

1993

## Ethics and Experts

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### Recommended Citation

Terry O'Reilly, *Ethics and Experts*, 59 J. AIR L. & COM. 113 (1993)  
<https://scholar.smu.edu/jalc/vol59/iss1/4>

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## ETHICS AND EXPERTS

TERRY O'REILLY\*

No lesson seems to be so deeply inculcated by the experience of life as that you never should trust experts. If you believe the doctors, nothing is wholesome: If you believe the theologians, nothing is innocent: If you believe the soldiers, nothing is safe. They all require to have their strong wine diluted by a very large admixture of insipid common sense.<sup>1</sup>

**E**XPERT WITNESSES are an ethical problem. They are inevitable, irreplaceable, chillingly expensive and, perhaps worse, they have assumed a commanding position in tort aviation litigation. In more complex matters, the lawyers are sometimes reduced to the position of a General Staff officer, simply managing brigades of expert testimony. It is the expert whose persuasive abilities direct the course of the trial, not the arguments of counsel. We know that juries distrust lawyers and look to the witnesses for convincing evidence. In this context, it is the advocate/expert who commands the field, regardless of the skill of the questioner.

What, then, are the ethical rules regarding the use of this powerful figure, the academically endowed superwitness who, by law, can depart from the facts and offer opinion as if it were truth?

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<sup>1</sup> Letter from Robert, Marquis of Salisbury, to Lord Lytton (June 15, 1877).

This paper discusses some thoughts on this little-explored topic, with a few suggestions for further thought.

### THE VIEW FROM THE WITNESS CHAIR

It is pointless to rely upon the professional ethics of experts, even where such a code exists, because most such codes have no binding effect and are often politely disregarded.<sup>2</sup> Apart from the broad requirement that a witness not give false testimony,<sup>3</sup> there is no binding legal statement of ethics for witnesses. Unless the expert is bound by a personal code of ethics or the rare professional code, specific to his own discipline, the lawyer cannot reasonably expect a witness to police himself.<sup>4</sup>

In all fairness to the expert, there is an unresolved dilemma that faces every expert and no agreed solution is to be found at law.

At the root of many of the ethical dilemmas experienced by scientists who become professionally involved in the law's adversarial system is the clash of two cultures. Law is an adversary process with a different set of operating procedures and values than science. For example, attorneys are free to interpret scientific evidence in a way that supports their client. Indeed, it is their ethical obligation to do so. Scientists, however, would not tolerate the arbitrary presentation of data or the deliberate concealment of unfavorable experimental outcomes. In science, the truth, wherever it may lead, serves everyone's interest. In the legal system, that which serves the interest of one's client is what counts as the truth.<sup>5</sup>

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<sup>2</sup> Reference to the Hippocratic Oath is generally regarded by physician experts as quaint, at best, and as a meaningless historical allusion, at worst.

<sup>3</sup> "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." FED. R. EVID. 603.

<sup>4</sup> Few professions have given the subject much thought. Forensic scientists have explored the field, as have psychologists, but beyond this the various professions seem to rely upon the law to police this problem.

<sup>5</sup> Mark S. Frankel, *Ethics and the Forensic Sciences: Professional Autonomy in the Criminal Justice System*, 34 J. FORENSIC SCI. 763 (1989).

Is the expert a scientifically detached observer of the fact whose opinion seeks objective impartiality, regardless of whose ox is gored? Or, is the expert an advocate for those facts and interpretations which best serve the interests of his client?

One discipline that has given some serious consideration of this ethical dilemma is the science of psychology.<sup>6</sup> Some trial lawyers may see an irony in this. There are few experts harder to cross-examine than the behaviorists, whether they be psychologists, human factors experts, or their medical counterparts, the psychiatrists. None of these fields seem to have firm standards and judicial attempts to limit their testimony have largely failed.<sup>7</sup> Psychologists are not insensitive to this problem.

