An Expert's Change of Mind Can be Shattering

By Robert Ambrogi

Twice last month, in high-stakes cases with high-profile expert witnesses, the experts reversed gears on their own opinions, potentially shattering the cases in which they were involved. In both instances, the reversals came after the experts became aware of additional facts not previously disclosed to them.

The two cases highlight the ethical quandaries experts face when new information comes to light in a case and the practical quandaries attorneys face when having to confront an expert's change of mind.

In the more dramatic of the two cases, the Kentucky Court of Appeals reversed a $42 million judgment on Feb. 4 against plaintiffs' attorneys in a Fen-Phen class action based solely on the affidavit of mass tort expert Kenneth R. Feinberg, only to have it then revealed that Feinberg had disavowed his own affidavit, saying that if he had known the true facts of the matter, he would have thrown his affidavit "in the waste basket."

In the second case, the former chairman of the U.S. Securities and Exchange Commission, Harvey Pitt, while serving as an expert witness in a securities class action against Fannie Mae, got up and walked out of his own deposition after defense counsel presented him with information that he said could change his opinion about the case. Within days of Pitt's walk-out, a federal judge in Washington, D.C., dismissed him from serving as an expert in the case, saying his walk-out was inappropriate.

Besides their circumstances, these two cases have something else in common – plaintiffs' class action attorney Stanley M. Chesley. In the Kentucky case, Chesley was one of the attorney defendants after having been lead counsel in the underlying Fen-Phen class action. In the Fannie Mae case, Chesley is lead counsel for the plaintiffs.

In Kentucky, a Mistaken Reversal?

The Kentucky case involves a plot twist worthy of a John Grisham novel. In reversing the $42 million summary judgment, the Court of Appeals expressly cited Feinberg's affidavit as the sole piece of evidence that raised enough of a factual issue to require a trial. "Feinberg's affidavit was sufficient to create genuine issues of material fact. … Therefore, reversal is necessary," the court said.

The case grew out of an earlier case, a class action by Kentucky plaintiffs against American Home Products over the diet drug known as Fen-Phen. That case was settled for $200 million. But when the plaintiffs later discovered that their attorneys paid some $127 million of the settlement funds to themselves and others, they sued their former attorneys for fraudulent misrepresentation and breach of fiduciary relationship.

The trial judge concluded that there were no material disputes as to the facts and no need for a trial. He found that the plaintiffs' attorneys had taken fees in excess of what they had agreed to in their retainer agreements. Based on this finding, he entered partial summary judgment in favor of the plaintiffs, awarding them $42 million.

Reviewing the judgment on appeal, the Court of Appeals quoted extensively from the affidavit submitted by Feinberg, who is well known as the attorney who oversaw the September 11th Victim Compensation Fund is now the administrator of the BP Deepwater Horizon Disaster Victim Compensation Fund.

In the 17-page affidavit, Feinberg expressed the opinion that the plaintiffs' attorneys had done nothing wrong in their handling of the settlement funds. "In my opinion, the case was handled properly and ethically," he wrote. "I have seen nothing that credibly suggests any misconduct by the attorneys."

Feinberg's opinion was good enough for the Court of Appeals. His affidavit, the court concluded, was sufficient to create genuine issues of material fact which required that the summary judgment be set aside and the case be scheduled for trial.

What the Court of Appeals apparently did not know, however, was that by then Feinberg had already renounced his own opinion. In a separate proceeding brought by the Kentucky Bar Association to disbar Stanley Chesley for his conduct with regard to the fees in the Fen-Phen case, Feinberg testified that he prepared the affidavit to help Chesley, who was a friend of his, and that he relied on information provided by one of Chesley's Fen-Phen co-counsel.

The transcript of the disbarment hearing showed that, when the trial commissioner asked Feinberg whether it was "safe to say you knew nothing about the actual factual occurrences in this case," Feinberg answered, "Your honor, I'm embarrassed today to say it's safe to say." To that, the trial commissioner responded, "Holy smoke."

