PERSPECTIVES

ETHICAL PRINCIPLES FOR EXPERT WITNESSES: PROFESSIONALISM, VALIDITY AND INDEPENDENCE

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In the ever-evolving world of litigation, the expert witness plays a critical role in helping courts decipher complex information, often influencing the outcome of high-stakes cases. That influence comes with responsibility: ethical lapses can compromise fairness and erode trust in the legal system. The core principles of professionalism, validity and independence apply regardless of an expert's discipline.

Today, many professionals, especially those new to the role of expert witness, lack a comprehensive guide to the ethical standards they must uphold.

Neil J. Wertlieb's article, *Ethics Issues in the Use of Expert Witnesses*, which focuses on ethical issues of attorneys retaining or serving as expert witnesses, provides the clarity this field needs. Mr Wertlieb draws upon his experience as a transactional attorney and expert witness to summarise standards applicable to attorneys engaging experts. His treatment of topics such as contingency fees, the discoverability of expert communications, and the distinction between consulting and testifying experts offers both nuance and practical insight.

This article is written in that same spirit of service. It aims to extend Mr Wertlieb's work by distilling those insights into actionable ethical guidance for all expert witnesses – lawyers and non-lawyers alike. We have organised our insights into three categories: professionalism, validity and independence.

Professionalism

Above all, expert witnesses are grounded in the ethics of their own professions. Every profession abides by a set of standards determined by its members. For example, there are codes in the fields of law, technology, finance and health. Specialised professions with specific standards for serving as expert witnesses include eye doctors (through the American Academy of Ophthalmology), oceanographers (through the Ethics Committee of the Association for the Sciences of Limnology and Oceanography) and surgeons (through the Statement of the American College of Surgeons, most recently revised in October 2024).

But there is not yet a single 'profession' called expert witness. The question of who qualifies as an 'expert' is not simply a matter of education or experience; it is a legal determination made by the court. While businesses do not always need to rely on experts, or to formally validate the expertise of advisers they engage, courts by contrast do set and follow standards for determining expertise.

Ethics for experts derived from professional standards. Expert witnesses come from all types of professions. The appropriateness of any given person as an expert depends largely on the facts and circumstances of the case at hand. Given millions of unique legal cases, it is reasonable to assume that assigned the right case, any professional can serve as an expert witness. In the US, state courts alone hear 66 million cases per year, according to a March 2025 study by the Pew Charitable Trust. The appropriateness of any given person as an expert depends largely on the facts and circumstances of the case at hand. No two of these cases are exactly alike. One case may need verification by a widely published nuclear physicist, while another might call for testimony by an experienced electrician or a human resources manager. The latter individuals may not perceive themselves as 'experts' per se, but if they pass the standards set by courts, they do indeed merit that distinction.

Regardless of profession or credentials, all expert witnesses have one primary responsibility: to the court. Though retained by one party, their role is not to help that side win, but to assist the judge or jury in understanding information that lies beyond the average person's knowledge.

Special duties of attorney-experts. One of the more interesting questions that has arisen in the expert witness field involves the appropriateness of an attorney serving as a testifying expert. As Emily

Lou Steenwyk of the Forensis Group recently asked, 'When Can an Attorney Serve as Expert Witness?'. There are limits to this role. For instance, the Fifth Circuit Court of Appeals has ruled that attorneys may testify as experts in limited circumstances but cannot opine on ultimate legal conclusions, as that is up to the court. Rule 3.7 of the American Bar Association's (ABA's) Model Rules of Professional Conduct discourages attorneys from serving as testifying experts in cases where they or their firm have been retained as counsel. They are also discouraged from drawing any legal conclusions. They can opine on matters such as standards for legal practice in malpractice cases or billing procedures in fee disputes, but it is up to the court to decide culpability of the parties.

Attorneys who serve as expert witnesses operate under an additional layer of obligation. Not only must they observe the ethical duties common to all expert witnesses, they must also follow the ABA Model Rules of Professional Conduct. Key among these are Rule 1.7 (Conflict of Interest), Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 3.7 (Serving as an Expert Witness) and Rule 1.7 (Conflict of Interest). Additional ABA opinions clarify that attorneys should not coach witnesses.

