



How Expert Witnesses Should Handle Attempts to Ghostwrite Reports and the Impact on Liability Claims - Episode #146

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Guest Expert: Dr. Janine McCartney of [HHC Services, Inc.](#)

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I am John Czuba, managing editor of *Best's Recommended Insurance Attorneys*, including Expert Service Providers.

We're very pleased to have with us today expert service provider Dr. Janine McCartney of [HHC Services, Inc.](#) in Philadelphia, Pennsylvania. The company provides safety engineering consulting and expert witness services to firms.

Dr. Janine McCartney is a senior safety engineer and expert witness, a seasoned professional with over 25 years of experience in safety engineering. Her professional career has spanned 38 years, 25 years in safety, and 13 years in oil and gas, and pipeline construction, as an exploration geologist, vice president, and regulatory expert.

Dr. McCartney started her professional work in 1979 in the oil and gas industry as a well site geologist and was one of the first women permitted to work in the field. She worked her way up from well site geologist to management, and then to an expert.

She has technical and historical knowledge in construction, telecommunications, utilities, manufacturing, food processing and distribution, oil and gas exploration and production, and property management. She is an editor of *Science Direct* and an editor and reviewer of *Science of The Total Environment*, two Reid Elsevier journals.

Dr. McCartney works on a day-to-day basis as a consultant and as an expert, and we're very pleased to have you with us today.

Dr. Janine McCartney: Thank you, John. I am very glad to have the opportunity and pleased to be able to help you with this topic.

John Czuba: Today's discussion is attorneys ghostwriting expert reports, and the impact on liability claims. Dr. McCartney, can you tell us, what is attorney ghostwriting of expert reports, and have you seen this in liability claims?

Dr. McCartney: The attorney ghostwritten expert report is an expert report that the attorney authors in whole or in part, and where the expert adopts and signs the report, and presents the report as the author. In training courses I attended through Seak and literature I've read, I've been made aware that attorneys ghostwrite expert reports.

Personally, I thought the practice was contained to medical malpractice cases, and where the attorneys ghostwrite the reports for the physicians. Recently, though, I've discovered that the practice of attorney ghostwriting is more widespread, and the practice has transcended to liability cases and to claims.

I've seen the practice used in workplace accident cases. I've also been made aware through independent research about attorney's ghostwriting expert reports.

A good court opinion for experts and for claims examiners to read is case number 13 11049, *Numatics v. Balluff* from the United States District Court, the Eastern Division of Michigan, Southern Division, December 16th, 2014.

This opinion and order explains who wrote the ghost report, what was contained in the ghost report, why the expert signed the ghostwritten report, when the expert signed the report, and how the ghostwritten report was discovered.

One of the reasons I approached A.M. Best about this podcast was to educate claims examiners and expert witnesses in the safety engineering and safety professions, about the ghostwriting of expert reports, and how this practice should never be allowed by any expert, and never tolerated by a claims examiner.

Through a myriad of issues, such as lack of time in preparing a thorough report, an expert witness may be caught in a trap, and never understand the ramifications of signing a ghostwritten report. An expert witness as a gatekeeper must be impartial, and should never allow an attorney to entice them into signing their ghostwritten report, period.

Surprisingly enough, both plaintiffs' lawyers, and according to the *Numatics v. Balluff* case, and defense lawyers prepare ghostwritten reports for their experts to sign. The practice exists, and the expert may not know what to do if they're faced with an attorney asking them to sign a ghostwritten report.

John Czuba: Dr. McCartney, what are some examples of ghostwritten reports, and have you seen these in liability claims?

Dr. McCartney: Certainly. Descriptions of sections of ghostwritten reports were provided in the opinion of *Numatics v. Balluff*. I encourage the claims examiners and experts to find a copy of the order and read it in its entirety.

In this particular case, the expert report of the defense liability expert did not analyze all the technical issues in the manner in which an expert would normally do so. The defense liability expert report contained pictures, charts, and diagrams that were the same as the defendant council Balluff's legal brief.

According to the opinion issued in this case, the court stated that the defense liability expert's ghostwritten report was actually a legal brief disguised as an expert disclosure. Candidly, I have seen, just within the last six months, several reports in liability cases, where I have questions as to whether or not the reports were ghostwritten.

John Czuba: How do courts discover the attorney ghostwritten reports, and were these discovered in liability cases?

Dr. McCartney: In the same case, the ghostwritten report written by the defense liability expert report was discovered through the deposition testimony. It was apparent by the expert's answers given in his deposition, that he had difficulty answering questions about the report, and it became obvious that this expert did not prepare the report.

It was also discovered that the defense liability expert could not identify any portions of the report analysis or subject matter that had been removed or changed from the attorney's draft. This particular case, this was a liability case.

