

## **Lawyers, Expert Witnesses and Ethics-Beyond Mere Testimony**

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Lawyers and courts turn to expert witnesses to provide triers of fact with explanations of aspects of a case that are not commonly known. It is the subject matter expert's education, experience, and skill in a particular area that will help the triers of fact to reach a well-informed conclusion/decision. Examples of expert witnesses include medical doctors, accountants, engineers, DNA scientists, safety professionals and more. Lawyers (and the courts) will employ an expert witness to shed more knowledge involving factual issues for the purpose of discerning the truth. In short, expert witnesses educate, clarify, and explain a subject that is not common knowledge for most people.

Lawyers who seek to use expert witnesses may find it helpful to learn about some of the "rules" that pertain to expert witnesses. (Expert witnesses may find this information helpful as well.) What kind of working arrangements can be made between lawyers and expert witnesses? What expert witness payment arrangements are permitted, and which are prohibited? What interactions between lawyers and adverse expert witnesses are permissible? What lines of questioning are permissible between lawyers and the adverse expert witness? Can expert witnesses be sued for their work and/or role as an expert? Is there a standard of care that the expert witness must satisfy in carrying out his/her duties? What professional concerns exist for the lawyer when using an expert witness? What is the lawyer's role in the judicial system regarding expert witnesses relative to their client's interests? There are many questions here, but the following will hopefully shed some light on these issues.

Let's start with the lawyer's role. The lawyer is held—first and foremost—at the forefront of responsibility and potential professional discipline in judicial proceedings. Almost everything taking place in our judiciary revolves around the actions of the lawyer. The underlying premise for responsibility is, quite simply, that lawyers have several, simultaneous, ethical duties in practicing law—namely, maintaining the confidences of clients and case handling relative to dealings with the court, among others.<sup>1</sup> In short, the lawyer is responsible for almost all actions that occur relative to our justice system.

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<sup>1</sup> Model Rules of Professional Conduct Rule 3.3 cmt. 2 (year).

Colorado adopted the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) on May 7, 1992.<sup>2</sup> The ABA Model Rules will be referred to in this article except where Colorado differs.<sup>3</sup>

Making false statements to a tribunal:

The ABA Model Rules expressly prohibit lawyers from knowingly making false statements to a tribunal. ABA Model Rule 3.3 (Candor Toward the Tribunal). This prohibition extends to evidence offered by a lawyer who knows that the evidence is false.<sup>4</sup> (As discussed below, this prohibition extends to lawyers knowingly using an expert's false testimony.) Making the untrue representation in appellate pleadings that counsel was appointed counsel in the underlying trial constitutes a false statement.<sup>5</sup> Not correcting the identification of a defendant where the true identify is known to the attorney and the attorney enters his appearance on behalf of the incorrectly identified party is deemed a false statement to the court.<sup>6</sup>

The lawyer has a further duty to take remedial measures where he/she subsequently learns the proffered evidence may be falsified.<sup>7</sup> A lawyer's failure to verify his client's falsehoods where multiple credible sources consistently contradicted client statements, even if negligently done by the lawyer, may result in findings of unethical conduct and professional disciplinary action.<sup>8</sup>

But what if the lawyers learn, or knows, that an expert witness's testimony is false?

The lawyer's ethical duty to correct or remedy the false information that is presented before a tribunal extends to expert witnesses.

The integrity of our court system, the primary means of resolving conflicts peaceably in our society, rests significantly on lawyers. Lawyers are considered a keystone to maintaining court system integrity and a significant ethical obligation is placed upon lawyers to ensure their actions "avoid conduct that undermines the integrity of the adjudicative process."<sup>9</sup> Any action by the lawyer which does, or could, result in misleading the tribunal by a false statement of law or fact, or of evidence that the lawyer knows to be false, is strictly forbidden.<sup>10</sup>

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<sup>2</sup> American Bar Association Center for Professional Reasonability, Jurisdictions That have Adopted the ABA Model Rules of Professional Conduct, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html).

<sup>3</sup> Source: Comparison of Newly Adopted Colorado Rules of Professional Conduct with ABA Model Rules, as of October 13, 2017, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_colorado.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_colorado.authcheckdam.pdf).

<sup>4</sup> ABA Model Rule 3.3. (a) (1).

<sup>5</sup> *In re Roose*, 69 P. 3d 43, (Colo. 2003).

<sup>6</sup> *People v. Casey*, 948 P. 2d 1014 (Colo. 1997).

<sup>7</sup> ABA Model Rule 3.3 (a) (3).

<sup>8</sup> *Matter of Olsen*, 326 P. 3d 1004 (Colo. 2014).

