

# **The Consultant in Litigation**

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I. WHAT MAKES A GOOD EXPERT WITNESS?

A. Litigation Is An Entirely Different Arena.

1. Litigation is an adversarial process.
  - a. Winning for your client, not simply advising him, is the goal.
  - b. The opposing lawyer will seek to discredit you and your expert opinion.
2. The environmental expert is a member of a diverse team of professionals.
  - a. The team includes the client, lawyers, paralegals, fact witnesses and one or more experts.
  - b. The environmental expert will likely be the only knowledgeable member of the team in his area of expertise.
  - c. The environmental expert may be the least knowledgeable member of the team about the litigation arena in which he is performing.
3. The expert may be uncomfortably constrained by limitations on the materials he is able to review, by preparation time and budgetary restraints, and even by the opinions he is requested to render.

B. Desirable Qualities Of An Expert Witness.

1. True expertise is an essential.
  - a. Your resume: friend or enemy?
  - b. How to prepare for the initial meeting with the lawyer and his client.
2. Will the expert be an effective member of the litigation team?
  - a. Will the expert be able to communicate openly and honestly with the team?
  - b. Will the expert be able to maintain undivided loyalty?
    - (1) Avoidance of conflicts, both ethical and practical.

- (2) Limitations imposed by prior service as an expert.
- (3) Disclosure of "skeletons."
- c. Will the expert be a "value added" team member? Strategic planner or mere guru?
- d. Will the expert be well prepared and thorough in his investigation and analysis?
- 3. Will the expert be a good witness?
  - a. Does he/she look and talk like an expert?
  - b. Will he/she reach a sound conclusion and stand by it?
  - c. Can he/she handle the slings and arrows of pointed questioning?
- 4. Establishing fees with litigation lawyers.
  - a. Contingency fees should be avoided.
  - b. Maintaining careful records of your time and expenses.
  - c. Remember that the jury (or fact finder) will undoubtedly learn the details of your fee arrangement.

## II. THE ENVIRONMENTAL CONSULTANT BEFORE LITIGATION STARTS.

- A. Initial Communications Between Lawyer And Expert.
  - 1. The lawyer needs to know how you feel about his case.
  - 2. Once "retained," you are a part of the litigation team until it concludes, and maybe even after.
- B. Gathering Facts Before The Lawsuit Starts.
  - 1. Your best opportunity to collect data and consult with others occurs before litigation.
  - 2. Maintain in an organized fashion the tangible materials you are given and the data you collect.
- C. Your Behavior As An Expert.
  - 1. Don't talk to the other side without first conferring with your lawyer.

2. Don't give out information about your investigation to anyone else.
3. Don't make a written report unless requested to do so.

### III. THE ENVIRONMENTAL CONSULTANT IN LITIGATION.

#### A. The Importance Of The Environmental Consultant In Litigation.

1. Educating the lawyers.
2. Assisting the lawyers in developing theories for the successful prosecution or defense of the lawsuit.
3. Assisting the lawyer in shaping pretrial discovery, including discovery from opposing experts.
4. Assisting the lawyer in developing settlement strategies, or even assisting in settlement discussions.
5. Testifying at trial.

#### B. The Environmental Consultant As A Consulting Expert.

1. Under Rule 26(b)(4)(B) of the Arizona Rules of Civil Procedure, the opposing party "may discover facts known or opinions held" by a consulting expert only "upon a showing of exceptional circumstances."
2. As a result, the consulting expert's written records and communications with the lawyer and others are generally protected from disclosure to the other side.
3. What happens if the consulting expert becomes a trial witness?
  - a. Discuss this possibility in advance with the lawyer.
  - b. Keep records and maintain confidentiality in your communications with the lawyer and others on the assumption that you may later be a trial witness.

#### C. The Environmental Consultant As A Trial Expert.

1. When will the environmental consultant be allowed by the court to testify as an expert at trial?
  - a. Rule 702 of the Arizona Rules of Evidence provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

b. The court, therefore, must make two determinations before an expert will be allowed to testify at trial:

(1) Is the issue upon which the expert proposes to testify an appropriate issue for expert testimony, i.e. will the expert assist the trier of fact in understanding the evidence or in determining a fact in issue, and

(2) Is the expert properly qualified to testify?

c. The scientific foundation of expert testimony is more closely scrutinized in courts today.

2. The importance of confidentiality.

a. Rule 26(b)(4) provides for discovery, through written interrogatories and depositions, of the "substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

b. The expert's conversations with the lawyer may not even be shielded by the "work product doctrine" (as embodied in Rule 26(b)(3) of the Arizona Rules of Civil Procedure), and certainly the expert's conversations with others are subject to discovery.

3. Developing the expert opinion.

a. Through careful discussions with the lawyers, develop a clear understanding of the precise issues about which you will be asked to give your opinion.

b. Investigate thoroughly all of the facts and data necessary to form a conclusion.

c. Thoroughly explain your opinions to the lawyers, the grounds upon which they are based, and any weaknesses in them.

d. Do not write a report or generate other written data unless requested to do so, and consider maintaining only the most current draft report.

4. Preparing for your deposition.
  - a. The importance of the trial expert's deposition.
  - b. The importance of preparation.
    - (1) The lawyer's role in preparing you.
    - (2) Your own preparation.
  - c. How should you dress and what should you bring to your deposition?
  - d. How to be a skillful deponent.
    - (1) Arrangements for the deposition.
    - (2) Your lawyers's role.
    - (3) The Ten Commandments for giving successful deposition testimony.
5. Preparing to testify at trial.
  - a. Trial testimony differs from deposition testimony.
  - b. Your role in the trial.
  - c. Preparing to testify at trial.
  - d. How to overcome stage fright.
  - e. The Ten Commandments for successful trial testimony.
6. The environmental consultant's role in administrative proceedings.
  - a. Dealing with agency staff in an adversary proceeding.
  - b. Maintaining your rapport/respect with agency personnel.
  - c. The administrative hearing officer as judge.
  - d. The effect of relaxed evidentiary rules in the administrative hearing.

