

If Experts Could Rule the World



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First let me apologize in advance if I offend anyone, especially if you are an attorney. I have to work with you, and that is punishment enough. In America it has become so easy to offend, since being offended is an emotion, and one cannot really control another's emotions. You see, I am a trained professional, an analytical person—an obvious advantage when your job title is “forensic expert.” Not so good if you are dating (thank God I am happily married to someone who does not put up with my rantings).

Experts are a very rare and unusual lot; they are an obvious necessity when your case involves something extremely technical and complicated. We are engineers, architects, contractors—even PhD's who quickly learn that the pay is far better than a teaching position and tons more fruitful than pounding nails.

I happen to be one of the lucky few who have been blessed with a multi-million dollar education in the construction industry, paid for by making mistakes. Oh, the lucrative education came much later, funded by insurance and plaintiff dollars. First there are the myriad jobs that I worked on as a laborer, carpenter, electrician and ultimately a contractor. Later, after I felt so self-righteous when I thought I knew everything and became an expert, I learned very quickly that I knew next to nothing—my ex-wife was right after all. Alas, an expert is born. As each case surrounds you with incredible talent from skilled attorneys, judges, and other experts, it seems that the longer one is in this business, the less we believe we know. As an expert becomes more ‘seasoned’, we learn to know a little about everything, and are happy to share that knowledge with you—whether you want to hear it or not.

I have been asked to offer some insight into this topic, "*If Experts Could Rule the World*," so herewith my short list of all the things we could change to make this industry a better, happier place...

Getting Paid

It's my favorite subject, and least desirable chore. It is a happy time when the check comes in the mail. It is unnerving when your banker becomes jealous because you are loaning out more money than him, at zero interest. It is a kick in the groin when your real client is so distant to the case that you never meet them. Boy does that make an expert feel important—to never meet the man whose name is on the label—or the front door for that matter.

Why does it take so long for experts to get paid? Well, attorneys love what they do. They love to work up the file, build the case strategy, attend depositions, and practice the art of eating at mediations. They try to look busy at certain court reporters' offices just to get the free lunch. They don't like spending time approving expert bills. So even though you diligently send them each month, sometimes they just become a staggering pile of unimportance at the corner of their desk. Until, of course when their whole case depends on your testimony, then you're suddenly important again.

Adjusters don't like doing math. Moreover, they don't like agreeing to pay their portion of a claim when little is known about the case and how it will eventually pan out. When multiple experts are hired on a case where multiple policies exist, and multiple defects occur over multiple years, and multiple trade partners are employed with multiple AI endorsements, well quite simply, you have a mess. This very complicated problem can be solved by an amazing device called a calculator. You actually push the button that looks like two zeros on a see-saw, and the problem is solved. Call me—I will teach you.

In a perfect world, the very first insurance policy that is tendered by the defendant should be obligated to defend the case. There, I said it! Does it not make perfect sense, that the first policy discovered in a builder's mess we call a job file should earn the prize? As complication ensues, they should be required to agree on percentages, get reimbursed, and handle the accounting workflow. After all, experts are mostly small business professionals and slow cash flow costs money and doesn't make us happy. Trust me—you don't want a sad expert on your team.

In a perfect world, experts would offer 2-percent discount net 30 days, and be able to actually charge interest for aged A/R. Don't worry, just agree to it. I will do the math for you, using that see-saw button again.

Until this happens, we experts can send accurate, timely billings that reflect all payments made on the account, and identify all payments made to date. We could post our invoices electronically so that they are available to the adjuster and attorney when (not if) they become 'lost in the mail'. Attorneys could inform us when more than one party is responsible for paying the bill. And when a change takes place that affects the payout percentage, we could adjust the balances due for each party.

For plaintiffs these worries are gone, but new fears emerge: Will the check bounce more than the floor at Vegas International Airport? Will the client die in the hell-hole leaky death trap they call a condo? Or will the stachybotrys chartarum (aka

'killer mold') infect the family, causing them to lose their jobs, miss their payments, and vote progressive to get Obama Care passed? Oh wait a minute, it did pass. We are doomed.

Finally, if all of us experts simply issued stop work orders on very old accounts, there would be more emphasis in getting us paid. After all, we aren't the ones getting sued, we didn't cause the accident, and didn't reverse lap the freaking window flashing. We are just here to help. Yes sir, the window leaks. That will be two grand.

