CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation & Expert Witness Interest Group

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Message from the Chair

by Vincent "Chip" Boylan Jr., CPCU

Vincent "Chip" Boylan Jr., CPCU, is senior vice president of Willis of Maryland Inc. He is past president and a former education director of the CPCU Society's District of Columbia Chapter. Boylan has been a member of the CLEW Interest Group Committee for more than nine years, and has served as the CLEW webmaster. Currently, he is board vice chair of the Insurance Agents & Brokers of Maryland, that state's affiliate of the National Association of Professional Insurance Agents.

On Jan. 15, 2009, Captain Chesley Sullenberger thrilled and amazed us by successfully landing US Airways Flight 1549 and its disabled engines in the Hudson River with no loss of the 155 passengers and crew aboard. Months after the media frenzy over this stunning event died down, *The Washington Post*, in an ongoing series titled "On Leadership," posed the following question: "What is it about airline Captain 'Sully' Sullenberger and his 'miracle on the Hudson' that has so fascinated the public?"

Answers published by *The Post* in print and online — from business executives, politicians, academics, writers and others — revealed several consistent themes that can be summarized by the following three words: commitment, competence and compassion.

While I have not met any Consulting, Litigation & Expert Witness (CLEW) Interest Group members who recently have saved 155 lives, I have met many that share Sullenberger's dedication to commitment, competence and compassion, as explained in the following paragraphs.

Commitment

While at the U.S. Air Force Academy, Sullenberger participated in a glider program (an early introduction to a skill that came in handy last year), served as an instructor pilot and received the Outstanding Cadet in Airmanship award when he graduated in 1973. His Air Force career included time as a fighter pilot and training officer.

Spend a few minutes talking to a CLEW member, and you will often learn of his or her early devotion to acquiring the skills and knowledge that led to later success as a consultant, attorney or expert witness. This disciplined focus on improvement establishes a foundation for later success regardless of the profession one pursues.

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Message from the Chair

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Competence

While honing his skills (and eventually logging 27,000 hours of flying experience), Sullenberger's abilities were soon recognized, as the Air Force called on him to assist with accident investigations, a position he also filled for the National Transportation Safety Board. In addition, he has served his industry as a volunteer with the Air Line Pilots Association, International (ALPA) in a variety of roles. More recently, Sullenberger established his own aviation safety consulting business.

A master of his profession, respected and sought after by his peers, and an industry volunteer — sounds like many CLEW members I have been fortunate to meet and learn from in recent years. And surely we recognize the strong entrepreneurial spirit of numerous CLEW members in Sullenberger's creation of his consulting enterprise.

Compassion

Sullenberger described the minutes before the Hudson River landing as "the worst sickening, pit-of-your-stomach, falling-through-the-floor feeling." His concern for his passengers and crew was paramount. Throughout a career deeply involved in flight safety, and certainly during the harrowing moments in the Hudson, Sullenberger has placed the lives of others before his own. Last January, he was the last one off the partly submerged plane — and disembarked only after checking the passenger cabin for stragglers twice.

The CPCU Society Creed states: "I will use my full knowledge and ability to perform my duties to my client or principal and place their interests above my own." You can't spend much time in the presence of CLEW members without witnessing or hearing about instances when concern for the client ruled the day. Sullenberger and CLEW members share the tenet of civil rights leader **Booker T. Washington,** who preached: "If you want to lift yourself up, lift up someone else."

Beth Brooke, Ernst & Young global vice chair of public policy, sustainability and stakeholder engagement, made the following comment to *The Washington Post* about Sullenberger and those like him:

> We should celebrate all the heroes and role models we encounter every day whose behavior and words are exemplary and full of integrity, even when nobody is looking.

If we take a closer look at CLEW Interest Group members, we will encounter some of these outstanding role models. ■

Four Phrases to Avoid When Reporting a Property or Liability Claim

by Ken R. Butler, CPCU, ARM

Ken R. Butler, CPCU, ARM, is the president of Legacy Risk Solutions LLC. He is an entrepreneur and industry leader in the analysis of affluent family and business risk management needs and development of legacy preservation plans.

