

Building Knowledge

The newsletter of the Illinois State Bar Association's Section on Construction Law

Editor's Note

BY SAMUEL H. LEVINE

This is the last edition of the *Building Knowledge* newsletter for the ISBA 2020-21 bar association year. I want to thank Justin Weisberg for his leadership as chair and look forward to Steven Mroczkowski's upcoming tenure as chair. *Design Basics LLC v. Signature Construction, Inc.* has received a lot of attention within the legal community. The seventh circuit identified a home design firm that filed more than 100 infringement lawsuits an internet troll calling the company's operation an intellectual property

shakedown. David Brezina describes the case and its ramifications for construction attorneys. David Brezina is an attorney who practices intellectual property with Ladas & Parry LLP, an adjunct professor at John Marshall Law School and a member of the ISBA Intellectual Property Section.

The Consumer Fraud and Deceptive Business Practices Act can be a significant factor in construction disputes. Former Real Estate Section Chair Adam Whiteman writes about the application of the

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Copyright Trolls in the Construction Industry—But Is It Good Law and Bad Facts?

BY DAVID C. BREZINA

Copyright and Construction

In *Design Basics LLC v. Signature Construction Inc.* No. 19-2716 (7th Cir 2021)¹ (hereafter "*Signature*") Judge Sykes described a problem of "copyright trolls"—being analogous to those creatures hiding under a bridge, popping up to demand a toll for using the bridge. In the copyright context this was said to be a cottage industry of registering a plethora of graphics or, in this case, architectural

graphics, and then, suing for copyright infringement, hoping to collect, at a minimum, statutory damages, and potentially an infringer's profits. But this label made no difference to the result in the case.

An important point was that not all copyrighted works have the same enforcement potential. Some works may contain highly original content, while others might only have bare minimum

originality—"thin" copyrights.

While disliking trolls, and copyrights can be "thin" so infringement requires a near identical copy, one should certainly consider all the "copies"—both the literal copies and the second, legal equivalent, preparing a "derivative works."

Copyright Trolls

If copyright is the right to control making copies, how can the "troll"

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Consumer Fraud and Deceptive Business Practices Act to business disputes. Former Construction Law Section Chair Paul Peterson writes about a breach of contract action involving a provision in an escrow agreement promising full performance for the contract price free and clear of mechanic's liens.

Copyright Trolls in the Construction Industry—But Is It Good Law and Bad Facts?

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business model work? For patents, it is easy to see, because totally independent actions can infringe. No copying is needed. For copyright, direct evidence of copying is not necessary—copying can be proven by inference. In the construction context, copyright is relevant because (1) while copyright did not historically protect useful things like buildings, an amendment decades ago permitted registration and enforcement of “architectural works”²; (2) the touchstone for copyrightability is “originality” with no requirement for novelty or creativity, and (3) infringement cases can be proven by an inference of copying from access and substantial similarity³. In the *Signature* case there was proof that Signature (1) literally made copies and (2) prepared its own modified drawings and (3) built architectural works—finished buildings. Therein lies a trap, because it appears the court decided the question of whether there was infringement at all incorrectly. In the *Signature* decision, summary judgment for the defendant accused infringer was affirmed, essentially because the level of similarity was “insubstantial” to what was original in the floor plans at issue.

The ‘Troll’ Label Did Not Appear to Legally Matter

Whether Design Basics was a troll or a legitimate designer because they made money drawing floorplans and “selling” them, but also made plenty of money from

The ISBA has published the second edition of Turner on Mechanics Liens, the authoritative source on mechanics liens. It is available for purchase through the ISBA. Howard Turner and the ISBA Construction Section Council are planning an advanced mechanics liens program for the fall. ■

settling lawsuits did not provide a basis for either the *Signature* decision or an earlier Lexington decision.⁴ Builders may not like paying for floorplans any more than the owner of a pub likes paying a license to have music, but there is always the option to “do it yourself” by drawing your own plans or composing your own music. The earlier Lexington case was decided because there was no evidence the builder had the plans in the first place and the recent decision decided because the final plans of the builder did not have enough similarity—whether Design Basics was a “troll” or an innovative creator made no difference in either decision.

