THE ROLE OF THE EXPERT IN ENVIRONMENTAL INSURANCE COVERAGE LITIGATION

William E. Simpson, CPA

*Thomas M. Neches, CPA

*Partner, Coopers & Lybrand

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Hazardous waste is produced in the United States at the rate of 700,000 tons per day, or approximately a ton per year for each person in the United States. As a result, in 1980 the Federal Government enacted the Comprehensive Environmental Response, Compensation and Liability Act, commonly known as Superfund. This act established a $1.6 billion Hazardous Substance Response Trust Fund to pay for the cleanup of abandoned or uncontrolled hazardous waste sites. The Superfund Amendments and Reauthorization Act of 1986 reauthorized the Superfund program for five years and funding to $8.5 billion.

The U.S. Environmental Protection Agency ("EPA"), which has the primary responsibility for managing the cleanup and enforcement activities under Superfund, has identified approximately 27,000 hazardous waste sites. Only a small percentage of these sites have been or are in the process of being cleaned up. Cleaning up a site can easily cost millions of dollars, and many companies face huge potential liability at sites nationwide.

Due to the magnitude of the environmental problems, Superfund litigation is proliferating. The Government is suing waste site owners and operators, waste producers and waste transporters, commonly known as potential responsible parties ("PRPs"), for reimbursement of costs expended by the Government in site cleanup and enforcement activities. The Government also seeks court orders compelling PRPs to implement Government-selected site

cleanup remedies. PRPs are suing each other over cost contributions to fund the cleanups and are suing the Government to recoup costs incurred in cleanup efforts. PRPs are seeking court approval to implement remedial solutions. Individuals and nearby property owners are suing PRPs for personal injury and property damage related to hazardous waste sites.

To no surprise, PRPs have turned to their insurance carriers to foot the bill. In turn, carriers have claimed in many instances that they are not liable under comprehensive general liability ("CGL") policies for government-mandated costs incurred for the clean-up of hazardous wastes. As a result, one of the most hotly litigated issues today is the extent of responsibility of insurance carriers to pay for liabilities or response costs incurred under Superfund and state statutes.

It remains difficult to predict the outcome of the coverage issue. State statutes and case law vary among states, and state supreme courts have yet to provide definitive guidelines on many of the key issues. Court decisions have been split, although it appears that the majority of courts have ruled in favor of policyholders that carriers are liable for environmental clean-up costs.

Whether the dispute is between the PRP and the insurance carrier, the PRP and the Government or other parties involved in the litigation, the costs of the clean-up, both incurred and anticipated, are sure to be central to the dispute. Assistance offered by certified public accountants ("CPAs") and other financial experts can provide enormous benefits to the client, not only in determining clean-up costs, but in controlling and mitigating the costs. CPAs will also act as expert witnesses in trial or other proceedings.

The remainder of this paper discusses the use of CPAs and other experts in environmental litigation. For the purposes of this paper it is assumed that clean-up costs are "damages" under CGL policies. The next section discusses the use of experts in the general context of insurance litigation. This is followed by discussions of specific services CPAs can offer in determining and controlling clean-up costs. The paper concludes with several observations on how to work effectively with experts in major environmental litigations involving multiple parties.

USE OF EXPERTS -- GENERAL

Major insurance litigation frequently boils down to a battle of experts. The side with the better experts -- more thorough, better prepared, more credible, more convincing -- is likely to prevail. The more complex the case, the more vital experts become: law firms do not maintain a staff of consultants, CPA and other experts with the depth and breadth of experience to evaluate all the business, technical, financial and economic aspects of a case. Similarly, law firms' clients do not have the resources to support major litigation without risking serious impairment to on-going operations.

An expert is an individual with "...special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates."[1] Attorneys rely on experts to assist in all phases of litigation. Experts provide knowledge of the industry and its terminology. They assist in drafting or responding to complaints, interrogatories and requests for documents. They perform

investigations, verify and discover information, reconstruct transactions, determine values, calculate damages, render opinions and testify as expert witnesses.

