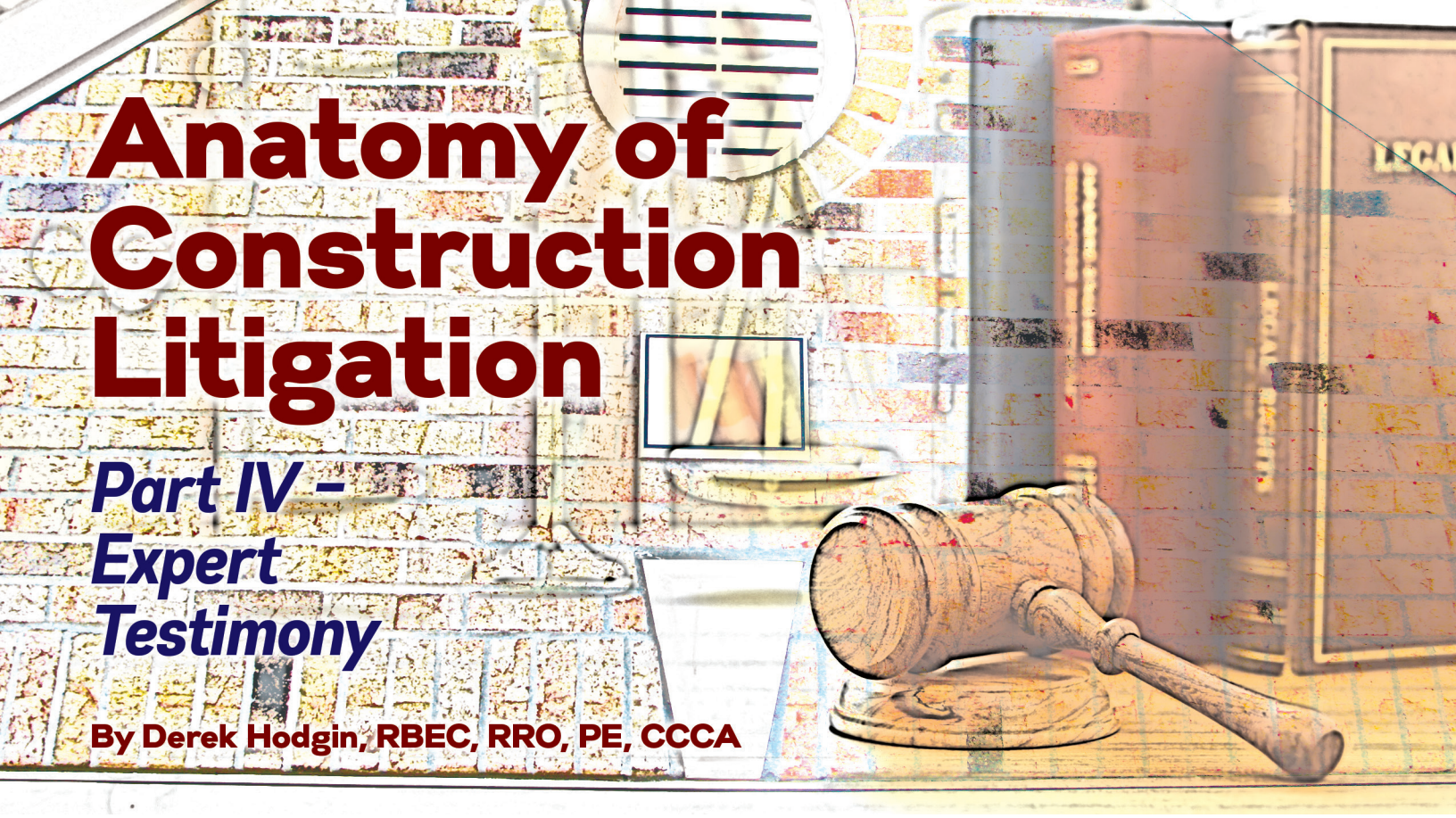


Anatomy of Construction Litigation

Part IV – Expert Testimony

By Derek Hodgin, RBEC, RRO, PE, CCCA

EDITOR'S NOTE: This is part four of a four-part series about construction litigation. For purposes of completeness, and so that each part can make sense individually, the disclaimer and a large portion of the background are repeated. Please see the August 2019 issue of IIBEC Interface *to read Part I, the February 2020 issue to read Part II, and the April 2020 issue to read Part III.*