A crucial distinction exists between consulting and testifying experts. Communications with consulting experts are typically protected under the work-product doctrine. However, once an expert is designated to testify, Rule 26 of the Federal Rules of Civil Procedure clarifies that nearly all materials used, reviewed or prepared become discoverable, including drafts, notes and emails.

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The ABA addresses this distinction in Formal Opinion 97-407. It makes clear that an attorney acting as an expert witness should not create an attorney-client relationship with the retaining party. Nonetheless, the attorney-expert must maintain confidentiality, avoid conflicts and act with professional discretion. If the expert receives sensitive or confidential information in that capacity, it cannot be used for future representation or

disclosure. Courts have delivered sanctions against such behaviour, for example excluding testimony and meting out professional discipline where lines were crossed.

Attorney-experts must also be vigilant in avoiding conflicts of interest. If a lawyer is asked to testify against a former client or in a matter closely related to a past representation, disqualification is not only possible but likely. Even in cases where no actual conflict exists, the perception of bias or impropriety can severely damage the expert's credibility.

Validity

In addition to meeting professional standards, an expert's approach must be valid. In the US, the two main standards for validity of expertise are the Daubert standard requiring scientific rigour of any methodologies used) and the older Frye Standard (requiring acceptance of the methodologies). Most states use Daubert, but some, including California, Florida and New York, use Frye. Several states use a combination of the two or, more rarely, their own standard. Furthermore, every state has a Rule of

Evidence, either its own or one modelled after the model Rule 702.

Rule 702 of the Federal Rules of Evidence, Testimony by Expert Witnesses, establishes that "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise", but stipulates that the proponent of the expert must demonstrate to the court that it is more likely than not that the expert's particular specialised knowledge will help the court understand evidence or determine facts. The expert's testimony must be based on sufficient facts or data, must result from reliable principles and methods, and must apply those facts, data, principles and methods to the facts of the case. The Expert Institute maintains a chart of state standards, showing combinations of Daubert, Frye and derivatives of Rule 702.

Experts must testify only within their specific area of expertise. Courts have repeatedly excluded testimony that reaches beyond a witness's qualifications or one that lacks a sound methodological foundation. Even well-credentialed professionals risk exclusion or impeachment if they fail to support their conclusions rigorously.

Experts using AI tools or algorithmic models must be prepared to explain their functioning, limitations and error rates. Courts require that those methodologies be not only reliable, but also understandable. Ethical experts must disclose when their analysis is partly or wholly dependent on non-transparent or proprietary systems, and they should be prepared to offer human-understandable rationales for their conclusions.

Courts and regulatory bodies have not hesitated to discipline experts who have employed invalid methods or facts. The most egregious cases often involve flawed science, overreach or outright fabrication.

Independence

Regardless of profession or credentials, all expert witnesses must be rigorously independent, with no bias toward either side on a legal conflict. Though retained by one party, their role is not to help that side win, but to assist the judge or jury in understanding information that lies beyond the average person's knowledge. As stated earlier, this expectation of objectivity is embedded in the Federal Rules of Evidence as well as in decades of judicial precedent. Attorneys should not coach witnesses.

A bright ethical line exists around expert compensation. As Mr Wertlieb emphasises, contingent fee arrangements, where an expert is paid only if the case is won, are flatly prohibited for testifying experts. Such arrangements create an incentive for bias, and courts have universally considered them undermining both credibility and fairness. Consulting experts who are never designated to testify may, in theory, operate under

more flexible arrangements, but most professionals wisely avoid even the appearance of contingency.

Misconduct and consequences: when experts fail

Dr James Grigson, nicknamed 'Dr Death', routinely testified in death penalty cases that defendants would "certainly" kill again – often without ever interviewing them. His absolute certainty, unmoored from psychiatric standards, led to his expulsion from professional associations and undermined numerous convictions.

In other instances, Dr Roy Meadow misused statistical data in several UK cases involving sudden infant death syndrome, leading to wrongful convictions of grieving parents. The General Medical Council found his testimony grossly misleading and revoked his medical licence.