The experimental psychologist who testifies as an expert witness is virtually always hired by the attorneys for one side in a case. Because attorneys' ethics require them to be zealous advocates for their clients, they often want the psychologist to discuss in expert testimony only those points for which the available psychological research supports their client's position. Psychologists who offer different testimony depending on who has hired them act at least to some extent as advocates; psychologists whose testimony does not differ according to employer act as impartial educators of the jury.

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Current practice in this sort of expert testimony is probably closer to advocacy than to impartial education . . . .

Most conference participants agreed that the most desirable role for the expert is that of impartial educator,

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<sup>6</sup> 10 LAW AND HUMAN BEHAVIOR, June, 1986 is given to multiple articles on this subject and is as good an overview as is presently available.

<sup>7</sup> In theory, psychiatrists cannot testify concerning non-patients. See *Matter of Cheryl H.*, 153 Cal. App. 3d 1098 (Cal. Ct. App. 1984); *In re Thomas*, 183 Cal. App. 3d 786 (Cal. Ct. App. 1986). However, we often hear opinions on the conduct and mental processes of deceased pilots. To complicate the question, of course, is the accepted right to pose these opinions behind a well-phrased hypothetical. *Am-Cal Investment Co. v. Sharlyn Estates*, 255 Cal. App. 2d 526 (Cal. Ct. App. 1967).

and some held that this is the only ethically defensible position . . . .

Many conference participants disagreed, however, contending that the educator role is difficult if not impossible to maintain, both because of pressures toward advocacy from the attorneys who hire the expert, and because of a strong tendency to identify with the side for which one is working within an adversary system, and seek to be a responsible advocate, presenting one side of an issue without distorting or misrepresenting the available psychologist research.<sup>8</sup>

It is important to focus on this dilemma. In general, I believe lawyers expect experts to maintain some degree of objectivity, assuming that an expert will not "lie", although we may accept some degree of advocacy as unavoidable. At the heart of the matter, I think we generally accept that an expert, when confronted with hard contradictory evidence, will bow to the better argument. This happens often enough to reinforce what may in fact be naive faith.

In truth, there are experts who sincerely believe that it is their job to be advocates and to make no attempt to be fair. Frightening though such a proposal would be, Dr. Loftus' conclusion is even more shocking.

The view that psychologists may serve as advocates, presenting only the beneficial side of the case, begins with the argument that the trial is an adversary process in which each side has the right to make the best possible case . . . .

Rivlin<sup>9</sup> went so far as to suggest that we acknowledge the development of a 'forensic social science' rather than pretend to be balanced, objective, free of personal biases, and acting as if we are offering all sides of the case so that people can judge for themselves. If left to Rivlin's design, a psychologist would simply prepare a position paper for or against a particular proposition. The position would be

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<sup>8</sup> Michael McLoskey, et al., *The Experimental Psychologist in Court*, 10 *LAW AND BEHAVIOR* 1, 4-5 (1986).

<sup>9</sup> Alice M. Rivlin, *Forensic Social Science*, 43 *HARV. EDUC. REV.* 61 (1973).

clearly stated, and the evidence that supports one side of the argument would be brought together. The job of critiquing the case that has been presented and of detailing the counter evidence would be left to a scholar working for the opposition. . . .<sup>10</sup>

Can some tentative conclusions be drawn on the advocate/educator issue, or should the decision be left to the individual psychologist? My inclination is to take a Darwinian approach. Each individual can decide what strategy best suits him or her, and let the survival of the fittest expert prevail.<sup>11</sup>

Quickly overlooked is the reality of a Darwinian solution. The wasted species are not three toed sloths or tree frogs; the failed experiments are the clients whose lawyers picked the less persuasive psychologist/advocate. From Dr. Loftus' perch, the victim is the unsuccessful advocate expert, whose fees deteriorate due to his poor persuasive abilities, not the client, for whom the inept expert may mean poverty and incarceration.