<sup>9</sup> ABA Model Rule 3.3 cmt. 2.

<sup>10</sup> *Ethics Issues in the Use of Expert Witnesses*, Vol. 24 No. 3, Neil J. Wertlieb ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

What if a client tells the lawyer, or the lawyer knows, that the client plans to make false statements to the tribunal? This situation puts the lawyer in an uncomfortable situation. Lawyers have a duty of loyalty to the client to protect confidences<sup>11</sup> however, this high standard has limits and courts have held that “[p]lainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth.”<sup>12</sup> A lawyer’s duty to protect client confidences does not extend to allowing the client to make perjurious statements to the court, and the lawyer must take steps to avoid being part of the same.<sup>13</sup> A lawyer involved in real estate litigation put into evidence a purported original letter that subsequently turned out to not be original. The court found that the attorney had practiced willful deception upon the court and the public.<sup>14</sup> According to ABA Model Rule 3.3, lawyers have a special duty to disclose untruthful evidence to the court and to prevent and disclose fraud upon the court, even if the disclosure compromises client confidences.<sup>15</sup> Courts jealously guard their mandate of providing a quality, accurate, and fair judgment, and any conduct threatening this standard is unacceptable.<sup>16</sup> Most significant in attaining and maintaining this standard is the lawyer and his/her duty to uphold the legal process.<sup>17</sup>

Learning of fraudulent conduct upon the court cannot only result in immediate judicial action in pending cases, but also in resolved cases—after even a significant passage of time. For example, an appellate court using its equitable authority vacated its original ruling (issued in 1932 with the final appeal in 1941) upon learning of a fraud committed upon it. A unanimous U.S. Supreme Court agreed, holding that “[n]o fraud is more odious than an attempt to subvert the administration of justice.”<sup>18</sup> In *Hazel-Atlas Glass*, a patent infringement case, the plaintiff’s counsel presented to the appellate court a document purported to be from an independent industry expert, which was subsequently determined to have been ghostwritten by the presenting attorney. The appellate court took a rather dim view of this activity and reversed its previous ruling of years prior. In the original case the prevailing party (which presented the ghostwritten document) received one million dollars and a licensing agreement as a result of the appellate court’s original ruling. The Supreme Court determined that a “planned and carefully executed scheme to defraud... the Circuit Court of Appeals” was extremely distressing.<sup>19</sup> “Tampering with the administration of justice,” where matters (in this case, a patent) of public interest are involved, the “preservation of the integrity of the judicial process” is critical.<sup>20</sup>

### What if the expert witness is going to, or has made, a false statement?

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<sup>11</sup> Colorado Rules of Professional Conduct, Rule 1.6 (a).

<sup>12</sup> *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

<sup>13</sup> *Nix v. Whiteside*, 475 US 157 (1986).

<sup>14</sup> *In re Jones.*, 5 Cal. 3d 390, 401 (1971).

<sup>15</sup> *Nix v. Whiteside*, 475 U.S. 157, 170-71 (1986).

<sup>16</sup> 1 W. Burdick, *Law of Crime* §§ 293, 300, 318-336 (1946); *Nix v. Whiteside*, 475 U.S. 157, 171 (1986)

<sup>17</sup> In re: APPLICATION OF the OKLAHOMA BAR ASSOCIATION TO AMEND the OKLAHOMA RULES OF PROFESSIONAL CONDUCT and to Amend Rule 1.4 of the Rules Governing Disciplinary Proceedings, 171 P. 3d 780 (Okla. 2007).

<sup>18</sup> *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 251 (1944).

<sup>19</sup> *Id.* At 245.

<sup>20</sup> *Id.* At 246.

A lawyer's duty to avoid presenting false evidence to the court, or to remedy the subsequent discovery of false statements, also extends to the expert witness's testimony. Courts have used ABA Model Rule 3.4 (b) when false statements from expert witnesses occur. This ABA Model Rule, *Fairness to Opposing Party and Counsel*, states: "Lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The conscious use of false evidence, including expert witness testimony, is prohibited under this ABA Model Rule and may result in reversing a years old court ruling. *Hazel-Atlas Glass Co., supra*.

However, an expert witness misstating a license credential status—if such a credential bears little weight on the nature of testimony—may not warrant judicial action.<sup>21</sup>

Are there restrictions on payment terms between the lawyer and the witness?

Yes. It depends on the type of witness involved. There are two types of witnesses: the occurrence witness (testimony regarding a personally experienced or seen event, i.e., a fact witness) and the expert witness (subject matter testimony).<sup>22</sup> This distinction is important, because payment of one (the occurrence witness) is prohibited by *ABA Model Rule 3.4*, and the other (the expert witness) is not.<sup>23</sup>

What manner of payment is acceptable for the expert witness?