Editor's note: This is a general discussion about the subject matter and should not be represented as applicable in any state in the United States. It shall not be reprinted or portions reproduced in any form without the permission of the author, who can be contacted at (330) 659-6337 or Ken.Butler@legacyrisksolutions.com or kenblegacy@aol.com.

Four phrases to avoid when reporting a property or liability claim to an insurance adjuster:

(1) "Flood Damage" — Never describe water damage as "flood" damage.

(2) "Estimate of Loss" — Never estimate the loss for an adjuster. Answer "I do not know," if asked.

(3) "Possible Whiplash" — This statement may negatively bias the adjuster. Talk about what hurts, if asked, but do not guess a diagnosis. Leave the diagnosis up to the physicians.

(4) "I Am Sorry" — Never apologize to the other party at the accident scene or to the adjuster. Offer to help at the scene but never apologize. Let the authorities assign the blame.

Editor's Notes

by Jean E. Lucey, CPCU

Jean E. Lucey, CPCU, earned her undergraduate degree in English and graduate degree in library science through the State University of New York at Albany. After a brief stint as a public school librarian, she spent six years at an independent insurance agency outside of Albany, during which time she obtained her broker's license and learned that insurance could be interesting. Serving as director of the Insurance Library Association of Boston since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CLEW Interest Group Committee.

In reading our chair's analysis of how those of us in any profession can learn from the example set by leaders such as Captain **Chesley Sullenberger,** I was reminded that on the afternoon of US Airways' successful water landing, a person who works in New York City with a perfect view of that part of the Hudson River was keeping us updated through a telephone conversation with a colleague in his office. We all tried to picture the plane as a skipping stone — what skill and nerve it took to accomplish that feat! (Maybe we helped. I know my posture in an airplane seat often helps it take off and later land safely.)

As a newsletter "short subject," you will find a list of four phrases to avoid when reporting a claim, provided by **Ken R. Butler, CPCU, ARM.** I'd just like to add that I find nothing wrong with saying you're sorry that something happened, but agree with his point that an apology or acceptance of blame at the scene of an accident is ill-advised.

Tommy R. Michaels, CPCU, AIC, ARM, ARe, is a CLEW member of whom we can all be proud. I sure can't imagine his going over to the "dark side." (And I know some people I can't say that about.) If everyone practicing as an expert witness followed the precepts he so succinctly outlines, which brought to my mind the movie *The Verdict*, it would be a better world — or at least a better tort system.

Access CPCU Society Publications Online — No Library Card Needed

The Online Library is a great place to search for topics of interest or archived articles of CPCU Society publications, including interest group newsletters. This resource is located under "Publications" on the Society's Web site.

Once you've logged in, you can narrow your search by title, author, year and/or subject in a specific publication or in all publications.

You can view articles by year of publication or in alphabetical order by title. Dive in to explore a wealth of archived information.

Who can disagree with **Kevin M. Quinley, CPCU, AIC, ARM, ARe,** that credibility and likability are a winning combination for an expert witness? Most of you who are reading this newsletter no doubt achieve this balance effortlessly, but it never hurts to be reminded about what we can do to burnish our presentations, whether it be in a legal setting or elsewhere.

Rosalie Hamilton practices as a coach of expert witnesses and publishes in the field. Her e-mail communications are often very apt. In this issue of the newsletter, you will find the beginning section of a recent communication reproduced (with permission, of course), followed by comments from various CLEW Interest Group Committee and CPCU Society members. I would welcome additional comments for inclusion in later newsletter issues.

SEAK Inc. was founded in 1980 in Falmouth, Mass., on Cape Cod, and is described on its Web site as "a leader in training, publications and directories for expert witnesses, attorneys, independent medical examiners, physicians, and workers' compensation and occupational health professionals." As another "short subject," you will herein find a summary of its National Expert Witness Data 2009, including high, low, average and median fees, retainers and years of testifying.

