



# Hired Guns

Insurance professionals can use their experience to help resolve disputes—and earn extra cash.

by Robert W. MacDonald

**T**he industry contains a small group of well-known insurance people who occasionally slip out of their normal roles and serve as expert witnesses in all types of insurance arbitration and litigation.

In the late 1950s, CBS network aired a series named "Have Gun Will Travel," in which the hero, played by the actor Richard Boone and named Paladin, rents himself out to settle disputes as a 19th-century mercenary.

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This is the mentality that goes along with the insurance savvy needed to be classified as an "expert witness." The only difference between Paladin and today's expert witnesses is that he often rejected compensation in order to take on just causes. The tendency today is for the "best gun" to go to the "best buck."

Undoubtedly insurance—whether property, casualty, annuity or life—is a complicated subject dominated by precedence, procedure and contract. The kaleidoscope of covered risks, combined with a special brand of jargon and complicated contractual pro-

visions, make it virtually impossible for any layperson, no matter how well intended, educated or intelligent, to make a reasonable judgment when insurance disputes escalate to the level of litigation.

So, before lawyers, judges and juries can render a judgment in a conflict, they must rely on experts to translate and explain the issues. The job of an expert witness is to put in plain words not only what the complicated issues of a dispute are, but also more importantly what they mean. As a result, these experts exert a significant impact on the direction



and results of insurance litigation. There is nothing wrong with the concept of calling on expert witnesses to lend their knowledge to the resolution of complicated disputes. No one argues with the logic of seeking expert guidance in areas where we possess little experience and understanding. But problems can and do occur when each side brings in their own "dueling expert witness" in order to win the day.

### Shades of Paladin

A few years ago, two companies were involved in an agent dispute and one retained me as an expert witness. With decades of industry experience ranging from agent to head of an agency company, I seemed well qualified to apply my expert knowledge. Much to my surprise, I walked into the hearing room only to discover that the other party had hired its own expert witness. And, he was not just any witness; he was someone I had known for more than 20 years and who had come as close to anyone to being my business hero and role model. It was a little like Paladin going up against the guy who had taught him to shoot. The case boiled down to each of us doing a quick-draw with our knowledge and experience, trying to shoot each other's position down. Fortunately, when we finished, both sides agreed to a compromise and settlement.

The point is that with high stakes at risk in most insurance litigation, such as the recent World Trade Center single/dual event litigation, neither side can take the chance of relying on just one expert witness for the case. Right or wrong, this situation can lead to an ugly and confusing battle, not over the right and wrong of the issues, but over which side can find the most believable and convincing expert witness.

Even though the expert-witness system has weaknesses, it does play a valuable role in the efficient and usually reasonable resolution of insurance disputes. This has given rise to a rather extensive, if somewhat unknown, cottage industry of "expert witnesses." It

### Profile of an Expert Witness

- Male
- Has about 12 years business experience
- Average age is 50
- Ages range from 30 to 70
- Testifies in court about four times a year
- Participates in an average of eight or more depositions a year
- Technical witnesses testify to the specific and formula-driven benefits of insurance; paid \$175 an hour
- Generalist witnesses have general management experience and bring abstract knowledge to an issue; paid \$300 to \$500 an hour

Source: The Legal Research Network; Robert W. MacDonald



is made up of individuals who are willing to put their experience up for sale and testify in a wide variety of insurance disputes.

Yet, despite the need, there is a dearth of qualified individuals who are available and effective as expert witnesses. Law firms are always scouring the landscape for the next superstar of expert witnesses. Insurance professionals with solid experience in the business, and who are good communicators, should consider becoming an expert witness in insurance disputes. Serving as an expert witness gives professionals the opportunity to have an impact on the future of insurance law.

### Who's Who

Expert witnesses have one of two types of credentials:

- Technical expertise and testify as to the specific and formula-driven benefits of insurance; or
- General management experience and bring their more abstract knowledge to the issue.

For example, an actuary may be called upon to testify as to the "human life value" of an individual in a wrongful death case or to the life expense for a teenager permanently disabled as the result of an at-fault accident. The more esoteric expert witness, who may be more valuable and difficult to

find, is the generalist who can effectively communicate the nuances of the insurance industry with the force of opinion as if it were hard fact.

Professionals in the insurance business with extensive technical training or expertise in the general areas of the industry such as operations, marketing, product development, systems, underwriting and new business, have the makings of an expert witness.

Based on a 1997 survey conducted by The Legal Research Network, the average age of most expert witnesses is a graying 50ish, with the youngest in their 30s and some as old as 70. Expert witnesses are predominantly male and have been in the business an average of 12 years. Those clearly identified as expert witnesses testify in court about four times a year and also participate in an average of eight or more depositions per year.

