

## THE ARCHITECT AS EXPERT WITNESS

*Pro-Demnity encourages architects to make themselves available and even specialize in being expert witnesses and litigation consultants. We prefer to hear opinions on the “duty of care” provided by architects rather than listening to engineers or technologists explaining to the court what architects do.*

*– David Croft, Claims Story No. 40, “It Takes a Spark”*

## BEING AN EXPERT

To help set your mind at ease, the OAA list of an architect’s [professional services](#) includes “offering expert witness testimony.” This means that if you are an employee, partner, etc. of a holder of a Certificate of Practice, providing such testimony will be covered by your Pro-Demnity professional liability insurance policy, subject to the terms and conditions of that policy.

As a “usual and customary” service of an architect, a claim related to the provision of expert witness services would be covered under a Pro-Demnity professional liability insurance policy, subject to the terms and conditions of that policy.

Confusion may have been created by the fact that there are two principle ways for an “expert” to act as a witness. The two functions are quite similar, but there are important differences. Be sure you know which function you are being asked to serve before you leap in.

The first of these is referred to as a ***factual witness***, sometimes as an *expert factual witness*, so-called because they provide technical details concerning the matter under discussion, from the perspective of someone who is aware of the facts of a case, having been involved in it. A factual witness may be engaged by either side in a dispute, whichever feels that the expert’s testimony will best serve their argument. We are aware of architects being approached by both sides in the same dispute, which presents a dilemma for the architect. An architect may also be subpoenaed by either party.

Regardless of how you are approached, it is important to remember that a factual witness must remain objective and not express an opinion or have an interest in the outcome.

Like other types of witnesses (e.g., eyewitnesses and character witnesses) the role of a factual witness is best described by the *Oxford English Dictionary* (OED), definition 2, which conforms to what most of us understand by the word *witness*: you know something because you saw or heard something:

*Witness*: a) Attestation of a fact, event, or statement; testimony, evidence; evidence given in a court of justice; b) The action or condition of being an observer of an event.

The second type of witness is commonly referred to simply as an **expert witness**, sometimes an *independent expert witness*. As the extended name suggests, this witness has no interest or involvement in the matter at hand. The RAIC *Canadian Handbook of Practice* (CHOP) defines this witness as someone who offers “a technical opinion on a project in which they have had no previous involvement.” This lack of involvement means that the normal definition of witness doesn’t and mustn’t apply. In this case, we rely on OED *witness* definition 1: “Knowledge, understanding, wisdom” – a definition that OED describes as “obsolete.” Except that it’s not, since it continues to appear in special instances, and this is one of them.

Acting as an (independent) expert witness may carry some professional prestige, since a court, a tribunal, or an authority of some sort, has recognized you as an expert in something. It may also produce reasonable financial reward. As a result, many architects have taken advantage of this professional opportunity. Some architects broadly advertise their services as expert witnesses, making it easier for potential employers to find them. Some architects, especially in the US, sign on with commercial agencies that provide expert witnesses in a variety of categories to anyone requiring their services. Other architects choose to be proactive by contacting potential employers directly. On the other hand, many legal and insurance firms, Pro-Demnity among them, prefer to rely on their own list of expert witnesses – those with whom they have had experience, or whose credentials have become known to them.

To clarify: as an architect, you may be factual witness, with some involvement in the matter at hand; or you may be an independent witness, with no prior involvement. You can never be both at the same time.

## SIMILARITIES

Naturally, you will be expected to be a genuine expert. Your credentials will have been scrutinized and approved by the party that hired you, as well as the presiding authority. You will be expected to provide technical information on a topic that other parties in the matter cannot provide and may not completely understand. Your job is to offer this information in a way that these other parties – participants, judges, mediators, adjudicators, etc. – can digest. Be aware that your facts and even your very expertise, will be questioned. Other experts will be introduced whose facts are different from yours, and different conclusions will be invited.

## DIFFERENCES

As a factual witness, your bias for one side in the dispute can be assumed. But David Croft, Pro-Demnity's retired former VP Claims has previously suggested that you exercise caution, since it may be more than your credibility that is on trial.

If you are required to be a witness in a proceeding to which you may not be a named party, understand that you may be actually on trial. Do not let yourself be flattered into believing that you are there as a "professional expert," whom the judge will listen to with respect. Contact Pro-Demnity for advice. – David Croft, Claims Story No. 4, "False Start," Lesson 4

Normally, witnesses (including factual witnesses) do not offer opinions – "Please stick to the facts, ma'am." But as an (independent) expert witness, you are expected – and have been engaged specifically – to offer your opinion because of your specialized knowledge.

It's improbable that anything you offer as an "expert" opinion will be used against you, or that any attempt to do so would be successful. However, nothing is etched in stone, and at the very least, your future as an expert witness may be impacted. For this and many other reasons, you should be sure to follow your counsel's instructions scrupulously. As one of the architects I spoke to told me: "Your ability to make your points depends on the lawyers."

And to reiterate, if you are called as a factual witness, consult Pro-Demnity, at your earliest opportunity.