Winding up this issue, I am very pleased to provide you with a discussion of liability coverage for incidents of assault and battery from the incomparable **Donald S. Malecki, CPCU.** Not only is he completely *au courant* with policies and coverages, but he recognizes the value of learning and tracing how various policy wordings developed. I have found that this can often bridge the gap between simple knowledge and deeper understanding. Don's contribution is in the form of a brief essay, rather than the Q&A format he usually provides. (You can pretend you've asked him a question yourself!) ■

The Dark Side — An Ethical Dilemma

by Tommy R. Michaels, CPCU, AIC, ARM, ARe

Tommy R. Michaels, CPCU, AIC, ARM, ARe, is the principal of T. R. Michaels Claim Consulting LLC and has been involved in property-casualty claims for more than 39 years. Michaels serves as an expert witness on claim handling issues and coverage interpretation, and is an instructor of insurance. A CPCU since 1976, he is a member of the CPCU Society's Connecticut Chapter.

Editor's note: This article is being published in the Consulting, Litigation & Expert Witness Interest Group newsletter with the permission of the author.

I worked at The Hartford for 36 years, with the last 15 very much involved in coverage litigation. When my co-workers heard I was retiring to become an expert witness, they cautioned me not to go to the "dark side." As opposing attorneys learned of my pending retirement and future work, they asked if I would be coming over *from* the dark side. Nobody defined the dark side, but an image of Darth Vader, from the original *Star Wars* movie trilogy, quickly comes to mind.

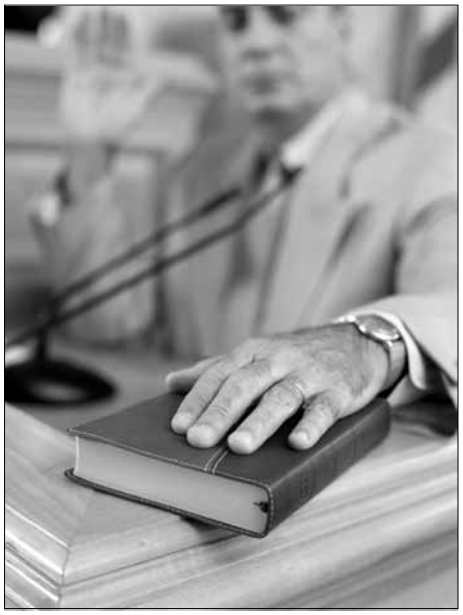
For those who are familiar with insurance coverage litigation, there is a dark side. The forces of evil fill the dark side. The dark side is the person or entity not on *your* side. If you are a policyholder or policyholder counsel, then the dark side is the insurance company. Conversely, the dark side for the insurance company is the attorney on the other side of the litigation along with his/her client. Following the CPCU Society Creed, the CPCU Society Code of Ethics and the American Institute for CPCU's Code of Professional Ethics will keep you from the dark side.

Role of Expert Witness on the Dark Side

The dark side really exists in the minds of all those who are advocates and have a stake in the outcome of the litigation. An attorney recently asked if I felt I could be a zealous advocate. This was even before he told me any facts of the case. I replied that his role is that of zealous advocate and the role of the expert witness is to give insight and help others understand matters that are not common knowledge. I also explained that prior to reducing any opinion to written form, I would talk with the attorney. In this way, the attorney knows about the weaknesses of the case and has the opportunity to end the engagement. This happened when I received a call from a person, representing a tenant, who was seeking an expert who could refute the property owner's claim that the day care facility run by his tenant increased his liability. It was necessary for me to tell him that from the description he provided, it did seem that the property owner would have increased liability exposure.

Be True to Yourself

Athletes often speak of "staying within themselves" as a reason for their success. The expert must also stay within his/her area of expertise and possibly recommend a more appropriate expert for the attorney, if necessary. An attorney called and wanted to use me because of my prior employment with The Hartford. As we discussed the case, it became clear that he needed an experienced underwriter — not my claims experience. I have given him names of two other persons who may be able to help him. A similar situation occurred with an attorney preparing for a class action regarding homeowner policies. Holding yourself out as an expert in an unfamiliar area cannot only damage your credibility in that specific case, but in future cases as well. The American Institute's Code of Ethics Rule R6.3 requires, "In rendering or proposing to render professional services for others, a CPCU shall not knowingly misrepresent or conceal any limitations on the CPCU's ability to provide the quantity or quality of professional services required by the circumstances."