Working with attorneys

After being retained on over 3,000 litigation cases, I have learned a bit about the legal side of my business—mind you just enough to think I know something about the law, but not quite as much as if I had stayed at a Holiday Inn Express last night. I love to work with new attorneys. They are young, eager and ask a lot of questions. And they make me feel very smart and very wise. When they fail to laugh at a Mork & Mindy impersonation due to the fact that they were not yet born, you feel old. Nanu Nanu. Sometimes the questions are really insightful. Sometimes the questions are remindful of your talks with three-year olds. But it is great to see those young associates climb the ladder and later (years later) pay you a compliment for helping them understand the technical stuff. The window leaks, okay? That will be two grand.

Young attorneys can also be a pain in the ass. Because of their usual lack of business acumen, they tend to have sloppy organizational habits and have difficulty accepting responsibility for any mistakes. Remember when you hire a great expert they can make your life a piece of cake by helping you catch your mistakes. We cannot change the facts, but we can help keep you from tripping over yourself and keep you focused on the game plan. Yes, gray hair does pay off, or no hair for that matter, to the detriment of the youthful. Remember that the next time you get anxious to hire an unknown new expert who sent you a flyer.

In complex cases, there is no substitute for experience. I know that my meetings may interrupt your ABOTA trial goal, but they really are important throughout the case. We experts may not need to suck on the teat of wisdom oozing from you each day, but at least grace us with your presence and spill your incredible perfection every so often. Gosh, we will be so lucky and so grateful. By the way hot stuff, the window leaks, that will be two grand.

I had a \$5 million single family case where the trial attorney never met me until the night before my trial testimony—which happened to be a Sunday night, after his golf game. After hearing the case perspective from my lips—it was as if I was speaking Klingon—he decided to throw away all 42 of my demonstrative evidence boards and have me 'wing it'. "Trust me—it will be like you are the teacher in a class, and you can just write things down on paper for the jury." Our styles didn't mesh, we were awkward in front of the jury, and we got creamed. The jury was gracious in their criticism, and politely said they would have given more weight to the defense argument if only they showed up for the trial. Of course, the attorney never hired me again, and of course I was blamed for losing the jury and not offering a total cost of repair—the one precisely detailed on Board No. 41. If only the jury could have heard a cost of repair number from

the defense... But Tom, I still tell this story to young attorneys so they won't repeat your costly mistake, so payback is bliss.

Depositions

Why depositions last more than a day has always been an incredible frustration for me. I once was deposed for 17 days on a multi-million dollar construction defect case. I could have rebuilt the place in that time period, and funded it with the money that was wasted on attorneys sitting around the table who were balancing their checkbooks (because Texting, Sexting and blogging had not yet been invented).

Depositions should not last more than 6 hours. To accomplish this, some rules will need to be created:

1. An expert's entire job file must be produced at least 5 days prior to the deposition, including the aforementioned final report.
2. All experts must create written reports, which spell out all opinions they will testify to at time of trial. No report, no testimony. Stupid opinion in report, stupid opinion at trial. Bad news for bad experts. End result: more Perry Mason-style trials because I know you lawyers love to watch us experts go down in flames. It's like dragon slaying, only for nerds who cannot use a calculator.
3. Plaintiffs must present their claims at least 30 days before the defense. Give me some consideration and trust me when I say that a few days' lead time to fully digest the plaintiff's opinions, which are sparsely pried out in depo questioning, is insufficient. We experts have a life, we have families who like us to come home at night, and sometimes we even have plans on the weekends. Respect us at least enough to consider that this is a job for us too, not a life-threatening emergency.
4. Experts who have survived more than 10 depositions should not have to endure the ground rule speeches, which just wastes time. For some attorneys, this diatribe is often the most salient and grammatically correct thing you will put on the record all day, but it is unnecessary for experts. Remember, we are trained professionals and we can recite them back better than you can read them off your cheat sheet. So let's focus on the facts. Yes, sir, the window leaks. It's all in my report. Now that will be two grand.
5. Attorneys should be penalized for asking stupid questions. I suggest a bell on the table, to be rung simply and proudly by the expert as a simple reminder to be cogent, concise and accurate. The bell is not recorded during the depo, but it reminds you that you need to try harder. Ask me a compound question and I get to ring the bell. Ask me a question starting with, "Now what I don't understand is..." and I get to ring the bell. Ask me my opinion of the expert you have hired (as if I am going to tell you what I really think about your expert) and I may get two rings. As Forrest's Mommy said, "Stupid is as stupid does."

