

FMA Workshop Session:
The Engineer as Testifying Expert

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A copy of this presentation can be downloaded at:
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Experience in Litigation Support

- Worked on well over 200 pieces of litigation
- Been deposed in excess of 100 times
- Testified in trial (judge [bench] or jury) 29 times
- Litigation support makes up about 90% of my business.
 - My typical cases are regarding:
 1. Flooding: class actions and individual properties;
 2. Storm drain system design, construction and O&M;
 3. Reservoir operations during flood events;
 4. Hydraulic impacts of bridges, structures, construction projects and maintenance operations;
 5. Highway drainage design (injury, wrongful death, etc.)
 6. Drownings: modeling the hydraulics surrounding....



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Part 1: What is an Expert Witness?

Part 2: The Litigation Process

Part 3: Testimony Tips and Tricks

Part 4: The Litigation Support Business

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Types of Experts

1. Participating

- Treating Physician
- Public Utility Maintenance Worker
- Flood Operations Manager

2. Experiential

- FEMA Region Representative
- State Floodplain Manager

3. **Hypothetical or Specially Retained Expert** ✓

- Their opinions are entirely based upon assumptions from provided material (Discovery) in the case
- No prior direct knowledge of case (Conflict of Interest)



What Is an Expert Witness?

Qualifications:

- Knowledge, skill, experience, training and/or education in a specific field of work or study
- Sufficient credentials or experience in a field to be considered to have valuable opinions on issues pertaining to that field
- Purpose of Expert's Testimony is to "assist" the judge or jury in making decisions on legal questions in a trial
- Generally, it is someone with "Specialized Knowledge," applied liberally, anyone can be an Expert



Federal Rule of Evidence 702

" [in order to] **assist** the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of **an opinion or otherwise.**

➔ **i.e., The Testifying Expert**



Federal Rule of Civil Procedure 26

“an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial.”

→ i.e., The Consulting Expert



Consulting vs. Testifying Experts

Confidentiality of information shared by the Attorney with the Expert:

- a lawyer shall “not reveal information relating to the representation of a client,” i.e., attorney-client privileged information
- Consulting Expert’s work product is protected from *discovery* by the opposing side
- Testifying Expert’s work product (and files) are *discoverable* by interrogatory, request for production, or deposition



Ethics Sidebar: Confidentiality

The Expert has an obligation to retain the confidentiality of all information pertaining to a case

- Discuss with family and friends?
- Write about in articles or on website?
- Discuss the case with your boss or colleagues?
- Discuss the case with the opposing Expert at this conference?



Expert Testimony Is Evidence

Types of Evidence:

- Physical Evidence
- Circumstantial Evidence
- Expert Opinion Evidence - the personal professional opinion based upon facts of record



Ethics Sidebar: Conflicts of Interest

- Involve whether a party may be prejudiced by a previous conversation, or relationship, with a party involved in the case
- Should be the first topic covered in an initial conversation with an attorney on a new case
- Don't talk to any involved parties, opposing attorneys, or other experts without permission from your client attorney – and then, still be careful
- Perceived Conflicts of Interest can result in Expert Disqualification



The Perfect Expert Witness

- Professional
- Knowledgeable
- Fair and Honest
- Thorough
- Sincere
- Communicates well
- Personable and Authentic
- Trustworthy



Characteristics of Bad Experts

- Jack-of-all-Trades (but expert in none)
- Report Writers (but don't make me testify!)
- Ideologues - Sincerely biased, but biased
- Honest but minimally qualified
- Honest but overqualified (intellectualizing)
- Advertising Expert (vs. Marketing Expert)*

* I will address Marketing and Advertising in more detail later today



Further Characteristics of Bad Experts

- Honest but willing to exaggerate
- Factually mistaken
- Factually misled
- Selectively uses facts
- Blinded by \$\$
- Advocates – “wannabe lawyers”
- “Hired Guns” – too willing to shape their opinions around their attorney’s case theory



Ethics Sidebar: The Biased Expert

Advocate vs. Expert Witness

- Who are you working for, and where is your allegiance?
- Do all assumptions swing one way?
- Emphasize the good and suppress the bad?



Attributes Paralegals Seek in Finding an Expert

- Education from reputable undergraduate and graduate universities
- Training licensure and certification
- Practical experience
- Litigation experience
- Professional memberships and affiliations
- Literature published and research projects
- Real world expertise



Characteristics Counsel Seeks in Selecting an Expert

- Ability to assist counsel
- Availability
- Being easy to deal with
- Charisma
- Credibility
- Demeanor
- Oral communication skills
- Qualifications
- Report writing skills
- Testifying skills
- Work Ethic



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