While lawyers may bridle at Dr. Loftus' brutal thesis, we should stop and ask the obvious question. How many experts already believe in this as their personal code? To what extent is this Darwinian struggle already played out in our courts?

Before criticizing the expert, it must be said that lawyers cannot seem to agree on this point. We, too, face a Darwinian system. Good lawyers "win" cases by obtaining the best result for their clients. Less successful lawyers fade from the arena. We accept this as the harsh code of trial work. Inevitably this requires the search for the most persuasive experts and their early retention, regardless of the costs. If this is now a lumbering Frankenstein, the truth is that you and I tightened all the screws and turned on the electricity.

A single persuasive expert can turn years of preparation

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<sup>10</sup> Elizabeth F. Loftus, *Experimental Psychologist as Advocate or Impartial Educator*, 10 LAW & HUMAN BEHAVIOR 63, 71 (1986).

<sup>11</sup> *Id.* at 77.

upside down and convince a jury to reach a conclusion which befuddles and mocks the probabilities of the evidence. While I believe that juries will generally find the truth,<sup>12</sup> there are a small number of cases which defy the evidence and produce results that are unpredictable and sometimes alarming. On reflection, these peculiar results can often be linked to the testimony of an expert witness which was not anticipated and was devastating in its effect on the finder of fact.<sup>13</sup>

Although experts have been an integral part of litigation since blunt weapons were last used to settle disputes, the truly professional witness, beyond criminal circles, is something of a post-war phenomenon.<sup>14</sup>

It is perhaps not surprising in aviation cases that Congress decided to exclude National Transportation Safety Board Investigators from the Courts, as far as possible. While this effort has not always been successful, the Federal Aviation Regulations (FARs) have at least given lawyers in the field of aviation litigation some relief from the forbidding presence of the official government investigator.<sup>15</sup> This is just as well, as it is a truism that few lawyers would dispute that in civil cases juries trust the cop more than any other expert.

Since the official government investigator is not available, we have been forced to employ a bewildering pano-

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<sup>12</sup> As those who have seen mock jury deliberations know well, this is a truly frightening process. To amend Bismark's famous analogy, this process, like sausage making and legislation, is best not seen until finished.

<sup>13</sup> Experience confirms that juries are not alone in their ability to be guiled.

<sup>14</sup> An industry which advertises heavily by mail and trade publication and which is often centralized with multiple experts, available nationwide, by phone call.

<sup>15</sup> The Supreme Court has trod an uncertain path in dealing with this issue. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Court permitted admission of the probable cause finding of a JAG accident report, under the Public record exception of Rule 803(8)(c). This is an odd counterpart to *U.S. v. Varig Airlines*, 467 U.S. 797 (1984), where the Court relieved the FAA from responsibility for negligent certification on the grounds that the FAA had neither the staff nor the ability to perform its duties in a reliable manner. Why the Judge Advocate Corps should be ordained with this Judicial imprimatur while the FAA is protected in the dunce's corner is a contradiction that seems invisible only in Washington.

ply of experts. For instance, we have the "accident reconstruction expert", a civil variation of the cop, hopefully one with Lindberg skills and humility, entrusted with guiding the jury through the remote wild blue yonder that few of them have ever visited (without a movie and a cocktail). Then, depending upon the case, come the engineers, the metallurgists, the designers, and then the subspecialists, whether the subject be fatigue, weather, pilot error or the like.

Lastly, and most mystifyingly, come the behaviorists, who can mediate upon the human condition as a whole and decide what was in the mind of others, in the serene knowledge that the suspect is generally dead and incapable of rebuttal. Taken as a whole, this pneumatic body of testimony, sometimes moved whole from case to case, can create a tide of opinion which overwhelms an opponent, and sometimes, the truth.

But, is this ethical?

