

## THE CARE AND FEEDING OF EXPERT WITNESSES

By John T. Bogart

When I was asked to review material and provide an opinion on an insurance case for the first time, I had little idea what to expect or, for that matter, what was expected of me. In the five years since, I've read numerous articles and legal decisions on what and how experts may testify but have seen nothing directed to attorneys on how best to utilize this legal tool. What follows is a general sketch of advice, from the viewpoint of an expert witness and consultant, that attorneys may find of some interest.

### 1. Selection Process

Start your search early. I'm always amazed when I receive frantic phone calls from attorneys saying they must designate an expert that day or the next day. Allow time to find an expert, to connect, (considering the usual telephone tag delays), to chat, and to get a feeling for the chemistry between you, and to briefly discuss your case. Ask the potential expert's

experience in the course of his career with matters germane to your case, and ask whether he has ever testified on anything similar. Get his general feelings about your case while keeping in mind



**When boxes and boxes of materials arrive, your expert may very well be overwhelmed. Give him some guidance by prioritizing it.**

case. You don't want him "squeezing you in" between other pressing cases. Discuss fees and retainers. Ask him to fax you his most recent CV and a list of prior testimony, along with the names and firms of attorneys who have retained him. Check him out. If he's smart, he'll probably be looking you up in Martindale-Hubbell within minutes of getting off the phone. If not time- and expense-prohibitive, arrange a meeting either at your office or his. If he is going to come to you, make it clear that you will pay for his time and expenses. There may be experts who are willing to give up a day or more to meet with you for free, but they are not going to be the ones whose time is very valuable and thus probably not the ones you want. I've had attorneys who expected me to crisscross the country for an interview with no more compensation than an airline seat. I politely but firmly terminated those inquiries. The first hour of this expert's time is usually free. After that the meter runs, as it does with lawyers.

### 2. After Retention

Detail as much as possible the areas and questions upon which you are asking him to opine. Obviously, you cannot and should not tell him what his

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that he now has only a thumbnail sketch of the issues involved. Tell him up front your time constraints, if and when a written report is required, and the dates of trial and probable deposition. Make sure he has the time to devote to your

## FROM NEAR AND FAR



Texas – A violent storm system struck Texas on April 5, causing more than \$880 million in insured property losses. The storm, which went on to cause havoc in nine other states, caused a total of \$1.2 billion in insured losses, according to the Insurance Services Office, Inc.'s, Property Claim Services unit.



Colorado – According to a report published in the April 14, 2003, edition of *Best Week*, William Gray and his Colorado State University storm-prediction team estimate that 12 named storms will develop in the Atlantic Basin between June 1 and November 30. The group also predicted that eight of those storms would develop into hurricanes, with three of those becoming intense.



Dallas – Dallas-based insurance agency Maxson-Mahoney-Turner was recently acquired by Compass Bancshares. Maxson-Mahoney-Turner was established in 1915 and serves a personal and commercial lines clientele. Senior managers at MMT will continue in their current roles, including David O. Turner as president.



Los Angeles – On May 3 a Los Angeles County jury ordered certain underwriters at Lloyd's of London, some U.S. insurers and some other London Market insurers to pay the Fuller-Austin Trust almost \$189 million to cover some of Fuller-Austin's future asbestos claims. The jury previously determined that Fuller-Austin's future asbestos-related claims could reasonably be expected to reach \$750 million.

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opinions are. After he has had a chance to review materials you have sent, you may certainly ask his opinions and, just as importantly, the bases for his opinions. Challenge him politely to defend them. Your opponent certainly will do so in deposition and at trial! Pick his brain and let him talk. I've had attorneys discover a whole new tack they may decide to take because of what they learned about how things really operate in my discipline. Now that you've retained him, all that he knows and has experienced is at your disposal. Take advantage of it.

### 3. Documents Sent

Since at deposition he will need to provide a list of all materials that he used and that helped in forming his opinion, you may wish to cover the waterfront and send him

everything. When boxes and boxes of materials arrive, he may very well be overwhelmed. Give him some guidance by prioritizing it. I always start with the complaint and get down pat the cast of characters in the case, both individuals

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***“Make sure the deposition transcripts have the exhibits attached or that your expert knows where to locate them.”***

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and entities. Discuss the allegations of who did what to whom, and when, and guide him to the pertinent documentation on both sides. He needs to understand your opponent's contentions and the bases for them if he is to defend his own and, hopefully, yours. Make sure

the deposition transcripts have the exhibits attached or that your expert knows where to locate them. I've run up needless billable hours searching for documents mentioned in deposition transcripts, but not among those sent to me. Discuss with him the reading materials that he has obtained on his own and ask to see them, if practicable. Make sure that he understands the rules of discovery before allowing him to seek advice from his own sources, people or documents. These sources may be invaluable but should first have your approval.

