

THE COST ENGINEER AS EXPERT WITNESS -- ARE THERE ANY RULES?

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Introduction



Look at

- Role of expert
- Recommended practices for consultants acting as experts in dispute resolution
- How to find & hire experts
- Experience & traits to look for
- Case management, level of expert involvement & typical tasks
- How to control costs

Role of Expert

In claims resolution

- Document organization
- Claim analysis
- Assist counsel with discovery & strategy
- Assist client & counsel with negotiation, mediation, arbitration or litigation



Recommended Practices



☰ Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes

- Published by American Society of Civil Engineers (ASCE)
- 1988

Endorsing Organizations

- ☞ ASFE/The Association of Engineering Firms Practicing in the Geosciences
- ☞ American Academy of Environmental Engineers
- ☞ American Association of Cost Engineers
 - Now, AACEI
- ☞ American Association of Engineering Societies
- ☞ American Congress on Surveying & Mapping
- ☞ American Consulting Engineers Council

Endorsing Organizations

- ☞ American Council of Independent Laboratories
- ☞ American Institute of Architects
- ☞ American Institute of Certified Planners
- ☞ American Nuclear Society
- ☞ American Public Works Association
- ☞ American Society of Agricultural Engineers
- ☞ American Society of Consulting Planners
- ☞ American Society of Landscape Architects

Endorsing Organizations

- ☞ American Society of Mechanical Engineers
- ☞ American Society of Safety Engineers
- ☞ American Tort Reform Association
- ☞ Association of Energy Engineers
- ☞ Association of Engineering Geologists
- ☞ California Geotechnical Engineers Association
- ☞ Illuminating Engineering Society of North America

Endorsing Organizations

- ☞ **Interprofessional Council on Environmental Design**
- ☞ **National Academy of Forensic Engineers**
- ☞ **National Society of Professional Engineers**
- ☞ **Structural Engineers Association of Illinois**
- ☞ **Washington Area Council of Engineering Laboratories**

Do Organizational Endorsements Matter?

☞ **I**f you're a member of an organization that has endorsed these “**Recommended Practices**”

- **You have agreed to abide by them**

☞ If you have **not** conformed

- Professionalism called into doubt
- Credibility & motivation questioned
- Testimony discredited

Recommended Practices

📄 Expert must avoid conflict of interests & appearances of conflict

- Opinion may be discredited
- Should reveal all past relationships
- Let client & attorney decide if conflict or appearance of conflict exists



Recommended Practices

- 📄 **Expert should take assignment only if qualified**
- 📄 **Expert should rely on others qualified in areas beyond own expertise**
 - Know limitations
 - Report need for other expertise
 - Refuse to be “**pushed**” beyond own area(s) of expertise



Recommended Practices

📄 Expert should consider other opinions relative to issues

- Should consider
 - » Relevant literature
 - » Opinions of other professionals
- If disagree with others, must be prepared to explain why



Recommended Practices

- 📄 **Expert should obtain all information to avoid reliance on assumptions**
- 📄 **If must make assumptions, must be prepared to explain**
 - Review all documents personally
 - May need to visit project
 - If make assumptions, identify & justify



Recommended Practices

📄 **Expert should evaluate all reasonable explanations of causes & effects**



- **Should study & evaluate differing explanations of causes & effects**
- **Should not limit review simply to support view of client**

