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The Architect as Expert Witness: A Survival Guide

by Bob Greenstreet

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Architects can turn their hands to a number of professionally related fields, which is a useful attribute when times are hard. We possess a broad perspective of the entire design and construction process, an ability to problem solve and think creatively on our feet and an innate knack of being able to talk intelligently about such subjective issues as space and design. For these reasons, architects can become very useful expert witnesses, and a number of our colleagues have developed rewarding sidelines by providing reports and testimony for either the plaintiffs or defendants in construction related disputes, of which there are regrettably no shortage.

However, as attractive as the field might seem, it must always be remembered that, when we enter the realm of law, we are out of our natural environment. We are in the combative world of attorneys whose task it will be to question and, if possible, undermine and call into question the reliability of our evidence. Attorneys were trained to do this, they do it every day and they

are usually very good at it. Consequently, a few safeguards might be advisable before you venture into their world to ensure that your role as an expert witness remains a credible one and that your opinions remain as defensible and as valuable to your clients as possible.

Polish Your Credentials

Being selected as an expert witness will depend to a great extent on the architect's credentials, which must be extensive enough to impress a judge, jury or arbitrator and signify that his/her opinion is one worthy of consideration. Degrees and diplomas from reputable academic institutions provide a solid foundation of credibility, which should be backed up with details of sufficient practical experience relevant to each case in question. Details of special training courses and ongoing continuing education are also helpful. If you've undertaken any teaching, have written any papers or articles or have given lectures within your field of expertise, all the better.

Make sure that you are scrupulously accurate in outlining your professional profile – if opposing counsel finds any exaggerations or inconsistencies in your claims, your credibility is diminished before you even get to your testimony or report – and make sure your resume is professionally balanced. If you appear to do little else beyond expert witness work, you are vulnerable to claims that you are nothing more than a 'hired gun' who will say whatever is required for compensation, regardless of your real opinion. An architect who is primarily involved in architectural practice and who does the occasional expert report can arguably demonstrate a greater degree of professional detachment and less financial dependency and can therefore be more convincing as an expert witness.

Expert witnesses can be selected based upon prior reputation, by a simple web search that will locate any earlier writings or websites, or through agencies that specialize in expert witness placement. In any event, you as a potential expert witness are likely to be interviewed before selection to determine if you are appropriately qualified for the case in question, if you possess the right characteristics of a convincing expert witness and if your opinions on the case in question are helpful to the lawyer and his/her client. If you have reports rendered in previous cases or articles written on similar construction issues, you might want to share them with the attorney, both to demonstrate your writing ability and your general approach to construction disputes. If you have expressed an opinion in your previous work that conflicts with the required direction indicated in the current case, your attorney will want to know in case it is discovered by opposing counsel and used to undermine your latest opinion.

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Writing the Report

Expert witnesses are usually required to commit their findings to paper, so it is vital to develop a clear, concise and unambiguous writing style – remember, the report will be read by people outside your profession, so avoid jargon or technical terms that may be unfamiliar or even confusing to the layperson. Similarly, avoid using legal terms – you are not a legal expert, and straying into this territory by using the language of law makes you vulnerable to attack if you don't use it absolutely correctly.

Keep your report as precise and factual as possible. Avoid exaggeration, colorful adjectives, fanciful metaphors and sweeping statements (for example; if you state that 'all the gutters are improperly installed' – only one gutter needs to be shown to be correctly placed, and your statement is effectively invalidated, casting doubt upon the remainder of your opinions).

Grace Under Fire Part 1: The Deposition

In some instances, an expert will prepare a report and will be required to do no more – the vast majority of cases are settled long before a court date has been set, after all. However, if the case continues, you may be required to defend your work in the form of a deposition by opposing counsel. You will be questioned, sometimes at length, by an attorney (or attorneys) who will probe your findings and ask many far ranging questions.

Remember, this is what he/she does for a living, so be careful. Do not attempt to outsmart the lawyer – you will lose – and answer every question carefully and precisely, pausing to think about your answer before you speak. You are in no hurry. Prepare well before the deposition so you are familiar with your report and the related materials but don't hesitate to ask if you can refer to them during the meeting. Again, take your time. If you don't fully understand a question, ask for it to be repeated (this also buys you more contemplative time). If you don't know the answer or the question is beyond your field of expertise, don't worry about stating 'I don't know'. It is better that you appear less universally knowledgeable than to give an incorrect or inaccurate answer that can be later thrown back at you.

When you've answered the question, stop talking. Don't volunteer supplementary information. If there is an uncomfortable silence, enjoy the break – it is not your responsibility to keep the conversation going, and by talking further, trying to be helpful or knowledgeable, you may not be helping your client. If you are getting flustered, confused or annoyed, ask for a break, but always be polite, professional and measured in everything you say. Remember, every word is being recorded by the stenographer (if one is present) and can be retrieved at a later date, so avoid humorous asides, defensive outbursts or anything that, upon later reading, may diminish your professional demeanor.

Grace Under Fire Part 2: The Courtroom

In the event that the case actually goes to court, you will be required to make a personal appearance to defend your opinions and convince a judge and possibly a jury of the credibility of your evidence.

Similarly, your appearance at a hearing may be necessary if the case is held before an arbitrator.

Expert witnesses differ from regular witnesses. The latter are only asked to comment on what they have seen or what they know to be factually correct, while you are being asked for your opinion. This is a more subjective task, which must be undertaken convincingly, clearly and professionally for it to be effective. The judge (or arbitrator) will be a professional too, although not necessarily one that is familiar with your field, so it

is important to communicate as clearly and comprehensibly as possible. This becomes even more important with a jury comprised of persons from multiple backgrounds. The same points made in the previous report writing section of this article apply – use no jargon, no obscure abbreviations or acronyms, no complex, technical terminology and provide simple, objective explanations wherever possible.

Appearance is obviously important, but demeanor is critical. The effective expert witness appears reasonable and balanced, almost a detached observer who presents his/her opinions in a precise, measured and even seemingly objective manner. You should be helpful during testimony and calm under cross examination. The pointers previously suggested for behavior during deposition still apply too. 'I don't know' is an acceptable answer. Always ask for clarification of a question if it is not fully clear to you and, where possible, don't allow yourself to be rushed. Above all, always think before you speak.

Summary

Despite the challenges of deposition and courtroom pressures, expert witness work is both professionally interesting and financially rewarding, and many architects excel in the field. Being an expert does take you into the field of law, however, so it is advisable to sharpen up your skills of communication and presentation and thereby enhance your credibility and ultimate success.

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