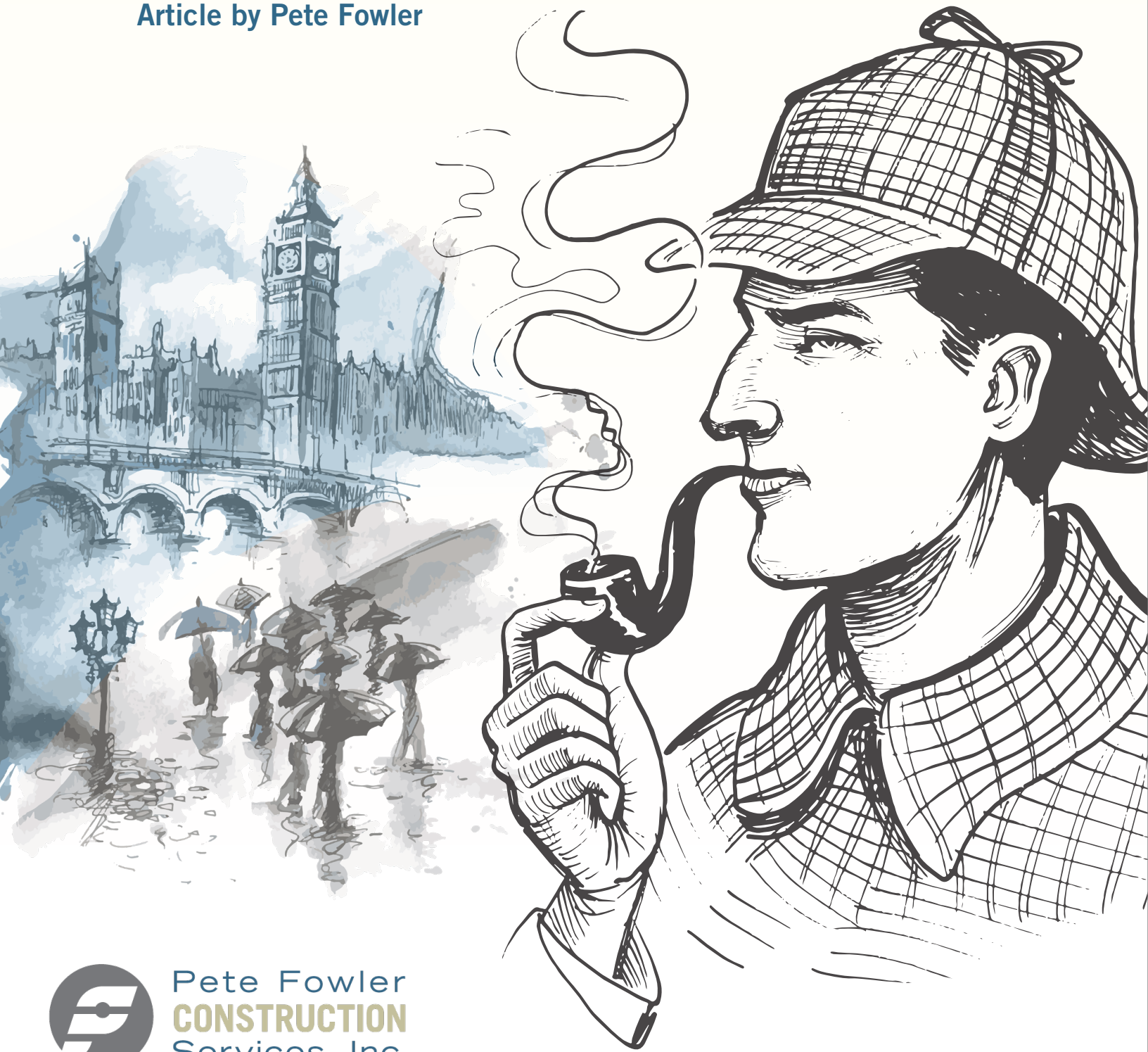


Good Experts...

