Law Professors as Expert Witnesses

Sponsored by the Ruby R. Vale Foundation, *Delaware Journal of Corporate Law*, and Widener Institute of Delaware Corporate and Business Law

Friday, April 24, 2015
8:15 am–4:45 pm

Ruby R. Vale Moot Courtroom
4601 Concord Pike
Wilmington, Delaware

Widener Law Delaware

law.widener.edu/CLE

Law Professors as Expert Witnesses
Symposium Agenda
Friday, April 24, 2015

8:15 – 9:00 am **Check In and Continental Breakfast**
Most course materials will be provided electronically.

9:00 – 9:15 am **Welcome and Introductions**

Lawrence A. Hamermesh, Director of the Widener Institute of Delaware Corporate and Business Law and Professor of Law, Widener Law - Delaware

9:15 – 10:45 am ***The View from the Bench.*** This panel will examine the utility of expert testimony from law professors – where it's been helpful, where it's been less than helpful, where it might be useful but hasn't yet been presented, and where it's unwelcome.

Chief Justice Leo E. Strine, Jr., Delaware Supreme Court
The Honorable Kevin Gross, Bankruptcy Court for the District of Delaware
President Judge Jan R. Jurden, Delaware Superior Court

Moderator: Professor Paul L. Regan, Widener Law – Delaware

10:45 – 11:00 am **Break**

11:00 am – 12:30 pm ***The View from Trial Counsel.*** This panel will discuss how to evaluate whether, when, and how to use law professors as expert witnesses, and how to address the obvious problem of how not to invade the law-determining function of the court.

Thomas J. Allingham II, Esquire, Skadden, Arps, Slate, Meagher & Flom, Wilmington, DE
Parvin Moyne, Assistant U.S. Attorney, Southern District of New York
Kenneth J. Nachbar, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, DE

Moderator: Professor Jules Epstein, Widener Law – Delaware

12:30 – 1:15 pm **Lunch (included with registration) – Barristers' Club**

1:30 – 3:00 pm ***The View from Academia.*** This panel brings together the views of law school administrators and professors who have acted as expert witnesses, on issues such as the appropriate place or extent of work as an expert witness in relation to academic obligations (does such work enrich teaching or scholarship, or both?), and any other considerations relevant to the mission of the law school.

Professor Arthur B. Laby, Rutgers-Camden Law School
Professor Edward B. Rock, University of Pennsylvania Law School
Professor Andrew L. Strauss, Widener Law – Delaware (Dean-elect, University of Dayton Law School)

Moderator: Professor Lawrence A. Hamermesh, Widener Law – Delaware

3:00 – 3:15 pm **Break**

3:15 – 4:45 pm ***The Ethical Perspective.*** This panel will explore considerations of professional responsibility in relation to law professor service as an expert witness, such as: do the Rules of Professional Conduct applicable to lawyers apply to work in this capacity? How and to what extent? Regardless, are there obligations of competence or diligence? Reasonableness of fees? Are there issues of conflict of interest? Obligations of candor to the tribunal? What are they?

Professor Stephen Gillers, New York University Law School
Lawrence J. Fox, Esquire, Drinker, Biddle & Reath, Philadelphia, PA

Moderator: Professor Louise L. Hill, Widener Law – Delaware

****

WIRELESS ACCESS INFORMATION AS A "WIDENER GUEST"

WIDENER UNIVERSITY SCHOOL OF LAW
RUBY R. VALE MOOT COURTROOM
FRIDAY, APRIL 24, 2015

Username: lawprofs
Password: lawprofscle

****

COURSE MATERIALS

Course materials are available for download as a pdf at delawarelaw.widener.edu/expertwitnesses

Approved for a total of 6 CLE credits (including 1.5 ethics credits) in Delaware and Pennsylvania.

BIOGRAPHIES

Thomas J. Allingham II

Thomas Allingham, a corporate litigation partner at Skadden, Arps, has more than 30 years of experience handling civil litigation at the trial and appellate levels. He has been lead counsel in numerous trials (non-jury and jury) and appeals in federal and state courts around the country. His cases have involved a broad range of corporate issues, including mergers and acquisitions, contested takeovers, fiduciary duties of directors, federal and state securities fraud claims, bankruptcy litigation, and corporate valuations and statutory appraisals.

Outside the corporate arena, after a 10-year battle, Mr. Allingham secured a writ of habeas corpus from the U.S. Court of Appeals for the Third Circuit sitting en banc, entitling his death row inmate client to a new trial almost 20 years after his initial conviction. In 2009 he was recognized with the Delaware ACLU's Gerald E. Kandler Memorial Award in honor of his pro bono work.
Mr. Allingham was elected as a fellow of the American College of Trial Lawyers in 2005. Chambers USA lists him in the top tier of Delaware Court of Chancery litigators, and he repeatedly has been selected for inclusion in The Best Lawyers in America. Lawdragon Magazine also included him in its list of the 500 leading lawyers in the country. In addition, Mr. Allingham was named Best Lawyers' "2015 Wilmington Litigation – Securities Lawyer of the Year" and "2013 Wilmington Litigation – Mergers & Acquisitions Lawyer of the Year."

Jules Epstein

Jules Epstein is Professor of Law at Widener University School of Law, where he teaches Evidence, Criminal Procedure and Criminal Law and is Director of the Taishoff Advocacy, Technology and Public Service Institute. He has published extensively regarding the death penalty, eyewitness identification and evidence, and is faculty for the National Judicial College, teaching Evidence and Capital Case courses.

In the area of eyewitness identification, Professor Epstein served as an expert witness in the State v. Henderson litigation in New Jersey and in two other cases. In the area of forensics, Professor Epstein has worked extensively on issues involving expert testimony, serving on two DNA workgroups and in capital case trainings for NIJ, and on a working group on latent print issues for the National Institute for Standards and Technology. He is co-editor of SCIENTIFIC EVIDENCE REVIEW: ADMISSIBILITY AND THE USE OF EXPERT EVIDENCE IN THE COURTROOM, MONOGRAPH NO. 9, (ABA, 2013) and THE FUTURE OF EVIDENCE (ABA, 2011) and served as section editor for the ENCYCLOPEDIA OF FORENSIC SCIENCES, 2nd Edition (2013). Professor Epstein has lectured on forensics and the law of expert evidence to judges and attorneys.

