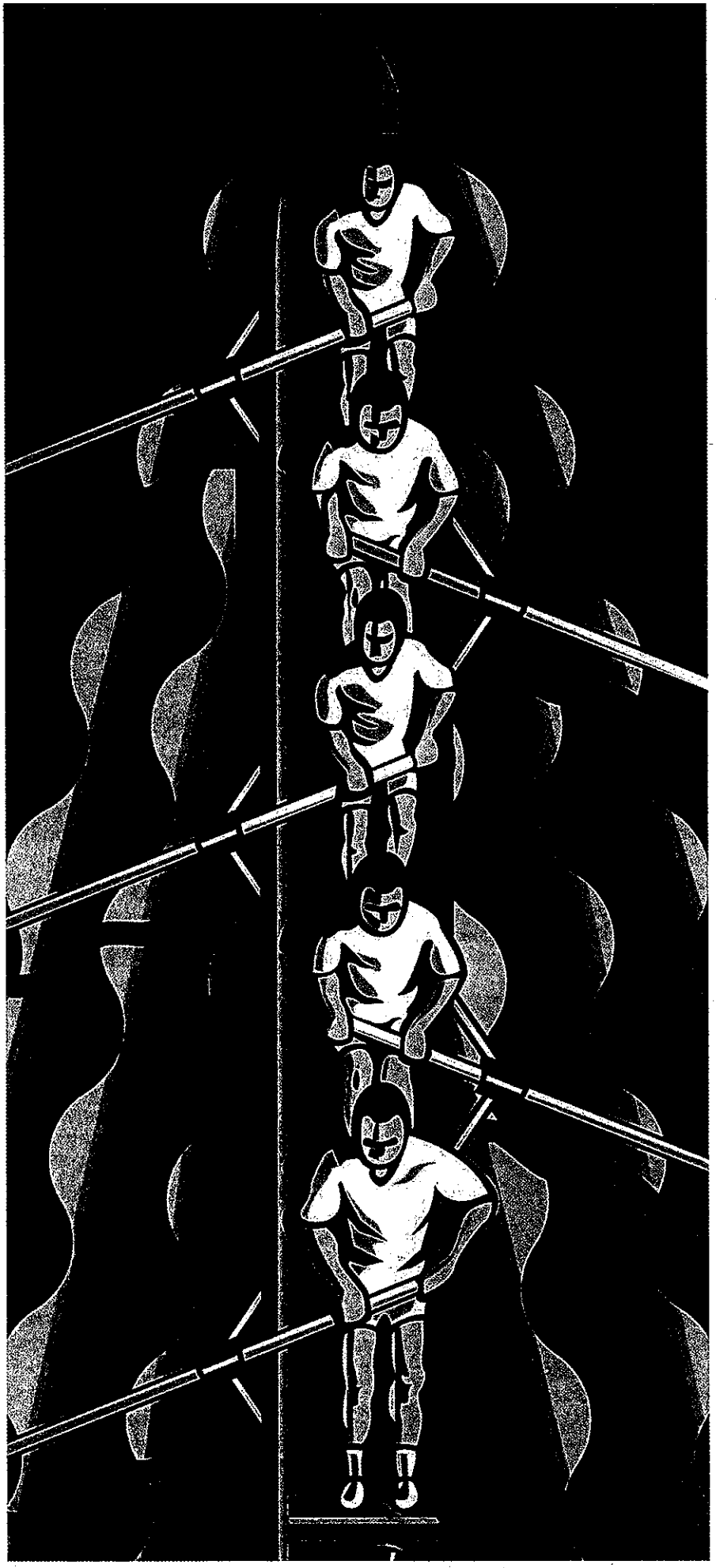


The **Care and**

TODAY, environmental engineers increasingly find themselves working with attorneys. Preparing a permit application, testifying as an expert witness in environmental litigation, meeting with a regulatory agency on a compliance or enforcement matter, or preparing due diligence for a property acquisition, the environmental engineer can experience significant interaction with one or more attorneys. Volumes have been written for engineers on the technical aspects of their profession, but little has been written about the engineer-attorney relationship.

This article provides eight tips to help engineers better understand some common issues that arise in the engineer-attorney working relationship. It draws upon the experience of two attorneys practicing in the specialty of environmental law who also have technical backgrounds. While some engineers may be quick to disparage attorneys, it is in their self-interest and in the interest of their mutual client to cooperate effectively with the client's legal counsel.

