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## **The Design Professional as Advocate in Construction Claims Processes: Is this the Wild West?**

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### **I Introduction and Summary**

Most lawyers and many non-lawyers accept the premise that a party in litigation, whether the plaintiff or the defendant, will probably be able to find an expert willing to testify in support of their position. In other words, it is accepted that “hired guns” roam today’s courthouses frequently, if not with impunity, like the mercenaries of the Old West. This is not necessarily a new phenomenon; negative attitudes toward expert witnesses, borne in large part out of perceptions of their mercenary traits, go back as far as the dawn of the twentieth century.<sup>3</sup>

The comparatively recent introduction and enactment of ethical codes and guidelines applicable to design professionals’ services were probably induced in part to curb perceived abuses in forensic practices. Still, it is rare that design professionals serving as expert witnesses are sued in connection with their forensic services and even more infrequent that professional disciplinary investigations are commenced against them. This is particularly so given the increasing use of mediation processes, which shield the participants with statutory confidentiality. There is also scant regulation directly applicable to forensic services. Design professionals may thus be emboldened and understandably tempted to offer findings and opinions suited to the interests of their employers even when a more objective analysis might yield contrary results.

Ultimately, while ethical codes and guidelines purport to disallow advocacy by design professionals, the financial rewards to be gained in construction claims combined with the lack of enforcement mechanisms tell us that the “hired gun” is here to stay for the foreseeable future. Fortunately, objectivity, trustworthiness and credibility continue to be the main drivers of both settlement value of disputes and jury verdicts, which should naturally curb potential abuses in association with forensic consulting.

### **II To Advocate or Not Advocate?**

The “battle of the experts” is an accepted and predictable occurrence in any given instance of civil litigation. Indeed, in many types of disputes, notably including construction cases, the California Legislature and courts have required that liability in such cases be determined on the basis of expert testimony. Expert witnesses assist both attorneys and triers of

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fact in understanding complex issues and provide a basis for decisions that would otherwise be based on ignorance or speculation. Attorneys increasingly hire experts to perform litigation services, not only as testifying expert witnesses, but also as consultants in pretrial processes. In some cases, the failure of an attorney to use an expert may constitute legal malpractice.

“To advocate or not advocate” is perhaps the most difficult question a design professional must ask herself in approaching each potential claims-related assignment. Our civil litigation model in this country is premised on adversity between the litigants, one side pitted against the other, with the parties’ attorneys being required to “zealously” advocate on behalf of their clients. It is therefore understandable that design professionals retained by attorneys as expert consultants or witnesses also often fall into that adversarial model, passionately arguing their employer’s case. One of the foundations of any work ethic, after all, is a responsibility to one’s employer. Other practitioners, however, go into such assignments fiercely committed to maintaining their “neutrality,” refusing to argue in favor of a proposition and instead emphasizing that they will only “call it like they see it.” When such statements are juxtaposed against the advocacy of an opponent litigant’s expert on a critical point of dispute, the “neutral” expert is essentially playing by a different set of rules and she and her principal may be substantially disadvantaged, even perhaps ambushed just short of high noon on their way to the OK Corral.

### **III Statutory Ethical Constraints**

The relatively recent advent of ethical codes and guidelines for design professionals, particularly engineers, raises several questions as to the acceptability of established practices in forensic consulting on construction claims. The Code of Professional Conduct - Professional Engineering, enacted as part of the California Code of Regulations (“the Engineers’ Code”) applies to every person licensed by the Board as a professional engineer. A violation of the Engineers’ Code “in the practice of professional engineering” constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Section 6775 of the California Business & Professions Code. An initial critical question, therefore, is whether forensic consulting is part of “the practice of professional engineering.”

The California Board of Professional Engineers and Land Surveyors appears to have largely concluded it is not, at least when such consulting reaches the testimonial phase in litigation. To wit, this author’s office has been informed by an enforcement official at the Board that the Board will generally investigate allegations of misconduct by members in connection with their forensic services, but only in advance of them being designated as expert witnesses in litigation. For example, a licensed mechanical engineer was disciplined for practicing civil engineering without a license (preparing an engineering analysis on a fixed-work structure which then led to litigation being initiated). Following expert designation, the Board reportedly defers

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to the courts and will not take any action. This is done under the rationale that members serving as expert witnesses in civil litigation matters do not require licensure.

