Best's Insurance Law Podcast

How Expert Insurance Service Providers Provide Trial Testimony - Episode #149

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today Fred Fisher from Fisher Consulting Group in California. Fisher Consulting Group testifies regularly as an expert witness in cases dealing with the duties and obligations of professionals, as well as on coverage and claims made policy issues.

Fred Fisher has an extensive background in claims with over 40 years' experience in the insurance coverage arena for professional liability. He's a founding member of the Professional Liability Underwriting Society and served as president. Mr. Fisher remains a special materials expert for several RPLU courses and is a senior technical advisor for the "Professional Liability Manual."

He has lectured extensively on professional liability issues for over four decades and has authored over 64 articles in trade journals and publications.

He's a faculty member of the Claims College and member of the Executive Council's School of Professional Lines sponsored by the Claims and Litigation Management Association and a course designer and web instructor for the Academy of Insurance. Mr. Fisher has also taught over 100 CE classes and lectures.

Fred, we're very pleased to have you with us today.

Fred Fisher: Great. Thank you so much for having me. I look forward to answering whatever questions you may have.

John: Today's discussion is determining when expert service testimony is needed in a claims trial. Fred, for our first question, what type of cases do you feel most comfortable with accepting in a claims trial, specifically?

Fred: Given my background, both in claims and as a wholesale broker, as well as from an educational perspective, I've probably handled personally, or supervised, error and omission claims against thousands of insurance brokers, wholesale brokers, MGAs, and MGU operations.

As such, I would say that 60 to 70 percent of all the expert witness matters I have been retained on have involved insurance brokers or wholesale brokers and product distribution channels for insurance related products.

I'm also comfortable handling professional liability claims involving other professionals, but only if I'm comfortable with the alleged breach of duty that may be in issue.

For instance, I was retained on a CPA case some years ago, but it really wasn't a case against an accountant, per se. It was really a management consultant problem where the CPA had been formally retained to act as the chief financial officer for a good sized company in the entertainment industry.

As such, I felt very comfortable with that case because of what the case was about and what this acting CFO missed with respect to procuring coverage for his "employer."

I've also taken some lawyer malpractice cases, but again, it depends on what the alleged breach of duty is, whether it's blowing a statute or whether it involves what's called Cumis issues or Cumis conflicts, as well as defense lawyer issues that aren't monitoring the limits that may be available on an insurance policy because it's a diminishing limit policy.

That one can get a little thorny because normally a panel attorney hired by an insurance company never gets involved, or shouldn't get involved, with coverage issues. He does have to know what the limits of the policy are. They have to be disclosed if requested during discovery.

I think diminishing limit policies are potentially dangerous. They have to be monitored by defense counsel, as well as the insurer. One of the problems being is you may be defending somebody with that kind of policy that you may not realize there's other claims against your client in other jurisdictions where your office or your law firm's not involved and yet you need to know what's happening.

In cases like that, I'm very comfortable. I also enjoy the luxury that I can afford to turn cases down that I'm not comfortable with when I'm informed as to what it's about.

John: You mentioned that, Fred. Have you ever declined a case specifically, and why?

Fred: Yes, I've often declined cases, either because they were outside my area of expertise or in discussions with the representative of the party seeking to hire me, they'll present facts to me that I'm just not comfortable with or I don't think I can be of assistance to them.

Even having said that, there have been a couple of instances, for instance, where I was willing to testify on maybe one or two select issues where I felt strongly I might be able to add some value to the case, but it would be up to the attorney to decide whether or not he would be able to take that limited engagement and leverage it to assist him in the case.

That's about as far as I will go. As I mentioned, I enjoy the luxury where I can afford to turn cases down. I only take cases I agree with. I think that makes me a very formidable witness because when you believe in what you do, it's tough to crack that.

John: You mentioned some claims cases Fred. Is it better, typically, to retain an expert early in the process or wait until absolutely necessary?

Fred: That's a very good question. I absolutely can't stand it when the defense or Plaintiff's attorney calls me up and says, "We really need to find an expert right away." They call me up.

I'll say, "When do you need to disclose?"

