

Legal Ethics

Effective and Ethical Use of Experts

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When You Need an Expert



Federal Rule 702

Testimony by Experts

- If scientific, technical, or *other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, *experience, training*, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule 702

Advisory Committee Notes

- Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. [A]n expert may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

When You Need an Expert



- Expertise beyond judge/juror experience
- Explain the normalcy of unexpected behavior
- Reframe counterintuitive as consistent

Expert Testimony as “Beyond Common Experience”

- An expert opinion would assist the jury/trier of fact in understanding delayed disclosure, decision to report, explain survival behavior

Who Can Be an Expert?

- Any witness with special knowledge, skill, etc. It is only error if the witness clearly lacks qualification as an expert
- Community, crime lab, law enforcement, academics

Types of Experts



Most Unusual Experts

- Dog Behavior
- Gemologist
- Lip Reader
- Meteorologist



Professional Standards



Personal Relationship With Your Expert



20th Century Studios: My Cousin Vinny

ABA Rule 1.7

Conflict of Interest

- (a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
- A concurrent conflict of interest exists if: (2) there is a significant risk the representation will be materially limited by . . . a third person or by a personal interest of the lawyer.

ABA Standards for the Defense Function

Standard 4-4.4 (a) Relationship With Expert Witnesses

An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.



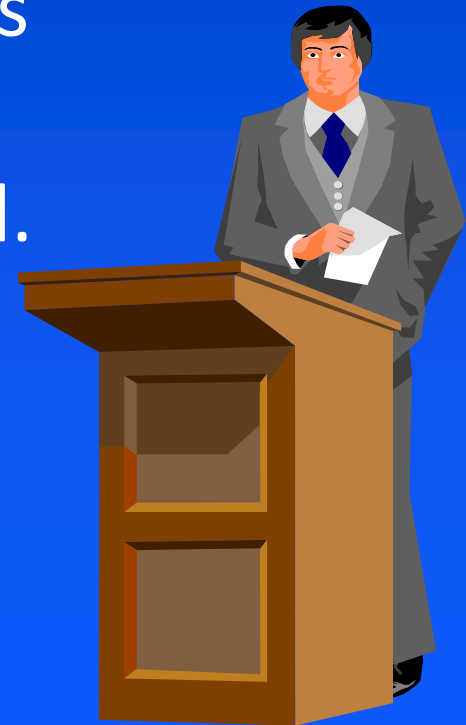
Creating Discovery?



ABA Standards for the Defense Function

Standard 4-4.4 (c) Relationship With Expert Witnesses

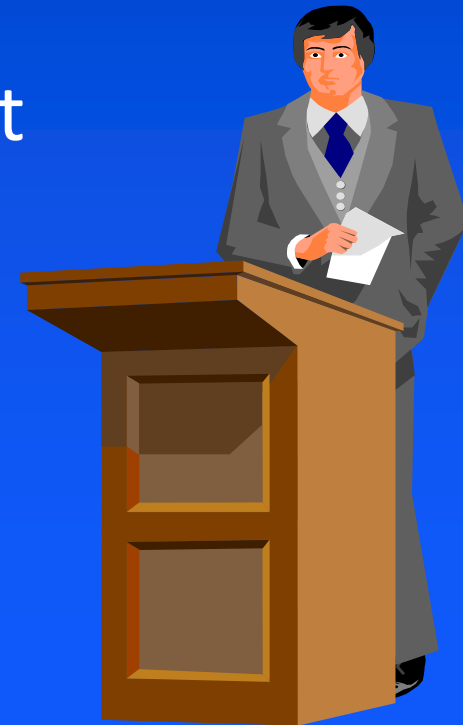
Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field.



ABA Standards for the Defense Function

Standard 4-4.4 (c) Relationship With Expert Witnesses

Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues.



ABA Standards for the Defense Function

Standard 4-4.4 (c) Relationship With Expert Witnesses

Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.



ABA Standards for the Defense Function

Standard 4-4.4 (e) Relationship With Expert Witnesses

Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic.



Explaining Survivor Behavior



Delayed Disclosure as the Rule, Not the Exception



Statistics Are Not Always Applicable to Your Victim



Preparing Your Expert for Court



Managing Expectations



Expert Transparency



ABA Model Rule 3.3

Candor in the Courtroom

A lawyer shall not knowingly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

ABA Model Rule 3.3

Candor in the Courtroom

A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. . . . If a lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3

Candor in the Courtroom

A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Model Rule 4.1

Truthfulness in Statements

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

Model Rule 8.4

Misconduct

Professional misconduct for a lawyer includes:

- Violate rules of prof conduct
- Commit a criminal act that affects honesty or fitness as a lawyer
- Engage in conduct prejudicial to the administration of justice

Resisting the Temptation to Embellish



“Temptations for the Expert Witness” (2017)

- Remaining humble will help experts present themselves as “a calm and confident teacher, whose job is to explain honestly to the triers of fact the evidence and logic that support each opinion.”

