

Bridging the Gap – The Role of the Interpretive Engineer

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In technical disputes lawyers will invariably seek expert opinion from engineers. Expert engineers are engaged to act independently in forming an opinion on particular issues involved. The expert is meant to assist lawyers 'at arms length' in preparing its case. The extent of understanding of the technical issues between lawyers and engineers can leave a gap in the middle. Too often lawyers do not understand the strength of their expert evidence until too late – in court when tested under cross-examination.

One way of bridging the gap is to involve an Interpretive Engineer (IE). The IE acts as an interpreter between the lawyers and experts or technical witnesses, providing a coordination and advisory function. That is, as distinct from the expert, the IE operates 'inside arms length'. The IE's role is not to be a witness for the parties.

Traditionally, the IE's role may be fulfilled through the involvement of the parties' own engineers. That will generally bring on board the necessary technical knowledge, but can carry excess baggage, particularly in defence mode. On the one hand this may involve emotional tie-ups, axes to grind, tunnel vision, biased discovery of documents, or 'no way it was our fault'. On the other hand, not wanting to know about it, too busy with forward work, has handballed the matter to its insurer and taken a back step, 'I did nothing wrong', or failure to appreciate the legal steps involved. This can hamper preparation of a defence and the identification of weaknesses.

The IE can also be a useful resource in both organising the document discovery process and day-to-day technical management of the case.

Ideally, the qualities of the IE will comprise not only an appropriate level of relevant technical knowledge, but also some experience of how the legal system works. In that way the IE will instinctively know where to head.

How an alliance between lawyer and engineer can work

Lawyers and engineers generally behave differently. At the risk of over generalising or appearing to indulge in some lawyer and engineer bashing, consider the following ideas:

1. A lawyers' grammar will tend to always reign over an engineers' grammar. You may have heard about the graduate engineer who remarked:

*'Six months ago I couldn't even spell engineer, now I **are** one.'*

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2. Think of a lawyer and engineer each asked to describe something. The lawyer responds with a lengthy essay, beautifully worded but no illustrations. The engineer immediately constructs a diagram, accompanied by a few words. In the case of the lawyer you try to picture what the lawyer is saying. In the case of the engineer you try to work out what the engineer is trying to say. The engineer is usually proficient at formulating an answer, but poor at expressing it. Combining the two talents will produce a much clearer description suited to a wider audience.
3. Having presented the above two examples in descriptive form, it is now time for a diagram. Consider the share of knowledge between two individuals. Figure 1 represents individuals having a common background, for example a builder and architect. Figure 2 represents individuals from different backgrounds, for the purposes of this article, a lawyer and engineer.

Figure 1. Builder and Architect

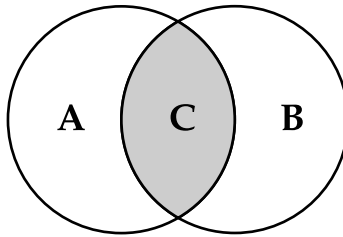
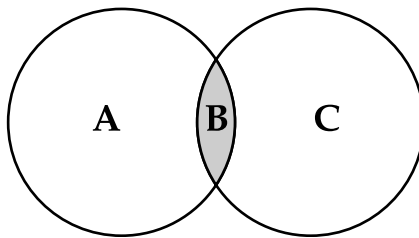


Figure 2. Lawyer and Engineer



Although in the Figure 1 partnership there is considerable reinforcement of core knowledge, or common ground (C), the breadth of overall knowledge (A+B-C) is not as great as in the case of the Figure 2 partnership. The broadened knowledge approach of involving an IE in the form of Figure 2 can significantly improve the effectiveness of running a technical dispute.

An army of lawyers and experts is not necessarily the most effective approach to running litigation. This discussion attempts to highlight the value in building up a litigation team with balanced resources, both technically and legally.

Benefits

In the case of a large technical dispute there are significant benefits from adding an IE to the legal team, including:

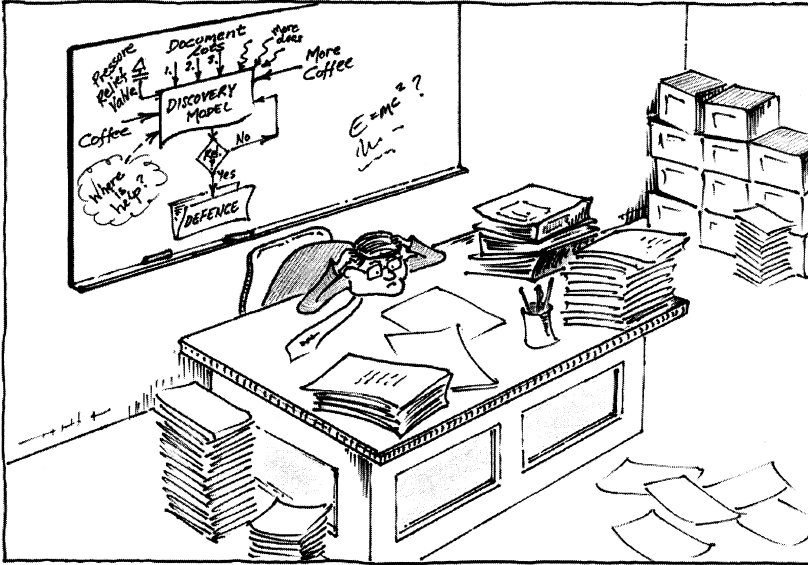
- A degree of independent technical advice.
- Obtaining an early understanding of the issues involved and likely exposures, even before experts are brought on board.
- Structuring the points and particulars of claims and ensuring that the numbers are properly presented. Why is it that the numbers never seem to add up in a claim document?
- Achieving an effective discovery of documents and control of documents.
- Drafting of briefs for expert assessments and counsel advice.
- Assisting in the sourcing of the right experts.
- Critiquing, comparing and stress testing expert opinions, sometimes to the extent of having to untangle differences in opinion between opposing experts.
- Preparing illustrations where appropriate including charts, spreadsheets, schedules, photograph and video galleries, models, drawings and diagrams.
- Ensuring that the lawyer's client is given accurate advice in relation to technical content and risk allocation.
- Day-to-day tasks which assist and maximise the output from solicitors and counsel.

Organisation

The IE can add considerably to the organisation of a technical matter. Of particular importance is document management or 'I know I've seen it, but where?' In the case of a very large volume of documents, it is crucial that the document discovery process is masterfully performed. Efficient discovery is being able to quickly differentiate between material that is key, relevant, and not relevant. Success at trial may boil down to the uncovering of a handful of key documents.

Documentation can come in the form of all sorts of files containing numerous duplicate copies and filed under different methods; in date order, in subject order, and others all over the place. For very large discoveries the sensible approach is for the parties to agree on relevant discovery only. The alternative in discovering the lot might be considered to be the safest approach, but apart from being cumbersome it will be extremely time consuming and

expensive. The burden of unnecessary discovery or messy discovery will continue to be felt throughout the litigation.



Where the discovery process has not been logically ordered, such as filed in chronological order and into particular claims categories, the IE can be also useful in sorting scattered documents into useable 'claim folders'. Once documents achieve this level of organisation the history and truth about claims issues will start to clearly unfold.

Concentrated discovery will also enable the preparation of effective briefs to experts, incorporating only relevant documents.

A lawyer's comment

*'When the lawyer is thinking in English, and the expert engineer is speaking in tongue, you need someone bilingual.'*²

2. An anonymous lawyer.

The test

Some questions for the legal practitioners, with due respect:

- Do your claims always add up?
- How many times has your client caught you out on unclear or inaccurate technical advice?
- Is your discovery always efficient and well organised?
- How quickly have you been able to place your finger on the right documents when you need them or source answers to day-to-day technical issues?
- Have your presentations and documentation lacked illustration?
- How well do you understand your expert evidence and has it covered all the angles?
- How accurate and complete are your briefing documents to experts?
- Has your client been critical of lawyer and para-legal team numbers?

If your answers to these questions trigger some doubts, the use of an IE may be appropriate for some of your cases.

Conclusion

The cost of litigation can be immense. Parties to litigation are always on the look out for ways to reduce costs. Alternative dispute resolution processes have answered the call in some respects. Lawyers and their clients who are regularly involved in litigation of substantial technical matters should review what management strategies have been employed, and whether those strategies could have been improved through a better balance of resources.

The role of an IE is not to take the place of the independent expert. However, the inclusion of an IE in the legal team can provide meaningful inside help in steering through the technicalities of complex litigation. Obviously, this approach tends to suit larger and more complicated claims. The IE may also play a useful but more limited role in smaller technical disputes.

The IE concept is not limited to engineers in a technical environment. An interpretive assistant in any number of disciplines could be matched with other forms of dispute; for example, a commercial manager engaged to assist in the interpretation of a commercial dispute. The concept is not novel, but is possibly not considered as often as it should in order to maximise a party's strengths and understand its weaknesses in technical disputes.