The truly qualified expert who has become an advocate is uncontrollable, particularly if he or she is a disciple of Dr. Loftus. Although good preparation can snare an expert with prior inconsistent testimony, the truth is that these moments are rare. The really skilled expert is seldom trapped by past overstatement. The capable expert does not step blindly into falsity. All he has to do is champion a minority opinion, sliding glibly through cross-examination with semantic shields. The words "not necessarily" should probably be inscribed on every expert's tombstone.

Although I practice entirely for the plaintiff, I believe that the statements made so far would apply equally to both plaintiff and defendant. Where the defendant sees outrageous fantasy, the plaintiff sees blind obstinacy. In either case, it makes little difference, since the end result is a cultivated, educated and well groomed witness who has become our worst nightmare, an advocate who has the opportunity to testify.

## THE VIEW FROM THE BENCH

Typically, federal and state statutes require little of an expert other than that his testimony "assist" the trier of fact.

This liberal view of expert testimony reflects Wigmore's early thoughts on the subject.

The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.<sup>16</sup>

This view has been fully adopted by Federal Rule 702.

If scientific technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

These statutes do not even require that the technical testimony be on matters unrelated to the knowledge of the jury. Even though the subject may be one of common knowledge, the test is whether or not the expert would provide testimony which potentially could assist the trier of fact, regardless of the common knowledge of the jurors.<sup>17</sup>

Where once the courts required some degree of unusual knowledge (the "beyond the ken" test as it is sometimes called),<sup>18</sup> most State courts have backed away from this requirement.<sup>19</sup>

Although few trial lawyers would object to a liberal ex-

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<sup>16</sup> 7 JOHN WIGMORE, *WIGMORE ON EVIDENCE*, § 1923 (Chadbourn, Rev. 1978).

<sup>17</sup> *United States v. Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985); *United States v. Windfelder*, 790 F.2d 576, 582 (7th Cir. 1986).

<sup>18</sup> *Kulak v. Nationwide Mut. Life Ins. Co.*, 351 N.E.2d 735, 737 (N.Y. 1976).

<sup>19</sup> *Selkowitz v. County of Nassau*, 379 N.E.2d 1140 (N.Y. 1978). Not all states, however. California still requires that the subject matter be "beyond common

pert rule,<sup>20</sup> this has led to expert testimony on issues which would seem so clearly within common knowledge that the use of an expert is gilding the lily. Does a jury, for instance, really need a photographic expert to decide if the robber in a bank photograph is the same person cowering behind the defense table?<sup>21</sup>

Nor is this problem confined to the criminal field, where perhaps the courts can be justified in leaning over backwards to prevent a false conviction. Civil experts also talk at great length about the obvious. For instance, does a jury really need to hear from an expert that it is unwise to dive headfirst into shallow water?<sup>22</sup>

The vice of this liberality is that it leaves the trial lawyer vulnerable to the very real fear that he must have an expert on any given subject, no matter how obvious, or run the risk that his opponent will call such an expert and the case will be lost. There is some comfort to be found in the appellate cases, since exclusion of experts does occur and is sometimes supported, but these cases are very much in the minority.<sup>23</sup>

If experts can, then, testify on almost every subject, no

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experience." CAL. EVID. CODE § 801 (West 1966); *Rosburg v. Minnesota Mining & Mfg. Co.* 181 Cal. App. 3d 726, 732 (1986).

<sup>20</sup> All swords, after all, have two edges.

<sup>21</sup> *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983) (the trial court thought not, the appellate court reversed); *see also* *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985) (in which a psychologist was called to offer an opinion concerning whether the defendant meant what she said when she admitted her guilt. The appellate court thought the testimony appropriate, falling back upon that hoary rubric that it all went to the weight of the testimony.).

<sup>22</sup> *Leonard v. Pitstick Dairy Lake & Park*, 464 N.E.2d 644 (Ill. App. 1984) (yes they do, according to the appellate court).