Lawrence J. Fox

Lawrence J. Fox is a partner (since 1976) and former managing partner of Drinker Biddle & Reath LLP, where he specializes in the counseling of law firms on professional responsibility concerns, providing advice in capital habeas proceedings and handling complex litigation.

Professional Responsibility. Larry is a nationally known author and expert on the professional responsibility of lawyers and law firms. His practice includes consulting with and counseling law firms, and participating in legal malpractice cases, on behalf of either the plaintiff or the defense. He often appears as an expert witness including several occasions as a court appointed expert.

In addition, Larry is the Crawford Lecturer at Yale Law School, where he teaches professional responsibility and is the founder and the supervising lawyer for the Ethics Bureau at Yale, a not-for-profit provider of pro bono professional-responsibility advice. Prior to teaching Yale, Larry was a lecturer on law at Harvard Law School, and the I. Grant Irey, Jr. adjunct professor at Penn Law School.

Articles and Books. Larry is the author of a long list of articles that have appeared in regional and national publications, covering a wide variety of subjects with particular emphasis on ethical issues.

He has also written many books on professional responsibility. Larry has authored *Legal Tender: A Lawyer's Guide to Professional Dilemmas*, American Bar Association (1995); co-authored (with Susan R. Martyn) *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility*, Aspen (2d ed. 2008); *Red Flags: A Lawyer's Handbook on Legal Ethics*, ALI-ABA (2005); *Your Lawyer: A User's Guide*, Lexis Nexis (2006); *How to Deal with Your Lawyer: Answers to Commonly Asked Questions*, Oxford University Press – Oceana (2008); *Red Flags: A Lawyer's Handbook On Legal Ethics 2009 Supplement*, American Law Institute (2009); *The Ethics of Representing Organizations: Legal Fictions for Clients*, Oxford University Press (2009); co-authored (with Susan R. Martyn and W. Bradley Wendell) *The Law Governing Lawyers, National Rules, Standards, Statutes, and State Lawyer Codes*, Aspen (2010-2011 ed.); edited and contributed to *Raise the Bar: Real World Solutions for a Troubled Profession*, ABA (2007);

co-edited (with Susan R. Martyn and Andrew S. Polis) and contributed to *A Century of Legal Ethics*, ABA (2009); and written numerous book chapters relating to internal investigations, sanctions, expert witnesses and other topics.

In General. Larry has participated in well over 200 continuing legal education programs and has given lectures or classes at over 35 law schools. Among his many professional and community service activities, Larry was a member of the ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000), Chair of the ABA Post-Conviction Death Penalty Representation Project (1996-2003), chair of the ABA Litigation Section and chair of the ABA Standing Committee on Ethics and Professional Responsibility. He was sent by the United States State Department to Argentina (1997) and China (2002) as a specialist and speaker on the Role and Rights of Lawyers. Larry has made numerous television appearances on *Nightline*, *Cross-Fire*, the *Today Show*, *Talk Back Live*, *Burden of Proof*, *CNN* and *MSNBC* on topics ranging from the Clinton Impeachment to the Death Penalty. He won the ABA's Pro Bono Publico Award in 2005 and the Michael Franck Award in 2007. He is also the recipient of the Howard Lesnick Pro Bono Award, given annually by the Board of Managers of the University of Pennsylvania Law School Alumni Society.

Larry received his LL.B., *cum laude*, from the University of Pennsylvania School of Law in 1968, where he was managing editor of the *University of Pennsylvania Law Review*.

Stephen Gillers

Stephen Gillers is Elihu Root professor of law at New York University School of Law, where he has taught since 1978 and was vice dean from 1999-2004. He has written widely on legal ethics and has spoken on regulation of the bar at hundreds of events in the US and abroad. He is the author of Regulation of Lawyers: Problems of Law and Ethics, first published in 1985, now in its 10th edition.

In 2000-2002, Prof. Gillers was a member of the American Bar Association's Multijurisdictional Practice Commission. In 2010-2013, he was a member of the ABA's 20/20 Commission. In 2011, he received the Michael Franck Award from the ABA's Center for Professional Responsibility. In 2015, he received the American Bar Foundation's Outstanding Scholar Award.

Prof. Gillers' scholarship includes: "A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II," 85 Wash. L. Rev. 215 (2007); "Guns, Fruit, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence," 63 Stan. L. Rev. 813 (2011); "A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It," 63 Hastings L. J. 953 (2012); "How To Make Rules for Lawyers: The Professional Responsibility of the Legal Profession," 40 Pepp. L. Rev. 365 (2013) (symposium issue on "The Lawyer of the Future"); and "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public," 17 J. Legis. & Public Policy 485 (2014).

He is currently working on a book about the First Amendment's Press Clause.

The Honorable Kevin Gross
Bankruptcy Court for the District of Delaware

Judge Kevin Gross was born in Wilmington, Delaware on August 7, 1952, where he has always resided except for three years of law school. He married Lawren Greenberg of Tyler, Texas in November 1978 and they have two children, Alison Brecher and Sam Gross.

Judge Gross was invested as a judge for the U.S. Bankruptcy Court for the District of Delaware on March 13, 2006 and became Chief Judge on July 1, 2011. He attended the University of Delaware, from which he graduated in 1974 with a Bachelor's degree in Psychology. He thereafter attended Washington College of Law at American University where he was a member of the Law Review. Upon graduation from law school in 1977, Judge Gross was a judicial clerk for the Delaware Court of Chancery. He was admitted to the Delaware Bar in March 1978.

Following his clerkship, in September 1978, Judge Gross joined the firm of Morris and Rosenthal, and became a Director of the firm in 1985, which later changed its name to Rosenthal, Monhait, Gross & Goddess, P.A.

Judge Gross was an active participant in the Wilmington desegregation case on behalf of the plaintiff class beginning with the remedy phase of that case; has handled several child custody and parental rights' cases; and has mediated many cases pending in Bankruptcy Court, District Court, Superior Court, and the Court of Chancery.

