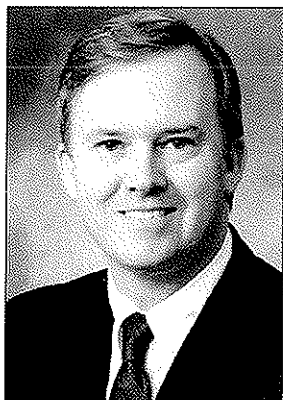


Is Your Expert a Liar or Does He Really Believe That Garbage?

by Edward M. Slaughter, J.D., and Lauren E. Wood, J.D.



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There are three kinds of liars: the common liar, the damned liar and the expert witness. William L. Foster, *Expert Testimony: Prevalent Complaints and Proposed Remedies*, 11 Harv. L. Rev. 169, 169 (1897). Because lawyers frequently rely on expert testimony to explain the science or applicable standard of care supporting the various theories underlying their cases, the ethical obligations of attorneys and their experts are inextricably intertwined. While attorneys are subject to strict ethical rules requiring them to speak and act truthfully, these rules do not apply directly to expert witnesses. Compounding this problem is the fact that experts themselves are subject to few professional regulations, rendering them free agents in the testimonial marketplace.

Though lawyers can never knowingly offer false testimony through an expert witness, this standard is so vague that it rarely succeeds in preventing the testimony it seeks to exclude. (See the *American Bar Association Model Rules of Professional Conduct*, Rule 3.3.) First, scrutinizing the favorable opinions of a witness the lawyer has hired to advance the interests of his client is in tension with that lawyer's duty to act as a zealous advocate. Second, the lawyer is often ill-equipped to determine whether an expert opinion is objectively true or untrue. Evaluating the truth of opinions, which are subjective by definition, is an epistemological task that would drive

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 he offers, all the while protecting the clients' interests, is an extraordinary responsibility. And yet that is precisely what attorneys must do.

Former U.S. Attorney General Dick Thornburgh, commenting on the attorney's ethical duty to keep junk science out of the courtroom, said "[I]t is unethical lawyers who are largely to blame for junk science." Dick Thornburgh, *Junk Science — The Lawyer'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 can be supported. He concluded that attorneys who present junk science testimony in bad faith should face Rule 11 sanctions. *Id.* at 467.

Does an expert have a similar ethical duty? Should he? Short of the penalties resulting from outright perjury, there is little to deter an expert from presenting questionable testimony. In fact, the opposite is true. He is paid to construct theories that become the foundation of an attorney's case, and there is an undeniable temptation to present those theories even when they are dubious.

Some states have reacted by enacting laws that more closely regulate expert testimony, particularly in the area of medical malpractice. For example, certain jurisdictions require that a neutral expert witness evaluate the merits of a malpractice action before suit is filed to determine whether credible evidence exists that the relevant standard of care was breached. See American Academy of Pediatrics, Policy Statement — Expert Witness Participation in Civil and Criminal Proceedings, *Pediatrics*, Vol. 109 No. 5, pp. 974-979 (May 2002). Another

proposed regulatory method takes aim at the expert's professional reputation in the form of peer review or sanctions.

The former approach calls for a panel of professionals in the expert's field to review and critique transcripts of the expert's testimony, with the testimony and corresponding peer analysis to be published in industry journals. The latter envisions an industry regulatory body that would impose sanctions, expel experts from memberships in professional organizations or take other disciplinary action. *Id.* After all, the expert's true currency in this business is his reputation, and for better or worse, it is inexorably linked to that of the attorney who has retained him.

Testifying experts and attorneys are also subject to state and federal rules governing perjury. Under federal law, a person may be guilty of perjury where he has testified that a "material matter" is true when he actually believes it to be untrue. See 18 U.S.C. § 1621(1). The penalty for perjury is a fine and/or up to five years' imprisonment. 18 U.S.C. § 1621. An attorney who procures an expert to testify falsely could also be found guilty of suborning perjury under 18 U.S.C. § 1622. Though the penalties for

perjury are steep, they do not serve as a major deterrent — successful prosecutions are rare due to the difficulty in proving the elements of belief and materiality.

