PDHonline Course G129A (8 PDH)

The Architect as a Consultant/Expert Witness

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The Architect as a Consultant/Expert Witness

MODULE #1: The Consultant/Expert Witness

Overview

This module addresses (1) the functions of the consultant and/or expert witness, (2) the activities that must be accomplished when working for the plaintiff versus when working for the defense, (3) the start-up activities as a consultant and/or expert witness, (4) contract and fee issues, (5) the steps to take when a case is acquired, (6) some issues of concern when investigating an incident, and (7) some general comments.

Background

The architect in the legal environment has a distinct role to play that is different from that of an attorney. The attorney hiring the architect has the responsibility to serve as the representative, advocate, and defender of his/her client. The architect has no such responsibility. The only advocacy that the architect can have is for the "truth" related to the case. Whether the architect is serving in the role of consultant or the role of expert witness, the architect cannot be swayed by the emotions of the case or the desire of the attorney to "win" a case. While both the attorney and the architect are being remunerated for their professional services, the professional service for which the attorney is remunerated is representation on behalf of the client, and the professional service for which the architect is remunerated is representation of the "truth".

Functions of the Consultant and/or Expert Witness

While the responsibilities of consultant and expert witness are different, there are some similarities in the activities that the architect must accomplish in each role. The primary responsibility of the architect serving as a consultant is to ensure that the attorney and the client have the best information possible on which to make decisions relative to the case in litigation. The primary responsibility of the architect serving as an expert witness is to provide clear, accurate, honest testimony relative to the case in litigation. However, both responsibilities require many of the same initial activities.

1. Education – Education must be accomplished at three levels. First, as a consultant or expert witness, the architect must become thoroughly immersed in all aspects of the case and ensure that each area related to the case is thoroughly understood. Second, the architect must ensure that the attorney and his/her client completely understands all relevant information and is aware of any pitfalls (often called "gotchas") that could arise and damage the arguments being offered to the court. Finally, the architect must ensure that evidence in his/her domain is prepared and presented to the jury at a level appropriate for the jury's level of understanding. It should be understood that many attorneys attempt to structure a jury that is uneducated in order to minimize "free thinking" on the part of the jury. Consequently, the architect

must often distill information to a level that can be understood by individuals with an eighth grade education.

2. Evaluation – The consultant and expert witness must make evaluations in three domains: evidence, strategy, and information needs. An *evidence evaluation* encompasses all available information that will be brought to bear in the presentation of the case by the attorney. The interrelationship of all information must be thoroughly understood, and the way in which information will be woven into the fabric of the case must be clear. While strategy is the domain of the attorney, the architect has the responsibility to understand the strategy being utilized, evaluate the strategy from a technical perspective, provide insights relative to any perceived weaknesses in the strategy, and ensure that the information being used in the case supports the strategy. The *strategy evaluation* ensures that the attorney and the architect are "on the same page". The *evidence evaluation* and the *strategy evaluation* lead to an *information-needs evaluation*. The architect should continually ask the question following two questions. "What questions have I failed to ask?" "What information do I need that should be acquired to better support the strategy for the case?"

3. Investigation – The point relative to *information-needs evaluation* is amplified by a position taken by an attorney in New York City who stated "I don't worry about the questions that I have asked and the issues that I have raised in the case but the questions that I have forgotten to ask and the issues that I have forgotten to raise." This attitude is invaluable when pursuing a case. The architect, both as a consultant and as an expert witness, must exhibit outstanding investigative skills. "No leaf must be left unturned." Continually asking "what if" questions can lead to new insights, additional pertinent issues, and (most important) new information that will "save the day" for the case. The key is to pursue a "worst case" strategy.

Working for the Plaintiff vs. Working for the Defense

The role played by the architect when working for the plaintiff is different from the role when working for the defense. This difference is due, in part, to the way the legal system is structured.

The plaintiff must be far more aggressive than the defense. The plaintiff's attorney must continually be on the "offensive". Consequently, the plaintiff's consultant/expert witness must likewise be aggressive in his/her pursuit of information in order to meet the needs of the attorney. The role of the plaintiff's attorney is to identify every possible defendant, to keep every possible defendant in the case as long as possible (in order to achieve as much financial gain as possible – either through settlement or through a judgment by the court), and to ensure that the case is being tried in the most desirable jurisdiction. [The author has had cases where the plaintiff's attorney has wanted to keep the case within the jurisdiction of a particular court because judgments for that type of case had been more favorable in that court's jurisdiction than in other jurisdictions. The key to staying in the desired jurisdiction rested on keeping one particular defendant in the case as long as possible because that defendant's primary business location was in the

jurisdiction of the particular court where the case was being tried.] Therefore, architects working for the plaintiff must understand the motivations of the attorney and assist the attorney in obtaining the advantages required to accomplish the goals of the plaintiff. An aggressive nature is most desirable.

