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MAKING DOLLARS AND SENSE OF CONSTRUCTION DAMAGES

DIRECT EXAMINATION OF DAMGES EXPERTS IN CONSTRUCTION CASES: TIPS AND BEST PRACTICES

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A. INTRODUCTION

This paper discusses general tips and best practices for the direct examination of a damages expert in a construction law matter. At the trial of a construction law matter, the direct examination is often the proverbial "meat and potatoes" of the case and, in this regard, it is important to develop and assert a strong and consistent theme with regard to your client's underlying position. This will serve to guide the trier of fact, whether you are before a jury, judge, arbitrator or disputes review board. It is important to note that the rules governing experts, particularly the examination of expert witnesses and the introduction of evidence, may be more relaxed in cases that do not proceed in court. Even with regard to those cases that proceed in court, however, there may be a greater potential for a relaxation of the rules in the context of a bench trial as opposed to a jury trial. In this regard, know your audience. It should be noted that whereas arbitration was once viewed only as an alternative to litigation, this forum has long since been used to resolve construction disputes.[1]

The success of a direct examination of any expert witness often begins with expert selection but ultimately falls on preparation. In this regard, it may be necessary to engage your expert early on and even at the inception of the case in order to make a proper assessment of all potential claims, particularly, any claim for damages. The selection of an expert in your matter, once you have determined that it is necessary to retain one, should never be an afterthought.

This paper explores, in a general fashion, the following topics pertaining to the direct examination of a damages expert in a construction law matter, without tailoring and/or limiting the discussion to any particular forum, understanding that there are many: (I) Expert Selection; (II) Preparing Your Expert; (III) Exhibit Selection; (IV) Establishing Expertise and a Lack of Bias; (V) Establishing a Foundation; (VI) Rebutting Opposing Experts; (VII) Opinions and

Reports; (VIII) The Hypothetical; and (IX) Calculating Construction Contract Damages: Total Cost Method and Independent Analysis. A brief conclusion will follow.

I. EXPERT SELECTION

At the outset, it is important to ascertain whether an expert is needed in your matter. In this regard, it may be necessary to pose the threshold question of whether the retention of an expert witness in your matter is necessary to establish causation and damages and/or to meet a particular burden of proof.

> *Specifically with regard to construction law matters, it is often necessary to proffer qualified expert testimony, irrespective of the forum (**TIP 1**).*[2]

See, for example, the case of Lichter v Mellon-Stuart, Co.[3] In this case, the court upheld the dismissal of a delay damage claim because the plaintiff presented no evidence that properly apportioned alleged cost overruns between actionable and non-actionable causes of delay.

In determining whether or not to retain an expert in your matter, the following questions should be asked:

(a) whether the trier of fact would be appreciably helped by the use of an expert in this case;

(b) whether the general experience of an ordinary person is sufficient; and

(c) whether, if general experience is not sufficient, what special experience is necessary.[4]

With regard to subsection (a), set forth above, consider the case of Jurgens Real Estate Co. v. R.E.D. Construction Corp.[5] In this case, the admission of expert testimony regarding delay-related issues required reversal of a judgment in the contractor's favor because the issues of cause, fault and effect of construction delays are not so highly scientific or technical or beyond the knowledge and understanding of an average jury such that the admission of such the

admission of such testimony was required. By way of comparison, review the case of Mega Construction Co. v. United States.[6] In this case, the court denied the contractor's recovery because of his failure to prove causation with respect to the owner's actions and resulting delay, having relied solely upon a bar chart schedule instead of the more sophisticated Critical-Path Method ("CPM").

The selection of your expert, if at all, should occur at the inception of the case and any selection must be carefully undertaken. The careful selection of your expert commences with your review and confirmation of the expert's qualifications.

> *Upon determining that it is in fact necessary to retain an expert in your matter, the selection of such expert should not be an afterthought **(TIP 2)**.*

Notwithstanding the fact that the "best practice" for expert retention is to have your expert join the case as early on in the process as practicable, the reality is that experts are often retained subsequent to the filing of a complaint or arbitration demand. This later retention of your expert is not necessarily something to be concerned with, because generally, at this juncture, your analysis will be further along and the pertinent issues narrowly tailored. This allows your expert to join your team with a clearer vision as to what is needed to effectively try your case.[7]

The issue of late retention of your expert may become an issue, however, for example, in a complex construction law matter where your expert is retained shortly before trial. In such instances, be certain to tailor your expert's opinion to his or her particular area of expertise, which opinion should be based upon specific verifiable facts that have been thoroughly reviewed and studied by the expert.[8]

II. PREPARING YOUR EXPERT

As can be gleaned from the overall theme of this paper, preparation is the key to a successful direct examination of a damages expert, particularly in a construction law matter. Your expert should be prepared in advance and early on in your case. In this regard, at the outset, review and confirm your expert's qualifications, including, but not limited to his or her education, training and work experience, certification and licenses. Additionally, review any relevant pleadings, testimony and publications, both in the present matter and in any prior proceedings.

