



## CNA HealthPro

### FAQs – You as an Expert Witness

**Q.** I have been asked by a defense attorney to give a deposition in a dental malpractice lawsuit. Before I decide to participate, I would like to know if I am exposing myself to significant legal risk as an expert witness, and how can I protect myself against these risks?

**A.** Although expert witnesses have historically enjoyed immunity from defamation suits as a result of their deposition or courtroom testimony, the scope of witness immunity varies among states and is being redefined or broadened in some jurisdictions through court decisions or legislation.

To ensure that knowledgeable professionals would be willing to testify freely in civil trials, courts have traditionally shielded paid witnesses from the threat of subsequent liability. In general, expert witnesses are treated as part of the judicial process and enjoy the same protections that unpaid witnesses do. Traditionally, witness immunity is thought to be “absolute,” meaning that witnesses can claim protection even if their testimony was knowingly false or malicious.

In its most basic form, the doctrine of witness immunity protects witnesses from defamation actions. Some state statutes go further. For example, California law extends the privilege by statute to all later tort actions, except malicious prosecution, while the Washington State Supreme Court appears to impose no limits in ruling that a hired expert witness will receive absolute immunity relative to the expert’s testimony. However, other state courts have expressed a contrary view. The Louisiana Supreme Court determined that a physician may sue his expert witness for inferior performance. Pennsylvania court decisions have permitted litigants to sue their own experts as well. However, the prevailing view is that all communication relating to the litigation, including oral deposition, is protected under the witness immunity doctrine.

As a result, expert witnesses are at little risk of being sued successfully by an adverse party. However, a California appellate court has ruled that the immunity does not extend to suits lodged against experts by their own clients. As a result of this decision, a California jury awarded more than \$42 million in compensatory and punitive damages to a company suing its paid litigation advisers. A Missouri court also has refused immunity to engineers in a suit filed against them by former clients who had hired the engineers for litigation support services.

Both of these suits were based on document preparation rather than witness testimony, focusing on the duty that consultants owe to their clients to perform their professional services with care and in accordance with contractual obligations. Expert witness testimony will in all likelihood continue to receive special protections from lawsuits filed by clients as well as opposing parties.

It is advisable to consult with an attorney about immunity statutes in your own state and in any other states where you are called to testify. If you testify or consult on a regular basis and are not already covered under your professional malpractice plan for personal torts, you may wish to consider purchasing additional liability insurance to protect against these risks. Check with your insurance representative or professional association to find out more about available coverages.

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