On the other hand, the role of the defense attorney involves (1) exploiting the strengths of the defendant's case, (2) exploiting the weaknesses of the plaintiff's case, (3) containing the weaknesses of the defendant's case, and (4) containing the strengths of the plaintiff's case. Consequently, the architect working for the defense must understand the relative strengths and weaknesses of both sides of the case and must analyze these strengths and weaknesses in an objective, organized manner. An inquiring nature is most desirable.

Getting Started as a Consultant/Expert Witness

Based upon personal experience, the following thirteen-point process is recommended for architects desiring to work as consultants and/or expert witnesses.

1. Complete Professional Licensure – While some jurisdictions allow experts to be involved in a case without being licensed, the possession of a license allows the consultant/expert witness to have a "calling card" and "credential" that signifies "public and legal approval" as well as a degree of "certification" that the non-licensed architect cannot claim. Certainly, the acquisition of the license is time-consuming; however, the ability to articulate this level of "certification" provides the architect with a significant advantage over the architect not having the license.

2. Read the Law Regulating the Practice of Architect – Read, understand, and be able to discuss the law regulating the practice of architecting in each state/ commonwealth in which you are licensed. The ability to insert key phrases and passages from the law regulating the practice of architect into testimony (either during a deposition or during a court appearance) can place an interrogating attorney on the defensive. In addition, if the architect "on the other side" of the case is not equally conversant with the law, your testimony can possess an aura of "higher credibility".

3. Read the Administrative Code for Professional Architects – Each state/commonwealth normally possesses an Administrative Code governing the practice of architect that supplements the law in that jurisdiction. This Administrative Code must likewise be read and understood. The ability to insert key phrases and passages from the Code can add to the "credibility aura".

4. Understand the Canons of Practice – Each jurisdiction, as well as all professional societies, have promulgated Canons of Practice (often called "Codes of Ethics") which the architect practitioner is expected to meet. These canons provide a framework for assisting the architect in ensuring that his/her conduct is appropriate – especially when working in the adversarial environment of litigation.

5. Develop a "Business Environment" – There are many models for your "business activity" such as incorporation, a partnership, a sole proprietorship. The writer uses a sole proprietorship as his business environment under the name "David A. Conner, Ph.D., P.E.". In this environment, an Employer Identification Number (EIN) was acquired from the Internal Revenue Service (IRS), and all billing and payments are accomplished under this EIN. Income is received and expenses are dispersed under this number. Your personal accountant can advise you on the best model for you to use.

6. Develop a Detailed Resume that Includes Credentials – Attorneys seeking consultants and/or expert witnesses desire to make an evaluation of potential candidates based on written documentation. A good, detailed resume is essential. The resume should include lists of college degrees (citing dates, degree, and institution); employment engagements (citing dates, employer, employer address, and types of work performed); skills (design, hardware, software, etc.); areas of expertise (detailed – not generic); and references (including full contact information such as name, address, telephone number, fax number, and E-Mail address).

7. Develop a Fee Schedule – It is important to provide potential employers with all relevant fee information so that there will be no misunderstanding relative to how fees will be assessed. Initially, the writer's fee schedule was simply a daily rate without defining what constituted a "day". It was quickly found that such a schedule did not provide for short-duration activities and yet allowed a rate that was too low for 12-hour to 16-hour days. In addition, the daily rate did not provide an appropriate mechanism for billing charges for others that might be used to assist in developing the work products for the assignment. As a result, a fee schedule that was more detailed was adopted. [Fee issues will be addressed in more detail later in this module.]

8. Develop a Billing Philosophy – Unfortunately, a few attorneys are noted for failing to pay their bills in a timely manner. Consequently, architects need to adopt one of three philosophies to protect themselves.

- Require an advance against which professional fees and expenses are debited.
- Bill early and often – on a monthly or bi-monthly basis.
- Establish a contractual relationship with the attorney.

