



## Using Expert Witnesses

by Sam Abdulaziz

Because Construction claims are so complicated and require peculiar skills, they almost always require the use of an expert witness.

Most states and the federal government allow an expert witness to testify if that testimony is something outside common knowledge. That is, if the work that is performed and being evaluated is something that a reasonable person would not be able to evaluate, and if an expert in that particular field could aid in that evaluation, then that expert's testimony would be allowed.

Workmanship in the construction area is not something that is normally within the realm of everyday knowledge. Certainly cracks and shades of color may be something that can be testified to by anyone.

However, the reason for the cracks, or when cracks might arise, is not something that can be testified to by a lay person. In this regard, you might consider the use of an expert to testify.

Further, most courts and arbitrators believe that both parties will see things differently. Even if we assume that everyone is telling the truth, the truth is not always viewed the same by all parties. The use of an expert, one who is somewhat independent, lends weight to your particular viewpoint.

### When to Hire an Expert

It is my belief that an expert should be consulted immediately upon the possibility of a claim arising.

Although an expert is usually thought of as one who testifies at trial, an expert's unbiased opinion can greatly aid you and your attorney in negotiations. Further, you and your attorney will need to prepare for trial in the event that negotiations break down. In this case, the expert's aid and advice will be of great value. The expert can also evaluate the opposing claim and the opinions of the experts they may have engaged to testify.

### Finding a Qualified Witness

Finding a witness in the construction area is not that hard. However, finding a competent expert is a tougher chore. Obviously, if you are dealing with plumbing, the expert

witness should be a person with plumbing expertise. The same goes for other subtrades. You should distinguish between remodeling and new construction expertise as well. But the key to an expert's ability to act as a witness is the expert's background and experience.

An expert witness should be one whose credentials in the particular field are substantial. Has the expert written any articles, lectured, or trained anyone else in the field?

Another major item of importance is the ability to communicate. Many "experts" are truly good craftspeople. However do they have the ability to communicate their knowledge and expertise, as well as convince the arbitrator, judge, or jury of their position? In this regard, you may wish to contact local trade associations to find people who have lectured, trained, or even advocated certain positions before regulatory agencies, as well as legislative bodies. People who have in fact been on the "firing line" and know the art of convincing by their words will work best.

One should also be wary about using the same expert over and over again. You do not want a "professional witness." Remember, you're looking for someone with expertise in the trade, not expertise in testifying.

In addition, you should inquire as to whether the expert has rendered opposing opinions previously.

### In Sum

The use of a qualified expert witness can help you prepare for construction disputes, whether you are going to court, or whether you arbitrate. Don't hesitate to make use of this valuable resource. ■

*Sam Abdulaziz is an attorney in Los Angeles specializing in construction and real estate matters. He has lectured throughout the U.S. on the subject. In addition, he has authored the Contractor's Guide to the Contractors' State License Board Citation Procedure and other books on construction law. We encourage you to send your questions on construction law to Sam c/o The Legal Column, New England Builder, P.O. Box 5059, Burlington, Vt 05402.*