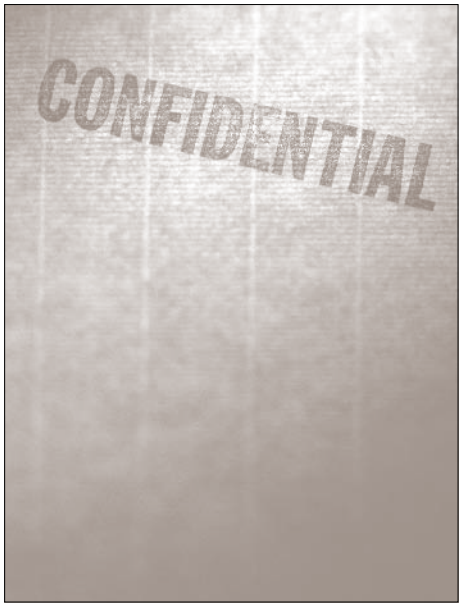


Expert Witness Must Remain Objective

If the expert does accept an engagement, it is paramount that the expert be objective in the analysis and formulation of a professional opinion. The expert should review all necessary documents, including deposition transcripts and not just deposition summaries. It is necessary to communicate with the attorney as the review progresses, request other documents if needed, and clarify any facts that may bear on the opinion and remain unclear. As the expert begins to form an opinion, or several opinions, based on expert knowledge and document review, consult with the attorney, especially if the opinion is not helpful to the attorney. The expert must resist any temptation or request by the attorney to modify or change an opinion to make it more favorable. Slanting an opinion transforms the expert from Jedi hero Luke Skywalker to Darth Vader. The attorney has the option to let the expert continue or to stop work rather than have the expert distort an opinion. A report does not have to be prepared unless requested. Additionally, the attorney becomes more aware of potential weaknesses and can become more prepared. One of the unspecified unethical practices in the CPCU Society Code of Ethics states: "A member shall not engage in practices which tend to discredit the Society or the business of insurance and risk management."

Payment Not Dependent on Outcome

The role of the expert is not to advocate, but to use expertise to enlighten the judge and jury in understanding matters that are not otherwise common knowledge. The expert's compensation should never be contingent on the outcome of the case, but should always be on an hourly basis, a flat fee or other similar method — not outcome based. The payment to the expert is for the time and experience rather than for a certain outcome. The amount and method of compensation is not a secret and is part of the expert's report if the litigation is in federal court (and some state courts). Even if the rules of evidence do not require disclosure in a report of the amount and method of compensation and any payment already received, it is often a topic in a deposition. Canon 1 of the American Institute's Code of Professional Ethics admonishes CPCUs to "endeavor at all times to place the public interest above their own." When the expert witness provides insight with testimony and does not advocate a specific position, the expert has placed the public interest above his or her own.



Confidential Information and Conflicts

The documents the expert reviews and information the expert receives are often of a confidential nature. Many cases may have a protective order in place that affects all documents, even those otherwise considered not confidential. If the expert is unsure about the confidential nature of documents, the expert should consider the information confidential until a determination is made. The main concern is release of documents outside the case or dissemination to third parties not connected to the case. An expert needs to have an agreement with the attorney at the beginning of the assignment regarding custody of documents during the engagement and the disposition of documents once the engagement has ended. This may include shredding the documents or returning them to the attorney.

Future assignments are another concern arising from documents and information the expert receives The CPCU Society Creed states: "... I will only engage in practices which reflect well on the Society and the business of insurance and risk management." Prior to accepting an assignment, the expert must determine if accepting the assignment would be a conflict of interest because of current relationships and assignments or past relationships and assignments. If another interest or obligation makes it difficult for the expert to fulfill his or her duties fairly, there is a breach of ethics.

