Proposed: A Lawyer's Code of Expert Ethics

By Robert Ambrogi

Ask five lawyers an ethics question about the use of expert witnesses and you could well end up with five different answers. The problem is not that the lawyers are uninformed. It is that there is little formal guidance for them to follow.

We believe it is time to change that.

Over the past year, we published a series of articles involving ethics and the use of expert witnesses. Now, we want to move the conversation a giant step forward. Today, we present our draft of a code of ethics for lawyers to follow in using expert witnesses. Next month, we will offer a parallel draft code for experts.

We hope these drafts will be the opening salvos that will launch broader discussion and debate among lawyers, experts, academicians and others. Consider our proposals the start of a conversation, one that might result in the legal profession's formal adoption of a clear and concrete set of standards for lawyers and experts to follow in litigation.

The Problem, As We See It

Existing ethical rules are all-but silent on the topic of expert witnesses. They address experts only in their broad mandates that lawyers not tamper with the truthfulness of witnesses or pay fees to non-expert witnesses.

To some extent, courts fill in this gap. Through their interpretations of ethical, procedural and evidentiary rules, judicial opinions provide much-needed guidance to lawyers and experts alike.

Trial lawyers also help fill this gap through a trial-and-error process of ethics by consensus. Through legal-education seminars, written articles and word-of-mouth, they give shape to general understandings of what is and is not acceptable in the use of expert witnesses.

Taken together, these common-law and practice-generated mileposts can provide useful guidance. But they are at best a patchwork, varying widely from jurisdiction to jurisdiction. Even within a single jurisdiction, these informal standards may be inconsistently applied and frequently misunderstood.

Lawyers are not alone in this. Experts, too, lack formal guidance on the ethical parameters of their work. While some professional associations maintain informal or aspirational codes of conduct, no standardized codes provide broadly accepted norms.

We have spoken to many lawyers and experts who believe more guidance is needed in this pervasive area of practice. To get the conversation started, we propose the following code for lawyers. Next month, we will follow-up with a proposed set of standards for experts.

A Proposed Code of Ethics

I.   Expert Impartiality

A.   A lawyer shall do nothing to interfere with an expert witness's independence and objectivity. A lawyer shall not attempt to influence the content of an expert witness's testimony.

B.   A lawyer shall not seek to pressure an expert witness, directly or indirectly, to change an opinion, even when the opinion is detrimental to the lawyer's case.

C.   A lawyer shall not induce an expert witness to offer opinions and testimony beyond the scope of the expert's expertise.

D.   A lawyer shall not knowingly permit an expert witness to present testimony that is false or misleading.

E.   A lawyer shall not, directly or through a third party, seek to discourage an opposing party's expert witness from testifying or attempt to influence the testimony of an opposing party's expert.

F.   A lawyer shall not manipulate an expert's opinion by withholding relevant information.

G.   A lawyer may ethically ask an expert witness to disregard certain evidence or to assume the existence of certain evidence for the purpose of framing a hypothetical scenario on which to obtain the expert's opinion.

H.   A lawyer may ethically assist an expert witness to prepare for trial or deposition, provided the lawyer does not seek to influence the substance of the expert's testimony or interfere with the expert's ability to testify truthfully and accurately.

I.   In preparing the expert, the lawyer may tutor the expert on the issues of fact and law at issue in the case. The lawyer may inform the expert of the questions to be asked during direct examination and of the questions likely to be asked on cross examination. The lawyer may counsel the expert on demeanor, language and form of answers.

II.   Confidentiality

A.   In communicating with expert witnesses, the lawyer shall at all times ensure that the preservation of client confidences remains paramount.

B.   A lawyer shall fully inform an expert witness on issues pertaining to client confidentiality and to confidentiality as it applies to lawyer/expert communications. A lawyer should ensure that the expert witness understands that, in general, all of their communications may be subject to disclosure, either through discovery or testimony.

III.   Fees

A.   A lawyer may pay an expert witness an hourly fee and may pay a flat fee provided it reasonably reflects the value of the expert's services and expertise.

B.   A lawyer shall not offer to pay or pay an expert witness a fee that is in any manner contingent on the content of the testimony or the outcome of the case.

IV.   Ex Parte Communications

A.   A lawyer shall not contact an opposing party's expert witness outside the process of formal discovery or otherwise engage in ex parte communications with an opposing party's expert witness.

B.   When a lawyer has any reason to believe that an expert has been retained in any fashion by another party to the lawsuit, the lawyer should have no further ex parte contacts with the expert.

V.   Conflicts of Interest

A.   A lawyer should withdraw from a case if the opposing side's expert witness is a former client, unless the expert consents in writing to the lawyer's continuing involvement in the case and acknowledges the potential for disclosure of confidential information obtained through the prior representation.

B.   A lawyer should refrain from retaining an expert who has opposed the lawyer or his firm in another case insofar as it may force the lawyer to alter his position on the expert's credibility.

C.   A lawyer who retains an expert witness should request that the expert refrain from accepting potentially adverse engagements for the duration of the retention.

D.   A lawyer shall not serve as advocate in a case in which the lawyer or a member of the lawyer's firm may be called as an expert witness.

VI.   Professionalism

A.   A lawyer who retains an expert witness shall ensure that the expert fully understands the standards applicable in the jurisdiction to the use and admissibility of an expert's opinion.

B.   A lawyer who retains an expert witness shall prepare and require the expert to sign a retention letter fully setting forth the scope of the retention and the expert's obligations with regard to truthfulness, independence and confidentiality. The retention letter shall also define the parameters of the relationship, including its scope and limitations and the expert's responsibilities.

C.   A lawyer shall not use expert testimony as subterfuge to introduce evidence that the court has already excluded or ruled inadmissible. A lawyer is permitted to ask the expert to base an opinion on inadmissible evidence if it is

of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

D.   A lawyer shall not identify someone as an expert witness before the expert is retained or after the expert has resigned or is terminated.

E.   A lawyer shall not retain an expert witness solely to exclude the expert from being retained by an opponent.

F.   A lawyer shall not seek to induce a retained expert to switch sides in a case or to alter his opinion or analysis.

G.   A lawyer shall not draft or dictate the contents of an expert's written report. A lawyer may properly guide an expert on the format of the report and the issues to address.

H.   A lawyer shall not use complex scientific and technical expert testimony to complicate or obscure the issues in a case.

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*This article was originally published in **BullsEye,** a newsletter distributed by IMS ExpertServices, the premier expert witness search and services firm.*