Contingent payment arrangements between the lawyer and the expert witness are prohibited under *ABA Model Rule 3.4*.<sup>24</sup> Generally, expert witnesses should not receive contingent fees out of concern for an expert's improper motivation to enhance testimony.<sup>25</sup> The reasoning is that the expert witness needs to provide unbiased and objective testimony devoid of concerns of case outcome.<sup>26</sup> Any condition that may interfere with the expert's testimony, or sway their testimony with the incentive of receiving a higher payout if the expert's testimony is "successful," is prohibited.<sup>27</sup> Our judiciary system is founded on the keystone of fairness and adjudication free from bias or misleading testimony. It is commonly understood and accepted that triers of fact give expert witness testimony "extra" weight by virtue of the expert's perceived specialized knowledge of a particular subject. Subject matter experts are relied upon in our judicial system to help sort out information so that, presumably, a verdict may be rendered based upon honest, unbiased information. Any condition or act that interferes with the justice process is strongly prohibited. Consequently, contingency fee agreements are prohibited because of the very real concern of improper influence on the expert's testimony.

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<sup>21</sup> See *United States v. David W. Price*, 357 F. Supp. 2d 63 (D.D.C. 2004) (*Government put 20-year narcotics enforcement agent on stand with apparently well-known reputation for "aggrandizing" his primary credential of years of narcotics enforcement experience but the court determined it did not impair his truthfulness by claim of being "licensed pharmacist"*)

<sup>22</sup> *ABA Model Rule 3.4, Fairness to Opposing Party and Counsel cmt.3.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *City and County of Denver v. Board of Assessment Appeal*, 947 P.2d 1373 (Colo. 1997).

<sup>26</sup> *Person v. Association of Bar of City of New York*, 554 F. 2d 534, 538 (2d Cir. 1977).

<sup>27</sup> *Person v. Association of Bar of City of New York*, 554 F. 2d 534, 529-38 (2d Cir. 1977).

Expert witness contingency fee agreements may also be prohibited by statute.<sup>28</sup>

What if a lawyer agrees to pay off a debt owed by the expert to some third party in return for the expert's testimony? Consider an attorney who paid off a debt owed by the expert and then preparing an installment note for the expert witness that will be forgiven upon "favorable" testimony. The lawyer's license was suspended because "a lawyer is prohibited from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. It is both illegal and against public policy to pay or tender something of value to a witness in return for his testimony."<sup>29</sup> In short, a straight hourly rate or fixed fee represents ethically acceptable forms of payment for the expert witness. The arena regarding terms of payment for expert witnesses does not suit imagination.

But the law is not so simple; there are always exceptions.

Exceptions are the lifeblood of lawyering. There is an exception to payment terms for expert witnesses. In the expert world, there are two types of experts: consulting and testifying. A consulting expert provides assistance directly to the lawyer in the development of his/her case and may research, guide, and even write a report for use by the retaining lawyer. The lawyer does not retain the consulting expert to testify at trial and the expert is not so designated under disclosure rules. The use of contingency fee agreements with consulting (versus testifying) expert witnesses may be acceptable.

In *Wilhelm v. Rush*<sup>30</sup> a lawyer prosecuting a fraud case on behalf of his client entered into a contingency fee agreement with an accounting expert witness. Compensation was directly tied to a "favorable outcome" on behalf of the client for research, finding fact witnesses, etc., but the expert was not involved with giving testimony. The expert attempted to negate his contingency contact with the lawyer as contrary to public policy. (The expert wanted more money.) The expert argued that such contingency agreements involving expert witnesses were against public policy, as such agreements encourage testimony that is likely to "procure testimony that would win the lawsuit."<sup>31</sup> The court found that generally contingent fee arrangements between lawyers and non-testifying expert witnesses are acceptable (except in divorce cases).<sup>32</sup> The *Wilhelm* court concluded that the contingency contract was valid for "ordinary civil case" facts, conducting investigative and research services, and other activities that supported the claim of fraud.<sup>33</sup> Again, prudence should lead the legal practitioner to avoid contingency fee agreements with experts, regardless of expert's classification (consulting or testifying), altogether.

What limitations exist on a lawyer's communications with adverse expert witnesses?

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<sup>28</sup> *City and County of Denver, Colo. v. Board of Assessment Appeals of State of Colo.*, 947 P.2d 1373 (Colo. 1997).

<sup>29</sup> 452 S.E. 2d 80 *People v. Belfor*, 197 Colo. 223, 591 P. 2d 585, 587 (1979).