Recommended Practices

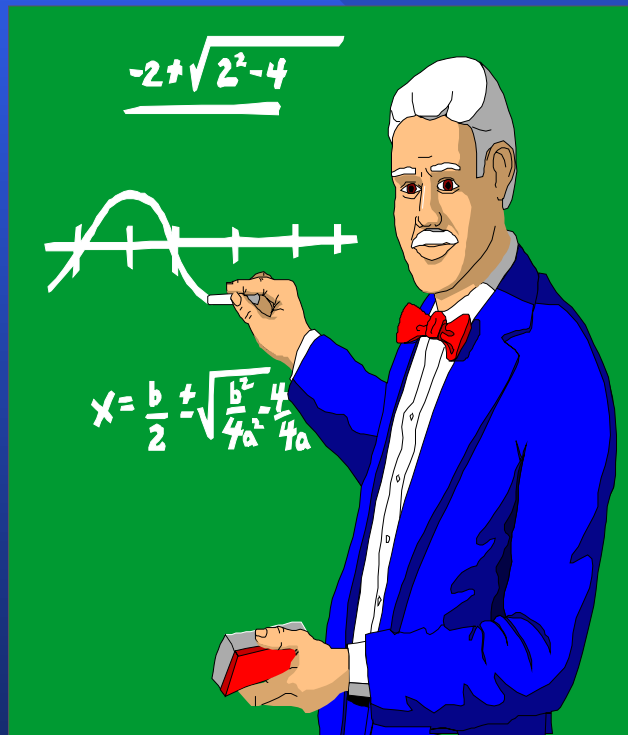
📄 **Expert should strive for integrity of tests & investigations conducted on case**

- **Conduct tests, investigations personally**
- **Or, direct through qualified individuals capable to serving as experts**



Recommended Practices

📄 **Expert should testify about standards of care only if have knowledge of standards at time**



- Remember -- Standard of care changes with time, location, type of project
- Must identify proper standards

Recommended Practices

Expert should use presentations which simplify or clarify issues

- Must be reviewed by attorneys prior to trial
- Should demonstrate relevant principles without bias



Recommended Practices



- **Expert should maintain custody, control over all materials entrusted to care**
 - Preservation of evidence, documentation necessary to admit evidence
 - Take appropriate precautions

Recommended Practices

📄 Expert should respect confidentiality of assignment

- All discussions are privileged & confidential
- Not disclosed without consent



Recommended Practices



📄 **Expert should refuse, or even terminate involvement if inappropriate attempts made to influence opinion**

- Retained to clarify issues with objectivity & integrity
- “**Buying time & effort, not opinion”**

Recommended Practices

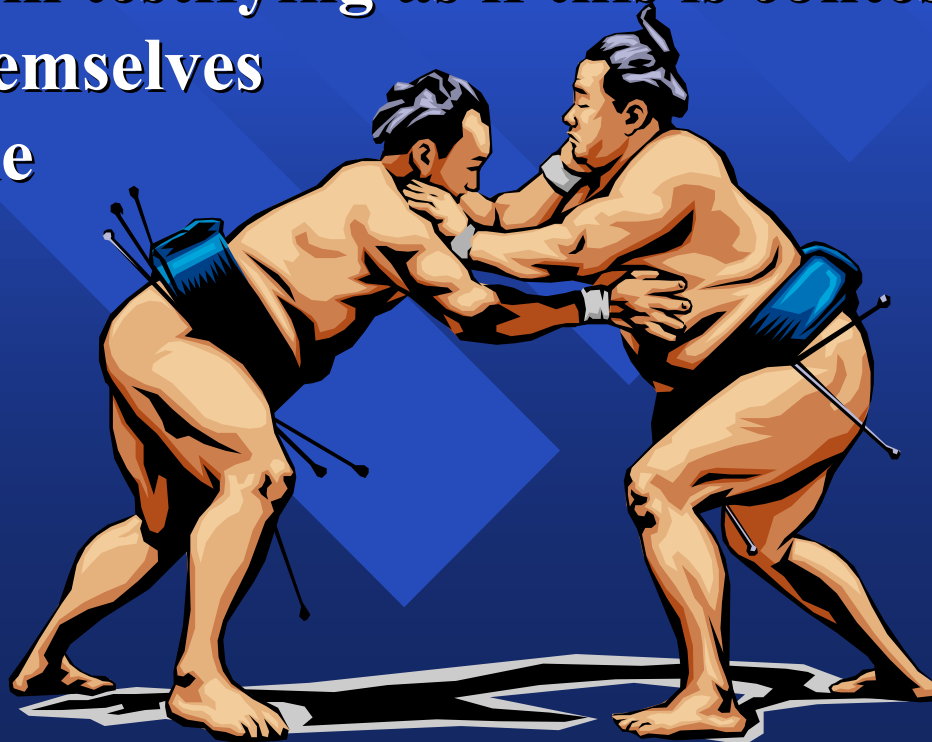


Expert should refuse, terminate involvement, if not permitted to perform necessary investigation(s)