This section discusses the use of experts in major insurance litigation. Because of the universal need in these cases, the discussion emphasizes accounting and analytical assistance provided by CPAs and other business experts. This is the most common type of expert assistance utilized in insurance litigation. However, most of the concepts discussed apply to the use of all types of experts, including scientific, technological and medical experts.

Selecting an Expert

An attorney may have the choice of using an expert from the client's organization or an independent expert. Compared to an outside expert, an in-house expert may be more knowledgeable about the client's operations and the particular issues of the case and may appear to be less costly for the client. On the other hand, the in-house expert will appear to have a personal stake in the outcome of the litigation. His or her objectivity and credibility will no doubt be called into question. Further, it is not cost-effective ordinarily for an expert who has responsibility for the client's on-going operations to be tied up to the extent required in litigation.

In most cases the use of an independent expert is preferable. Sources of experts include officers or employees of other firms in the same industry, college and university professors, and representatives from research organizations, accounting firms and consulting firms. Each source has advantages and disadvantages.

Industry experts may possess detailed business and technical knowledge essential to the case, but competitive considerations may mar their testimony. College professors and researchers have an air of academic authority and independence, but often they are unfamiliar with the practical business aspects of an organization and the key issues of the litigation. An accounting or consulting professional, especially one who specializes in litigation assistance, may be best suited to perform the analyses and provide competent testimony. However, he or she may be expensive and may appear to be a "hired gun" or "professional witness."

The personal characteristics of the expert, which determine to a large degree whether he or she will be a credible and effective witness, should be paramount in selecting the expert. The expert should possess excellent credentials, of course. But a long list of academic honors or professional qualifications will not prevail in court if the expert appears arrogant, indecisive, unorganized, inarticulate or frightened. The expert witness must have good courtroom demeanor and a professional appearance. He or she must possess the ability to articulate positions precisely and concisely in clear and simple language. In addition, the expert must be able to stay calm under pressure.

Natural abilities may make an expert good, but the expert's capabilities are enhanced through practice. For this reason trial attorneys prefer experienced expert witnesses. A trial attorney is better served by an expert with outstanding courtroom presentation skills than an expert with better credentials but a poor courtroom manner.

Assistance in Drafting or Responding to Complaints, Interrogatories and Requests for Documents

Experts can assist in fashioning detailed allegations that make complaints motion-proof. An accounting expert can identify specific items presented in financial and accounting records which are beneficial to the case. This can prompt early settlement or avoid the dismissal of an otherwise solid claim.

A CPA can help ensure that appropriate documents are sought and that they are requested in the correct nomenclature. An expert familiar with an industry can suggest sources of information which may not have occurred to the attorneys. In addition, the expert can review the opposition's document production.

Lawyers should not turn over documents without knowing what they contain and how they may affect the case. A CPA can assist by advising lawyers about the contents of financial documents and any other business records. The CPA can also help the attorney narrow document requests and can provide another opinion about the potential jeopardy to a litigant because of the materials. If damaging documents are identified, a timely settlement offer can be made before the case deteriorates.

The expert can be invaluable in reviewing the opposition's document production. An expert may identify missing material which should have been produced by the opposition. For example, the absence of supporting schedules or a memorandum file may be obvious to the CPA, but not to the lawyer.

The accounting expert also can assist in preparing and responding to interrogatories. When the opposition's document production does not provide the information the expert needs to

complete the analysis, a specific interrogatory drafted by the expert is often the most efficient method to obtain the necessary data. Expert assistance is often essential to respond to interrogatories involving complex accounting or business issues.

Deposition Testimony and Assistance

A lawyer should not take the deposition of the opposition's expert without expert assistance. The depositions of certain fact witnesses, such as a financial vice president or controller, may be more thorough when taken with the assistance of an expert accountant. Financial officers and employees of a company can be interrogated more effectively with precise questions using the correct technical language and terms of art. The expert may also help to prepare witnesses for depositions. The skepticism and expertise of an accountant can help to prepare a witness by probing vulnerable areas and anticipating questions that may cause the witness the greatest discomfort and the lawyer's case the most adverse result.

