

## Best's Insurance Law Podcast

### Understanding the Impact of Wrongful Expert Designation - Episode #190

Posted: Thurs., April 28, 2022



**Hosted by:** John Czuba, Managing Editor

**Guest Expert:** Dr. Janine McCartney from [HHC Safety Engineering Services, Inc.](#)

Qualified Member in *Best's Insurance Professional Resources* since: 2017



**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 very pleased to have with us today expert services provider Dr. Janine McCartney of [HHC Safety Engineering Services Inc.](#), and HHC Safety Consulting Services Corporation of Wilmington, Delaware, and a new office in Houston, Texas. The companies provide safety consulting, safety engineering consulting, and expert witness services to law firms and the insurance industry.

Dr. Janine McCartney is a senior safety engineer and expert witness. She has the Certified Safety Professional and a Construction Health and Safety Technician designation with 30 years' experience in safety. Her professional career has spanned over 40 years in private and government service with OSHA consultation. She has worked in the oil and gas industry and in the pipeline and construction industry as a regulatory expert.

Dr. McCartney started her professional career in 1979 in the oil and gas industry as a well site geologist and one of the first women permitted to work on a drilling rig. She gained respect from all she worked on with the rigs due to hard work and willingness to do all the jobs on work on all the shifts.

She worked her way up from well site geologist to exploration geologist, then to management, and then technical expert. In safety, she worked her way up from safety representative, to the safety manager, to safety officer II, to manager, and then expert. She has extensive OSHA policies knowledge and has technical and historical knowledge in construction, telecommunication, utilities, manufacturing, food processing, distribution, oil and gas exploration and production, and property management.

She is an editor of "Science Direct," "Heliyon," and "Data in Brief," and an editor and reviewer of "Science of the Total Environment." Dr. McCartney works as an expert and consultant on a day to day basis. We're very pleased to have you with us again, Dr. McCartney.

**Dr. Janine McCartney:** Thank you, John. I appreciate the opportunity.

**John:** Today's discussion is the "Wrongful Designation of an Expert." For our first question. Dr. McCartney, can you tell our audience, what is wrongful designation of an expert?

**Dr. McCartney:** Certainly. The wrongful designation can be categorized into two scenarios. This is according to an AAIMCO publication by Thomas Braniff and Robert Gaddis. The scenarios reported to them by their members, experts, and insurance company employees are as follows.

In the first scenario, an attorney without ever talking to the expert makes a written designation that identifies the expert as their testifying expert to the court and opposing counsel. The attorney will then state the opinion the expert is expected to give.

The case will settle before the expert is needed to write a written report, give a deposition, or appear at trial and testify. Later, the wrongfully designated expert then discovers this designation without their consent. In the second scenario, the attorney calls the expert witness on the phone, based on their ad, referral, or a website they saw with the expert's information.

After talking to the expert, the attorney gets the expert's initial thoughts about the case, but before contractually engaging the expert or providing any case materials to the expert, the attorney makes a written designation to the court, and opposing counsel naming the expert as the testifying expert and states the expert's opinion based on that telephone conversation.

Subsequently, the case settles before the expert is needed to provide a report, give a deposition, or provide trial testimony. Sometime after the designation to the court, the expert discovers that they were designated as an expert in the case without their consent.

**John:** Dr. McCartney, why would an attorney designate an expert without their consent?

**Dr. McCartney:** Currently the court rules prohibit an attorney representing a party in the lawsuit from contacting an expert that another attorney has designated as a testifying witness. By a wrongful designation, the attorney is able to keep opposing counsel from retaining this expert, thereby preventing opposing counsel from learning any truths from the expert and his or her opinion.

**John:** Why is designating an expert without their consent an issue?

**Dr. McCartney:** In a wrongful designation and when an attorney misstates an expert opinion to the court and opposing counsel, the degree of impact on the expert's reputation depends on how far removed the wrongfully designated expert's alleged opinion is from what the expert's opinion would have been and from what that other experts in the same industry may have been.

If the wrongful designation provides an opinion that's greatly different from both what the expert would have opined, and an opinion that is different from an opinion of an industry expert, the wrongfully designated expert's reputation will be affected.

No one can or will tell the expert how great their reputation has been damaged by a poor opinion because of confidentiality rules. The expert just won't be hired. The expert won't understand why they have not been hired unless they find out in the future.

There's no central comprehensive database of expert designations by attorneys, although there should be. There are no court rules which require a notarized signature of an expert on an expert designation, although there should be. In a wrongful designation, the expert is prevented from having the ability to do a conflict check. Normally, experts perform conflict checks as to the parties to the suit and attorney representing the parties. Experts may refuse a case due to legal conflict of interest and business reasons.

Opposing counsel is also affected by a wrongful designation. The attorney who filed the wrongful designation, may be doing so to make opposing counsel believe that a respectable and credible expert will testify against them if the case does not settle on that attorney's terms that is advocating.

Opposing counsel may also believe that great harm will come to them and their client due to the wrongfully designated expert's alleged opinion should the case go to trial. In the case where the opposing counsel and clients settle the case on terms less favorable to them than they would have otherwise had the expert's name and alleged opinion not been used, the wrongful designation has then caused harm to the opposing counsel and their client.

This would be particularly true in a situation when there's only a limited number of properly qualified experts available.

**John:** Dr. McCartney, what is the impact on the claims adjuster and the insurance carrier by the attorney's action of designating the expert without their consent?

**Dr. McCartney:** Nothing good can come from a wrongful designation for the insurance company and the claims adjuster. The attorney who filed the wrongful designation may be affecting the claim for the insurance company and the claims adjuster.

In the wrongful designation the insurance company and claims adjuster believe that a respected and credible expert will testify against them if the case does not settle on terms the attorney who filed that designation is advocating. They may also believe that great harm will come to them due to the wrongfully designated expert's alleged opinion should the case go to trial.