<sup>30</sup> *Wilhelm v. Rush*, 18 Cal. App. 2d 366 (1937).

<sup>31</sup> *Wilhelm v. Rush*, 18 Cal. App. 2d 366 (Cal. Ct. App. 1937) (citing *Quirk v. Muller* 36 P. 1077 (Mont. 1894)).

<sup>32</sup> *Wilhelm v. Rush*, citing *Haley v. Hollenbeck* 165 P. 459 (1917)

<sup>33</sup> *Wilhelm v. Rush*, 18 Cal. App. 2d at 370.

The *ABA Model Rules, Preamble and Scope*, declares that a lawyer, “as a member of the legal profession,” wears several hats simultaneously: a lawyer represents the client, is an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>34</sup> The ABA Model Rules hold lawyers to standards concerning the client, the justice system, and a special responsibility for the quality of justice.<sup>35</sup> In short, lawyers need to represent the interests of their clients, but they must do so in accordance with the law. One of the elements of judicial propriety is the treatment of third persons, including adverse expert witnesses.

*ABA Model Rule 4.4, Respect for Rights of Third Persons*, broadly addresses the standard of dealing with others, which includes adverse expert witnesses. “A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”<sup>36</sup> Generally a lawyer must zealously act on behalf of his/her client;<sup>37</sup> however, this duty is tempered with regard to the methods that a lawyer may employ when carrying out his/her duties toward the client involving witnesses and third persons.<sup>38</sup>

Lawyers seeking to discredit or impeach an expert must avoid the use of discrediting facts or assertions that exceed the realm of truthfulness against the expert’s testimony.<sup>39</sup>

Prohibited activity under *ABA Model Rule 4.4* includes witness intimidation or tampering. If a lawyer offers an opposing expert witness employment or engages in ex parte communication, it will likely be deemed as tampering, which is prohibited. The “simple” act of asking an opposing expert witness to inspect a lock (the lock was unrelated to the present case)<sup>40</sup> for a fee of \$100 per hour crosses into prohibited territory and such conduct was found to deny a party a fair trial.<sup>41</sup> Sanctions for such behavior from a lawyer can result in monetary fines, charges of contempt, or disqualification of the offending counsel from the case.<sup>42</sup>

#### Lawyer and adverse expert witness contact:

*ABA Model Rule 3.4 (c)* does not expressly prohibit contact between a lawyer and the opposing expert witness. A common view regarding lawyer contact with adverse expert witnesses is that it is appropriate only during the discovery phase of litigation, namely, during interrogatories or depositions, and of course, at trial. All other forms of lawyer contact with the adverse expert witness is generally viewed as unethical.<sup>43</sup> (*ABA Model Rule 3.4 (c)* prohibits lawyers from

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34 ABA Model Rules, Preamble & Scope cmt.1.

35 Id.

36 ABA Model Rule 4.4, Transactions With Persons Other Than Clients, Respect For Rights of Third Persons.

37 ABA Model Rules, Preamble & Scope cmt. 2.

38 ABA Model Rule 4.4 (a), Transactions With Persons Other Than Clients, Respect For Rights of Third Persons.

39 Ethics Issues in the Use of Expert Witnesses, Vol. 24 No. 3, P. 3 Neil J. Wertlieb, ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

40 Erickson v. Newmar Corp., 87 F. 3d 298, 302 (9<sup>th</sup> Cir. 1996).

<sup>41</sup> Erickson v. Newmar Corp., 87 F. 3d 298 (9<sup>th</sup> Cir. 1996).

42 Erickson, 87 F. 3d at 303.

43 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-378 (1993); see Model Rules of Professional Conduct, Rule 3.4(c) (1983).

knowingly disobeying the obligation under rules of a tribunal.) *ABA Commission on Ethics and Professional Responsibility, Formal Op. 93-378 (1993)* does not expressly prohibit ex parte contact, but opines that such contact violates the lawyer's duty to obey obligations of the tribunal. In particular, Federal Rules of Civil Procedure (FRCP) 26 (b) (4) (A) defines procedures of conducting discovery as the only acceptable means of contact with an adverse expert witness. (FRCP 26 sets forth the "exclusive" means of obtaining opposing expert witness opinions.) It is the discovery rules in civil procedures that govern contact between the lawyer and the adverse expert witness. However, after the ABA issued their formal opinion, FRCP 26 was amended to omit the word "exclusively." Despite this amendment to FRCP 26, courts continue to follow the original standard by limiting contact between lawyers and opposing expert witnesses to interrogatories and/or depositions.<sup>44</sup>

#### Privilege, discovery, and the expert witness:

How much of the expert witness's work is discoverable by the opposing lawyer? It depends. If the expert witness is a consulting witness, then reports, notes, and research by such an expert is deemed "attorney work product" and therefore is not discoverable.<sup>45</sup>

On the other hand, a testifying expert's work is discoverable, as no confidentiality or privilege extends to this class of expert witness.<sup>46</sup> So all reports, notes, outlines, and memoranda prepared by the expert is considered discoverable—as is all communication between the testifying expert and the retaining lawyer. It has been my experience that the extent of discovery of a testifying expert work varies from state to state. Check local rules for a more definitive answer to this question.

