

What does it take to be an

EXPERT BUILDING CONSULTANT and WITNESS?

by Michael Casey, ASHI Member

Experts or expert witnesses have become an important part of the American judicial system. They investigate, review, and evaluate technical issues and explain their findings and opinions to the attorneys who hire them and possibly to a lay jury so it may reach a verdict. The term "expert witness" is somewhat of a misnomer. You are not an expert witness until an attorney designates you as his or her expert AND a court of law or other tribunal accepts and confirms such recognition and allows you to render an opinion as evidence.

A few dos and don'ts

Opposing parties in a dispute retain experts to investigate and to form an opinion regarding the issues at hand. This opinion should be based upon facts and professional judgment, experience and education. Rarely do the experts for both sides agree. There is a cardinal rule for being an expert consultant: Your opinion regarding an issue should never differ according to who has hired you. Also, it is advised that as an expert witness you work for both plaintiffs and defendants (and hopefully as third party independent) on a relatively equal basis. There are some experts in the building consulting field who are known as "plaintiff prostitutes" or "defense dorks" because they only work for specific parties. Or worse yet, they get tagged with derogatory nicknames because everyone in the field knows what they will allege in almost every case. Keep in mind, an

expert is not an advocate. The attorney is the advocate. As an expert, your role is to perform your investigation to the fullest, evaluating all avenues so you can come to an honest and objective conclusion, even if your client may not be thrilled with your opinion.

Another important obligation of the expert consultant is to disclose all conflicts and potential conflicts of interest at the onset of the matter. The prime duty of an expert is to render an impartial, educated, opinion. Possible conflicts should be discussed with an attorney during the initial contact. Before accepting an assignment, I ask for a list of all parties involved so I can perform a conflict check, and turn the offer down if one is discovered. Your opinion may be discounted because of any conflict of interest or relationship with a party, even if only perceived, thereby wasting your clients' time and money, or worse yet, losing the case for them and looking like a fool.

Always be aware of your limitations! Don't take a case if it is totally out of your expertise. If you are comfortable with the matter as a whole, know when it is necessary to obtain assistance. Experts are allowed to rely on the opinions and findings of others they hire to assist them.

As you form your opinion, be aware of the opinions of other respected experts in your field, as well as established codes or standards. If you disagree with the opinion of most other experts or with estab-

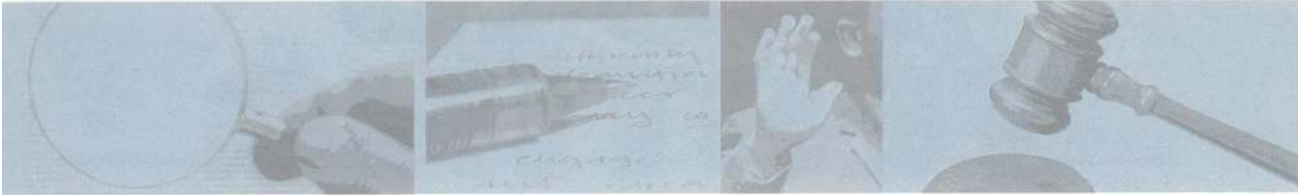
lished standards and codes, be prepared to fully explain and back up your opinion to all parties involved as to why yours should prevail.

Developing a curriculum vitae

A curriculum vitae (CV) or resume is a history of your background, experience, and training. It will change as you become experienced and gain knowledge. The worst mistake you can make is to exaggerate or be untruthful in your resume. Expect to be grilled on your qualifications for at least a half-hour at deposition. The opposing attorney is looking for evidence to disqualify you.

Build your CV by listing your background (such as contractor, inspector, etc.); your education, including special studies such as seminars and conferences; then your experience, such as prior cases or significant assignments. Mention leadership activities in your field. Holding office in a professional association, being active in committees, and writing technical papers all help you establish yourself as an expert.

In the building consulting field, it's important to belong to relevant organizations, such as the American Society of Home Inspectors, the California Real Estate Inspection Association, the Construction Specifications Institute, Roof Consultants Institute, International Conference of Building Officials, International Association of Electrical Inspectors, and American Society of Professional Estimators to



name a few. It impresses attorneys. More important it's a must for keeping up-to-date with new information. To remain credible, an expert must be cognizant of changes in construction practices and knowledge. Choose one or two organizations and become active and known by your peers. You'll be surprised by how much work may come your way from others in your field.

