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**Experts – When to Discuss the Facts and When to Obtain a Report**

How many times have you received an expert report without requesting one? It happens more than one would think. Hopefully, you are working with experts who do not prepare reports on their own without your request. If you are working with an expert for the first time, it would be wise to communicate with the expert to ensure that everyone is *on the same page* when it comes to a written report. After all, once an expert has issued a report, it cannot be re-written.

This article will address, first, when to discuss the facts surrounding a loss with an expert. Secondly, the essential components of how an expert report should be written will be addressed. Finally, the decision for whether to have the expert prepare a report will be discussed.

**When to Discuss the Facts with the Expert**

Upon the initial retention of an expert, the subrogation professional and the expert must communicate about whether an expert report is expected to be written in the scope of the assignment. An expert needs a clear understanding of the scope of his or her assignment, and that includes whether the expert issues a report.

1. Is the investigation ongoing?

If the investigation is ongoing, then the subrogation professional may want to discuss the facts surrounding the loss with the expert. It is best, however, to wait until the investigation is complete before an expert report is written, assuming one is needed. This can eliminate the need for supplemental reports, and experts having to change or modify their opinions when new facts are discovered. A typical subrogation investigation can have an initial examination, joint scene examination, and evidence examination. A good practice is to ask the expert if the investigation is complete before requesting an expert report, or to ask if there is any additional investigation or testing that the expert

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would like to complete before his or her opinions are finalized. Always allow your expert to *complete* his or her investigation, if at all possible, before you obtain his or her report.

2. Is the cause undetermined?

Sometimes an expert advises that there are multiple *possible* causes for a loss, and an exact cause of the loss is undetermined, or no cause can be determined because of destroyed evidence. An expert report with an undetermined cause may not be fruitful or add any benefit to a subrogation claim, and may thus not be warranted. However, sometimes an expert report is still appropriate in certain jurisdictions where an exact cause of a fire cannot be determined. For instance, in Florida, in *Cassisi v. Maytag*, 396 So.2d 1140 (Fla. 1<sup>st</sup> DCA 1981), a product is presumed defective when a product damages itself, and there are no remains left to determine the exact cause of the loss. For this reason, the subrogation professional needs to be aware of the law for proving causation for each loss, and should seek the advice of legal counsel when deciding whether to discuss the facts of a loss with the expert, or have him or her issue a report in a loss when the cause is undetermined.

3. Is there no avenue for subrogation recovery?

Many subrogation investigations are opened and closed without the issuance of an expert report. A majority of the insurance companies accept verbal reports from the experts concerning the causation of a loss. It is not cost effective for insurance companies to require written expert reports on claims that clearly have no subrogation recovery potential. When there is no avenue for a recovery, it is always best to discuss the facts of the loss with the expert and forego an expert report.

### **How to Write an Effective Expert Report**

Effective expert reports should follow the four “C’s” rule: clear, complete, convincing, conclusions. An effective format for an expert report is a listing of the facts in a concise chronological order that leads the reader to a logical conclusion. The subrogation professional and expert should work together to ensure that the expert has sufficient information needed to write a complete and thorough report that includes a explanation of the facts and the conclusions.

**Clear** – The expert report is intended to provide the reader with an understanding of the claim with an orderly chronological statement of the facts. A well written expert report educates the reader and explains the issues, the investigation, and the discovery, with an analysis of the expertise applied to the facts and circumstances. The ultimate conclusion should be a logical result of the investigation. The expert report does not want to mislead the reader with confused or clouded facts, because the reader will not comprehend the claim, or most important, the conclusion. A photograph is worth a thousand words, and excellent visual aids can more clearly show the reader the expert’s

presentation of the claim. Other great tools are diagrams, charts, graphs, and similar visual summaries.

**Complete** - The expert report needs to consider all of the circumstances, even the bad and unfavorable facts. Any bad or unfavorable facts should be addressed, along with a discussion of why those facts have no impact on the ultimate conclusions. There should be no loose ends, or unanswered questions, so that the reader is left uncertain. As discussed above, it is always best to wait until the investigation is complete before the expert issues a written report, in order to avoid multiple reports, because the report was written too soon before the completion of the investigation.

**Convincing** – A good expert report sets forth a clear understanding of the claim, with a persuasive explanation that is believable, plausible and convincing. The intent is to leave the reader with no doubt that the expert has been thorough. The statements must be logically based on the evidence, and then the resulting opinions become convincing.