They'll say, "Well, we have to disclose today by five," or, "By Friday," what have you. There's a very narrow window where they have to disclose. That raises a significant number of problems. Number one, as I may ask questions about the case, all of a sudden new theories may emerge. New issues regarding evidence that may be obtained may emerge.

Things that I may want to rely on, and then find out that discovery is closed. "We won't be able to get that for you." That may alter my ability to be effective if I'm stuck with only what they have already obtained through discovery, and depositions, etc.

They didn't ask a certain question. They didn't obtain certain things and information that I may need to know. Again, my ability to be effective may be somewhat harmed.

Secondly, the other danger is, I'll agree to be acting as the expert and then it turns out the facts are not as they had represented to me. Now, I may have to withdraw or I may not be able to give the opinions I originally agreed to provide.

It's because they misled me. I'm not going to suggest that's intentional. Sometimes they do not realize they're misleading me. When I read through some materials they provide me, finally, I'll have to call up and say, "Hey, look. I've got to change my opinions." They've already disclosed me.

Worse, it's three o'clock in the afternoon on the day where they have to find you an expert to disclose my find. I have to say, "I'm sorry. I can't help you on this case." That's the danger. They should not wait until absolutely necessary. They should retain an expert early.

For the most part, the initial consultation, I don't know anybody, including myself, that charges for the first half an hour or hour of consultation. Then, they could say, "You know what? We want to retain you." Then they'll "park" us.

That's good, because then, as the case progresses and evolves, we may be able to be consulted on again and give them additional advice or additional issues where we need them to get information to assist us in providing the opinions they need. That way, it's flowing throughout the case.

John: Fred, how much information is typically enough in a standard claims case?

Fred: That's, again, a very good question because there was such a potential for impeachment and/or surprise when you've been given limited information and then the other side has more information that you may not be aware of or haven't seen.

Now, you're wide open to be impeached. You're wide open to be surprised by information or documents that you have not previously seen.

I always have to advise counsel. I said, "I don't like surprises. Don't put me in a position where in deposition, or worse, at trial, I'm hit with something I've never seen that you've known about. Now, I'm going to look like an idiot in front of a jury. That's not good for anybody."

That's problem number one. The second problem is, what if we have seen everything that I need to see, at least I think I know what I need to see. Number one, I don't know what they're all saying they have. Obviously, the attorneys hiring me are in a better position to know what they've got that I have not seen.

The problem with that, as well, is the fact that we all know what the evidence probably shows. We all know what the testimony is. We all know what the file of the professional involved shows or the insurance company. If it's a bad faith case, for instance, because I do those, as well.

We all know what it says. We based our opinions on that. If I come out with an opinion that says, "Yes, we've got a very strong case," but then I also have to scratch my head and say, "OK, so why are they fighting? Why are we in this fight? What do they have, or what might they have, that would change the landscape dramatically?"

We know what our client says We know what our witnesses say. We know what the documents say. Why are they pursing this? Why are they taking this position? What else could there be that would support what they're saying?

That's important. That's something else I like to explore with the attorneys.

John: Fred, anything that should not be given to an expert?

Fred: Absolutely. Anything that is considered either confidential or, more importantly, privileged, where there's a possibility of providing me with privileged material might waive the attorney/client privilege.

That usually is a problem when you are involved with counsel in defending a case where the attorney's giving opinions to an insurance company or maybe his client. I've got to be really worried about giving that stuff to an expert because now you're waiving attorney/client privilege.

That is equally true, and I know there's been some new cases coming out with respect to what's called house counsel. An attorney who's actually employed by a company as their in house counsel. He's not an independent lawyer or working for an independent law firm.

There, again, there's problems with waiving attorney/client privilege. Obviously, anything that falls into that category is not something that should be given to the expert. It's possible that other information that's not considered privileged in that basis can be shared and should be shared, of course.

John: Fred, is it true that every case is really three cases?

Fred: Oh, yes. I think so. Whenever attorneys get involved in litigation in an adversarial environment they have their theory of the case. They have their case plan. That's true of both the people prosecuting the case, as well as the people that may be defending the defendants, as well as, maybe, any cross actions that may apply.