> *Know and understand that experts write, testify and public. Accordingly, be sure to review all relevant documents, including advertising materials, deposition testimony and publications with your expert in order to adequately prepare him or her for cross-examination, and, specifically, the potential for impeachment and attacks on the expert's credibility (**TIP 3**).*

In addition to the above, be certain to review the expert's file, determine the subject of the expert's testimony, and, most importantly, establish and maintain a strong and consistent theme throughout your case, using the facts and the law. Specifically with regard to construction law matters, one may choose to adopt the following theme: <u>*power v. choices: which party had the greater ability to ultimately control and determine the outcome of the matter?*</u>

With regard to the subject of the expert's testimony, specifically as it pertains to construction matters, consider the following potential topics:

(a) determining fault for design and construction defects;

(b) faulty construction, fabrication or installation;

(c) problems during the submittal process;

(d) communication lapses;

(e) lack of coordination or supervision;

(f) changes during construction;

(g) calculation of damages-repair or replacement costs, delay, inefficiency and productivity claims; and

(h) consequential damages, including, without limitation, business interruption, profits, revenue stream and lost income.[9]

In order to adequately prepare your expert, be sure to practice testimony in advance of any trial, arbitration or other proceeding. In this regard, engage in a mock trial or arbitration proceeding. Learn to anticipate and expect the unexpected.

Additionally, understand the rules of court in whatever jurisdiction in which you practice. The two most notable Federal Rules of Evidence concerning the testimony of experts are Rules 702 and 703. Federal Rule of Evidence 702 states, in pertinent part, regarding testimony by experts:

> 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.[10]

At a Daubert hearing on expert testimony, the burden of demonstrating that the testimony is competent, relevant and reliable rests with the proponent of the testimony.[11] Federal Rules of Evidence 703 states, in pertinent part, regarding the bases of opinion testimony by experts:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[12]

*In certain cases, courts will allow an expert's opinion to be based on interviews of witnesses and the expert's review of project documents, under an exception to the hearsay rule (**TIP 4**).*[13]

In preparing for litigation of a construction case, your expert witness must be evaluated for his or her credibility, ability to relate the facts and ability to withstand cross-examination. Ultimately, the task of educating and preparing an expert falls on counsel.[14]

III. EXHIBIT SELECTION

Exhibit selection varies depending upon the nature and circumstances of each project. Use the exhibits to reconstruct the past.[15] In this regard, a damages expert in a construction law matter should consider the utilization of demonstrative evidence, which must be properly authenticated and admissible pursuant to the rules of evidence. Such demonstrative evidence should be used, if at all, in order to educate the trier of fact. The simplicity and clarity of such demonstratives is crucial, particularly due to the scientific and/or technical nature of most construction matters. In the realm of construction law litigation, demonstratives may be presented in several forms, including, but not limited to, charts, graphs, maps and photographs. Specific examples of demonstrative exhibits in construction law matters are as follows:

(a) original estimate, bid or budget;

(b) revised estimate, bid or budget;

(c) contract and amendments;

(d) change orders;

(e) unapproved change orders;

(f) applications for payment;

(g) invoices;

(h) job cost reports;

(i) labor reports;

(j) production reports;

(k) equipment reports;

(l) contractor financial statements and supporting schedules;

(m) contractor general ledger;

(n) project daily reports;

(o) project meeting minutes; and

(p) project schedules and updates.[16]

At the trial of a construction law matter, it is extremely important to understand and appreciate Federal Rules of Evidence 1006, which states, in pertinent part, as follows:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.[17]

The significance of this Rule often comes into play with the presentation of demonstrative evidence. Here, summaries, charts or outlines of voluminous documents may be presented to the court in lieu of the documents themselves. Some of the base documents will still be introduced, however, but Federal Rules of Evidence 1006 allows for this expeditious presentation of evidence so as to not cause any unnecessary delays or to detract the from the attention of the judge or jury. For example, an expert's "as-built" or "as-planned" schedule, which schedule is prepared in the context of assessing delay issues, may be admissible to introduce volumes of documents without ever having to introduce the entire universe of documents that sets forth what work was done and when.[18]

