RISK MANAGING YOUR EXPERT WITNESS PRACTICE: DO YOU NEED LIABILITY INSURANCE COVERAGE?

KEVIN M. QUINLEY

As the expert strides through the courtroom en route to the witness stand, he stops before the court reporter and raises his right hand. This time, though, the expert is not there as a witness. Unfortunately, this time the expert takes the stand as a *defendant* in a civil lawsuit, which alleges that the plaintiff -- an ex-client -- suffered damages due to the expert's alleged negligence on a case.

It's the dark side of expert witnessing that nobody wants to think about. Often, expert witnesses are drawn into litigation, to offer opinions. They have no stake in the lawsuit's outcome. Either way, they get paid, usually by the hour. Other than ego, they have no “skin in the game.” Tables turn dramatically, though, if experts find themselves in the role of a defendant in a civil lawsuit.

Expert witnesses can face liability claims and suits for any number of scenarios[1]:

- Blowing a deadline for a report or disclosure
- Negligent failure to show for a deposition or trial testimony
- Not preparing for a deposition or trial testimony, harming the retaining party's ability to construct a case or defense
- Executing a 180-degree change in opinion that craters the client's case.
- Exaggerating or falsifying credentials (e.g. claiming to have an MBA when you have only taken a few management courses)
- An opposing expert (or attorney) files a defamation suit, claiming that the expert disparaged them.

This is not an exhaustive list. Even if a claim against a witness is baseless or frivolous, the expert who becomes a defendant must hire a lawyer to answer

[1]*Liability insurance will not necessarily cover all these “sins,” particularly the one on fudging credentials.*

the suit and mount a defense. This costs a lot of money. Many experts lack the financial means to fund such a defense or prefer not to pay lawyers when they could be (re)investing dollars in growing their practice. Bottom line: just thinking that you do a good job or that you are bulletproof provides no insulation from liability claims. Few doctors expect to face a malpractice lawsuit, but this does not stop them from (prudently) buying medical malpractice insurance coverage. While claims and suits against expert witnesses are rare, they are not altogether unheard of. (Two cases to ponder are *Lambert v. Carneghi* and *Pace v. Swerdlow*.)

In today's litigious society, troublesome scenarios can emerge. For example, a disgruntled client loses a case or has a bad outcome and searches for scapegoats. “Hey -- maybe the expert dropped the ball! Let's make a claim!” Or perhaps a billing dispute arises toward an engagement's end. The expert believes he or she is due payment and pursues collection. The non-paying client decides the best defense is a good offense and asserts a counterclaim alleging expert malpractice. Perhaps she hopes to leverage this to get the expert to drop the collection action.

Failure to insure against the possibility of a liability claim can wreak devastating financial consequences for the expert, including bankruptcy. Bottom line: experts who want to protect the investment they have in their practice should consider liability insurance coverage for their errors and omissions -- real or alleged.

We can liken expert E&O (short for “errors and omissions”) coverage to a doctor's medical malpractice insurance, with an important difference that the latter covers bodily injury while an expert's E&O policy likely will not. Malpractice insurance protects doctors when patients allege harm from a physician breaching the appropriate standard of care. Similarly, an E&O policy defends and covers an expert from certain types of claims from third parties (disgruntled clients or others) who allegedly have suffered financial loss due to an expert's alleged negligence.

Much of what the expert buys here is *legal defense coverage*. This pays for attorney fees, which can be daunting even if a claim is groundless and unsuccessful. Attorney costs alone could drain the resources of many expert witnesses, many of whom are sole practitioners or small business owners. Obtaining coverage is easier if the expert knows what to expect in the underwriting process.

Questions to expect from Underwriters

When seeking coverage, expect underwriters to ask the following questions:

- Have you had any prior claims?
- What is specialty or field?
- How long have you been an expert witness?
- What legal form does the business take -- e.g., sole proprietor, limited liability company, S-corporation, etc.?
- Are you predominantly a *consulting* or *testifying* expert?
- Do you know of any situation which could give rise to a claim?
- Do you use written engagement letters?

When shopping for professional liability coverage, what questions should the expert ask to find the best deal? Here are six:

1. “Can I see a sample policy?”

You likely wouldn’t buy a car without a test-drive. Unfortunately, you can’t test-drive an insurance policy. You can, though, request and review a “specimen copy” of the policy before buying. Invest time in reading the policies – side by side – and reviewing the differences. Get your insurance agent or broker to help.

2. "How much is my coverage or liability limit?"

Normally, the policy section titled, "Declarations of Coverage" lists the amount of insurance, along with the dates of coverage. Coverage of $1 million per loss - $3 million aggregate, for instance, means you have coverage for up to $1 million per claim and up to a total of $3 million per year.