### Compensation

The financial rewards for a leading expert witness are quite substantial. While figures will vary depending on a number of factors, the average technical expert witness can expect about \$175 per hour, plus expenses. An experienced and effective generalist in the industry can command anywhere from \$300 to \$500 per hour for his experience.

Many expert witnesses bifurcate their fees, depending on the situation. For example, an expert may charge \$300 per hour in court and \$150 in depositions. In addition, leading expert witnesses can also demand a retainer for their services. These retainers will range from \$2,000 to \$5,000. Using these averages, it's fairly easy to see that a popular expert witness can generate annual income well into the low six-figure range. That's not shabby for simply talking about what you have stored in your knowledge base.

Expert witnesses advertise their experience and availability in any number of legal journals and publications, such as *The American Lawyer* and *National Law Journal* or various state books such as *The New Jersey*



Law Journal, Minnesota Lawyer or New York Law Journal, to obtain positions.

In today's connected Internet world there are numerous Web sites designed to help lawyers find expert witnesses and to serve as a bulletin board for expert witnesses, albeit for a fee, to register their experience and availability. Believe it or not, there are even "expert witness brokers," much like employment agencies, who, for a percentage of fees, will represent and market the availability of an expert witness to lawyers nationwide.

To have better success at being hired as an expert witness it's important to market yourself without seeming to do so. Avoid the appearance of being a "professional" (hired gun) expert witness. If it is obvious that you are making a career simply out of selling your experiences, then you can become tainted as a witness who offers his or her opinion to the highest bidder. The opposing side will make the point, causing some of your effectiveness and credibility to be lost and your value as an expert witness would be reduced.

However, there are three underpinnings that lead to being a successful expert witness:

- Know how much you are worth,
- Be honest; and
- Be simple.

Also, don't be afraid to charge fair value for your experience. You have worked long and hard to become an expert in your field and have something few others have and many need and want.

### Rely on Public Relations

The best way to be viewed as a potential expert witness is to be visible in the industry. Market yourself as an expert to the industry by writing articles for trade publications and by making speeches to various organizations. If your specialty is in product development and design, write about it. If you have extensive experience managing distribution, give speeches. Another way to gain exposure as an industry expert is in

the media. Few in the media really understand the insurance business. They are always looking for a credible source to help them understand the issues and to frame the story they are writing. Although compensation isn't offered, cultivating your "expert status" with the media will make your name visible to those who are willing to pay you for your experience. Setting up a Web site to showcase your articles and to list your expert witness experience is also important.

### On the Job

There is a lot more to being an expert witness than simply walking into the courtroom and offering an opinion. Testimony in a trial is the culmination of the expert's contribution to the case—not the totality. At the front-end of each case, a good deal of time is spent reading all the information relative to the case and meeting with attorneys. Keep track of the time spent on each activity and stand by your numbers. Not only will this earn you more respect, but inevitably you will be in higher demand and ultimately better paid.

Fundamental to succeeding as an expert witness is to be honest with your opinion or don't even offer it. To be respected and effective as an expert witness you must have the courage to tell the lawyers your honest opinion—not just what you think they want to hear. Taking this approach may mean that you miss an opportunity to make a few bucks, but the alternative of trying to massage your opinion to fit the situation will ultimately damage your credibility and make you persona non grata as an expert witness. Therefore, miss some

business, give up a few bucks, but be honest with the lawyers (even if they don't want to hear it) and you ultimately will be better for it.

The most important talent an expert witness can bring to a case is the ability to take complicated issues and make them simple. An expert witness is called because there is a complicated issue few people understand. The job of an expert witness is not to make insurance experts out of the judge or jury, but to help them understand the meaning of what an expert knows about insurance. Unfortunately, many expert witnesses seem to believe the job is to

educate rather than elucidate. All they end up doing is confirming the obvious—that there is a complicated issue at stake.

The insurance business is full of arcane, boring, confusing issues, with complicated benefits, obscure contract provisions, all contributing to an abyss of understanding. A person who knows all this, yet has the ability to make them all sound more like a romance novel than a manual for

assembling dirt, will have a very successful career as an expert witness. Anyone can make simple things complicated. It takes a talented communicator to make complicated things simple.

Sure, the bottom line is that the expert witness is the hired gun of insurance litigation, but such a person can impact and add real value in the reasonable resolution of insurance disputes. An individual with valid expertise in the business, a core value of honesty and the ability to communicate effectively not only can contribute to the smooth flow of the insurance concept, but also have a good time playing expert for hire. ■