DISCLAIMER

The issues described in this paper are considered to represent the realities of construction litigation. The opinions expressed are not intended to offend any particular participant of this process. Rather, it is the author's intent to promote open discussion and/or debate among participants regarding improving on the "defective" (but sometimes necessary) process of construction litigation. Additionally, the issues discussed in this paper should serve to promote self-evaluation of participants to determine whether we are truly fulfilling the ethical and professional standards that we have all agreed to meet. In the end, it is the author's opinion that those most offended by the content of this paper are likely those who are guilty of the abuses that it serves to expose. Perhaps by acknowledging the shortcomings in the process, the participants can collectively work toward needed improvements.

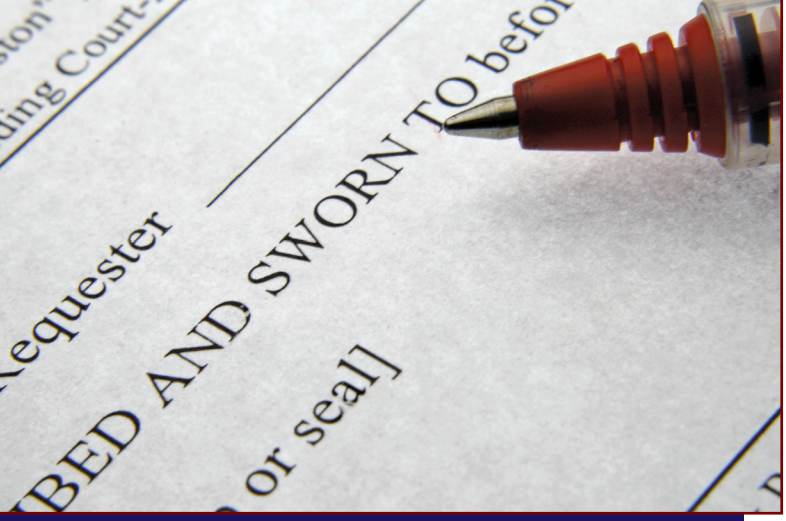
BACKGROUND

No matter how tough times get, the business of construction litigation seems to go full steam ahead. Each claim typically has at least one real problem that serves as the mode of discovery for the building owner. However, when this problem is investigated, the investigator (typically a professional engineer or licensed architect) is asked to provide a list of any other issues that may represent deviations from the project plans and specifications, applicable building codes, accepted industry standards, or manufacturer instructions (collectively referred to as contractor's instructions).[1] After all, the plaintiff only gets one opportunity to provide a list of alleged defects to which the defendants will respond. This scenario often causes unsuspecting building owners (who may have thought they only had a leaky patio door—the one real problem that initiated the process) to face a myriad of alleged defects that essentially require the building to be reconstructed from the framing out. It is common for plaintiff reports, as well as associated repair scopes, to require complete removal and replacement of roof coverings, exterior cladding (e.g., brick veneer, siding, stucco), windows, doors, balcony waterproofing systems and even the reconstruction of concrete driveways, patios, and sidewalks.

Could the construction of new buildings really be that bad? With so much "wrong" with these buildings, it is surprising that they ever passed an inspection or were sold to discriminating buyers to represent quality construction. The fact is (and anyone that provides an honest evaluation of constructed buildings should agree), many of the alleged defects simply represent deviations from the contractor's instructions. Some deviations actually have a consequence such that a repair is warranted, while many do not. This paper will discuss the final element of a typical construction litigation case, the expert testimony, and will provide commentary based on direct involvement in numerous cases in which the author has provided expert services to both plaintiff and defense parties. Parts I, II, and III of this paper discussed identification of defects, the expert report, and repair scope, respectively.

