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When Experts Lie

The Lawyer's Duties of Advocacy and Candor in Tension

By Edward M. Slaughter and Lauren E. Wood

Though lawyers can never knowingly offer false testimony through a witness, expert witnesses present special problems. First, challenging the favorable opinions of a witness that a lawyer has hired to advance the interests of his or her client is in tension with that lawyer's duty to act as a zealous advocate. Second, a lawyer is often ill-equipped to determine whether an expert opinion is objectively true or false. Evaluating the truthfulness of opinions, which are subjective by definition, is an epistemological task that would turn Kant to the bottle. Moreover, experts are retained because they have special knowledge beyond that of a lay person or lawyer. Determining whether a witness with advanced training and knowledge subjectively believes the opinions that he or she offers, while protecting our clients' interests, is an extraordinary responsibility. Yet that is precisely what we must do.

Lawyers have an ethical obligation to keep junk science out of the courtroom. Commenting on meeting this obligation, Chief Judge Jack B. Weinstein wrote, "When all else fails—when neither improved pretrial procedures nor strengthened ethical codes succeed in terminating litigation in which one party's position is grounded solely on suspicious expert testimony—it may be the task of the judge to do what the adversarial process and professional ethics have failed to do." See Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 483 (1986). Judge Weinstein's point is that attorneys have the first responsibility for keeping junk science out of the courtroom.

When does an expert's opinion qualify as a lie under Model Rule of Professional Conduct 3.3, which governs an attorney's duty of candor? The adversarial process often creates incentives for paid expert witnesses to exaggerate or lie that are rarely found with disinterested witnesses. Still, there is no authority conclusively establishing the boundaries of expert opinion. See John L. Watts, *To Tell*

The Truth: A Qui Tam Action for Perjury in a Civil Proceeding is Necessary to Protect the Integrity of the Judicial System, 79 TEMP. L. REV. 773, 790 (2006). Identifying a false expert opinion is difficult because opinions encompass more than objective truth. An opinion is defined as "a view or judgment not necessarily based on fact or knowledge." *Oxford English Dictionary*, 2nd ed. New York: Oxford University Press (1989). Some opinion testimony may be false. Other opinion testimony represents novel beliefs subject to contentious disagreement but genuinely held by their proponent. The ethical challenge is to suppress the former without chilling the rights of counsel and their witnesses to present the latter.

Rule 3.3 instructs that a lawyer shall not knowingly offer false evidence. If a lawyer discovers that his or her witness offered false *material evidence*, reasonable remedial measures must be taken, potentially including disclosure to the tribunal. But in the event that an attorney fails to disclose, how can this rule be enforced? Some circumstances permit courts to infer an attorney's knowledge of perjury. The most obvious inference is made when an expert witness has offered testimony in a previous case that contradicts testimony in a present case. See, e.g., *In the Matter of Peasley*, 90 P.3d 764 (Ariz. 2004). In this situation, an attorney is presumed to know that one or the other of the expert's statements was false, even if he or she cannot identify which is false. *Id.* at 779; Rule 3.3, comment 8.

The Model Rules does not require a lawyer to discard all expert testimony that he or she finds suspect. Under Rule 3.3, a lawyer may still present expert opinions when he or she is uncertain about their validity, but uncertainty must be both reasonable and genuine. Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §3.3:401 (2d ed. 1992 Supp.) While some commentators argue that it is not the attorney's role to test his or her own expert's opinions, others believe that an attorney should take on a gate-keeping function, weeding out improper testimony. Robert Haun, *Truth for Hire With a Ph.D.: The Abuse of Expert Witnesses*, 8 MACALESTER J. PHIL. (1998). Acting reasonably when uncertain about the validity of expert testimony requires that a lawyer

Ethics, continued on page 71



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Indemnity, from page 22

agreed to "hold harmless and indemnify the Port for loss in connection with any action 'resulting or allegedly resulting from [Starplex's] acts, omissions, activities, or services in the course of performing this contract.'" At least one jurisdiction construes an agreement to indemnify against "claims" to mean that the indemnitor will pay for the defense, irrespective of liability to the claimant. *Stewart v. O'Connor Constr. Co.*, 18 MASS. L. REP. 433 (Mass. Super. Ct. 2004) (citing *Urban Inv. & Dev. Co. v. Turner Constr. Co.*, 35 Mass. App. Ct. 100, 616 N.E.2d 829 (1993)).

Assuming that an indemnity provision provides for (or is construed to provide for) a defense based on allegations, another issue is whether Alpha needs to reserve the right not to indemnify Bravo if it undertakes Bravo's defense and Alpha's negligence is not established at trial.

The determination of the obligation to defend and indemnify is more easily resolved prior to verdict or judgment if the trigger is an *activity* rather than *negligence*. Thus, if we modify the hypothetical so that the unilateral indemnity is as follows, then it is more likely that Alpha will recognize an obligation and undertake Bravo's defense from the outset:

Alpha agrees to hold harmless and indemnify Bravo for all damages, claims, or suits—whether in law, equity, or otherwise—to or against Bravo and arising out of the use by Alpha of a taxicab owned by Bravo.