**Conclusions** – The conclusions and opinions are the finale of the expert report. The report needs to have a logical sequence of events, demonstrating a process that leads to a strong conclusion. Expert reports are not effective when an expert “jumps to conclusions” without the supporting evidence. Some expert reports have more than one opinion, and each ultimate opinion needs its own support. Such support is a derivative of facts and data accumulated throughout the investigation. The conclusion should be built off of the analysis set forth earlier in the report.

### **Decision to Write an Expert Report**

#### **1. Is an expert report needed for pre-suit settlement negotiations?**

Sometimes expert reports are written to help resolve claims in pre-suit settlement negotiations. At the same time, many pre-suit settlements occur without any expert report. Expert reports are effective ways to establish a claim against a responsible party. When an adverse party requests an expert report, the subrogation professional should understand the reason for the request, and be confident that the report is truly necessary at an early stage in the litigation process.

In some instances, an adverse party has no intent to settle a claim pre-suit, and the request is only to gain access to your expert’s opinions, knowing that the claim is headed for litigation. If this is the case, then a decision could be made to forego writing a report. On the other hand, the subrogation professional may decide that an exchange of expert reports would be beneficial to learn the other party’s position as to causation and liability. There is no requirement that an expert report be prepared in pre-suit settlement negotiations, but the other party may need a report to justify the payment of a liability claim and assist the claim in a settlement.

## **2. Is the case going to Arbitration Forums?**

Expert reports are a very effective tool when submitting a case to Arbitration Forums. Intercompany arbitration is a forum for claim resolution for insurance carriers that are participating members. Compulsory arbitration is applicable to a maximum amount of \$100,000 for a company claim amount in automobile, medical payment, property claims, and uninsured motorist forums. Compulsory arbitration is applicable to a maximum amount of \$250,000 for a contribution sought amount in *special arbitration* forums. The Arbitration Forums consist of subrogation professionals who review written submitted claims, and written rebuttals. There are no rules of evidence that control the submission of documents in Arbitration Forums. The arbitration decisions are binding on the parties. If an expert report is well written, then it can be a cost effective tool to assist in the resolution of your claim in Arbitration Forums.

## **3. Is the case going to be litigated in State Court?**

Every State Court has different rules, procedures, statutes, and case decisions. Generally, State Courts do not have mandatory expert written report requirements, although any State Court can order an expert report to be written. Be aware that there can also be differences within a State from County to County, and even from judge to judge. Each State has its own statutes and case law that govern the standards of negligence, products liability, breach of contract, and comparative/contributory negligence. The variety of laws may have a direct impact on the opinions that may need to be addressed in an expert report to prove causation or liability. It is best to seek advice of counsel when dealing with issues of law involved with a subrogation claim. Note that many situations arise in State Court where expert reports are not required, and the verbal opinion testimony of the expert is presented through deposition and at trial.

## **4. If the case is going to be litigated in Federal Court, will the expert report fulfill the obligations under *Fed.R.Civ.P. 26(2)(B)(i)-(vi)*?**

*Fed.R.Civ.P. 26(2)(B)(i)-(vi) Disclosure of Expert Testimony* states:

*(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.*

Failure to comply with the mandated provision, may possibly result in sanctions against a party, the striking of an expert report, or the striking of expert testimony, which could then lead to the dismissal of a lawsuit.

*An expert report must contain:*

*(i) a complete statement of all opinions the witness will express and the basis and reasons for them;*

The report is required to set forth each opinion with a supported basis and reason for each. One opinion may have numerous facts of support. The basis is the foundation, origin and source of each fact relied upon in formulating the opinion. The basis cannot be based on speculative or unsupported facts. The reason is the cause, rationale, explanation and analysis used to reach the opinion. See *Loeffel Steel Products, Inc. v. Delta Brands, Inc.* 387 F. Supp. 2d 794 (N.D. Ill. 2005) (excluding report of damages expert because it did not comply with the rule when there was no explanation, written opinions, details or analysis in the report); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262 (6<sup>th</sup> Cir. 2010) (excluded expert report because the report did not set forth the facts and outline the reasoning with a logical foundation when it did not include the “how” and the “why” that was so crucial).

*(ii) the facts or data considered by the witness in forming them;*

The intent is that “facts or data” are to include any material considered by the expert from whatever source that contains factual information. The rule extends the obligation to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

There is a relatively new rule that went into effect on December 1, 2010, that provides work-product protection for draft disclosures and most attorney/expert communications under *Fed.R.Civ.P.* 26(b)(4). The subrogation professional needs to nonetheless presume that all documents contained in the expert’s file will probably be discoverable in litigation, with a few exceptions, including the attorney/expert communication. Thus, consider everything in the expert’s file will be read by the opposing party, including all e-mail communications. As a result, the subrogation professional should pay attention to what is communicated to the expert in writing. The telephone is therefore an excellent way to communicate with your expert.

