

The Historian's Valuable Role as Expert and Advisor in Environmental Litigation

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When faced with legal matters requiring interpretation of a complex set of historical facts, attorneys can employ at least three strategies to convey the historical story to a trier of fact. First, counsel can rely on the testimony of eyewitnesses, if such witnesses are still alive, have a good recollection of the events in question, and are able to present their inherently limited perspective of the events effectively within the context of other available evidence. Often, numerous witnesses are needed to tell a complete story; frequently, too, due to passage of time or vagaries of memory, there are unavoidable gaps in the firsthand knowledge of eyewitnesses.

A second strategy, perhaps used in conjunction with surviving witnesses, is to present key historical facts as part of arguments in legal memoranda and trial summations. This approach, however, poses significant challenges. Evidentiary issues might arise in authenticating historical documents, and even when they come into evidence, introduction and interpretation of historical evidence solely or largely by party advocates can lead to an unwanted perception of bias with respect to those specific facts—the trier of fact might view the lawyer as an interested advocate rather than as an informed researcher and credible storyteller, and thus view the historical information as argument rather than facts. This approach can obscure, rather than clarify, important historical facts central to a party's case.

A third strategy, retaining a professional historian as an expert witness, can be useful in avoiding the limited perspective and fading memories of eyewitnesses and the perception of bias associated with advocates relating historical facts. Historian experts, similar to their counterparts in the hard sciences, employ specialized contextual knowledge and a disciplined methodology in their research and analysis, and use a customized and targeted approach to effectively gather and synthesize the available historical evidence and to relate historical facts in

a thorough and compelling manner. With increasing frequency, litigators are turning to professional historians and finding them invaluable at several stages of the litigation process. Still, engaging a historian as an expert witness is relatively uncommon.

The Three Stages of a Historian's Value

From the beginning of the litigation process, professional historians can assist lawyers in framing the historical issues central to prosecuting or defending a claim and can assist counsel by serving as an early warning system if the historical facts do not comport with a lawyer's theory of a case. At this early stage, historians can perform targeted and reproducible research to investigate the validity of historical facts alleged as well as the preliminary factual conclusions of counsel. Historians can use this foundational research to identify leads to additional potential sources of information and give an educated opinion on the probability that these leads ultimately will produce useful evidence, informing the research phase of the litigation process such that counsel can weigh the legal risks of pursuing or not pursuing the identified leads. Historians likewise can be useful with respect to researching statute-of-limitations issues, for example, in identifying historical documentation that might indicate common knowledge of risks in products-liability matters, or discovery-rule facts specific to any given case (who knew what, and when?). In environmental lawsuits specifically, cases involving the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), for example, such research also can help develop a basis for assessing levels of past involvement in waste disposal and operations at a site, uncovering historical sources that may point to viable potentially-responsible-party candidates.

Trained to identify and gather historical sources that can uncover and illuminate the underlying fact pattern, historians also can be important advisors during the discovery

and pretrial motions. Historians are trained to find and relate the key storylines from a multitude of historical documents and thus can assist in establishing a strong factual foundation for legal argument. Often, the documents relied on by historians may be admissible in evidence as ancient records in support of a summary-judgment motion. Moreover, professional historians can provide helpful analysis of the historical facts underlying the conclusions of other experts and can provide meaningful commentary and insight on the sources cited and supplied by opposing parties.

Finally, through carefully documented expert reports and testimony given in depositions and at trial, historians can effectively relate complex historical facts and introduce historical documentary evidence in context. Like specialists in other areas, historians effectively and reliably compile data (in their case, historical documentation) using a thorough and well-documented research methodology. Subject to and consistent with the time, scope, and budget constraints provided by their clients, they can accurately synthesize the documents into a credible historical record and relate their findings in a useful and compelling way. Historians share the ability of their hard-sciences counterparts to track their research, including the ability to describe what was searched and replicate how it was found. Moreover, their skill in synthesizing, analyzing, and relating historical findings can be a major asset in providing support for and placing in historical context eyewitness testimony and advocate arguments.