Case Management

Major litigation cases may tax the resources of even the largest law firm. Case management often can be accomplished more cost- and time-effectively by litigation experts, freeing the attorneys to focus on legal rather than on administrative issues. Experts can assist litigators by:

- Establishing procedures to track and control document discovery
- Managing and staffing discovery sites

- Recommending and implementing document indexing and computer support systems
- Developing and tracking case plans and budgets.

Damage Claims Preparation and Analysis

Expert assistance is essential in dealing with the complex analytical issues which may arise in preparing or analyzing damage claims. A good technical analysis alone does not necessarily translate into a winning presentation in court, however. Discussed below are several principles which have been applied successfully in developing damage claims and assisting the expert in cross-examination.

Use of Assumptions and Estimates

Preparing damage claims requires the use of assumptions and estimates. Typical and basic assumptions and estimates which play a major role in the calculated damage amount include the methodology chosen to project activity, how far into the future damages are calculated, the factor used to discount damages to present value, and assumptions concerning pricing and expenses.

The use of estimates and assumptions is valid in court. Courts have ruled consistently that a litigant cannot be denied compensation for losses merely because the damages cannot be quantified precisely.[2] Damages may be awarded based on reasonable assumptions. However, the expert witness can expect a vigorous attack on these assumptions.

It is important for the damage expert to distinguish clearly between assumptions resulting from uncertainty concerning the

amount of damages as opposed to the occurrence of damages, particularly when calculating future damages.[3] A mere contingency will not support a claim for damages.

If alternative assumptions are equally probable and reasonable, the attorney may ask the expert to provide the judge or jury with a range of damage amounts, together with the expert's best estimate. This provides the trier of fact with additional information which may be used to pick an alternative damage amount when, for whatever reason, the trier of fact does not accept a testified-to damage amount.

Principle of Conservatism

Experts developing damage claims often combine a series of assumptions favorable to the client's position to reach an unrealistically high (or low) damage amount. This type of overreaching can be self-defeating. For example, the credibility of an inflated damage calculation may be undermined easily, simply by adjusting certain assumptions within a reasonable range, so that one can arrive at a dramatically different damage amount. Similarly, the credibility of a strong damage claim may be hurt when it is accompanied by additional claims for tangential and speculative damages.

The attorney must work with the accounting expert to make sure the damage analysis avoids overreaching and speculative claims. A conservative, fully documented analysis better serves the litigant.

Flexibility and Responsiveness

Decisions by the court during the course of trial may require

rapid recalculation of the damage amount. For example, the judge may rule on the damage period or categories of damages allowed. The expert must be able to respond as the facts of the case shift. Use of computerized damages schedules capable of rapid adjustment is perhaps the best method to deal with fact changes. When this is not practicable, the expert should prepare alternative approaches based on anticipated decisions of the court.

Substantiation of Damage Testimony

When testifying to very simple -- or very complex -- damage issues, there is a temptation simply to state a final damage figure without explaining the calculations which led up to this value. This can be a grave error, as courts have repeatedly denied such damage estimates as speculative or uncertain.[4] On the other hand, a lengthy, technical dissertation by the witness, discussing every detail of the damage analysis, is more likely to bore than inform the judge or jury. The plaintiff or the plaintiff's expert is more likely to fall into this error than an independent expert.

An effective damage presentation may be the following: state the final damage amount (or range of amounts) and provide a brief explanation of the overall approach used to calculate the damage amount. In more complex cases, a further discussion of issues raised in the overall explanation may be necessary. Frequently, the damage expert would need to testify on damages in direct examination for less than one hour.

Although the damage expert may not discuss all the details of his or her damage calculation on direct examination, he or she

must be able to respond quickly to cross-examination concerning any portion of the analysis. The expert also must be able to produce any business records on which his or her testimony is based.[5] To accomplish this, all damage calculations and supporting documentation should be organized in cross-referenced working papers. An effective format for working papers is a hierarchical structure in which the main results are broken down into a series of subsidiary calculations, each in turn supported by further calculations and original source documentation. Cross-referencing each level of the calculations helps to assure the overall integrity of the damage calculation and eliminate errors and inconsistencies which undermine the overall credibility of the calculation.