Ethics Strengthen the Expert

Ethics do not interfere with the work of an expert or hinder the expert, but strengthen the expert. A better opinion will result from an expert who honestly and fairly evaluates all of the facts without trying to slant an opinion. The expert can more strongly defend the opinion and withstand cross-examination. The credibility and future work of the expert increases when the expert adheres to ethical practices. Finally, ethical behavior not only reflects favorably on the expert, but also on the CPCU designation and the industry. ■

How Likable Should an Expert Witness Be?

by Kevin M. Quinley, CPCU, AIC, ARM, ARe

Kevin M. Quinley, CPCU, AIC, ARM, ARe, is an insurance claim expert in the Washington, D.C., area. You can reach him at kquinley@cox.net or at www.kevinquinley.com. He is a member of the CPCU Society's Consulting Litigation and Expert Witness Interest Group Committee.

Recent Bud Light TV commercials suggest that the beer has a superior quality of "drinkability." Even amongst beer aficionados, there appears little consensus and much head-scratching over the exact meaning of the term drinkability.

We may puzzle over this attribute of a polyester beer. Perhaps drinkability is to beer as likability is to expert witnesses. We all can agree that strong expert witnesses should be credible. But must they also be *likable?* More to the point, can expert witnesses actually enhance their likability to maximize their persuasive oomph before juries and judges, making themselves even more powerful expert witnesses?

This discussion's genesis stems from a recent article in the *Journal of American Academy of Psychiatry and the Law* ("Credibility in the Courtroom: How Likable Should an Expert Witness Be?" by **Stanley L. Brodsky, Ph.D.,** et al., Volume 37, Number 4, 2009, pp. 525–532). Much of the article contains fairly daunting statistical methodology. The study's gist: The likability of an expert witness significantly relates to juror perceptions of trustworthiness. Further, the study concludes that likability is an important factor in expert witness credibility and supports an empirical foundation for addressing likability as part of expert witness preparation. Anecdotal views of real-world practitioners augment the study's rigor.

Body Language Counts

Janet Palmer, Ph.D., leads the Communication Excellence Institute in San Dimas, Calif. She says, "Likability, or lack of it, is often communicated nonverbally, whether the expert witness is aware of it or not." In other instances, likability is also communicated verbally. She cites politeness as an example, along with frequent use of a person's name instead of a personal pronoun. "Nonverbal expression of likability is so potent," Palmer notes, "that my partner and I spend most of our consulting time on that dimension of communication."

She recently worked with an economics expert who was brilliant. However, his body language was so negative, the litigators feared the jury would give his opinion little credence. Palmer showed him how to be more open and accessible to the jury. Also, she videotaped him in before-and-after takes. He was amazed at the difference. He told Palmer, "I have been making my living as an expert witness for 35 years, but I have never heard what you have just told me! I wish I had known this years ago!"

Being credible is not the same as being likable. Liking and respecting someone are two different issues. Integrity is relevant, so be true to yourself and do not try to be more "likable" than you really are. On the other hand, being liked never hurts.

TV advertising research consistently shows that how much you like an ad correlates strongly to the probability of buying the product in question. Even ads that aren't "credible" (recall the Joe Isuzu commercials) can click. For effective experts, credibility is a given; experts lacking credibility (or whose opinions are not credible) don't get hired. It follows that experts need a base level of credibility. With that in place, you have to get the judge and jury to like you.

Credibility + Likability = Success

Likability is vital, but so is credibility. Combine the two, and you have a powerful expert witness. A witness can be credible without being likable, and vice versa. It's not an either/or proposition.

Should an expert consciously attempt to exude likability at trial but be less concerned with this during a deposition when just the expert, the lawyers, and a court reporter and videographer are present? Do different settings call for different emphases on likability?

An expert witness must be consistent in demeanor in both the deposition and the trial. Many depositions are now videotaped. The tape can be played in court before a jury. If vivid differences emerge on tape between your manner and testimony in the deposition, as compared to your trial testimony, those differences will significantly compromise your credibility.

