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Selecting and working with forensic consultants: Optimizing benefits and minimizing problems

By Lee E. Martin

When hiring forensic experts, it is important to find the best fit available, provide the expert all pertinent information, and make any calendar or financial constraints clear. Doing so will enable the expert to contribute meaningfully to the resolution of the case at hand, and potential opportunities for misunderstanding will be minimized.



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consideration is finding one whose prior experience matches the requirements of the case at hand. Secondly, the ability of the expert to communicate effectively, and his or her prior experience offering testimony in deposition and trial, are often considerations for retention. In some cases, more than one expert may be required to fully explain a condition or event.

Reasons for retaining a forensic expert

In matters where specialized knowledge would assist the finder(s) of fact (judges and juries) understand concepts or events in a lawsuit, forensic experts can offer opinions based in science for consideration in determining ultimate outcomes. The role of the forensic expert is one of education in explaining technical details or how and why an event occurred. The expert is not an advocate, and his or her job is to present scientific evidence that explains a concept not known to, or understood by, most people in order to shed light on the event in question.

In some cases, the opinions the expert offers are disputed, and a motion in limine can be filed to disqualify the expert from testifying. When informed of a challenge, experts can offer rebuttal information based on science in such situations. Qualification will allow experts to remain in the case, defend their reports, and offer opinions for consideration by finders of fact.

Experts are also retained in insurance matters that most often do not end up in litigation. In such cases, experts can provide information that assists the insurance adjuster in determining coverage under terms of the policy, liability, extent of the loss, as well as opportunities for subrogation (recovery from other parties). Experts are also able, in many situations, to determine whether fraud was committed by the insured in an attempt to recover under provisions of the policy.

Types of cases and forensic experts

In virtually every area of human pursuit, if a condition or situation becomes a legal matter there is an expert to assist in explaining it. When selecting an expert, the primary

Initial conversation

The initial discussion between attorney and prospective expert is critical in terms of selection, and also for establishing case parameters. The attorney needs to be confident that the expert being interviewed is best qualified to assist in the case based on background and ability to formulate accurate and relevant opinions based on the facts of the case. The expert needs to communicate what information would be most helpful in pursuing an investigation, and any special experience or knowledge the expert has that is pertinent to the case at hand. Cost and schedule should also be discussed and agreed to early in the process.

Communication

As a case progresses, it is important that attorneys, insurance adjusters, and others who retain experts provide those experts with all the information they need to properly evaluate the facts. It is equally important that experts keep clients informed of progress, any needs they may have for information, and opinions they form as the case progresses. Unfavorable opinions especially need to be discussed as early as possible to evaluate their effect on the case. Report deadlines need to be disclosed ahead of time to allow experts enough time to thoroughly research, develop, and explain their opinions in the case, and to obtain peer review of their work products.

Cost

Review of discovery material, written reports, and site inspection travel time are often the biggest elements of forensic expert expense. Organizing discovery material prior to Bates numbering is one way to keep document

review time lower than it would otherwise be. In a construction case, for example, putting all pay applications, project meeting minutes, etc. together makes review go faster. Attorneys and experts weigh the need to be cost-effective with the need to catch any problematic details that could come up later in deposition or trial.

Timing

Experts should ask, or attorneys disclose, during the initial conversation whether or not there is a critical time constraint. More experienced experts tend to be extremely busy, and their ability to respond in a short period of time is limited. In addition, peer review and final editing are mandatory steps in most forensic expert firms, and time required for those tasks is beyond the control of the expert.

Results

Results of a forensic investigation consist of oral and/or written opinions with supporting documentation. Opinions that are speculative or lack support (i.e., “net” opinions) are subject to challenge and disqualification. Negative findings need to be brought to light as early in the case as possible and discussed regarding their effect on the overall argument being made. Attorneys and experts should discuss findings before final reports are sent.

Examples

After an apartment fire in Indiana some years ago, attorneys for the insulation subcontractor on the original building project contacted an expert and indicated their client was being blamed for the rapid spread of a fire that resulted in the total loss of a 20-unit building. The expert determined that the architect incorrectly specified the paper faced insulation, and the general contractor improperly framed the building, facilitating the spread of the fire. The insulation subcontractor participated in a global settlement that was much less than what it initially anticipated paying. Additionally, it was able to cross file and recover from the architect and the general contractor.

In another matter, a teenage driver was cited for reckless operation of a motor vehicle and vehicular manslaughter when he encountered a patch of ice on a curve in a residential street. His companion in the front passenger seat was killed when the vehicle struck a roadside object. There were no witnesses to the collision. The police report described the skid and collision in a manner that placed liability on the teen driver. Defense attorneys retained an automotive expert who determined that the ice formed after city officials tested a fire hydrant earlier in the day and left a large amount of water in the street, where it froze. The expert further determined that the police report was inaccurate with respect to the interpretation of skid marks in the street, and the speed at which the vehicle was travelling when it slid on the unexpected patch of ice. As a result, charges against the teen driver were dismissed.

By clarifying scientific and technical principles or determining whether a standard of care was or was not maintained, forensic experts can assist attorneys, judges, and juries in reaching sound outcomes. Communicating effectively, and monitoring cost and schedule throughout the process, help proceedings run smoothly. ■

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