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The Use of Experts in  
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## **The Role and Use of Experts: A Reminder and Refresher of Why and When to Use Them**

**William R. Allensworth**

Author contact information:  
William R. Allensworth  
Allensworth & Porter, LLP  
620 Congress Ave., Suite 100  
Austin, Texas 78701

[wra@aaplav.com](mailto:wra@aaplav.com)  
512-708-1250

**The Role and Use of Experts:**  
**A Reminder and Refresher on Why and When to Use Them**

Unlike intersectional collisions, the issues involved in construction disputes are not intuitive and are not within the general experience of most jurors, or for that matter, lawyers and judges. American law has, for two centuries, allowed experts to testify in order to aid the jury. The details of who can testify, what they can say, and how the courts handle them will be addressed by other speakers at this conference. We will focus on the general why and when to use experts.

Since 1782, and as currently codified in Rule 702 of Texas Rules of Evidence, the job of an expert is to assist the trier of fact by providing relevant and reliable information and opinions which are outside the scope of a lawyer's knowledge. The most obvious reason to hire an expert is because one is necessary to prove or disprove an essential element of your case; for example, the standard of care. The expert, as a person delivering forceful opinions in court, is classic, but testimony is not the only reason to hire an expert. An expert retained primarily for testimonial purposes may serve several consulting functions of equal or greater value. Experts can aid the lawyer as much as they aid the court.

The earliest records regarding expert witnesses go back to at least the 14<sup>th</sup> Century. In a time prior to the development of the rule prohibiting opinion evidence, experts were probably not all that uncommon. For instance, surgeons were often summoned to testify as to whether a wound was fresh. By the 17<sup>th</sup> Century, a certain Dr. Brown of Norwich was a well-known expert in witches' cases. He was sometimes asked to state his opinion of the accused person and as to whether he was clearly of the opinion that they were witches. Dr. Brown based his opinions upon a scientific examination of the fits to which the accused were subject. It is probable that at least some individuals were burned at the stake based on the opinions of Dr. Brown. Brown was the forerunner of today's forensic experts in D.N.A. finger printing and ballistics. In this enlightened era, convicted defendants are no longer sent to the stake to be burned, but are lethally injected.

Sometime in the 18<sup>th</sup> Century, rules of evidence began to develop such that opinion evidence was no longer admissible at trial. This created a tension between the use of an expert and the new rules of evidence. The seminal case which allowed experts to be called by parties, and to testify as to their opinion, was *Folkes v. Chadd* (1782) 3 Doug K.B. 157. The litigation in *Folkes* involved a question of the cause of the filling of a harbor. Plaintiff Chadd alleged that silt in the harbor was caused by a seawall put up by Defendant Folkes and brought an action to abate on information as a nuisance. Folkes, in his defense, tendered as witnesses civil engineers and attempted to elicit their opinions as to the true cause of the filling of the harbor. The engineers were not allowed to testify because of the prohibition against opinion evidence. The case was appealed, and in a decision by Lord Mansfield, was reversed and remanded to allow for the expert testify.

By 1795, Gilbert's "The Law of Evidence," the evidentiary standard for the English common law at that time stated, "In general, it must be taken that where testimonies of professional men of just estimation are affirmative, they may be safely credited; but when

negative, they do not amount to a disproof of a charge otherwise established by various and independent circumstances.”

Since the *Folkes* case, opinion evidence from experts has continued to be problematic at trial. As Judge Leonard Hand said over a century ago,

The trouble with all this (expert opinion) is that it is setting the jury to decide where doctors disagree. The whole logic of the expert is to tell the jury, not facts, as we have seen, but general truth derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.

Hand went on to state,

What hope have a jury, or any other laymen, of a rational decision between two such conflicting statements each based upon such experience. If you could get at the truth in such cases, it must be through someone competent to decide.

Hand believed that the present system, where in the vast majority of cases there is a dispute upon all subjects of human inquiry, there was a “practical closing of the doors of justice upon the use of specialized and scientific knowledge.” Hand proposed the use of one expert only, presumably chosen by the judge, whose opinion became, essentially, a rebuttable presumption.

### **Why and When to Use Experts**

#### **1. Education of the Attorney**

An attorney must understand the technical nuances of a case in order to be an effective advocate. Indeed, an attorney must often focus on a small or specific area of a particular science, such as engineering or medicine, and for a short time know enough to go toe-to-toe with a person who makes his living in that field of endeavor. The expert can condense complex technical matters and provide the attorney with a crash course in these diverse areas of obscure technical knowledge. Without a full understanding of the technical issues, discovery may be wasted: valuable information can be overlooked or not appreciated, even if it is obtained. Moreover, not only is understanding of technical issues necessary when taking an opposing expert’s deposition, it can be crucial to getting significant testimony when deposing witnesses and opposing parties. Finally, without an understanding of the technical issues of your case, pleadings may be inadequate to sustain a cause of action through trial.

#### **2. Interpreting the Construction Contract**

Beyond defining technical terms in contracts, experts can help attorneys get a feel for industry usage and custom terms and clauses in a contract. The expert may also be able to analyze a client’s performance against the industry norms to realistically apprise if there was

breach of contract or negligence. The expert will often have access to the applicable standards and codes necessary to contextualize the contract, as well as providing industry data on costs and performance. In short, an expert must be your substitute for skipping medical school or courses of learning in various sciences. The best expert is not only a tutor, but a mentor as well.

