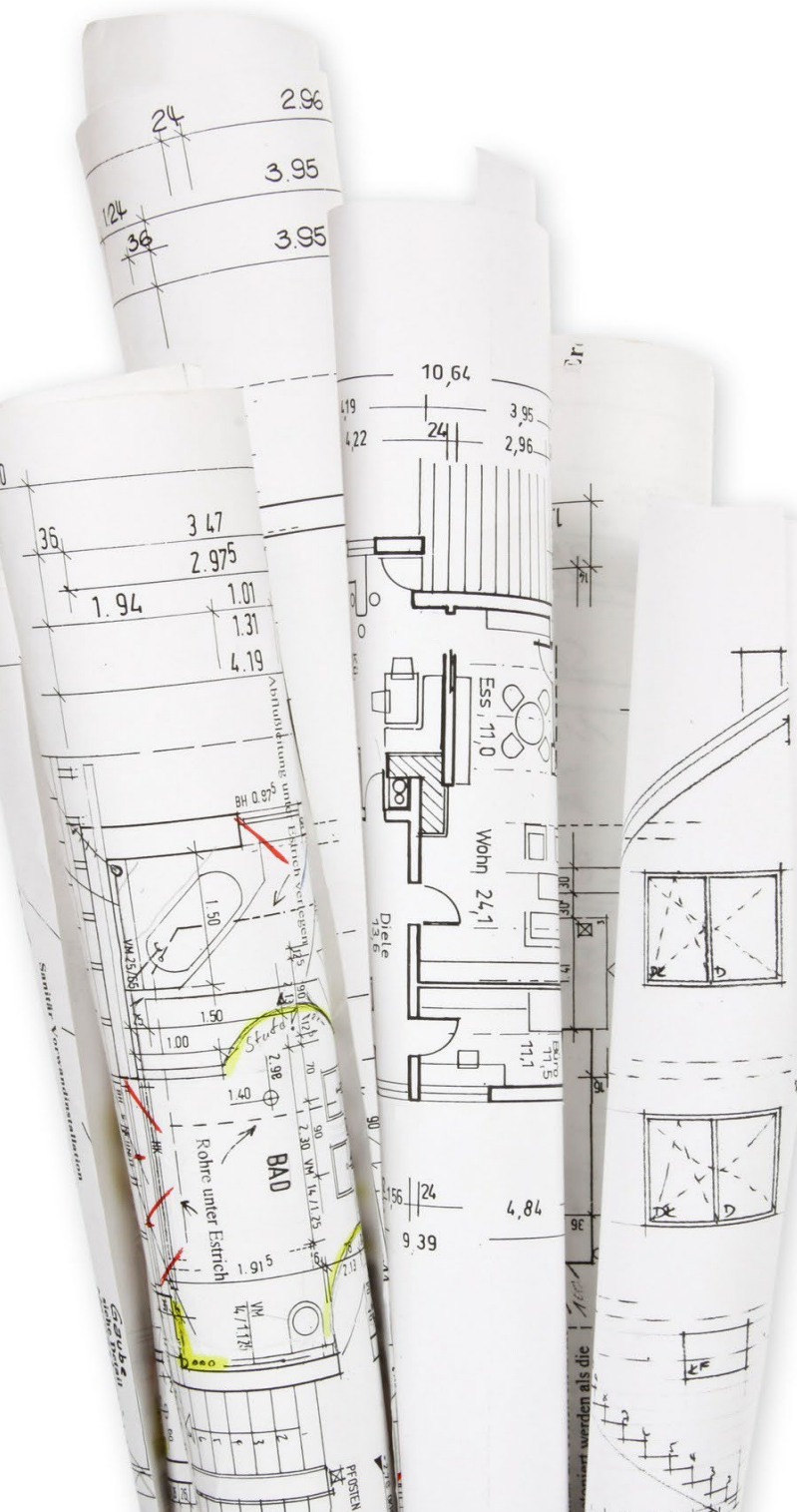


BUILDING BLOCKS

DESIGNPRO
INSURANCE GROUP
A Wichert Insurance Agency



Expert Witnesses in Design & Construction Disputes

By: Eric O. Pempus, FAIA, Esq., NCARB
DesignPro Insurance Group

Unfortunately, disputes do arise on design and construction projects. It is not possible to list what circumstances can go wrong. From a legal perspective, the allegations can include breach of an agreement between the project participants—project owners, design professionals, consultants, construction contractors, sub-contractors, and more. Also, a project participant may be accused of falling below their standard of care—amounting to a claim for negligence, delay claims, etc. Allegations can be numerous.