Investigate Like Sherlock Holmes, Think Like Lawyers,
Write Like Journalists, and Present Like Walter Cronkite

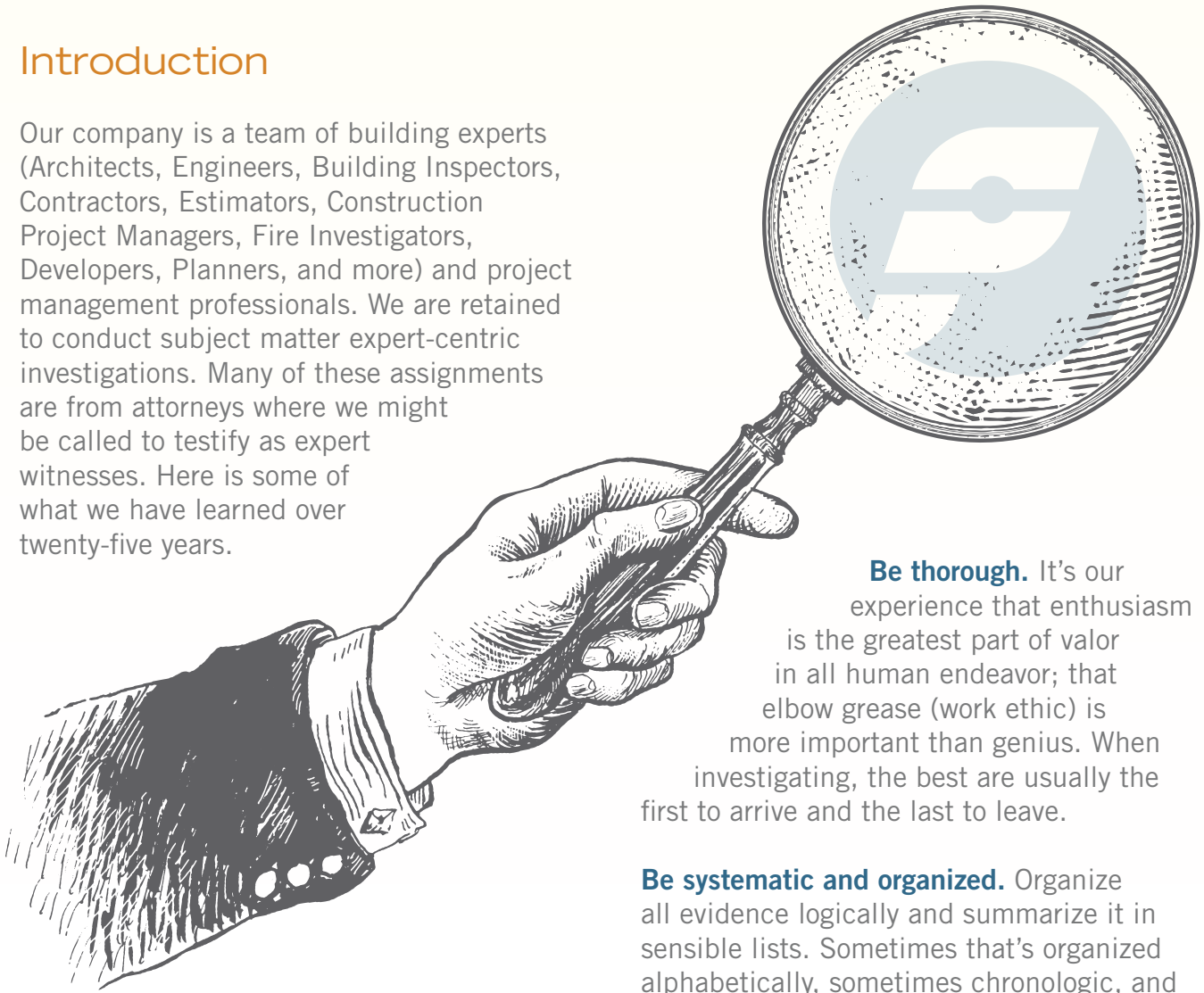
Article by Pete Fowler



Pete Fowler
CONSTRUCTION
Services, Inc.

Introduction

Our company is a team of building experts (Architects, Engineers, Building Inspectors, Contractors, Estimators, Construction Project Managers, Fire Investigators, Developers, Planners, and more) and project management professionals. We are retained to conduct subject matter expert-centric investigations. Many of these assignments are from attorneys where we might be called to testify as expert witnesses. Here is some of what we have learned over twenty-five years.