Getting work as an expert

There is no easy way to advertise your services as an expert building consultant. Of course the phone book has a section entitled "building consultants." However, I see few firms buying space there. Consider these avenues of obtaining business:

- Schedule or sponsor a lunch meeting for attorneys who practice in the construction defect field and discuss a timely topic, distributing your firm's package at the end of the meeting.
- Prepare a professional mailer to attorneys, hoping they will keep your information on file.

The best advertisement, of course, is word of mouth. You will need to become known as an authority in your field. Getting active in organizations relative to the building industry is the best method. If you are skillful at what you do and have reasonable visibility, the rest will fall into place.

You will need to create certain documents, such as a fee schedule, retainer agreement, and other document control methods. These are

individual items, to be developed as the need arises. A well-executed agreement is a must to assure you get paid for your services. Consult a business attorney to create a consultant/retainer agreement. It's a good idea to use invoicing software, such as Timeslips, to keep track of your billings on various cases and to generate invoices. Billing manually can become tedious once you are retained on several cases.

Meeting with the client/attorney

Once retained, it's wise to have an initial meeting with your client and/or attorney to discuss the issues of the case and to possibly plan some strategy. Dress respectfully when attending meetings; a tie and sport jacket is appropriate. Be concerned about the outcome of the matter (but never promise any outcome); take notes, and inform the client how you can help him. Now is the time to bow out and recommend another expert if the elements of the case are beyond your comfort level.

Gathering evidence

As you proceed, review the opposing side's documents. Look for inconsistencies, duplicative allegations, and inaccurate or misconstrued quoting of manufacturer's specifications or codes. Oftentimes experts use the wrong year building code (newer than property) when writing reports. Ask the attorney for the opposing expert's deposition transcript and review it; you will gain insight to his/her opinion and

strategy, and you may be able to discredit it. When reviewing plans, be sure you have the approved set or as-built set; preliminary or conceptual drawings may not be accurate.

Be prepared and be organized! Don't attend a site inspection of an attic wearing a suit and wing tip shoes. Don't arrive at a site to perform a roof inspection without a ladder. You are being paid a lot of money to be an expert consultant, and you are expected to know what you are doing, as well as to be prepared to perform your inspection.

Many consultants use a cassette recorder at site inspections to record their findings. These may work fine for them, but personally I prefer to take written notes at the site. Too much can be lost with a tape recorder. At times I find sketches made in the field to be invaluable later on. Occasionally I will create field sheets unique to the project for ease of documentation. My advice is to take thorough notes at the site, not later when you may forget a critical piece of information. Be sure to identify the case, date, who was present, and page number on your notes.

A quality camera and lots of film (it's embarrassing to run out!) is a must. I prefer a camera that imprints numbers in sequential order on each photo itself. It is not uncommon to take several hundred or even thousands of photos during investigation of a large project. These "data-back" cameras make keeping track of photos a breeze.

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You only need to identify the photo number (and not duplicate photo numbers during return trips) in your notes to keep a record of each and every one. Sometimes an erasable marker board used in the photo can be helpful to identify the condition being photographed; however, this can be time consuming.

Be sure to use a tape measure in photos where necessary to show perspective of a defect, such as a slab or wall crack. Try to keep unnecessary things out of photos, such as tools, persons, etc.; they tend to be distracting later when using the photos at mediation or trial. Take adequate notes and photos at the site inspection; it may be the only chance you have to see the defects (or lack of). Many experts now use digital cameras. However, many persons on the jury may believe the photo was "computer altered" just because it's digital.

Do not discuss your opinions at the site with other opposing experts (even if you think their conclusion or comments are wrong). They can testify as to what you said during their deposition or the trial. If you were in error or have changed your opinion, this testimony may affect your credibility. Be sure to discuss your findings and conclusions with the attorney first. When asked by another expert, "So, what do you think?" my favorite answer is, "I don't know, what do you think?"

Writing the report

Do not prepare any report until you discuss your findings with the attorney and are asked to prepare a written report. Once anything is written, it becomes discoverable to all parties in the action. Too many times experts publish unsolicited or embarrassing documents that must be dealt with by the expert and the attorney. Oftentimes cases drag on for years and publishing a report too early can be a mistake; new information may alter your opinion.

When assigned to prepare a written report, ask the attorney whether he/she would like photographs included. Most of the time photographs are approved, and can make your opinion more convincing.

Most of the time my reports are "preliminary." Very rarely do I prepare a "final" report. The danger of the final report is the inability to change it if necessary. When in doubt, consult with your client's attorney.