Feeding of Attorneys:

An Environmental Engineer's Guide to Working with Lawyers

by Steve Morton and Carrick Brooke-Davidson, Esquires

Do As I Say; Not As I Do.

If not for deadlines, the trial of Cain for the murder of Abel would still be pending. Some lawyers are notorious procrastinators and may not always explain the significance of deadlines, particularly in litigation, to the environmental engineer who is working with them. The engineer must take the initiative to determine when the work product to be provided must be produced to avoid being surprised by the attorney's call advising it has to be filed tomorrow.

Make Sure That 2 + 2 = 4.

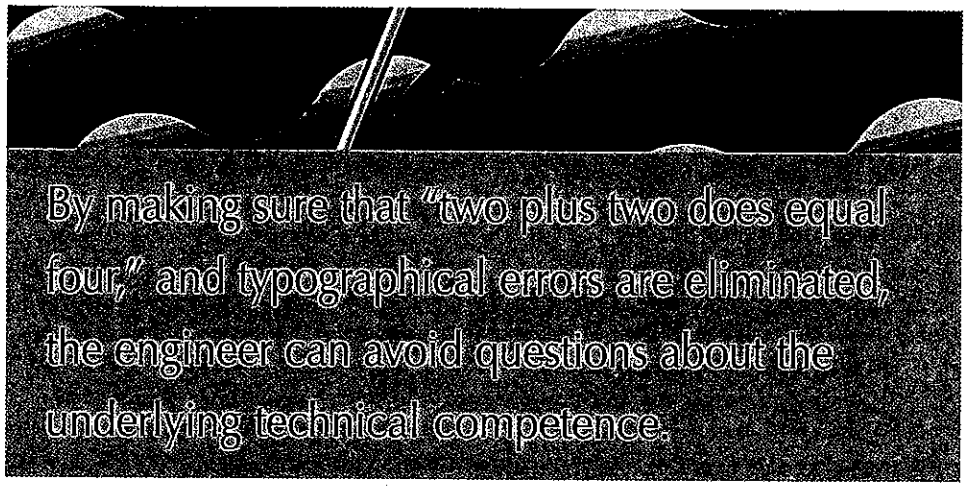
Many attorneys practicing in the environmental area have scientific or technical backgrounds. Even those who do not will often review the technical aspects of the expert engineer's work on a project for which they are legal counsel. If an attorney finds errors in the engineer's work, the engineer's technical competence becomes questionable. Nothing is more embarrassing to a testifying engineer than to have an opposing attorney pull out a calculator and demonstrate that the engineer has made a simple mathematical error. The attorney can then proceed to attack by inference, not only other calculations, but the expert's conclusions as well. Therefore, it is prudent for the engineer to review the work product in detail. By making sure that "two plus two does equal four," and typographical errors are eliminated, the engineer can avoid questions about the underlying technical competence.

Also, the engineer must know how to use a Hewlett-Packard calculator with Reverse Polish Notation. More than one opposing attorney has handed such a calculator to an engineering witness on the stand and asked him or her to perform a simple calculation. The judge and jury seldom have sympathy for those engineers that don't know how to work a calculator!

"Adversarial" Is Not A Dirty Word.

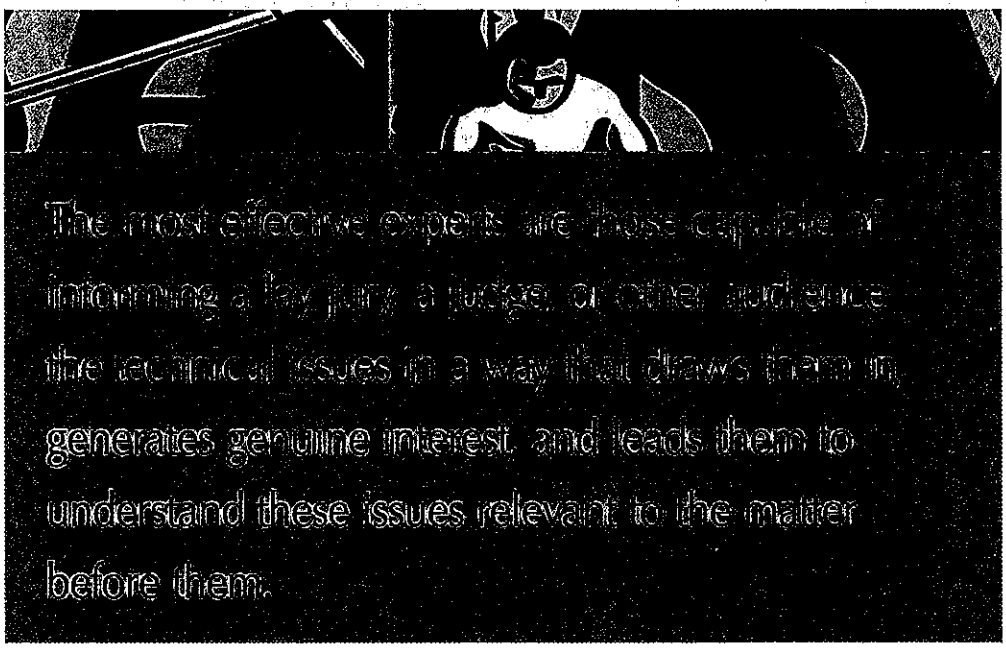
Technical professionals are often uncomfortable in litigation and other adversarial proceedings. Following are three observations about the process to help become a more effective expert witness.

