

## **Using Expert Testimony in Construction Disputes**

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Construction disputes require lawyers to deal with complex, highly-technical architectural, engineering and construction issues, making expert testimony crucial to prove or defend claims arising from construction projects. The best construction experts will have both in-depth knowledge in their area of expertise and the ability to explain complex subjects to lay people or judges unfamiliar with construction cases in an easy-to-understand and persuasive manner. Knowing how experts are used in construction cases and what to look for in selecting the best experts for your case can make all the difference between winning and losing.

### **How Construction Experts Can Help**

The level and type of support a construction expert can provide will vary from case to case. Some cases require an expert to give some initial advice and opinions, which will drive the decision whether to bring litigation or not, and if so, against whom. This type of expert will ultimately provide expert testimony at trial or arbitration. Other cases may benefit more from an expert advisor who advises strategically and tactically, does not necessarily give expert testimony, but rather works behind the scenes with the legal team advising on each aspect of the claim. Best practices thus call for identifying and retaining an expert at an early stage in the dispute. An early expert evaluation often fundamentally affects the decision whether to assert a construction claim.

Experts are equally important in defending against construction claims. For example, the construction defect expert for the plaintiff will testify about the standard of care, how the work deviated from the standard of care, whether a termination was supportable, how the plaintiff was damaged and the cost to make the plaintiff whole. In contrast, the defense construction defects expert can defuse the plaintiff's expert's testimony by attributing the damages to another cause, proving that the termination was wrongful or by opining that a lesser repair is appropriate.

A construction expert can examine a completed project and opine as to the quality of the work in place, and its compliance with the applicable plans and specifications. An expert can also evaluate a partially completed project and determine what work remains. Where corrective work is required, an expert can give testimony as to what work is required to repair the poor work in place as well as the cost for doing so. The expert can explain how poor work and delayed work impact the rest of the project, as well as attribute cause for delays.

An expert can also determine the cause of a defect through examination of the work and/or through the use of destructive testing. The expert can then explain the process for the destructive testing and sampling, and how destructive testing is affected by factors like strength, toughness, and hardness or how corrosion or deterioration affects the structural integrity of a building.

Experts are also helpful on cases involving defective materials. If the bricks used on a project crumble with normal use or a concrete slab cracks and fails, an expert can opine on the quality of the materials used, and the resulting damage. An expert can also track a defective component to the source and assist the lawyers and parties in identifying the culpable parties.

### **Various Disciplines for Construction Dispute Expert Testimony**

Construction cases frequently require the use of experts in different disciplines. Consider a project where the owner hires a general contractor to build a project that an architect/engineer has designed to include precast concrete panels with embedded windows. Shortly after being installed, the panels fail, and the windows begin to leak. Expert evaluation can cover the following areas: (a) the drawings and specifications for the precast concrete panels; (b) quality control of the fabrication of the panels including compliance with the specifications, the quality of the materials used, and the fabrication techniques employed; (c) conformance of design and fabrication with applicable industry standards; (d) if the project was incomplete when the leaking began, the effect of the leaks on the remaining work; and (e) damages.

In this example, review of the design and specifications would require evaluation by an architect or engineer. The same expert may also have the credentials to review the quality of the work and the compliance with applicable standards, but perhaps an expert with a forensic practice would be best suited to doing the failure analysis. In some situations, however, an experienced contractor, with a long history of similar construction projects may give helpful testimony about the quality of the work and conformance with applicable industry standards. Finally, delay analysis and damage calculations require yet different types of expertise -- scheduling and accounting.

While some experts may have expertise in a variety of disciplines, frequently more than one expert will be required to support different claims.

### **Admissibility of Expert Testimony in New Jersey**

In New Jersey, it usually is not possible to prove or defend against a construction claim without an expert. See *Interstate Industrial Corp. v. State of NJ*, 2008 WL 2875475 at \*7 (N.J. Super. Ct. App. Div., July 28, 2008). There, the Appellate Division noted that "... there is no general requirement for expert testimony to establish a standard of care," but that, despite the attempt to simply the claims, "there is little doubt that [the parties'] claims required expert support and explanation." The court reasoned that where the claims involved claims of negligent design, interpretation of the contract documents, delays and the causes therefore, as well as unforeseen site conditions, expert support was needed, holding "[i]n short, we reject the contentions that [the parties] could proceed on their affirmative claims without expert testimony. ..." *Id.* See also *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) ("Given the inherently voluminous and highly technical nature of the data in such cases, the parties in a construction-contract dispute usually must retain experts to summarize and interpret that data.").

A construction defect expert, like any other expert, must prove he or she is qualified to provide opinion testimony as an expert. The expert must give testimony on their experience in the field, educational background in construction matters or through their work in the construction arena. Experts must also show that the methods used support their conclusions are reliable.

*In re Accutane*, No. 079958, 2018 WL 3636867 (N.J. Aug. 1, 2018), the New Jersey Supreme Court recently wiped out the acne medication mass tort case by more strictly scrutinizing the scientific evidence used to support the expert opinions proffered by the plaintiff class. The Court judged the admissibility of the expert testimony based on the reliability of the expert's methodology and data along the lines of the Daubert standard and found it lacking. *Id.* at 66.

Even though New Jersey has not outright adopted the Daubert standard for admissibility of expert testimony, the *Accutane* decision emphasizes the gatekeeping role of the trial court. The decision warns that the trial courts will examine the methodology used by an expert to ensure it is reliable, and that the trial courts will exclude net opinions if they find that the scientific support for the expert opinion is questionable.

## **Conclusion**

Experts provide an important resource to lawyers litigating construction disputes. An expert's assistance can range from the initial appraisal and development of a plan of attack, to a continuum of technical issues in connection with defect claims, termination claims, extra work claims, delay and disruption claims, acceleration claims, and claims for lost labor and equipment productivity. Experts are key in providing the relevant factfinders in construction disputes with a thorough understanding of the highly technical and specialized facts, from the most complex to the most straightforward construction case.

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*\*This article was published prior to Jacqueline joining Mandelbaum Salsburg P.C.*