The Board's deference to the courts is questionable insofar as courts do not mete out professional discipline and virtually never penalize witnesses. If an engineer misrepresents data in an engineering report presented in litigation, for example, she should be subject to discipline under Board Rule 475(c)(11) of the Engineers' Code, explained below. Yet, the Board will reportedly not even investigate such circumstances.

Even if disciplinary investigations are limited to pre-designation circumstances, the following professional rules would conceivably apply to engineers in the context of forensic services:

Rule 475(a), Compliance with Laws Applicable to a Project: "A licensee shall provide professional services for a project in a manner that is consistent with the laws, codes, ordinances, rules, and regulations applicable to that project." For example, should a consulting engineering expert make a representation inconsistent with a building code or state something false under penalty of perjury, that could be a violation of Rule 475(a).

Rule 475(b), Conflict of Interest: "If a licensee provides professional services for two or more clients on a project or related projects, the licensee shall disclose in writing to those clients and property owners or their authorized representatives his or her relationship to those clients." This rule begs the question of how many clients an expert witness has on a construction claims assignment. Depending on the context of an assignment, the expert's client could be a retaining attorney, that attorney's client, the client's insurance carrier, the court, or a combination of these.

Rule 475(c)(3) & (4): "A licensee shall not misrepresent his or her scope of responsibility in connection with projects or services for which the licensee is claiming credit. A licensee shall not misrepresent nor permit the misrepresentation of his or her professional qualifications, or affiliations or the affiliations or purposes of the institutions, organizations, or other businesses with which he or she is associated." These rules could serve to constrain the expert who attempts to establish her expertise in any particular field for purposes of qualifying as an expert.

Rule 475(c)(7): "A licensee shall only express professional opinions that have a basis in fact or experience or accepted engineering principles."

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Rule 475(c)(8): “A licensee shall attribute proper credit to others for their professional work or professional contribution and shall not misappropriate the professional work of others.” This rule might apply to limit the things an expert might try to say in order to demonstrate her own expertise. For example, if an expert worked at a firm which worked on numerous fire protection projects, but was not significantly involved with those analyses, she would not be entitled to claim expertise in fire protection analysis based on that experience.

Rule 475(c)(9): “A licensee shall not knowingly permit the publication or use of his or her data, reports, plans, or other professional documents for unlawful purposes.” This rule could operate to preclude an expert witness from allowing her conclusions to be modified or manipulated by her retaining attorney in support of an argument or presented incompletely by such attorney.

Rule 475(c)(10): “A licensee shall not falsely or maliciously injure or attempt to injure the reputation or business of others.” This rule might serve to curb an expert’s criticisms of her opponent in the course of claims consulting, a practice which her retaining attorney might otherwise request.

Rule 475(c)(11): “A licensee shall not misrepresent data and/or its relative significance in any professional engineering report.” (Underlining added.) This rule is perhaps the single most profound ethical constraint inhibiting the modern-day “battle of the experts.” If experts are not allowed to argue about the “relative significance” of data in litigation, what is there left to “battle” about?

The rules of professional conduct for architects in California were adopted under Title 16, California Code of Regulations, Section 160. None of those rules relates specifically to forensic services and while some refer generically to the performance of “professional services,” others are more specifically limited to the practice of architecture or the design of a project, suggesting that they are not applicable to forensic services.<sup>4</sup>

#### **IV Professional Societies’ More Restrictive Rules and Guidelines**

Design professional societies’ guidelines are more restrictive than states’ ethical codes and generally rail against the notion of an expert witness being an advocate for her client. Instead, they strongly stress the necessity of the expert remaining neutral, independent, objective and unbiased. For example, the American College of Forensic Examiners International, which bills itself as the largest forensic member association, “believes Forensic Examiners do not ‘win’ or ‘lose’ cases. Forensic Examiners seek only the truth and conduct evaluations, examinations, and inquiries and report the true results of their findings in an unbiased and objective manner.”

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The Code of Ethics for Engineers of the National Society of Professional Engineers (NSPE) also sets forth canons and rules generally emphasizing the importance of the engineer remaining fiercely independent. NSPE's members are expected "to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct." NSPE's members are to "conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession." (Fundamental Canon 6.)

