Experts – they're not just for trial

Experts are a resource for opposing MSJs and to prepare for depositions and mediations

By Thomas Stolpman

In too many cases, we start thinking about experts in the case a few days before our expert designation is due under Code of Civil Procedure section 2034. By rushing around to retain trial experts, we often miss out on the input that they can have during the earlier stages of the case.

Investigator

In medical-malpractice cases, the attorney has to get the records reviewed by a medical doctor or other health-care professional in order to determine whether or not there is a viable case and in order to comply with the procedural requirements involved. Although I learned early on that the combination of MICRA and juror bias in favor of doctors mitigated against handling medical-malpractice cases, I often found that the expert was able to give me a roadmap to use during the discovery process, particularly when taking depositions of the health-care professionals, including doctors, nurses and therapists.

In other cases such as construction-site accidents, after a few years of practice it was easy to know what the good cases were and how to conduct the investigation and discovery without the need for an expert.

However, in complex cases such as product liability which are more like medical-malpractice matters, before spending significant sums of money in a case, having an expert look at the product and give opinions about its design/ manufacture can be very helpful in both case selection and in formulating a strategy for the case.

A good example of this type of work is a case presently in our office, in which we are suing on behalf of homeowners and residents for personal injuries and property damage arising out of the exposure to stray electricity and electromagnetic fields (EMFs). Before filing the lawsuit, we engaged several experts to assist us in understanding the issue involved and in navigating through the holdings of several appellate cases which seem to foreclose claims of injury based upon exposure to EMFs. These experts

will assist us in drafting discovery documents, such as document requests and interrogatories and in helping us to prepare for depositions of key utility employees. They were also instrumental in helping us to draft a complaint which we hope overcomes the demurrers and motions to strike which have been filed by Southern California Edison Company.

Motion for summary judgment/ adjudication forum

It seems that in almost every case, the defense files a motion for summary judgment or summary adjudication. In medical-malpractice cases, the healthcare providers will file these motions and attach a declaration which simply states that the care and treatment rendered by the moving party was within the standard of care. This requires an opposing declaration by an expert opining that the standard of care was violated in some particular respect.

For defendants, this is a way to figure out where the plaintiff is going with her case. By having the expert address the issue of who complies with the standard of care, the trial lawyer is in a position to meet with the expert and to flesh out the case as one prepares to take the depositions of the declarant whose testimony was filed by declaration in the motion.

As in the investigation stage, the key benefit to the trial lawyer is being educated about the technical issues in the case.

We occasionally see dispositive motions filed in products-liability cases using the same defense strategy, and as in the medical-malpractice situation, using the expert to assist in preparing an opposing declaration is an education opportunity for the trial lawyer.

Mediation

As we enter the phase of post budget-cut trial-court operations, mediation and settlement conferences are going to become even more critical in resolving cases. In the last 15 years, we have seen amazing developments in the sophistication of the materials submitted by parties to the mediator. Simple mediation briefs are still filed in many cases, but mediation notebooks are put together by many lawyers to lay out the entire case for the mediator and for the other side.

This makes a lot of sense because of my belief that providing the defense with more information is better than providing them with less information. This is based upon the simple process followed by insurance companies and self-insured entities in dealing with claims. Without substantial information, the attorneys and adjusters cannot document their files sufficiently to get settlement authority which will help the case to settle.

By providing them with information, plaintiffs' attorneys are giving them the ammunition they need to evaluate the case and to have the claims people who make the decisions (usually people whom we never meet during the pendency of a claim) issue settlement authority which will settle the case, set reserves which allow flexibility in changing that authority, and in bulletproofing their decision when the file is audited at a later time.

Experts can be used to help prepare the mediation notebook to provide key photographs or other documentary evidence, and on occasion to submit a report to the mediator and the other side.

Given the general preference not to have experts prepare reports, which merely become roadmaps for the person taking their deposition before trial, one must waive the benefits of working to settle the case versus opening up the case as much as one does by having an expert prepare a report.

In a few cases, experts have actually attended mediation sessions.

The bottom line in the mediation context is whether one wants to make every effort to settle the case at mediation, or whether, as happens in some cases, the mediation is likely to fail and a trial is likely to occur. Having made the determination of which outcome is likely to occur, the trial lawyer is in a position to make decisions about how much to disclose during the mediation.

Discovery

As noted above, experts can often be useful in helping to prepare written discovery designed to elicit key information which will be necessary in satisfying the elements of proof in a particular case. The experts often know the role involved in a particular field and often have significant knowledge about a particular defendant and how they operate. These types of insights can be critical in drafting discovery requests which require response rather than objections that they are ambiguous or that the responding party doesn't understand what is being requested.

Having worked with the expert in the beginning of the discovery process, the trial lawyer will then be in a better position to draft responses to discovery which comport which language will be used at trial.

Experts in deposition and trial preparation

As has been discussed above, experts can be very useful in depositions and for trial preparation. By the time depositions begin, the lawyer should have certain themes established which will prevail in the case. The lawyer should be familiar with the jury instructions which are likely to be given at trial. In addition, the trial lawyer must have knowledge and a grasp of the technical issues of the case which evolve the bargain being used, the technical alternative available to the manufacture or other defendant, etc.

In certain cases over the years, lawyers have actually had their experts attend the deposition of an opposing expert so that they are able to assist in formulating further questions based on the answers given by the deponent.

Conclusion

We started with the proposition that recognizes that most of us don't really think about experts until our designation is about to prepared and served.

By waiting well into a case before selecting experts, one can save some money, but ultimately lose out on preparing an effective case that can be settled or, if it is necessary to try the case, won at trial.

When I open a case, as I am interviewing the potential client, I am already thinking about how I am going to argue the case, thinking about the themes which will resonate with jurors.

To fully develop those themes, most cases require that an expert help the trial lawyer address the questions which have to be answered during the course of the case.

As litigation becomes more and more expensive, this may seem to be an onerous burden, but if lawyers are going to handle substantial damage cases, they must be prepared to spend the time and money necessary to obtain fair compensation for the client. After all, that is the job of a trial lawyer.


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