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The Expert's Role in Construction Disputes

by Robert Greenstreet

In the past few years, there has been growing pressure for tort reform in the United States. These proposed reforms, which would not leave construction disputes unaffected, include restrictions on frivolous suits, time limitations on liability, limitations on damages, and restrictions on the use of "junk science" (i.e., the use of expert witnesses). The last proposal—restrictions on expert witnesses—may be most surprising to those in the construction field, given that experts can play an important role in complex building disputes.

Because I believe that expert witnesses are likely to continue to be involved in these disputes—at least for the near term—despite attempts to reduce their role, this article will explore the part the expert witness plays and provide some guidance for those who are asked to act in that capacity.

Why are Expert Witnesses Necessary?

If the disputed issues in a construction dispute involve pure issues of law, expert testimony is not required. However, in many negligence cases, expert testimony is necessary to establish whether the defendant's conduct has fallen below the legally required standard of care. Determining this benchmark of performance—

"the level of ordinary and reasonable skill usually exercised"—is necessarily qualitative and is the province of the fact-finder, i.e., the judge or jury if the dispute is resolved in litigation, or the arbitrator if the dispute is resolved in arbitration.

While the required standard of care can, to some degree, be established by reference to relevant case law, the defendant's performance will most likely be measured against that standard based on the testimony of expert witnesses presented by both sides. Expert witnesses provide the specialized knowledge and experience that goes beyond ordinary human knowledge to help the finder-of-fact come to an enlightened decision.

The practice of using expert witnesses certainly has its detractors. The first problem they point to arises out of our adversarial system of determining the truth, which casts doubt on the supposed impartiality of expert witnesses. In both litigation and arbitration, both sides hire their own experts to substantiate their respective viewpoints. Each expert is likely to propound a position diametrically opposed to the other and, as a result, each will likely be viewed by the fact finder as a "hired gun." Thus, "even if the expert manages to achieve Olympian detachment, his [or her] neutrality is likely to be undermined by the workings of the adversarial system."¹

Critics of expert witnesses also point to the considerable costs involved in hiring expert witnesses—a sensitive issue for arbitration, which is less expensive than litigation. Experts can also overcomplicate a dispute, and critics claim that the use of these witnesses is excessive. They would like to see the rest of the country join the states that have already limited the use of what has been termed "junk science" in the courtroom.²

However, despite such criticism, the expert witness is likely to continue

to have a place in complex construction disputes, at least for the near future. One reason for this is that both arbitrators and judges are loathe to issue rulings that may cause their judgments to be overturned. Excluding evidence during an arbitration hearing or a trial is a ground upon which an award or judgment may be subsequently vacated by the court. Indeed, at least one court decision has been reversed where the judge had refused to hear expert testimony.³

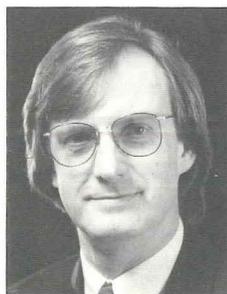
If the expert witness is here to stay, those who undertake to serve in that capacity should observe a few safeguards to ensure that the experience is not an unduly painful one.

Criteria For an Effective Expert Witness

First and foremost, the expert witness needs credibility to ensure that his or her opinion will be relied upon over the other experts who testify. An element of the witness's credibility is derived from his or her stature in the building industry or profession. The witness's stature in the field is established through a presentation of his or her qualifications, professional affiliations, registration, awards, writings, and relevant, hands-on experience. Of course, people with little practical experience, such as academics and scientists, can testify as experts. However, considerable practical experience is usually considered an important component of credibility-building.

