

# Updated: An Attorney's Code of Expert Ethics

By Robert Ambrogi

In two articles published here last year, we proposed an [Attorney's Code of Expert Ethics](#) and an [Expert Witness Code of Ethics](#). We hoped our proposals would generate discussion among attorneys and experts alike. That they did, with a number of readers posting comments and sending e-mails offering both praise and criticism for the proposals.

You talked, we listened. What follows is an updated version of our proposed code for attorneys. We are also publishing a revised version of our code of ethics for experts. 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 these codes, our impetus was a series of articles we published involving ethics and the use of expert witnesses. We realized there are many 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

The response from our readers was overwhelmingly in support of the need for these codes. While some readers quibbled with specific sections, almost everyone who commented endorsed the effort. "Wonderful," wrote one commenter. "Now how do we promulgate and enforce these?"

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."

Of our proposed code for attorneys, the sections that generated the most comments were two pertaining to conflicts of interest, sections V.A. and V.B. In V.A., we proposed that an attorney should withdraw from a case if the opposing side's expert is a former client, unless the expert consents to the attorney's continuing involvement. In V.B., we proposed that an attorney should not retain an expert who the attorney opposed in another case if the attorney would have to alter his position on the expert's credibility.

Many readers expressed the opinion that these sections are not needed or are overly broad. "I view it as a professional compliment when an opposing attorney on one case

subsequently seeks to hire me on an unrelated case at a later date," one expert wrote. "It means that I was a worthy and credible expert."

Another commenter wrote: "V.B. needs clarification – counsel should exclude a formerly opposing expert ONLY if counsel had previously argued that the expert was not credible on the particular subject matter of the case."

This last comment speaks to our intent in proposing V.B. We did not mean to suggest that an attorney should *never* retain an expert who was on the opposing side in a former case. To the contrary, we're all for it, when appropriate. We continue to believe, however, that an attorney who *attacked the credibility* of an expert in one case should think twice before retaining that expert in another case. We have revised that section in an attempt to be clearer about this.

We also stick to our guns regarding V.A. If an opposing expert is a former client of the attorney, the attorney could face a dilemma between zealously representing his current client and protecting the confidences of his former client, the expert.

## **Other Changes**

Another proposal that generated disagreement was VI.G., wherein we said, "An attorney shall not draft or dictate the contents of an expert's written report." Several comments said they saw nothing wrong with an attorney drafting or assisting in the drafting of the report, provided the report reflected the opinion of the expert and the expert signed off on it. That makes sense, so we've revised the language to reflect that.

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.

## **A Proposed Code of Expert Ethics**

### **I. Expert Impartiality**

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

B. An attorney shall not seek to pressure an expert witness, ~~directly or indirectly,~~ to change an opinion, even when the opinion is detrimental to the attorney's case. *This rule should not be construed as intended to inhibit healthy*

*discussion and debate between attorneys and experts or to prohibit an attorney from testing and challenging an expert's opinions.*

- C. An attorney shall not induce an expert witness to offer opinions and testimony beyond the scope of the expert's expertise.
- D. An attorney shall not knowingly permit an expert witness to present testimony that is false or misleading.
- E. An attorney 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. An attorney shall not manipulate an expert's opinion by withholding relevant information.
- G. An attorney 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. An attorney may ethically assist an expert witness to prepare for trial or deposition, provided the attorney 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 attorney may tutor the expert on the issues of fact and law at issue in the case. The attorney 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 attorney may counsel the expert on demeanor, language and form of answers.

## **II. Confidentiality**

- A. In communicating with expert witnesses, the attorney shall at all times ensure that the preservation of client confidences remains paramount.
- B. An attorney shall fully inform an expert witness on issues pertaining to client confidentiality and to confidentiality as it applies to attorney/expert communications. An attorney 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. An attorney 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. *An attorney shall pay all fees due an expert witness in a timely manner.*

B. An attorney 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.

C. *State codes of professional responsibility contain specific provisions on attorneys' payments of court costs and litigation expenses. An attorney's payments to an expert witness should conform to the requirements of the applicable code.*

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

A. An attorney 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 an attorney has any reason to believe that an expert has been retained in any fashion by another party to the lawsuit, the attorney should have no further ex parte contacts with the expert.

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

A. An attorney should withdraw from a case if the opposing side's expert witness is a former client, unless the expert consents in writing to the attorney'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 alter his position on the expert's credibility.~~ *If an attorney challenges the credibility or veracity of an opponent's expert witness in one case, the attorney should not subsequently retain that same expert as his own in another case involving the same or similar subject of expertise. Doing so could expose the expert to challenge and thereby weaken the attorney's ability to represent his client.*

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

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

#### **VI. Professionalism**

A. An attorney 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. An attorney 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. An attorney shall not use expert testimony as subterfuge to introduce evidence that the court has already excluded or ruled inadmissible. An attorney 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. An attorney shall not identify someone as an expert witness before the expert is retained or after the expert has resigned or is terminated.

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

F. An attorney 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.~~ *In the course of preparing an expert's written report, an attorney may properly guide the expert on the format of the report and the issues to address. The attorney may also assist the expert in drafting the report, provided that the attorney does not dictate the report's ultimate conclusions and that the report accurately reflects the conclusions of the expert.*

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

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