The writer's practice varies based upon information available concerning the legal firm involved. If the firm is local (where a Small Claims Court is available to force bill payment) and does not possess the reputation of failing to pay bills in a timely manner, no advance is requested, and a contract may or may not be executed. Billing, however, is generally accomplished on a monthly basis. If the firm is not local but is known to pay bills in a timely manner, a contract may or may not be executed, but billing is also accomplished on a monthly basis. If the firm is not local and nothing is known relative to the firm's payment practices or if the firm is noted for not paying bills in a timely manner, an advance is definitely required. The amount of the advance should at least equal ten hours of charges.

9. Develop a Philosophy on Files – To emphasize this point, consider the following

situation. You have been working on a case for an attorney. An opposing attorney in the case subpoena's you to give a deposition and, at the time of the deposition, to produce all of your files related to the case that is the subject of the deposition as well as all files in your possession related to any other similar case in which you have been employed. What do you do? Bring all files to the deposition? Refuse to bring any files to the deposition? Bring only some of the files to the deposition?

The writer has developed the philosophy that the only items in his possession that are his property are the bills which were submitted to the hiring attorney. Therefore, all files, data, and records are the property of the attorney and a work product of the attorney. As a result, there are no documents available to submit to the opposition. Clearly, this position creates a certain degree of havoc at the time of the deposition; but, it not only protects the hiring attorney and his/her client but also all other, previous and current attorneys for whom you served or are serving as a consultant/expert witness..

A "War Story": A number of years ago the writer was involved in a case that related to an electric power transformer that had received damage some time between the time of manufacture and the time of receipt at its shipping destination. The transformer had been shipped by rail. The transformer manufacturer repaired the transformer and filed a claim for repair costs with the terminating rail carrier (who was responsible for handling the claim on behalf of all rail carriers). The terminating rail carrier deemed the repair costs to be excessive and inappropriate and denied the claim. The transformer manufacturer then filed suit. The writer was hired by the attorney representing the rail carrier first as a consultant and then later as an expert witness.

It happened that the transformer manufacturer had a number of transformers that had resulted in a similar fate that were already in litigation. It also happened that the writer was involved in a portion of these cases working for other rail carriers. At the time of deposition for this new case, the writer was subpoenaed to produce all files on the current case as well as all files on similar previous and current cases. (It was clear that the attorney was attempting to assist his client in getting inside information relative to other cases in litigation.) Since the writer had taken the position that all files were the "property" of the hiring attorney, no files were taken to the deposition. Of course, the opposing attorney ranted and raved during the deposition, but he was helpless to take any action. He was politely told that the writer would be pleased to provide the name and address of each attorney "owning" files, but that response only made the events of the day more enjoyable for the writer's attorney. The opposing attorney was never able to see the desired files.

10. Develop a Philosophy on Personal Note Taking – Just as a philosophy is needed for files, a philosophy is needed relative to personal note taking. The writer does <u>not</u> maintain personal notes on <u>any</u> cases. If notes are taken during an inspection, for example, once the inspection report is written, all notes taken during the inspection are destroyed. The point is that these notes, if they existed, are available for discovery by an opposing attorney. On the other hand, a friend that is an active consultant/expert witness maintains an "consulting notebook" that contains all notes relative to all cases.

Interesting enough, he has been able to protect this notebook from subpoena. The choice is yours. But you need to make a conscious decision as to your philosophy on note taking.

11. Let People Know You are Interested in Being an Expert Witness – If you desire to be a consultant/expert witness, your best source of business is through your network of friends and fellow architects. Attend professional and civic meetings and let people know of your interest. Some will be called on for a recommendation by their friends who are attorneys. Some will know litigation attorneys that are actively seeking consultants/expert witnesses who would welcome receiving your resume. Others will know of corporate contacts that interface with litigation attorneys that service their corporation. Talk to your friends that are already working as a consultant/expert witness. They may need assistance on one or more of their cases. They may be able to refer cases to you that are outside of their area of expertise.

12. Talk with People Who Have Served as a Consultant and/or Expert Witness for Advice, Guidance, and WAR STORIES – There are many things to learn about being a consultant and an expert witness. Do not be reluctant to seek advice and guidance as you progress on your career. Listen willingly to the "war stories" of other experts. They will be invaluable in assisting you to know what to expect and how to respond in different situations. In fact, a number of "war stories" are included in the modules that follow. Their purpose is to assist you in gaining valuable insights into the activities, experiences, and issues that will confront you as you progress through your career.