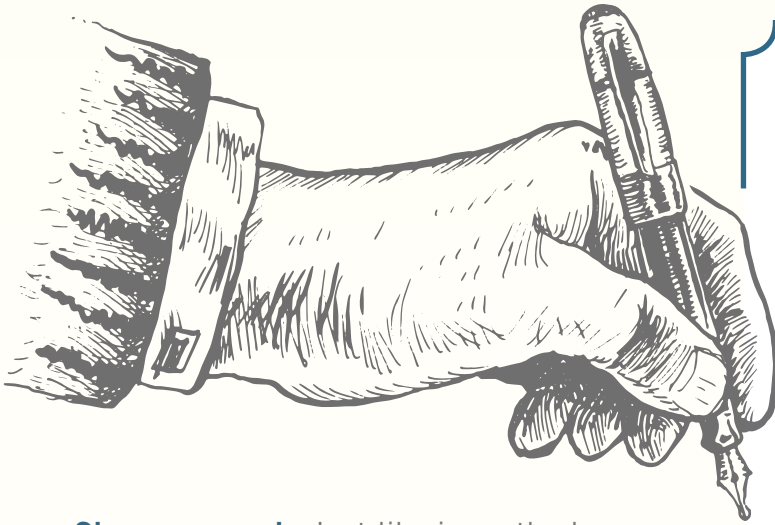
Be thorough. It's our experience that enthusiasm is the greatest part of valor in all human endeavor; that elbow grease (work ethic) is more important than genius. When investigating, the best are usually the first to arrive and the last to leave.

Be systematic and organized. Organize all evidence logically and summarize it in sensible lists. Sometimes that's organized alphabetically, sometimes chronologic, and maybe by party, issue, or some combination. Someone reasonably smart should be able to discern the organizational scheme within a minute of examination. Some subject matter experts are not naturally organized (think mad scientist). This is why we work on great teams. Ben Franklin's wisdom should prevail: "A place for everything, and everything in its place." Everything should have a designated place where it is kept, and it should be returned to that place when not in use. This helps to maintain order, reduce clutter, and makes clear thinking easier. If our project file is orderly and we can find key information when it's needed, people find us more trustworthy. They think "Those people have their act together, and this case is safe in their hands." If they are on opposing sides they think "I wish we would have hired them."

Investigate Like Sherlock Holmes

Be quiet and curious. The Greek philosopher Epictetus said "We have two ears and one mouth so that we can listen twice as much as we speak."

Be a scientist: Observe, hypothesize, predict, test, and repeat as necessary. Develop hypotheses based on evidence; but don't fall in love with them. The scientific method requires us to look for evidence to disprove our own hypothesis. If there is significant evidence that detracts from our theory, then we need to revise it. Remember: We don't make facts; we evaluate evidence and draw conclusions.



Show your work. Just like in math class, simply getting the answer right does not earn the student an A+. We have to show how we came to our conclusions. We document interviews, meetings, and testimony summaries in writing. Onsite investigations are performed in conformance with a reliable “forensic protocol.” The foundation stones of a good analysis can be shown to clients, other key players, and to judges and juries. Good, systematic work is persuasive.

Make a plan and budget. Compare plan and budget to performance, often. Surprising invoices are a quick way to a bad reputation. We exercise “Checklist Management Discipline” because some assignments have so many little things to do, that if we don’t maintain a list, and revisit it often, we get lost among the “trees” of complexity, and lose perspective of the “forest.” Checklist discipline allows us to bounce between the big picture and the details without getting lost or going off on expensive tangents that don’t add value for our clients.

Be right. The fruit of our analysis should be opinions or conclusions that are correct, clear, concise, and precise. Our opinions should be supported to the point that they can withstand brutal cross-examination, and still stand.

Think Like a Lawyer

Lawyers are smart. No one can pass the bar examination without being smart. They also have to understand the law and legal procedure broadly, research and analyze case law specifically, integrate all applicable facts, ignore a lot of “noise” that is part of most cases, develop arguments, analyze arguments of others, and think and re-think critically about all of the above. Only the best are also wise, emotionally mature, and skilled strategists.

Be qualified. Rule 702 of the Federal Rules of Evidence outlines the criteria for admitting expert testimony, and say a witness qualified as an expert by knowledge, skill, experience, training, or education may provide opinions if they will help the trier of fact (judge or jury) understand the evidence. Qualifications require experience, and also commonly include professional licenses, certifications, specialized education, teaching, and publications.



Understand Civil Litigation Basics.¹

This includes common case types like construction defect litigation, personal injury, job site accidents, property claims, contract claims, subrogation, and equitable claims. Roles include plaintiffs, attorneys, defendants, insurance companies, insurance professionals/claims handlers/adjusters, cross-defendants or third-party defendants, judge, jury, mediator, arbitrator, and expert witnesses. The stages of civil litigation include pre-filing, pleadings, discovery, pre-trial, trial, and post-trial. There are alternatives to litigation we need to know about, including mediation, settlement, and arbitration. Finally, be on the lookout for the differences between state and federal rules, especially when working in a new state. For us the best examples are state-specific “Builder’s Right to Repair” statutes that have entirely unique rules that we need to follow.