Forensic Accounting

Broadly speaking, forensic accounting, also called investigatory accounting, is any accounting activity for use in a court of law. Forensic accounting can be the acquisition, reconstruction, review and analysis of the books and records of an entity, and the development evidentiary materials. In this sense, damage claims preparation and analysis, discussed above, is forensic accounting.

Differences Between Forensic Accountants and Traditional Accountants

Although many of the tasks of the forensic accountant appear similar to those of the traditional accountant or auditor, there are significant differences. Unlike the traditional CPA, who typically reviews well-documented audit trails, the forensic

accountant must work with the sketchy, inaccurate or even deliberately falsified information often encountered in litigation. Frequently, the accountant must develop missing information based on reasonable assumptions or on analytical techniques applied to the information available. The forensic accountant must apply creativity and perseverance to reconstruct transactions and records of an entity.

Typically, the forensic accountant must begin with only a general idea of the objectives while facing tremendous numbers of records and documents. Often faced with strict time constraints, the forensic CPA must work quickly to obtain an overview of the relevancy of the documents and proceed to formulate a strategy. Although attorneys usually have reviewed at least some of the documents prior to retaining the forensic accountant, they rely on the accountant's greater familiarity with financial and accounting documents to guide the process of selection of documents for review.

For example, in insurance litigation involving a multi-million dollar entity, the litigation team may have access to thousands or even millions of documents. The accountant may first obtain a quick understanding of the entity and its history by arraying five to ten years of historical profit and loss statements. This in turn may lead to areas requiring further investigation.

Finally, forensic accountants are familiar with the legal system and comfortable working within it. They understand the laws pertaining to discovery and the presentation of opinions in court. They are familiar with, and may even relish, the rigors of cross-examination, an experience the typical accountant can fairly be said to dread.

Advantages of Using Forensic Accountants

Forensic accountants and their staffs typically are better equipped to review large numbers of records than are litigators and their staffs. Because of their greater familiarity with financial and accounting records, the forensic CPA is in a better position to detect and extract critical information from the records. For example, faced with a large stack of computer printouts from a general ledger, the forensic accountant could quickly identify critical accounts and enter monthly subtotals into a worksheet to identify trends. Forensic accountants at major CPA firms can marshal enormous resources when needed to perform large tasks in a short time. In one litigation, for example, in a two-month period nearly 40,000 hours of special audit work was performed in twenty-one cities around the country to meet a tight deadline. Finally, because the investigatory tasks would be performed by staff personnel under the direction and supervision of the forensic accountant, the CPA is in a position to testify as to his or her findings.

Techniques of Forensic Accounting

The forensic accountant may apply a variety of techniques to perform the analysis. These techniques, which encompass a broad spectrum of accounting and general knowledge, can be adapted strategically to strengthen the case. Forensic accounting techniques include:

- o Audits
- o Reviews
- o Agreed-Upon Procedures
- o Investigation

- o Inspection
- o Observation
- o Interviews
- o Sampling
- o Comparison.

In addition to these techniques, which are associated with traditional accounting and auditing, the forensic accountant will rely on the work of other specialists in performing certain technical analyses (e.g., statistical analyses, valuations, cost and price analyses, or economic analyses).

The Accountant as Expert Witness

The courts have uniformly accepted the accountant, in particular the certified public accountant, as an expert.[6] Trial attorneys, however, have considered the accountant to be a poor expert witness. This perception is often justified. Accountants often seem unable to avoid the use of arcane terminology and detailed qualifications to explain accounting issues. This may make a bad impression on the judge or jury. After all, accounting deals with numbers, and it would seem reasonable to expect a decision based on numbers to be clear, precise, and unqualified.

