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## Effective Resolution of Construction and Environmental Cases © 2015

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There are many different approaches used by attorneys to resolve Construction and Environmental Litigation cases, which result in varying degrees of effectiveness. The “difference makers” in efficient and effective case resolution are directly affected by the following key factors:

- Look at the big picture
- Procure appropriate experts
- Be objective
- Focus on key issues
- Have a fundamental understanding
- Perform effective discovery
- Have solid testimony/exhibits
- Have effective direct cross examinations

### **LOOK AT THE BIG PICTURE**

Construction Litigation Clients want one of two things: (1) gain the maximum net return (plaintiff) or (2) minimize the total loss (defendant). The approach depends on the size of the case. In other words, large cases should not be handled in the same manner as small ones as there is much more at stake. A difficult question to answer in this regard is, when do expert investigation and support costs exceed the cost benefit ratio of the outcome?

There is no data source I'm aware of which can resolve this question. However, in larger cases the most successful attorneys appear to be proponents of strong investigative and support efforts. However, once an attorney has an accurate assessment of the case, he/she has the best opportunity for case management in terms of the direction of the litigation.

In large cases, waiting to hire an expert(s) late in the litigation in an attempt to minimize the associated cost is likely not to be cost effective. This approach tends to attract less competent experts. In other words, few well qualified experts will accept a “last minute” case knowing that adequate due diligence cannot be done in the limited time remaining. This approach puts the attorney and the expert(s) “behind the eight ball” and in catch up mode. As a result, the attorney and experts are learning what opposing investigators already know and possibly then relying on their data collected during and after construction or an environmental event. In the end, hiring an expert later in the litigation is not likely to be as effective and will not necessarily result in lower expert cost.

The larger and weaker the case, the tendency is greater for “smoke and mirrors”. Here, experts with questionable theories, jury trials, and asserting pseudo-inconsistencies in opposing expert opinions gravitate.

### **PROCURE APPROPRIATE EXPERTS**

Obtain competent experts. These experts can make up for other shortcomings in litigation. (See article entitled: *Traits to Dig for in an Engineering Expert*, an essay by Gennaro G. Marino Ph.D., P.E., D.GE, published in the ABA Expert Witnesses, American Bar Association Section of Litigation Newsletter, Winter 2014, Vol.9, No. 1, January 21, 2014. At times in the procurement of an expert, the search becomes too focused on an expertise identified from a superficial examination of the case. This can be a mistake, as the chosen expert now may have too limited of a focus, and is not sufficiently capable of addressing other important aspects of the case, which are subsequently revealed. Many times, a better-rounded expert will be more effective in investigating the case when other factors are discovered as the case proceeds onward.

## **BE OBJECTIVE**

In some cases, the cause(s) of the loss appears obvious with counsel focusing on obtaining a superficial expert engineering report stating the same. Superficial cause/origin assessments are a waste of effort when effectively rebutted by an intelligent cross-examination. Where technical issues are significant in the case, preconceived ideas are rarely completely accurate. Many times, only after significant engineering investigation and fact disclosure are important aspects of the case uncovered and the direction of the litigation best determined. It should not be a surprise if the results from the engineering investigation change the focus of the case.

## **FOCUS ON KEY ISSUES**

Significant effort can be wasted on what are really minor issues in the case. The focus of the forensic investigation should be on the causes and origin (of the cause) and the scope of the damage. A sound explanation of the cause/origin and damage should have an appropriate correlation to the governing liability conditions. If, however, the cause and origin are found to be obvious after due diligence, the focus should then be placed on the damage regardless of whether as the attorney you represent the plaintiff or defendant.

There should be a significant focus placed on damage issues as it determines the magnitude of any case. Obviously, when the damage/claim occurs on environmental or related construction projects and it has been remediated, the damage scope and costs are more definable. However, where the repair or remediation has not been done, the quantification of the damage from experts is oftentimes dramatically different in scope of work and cost estimates, and therefore requires greater scrutiny. Significant injury losses would fall in this latter category.