13. Understand the Difference Between Being a Consultant and Being an Expert Witness – As noted at the beginning of this module, the primary responsibility of the architect serving as a consultant is to ensure that the attorney has the best information possible on which to make decisions relative to the case in litigation, while the primary responsibility of the architect serving as an expert witness is to provide clear, accurate, honest testimony relative to the case in litigation. The roles are clearly different.

Contract and Fee Issues

The following information describes a possible "contract" that could be used when it appears desirable to have the hiring attorney commit to a relationship in writing. You will note that there are a number of subdivisions in the fee schedule, and you will note that all fees are presented in 0.1 hour increments. This approach allows a clear delineation between job functions and ensures that remuneration relates to the actual time expended on the case.

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The purpose of this document is to indicate the agreement of _____ _____ (BUYER) to the fee schedule, with accompanying conditions, indicated below for professional services that will be rendered by _____, (CONSULTANT) to BUYER.

Fee Schedule: CONSULTANT's fees will be charged to BUYER for each of the following activities: telephone calls, file reviews, pre-consultation preparation, travel, consultation, post-consultation reporting, deposition preparation, deposition testimony, pre-trial preparation, and trial testimony. CONSULTANT'S fee classification and billing rates per one-tenth (0.1) of an hour are as follows.

Fee Classification	**Rate per 1/10 hour**
Licensed Architect	$20.00
Architect I (Non-Licensed)	15.00
Architect II (Non-Licensed)	7.50
Technician	5.00
Clerk/Typist	3.50

Expenses: All normal and reasonable expenses for travel, contracted services, special supplies, photography, equipment usage, telephone services, document processing, and printing by CONSULTANT will be billed to BUYER.

Testimony Surcharges: A Surcharge of $500.00 per day, over and above professional fees and expenses, will be charged by CONSULTANT to BUYER for each day, or part of a day, in which an appearance by CONSULTANT is required either in a deposition or in court. This fee will be charged when CONSULTANT must "give testimony," "show up," or be on "stand by."

Payment: Payment is due thirty (30) days from the date of the bill. A service charge of 2% per month will be added for each month that payment is past the due date. All reasonable charges for collection expenses and attorney fees will be added to the amount due.

Agreed to this the _____ day of _____, 20__.

_____ _____SEAL
Name – Printed Signature

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You will note that the fee schedule contains five levels of expertise.

- Licensed Architect
- Experienced, Non-Licensed Architect (Architect I)
- Entry-Level, Non-Licensed Architect (Architect II)
- Technician
- Clerk/Typist

As case loads increase, there will be a need to obtain assistance in one or more of these five categories.

<u>What to do When a Case is Acquired</u>

1. Explain the Fee Schedule, the Billing Schedule, and Payment Expectations to the Attorney Employing Your Services – It is important that, as a first step, you and the attorney come to an understanding as to your fee schedule, billing schedule, and expectations relative to payment of your bills. If you desire a retainer, obtain the retainer before initiating any work on the case. If you want a contract executed, obtain the contract before initiating any work on the case.

2. Explain Philosophy on Files – Make sure that the attorney understands how you plan to handle case information. If the attorney has problems with your philosophy, resolve your differences to the satisfaction of both of you.

3. Discuss Reporting Procedure – Come to an agreement with your client as to how reports, both written and oral, will be handled. Some attorneys do not want any written communications. Others desire written information that can be included in their attorney work product file. For these attorneys, some desire that the work product be in report format, and some desire that the work product be in letter format. It is important that you understand the form and format of communications desired.

4. Review Case File (to be discussed in a later module in more detail) – Getting started on a case requires a careful review of all documentation accumulated to that point in time. The writer likes to start "at the beginning of the case" (i.e., with initial case documents) and work through the documents in time sequence seeing how case information has developed. Therefore, case documents such as complaint, charges, interrogatories and responses, depositions, reports, and pictures are reviewed in time sequence. This sequencing allows one to follow the attorney's acquisition of information. In addition, it allows one to understand biases that the attorney might have acquired up to the time of being hired to work on the case.

5. Review ALL Applicable Codes, Regulations, and Standards – Each case is unique! Therefore, a thorough review of ALL applicable codes, regulations, and standards should be made relative to the issues of the case. This foundation will provide the basis for the additional work that must be accomplished on the case.