*(iii) any exhibits that will be used to summarize or support them;*

This requirement is intended to allow the expert to use a summary and exhibits for display at trial, and is usually done close to the trial date. For instance, demonstrative

evidence such as diagrams, graphs, and charts can be effective visual aids for the jury to better understand the expert opinions.

*(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;*

An updated resume or curriculum vitae, or "CV", is sufficient to disclose the expert's qualifications. The purpose is to disclose that the expert is qualified in education, expertise or specialty to provide expert witness testimony. See *Cruz-Vazquez v. Mennonite General Hosp. Inc.*, 613 F. Supp. 2d 202 (D.P.R. 2009) (excluding plaintiff's expert due to failure to provide defendant with updated CV of expert prior to trial). Compare *Soufflas v. Zimmer, Inc.*, 474 F. Supp. 2d 737 (E.D. Pa. 2007) (finding the orthopedic surgeon's CV sufficient when there was disclosure of experience of knee and shoulder surgery, training courses, instruction courses, and private practice). If the expert has no publications, then it should be noted in the report, because the failure to provide the information can have unfavorable results. See *Sykes v. Napolitano*, 634 F. Supp. 2d 1 (D.D.C. 2009) (issuing a technical violation because of the missing list of publications the expert had authored in the past ten years).

*(v) a list of other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and . . .*

The rule does not require the witness to make the deposition transcripts available to the other party. As a subrogation professional, the list of deposition and trial testimonies, as well as the resume or curriculum vitae, can be very useful when working with an unfamiliar expert. You may find that an expert has the credentials to serve as an expert, but has neither been deposed nor testified at trial. Knowing this information early in the investigation can also assist the subrogation professional in selecting an expert, because you may need an expert with both the credentials and trial testimony. See *Sykes v. Napolitano*, 634 F. Supp. 2d 1(D.D.C. 2009) (holding report that lacked a list of the cases in which the expert had testified in the last four years was deficient under the rule). *But see Currier v. United Technologies Corp.*, 213 F.R.D. 87 (D. Me. 2003) (ruling that although plaintiff may not have provided a listing of the other cases in which the expert had testified that would not be ground for excluding their testimony).

*(vi) a statement of the compensation to be paid for the study and testimony in the case.* The purpose of this provision is to let the other party know how much money the expert billed to date through the preparation of the report, and the rate for trial testimony. Compliance includes an invoice outlining the dates worked and the hourly rate charged from the inception of the claim through the investigation, up to the date of the report. The statement should also include the hourly rates charged for deposition and trial testimony.

**5. Are there any additional opinions after the expert report is written?**

Experts are limited to the opinions only stated in the report, and cannot offer new information or theories not included in their reports. *Fed.R.Civ.P.* 26(E) requires experts to supplement expert reports when required. *Fed.R.Civ.P.* 26(e) states that a party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures are due. See *Macaulay v. Anas*, 321 F.3d 45 (1<sup>st</sup> Cir. 2003) (precluding plaintiff's expert witness from testifying to a new theory of liability that had been asserted after the deadline).

## **6. When should an expert report be prepared for Federal Court?**

The subrogation professional needs to keep in mind that expert reports in Federal Court are due to the other party 90 days before trial, *unless* a different time is ordered by the court. The expert report is therefore usually written shortly before trial, so that the opinions rendered can take into consideration the totality of the facts, circumstances, and evidence involved in the case. Thus, consider that the totality of the facts, circumstances, and evidence may not all be favorable to your position or the expert's opinions. A well written expert report addresses the unfavorable and negative facts by distinguishing and reasoning why those facts are not relevant or material to your expert's ultimate opinions.

## **Conclusion**

In summary, the subrogation professional and the expert are a team that must work together during the investigation of a claim to determine whether a claim has any subrogation recovery potential. Whenever a claim has subrogation recovery potential, a decision is then made whether a verbal report from the expert is sufficient, or whether a written report is needed. Whether an expert report should be written depends on the status of the investigation, the forum of where the expert report will be used, and the criteria needed for the report. A good expert report is based on a complete investigation that chronologically states the facts, and leads the reader to a logical, clear, and convincing conclusion.