OPPORTUNITIES FOR TESTIMONY

There are several opportunities for testimony during the course of litigation. The most common examples of dispute resolution and testimony environments are described in the following.



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Deposition

A deposition is the most common form of sworn testimony in a construction litigation case. A deposition provides an opportunity for attorneys who represent various parties in a case to take turns asking questions about your knowledge and opinions of a particular case. However, nothing is really off limits in a deposition. An expert can be asked about other cases, his or her professional career, personal issues, or anything that may be relevant to the expert's credibility and experience.

This is a great opportunity to serve as a teacher for folks who are actually interested in what you are saying and have some knowledge of construction. Most attorneys have retained an expert who has coached them on the facts of the case and may have received a list of questions for your deposition. A deposition is simply the mechanism by which the facts and opinions of the two sides are disclosed and recorded. This process allows both sides to judge the value of the case and prepare for one of several forms of settlement, described in the following.

Mediation

Mediation is another form of dispute resolution; however, it does not include sworn testimony. In lieu of testimony, the expert may provide a presentation that summarizes the facts of the case to a room full of stakeholders that include the plaintiffs, the defendants, insurance carriers, attorneys, and a neutral mediator. Mediation negotiations are protected by a confidentiality agreement that allows all parties to speak freely without concern of statements being held against them if the case does not settle.

After both sides present their case, they retire to separate rooms for the remainder of the mediation and are visited by the mediator to discuss the strengths and weaknesses of the case, and to receive and make monetary settlement offers. Mediation is the least formal, and most common, form of dispute resolution (at least based on the author's experience). Even if a case does not settle during the mediation process, negotiations typically continue following an "unsuccessful" mediation and before a pending jury trial, often settling before trial commences.

Arbitration

Arbitration is one form of dispute resolution that is more formal and structured than mediation, but less formal (and typically less costly and time consuming) than a jury trial. Arbitration involves sworn testimony. Arbitration is like a mini trial without a jury. The arbitrator (or arbitration panel of up to three individuals) serves as the judge and the jury. The two sides present witnesses to testify. An expert can provide testimony to each side, as well as to the arbitrator(s).

Arbitration can be binding or non-binding. Typically, an award is determined by the arbitrator(s) within 30 to 45 days. If binding, the decision can only be overturned by evidence of fraud or misconduct. If non-binding, the decision can be rejected by either party and be followed by a jury trial.

Jury Trial

A jury trial only happens after other efforts to settle have failed. In construction litigation, very few cases go to trial. Often, a case may be headed to trial and settle just before the trial starts. There is nothing that bars the parties in litigation from continuing settlement negotiations throughout the case. Trial testimony is the most formal and requires understandable testimony (by a jury that may not understand construction issues), as well as a polished visual presence with a command of the facts.

The first order of business for an expert in a trial setting is to be "qualified" by the court in the subject matter in which the attorney intends for the expert to offer opinions. The expert is offered a series of leading questions that are typically answered by a review of the expert's curriculum vitae (a legal term for résumé, also known as a CV), which is offered as an exhibit. Once qualified, the expert answers questions by the attorney(s) from the law firm that retained his/her services; this is known as direct examination. Direct examination is intended to establish the expert's opinions, hopefully in the most

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favorable way (based on the available facts) for the client. The opposing attorney(s) follow with their own set of questions, which are typically intended to paint a contrary position that is favorable for the opposing client; this is known as cross-examination. The attorneys can re-direct and re-cross until the expert has answered all of the questions from each side.

TESTIMONY BASICS

Look the Part

Depending on the venue, an expert should dress respectfully for the testimony occasion. A deposition is the least formal, and a jury trial is the most formal. The expert should look professional, but not so slick that it detracts from the testimony. Unfortunately, the outcome of a trial can be based on perception as much as facts. If the facts are completely on your side, but your most expensive suit caused the jury to perceive you as an expensive hired gun, the outcome may be inappropriately influenced. Look nice, engage with the jury as much as the attorney asking questions, and provide the facts that are needed for the most informed resolution.