The expert's performance in each case will also play an important part in determining whether he or she is effective. Much of the expert's work is completed out of the courtroom or hearing room and that work must be thorough. Some of the pre-trial and pre-hearing work experts perform include:

- helping the lawyer who retained the expert review the case and develop case strategies



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- making site inspections
- presenting a written report of the expert's findings
- giving deposition testimony to the opposing counsel
- advising on the use of technical construction terms
- preparing questions for use in cross-examination of the opponent
- listening to the opposing side's experts and recommending questions to undermine that expert's testimony.⁴

The importance of the expert's performance in presenting—and defending—his or her testimony cannot be underestimated. It is during cross-examination that the expert's credibility will be vigorously tested. There, the expert will be challenged by opposing counsel, who will not hold back in trying to undermine every statement the expert has made. From the expert's perspective, it is surely the most memorable and vivid aspect of the work that is done in the case. It is vital for the expert who will testify to remain calm and professional when under examination and cross-examination.

An effective expert witness maintains a professional appearance and also exhibits a dispassionate and reasonable demeanor to the arbitrator, judge or jury. In addition, it is important to speak clearly and take care not to overwhelm the fact finder with technical jargon. Care should also be taken not to speak in a patronizing manner or bore the finder-of-fact with unnecessary details.

Expert witnesses are allowed to refer to notes and other materials relevant to their testimony. Thus, an effective witness will take advantage of graphics, models, computer simulations and similar visual aids to demystify and clarify complex data for a lay audience. For example, in a recent highly complex arbitration alleging the inadequate shoring of an excavation, the respondent used an ingeniously constructed, transparent model of the soil surrounding the

excavation to demonstrate the flow of various aquifers through the substrata of the site and their impact on the construction work. In this way, the respondent took highly technical data and conveyed it clearly and convincingly to the panel of arbitrators, providing strong support for its argument.

Pitfalls to be Avoided

All experts must guard against being led into inconsistency by an attorney skilled in cross-examination. They should also avoid exaggeration of their credentials and experience, since on cross-examination, the attorney can easily bring out the true facts, which can call into question the credibility of an expert's entire testimony.

Good expert witnesses stick exclusively to the issues within their field of expertise and do not speculate or proffer suggestions on how the work should have been completed. In short, the expert witness should strive to offer no unsubstantiated opinions, to come across with convincing credibility on direct examination and to be even more convincing on cross-examination.

Since the expert should expect his or her testimony to be closely scrutinized, which no doubt will be a trying experience, opinions should only be ventured based on solid knowledge and personal experience with the construction process involved in the case.⁵

Acting as an expert in an arbitration or litigation is a challenging experience, but it can be a rewarding one if the expert is qualified to testify as to the disputed issues and is well prepared.

ENDNOTES

1. J.R. Spencer, "Mischief and the Expert Witness," *The London Times*, July 12, 1990.
2. Two such states are Maryland and Kansas. *Liability Update*, vol. 5, no. 10, Oct. 1992 (V.O. Schinnerer, Of-

fice for Professional Liability Research Inc.).

Two years ago, the U.S. Supreme Court issued a ruling that addressed the issue of expert scientific testimony in the federal courts. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 61 U.S.L.W. 4805 (U.S. 1993). That ruling assigned the district judge the "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 61 U.S.L.W. at 4810. The Supreme Court stated:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

61 U.S.L.W. at 4808-09. It has been questioned whether *Daubert* applies only to scientific evidence, or also to "technical testimony." Michael Honig, "More on Screening Experts After 'Daubert'," *New York Law Journal*, June 12, 1995, p.6. col.6.

3. *Friendship Heights Assoc. v. Koubek*, 785 F.2d 1154 (4th Cir. 1987), discussed in *Legal Highlights, Guidelines for Improving Practice*, vol. XVII, No. 9, (V.O. Schinnerer & Co. 1987).
4. W. Lohmann, "Diagnostics: The Expert Witness," *Progressive Architecture*, Sept. 1988, pp.57-60.
5. In general, expert witnesses enjoy immunity from suit based on their opinions given in litigation. This immunity has been extended to witnesses testifying in arbitral proceedings. *Moore v. Conliffe*, 871 P.2d 204 (Cal. 1994). However, in one older case, an intermediate appellate court found that an expert was not immune from suit where the opinion he gave in a prior litigation was negligently given. *Bruce v. Bryne-Stevens & Assoc.*, 752 P.2d 949 (Wash. Ct. App. 1988). ■