claim and the value of your case. Obviously, we always want to hold down expert costs in our cases, but we must also consider the overall value of our case when making up a budget for expert witnesses.

Sometimes it is necessary to retain multiple experts early-on in a case. If you can wait to send the expert witnesses the working material until you have a better handle on the overall case value, you will save your client costs. If the case is

resolved early, many experts will refund all or a portion of the retainer because they didn't do any actual work on the case. This is a topic you should discuss with your experts when you first retain them.

Creative ways to use your expert

After you have obtained the initial accident collision report in an automobile accident case and after you have determined that you have a viable theory of liability and a defendant who has coverage, I always try to get basic information on the amount of the insurance coverage available before I go out and hire a lot of experts. Assuming there is a decent amount of coverage, the next question is what materials you should send your expert witness early-on in the case. The important point here is that the expert charges for his time reviewing any and all materials sent to him. I once had an automobile vs. automobile case where the defense took the plaintiff's deposition over six days. There were seven or eight volumes to the deposition transcript and it was over 500-plus pages long. If I had just sent the entire transcript to the reconstruction expert without any additional instructions, there would have been over \$10,000-\$15,000 in costs just for the expert reading the deposition.

Instead, I referenced for the expert where in the deposition the key pages concerning the facts were that would be important about the accident. Although I had to send the expert all eight volumes of the deposition, I outlined in an instructional letter the key pages of the deposition for the expert to focus on so that he would not spend unnecessary time reviewing a transcript that had nothing to do with the facts of the accident. Specifically, I asked him not to

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review the entire deposition and to focus in on the pages only concerning the accident which would be the subject of his reconstruction. As a result, I was only charged for an hour or two of his work in the review. At his deposition before trial, he was able to state that he had received the whole transcript, but only reviewed the parts of the testimony concerning the accident which were important to him. Although the defense wanted to try and make a point of the fact that he hadn't reviewed the whole eight volumes of deposition in detail, once the matter went to trial, it really didn't come out very well on cross-examination and made the defense look bad for having taken an unreasonably long deposition of the plaintiff in the case.

Similarly, damage expert witnesses can work on a portion of the overall material as well. You can send the whole transcript to the damage witness, but then ask him to review only the key testimony about the injury or damages included in the deposition. Many times, this can save your client thousands of dollars in costs. The damage expert should be able to explain on cross-examination why it is that he or she did not review the facts of the accident and/or other collateral issues which would not be the subject of his/her expert testimony.

Another cost-cutting measure for damage witnesses is the use of treating doctors. Usually, it is less expensive to hire the treating doctor as an expert in your case. However, many times the treating doctor does not like to testify as an expert and/or get involved with lawyers and lawsuits. If the treating doctor will not cooperate, then you must get a non-treating expert to discuss your client's injuries and damages. The good news is that most medical records are now stored on computers, along with many of the radiological reports. It is far less expensive now to obtain these reports on digital media and forward them to the medical expert witness.

Since I think it is safe to say that the defense almost always disputes the plain-

tiff's injuries and/or damages, it is necessary to obtain the key diagnostic films and medical records and get them on disc as soon as possible. However, in an effort to keep costs down, you can wait to send these items to a damage expert until a little later on in the case after a liability picture has become more clear.

A word of caution: You are almost always going to need someone to explain your client's injuries to the mediator, jury and/or arbitrator. It is best to try to have an overall medical doctor expert to discuss the injuries incurred by your client. Sometimes as in the case of a head-injury plaintiff, you will need multiple medical experts to discuss those injuries. For example, in the traumatic brain injury (TBI) case, one is always going to need to retain a neurologist, a neuropsychologist, and a psychiatrist. Many times, an injured plaintiff who was hurt in the workplace will have a neurologist and neuropsychological exam that was a part of their worker's compensation treatment. If so, obtaining these records could save your client costs and negate the need to have your client re-tested with neuropsychological testing if it was already performed as part of their worker's compensation case. You should be able to obtain the raw data from the worker's compensation testing and have it sent directly to your neuropsychological expert and/or you could consider just retaining the physician used in the worker's compensation case if they will cooperate.

Economic damage experts

Usually, the economist expert is the last expert that one retains in the case. The materials that are provided to the economist are usually limited to wage and payroll records, employment and/or benefit package records. Many times, the plaintiff's deposition is also sent to the economist to confirm background on their work-life experience.

In an effort to keep costs down, many economist experts today will provide counsel with a preliminary economic

analysis that will cost you less and can be used at least for settlement, mediation and/or other purposes in the case. If the case cannot be resolved and the expert will have to give a deposition for trial, again you can set forth the key portions of the testimony that are relevant for the economic analysis for their review.

There are downsides to selectively providing written materials to the expert witnesses. If the case goes to trial, the defense can make a point of the fact that the expert does not have all of the materials involved in the case. This is a judgment call for the plaintiff's lawyer as to what materials to send to the expert. Also of importance today is the use of e-mails. It should be noted that any and all e-mails sent to expert witnesses will probably be produced at the deposition, and you should be mindful what you put in any correspondence to any expert on any case.

Summary

There are always to-do items that you or a member of your staff can take care of early-on in the case to obtain/secure valuable evidence and other information for your expert. Do it! This is the fastest and easiest way to keep case costs down for your client. If the case goes to trial it is always costly, and a lot of that cost is in your experts. Both plaintiff and defense should strive to try to keep the early-on costs for expert witnesses down in non-essential matters, especially in cases that have a real opportunity to settle during mediation.

Geoffrey Wells is a partner in the firm of Greene Broillet & Wheeler, LLP and joined the firm in 1992. Since that time, he has been involved in over one hundred (100) multi-million dollar trials and settlements and is currently the liaison counsel in the Cedars-Sinai over-radiation cases. Currently, he serves as First Vice President for Consumer Attorneys Association of Los Angeles. He is an elected member of the American Board of Trial Advocates and is also a member of AAJ and CAOC. He is a graduate of the University of Washington (B.A., 1981) and received his law degree from Pepperdine University School of Law (1985).