IV. ESTABLISHING EXPERTISE AND A LACK OF BIAS

On direct, it is very important to establish expertise as well as your expert's lack of bias. With regard to expertise, the level of expertise of your expert should be carefully examined and established early on. In this regard, consider stipulation and be certain to review and confirm your expert's qualifications. Consideration should be given to the following areas (the following list is merely illustrative and by no means exhaustive):

(a) educational qualifications;

(b) professional experience;

(c) publications;

(d) honors or recognition received in his/her particular field;

(e) teaching experience;

(f) membership in professional organizations; and titles held and/or licenses or certifications obtained.[19]

*Consider exploring this area at a deposition, before the case proceeds to arbitration or trial or other final proceeding (**TIP 5**).*

With regard to bias, it is important to establish a lack of bias because bias goes to the truth and accuracy of a witness' testimony and is generally always considered to be relevant, such that inquiry into this area is generally appropriate. With regard to bias, establish the reasonableness of the expert's fees, which should be commensurate to his or her skills and/or services. Additionally, determine whether there is or may be a conflict of interest.

*An adversary may wish to examine an expert witness' compensation for the purpose of impeaching the expert on the basis of bias **(TIP 6).**[20]*

*Although the issue of bias may be explored on cross-examination where a witness' credibility is put in issue, such examination should be limited (**TIP** 7).[21]*

Due to the potential impact bias may have on a matter, consider exploring this area at the expert's deposition, before the case proceeds to arbitration, trial or other proceeding.

V. ESTABLISHING A FOUNDATION

Notwithstanding an expert's impressive and sound qualifications, an expert opinion will not be sustainable without establishing the proper scientific foundation. As set forth in Daubert v. Merrell Dow Pharms., Inc.[22], "something doesn't become 'scientific knowledge' just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive…"[23] In performing its essential gate-keeping role, the court must carefully and critically "examine the manner in which experts reason from [their information] to a conclusion," as well as "each step in [the experts'] reasoning."[24] A proper foundation must also be established for the introduction of any evidence, including demonstrative evidence.

The proper presentation of evidence on direct examination, in the context of a construction trial, can be broken down into four basic steps:

(1) qualify the expert;

(2) demonstrate the thoroughness of your expert so that it is clear to the judge or jury that your expert has carefully analyzed the pertinent issues in the case;

(3) ask the expert for his or her opinion; and

(4) have your expert explain the basis of his or her opinion.[25]

In a construction law matter, your expert, at the outset, should perform a detailed analysis of all potential issues. Specifically with regard to the subject of delay, your expert may elect to analyze and compare "as-planned" versus "as-builit" schedules. This detailed schedule analysis will help to establish causation of delays on a particular project and the responsibility for such

delays. This analysis of delay issues may, thereafter, be used by your expert as a framework for calculating delay damages and the basis for your expert's opinion is generally comprised of his or her analysis of all pertinent issues, assessment of delay-related items and calculation of damages.[26]

VI. REBUTTING OPPOSING EXPERTS

In rebutting your adversary's expert, determine the following:

(a) whether its expert is qualified;

(b) whether its expert is credible;

(c) what the reputation of their expert is within the construction law community;

(d) whether the report can be stricken as a "net opinion" and

(e) the basis for the expert's opinion or report, if any.

*Do your "homework" early on in the case; do not wait until the time of trial or other proceeding to make these assessments (**TIP 8**).*

*Beware of opening the door for potential attack on cross-examination. Only elicit that which is necessary to prove your point and which can be substantiated (**TIP 9**).*

VII. OPINIONS AND REPORTS

Beware of the "net opinion." The basic rule governing the acceptance of expert testimony is that "an expert's bare conclusions, unsupported by factual evidence, are inadmissible.[27] The "net opinion" rule requires an expert to give the "why and wherefore" of his or her opinion, and not just a mere conclusion.[28]

Where an expert offers an opinion without providing the specific underlying reasons for his conclusion, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror."[29]

With regard to opinions generally and in accordance with Federal Rule of Evidence 702, ask your expert for his or her opinion and the basis for that opinion. Expert witnesses are permitted to testify "in the form of opinion or otherwise.[30]" According to the Joint Subcommitte on Evidence of the Supreme Court Civil and Criminal Practice Committees, an expert opinion may be based on facts or data derived from the following:

(a) the expert's personal observations;

(b) evidence admitted at trial; or

(c) data relied upon by the expert that is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject.[31]

With regard to expert reports, determine at the outset whether one will be necessary in your case. A compilation of data and analysis, in the form of a report, may be absolutely necessary to understand the expert's opinion.