The insurance company may believe, as a result of the wrongful designation, that they have no alternative but just to pay the greater amount demanded by the attorney who filed that wrongful

designation. In reality, had they had the correct information, the insurance company and claims adjuster could have evaluated the suit, or had the suit evaluated by a respected expert or the wrongfully designated expert and not pay more to settle the claim with that wrongful designation.

When the defense attorney files a wrongful designation and who is representing the insurance company, the insurance company may take on additional liability in the claim. Some insurance companies have measures in place to guard against this practice and require reviews of the expert's contract prior to their retention by the attorney. Some insurance companies require the expert's invoice sent directly to them for payment.

The motive by a defense attorney who files a wrongful designation may do so to save money on the case and try to affect the plaintiff's attorney taking less. However, the expert in this scenario will not know if they have a conflict, have a business reason not to have taken the case based on the facts of the case, or would not have been able to support the wrongfully designated opinion. The expert's reputation may also be damaged.

**John:** Dr. McCartney, is this professional misconduct on the part of the attorney or the claims adjuster?

**Dr. McCartney:** It's a legal question, John. I can't fully answer for you, but what I can tell you is this. Certainly, the claims adjuster who has no knowledge of the attorney's designation is not involved, but the question of liability still remains.

One way for the claims adjuster to be proactive against this type of attorney conduct is to require that they approve and see all expert retention contracts prior to approving any legal bills by the attorney with a motion to designate an expert witness. The claims adjuster certainly has the right to seek legal counsel and guidance from the state bar of where the attorney practices.

What I do know is that according to the AAIMCO publication by Thomas Braniff and Robert Gaddis, is that the ABA has a code of professional conduct and individual states have codes of professional conduct. The act of wrongful designations may be violations of the ABA codes and the individual state bar professional responsibility.

What is cited with respect to the ABA, is Rule 3.4: fairness to opposing party and counsel. Rule 4.1, truthfulness in statement to others, and Rule 8.4 on misconduct. In summary, if you take a look at the fairness to opposing party and counsel, the lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

In the Rule regarding Truthfulness in statement to others, in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

In the Rule regarding misconduct, it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, engage in conduct that is prejudicial to the administration of the justice rule.

**John:** How can an expert reverse the process of being designated as an expert without their consent?

**Dr. McCartney:** When the expert discovers the wrongful designation while the case is still active, the expert can retain an attorney to file a motion withdrawal as the expert in the case. If the case has already settled, the expert should obtain the court wrongful designation motion filed by the attorney. The expert can hire a service to obtain this motion or search court filings in web based databases such as PACER or Westlaw. Once the information is substantiated, the expert should consider hiring an attorney to discuss all of the expert's options, including filing a complaint with the state bar in the state that the act occurred. Only the expert will know the extent of the damage to their reputation by this wrongful designation.

**John:** How often does this happen?

**Dr. McCartney:** It's uncertain, John. One time is too many times. The amount of time, money, and loss of reputation that an expert will incur when they have been wrongfully designated can be great. The expert should consider legal representation to ensure that they are protecting their company, reputation, and limiting their damages. The claims adjuster and insurance company certainly will be disadvantaged by a wrongful designation.

**John:** What can an expert do to prevent wrongful designation, if anything?

**Dr. McCartney:** John, I have three suggestions. One solution is for the courts to adopt new rules requiring notarized signatures of all experts on all expert designations. Today, insurance companies and claims adjusters can require that their experts sign a notarized statement for all expert designation, but there's no assurances that the court will accept the filing. That suggestion is a legal question I really can't answer.

A second suggestion is experts should have systems in place to document attorney calls when they discuss cases and possible retentions. The experts should have databases in place in their businesses that document potential retentions with parties to the case, the attorney who is discussing the case with them, the name of the law firm, phone number, and the name of the attorney. The expert should document the attorney's narrative about the case and their position. The expert should take notes during the phone call.

The third suggestion is good practice for the expert is to obtain a copy of the claim complaint, even before they've discussed the case with the attorney to substantiate the information, run a conflict check prior to discussing the case. Most attorneys are good, honest professionals. Unfortunately, the fact that a wrongful designation as a practice has been reported to AAIMCO and the fact that I've personally seen the practice in action is still cause for concern.

I appreciate AM Best's time and taking the time to allow me to provide this information to its insurance company claims adjusters and expert members.

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

**Dr. McCartney:** Thank you.

**John:** You've just listened to Dr. Janine McCartney of [HHC Safety Engineering Services Inc.](#), and HHC Safety Consulting Services, Corporation of Wilmington, Delaware, and a new office in Houston Texas. Special thanks to today's producer, Anthony Palma.

Thank you all for joining us for "Best's Insurance Law Podcast." To subscribe to this audio program, go to our web page, [www.ambest.com/claimsresource](http://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](mailto:lawpodcast@ambest.com).

I'm John Czuba, and now this message.

Transcription by CastingWords

To find out more about becoming a Qualified Member in *Best's Insurance Professional Resources*, contact [claimsresource@ambest.com](mailto:claimsresource@ambest.com) or visit our [Learn More](#) page to start the application process.

#### BEST'S INSURANCE PROFESSIONAL RESOURCES

Copyright © 2022 A.M. Best Company, Inc. and/or its affiliates ALL RIGHTS RESERVED.



No portion of this content may be reproduced, distributed, or stored in a database or retrieval system, or transmitted in any form or by any means without the prior written permission of AM Best. While the content was obtained from sources believed to be reliable, its accuracy is not guaranteed. For additional details, refer to our Terms of Use available at AM Best website: [www.ambest.com/terms](http://www.ambest.com/terms).