#### What happens when the expert witness's designation changes from consulting witness to testifying witness?

Courts have held that a testifying expert witness's work product is not protected under privilege.<sup>47</sup> The moment that an expert witness's designation changes from consulting to testifying, the privilege is lost.<sup>48</sup> But the loss of privilege exists ONLY from the point in time when the designation changes from a consulting to a testifying witness.<sup>49</sup> When the expert advises a lawyer and also provides testifying services, this dual capacity will often result in an

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44 *Beyond the No Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, George M. Cohen, Tulane Law Review, Vol. 87:1197, P. 1210. (In short, no contact with an adverse expert witness (outside of interrogatories or depositions) is permitted).

45 *Shadow Traffic Network v Superior Court* 24 Cal. App. 4th 1067 (1994); Ethics Issues in the Use of Expert Witnesses, Vol. 24 No. 3, Neil J. Wertlieb, P. 5 ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

46 Ethics Issues in the Use of Expert Witnesses, Vol. 24 No. 3, Neil J. Wertlieb, P. 5 ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

47 *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 689 (Cal. Ct. App. 2013).

48 *Id.* (citing *Shadow Traffic Network v. Superior Court*, *supra*. 24 Cal. App. 4th at p. 1079).

49 *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th at 690 (citing *People v. Millner* 753 P.2d 669 (Cal. 198); *Williamson v. Superior Court*, *supra*, 582 P. 2d 126, 21 Cal. 3d 829, 834-35 *Sanders v. Superior Court* 34 Cal. App. 3d 270, 278-79 (Cal. Ct. App. 1973).

camera review to separate consulting versus testifying expert work during the discovery process.<sup>50</sup>

As mentioned earlier, there is a significant distinction made between testifying and consulting expert witnesses and the creation of attorney-client privilege. But the mere designation as a testifying expert is not dispositive, since such designations may be withdrawn. In instances where the designation of testifying expert is made, privileged information is not disclosed, and the initial designation is subsequently withdrawn, the privilege survives. In the *Shooker case*<sup>51</sup> the plaintiff initiated a lawsuit and designated himself as one of several other experts whom he planned to call. During depositions, the defendant started asking questions of the plaintiff regarding the plaintiff's conversations with his attorneys. The plaintiff refused to answer and sought protective orders. The hearing judge refused the plaintiff's motion for protective orders and the plaintiff appealed. The appellate court ruled that no determination of privilege occurs at the mere designation point, as designations are subject to change. Rather, the determinative element is whether or not a disclosure of privileged information has occurred. Therefore, if an expert's designation is withdrawn before any privileged information is disclosed, there is no waiver of privilege. The mere label of "testifying expert" does not affix until the expert's documents are produced, testified to, or information has otherwise been made known to the opposing side. *Shooker*, 111 Cal. App. 4<sup>th</sup> at 925. There is no implied waiver of client-attorney privilege with a simple designation.

The potential consequence of a lawyer retaining an expert witness who was retained previously by the opposing party is disqualification of the retaining lawyer.

The criteria for expert disqualification are based upon whether the expert possesses confidential information materially related to the proceedings before the court. This thorny issue has been resolved by courts holding that testifying experts possess information that is not of a privileged nature, as no privilege rests with testifying experts.<sup>52</sup> In other words, any communications between the retaining counsel and the testifying expert is deemed a waiver of privilege.

What if the testifying expert witness from an earlier trial is subsequently retained by opposing counsel after the original case concluded several years prior?

In *DeLuca*,<sup>53</sup> a lawyer retained an opposing expert witness from a case several years prior but involving the same parties. Opposing counsel immediately moved to disqualify the retaining lawyer claiming privilege given its communications with the expert witness in its prior relationship. The court held any information lawyers communicated to the testifying expert enjoys no privileged status.<sup>54</sup>

What if a lawyer retains an expert interviewed by, but not hired by, opposing counsel? Again, the guiding rule is dependent upon the nature of the information that was communicated by the lawyer to the expert witness. Where confidential or privileged information (mental impressions, case theories, etc.) has been passed from lawyer to expert witness, then the expert witness is disqualified from working with an opposing party. Witness disqualification can occur

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<sup>50</sup> *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th at 690.