<sup>23</sup> *Andrews v. Metro N. Commuter R. Co.*, 882 F.2d 705 (2d Cir. 1989) (holding that an expert was not necessary to testify that a filthy platform would be unsafe); *Rossmann v. K-Mart Corp.*, 701 F. Supp. 1127 (M.D. PA 1988) (finding no need for an expert to discuss the liability of a store to a customer who was crushed in a riot over Cabbage Patch dolls). Lastly, and one of my favorites, is *United States v. Barta*, 888 F.2d 1220 (8th Cir. 1989) (rejecting the testimony of a defense psychologist in a tax fraud case. The psychologist offered the thought that the defendant was suffering from a personality disorder which was described as "detail phobia," thus being unable to be responsible for the fraudulent details of the tax return). I often find myself afflicted with detail phobia, although I receive no more sympathy than the unfortunate Barta.

matter how obvious, is there any restraint on the expert who views his subject not from the accepted center, but from the nut fringe? Again, the bench offers little hope on this subject.

For many years the leading case on this subject was *Frye v. United States*.<sup>24</sup> *Frye* established the "general acceptance" standard, deciding that the test for expert testimony was whether the process, system, or theory upon which the evidence was based was "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>25</sup> *Frye* is a criminal case, which is still cited to exclude fringe testimony.<sup>26</sup>

In June 1993, the Supreme Court resolved this question, to some extent, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>27</sup> This case deals with the drug Bendectin, a frequent source of appellate rulings on *Frye* issues.<sup>28</sup> The parties had gathered droves of epidemiologists to review and to reassess the published data, with the inevitable result that their findings were totally opposed. The trial court cut this Gordian knot by rejecting the plaintiff's experts, since their analysis had not met peer review and was therefore not "generally accepted," specifically using the *Frye* test. The Supreme Court found that the Federal Rules had superseded *Frye*, at least to the extent that *Frye* constituted a threshold test.

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evi-

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<sup>24</sup> *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

<sup>25</sup> *Id.* at 1014.

<sup>26</sup> *Frye* has been repeatedly cited to exclude hypnotically refreshed testimony. *State v. Hughes*, 453 N.E.2d 484 (N.Y. 1983); *Illinois v. Zayas*, 546 N.E.2d 513 (Ill. 1989).

<sup>27</sup> 113 S. Ct. 2786 (1993).

<sup>28</sup> *Novak v. United States*, 865 F.2d 718 (6th Cir. 1989); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 855 F.2d 167 (5th Cir. 1989).

dence admitted is not only relevant, but reliable.<sup>29</sup>

Fair enough, but what makes scientific testimony “reliable”? The Court turned to the “scientific knowledge” language of Rule 702, albeit in a somewhat circular fashion.

[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e. ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”<sup>30</sup>

In a sense, determining scientific reliability is like trying to pin down a definition of obscenity. Fine concepts drift into a semantic bog from which emerges, at best, a local standard, dependent on each judge’s education and tolerance for novelty.

In an effort to break the semantic circle, the Supreme Court does offer some tests; first, whether the scientific knowledge will assist the trier of fact, second, whether the theory has ever been subject to peer review, and, lastly, whether there is a “known or potential rate of error.”<sup>31</sup> Some very precise fields of science (the Court suggests spectrography) may be subject to this analysis, but it is hard to see how this can be applied to the less exact sciences.

Perhaps most significantly, while the Court finds that Rule 702 is the guiding principle, the Court does not abandon the *Frye* test.

Finally, ‘general acceptance’ can yet have a bearing on the inquiry. A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. *United States v. Downing*, 753 F.2d at 1238 (citations omit-

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<sup>29</sup> *Daubert*, 173 S. Ct. at 2794-95.

<sup>30</sup> *Id.* at 2795.