6. Visit Site – Most cases involve an event that took place at a specific location. Visit this site and gain as much insight as possible relative to the events that surround the case. Nothing is more embarrassing than to have to admit during testimony that you did not take the time to visit the site of the event about which the case revolves. Even if nothing at the site was the same when you visited the site, at least you are able to prevent the opposing attorney from belittling you for your negligence.

7. Examine Evidence – After reviewing ALL applicable codes, regulations, and standards and visiting the site, closely examine all evidence a second time. On this pass, play close attention to every detail. Start making your critical analysis of plaintiff strengths and weaknesses and defense strengths and weaknesses. In addition, begin developing your list of additional information that should be acquired as discovery

progresses, and begin thinking about the exact expertise that the attorney will require should the case progress to trial. (Clearly, if you are not capable of providing the required expertise, you need to begin assisting the attorney in finding a consultant/expert witness capable of providing the required expertise. If you are capable of providing the required expertise, begin honing your insights so that you can provide the attorney with the best possible support.)

8. Research Information on Similar, Previous Cases – Use available architectural and legal reference sources to research similar, previous cases to determine aspects that may have been overlooked in your case and to gain valuable insights concerning how to best proceed in providing support to the attorney. Your client attorney can assist you in obtaining information through legal reference sources. (In fact, a good attorney will accomplish this research early in the discovery process.)

Some Issues of Concern When Investigating an Incident

Many court cases involve an Incident where an individual (or individuals) were injured or killed. These Incidents usually involve equipment or a product that is the subject of the case. The reconstruction of events and circumstances become increasingly difficult with the passage of time. Since many lawsuits are not initiated until well after the event and since these lawsuits often extend over a significant period of time, the consultant/ expert witness is often expected to have magical perceptive powers when reconstructing the scene of the Incident. When faced with such a situation, use the following issues to guide you in your investigation and preparation.

1. The Equipment (Product) Involved in the Incident – Have a clear understanding of the exact equipment involved in the incident. Pertinent information includes, but is not limited to, the following check list.

a. Name and address of the manufacturer
b. Model number and serial number
c. Date of manufacture (which is important in establishing applicable manufacturing codes, regulations, and standards)
d. Who sold/distributed the equipment (the manufacturer or some other entity)
e. Who installed the equipment
f. Who inspected the installation upon completion
g. Modifications, if any, made to the equipment between the time of manufacture and the incident
h. Who designed the modifications, if any
i. Who made modifications, if any
j. When modifications, if any, were made (again, an important issue in establishing applicable manufacturing codes, regulations, and standards)
k. The exact location of the equipment at the time of the incident as compared to the current location of the equipment
l. The condition of the equipment at the time of the incident
m. Changes made to the equipment since the incident
n. The type and extent of damage to the equipment as a result of the incident

2. The Sequence of Events Surrounding the Incident – Have a clear understanding of the sequence of events – an issue that will be important as you are interrogated during either a deposition or court testimony. Establish not only the time sequence but also the interval of time between the significant events in the incident. In addition, attempt to establish any possibility of contributory negligence that resulted in the incident. This issue will be most important in the final disposition of the case. Depending on which party or parties were negligent, the arguments surrounding this negligence could result in maximizing an award for the plaintiff(s) or minimizing an award paid by the defendant(s).

3. The Type and Extent of Damage to Person and Property – A clear understanding of the type and extent of injury to each individual and damage to each item of property is important. To achieve the maximum results in the case, the plaintiff must be able to articulate the extent of each injury and damage in order to justify the level of award being demanded. The defendant, on the other hand, needs the information in order to be able to minimize the extent of injury and damage.

4. Ownership of and Management/Supervisory Responsibility for the Equipment (Product) at the Time of the Incident – Both ownership and management/supervisory responsibility are important issues. This information serves as a foundation for identifying the entities/persons that should be involved in the case and provides insight as to who needs to be interrogated relative to the facts of the case.

5. The Maintenance and Calibration History of the Equipment (Product) – Equipment (product) history provides insight concerning the care given the equipment (product) since installation. The presence of this information restricts the theories that can be developed relative to the cause of the incident and protects the defense. The absence of this information allows a plaintiff to “go wild” developing theories concerning the cause of the incident.