<sup>51</sup> *Shooker v. Superior Court*, 111 Cal. App. 4th 923 (Cal. Ct. App. 2003).

<sup>52</sup> *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th at 691.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* At 691.



even where no retention agreement is entered into or fees paid to an expert witness. If there was a “reasonable expectation [that] information would remain confidential,” then a privilege was created.<sup>55</sup>

#### What questions can a lawyer ask an opposing expert witness?

A consulting expert- generally nothing. The testifying expert, however, is, as indicated above, a different animal. Permissible discovery regarding expert witness information and questions sought from a testifying expert include his/her notes, reports, memoranda, draft reports, notes, task lists, outlines, draft letters—pretty much everything. However, some courts distinguish between expert witness draft reports and information surrounding draft report preparation, but otherwise, privilege does not extend to much of the testifying expert’s work product. For example, in the case of *Tesseara Inc. v. Sony*,<sup>56</sup> the court ruled that there was no FRCP 26 (b) (4) (C) work product protection for the notes, communications identifying facts, or data provided by the counsel.<sup>57</sup>

#### What is discoverable from the opposing expert witness?

The expert’s compensation for generating his/her report(s) and/or testimony, identifying facts or data that the party’s attorney provided which the expert subsequently considered in forming the opinions, or identifying assumptions that the party’s attorney provided which the expert then relied upon in forming his/her opinion are discoverable.<sup>58</sup>

It is also possible to waive privilege where a report generated by a third party at the behest of the attorney is produced at trial. The waiver, however, is limited to the extent of the testimony or report produced to the court. Therefore, matters covered by investigators or expert’s testimony are deemed waived and lose the cloak of privilege.<sup>59</sup>

#### Role of expert witness’s own professional rules of conduct.

Generally, licensed or certified persons are subject to their own profession’s Rules of Professional Conduct.<sup>60</sup> Lawyers, for example, are subject to the ABA Model Rules of Professional Conduct, and most states have adopted these rules as their state’s ethical rules to govern lawyers who are subject to their jurisdiction.<sup>61</sup> As another example, the American Institute of Certified Public Accounts (AICPA) has Rules of Professional Conduct which apply to all of their members. The AICPA has the authority to hold its members to accounting professional standards and enforce discipline (revocation of firm’s registration, fines, and

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<sup>55</sup> *Shadow Traffic Network v Superior Court*, 24 Cal. App. 4th 1067, 1082 (Cal. Ct. App. 1994).

<sup>56</sup> *Tesseara Inc. v. Sony*, No. C-11-04399 EJD (HRL), 2013 U.S. Dist. Lexis 150427 (N.D. Cal. Oct. 18, 2013).

<sup>57</sup> Ethics Issues in the Use of Expert Witnesses, Vol. 24 No. 3, Neil J. Wertlieb, P. 5 ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

<sup>58</sup> Federal Rules of Civil Procedure, FRCP 26 (b) (4) (C) (i) – (iii).

<sup>59</sup> *United States v. Nobles*, 422 US 225 (1975).

<sup>60</sup> Ethics Issues in the Use of Expert Witnesses, Vol. 24 No. 3, Neil J. Wertlieb, P. 8 ([https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-3/ethics-issues-use-expert-witnesses.html)).

<sup>61</sup> American Bar Association, Jurisdictions That Have Adopted The ABA Model Rules of Professional Conduct ([https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html)).

barring from association with persons of a registered public accounting firm, etc.) for failing to observe their rules.<sup>62</sup>

Safety expert witnesses holding a Certified Safety Professional (CSP) designation are regulated by the Board of Certified Safety Professionals. This program is internationally accredited by the American National Standards Institute. The CSP holder is subject to a Code of Ethics, and members holding the CSP designation are subject to disciplinary action for ethical violations.<sup>63</sup> Other trades and professions that are commonly regulated include acupuncturists, addiction counselors, appraisal management companies, insurance agents, real estate brokers and land surveyors, just to name a few.<sup>64</sup>

#### Lawyer's possible uses of unprofessional conduct by the opposing expert witness

Legal challenges to opposing expert witnesses for a prior infraction (professional censure) are acceptable if the violation(s) bear directly upon the veracity of the witness regarding the issues involved at trial. For example, a medical expert witness's pending censure by a professional medical association (even if the censure is under appeal at the time of trial) may be used as cause for impeachment.<sup>65</sup> However, if an expert's prior bad act has no bearing on his/her credibility or the underlying case then challenging the witness on such bad act is improper.<sup>66</sup>

The expert witness's conduct as an expert witness must satisfy the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field."<sup>67</sup> In short, the expert witness's methodology, care, methods of documentation, and testimony must be in line with standards that are commonly observed by others in the same profession; otherwise, they risk presenting unreliable findings that may result in exclusion.