Recent cases include: Los Angeles Dodgers, NewPage Corporation, Friendly's Ice Cream Corporation, Nortel Networks Corporation, Boscov's, Pierre Foods, Mervyn's Holdings, Sharper Image, Cadence Industries, Dynamerica Manufacturing, Intermet Corporation, Source Interlink Companies, Aventine Renewable Energy, Fisker, Tuscany Holdings and Greenfield Energy.

Lawrence A. Hamermesh

Lawrence A. Hamermesh is the Ruby R. Vale Professor of Corporate and Business Law at Widener Law Delaware, where he teaches business organizations, securities regulation, and professional responsibility. A graduate of Haverford College (1973) and Yale Law School (1976), he practiced law with Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware from 1976 to 1994.

Since 1995 Professor Hamermesh has been a member of the Council of the Corporation Law Section of the Delaware State Bar Association (responsible for the annual review and modernization of the Delaware General Corporation Law), and served as Chair of the Council from 2002 to 2004. From January 2010 to June 2011, he served as senior special counsel in the Office of Chief Counsel of the Division of Corporation Finance of the U.S. Securities and Exchange Commission in Washington, D.C. (advising the Staff of the Commission on matters of state corporate law).

Professor Hamermesh is the Reporter for the Corporate Laws Committee of the American Bar Association Section of Business Law (responsible for the drafting and revision of the Model Business Corporation Act), and served from 2001 to 2007 as an elected member of the Committee. In 2002 and 2003 he also served as Reporter for the American Bar Association's Task Force on Corporate Responsibility.

Recent publications include: *Director Nominations*, 39 Delaware Journal of Corporate Law 117 (2014); *Putting Stockholders First, Not the First-Filed Complaint* (69 The Business Lawyer 1 (2013) (with Leo E. Strine, Jr. and Matthew C. Jennejohn); *Who Let You Into the House?*, Wisc. L. Rev. 359 (2012); *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 Duke J. L. and Cont. Prob. 107 (2011) (with Leo E. Strine, Jr. and Jeffrey M. Gorris); and *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L. J. 629 (2010) (with Leo E. Strine, Jr., R. Franklin Balotti, and Jeffrey M. Gorris).

Louise L. Hill

LOUISE L. HILL is a Professor of Law at Widener Law, Delaware. She is the former Associate Dean for Faculty Affairs at Widener, with her career in legal academia spanning over thirty years. Prior to joining the faculty at Widener in 1987, she was a member of the faculty at the University of Toledo College of Law. Professor Hill has also taught at Villanova Law School and the Earle Mack School of Law at Drexel University. Professor Hill teaches in the areas of Legal Ethics, Commercial Law and Wills & Trusts. She sits on the Editorial Board on the ABA/BNA Lawyers' Manual on Professional Conduct.

Professor Hill received a bachelor's degree from the Pennsylvania State University, a master's degree from Boston University and a law degree from Suffolk University Law School, where she was on the Law Review. Upon graduation from law school, Professor Hill served as a law clerk to the Hon. Don J. Young, United States District Court for the Northern District of Ohio. She then served with the United States Department of Justice as an Assistant United States Attorney, Northern District of Ohio, handling civil and criminal litigation, as well as appellate proceedings.

Professor Hill has published extensively in the area of legal ethics. The following articles are among her recent publications: *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U. L. REV. 907 (2014). *Could Nine or Cloud Nein? Cloud Computing and its Impact on Lawyers' Ethical Obligations and Privileged Communications*, 2013 J. PROF. LAW. 109; *Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows*, 45 U. MICH. J.L. REFORM 829 (2012); *Gone but Not Forgotten: When Privacy, Policy and Privilege Collide*, 9 NW. J. TECH. & INTELL. PROP. L. 565 (2011); *Emerging Technology and Client Confidentiality: How Changing Technology Brings Ethical Dilemmas*, 16 B.U. J. SCI. & TECH. L 1 (2010); FATF Symposium *The Financial Action Task Force Guidance for Legal Professionals: Missed Opportunities to Level the Playing Field* 2010, J. Prof. Law. 151.

President Judge Jan R. Jurden
Delaware Superior Court

The Honorable Jan R. Jurden, a Delaware native, is the President Judge of the Superior Court of Delaware. Judge Jurden first joined the Superior Court bench in 2001.

After proudly serving three years in the United States Army following high school, Judge Jurden received her B.A. *summa cum laude* from Muhlenberg College in 1985, and her J.D. from the Dickinson School of Law (now the Dickinson School of Law of the Pennsylvania State University) in 1988, where she was an Articles Editor of the *Dickinson Law Review*, a member of the Woolsack Honor Society, and a recipient of the Gwilyn A. Price, Jr. Memorial Prize and the Abel Klaw Advocacy Prize.

Before joining the Superior Court, Judge Jurden practiced law for 13 years with the law firm of Young, Conaway, Stargatt & Taylor, concentrating on corporate, commercial, and personal injury litigation.

In 2008, Judge Jurden launched Delaware's first felony Mental Health Court in an effort to improve responses to justice-involved persons suffering from serious mental illnesses and to reduce probation violations and recidivism. Judge Jurden has presided over the Mental Health Court since its inception, and The Mental Health Court Team was awarded the Governor's Team Excellence Award in 2010.

In recognition of her pioneering work on Mental Health Court and other problem-solving courts, the Delaware State Bar Association presented Judge Jurden with the Outstanding Service to the Courts and Bar Award in 2011. Judge Jurden formerly presided over Veterans' Court and currently serves on the Complex Commercial Litigation Panel. She is co-chair of the Delaware Supreme Court Criminal Justice Mental Health Task Force and co-chair of the Criminal Justice Council of the Judiciary. She is a member of the Delaware Supreme Court Ethics Advisory Committee, Court Interpreters' Advisory Board, and Judicial Education Committee. Judge Jurden teaches criminal procedure as an adjunct professor at the University of Delaware.