<sup>31</sup> *Id.* at 2797.

ted). Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community,' *Downing supra*, at 1238, may properly be viewed with skepticism.<sup>32</sup>

In short, the Court finally came down on both sides, simply reducing "general acceptance" from its former status as a bar to a mere test (although the effect of its application would be the same). Still unresolved is the problem every Court faces—the well-qualified expert whose opinion challenges accepted wisdom, or worse, who uses the same data as the opposing experts to reach opposite conclusions. *Daubert* suggests that in the end, discretion is the better part of valor and restrictions on novel testimony will be few.

It is easy to sympathize with the courts confronted with novel scientific testimony. Firm standards learned in college and law school can often become quaint historical anomalies by the time an experienced lawyer ascends to the bench. Where once damages were limited to pecuniary loss in wrongful death cases, now it is not unusual for the plaintiff's economist to discuss "hedonic damages" and to have the courts endorse this expanding area of recovery.<sup>33</sup>

Similarly, the history of science is strewn with firm principles, once resolutely defended by gray-bearded professors, which modern experts dismiss with amused shudders.<sup>34</sup>

My next witness, your honor, will be Piltdown Man.<sup>35</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> See *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985) (supporting an \$850,000 hedonic damages award). *But see Mercado v. Ahmed*, 756 F. Supp. 1097 (N.D. Ill. 1991), *aff'd*, 974 F.2d 863 (7th Cir. 1992). See also PALFIN & DANNIGER, *HEDONIC DAMAGES* (1990).

<sup>34</sup> GORDON, *GREAT MEDICAL DISASTERS* (1983).

<sup>35</sup> Piltdown Man was a prehistoric skull fragment "discovered" in the English countryside in the 19th Century. Some of the greatest scientific minds of the time considered Piltdown Man to be the long sought "missing link" between ape and man, until it was proved to be a forgery many years later. See FRANK SPENCER, *PILTDOWN: A SCIENTIFIC FORGERY* (1990).

One of the grayest ethical areas must be the casual manner in which inadmissible and hearsay evidence is pumped into the basis for an expert's opinion. There is perhaps no greater opportunity for mischief, and again the courts have done little to patrol this enormous loophole in Rule 703. Thus, a defendant's doctor in a personal injury case has been allowed to testify on the possibilities of curing a plaintiff's knee injury, based upon newspaper accounts of surgery on Mickey Mantle,<sup>36</sup> or a plaintiff's expert was given the opportunity to offer opinions based upon "literature and information furnished him by plaintiff's attorney," and upon "a whole body of literature in the area of bio-mechanics."<sup>37</sup>

Some cases require the courts to examine the reliability of the underlying sources,<sup>38</sup> but there are few guidelines and attempts to impose guidelines generally assume a knowledge of the expert's discipline that courts rarely possess.<sup>39</sup>

If the trial court chooses to rigorously view the supporting evidence upon which an expert relies, there is some hope of keeping the testimony at least loosely related to the evidence the jury hears. This can be a mixed blessing, however, if the judge acts arbitrarily based on a poor understanding of the expert's discipline, or, perhaps worse, if the judge has a mild degree of experience in the field himself. The latter is especially problematic, since errors and misunderstandings in the judge's recollection are difficult to correct and sometimes lead to exclusion of en-

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<sup>36</sup> *Gregory v. South Hills Movers Inc.*, 477 F. Supp. 484, 488 (W.D. Pa. 1979).

<sup>37</sup> *Mannino v. International Mfg. Co.*, 650 F.2d 846, 853 (6th Cir. 1981).

<sup>38</sup> *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983).

<sup>39</sup> See *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 276-78, (3rd Cir. 1983), *rev'd*, *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which seems to assume that the trial court judge can rely upon the assessment of other experts to determine what reliable material would be in a given discipline. In contrast, Judge Weinstein took a very rigorous attitude toward the experts' opinions in his opinion *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, *Lombardi v. Dow Chem. Co.* 487 U.S. 1234 (1988), discussing at some length his means for reviewing the bases for the experts' opinions. See also *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984).

tirely appropriate expert testimony. Generally, however, I believe the judge who closely reviews an expert's underlying foundation is more of a help than a hindrance.

