Oct. 16-29, 2019

DTCI DEFENSE TRIAL COUNSEL OF INDIANA

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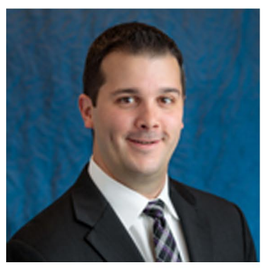
# When Expert's Testimony Should Be Inadmissible

*By* **Justin Curtis and Anastasiia Allen**



Curtis

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The necessity of expert testimony in civil litigation is widely recognized. Physicians in medical malpractice actions, engineers in product liability actions, and life care planners in serious injury cases are just a few examples of necessary experts who provide specialized testimony. Expert testimony is virtually indispensable in cases where the relation between the facts and results may be understood only by those with special skill or training. Often, a case turns entirely on the expert's testimony and how well she is presenting evidence on behalf of a party.

Expert assistance is also very costly, representing a significant litigation expense. The payment of an expert's fee can be second only to the payment of the attorney's fee in civil litigation. Given the significant expenses associated with expert retention, many plaintiffs have attempted to reduce their expenses by entering into contingency fee agreements with potential expert witnesses.

While retaining an expert witness on a contingency fee basis may appear to resolve a large portion of the upfront costs of litigation, this arrangement gives rise to many unintended consequences. The generally accepted rule in most jurisdictions is that experts shall not be compensated on a contingency fee basis. The reasoning behind the rule is clear: the courts are concerned that this arrangement could encourage false testimony and damage the public's impression of a legal system that allows such arrangements. Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise.

Prohibition of expert contingency fee agreements in litigation is aimed primarily at the preservation of the integrity of expert testimony in court. It is not a far stretch to imagine that an expert would be interested in the outcome of a case wherein her payment is contingent upon the resolution of the controversy in her favor. This is especially true when the expert is testifying as to the amount of damages. An expert's "interest in the amount of the damages furnishe[s] a powerful motive for exaggeration, suppression, and misrepresentation, a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice, and therefore invalid." *Swafford v. Harris*, 967 S.W.2d 319, 322 (Tenn. 1998) (quoting *Sherman v. Burton,* 130 N.W. 667, 668 (Mich. 1911)).

## The Public Adjuster Example

The issue of experts being compensated on a contingency fee basis often arises in the first-party property context. In recent years, there has been a marked increase in policyholders' use of public adjusters during the adjustment of property claims. A public adjuster's role is to assist an insured during the adjustment of an insurance claim covering real or personal property. The term "public adjuster" is statutorily defined in Indiana as "every individual or corporation who, or which, for compensation or reward, renders advice or assistance to the insured in the adjustment of a claim or claims for loss or damages under any policy of insurance covering real or personal property… ." Ind. Code § 27-1-27-1.

With regard to a public adjuster's "compensation or reward," it is typical for the public adjuster to enter into a contingency fee agreement with the policyholder wherein the compensation is set at a percent of the amount ultimately paid under the claim. As addressed above, the contingency fee agreement becomes an issue if the public adjuster subsequently is asked to serve as an expert in litigation stemming from the insurance claim. The recent alignment of public adjusters with policyholder attorneys has led to the increase in adjusters being asked to provide expert testimony after litigation ensues.

The possible conflict between the public adjuster's role (to assist the insured in recovering under a claim) and a public adjuster expert's role (to provide an unbiased and competent opinion based on the facts) raises significant red flags from the outset. It is difficult not to question a public adjuster's motives when providing expert evaluations of the claim, given that her primary purpose is to recover as much money under a claim for insurance as possible. While the concern regarding the reliability of an expert's testimony when her compensation is tied to the outcome of the case is not limited to public adjusters, this situation is increasingly prevalent in modern litigation, and we have provided examples below.

### *1. Riley v. Liberty Mutual Insurance Co.*

The authors' firm was recently able to exclude a public adjuster's expert testimony in *Riley v. Liberty Mutual Insurance Co.* In *Riley*, the policyholder's home suffered severe fire damage, and a claim was filed with his insurer. The policyholder retained a public adjuster the day after the fire. At the time the public adjuster was retained, he entered into a contingency fee agreement with the policyholder entitling him to a percentage of the claim. The claim was ultimately denied and litigation ensued in the District Court for the Northern District of Ohio. After suit was filed, the policyholder identified its public adjuster as an expert witness regarding the contents portion of his claim. The public adjuster prepared an expert report and eventually sat for a deposition.

Shortly before trial, the insurer moved to bar the public adjuster's testimony, based largely upon his payment being contingent on the outcome of the litigation. The court quickly determined that it was improper to pay an expert witness a contingency fee. The decision then focused on whether the expert testimony should be excluded altogether or admitted and its credibility evaluated by the factfinder. After examining relevant authority, the court determined that the ethical issues presented by the expert's compensation being tied to the outcome of the case warranted the outright exclusion of the testimony. This was significant because the policyholder was unable to provide competent testimony as to the value of his contents at the time of trial.

