

The Role of an Expert Witness

Anders Sleight: Welcome back to the Litigators Lounge devoted to exploring timely commercial litigation topics with Offit Kurman commercial litigators. I'm Anders Sleight and joining me today is my partner, Niall McMillan. Niall, welcome back to the Lounge. How you doing?

Niall McMillan: Good to see you, Anders.

Doing well.

Anders Sleight: Good. Thanks for joining me. In today's world of litigation, we hear often a lot about expert witnesses and their role in a case or a trial. Can you shed any light on how an expert witness might help a litigation matter and move that forward?

Niall McMillan: Yeah. So the first thing's probably best to say what an expert witness is.

So in litigation we have fact witnesses and expert witnesses. Fact witnesses are basically gonna be the people telling you, from their personal knowledge, what they observed, what happened. Expert witnesses are gonna be people who the court needs to [00:01:00] explain complex technical issues, and they're gonna do that based off their own expertise, their experiences and their review and analysis of the facts of the case.

So what that could mean for something like a construction defect case. Your fact witness can tell you there's a crack in the foundation, but the expert witness is gonna tell you how that crack formed, et cetera, and what the best practices or standard of care were there. And so with expert witnesses, how we're gonna use 'em in trial.

So court's gonna issue a scheduling order, typically telling you when you have to identify your expert witnesses. However, the best time to identify those expert witnesses on your own end, if you're the plaintiff, it's before you file the case. Or start at least thinking about them as defendant. It's when you receive that complaint there 'cause that's gonna be the most important time to shape your case, your theory of the case, and to prepare them from there.

Now, generally how you would use them at court is kind of how I talked about they're gonna identify [00:02:00] either, the standard of care, and if that was breached, they're not gonna speak to the ultimate issue of if it was breached or not, but they're gonna lay out that an industry, we would do this, et cetera.

And then here observing the facts that they did not do that. Then the trier of fact can make their own inferences from there, that the breach was made, et cetera, has come up in a LLC or a company shareholder dispute. A lot of times it's going to be dispute over how the company was managed. That's usually a prudent investor or a business judgment rule analysis there. An expert witness can help speak to those facts as well.

Anders Sleight: Is an expert witness needed in every commercial or business dispute case, Niall?

Niall McMillan: No, they definitely are not. So if you have a simple breach of contract, someone didn't pay you, you don't need an expert to tell you that they didn't pay and that they should have.

However, it comes up more in the technical issues where let's say you have a very [00:03:00] complex type of contract or services that are being performed. And the issue is whether they performed that contract negligently or breached a standard of care that they should have done in performance of that contract, then an expert may come into play.

Anders Sleight: Yeah, that's important to know. Not every case is gonna require an expert, but usually if it's a highly contested case or with technical issues, you're gonna wanna bring the expert in. Who pays for the expert if there's costs related to that?

Niall McMillan: Yeah, so that's in the commercial context, that's sometimes an issue of contract.

So if you have attorney's fee in your contract, sometimes it'll say the expenses of litigation or specifically say for expert fees in there. But if it doesn't, typically that would go on to you. So you're obviously gonna pay the upfront costs in any situation of obtaining that expert.

And then it's just an issue of if your contract allows for experts to be included in that attorney's fees award. A lot of them don't. And it's something to think about too when you're drafting your contracts. If you want to include them or [00:04:00] not. It's really analysis. Sometimes, you don't want to include them 'cause it could be a little expensive if you're on the losing end.

Anders Sleight: That's good to know. I mean, a lot of contracts, will call for just the award of attorney's fees, but may not touch upon the issue of expert witnesses. And if you're looking at fees for extra witnesses that could reach into the five figures or higher, that could be significant. That's a good one, Niall.

Niall McMillan: Exactly. And typically when you need an expert witness, you're gonna need them to actually win your case or defeat your case. So just a quick plug too, is that the other side needs expert witness. You don't always need a rebuttal witness to that, but it's something to consider with your attorney. And it's also something to consider the value that the attorney brings as well is that when they have experience in this area of litigation. They typically have experience with different experts and they know who's gonna be credible to the court, who's gonna present themselves well, and that the court's gonna be able to trust and will do a good job for you.

Anders Sleight: That's great. Thanks. Niall. Yeah, important things to keep in mind if you got an expert that's [00:05:00] needed in your case.

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Niall McMillan: Thank you.

