



OBG PRESENTS:

Providing Expert Scientists and Engineers to Support Litigation

Moderator: Maureen Hoke- Vice President, OBG

Speakers

Lawrence D. Malizzi, PG- Senior Manager, OBG

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Types of Experts

Non-Testifying Expert (Consultant)

Not
designated
or deposed

Work is non-
discoverable

Testifying Expert

Designated
and can be
subpoenaed

Work can be
discoverable

Fact Witness

Knowledge
of facts
through
participation
or
observation



Disciplines of Potential Experts

Engineers

- Remediation, Chemical, Wastewater, Structural, etc.

Geologists

- Hydrogeology, Geophysics, Geomorphology, Hydrology

Risk Assessors

- Human Health, Ecological, Fate and Transport, Worker Exposure, etc.

Biologists

- Wetland, Restoration, Benthic, Avian, etc.



Types of Work
Products

**Expert
Reports**

**Field
Sampling/
Studies**

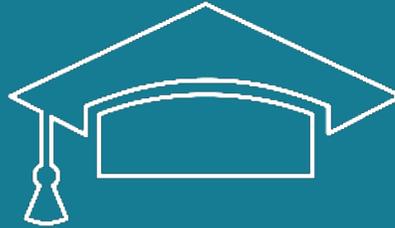
**Deposition
Testimony**

**Courtroom
Testimony**

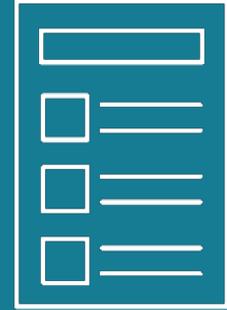


Qualities of a Good Expert

Knowledgeable



Concise



Perceived as Objective



Strong Communication Skills



Georgia Environmental Conference
Selecting and Managing Experts –
The Legal Perspective
August 23, 2017

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KING & SPALDING

Agenda

- Use of Experts
- Timing
- Selecting Experts
- Contracts
- Environmental Trial Tips

Use of Experts

- Case development (consulting experts)
 - Educating the attorney
 - Case strategy
 - Research
 - Analyzing and modeling data
 - Performing experiments/generating new data
 - Selecting and preparing testifying experts
- Testimony (testifying experts)
- Settlement

Timing

- Consulting expert should be hired early
 - Review historical and technical data
 - Technical interpretation of environmental laws & regulations
 - Develop early discovery strategy

Pleadings and Discovery

- Assist in development of
 - Pleadings (answer, counterclaim)
 - Discovery responses (e.g., interrogatories, request for admissions (RFA) and request for production of documents (RFP))
 - Affirmative discovery
- Review and analyze data and information from discovery responses

Testifying

- Prepare expert reports, opinions and trial exhibits
- Communication skills and credibility essential
- “Prestige factor” important to judge’s “Gatekeeper” role – *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2792-94 (1993)

Selecting Experts

- Assess need based on roles and responsibilities
- Independent
- Prior to selection, check:
 - References
 - Previous testimony
 - Prior publications
 - Attorneys that have worked with them
 - For disciplinary actions and suspensions

Contracting Issues

- Retained by and under direction of attorney
 - Work product and privilege
- Defined scope of work
- Rates
- Insurance and indemnification

Confidentiality Issues

- Anything in writing may be discoverable
- Imminent and substantial endangerment
- Sampling data

Environmental Trial Tips

- Expert site visit
- Leading questions on qualifications
- Be professorial

Preparing Expert for Deposition and Trial

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General Rules

- ▶ Honesty
- ▶ Consider the question
- ▶ Think about your answer
- ▶ Do not answer confusing or compound questions
- ▶ Do not ramble
- ▶ Do not guess, speculate, or assume
- ▶ Bring your reports
- ▶ Ask for breaks
- ▶ Always read & sign

Preparation by Expert

- ▶ Review your CV
- ▶ List of previous cases
- ▶ Review reports
- ▶ Review data
- ▶ Review treatises and other documents relied upon
- ▶ Review any relevant depositions
- ▶ Review other expert reports
- ▶ Consider your rebuttal opinions

Meeting with Attorney

- ▶ Review Opinions
- ▶ Discuss any weaknesses of opinions and how to address
- ▶ Review opinions of opposing expert and rebuttal
- ▶ Discuss strategies and goals of opposing counsel
- ▶ Discuss issues that opposing counsel may raise
- ▶ Address questions and concerns