*Make this assessment early on (**TIP 10**).*

A report in a construction matter can be a helpful tool to evaluate a damages claim and assist in an effective presentation at trial. It can also potentially destroy the credibility of your expert and the claims asserted in your case. Thus, proceed with caution and prepare properly.

> *Make certain that the expert's testimony is completely consistent with his or her report. Even the slightest inconsistency will be detected by a competent adversary and used against the expert on cross-examination (**TIP 11**)*[32].

The presentation of a damages claim, in the context of a construction law matter should be consistent with the contract and comply with the law of your jurisdiction. In formulating an understanding of what costs were incurred in any particular matter, the following basic procedures should be followed:

(a) compare estimated costs and actual costs to ascertain any variations in the estimate;

(b) evaluate any adjustments made to the bid estimate to ascertain if reflected in actual costs;

(c) evaluate the accuracy and completeness of procedures used to track incurred costs and work progress;

(d) evaluate the consistency of the treatment of similar costs from project to project;

(e) evaluate equipment rental charges for reasonableness;

(f) review overhead cost accounts for any costs that may be unallowable pursuant to the contract or law;

(g) review change order pricing, back charges and insurance claims to ensure there is no duplication of recovery; and

(h) review contracts to determine whether there is any language that precludes the recovery of certain costs.[33]

VIII. THE HYPOTHETICAL

The rule of evidence concerning hypotheticals permits experts to base an opinion on any "facts or data" that are "perceived by or made known to the expert at or before the hearing." This includes, but is not limited to, facts and data made known at the hearing, in other words the "hypothetical question."

IX. CALCULATING CONSTRUCTION CONTRACT DAMAGES: TOTAL COST METHOD AND INDEPENDENT ANALYSIS

In examining your expert, first elicit a line of questioning concerning liability. Once you establish liability, you may then proceed to establish damages. In the context of a construction law matter, there are basic frameworks to utilize when calculating and presenting damages,

namely, the total cost method ("TCM"), specific identification of claims, modified total cost method and *quantum meruit*.[34] The TCM will be the focus of this section. With regard to the TCM, this damage theory is generally used to quantify labor hour overruns.

*Assess cause and effect and, thereafter, damages (**TIP 12**).*

The TCM method of evaluating damages in construction matters has evolved over time. Where the TCM is used, there is no dispute that damages exist; rather, the question becomes what is the amount of the damages and how can that amount be reasonably ascertained? The TCM is used hesitantly, but in recent years, more frequently by courts and in instances when it is difficult for the non-breaching party to ascertain damages to a reasonable certainty, particularly in construction matters, where the end product is generally a custom-made product. The measure of damages under the TCM becomes *the total cost of performance less the contract price*, which is essentially the non-breaching party's "cost overrun," or, cost to perform extra work not contemplated under the contract.

There is a four-prong test for calculating damages under the TCM. Under this four-prong test, the non-breaching party/contractor must show: (a) the impracticability of proving the cost of "extra work" by other means; (b) the reasonableness of the contract price; (c) the reasonableness of the actual costs; and (c) the lack of responsibility for the increased cost of performance.[35]

An independent analysis should be performed by your expert to assess labor hour overruns. In this regard, encourage your expert to conduct worker interviews and an on-site analysis and prepare a detailed weekly analysis of labor productivity losses.

X. CONCLUSION: PREPARATION IS THE KEY TO A SUCCESSFUL DIRECT EXAMINATION OF A DAMAGES EXPERT IN A CONSTRUCTION LAW MATTER

As can be gleaned from this discussion, the key to a successful direct examination is preparation, commencing as early as possible in the case, even in the pretrial stages. The more you know and the sooner you know it, the better – let that be your "best practice."

With regard to preparation, Louis Nizer said it best: "[t]he stupid man it will make bright, the bright, brilliant and the brilliant, steady."[36]

In the realm of construction law litigation, determine at the outset whether an expert is required in your case. Make this assessment by carefully examining the specific facts and circumstances of your matter, on a case-by-case basis, including, whether your matter is so complex, scientific or technical such that the retention of an expert is necessary to assist the trier of fact in understanding the evidence presented.

Construction law matters are unique and no two cases are identical. Upon determining that the retention of an expert witness is necessary, the selection of your expert should be based upon whether the expert possesses the necessary skills and expertise relative to the particular subject matter at issue in your case.[37]

ENDNOTES

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[1] Robert Cushman, John Carter, Paul Gorman, Douglas Coppi, Robert Peckar and Joseph Castellano, *Construction Disputes Representing the Contractor*, Chapter 14: Effective Preparation for a Construction Arbitration, CDRTC s 14.02.

