



Expert Witness Liability - A Shifting Landscape

By: Steve Rowinski

As litigation in our society has become more complex the use of expert witnesses has become much more common. Experts are often retained to assist in reviewing information obtained through pre-trial discovery in construction cases. Expert testimony may be used to educate a jury of laymen about complex construction issues. Expert testimony is required in professional liability claims in order to establish negligence - i.e. a breach of the prevailing professional standard of care.

Historically the expert witness has been protected from lawsuits arising out of their work by the doctrine of witness immunity. In most jurisdictions they are still protected from suits by adverse parties. However, a theory of expert witness liability appears to be emerging and a number of state courts have ruled that a retained expert, or "friendly witness", who testifies voluntarily and who is paid for his services, is no longer shielded from negligence in providing pretrial litigation services or trial testimony.

Currently a handful of states including California, Connecticut, Louisiana, Massachusetts, Missouri and Pennsylvania allow malpractice claims against friendly expert witnesses. In addition, New Jersey and Vermont have held that court appointed expert witnesses may face liability for negligent performance of their professional duties. In so ruling, the courts have generally reasoned that retained experts are more like attorneys and advocates than impartial occurrence witnesses, and should be held to the professional standard of care in providing their services.

Obviously this area of law is still evolving and only time will tell the extent to which traditional expert immunity will be eroded. Architects and engineers currently providing expert witness services should be aware that they may be held to the professional standard of care and skill, and that an adverse result in the litigation may lead to finger pointing and claims. While the expert may ultimately be found to be immune, he (and /or his insurance carrier) may still incur the costs of defending himself.

About the Author

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