### 4. Reports

Don't be shy about offering your suggestions after reviewing a first

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draft of a report. A good expert has (or should have) an ability to see that this report may be instrumental to the case and be willing to make necessary changes or to opine further on stated points without compromising his independent conclusions. In making your suggestions, it is a good idea to preface them with the words, "If you agree. . . ."

## 5. Preparation for Deposition and/or Trial

Meet with him the day before a trial or deposition to go over all of the points he will make as well as to prepare him for topics that you expect will be asked. You don't want to be surprised at deposition by any of his answers. Meeting on the day before also allows him time to run through in his head all of his conclusions and bases for them and to review again, alone in his hotel room, any discussions you had in preparations that

day. Then have him arrive fresh in the morning, early enough for any last-minute conferring with you.


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***"Make him feel he is part of the team and not a 'hired gun.' Reputable experts bridle at that term and to any vibes they get that they are being thought of that way."***

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## 6. Attitude

This is the most important of all, at least to me. Make him feel he is part of the team and not a "hired gun." Reputable experts bridle at that term and to any vibes they get that they are being thought of that way. Introduce him to the other lawyers on your side and to your client, if you deem it wise. When he is in your office, treat him as you would a client, not as a vendor. If

you retain the right person, he is a professional and expects to be treated as one. But while he may be on the team, you are the team captain, and he should not be attempting to try your case for you. If you see tendencies that way on his part, diplomatically suggest that there are legal reasons why you do what you do but that you look to his contributions to those aspects of the case for which you retained him. With a positive attitude on both sides and a clear understanding of his perspective, he should advance your case and help in bringing about a successful result. 

*John T. Bogart is an associate of Robert Hughes Associates and a former underwriting officer, reinsurer and CEO of an excess and surplus lines brokerage firm.*

## A Change of Title



*Robert Hughes  
Chairman of the Board  
Chief Executive Officer*

Robert Hughes Associates, Inc., would like to announce that its founder and president, Bob Hughes, has decided to begin the passing of the torch and has assumed the positions of chairman of the board and chief executive officer. Bob founded RHA in 1979 and has been at the helm ever since. Bob says this move will allow him to devote more time to his clients' needs.

Additionally, John Oakley was named president and chief operating officer. John has been with RHA in various capacities since 1994. He was most recently executive vice president. He will be responsible for the day-to-day operations of the corporation.



*John Oakley  
President  
Chief Operating Officer*

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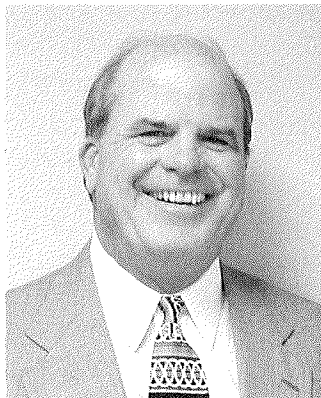
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## ANNOUNCING ...

Mr. Greg Wimmer, CSSC, Ch.FC, CLU, has joined Robert Hughes Associates, Inc., as an associate. Greg is currently with Plaintiff Structures, a structured settlement firm. Greg will provide consulting and expert testimony in a number of areas, including but not limited to the following:

- Structured Settlements: definitions, contracts, practice, trusts, etc.
- Employee Benefits: ERISA, pension plans, profit sharing, IRA, SEPIRA, etc.
- Securities: definitions, licenses, broker standards and practices, etc.
- Health Insurance: contracts, agents' practices, self-insurance, etc.
- Disability Insurance: underwriting, contracts, agents' practices, etc.
- Life Insurance: underwriting, ownership, financial ratings, agents' duties, standards of care, company practices and standards, regulations, etc. 



*Greg Wimmer,*  
CSSC, Ch.FC, CLU

## THE RHA REVIEW

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*The RHA Review* is published quarterly by Robert Hughes Associates, Inc. — an independent international litigation support, actuarial, risk management and insurance consulting company based near Dallas, Texas, with offices in Houston, Texas, and London, England. The purpose of this publication is to offer insurance-related information and critical comment pertinent to the clients, friends and fellow professionals of Robert Hughes Associates, Inc. This publication is available free to interested parties. The information contained in this publication is intended to be general in nature; readers should obtain professional counsel before taking any action on the basis of this material.

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