As an (independent) expert witness, you have been hired by one side or the other, in the hope of supporting their case, but you are acting as an unbiased authority. You have nothing to gain from the final decision. Your impartiality is unassailable.

## IMPARTIALITY

Architects get a lot of practice in impartiality, because our profession requires it. *Canadian Law of Architecture and Engineering (CLAE3)*, devotes an entire chapter to "The Architect and Engineer as Decision-Maker," in which it points out that, even as agents of the owner, we are frequently required to be judges – certifying payment, granting extensions, ironing out disagreements, etc. As owner's agent, we act on the client's instructions, but as a decision-maker, where the contract is involved, we must be an unbiased advisor. Always. [pp. 243 ff.]

However, as an expert witness, your impartiality may be challenged. Your facts, as presented, will undoubtedly favour one side or the other, but if your opinion can be shown to be biased, or your impartiality questioned, your testimony may be tainted or even disregarded. In fact, courts have

strict rules about this. A judge may not hesitate to dismiss evidence they view as advocacy rather than expert opinion. In one or two cases that Pro-Demnity has defended, expert witnesses introduced by plaintiff's counsel have turned out to be advocates for a cause. Regardless of the validity of the cause or the apparent urgency of the facts, as soon as this bias was revealed, the plaintiff's case crumbled.

Complete impartiality has to be regarded as an aspiration rather than an achievable goal. We all harbour tiny preferences that we may not even acknowledge. The opposing side in a dispute will invariably try to find the buried biases in an expert witness. For example, an expert witness most certainly belongs to a professional or academic organization, and as a result, can be expected to represent the values of that organization. Although this should be regarded as a credential, and a source of wisdom, rather than a bias, it may still skew your views on some topics.

Under cross-examination, your facts and conclusions may be questioned. But for greater impact, your questioner may try to create doubt about your impartiality, and even your expertise and your credibility, which can effectively erode the validity of all your facts and opinions. Thankfully, you may be invited to weaken the case of the opposition by disputing their "expert's" facts and opinions. As Mario Salvadori reveals, in *Why Buildings Fail*<sup>1</sup>, the lack of agreement among experts can lead to a legal battle "as exciting as that of a murder case." [P. 24]

## PREPARATION, DELIVERY & DOCUMENTATION

You will be questioned, possibly grilled, perhaps mercilessly. It's important to be sure of your facts. One of the architects I spoke to recommended: "Know your material backwards and forwards." You've been hired because you're an expert, which means that a) you *are* an expert; and b) you have a command of the range of current thinking on your subject. The more you know, and the more confidence you have in that knowledge, the more effective you will be, and the less likely it will be that you will get confused or rattled under cross-examination.

In addition, remember that your testimony is essentially a presentation, so you need to know who you are presenting to. And, since your job is to clarify matters, not obscure them, choose your terminology and your tone carefully. You may be required to make both an oral and a written presentation and each has its own requirements. In all likelihood, the written presentation will be the most important, since it will be subject to the greatest scrutiny.

University of Wisconsin Dean Robert Greenstreet advises:

*Expert witnesses are usually required to commit their findings to paper, so it is vital to develop a clear, concise and unambiguous writing style – remember, the report will be read by people outside your profession, so avoid jargon or technical terms that may be unfamiliar or even*

*confusing to the layperson.*

- *"The Architect as Expert Witness: A Survival Guide,"*

When giving your oral presentation, be clear, succinct, responsive, confident and unflappable. In your written document, be direct, thoughtful, logical, and literate. It's a good idea not to put pen to paper too early and avoid delving into matters that are outside the specific question(s) asked by counsel.

## CONCLUSION

In any dispute, discussion or focused examination, your expert opinion is only part of a bigger picture. There will be a lot of information to be weighed and considered, in addition to what you provide. Much depends on the strength of the arguments being presented, and on the skill of the lawyers or advocates who have engaged you. In fact, the outcome of the matter may easily hinge on their skill in weaving your testimony into an overall argument, emphasizing some facts and de-emphasizing others.

As a final consideration, from a risk management perspective, the format of an expert opinion is very important. Be sure to include suitable disclaimers on its purpose (in possible anticipation of litigation), an indication of who is entitled to rely upon the opinion (the party commissioning the opinion), the material upon which the opinion is based, etc. Being an expert witness is not a "creative" exercise.

## FURTHER INFORMATION & ENCOURAGEMENT

CHOP [Section 3.10](#), [APPENDIX A](#) offers a comprehensive discussion on "The Architect as Witness." This document is worth reading in its entirety before you appear as an expert or a factual witness. Another valuable source of information is Chapter 12 of CLAE3, "The Architect and Engineer as Decision-Maker." This chapter offers an excellent overview, and many examples, of what "impartiality" means in the context of architectural services. The OAA has published a [Practice Tip](#) (PT.07, Version 2.1), "Professional Opinion – Independent Opinion – Reviewing a Project Prepared by Another Architect," which discusses the issues surrounding professional advice in a number of circumstances.