

Know the Ethics of the Expert Witness, Whether Friend or Foe

Whether calling an expert witness or cross-examining one, a litigator in the criminal justice system has an obligation to conduct a multifaceted investigation of the expert in question. To determine the expert's qualifications, the litigator must thoroughly evaluate the witness's credentials, including academic training, work experience, and publications. But litigators often overlook an important aspect of an expert's background—the ethical code or codes that govern the expert's conduct in his or her field of expertise and in the courtroom.

While ethical competence for a litigator in a case involving expert testimony requires counsel to have or develop a working understanding of the witness's area of expertise, that same ethical standard mandates the litigator appreciate the ethical context in which that expert practices and testifies.

Numerous professional organizations, such as the American Psychological Association or the American Medical Association, have ethical precepts to govern the conduct of their members. If the expert is a member of a professional organization, that membership constitutes a commitment to follow the ethical standards embraced by the entity in its code of conduct. Even if the expert eschews membership in an appropriate umbrella association, the ethical principles of that organization reflect the minimum as well as the aspirational standards of the witness's profession. The expert witness may be ignorant of these professional standards or dismiss them as unimportant to his or her work. Nevertheless, these standards of conduct are objective benchmarks by which to evaluate the expert's professionalism.

Today most professional organizations have a presence on the Internet that includes public access to an individual profession's ethical code, whether called ethical principles, guidelines, or standards. A litigator may easily use the Internet to obtain the profession's actual ethical rules or at least instruc-

tions on how to obtain them in written form. For example, the American Psychological Association's ethical principles and code of conduct may be found at www.apa.org/ethics/homepage. Occasionally, an association's ethical precepts are not readily apparent on the Web site. The American Academy of Forensic Sciences' code of ethics and conduct is available online; however, the standards are contained in a section of the organization's bylaws found at www.aafs.org/.

Litigators must also realize that many expert witnesses whose areas of expertise are not immediately perceived by the public as professions may nevertheless be members of an association that is dedicated to the professionalizing of that occupation.

Those associations are just as likely to have committed to an ethical code as many of the established or more recognized professions. The Association of Firearm and Tool Mark Examiners, for example, has a code of ethics available at www.afte.org/.

Specialized or more limited areas within a general profession, such as medicine, are also likely to have their own professional associations. The American College of Emergency Physicians (www.acep.org) is such an association. Its existence is premised in large part on the principle that there is a body of knowledge unique to emergency medicine that requires continuing refinement and development. Litigators must endeavor to identify the various professional associations that may govern the witness's specific expertise and the codes of conduct for each group.

The witness may belong to yet another more general type of professional association that brings together diverse experts solely on the basis that they spend a portion of their time consulting and testifying within the court system. The Forensic Expert Witness Association (www.forensic.org) and the American Academy of Forensic Sciences are examples of these types of professional organizations. Both have codes of ethics available on the Internet.

If the litigator's own expert is unaware or dismissive of the profession's ethical code, counsel must probe the witness to understand how to explain and justify to the fact finder this incongruity should it become an issue in the case. If an

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expert is being interviewed as a potential witness in the litigation and lacks an adequate explanation for ignorance or disregard of the profession's code of conduct, the simple solution may be not to retain this expert. However, if the litigator is forced to keep the expert as a witness, counsel should endeavor to demonstrate that the expert's actions in this case conform to or exceed the profession's ethical guidelines or are justified under the unique circumstances of the case. The litigator cannot make these evaluations and adjustments without a thorough appreciation of the expert's ethical code.

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When preparing to cross-examine an opposing expert witness, counsel's awareness of the expert's deviation from the ethics of the profession in matters important to the litigation is a fertile area of inquiry. An expert's entitlement to provide an opinion in a trial flows in part from his or her professionalism. When the witness is shown to have acted unprofessionally by the standards of those who have the same expertise, the expert's credibility becomes suspect or even nonexistent.

Demonstrating the opposing expert's ignorance of his or her profession's ethical standards also undermines the witness's credibility in the eyes of the fact finder, even when the examiner is not able to demonstrate that the witness actually violated those principles in the case being tried. Lack of knowledge of the ethical code of the profession is a legitimate attack on the expert's education and credentials.

Armed with knowledge of an expert's ethical code, a litigator may evaluate the witness's qualifications or suitability for the task at issue. A profession's ethics may provide requirements as to the type of knowledge or training the expert must have to undertake a particular project.

Psychologists are bound by this type of ethical rubric. The American Psychological Association's ethical standards explain that "[w]here scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists [must] have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they

[must] make appropriate referrals." (American Psychological Association, Ethical Standards, Standard 2.01(b), Boundaries of Competence (2003).)

This ethical commandment may be used by the litigator, either offensively or defensively, to explain why an expert is uniquely qualified or unqualified to conduct an evaluation of a particular individual whose background is complicated by factors not routinely encountered or studied. The profession's ethical rules provide objective, unbiased support for this line of questioning, which the fact finder will normally accept.

Codes of conduct for some professions provide specific rules for the professional when he or she functions as an expert witness. These principles may set essential qualifications for serving as an expert witness, provide guidelines for members who testify, direct the expert to become reasonably familiar with the judicial rules governing the witness's role, mandate that the expert's testimony be submitted to the association for subsequent peer review, or even emphasize that misconduct as an expert witness will subject the member to disciplinary action. Membership in a forensic association will also subject the witness to additional ethical principles that govern consulting and testifying. Litigators must familiarize themselves with the ethical rules that address the forensic function of any expert who will testify in the case regardless of who calls the witness.

Indeed, the litigator may wish to mine the forensic rules of a variety of ethical codes to assemble a list of ethical standards for experts who testify. Even if a particular standard has not been incorporated into the code of conduct that governs a particular expert witness, its adoption by another professional organization may give it weight as a measure of professionalism in preparing for and testifying in court. This collage of forensic ethical guidelines may be helpful to a litigator who wishes to ensure his or her expert witness has met the highest standards of those associations whose members are called on to provide expert testimony in judicial and administrative settings.

Today a litigator who anticipates calling or cross-examining an expert has no excuse for not having a section in that individual's trial file devoted to the associations that govern the expert's profession, the appropriate subspecialties, and the expert's function as a litigation consultant and witness, complete with each organization's code of ethics. Counsel cannot know, let alone demonstrate, that the expert has adhered to or violated the rules of his or her profession when counsel has no idea of what those rules are.