

Best Practices for Developing Effective Relationships Between Lawyers and Origin and Cause Experts



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Lawyers representing a product manufacturer against claims that the manufacturer's product started a fire rely on origin and

cause experts to put their client in the best position possible, starting at the pre-litigation claims stage and, potentially, through trial. Experts play a vital role in defending these claims, so it is key for lawyers and their clients to identify the proper experts early so that relevant evidence can be analyzed in a timely manner and the experts can advise of their hypotheses. By leveraging a qualified expert's knowledge and expertise, a lawyer can position her case to settle before substantial discovery costs accumulate, succeed on summary judgment, or have a significant advantage at trial. This article explores the interplay between attorneys and fire investigators, and identifies best practices and considerations for both parties through each stage of the investigation and defense of the claim, from the claim intake through trial.

Claim Intake

In determining who to retain as an expert in a particular matter, attorneys and their clients should anticipate that the claim will go to trial and act accordingly. After confirming an expert does not have a conflict in being retained by a particular client or firm, counsel should consider whether the expert has the appropriate qualifications for each stage of the investigation of the origin and cause of the fire. The lawyer should confirm the expert is familiar with and meets the qualifications set forth in NFPA 1033 and will conduct a fire investigation consistent with NFPA 921. Best practice is also to confirm whether the expert holds any fire investigation certifications (e.g., Certified Fire Investigator, Certified Vehicle Fire Investigator, or Certified Fire and Explosion Investigator) and any specific licenses required by the jurisdiction where the investigation will occur. For example, if an attorney is looking to retain an expert to attend the scene inspection, she must ensure that any potential expert is legally authorized to investigate the scene

of a fire in a particular jurisdiction. See NFPA 921, Ch. 12, §12.3.1 (2021 Ed.). Many states require that a fire scene investigator hold a private investigator's license or meet a statutory exception (e.g., hold a professional engineer license), and some courts may exclude an expert's testimony because the expert failed to meet such a licensing

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requirement. See, e.g., *McKeegan v. Sears, Roebuck & Company*, No. 6811, 1995 WL 527441 (8th Dist. September 7, 1995). Counsel will also want to consider the expert's level of experience relevant to the claim, research whether a court has ever excluded or limited the expert's testimony at trial, determine whether the expert has experience working with both plaintiffs and defendants, and note the frequency with which she or her firm retains the expert or her firm.

From the expert's perspective, she will similarly need to confirm that she or her firm will not have a conflict if retained. This analysis should include a consideration of whether the engagement would require the expert to take contrary positions about the safety of a product, raise concerns of any existing client related to

potential proprietary information being shared with a competitor, and whether retention in this matter will preclude the expert or her firm from pursuing other avenues of business in the future. The expert should conduct an honest assessment of whether her qualifications match the client's needs, consider any history with the client that would impact the potential engagement, and explore whether the client's expectations are consistent with what the expert can deliver. Open communication between counsel and the expert at the beginning of the engagement to identify the goals of the investigation and to set expectations for both parties as to the scope of work, budget, work product, timing, and cost is key to ensuring a successful working relationship.

COVID-19 Note: Lawyers and experts both may need to consider the geography of the loss more carefully and note whether the expert is within driving distance of the evidence and, if travel becomes an issue, determine whether an expert from a different office location or firm more local to the loss who could conduct the investigation.

Scene Inspection

A scene inspection will typically take place almost immediately after the fire occurs to put all interested parties on notice and allow them to collect data that will aid in the determination of the origin and cause of the fire. Best practice after receiving notice of a scene inspection is to retain a fire investigator to go to the scene to document the available evidence. If the client chooses to forego participating in the inspection, counsel should endeavor to obtain as much information as possible from the individuals who do attend the scene inspection, as well as the relevant first responders. Lawyers and clients should also consider whether a client representative or technician should attend the inspection to assist the fire investigator who may be unfamiliar with the product at issue or to obtain information about the claim first-hand to report to particular stakeholders. The same considerations apply to whether the lawyer should attend. It may be helpful for the attorney to attend a scene inspection to answer any questions

that may arise or learn certain information first-hand and engage any investigators or adjusters in conversations about the loss.

