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DISARMING THE HIRED GUN

Trials are required when facts are in dispute, so the trier of fact – the judge or jury – can hear each side's version of events and then decide what really happened. Expert witnesses play a pivotal role when technical issues are involved, by explaining causes and conditions most triers of fact would find difficult to understand.

In a courtroom, experts' opinions carry the same weight as facts. As such, when the opinions of two experts differ, it's the same as facts being in dispute, necessitating a trial. There's nothing wrong with experts disagreeing, as long as their disagreement stems from honest differences in professional judgment. Regrettably, if you pay them enough, all too many engineers are willing to say whatever a lawyer wants to hear, thus legitimizing a wide array of specious claims. Even more regrettably, little can be done to stop these hired guns, because opposing experts may not be sued for rendering an opinion. (In a number of jurisdictions experts are immune from suit even when performing negligently.)

Hired guns can be particularly destructive when an engineer (or other design or environmental professional) is accused of negligence. For the trier of fact to find the engineer liable, it must conclude that the engineer failed to abide by the standard of care and, as a consequence, caused injury or damage. To do that, the trier of fact first must decide what the standard of care was and, for that, experts usually are required, with the plaintiff and defendant commonly retaining one each. Which expert's testimony will receive more weight? The one who seems more credible to people who must use their common sense as a litmus. In other words, the person who looks and speaks more like an expert will probably carry the day.

As dignified as many hired guns appear, they are vermin who violate all ethics and use the law's protections to commit what many people believe is tantamount to perjury. As

an example, consider the professor who stated, under oath, that the standard of care requires civil engineers to supervise the execution of their plans to ensure worker safety, even if they do not have a contractual responsibility to do so, and even if they are not paid. Why did he say something so outlandish? Because the civil engineer was the only party available to sue in a trench cave-in case. The contractor that employed the deceased worker was protected by workers' compensation statutes, and the developer had given constructive control of the site to the contractor. If the widow were to receive additional compensation, the trier of fact would have to conclude that the civil engineer owed a duty of care to the worker, and that failure to perform that duty led to the accident. The professor was willing to say what had to be said to make the claim stick.

To serve as an expert, a person must by recognized as such by the court hearing the case. The professor had no problem in that respect. In fact, he had been recognized as an expert more than 50 times before. Nonetheless, in this particular case, his expert recognition was withdrawn, because the civil engineer was aware of something unknown to the other side: *Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes*.

Created in 1988, *Recommended Practices*...has been endorsed by 35 prominent organizations and, as such, is believed to be the most heavily endorsed document of its kind ever produced by the construction industry.

"Have you ever heard of this document," the professor was asked. "No," came his reply, although he did have to admit that he had heard of most of the endorsing organizations. Then he was directed to read the seventh recommendation:

> ***The expert witness should testify about professional standards of care only with knowledge of those standards which prevailed at the time in question, based upon reasonable inquiry.***

He was also asked to read the accompanying commentary, which defines "reasonable inquiry" to mean "...investigation, such as the review of reports, records, or opinions of other professionals performing the same or similar services at the time in question."

When asked what he had done to identify the standard of care, the professor said, in effect, that he had done nothing. So how did he know he was right about the standard of care? "Because I'm an expert," he said. Then the judge broke in. "Do you mean to tell me that you've done absolutely nothing to identify the standard of care in our state," he asked.

"I didn't have to, your honor. I'm an expert."

"Well, you're no expert in this court," the judge said, and that, as they say, was that.

Are you familiar with *Recommended Practices*...? You should be, and so should the attorneys you retain and who retain you. It's the only tool available to lessen your risk of being ambushed by a hired gun. Order a copy from ASFE (www.asfe.org). It only costs $5, and could easily be one of the most important documents you could own.