Arthur B. Laby

Arthur Laby is Professor of Law at Rutgers University and formerly Assistant General Counsel at the U.S. Securities and Exchange Commission. Professor Laby teaches securities regulation, business organizations, investment management regulation, and fiduciary law. His research focuses on the regulation of investment advisers and broker-dealers, conflicts of interest, and the fiduciary relationship.

Parvin Moyne

After graduating from NYU School of Law, Parvin Moyne worked as an associate in a large New York law firm for 2.5 years and clerked for one year for the Honorable Dennis Jacobs, United States Court of Appeals for the Second Circuit. She joined the United States Attorney's Office for the Southern District of New York in 2006, where she has served as an Assistant United States Attorney in the Criminal Division for over 8.5 years. Parvin has investigated and prosecuted a wide array of federal crimes including securities and commodities fraud, insider trading, investment advisor fraud, wire and mail fraud, health care fraud, international and domestic money laundering, immigration fraud, homicide, kidnapping, and international narcotics trafficking.

Kenneth J. Nachbar

Ken Nachbar is a member of the Corporate and Business Litigation Group of Morris, Nichols, Arsht & Tunnell, LLP. His practice focuses on cases involving mergers and acquisitions, control contests and shareholder class and derivative actions. He also advises corporate clients and boards of directors with respect to litigation and transactional matters including structuring of corporate transactions, defensive mechanisms and representation of special negotiating committees and special litigation committees.

Ken has participated and acted as lead or co-counsel in many of the seminal cases involving Delaware corporate law, for clients such as The Dow Chemical Company, 3M Company, Barclay's Bank Delaware, FedEx Corporation, Oracle Corporation, Allergan, Inc., Air Products and Chemicals, Inc. and KFC Corporation. Ken has also advised Special Committees of the Boards of companies such as Ralph Lauren Corporation, TripAdvisor, Inc., Massey Corporation and MoneyGram International, Inc.

Ken is a Fellow of the American College of Trial Lawyers. He has been recognized annually since 2002 in Chambers USA where he is ranked in the top band of Court of Chancery litigators.

Paul L. Regan

Paul L. Regan is Associate Professor of Law and Associate Director of the Institute of Delaware Corporate and Business Law at Widener's Delaware campus. Professor Regan received a B.S. cum laude from Villanova University in 1979 and a J.D. magna cum laude from Temple University Law School in 1982.

Following graduation from law school, Professor Regan served as Litigation Associate, Fellheimer, Eichen & Goodman, Philadelphia, Pennsylvania, from 1982-83; Litigation Associate, Liebert, Short, Fitzpatrick & Lavin, Philadelphia, Pennsylvania, from 1983-85; and Corporate Litigation Associate, Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, from 1985-94.

Professor Regan joined the faculty at Widener as Visiting Associate Professor of Law and served in that capacity from 1994-95. Since 1995, Professor Regan has served as Associate Professor of Law and was awarded tenure in 2000. Professor Regan is admitted to practice in New Jersey, Pennsylvania and Delaware. He teaches and writes in the areas of Business Organizations, Advanced Corporations, Corporate Finance, and Contracts. Professor Regan twice has received the Outstanding Faculty Award, as voted by the graduating classes of 2002 and 2008. Professor Regan also has served as Director of Widener's International Law Institutes in Geneva, Switzerland (Summer 2001 and 2003) and Venice, Italy (Summer 2007 and 2014). Professor Regan also contributes to the annual Ruby R. Vale Interschool Corporate Moot Court Competition by regularly drafting cutting edge Delaware corporate law problems for the competition and judging rounds of arguments by various teams of competitors.

Professor Regan has been active in a number of civic and professional organizations, volunteering for the past twelve years as an advisor and extra coach for a local high school in the Delaware mock trial competition, working with a high school youth group in a local church and coaching youth soccer and track and field teams for the past twenty years. Professor Regan also has served as liaison to the Pennsylvania Board of Law Examiners for the Law School.

Edward B. Rock

In September 2012, Edward Rock was appointed Senior Advisor to the President and Provost and Director of Open Course Initiatives. In this role, Professor Rock is responsible for the University's partnership with Coursera. As an academic, Edward Rock writes widely on corporate law and corporate governance. In recent years, working with Marcel Kahan at NYU, he has written a series of award-winning articles on hedge funds, corporate voting, proxy access, corporate federalism and mergers and acquisitions. Currently, he is working on the implications for corporate law of substantially controlling the classic shareholder – manager “agency costs” through changes in market and firm practices.

Andrew L. Strauss

Andrew Strauss is the Associate Dean for Faculty Research and Strategic Initiatives and a Professor of Law at Widener University School of Law in Wilmington, Delaware. He is the Dean Designate at the University of Dayton Law School. His term will start on July 1st. He specializes in public international law, international economic law, international transactions and international organizations. He earned his Bachelor of Arts from Princeton University's Woodrow Wilson School of Public and International Affairs and his Juris Doctor from New York University School of Law where he served as a staff member on the Review of Law and Social Change. Prior to joining the Widener Law faculty, he practiced law in New York City for the law firms of Shearman & Sterling and Graham & James. His practice centered on international banking and finance. In the spring of 2008, he was a Visiting Professor at the University of Notre Dame Law School, and in the fall of 2008, he and two colleagues became the first faculty members at Widener to be awarded the title of Distinguished Professor of Law.

Dean Strauss is co-author (with Weston, Falk and Charlesworth) of the Fourth Edition of International Law and World Order, a standard international law textbook. He is also co-editor (with Wil C.G. Burns) of the 2013 Cambridge University Press book, Climate Change Geoengineering: Philosophical Perspectives, Legal Issues, and Governance Frameworks. His articles have appeared in international journals such as Foreign Affairs, The Harvard Journal of International Law, and The Stanford Journal of International Law. He is most known for his theoretical contributions to international jurisdiction, his articles on democratizing the international system, and his work conceptualizing global warming litigation. This latter work has been profiled by the New York Times Magazine in its innovative ideas of the year edition.