IN THIS ISSUE:

FEATURED ARTICLE
CONTINUING EDUCATION
SOCIAL MEDIA
MEET OUR PEOPLE

THE DESIGN & CONSTRUCTION INDUSTRY IS PRONE TO DISPUTES

Keep in mind that projects have many moving parts. Buildings are built on assumed conditions (soil borings included in a geotechnical report), varying weather conditions, labor and material availability, and the project “team” may work together only one time (so there is no economy based upon established relationships). When a dispute arises, when the parties go to battle with each other, it is highly likely that attorneys are involved to represent their clients. In the dispute resolution process, either through mediation, arbitration or litigation, the need for an “objective outside set of eyes” in the form of an expert that can support a project participant’s case.



<http://www.quarles.com.au/cash-flow/top-10-issues-facing-construction-industry-2018/>



<https://attorneyatlawmagazine.com/latest-articles/most-common-construction-accidents-that-happen-on-site>

But there is a distinction here to be recognized. A “fact” witness would be involved to support their position because they are directly involved in the dispute. These fact witnesses would obviously include the parties in the dispute themselves—the named defendant(s) and plaintiff(s), and eyewitnesses. The expert comes into the case to educate the fact finder(s), such as a jury in litigation or arbitrators in an arbitration, about the merits of one side of the dispute. An appropriate expert witness, working with an attorney representing one of the parties,

needs to be objective and inform the legal counsel (their client) about the pros and cons in the dispute.

A PERSPECTIVE ABOUT EXPERT WITNESSES

The Legal Information Institute (LII) is a research, engineering and editorial group housed at the Cornell Law School in Ithaca, NY. The members include publishers, legal scholars, computer scientists, government agencies and other groups and individuals that promote open access to law, worldwide. The LII is supported by private donations, corporate sponsorships, and the parent institute, the Cornell Law School.

LII Legal Information Institute

[About LII](#) [Get the law](#) [Lawyer directory](#) [Legal enc](#)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. “There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.” Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore §1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

THE FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence addresses the qualifications of an expert witness involved in disputes.

[Federal Rules of Evidence](#) > [ARTICLE VII. OPINIONS AND EXPERT TESTIMONY](#) > Rule 702. Testimony by Expert Witnesses

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

IN CONCLUSION

Design professionals, including architects, landscape architects, engineers and surveyors have a duty to conform their conduct consistent with their profession, when providing their services, to establish their credibility. For example, typical state rules of conduct found in Boards of Engineers is as follows. An engineer shall:

(D) Express an opinion as a technical or expert witness before any court, commission or other tribunal, only when it is founded upon adequate knowledge of the facts in issue, upon a background of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of his or her testimony.

About the Author of this Risk Management Building Block Article

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 prior years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individuals, groups, or institutions. This article is an expression by the author(s) to generate discussion and interest in this topic.*

MARK YOUR CALENDARS FOR ERIC'S UPCOMING



CONTINUING EDUCATION PROGRAMS:

Speaking Engagements:



“Current Issues in Kentucky Engineering Practice”

- **Best Practices for Managing Engineering Liability and Risk**

Live, Interactive Webinar – April 20, 2023



Current Issues for Ohio Architects and Engineers

- **Working Under Ohio’s Design Professional Licensing Laws**
- **Preventing and Resolving Ethical Issues on Ohio Construction Projects**

Webinar – May 31, 2023

GET TO KNOW US ON SOCIAL MEDIA



Get the latest updates from DesignPro by following us on social media!

Visit the DesignPro Website at: www.designproins.com

Visit the Wichert Website at: www.wichert.com

Follow DesignPro on Twitter at: [@DesignPro_Insurance](https://twitter.com/DesignPro_Insurance)

Follow Eric Pempus on LinkedIn at: [eric-o-pempus-esq-faia](https://www.linkedin.com/in/eric-o-pempus-esq-faia)

Follow Brad Bush on LinkedIn at: [brad-bush-a2a0136](https://www.linkedin.com/in/brad-bush-a2a0136)

Follow Wichert Insurance on Facebook at: facebook.com/wichertins

Follow Wichert Insurance on Twitter at: [@Wichert_Insurance](https://twitter.com/Wichert_Insurance)

MEET OUR PEOPLE:



Brad Bush, CPCU, AU
Principal
brad.designproins@wichert.com



Eric Pempus
FAIA, Esq., NCARB
Risk Manager
eric.designproins@wichert.com



Tracey Heise
Account Manager
tracey.designproins@wichert.com



Chuck Petretti
Account Executive
chuck.petretti@wichert.com



Roger Perry
Account Executive
roger.designproins@wichert.com



Tracy Combs
Risk Manager & Loss Control Specialist
tracy@wichert.com