It is interesting to note that the public adjuster in the above case renounced his contingency fee agreement in writing after the motion to bar his testimony was filed. The public adjuster allegedly entered into a new agreement wherein he would charge an hourly rate. The court concluded that the bandage did not repair the wound because the expert report and deposition testimony occurred while the contingency fee agreement was in place. In the end, the court found that timing mattered. The expert was biased at the time he testified and calculated the alleged damages in this case, which could not be corrected by the belated rescission of the contingency fee agreement.

### *2. Everett Cash Mutual Insurance Co. v. Gibble*

Similarly, Pennsylvania courts unanimously disallow testimony of an expert who enters into a contingent fee agreement. In *Everett Cash Mutual Insurance Co. v. Gibble,* the defendants' furnace emitted soot in their home, and they made a claim under their homeowner's insurance policy. 2004 WL 5149339 (Pa. Com. Pl. 2004). They entered into an agreement with a public adjuster and agreed to pay a contingency fee based upon the amount paid on the claim. The insurer ultimately filed an action seeking declaratory judgement against the defendants. During the litigation, the defendants identified their public adjuster as an expert concerning the amount of damages.

The insurer moved to exclude public adjuster's testimony arguing that the contingent fee arrangement gave him "pecuniary interest in the outcome of the proceedings." *Id.* The court agreed with this reasoning and precluded the public adjuster's testimony. The defendants attempted to avoid the exclusion of their expert by arguing that the public adjuster was acting "as an expert in his role as a consultant, at the rate of $75 per hour, and only his work as a public adjuster [was] subject to the contingent fee agreement." *Id.* The court outright rejected this line of reasoning, finding that any attempt to distinguish the public adjuster's work as an expert witness from his work as a public adjuster is "merely one of form."

## The majority rule

The majority of courts in this country follow the above reasoning and have established rules barring expert testimony when the expert's payment is contingent on the outcome of the case. Examples include California, where expert testimony is excluded per se when the expert's compensation is contingent on the outcome of the case. *Straughter v. Raymond IV,* 2011 WL 1789987, at *3 (C.D. Cal. 2011). The American Law Institute's Restatement of Law also supports the majority rule. The Restatement (Third) of Law Governing Lawyers § 117, cmt. D (2002), provides that "[a] witness may not be bribed or offered compensation that is contingent on the witness's testimony or the result in the litigation." While it is not a controlling authority, the *Restatement* is a well-established and widely used source of legal authority. As discussed above, the reliability of an expert's testimony suffers catastrophically when her compensation is tied to the case being resolved in her client's favor. This argument is more compelling when the expert is testifying on the subject of damages.

## Indiana's treatment of expert contingency fee agreements

Despite the majority of courts taking a hard stance on the issue, Indiana courts have not adopted a per se rule excluding expert testimony when the expert's compensation is contingent on the outcome of the case. While the issue has not been directly addressed for some time, the previous Indiana cases confronted with challenges to expert testimony in this regard have taken the approach that the ethical concerns created by the fee agreement are a matter of credibility to be weighed by the factfinder.

See **TESTIMONY** on next page

# Defense Trial Counsel of Indiana

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## TESTIMONY

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In *Wirth v. State Board of Tax Commissioners,* the Indiana Tax Court stated that "despite the disapproval expert witness contingen[cy] fee agreements have received, there is no absolute prohibition on the admission of a contingently paid expert's testimony." 613 N.E.2d 874 (Ind. T.C. 1993). The court determined that the contingent nature of the fee went to the weight of the testimony, as opposed to its admissibility. *Id.* It is important to note that the ruling was limited to tax court cases, which operate without a jury. The court found less potential for abuse in this specific instance because it was weighing the credibility of the testimony itself. This comment also implied that the court may reach a different conclusion in different situations. It should be noted that this was the last time an Indiana court issued a ruling regarding this specific issue.

The approach taken in *Wirth* is surprising because Indiana Rule of Professional Conduct 3.4, comment 3 clearly provides that "it is improper to pay an expert witness a contingent fee." Many of the cases barring expert testimony where a contingency fee agreement is in place base the ruling on their states' respective rules of professional conduct. For example, in *Martello v. Santana*, the court relied directly on Rule 5.4 of the Kentucky Rules of Professional Conduct to invalidate an expert witness contingency fee agreement. 713 F.3d 309, 313 (6th Cir. 2013). Likewise, the *Riley* opinion began by citing the Ohio Rules of Professional Conduct, which make clear an attorney should not compensate an expert witness with a contingency fee.