The 2021 *Signature* Decision Missed Important Facts—A Trap for Future Builders

Signature: (1) had Design Basics plan books (so access was given), (2) had photocopies of four specific Design Basics plans, (3) made its own plans.⁵ Thus, there were originals, there were duplicates (photocopies) and there were derivative works—Signature's plans. There were no contentions that the photocopies were made by someone else and the physical copies on paper magically (innocently) appeared in Design Basics' hands. One of the photocopies was marked up by Signature in red and given to a Signature draftsman to make a derivative work⁶. An important omission at both the District Court and Seventh Circuit levels appears to be

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consideration of only the derivative works⁷ and not the direct copies.

Substantial Similarity to Original Copyrightable Content Only Compares Design Book to Finished Plans

It is important to understand that the Constitution empowers copyright balancing free exchange of ideas and reward for creative express. Applying this, here, the level of similarity that will be infringingly substantial is inversely proportional to the amount of originality. For architectural works this is assisted by the express exclusion in the copyright office rules of “standard configurations of spaces, and individual standard features, such as windows, doors, and other staple building components.” Where a copyrighted work contains utilitarian aspects (technology is the subject of patent not copyright) it is appropriate to find there is a “thin copyright.”

Thin Copyright

Thin copyright is a category derived from different analyses for different media: common themes expected in many stories are called scenes a faire⁸; lists or facts, similarly, could be copyrightable as lists, but would not extend to individual items in the list, or to facts⁹; what occurs in nature is free to emulate¹⁰ and there can be “merger”—where the “idea” and “expression” are the same—copyright is not enforceable.¹¹ In architecture, thinness derives from the connection between the “art” (architecture) and the utilitarian engineering and construction.

Under the facts presented in the *Signature* case, Design Basics sent around to construction businesses, and posted on the Internet, thousands of floor plans. Signature had photocopies, that they marked up. Signature drew up its own plans. Only then, apparently, did Signature build homes using design features like “sheltered front door,” “welcome area” “covered stoop,” “long wall of the Living Room.” Comparing the Signature plans and homes to the Design Basics plans, noting functional features included in a copyrighted work, proof of infringement is strict because the copyright is thin and the similarities functional. It is only “copying”

of what is “original” that is infringing. Thus, a work of small originality (“thin”) requires large similarity (“virtually identical”).

What About Those Photocopies?

The legal analysis above is sound but there were more facts not considered. There were exact copies. In terms of whether there was infringement or no infringement, if the analysis requires that there be exact copies, what else is a photocopy? Skipping ahead to whether a derivative work (Signature’s own plans) has sufficient similarity avoids the liability resulting from making an exact copy. The case involved at least two, maybe three, questions of infringement liability: (1) plans vs. photocopies, (2) plans vs. plans and possibly, and (3) plans vs. finished homes as architectural works. The decisions skipped no. (1).

Might there have been defenses to plan vs. photocopy? Certainly, but since the decision did not consider the question, they were not evaluated. One could imagine defenses asserted that four photocopies from design books were *de minimis*¹², or that since preparing derivative works was permitted, the intermediate step was fair use¹³. Defendants like defenses, plaintiffs do not, but they were not discussed.

Would liability on plan vs. photocopy matter for remedies? Here we also speculate. Attorneys’ fees might be awarded to a “prevailing party.”¹⁴ Does winning on one issue but losing on a bigger issue change who prevails? Would plan vs. photocopy instead of plan vs. infringing architectural work impact damages? It would certainly have been easier to try to collect an infringer’s profits on home sales if the infringement made those sales “attributable”¹⁵ to plan vs. infringing architectural work infringement¹⁶. Adding two steps (preparing infringing plan and then infringing house) make attribution less direct.