Dean Strauss is also a frequent public commentator on matters of international law and policy with articles appearing in such publications as The International Herald Tribune, The Nation, and The Financial Times. Among his contributions to the broadcast media, his radio commentaries have been aired on Public Radio International's Marketplace.

Overseas, Dean Strauss has served as a Fulbright Scholar in Ecuador where he studied tribal politics in the Amazon. He has taught Singaporean constitutional law on the law faculty of the National University of Singapore, and he has been

a lecturer at the European Peace University in Schlaining, Austria. In addition, he has served as the Director of the Geneva/Lausanne International Law Institute and the Nairobi International Law Institute. Domestically, he has been an Honorary Fellow at New York University School of Law's Center for International Studies. In 2006 he delivered the Henry Usborne Memorial Lecture in the British Houses of Parliament.

Dean Strauss is internationally active in many civic and professional organizations. He has conducted human rights missions to Asian countries and been a consultant to both Human Rights Watch and Human Rights First. Dean Strauss is a member of the Consultants Working Group of the Climate Legacy Initiative. He is a member of the International Advisors Group of the One World Trust and the Advisory Council of the Center for U.N. Reform Education. He is the founder of the International Court of Justice Jurisdiction Project.

Chief Justice Leo E. Strine, Jr.
Delaware Supreme Court

On February 28, 2014, Leo E. Strine, Jr., became the 8th Chief Justice of the Delaware Supreme Court. Before becoming the Chief Justice, he had served on the Delaware Court of Chancery as Chancellor since June 22, 2011, and as a Vice Chancellor since November 9, 1998.

Chief Justice Strine holds long-standing adjunct teaching positions at the Harvard, University of Pennsylvania, Vanderbilt, and UCLA Schools of Law, where he teaches diverse classes in corporate law. Chief Justice Strine is a Senior Fellow of the Harvard Program on Corporate Governance, as well as the Austin Wakeman Scott Lecturer in Law at Harvard Law School. Chief Justice Strine has served as the special judicial consultant to the ABA's Committee on Corporate Laws since 2006.

Chief Justice Strine speaks and writes frequently on the subject of corporate law, and his articles have been published in *The University of Chicago Law Review, Columbia Law Review, Cornell Law Review, Duke Law Journal, Harvard Law Review, University of Pennsylvania Law Review,* and *Stanford Law Review*, among others. On several occasions, Chief Justice Strine's articles were selected as among the Best Corporate and Securities Articles of the year, based on the choices of law professors.

Before joining the Court, Chief Justice Strine served as Counsel to Governor Thomas R. Carper, and had also worked as a corporate litigator at Skadden, Arps, Slate, Meagher & Flom. Chief Justice Strine was law clerk to Judge Walter K. Stapleton of the U.S. Court of Appeals for the Third Circuit and Chief Judge John F. Gerry of the U.S. District Court for the District of New Jersey. Chief Justice Strine graduated *magna cum laude* from the University of Pennsylvania Law School in 1988, and was a member of the Order of the Coif. In 1985, he received his Bachelor's Degree *summa cum laude* from the University of Delaware and was a member of Phi Beta Kappa and a Truman Scholar.

In 2000, Governor Carper awarded Chief Justice Strine the Order of the First State. In 2002, President David Roselle of the University of Delaware presented Chief Justice Strine with the University's Presidential Citation for Outstanding Achievement. In 2006, Chief Justice Strine was selected as a

Henry Crown Fellow at the Aspen Institute.

Chief Justice Strine lives in Hockessin, Delaware with his wife Carrie, who is an occupational therapist at the DuPont Hospital for Children, and his two sons, James and Benjamin.

COURSE MATERIALS

. ABA Standing Committee on Ethics and Professional Responsibility – Formal Opinion 97-407, Lawyer as Expert Witness or Expert Consultant - May 13, 1997

. Law Professors as Expert Witnesses: The Trial Lawyers' Views

. Law Professors as Expert Witnesses: The View from Academia

. Law Professors as Expert Witnesses: The View from the Bench

. University Policy on Extra Compensation

. When Law Professor Experts Testify: Considering the Implications of Fed.R.Evid. 703

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 97-407 **May 13, 1997**
Lawyer as Expert Witness
or Expert Consultant

A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law-related service" to the party within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party's confidential information from use or disclosure adverse to the party.

Model Rules 1.7(b) and 1.10(a) apply to the lawyer's representation of a client adverse to a party for whom he is serving as a testifying expert. If the duty of confidentiality to the party on whose behalf the lawyer serves as a testifying expert would "materially limit" the responsibilities of the lawyer to one of his clients, the lawyer and any firm with which the lawyer is associated may be prohibited from concurrently representing that client. Ordinarily it would not be reasonable for the lawyer to believe in those circumstances that the representation of the client will not be adversely affected, and thus client consent would not permit the representation. Moreover, even though these requirements of the Model Rules are satisfied, other law, including the law of client-lawyer privilege and the law of agency, may prohibit the lawyer and his law firm from representing the

---

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

client, unless the party on whose behalf the lawyer serves as a testifying expert waives its right to object.

After the testifying expert relationship has concluded, the testifying expert and his law firm may be precluded from representing a client in a matter in which use of the party's confidential information would be necessary. Model Rules 1.9(a) and 1.9(c) do not apply because the party for whom the lawyer was asked to testify is not a former client. Nevertheless, the responsibilities of the lawyer under other law to maintain the confidentiality of the party's information may materially limit the representation in the subsequent matter, and it may not be reasonable for the lawyer to believe that the representation would not be adversely affected; if so, Model Rules 1.7(b) and 1.10(a) would bar the subsequent representation.

Opinion

The Committee has been asked whether, under the Model Rules of Professional Conduct, a lawyer who is retained to testify as an expert witness on behalf of a party who is another law firm's client may undertake a representation directly adverse to that party. Further, if the lawyer expert may not undertake the representation adverse to a party on whose behalf he is currently serving as a testifying expert, may the lawyer undertake the adverse representation *after* his testimony on behalf of the party has been concluded? Finally, if the lawyer in either situation is disqualified, may another lawyer with whom the lawyer is associated in a firm nevertheless undertake the representation?