An expert witness can skillfully cultivate likability by nonverbal means. Just to name a few:

- Consistently using "open" gestures.
- Cultivating a credible head posture (chin position parallel to the floor, head straight up and down — not ever tilted).
- Using palms-up gestures when appropriate.
- Maintain a positive facial affect.

Research in nonverbal communication supports these guidelines. TV news anchors, whose professional effectiveness depends on credibility and likability, are often schooled in such techniques.

Peripheral Factors Enter In

Ron Leckie is a semiconductor/electronics expert from San Francisco. In his niche, communicating technical topics to lay audiences, such as juries, is a challenge. In an intellectual property case before the International Trade Commission (ITC), he was presenting in a final hearing/trial. The judge remembered him from when he appeared months earlier at a "Markman" hearing (a pretrial stage in patent infringement lawsuits). His credibility on technology issues was a factor, but he also heard that his Scottish accent kept the judge's interest. Leckie concludes, "I guess our 'likability,' or lack thereof, is a combination of several factors, not all of which we can fully control. "

Many believe that *the* most important thing is to be *expert* in the subject matter. A good attorney can help smooth out a presentation. Many might say that the attorney's presentation skills are of utmost importance. One expert recalls where — after a trial — a juror was asked why she voted as she did; she replied that the attorney wore a brown belt with grey pants.

In general, an expert must be likable. That does not devalue experience and accuracy. When two qualified experts have equally supported opposite opinions, though, time and again the jury will go with the better witness, the witness whom they feel more comfortable supporting.

Too much credibility plus meager likability equals an expert witness who comes off as arrogant, aloof and detached. A surfeit of likability but little credibility and you have a cringe-inducing lightweight. In January 2009, Barrack Obama was sworn into office as president, brandishing credibility and likability. One year later, his popularity rating has dropped. Many factors may account for this. Many voters like him, but others claim there is little substance or gravitas. Like effective politicians, superb expert witnesses combine rock-solid credentials and credibility in a pleasing package with appearance, communication skills and habits. The latter enhances likability, something that no trial or deposition transcript can entirely capture or convey.

What is more important, credibility or likability? The answer is, "Yes!" The truth is, it is not an either/or choice. It is best to have both.

And that's a combination we all can like! ■

Getting Paid for Your Expert Services — An Excerpt from Expert Communications

Contributed by Jean E. Lucey, CPCU

Editor's note: The following material has been excerpted with permission from a March 26, 2010, e-mail communication from Rosalie Hamilton, "the Expert's Expert on marketing." She is the founder of Expert Communications, a firm that provides expert witness training tools and creates marketing plans, materials and Web sites for expert witnesses. A prolific writer, Hamilton is the author of *The Expert Witness Marketing Book*. She may be contacted via her Web site: www.expertcommunications.com.

Rosalie Hamilton Excerpt

Ten years ago, when I started providing individualized marketing analysis and recommended promotion programs for experts and expert firms, my objective was (and still is) pure and simple — to help them get more engagements and make more money.

It didn't take long for me to realize a related issue needed to be addressed, for almost every client — getting them paid! Now, coaching on this business aspect is a part of every consulting program I do.

With experience, as you know if you read my articles or hear me speak, this topic has become a passion for me. And the basis for my fervor is simple — I feel that for experts, whose education and experience are significant enough to qualify them to assist the courts of our land in understanding the issues before them, to have to beg, cajole, re-negotiate (bargain), institute collection procedures and even sue for their compensation is unseemly. It extracts a measure of dignity from the litigation process, which, due to its lofty, at least in theory, objective, should be dignified.

Do I sound like I'm once again on a stump preaching? You betcha.

Because apparently when business slows down a bit, you tend to become willing to relax your requirements and safeguards in order to get the engagements. Can I blame you? Of course not. I'm just concerned about your long-term survival.

Comments from CLEW Committee Members

I asked some fellow-CLEW Interest Group Committee members for comments on this excerpt, and their responses are below.

Problems arise in three areas:

(1) Starting a project before a retainer is received.

