

Ethical Considerations in Dealing with Expert Witnesses

By

Thomas M. Fitzpatrick
tom@tal-fitzlaw.com

Thomas M. Fitzpatrick is a graduate of the University of Montana (1973) and the University of Chicago Law School (1976). He is a former partner in the firm of Karr, Tuttle, Campbell (1978-1989) and Stafford Frey Cooper (1989-1999); managing partner (1991-1994). From 1999 through 2004, he served as Assistant Chief of the Snohomish County Prosecuting Attorney's Office, Civil Division, heading the Litigation and Employment unit. He was named a "Super Lawyer" by the publication Washington Law and Politics in 2004. In 2005, the elected Snohomish County Executive, selected him as Executive Director of Snohomish County with oversight responsibility for planning and development, economic development, environmental policy, the airport, risk management, and several other county offices. In 2006, he returned to private practice, joining former Washington Supreme Court Justice Phil Talmadge with whom he previously practiced, at the Talmadge/Fitzpatrick firm. His practice has an emphasis in professional responsibility, municipal law, land use, water and the environment, and litigation. Mr. Fitzpatrick has extensive bar association experience including service on the Board of Governors of the American Bar Association (1998-2001) and the ABA House of Delegates (1989-present). Mr. Fitzpatrick served two terms on the ABA Standing Committee on Professional Discipline, and one term as a member of the ABA Standing Committee on Ethics (2001-2004). He served on the committee which wrote the Model Rules of Judicial Discipline, and the Joint Commission which rewrote the Model Code of Judicial Conduct adopted by the ABA in 2007. He currently serves on the ABA Lawyer Professional Liability Committee.

A Century of Lawyer Ethics

This year we celebrate a century of formalized lawyer ethics. In 1908 the American Bar Association (ABA) published the first code of lawyer ethics known as the Canons. At the time, there was no enforceable code relating to ethics and how lawyers should conduct themselves. Since that time, the ABA has remained as the principal source of guidance in regard to lawyer and judicial ethics.

Over the past 100 years, the ABA has adopted various versions of ethical codes for lawyers, known as the Model Code. Sometimes the ABA does a wholesale revision of the entire code, as it did earlier in this decade. Usually a special commission of the ABA conducts a review and a rewrite of the entire code. The ABA also considers various amendments to the code in the intervening years. The Ethics Committee is charged with the responsibility of drafting various proposed amendments and submitting them through the ABA political process for adoption.

Once the ABA has acted, the states usually consider what the ABA has done and propose changes to the applicable code in the respective state. The final authority on the practice of law, usually the supreme court of the state, adopts the ethical code which is used as the basis for disciplinary action. In the process, the states often change what has been proposed by the ABA. Although ethical codes in all the states have basic principles in common, there is wide variation in what is contained in the codes of various states. Lawyers admitted in more than one jurisdiction need to be knowledgeable about the differences in ethics in the various jurisdictions in which they practice.

The current version of the Washington RPCs is a follow on to a major revision of the RPCs by the ABA. On July 10, 2006, the Washington Supreme Court adopted *en banc* (by a 7-2 vote) a series of amendments to the Washington Rules of Professional Responsibility. The adoption of these amendments, and some new rules, was the culmination of nine years of public process which resulted in the new rules.

The process began in 1997 when ABA President Jerry Shestack created "Ethics 2000." Ethics 2000 was an effort by the ABA to update the Model Rules of Professional Conduct for the new millennium. The impetus to do so was more than simply the dawning of a new century. Over twenty years passed since the RPC format was adopted. During that time, the practice of law dramatically changed. Corporate scandals focused public and legislative attention on the role of counsel. In an effort to respond to this changing legal environment, the ABA began a comprehensive review and rewrite of the Model Rules.

After final adoption by the ABA, the Washington State Bar Association created "Ethics 2003." The committee, chaired by Ellen Conedera Dial, utilized the Model Rules and made a series of recommendations to the WSBA Board of Governors for changes in the Washington RPCs. Some followed the Model Rules. Others were unique to Washington. The Board of Governors made some changes to the Ethics 2003 proposals and submitted them to the Washington Supreme Court. In March 2005, the Supreme Court published 185 pages of

proposed changes for public comment. The comment period closed in April 2005. The proposed changes were before the Washington Supreme Court until July 2006 when the court issued the final rules. The new rules were effective September 1, 2006.

Fundamental Principles

The principal purpose of ethical rules is to establish minimum standards for acceptable conduct. Legal ethics does so in the context of the Anglo-American adversarial tradition of lawyering.