Then, you get the experts involved. Now, the case takes on a third dimension. You've got the experts theory on the case that may or may not be in tune with what the attorneys hiring you wanted you to do because you've seen stuff. You have experience. You've thought of things that they have not thought of.

Now, you've got three cases. They have to be reconciled. They really have to be reconciled so everything's on the same page, at least as far as the side you're working on, so that it's presented properly.

More often than not, I've had a lot of attorneys tell me that I came up with stuff that becomes a game changer, that they hadn't thought of themselves and it changed the whole posture of the case.

In one instance, I think it was the one involving the CPA. I'm in the middle of a deposition and they're grilling me about what I don't know about being an accountant, which to me was like, "Yeah, so."

Finally, he said, "Mr. Fisher, what makes you think you're qualified for this case?"

I said, "Because it's not a CPA malpractice case." When I explained why, the attorney interrogating me had to take a 15 minute break because he was stunned. He didn't see that coming."

He started to lose his temper, and then he decided that's a bad idea on the record of the deposition and asked for a 10 minute break or a 15 minute break. It was a theory he hadn't thought of. That's happened on numerous occasions.

That's why you hire an expert, because they know the day to day operations of a particular industry. Unfortunately, the attorneys are dealing with case law and precedent and they don't.

John: Fred, did you ever have a case you accepted and later had to withdraw from?

Fred: Yes, I have. That's also due to a couple of categories. Number one, the facts weren't...It turned out the facts were not as represented to me. I'm not sticking my neck out like that. Number one, I'm not going to commit perjury. Number two, I'm not going to give an opinion simply because I'm being paid to give that opinion and I don't believe in it.

I will withdraw, especially if the facts, it turns out, were misrepresented.

In another instance, I withdrew from a case because I was asked to opine on whether or not a particular defendant had acted within the standards of care of a surplus lines broker.

In doing my own due diligence, I discovered not only was the organization not licensed as a surplus lines broker in California at the time of the acts complained of by the plaintiff, they didn't have a non-resident license in California given that the parent company was out of state. More damaging was the fact that the individual that was handling the matter was not licensed as a broker ever.

How can I opine that the act was within the standard of care of a surplus lines broker when they weren't licensed as one? I had to call the attorney immediately and say, "I don't think I can help you."

They asked me to stay on as a consultant so at least I had my lips sealed, so to speak. I did not testify in that case.

John: Fred, finally, what type of deposition style works best in a claims related case?

Fred: Number one, you're there to tell the truth. You're going to answer a lot of questions either yes or no. I think the mistake a lot of experts make often, especially with their attorneys — oh my God, they're the worst — is forgetting the fact that there's only one person that's going to benefit from your answers.

That's the person interrogating you, and adversary. They're going to benefit. They want to get as much information from you as they can.

Granted, there are obligations of experts as far as I'm concerned, and I've testified to this, to be fair, and impartial, and review the facts, and give a good faith opinion based on those facts. I do that. I believe in that very strongly, which is why, again, I only take cases I agree with.

On the same token, most of the questions are phrased in such a way that you could answer them yes or no. I'll do that. Even by giving a yes or no answer to a question, you may think, "Oh my God, I should add a "but" to that and explain it."

No, you don't. You don't do that, not unless it affects your requirement to make sure that you've stated all your opinions. That, you are required to do, of course.

If they ask me a question that calls for a yes or no answer, I'm going to answer it yes or no because I can always do the caveat, the "but," so to speak. I can do that on direct testimony. I can explain my opinion and the basis for those opinions the way I wish on direct testimony.

The only people I know who benefit from your deposition are the people opposing you. It requires some skill to know when to just answer yes and no and when to maybe add a little bit more to it. Of course, always bear in mind that you are required to make sure that all of your opinions have been disclosed.

That sometimes becomes a little bit of a problem but that's the bottom line.

John: Fred, thank you so much for joining us today.

Fred: Thank you for having me. It's always a pleasure to work with AM Best. I'm very thrilled to be part of your family now.

John: That was Fred Fisher from Fisher Consulting Group in California. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba and now this message.

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