(2) Receiving payments once bills have been submitted.

(3) Collecting payment for depositions taken by opposing counsel.

With respect to No. 1, there are several variables to be considered, including the projected amount of time required for the matter and who is paying. If retained by counsel defending a lawsuit or potential claim (and there is an insurer funding the defense), payment may be slow, but it always arrives. My experience has been that some insurers are reluctant to pay a retainer, choosing to pay the bills as they are received.

Retainers in some instances are necessary, especially if litigation is contentious. Questions may be asked about why work was started before payment was received despite the request or requirement for a retainer agreement. If the attorney hiring the expert represents a plaintiff who is paying out of pocket, retainers are a must before work begins.

With respect to No. 2, payments seem to be coming more slowly than ever before. It is not unusual for me to have to send two reminders before payment is received. Obviously, if work is needed by retaining counsel and a bill has been outstanding for a long time, the leverage is there and payment is ordinarily received very quickly. Although the retainer agreements

I use contain language entitling me to interest at 1 percent per month, 12 percent per annum, I seldom use it.

Finally, with respect to No. 3, experts must understand the arrangement that is made for his/her deposition with respect to payment. I bring a form with me that I request opposing counsel to sign (if the attorney who retained me is not paying my deposition time), which guarantees payment. Requesting the attorney to bring a blank check so that payment can be made at the end of the deposition is also an alternative. Leaving the deposition without an understanding of how payment is to be made will cause problems. If all else fails, the expert should ask the attorney to place on the record that he/she is paying the fee upon conclusion of the deposition.

— **Stanley L. Lipshultz, CPCU, J.D.**
Interisk Limited

Charging late fees helps in some cases, but not all. I don't require my clients to sign an "Accepted" line on my engagement letters, but perhaps I should. If you have to take legal action, this would help.

— **Donn P. McVeigh, CPCU**
Creative Risk Concepts International

From the insurance company perspective, I would have to disagree with some information in the article. I pay my expert bills on a timely basis. It is only in rare situations, when I thought the billing submitted by the expert was unfair, that delays in billing became a problem. In those situations, experts should not refuse to go to depositions or refuse to continue other work in order to force the insurance company to pay an amount which the insurance company perceives to be unfair.

— **Joseph Gerald Burkle, CPCU**
EMC Insurance Companies

I can assure you of this. This is not covered by an insurance policy for the professional. It will not cover the suit either. Insurance policies are not collection vehicles.

— **James A. Misselwitz, CPCU**
ECBM ■

National Expert Witness Data 2009 (Based on 1,208 responding expert witnesses)

In-Court Testimony — Hourly
High: $5,000
Low: $60
Average: $438
Median: $350

File Review/Prep — Hourly
High: $1,500
Low: $40
Average: $297
Median: $275

Depositions — Hourly
High: $3,500
Low: $50
Average: $401
Median: $350

Upfront Retainer — 74 percent
Retainer Amount
High: $25,000
Low: $150
Average: $2,601
Median: $2,000

Years testifying
High: 50
Low: 0
Average: 15
Median: 15

Source: National Expert Witness Data 2009, SEAK Inc., a publisher of various directories, including the *SEAK Expert Witness Directory 2010.* See www.seakexperts.com.

Note: For a free copy of the *Expert Witness Directory 2010,* e-mail **Alex Babitsky** at Alex@seak.com with your name and mailing address.

Your
CLEW Interest Group presents ...

Mock Trial 2010 — Broken Building, Broken Trial ... A Miscarriage of Justice?

Sunday, Sept. 26, 2010 • 9–11:30 a.m.

