

Proposed: Expert Witness Code of Ethics

By Robert Ambrogi

A popular perception is that expert witnesses are hired guns – that lawyers shop around until they find an expert willing to say whatever needs to be said. The perception is unfounded, of course. Yet it underscores the need for lawyers and experts alike to be vigilant in maintaining high standards of ethics.

But what are the standards they should maintain? For lawyers, existing ethical rules are all-but silent on the topic of expert witnesses. For experts, there is no formal code applicable to all. A handful of professional associations provide guidelines applicable to their members, but such guidelines are rare and lack uniformity.

In an article we published last month, we sought to address this gap in standards by proposing a [code of ethics for lawyers](#) to follow in using expert witnesses. This month, we follow that by proposing a parallel code for experts.

Neither of these proposed codes is intended to suggest that either lawyers or experts are unethical. Rather, they are meant to provide all involved with clearer guidance in an area in which little now exists, and thereby shore up public confidence in the legal system.

As we said last month, we hope these drafts will be the opening salvos that will launch broader discussion and debate among lawyers, experts, academicians and others. Consider these proposals sparks to fuel a larger 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.

Let us know what you think by adding your comments below.

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. An 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.
- D. An expert witness shall present a complete 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.
- 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 shall not communicate with adverse counsel except through the process of formal discovery and judicial procedure.
- B. An expert witness 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. 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.

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.

*This article was originally published in **BullsEye**, a newsletter distributed by IMS ExpertServices, the premier [expert witness delivery](#) firm.*