Understand common legal documents

including complaints, answers, cross-complaints, third-party complaints, amended complaints or pleadings, interrogatories, depositions, declarations, expert designations, motions, including motion for summary judgement (MSJ), discovery requests, case management orders, subpoenas, trial briefs, jury instructions, judgments, verdicts, post-trial motions, appeals, settlement agreements, and protective orders.

Write reports conforming with the Federal Rules of Evidence, including: (1.)

A complete statement of all opinions the witness will express and the basis and reasons for them. (2.) The facts or data considered in forming them. (3.) Any exhibits that will be used to summarize or support them. (4.) The witness’s qualifications, including a list of all publications authored in the previous 10 years. (5.) A list of all other cases

in which, during the previous 4 years, the witness testified as an expert at trial or by deposition. (6.) A statement of the compensation to be paid for the study and testimony in the case.

Understand Daubert vs. Merrell² is how expert testimony can be disqualified if it is not scientifically valid, reliably applied, or relevant and helpful to the trier of fact. See “Be a scientist” above.

Be mindful of strategies for negotiation, litigation, and trial. In litigation being above the game, “playing chess,” is superior to blindly hacking through the jungle. Every case and every lawyer are different. If we think we understand the strategy without having had a direct conversation about it, then we are being dangerously arrogant. We don’t always need to know the client’s strategy. Sometimes it is better to clearly explain our work and let them integrate it into their strategy. Then we stay in our lane and speak only when spoken to (see “Be quiet and curious,” above).

Lawyers write for a living and are usually the first reader of an expert’s written work. They judge the quality of the thinking based on the quality of the writing. In general, they are correct that the two are synonymous. Good experts are accurate, clear, concise, and precise. And we have learned that even people who CAN read at the collegiate level prefer when we use small words and short sentences. We have also learned that having a good team is the best way to work through complex issues and emerge with correct, clear, concise, and precise thinking and writing.





Write Like a Journalist

I was a journalism major for a short time in college and it's one of the reasons expert work came easier to me. I recently testified that a significant part of our work is pure journalism that the parties should not argue much about, because we first gather and explain what the evidence says, including where it is missing, vague, or contradictory. Only then should we engage in disagreement about interpretation of what evidence is more correct or reliable, and our opinions about the evidence.

Investigative journalism is a challenging and time-consuming process involving in-depth research and reporting about significant issues. Investigative journalists are persistent, often spending weeks, months, or even years extensively researching a story. They may delve into public records, conduct interviews, and sift through large amounts of data. This process involves critical thinking, fact-checking, and verifying information rigorously to ensure accuracy, and presenting findings in a compelling, ethical, and impactful way.

Explanatory journalism seeks to explain complex issues in a clear, concise, understandable, and accessible way. The goal is to provide context, clarification, and explanation about complicated topics, so people can make informed decisions. This can involve breaking down difficult concepts, providing background information, interpreting data, or exploring the causes and effects of a situation to help the audience understand the nuances of significant issues. Explanatory journalism often employs pictures, graphics, charts, videos, and other visual aids to help the audience understand.

Summarize! For some the ability to summarize comes naturally; but it's a struggle for many. We must collect anywhere from 10 to 10,000 pieces of evidence, organize it sensibly, and then write or explain it to someone who has no technical training in our field (like a lawyer, insurance professional, mediator, judge, or jury). In our office we say "Explain it to Pete's mom." She's very smart, but like most of the people who need to use our information to make a smart decision, she didn't go to engineering school.

Journalists are able to cram an amazing volume of information into a small space. They use a strategy called the inverted pyramid where the most important information is presented first, followed by supporting details. We call our strategy for this "basic analysis." We begin with a sensible list of all files, players, a timeline of events, and a list of the allegations, complaints, or issues that we will need to support or respond to; this "issues list" often serves as the "logic structure" for our assignment. A building problem is almost always easier to explain using images, maps, plans, photographs, video, diagrams, or graphics, because a picture is worth a thousand words, and the right diagram is worth a thousand pictures. Then we use the 8 W's (who, what, when, where, why, how, how many, and how much) as a checklist and make as many passes as necessary to write and then explain, in less than five minutes:



(1.) overview of the case; (2.) all the information we have to work with; (3.) what we've done; (4.) what we think (opinions); and (5.) what we recommend. Experts who can do this become highly sought after.

Be ethical. We decided what our values are long ago, and we stick to them. Anyone who does a lot of expert consulting will be asked to say something they don't really believe. Thankfully, it is rare. It's best to decide in advance how to handle it. Our number one value is "Act with Integrity—We never do anything unethical," so it is easier (although not easy) for us to push back.