And yet, professional societies' rules are also at times inconsistent. For example, NSPE Rule 4 provides that engineers shall act for each employer or client as "faithful agents" or "trustees" which suggests that the employer or client is owed loyalty. NSPE Rules 3(b) & (c) also provide: "Engineers may express publically technical opinions that are founded on knowledge of the facts and competence in the subject matter. Engineers shall issue no statements, criticisms, or *arguments on technical matters* that are inspired or paid for by interested parties, *unless* they have prefaced their comments by explicitly *identifying the interested parties on whose behalf they are speaking*, and by *revealing the existence of any interest* the engineers may have in the matters." These rules tend to suggest that it is permissible for an engineer to act as an advocate in the course of forensic consulting under NSPE's rules, at least so long as she discloses whose side she is advocating on.

Several of NSPE's rules of practice appear to run contra to attorneys' standard advice to an engineer about to provide testimony, at least in the deposition context. For example, Rule 3(a) provides that engineers shall include "all relevant and pertinent information" in their public statements, reports and testimony. Generally, attorneys direct their experts to not volunteer unsolicited information.

NSPE Rule 1(d) arguably precludes an engineering expert from participating as a litigation consultant if her findings or opinions are manipulated or misrepresented by counsel. That rule states: "Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe is engaged in fraudulent or dishonest enterprise."

NSPE Rules 2 and 2(a) provide: "Engineers shall perform services only in the areas of their competence. Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved."

In construction claims, opposing experts are often the only ones competent to critique each other's work, methodologies, and opinions, and the process generally relies upon their

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ability to render such criticisms in order to expose the weaker opinions and elevate the stronger ones. NSPE Rule 1(f), in this regard, requires engineers to carry out a self-policing function with respect to even claimed violations of NSPE's Code: "Engineers having knowledge of any *alleged violation* of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required." The American Institute of Architects' 2012 Code of Ethics & Professional Conduct imposes essentially the same self-policing requirement on its members.

One strong argument for not holding design professionals to the normal professional and ethical requirements associated with design services when performing forensic consulting is that a design professional customizes her forensic engagements according to the needs of her client and the retaining attorney, and her work is subject to scrutiny by the client, the attorney and the opponent party through discovery and cross-examination.<sup>5</sup> In effect, the client and the attorney determine the objectives and the standards for the expert's work in the forensic context. The American Institute of Certified Public Accountants, recognizing these factors, classifies litigation services as consulting services, as to which the stringent reporting standards applicable to audits and attestation services do not apply. Unfortunately, California's statutory codes and design professional societies' guidelines do not directly distinguish between design professionals' design services and forensic/consulting services.

## **V Courts' Views**

Several courts, including the California Court of Appeal, have issued opinions finding expressly that expert witnesses are not neutral or unbiased, but rather act similarly to legal counsel, advocating on behalf of their clients in the litigation setting. States which deny expert witnesses immunity from liability for negligence in the course of providing expert witness services, such as California, rely on such findings as a rationale for that position.<sup>6</sup> For example, in *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1142-1144, the California Court of Appeal stated that "in reality," an "expert retained by one party is not an unbiased witness to begin with... [Rather, e]xperts retained by a party are partisan witnesses, and we fail to see how permitting them to be sued would undermine the judicial process any more than permitting attorneys to be sued by their own clients."

In *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 682 (Mo. 1992), the Missouri Supreme Court similarly stated:

These experts do not usually act solely as witnesses, but perform substantial pretrial work. Also, ... experts retained by one party voluntarily assume a professional duty to their client in exchange for direct monetary remuneration.

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Their advice is used to help their client make his or her case more persuasive. They function as paid advisors and as paid advocates.

... Often professionals play as great a role in the organization and shaping of the evaluation of their client's case, as do the lawyers. Those who provide these services are selected for their skill and ability and are compensated accordingly just as any other professional."<sup>7</sup>

## **VI A Clear Path for Effective Advocacy**

Although the *Lambert* court unfortunately described expert witnesses as "partisan," which may be unwarranted in most cases, it otherwise correctly observed that the testimony and opinions of expert witnesses retained by litigants are intended to "advocate *a position*" for the retaining party. There should be nothing wrong whatsoever in a forensic consultant advocating positions so long as the positions are objectively arrived at in an unbiased fashion.