Far more difficult to control is the expert who has omitted relevant material in order to reach his opinion. This is an area of great ethical concern for the lawyer, since it is within the lawyer's power to restrict the source material given to the expert, and deft manipulation of the available evidence can lead an honest expert to offer an opinion, in all good faith, which would be entirely different if all the facts were available. The theory that this evil is uncovered by cross-examination is often naive.

Unfortunately, it is not clear from the applicable codes of ethics that such conduct is unethical on the part of the attorney; it can easily be viewed as simply zealous representation of a client and an extension of normal advocacy.<sup>40</sup>

In short, with the rare exception of an assertive and sophisticated judge, there is little prospect that an expert's tactics or research will be closely scrutinized. It is impossible for the average jurist, or even the exceptional jurist, to be fully briefed on the technical issues raised by every case, or the subtleties of the disciplines of the experts. There are few Solomons, and it should be remembered that Solomon himself was not entirely successful as a judge. Nor was his wisdom unending.

The ethical problem, then, reverts again to the lawyer. The Federal Rules of Evidence have given us more or less an open field when it comes to presenting expert testi-

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<sup>40</sup> There is little to be said for the expert who deliberately ignores facts to manufacture an opinion. I recently examined an expert on visibility issues, who conducted extensive reconstruction of the accident while carefully refusing to determine whether the defendant, whose eyesight was in question, had normal vision. In fact, the defendant was legally blind in both eyes, evidence which most experts would consider of some importance. The expert had talked to the defendant at some length, but was apparently unmoved by the defendant's "cokebottle" glasses. Not surprisingly, the case settled, but not before the expert had testified at considerable length to the faultlessness of the defendant.

mony. How much advantage can we ethically take of the opportunity given by the law?

### III. THE VIEW FROM THE COUNSEL TABLE

It is the duty of an attorney to do all of the following:

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(d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the Judge or any Judicial Officer by an artifice or false statement of fact or law.<sup>41</sup>

However hard the rule may be to enforce, virtually all States' Statutes agree; it is the responsibility of the lawyer to present truth and, by implication, not to present distortion of the truth by an expert. The expert may see a dilemma, but there is only one horn that the attorney can accept. It is our responsibility to make sure that the expert understands his place and agrees to accept it.

If the experts look for a Darwinian solution, then we are in the position to provide one. Since we pay the expert, we can reject the advocate and seek the objective expert. This may not be the easiest solution and it may call for a far greater exercise of skill on the part of the trial lawyer, but neither effort is undesirable.

Rather than retreat behind these generalities, however, I believe the time has come to set some rules. Some of the rules I would suggest are really a matter of self-interest. For instance, I would first suggest that we only seek experts with *legitimate qualifications*. We all know that there are experts with endless self-esteem, perfectly prepared to reconstruct accidents, to examine metal fatigue, or to interpret the F.A.R.s, qualifications be damned. We also know that there are some fringe areas where an expert can

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<sup>41</sup> CAL. BUS. & PROF. CODE § 6068(d) (West 1990). Section 6068(f) reads, in part, that it is the duty of the attorney "[t]o abstain from all offensive personality. . . ." *Id.* § 6068(f). Makes you wonder if anybody ever reads this. It also makes you wonder who wrote this.

easily self-promote his qualifications without a clear litmus test. Biomechanics is only the most glaring of these areas. There are, however, legitimate experts in these fields and it would seem an ethical duty to seat those experts and to trim the self-promoters.

Similarly, I believe it to be an ethical duty of the lawyer to achieve an *independent assessment of the subject matter*. With a busy practice, it is easy to retain an expert and then to let the expert dictate the direction of the lawsuit. Once this is done, any attempt to exercise critical judgment of the ethical conduct of the expert is lost. If one only accepts what one is told, how can one judge? Good trial lawyers try to learn as much as they can about the central issues of their case. In this business, good ethics and good practice are one.