Accountants are not entirely at fault, however. Often the issues facing accountants are not simple. Most laypersons do not understand the large role that subjective judgment and assumptions play in the development of accounting and financial statements. An example of the role of judgment in what at first appears to be a simple arithmetical task is valuing inventory. If the costs of supplies and manufacturing are known, the value of the product would seem easy to calculate. But which value

should be used, cost or market? It cost is used, then is historical or replacement cost appropriate? If historical cost is chosen, then what method should be used to compute historical cost: last-in-first-out, first-in-last-out, or some other cost method? If market value is used, should it be based on normal selling price or liquidation selling price? Should the cost to complete the inventory and selling cost be included? The expert witness testifying to the value of inventory clearly has to do more than add up columns of numbers. He or she must make difficult accounting decisions and explain them to the judge or jury.

For their part, in presenting complex issues in court, accountants often take for granted that the judge or jury understands accounting principles and terminology. Accountants may use technical terms without explaining them adequately, and may dwell on subsidiary issues of minor importance in their overall conclusions. This is a frequent problem among accountants, most of whom spend their time working with other financial professionals. Most accountants are more comfortable with the familiar role of practicing their craft than with the often more difficult task of explaining it to non-accountants by testifying in a trial.

Many accountants make excellent witnesses. As is true with most technical subjects, accounting transactions can be explained in terms understandable to judges and jurors who have no technical background in accounting. The attorney should retain the accountant who says, "They bought the tractor with a cash down payment and borrowed the rest," instead of, "The acquisition of the farming machinery resulted in a debit to fixed assets and credits to cash and notes payable."

Other Trial Assistance

In addition to providing his or her own testimony, the accounting expert should be present for the testimony of the opponent's expert. In addition, it may be wise to have a CPA present during the testimony of business-related fact witnesses on both sides. The CPA can provide a specialized audience whose critical and objective comments may be most helpful, if not crucial. During trial the expert should also prepare for rebuttal testimony, if needed, and review relevant testimony for aspects useful in post-trial motions and potential appeals.

USE OF EXPERTS -- SUPERFUND LITIGATION

Having discussed in a general context how CPAs can assist attorneys involved in litigation, we turn now to several specific services CPAs can provide to parties involved in Superfund litigation. These services are categorized into three areas:

- o Analysis of incurred cost claims
- o Economic review of alternative remedial cost estimates
- o Other expert assistance.

Analysis of Incurred Cost Claims

In an incurred cost claim, the Government seeks reimbursement from PRPs for funds expended by the EPA in Superfund site cleanup efforts as well as funds expended by the EPA and the U.S. Department of Justice ("DOJ") in enforcement activities. In addition to actual cleanup costs, the Government and its contractors and subcontractors may incur and seek reimbursement for substantial costs in preremedial activities, including costs to secure the site, costs to determine the nature and level of

contaminants and costs to perform feasibility studies prior to selection of a cleanup remedy. PRPs in Superfund cases are both challenging the Government's incurred costs and turning to their insurance carriers to foot the bill. Expert assistance is essential to analyze the Government's incurred costs and can reduce the dollar amount of the incurred cost claims. Further, because the Government may delay the filing of claims until millions of dollars have been expended at a particular site, it is wise to retain an expert to monitor and control costs as soon as significant site costs are incurred by the Government.

Examples of three incurred cost issues which may require expert assistance are discussed below.

Appropriateness of Indirect Costs Allocated to a Particular Site

The EPA, DOJ and each of their contractors and subcontractors allocate their indirect costs to individual sites, each using a different cost allocation method. The method utilized currently by the EPA allocates indirect costs (including both regional and headquarters costs) based on direct labor hours incurred at individual sites by regional EPA personnel. Under this method, which has been in effect since 1983, the EPA's annual indirect cost rates have ranged from $47 to $71 per regional direct labor hour. Thus, a significant portion of the Government's incurred costs is comprised of EPA indirect costs. This allocation method, as well as its application to a particular site, should be analyzed to determine whether the inclusion of certain costs is appropriate and whether the mathematical computation of this cost component is accurate.