[2] PLI, Construction Litigation, 2nd Edition, Chapter 11, Delays and Disruptions at 688-9, Footnote 92, citing Lichter v. Mellon-Stuart, Co., 305 F.2d 216, 219 (3d Cir. 1962).

[3] Lichter v. Mellon-Stuart, Co., 305 F.2d. 216, 219 (3d Cir. 1962).

[4] Harry A. Gair, *Selecting and Preparing Expert Witnesses*, 2 Am. Jur. Trials 585, Section 6 (Originally published in 1964; Database updated August 2012).

[5] Jurgens Real Estate Co. v. R.E.D. Constr. Corp., 659 N.E.2d 353 (Ohio Ct. App. 1995); *See also*, Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.06.

[6] Mega Construction Co. v. United States, 29 Fed. Cl. 396 (1993); *See also*, Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.06.

[7] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 4: Use of Experts, CDPGF s 4.03.

[8] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 4: Use of Experts, CDPGF s 4.03.

[9] Christopher J. Heffernan, Jocelyn L. Knoll, Tracey L. Steedman, Rebecca Weisenberger, *Defending and Asserting Daubert Challenges in Construction Disputes,* 32-SPG Construction Law. 6.

[10] F.R.E. 702.

[11] Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315-16 (9th Cir. 1995).

[12] F.R.E. 703.

[13] Philip Croessmann, *Expert Witnesses: Construction Cases,* Section 9:10.

[14] Robert Cushman, John Carter, Paul Gorman, Douglas Coppi, Robert Peckar and Joseph Castellano, *Construction Disputes Representing the Contractor*, Chapter 15: Preparing the Complex Construction Case for Litigation, CDRTC s 15.04.

[15] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 18: Presenting the Case, CDPGF s 18.01.

[16] Phillip Croessmann, *Expert Witnesses*: *Construction* Cases, Section 9:11.

[17] F.R.E. 1006.

[18] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.07.

[19] Harry A. Gair, Selecting and Preparing Expert Witnesses, 2 Am. Jur. Trials 585, Section 6 (Originally published in 1964; database updated August 2012).

[20] Cary Oil Co., Inc. v. MG Refining & Marketing, Inc., 257 F. Supp. 2d 751 (S.D. N.Y. 2003).

[21] State v. Engel, 249 N.J. Super. 336, 375 (App. Div. 1991).

[22] Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 111, 1315-16 (9th Cir. 1995)

[23] Daubert, 43 F.3d 111, 1315-16 (9th Cir. 1995)

[24] Landrigan v. Celotex Corp., 127 N.J. 404, 420-1 (1992).

[25] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 17: Court Trials, CDPGF s 17.06.

[26] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 4: Use of Experts, CDPGF s 4.03.

[27] Myrlak v. Port Authority of New York and New Jersey, 302 N.J. Super. 1, 8 (App. Div. 1997), aff'd in part, rev'd in part, 157 N.J. 84 (1999) (citing Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)).

[28] Jiminez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), certif.. denied, 145 N.J. 374 (1996).

[29] Jiminez, 286 N.J. Super. at 540.

[30] F.R.E. 702.

[31] N.J.R.E. 703, Comment 1.

[32] Daniel Riesel, PRE-TRIAL DISCOVERY OF EXPERTS, SCIENTIFIC PROOF, AND EXAMINATION OF EXPERTS IN ENVIRONMENTAL LITIGATION, C127 ALI-ABA 209.

[33] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 9: Elements of Damages, CDPGF s 9.02.

[34] Thomas Kelleher, Jr., Brian G. Corgan and William E. Dorris, *Construction Disputes Prac. Guide With Forms*, Chapter 9: Elements of Damages, CDPGF s 9.03.

[35] Karl Silverberg, P.E., *CONSTRUCTION CONTRACT DAMAGES: A CRITICAL ANALYSIS OF THE "TOTAL COST" METHOD OF VALUING DAMAGES FOR "EXTRA WORK*," 17 St. John's J. Legal Comment. 623, 624 (2003).

[36] Janeen Kerper, *THE ART AND ETHICS OF DIRECT EXAMINATION*, 22 Am. J. Trial Advoc. 377 (1998) (citing, Louis Nizer, My Life In Court 8 (1961)).

[37] Christopher J. Heffernan, Jocelyn L. Knoll, Tracey L. Steedman, Rebecca Weisenberger, *Defending and Asserting Daubert Challenges in Construction Disputes,* 32-SPG Construction Law.6 at 15.