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## HOW TO BE AN EFFECTIVE EXPERT WITNESS

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TUESDAY, MAY 15, 2018 - 12:00-1:00 PM

JOIN LLW ATTORNEYS KEVIN HENNESSY, FRED ASCHAUER AND JOHN WALLACE  
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# HOW TO BE AN EFFECTIVE EXPERT WITNESS



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# Administrative Proceedings

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- Forget what you've seen on TV.
- Agency "Action" at issue.
  - Environmental permit
  - Licensing decision
  - Rulemaking
- The rules of evidence are relaxed.
- Before an Administrative Law Judge.
- Formal process follows a petition.



# View from the Agency

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- Agency is entitled to deference and usually gets it!
- Expert opinions ultimately must tie to agency rules.
- Agency staff identify experts they trust and respect.



# Overview

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- Administrative Proceedings
- Pre-petition
  - Attorney-client privilege
  - Work product
    - Incl. Ch. 119
  - Best practices
- Post-petition
  - Opinions
  - Interaction with the Agency
  - Depositions
  - Final hearing
  - Post-hearing

# Administrative Process Overview

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- It is an expert driven process – technical rule criteria; professional licensing; and submissions often require engineer certifications.
- Experts handle applications – can insure complete applications, identify likely controversy or challenges.
- Avoid hearings by always publishing notices.
- Can recommend legal review.



# What can be kept confidential?

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- Attorney-client privilege
- Protects communications between a lawyer and a client not intended for disclosure except for: Those to whom disclosure is in furtherance of the rendition of legal services to the client; and
- Those reasonably necessary for the transmission of the communication.



# Work Product Privilege

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- The work product privilege protects certain materials, such as notes, memoranda, diagrams.
- In order for the work product privilege to apply, the materials must have been:
  1. Prepared by or for a lawyer or by or for a consultant; and
  2. Prepared in anticipation of litigation or trial.



# Non-Testifying Experts

- The non-testifying expert privilege applies to experts hired in anticipation of or in preparation for trial, who are not expected to testify.
- Shields such experts from discovery of facts or opinions held by such experts.
- This privilege does not shield discovery of facts held by non-testifying expert if facts were learned outside scope of employment as non-testifying expert.



# Exemptions From Public Records Law (Chapter 119, Florida Statutes)

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- Special caution must be utilized when the client is a public agency.
- Records are exempt from disclosure until conclusion of litigation if such records:
  1. Are prepared by an agency attorney or at their direction;
  2. Reflect mental impression, conclusion, strategy, legal theory of attorney or agency; and
  3. Prepared **exclusively** for litigation or adversarial administrative proceedings, or for imminent litigation or adversarial proceedings.



## The “Multiple Hat” Problem

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- Consultants and experts often function in multiple roles.
- Therefore understand your role.



# Best Practices!

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# Identify Controversial Projects

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- Discuss with your client whether the project is likely to be controversial.
- Have similar projects been challenged in the area?
- Is there a serial petitioner in the area?
- Has there been heated public discourse over the project?
- Is your developer unpopular in the community?
- Problems with Agency Staff.



# Understand your role

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- If there is an attorney involved, discuss your role with the attorney and understand what is expected.
- If you are (or are going to be) the engineer/consultant of record on an application, be cautious of what you put in paper.





If an attorney has been retained, keep the attorney in the loop with client communications. Carbon Copying (cc'ing) an attorney will not always protect a communication from disclosure to opposition, but it may help.

# Written Communication and Privilege

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- Do **NOT** include non-essential personnel on emails that are to remain confidential.
- Privilege can be waived by disclosure to third parties.
- Think before you email!
- Avoid unnecessary emails.
- Avoid drafts.
- Do not create documents unless asked to do so.



# The Petition

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- Must be timely and contain required content.
- Must allege violations of agency rules.
- Must adequately allege a petitioner's standing to bring the challenge.

# Standing Requirements

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- Real and immediate injury within the Agency's responsibility;
- Environmental impacts, for example:
  - Pollution;
  - Wetland impacts; and
  - Impacts to endangered species.
- Standing does not include:
  - Views;
  - Lost profits; or
  - Impact on property values.





# Opinions

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- *Preparation of your Opinions:*

- Double check application work.
- Review similar work and prior opinions.
- Only create written material when requested.
- Always communicate opinions prior to depositions or document production.