The indirect cost allocation method utilized currently by the

DOJ follows the basic theory underlying the EPA methodology, although there are differences between the two methods. DOJ's indirect costs also should be analyzed to determine if the computations are mathematically accurate and if indirect costs are allocated appropriately.

The majority of goods and services contracted for by the EPA and the DOJ for Superfund include indirect cost components. Each significant contractor's indirect cost computation should be reviewed to determine whether it complies with Government cost accounting standards and whether the appropriate indirect costs and rates for each contractor have been reflected correctly in the Government's incurred costs.

Adequacy of Incurred Cost Documentation

The EPA typically prepares a summary cost documentation package to support its incurred cost claim for a particular site. A typical package would include a summary page of expenditures by cost component and detailed information for each cost component. A sample listing of the components of Government incurred costs includes the following:

- o EPA Payroll Costs
- o EPA Indirect Costs
- o EPA Travel Costs
- o Other EPA Costs
- o EPA Contractor/Subcontractor Costs
  - oo Remedial Planning Contracts
  - oo Field Investigation Contracts
  - oo Technical Assistance Contracts
  - oo Contract Lab Program

- oo Enforcement Investigation Contracts
- o Interagency Agreement Costs
  - oo Department of the Interior
  - oo Department of Justice
    - Direct Costs
    - Indirect Costs
    - Contractor/Subcontractor
  - oo Other Federal Government Agencies
- o State Cooperative Agreement Costs

During the discovery process the Government usually provides additional detailed documentation supporting its incurred cost claim. This cost documentation should be analyzed to determine whether it is adequate to support the Government's cost claim. The EPA has contracted with several companies to perform cleanup procedures at numerous Superfund sites throughout the United States. Typically, the Government pays these contractors based on a single monthly invoice for work at all sites. A contractor's determination of the proportion of a nationwide invoice applicable to a given site should be analyzed for propriety.

Excess Costs Resulting from Multiple Layers of Contractors and Subcontractors

It is common practice for the EPA to engage a contractor, who engages a subcontractor, who engages another subcontractor and so on, each of whom performs portions of the site work. Due to the typical structure of Government cost-based contracts, these multiple layers of contractors and subcontractors involved in the performance of various site cleanup procedures may result in

unreasonbly high charges. An analysis of the extent and cost effect of layering may be beneficial.

Economic Review of Alternative Remedial Cost Estimates

Government and PRP environmental engineers may each prepare a proposed remedial solution for site cleanup. Frequently, the Government's proposed remedial solution varies greatly in approach and estimated cost from the solution proposed by the PRP. Proposed remedies typically involve cleanup actions over several years, and the associated cost estimates are based on numerous assumptions. PRPs are more likely to prevail with the Government when they can demonstrate that their approach costs less while achieving the same environmental quality cleanup objectives.

In negotiating or litigating with the Government or insurance carriers over alternative cleanup remedies, expert accounting assistance is essential. Assistance in the analysis of remedial solutions proposed by the Government and PRPs includes the following procedures:

- o Review of the cost estimates prepared by the engineers and comparison of these estimates to available industry standard costs and quotes obtained independently from contractors
- o Verification of the mathematical accuracy of the cost estimate calculations
- o Comparison of the cost estimates of the various recommended remedial solutions using financial modeling techniques

- Comparison of the EPA estimated cost with EPA cost estimates for similar remedial solutions at other sites
- Comparison of EPA cost estimates with actual costs incurred for similar recommended remedial solutions at other sites.

These procedures result in expert conclusions regarding the accuracy and reasonableness of the estimated costs of the remedial solutions proposed by the Government and the PRPs.

Other Expert Assistance

Accounting experts also can provide a variety of other services related to Superfund litigation. These services include the following:

- Establishment of an accounting control system to record costs incurred by PRPs for the dual purposes of: (1) substantiating cleanup and other response costs for assessment to PRPs based on their varying degrees of responsibility at a particular site and (2) filing claims against the Government for reimbursement of excess costs incurred as a result of government actions
- Determination, for use in insurance claims, of the total incurred costs and future liabilities for site cleanups
- Establishment and periodic review of accounting and financial controls over the proposed cleanup procedures to be undertaken at a given site, including systems to allocate the related costs in the manner prescribed by the settlement agreement among the PRPs and the Government
- Analysis of personal injury and property damage claims related to hazardous waste sites to assess their reasonableness
- Expert testimony concerning findings and conclusions.