The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a "law-related service" within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 ("Conflict of Interest: General Rule") and Rule 1.9 ("Conflict of Interest: Former Client"), and the conflict of interest of the lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm. Based on the analysis and assumptions in Part I of this Opinion, the Committee concludes that under the Model Rules a lawyer serving solely as a testifying expert witness on behalf of another law firm's client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify, and is not thereby providing law-related services. The lawyer nevertheless should take reasonable precautions to avoid confusion in the minds of the retain-

ing law firm and its client as to the different duties applicable to service as a testifying expert.

Moreover, the lawyer expert witness has duties under other law, such as a duty to protect the confidences of the party for whom the lawyer may testify, that may limit the lawyer and his law firm in the representation of a client in a matter adverse to the party for whom he serves or previously has served as a testifying expert.[1] These limitations on the lawyer testifying expert are analyzed in Part II of this Opinion.

I. A Lawyer Serving Solely as a Testifying Expert as Distinct from an Expert Consultant Does Not Thereby Occupy a Lawyer-Client Relationship or Provide a "Law-related Service."

A lawyer who is expert on a legal subject may be engaged to serve one of two distinct roles: as an expert witness who is expected to testify at a trial or a hearing as a "testifying expert," or as a nontestifying "expert consultant." In this Part I, the Committee (a) analyzes the role of the lawyer testifying expert as distinguished from the role of the lawyer expert consultant in respect of whether the testifying expert forms a client-lawyer relationship; (b) cautions as to the lawyer's duty to clarify his responsibilities in either role, especially in circumstances where the roles become blurred; and (c) examines whether the role of testifying expert falls within the purview of Model Rule 5.7.

(a) A lawyer employed as a testifying expert does not form thereby a client-lawyer relationship.

The Model Rules note that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." MODEL RULES OF PROFESSIONAL CONDUCT, Scope [15] (1995). Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

The Committee previously has stated that, as a general matter, a client-lawyer relationship can "come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations." ABA Formal Opinion 95-390 at 8; *see also* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:103-105 (1989).

1. The Committee neither makes factual findings nor decides purely legal questions. The Committee nevertheless may assume factual and legal conclusions in order to render an opinion as to ethical responsibilities under the Model Rules, and here does so.

Clients reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including duties of confidentiality and loyalty, and avoidance of conflict of interest.

The Committee believes, however, as long as the lawyer's role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.[2]

2. *See, e.g.*, Fed. R. Civ. Proc. 26(a)(2) and 26(b), which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation. Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product. *E.g.*, Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991). Other courts continue to employ a case-by-case analysis and, absent compelling circumstances, deny discovery of lawyers' opinions and mental impressions communicated to testifying experts notwithstanding the 1993 changes to FRCP §26. *E.g.*, Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), following Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1993). *See also* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE: Civil 2d (1994) §2031 at 439, noting that *Bogosian* probably was overruled by the 1993 amendments. *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §141(Proposed Final Draft No. 1 March 29, 1996) (adopting the *Bogosian*

State bar ethics committees have rendered opinions on related issues that support the conclusion that a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify. The Virginia State Bar, Standing Committee on Legal Ethics, Opinion 1884 (1989) was asked whether a lawyer had a conflict of interest if the lawyer executed affidavits as an expert for both the plaintiffs and the defendants in the same litigation, but on different issues. Noting that the issue, whether the expert had a client-lawyer relationship, involved a "factual determination and is beyond the purview of the committee," the committee added:

> Should the attorney's capacity have been purely that of an expert witness, the Code of Professional Responsibility should be inapplicable in that situation as it does not in any way preclude an individual from serving as an expert witness for both parties to an action.[3]

In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified,

---

approach). Assuming, however, that questions are not asked at the deposition or trial about all such communications, the lawyer expert as an agent has duties of confidentiality to the principal under other law apart from duties under specific Model Rules. *See* RESTATEMENT (SECOND) OF AGENCY §387 (agent's use of principal's confidences for the agent's or another's benefit is improper absent principal's consent), and §395 (agent must not use or communicate principal's confidential information whether or not related to the transaction unless generally known or otherwise agreed) (1958); and *see also id.* §396 (agent's duties continue following termination of the agency).

3. Other state bar ethics opinions also have found that a client-lawyer relationship does not arise between a testifying expert and the party for which the lawyer is engaged to testify. *See, e.g.*, State Bar of S.D., Ethics Comm. Opinion 91-22 (1992) (lawyer serving as testifying expert for insurance company A defending a bad faith claim brought by insurance company B may represent an insured of insurance company B in an unrelated claim against a third party, in part because insurance company A is not the testifying expert's client); Phila. (Pa.) Bar Ass'n, Professional Guidance Comm. Opinion 88-34 (1988) (permissible [under the Pennsylvania Rules of Professional Conduct] for a lawyer to serve as a testifying expert for a party while at the same time serving as a testifying expert for the party's opponent in another unrelated suit).

and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation. In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.

(b) The lawyer should assure his role as testifying expert is made clear and obtain client consent should his role change to consulting expert.

In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred. The engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences. It is the responsibility of the firm that has engaged the testifying expert to assure that its client is fully informed as to the nature of the testifying expert's role. *See* Model Rule 1.4.

The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm's client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity.[4] The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. *See infra* nn. 10, 11 and 13.

4. *See* Model Rule 1.2(c) stating: "A lawyer may limit the objectives of the representation if the client consents after consultation." Obtaining client consent after "consultation," see MODEL RULES OF PROFESSIONAL CONDUCT, Terminology (1995), is in this instance the joint responsibility of the law firm and the expert. *See also* Model Rules 1.4 and 1.5(e). Disclosure of all materials furnished to the expert by trial counsel, including opinion work product, may be ordered by courts following *Intermedics*, *supra* n. 2, when the testifying expert also serves as expert consultant. *See, e.g.*, Furniture World, Inc. v. D.A.V. Thrifty Stores, Inc., 168 F.R.D. 61 (D. N.M. 1996).

(c) The testifying expert does not provide a "law-related service."