### Conclusion

Considering the clear prohibition against expert contingency fee agreements expressed by the Indiana Rules of Professional Conduct and the overwhelming authority from other jurisdictions, it is likely courts in our state will adopt a rule excluding contingent expert testimony, should the issue arise. This issue has not been revisited by our courts for some time and the *Wirth* opinion was clearly limited to the facts of that case. Thus, it is vital to always inquire about the expert witness's fee arrangement as a potential source of disqualification. Even if Indiana courts continue to allow testimony obtained by such means, contingency-based fee arrangements are always suspicious and will heighten the court's awareness of the potential for perjury and exaggeration. As defense counsel, we should advocate for the outright exclusion of expert testimony when the expert's compensation is based on the outcome of the case.•

■ *Justin Curtis and Anastasiia Allen and are associates with HeplerBroom LLC in Hammond. Curtis chairs the Insurance Coverage Section of the DTCI, and Allen is a member of the association. Opinions expressed are those of the authors.*

## 2019 CALENDAR

*All events are held in Indianapolis unless otherwise noted.*

Oct. 16-18
**DRI Annual Meeting**
New Orleans Marriott Hotel
New Orleans

Nov. 21-22
**DTCI Annual Meeting and Membership Meeting**
Monroe Convention Center
Bloomington

*For details about any of these events, please e-mail **lmortier@dtci.org**. For the latest changes, notices, and additions, check the events calendar on the DTCI homepage at **www.dtci.org***

# DTCI 26th Annual Conference

REGISTRATION IS NOW OPEN!

**November 21-22**
**Monroe Convention Center, Bloomington**
**Register:** www.dtci.org > Events > Conferences > Annual Meeting

**CLE:** 12 CLE Credits (1.0 ethics & 1.0 CME pending)
**Hotels:** Marriott Courtyard 812-335-8000
or Graduate Hotel 812-994-0500

### Thursday, November 21

**8:00-9:00** – *Annual meeting of membership and Board of Directors' meeting*

**10:00-11:30 – Section breakouts**

**Healthcare Law:** *Panel Hot Topics & Current Trends in Med Mal & IPCF Litigation.* Heather Gilbert (Cassiday Schade); Cathy Treen (IU Health Risk Retention); Edward Fujawa (Indiana Dept of Insurance); Scott Cockrum (Lewis Brisbois); Neil Bemenderfer (The Mediation Group)

**Employment Law:** *Do's & Don'ts before the ICRC; Recent Developments in the Law.* Doneisha Posey (Deputy Director, Indiana Civil Rights Comm'n)

**Worker's Comp:** *When the Employee Has a Pending Charge with the ICRD or EEOC.* Libby Moss (Kightlinger & Gray)

**11:40-12:40 – Section breakouts**

**Insurance Law:** *Incident Data & Their Interconnectivity to Support Litigation.* Matt Jeske (ESI) and Benjamin Bierce (Revelation Cellular Forensics)

**Construction Law:** *Innovations in the Industry & Making Construction Premises Safer.* Lee Martin (Robson Forensic)

**12:45-2:15– Lunch** — *Recent Developments in the General Assembly & Legislative Update.* **Speaker:** Hon. Rodric Bray, Senate President Pro Tempore

**2:20-3:20 – Section breakouts**

**Business Litigation:** *Changes in Preferred Venue, Principal Place of Business, T.R. 75.* BJ Brinkerhoff (Jeselskis Brinkerhoff & Joseph) & John Higgins (Katz Korin Cunningham)

**Product Liability:** *Wearable Technology & Product Liability.* Scott McLean (Exponent) and Marie Kuck (Kightlinger & Gray)

**3:30-5:00** – *Trial Tactics: Voir Dire, Complex Evidence, & Jury Deliberation.* Dennis Devine (ThemeVision). **Panel:** Renee Mortimer, Lonnie Johnson, Jeff Hawkins, David Beach

**6:00-8:00 – Cocktail Reception & Buffet Dinner**

**8:15-12:00 – Pub Crawl, led by Young Lawyers (everyone invited)**

### Friday, November 22

**7:45-8:45** – *Women in the Law Breakfast: Civility & Leadership in Law (ticketed).* **Speaker:** Hon. Holly Harvey, Monroe Circuit Court

**9:00-10:00** – *Civil Rights Litigation: A Primer for Defense.* Casey Stansbury (Freeman Mathis & Gary)

**10:00-11:00** – *Challenging Stigma & Improving Lawyer Well-Being.* Terry Harrell (JLAP)

**11:10-12:10** – *The Art & Science of Mediation: Three Perspectives.* Sam Ardery (Bunger & Robertson); Erin Clancy (Kightlinger & Gray); Betsy Greene (Greene & Schultz)

**12:15-1:25 – Lunch** — *Past Presidents' Panel: Leadership Lessons Learned.* Michele Bryant, Tom Schultz, Scott Starr, John Trimble

**1:30-2:30** – *Second Chair: It's Not Just a Piece of Furniture.* Kevin Tyra & Bailey Coultrap (Tyra Law Firm). Adam Ira & Michael Wroblewski (Kightlinger & Gray)

**2:30-3:30** – *Ethics: Civility Matters.* Hon Melissa May, Indiana Court of Appeals. Fred Schultz, Greene & Schultz

**3:30 – Adjourn**

**Young Lawyer Service Project Amethyst House**

In conjunction with the Annual Conference, the Young Lawyers Division of DTCI will be hosting a donation drive for Amethyst House, Inc. Some items the organization needs include: basic household items, hygiene products, clothing, toiletries and food. Bring an item to contribute!

Amethyst House is a Bloomington-based nonprofit United Way agency that provides structured living environments, treatment, education, and recovery services for individuals with addictions and substance abuse issues. It operates four transition houses in Bloomington for men, women and children.•

## Officers & Directors