### 3. Issue Identification

It is essential to hire the expert early in the dispute. This is one of the most misunderstood or ignored of the unwritten rules of practicing law. In complex litigation, the expert may help identify various claims, such as design defect or negligence, which the attorney may have missed while focusing on a contract or other legal issue. The expert can also identify the need for additional experts to substantiate or defeat a claim. Moreover, giving the expert early access to a broad base of information can allow him or her to spot issues that only come to light when the history of the construction project is completely reviewed. Also, bringing the expert in early can improve the working relationship between the attorney and the expert and give the attorney a sense of security in approaching and evaluating a case.

### 4. Realistic Evaluation of Technical Issues

The liability and damages theories tend to blend together in construction cases. A realistic evaluation of the technical issues is necessary to maximize settlement. The expert can bring sharp focus to the blur of disparate technical information, helping the larger picture to emerge. This may allow the expert and attorney to avoid dead ends and guide the litigation through the technical maze, without getting bogged down.

### 5. Preliminary Assessment and Pre-Trial Matters

Tentative assessments of the most crucial issues are generally necessary to formulate discovery plans and conduct pre-trial preparation. They can help to map out a trial or settlement strategy. Experts can pinpoint what information still has to be developed, and a preliminary report can also help define the events, processes, or problems relating to the technical and legal issues. In pre-trial pleading, the expert's preliminary assessment can help to fashion a colorable cause of action by marshalling facts on which a sustainable argument can be based.

### 6. Assistance with Discovery and Discovery Planning

A well-versed construction expert can help an attorney precisely request (and review) necessary documents (such as blueprints, shop drawings, or schedules) that will be routinely produced during a construction project. An expert can also ensure that all discoveries requested are properly received, and that necessary inspections and testing are done on physical objects involved in the case. As stated above, experts can also be very helpful to attorneys when preparing for depositions, by clarifying and pinpointing the technical issues of a case. Their help is often essential when preparing to depose the opposing expert. Having the expert attend the opposing expert's deposition with you, while costly, often pays great dividends in helping you at the deposition and eliciting his or her own testimony.

## 7. Providing the Technical Support Staff to Supplement the Legal Professional Staff

Technical experts often come with technical staff that can assist to sort, evaluate, summarize, and categorize discovery material. Experts may also have applied software specifically developed for their area that can aid in pre-trial preparations. Rather than fearing these additional costs, a good lawyer actually uses these resources to cut down on expert fees through more efficient work.

## 8. Creating an Analytical Process From Which to Draw Conclusions

An expert's analytical process, which is more often than not different from the legal model, can provide a "frame" for an attorney's argument, creating a context in which facts can be structured, not only during the expert's testimony but throughout the development of evidence.

## 9. Drafting Reports for Litigation and Otherwise

The expert's report is useful, not only in litigation, but as a tool for the attorney. It can help focus the pleadings and case research on specific technical questions or significant facts. Often overlooked is the expertise an expert can give you which allows for better communication in reports to your client who usually speaks a language closer to your expert's than to yours. It is for this reason, among others, that the client should always have a role in expert selection.

## 10. Assistance At Trial in Cross-Examination of the Opposing Expert

When assisting in the cross-examination of an opposing expert, your expert can point out the (unsupportable) assumptions that underlie an opinion. They can also help the attorney by noting shortcomings in the opposing expert's qualifications and methodologies and any limitations on data which might force a qualification of the opinion, as well as pointing out areas that are still subject to professional debate.

## 11. The Use Of The Opponent's Expert

In this day of the battling expert, untold hours and fees are spent in putting together cross examinations to shake loose from a professional testifier an opinion for which he has already been paid to give, and in many cases for which he has been paid to give over one hundred times. It never ceases to amaze me that lawyers will spend hours arguing against the proverbial immovable object, when there is so much more to be gained from an opponent's witness.

Unlike you, one who has the luxury of arguing one side of an issue for one client and the polar opposite for another client three years later, most experts are constricted, and even bound by certain immutable laws. Those laws may be the law of physics or simply written OSHA regulations, but the expert is confined to a certain playing field which he cannot leave without destroying his credibility. Thus, the expert can effectively be used by you to prove up points on your behalf—often points which your opponent has been recalcitrant on. Unlike us, professionals who were trained for, or picked up by osmosis, the theory that every trial point is

an onion whose defense is only peeled away one painful layer at a time, experts are straight forward. Someone's defense may be two fold, that the accident site was a safe place to work and that OSHA regulations did not apply anyway. The OSHA expert will be willing to say that OSHA does not apply in this case, but he will not take a position that simply because OSHA does not apply, that the work place is safe. He can't afford to look silly, or worse, like he is a paid testifier who does not really care about human life and safety. Points can be made through his admissions on these types of things which will cost his client crucial credibility points.

The best way to approach the professional witness is to understand that you will probably not shake his main opinion, and, for the most part, simply use him as if you had called him. At best, he can prove elements of your case that will pave the way for your expert ("Do you agree with what Dr. Doolittle just said about...") and, at worst, if he is totally combative on these points, he will show the jury exactly what type of a witness he is. No matter how bright you are, you must always bear in mind that you are on the expert's turf when talking about the subject matter. But it is equally important to realize that he is on your turf with regard to the process and if you are capable of ordering the process correctly, he may not damage you as much, and may even help you.