

# Updated: Code of Ethics for Expert Witnesses

*By Robert Ambrogi*

In two articles we published last year, we sought to address the lack of ethical standards governing the relationship between attorneys and expert witnesses. In the hopes of generating broader discussion of these issues, we proposed two codes, an [Attorney's Code of Expert Ethics](#) and an [Expert Witness Code of Ethics](#).

The response from our readers was significant. A number of you posted comments and sent e-mails offering both praise and criticism for the proposals, along with many constructive suggestions for improving them.

Based on your feedback, we revisited our proposed codes. What follows is a revised version of our proposed code for experts. We are also publishing a revised version of our code of expert ethics for attorneys. Both revised codes are attempts to incorporate the feedback we received from so many of you.

## **Why Do This?**

As we said when we first proposed the codes, our impetus was a series of articles we published involving ethics and the use of expert witnesses. We realized there are many ethical grey areas here, with little formal guidance for either attorneys or experts.

Our proposed codes were attempts to initiate a conversation. We saw them as opening salvos that would launch broader discussion and debate among attorneys, experts, academicians and others, perhaps leading ultimately to the legal profession's formal adoption of concrete standards for attorneys and experts to follow in litigation.

## **Your Response**

Your response was overwhelmingly in support of the need for these codes. While some readers took issue with specific sections, almost everyone who commented endorsed the effort. "Wonderful," wrote one commenter. "Now how do we promulgate and enforce these?" Said another: "Developing a code of ethics for expert witnesses is important and elevates their standing, commitment and integrity."

Note that we said *almost* everyone endorsed the effort. Some readers saw it as unnecessary. "If an expert or attorney needs this code," wrote one, "the attorney should not practice law, and the expert should not be an expert."

With regard to our proposed code for experts, a significant amount of the feedback related to the section on expert impartiality. Read through the [comments](#) to that article and you will find a vigorous debate about the extent to which an expert can take sides in a case. Several comments suggested that there is nothing wrong with an expert being partial towards a particular party or position, provided that partiality does not color the

expert's independent and honest opinion. Others argued that an expert should maintain strict impartiality.

We were convinced by those who argued against strict impartiality. We have revised our proposed rule to indicate that there is nothing wrong with taking sides in a case, provided the expert does not let advocacy interfere with the ability to provide an independent and honest opinion.

Another provision that prompted discussion pertained to our proposed rule III.C., pertaining to the circumstances under which an expert may charge a nonrefundable retainer. (We emphasize that the discussion applies only to *nonrefundable* retainers, not retainers in general, which are common.)

One person expressed a "small quarrel" with our proposed rule, which said that an expert may charge a nonrefundable retainer only in cases where the expert would be precluded from accepting other clients. Others agreed. We agree also. We recognize there may be other circumstances in which it is fair to charge a nonrefundable retainer. Thus, we've revised that rule to reflect this.

Other comments led us to make various other revisions to our earlier proposal. As you read through the revised version that follows, deletions are marked with strikeouts and new language with italics.

As with the first draft, we hope you will comment on this version and continue to carry the conversation forward.

## **Proposed Code of Ethics for Expert Witnesses**

### **I. Expert Impartiality**

- A. An expert witness shall at all times serve with independence and objectivity, without regard to the consequences to the client.
- B. ~~A~~ *testifying* expert witness shall impartially assist the court on relevant matters within the expert's area of expertise.
- C. An expert should fully cooperate with retaining counsel, but shall remain independent and professional and not ~~become the client's advocate~~ *let advocacy interfere with independent and honest judgment*.
- D. An expert witness shall present a ~~complete~~ *representative* and unbiased picture of the research relevant to the case and to the expert's opinions.

### **II. Confidentiality**

- A. An expert witness shall strive to understand the rules of confidentiality applicable to the case and jurisdiction in which the expert is retained.
- B. An expert witness should assume that all communications with the client or with retaining counsel may be subject to disclosure through discovery and testimony, unless instructed otherwise by retaining counsel.

### **III. Fees**

- A. An expert witness shall be entitled to fair reimbursement for all work performed. An expert may charge fees based on hourly billing and may charge a flat fee provided it is based on the reasonable value of the work.
- B. An expert witness shall neither contract for nor accept a fee that is contingent on case outcome.
- C. An expert may ethically charge a nonrefundable retainer ~~in cases where the expert may be precluded from accepting other clients,~~ *provided it is fair and reasonable under the circumstances of the particular engagement.*
- D. An expert witness shall remain free from any financial inducements that might interfere with the ability to testify truthfully and impartially.

### **IV. Ex Parte Communications**

- A. An expert *who has been retained in a matter* shall not communicate with adverse counsel except through the process of formal discovery and judicial procedure.
- B. An expert witness *who has been retained in a matter* shall not engage in ex parte communications with the judge or jurors in a case.

### **V. Conflicts of Interest**

- A. An expert may ethically accept concurrent engagements that are both favorable and adverse to the same party, providing the opinions are logically consistent and can be explained. An expert should not accept conflicting engagements, either concurrently or successively, that are factually related.
- B. *Once retained in a matter,* ~~An~~ an expert may not switch sides, even following discharge or release, if to do so would violate the original client's reasonable expectation of confidentiality. This will depend on a number of factors, including the extent of communications between the expert and the original client and the nature and types of information the client provided to the expert.

C. An expert witness should disclose any interests the expert may have in the case or its outcome.

*D. Until an expert is formally retained in a matter, the expert is under no obligation to refrain from communicating with any party or its attorney.*

## **VI. Professionalism**

A. An expert shall accept only engagements that are within the expert's area of competence and training. An expert shall not purport to be an expert in matters in which the expert has limited knowledge or experience, or in any matter in which professional peers with the same level of knowledge and experience would not hold themselves out as experts.

B. An expert shall ensure that all tests, analysis and other operations leading to conclusions and opinions are based on adequate and accepted procedures within the profession. An expert who uses procedures that are considered experimental or controversial should so say in rendering any report or conclusions.

C. An expert witness shall be clear about the strength of the expert's conclusion. An expert witness shall indicate when an opinion is inconclusive because of insufficient research or insufficient data.

D. An expert witness shall update an opinion in light of new information if there is continuing reliance on the opinion. If an expert witness changes an opinion on a material matter after providing a report to the client, the expert shall promptly provide the client with a supplementary report explaining the change.

E. An expert should strive to understand the standards applicable in the jurisdiction to the use and admissibility of an expert's opinion.

F. An expert's written report should reflect the expert's independent analysis and opinion. While an expert and the retaining attorney may discuss the contours, scope and subjects of the report, the final product must conform to the expert's findings and conclusions.

G. An expert witness shall not conceal or destroy documents or evidence that are or may be discoverable.

H. An expert shall not knowingly present opinions or testimony that are false or misleading.

I. An expert witness should not accept the client's characterizations or conclusions without exercising due diligence by inquiring into the underlying facts.

J. The expert witness shall provide opinions that are reasoned and based on the expert's own analysis. The expert shall not unreasonably exclude issues that are material to the client's purpose and within the expert's expertise.

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