Plaintiff can choose statutory damages of between \$750 and \$30,000. This may be less than the price of a home, but with less need for attribution. Arguably evidence of acting as a copyright troll and the functionality of features in a finished home might be persuasive to keep damages low. Arguing a goal to encourage builders to pay it for floor plans could support a penalty of about

three times what it would have cost to buy a legitimate license.¹⁷

Conclusion

Do not conclude that court hostility to a business model is a guarantee of success. It worked twice involving this plaintiff, but there are overlooked facts in the recent decision. Instead, it is always better to not be a “copycat.” For residential construction, of course, there are a vast number of utilitarian needs that must be met, for safety, durability and functionality in providing shelter, code and zoning compliance. There is a tradition of using what has worked in the past. “Fashion”¹⁸ is not so much a factor for lasting designs.

Exercise care in “copying.” Independent creation is best. If the point is to get good ideas of functional features—don’t make a copy, make a list of ideas and facts, and draw your own, sharing only the functional and factual. Maximize your own design originality and keep borrowing to the strictly utilitarian. Judges and juries do not like copycats just as judges do not like copyright trolls. ■

1. <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D04-23/C:19-2716:J:Sykes:aut:T:fnOp:N:2694335:S:0>.

2. *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017).

3. “Direct evidence of copying is only rarely available. A plaintiff may also “prove copying by showing that the defendant had the opportunity to copy the original (often called ‘access’) and that the two works are ‘substantially similar,’ thus permitting an inference that the defendant actually did copy the original.” *Peters v. West*, 692 F.3d 629, 633 (7th Cir. 2012).” *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017).

4. *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017).

5. *Design Basics, LLC v. Signature Construction, Inc.*, 2019 WL 4805888 (CD Ill., 2019).

6. “The photocopy of Design Basics’ 2461 Shawnee floor plan had red markings on it, indicating modifications to the plan. John Tanner, a draftsman at Signature, testified that he received the marked-up image from Steve Meid, a Signature partner, and understood that the markings were modifications that Meid wanted him to make.” Seventh Circuit Slip. Op. at 5.

7. The District Court’s discussion was under the heading “Substantial Similarity Between Plaintiffs’ Plans and Defendants’ Plans” (emphasis added).

8. “so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.” *Bucklew v. Hawkins, Asb, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003). See also *Ets-Hokin v. Skyy Spirits Inc.* 55 USPQ2d 1769, 1778-79 (9th Cir 2000).

9. *Hoehling v. Universal City Studios Inc.* 618 F.2d 972, 979-80, (2d Cir 1980).

10. *Herbert Rosenthal Jewelry Corp. v. Kalpakian* 446 F.2d 738, 170 U.S.P.Q. 557 (9th Cir., 1971) but see *Wildlife Express Corp. v. Carol Wright Sales*, 18 F.3d 502, 30 U.S.P.Q.2d 1140 (7th Cir. 1994) where the animal inspired works were protectable and copied.
11. *Beaudin v. Ben & Jerry's Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996) (“Where the quantum of originality is slight and the resulting copyright is ‘thin,’ infringement will be established only by very close copying because the majority of the work is unprotectable”).
12. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (refusing to recognize *de minimis* defense to copying 2 seconds of sound recording).

13. *Google v. Oracle, supra*.
14. *Fogerty v. Fantasy Inc.* 510 U.S. 517, (1994).
15. 17 USC 504(b).
16. “The proper measure of actual damages for the infringement of copyrighted architectural drawings owned by a builder and infringed by a competing builder is the lost profits suffered by the plaintiffs from the home constructed pursuant to the infringing plans. *Robert R. Jones Assocs.*, 858 F.2d at 281; *Intown Enterprises, Inc. v. Barnes*, 721 F. Supp. 1263, 1267 (N.D.Ga.1989).” *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F. Supp. 1560 (M.D. Fla. 1995).
17. “... two to six times the license fees defendants

“saved” by not obeying the Copyright Act.” *EMI Mills Music, Inc. v. Empress Hotel, Inc.*, 470 F.Supp.2d 67 (D. Puerto Rico 2006).
18. See, e.g., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 197 L.Ed.2d 354 (2017).