I remember quite fondly in one deposition on the seventh day, the \$400 per hour trial attorney asked me, "Mr. Luhr, where do you think the workers who will do this repair are going to eat their lunches?" Flabbergasted, I hesitated and then responded, "Mr. Dickman" (not his real name but I call them as I see them), "there is a lovely park across the street. I think they will eat there." Word of caution to you lawyers who believe that bad depo questions die. We have a Depo Question of the Month board at work, and someday I should write a book on that theme alone. Some of you—and you know who you are—have graced our bulletin board many times over the years. Your words are famous.

6. The Stupid Question Bell should be used against the expert as well, which can be rung when we go on and on and on without really saying much. It then becomes the Stupid Answer Bell. Sometimes when reading a depo, I ponder if the expert was calculating how much money he just made by answering the question—"Five dollars a minute, five dollars a minute. Just three more answers like that and little Joey's college tuition is in the bank." Of all complaints from attorneys, I am guilty of this one the most. But remember, I had to put four of those potty-mouthed teenagers through college, and fund an ex-wife's excessive Twinkie and chocolate milk habit.

I remember vividly my longest answer on record, and I believe the longest answer in the history of mankind. It was Newport Beach. A 230- unit condo project with mushrooms growing from the balcony decks. (Ah, real defects... those were the days...) The first depo began innocently enough by the plaintiff attorney, and after about an hour he proceeded to have a heart attack. Seriously. Now this reaction used to be limited to my first dates, but a seasoned attorney! Of course we didn't know it at the time, but the man was sweating like John Candy dancing to "Maniac". We took a break, wherein he and the defense lawyer agreed to have me answer just one question until he returned. Clutching his chest and turning clammy the question was simply, "Please describe everything you did and all of your opinions in this case". Since the defense attorney did not want to allow the subcontractors to question me until the plaintiff concluded, he instructed me to keep the answer going until the plaintiff returned from the doctor. An hour became two, then three, then lunch, then four—still no plaintiff. My answer ultimately became longer than the quintuple bypass surgery he endured that day. Pretty soon, the court reporter began making fun remarks. "You've made it to 50 pages!" Young associates, who were balancing their checkbooks and picking their noses, eventually began cheering and betting on how many pages the famous answer would ultimately become. By the end of the day the answer 182 pages long, a totally useless and painful experience for all who attended.

So to encourage brevity (above story notwithstanding) and concise answers from experts, I suggest a daily deposition fee. We make more money if we get done early. You get your answers without all the dodging and smart aleck responses; we make more money. Everyone wins.

7. There is nothing more frustrating than an attorney spending five hours and never getting the expert pinned down, so here is my most favorite idea

of all: let's allow experts to ask an hour's worth of questions! It seems you cannot train an attorney to stay on theme, and ask the killer question just when the expert is teetering on the brink of irrelevancy. Gast! The question, the most important question, the question that would be so obvious for an expert to ask, the question the deponent is secretly fearing the most, falls to the wayside like the chocolate chip cookie crumbs in the lobby at Glass Mediations. If experts could ask the questions—or at least part of them—a huge amount of savings in depo prep and transcripts could be saved. I promise we won't take away your relevance, but just once it would be nice to nail that sleazy, sneaky, crafty commie bastard to the wall... Hell, we might even do it for free if you let us.

8. I have given over 500 depositions over the years. Attorneys know what I will say about extrapolations, the building code, and standards of care. In Utopia, my dream is to show up to a deposition and kindly face a trained legal professional who has read my report thoroughly. He asks, simply, "Mr. Luhr, are all the opinions that you anticipate giving at trial articulated in your report?" I pause for a brief moment (trying to remember what the word "articulated" means), my right finger ever so slightly supporting my chin. "Yes, counselor," I say, in my deepest adult voice. Sigh. The window leaks, and I don't even have to say it. That will be three grand.

