

CONSULTING ETHICS: ETHICAL ISSUES FOR THE EXPERT WITNESS IN INSURANCE LITIGATION

Presented by

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1. Stick to your field of expertise or experience; don't misrepresent or try to stretch beyond your experience or qualifications.
2. Be Objective: Keep your professional perspective; consider both sides of the case or issues before forming opinions. Do you have any pre-formed opinions or biases about the case or issues, or about any of the parties? Could you testify for the other side if you had been retained by them first? Do not commit to an opinion until you have actually reviewed documents and/or testimony in a case. What you are told about the factual background by the attorney may not be accurate.
3. It enhances your credibility, independence and appearance of objectivity to have experience testifying for both plaintiffs and defendants (i.e., for insureds, insurers and agents or brokers). Exception: when you have given contradictory testimony or opinions in another case with similar or identical issues (see no. 6 below).
4. Your reputation for integrity as a witness is your most important asset. Be careful about the cases you accept. Testify truthfully about all questions you are asked.
5. The ONLY acceptable methods of compensation are time and expenses, or a flat fee. Contingent or "bonus" arrangements based on the outcome are unethical and may be illegal. You cannot be objective if you have a financial interest in the outcome of the case and your credibility will be weakened considerably.

6. Consistency: Don't contradict your opinions in earlier testimony or publications unless you can defend an attack on your credibility and justify changing your position. Look carefully at facts, circumstances, documents or changes in the industry that may have changed and that would justify a different opinion because "times have changed." If you have given contradictory statements in the past (publications, reports, testimony, etc.), your retaining attorney should be prepared to question you in court about the reasons your testimony is different now. If not, expect opposing counsel to introduce the contradictory material and announce loudly for the benefit of the jury that you have been impeached before you will be permitted to answer.
7. Don't play amateur "lawyer" (even if you are one). The expert is a witness, not an advocate. Lawyers are advocates and determine the strategy and legal issues they will use to support in their case. What you believe to be important may be the wrong legal strategy in the case. The only thing an expert advocates and must defend is his or her opinions.
8. Advertising in legal trade publications to announce your availability is acceptable, but should not suggest any bias in the parties for whom you will testify or the methods you will use to reach your opinions. Some attorneys may take your ads and produce them in court to attempt to make you appear unprofessional. TEST: How would your ad look if opposing counsel showed it to a jury?
9. The justice system relies on TRUTH, but not necessarily on HONESTY; the "truth" of the case as argued by the attorneys may not give full consideration to all sides of an issue. When you encounter this, remember to play by the rules; don't try to use guerilla tactics to impose your own strategies on the outcome of the case.
10. Potentially damaging personal information should be disclosed to your counsel. This will allow the retaining attorney to deal with intrusive personal discovery by opposing counsel. Your professional background and/or personal life should be able to withstand an in-depth sub-rosa investigation by a determined opponent. Would it discredit or embarrass your client? By making full disclosure to the retaining attorney, he or she can deal with the issues and determine whether you are acceptable. It is better to make the disclosure early rather than in the course of a deposition.