The Historian's Assistance During Fact Investigation and Research

Perhaps the professional historian's greatest value is in developing and implementing a thorough research methodology. The historical record, of course, is never complete; thus the historian's expertise is in compiling the available historical evidence and using contextual knowledge to

relate the history in an informed and credible way. Ordinarily, lawyers are heavily reliant on the discovery process to flesh out the facts underlying a party's claim or defense. Often, parties rely almost exclusively on the documents in their own possession at the beginning of the litigation process together with the documents that they receive from opposing parties in response to discovery requests. Where, however, a case involves a complex historical fact pattern (for example, relating to contamination of a watershed over the course of an entire century), it might be difficult for litigants to develop a credible history, using only the documents in their possession or that they receive in discovery. Instead, historians can develop a detailed and targeted research plan to locate publicly available documents pertinent to salient legal disputes within a defined scope of effort. Indeed, one of the ways historians pursue objectivity in the research process is to identify legal issues with historical significance in the case and frame research questions in a way that is independent of legal argument. For example, in a CERCLA matter where a defendant might be interested in determining if the U.S. government can be considered an owner, an operator, an arranger, or a transporter of waste for legal-liability purposes, the historian simply tailors a research plan to identify and secure available documentation relating to the history and level of government involvement at the site in question. The research the historian performs serves to reveal the available and pertinent historical record, which the lawyer then can assess with respect to the applicable legal criteria. Where the historian's research is thorough and carefully crafted, the results are reliable and credible within the stated scope: The greater the scope of the historian's research, the more credible and reliable the historian's opinion. Ideally, the historian is given access and time to review not only the available public documents but also the parties' documents exchanged through the discovery process and whatever other private collections are available containing relevant records.

Generally, lawyers should allow historians sufficient breadth and depth of scope

to investigate all reasonable opportunities for uncovering relevant historical evidence. These likely include publicly and privately held historical documents, secondary sources, and primary documents. The more thorough an expert historian's research and the better documented those searches are, the stronger the historian's credibility as to collecting, analyzing, and synthesizing the evidence for use in the litigation process. While the historical record is virtually never complete, the historian pursues objectivity in his or her professional methodology by identifying, collecting, synthesizing, and placing in perspective the available historical documents. Properly evaluating the legal merit of these findings falls squarely within the duty of the legal counsel.

Environmental litigation, so often hinging on site history, waste-handling practices, or past policy determinations, offers a compelling arena for use of historians as experts in conjunction with other experts. In site-specific matters involving contamination of a specific site over time, the likelihood is that the site and surrounding areas have been subject to multiple occupants and many different uses. Where a party is targeted as the subject of an environmental-contamination investigation, the time and expense of clarifying the party's alleged contamination of the property is substantial and likely includes significant research to determine—what was generated, treated, stored, and/or disposed of on or near the property; what might mitigate or place in proper context a party's alleged responsibility for the contamination; who might also bear responsibility for environmental clean-up based on prior activities; and what might be the legitimate basis for apportioning such responsibility. Professional historians have the expertise to gather important information relevant to each of these determinations systematically and cost-effectively due to their specialized training and extensive research experience. The knowledgeable historian can also serve to point out likely gaps in the available record along with potential hurdles (e.g., access and classification issues as well as disposal of files) in the way of discovery of the complete record.

Often secondary sources—published materials such as specialized industry and trade journals, local history pieces, as

well as selected newspapers—will report benchmark events that occurred at a site, including specific products used or manufactured, processes employed for operations and waste disposal, and changes to the landscape. Additionally, historical maps and atlases provide snapshots in time from which a historian can trace the evolution of the occupancy and often the use of a site and the surrounding area. Much of the foundational secondary-source research that informs more localized research can be done at several large federal repositories located in Washington, D.C.; professional historians have the skills to survey and review adeptly and efficiently the voluminous holdings of the Library of Congress, federal libraries, and the various record groups of the National Archives and Records Administration. *See generally* Philip L. Cantelon, *et al.*, "Performing a Superfund Site History: Time and Money Well Spent," *Toxics Law Reporter* 595 (October 9, 1991).