- Should inform client & attorney about investigations needed
- If limitations too restrictive to allow testifying with reasonable degree of certainty, resign

Recommended Practices

- 📄 **Expert should strive to maintain professional, dispassionate demeanor**
 - Refrain from testifying as if this is contest between themselves & other side



How to Find & Hire

☞ Identify needs of case

- Schedule delay
- Geotechnical
- Design issues
- Damages

☞ Identify potential experts

- Attorneys
- Expert directories
- Others similarly situated



How to Find & Hire

- Review resumes
- Check references
- Interview
- Discuss case, needs, approach
- Question how expert would like to proceed



Experience

Discuss expert's experience

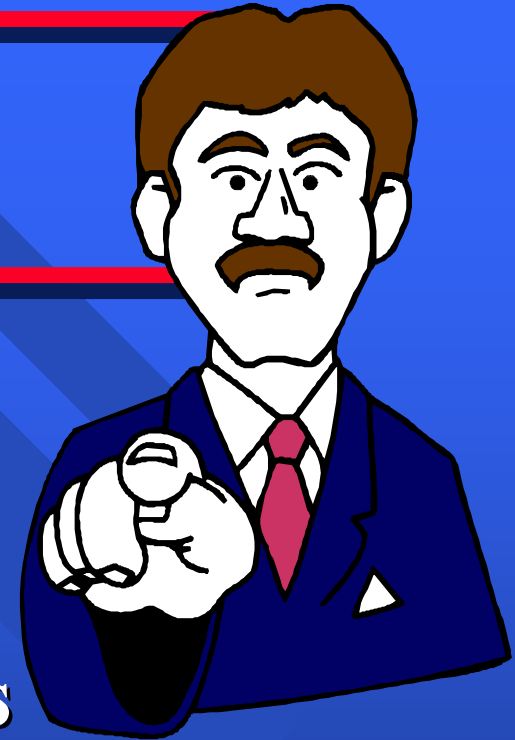
- With similar cases
- With issues

Explore various ways to analyze situation

Discuss pros & cons of each method

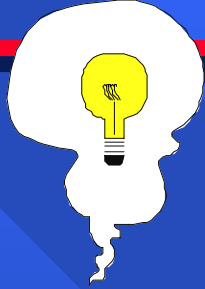


Traits to Look For



- ☞ Integrity & objectivity
- ☞ Preparedness
- ☞ Accessibility & responsiveness
- ☞ Regular status reports
- ☞ Defined work scope & budget
- ☞ Early notice of out-of-scope work
- ☞ **GOOD COMMUNICATION SKILLS!**

Management of Case



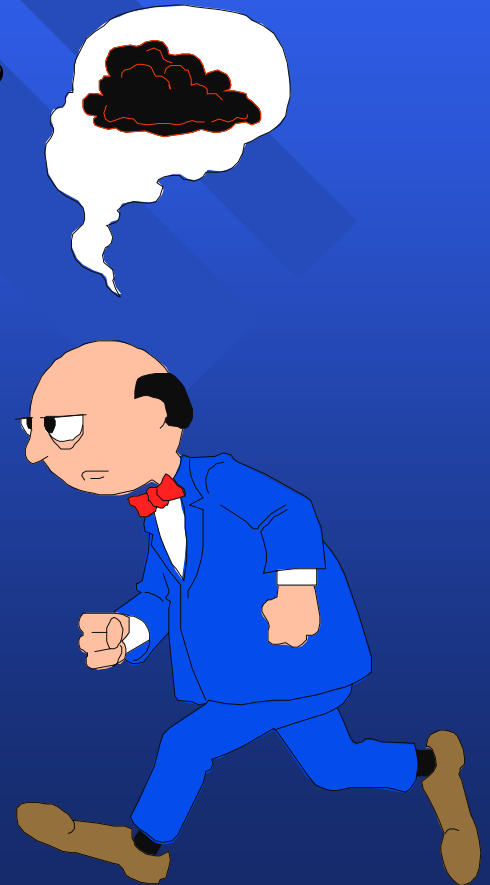
DO

- Take active role
- Keep experts involved
- Follow through with commitments
- Retain experts in advance
- Pay for services timely