Deposition

- ▶ Neutrality
 - ▶ Opinion based on scientific data, industry methodologies, training & experience
- ▶ Clearly articulate opinions
- ▶ Calm, cool & collected
- ▶ Do not testify outside area of expertise
- ▶ Beware of hypotheticals
- ▶ Listen to objections
- ▶ Privileged documents & communications

Video Deposition

- ▶ Consider the Jury
- ▶ Impeachment
- ▶ Tone
- ▶ Facial expressions
- ▶ Appearance

Trial Testimony

- ▶ Review deposition testimony
 - ▶ Discuss any issues that need to be addressed
 - ▶ Possible impeachment
- ▶ Discuss possible cross examination questions
- ▶ Know your audience
- ▶ Use demonstrative aids
- ▶ Refer to reports
- ▶ Confidence not arrogance

Georgia Environmental Conference

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**Maintaining Confidentiality
in Litigation**

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Overview

- **Attorney-Client Privilege**
- **Work Product Doctrine**
- **Privilege Log**
- **Joint Defense Agreement/Common Interest Doctrine**
- **Witnesses**
- **Experts**

Introduction

- **litigation claims by residents**
- **enforcement by state and federal governments**
- **case involves use of multiple experts and others with knowledge**
- **opposing counsel will want to discover all of the underlying information**
- **will assert claims of privilege and work product to protect information**

Attorney-Client Privilege

- **oldest privilege**
- **encourages full communications**
- **not limited to communications directly with lawyer**
- **narrowly Construed**

Attorney-Client Privilege

- **What Is It?**
 - **communication**
 - **made between a lawyer and a client**
 - **in confidence**
 - **for the purpose of seeking, obtaining or providing legal advice to the client**

Attorney-Client Privilege Waiver

- **Absolute Unless Waived**
- **Waiver**
 - **Client disclosure to unrelated third party**
 - **Failure to claim the privilege or object to disclosure**
 - **Subject matter of a privileged communication is placed in issue**

Work Product Doctrine

- **What Is It**
 - materials prepared in anticipation of litigation
 - can be prepared by the party's attorney, consultant, surety, indemnitor, insurer or agent
- **Types**
 - facts
 - opinions
- **Protection**
 - opinion
 - fact

Work Product Waiver

- **Intangible and opinion work product is absolute unless waived**
- **Tangible and other work product is discoverable upon showing of substantial need and undue hardship in obtaining equivalent**

Distinctions Between Privilege and Work Product Doctrine

- **Attorney-Client Privilege protects your communications**
 - Protection is absolute
- **Work product protects only trial preparation materials**
 - Protection is not absolute

Joint Defense Agreements

- **Based on same principles as the A-C Privilege**
- **lawyer shall not reveal information relating to the representation of a client**
- **extend the attorney-client privilege to situations concerning communications between parties sharing common legal, and sometimes business, interests.**

Privilege Log

- **documents Withheld Have to be Identified and disclosed to opponent**
- **privilege log provides a party with "sufficient information to evaluate a claim of privilege or work-product protection, and to allow a court to rule on a claim of privilege without having to review the allegedly protected document itself."**
- **penalty for Failure to Produce Compliant Logs: Waiver**

Lay Witness vs. Expert Witnesses

- **lay witness vs. expert witness**
- **expert witnesses link the testimony of “lay” fact witness with causation or liability**
- **if you use or designate experts improperly, you may accidentally waive privilege**

