

CLM 2015 ATLANTA CONFERENCE
November 5-6, 2015 in Atlanta, Georgia

When Saying You're an Expert Isn't Enough: Selecting, Working With and Keeping Expert Witnesses Qualified in a Construction Defect Case

I. Introduction

One of the most complex types of claims in the industry today is the construction defect claim. In most instances, the claimant usually engages a virtual army of experts and consultants who test, inspect and report on defects long before the lawsuit, or even the claim, is made. These experts and consultants perform destructive testing, prepare reports, and usually opine that the building has major deficiencies that require repairs that end up being just shy of razing the entire structure and rebuilding it. Oftentimes, defense counsel is brought in well after the time such a process has begun, and many times, budgetary issues and other constraints limit the ability to bring in the necessary team to counter the claimant's army of experts. However, selecting the right expert – at the right time – can not only serve to counter the opinions of the claimant's consultant team, but it can also serve to narrow the issues, provide a valuable defense to the claim, and result in a far more reasonable resolution that makes everyone happy.

II. Selecting your expert

When a claim arrives, one of the first issues facing both the claims handler and the attorney hired to defend the claim is reviewing the plaintiff's expert or consultant information and developing a strategy to counter the information. Typically in large construction defect matters, the claimant will have already had a team of experts inspect and opine on the issues with the building or buildings involved. This is more likely to be true where the jurisdiction requires the claimant to engage in a pre-suit notification period. *See, e.g.,* Fla. Stat. §558.001, et seq. In cases where pre-suit notification is mandated, the claimant is essentially required to provide notice of each and every defect that it can reasonably ascertain in order to give the potential defendants an opportunity to cure the defect in order to avoid suit. Therefore, more than likely a claim is going to be presented with an accompanying set of reports, photographs and even testing that sets forth the defects that are being claimed.

In a lot of cases, the defense team will counter this information by hiring a "degreed" expert – that is, a licensed architect or engineer. Many times, defense counsel or the claims handler will have a short list of tried and true experts that generally fit the qualifications that allow the expert to pass muster and be able to testify in court. However, while certain times such a credentialed expert can be sufficient, caution should be exercised in attempting to use a "one size fits all" expert for each and every construction defect case that may cross the desk.

Instead of simply looking at the resume, take time to research and look at some of the more latent, but equally important, qualifications of the expert or experts you need to hire. Ask these questions:

- How well does the expert communicate?
- How well does the expert understand the trade that you are being hired to defend?
- How technical is the issue you are dealing with?
- What experience does the expert have with the particular defect?
- How well does the expert fit with the defense team?

Early on in the selection process, take the time to sit down with the expert and discuss more than just the black and white forensic nature of the claim. TALK to the expert. See how he or she communicates. The best expert needs to be able to communicate highly technical processes and techniques in a way that jurors and lay witnesses can understand and appreciate. Has the potential expert ever testified before? How did he or she hold up under cross examination? Check references and take the time to do some internet-based research on the particular witness you are considering. Do not rely exclusively on the expert's word when it comes to their qualifications – the expert wants to get hired.

Also, ask yourself: does the expert fit well in your particular jurisdiction? Many times, jurors and judges are turned off by the “national” expert who doesn't understand the subtleties of local business practices. In other words, they don't relate well. All the credentials in the world will not make a difference to a jury if the expert comes across as arrogant, or worse.

Ask to review some of the expert's previous reports. Chances are, the expert has a file that contains reports prepared in previous matters (and if they don't, you should be concerned). Many experts can discuss a case with a high degree of intelligence, but the ability to write a cohesive report in collaboration with the defense team can be critical to the outcome of the case. After all, most construction defect cases settle and many times the mediation is convened prior to the parties incurring the expense of deposing many of the experts. Oftentimes a well-reasoned, clear, and concise report can serve to enlighten the other side and make a reasonable settlement more likely.

III. Educating your expert

This really brings us to the next step in the process: what does your expert need in order to help the team respond to the claims? Any expert you choose should naturally bring a large amount of experience to the table. However, always keep in mind that the expert is going to have zero experience in the case they are being retained to work on. Each claim has unique aspects to it. Some would say a stucco claim is like any other stucco claim, or that a window is a window. Allowing yourself and your expert to fall into this trap can be devastating to your case, however. Insist that the expert be given and review every bit of information that you can make available to him. Provide the expert with every photograph, video, report, statement, deposition, product information and record that you can collect. Let the expert make the determination if it is relevant or not.

Of important note: as outside counsel, be sure to discuss this stage with the claims handler or client. Work with them and with your expert to develop a truly workable budget that reflects the necessary costs associated with educating the expert on the nature of the claims. Will there be on-site inspections? If so, how many? How long will the expert really need to conduct a thorough inspection? Hours? Days? Weeks? Discuss the need for destructive testing and develop a thorough scope that can be used to set reasonable expectations for costs associated with the testing.