1. **Understand the expert's role for each case.** In some instances, engineers are retained to provide expert testimony and in others they are engaged only to advise the attorney on the technical merits of the situation. For those engineers who will testify, they can expect to produce some type of report, probably be deposed by opposing legal counsel and provide testimony. Testimony can be provided through depositions, written affidavits, in person, or in all of these forms. Those engineers retained solely as the attorney's consultant will usually not be identified as an expert and, in most cases, not subjected to discovery. If the engineer has concerns about the engagement or is unclear of what is expected, these issues should be thoroughly reviewed with the attorney.
2. **Understand the ramifications of discovery.** Expert witnesses must understand the comprehensive scope of discovery. *Discovery* is the pre-trial practice of obtaining information about the matter at issue from the opposition. In general, almost anything reviewed by a testifying expert is subject to discovery, including drafts of the engineer's reports, even prior work unconnected to the present matter. Accordingly, prudent expert witnesses have a policy of destroying old report drafts that they have provided for attorney review upon receipt of comments and generation of a new draft. Attorneys appreciate experts who employ such a policy as part of their routine. It is important that this policy be routine. If the engineer is asked in a deposition, "Did you prepare any drafts of your report?" The answer should not be, "Yes, I did, but Attorney Jones told me to throw them away, so I did." The correct response is to answer truthfully, "Yes, but it is my policy when testifying as an expert to discard prior drafts once I have prepared a new one."
3. **Provide the attorney an honest opinion.** Many experts believe they are retained to supply a foregone conclusion. Nothing



will harm the engineer's credibility more than simply parroting a position proffered by an attorney which the engineer believes has no technical justification. Always, provide the attorney an honest, complete appraisal of the situation based on your expert knowledge and experience — both the good and the bad. It is these special capabilities for which you have been retained.

Having said that, however, nothing is more frustrating to an attorney than to have an expert change position in the midst of an adversarial proceeding. Once an expert has adopted a meritorious technical position, the engineer must be prepared to defend it against challenge by the other side. An adversarial proceeding is not a seminar in which the relative merits of a position are to be freely debated. Rather, it is a forum in which experts defend their analysis under challenge. Therefore, it is important that the engineer be comfortable with the adopted position despite how it comports with what the attorney wants to hear.



Remember — Class Is Out.

There is a story, perhaps apocryphal, of the expert geologist who was being deposed as an expert witness and was asked a general question about the field of geology. His answer began, "Well, in the beginning the earth was a molten mass." Depositions, hearings, meetings with agency counsel, or meetings with opposing parties are not intended for the expert to demonstrate the length and breadth of his or her knowledge. This is hard for some technical experts to understand because they are rightly proud of their credentials and their accomplishments. If necessary and/or appropriate, the attorney will provide an opportunity for the expert to impress the judge, the jury, or other decision maker with his or her expertise.

When being questioned by the opposition, the expert is not to provide them a free education about a technical subject about which they may be poorly informed. A central feature of the adversarial system is that each side to the dispute is responsible for assembling their own case. An expert retained by a party in litigation or other disputed matter is to apply his or her skill and experience for the ultimate benefit of that party. Therefore, do not volunteer information or insights or provide other assistance to the opposition whose knowledge of the underlying technical issues may be lacking. With this admonition in mind, however, it is also important to understand that in the course of a deposition or a trial, an expert must answer the questions posed. But that is all that is required. Answer only *the questions asked.* Resist the temptation to explain. If the opposition has a basic misunderstanding and that misunderstanding does not in any way diminish the expert's testimony, volunteered information simply provides the opposing attorney more ammunition to attack the engineer's testimony.

