

EXPERTS, ESQUIRES, AND THE ENVIRONMENT A PERSONAL PERSPECTIVE

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INTRODUCTION

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only days but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue (Winans, 1858).

The use of technical professionals by attorneys for litigation support and as expert witnesses is a practice dating back well into the 18th Century. However, the number and variety of expert witnesses has risen sharply in the last quarter century. Nearly ninety-percent of trials now involve the use of expert witnesses (Gross, 1991). On average about three experts are used in conjunction with each trial. There has been much speculation and discussion as to the value and role of technical professionals in providing litigation support and serving as expert witnesses. On one hand, the use of expert witnesses has become an indispensable tool for attorneys and contributed to many very large and widely publicized monetary settlements. On the contrary, there is the concern regarding the integrity and credibility of expert witnesses, prompting some attorneys and judges to suggest they are a kind of “intellectual prostitute” (Haun, 1998). Some also suggest that attorneys harbor an extremely negative view of expert witnesses although ironically attorneys created the problem. Concerns over the inappropriate use of expert witnesses and their lack of credentials in recent years has prompted courts, as in the famous U.S. Supreme Court *Daubert* case, to set new guidelines for the admissibility of technical evidence (Anderson and Parsons, 2000). This case and others has resulted in a dramatic shift in view of the court system regarding unreliable science. State and federal courts have moved considerably to the side of excluding experts and their testimony, particularly those of the plaintiff.

Nonetheless, the use of technical professionals for litigation support and as expert witnesses is quite valuable. This paper examines the appropriate role of technical professionals in litigation with particular emphasis on the environment and hard rock mining. In addition, a few general guidelines and case studies are provided which may aid attorneys in the selection of technical professionals.

THE LITIGATION EXPLOSION

It has become commonplace that the United States is the most litigious nation on earth, indeed in human history, and that excessive resort to law marks America's moral decline and portends painful political and economic consequences. A phalanx of mournful and indignant commentators concur that America is in the throes of a litigation crisis requiring urgent attention from policymakers (Galanter, 1986).

There is a perception in the United States, that it is in the midst of a litigation explosion, prompted in large part by the media (Gergen, 1991). This perception has been fostered by seemingly endless and frivolous lawsuits, and comments like those of former Vice President Dan Quayle indicating that 70% of the attorneys in the world reside in the United States and of former Governor Richard Lamm of Colorado noting no nation in history has ever sued itself to greatness (August, 1992). This perception has led to a discussion regarding the perceived glut of attorneys in this country and is there a need for more.

Based upon information gathered from various Internet sources, there are about 850,000 attorneys in the United States, representing between 25% and 35% of the attorneys in the world. According to some sources, about the same number of students are currently enrolled in law schools in the country. Between 30,000-40,000 attorneys are admitted to the bar annually, of which over 40% are now women. Although the United States apparently has more attorneys than other country, it ranks only 35th in terms of the number per capita, while Vatican City ranks first with nearly 350 attorneys per 1,000 people. (August, 1992).

Based upon this information, is there truly a glut of attorneys in the United States making excessive sums of money and how do technical experts fit into these statistics? In attempt to answer these questions, a fascinating investigation of the legal profession was undertaken by legal authorities from the University of Wisconsin (Trubek, et al.). The investigation involved a nationwide survey and thousands of attorney interviews. Over 1,000 cases were reviewed, excluding those with an initial claim of under \$1,000 and the "megacases". The researchers found that about 72% of individuals with grievances complained to the offending party, and that a dispute arose in 63% of these situations. Of these disputes, only about 11% resulted in a lawsuit, most of which are settled out of court. Of the lawsuits filed, nearly 60% of them involved a post-divorce dispute.

With respect to the amount of money at stake in these lawsuits, 56% involved less than \$10,000 and only 12% involved \$50,000 or more. About 60% of the attorneys involved in these cases spent less than 40 hours of professional time on them. Only 12% of the cases required more than 120 hours of professional time. In terms of total legal fees, over 80% of the cases involved less than \$5,000, with only 8% exceeding \$10,000. With respect to income, 63% of the attorneys taking part in the survey made less than \$50,000 per year. Only 5% of the attorneys had an annual income exceeding \$100,000. This research and other statistics seem to indicate that the litigation explosion is not widespread and that all attorneys are not getting wealthy from their involvement with lawsuits. Nonetheless, due to the size of the country, thousands of lawsuits are filed each year.

On the other hand, the rise in super settlements is related to three basic categories of lawsuits including professional and medical malpractice, product liability, and toxic chemicals and environment (Luu, 2000). These lawsuits are often protracted, requiring about four years or 48 months to settle in contrast with the 30 months that are required on average to settle a lawsuit. However, over 20% of these lawsuits resulted in settlements exceeding \$250,000, with about 8% exceeding \$1,000,000. The final nationwide settlement involving “Big Tobacco” reached 246 billion dollars (Lavelle and Cannon, 1999).

Associated with these larger monetary settlements, wages and salaries of legal employees increased from about 9.8 billion dollars in 1980 to about 45 billion dollars in 1992. Several attorneys indicated that increased number of lawsuits with large settlements was attributed in large part to the increased use of technical professionals for litigation support and as expert witnesses (*Wall Street Journal*, 1997). The value of the expert is further enhanced with the knowledge that their fees often represent only a modest portion of the overall cost of a lawsuit. Due to the value of experts for litigation support and as witnesses, many have made a career of appearing in numerous lawsuits. However, there are ongoing concerns regarding the credibility of experts and the manner in which attorneys select and interface with experts.