Moreover, and quite fortunately, the more objective, independent and unbiased expert tends to be the most compelling and credible expert in the litigation context. Expert witness credibility is a multifaceted construct comprising numerous components including believability, credentials and likability and can be succinctly characterized as the degree of trust potential jurors ascribe to the expert. The confidence-heuristic model posits that receivers of information such as jurors judge credibility or accuracy based on the messenger's level of confidence, instead of processing a significant amount of information themselves. Studies indicate that while judges and lawyers tend to prefer experts who come off as highly competent (even bordering on arrogant) and who make definitive conclusions, jurors respond more favorably to expert witnesses displaying moderate levels of confidence. That is, they tend to associate greater credibility with expert witnesses who display "medium" confidence as contrasted with "low" or "high" confidence. Medium confidence is significantly exhibited by a willingness to acknowledge a degree of certainty ("I am reasonably certain") as contrasted with more absolute statements, which are associated by jurors with unwarranted cockiness. In other words, jurors find more objective experts more trustworthy, likable and believable.<sup>8</sup>

Furthermore, and not surprisingly, the more objective expert tends to be more effective in alternative dispute resolution processes, notably including mediation. Experts' communications in mediation are generally inadmissible and confidential such that they can never be repeated.<sup>9</sup> This at times results in experts misrepresenting or ignoring relevant data in the course of advocating for their clients since there is effectively no accountability. However, such misrepresentations can be ferreted out and credibility is the biggest driver of settlement value in such processes as the decision makers attempt to place themselves in the shoes of an eventual jury, which, as noted, favors the more objective analyses.

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Considering the lack of regulation, the relatively low frequency of malpractice claims brought against expert witnesses, the professional boards' reluctance to initiate disciplinary investigations against licensees based on forensic consulting services and the modern prevalence of mediation as a process for resolving construction claims, modern day design professionals as "hired guns" are indeed akin to the gunslingers of the Wild West, working in an arguable "shadow" subpractice of the fields of design and construction. However, since objectivity, trustworthiness and credibility continue to be the main drivers of both settlement value of disputes and jury verdicts, design professionals are generally able to most effectively perform forensic claims consulting services within the confines of the law and applicable ethical requirements and are naturally advised to avoid any temptation to yield to any form of bias.

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<sup>2</sup> Severson & Werson has provided legal services throughout California and the country for more than sixty years.

<sup>3</sup> Eric G. Jensen, Comment, When "Hired Guns" Backfire: the Witness Immunity Doctrine and the Negligent Expert Witness, 62 UMKC L. Rev. 185, 206 (1993).

<sup>4</sup> See, e.g., Sections 160(a)(1) and (2), and (b)(1).

<sup>5</sup> See Application of AICPA Standards in the Performance of Litigation Services, CONSULTING SERVICES SPECIAL REP. 93-1, section 74/120 (American Institute of Certified Public Accountants 1993.)

<sup>6</sup> In California, the "suit within a suit" doctrine applicable to legal malpractice suits also applies to malpractice lawsuits against party experts who have provided litigation services. The client experiencing an adverse result in the first action must prove that a more favorable outcome would have occurred but for the expert's fault, in which case the expert is liable for the economic difference between the outcome of the original suit and the outcome of the suit within a suit.

<sup>7</sup> See also *Boyes-Bogie v. Horvitz & Associates* (Mass.Super.Ct. 2001) 14 Mass.L.Rptr. 208 ("By definition, expert witnesses retained by a party are not objective witnesses") and *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 404 (the plaintiff's expert "was not a 'neutral expert,' but one hired by" the plaintiff).

<sup>8</sup> Medium confidence is also exhibited by a moderate and stable tone of voice, clarity in speech, moderately paced speech, smooth narrative statements, good posture and straight back, comfort and poise, consistent eye contact, and accurate hearing and appropriate responses. (Robert J. Cramer, M.A., Stanley L. Brodsky, Ph.D., and Jamie DeCoster, Ph.D., "Expert Witness Confidence and Juror Personality: Their Impact on Credibility and Persuasion in the Courtroom," J. Am. Acad. Psychiatry Law 37:1:63-74 (March 2009).)

<sup>9</sup> See, e.g., Cal. Evid. Code section 1119.