

EXPERT INVOLVEMENT: Early, Often And Maybe More Than One

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It is no secret that recovery in a subrogation case may hinge on having the right expert. Subrogation professionals have come to understand the value, not merely the expense, of hiring an expert for their initial loss investigation. However, in some instances in order to prove your claim you need to look beyond the initial expert and hire a second or even third expert.

This leads to one inevitable question: "Why do I need another expert?" First, we urge against viewing additional experts and the associated costs as second or supplemental. To this end, it is important to remember that what may be sufficient evidence to justify paying an insurance claim is not necessarily sufficient evidence to prevail in a subrogation case.¹ It is a rare file where the opposing party will simply accept your initial investigation and pay your claim. Rather, the norm is to expect that the opposing party will scrutinize every point and detail of your investigation. Thus, while a certified fire investigator may be fully capable of determining the origin of a fire, it may require an electrical or mechanical engineer to provide a reliable opinion as to the mechanism of failure. Often retaining the more specialized expert will lead to greater success in litigation.

The Right Stuff

Not just any specialized expert will do. Under the *Daubert*² analysis that now governs the Federal Courts (and most of the 50 states have adopted similar variations), expert testimony is only admissible if it meets four key factors:

1. Whether the expert's theory or technique is scientific knowledge that can be, and has been, tested
2. Whether the expert's theory or technique has been subjected to peer review and publication
3. Whether the expert's technique's known or potential rate of error is acceptable to place reliance on the technique
4. Whether the expert's theory or methodology is generally accepted in the relevant expert community³

This test is focused on the reliability of the methods used by an expert and assures that the basis of an expert's opinion meets certain standards which justify the Court's acceptance of the opinion. Realistically, most subrogation cases will call upon experts to form opinions using methods and techniques which are considered standard practice and will easily meet the *Daubert* test. However, no matter how qualified, experienced and educated an expert may be, if the proposed expert does not satisfy this threshold, his testimony will be excluded.

As the law stands now, if your expert witness is disqualified under *Daubert* at trial or on appeal, you may not even have the option of retrying your case.⁴ Therefore, it is important for both the adjuster and counsel to be familiar with the accepted practices and techniques in the expert's field and to confirm whether the expert's opinion is based upon those accepted methods.

In many jurisdictions, expert reports or opinions supporting your claim may be reviewed by the other side and its expert. Any short-comings, no matter how minor, can be exploited to discredit the subrogation theory. Thus, it is much better to know, from the start, that your expert is qualified and can adequately defend and explain the attacks that will surely be made by your opponent. To find out at a deposition, or even worse, at a trial, that your expert does not have the "right" qualifications or expertise, or has gone beyond its area of expertise, can greatly reduce or eliminate your eventual recovery. It can be equally frustrating and fatal to your claim if the expert cannot adequately explain and defend the basis of his opinion.

Therefore, in addition to competency, it is crucial to consider the expert's ability to clearly articulate both the underlying theories as well as the ultimate opinion regarding the loss. Often, the very characteristic that makes an expert so valuable can also be the Achilles heel if the subrogation claim goes to trial. No matter how brilliant or qualified the expert appears on paper, if the expert cannot coherently communicate to a layperson, the expert fails to serve his purpose. At times, in fact, it can seem that an expert is speaking a different language. In many instances, the adjuster and subrogation counsel, through their experience and training, are fluent in this technical language. However, it cannot be forgotten that a jury or judge will need a straightforward explanation of foundational points that allowed the expert to conclude that your side is right and the other side is not.

Understanding that subrogation claims, like most civil litigation, usually do not end up in front of a jury, an articulate expert plays an even more important role at deposition.⁵ In a deposition, the authenticity and credibility of your expert will put the defense on notice that you have a serious claim and that you have the ammunition to prove it. Solid deposition testimony by the expert will strengthen the subrogation bargaining position and may even persuade a defense team of the validity of your claim. In the alternative, even if your expert appears vulnerable or even unqualified, this determination should lead to earlier settlements, avoiding the unnecessary costs of protracted litigation. >>

Investigative Balance

Not every case requires a second or specialized expert. In some instances an expert with broader qualifications may be more appropriate in responding to the opposing side's claim that the expert was too focused on one particular cause and lacks the experience or education to see the forest through the trees. However, despite this concern, be careful not to overlook the need for an additional expert or the expert who has rushed to judgment.

Usually, the initial expert to evaluate a loss begins to form an opinion based upon generalized experience and readily available evidence. However, the expert must utilize an accepted methodology and/or perform a scientific analysis to identify the specific evidence and scientific basis for the opinion. Often, it is not enough to have an expert pointing to the only electrical appliance in the room to prove your case. In many circumstances, if the loss is related to a particular

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product or type of building material, hiring a second expert with the requisite engineering degree and specific product experience can be crucial.

So when should you bring another expert onto a case? Inevitably, this answer depends upon the circumstances and the need. Certainly, in cases involving an initial expert with general or broad qualifications, the retention of a specialized expert should occur as soon as the initial expert's limitation becomes apparent. The adjuster or counsel must remain vigilant to recognize the need and determine whether the circumstances mandate an additional expert. Fortunately, many experts will often recognize the need and recommend another expert or consulting firm with more experience with a specific product or failure.

Some situations do not require you to immediately retain the specialized expert. For instance, an expert that is testifying as to the standard of care may not necessarily need to personally view the loss or engage in the testing of the product at issue. Rather, a review of the evidence, reports and documents already produced will sufficiently allow the expert to formulate an opinion upon which you can rely and present at deposition

or trial. Of course, it should never be assumed that an expert will be able to opine without first-hand knowledge. Therefore, if either the adjuster or counsel have doubts about the initial expert's ability and effectiveness to communicate the subrogation theory and opinion, the additional expert may be necessary at an earlier stage. The need to engage a specific expert must be recognized early and remedied without delay.

If compliance with the *Daubert* standard becomes an issue, the concern is not usually when to bring in the additional expert, but rather when the need for another expert is realized. If your initial expert cannot meet the *Daubert* requirements or would face serious challenge under *Daubert*, an additional expert should be retained immediately. As technology changes, more information is available to assist in the location and retention of a wide variety of experts. It is now possible to read and review some experts' prior depositions and trial testimony.⁶ This can be advantageous in making sure that you are selecting an expert who has the qualifications required and to see how the expert stands up to cross examination when its theories are questioned.⁷

Retaining two experts is not appropriate for every case. But when questions remain about how or why the loss occurred, it is advised or even required to hire an additional expert with more specialized knowledge to maximize the recovery. Involving the subrogation professional or recovery attorney early in the investigation of a claim can help identify where it is appropriate and when an additional expert is needed. Whether in proving the claim to the jury or judge or by leveraging a favorable settlement agreement, having specialized expertise on your side can tip the recovery scale in your favor.

ENDNOTES

1. Levitt, Tony, *Retention Leads to Recovery*, THE REVIEW: WORLDWIDE REINSURANCE, June 2007.
2. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
3. *Id.* For a further discussion of the implications the *Daubert* decision and the admissibility of expert opinion see Saks, Michael J., *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS JOURNAL 229 (Winter 2000).
4. *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
5. Depending on the study, less than 1% of Federal Civil cases are heard by a judge or a jury and similar numbers follow for civil suits in the state courts. See generally Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. OF DISPUTE RESOLUTION 35, 36-37.
6. Both of the dominant legal research databases, Westlaw and LexisNexis, have in place databases of testimony and there are a number of other for-profit databases that provide transcripts.
7. There may also be a strategic advantage in reviewing the opposing expert's prior testimony but that is for another article.