9. Attorneys spend a lot of time and charge a lot of money writing depo summaries. But we experts never get to read them because you fear they are "work product". Who cares? Do you really believe another attorney will use your depo summary to castigate your Readers Digest talents at trial? You really do a great job summarizing depositions, creating timelines of relevant facts, and lists of important documents. We hate doing this, and I am sure the insurance company hates paying for stuff multiple times. So hand them over and we can save a tree.

SB800

I am proud to say I participated in many discussions when SB 800 was being formulated in 2002. I am sad to admit the law has not lived up to the industry's expectations—so what else is new? When I first heard the *Aas v. Supreme Court* ruling, I was shocked that those smart people could somehow agree that finding a missing firewall is no longer a defect. So we fixed it with SB 800. Now, peeling paint is compensable, as are rotting fence posts. There, the world is now safe. Many a night after *Aas* I worried that millions of consumers would die when their cedar pickets began tumbling atop them. I can now rest comfortably knowing that SB 800 has brought back sanity in CD law. If only it worked...

In a perfect world, a claimant figures out that his balcony deck is leaking, so he files a written complaint. The builder quickly acts upon this and sends a team out to investigate (I imagine clean-cut guys in royal blue jumpsuits, the kind with the uni-buckle in the center). The leak is discovered, the damage is fixed, and the homeowner is once again happy that their home is protected.

But lawyers do serve a purpose when things go sideways. And a really feisty lawyer makes this job seem fun. I have been told where to stand, to not speak, to not touch anything, to not ask where the defects are, and to refrain from taking photos of the nude man painting (there was a crack I needed to document), which happened to be the plaintiff homeowner. These games are fun for some of you, they allow you to feel empowered for a moment, but they are costly and do not benefit the homeowner. The games should be left out of the process of fixing broken homes. For the crack photo, visit my website).

And builders need structure too. For many of them today, the structure they need is a payment plan for their debts—I think they call that Chapter 11. When a builder responds to a claim, they should be obligated to state that they have the financial capacity and the technical expertise to actually fix the problems. I have always told builders, “It will never be cheaper to fix a defect than when you first discover it.” I guess I didn’t understand how the process works, where you legally hold your subcontractors hostage and as they bleed legal and expert fees they succumb to paying your graft demand. If not, litigation may ultimately be the best forum to align all parties and suck money out of them so homeowners can buy a new RV—I mean fix their homes. But, don’t forget to mediate the claim five or six times so you can actually learn what the case is all about.

Herewith my recommendations for a new, improved, streamlined SB 800 process:

1. Claims must be specific and detailed. If the homeowner (or expert) hasn’t identified the location where water comes in, or which window fails to close, or the most egregious cracks in the stucco, the claim should be rejected as failing to meet the unambiguous intent of the standards. How can that work in any other industry? You go to the doctor, complaining of cancer. Doc asks where does it hurt? You say same place as the gal next door, and you’ll have to find it yourself, so start probing. Come on folks, let’s give the builder the information so he can fix it, or at least fall on his face trying. Then sue.
2. Builders should anticipate claims, and be required to digitally archive all their important construction documents. No more excuses that the documents are in a Bakersfield farm house shed. It should take minutes—not months—for builders to retrieve job files, and I really do hate getting file boxes full of rat shit. Electronic files save incredible time and money, since we experts will actually know how you built the job, what materials might be used and other good stuff that excites us. Nothing more sexy than a set of clean, crap-free as-builts.
3. Once a legitimate claim has been accepted, the claimant should be ready to participate in the builder’s inspection. I am always amazed when claimants are unavailable for weeks after filing the notice of claim which provides for a 15-day inspection. “Honey, lets file a huge claim against our builder and then it’s off to Jamaica for the Bobsled trials.” Countless hours are wasted every day as a team of experts sits in the claimant’s driveway, waiting for them to return home and open up the house. And so if the experts show up at the door but your hair appointment beckoned you, your claim should be denied, and you get to start over.