‘Verify’ That Your Verification is Proper to Avoid a Potentially Fatal Defect in a Lien Claim

BY ADAM WHITEMAN & STEVEN MROCZKOWSKI

The Illinois Mechanics Lien Act (770 ILCS 60/1 et seq) (the “MLA”) is full of traps for the unwary. Section 39 states that the MLA “shall be liberally construed as a remedial act.” However, lawyers that have ever briefed an issue related to a technical defect in a lien claim will be (or at least should be) familiar with the appellate court maxims related to the application of Section 39. Because the MLA is in derogation of the common law, it must be strictly construed with reference to the requirements upon which a right to a lien depends. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 680 (1st Dist. 2002). Further, liberal construction occurs only after the claimant has “scrupulously observed all the statutory prerequisites that give effect to the lien.” *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street, LLC*, 356 Ill. App. 806, 812 (1st Dist. 2005).

Generally speaking, in order to properly perfect a lien against real property, a claimant must comply with section 7 of the MLA which requires a recorded claim for lien to be “verified” by “affidavit.” 770 ILCS 60/7(a). An affidavit has been defined as “a written declaration under oath sworn to before a person with authority under the law to

administer oaths.” *Weydert Homes, Inc. v. Kammes*, No. 2-08-0768 (2d Dist. 2009). Without proper verification, a lien claim that otherwise complies with the MLA, might be invalidated. Fortunately, there is instructive caselaw that provides examples of the consequences of non-compliance.

In *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, the plaintiff sought to enforce an unverified, recorded claim for lien against several parties. 357 Ill. App. 3d 714 (1st Dist. 2005). The plaintiff’s recorded lien claim only bore the signature of plaintiff’s president; it was not verified by affidavit or any statement under oath and penalty of perjury. *Id.* at 716. Defendants (owner, tenant, and lender) filed a joint motion for summary judgment based on the material defect on the face of plaintiff’s lien claim. *Id.* at 717. The trial court granted the motion and the appellate court affirmed. *Id.* at 722. Plaintiff argued that the result was harsh and stemmed from a “hyper-technical” reading of the Act. *Id.* at 720. The court disagreed noting that the MLA’s verification requirement serves the important purpose of requiring recorded claims (involuntary liens on private property) to be sworn to under oath and under penalty of perjury – which

discourages fraud. *Id.* at 722. “Despite the unfavorable outcome to the [plaintiff]... we will not depart from the plain language of the statute by reading into it exceptions that conflict with the intent of the legislature.” *Id.*, citing *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507 (2003).

In *Vancil Contracting, Inc. v. Tres Amigos Properties, LLC (In re Vancil Contracting, Inc.)* 381 B.R. 243 (2008), the United States Bankruptcy Court for the Central District of Illinois discussed the elements of a proper verification by affidavit. The court noticed that “Illinois law allows a notary public to perform certain acts, including: “Taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, and witnessing or attesting a signature.” 5 ILCS 312/6-101(a). The court distinguished a verification upon oath from an “acknowledgment” which is a simple declaration that the person signing the instrument is the person identified in the instrument. The court then explained that “For a verification upon oath or affirmation, “[s]igned and sworn (or affirmed) to before me” is the suggested language to be included. 5 ILCS 312/6-105(c).” *Vancil, supra* 381 B.R. at 245-46.

Here is an interesting twist from the *Vancil* decision. The court deemed Vancil's recorded lien inadequate to preserve the claimant's lien rights because it did not contain the proper verification language. But that was not the end of the road for Vancil. Fortunately, Vancil specifically alleged "not only that its lien rights preserved by the Lien Notice, but also that "its lien rights were preserved by the timely filing of an action to foreclose." *Id.* This was Vancil's saving grace because under section 7 of the Lien Act, a contractor can preserve their lien rights to the "prejudice of any other creditor or incumbrancer or purchaser" if they, within four months of completing work, "either bring an action to enforce his or her lien" or file the lien claim verified by affidavit. Thus, even though Vancil's recorded lien did not preserve its lien rights, the manner in which it plead still allowed Vancil to state a cause of action under the Lien Act.