Management of Case

DON'T

- Take a “**wake me when its over**” approach
- Fail to keep expert informed about things which may effect their work
- Leave your expert hanging
- Wait until 3 weeks before trial to select experts
- Ignore expert’s invoices



Expert Involvement

Light

- Review client work product
- Review only selected issues

Medium

- Supplement client work product
- Prepare independent findings



Expert Involvement

Heavy



- Document organization
- Detailed analysis
- Heavy discovery assistance
- Heavy participation at hearings

Typical Tasks

- 📄 Site visits
- 📄 Project administration
- 📄 Status meetings with client
- 📄 Review claim submittal
- 📄 Identify claim issues
- 📄 Document organization & control
- 📄 Develop issue files



Typical Tasks

- 📄 Prepare as-built schedule
- 📄 Delay & productivity
- 📄 Damages analysis
- 📄 Interrogatories
- 📄 Deposition & discovery assistance
- 📄 Prepare opinions & reports
- 📄 Presentation graphics
- 📄 Testimony



How to Control Costs

📄 Agree on **scope of work**

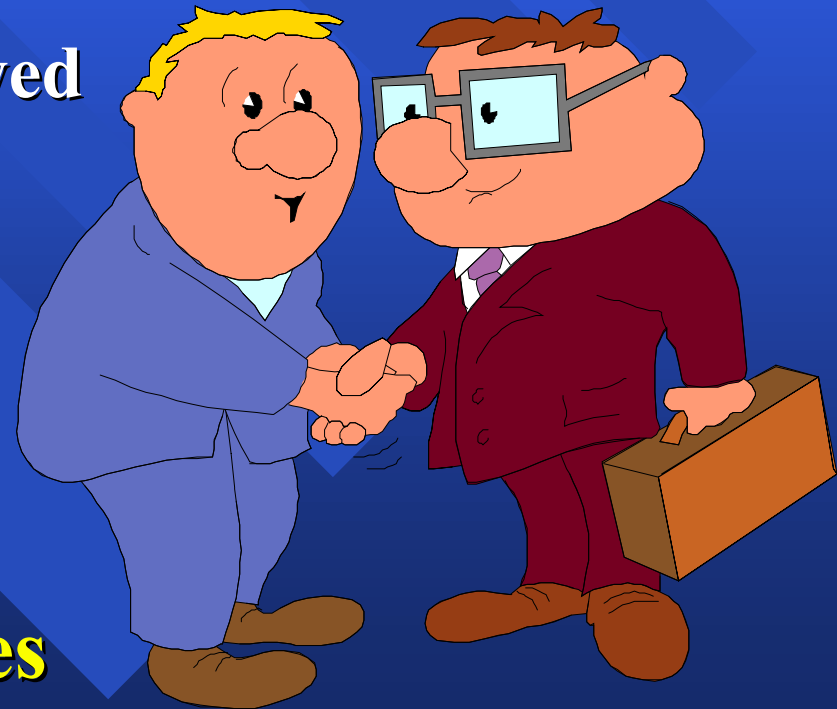
- Approach
- Records to be reviewed
- Expected outcome

📄 Agree on **schedule**

📄 Agree on **budget**

- Not to exceed cost

📄 Agree on **deliverables**



Fee Reduction Approach

Use Client Staff

Tasks client staff can perform

- Document organization & control
- Compile issue files
- As-built schedule information
- Non-technical interrogatories
- Deposition support
- Attendance at hearings



 Lower level of expert involvement =
lower fees!

Conclusion

- ❏ Make certain expert follows recommended practices
- ❏ Make certain expert has experience with type of claim you're dealing with
- ❏ Make certain expert has experience needed
- ❏ Control costs

