

Tips on The Use of Experts in Insurance Coverage Litigation

The use of experts in coverage litigation shares a lot of commonalities with that in other types of litigation, but also has its own unique issues of which practitioners need to be mindful.

By Huiyi Chen

Unlike most specialized areas of litigation, insurance coverage litigation often encounters the use of experts in a vast variety of substantive areas—different first-party insurance policies may require expertise about different types of causation and losses, and the subject matter of third-party coverage disputes often depends on the issues in the underlying litigation, which could vary from medical malpractice to chemical pollution. The author recently spoke at an ABA panel* on how to navigate the thorny issues in the use of experts in insurance coverage litigation and has a few practical tips to offer.

- **Maintain due diligence throughout the expert engagement.** The first thing counsel wants to avoid is the opposing party finding materials your experts published in the past that directly contradict their opinions offered on your client's behalf—they can then use those materials in deposition or cross-examination at trial. Sometimes there aren't a lot of candidates in a particular area of expertise and litigators may not have much latitude in picking an expert (especially when insurers/reinsurers in different layers want to engage different experts instead of sharing the same ones). Other times, there is a strategic advantage to engage an expert first so that your opponent cannot. Even under such circumstances, due diligence on the expert's past publications and reputation is critical so that you are at least aware of any potential weaknesses and inconsistencies and can try to navigate around them. Due diligence is not a one-off practice before you engage an expert; instead, it should be a continuous effort throughout the litigation. This is especially important considering the prevalent use of social media nowadays and because experts tend to be active speakers and writers.

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- **Consider using experts in a privileged capacity.** Not all experts need to testify. There may be benefits in having two separate sets of experts looking at the same issues or data sets early in the case to “test the waters.” Experts can also be helpful in the context of mediation and settlement negotiations. Be mindful, however, that the law in your jurisdiction regarding privilege protection over non-testifying experts might be stricter than Federal Rule of Civil Procedure 26(b)(4)(D), and you might end up having to disclose what you presumed to be privileged and confidential. Experts engaged at the claims adjustment stage (even in anticipation of litigation) might work on compilation of facts or data that a court later may find to be non-privileged. It is good practice to ascertain the parameters of non-testifying expert privilege protection in your jurisdiction to inform your decision of expert engagement and communications.
- **Avoid exclusion of your experts.** Timely and adequate disclosure of expert opinions and the bases of the opinions is essential to maintain your expert’s ability to testify at trial. A recent Fifth Circuit decision upheld the trial court’s decision to strike an insurer’s causation expert’s reports and deposition because the initial report was “preliminary,” contained “no real opinions,” and lacked “a complete analysis or findings section,” and because the expert untimely submitted a supplemental report on the day of the close of discovery. *AIG Eur., Ltd. v. Caterpillar, Inc.*, 831 F. App’x 111, 115 (5th Cir. 2020). Another common pitfall that can lead to expert exclusion is using experts to testify to the ultimate question of law or the meaning of the policy terms at issue. Contract interpretation is usually a question of law for the court, but insurance policies often contain specialized terms that have a definite meaning in the custom and practice of the insurance industry or some other specialized discipline, and they may warrant expert testimony. Carefully drawing a line between the two is critical in preserving expert testimony related to the meaning of policy terms.

In sum, the use of experts in coverage litigation shares a lot of commonalities with that in other types of litigation, but it also has its own unique issues of which practitioners need to be mindful.

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**The 2021 ABA Women in Litigation Joint CLE Conference, co-panelists: Cara Tseng Duffield (Wiley Rein LLP); Elizabeth Hanke (KCIC, LLC); William Downs (Ankura Consulting Group, LLC).*

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