However, the analysis goes on. Oftentimes, signatures on lien claims are notarized, opening the door for application of the Notary Public Act (5 ILCS 312/1-101 et seq.) ("NPA"). The NPA requires, unequivocally, a date to accompany any notarial act for it to be valid. 5 ILCS 312/6-103(a). Similar to the application of section 39 of the MLA, caselaw requires strict

compliance with 5 ILCS 312/6-103(a) before allowing for the generous application of oath administration. See *Cintuc, Inc. v. Kozubowski*, 230 Ill. App. 3d 969, 973-74 (1st Dist. 1992) (a jurat is sufficient if it **meets the requirements of subsection (a) and** (1) is in one of the short forms listed in section 6-105...). Indeed, that is what the language of the NPA requires: "a certificate of a notarial act is sufficient if it *meets the requirements of subsection (a) and it...* [listing additional form/jurat/oath requirements]. 5 ILCS 312/6-103(b), emphasis added. Compliance with 6-103(a) is not optional.

Lawyers that send a lien claim to a client for review and signature need to make sure it is proper in form and language, and is completely, properly and accurately signed and filled out before filing it. If it is missing a date or contains an errant signature line, a court might invalidate it for what seems like a technical defect in verification. If possible, as an added measure of protection, when it is time to sue, make sure to include allegations confirming that the suit is brought not only pursuant to the recorded lien notice, but also allege that, separately and apart from the recorded lien, the lien rights were preserved by the timely filing of an action to foreclose pursuant to section 7 of the Lien Act. Lawyers representing claimants need

to be diligent, detail oriented, and extremely thorough. One of the first steps in defending a lien claim case is to scrutinize the lien claim itself for technical defects. Errors in verification are just one of many traps for the unwary under the MLA. ■

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Baldwin Enterprises: Another Percent Completed Dispute

BY PAUL PETERSON

Baldwin Enterprises, Inc. v. Articon Hotel Services LLC, 2021 IL App (5th) 200150-U, 2021 WL 661544 (Feb. 18, 2021) is a Rule 23 unreported Illinois appellate court decision where a construction lender sought, but failed, to get a lien free project through creative drafting on a contract for \$6,065,298.82 for hotel rehabilitation. Construction on the project ultimately ceased after the owner or lender disagreed

with the contractor over the percentage complete of the project and stopped funding. The contractor filed a mechanics lien claim for \$930,108.33. In hindsight, the owner and lender would have been better protected by requiring the contractor to furnish a payment and performance bond and spending more time and money on draw-by-draw monitoring.

Under a stock construction disbursing

escrow used by most title insurance companies, the contractor is not a party to the escrow. Instead, the contractor signs an acknowledgement to the escrow acknowledging the requirements of the title company to fund and issue its limited mechanics lien endorsement to the lender's loan policy. In this escrow, the contractor agreed to a provision that the owner and lender argued required the contractor

to release its mechanics lien claim. The appellate court held the phrase “for the contract amount” in the contractor’s promise “To fully commence construction from the date hereof and to fully construct and complete the improvements to the Property in a first class, workmanlike manner according to the construction contract and the plans and specifications, for the contract amount, ... with all claims and materials paid in full, free and clear from mechanic’s liens...” rendered the covenant conditioned upon payment of the full amount of the contract.