The ethical lawyer should *always fully inform the expert of all the facts*. Again, this seems to be obvious, since the ill-informed expert is also subject to damaging cross-examination, but in the real world not every lawyer is well prepared and an expert working with cultivated ignorance can often pass unscathed.

An ethical attorney should *pose the question, not the answer*. An expert who would accept an opinion simply because an attorney wants it to be so, is not an expert one should employ. This is the obvious extreme, however, and as is often the case with ethical questions, the difficult area is the area in the middle, where the lawyer becomes a spin-doctor for his own case. This is a particularly easy trap for the harassed lawyer in trial, whose case is not doing well. Leading questions can be just as effective in priming an expert before trial as they can be with a jury. The danger is that if those leading questions are asked in conference before trial, they can so firmly suggest a needed opinion that objectivity disappears. The ethical lawyer should bite his tongue and work with the opinion he is given, not mold that opinion to the needs of the moment.

Since lawyers have firm ethical guidelines and experts do not, it should be the duty of the lawyer to *give ethical*

*guidance*. We have to be committed to the truth. There are many disciplines in which the truth is barely recognizable and may in fact be unavoidably relative. That is when a firm commitment to objectivity is needed most. The corollary of that rule is that a lawyer *should not interfere with discovery*. Unless the deposition examination infringes on truly privileged areas, I believe it is unethical for a lawyer to steer his witness through cross-examination by disruptive objections. I recognize that in the real world, this is a particularly difficult line to draw. Trial lawyers are, by nature, adversarial and there are times when all patience wears out. Still, if the expert cannot float on his own, the lawyer should not start paddling.

Lastly, I strongly believe that experts *should not be allowed to substantially alter their opinion after their deposition*. Although this would seem to be a simple area of equity, to be managed by the trial court judge, in practice this is an area of great mischief and deceit. To some extent, the plaintiffs are more vulnerable, since a defendant has the opportunity to review the entirety of the plaintiff's case and then to rush out to perform theory or to support an alternate explanation of the accident. In theory, a plaintiff can perform the same disservice to the truth by using rebuttal, although this is so much of a matter for discretion that it is a very risky solution.

The Federal Rules require that by the time the parties reach a pretrial conference, the evidence be set and the parties be prepared to try the issues with an exposed hand. I strongly believe that this is the only appropriate way to limit a herd of experts revising their opinions after the flaws have been exposed. Too often this last minute reconstruction is defended as being merely "illustrative," and I have never seen an instruction by a court limiting this type of testimony.<sup>42</sup>

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<sup>42</sup> Worse still, there are recent cases which suggest that this kind of sandbagging is entirely appropriate. In *Martinez v. City of Poway*, 12 Cal. Rptr. 2d 644 (1993), the Court held that it was not necessary for the defendant to advise the plaintiff that post-deposition accident reconstruction had been performed. *Id.* at

By the time the expert is called to deposition before trial he should be fully prepared to testify concerning all his opinions. Subsequent substantial changes in his opinions should remain buried in the private reaches of his mind.

I believe these are rules that trial lawyers need to adopt and to insist on being respected. Having witnessed the dreary and tedious manner in which large Bar Associations attempt to adopt rules, I do not believe that these are issues for general bar associations. Is there any more dispiriting experience than listening to a committee of generalists trudge through issues they do not understand, that do not effect them, and that are of no pressing concern? The end result is usually so vague as to have no real application for the day-to-day business of trial work. No, these are issues that need to be defined by trial lawyers and put into effect by trial lawyers. If nothing else, there needs to be a code of ethics established for experts that can at least guide a trial court in determining the intricate complexities that sprout from the witness chair. One thing seems clear, a general statement of ethical conduct for expert witnesses seems long overdue.

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432. The mere designation of the expert's name was considered to be sufficient warning that this kind of deceit could be expected. *Id.*

# **Comments**