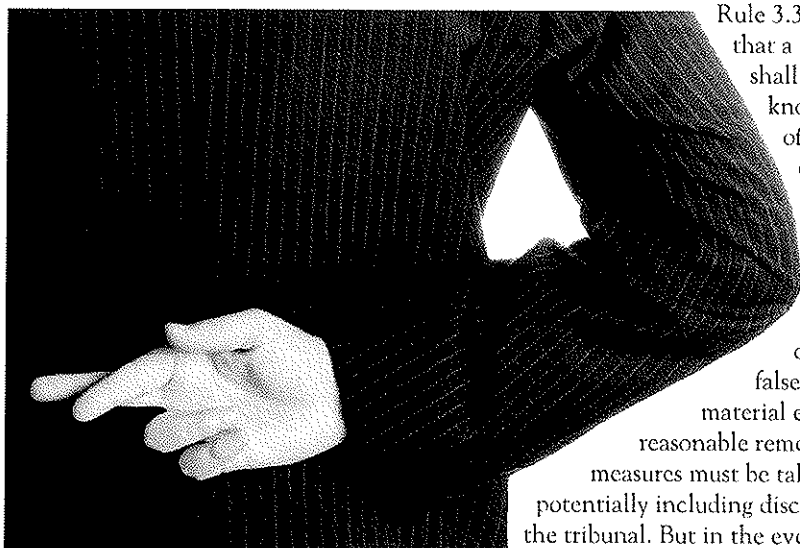
But when does an expert's opinion qualify as a lie under Model Rule of Professional Conduct 3.3, which governs the attorney's duty of candor? The adversarial process often creates incentives for paid expert witnesses to exaggerate or lie that are rarely found in disinterested witnesses. Still, there is no authority conclusively establishing the boundaries of the 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. Identifying a dishonest expert opinion is difficult because opinions go beyond 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 untrue. Other opinion testimony represents novel beliefs subject to contentious disagreement but genuinely held by their proponent. The ethical challenge lies in suppressing the former without chilling the rights of counsel and their witnesses to present the latter.

an attorney fails to readily make such a disclosure, 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 that which he is offering in the present case. See, e.g., *In the Matter of Peasley*, 90 P.3d 764 (Ariz. 2004). In such a situation, the attorney is presumed to at least have knowledge that one or the other of the expert's statements was false, even if he cannot identify which. *Id.* at 779; Rule 3.3, comment 8.

Is an attorney culpable of a similar Rule 3.3 violation if he offers conflicting expert opinions in the same lawsuit? Though it is unlikely that the conduct of the attorney or his expert witness in the story related below violated any ethical rule, it should serve as a cautionary tale for members of both professions who tread the line between truth and fiction. It also illustrates the importance of communication in the expert-for-hire scenario. Though a failure to communicate may not rise to the level of professional malpractice, it certainly defies common sense.

Our story begins with a \$25 million property loss. While the property was being constructed, it was destroyed by fire in the middle of the night. On the day prior to the fire, a large quantity of solvent had been utilized without adequate ventilation. The plaintiff's theory of liability in the case was that the client's solvent caused the fire when vapors were ignited by electrical sparking in the attic. To explain this theory, one of plaintiff's experts relied on the concept of fractional distillation, a process traditionally occurring only in laboratory settings whereby a product's lighter chemicals are separated out and are able to move independently through the atmosphere. But in his deposition, the expert opined that the product at

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Rule 3.3 instructs that a lawyer shall not knowingly offer false evidence. If the lawyer discovers that his witness offered false material evidence, reasonable remedial measures must be taken, potentially including disclosure to the tribunal. But in the event that

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issue spontaneously underwent fractional distillation, certain chemicals migrated into the property's HVAC system and condensed, then later re-vaporized and were ignited by an incendiary arc from the electronic air cleaner.

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Does this testimony qualify as junk science, or just zealous advocacy? Under these facts, the hypothetical treads the line. Ultimately, though, there is no evidence that the expert's testimony was presented in bad faith or was patently false. Plaintiff's counsel did make a tactical error, however, in failing to communicate this theory to his remaining experts, one of whom testified unequivocally at his deposition that fractional distillation not only cannot occur at room temperature, but cannot occur outside a laboratory environment. Clearly unaware that his testimony was undermining the plaintiff's theory of causation, when asked if there was any way that vapors entering the HVAC system could have become fractionally distilled, the expert scoffed: "positively not."

In order for this scenario to implicate Rule 3.3, it must be shown that the expert's testimony was knowingly false. Though the knowledge element can be inferred where a single individual offers contradictory testimony, it can't be presumed when the testimony is advanced by separate individuals who are capable of holding independent beliefs.

Given the relationship between attorney and expert, it may be advisable — even absent the existence of an applicable ethical duty — for the expert to investigate any lawyer wishing to retain

him before any money changes hands. At a minimum, the expert should research the attorney's ethical standing with the State Bar, determine his win-to-loss ratio and inquire into his billing practices. Most importantly, an expert should communicate his opinions to the attorney in advance of his deposition or trial, even if not prompted, and request a synopsis of any other expert opinions the attorney intends to offer in the case.

An attorney should take the same precautions. Though a lawyer may still present an expert opinion if he is uncertain about its validity, his uncertainty must be both reasonable and genuine. Geoffrey C. Hazard Jr. and W. William Rhodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:401 (2d ed. 1992 Supp.) Acting reasonably when uncertain about the validity of expert testimony requires that the lawyer make a serious evaluation of the expert and his opinions before offering them.



Though it takes years to build up a professional reputation as a trial attorney or as an expert in a given field, it can take only minutes to spend that currency. This result can be avoided by both sides working together to present credible, persuasive testimony and doing their part to keep junk science out of the courtroom. ■