

WHAT IS THE ROLE OF AN EXPERT WITNESS?

Increasingly, bankcard professionals are being asked to testify in lawsuits to provide their opinions as expert witnesses. Below I will provide the definition of an expert witness and explain the potential role of an expert witness in legal proceedings relating to the bankcard industry.

What is an Expert Witness?:

An expert witness is generally defined as a person possessing certain specialized knowledge, training, education, skill and/or experience that goes beyond the knowledge of ordinary members of the general public. Both state and federal courts allow expert witnesses to testify in lawsuits in order to aid the trier of fact, usually a jury but often the judge, to determine how to rule on a case.

Often people think of an expert witness as someone who testifies at trial to help one side or the other prove its case. An expert witness is typically seen as testifying on behalf of one party or the other to support that party's version of the case. However, an expert witness does not have personal knowledge of the facts of a case. Instead, the expert witness is used to explain and provide opinions about particularly complex issues that are beyond the general knowledge of most people. An effective expert witness is one that can take technical jargon and explain it in a way that the typical jurors can understand. The jurors then take that information and uses it to help them understand parts of the case and render a verdict.

An expert witness's role can involve much more than testifying in trial. An expert witness can also assist the trial attorneys in understanding certain facts they may not be familiar with. For instance, most litigation attorneys know nothing about a particular industry before they get a case. The attorneys have to learn all about the industry, such as the bankcard industry, from the case documents, witnesses and if needed, expert witnesses. As such, an expert witness plays an important role in educating trial attorneys about particular industries.

Another role of the expert witness can be to help in evaluating a potential case. Recently, there have been data security breaches in our industry involving merchants and to a lesser extent ISOs. An expert witness can be used to evaluate whether or not a merchant's data security policies and procedures complied with those required by the card associations. This could help the attorneys handling the case evaluate the merchant's potential liability for any compromised data. These are but a few examples of how an expert witness can assist the attorneys and parties to a lawsuit.

The Expert Witness in Bankcard Cases:

There are a number of instances specific to the bankcard industry where an expert witness can be of assistance to help explain the case to the judge or jury. One area that is very specialized is the area of risk management as it relates to chargebacks and other types of merchant losses. The industry standards as to policies and procedures to prevent merchant losses change quickly. Crafty crooks are continually finding new ways to exploit the system to defraud merchants and get around risk managers' efforts trying to stop their illegal activities. An expert witness can be of great use to a judge or jury in explaining this highly technical and little known part of the bankcard industry.

Also, the data security requirements for the industry are very complicated and lend themselves to using expert witness testimony to explain their operation and importance. Many of the card associations have their own specific data security requirements. In addition, there are additional security standards that are "best practices" that can be transferred from other industries. An expert witness can be utilized to simplify all these standards in testimony to allow the judge and jury to understand these requirements. In addition, an expert witness can provide an opinion as to whether or not a data breach was caused by a merchant (i.e. whether the merchant had all the right data security policies and procedures in place and hence was not responsible for a breach).

Another important role for an expert witness is providing testimony of what the standard in the industry is for terminating residual payments. For instance, if an agent agreement is terminated without cause, can the agent's residuals also be terminated, even though the contract is silent on the issue of payment of residuals after termination of the agreement? In circumstances like this, an industry professional can testify about the standards and practices in the industry of continuing to pay residuals unless the agent agreement is terminated for a material breach or some other good cause. An expert opinion in these circumstances can save an agent's residual payments.

Another use of expert witnesses is to value merchant portfolios. This can be done in situations where a residual payment has been terminated and the judge or jury needs help determining the value of the residuals that were terminated. In a trial, the plaintiff needs to provide this type of damages evidence to the court or the jury in order to prove its case. Another area where portfolio valuations are important is in divorce proceedings. Again, the court needs to assign a value to all the assets in such a case and an expert witness can aid in providing that type of information.

An expert witness can be of great use in a lawsuit to help in the preparation of the case and also to testify as necessary. The role of expert witnesses in our industry is bound to continue to expand, given the increasingly complex nature of the industry and the potential for more lawsuits.

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