After the historian has developed appropriate context, consulted key secondary sources, and determined the general history of a site, a next step likely requires identifying and research at local repositories near the site that might have relevant information. Typically, this includes local libraries, historical societies and archives, chambers of commerce, and local government agencies that might have regulated or secured information on the historical use or occupancy of the site. Working with personnel at these types of repositories, professional historians have the expertise to review large volumes of potentially relevant information under sometimes challenging conditions (including limited access and often nonexistent indexing of records) and identify and collect the pertinent information therein. Professional historians also serve as skilled navigators of the various local, state, and federal freedom-of-information statutes that require the requestor to shape and hone requests to get meaningful and helpful responses. *Id.*

Particularly in environmental matters, parties also tend to rely heavily on scientific experts, including environmental scientists, to research and develop the relevant historical facts on which they base their scientific conclusions; however, reliance on experts to testify outside of their respective fields (for example, asking an environmental scientist

or economist to testify as to the authenticity and reliability of historical documents) invites a motion to exclude by opposing counsel and weakens the expert's credibility. Professional historians apply their specialized and valuable methodology, based on demonstrated experience and broad standards issued by organizations such as the American Historical Association and the National Council on Public History, to uncover a multitude of potential sources of third-party information, to expand a party's knowledge of relevant events, and ultimately to relate a credible interpretation of available historical facts relevant to the litigation, within the defined budgetary, time, and scope limitations of his or her effort. Historians are trained to carefully handle source materials, thoroughly document research strategies, and keep detailed research notes about where they have looked, why they have looked there, and what they have found. Using foundational knowledge of a given environmental site, where reconstructing the site history has critical legal value, historians develop and execute a specific, customized work plan unique to each case. Moreover, they bring professional credibility and expertise in interpreting the documents that stem from their research, informed by their custom-tailored understanding of the historical dimensions of the crucial legal criteria and thresholds involved in each matter.

The Historian as Consulting Expert for Motion Practice and Depositions

Perhaps a lesser known value brought by historians to the lawyers who retain them is their role as advisors when depositions are taken and key motions are drafted. Although an attorney employing a historian will need to decide whether to declare that historian as testifying or non-testifying, or simply use historical services on a consulting basis for research and evidence-finding, a professional historian holds great value as someone who can work closely with lawyers as well as scientific and other experts to frame requests for production of documents, interrogatories, and requests for admission of facts. Together with other pertinent experts, the historian can help the lawyer prepare for depositions of opposing experts, eyewitnesses offering

historical evidence, scientists or economists whose calculations might derive from alleged historical facts, and even other historians who might have undertaken documentary searches themselves. Specifically, an experienced historian can frame technical deposition queries based on the record or a search of it and can examine others' historical testimony and the underlying research to spot potential gaps as well as assess strengths.

Expert Historians at Trial

As a matter moves into trial phase, whether before a court or in arbitration, an expert historian can provide relevant and reliable information to assist the trier of fact in understanding and evaluating the evidence where complex historical facts are at issue. Indeed, Federal Rule of Evidence 702 specifically 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 702; *see also* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 113 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). As with any expert witness, historian experts are granted "testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis in the knowledge and expertise of his discipline.'" *See Kumho Tire*, 526 U.S. at 147, *citing Daubert*, 509 U.S. at 592. Historian experts provide relevant and reliable testimony based on documentary evidence. Just as any other expert, the historian could face a potential *Daubert* challenge, and thus must meet the *Daubert/Kumho* test for admissible expert testimony:

1. whether the historian's theory and

research techniques can be tested and replicated

2. whether the historian's work, theory, or technique has been subjected to peer review and publication
3. whether, with respect to the historian's work, theory or technique, there is a high known or potential rate of error, and whether there are objective standards controlling the technique's operation
4. whether the historian's work, theory, or technique enjoys "general acceptance" within the relevant community

See Kumho Tire, 526 U.S. at 142–147. As with any expert, experience is critical for credibility. The more pertinent projects an individual has directed, and the more independent peer review the historian's work has received, then generally the stronger and more credible the expert.

Conclusion

Historians' involvement throughout the litigation process is valuable to lawyers, both as a standalone subject-matter expert conducting research and analyzing and relating historical data, and in support of other experts whose conclusions rely on underlying historical facts. Lawyers are best served by involving historians in all phases of the litigation process, from the research and factual-investigation phase, during discovery and pretrial motions, and finally at trial.

A unique understanding of historical context and specialized research skills help historians to synthesize a reliable history from multiple sources, explain or reconcile inconsistencies among the historical record, and present an interpretation that is compelling because of its transparent and careful reliance on the available historical evidence. Trained to convey their findings within the defined scope of their research in plain language and to defend those findings under close scrutiny, professional historians are well qualified to serve as consulting and testifying experts. ♻️

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