A question remains under the Model Rules whether a lawyer who serves solely as a testifying expert provides "law-related services" as contemplated by Model Rule 5.7.[5] If so, the lawyer testifying expert would be subject to all the Model Rules unless the provision of the services satisfies the requirements of subparagraphs (a)(1) or (a)(2) of Rule 5.7, even though he has no client-lawyer relationship with the party on whose behalf he is to testify.

In answering the question, the Committee finds significant but not dispositive that Model Rule 5.7 is intended to address potential conflicts that arise when lawyers engage in businesses ancillary to their law practices, and that nowhere in the extensive literature surrounding adoption of Model Rule 5.7 is it suggested that a problem exists when lawyers serve as testifying experts.[6] Of greater significance is that the way in which tes-

---

5. Model Rule 5.7 ("Responsibilities Regarding Law-related Services") states:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Model Rule 5.7 has been adopted in the Virgin Islands. Pennsylvania has adopted a similar rule that is based on the same rationale. At this date, no other jurisdiction has a rule dealing expressly with ancillary or law-related services.

6. Adoption of Rule 5.7 followed directly from the Stanley Commission's recommendation that "[t]he Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved." Report of ABA Commission on Professionalism, *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 280-81 (1986). One of three areas of concern prompting this recommendation was that

> some firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law—real estate development or investment banking, for example. Other firms or individual lawyers have become active in businesses which have little or nothing to do with their practice. *Id.* at 280.

The reports, published debates and articles surrounding the adoption of Model Rule 5.7

tifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. See Rule 5.7 Comment [1]. As noted in Part I.(b), the testifying expert should appropriately define his role at the outset of the engagement so that the law firm's client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.

While some members of the Committee believe that the plain language of Rule 5.7 encompasses testifying expert services rendered in "circumstances . . . not distinct from the lawyer's provision of legal service to client," Model Rule 5.7(a)(1), the clear majority believes that the words do not apply. In the view of the majority, lawyers serving as testifying experts do not offer their services "in conjunction with" the legal services they offer to their clients, Model Rule 5.7(b). Rarely does a testifying expert provide services directly to a client. The client invariably is represented by its own trial counsel, who manages the role to be played by the testifying expert in discovery, preparation and trial. Accordingly, the majority concludes that testifying expert services and trial counsel services always remain distinct with regard to a particular matter. Rule 5.7, adopted in only one jurisdiction, should not be construed to reach beyond the intent of its drafters.

For these reasons, the Committee concludes that testifying expert services are not "law-related services" under Model Rule 5.7. Thus, the testifying expert's role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules

and its predecessor also make it clear that the perceived problems related solely to lawyers being involved in businesses ancillary to their law practices and not at all to lawyers testifying as experts. *See, e.g.*, ABA Section of Litigation, *Recommendation and Report on Law Firms' Ancillary Business Activities* (1990) (recommending that the ABA adopt a rule prohibiting ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 82); ABA Special Coordinating Committee on Professionalism, *Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms* (1990) (recommending that the ABA adopt a rule allowing, but regulating, ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 429); Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992) (defending the ABA's first version of Model Rule 5.7, adopted in 1991 and rescinded in 1992, that made ancillary businesses unethical). Other authorities are gathered in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 91:410-91:413 (1994). Predecessor Model Rule 5.7 was adopted by the ABA House of Delegates in 1991 and rescinded in 1992.

to apply to his relationship.[7]

II. The Lawyer Testifying Expert Has Responsibilities to Others That Under the Model Rules May Limit Representation of Clients by the Lawyer or His Firm.

In this Part II, the Committee answers the questions posed at the beginning of this Opinion by analyzing the limitations that the Model Rules impose upon the lawyer and his firm as a result of his serving as a testifying expert when the lawyer is called upon (a) to represent a client concurrently in a matter adverse to the party for whom the lawyer currently is serving as a testifying expert, or (b) to represent a client after the conclusion of the testifying expert service.[8]

(a) Rule 1.7(b) may bar concurrent representation of a client adverse to the party for whom the lawyer is serving as a testifying expert.

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify.[9] Accordingly, if the testifying

7. The lawyer who serves as a testifying expert is, however, subject to the Model Rules that govern lawyers generally, particularly Rule 8.4 ("Misconduct"). *See, e.g.*, Attorney Grievance Commission of Maryland v. Breschi, 340 Md. 590, 667 A.2d 659 (1995) (willful failure to file income tax return on time justifies disbarment). Thus, for example, were the expert witness to testify falsely, discipline under Model Rule 8.4 would be warranted. *See also* ABA Formal Opinion 336 (1974).

8. A lawyer who is called upon to serve as a testifying expert in litigation in which information relating to the representation of a former client may be relevant is barred by Rule 1.9(c), *infra* n. 14, from using or revealing information relating to the earlier client representation in the earlier matter that is not generally known, except as permitted under Rules 1.6 or 3.3. *See also* Rule 1.8(b). If the former client is the opposing party, the testifying expert is subject, not only to a disciplinary charge, but also to disqualification as an expert witness in the case. *See, e.g.*, W.R. Grace & Co., et al. v. Gracecare, Inc., et al., 152 F.R.D. 61 (D. Md. 1993) (lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff's counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert). *Compare* cases cited *infra* n. 9 involving efforts to disqualify non-lawyer experts.

9. The Committee believes that most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify. *See supra* n. 2. Courts, in cases seeking to disqualify expert witnesses from testifying for an opponent, have either held or assumed that a nonlawyer testifying expert (or a nonlawyer expert consultant) occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert. *See, e.g.*, Conforti & Eisele, Inc. v. Div. of Building Constr., 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979) (nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant's counsel and his testi-

expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party's confidences or by other duties he owes the party, Model Rule 1.7(b)[10] applies to that concurrent representation. At least in circumstances where the party's material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert's own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b) and by Model Rule 3.7(b).[11] Under Model Rule 1.10(a),[12] the testifying lawyer's disqualifica-

mony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences under DR 4-101 of the predecessor Code of Professional Responsibility, and that plaintiff's use of the expert "would be fundamentally unfair"); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (plaintiff's nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant's baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff's injury occurred between the expert and the defendant); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990) (nonlawyer expert for defendant not disqualified where he worked closely with plaintiff's expert at the same research center, rejecting as in the *Paul* case use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm).

