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ROUND TABLE: SELECTING THE RIGHT LITIGATION SUPPORT PROFESSIONAL

Forensic Accounting and Litigation Support Cases
essentially cross-examined by the mediator.

We did the same thing in a case involving a utility client. We hired a mediator who was very knowledgeable in utility matters and valuations, and then each side presented their proposals. I think having your expert talk directly to a person who really understands the basis for the opinions may be the most efficient and effective way of dealing with disputes of that kind.

JUDY KORCHIN: In the situation where each side is presenting a position on the amount of damages to a mediator, is that person going to be like a judge, and provide his opinion on the correct amount of damages or the correct valuation?

DAVIS: Well, the person is mediating, not adjudicating. But the benefit of the process is that after listening to both sides, the mediator can say to both parties, these are the flaws in your theories and the weaknesses in your case. In the most recent instances, the cases settled at that point. That’s how it worked.

NEAL SONNETT: I would like to ask a question to the accountants. What portion of your practice is consulting for expert forensic testimony and what portion is without the expectation of testimonies? And in what ways, if any, does that affect your approach to the case and the way you work with the lawyer?

FOODMAN: For the last 20 or 30 years of my forensic practice has been geared towards my forensic testimony. More recently, I’ve been doing more consulting without necessarily testifying. But I still behave in the same way. I must still provide an objective opinion based on what I see in the documents. I have to maintain my independence, even when I’m not testifying, because if I don’t, I could mislead the attorney or create misleading expectations with respect to the client. So from my perspective, I tend to work the same way and be as objective as I can to avoid any misleading expectations, conclusions or assumptions based upon an emotional involvement with the case.

USING EXPERT WITNESSES IN A RESORT LITIGATION CASE

As a board-certified civil trial lawyer, John Leighton uses many different types of expert witnesses in his cases. “I bring in consulting experts at an early stage to educate me and help me navigate through the issues in the case,” said Leighton, principal, Leighton Law, P.A., Miami, and a South Florida Legal Guide Top Attorney.

In fact, Leighton used seven experts – plus consulting physicians – in a 2007 case involving an individual who suffered a brain injury while taking part in a water sports activity as a guest at a U.S. resort.

Because the company providing the water activity was not the resort itself, Leighton brought in an expert with experience in the hotel and resort management industry to talk about the connections between the operator and the resort. “He discussed how the resort promoted this activity, and benefitted – financially and otherwise – from offering water sports,” Leighton said. “We also found that the employees of the water sports operator were essentially treated as if they were employees of the hotel.”

That expert played a role in addressing the issue of apparent agency, Leighton added. “We showed that guest or customer would have reason to believe that this business was part of the resort and would rely on the fact that the resort was promoting it on the property.”

A second expert testified on standards of care in the water sports field: what would be taking reasonable care of a customer and what should not be done, Leighton said. A third expert focused on the technical aspects of the water sports activity. “We found that the equipment performed incorrectly and was defective,” he said.

A fourth expert was a meteorologist, who was brought in to explain the weather conditions at the resort on the day and time of the incident.

“We also had to document the future medical care that would be required for the injured guest, so we needed an expert on a life care plan,” Leighton said. “We also had a vocational rehabilitation expert to discuss possible training and retraining options, and an economist to analyze future economic damages.”

But despite engaging a multitude of experts, Leighton and his investigator went to the resort and spent time on the site observing operations. “I have found there is no substitute for going to the scene,” he said. “You have to be able to visualize it yourself if you want to draw a clear picture for the jury.”

When Leighton needs an expert for a new case, he first reviews his contacts from lecturing and involvement in trade organizations. “Then, I will ask other trial lawyers around the country through various legal groups,” Leighton said. “Then, I look for the top people in a given field, such as the president or officer in a trade association.” He also checks to see if the expert has lectured or published articles or papers on relevant topics. “Finally, I do online checks to see if they have testified in this area and if they know the field.”

In Florida cases, Leighton generally does not have experts prepare written reports because they are not required. “It’s important to remind the experts at the outset that anything in writing is discoverable,” he said.

Finally, Leighton looks for an expert who is an educator – someone who can teach a jury about a complicated topic. “Whoever you have as an expert has to communicate their opinions in a way the jury can understand,” he said. “They absolutely have to be able to convey complex concepts in a simple way.”