

Discussion of Expert Witness Requirements in Your Case

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In the course of many cases, the judge or the jury will need to hear from a witness who gives an opinion on a topic and is not a fact witness. That person is referred to as an expert witness and there are things you need to be aware of about such a person.

What is the problem that must be addressed?

Clients do not always like to hire experts. They believe that they can do what is needed themselves or through the attorney or through a friend. That is usually not a correct approach and often leaves the clients very unhappy when things go against them at trial because they did not have the required testimony. To illustrate, a client will be allowed to testify as to an obvious medical condition arising from an accident, such as a broken bone, but an injury to their back as well as to prove that the medical treatment and bills were fair, reasonable and necessary, will require the opinion of a licensed physician. If such an expert is not engaged, then the client's case will fail as to that issue.

What is a fact witness and how is he different than an expert witness?

A fact witness is someone who saw something, heard something or did something. A witness to an automobile accident is a fact witness. A police officer usually does not see the accident but heard statements about it and observed the scene that followed. He too is a fact witness.

The health care provider for the injured plaintiff is a fact witness as to what injuries were observed but in many cases, he must render an opinion as to whether those injuries were the result of the accident. That opinion puts the doctor in the realm of being an expert witness.

Do you have to hire an expert witness?

Where your case requires the opinion of a contractor, health care provider, real estate appraiser, engineer or some other professional, to explain what the facts of the case mean and that knowledge is not something within the common everyday knowledge of non-professionals, then you will need to hire an expert.

The selection of an expert is usually left to the client, but often the attorney may be able to make a recommendation.

In a partnership or corporate dispute case, for example, an accountant may be needed in order to testify as to his opinion about what the company's books and records show. In a complex case involving complex record keeping, an accountant (often referred as a forensic accountant) is extremely important. Why can't the attorney simple so the analysis himself and

tell the judge what he found? The attorney is not a witness and cannot testify as to his thoughts about what the records mean – it cannot come into the case as evidence.

Unless the client is able to assemble, review and analysis the data and report his findings (which most clients are not qualified to do or are unwilling to do) then a forensic accountant is necessary and important. Without such a witness, the opinion of the client may not be admitted into evidence because he has to qualify as an expert witness.

In construction cases, often the client is the expert, but the property owner is not usually a licensed contractor and not qualified as an expert.

In real estate cases where the issue of value is involved, you will need to engage a licensed appraiser. A real estate salesperson or broker is not qualified to testify as to value in Virginia. The opinion giver must be a licensed appraiser. The owner of property is permitted to give his/her opinion as the value of their own property if they have some basis for that opinion.

Cost of expert and who pays?

The client is the person who must pay for the expert. The attorney charges for his time and is not a financier of the case. The client must understand that without the proper witnesses, there may be no case.

To illustrate. If the measure of damages in a breach of real estate sales contract is the cost to repair or the diminished market value, whichever is lower, then an expert will have to testify as to both the cost to repair as well as an expert as to the diminished market value. This is then two expert witnesses.

When must the expert be engaged?

In many jurisdictions, the rules of court require that the expert witness must be designated, and the (1) subject matter of his opinion, (2) the substance of the facts and opinion as to which the expert is expected to testify, and (3) the grounds for his/her opinions must be provided. This is usually 90-days prior to the trial date. That means if a case is set 6 months from the filing date of the suit, that the expert must be designated no later than 3-months from filing the suit. A failure to timely and properly designate the experts may result in the experts' testimony not being allowed at trial – this could prove destructive to the case.

To illustrate, if you do not have testimony as to value of realty where it is needed, or the testimony of a doctor as to what the internal injuries to the accident victim are, and that they were caused by the accident, and that the medical bills are reasonable and necessary and that the injuries will, most likely, be permanent, then that information will NOT be admitted into evidence at trial and those portions of the case affected will fail.

In the federal court system, the expert designation that must be provided is much greater detailed – which requires a greater effort to develop that information.

Conclusion

When the attorney says that an expert is needed, DO NOT DELAY in engaging one. It could mean the difference between winning and losing.