For lawyers to function effectively in an adversary system of justice, there are two overarching duties: confidentiality and loyalty. Clients need to be assured that what they tell the lawyer will not be used against them. If clients do not believe this, they will not be candid with counsel. Thus the need for confidentiality in the client-lawyer relationship arises. There is a constant tension to protect confidentiality, while at the same time recognizing the lawyer's responsibility to society and the justice system.

Clients must also have confidence that the lawyer will act to serve their interests, not someone else. This implicates the concept of loyalty. The RPCs do not mandate a duty of loyalty. Rather, aspects of loyalty are implicit in the various duties imposed upon a lawyer through the RPCs.

While the RPCs impose minimum standards, aspiring to a higher standard of conduct is encouraged. The Washington Supreme Court emphasized this by retaining the "Fundamental Principles" section from the 1985 rules.

In addition, a special Washington revision to the Preamble eloquently summarizes the ethical approach that should be taken by Washington lawyers.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of the Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Fundamental Principles Relating to Experts

Over the years, what is admissible opinion has been the subject of extensive debate in the legal profession. Historically, the law always made a distinction between lay and expert opinion. This distinction remained with the adoption of the modern Rules of Evidence (“ER”). ER 701 limits the scope of testimony permitted a lay witness. Opinions or inferences that a lay witness may testify about are limited to those which are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.”

ER 702 allows for testimony by experts. Under the Rule, expert testimony is allowed “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Before a person is allowed to testify about such matters, ER 702 requires the witness to be “qualified” based upon “knowledge, skill, experience, training, or education.” A qualified expert is then allowed to testify in the “form of an opinion or otherwise.”

The modern Rules of Evidence made a dramatic shift in broadening the scope of expert testimony. Gone were requirements that the expert opinion had to be based upon admissible evidence. Under ER 703, all that is required is that the facts or data underlying the expert opinion be “of a type reasonably relied upon by experts in a particular field in forming opinions or inferences on the subject.” The Rule makes clear “the facts or data need not be admissible in evidence.” ER 704 allows testimony by an expert on “an ultimate issue to be decided by the trier of fact.” ER 705 allows the expert to testify “without prior disclosure of the underlying facts or data, unless the judge requires otherwise.” ER 705 provides that the expert “may in any event be required to disclose the underlying facts or data on cross examination.”

In addition to the provisions of the ERs, discovery practice also differs in regard to experts. Traditionally the Civil Rules (“CR”) make a distinction between experts who are going to testify, forensic experts, and those who may assist a lawyer but are not going to testify, consulting experts. In state court practice, CR 26(b)(5)(A) allows the other side to discover the substance of the facts and opinions of a forensic expert through interrogatories, and by taking the expert’s deposition and paying his fee for the time involved. Generally facts known or opinions held by a consulting expert are not discoverable absent “extraordinary circumstances” and a showing that it is impracticable for the party seeking discovery to obtain the information “by other means.” CR 26(b)(5)(B).

Federal practice differs in that party must disclose to other parties the identity of any forensic expert and supply a detailed report, prepared by and signed by the expert, listing all opinions, the basis for the opinions, the data or information considered by the expert, the witness’s qualifications and publications, and all cases in the last four years in which the expert has testified. FRCP 26(a)(2)(A)(B). The prohibition of obtaining information relative to consulting experts is essentially the same in federal as in state practice, requiring a showing of “extraordinary circumstances.” FRCP 26(b)(4)(B). For ethical purposes, a lawyer shall not offer evidence the lawyer knows to be false. RPC

3.3. Accordingly, if a lawyer learns from a consulting expert that something is not true, the lawyer cannot knowingly present the testimony of a forensic expert to the contrary.

Often it is the responsibility of the lawyer to obtain an expert witness for purposes of forensic testimony. However, often the client or a client's representative has expertise and may be qualified to testify as an expert witness. The lawyer has to judge whether in such a situation the credibility of the testimony will be lessened. Ethical duties may differ depending on whether the expert is the client or not.

When to Retain the Expert

Generally the CRs and practice contemplate retention of an expert witness after the lawsuit has been instituted. There is nothing wrong with that in cases where the lawsuit can be instituted based upon information known to the lawyer at the time the complaint or the answer is filed and the lawyer can submit a good faith pleading. This is certainly the case where the expert opinion meets the classical purpose of ER 702 "to assist" the trier of fact to understand the evidence.

In other instances, however, expert testimony is often required to establish a prima facie case of liability. An example of this is primarily cases involving professional liability. In these types of cases, generally expert testimony is necessary to establish the standard of care required of the professional and why it was breached.