Listen to the Questions

It sounds simple enough, but sometimes the excitement to share your knowledge will get the best of you and your answer will provide much more than what was asked. If the depth of your knowledge is important to the case, the questions should be asked that will allow you to explain the facts in more depth. However, if a simple "yes" or "no" answer will suffice, stick to that. If clarification is needed, provide it. However, avoid long-winded answers that go far beyond the extent of the question.

Tell The Truth

This is the most important instruction for effective and credible testimony. Make sure that your client is aware of the truth before you provide any testimony. It could be uncomfortable if your client hears the truth for the first time during your testimony, particularly if it is potentially harmful to the case. Rarely is the truth completely in favor of your client; if it were, there would not likely be a disagreement. It is all right if your truthful testimony is not beneficial to your client. It is most important that the jury (and your client) hear the facts, good or bad. As an expert, you should always "play the hand that you are dealt." The fact is, sometimes you are dealt a good hand, and sometimes you are not.

Honor Your Profession

If you are a professional engineer, be an engineer. If you are a licensed architect, be an architect. You are not a professional expert witness. You are an expert who has been retained to serve as a witness. Your purpose is to provide the facts of the case to the decision makers (for example, the judge, jury, parties of the case, insurance adjusters, and the like). As an expert witness, you are not allowed to be an advocate. The attorneys can "spin" the case in the best interest of their client; experts cannot. Your integrity as an expert is much more important than the outcome of any case. Always avoid the temptation to testify in a way that is favorable to your client if it does not follow scientific, engineering, or construction principles. Most of all, make sure that your testimony is reasonable and follows common sense that can be understood by everyone, because that is who is eligible to serve on a jury.

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Stick to What You Know

Do not testify about issues or topics in which you lack expertise. You have been retained because you have expertise that will assist the triers of fact in reaching a resolution. Testifying about topics that you are less qualified in could reduce or even harm the value of your testimony. Engineers are particularly vulnerable to wandering into topics that should be avoided. As hard as it may be to say "I do not know," it is sometimes the most accurate and appropriate answer.

Attorneys can exploit the pride of a witness by asking numerous questions in an attempt to deflate the expertise of the witness. Thankfully, the author observed this tactic early in his career and it served as an example of what not to do as an expert. A respected engineer colleague was retained to defend a general contractor in a construction litigation case that included some rotten wood-framed patio doors. The engineer sampled the wood to be analyzed for the presence of preservative treatment.

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During the deposition, the engineer was asked numerous questions about his background, to which the attorney likely already knew the answers. The exchange went something like this:

Attorney: Are you a door manufacturer?
Witness: No.
Attorney: Have you ever manufactured a patio door?
Witness: No.
Attorney: Have you ever been employed by a door manufacturer?
Witness: No.
Attorney: Are you a wood scientist?
Witness: No.
Attorney: Have you ever been a wood scientist?
Witness: No.
Attorney: Do you have a degree in chemistry?
Witness: No.
Attorney: Have you ever been employed as a chemist?
Witness: No.
Attorney: Have you ever been a chemist that studied wood preservatives?
Witness: No.
Attorney: Are you a wood preservative expert?
Witness: No.
Attorney: Do you practice as a chemist in the wood industry?
Witness: I do not practice chemistry in that regard.

While the correct answer was no, the engineer expert got tired of answering no to every question and inappropriately felt that it was necessary to provide a different answer to salvage some of his "expert" status.

Of course, the next question was "In what regard do you practice chemistry?" After the expert elected to change course, the attorney seized the opportunity to go down a very uncomfortable path with the expert, discussing all of the ways that he was qualified to testify as a chemist, which he obviously was not.