But When It's Your Turn, The Class Is In.

When it comes to presenting the case for the expert's client, then it is up to the engineer to teach the decision maker — not the opposition. The most effective experts are those capable of informing a lay jury, a judge, or other audience the technical issues in a way that draws them in, generates genuine interest, and leads them to understand these issues relevant to the matter before them. Therefore, engineers should carefully plan the most effective way to present their expert testimony, including the use of visual aids or exhibits. The expert need not be constrained because of a courtroom setting. The rules of evidence are quite liberal and many visual aids that would be used in a presentation in another setting can also be usefully employed in court. Regardless of setting, the expert's basic task is to convey complex information tailored to the abilities and background of the audience.

The exhibits used in a litigation context will probably be very different from those employed in a presentation to professional colleagues. However, there is a large body of literature about visual presentation that concludes that good visual aids are usually appropriate for a wide variety of audiences. If visual aids are to be used, the engineer must understand the deadlines governing their production. In many courts, advance discovery of exhibits to be used at trial is required and failure to produce them in a timely manner will prevent their use. Therefore, exhibits the engineer intends to use should be prepared in advance, reviewed by the attorney, produced to the other side, and any potential disputes about their use in court resolved prior to the hearing or trial.

Daubert Was Not A Contemporary Of Newton.

Those asked to be an expert witness can expect to hear the name Daubert ("dow bear" or "daw bert") thrown about by the attorneys. This name refers to a landmark United States Supreme Court case in which the Court held that trial court judges must determine if expert witness testimony offered by a party is reliable. While the case dealt with scientific testimony, it has since been extended to all forms of expert testimony. As a result, it has now become a fairly standard practice for parties in litigation to challenge the other side's experts based on the Daubert case or state court analogues to attempt to prevent

these experts from testifying on the basis that their testimony is not reliable.

Courts have set out several factors to determine if expert testimony is reliable. These include a determination of whether the subject matter and opinions of the expert have been subject to peer review or whether the expert's opinions were made solely for the basis of litigation. Those planning to work as an expert witness should become familiar with this body of the law because it is a growing issue for any expert retained to testify. In some cases, including environmental cases, the issue of expert testimony may be determinative of the entire outcome.

Lawyers Get Paid By The Word.

The attorney should always be allowed to review the engineer's draft work product, whether it is a letter, a report, a figure or a map. The attorney is typically tasked by the client with looking at the overall situation. This perspective may result in suggestions to the engineer enabling the engineer's product to better dovetail with the client's overall goals. In addition, the attorney will vet the document for statements or discussions that reveal attorney-client privileged information or for statements that may contain unnecessary legal conclusions.

We're All On The Same Side.

It's an age-old tradition — attorneys try to practice engineering and engineers try to practice law. In our experience, if these exercises occur in private between the lawyer and the engineer (and not in front of a judge or a permit writer), it is a healthy "give-and-take" that improves the overall product. Believe it or not, most attorneys rely heavily on their engineering expert's opinions on strategy and will usually encourage questions and comments. For these reasons, it is important that they work cooperatively with open and frank communication on all matters pertaining to the case or project.

If a problem with the case arises or an error is discovered, the engineer should inform the attorney about it as soon as possible. Nothing is ever perfect and attorneys are used to dealing with problems as long as they know about them in time. Similarly, the attorney should be expected to question the expert's work product and basis for opinions. The expert should not take this questioning personally and become defensive; rather, consider it valuable practice for the real thing, the presentation in front of a judge, commission, or the client.

Summary

In conclusion, the engineer-attorney collaboration brings unique and powerful synergies to client projects. This collaboration can be improved by a better understanding of each contributor's objectives. The authors hope the tips provided in this article have improved that understanding for environmental engineers offering expert testimony and consultation.

About the authors

Steve Morton and Carrick Brooke-Davidson are environmental attorneys with the Environmental Law Practice Group of Jenkens and Gilchrist, P.C. a national law firm. Collectively, they have more than 30 years of experience in environmental litigation, regulatory and transactional matters. Mr. Morton has a degree in environmental science and technical experience in hydrogeology and Mr. Brooke-Davidson has a degree in aeronautics and astronautics.