Before filing such a case, a lawyer has to be mindful of CR 11 obligations as well as those contained in RPC 3.1. It provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

The Unique Standard of Care for Lawyers

A standard of care expert for lawyer civil liability operates under some unique provisions of Washington law. A lawyer may be subject to civil liability for malpractice from conduct flowing from a breach of ethics. However, this is not direct in Washington. Under *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992), violation of an ethical obligation does not directly translate into a breach of duty by the lawyer for purposes of civil liability. Nor can evidence be introduced to the effect that a lawyer has acted unethically. Rather, a standard of care expert must testify to the standard of care applicable to the lawyer. If it involves conduct controlled by the ethical rules, the expert generally testifies to the effect that what is contained in the Rules is the general standard of care that the lawyer must meet without mentioning it is controlled by an RPC. This does allow for experts to disagree about the standard of care, even if the conduct is covered by specific provisions of the RPCs. For instance, the expert might testify the lawyer is held to a higher standard than what is contained in the provisions of an RPC. Surprisingly, some experts have testified that the standard of care is less than what is required by the RPCs.

What Information Must Be Provided to an Expert

In providing information to an expert to be used as a basis of testimony, the lawyer's obligation to be candid with the tribunal must be kept in mind. Under RPC 3.3(a)(4), a lawyer cannot offer evidence the lawyer knows to be false. The lawyer's duties are broader when the provisions of others RPCs are considered. Under RPC 3.4(b), lawyer must not falsify evidence or "counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." RPC 4.1 precludes a lawyer from deceiving an expert witness. It provides: "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person: or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is *prohibited* by Rule 1.6."

What Happens When You Learn an Expert Has Testified Falsely

If the lawyer learns an expert has testified falsely, the lawyer has differing obligations under the Rules. Under RPC 3.3(c), "If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is *prohibited* by Rule 1.6." Under Rule 1.6, almost all information learned by the lawyer is confidential as "information relating to the representation." The first reaction is then that disclosure cannot be made under the Rule relating to client confidentiality. In such a situation, RPC 3.3(d) requires that the lawyer "make reasonable efforts to convince the client to consent to disclosure." If the client refuses to allow the disclosure, the lawyer "may" then seek to withdraw while protecting the confidential information protected by RPC 1.6.

However, the situation is probably different if the expert is the client or the client's representative. This is because of a new exception allowing permissive disclosure relating to client criminal activity or fraud. RPC 1.6(b)(3) provides:

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(3) may reveal information relating to the representation of a client to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

The Candor Toward the Tribunal Rule 3.3 requires disclosure unless the disclosure is *prohibited* under RPC 1.6. If the client is the expert, new exception (3) allows a permissive disclosure, so it is no longer prohibited under 1.6. Therefore, it appears RPC 3.3 requires the disclosure to the tribunal, if the requisites of exception (3) to RPC 1.6 are met.

Experts and Judicial Ethics

The Washington Supreme Court is in the process of creating a Commission which will review the Washington Code of Judicial Conduct (“CJC”). This follows the adoption of a new Model Code of Judicial Conduct by the ABA.

ER 706 governs court appointed experts. It allows the court to appoint its own expert. The witness’ duties shall be outlined in writing and filed with the clerk. The parties shall have the opportunity to participate in the duties given to the expert. The court appointed expert must advise the parties of the witness’ findings, if any, and the expert’s deposition may be taken. Such an expert can be called by any party or the court.

In addition, the CJC constrains the ability of judges to obtain outside advice of experts on the law. Canon 3 (A)(4) provides “Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by amicus curiae only, if they afford the parties reasonable opportunity to respond.”

The provisions relating to experts and outside research by judges was a topic of much dispute during the drafting of the current version of the ABA Model CJC. New Model Rule 2.9 (A)(2) provides that a judge “may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.”

Independent research, particularly internet research, is dealt with in the new Model CJC. Rule 2.9(c) provides: “A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.” Subsection (D) provides the judge shall make reasonable efforts to assure court staff does not violate these provisions.

Pay particular attention to these types of provisions, which could affect your case, as Washington develops a new version of the CJC.

Conclusion

Most experts provide valuable testimony and assistance to the courts. They do so with honesty and integrity. The lawyer has numerous ethical requirements to comply with in dealing with experts, particularly if the expert is the client or a client representative. Before proceeding with a case or dealing with an expert witness, a lawyer is advised to keep these various ethical considerations in mind.