This, however, raises additional questions. If Alpha undertakes Bravo's defense, may it use the same lawyer or law firm that it uses for its own defense? If the lawyer or law firm concludes that it has a conflict it can waive to represent both Alpha and Bravo, can Bravo be compelled to provide the requisite waiver? Is Bravo obligated to cooperate with Alpha in its defense or risk losing its right of indemnity? What rights does Bravo have to settle the suit against it and hold Alpha liable to pay the settlement? Insurance policies contain the answers to many of these questions, but most indemnity provisions do not.

Clear and detailed drafting of contractual indemnity provisions will allow both parties to a contract to know—in advance—who is on first. **PD**

Biomaterials Act, from page 55

the plaintiff's contentions, concluding that Morgan was entitled to dismissal. *Whaley*, 2008 WL 901523 at * 3.

The Declaration Provision

Section 1604(b) outlines a procedure that permits any person to petition the Secretary of Health and Human Services to issue a declaration that the supplier was required to register under 21 U.S.C. §360 and failed to do so, or was required to include its product on a list of devices filed pursuant to 21 U.S.C. §360(j) and failed to do so. The act does not specify that the plaintiff initiate the petition. However, only the plaintiff can use the declaration in his or her affidavit to oppose the biomaterial supplier's motion to dismiss. 21 U.S.C. §1605(c)(2)(B)(i).

In April of 2001, the FDA provided a draft guidance for the contents of a petition for declaration. F.D.A., *Implementation of the Biomaterials Access Assurance Act of 1998*, 2001 WL 34768209 (Apr. 2,

2001). The guidance document sets forth that a petition should identify (1) "the final product and how it is intended to be used"; (2) "specifically what activities the supplier performs with respect to the device"; and (3) "the name and type of entity/person to which the supplier sends the device." The guidance also sets forth the review procedure for a petition for declaration by the FDA, including a hearing and a final decision.

The main problem with the declaration provision is that a plaintiff could arguably insist that he or she needs voluminous discovery to provide sufficient information to the FDA to obtain the declaration. If this type of request is made, a supplier should argue that section 1605 clearly states that once a motion to dismiss is filed, discovery is limited to certain information, and that there is no exception for a declaration petition. Moreover, it would defy the "spirit" of the act to allow discovery regarding a petition for a declaration.

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apply here, thereby bolstering generic drug manufacturers' preemption claims.

In the absence of evidence that a generic drug manufacturer withheld important

safety information from the FDA either before or after ANDA approval, the preemption defense remains a viable option for generic drug manufacturers, and it is consistent with

both the purposes of the Hatch-Waxman Act and the FDA's experience-based judgment that brand rather than generic drug companies should initiate label changes. **FD**

Monitoring, from page 31

a medical monitoring claim at the earliest stages of the lawsuit.

Finally, in an effort to avoid the demands of FED. R. Civ. P. 23(b)(3), plaintiffs have sought certification of medical monitoring classes under FED. R. Civ. P. 23(b)(2), which authorizes class actions seeking primarily injunctive relief. While plaintiffs argue that medical monitoring claims are at their core a request for injunctive relief, courts have almost universally seen these plans as a means of avoiding the predomi-

nance or superiority requirements of FED. R. Civ. P. 23(a). See, e.g., *Zinser v. Accufix Research Ins.*, 253 F.3d 1180 (9th Cir. 2001); *In re Propulsid*, 208 F.R.D. 133 (E.D. La. 2002); *Mehl v. Canadian Pacific Railway Ltd.*, No. A4-02-009, 2005 WL 1027158,*5 (D.N.D. May 4, 2005).

Conclusion

In the wake of *Sinclair*, the long-term viability of medical monitoring claims for pharmaceutical products and medical devices is certainly in question. While the prospect of

facing medical monitoring claims was once foreboding, early and decisive motion practice can ensure the early dismissal of these claims. *Sinclair* provides great ammunition for defendants facing medical monitoring claims. While the New Jersey Supreme Court spurred the early development of these claims with *Sinclair*, this court might also help to close the door on the widespread use of medical monitoring class actions in cases involving pharmaceutical products and medical devices. **FD**

Ethics, from page 68

seriously evaluate the expert and his or her opinions before offering them.

Former U.S. Attorney General Dick Thornburgh, commenting on our ethical obligations, said, "[i]t is unethical lawyers who are largely to blame for junk science." Dick Thornburgh, *Junk Science—The Law-*

yer's Ethical Responsibilities, 25 FORDHAM URB. L.J. 449 and 462 (1998). He suggested that lawyers have an ethical obligation to test the opinions of their own experts and offer only those that are supportable. He concluded that attorneys who present junk science testimony in bad faith should face Rule 11 sanctions. *Id.* at 467. There is a dis-

tinction between opinions that cannot be supported to the satisfaction of a court and outright lies offered by paid witnesses. As stewards of the law and our profession, we should endeavor to keep both out of the courtroom, in keeping with our duty of candor to the court. **FD**

Conte v. Wyeth, from page 45

Courts of Appeal. *McCallum v. McCallum*, 190 Cal. App. 3d 308, 316 n.4 (Cal. Ct. App. 1987) ("As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority.").

Thus, the arguments that were available to Wyeth are equally available to all pioneers in future California cases. Particularly given the California Supreme Court's refusal to review this decision, those of us who litigate product liability cases on behalf of pioneer manufacturers can look forward to the day when a different panel of the California Court of Appeal faces this same issue. But we would probably prefer someone else's client to bear the risk. **FD**



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