

Chapter 8

Dealing with the Expert Witness

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General Guidelines for a Consumer's Expert Witness

An expert witness can be immensely helpful to a retaining attorney and his client in understanding the more complex mechanical aspects of a defective product. The expert's analysis can contribute to a better understanding of the true state of the facts in a dispute.

An expert witness in a case is often called upon to write a "Report" to explain their work and opinions, among other things.

The purpose of this paper is to explain the basic responsibilities and guidelines for being an expert witness and the considerations of writing an expert witness Report.

More about writing an expert report can be found at these and other web sites: www.seak.com, www.witness.net, and www.expertcommunications.com.

The Expert's Job

An expert should be impartial and independent and not have any close personal or business ties with any party or attorney in a case or any personal or business interest in the outcome of a case. The expert owes his duty to finding the truth about a matter and not to the party or attorney that hired him. The expert is not an advocate for the party that hired him; the expert is an advocate only for the truth that his opinions lead him to. Telling the consumer and the consumer's attorney the "bad" part of a case is just as important as telling them the "good" part.

The Employment Agreement

The expert's employment agreement does not have to be in writing but, absent a good working relationship, it may be wise to have a written letter or memo of understanding. The expert should keep careful track of all the time spent on the job, since that shows the thoroughness of the work performed and may be needed for billing purposes anyway.

Once you have retained the expert in a case though, be sure he/she is promptly and fully paid for their work. The attorney-expert relationship is likely to be long-lasting, over many cases, so it must always be nurtured, compensated and protected. An expert witness can be your best friend in a trial, or your worst enemy, depending on whose side they are on and how strongly they feel about their position.

Avoiding Conflicts of Interest

To guard against any misunderstanding or confusion, after the expert is contacted by one party in a dispute, the expert should not have any direct contact or dealings with the other party or their attorney, concerning the same case, outside of the presence of the first party. Great caution should still be exercised even when the contact is on a different case.

A written account of all contacts with the opposing side of the case should be kept as it occurs, giving the substance of the matters discussed. This account should be sent to the party/attorney who retained the expert as soon as possible.

Preparation for the Inspection

Early in the process, the expert should obtain complete copies of all documents that the parties consider “evidence” in a case, in order to get as complete a picture as possible of the case. The expert should study all documents received and consider starting the investigation by having a talk with the consumer and perhaps their attorney, in order to ask questions, get a verbal explanation of the issues and better understand the task at hand.

The Inspection Process

The purpose of a product inspection, fundamentally, is to see first-hand the product involved, conduct any relevant tests or product breakdown, and obtain the information needed to create a solid foundation for the expert’s conclusions and opinions.

In many cases it is necessary for the expert to inspect or test the product at issue, if only to be able to state he has done so and verified the serial number, etc., of the product at hand. If the product is in the hands of the opposing side, then the expert should ask the consumer’s attorney to make arrangements well in advance for the intended visit and inspection and allow the opposing side to be present and observe the process.

Inspection Participants

The opposing side does not have to be there, but the expert should never be the person to deny the opposing side the opportunity to observe what the expert is doing. They can always watch what the expert does. They must never be allowed to interfere with what the expert is doing.

At the inspection the expert may consider giving the parties the opportunity to make remarks and requests but the expert should not allow anyone to interfere with the inspection process. If remarks and/or requests occur during the inspection, the expert's written Report should show that it occurred and the requests were complied with or not, according to the decisions the expert makes at the time. The substance of the remarks and requests should be stated in the expert's written Report but do not need to be repeated in detail. If either party sends any written remarks to the expert, the expert should consider attaching copies to the final Report.

The parties are obligated to co-operate in an investigation by an expert. If any party fails to cooperate, the expert may mention it in his Report and may comment or draw appropriate conclusions from the lack of co-operation.

Making Notes

During the inspection, the expert should carefully make detailed notes of anything significant that occurs or is observed and take photographs of anything and everything that could remotely be significant. This is the expert's one chance to have a "free rein" to do anything he wants and take all the photos he could possibly need. Take more photos – not less. The expert must never destroy any photograph that has been taken; that is true even when the photo is out of focus or useless. Keep them all.

The inspection of the product, and the Report that results, should be done by the expert himself. Use of helpers is acceptable, but always remember that it is the expert who is responsible for all steps of the inspection and all parts of the Report. Any helpers in the inspection process should be identified by name in the Report.

The expert's Report should be written as soon as possible after the inspection occurs, when the events are still fresh in one's mind.

Using the Preliminary Draft Report

Before sending the final expert Report to the party/attorney who retained him, the expert should check and double check the Report for thoroughness and accuracy. The expert may wish to ask the party/attorney retaining him if they

wish to review a preliminary draft of the Report in order to get their comment on it. The practice of using a preliminary draft Report may be discouraged by some attorneys, however, since multiple drafts of a Report may give an appearance of uncertainty or that the expert is not truly impartial and independent.

The Report should also be signed by the expert. The expert's signature means that the Report was carefully done and the expert believes in its accuracy and the opinions given in it. If signing it is not possible at the time, the Report should state why it is not signed. When the expert submits the "Report", the expert should generally also submit the bill for all work performed up to that point, if the expert has not been paid in advance.