

Ethics and the Testifying Expert

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*“Yeah and Nay –
Each Hath His Say;
But God He Keeps the Middle Way”*
Herman Melville – The Conflict of Convictions

The expert met not once, but twice with plaintiff’s counsel, each time spending no less than 90 minutes reviewing documents and discussing details of the case.

At the conclusion of the second meeting, having reviewed litigation strategy and internal memos, the expert pronounced that he could with absolute confidence and certainty testify on the plaintiff’s behalf. The defendant had clearly violated their own written policies and guidelines.

As a result of chasing, confronting, and fighting with a suspected shoplifter, a wrongful death had occurred.

Absolutely.

Positively.

Scout’s honor.

After careful deliberation and consideration, the law firm opted to retain another expert that they felt had more practical experience and a better rounded background.

So, what did the first expert do?

He approached the firm representing the defendant, was retained by them and subsequently gave testimony under oath directly contradicting his previous opinions.

In the face of such moral equivalency, I am reminded of a very old joke- the punch line of which is: “We’ve established what you are. Now we’re just haggling about price.”

The use and reliance upon expert witnesses in civil litigation has grown from a groundswell in the mid to late twentieth century, to a virtual explosion in the 21st.

Almost every major case now involves the use of “dueling experts”.

What is often left unexamined, however, is the inherent potential for conflict between attorneys and experts.

As officers of the court, good lawyers are expected to zealously represent their clients.

Whether for plaintiff, or defense, this representation is often by its very nature subjective.

Counsel works to present their case in the very best light to achieve optimal outcome.

In stark contrast, the expert witness must be objective. The experts’ role is to offer opinions based on well established practices within their field and based on their training and experience.

“High stakes” law suits where both parties are locked in a sustained fight and where outcomes carry significant financial rewards or losses lead in turn to high expectations.

Enter the “professional expert” he or she in almost any field and on almost any subject, who tailor their opinions not to the facts, but rather to suit the needs and respond to the pressure and demands of the attorney.

Such unethical practitioners are not hard to identify.

They are typically characterized as appearing regularly, disproportionately or exclusively either on behalf of plaintiff or defendant.

They are generally intransigent and unwilling to concede even the most minor elements of a fact pattern.

They typically move further and further out “on a limb” and away from mainstream practices, protocols, and theories within their own field.

A few years ago, I testified at a trial on behalf of the defense in a case involving an assault at a shopping mall.

The expert for the plaintiff had no prior experience concerning security and shopping centers. He had never been consulted on crime in that unique environment, never conducted a security audit or review of a mall, never lectured on the subject, never drafted “post orders” for retail security officers, nor conducted training for same.

The plaintiff’s expert offered the opinion that the assault in question was foreseeable and preventable. He also offered up his own unique position as to why in “hundreds” of civil cases involving premise liability stemming from a third party criminal act he had never once appeared for a defendant.

It would, he informed the jury gravely, simply be immoral.

There could never ever be a defense in such a case.

The judge admonished the witness, although I hardly thought it necessary.

Under direct examination by a skilled counsel, I explained my own background in the field, explained that there had been no prior or previous crimes of even a remotely similar nature previously on the property and went on to point out that the assault in question was observed and interrupted by a mall security officer whose quick response not only saved the victim from further harm, but prevented her successful abduction from the parking lot and led to the subsequent arrest, identification, and successful criminal prosecution of the assailant.

The jury returned a verdict for the defense before my return flight home touched down on the tarmac.

So, why do questionable “experts” with dubious qualifications and extreme positions outside the norm of their own disciplines continue to regularly grace the witness stand?

Let me emphasize that within my own area of expertise, I regularly encounter expert witnesses opposite me whether for defense or plaintiff, for whom I have the greatest respect and whose characters are beyond reproach.

Still, in almost every profession there exists a number of experts whose approach and conduct is questionable, if not unethical.

Again, we are confronted with the reality of the “expectations game”.

Are dubious “experts” willingly compromising their integrity for economic gain, or are they “nudged” into staking out more extreme positions by zealous attorneys caught up in a high stakes poker match which must be won at all costs and without regard to consequences.

The answer appears to be a “chicken or egg” argument.

Over the last 20 years, I have worked with a significant number of attorneys across the United States and on both sides of the aisle.

I am happy to report, that for the most part, these lawyers conducted themselves (as befits an officer of the court) in an ethical, responsible and courteous manner

The exceptions to that rule, however, are troubling and worth noting.

Some time ago, I was involved in a complex case on behalf of the plaintiff and involving an assault in a parking lot.