Discovery of Experts Work

- **testifying experts**
- **consulting experts**

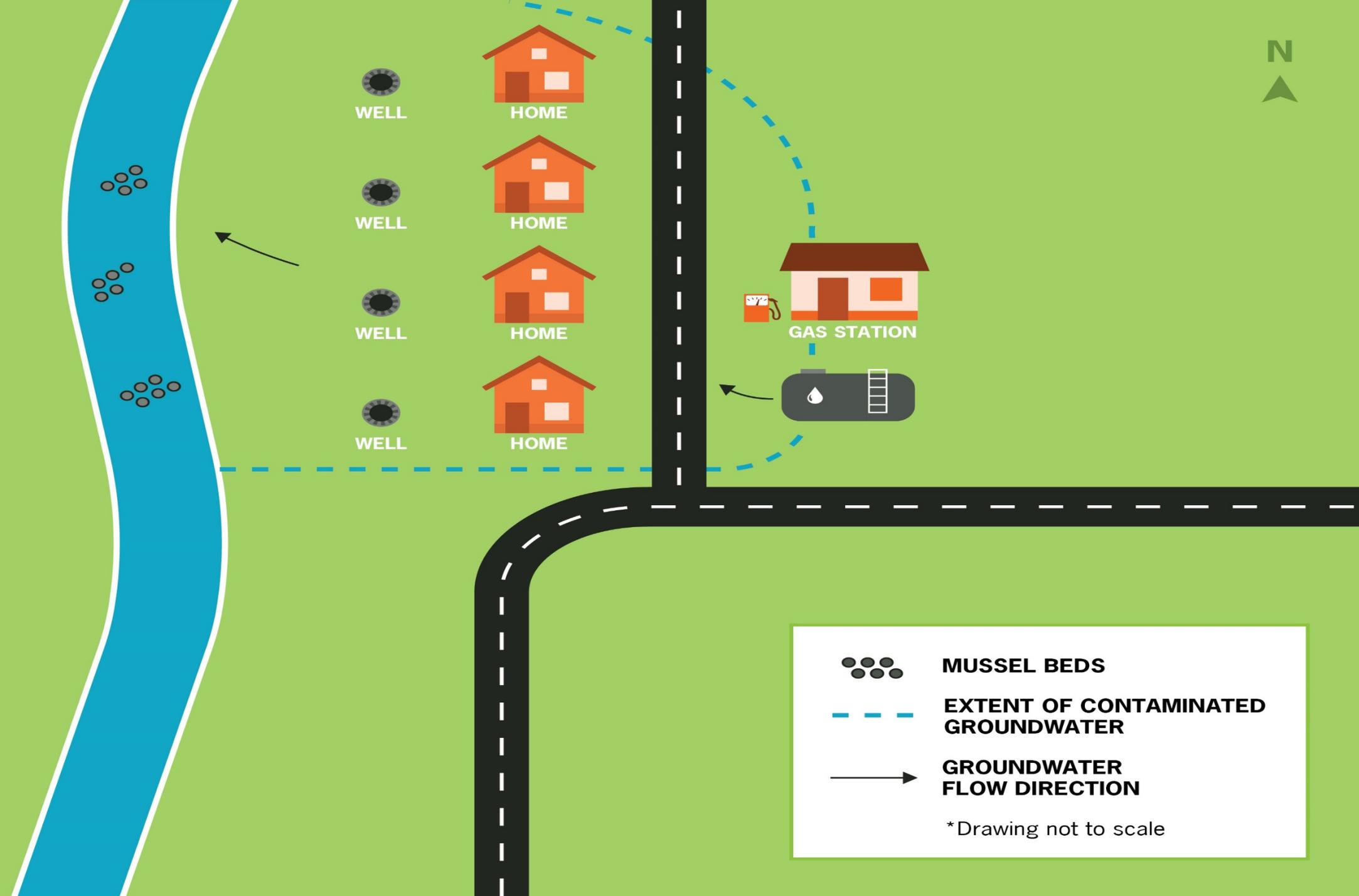


Example Environmental Litigation Case

Oil company X operates a gas station that is located adjacent to a residential community with individual groundwater wells used for drinking water. The gas station also borders a creek that contains endangered mussels. During the installation of a new a 10K gallon unleaded gasoline underground storage tank (UST), Fuel Supplier Y mistakenly overfilled the new UST, which was not yet connected to all the associated piping. Consequently, there was a release of unleaded gasoline into the soil and groundwater, which included the constituents of benzene, toluene, ethylbenzene and xylene (BTEX) and methyl-tert-butyl ether (MTBE). The contamination migrated via the groundwater to the residential wells, as well as, the adjacent creek. Surface water and sediment within the creek were impacted.

Based on these alleged facts, the residents filed a class action law suit for impacts to their drinking water supply. The state issued a cleanup order for contamination to the groundwater and creek. The state and US Fish and Wildlife Service (USFWS) filed a Natural Resource Damage (NRD) claim for alleged injury to the mussels. Oil Company X and Fuel Supplier Y retained separate counsel to address the contamination and NRD legal matters. Both law firms retained hydrogeology, remediation, human health and ecological risk, and mussel experts to support the defense of the respective clients. Also, Oil Company X filed a claim for property damages/diminution against Fuel Supplier Y and both sides have retained counsel and applicable experts.





	MUSSEL BEDS
	EXTENT OF CONTAMINATED GROUNDWATER
	GROUNDWATER FLOW DIRECTION

*Drawing not to scale



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Questions?

Thank you!