6. The Operator of the Equipment (Product) at the Time of the incident – Knowing the name of the equipment (product) operator is important. This individual will be a key to understanding the events surrounding the incident. Important issues will not only be limited to the events surrounding the incident as viewed by the operator but also include operator training, operator experience, management/supervisor instructions to the operator, working environment conditions as viewed by the operator, and the operator’s personal lifestyle. (The following questions are examples there is are issues that need to be answered relative to the operator’s lifestyle. Is the operator a heavy smoker? Does the operator consume significant quantities of alcohol? Does the operator get sufficient sleep at nights? Is the operator taking specific medications? Does the operator have marital problems. Answers to questions such as these, can identify possible operator causes for the incident.) The operator of the equipment (product), as opposed to the equipment (product) itself, may be the focus of the case.

7. Witnesses Before, During, and After the Incident – Each and every person who was

at the site of the incident prior to, at the time of, and immediately after the incident needs to be identified and interviewed by some one associated with your side of the case. Their recollections and insights will be invaluable in assisting in the development of the time sequence of incident events and theories surrounding the cause of the incident.

8. Can Identical Equipment (Products) be Obtained (for Detailed Investigation and Inspection)? – If the equipment (product) involved in the incident is not too large and not too expensive, it is always helpful to have an identical piece of equipment (product) available for laboratory testing and investigation. While the original equipment (product) may not be available because of destruction or because the opposing side does not want to allow testing to be performed on the equipment (product), having your own piece of equipment does provide an ability to tear apart, test out theories in the absence of representatives from the opposing side of the case, and (if appropriate) even attempt to destroy the equipment (product) in the same manner theorized in the case.

9. Location and Availability of Reports by Other Parties and Inspectors/Marshals – The prudent consultant/expert witness attempts to learn about each and every report that has been written about the case at hand -- who wrote the report, where the report is located, and how access can be gained to a copy of that report. Prior to reading each of these reports, an understanding of the relationship of the writer to the case should be gained so that writer's biases can be clearly identified as the report is read.

Cases involving fire environments will normally have a report written by a Fire Inspector or a Fire Marshal. Reports written by these individuals usually play a significant role in determining the outcome of a case. Many Fire Inspectors/Marshals are extremely knowledgeable about events and causes of fires. Reports from this group can be of significant assistance in achieving a rapid conclusion to a case. Unfortunately, there are also many Fire Inspectors/Marshals that do not understand the operation of certain equipment/installations or the related design issues related to the equipment/installations, or the construction issues related to the equipment/installations that may be the basis of the fire. The reports from this latter group can be a significant impediment to achieving the appropriate result in a case. Prior to reading a report from a Fire Inspector/Marshall, it is important to know the writer's education and experience background and to know how many fires the person has reviewed that involved similar equipment.

10. Each Piece of Key Evidence in the Case – A knowledge of each and every piece of evidence that will be presented in the case is extremely important. This knowledge involves knowing each piece of evidence that will be introduced, the role the evidence plays in the case, the strengths and weaknesses of the evidence, who has possession of the evidence, who will be used to testify as to the relationship of the evidence to the case, the background and strengths and weaknesses of the individual(s) that will testify relative to the evidence, and how the evidence can benefit or damage the attorney's presentation of the case.

General Comments

1. Never Form Any Opinion Until Absolutely Necessary – One of the most damaging things that a consultant/expert witness can do for a case is to form a firm and (by appearance) final opinion too early in the case, especially if working for the defense and giving a deposition. An architect who forms and articulates a firm opinion before having "all of the facts" is a "loose cannon" and can damage the case. Opposing attorneys love to belittle an "expert" that has formed an opinion without all of the facts. Creditability relative to the case and relative to one's general reputation can be irreparably damaged. If an opinion absolutely must be stated "for the record" prior to trial (for example, during a deposition), qualify the opinion with statements such as "Based upon the evidence *reviewed to date*, it is my professional opinion that …" or "It is my *preliminary finding* that …" or "*At this point in time* it is my professional opinion that …, *however, I am continually reviewing this opinion in the light of new evidence*." (The operative words are denoted in *italics*.)

Be careful in using the first statement (i.e., "Based upon the evidence *reviewed to date*, it is my professional opinion that …"). A "good interrogator" will follow such a response with the question "What evidence have you not reviewed?" If you have reviewed all of the information that was available to you at the time, answer the question with "Any evidence that may come to my attention between now and the trial."

Be careful in using the second statement (i.e., "It is my *preliminary finding* that …"). A "good interrogator" will follow such a response with the question "And when will you form your final opinion?" Your response should be "When I am confident that I have been able to view all relevant information."

