

Do I Need An Expert Witness? How Do I Find One?

By Thomas L. Rosenberg

When contractors get involved in arbitration or litigation, a question that the contractor and its counsel will often have is whether an expert witness is necessary and if so, how to obtain the right expert witness. Expert witnesses serve an important part in adversarial proceedings. They were not involved in the underlying dispute that gave rise to the claim, yet they look at the conduct of all of the parties to the dispute and offer an opinion based upon their expertise, background, and training as to many of the ultimate issues in dispute. Therefore, the selection of an expert witness can be extremely important to the success of pursuing or defending a claim.

FINDING THE RIGHT EXPERT

An initial issue to consider on finding the right expert witness is whether the forum in which the expert will testify is important. Many of our claims are in court. Others are in arbitration. Is there a difference in searching for an expert for arbitration as opposed to court? Yes. In court, you may want an expert witness who is more of a showman, storyteller, and able to connect with the jury. In arbitration, this may not be necessary. In all circumstances, however, the basic technical criteria apply. The expert needs to be personable, a communicator, and be one who talks to the listeners (jurors or arbitrators), not at the listeners. The expert must be able to simplify the complex technical issues for the ease of understanding.

With the aid of the client and even an insurance claim representative, a determination should be made at the outset as to what type of expert and the scope of the expert's analysis is needed, prior to engaging the expert. One size does not fit all. An expert may have great subject matter on certain issues, but if the matter involves other issues the expertise may be lacking. Therefore, before an expert is employed, consider exactly what you need. The greater the specificity, the more likely the success.

There are many resources available for identifying potential experts. Other lawyers in the field of construction law are often the best resources for identifying experts. Electronic searches can be of some help in finding possible experts. However, when unfamiliar with a potential expert,



it is very important to speak with people who have employed the expert in the past to get a true understanding of the strengths and weaknesses of the person.

INITIAL INTERVIEW PROCESS

Once an expert has been identified, an initial interview should occur. If time and money allow, the interview should be in person. If not, it can be by telephone. This allows you to determine if the expert is the right person for your needs and whether you will be able to work with the expert for the time necessary to address the claims in dispute.

With today's technology it is not difficult to find lists of the expert's prior testimony. The Federal Rules of Civil Procedure require testifying experts to produce a list of all recent testimony they have given. Many experts maintain such a list. If the list includes cases in litigation, sometimes you can find the actual filing of a deposition given by the expert on a court's website. The review of such testimony can give you great insight into the expert's abilities.

ABOUT THE AUTHOR

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Through the interview process, you want to determine the expert's actual experience regarding the issue at hand, potential conflicts of interest with an opponent's experts, and other cases in which the expert has testified, as well as discuss the issues of importance to your case.

CLEAR ENGAGEMENT LETTER

It is important to have an engagement letter with the expert. More often than not, the expert is "employed" by the lawyer for the contractor. This may extend the privilege between the lawyer and the expert in some jurisdictions. While the lawyer may be employing the expert, the lawyer is rarely, if ever, paying for the expert. Therefore, an engagement letter has to be clear as to whom the expert can look to for payment.

There are different types of experts in the adversarial process. There are testifying experts and consulting experts. A testifying expert is the more traditional expert who often provides a report, testifies at deposition, and then at arbitration or trial. A consulting expert will often assist counsel in considering the strengths and weaknesses of the case and be candid about the weaknesses of the case in an effort to try to help resolve the dispute. Such an expert does not issue a report nor testify.

ESTABLISH A BUDGET

It is also important to establish a budget for the expert's services. Insurance companies often require budgets for such services. The budget needs to take into account all

necessary tasks. Not only will the expert investigate the matter, prepare a report, and testify at deposition, but often the lawyer will want the expert to assist in reviewing an opponent's expert report, help prepare the cross-examination of an opposing expert, assist in the preparation of demonstrative evidence for use at trial or arbitration, and engage in other acts. Therefore, the budget needs to be well thought out as to all activities the expert may address.

Lastly, in some jurisdictions around the United States, the relationship between your lawyer and expert is changing. In some jurisdictions, a privilege now exists that protects the drafts of an expert's report, email, and correspondence between the lawyer and an expert, as well as other communications between the lawyer and an expert. In other jurisdictions, there is no such privilege. It is important that the expert understand whether there is such a privilege before engaging in communications with the lawyer. Unless the lawyer is present, there typically is no privilege between the expert and contractor. In fact, it is quite common that at deposition, the expert is asked to convey everything that was discussed, shared, and considered in meetings with the contractor.

CONCLUSION

Experts serve a vital purpose in the adversarial proceeding. A good expert can help a great deal in proving or defending your case. A contractor must work closely with its lawyer to properly prepare and educate the expert witness on the case and its facts. Doing so will enhance your chances to be successful in an adversarial proceeding. ■

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