I gave a deposition in which I specifically faulted one of two named defendants as having erred in failing to exercise due diligence by retaining a security company that was neither licensed nor insured in the state.

I further opined that the same defendant failed to obtain any sort of security plan from the contractor, nor advise the contractor of specific known risks on the subject premises.

The principle defendant in the case was dismissed via a complex and last minute workman’s comp ruling, and my client, the plaintiff’s attorney was on the phone to me demanding that I “revise” my opinions to focus blame on the only remaining defendant.

I explained that I had already given deposition testimony concerning my findings.

“So change your opinion.” Ordered the lawyer. “That’s what I’m paying you for.”

As patiently and politely as I could manage, I explained that in fact, he was “paying” for my 36 years of training and specialized expertise. That I had spent considerable time reviewing all Discovery materials related to the matter, and had given my opinions under oath.

In a strange bit of irony, the attorney in question sat on the ethics committee of his state bar association. Granted, it is a very small state.

Recently, I was contacted by an enthusiastic plaintiff's counsel who relayed a fact pattern concerning a vicious assault on his client in a bar parking lot.

The establishment in question was "notorious" alleged the attorney. The site of numerous assaults and brawls. His client had been attacked by a gang who, without provocation, beat him mercilessly and caused horrendous and permanent damage.

After extensive conversation and questions by me, I agreed to undertake a review of discovery.

I was more than surprised after spending almost 16 hours reading well in excess of 2,000 pages, including depositions, police reports, investigative files, and calls for service by police to the location, to find a very different set of facts .

There were comparatively few prior police calls to the location in question.

The assault happened after the bar closed, and police determined that it took place as a direct result of actions by the plaintiff who also initiated the fight by throwing the first punch.

Employees of the bar rushed outside and actually held the participants until the police arrived.

The plaintiff refused to co-operate with any police investigations.

I returned the materials to counsel and expressed my regret at being unable to assist him in the matter.

I have no doubt that the lawyer in this case had been swayed by the extensive nature of the injuries to his client. The level of the injuries does not, however, change the facts. This attorney was either shopping for a "flexible" expert who would not let the facts get in his way, or he had blinded himself to the realities of the case.

Perhaps even more troubling are situations where counsel seeks to "gild the lily" by encouraging an expert to overreach in their opinions, even though the opinions may be favorable.

In an interesting and disturbing example of not taking yes for an answer, I had a case some time ago in which I rendered a favorable opinion to defendants in a homicide case.

The crime was in my estimation neither foreseeable nor preventable.

The victimology in this instance conformed to a pattern of remarkably similar crimes happening all across the United States with special circumstances that made it particularly difficult either to anticipate or prevent, a fact well documented and established by local, state and federal law enforcement agencies. Never the less, one of the co-defendants (who had their own expert and with whom I had no relationship) insisted that I meet with them.

The meeting was terminated abruptly when one of the lawyers (thankfully, not my client) began to pressure me to suggest or agree with facts that I did not believe to be supported by evidence.

What was significant here was that the details this attorney wanted me to agree with in no way altered or lessened the significance of my findings concerning the affirmative defense in this case, nor the particular and anomalous nature of the offense which made it in my opinion neither foreseeable nor preventable.

There is a bright line between being an aggressive advocate for your cause and running the risk of attempting to suborn perjury.

So how do experts and attorneys successfully walk the tightrope of their relationships in order to accomplish their respective parts in the litigation process in a manner that is both effective and appropriate?

For the Attorney:

Take the time to find an expert with practical experience in dealing with a close proximity to the fact pattern you are dealing with.

Confirm the expert will take a balanced and objective approach and that they have a curriculum vitae that reflects that fact.

Keep the expert in the information loop as discovery proceeds and avoid withholding information. No case has ever been lost by failing to review and analyze its potential weaknesses and vulnerabilities as well as the strengths. A good expert should help you with both.

For the Expert:

Don't hesitate to decline cases. An expert who takes every case they are offered is an expert who has lost objectivity and compromised standards.

Be candid with your client. Don't hesitate to point out the good, the bad, and the ugly concerning your opinions in the subject litigation. Neither you nor your client want any "surprises" on the witness stand.

Stay current. Experts in any discipline who are neglecting to be "life-long learners" fail both themselves and the clients they serve. Continuing education in your chosen field is essential.

Clear communications and mutual respect between counsel and expert are the fundamental foundation upon which lasting and effective partnerships are built.

Observing these guide lines while adhering to professional standards of conduct will help to ensure a positive experience and beneficial outcome for both counsel and expert.

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