## **HAVE A FUNDAMENTAL UNDERSTANDING**

Some attorneys attempt to become educated during cross-examination. This is not a good use of time, especially if there are restrictions on the deposition time. Counsel should have a good understanding of the technical aspects of the case. This is time well spent. This understanding should extend to the opinions, assumptions, and methodology of both sides. A better understanding of these technical aspects of the case leads to better negotiation capability and more effective cross-examination even if your expert is present. In some cases, due to the technical nature of the case, some firms even use an in-house or outside consultant to facilitate their understanding.

## **PERFORM EFFECTIVE DISCOVERY**

This action is so important that it should be persistently and aggressively executed when necessary. Requesting only relied upon data, is subject to the liability of the adjudication of the opposing expert. It has been my experience that excluded data or information from disclosure, which has been justified as not "relied upon", can be a key to resolving the case. Requesting preliminary analyses performed by the expert, however, can be confusing and irrelevant, not to mention costly to pursue.

## **HAVE SOLID TESTIMONY/EXHIBITS**

You can be right but the case resolution or outcome can be inconsistent with the facts. The "whys" for this include:

- Ineffective presentations/communication of evidence
- Expert investigation is insufficient (in some aspect(s))
- Counter-arguments are not effectively diffused

In lieu of a detailed expert report, some attorneys only request a Summary of Opinions (SOO). For significant damage cases, the disadvantages far outweigh the advantages in using SOOs in obtaining a successful result.

The advantages of an SOO are:

- Expert report not required in certain jurisdictions
- Significantly lower report costs

The disadvantages of relying solely on an SOO are:

- SOOs put plaintiffs and defendants on more of equal footing independent of the strength of one's case as the focus is on a statement of opinions and not on the establishment or validation of those opinions.
- With only the SOO the attorney can get wrapped up in depositions in an attempt to obtain the important technical background of the rendered opinion. This becomes impractical for counsel to achieve given the subject matter, independent of how much deposition time is spent with the witness.
- SOOs are not effective in persuading the opposing side of your position(s) through explaining investigation methodology, analyses, the approach to an opinion, and addressing opposing views.
- Technical subjects are impossible to verbally explain. Furthermore, in the process of preparing a detailed expert report, areas are identified which are important to clarify.

The overwhelming advantages of a detailed, solid, expert report is evident by cases which have been settled mainly on the basis of these reports alone. However, a forensic report which is authored by different investigators can fall apart during cross-examination especially when the co-author(s) have not done the research and detailed engineering analyses themselves. This can represent integrity issues for those who "sign off" on the combined report without sufficiently examining the relevant facts and analyses.

#### **HAVE EFFECTIVE DIRECT AND CROSS EXAMINATIONS**

In preparing for direct and cross examinations an attorney needs to listen and duplicate what the expert is saying. It is important for the retained expert to provide outlines for cross examination in deposition and trial for the other witnesses and experts. For certain witnesses or experts, the quality of cross-examination is greatly enhanced by having the expert in attendance at the depositions, especially if there is a time restriction. In addition, many times one cannot predict how a deposition will go. Here, unexpected technical information is disseminated which has not been previously evaluated. In this situation, it can only be effectively addressed with your expert present. Note that some of the expense of your expert's attendance at depositions is offset by savings in his/her efforts to later examine those deposition transcripts.

An expert(s) should provide you with a detailed outline of their testimony for trial with key exhibits well in advance, so that effective adjustments can be made to ensure his/her testimony communicates.

#### **SUMMARY**

In closing, the resolution of Construction and Environmental Litigation cases is directly affected by the legal team's ability to see the big picture, retain the appropriate experts and be objective and focused on the key issues. In addition, having a fundamental understanding of the case backed up by solid testimony and exhibits, along with effective examinations are also key factors.

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Effective Resolution of Construction and Environmental Cases, ABA Expert Witnesses, American Bar Association Section of Litigation Newsletter, Spring 2015, Vol.10, No. 2, March 23, 2015.

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