The lawyer should take a lead role in obtaining all information possible prior to the inspection, including identifying the specific product at issue; identifying what facts might be important considerations for a defense; confirming whether there have been previous inspections conducted without the client's presence; reviewing any documents produced by other interested parties; and confirming that the scene is safe and secured. Counsel should also consider requesting documents from the local fire department and/or police department via a Freedom of Information Act request (or state law equivalent). It may be helpful to retain a local private investigator who has a relationship with someone in the public sector to identify the appropriate personnel to whom to direct queries and facilitate the production of information. Depending on the size of the claim and the retention agreement with the expert, consider scheduling a meeting between the client and the expert so that the expert can learn about the product and ask questions prior to the inspection. Best practice would also dictate that the lawyer be in contact with the expert to identify any additional requests for information that should be answered before the inspection occurs.

Leading up to the scene inspection, counsel should communicate to the fire investigator the client's expectations, if any, as to how and to what extent the expert should participate. For example, the lawyer and fire investigator should weigh the pros and cons of the expert driving the inspection versus being a more passive observer. It may be useful to work together to create a decision matrix for the fire investigator to consult during the inspection. Counsel should also clearly communicate how and when she would like to debrief with the expert following the scene inspection. The lawyer should similarly consult the fire investigator to ensure that an appropriate protocol for the inspection is developed and circulated to all of the parties intending to participate.

The expert should be sure to identify specific information that would be helpful

to review in advance of the scene inspection and request the lawyer's assistance in obtaining it if necessary. She should endeavor to collect all publicly available information, including documents, photographs, and witness statements. While requesting such documents should be on the attorney's radar, the expert should consult with counsel to determine whether it might be more helpful if she obtains information on the loss from the public sector rather than the lawyer. If the expert has never worked for the client, it may be helpful to request an exemplar of the product to examine prior to the inspection. The expert should request to review any proposed protocol for the inspection to ensure it is consistent with NFPA 921 and offer revisions as necessary.

At the scene, the expert should interview all available witnesses and hear the claimant's theory as to how and where the fire started. The fire investigator should take photographs and prepare diagrams consistent with NFPA 921, informed by any communications with counsel regarding areas of particular interest. The expert should consider, and raise to the attorney for contemplation, whether to invite the public sector to the scene. The most helpful observations are the first observations made on the scene, including the size and location of the fire, so having access to those individuals early on may make sense.

The expert should ensure that the evidence is properly collected and document the chain of custody consistent with NFPA 921. To the extent there are any disagreements as to what evidence should be retained, the expert should consult with counsel. The expert should communicate her observations and hypotheses to the attorney consistent with any instructions provided. Best practice would be to communicate via telephone and provide written work product or photographs upon request.

COVID-19 Note: If necessary, consider whether remote attendance is practical or possible for any potential participant (fire investigator, client representative, public sector). Participants should request any COVID-19 questionnaires about health symptoms or travel prior to attendance to ensure compliance.

Evidence Exam

A key consideration for any attorney in advance of an evidence exam is whether the same expert who participated in the scene inspection should attend the lab exam. Continuity is convenient and often helpful, but one must consider the specific product at issue and the alleged failure of the same to determine whether an electrical engineer or mechanical engineer, for example, should participate if someone with those relevant qualifications did not attend the scene inspection. Similar to the scene inspection, the lawyer should consider whether a client representative or technician would be helpful to have present at the lab exam. This would be particularly helpful to the case if it is the first or one of a few claims involving a specific product so the client can gather as much information about the claim and alleged failure or defect as possible. The lawyer should also contemplate whether her attendance would be beneficial, though this is most often a decision to be made by the client. If the lawyer is not familiar with the product, it would be helpful for the lawyer to see the product with her own eyes and have the ability to privately discuss the expert's obligations to ensure she understands rather than relying on phone calls and photographs.

The lawyer should be sure to communicate her expectations or those of her client regarding when and how the expert should communicate her opinions following the lab exam. The lawyer should similarly consult the fire investigator to ensure that an appropriate protocol for the exam is developed and circulated to all of the parties intending to participate. Be sure to confirm all interested parties have been put on notice and that the parties agree whether the lab exam will be destructive or non-destructive in nature. The expert should confirm that all necessary equipment is available to conduct the actions identified in the protocol and, if not, suggest contracting with a local lab (*e.g.*, for microscopy or additional testing).