Utilizing a "mock trial" role–playing technique to illustrate underwriting and claim–handling processes, trial mechanics and the appellate process, Mock Trial 2010 examines the appeal of a lawsuit arising out of an insurer's denial of coverage for a construction–related claim. Attendees will observe how a risk is underwritten by an insurance company, including the role of an agent and broker in the underwriting process, and how, after a loss, the claim–handling process can lead to litigation. ***Filed for CE credits.***

Presenters: Nancy D. Adams, CPCU, J.D., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC; **Gregory G. Deimling, CPCU, ARM, AMIM,** Malecki Deimling Nielander Associates LLC; **Stanley L. Lipshultz, CPCU, J.D.,** Interisk Limited; **Robert L. Siems, CPCU, J.D.,** Law Offices of Robert L. Siems PA; **George M. Wallace, CPCU, J.D.,** Wallace, Brown & Schwartz; and other Consulting, Litigation & Expert Witness Interest Group and Claims Interest Group members serving in various trial roles.

The Mock Trial is generously sponsored by the CPCU–Loman Education Foundation.

Millionaire Feud — The Coverage Game

Monday, Sept. 27, 2010 • 1:30–5:10 p.m.

Join four industry experts in this fast–paced interactive game show, which presents insurance issues and coverage forms affecting D&O, property valuation, general liability and additional insureds. The entire audience will participate by sharing ideas regarding the coverage issues and resultant claims as well as the various terms and conditions found in the policy provisions. Don't miss this opportunity to gain additional knowledge in these coverage areas while being involved in a fun and participative learning experience. ***Filed for CE credits.***

Presenters: Nancy D. Adams, CPCU, J.D., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC; **Gregory G. Deimling, CPCU, ARM, AMIM,** Malecki Deimling Nielander & Associates LLC; **Donald S. Malecki, CPCU,** Malecki Deimling Nielander & Associates LLC; **Kathleen J. Robison, CPCU, ARM, AIC,** K Robi & Associates LLC

Visit www.cpcusociety.org for more information.

A Discussion of Liability Coverage for Assault and Battery

by Donald S. Malecki, CPCU

Donald S. Malecki, CPCU, is a principal at Malecki Deimling Nielander & Associates LLC, based in Erlanger, Ky. During his 45-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, insurance company claims consultant, and as publisher of *Malecki on Insurance,* a highly regarded monthly newsletter.

As a matter of history, the 1941, 1947 and 1955 liability policies defined "assault and battery" stating: "Assault and Battery shall be deemed an accident unless committed by or at the direction of the insured." Following through on these policies, one will note that with the 1966 and 1973 liability policies, coverage was based on an occurrence rather than an accident basis. Whether these later policies made an exception for assault and battery was vague. (The assault and battery coverage got caught up in the definition of "occurrence.")

When the 1976 broad form (BF) CGL endorsement was made available, one of the extensions of coverage was Extended Bodily Injury Coverage. This stated that: "The definition of occurrence includes any intentional act by or at the direction of the insured which results in bodily injury, if such injury arises solely from the use of reasonable force for the purpose of protecting persons or property." This was supposed to clarify that if the assault and battery were not intentional but inflicted for purposes of defense, there would be coverage.

As mentioned above, this same coverage was available with the earlier 1966 and 1973 policies, but purchasing this BFCGL endorsement clarified the intent.

The 1986 and subsequent policies, including the 2001 edition you are dealing with and the latest 2004 edition, address this matter under Exclusion *a.* — Expected or Intended Injury. Note the exception to this exclusion of BI or PD expected or intended from the standpoint of the insured: "This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."[1]

So there you have it, The modern liability policies do not specifically mention the words assault and battery, but they still deal with them. Fortunately for some insureds who are confronted with allegations of assault and battery, the insurer may have to provide a defense until the allegation is proved.

Those insurers adding specific assault and battery exclusions may want to make the intent clearer, particularly in relation to some businesses conducive to these kinds of offenses. This type of exclusionary endorsement, furthermore, is found on a lot of policies issued by E&S insurers.

I answered your question by going through the history not to show what I know about this subject but to explain: (1) that history is important even though some people today think it is boring; and (2) that history is a way to trace when a provision began and where it might appear in today's policy provisions.

There is a great deal of case law on assault and battery. I have collected a lot of them, thinking I might write on the subject some day. However, in these exciting and challenging times, there are far too many priorities.

Reference

(1) Copyright, ISO Properties, Inc. 2003.

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