Technicality of the issue is also a concern. Oftentimes, particular product installers or manufacturers are sued, along with the general contractor and other common trades. Does your expert have the requisite experience with this particular product to be able to give a clear and concise opinion? The engineering of building products and how they are applied in a real-world setting are, quite frankly, more of a science than they are a trade. Many times the product manufacturer will have personnel with a significant wealth of knowledge and expertise that can be exploited to help with the defense of the claim. However, those internal experts may also lack the ability to effectively communicate with opposing counsel and/or the judge and jury. Can your external expert therefore collaborate effectively with the team to fully understand the science behind the products? Does the manufacturer have the ability to educate the expert on their products and the engineering behind them?

IV. Defining the scope of the testimony of your expert

Once you have the expert you believe will assist you in the claim at hand, then you want to make sure you have adequately defined the scope of the expert's testimony. In fairness, this issue arises more often when you are defending or handling a claim on behalf of a party that played a large role in the project, such as the developer, general contractor, architect, principal engineer, etc. Most of the time, when handling a claim on behalf of a particular trade, such as the roof installer, framer, etc., the expert is somewhat limited by the very nature of the claim against your insured or client. However, as a general rule, the broader the scope of work or responsibility, the more important it is to ensure you have the right expert opining about the right issue.

A typical strategy to find a construction expert is to hire an engineering or architectural expert. Both of these categories of experts involve professionally licensed individuals who have a broad range of exposure to many types of construction issues. In addition, many of them have likely undertaken, at some point in their careers, the inspection and approval of the work done on large projects. However, care must be taken in order to ensure the more general expert is not overreaching in regard to his or her testimony. For example, as part of a forensic analysis of water intrusion into a condominium project, an engineer may say the windows were not properly installed. However, upon closer examination, you may learn that the engineer has no experience actually installing the windows, or even the materials surrounding the windows.

Do not expect one expert to be able to competently cover every issue in a case, especially when those cases are highly complex and involve multiple parties. This is not to say that you must have an individual expert for every single trade on a project. However, you must try to keep in mind that each small "deficiency" in an expert's ability to competently testify (if

you want to call it that) can eventually add up to an overall strike against the expert's credibility. Defining what you want the expert to talk about and limiting his or her report to those definable issues will end up serving you and your client best in the long run.

Another tip: don't discount as an expert someone who is routinely engaged in the local trade you are dealing with. Local roofers or stucco installers, for example, are going to know the business and regulatory environment of the area, they are going to know the true issues with a project, say, located on the coast, and they are likely going to garner some credibility before a jury just by living a short drive away from the courthouse. In this respect, a tradesman may be at least as capable as a degreed engineer or architect. Indeed, just as architect and engineers can provide expert opinions on defective work, so can many tradesmen, who are likely to have the requisite experience to testify concerning the errors and omissions in plans drawn by an architect or engineer.

V. Keeping your expert qualified

Put simply, there is no one-sized solution for selecting an expert. The best defense to problems arising later, however, is to be as thorough as possible in both understanding your experts' knowledge of a given issue and defining the scope by which you wish for that expert to testify. The key is effective communication. This goes for both the counsel-expert relationship and the counsel-client-insurer relationship.

Getting the most out of your expert is important. Doing the simple things discussed above will go a long way to ensuring you have a competent, qualified expert. On an even more basic level, don't forget these tips, either:

- Communicate orally with your expert whenever possible
- Do not put words into your expert's mouth (this goes for drafting the report, too)
- Send the information the expert needs in an organized manner
- Pay your bills on time
- Keep the expert in the loop as much as possible (if practical, have the expert attend or listen in to critical depositions as they are taking place).

Even if you have all of the tools arranged for your expert, you still must ensure that he or she is qualified to testify in the jurisdiction in which your claim is pending. Having a thoroughly prepared expert is critical to surviving a challenge to his or her ability to testify. In addition, you want to be able to highlight your expert's qualifications. To that end, choose an expert that has a good curriculum vitae (CV). Illustrate your expert's qualifications in terms of education, training and experience. Highlight any peer-reviewed publications, as this can weigh heavily on the judge's determination of qualification. Also, ensure that any inspection and testing is properly recorded so that the methodology of the analysis can be scrutinized and, if proper for the case, recreated. Finally, ensure that the report process is done only after the expert has truly reviewed all of the information necessary to formulate and support his or her opinions.

VI. Conclusion

Construction defect cases are dependent upon experts. They play an integral role in both the theory of the case and the defenses to those theories. In fact, they often hold the key to liability and damages in most cases. Care should be taken to ensure that the expert is competently chosen, properly educated, and adequately prepared to give the most compelling testimony possible, if given the opportunity.