The Task Force presented a report to Governor Mofford in October, 1990 summarizing the actions taken by the Task Force in response to EO 89-16. The report proposed the following definition of "riparian area":

A riparian area is defined as an aquatic or terrestrial ecosystem that is associated with bodies of water, such as streams, lakes or wetlands, or is dependent upon the existence of perennial, intermittent, or ephemeral surface or subsurface water.

In addition, the Task Force reported that no agency had specific statutory authority to protect riparian ecosystems, and initiated the process of creating an inventory of riparian areas and identifying key areas of concern.

In addition to simply summarizing actions taken in response to EO 89-16, the Task Force's report also contained a number of recommendations for future actions. These included: (i) the issuance of a second executive order setting forth a state policy for the protection of riparian areas and ordering specific actions to be taken by state agencies, (ii) a directive to all state agencies to utilize the Task Force's new "Handbook On Riparian Measurements," (iii) encouraging other entities to consider the Task Force recommendations, and requesting a cooperative mapping effort with the FWS, and (iv) designating qualified rivers in Arizona as National Wild and Scenic Rivers.

C. Executive Order 91-6.

Governor Mofford accepted the Task Force recommendations almost verbatim in Executive Order 91-6 (EO 91-6). EO 91-6 adopted the Task Force's definition of riparian area and specifically established a state policy for protecting and restoring riparian areas and encouraging appropriate management practices. The new policy requires that "any loss or

degradation of riparian areas be balanced by restoration or enhancement of other riparian areas of equal values and functions."

EO 91-6 orders all state agencies to "rigorously enforce their existing authorities to assure riparian protection, maintenance and restoration." EO 91-6 also encourages state agencies to explore public-private partnerships to acquire, protect and enhance riparian areas, and to provide technical assistance to landowners. Under EO 91-6, state agencies are required to advocate and participate in a riparian education and outreach program and to assist in the identification and evaluation of rivers to be designated as National Wild and Scenic Rivers.

EO 91-6 replaces the Riparian Habitat Task Force with a new entity called the interagency "Riparian Areas Coordinating Council." Like the Task Force, the Council consists of various state agencies whose activities could effect riparian areas. The chair of the Council rotates among the various state agencies on an annual basis, beginning with a representative of the Commission on the Arizona Environment. The Council is required to develop time frames to implement the various other directives contained in EO 91-6 and is further required to submit annual reports on actions taken pursuant to the Order. The Council is responsible for recommending a statewide riparian management plan, and other future actions and legislation as needed.

EO 91-6 also assigns specific tasks to different state agencies. For example, the Commission on the Arizona Environment is designated as the lead agency for coordinating development of legislation to create an "Arizona Watershed and Riparian Enhancement Board." This Board is to "be non-regulatory and would oversee a cost sharing or grants program to

Arizonans for funding demonstration projects to accomplish on-the-ground improvement, restoration and enhancements projects."

ADEQ is responsible for coordinating with other state agencies to develop legislation mandating state riparian area protection. In addition, ADEQ is required to consider the protection of riparian areas in deciding whether to grant water quality certifications under Section 401 of the CWA.

Other state agencies were also given specific "marching orders." The Game and Fish Commission is required to coordinate the drafting of a statewide riparian management plan, to conduct a statewide inventory and classification of riparian areas, and to develop methodologies for determining equal function and values of various riparian areas. The State Parks Department is directed to continue its multi-objective river corridor planning efforts and, in cooperation with the Game and Fish Commission, to acquire and manage key riparian areas. Finally, the Department of Water Resources is required to develop rules to allow for the filing and processing of in-stream flow water rights applications, to coordinate with other agencies in developing legislation to protect in-stream flows, and to develop or modify rules to facilitate the protection of riparian water usage. DWR also serves as coordinator in developing a model local government ordinance for riparian protection and maintenance.

D. Recent Legislation.

S.B. 1030, passed by the legislature in the most recent regular session, articulated the following new definition of "riparian area":

a geographically delineated area with distinct resource values, that is characterized by deep-rooted plant species that depend on having roots in the water table or its capillary zone and that occurs within

or adjacent to a natural perennial or intermittent stream channel or within or adjacent to a lake, pond or marsh bed maintained primarily by natural water sources.

This definition significantly narrows the "riparian area" definition of EO 89-16 by excluding "ephemeral" surface or subsurface water from consideration, and for that reason is of concern to environmentalists and the scientific community.

S.B. 1030 also requires several agencies to conduct studies on activities that impact riparian areas. The Water Resources Department director must study the effect of groundwater pumping and surface water use on riparian areas. The Game & Fish Department must, as it is already required to do under EO 91-6, develop a system for classifying riparian areas that includes relative functions and values. ADEQ must identify land uses that alter riparian areas, including development, recreation, mining and timbering. This duty creates an interesting definitional conflict for ADEQ. ADEQ must use the narrow "riparian area" definition of S.B. 1030 to analyze land uses that alter riparian areas, but must consider the impact on the "waters of the United States" when evaluating a request for Section 401 certification. Finally, S.B. 1030 establishes a committee to draft a riparian area protection program.

#### V. CONCLUSION.

As concern for protecting this country's natural beauty and resources continues to grow, wetlands policy remains an important and sometimes controversial agenda item for environmental groups. Much of the new initiatives in this area will occur at the state and even local levels. Because wetlands regulation can delay and even completely derail development projects, it is essential that real estate counsel be sensitive to possible impacts of development on wetlands and seek the advice of experts when appropriate.