Preparing for deposition

A deposition is somewhat informal; however, the opposing attorney (who, remember, is trying to win the case) takes your testimony under

"Always count to three before answering any question."

oath, and it is transcribed by a certified court reporter. Be careful about what you say; the opposing attorneys and experts will carefully scrutinize your testimony. Deposition testimony is typically considered your final opinion and can be used at trial; any additional work or opinion changes may not be admitted at trial. If you do not have conclusions regarding the case, the opposing attorney will usually reserve the right to depose you again.

Depositions can go on for days and can be exhausting. Be physically and mentally prepared for the deposition. Review your documents and be familiar with their whereabouts. A three-ring binder with tabs distinguishing different aspects of the case is handy. You will appear unprepared if you have to shuffle for ten minutes through a bankers box full of papers and photos to find an important

item. Be sure your attorney has reviewed your files prior to the deposition and removed any privileged documents; the opposing attorney will study and typically copy your entire file(s), including photos.

I find it impresses (and possibly frustrates) the attorneys present when I'm able to cite from memory pertinent sections of the Codes that apply to the subject matter to be discussed at the deposition. It is always wise to remember important and commonly used sections of the Building Code or other common authoritative documents.

Always count to three before answering any question. This allows your attorney time to object if necessary, although you must still answer the question if you understand it. Answer deposition questions with a "yes" or "no" whenever possible. Do not volunteer information; you are not there to convince the attorney of your opinion; save that for the jury. Don't answer poor, compound, or vague questions; ask that they be re-worded. Some questions will be outright dumb, such as "Have you ever made a mistake?" The correct answer, of course, is "yes." Adding, "But I always made every attempt to correct it" limits the damage. After some experience you will become accustomed to these tactics and will be able to counteract them. You must answer any question you understand, even if it damages your case. Be truthful at all times, and do not alter your opinions to favor your client. Remember many attorneys and experts keep files of previous depositions. Differing opinions from other cases may damage your credibility unless you have a valid reason for the change.

Have a good understanding of your scope of work and testimony before entering the deposition. The opposing attorney will ask when you were first contacted in the matter and what your scope of work entails.

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Discuss this with your attorney, or request a copy of the expert designation naming you and your scope. As a home inspector your scope may include rendering an opinion on the standard of care for a home inspector in this area or opine on the opposition's findings and complaint. Do not guess when answering a question, if you cannot answer, say so, and offer to perform the research to find out. Oftentimes blank spaces can be left in a deposition transcript for you to fill in upon your review of the document.

The trial

Appearing at trial, whether in front of a jury or a judge, is the ultimate test of your expert skills. The fact that you are asked to appear at trial indicates that the court has accepted you as an expert. You testify to the judge or jury. That's who you must convince, not the questioning attorney. Dress appropriately, a conservative dark suit and red or yellow tie is best. Show respect to everyone. The judge is "Your Honor", and the attorneys are Mr./Ms._____, no matter how hard they may be trying to discredit you. Remain dispassionate and cordial at all times. Your job is to appear emotionally uninvolved. Be objective regarding the matter at hand. State the facts and your opinions when asked.

There are two types of courtroom examination: direct and cross. Direct will be asked by your attorney. The opposing counsel propounds cross-examination. Do not engage in a battle of wits with opposing counsel. Answer only questions asked and don't volunteer information; it may hurt your case or make it appear that you feel the need to qualify every answer because you are unsure. Count to three after every cross-examination question so your attorney has a chance to object, and wait for the judge to rule on the objection before answering.

Graphical exhibits can be of great use in the courtroom to visually aid your testimony regarding the matter. Discuss with your attorney what exhibits should be created (this may depend upon the trial preparation budget) and when they will be used. Exhibits should be clearly visible from 10 to 20 feet away. Photo enlargements of actual site conditions work well, as do mock-ups of components. Any mock-up must be completely accurate or it may not be allowed as evidence.

Other areas of work

As you become known as an expert building consultant, other, non-litigation, work may be pursued. When owners and contractors have disputes, a knowledgeable consultant is needed to mediate between parties. Insurance companies may ask your opinion on a claim. Building owners may need assistance investigating a problem and designing a solution. Don't be afraid to take on an assignment even if you are unfamiliar with all the aspects; you can act as a coordinator of sub-consultants to resolve the problem. Remember that the key to success is professionalism and a positive attitude. ■

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