WORKING EFFECTIVELY WITH EXPERTS IN ENVIRONMENTAL AND OTHER LITIGATIONS

Bring Experts in Early

Often attorneys delay bringing in an expert until only weeks or even days before trial. The result of such last-minute calls is often extra effort and cost as well as a weakened ability to present an effective case. The expert may have to redo work already performed by the attorney or the attorney's client because the expert must be able to testify as to his or her independent analysis of the facts. Experts brought in after the close of discovery may find the credibility of their analyses undermined because important information is not available to them -- information which could have been obtained readily if an expert had been available to point out its significance earlier.

Both attorney and client benefit by bringing in experts early. On a cost basis alone the expert's ability to help attorneys avoid unnecessary discovery by pinpointing key documents justifies early involvement.

Work in Concert on Strategy and Approach

The expert and the attorney must work together to develop the expert's testimony. The good expert witness makes it clear, albeit diplomatically, that he or she will not simply say what the lawyer wants the witness to say. The attorney must take care not to impose his or her preconceptions on the expert. Initially, in complex litigations, the attorney will be far more familiar with the facts of the case than is the expert. However, the attorney often has only an incomplete understanding of what the expert potentially could do to assist in the litigation. The

attorney should solicit the expert's advice concerning the tasks the expert will perform. At the same time, the expert must be guided by the attorney, who is responsible for presenting the case.

Preliminary Analysis of Damages

In even the most complicated case, a good expert can develop a rough estimate of damages in a matter of days. This analysis can be refined as further information becomes available. Developing a preliminary damage estimate as soon as possible in a litigation offers several advantages to the client. First, it helps determine the appropriate level of further effort. If the exposure or potential is lower than first thought, a more detailed damage analysis may not be cost effective. This information can be extremely useful in settlement negotiations. Second, the preliminary analysis may reveal that further discovery is needed.

A third advantage of developing a preliminary analysis and subsequent updates is that they provide the accounting expert with a basis to testify to his or her findings even if time or budget constraints do not allow the expert to finish every aspect of the analysis. This safeguards against the possibility (indeed, a real danger in large litigations involving numerous documents) that the expert will run up large fees while collecting, organizing and analyzing the data without reaching any opinions.

Establish and Monitor a Budget

A famous lawyer was once asked, "How much will this case cost

to litigate?" His answer was, "Everything you've got." Experts rarely are, or should be, in a position to treat budgets so cavalierly. Insurers take a dim view of exploded budgets for experts, and they respond by refusing to pay the fees of the experts and the attorneys who hired them. Estimated budgets can and should be developed for any litigation task. Attorneys and insurers should be informed before budgets are exceeded so they may react appropriately, either by authorizing further expenditures or by scaling back the expert's scope of work. Doing this helps protect both the expert and the client against disputes concerning fees. In major litigations, when budgets take a second seat to frantic efforts to meet deadlines, the client and the insurance company should be kept informed on a very frequent basis of fees incurred.

Confer Frequently

The attorney must be informed of the progress the expert is making, both in terms of the analysis and fees being incurred. Experience shows the experts often must take the initiative to contact the attorneys to let them know what they have accomplished and what they intend to do next. When dealing with experts, many attorneys seem to take the attitude that no news is good news, and they may be unpleasantly surprised when the expert's findings or fees were not as expected. Similarly, when using multiple experts, for example, a marketing expert, an accountant and an appraiser, information must be shared. Lack of communication during preparation of the case can lead to disaster in the courtroom.