Fred Zain, a forensic chemist in West Virginia, fabricated lab results that led to wrongful convictions over a decade. A state supreme court eventually ruled that all of Mr Zain's work was presumptively invalid, and an official investigation revealed institutional failures in verifying his testimony.

In the civil context, the case of *LLMD of Michigan v. Jackson-Cross Co.* presents a rare but telling example of accountability, where an expert hired to perform a business valuation was later sued for malpractice after providing a damages estimate deemed legally and methodologically unsound.

In ongoing litigation over the herbicide paraquat, a federal court excluded the testimony of a biostatistician whose methodology was criticised as selective and unscientific. The ruling reaffirmed that even highly credentialed experts must meet Daubert standards for scientific reliability.

In today's digital and highly searchable environment, expert testimony can leave a long trail. Judicial opinions, deposition transcripts and disciplinary actions are often publicly accessible. Experts must recognise that their testimony, even in obscure or early-career cases, can shape how future courts, clients and licensing boards view them. Ethical missteps are not easily erased and may affect professional standing, licensure or future expert engagements.

Best practices and recommendations

To avoid ethical pitfalls, experts should commit to several best practices, as outlined below.

Use detailed engagement letters. These documents should define whether the expert is consulting or testifying, clarify compensation (hourly or flat), and explain obligations concerning confidentiality and disclosure. They should also outline timelines, responsibilities regarding deposition and trial attendance, and procedures for handling disagreements about findings or revisions. Anticipating potential areas of friction early in the

engagement letter promotes smoother collaboration and reduces ethical risk.

Document methodology and sources. A clearly reasoned, peer-reviewed and replicable analysis is the best defence against a Daubert challenge. Experts should also maintain internal records of all steps taken, from initial assumptions to rejected alternatives, to demonstrate rigour if their process is later questioned. This archive can prove essential during cross-examination or when testifying long after the initial analysis.

Avoid overstating conclusions. Experts must resist pressure to strengthen their opinions beyond what the evidence supports. This is especially critical in criminal or high-stakes civil cases. Care should also be taken with charts, analogies or extrapolations that could imply a level of certainty not grounded in the data. If asked about matters outside the scope of their expertise, experts should candidly say so rather than speculate.

Attorney-experts should conduct rigorous conflict checks (for attorneys). Before accepting an engagement, they must ensure that the testimony would not jeopardise current or former client relationships. They should also screen for indirect relationships, such as shared business interests or prior informal consultations, that may create the appearance of a conflict, even where none formally exists.

Stay current with ethics education. Many professional organisations and bar associations offer continuing education on expert testimony, ethics and evolving evidentiary standards. Emerging areas like artificial intelligence, statistical modelling and digital forensics introduce new ethical considerations. Participating in interdisciplinary ethics programmes can help experts remain aligned with best practices across both technical and legal dimensions.

Clarify communication protocols. Experts and legal teams should agree upfront on boundaries for discussions, especially around draft reports or analysis updates. Clear channels reduce the risk of perceived coaching or inadvertent violations of discovery rules.

Contribute to clarity, not advocacy. An expert witness's primary responsibility, as mentioned earlier, is to the court. While retained by one side, their duty is not to act as an advocate. Their role is to explain technical or specialised information in a way that is accessible to the court, without exaggeration or selective framing. Effective experts help build understanding through neutral, well-structured communication – using charts, analogies and plain language that clarify rather than persuade. This clarity aids the factfinder without compromising impartiality.

Conclusion: the integrity of the courtroom depends on ethical experts

The role of expert witnesses is an honour and a responsibility. Their analysis can alter lives, affect corporate outcomes and shift public policy. Ethical lapses, whether in testimony, communication or preparation, can reverberate beyond a single case.

Inspired by Mr Wertlieb's thoughtful exploration of these issues for attorneys, this article aims to help both attorney-experts and their non-lawyer peers navigate their responsibilities with greater awareness and discipline. Ethics in expert testimony is not merely an academic concern; it is foundational to a fair and functional legal system. R&C

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