When analyzing the defendant's liability expert's invoice for his expert report, the expert spends only 15 to 20 hours on the case. That included attending meetings. This point is something for a claims examiner to note. If they are paying the bills for an opposing expert's report, they should also take a look at the number of hours that that expert spent preparing the case.

The court ruled in the *Numatics v. Balluff* case, that the defendant's liability expert did not furnish a report of his own that even approximated his original work in the case. He could not apply the facts of the case to scientific principles.

It was ordered that the plaintiff's motion to strike portions of the testimony of the defense experts was granted. The court ordered that the defendant's liability expert may not testify as an expert witness in this case.

John Czuba: Dr. McCartney, is it unethical for the attorney and expert to engage in this behavior?

Dr. McCartney: Yes, it is. There's a citation to the Thurgood Marshall Law Review. It's *Klebanoff*, K L E B A N O F F, 2015, Volume 40, Issue 31. Courts have imposed sanctions on attorneys for doing so, and the courts have condemned their behavior.

John Czuba: Why do attorneys ghostwrite expert reports when the expert is perfectly qualified to do so themselves?

Dr. McCartney: Again, according to *Klebanoff*, ghostwriting allows the attorney to provide his or her own services at a lower cost. Ghostwriting provides more options in the scope of lawyer representation of a client.

Some attorneys who ghostwrite reports act under the mistaken assumption that doing so relieves them of certain procedural and ethical obligations otherwise required by fully representing their clients.

I recommend that an expert, if they discover an opposing expert report: fails to apply the facts of the case, or that expert fails to apply the principles of the expert's discipline, or is only three to four pages in length, that the expert discuss this report with the attorney that retained them. These same issues are red flags to me.

John Czuba: Dr. McCartney, why do experts allow the attorney to ghostwrite for them, and what are the ramifications for the expert in those cases?

Dr. McCartney: Some of the motivations for an expert to allow the attorney to ghostwrite the report are, lack of time to prepare the report, the insistence by the attorney for the expert to allow the ghostwriting, and the expert desires to preserve the relationship with the attorney.

The expert may be unaware that signing a ghostwritten report has devastating ramifications for them. Expert reports are not discoverable under Rule 26 in the federal court system. A ghostwritten report is more difficult to discover and easier for an attorney to entice an expert to sign the ghostwritten report. Then lastly, it's cost savings.

John Czuba: What would a federal judge likely do to an expert if they found out that the report was ghostwritten?

Dr. McCartney: We'll use the case of the *Numatics v. Balluff* as an example. The expert testimony was stricken. This could have devastating effects on a claim, because the attorney would then be left without an expert, if the expert's testimony was stricken.

John Czuba: What are the ramifications for the claim and case with a ghostwritten expert report?

Dr. McCartney: The attorney who wrote the ghostwritten report would be left without the expert at the time of trial, significantly impacting a settlement and judgment. Simply put, the liability case and claim would suffer. The claim would be negatively affected.

John Czuba: Dr. McCartney, can the expert be barred from testifying or performing expert work if they engage in attorney ghostwriting?

Dr. McCartney: Certainly. As in the *Numatics v. Balluff* case, the expert's report was stricken. The expert was not permitted to testify in this case in federal court. There may be ramifications for the expert in future cases, as well. If a court orders that an expert may not testify in the present case, other attorneys may not hire that expert if they have prior rulings against them.

This is also the practice when an expert has a motions in limine, (*Daubert* or *Frye* challenges) filed against them for a poorly written report or an incomplete report. The Expert may be barred by the court or not eligible for hire by an attorney in future cases.

John Czuba: Dr. McCartney, is attorney ghostwriting unethical, and what is the authority declaring it unethical?

Dr. McCartney: Attorney ghostwriting of an expert's report is unethical. The expert who allows and participates in this practice by signing a report they did not write is committing an unethical act. If discovered, the expert faces actions from the court which may affect their future ability to act as an expert.

Signing a ghostwritten report is no different than an expert that signs a plagiarized report from another expert. If discovered, the plagiarizing expert's report may be stricken, and the plagiarizing expert may be barred from testifying.

If the original expert discovers the bad acts of the plagiarizing expert, the original expert may also seek other legal actions against the plagiarizing expert. In summary, it's easier for an expert to walk away from a case, rather to engage in that unethical practice.

It's my experience that experts, unless they are educated about this practice, won't know what to do when it happens. The best thing that an expert can do is to consult their personal attorney for advice and have exit strategy for cases in your retention agreement.



John Czuba: Dr. McCartney, thank you so much for joining us today.

Dr. McCartney: Thank you John, for this opportunity.

John Czuba: That was Dr. Janine McCartney of [HHC Services, Inc.](#) in Philadelphia, Pennsylvania. Special thanks to today's producer, Frank Vowinkle. Thank you all for joining us for the *Insurance Law Podcast*.

To subscribe to this audio program, go to our web page, www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now, this message.

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