Other policies have a combined single limit, where your total coverage is $3 million. Whether you have one $3 million claim for six claims valued at $500,000 apiece, $3 million is the maximum the policy will pay. Tip: gauge the "thickness" of your financial security blanket! This leads to the next tip.

3. "How solvent is the insurance company?"

Expert witnesses seeking coverage want insurers who will be around for the long haul, especially since claims could surface only months or years after the engagement in question. While most insurers are financially strong, occasional headlines show that some suffer financial woes. Tip: check the strength and stability of any candidate insurance companies placed before you. Independent rating agencies "grade" insurers on their financial strength. A cheap premium quotation does no good if the insurer goes broke. Contact any of the following insurance company rating services for financial health information:

- ✓ A.M. Best **(908) 420 0400**
- ✓ Duff & Phelps **(312) 368 3157**
- ✓ Moody's **(212) 553 0377**
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Suggestion: limit insurance placement to companies with the highest grade of financial rating, usually expressed by letters such as A+++, A+, etc. Avoid "grade-B" or lower insurers. You will sleep better knowing that your insurer has rock-solid financial stability, even if the premium is higher.

4. "Will I have 'claims-made' or 'occurrence' coverage?"

An occurrence policy covers you for loss occurring while you're insured by that policy, regardless of when a claim is actually brought. The key event is the *date of the loss* or accident. A claims-made policy, however, covers you only if you're still insured by the same policy when a claim arises. Under most claims-made policies, the loss must occur during the policy dates AND the claim must be made during the policy.

States have different time limits -- *statute of limitation* -- within which claimants can file suits. Some are as short as a year; others are as long as six years. Since these time-limits vary among states, a claims-made policy makes you think twice before switching insurers. If you stick with the same insurer year-to-year, the differences between occurrence and claims-made policies blur. However, jumping from one insurer to another when you have a claims-made policy, or moving from claims-made to occurrence can be tricky. This isn't to say that occurrence coverage is better, that claims-made is inferior or that one is inherently better than the other. Know and understand what you're buying and its impact on cost and coverage.

5. "Am I buying enough insurance?"

A million dollars in coverage may sound impressive, but when jumbo jury awards are common, you could risk financial disaster if you are under-insured. The answer to the question, "How much coverage is enough?" is like Abraham Lincoln's reply to the question, "How long should a man's legs be?" The answer: "Long enough to reach the ground." No pat

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6. "Can deductibles cut my costs?"

The short answer should be, "Yes!" Increasingly liability policies have deductibles. Not all pay first-dollar. The higher the deductible you are willing and able to absorb, the lower your insurance premium. Negotiate deductibles with the insurance company to obtain rate concessions.

A Final Tip: Read the policy! If anything varies from what the insurance company's representative told you, question it and keep careful records of all correspondence.

No expert likes to think of the possibility of getting sued. Many may view the odds as remote and decide to forgo liability protection. Other experts may view insurance protection as a modest investment for peace of mind, figuring, "Better to have it and not need it than need it and not have it." For those considering such financial protection, use these strategies to be a savvy shopper and to get the broadest coverage at the best price.

Possible Sources for E&O Coverage for Expert Witnesses

BizInsure

(877) 900 9998 | http://www.bizinsure.com/

Brunswick Companies

(800) 686 8080 | http://www.brunswickcompanies.com/pl-other.html

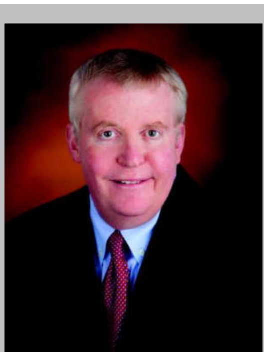
Complete Equity Markets

(800) 323 6234 | http://www.cemins.com/

Darwin/Allied World Assurance

(860) 284 1968 | http://www.darwinpro.com/products/mpl.html

Listed here are some sources for finding insurance coverage. Inclusion here does not constitute an endorsement and omission of any source does not infer any negative connotation. This is not an exhaustive list, but rather a starting point.



About the Author:

Kevin Quinley, CPCU, AIC, ARM, ARe, AIM, RPA is an insurance claim expert in the Richmond, VA area. He helps clients nation-wide as an expert witness on issues of insurance bad faith, adjuster standard-of-care and extracontractual liability. You can reach him at kevin@kevinquinley.com or at www.kevinquinley.com. He is a member of the CPCU Society's Consultant, Lawyers, Educator and Witness (CLEW) Interest Group Committee. The author is not an attorney and this article is not intended as legal advice.