Be careful in using the last statement. (i.e., "*At this point in time* it is my professional opinion that …, *however, I am continually reviewing this opinion in the light of new evidence*.") A "good interrogator" will follow such a response with the question, "What additional information are you seeking?" And, if you actually provide a list, you will be asked "And, how will the availability of this information affect your opinion?" Either of the previous two responses is preferred over this latter response.

2. Don't Forget Billing, Don't Forget Billing, Don't Forget Billing – That's correct, don't forget billing!

3. Be Honest Relative

a. Be Honest Relative to the Validity of the Case – The writer was hired by a plaintiff's attorney in Northern Alabama. After reviewing the case file, it was determined that there was no case based on technical merits, and the attorney was so informed. The attorney appreciated this information and proceeded to restructure the case on non-technical issues. While the writer lost income by not continuing on the case, personal ethics were upheld, and creditability was established with the attorney.

b. Be Honest Relative to Your Value to the Attorney – An excellent example relates

to the writer's experience in cases involving electric power transformers that were allegedly damaged during shipment by rail. These cases involved issues from many fields. While the writer has education and experience in many of the areas, the primary personal question became "Am I the best person to be testifying on all of the issues involved in this case, or is there some one else that can better represent the interests of the attorney on a particular issue?" In each case, the writer shared his thoughts relative to each issue so that the attorney could make an informed decision as how to proceed with the case. This act established personal credibility with the attorney.

c. Be Honest Relative to Your Testimony – A friend who serves as a consultant/expert witness had a case involving a water fountain in a shopping mall. After inspection of the evidence in the case, the client attorney was informed that testimony could not be given that was totally favorable to the attorney's case. The problems with the attorney's case were indicated, and an offer was made to withdraw from the case. The attorney thought the matter over and indicated that he would prefer to retain the individual on the case and would do the best that he could with respect to the evidence that was favorable to his case. The consultant/expert witness' creditability was definitely established with the client attorney.

NOTE: The code of conduct for attorneys is different from the code of conduct for architects. Attorneys judge matters in relationship to the law. Something is either legal or illegal or untried. Many attorneys do not judge matters on ethical or moral grounds – only on the grounds of legality or illegality. DO NOT ADOPT THEIR CODE AS YOUR CODE WHEN YOU WORK FOR THEM.

4. Do Not Take Cases That Will Cause Hard Feelings with Associates or Friends – For most of his career, the writer's primary employment has been in a public, academic environment. The institution depends on funding from local businesses/corporations in the form of training and continuing education grants, research contracts, and donations to capital campaigns. This support for the writer's primary employer is too important to endanger. Consequently, no cases are taken against businesses/corporations that give financial support to the unit within the institution where primary appointment is held. Understand, however, that cases will be taken against business/corporate partners that are geographically separated from the service area of the institution. For an example, a local operating utility may have an affiliation with a number of operating utilities in adjoining states. While no case will be taken against the local utility, cases may be taken against one of the affiliated utilities.

5. For Evidence: Maintain "Chain of Possession" Records – If evidence comes into your possession, be sure to maintain records that indicate (a) when and from whom you received the evidence, (b) where you stored the evidence while in your possession, (c) what you did with and to the evidence while in your possession, and (d) when and to whom you gave the evidence. Do not let your stewardship of evidence be a point of contention during a case.

6. For Reports
   a. Define Each Term Particular to Your Profession in Language Understood by a

Person Not in Your Profession – Remember that most readers of your report will not necessarily possess a similar background nor an understanding of the issues being addressed by your report. Do not leave room for misunderstanding or misinterpretation.

b. Include Well-Identified Photographs and Diagrams – The old statement that a picture is worth a thousand words is especially meaningful in the legal environment where juries often have great difficulty understanding the information being presented in the case. Seeing can be believing. However, each photograph needs to be clearly identified relative to its contents and the significance of the photograph, and each diagram needs to contain an appropriate title and explanation to ensure that its contents and its application are clearly understood.

c. Separate Facts from Analysis from Professional Opinion – Often the architect intermingles facts, analysis, and professional opinion when discussing issues with other architects. Unfortunately, this approach can be devastating in the legal environment in that it provides the opposing attorney with the opportunity to confuse salient aspects and to "weave" the information into a pattern that fits the theory(ies) of his/her case. BE VIGILANT! Through your report organization and heading structure, carefully identify the facts of the case separate from presenting your analyses separate from your statements of professional opinion.

The Next Module

Module #2 presents a "big picture" of the legal system from the viewpoint of the consultant/expert witness.