

# ETHICAL CONSIDERATIONS ON THE CARE & WATERING OF 980 EXPERTS

R. Steven Prifogle

In a Chapter 980 case, the respondent's attorney, to function effectively, must adhere to two primary duties: maintaining the client's confidentiality and representing the client zealously. A client needs to know that what he tells his lawyer will not be used against him, and that the lawyer will act in the client's best interests, not someone else's. Difficult ethical problems arise from the conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical counselor while maintaining his practice with other clients within the legal system.

Outlined below are some considerations, a check list if you will, for dealing with expert witnesses in a Chapter 980 case. Thereafter is a list of topics for discussion regarding some issues which invariably arise during expert testimony in such cases, inviting the group to consider the ethical dilemmas of such matters. Chapter 980 law has created an area of practice blending law and psychology in a fashion that is rarely satisfactory to participants of either profession. An appreciation of the ethical problems which can arise might at least help make practice under this law a more tolerable ugly stepchild.

Consider the following:

1. A lawyer should not attempt to influence the content of an expert witness's testimony, and thereby should not interfere with the expert witness's objectivity and independence.
2. A lawyer should not attempt to urge an expert witness to change an opinion, even if the opinion is detrimental to the lawyer's case.
3. A lawyer should not urge an expert witness to offer opinions and testimony beyond the scope of the expert's expertise.
4. A lawyer should not knowingly allow an expert witness to present testimony which is false, misleading, or otherwise prohibited by rules of evidence.
5. A lawyer should not manipulate an expert witness's opinion by withholding relevant information.
6. A lawyer may assist an expert witness's trial preparation as long as the lawyer does not seek to influence the substance of the expert witness's testimony or otherwise interfere with the expert witness's truthful and accurate testimony.
7. A lawyer may offer a hypothetical situation calling for the expert to disregard or assume certain evidence in order to obtain the expert's opinion. Such a hypothetical must clearly be labeled as such.

8. A lawyer may explain to the expert witness legally relevant issues of law and fact in the case as they pertain to the expert's testimony and opinions. The lawyer may prepare the expert witness for questions to be asked during direct and cross examination.
9. A lawyer should fully explain issues pertaining to client confidentiality to the expert witness and how such confidentiality relates to communications between the lawyer and the expert witness. A lawyer, as well as the expert, should understand the general rule that their communications may be subject to disclosure through discovery and testimony.
10. Fees paid to an expert witness are subject to disclosure and cannot be contingent on the expert witness's opinion, testimony, or outcome of the case.
11. A lawyer should not have ex parte communication with an opposing party's expert witness without that party's consent, and that the scope of that consent should be clearly understood.
12. A lawyer should not retain an expert witness who has previously rendered an opinion against the client without the full disclosure to the client of the reasons for retaining said expert.
13. A lawyer should ensure that the expert witness fully understands the law and standards applicable in the jurisdiction in which the expert will testify. The lawyer should ensure that the expert witness is qualified to testify in that jurisdiction.
14. A lawyer should not intentionally proffer expert testimony to introduce evidence which has previously been ruled inadmissible or excluded by the court.
15. A lawyer should ensure that the expert witness's testimony does not violate the expert's ethical considerations.

This list should by no means be considered exhaustive.

Topics for discussion:

1. Experts are expected to be objective and base their opinions on facts and data reasonably relied upon by others in their field of expertise. How does the lawyer address the line between expert objectivity and expert advocacy?
2. What are the lawyer's considerations for attempting to preclude or disqualify an expert from testifying?
3. Daubert hearings are one way to seek exclusion of certain scientific evidence. What other limine methods might be appropriate for excluding certain scientific evidence? What are the expert's responsibilities for determining what data is "of a type reasonably relied upon by others in the field"?

4. Should a lawyer seek to exclude certain testimony or evidence by an expert because the lawyer believes such testimony violates the expert's ethical considerations? How should such an attempt to exclude be approached and presented?
5. A lawyer cannot proffer evidence he knows to be inadmissible or frivolous. A lawyer cannot argue legal issues which have been previously decided, overturned, or no longer legal precedent.
6. What are the considerations, in somewhat the same sense, for scientific evidence which may no longer be valid or is outdated?
7. Is it worth considering the impact on other clients of attacking an expert in any given case?

This list of questions is by no means exhaustive.

8 April 2014