Don't Make Exclusive Statements

Be reasonable; nothing is 100%. If something is possible, admit it. It might not be probable, or even likely, but your testimony has to be believable. If clarifications to your testimony are needed, provide them. If you paid attention to Part II of this article series, The Written Report, you will have nothing to worry about; your testimony can simply follow your written report.

When an unreasonable position is taken by making an exclusive statement, such as, "There are no maintenance issues on this building," it can hurt the credibility of the remaining testimony. The truth is likely: "There may be some minor issues with maintenance at the subject building, but I do not believe they contributed in any significant way to the repairs that are currently needed." This testimony will be much easier for the jury to accept and believe, along with the rest of your testimony.

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POTENTIAL TESTIMONY CHALLENGES

When the Attorney is a Jerk

Occasionally, an attorney may want to test your demeanor under duress. This is accomplished by challenging your opinions, sometimes in an aggressive manner. If you are telling the truth and are convinced of your opinions, you have nothing to worry about; just ride out the storm and keep answering the questions. If you are an expert who is pushing the envelope (for example, exaggerating or minimizing the facts), you may get rattled by the aggressive attorney and lose your cool. However, don't think that the demeanor of the attorney is always related to the reasonableness of your testimony. An attorney may just want to "test the water" to see how well you hold up. This allows them to judge how effective (or ineffective) you will be in front of a jury. In most cases, an attorney will only behave like a jerk in a deposition, not in a jury trial, because they do not want to be disliked by a jury.

Controlling the Flow

Don't forget that you have as much control over a deposition as the attorney asking the questions. If an attorney is moving at a pace that is too fast, slow things down. If there is relevant research to discuss, be sure to mention the research in an answer and be prepared to offer the work as an exhibit to your testimony. If there are relevant seminars that you have attended or taught, be prepared to discuss. If you have authored peer-reviewed papers for industry publications that are relevant to the testimony in the case, this could be relevant to establishing your expertise. Be sure to take breaks when needed. Breaks are typically needed during a deposition, which can last for a full day or multiple days. Trial testimony is typically provided in a much shorter time span, where a break may not be necessary.

Beware of Leading Questions

Answer "yes" or "no" when appropriate. However, beware when an attorney provides a setup for the question that does not match the facts of the case. There may be an important detail that is changed and the attorneys starts by saying, "Would you agree with me that…" and requests that you answer "yes" or "no." You do not want to be

argumentative. You also do not want to add commentary to every single question that is asked. Sometimes, it is best to respond "Based on the hypothetical situation that you've described, which does not apply to this case, my answer would be 'yes' (or 'no')." This answer complies with the "yes" or "no" request, but serves to establish the shortcoming with the question.

Engaging the Audience

Regardless of the venue, it is always a good idea to engage the person who is asking the questions. The only exception to this is the jury trial. While it is the attorney who is typically asking the questions (the judge may occasionally ask a question), you need to engage with the jury in a trial setting. An opposing attorney knows this, and when the attorney asks questions that are favorable for their client, they will stand next to the jury so that you have an easy time looking toward the attorney and the jury. When your answer is potentially harmful to the attorney's client, they may decide to stand on the other side of the courtroom, causing the expert to choose which way to direct the answer—toward the attorney or the jury. The attorney hopes the expert follows natural instincts to direct the answer toward them, potentially causing a disconnect with the jury.

Facts vs. Perception

Even when the facts are on your side, justice does not always prevail. Whether it is relevant or not, juries seem to like data. As an engineer, the author likes data too. However, the data has to be relevant to the subject matter that is being discussed. In a retention pond failure case, the author testified to a jury about stormwater hydraulics and why the release of over a million gallons of stormwater onto a residential property caused soil erosion/deposition issues.

The opposing expert indicated that the storm that caused the failure, and the subsequent discharge of water, were well within predicted stormwater design parameters and did not cause damage. As part of the hydraulic evaluation, the expert "modeled" the event using stormwater design software. Even though the inputs that were used by the expert were completely inappropriate for the project site (similar to the computer world as: garbage in, garbage out), the model produced about 3 inches of data that supported the expert's opinions. The attorney made a point to ask the expert to lift the binder full of "data" and show it to the jury. At the end of the day, the jury found in favor of the expert with the data.