The contractor also furnished “check the box” form lien waivers on a draw-by-draw basis. The first box was “Full/Final Waiver – Missouri Residential Jobs”, the second “Full/Final Waiver- any Commercial Jobs and Illinois Residential Jobs,” and the third “Partial Waiver.” The appellate court agreed that the language of the Full/Final Waiver checked by the contractor in five paid draws was on its face a full/final waiver of all work done or to be done in the future. However, in remanding the issue of the effect of that language to the trial court, the court noted: “While, as a general rule, an unambiguous waiver of lien rights bars an action under the Act, this rule is only applicable when an innocent party relies on the waiver in making payments. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App 3d 334, 362 (2008). Moreover, whether an innocent party has relied on a lien waiver is a question of fact. *Id.* Thus, for the purposes of summary judgment, consideration of extrinsic evidence as to reliance on lien waivers is permissible. *Id.* at 367. ‘Specifically, in evaluating a lien waiver defense, it is appropriate to consider evidence relating to the customary practice of the parties as well as the practices in the industry with respect to lien waivers.’” It is likely, following *Cordeck*, the waivers will be construed as waivers only to the extent of the payment in Illinois. However, the trial court may focus on the fact that the partial waiver box was available but not checked.

Finally, the court held the subordination of any lien to the mortgage provision in the “Contractor Covenants and Agrees” section of the construction disbursing

escrow unenforceable pursuant to 770 ILCS 60/1(d).

A payment and performance bond would have been valuable in this project. If the bonding company determined that the contractor was in material breach of its contract, the owner would have been required to pay the balance of the contract to the bonding company but would have gotten a completed project.

The dispute between the owner and the contractor in this renovation project is one over whether the work in place justified the payment being requested and whether the work was done in a workman like manner. Those are key concepts in the certifications of the contractor and the architect where an American Institute of Architects AIA G 702 Application and Certification for Payment is used. It makes a difference if the architect’s certification is based on a brief inspection or if the architect is paid to make a detailed inspection or inspections each month and look at lower tier invoices and lien waivers. On occasion architect’s certifications can be expanded to include a certification that (i) attached are all submitted requests for change orders for either time or price or (ii) a certification that the project appears to be in budget or (iii) a certification that the project can be completed in the time required by the contract. Where the architect and the contractor disagree, hopefully the construction contract provides for prompt mediation or arbitration of the dispute.

Note, however, that the AIA G702/703, where the contractor and the architect certify that the work in place justifies the payment being made, does not meet the requirements of an Illinois statutory certification that these are all parties, their addresses and their balance due or to become due as required by 770 ILCS 60/5. Without the section 5 affidavit, a contractor is not entitled to payment and an owner cannot assert that the subcontractors and suppliers are limited to the amount due or to become due their contractor. Thus, on many jobs an AIA G702/703 is required to determine the amount of the draw and the statutory section 5 affidavit is required to allocate the amount of the

approved draw to the appropriate parties. The section 5 affidavits are the required first steps to establishing the proper payment defense under section 21(d) to limit the amount due lower tiers to the amount due their contractor. See *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill.2d 385, 909 N.E.2d 830 (Ill Sup. 2009) for a fuller discussion of the requirements to establish a proper payment defense. The court in *Weather-Tite* held that payment in full to the contractor with known reliance on the contractor to later pay its subcontractors did not establish a proper payment defense against lower tiers. Note also that the court said the sworn statement in the *Weather-Tite* case was not a statutory sworn statement. A review of the owner’s brief discloses the contractor’s statement, while containing names, addresses and contract status of lower tiers, used an AIA G702 certification that the work in place justified the payment being made and not a statutory section 5 affidavit that these are all parties, their names, addresses and amounts due or to become due.

In conclusion, the Chicago Title and Trust Construction Disbursing Escrow provides in part that the documentation required by the escrow does not guarantee percentage completion, completion on a timely basis or completion in a workman like manner. Those are functions beyond the scope of the escrow that must be dealt with by the owner and the lender. They should be considered on each construction project. As for clauses providing for waivers of liens for future work and subordinations of mechanics lien claims, you can expect courts to frown on them. ■

Paul Peterson is a former VP and senior underwriter for the Fidelity Family of Title insurers who specialized in construction underwriting and workouts. He was also a chair of the ISBA Construction Law Section Council. While retired, he is available for construction document review training, consulting or as an expert witness.