Establish a Primary Contact for the Expert

Major insurance litigations often involve multiple attorneys and law firms representing different parties in the case. To save costs, several parties may agree to share the services of an expert. Because the interests of parties in litigation rarely converge exactly, the expert may be pulled in conflicting directions. To avoid this potential problem, the litigants should establish one attorney as the primary contact to whom the expert reports and from whom the expert receives his or her instructions. This attorney also should be responsible for making sure the experts are provided with the resources (e.g., documents and access to individuals) they need to accomplish their tasks. Often this role is delegated to a more junior attorney involved in the litigation. A better choice is the litigator who will examine the expert on the witness stand.

Understand the Rules Governing Discovery of Expert Opinions

Both experts and attorneys should be familiar with the work product doctrine and attorney-client privilege as they relate to the discovery of expert opinions. The laws can differ among states and from the federal rules of evidence. Generally speaking, observations and opinions of an expert employed as a pre-trial consultant rather than a potential witness are deemed work product of the attorney and are protected from discovery.[7] Once an expert is employed to testify at trial, however, his or her opinions are relevant evidence and generally are not protected by the work product doctrine.[8]

The laws can be complex, and misunderstandings may have

important consequences in a litigation. For example, an expert's examination and analysis of confidential client documents may be privileged, but certain types of direct testimony may constitute a waiver of the privilege and enable the adverse party to cross-examine the expert on the subject of the privileged information.[9]

Rehearse Testimony

Neither the lawyer nor the expert should surprise the other at trial or during deposition. The expert witness should work with the attorney in framing questions in such a way that the expert can provide answers which are helpful to the case. In complex testimony, attorneys may wish to take advantage of the fact that it is permissible to lead an expert in direct examination. If the expert is testifying for the first time, the expert should spend some time prior to testifying sitting in on the trial (or another trial) to familiarize himself or herself with courtroom procedure.

SUMMARY

Using experts is an integral part of virtually any major insurance litigation. The expert can form an opinion or an inference on complex, unfamiliar or specialized matters when the layperson would not be able to do so. Although expert witnesses come from many fields, perhaps the most commonly used expert is the accountant. Expert accountants perform valuable services both before and during trial. Attorneys call upon CPAs to explain or interpret complex financial transactions, to trace funds, to estimate value, to calculate damages, to perform technical analysis, and to render opinions. CPAs can assist in

Superfund litigation by reviewing Government incurred cost claims, providing economic evaluations of clean-up costs and developing financial and accounting control systems. Although most cases do not reach the courtroom, attorneys should always look for an accountant who has the right combination of professional skills and personal characteristics to be an effective expert witness. Finding the right expert witness can make the difference between winning and losing a case.

FOOTNOTES

[1] Federal Rules of Evidence, Rule 702; California Evidence Code, Section 720(a).

[2] California Lettuce Growers v. Union Sugar Co., 45 Cal 2d 474, 486-87, 289 p.2d 785, 793 (1955). Smith v. Onyx Oil & Chem. Co., 218 F.2d 104, 110 (3d Cir. 1955).

[3] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Wells Truckways, Ltd. v. Burch, 247 F.2d 194 (10th Cir. 1957).

[4] Karlen v. Butler Mfg. Co., 526 F.2d 1373 (8th Cir. 1975); Autrey v. Williams & Dunlap, 343 F.2d 730 (5th Cir. 1965).

[5] Lee v. Durango Music, Inc., 144 Colo. 270, 355 P.2d 1083 (1960); Quad-States, Inc. v. Vande Mheen, 220 Neb. 161, 368 N.W. 2d 795 (1985).

[6] Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59 (1st Cir. 1984); Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

[7] Federal Rules of Civil Procedure, 26(b)(3); Scotsman Mfg. Co. v. Superior Court, 242 Cal. App. 2d 527, 531, 51 Cal. Rptr. 511 (1966).

[8] Quadrini v. Sikorski Aircraft Div., 74 F.R.D. 594 (D. Conn. 1977). See also Federal Rules of Civil Procedure, 26(b).

[9] People v. Whitmore, 251 Cal. App. 2d 359, 59 Cal. Rptr. 411 (1967).