Don't Expect Additional Testimony Opportunities

The author learned a hard lesson during a jury trial. When questioned about a window installation that did not follow the manufacturer installation instructions, it was acknowledged that this deviation would technically violate the building code and was not addressed by the proposed repair scope. In an effort not to be argumentative, the answers were "yes" or "no," with the expectation that an opportunity for clarification would soon be provided during a redirect examination by the retaining attorney.

At the conclusion of the cross-examination, the jury was left with the perception that code violations existed that would not be corrected during the proposed repair process. When the judge turned to the retaining attorney and asked if there were any further questions, the attorney replied, "No further questions, Your Honor."

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What!? Was the attorney not paying attention to the last line of questions? How could the attorney let the jury be left with such an incorrect perception of his expert's opinions and scope of repair?

The author fully expected to be asked about his analysis of the window installation that revealed that, while the installation technically deviated from the manufacturer details, the completed work met or exceeded the intent of both the manufacturer and the building code. The deviation was determined to have no measurable consequence that would warrant a repair. These were all statements that the jury needed to hear to have a full understanding of the facts.

The takeaway from this experience is to always provide a bit of commentary or even a cue to the retaining attorney that an issue needs further discussion. Given the same set of questions today, the author would recommend a response such as: "Yes, there is a technical deviation from the manufacturer instructions, but I have determined this deviation to have no impact to the anticipated function and service life of the window." Alternatively, an expert could stick with the "yes" or "no" answers, but simply ask if an opportunity will be provided to discuss further. This causes the attorney to allow you to clarify, or it serves as a cue for the retaining attorney to provide some follow-up.

SUMMARY

Testimony in construction litigation often represents the "final chapter" in a case for an expert. Once all testimony has been provided, an informed resolution can be reached. If you have an opportunity to serve as an expert, it can be a rewarding experience that allows for a depth of research and understanding not typically provided in traditional design professional roles. After all, it is one thing to understand a subject; it takes a higher level of understanding to teach a subject. An effective expert is ultimately serving as a teacher to all parties in a case, not just the client who retained the expert.

As a summary, the most relevant takeaways for effective testimony as an expert witness are as follows:

- Tell the truth, the whole truth, and nothing but the truth.
- Don't be badgered into opinions that you don't hold.
- Keep it simple.
- Answer the question.
- Be reasonable.
- Give up the obvious little stuff, but stay firm on big stuff (lose battles; win the war).
- Honor your profession.

Finally, never agree to serve as an expert witness if you do not enjoy it. It is difficult to be great at something that you do not love doing.

REFERENCES

1. Hodgin, Derek A. and Luther McCutchen. 2004. "Contractor's Instructions: A Forensic Engineering and Legal Perspective." *IIBEC Interface*. March.

Derek A. Hodgin

Derek A. Hodgin, of Construction Science and Engineering (CSE) in Westminster, SC, has over 25 years of experience as an engineering consultant. He is responsible for facility condition inspections, failure analyses, damage assessments, and forensic engineering investigations of all types of structures. A large part of his projects have included analysis of deficient construction cases, including roofs, exterior walls, windows, doors, structural framing, civil site work, and building code review.

Updated Guidance for the UK

Building Services Research and Information Association (BSRIA), a nonprofit organization in the United Kingdom, has published an updated guide on handover and O&M manuals. The guide, BG 79/2020, covers the process of handing over a building from the construction team to the end client and building operators, including the suggested documentation to include. The guide especially focuses on operating and maintenance (O&M) manuals and their importance to this process. Also discussed as part of the handover procedure are "record drawings, certificates, and BIM models, with a focus on legislative requirements and the need for handover documentation to reflect the operating and maintenance strategy of the building."

The guide is available to download from the BSRIA Bookshop, with free downloads for BSRIA members. For further information, please contact bookshop@bsria.co.uk.

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