Write excellent billing entries. For any amount of time spent, from 0.1 to 10.0 hours, our billing entry should be written contemporaneously and be a one-sentence to one-paragraph mini-report explaining our valuable, professional work. It should be a clear, concise little gem that makes the client think and feel "These people are smart, and this sounds like time well spent!" We need to communicate to clients, clearly and concisely, the value added from that time spent.

Run good meetings. Often, we only get one chance to collect evidence from witnesses. We make meeting agendas and use them as a checklist. We take good notes and save them in the file. And we are sure to integrate everything we learn in our meetings, because it makes project players feel unsafe when they have to tell us the same thing more than once.

Write great reports. We listed some legal requirements for expert reports, above, but the science and art of technical report writing can't be summed up in a paragraph. First: When we work on a great team, it's more effective. A close second: "Don't bury the lead." We present the most important information at the beginning, rather than burying it in the details. If the reader needs to search to find our conclusions or opinions, we've done it wrong. And like all things excellent in expert work: We need to be accurate, clear, concise, and precise. Finally, in explaining complex subjects, "work from large to small," from the big picture (for orientation) to the details, and make it graphic intensive.



Present Like Walter Cronkite

Be professional, including on time and respectful to everyone, regardless of how others might behave. Be calm and resilient under questioning in a tough environment like important (and sometimes contentious) meetings, mediation, deposition, arbitration, and trial. Although suits and ties are rarely necessary these days, people still judge professionalism based on how put-together we are, from head to toe: Be well groomed and dressed to impress.

Be credible and trustworthy: Stephen Covey said to be trustworthy we must be both (1.) capable and (2.) interested. If someone is not both, they will not be a good expert. Also: don't advocate for the client. It's okay to advocate for the quality of our analysis. Let the lawyers be the zealous advocates; it is their job, not ours.

Be prepared. Always remember the paradox "When the time to perform has arrived, the time to prepare has passed." This cuts both ways, so prepare prior to performance, but once the time arrives, relax, and let the best in you shine.

Be yourself. If we try to take on some personality other than our own, people will sense our being disingenuous. If you're not naturally professorial, don't try to be. If you don't use words like "heretofore" in conversation, don't use them in reports. On the other hand, if you're funny, then it's okay to be funny sometimes, just not at someone's expense.

Be confident. If we are qualified and prepared then there is no reason to not present confidently. Be ready to explain your qualifications, without sounding braggy. Look people in the eyes and tell them what we have done and what you think. Don't fold like a lawn chair; defend our work, hypotheses, and opinions.

Be Approachable and humble. In a 1990 interview Steve Jobs said;

I've had an opportunity to meet a few great people in my life. And they all had one characteristic in common... they treat everyone the same. Whether it's the janitor or the president of the company... And if a question is asked, they will directly answer that question to the best of their ability. The look in their eyes is exactly the same... Any question asked was the most important question that could have been asked at that moment, as far as Dr. Juran was concerned. And the caring and straight-forwardness that he expressed towards every individual made a big impression on us... But beyond his awesome knowledge of the subject, the way that he viewed people so optimistically that even the most foolish question was addressed with the greatest desire to transmit what he had learned in his life.³

Be like Dr. Juran.

Technological skills are required these days. We need to know how to quickly initiate and join web- meetings on Zoom and Microsoft Teams; and we need to be able to smoothly share our screen and navigate on the computer to "Show your work" (discussed above). Along the same lines, when people are on a web-meeting in the kitchen with their cat roaming around, or in a dark messy bedroom, it's less awesome than someone in a neat, professional space with good lighting and sound.



Conclusion

Being an expert witness is not for everyone who qualifies. We have had several highly qualified experts work with us, and after their first tough deposition decided they just did not like the work. They said things like “Those people are mean!” And they were right. On the other hand, I descend from a long line of hard-drinkin’, bar-fightin’ Irishmen who’s attitude was “Is this a private fight, or can anyone join?!” People who have the suit-and-tie version of that attitude, plus deep subject matter expertise, tend to like it.

Finally, try to make peace with feedback and periodic failure; it’s the fastest route to continuous improvement. Being an expert witness is a rough and tumble business where opposing parties have vested interests in making us look bad. If they only succeed periodically, then we are doing a good job.

¹Pete Fowler Construction Services, Inc., Civil Litigation Basics for Construction Professionals (Feb. 6, 2024), <https://www.petefowler.com/blog/2024/2/5/civil-litigation-for-construction-professionals>.

²Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

³Interview with Steve Jobs, Nova Southeastern University (Dec. 19, 1990).