The Role of Expert Witnesses in a Claim against an Engineer

By David J. Hatem, PC and John B. Connarton, Jr., PC

In any lawsuit, there are basically two types of witnesses that will testify. A fact or "lay" witness is allowed by rules of evidence to testify concerning matters of which he or she has personal knowledge and that are relevant to the issues involved in the case. If the fact witness has seen it, felt it or in certain limited circumstances has been told of it, the witness may so state. One long established limitation, however, is that, with a very narrow exception, a fact witness may not express an opinion. If the issues involved in the case relate to matters outside the common knowledge and general scope of experience of the average fact finder, i.e., jury or judge, the rules of evidence allow an "expert" witness to testify and express opinions concerning these issues, even though the expert was not personally involved during the relevant time period.

Professional liability claims, such as those asserted against design professionals, are the type of claim where expert witness testimony is not only allowable, but in the vast majority of claims is actually required. Engineering, as with other complex professions, involves complicated questions of technology and, therefore, usually requires the presentation of expert testimony first as to whether the alleged wrongdoing did in fact occur and, second, whether, even if it did, any damage or loss occurred as a result. The only exception would be the very rare factual circumstance where the alleged inadequate acts or omissions of the engineer are so gross or obvious that a layperson can rely on their own common knowledge to recognize or infer negligence.

The role of an expert witness also goes beyond this requirement for technical testimony. Once a claim has been asserted, the expert will first provide assistance in evaluating the claim as well as assisting in its potential resolution short of a trial. The expert's use before a trial in the investigation and evaluation of the claim will often involve the collection and review of documents, attendance at interviews, site visits and possible testing. The expert will also review deposition transcripts and exhibits, securing a more complete understanding of what actually occurred and providing counsel with assistance during the discovery process. The expert may also be involved with working with other experts dealing with other aspects of the case, so that coordinated and consistent expert presentations result for use at a mediation or testimony at a trial. In a similar, important manner, the expert should also be able to understand the client's exposure and be able to provide a reality check to the client in that regard.

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During any phase, however, the expert's primary responsibility is to assist with the determination as to whether the design professional's services met the applicable ***standard of care***. If so, there should be no liability of the design professional for any alleged loss.

Unlike the provisions of the American Institute of Architects (AIA) standard contract documents AIA B141-1997, AIA B101-2007, the *Owner-Architect Agreement*, in §2.2 now provides a more detailed definition of the applicable standard of care for an architect as follows:

> *"The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the project."*

AIA C 401-2007, the *Architect – Consultant Agreement*, also modified the previous 1997 version by, in general, "flowing down" the provisions of the *Owner-Architect Agreement*. §2.1 of C 401-2007 states the definition of the standard of care for the consultant in language nearly identical to that found in B-101-2007.

Although each state may have its own definition of the standard of care, the language of B101 and C401 track these generally accepted definitions which were summarized by the Massachusetts Supreme Judicial Court:

> *"As a general rule, an architect's efficiency in preparing plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one of that profession . . . [I]n the absence of a special agreement, he does not imply or guaranty a perfect plan or satisfactory result. . . Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals."*

The expert witness must be able to explain what this standard of care actually means and how it applies to the facts of the case in question. He/she must also be able to describe how a design professional may have a higher standard of care in a particular case or, perhaps, a lower or more limited standard of care. Each may be possible depending on the language of the contracts involved for the project, and the law of the jurisdiction in which the claim is pending. Similarly, the expert must be able to explain how and why compliance with an applicable "code" might or might not mean that the standard of care was met. The expert must, of course, fully understand what the standard of care is for the project in question, and must also be able to explain the distinction between errors and omissions by a design professional and a violation of the standard of care and why the existence of an error or omission does not necessarily mean that a violation of the standard of care exists.

Having established the need for an expert in the defense of a claim, there are certain criteria to be taken into consideration when identifying and selecting an expert for a particular case. The first of these, of course, would be his/her qualifications and experience with respect to the area and issues involved, as well as his/her reputation both as a practitioner and as an expert witness. It is usually preferable to select a person who is an active practitioner as well as an experienced expert

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witness, rather than one who spends most of his/her time involved in acting as an expert. Having an actual practice provides credibility, while spending too much time as an expert witness allows for an argument that the expert is nothing more than a "hired gun". Additional criteria would include the client engineer's knowledge of the expert, counsel's experience with the expert, and the expert's availability and commitment.

In a court setting, the judge has wide discretion in whether to qualify a witness to offer expert opinion on a particular question. The initial question is whether the witness has sufficient skill, knowledge and experience in the area of his/her training to aid a jury. In addition, however, the judge must insure that the expert's proposed testimony is reliable. In that regard, the court will review the grounds for the proposed testimony and determine whether the expert has employed the same level of intellectual effort that otherwise would be expected of an expert in the field in question, and does not rely upon subjective belief or unsupported speculation. Although one might expect that only an engineer should be able to testify against another engineer, in some circumstances there is no specific requirement that testimony on a particular issue must be provided from an expert qualified in that subspecialty rather than from an expert more generally qualified.

At the same time, the judge has this initial gatekeeper role: the testimony given by an expert is still subject to evaluation by the jury which can accept all, some or none of the witness' testimony. As such, another criterion in selecting an expert is the person's ability to testify in an articulate, candid manner with as much objectivity as possible. The person must be able to act as a teacher by simplifying complex issues in a manner comprehensible to a layperson, while at the same time not appearing to talk down to the jury. The person must also be able to do this in a believable, respectful and courteous manner both while being questioned by the client's counsel and while holding his/her own during cross examination. A good expert will also think as much about his/her presentation as about the technical substance and content of his/her testimony. Being effective requires an ability to communicate well both orally and with body language while walking a fine line to avoid undue advocacy. In short, the expert must be able to connect with the jury so as to convince the jury to accept his/her opinions because he/she is correct and not just because he/she has been hired to act by a particular party to the lawsuit. A well qualified and well prepared expert will do just that.▪

David J. Hatem, PC is the founding Partner of the multi-practice law firm Donovan Hatem LLP. He leads the firm's Professional Practice Group. Mr. Hatem can be reached at ***dhatem@donovanhatem.com****.*

John B. Connarton, Jr., PC is a Partner at Donovan Hatem. He is an active member of the Professional Liability Underwriting Society, Product Liability Advisory Council, International Association of Defense Counsel and Defense Research Institute. Mr. Connarton, Jr. can be reached at ***jconnarton@donovanhatem.com****.*