It also bears noting that lawyers employing expert witnesses who completely fails to observe professional standards may experience sanctions themselves from the trial court. *See Harron, M.D.*, 163 So.3d at 949; *see also In re Moncier*, 550 F. Supp. 2d 768 (2008) (courts entitled to act without need of complaint by another when faced with lawyer's unprofessional or unethical conduct).

#### Expert witness immunity:

Generally, expert witnesses are immune from lawsuits against them to prevent an expert witness's unbiased testimony from being influenced by the possibility of being sued.<sup>68</sup> The objective of this line of thinking is to provide a "path to truth" arising from an expert's "forthright and candid" opinion.<sup>69</sup> However, this immunity does not extend to the expert's

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62 Public Company Accounting Oversight Board, PCAOB Release No. 105-2017-036, August 2, 2017, Order Instituting Disciplinary Proceedings, Making Findings, and Imposing Sanctions, In the matter of Jerome Rosenberg CPA, P.C. and Jerome Rosenberg, CPA.

63 (<https://www.bcspp.org/Portals/0/Assets/DocumentLibrary/BCSPcodeofethics.pdf>).

64 Partial list from State of Colorado, Department of Regulatory Agencies (<https://www.colorado.gov/pacific/dora/node/96181>).

65 *Wagner v Georgetown University Medical Center*, 768 A. 2d 546, 562 (D.C. Cir. 2001).

66 *Portillo v. United States*, 609 A.2d 687, 691-92 (D.C. Cir. 1992).

67 *Mississippi State Board of Medical Licensure v. Harron, M.D.*, 163 So. 3d 945, 955 (2014).

68 What Happens When Hired Guns Misfire, David D. Dodge, Arizona Attorney, March 2017, P. 31, citing *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 776 P. 2d 666 (Wash. 1989).

69 *LLMD of Michigan Inc., v. Jackson-Cross Co*, 740 A. 2d 186, 191 (Pa. 1999).

professional negligence, and the allegations of negligence are not based upon the substance of the expert's opinion.<sup>70</sup> In *LLMD of Michigan Inc., v. Jackson-Cross Co.*,<sup>71</sup> an expert was hired to opine on the loss of a developer's claim of lost profits when the finance sources for his planned development breached a financing agreement. On the stand, the expert was forced to admit that his calculations were flawed resulting in the developer being subsequently forced to settle for a significantly reduced damage amount. The developer sued his expert. When the expert witness moved for judgment under the theory of witness immunity, the court ruled that immunity does not extend to professional negligence. *LLMD of Michigan*, 740 A.2d at 191.

An expert can also be held accountable and disciplined for breaches of his/her standard of conduct by agencies with whom the professional files documents (for example, the Securities and Exchange Commission),<sup>72</sup> or by the expert's professional association in their chosen field of expertise (such as Certified Public Accountants).<sup>73</sup>

Many states regulate certain services and professions, and those regulations may be referenced to learn the proper legal guidelines and licensing standards for each career and professional field of expertise.<sup>74</sup> It is within the proper scope of impeachment or challenge to an expert's credibility based on a failure to comply with his/her professional standards.

#### Other limitations on expert witness immunity.

An expert witness may not enjoy immunity in situations where a professional licensing board takes action against the expert witness, even where the association's action is initiated by the adverse party.<sup>75</sup> In *Ioppolo v. Rumana*,<sup>76</sup> the plaintiff was a neurologist who testified against two other neurologists in a professional malpractice case (which was ultimately settled against the two defendants). The expert witness/plaintiff and the two defendants were members of the American Association of Neurological Surgeons (AANS). Subsequent to settlement of the trial the two defendants then filed a complaint with the AANS, alleging unprofessional conduct associated with the expert's testimony. The AANS has guidelines calling for testimony to be "truly expert, impartial and available to all litigants."<sup>77</sup> After an AANS hearing, the panel concluded that the expert neurologist's conduct at trial was "unprofessional" and "egregious," yielding a recommendation of imposing sanctions. The expert witness was ultimately suspended for two years from the AANS.<sup>78</sup> (In making its decision, the AANS reviewed the Professional Conduct Committee's findings and the Cat scan films of the case in which the neurologist testified as an expert.)