Prior to the exam, the expert should identify and discuss goals with the attorney and/or client. The expert should consider asking whether an exemplar product is available for analysis prior to the lab

exam so that she can become familiar with any component parts and how the product is supposed to look and operate. An exemplar comparison after the lab exam may also be helpful to highlight any differences from the subject product. The expert should also speak up if it would be helpful to have a technical representative from the client present for the exam, particularly if the product at issue is complicated. The expert may also consider recommending inviting the public sector to the exam if she thinks it would be helpful. The expert should identify the pros and cons of quietly observing the exam versus driving it forward, and decide in advance whether the expert should educate other experts and/or party representatives in attendance. It is also helpful for the expert to identify in advance of the lab exam how she should handle any decisions on whether to proceed with the exam or suspend it to put another later-identified party on notice.

COVID-19 Note: Consider remote attendance if necessary and work to develop a protocol that would allow all interested parties to observe the exam and provide direction if desired; participants should request any COVID-19 questionnaires about health symptoms or travel prior to attendance to ensure compliance.

Litigation

Lawyers should endeavor to take advantage of their experts' expertise at the beginning of litigation to start developing the defenses and themes for the case, or to support a recommendation to the client that early resolution might be best. Early involvement of the expert can identify potential holes in the client's defense that convince counsel and her client to either concede liability or engage opposing counsel in settlement talks before the client incurs significant defense costs. The expert can also be key to preparing effective discovery requests—if certain information that would assist the expert in developing her theory of the case and/or ruling out certain hypotheses was not available at the scene inspection or lab exam, the lawyer should be sure to include requests for that information early in the case.

The lawyer and expert should continue to communicate regarding expectations,

including budgetary concerns and deadlines. Best practice would be to ensure that the lawyer sends the expert scheduling orders and any amendments thereto in a timely fashion and follow up with the expert as the litigation continues to confirm the expert has received all relevant information available and that the report will be completed on time. Be sure to provide the pleadings, written discovery, documents produced by the opposing party, deposition transcripts and exhibits, and any client documents produced. Keeping in

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mind that certain communications may be discoverable, the lawyer should endeavor to assist the expert in her review by identifying key transcripts or documents for review.

When it comes time for depositions and trial, the lawyer should make adequate time to assist the expert in preparing. The expert may have her own process for preparing for deposition, so the lawyer should ask what would be the most helpful in that regard. The lawyer should be able to provide insight into the temperament of opposing counsel, preview the types of questions the expert should expect, clarify with the expert the scope and limits of her investigation, and identify the limits of the expert's expertise. The lawyer and expert should review the expert's CV and

the content of the expert's file for the matter (which will likely be produced to the other side).

Counsel should remind the expert that *Daubert* challenges are commonplace but be sure to go over the expert's qualifications and methodology, and analyze the fit of the expert's opinion(s) to the facts of the case to preempt any real challenge to the expert and her testimony on those bases. On the other hand, the expert may be able to provide helpful insight to counsel in preparing her cross-examination of the opposing expert(s) and *Daubert* motions to limit or exclude the testimony of that expert. To the extent any *Daubert* motions are filed challenging your retained expert, counsel should inform the expert and work cooperatively with any additional parties (e.g., counsel for the expert firm) to oppose the same.

The lawyer should work with the expert to develop compelling exhibits to illustrate the origin and cause investigation. Contemplate any animation features to illustrate the origin and spread of the fire, and consider asking the expert to reference an exemplar product to demonstrate her command of how the product functions to lend additional credibility to her origin and cause hypotheses.

COVID-19 Note: Be sure to notify experts of all changes to trial dates and anticipated dates of testimony, as well any courtroom restrictions; with trial delays, it may also be necessary to address access to and storage of evidence.

Conclusion

The relationship between counsel and an expert is critical to developing an effective defense for the client. Open communication between both parties about expectations and fact-gathering efforts allow the lawyer to feel comfortable that the expert conducted scientifically sound examinations of the evidence and to evaluate the case for early resolution, summary judgment, or success at trial.

Many thanks to Trey Morrison (Exponent), Suzy Smyth (Tesla), and June Bott (Jensen Hughes) for their contributions to identifying best practices from the perspective of the origin and cause experts.