Two weeks after the Court of Appeals issued its decision, the trial commissioner issued his report recommending that Chesley be disbarred. In his report, he wrote, "In this proceeding Feinberg disavowed the information which he provided in his affidavit and stated that if he knew what he knows now he would have thrown the affidavit in the wastebasket."

The impact of this revelation remains to be seen. One of the Court of Appeals judges told a news reporter that he could not comment because the case might come back before him. Meanwhile, the attorney for the plaintiffs says she will ask the Kentucky Supreme Court to review the case.

In Washington, an Unusual Walk-Out

Even the federal judge overseeing the case called it "unusual" when former SEC Chairman Pitt got up and walked out of his deposition. Pitt, who is now CEO of the Washington, D.C., consulting firm Kalorama Partners, was retained as an expert for the plaintiffs in a securities class action that alleged Fannie Mae had overstated profits and failed to comply with generally accepted accounting principles.

As a defense attorney deposed Pitt, he asked him about deposition testimony given in 2009 by Donald Nicolaisen, a former chief accountant at the SEC, pertaining to Fannie Mae. Pitt, who had already submitted a 45-page expert's report, responded that he could answer no further questions because he had not known about Nicolaisen's testimony and did not know how it might affect his earlier opinion.

As the defense attorney continued to press for answers, Pitt got up and left the deposition. The defense team quickly responded by filing a motion in federal court to either dismiss Pitt as an expert or order him to continue with his deposition without changing his report.

After considering the motion, U.S. District Judge Richard Leon issued an order on March 4 dismissing Pitt as an expert witness in the case.

What Is to Be Done?

Each in its own way, these two cases illustrate how severe the consequences can be when newly unearthed facts cause an expert to question his or her own opinion. But what should experts and attorneys do in such situations?

In the Harvey Pitt case, Pitt no doubt saw himself as between a rock and a hard place. Joseph C. Gioconda, a litigator in New York City, described it this way: "An expert witness in such a situation has to weigh the pros and cons of each of the two options: Continue to testify in an uneducated way that is potentially embarrassing, or walk out and also be embarrassed."

His advice – advice that seems to reflect the consensus of attorneys and experts – is that experts who find themselves in such a situation should remain and continue to testify, "but add many caveats to the record that they had not had the opportunity to study this new information and therefore should not be expected to testify in any detail about it."

As for the attorneys in the case, the defense counsel responded as most any attorney probably would – by seeking a remedy from the court. For the plaintiffs' attorney, it was either a tactical error or simple negligence for him not to make sure Pitt had all the information he needed in advance of the deposition. Had he done that, the walk-out might never have happened and Pitt might still be his expert.

The Kentucky case is more complicated on a number of levels. With respect to Feinberg, there are many questions surrounding his decision to give an affidavit about something he admittedly knew nothing about.

"This happens all too often," writes Ted Frank, adjunct fellow at the Manhattan Institute Center for Legal Policy, at the blog PointofLaw.com. "Ethics experts often take a set of facts favorably construed by their clients, put on blinders and do not conduct any investigation of the truth of those assumptions, and then issue an opinion that their client did no wrong, and judges accept the opinion without care for the methodology used to reach it, even though the expert essentially assumed the conclusion."

For the attorneys in the case, Feinberg's disavowal raises a knotty procedural question. Because it happened so long after the trial judge entered summary judgment, because it is not formally part of the judicial record, and because the trial judge didn't give the affidavit enough weight in the first place to counter the summary judgment, is it now better to take this issue to the state Supreme Court or back to the trial judge?

As noted above, the plaintiffs' attorney has already said that she intends to take it to the Supreme Court. At least one legal expert agrees with that strategy. Richard Underwood, a professor of legal ethics at the University of Kentucky, told the Louisville Courier-Journal that the Supreme Court should be able to take judicial notice of Feinberg's recantation and reverse the Court of Appeals.

But Ted Frank thinks that is a questionable strategy and that the plaintiffs should instead go back to the trial judge, who "can simply point to Feinberg's disavowal and issue the same result."

To write the final chapter for either of these cases, we may need John Grisham to step in.

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