#### Expert immunity:

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70 Id., What Happens When Hired Guns Misfire, David D. Dodge, Arizona Attorney, March 2017, P. 31.

71 *LLMD of Michigan Inc.* at 191..

72 *Ponce v. Securities and Exchange Commission*, 345 F. 3d 722 (9th Cir. 2003).

73 *Order Instituting Disciplinary Proceedings, Making Findings, and Imposing Sanctions, in the Matter of Jerome Rosenberg CPA, P.C. and Jerome Rosenberg, CPA*, PCAOB Release No. 105-2017-036).

74 For example, the State of Colorado Department of Regulatory Agencies (DORA).

75 *Ioppolo v. Rumana*, 581 Fed. App. 321 (5th Cir. 2014).

76 Id.

77 Id. At 324.

78 Id. At 325.

According to the American Bar Association and the Expert Witness Committee, there has been a rise in lawsuits against expert witnesses in recent years.<sup>79</sup> Litigation has included actions against “adverse experts,” as well as “friendly experts.” In the case examples shown above, we have already discussed actions against “friendly experts” due to professional negligence, however, courts have generally held that suits against adverse experts are barred.<sup>80</sup>

Witness immunity is a common law doctrine that was originally intended to provide witnesses with the protection to freely and truthfully testify without facing the threat of legal action arising from the content of their testimony.<sup>81</sup> Such protections extend to testimony in court, statements made during pre-trial stages, depositions, affidavits, and reports.<sup>82</sup> Perjurious witness testimony is not protected from criminal prosecution. An adverse party filed a lawsuit against an expert witness, claiming perjured testimony, submission of false and fraudulent documents, and a RICO action. The court granted expert immunity in all claims except the RICO claim. See *Darragh v. Superior Court*.<sup>83</sup>

Civil suits against adverse expert witnesses protect against defamation, fraud, and negligence claims.<sup>84</sup>

The judicial view of expert testimony is that it should consist of unfettered truth that is based upon solid fact.<sup>85</sup> Justice is served when objective testimony is available to the court and/or jury, and the fact that an expert witness is paid by one party does not change the demand for experts to be objective and unbiased while participating in a judicial proceeding.<sup>86</sup> A friendly expert who discerns and testifies that prior reasoning may have been inaccurate enjoys witness immunity. In one case a medical doctor provided prior depositions to opposing counsel regarding her position, but upon cross-examination, she realized that her reasoning in earlier depositions was inaccurate. The retaining attorney sued the expert witness for damages resulting from the unfavorable verdict. The court held the friendly expert was immune from litigation.<sup>87</sup>

#### Conclusion:

The role of expert witnesses in our judicial system provides many benefits, especially where facts that are vital to resolving a legal controversy need a professional’s explanation to assist the trier of fact in arriving at an informed decision. The judicial system requires that expert witnesses be unbiased, and that they present thorough, reasoned explanations and conclusions in their work. By its very nature, an expert witness’s testimony is given additional weight by

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79 American Bar Association, Expert Witness Committee, Vol 3, No. 1, p. 1 Winter 2007, John P. McCahey.

80 Id.,.

81 Id.

82 Id.

83 Id.; *Darragh v. Superior Court*, 900 P. 2d 1215 (Ariz. Ct. App. 1995).

84 American Bar Association, Expert Witness Committee, Vol 3, No. 1, p. 9 Winter 2007, John P. McCahey.

85 *Panitz v. Behrend, Bernsberger*, 429 Pa. Super. 273, 280 (Pa. Super. Ct. 1993).

86 Id. At 280-81.

87 Id.

triers of fact, since the testimony is given by a professional expert on the subject matter, along with (presumably) an unbiased position that adds to the credibility and weight of his/her words.

It is easy to overlook the professional standards applicable to both lawyers and expert witnesses in a legal controversy. Professionals who act as expert witnesses should always adhere to their professional code of conduct to avoid injuring their retaining lawyer's case due to the possibility of an impeachment or a disqualification ruling. A lawyer's code of professional conduct standards can also be compromised when their expert witnesses breach their own professional conduct as the lawyer's obligations under the ABA Rules of Professional Conduct apply to all actions of the lawyer (including that of his/her experts).

Greg Gerganoff was admitted to practice law in Colorado in 1983 and actively practiced for about 12 years before discovering the professional challenges of the safety profession. For the past 18 years he has served as a safety manager for companies in mining, oil and gas and construction. Greg started Rocky Mountain Safety Consulting, Inc., his safety consulting business, in 2014 providing professional safety services for a national insurance company, an insurance broker, and small oil and gas, manufacturing, mining and construction companies. He provides safety professional expert witness services to plaintiffs and defendants in the U.S.A.