4. Builders should have a pre-assembled team of experts who are especially skilled at handling these types of claims (I must say that I am particularly good at this, and I have a blue jumpsuit). Experts should write written reports of findings, create an actionable repair plan and costs. Builders should immediately offer to repair the actionable defect or provide the cost of repair, and the homeowner may either accept the repair or take the money (and buy the RV if they have any money left after their attorneys' fees).
5. A new insurance policy should be developed that specifically addresses SB 800 problems. In California we all now are aware of what an actionable claim is and what is not. Leaky windows are covered—drywall corner bead cracks are not. So why not have a policy that simply covers all investigations and all actionable claims. The builder pays for his defects in advance—that way as the defects compound, so does the interest. The builder receives rebates after a few years on every house that never has a claim, yet there is no deductible. This is the Holy Grail!
6. When crazy circumstances occur that cause SB 800 to fail (like when there is a contingency fee involved) then we should pursue the most robust of litigation claims against all parties. But let's do it with dignity, considering the environment and the Japanese quality culture of Toyota... On second thought, let's consider LEAN quality principles, where quality is derived from consistent simplification of complex things. Let's practice *Muda*, the Japanese culture of eliminating waste, or anything that does not add value to the final product. Let's all strive to consider paperless filing, electronic communications, high speed scanning of all paper, and electronic trial presentations. Enforce an office rule that if it is an electronic document, it stays an electronic document. Let's find a way to not have multiple experts attend silly visual inspections that are not conducive to finding the cure. Let's think about our deposition questioning, and plan exactly what we will accomplish in mediation instead of it being a trial run of how to conduct discovery. If we all pitch in, costs will go down, we will be happier because we will be doing more beneficial and productive work, and the ever-increasing litigation burden we all pay for will eventually subside. Boy am I an optimist, but mama always said you have to dream it before you can do it.

Mediations

Lastly, I ponder all the wisdom learned and all the settlements made in this ever-popular Construction Defect innovation of non-accountability: the mediation.

Back in the olden days, mediations were way different than they are today. The mediation process was like a mini-trial. Expert opinions and discovery were fulfilled, and folks were just downright prepared to try their cases. Now, there are few detailed "Dog and Pony" shows as before. Defense experts rarely publicly criticize the plaintiff findings or methodology, since that would entrench the cross-defendants and there goes all the extortion money to settle the case. But is extortion a fair concept in business? Why are subcontractors' insurance companies held hostage simply because they were stupid enough to sign a Type I indemnity provision and hand over the million dollar post-dated blank check you call a policy? I ponder this because a real

operative wrap policy hasn't been invented yet. Yes, I ponder how wonderful life could be if experts really could rule the world.

So move forward with the mediation, but set some preconditions:

1. The plaintiff must produce written reports, and the principal expert shall be deposed for a day, questioned only by the defense counsel.
2. Prior to the mediation, every party must prepare a case summary binder, which includes their client's contract, relevant change orders and other pertinent case data. Showing up to mediation without this results in a fine.
3. The mediator gets two days' salary—a day to review the briefs and a day to conduct the negotiation. After all, mediations should only move forward when the parties are motivated to settle, taking considerable risks and expenses off the table. Mediation is not for discovering your case—it is all about THE NUMBER.
4. Each defendant must have a number at which their client has agreed to settle the case. No number, no participation at mediation, no stroganoff for you that day. It is silly and non-productive to attend mediation with no authority and an incomplete case analysis. You don't get to bill for the day without a number. And for God's sake, if you don't have a number, at least let the mediator know when you arrive, because I am told by mediator friends that this is a mortal sin.
5. The plaintiffs must attend the mediation with full and reasonable authority to settle. No number—no cookies and punch.

So you say a single forensic expert cannot change the world, or the law, or how the litigation dance is played. I say nay to that, since big things happen when you make little improvements. So take my list, pick just one item you agree with, and make it your own to push forward.

Finally, let's put some fun into this otherwise dreary work. After a case settles, the experts and attorneys should meet to raise a pint and toast to life and what's left of liberty, since we are legally entitled to have some fun. After all, the camaraderie could do us all some good!

Cheers,

Stan Luhr

Stan Luhr is President of Pacific Property Consultants Inc., a forensic building consultancy firm with more than 30 years experience in the construction industry. Mr. Luhr has provided court testimony in over 100 cases ranging including building durability, standards of care, building codes, inspector negligence, cost of repair and product failures. He is also the founder of Quality Built, a construction quality assurance firm which has provided QA services on more than 400,000 units in 33 states.

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