THE ROLE AND SELECTION OF EXPERTS

The technical issues associated with professional malpractice, product liability, and environmental cases can be extremely complicated. In some situations, the role of the expert is not to explain in simple terms, but to confound through the introduction of highly technical and tedious testimony, as seemed to be the case with respect to the DNA evidence in the O. J. Simpson murder trial. It is vitally important, that technical data of whatever kind relied upon be verifiable and not considered merely “litigation generated”.

From the literature and personal experience in attending public hearings, in giving depositions, in presenting testimony at trial, and in providing litigation support, several observations and general guidelines are worthy of mention that may aid attorneys in their selection of and interfacing with professionals serving as testifying and non-testifying experts (Coggio and DeMasi, 2000).

- Select experts early for several reasons. One reason is to not afford opponents the opportunity to retain the preferred experts first. Another is to use experts to aid in the selection of other experts. Another is to allow the experts to examine the technical merits of the litigation and to provide background discussions of the technical issues. Finally, do not under estimate the legal knowledge gained by an technical expert through many years of experience.
- Do not underestimate the value of non-testifying experts that provide litigation support only. There are individuals who may not be suited to providing expert testimony on the witness stand, but have an excellent grasp of the technical issues involved in the litigation. Communications with this class of experts are generally not discoverable, allowing these experts to serve as technical “sounding boards” prior to trial.

- Interface with and inform experts and make them part of the “litigation team”. Experts are often offended when attorneys do not engage them in the details of the litigation and leave out information, which is pertinent and essential to the formulation of the expert opinion. The treatment of an expert by the attorney can strongly influence their degree of enthusiasm and ultimately their level of participation in a lawsuit.
- Be leery of the professional “expert witness”, who has provided testimony in many lawsuits. The credibility of these witnesses is more likely to be challenged than the practicing consulting engineer or scientist. Academicians do not necessarily provide the most credible and knowledgeable expert witness, since many of them are researchers only and not practicing engineers or scientists.

Using the information provided regarding the value and role of experts in litigation, some additional insights are provided through the use of case studies taken from the personal experience of the author.

CASE STUDIES INVOLVING MINING AND THE ENVIRONMENT

To provide further insight into the role and value of experts in litigation, a brief discussion of some personal case studies are provided involving environmental litigation and the hard mining industry. For background purposes, there are three basic phases associated with the life of a hard rock mine including:

- The permitting phase during which an Environmental Impact Statement is prepared in compliance with state and federal regulations.
- The operational phase during which a precious metal, such as gold, platinum, palladium, or silver, and/or a base metal, such as lead or nickel, or zinc, is recovered.
- The closure phase during which the site is reclaimed and rehabilitated to the degree mandated to achieve a designated post-mining use.

Most of the legal confrontations occur during either the permitting or closure phases of the life of a mine. With respect to the permitting phase, the litigation often centers more on legal than technical issues, while litigation arising during closure often focuses upon more technical issues associated with an attempt to define long-term environmental risks. Environmental issues arising during operation usually pertain to smaller solution releases, which are dealt with by the state and federal regulatory agencies. Large environmental incidents involving a tailings dam collapse can result in natural resource damage suits and protracted civil and criminal lawsuits.

From personal experience over the last two decades, the usually lengthy and contentious litigation process associated with environmental lawsuits and the hard rock mining industry has not served the best interests of the public and not provided rapid and permanent protection of the environment. As an option to the typical environmental lawsuit, some are now turning to Alternative Dispute Resolution to mediate differences in an attempt to provide more creative and reasonably implemented negotiated outcomes.

Additional insight into the litigation process as it relates to environmental matters and the hard rock mining industry can be provided through discussion of the following and other case studies:

- **Case Study 1.** This case study involved a gold mining company that was sued by environmental groups for unauthorized discharges from a tailings impoundment at a closed and reclaimed mining operation into local surface waters without a federal discharge permit in violation of the Clean Water Act. Cyanide found in the local surface waters was used as a “signature” pollutant to justify that a release had occurred.
- **Case Study 2.** This case study involved a civil lawsuit in Canada between a gold mining company and an international chemical supplier providing reagents and technical expertise in the area of water treatment. According to the mining company, the chemical supplier misrepresented the ability of their patented technology to effectively and economically treat excess solution prior to its discharge into the environment. As a result, the excessive cost of water treatment resulted in premature closure of the mine and bankruptcy of the company. This lawsuit involved a potential settlement in the tens of millions of dollars.
- **Case Studies 3 and 4.** These case studies involved both civil and criminal lawsuits, the USEPA, and DOJ. In these legal proceedings, corporate officers were charged with either purposely exposing an employee to a toxicant or spilling a toxicant into the environment. In both situations the toxicants were contained in allegedly improperly stored hazardous waste generated during the recovery of silver from mining wastes. The potential fines and penalties involved in these cases included million of dollars and years in federal prison.
- **Case Study 5.** This case study involved a civil lawsuit in Australia brought against multiple engineering consulting firms for professional malpractice that allegedly occurred in conjunction with designing and permitting a new gold mining operation. The lawsuit involved a potential settlement in the tens of millions of dollars and focused upon the degree to which the engineering firms inappropriately designed the metallurgical process and environmental management system including the water treatment systems. The failure of the metallurgical process and environmental management system ultimately led to the closure of the mine, the bankruptcy of the multi-national mining company, and loss of hundreds of millions of dollars.

SUMMARY AND CONCLUSIONS

The use of experts has become an integral part of the legal process in the United States. It is hoped that the information presented and discussed will provide useful insights into the important and varying role experts perform in litigation and will prompt attorneys to incorporate them directly into the legal team and overall strategy development.

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