“Temptations for the Expert Witness” (2017). Resisting the Lures:

- Argumentativeness
- Narcissism
- Emotion
- Scientific Language
- Stubbornness
- “Losing”

On Notice

Brooks v. State (1999)

- Expert always testified with certainty. Repeatedly stated opinion as "indeed and without doubt."
- Expert proclivity "To boldly go where no expert has gone before" (Dissent)



On Notice

Brooks v. State (1999)

- “This Court's apparent willingness to allow [] to testify to anything and everything so long as the defense is permitted to cross-examine him may be expedient for prosecutors but it is harmful to the criminal justice system.” (Dissent)



On Notice

Brooks v. State (1999)

- An ethics committee of the American Academy of Forensic Sciences concluded that [the expert] had "misrepresented data in order to support his testimony" and that [he] had presented testimony "outside the field of forensic odontology."



A Confidence-credibility Model of Expert Witness Persuasion (2011)

Expert credibility:

- Knowledge
- Confidence
- Trustworthiness
- Likeability

A Confidence-credibility Model of Expert Witness Persuasion (2011)

- Highest ratings of credibility or persuasiveness were linked with moderate confidence
- Overly high confidence can detract from expert's impact on jurors

Verbal and Nonverbal Indicators: Low and High Confidence

- Low: erratic voice tone, alternating pace, excessive hesitations and pauses, asking for repetition of questions, slouching, fixed eye contact
- High: loud volume, rapid pace, expressing absolute certainty of knowledge, assertive/combative mannerisms, good posture and leaning forward

Verbal and Nonverbal Indicators: Medium Confidence

- Verbal indicators: stable tone of voice, clear speech, moderate pace, elaboration on details, acknowledgment of limitations of knowledge
- Nonverbal indicators: consistent eye contact, straight posture, emotional control, hearing questions correctly

Cross Examination

A brown bear is shown in profile, facing right, as it catches a salmon in a river. The bear's fur is a rich brown color, and it is surrounded by splashing water. The salmon is held in the bear's mouth, and its silver scales are visible. The background is a blurred view of the river and surrounding landscape.

You

**Opposing
Expert**

ABA Model Rule 4.4

Respect for Rts of 3d Persons

a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

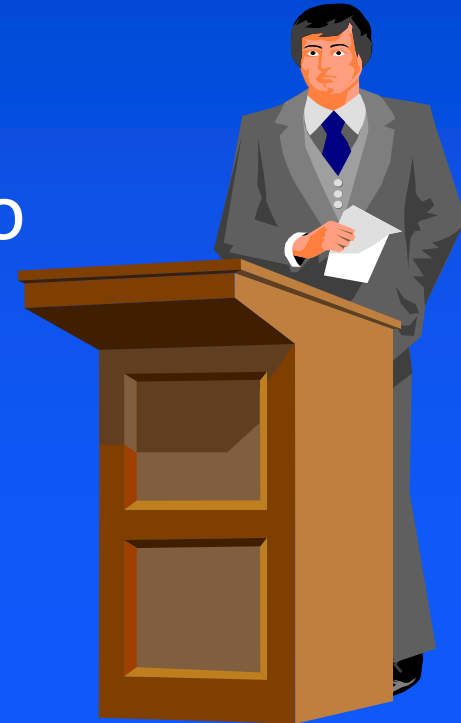
How Your Expert Can Prepare *You* For Court



ABA Standards for the Defense Function

Standard 4-4.3 (c) Relationship With Witnesses

Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.



ABA Standards for the Defense Function

Standard 4-4.3 (d) Relationship With Witnesses

Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights.



ABA Standards for the Defense Function

Standard 4-4.3 (d) Relationship With Witnesses

Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.



ABA Standards for the Defense Function

Standard 4-4.3 (f) Relationship With Witnesses

Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview.



ABA Standards for the Defense Function

Standard 4-4.3 (f) Relationship With Witnesses

When the need for corroboration is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.



ABA Standards for the Defense Function

Standard 4-4.3 (h) Relationship With Witnesses

Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules.



ABA Standards for the Defense Function

Standard 4-4.3 (h) Relationship With Witnesses

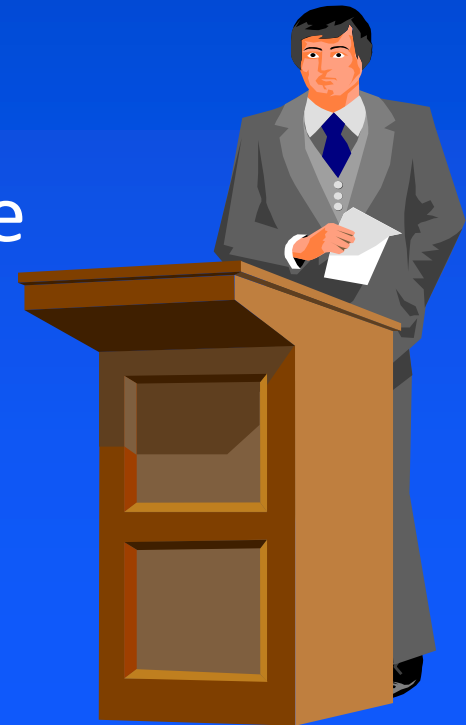
Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give.



ABA Standards for the Defense Function

Standard 4-4.3 (h) Relationship With Witnesses

Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.



The Ultimate Goal



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