

THE FORUM

Retaining experts

MODERATOR



Richard Lenkov,
capital member,
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Mr. Lenkov's practice areas include insurance litigation and workers compensation, among others. With nearly 20 years of experience, he serves as co-chair of the Claims and Litigation Management Alliance's Workers Compensation Committee.

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Dorothy J. Stolle, Gallagher Bassett

How do you decide which cases warrant an expert?

JEFF MARSHALL: Our most consistent use of experts occurs when we start to see a pattern of extended opioid use. Using experts to develop and advocate a pain management response with lower dosage and shorter dependence on opioids creates a win-win. We reduce claims costs and give associates control of their lives.

SCOTT GOLDSTEIN: Disputes over causation sometimes warrant hiring an expert.

DOROTHY J. STOLLE: Ask "what I am hoping to obtain?" The facts vary depending upon the injury/accident. Reasons for the opinion could relate to safety violations, causation, work status, medication review or maximum medical improvement.

ADAM E. WHITTEN: I typically recommend an expert when there are legitimate questions about causation, when making a "back-to-baseline" argument and when an occupational disease is alleged.

What factors do you consider when retaining a surveillance expert?

MARSHALL: In a word, "ethics." Surveillance is difficult because if we are surveilling, it is because we believe that there is something suspicious. Field investigations are particularly difficult because they can end up charging for days of surveillance without anything to show for their efforts. All vendors want to get results for their clients. As

a result, there is pressure which often results in pretexting or other actions that do not align with our principles.

STOLLE: It is important to consider how the expert conducts surveillance and what options they offer, such as unmanned surveillance or activities check, as a precursor. I also review their success ratio and any "outside of the box" thinking to make surveillance is successful. Finally, word of mouth carries quite a bit of weight.

What is the best method to question an opposing expert's credibility?

GOLDSTEIN: I like to first get them to concede on the record certain points that are helpful to my client. This demonstrates credibility with the position that you are trying to establish. Ultimately, the more you can get them to agree with you on the record, the less disagreements the trier of fact sees with the expert vis-a-vis your client. It is almost like your opponent's expert is morphing into your expert.

WHITTEN: Prior testimony offers a way to impeach the opposing expert. Another way is to attack the underlying data the opposing expert relies on to form their opinion.

What steps do you take to try to ensure that an independent medical examination is successful?

MARSHALL: I am often told, "In this jurisdiction we cannot advocate — we merely send the records." I don't buy it. I always insist that we send a

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Jeff Marshall, Mars Inc.

cover letter highlighting our concerns and presenting questions. If done well, it can help the IME examiner without overstepping and offending them. The examiner can always choose to ignore it, but we should never waive our ability to advocate.

STOLLE: The success of an IME depends upon the information we provide. It is imperative to provide prior treatment and primary care physician records, surveillance and job descriptions. The cover letter also needs to directly address questions you need answered.

GOLDSTEIN: I prep my client before they attend the IME.

WHITTEN: Before the IME, I talk to the doctor on the phone. I make sure the doctor has every medical record available and make sure to provide a supplement with any new records before a deposition. It is also important that doctor has the actual X-ray and MRI films and not just the radiologist's interpretations.

How do you overcome the perception that your expert is merely a "hired gun"?

GOLDSTEIN: The best way to do this is to hire an expert that does work for employers and employees.

WHITTEN: I use experts whose medico-legal work is only a small fraction their practice. I also choose experts who actually practice in their area of expertise and not just generalists.

What questions should our readers ask when interviewing a potential expert?

MARSHALL: My need for an expert falls into two categories: (1) improving outcomes for my employees, and (2) improving our position if the matter must be litigated. To those ends, my experts must have top credentials such as board certifications and have significant court experience. I also want experts that derive most of their active income by practicing their trade instead of being professional witnesses — this promotes both of our objectives.

STOLLE: (1) What is the level of experience with these types of cases? (2) How is the reputation of this expert with the court, or do they even have a reputation? (3) Is this expert seen as someone who is partial to either employers or employees? (4) How do they come across on deposition?

Are there any trends with regard to use of experts that you see?

MARSHALL: Overusing the same experts. While using the same experts

for all claims has its benefits — primarily providing consistency to judges — too quickly these experts become "damaged merchandise." A high-quality expert can rebut the presumption that the treating doctor should be given more credence than an expert who only saw the injured employee once.

GOLDSTEIN: The use of experts has risen over the years as the defense side seems intent on litigating all cases rather than using a method like a pretrial to try overcome disputes.

STOLLE: There have been changes in some states regarding the compensability of heart attacks, increasing the need for an expert. There is an increased need for experts to evaluate internet-based evidence such as social media. Cyber crime is also a hot issue.

WHITTEN: I am seeing vocational experts used more due to some recent case law in North Carolina. I also see employees' attorneys using and reusing physicians with whom they have relationships, rather than finding experts who are specialists.

MEET THE PANEL



Jeff Marshall is the claims manager for Mars Inc. in Budd Lake, New Jersey, where he handles the full array of claims that arise from being

the largest pet food producer, the largest veterinary hospital service provider and the largest chocolate producer in the world. Previously, he was the director of risk management for the School District of Philadelphia and the deputy director of the New Jersey's Bureau of Risk Management.



Scott Goldstein is a partner at the Ankin Law Office L.L.C. in Chicago. He prides himself on fighting on behalf of his injured clients so that cases can settle on favorable terms.



Dorothy J. Stolle is an assistant branch manager in St. Louis for Gallagher Bassett Services Inc., a subsidiary of Arthur J. Gallagher

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Adam E. Whitten is an equity partner in the Charlotte, North Carolina, office of Goodman McGuffey L.L.P., a regional civil defense firm with

eight offices across the Southeastern United States. He has been practicing in workers compensation for nearly 15 years. He serves as managing partner for the firm's offices in North and South Carolina.