

# **The Trouble With Ethics Experts**

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Los Angeles Daily Journal

August 26, 1994

Most witnesses are amateurs. They are involved in legal proceedings because — either as parties or other participants — they have percipient knowledge with respect to facts that are in dispute. In contrast, professional witnesses are usually experts of one kind or another.

Experts in general pose some interesting and challenging issues for the trier of fact in a contested proceeding. The so-called ethics expert raises certain of these issues rather dramatically.

An ethics expert may be called upon to testify in any forum where the conduct of an attorney is the subject of the dispute. Typically, such disputes arise between attorneys and their clients and are resolved in a variety of contexts, including disciplinary actions, arbitration proceedings and lawsuits. Whenever the conduct of an attorney is in issue, there is at least theoretically a role for the ethics expert.

Short of conduct that constitutes a crime, a client is relatively unfettered in his or her dealings with an attorney. In contrast, an attorney is constrained not only by the requirements of law, both criminal and civil, but also by the legal requirements that govern fiduciaries, state rules of professional conduct and ethical strictures. It is this labyrinthine system of regulation that is the warren of the ethics expert.

The basic problem is that the "testimony" of the ethics expert may invade the province of the trier of fact to decide the ultimate issues in the case. If a lawyer accused of misconduct must defend himself in a disciplinary proceeding, ethics experts may be called upon to opine on whether and to what extent the lawyer's conduct ran afoul of rules of professional conduct and even the leniency or severity of the punishment that should be imposed. The institutions charged with the discipline of lawyers do not always appreciate this help. Consider the following remarks by the Supreme Court of Iowa:

Over the objection that it was an improper subject of expert opinion, Professor Geoffrey Hazard gave his opinion to the state's disciplinary commission as to sanctions. The Court noted: "When a standard, or a measure, or a capacity has been fixed by law, no witness, whether expert or nonexpert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct in question measures up to that standard. *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (Iowa 1942)." The Court concluded: "We think Prof. Hazard trod heavily with his academic boots on the *Grismore* rule. To say the rule survived is more a resurrection than an affirmation." *Committee of Professional Ethics and Conduct of the Iowa State Bar Association v. Baudino*, 452 N.W.2d 455 (Iowa 1990).

There is understandable resistance to the idea that hearing offices, disciplinary boards or courts should be told by purported "experts" how to discharge their responsibilities.

Infirmities are inherent in the process of giving an expert opinion. By definition, experts have no involvement in the events that gave rise to the dispute. They know only what they are told. They are told

only what the party who has hired them chooses to disclose. To be sure, there are risks in telling the expert too little. A fertile subject of cross-examination is what the expert wasn't told and whether the additional facts the other party intends to prove (or assumptions with respect to those facts the expert is asked to make) would change the expert's opinion. The narrower the expert's focus — the fewer facts the expert considers — the more likely the expert is to be cross-examined about the facts he didn't consider in forming his opinions.

There is a fine line here: An expert who bases his opinion on everything that could conceivably be relevant is order to avoid the charge that a material fact was not considered must be familiar with the pleadings, discovery, the testimony of the percipient witnesses, and the exhibits introduced into evidence. This is a virtually impossible standard to achieve.

While experts typically take some pride in the fact that they have no personal knowledge and conduct no independent investigation of the facts, it is this very characteristic of their modus operandi that can undermine their credibility. It has been said that an expert is someone who wasn't there but who will, for a fee, gladly tell you what it must have been like. What they are told is all they know; what they know is the basis for their opinions. If the trier of fact knows more than they do, the reaction to the opinion of an ethics expert may be characterized by considerable resentment. This is dramatically illustrated by the comments of a judge whose own conduct was the subject of such an opinion:

Monroe H. Freedman and Geoffrey C. Hazard, Jr. present themselves as experts on ethics and, as such, each expresses his opinion on how, as a matter of law, the Court should decide the pending motion. They support their submission with a weighty compendium of their extra-curricular activities to add verisimilitude to their sworn legal conclusions that, in their opinion, the Court should not try this contempt case. . . . What makes their gratuitous sworn legal opinions even more inappropriate [besides being based on hearsay] is their apparent obliviousness to the self-evident utter absence of any factual basis in the record for a cognizable opinion from them — expert or other. . . . [T]hey assume and aver assumptions as facts, state selected hypotheses of what the facts might have been, and take leave to assert rank heresay of the second or third degree, *dehors* the record, as support for their legal opinions.

U.S. v. Eyerman, 660 F.Supp. 775, 781 (S.D.N.Y. 1987).

In a sense, the expert's opinion is undermined by the very fact that he was hired to give it. To a significantly greater extent than a forensic accountant who is called upon to value a business or a reconstruction expert whose task is to recreate an accident, the opinions of an ethics expert are inherently subjective. They uniformly reflect the perspective of the party who hired the ethics expert in the first place. But this is not their most pernicious vice. The opinions of all experts serve the interests of the party who hired them; otherwise, they would not have been retained to testify.

It is the argumentative nature of the opinions that is likely to be most offensive to the trier of fact. This is not because the parties do not have the right to argue the case. They most assuredly do. But there is

a time and a place for argument. That time and place is after all evidence has been adduced, at the end of the case. The fundamental objection to the opinion of an ethics expert is that it is argument presented in the guise of evidence.

Ethics experts are not parties who have a right to tell their side of the story or other participants in the events at issue who have an obligation to tell what they know (and often do so under the compulsion of legal process). They are also not bystanders or other peripheral witnesses who may be called upon to establish facts that will not be seriously disputed. They are not even experts with some pretension to objectivity.

Ethics experts are experts with an attitude. The line between their roles as a witness and an advocate is so blurred as to be obliterated for all practical purposes. Accordingly, those charged with the task of passing upon the conduct of lawyers might do well to welcome the opinion of an ethics expert when presented as argument and to shun it when it is offered as evidence.

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