# Opinions

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- ***Basis of Opinion:***
  - Your work, work of others under your direction.
  - Work that you understand and could do yourself.
  - Work that you would normally rely on.
  - Work that is considered authoritative.



## Supportive Materials

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You can identify factual data from other experts to support your opinion.

Cannot simply be a conduit for another's opinion or bolster your opinions with another expert's opinion.

*"Of course I talk to myself.  
Sometimes, I need expert advice!"*  
*-Edward Henheffer*

# Examples of Expert Testimony

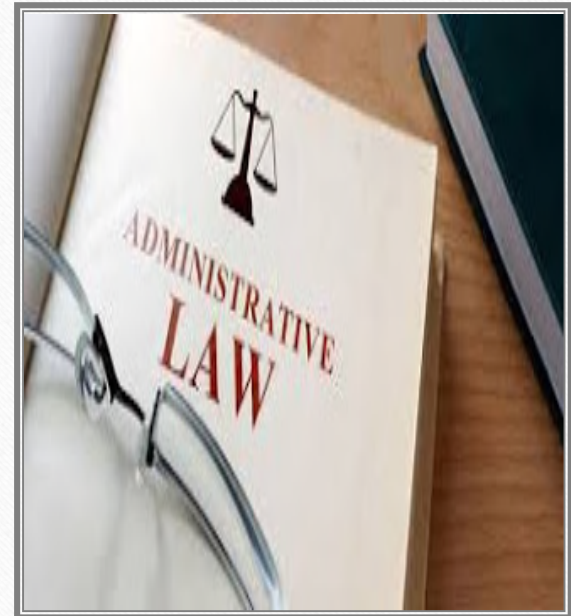
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- An expert can testify to:
  - design or construction plans prepared by others pursuant to direction.
  - architectural plans normally used for development of engineering plans.
- An expert **cannot** testify to:
  - modeling results you could not recreate.
  - a letter prepared by another expert stating agreement with your opinion.



## Interaction with an Agency During the Administrative Process

- Agency may not be on your side or employee may not be on board.
- Statements made can be introduced against you or the client.
- Communications through or by attorney not evidence.
- Copy attorney on all documents submitted to agency.



# Depositions

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- Depositions only benefit the opposing party.
- Always be honest, accurate, consistent and concise.
- Do not try to persuade, convince, educate, explain or try to befriend the opposing party.
- Only answer the questions you are asked.
- Don't bring documents not subpoenaed.



## Represent yourself like the expert you are!

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- Dress for success = reliable.
- Don't deny your expertise.
- Be organized, not messy.
- Have final opinions



## Final Hearing: Preparation and Attendance

- Familiarize yourself with the exhibits.
- Attend all practice runs with the attorney.
- Assist the attorney with the examination of opposing parties and witnesses.
- Take notes during the trial.
- Don't have any notes in front of you when you testify you don't want to share!
- Don't do math or experiments as part of your testimony.





# A Judge Put this in his Decision!

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- Petitioner's expert's opinion is mere conjecture without any studies supporting it.
  - Petitioner's expert's opinion objecting to the project "differed from his prior scholarly study of same pass"... and "his study supported the efficacy of the proposed project."
  - Expert's "lack of experience"... "reduced the weight of his testimony."
  - Expert's opinion was found to not be "generally accepted" among other experts.
  - Expert's hypothesis is "not supported by engineering studies of equivalent weight."
  - The Expert "conducted no studies or calculations to support this assertion."
  - "It was an educated guess and insufficient to rebut Applicant's case."
  - "The opinions of the Town's expert were based in large part on assumptions that were shown to be mistaken"

# An Expert Said This!

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- “The report came in late and I could only skim through it...” ( But relied on it for his testimony!)
- My objections to the report are from an “academic perspective.”
- “That’s true, I am going out on a limb.”
- “I did not prepare a report because my client might not have liked the results.”
- Q: And in fact you are charging a premium rate for you testimony here today?  
A: “In my opinion I can’t charge enough for the stress today.”
- Q: And your lawyer told you what your testimony would be?  
A: “Yes.”



# Post Final Hearing

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- Review the hearing transcripts.
- Proposed Recommended Order.
- Exceptions to the Recommended Order.
- Response to Exceptions.
- Final Order.
- Appeal.

*Thank you for attending!*

Questions?

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# Don't forget your trial prep survival kit!

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