10. Model Rule 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

11. Rule 3.7(b) states:

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

See also State Bar of Mich., Comm. on Professional and Judicial Ethics Opinion RI-21 (1989) (firm barred from representing defendant when newly arrived "of counsel" to the firm previously had provided an expert opinion on plaintiff's behalf and would be called as a witness in the litigation).

12. Model Rule 1.10(a) states:

tion would be imputed to his law firm.

If the lawyer reasonably concludes that despite the possibility of a material limitation, the representation of a client will not be adversely affected by his duties as a testifying expert, the consent of the client after consultation is nonetheless required. This may be true, for example, if the matter in which the lawyer will testify and the matter in which a client seeks representation are entirely unrelated, and no material confidential information that the testifying lawyer has learned from the party has relevance to the second matter.

(b) Rule 1.7(b) also may bar subsequent representation if materially limited as a result of the earlier relationship.

If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert's law firm on an *unrelated* matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a)[13] would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c)[14] would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service.

Although neither Rule 1.9(a) nor Rule 1.9(c) applies, the expert and lawyers associated in his firm nevertheless may have duties of confidentiality under other law that might materially limit the representation of the current client, even in a matter which is unrelated to the earlier engage-

---

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

13. Model Rule 1.9(a) states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

14. Model Rule 1.9(c) states:

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

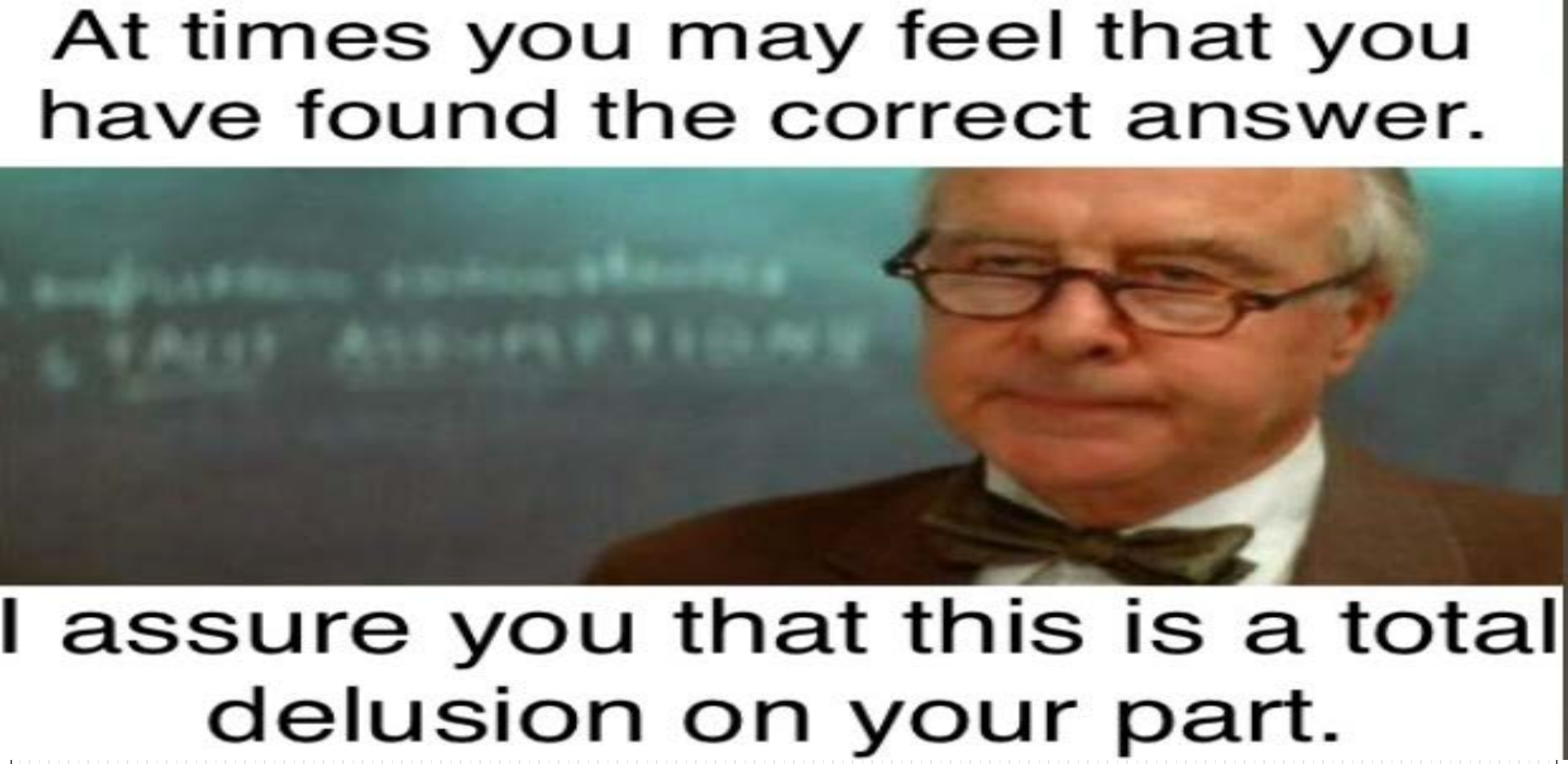
ment.[15] For example, if the representation of the current client were to require the use of confidential financial information learned in his testifying role, the lawyer and his firm would be barred from undertaking the current client representation by Rule 1.7(b) and Rule 1.10(a) unless they reasonably believe the representation will not be adversely affected by the lawyer's duty of confidentiality owed the party for whom the lawyer earlier had served as a testifying expert and the current client consents after consultation.

Summary

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset. If the lawyer's role is or later becomes that of an expert consultant for the party as described in this Opinion, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law. Subsequent representation may, for the same reason, also be barred where the party's confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

15. The testifying expert's duties of confidentiality continue after the relationship with the party terminates. *See supra* nn. 2 and 12.

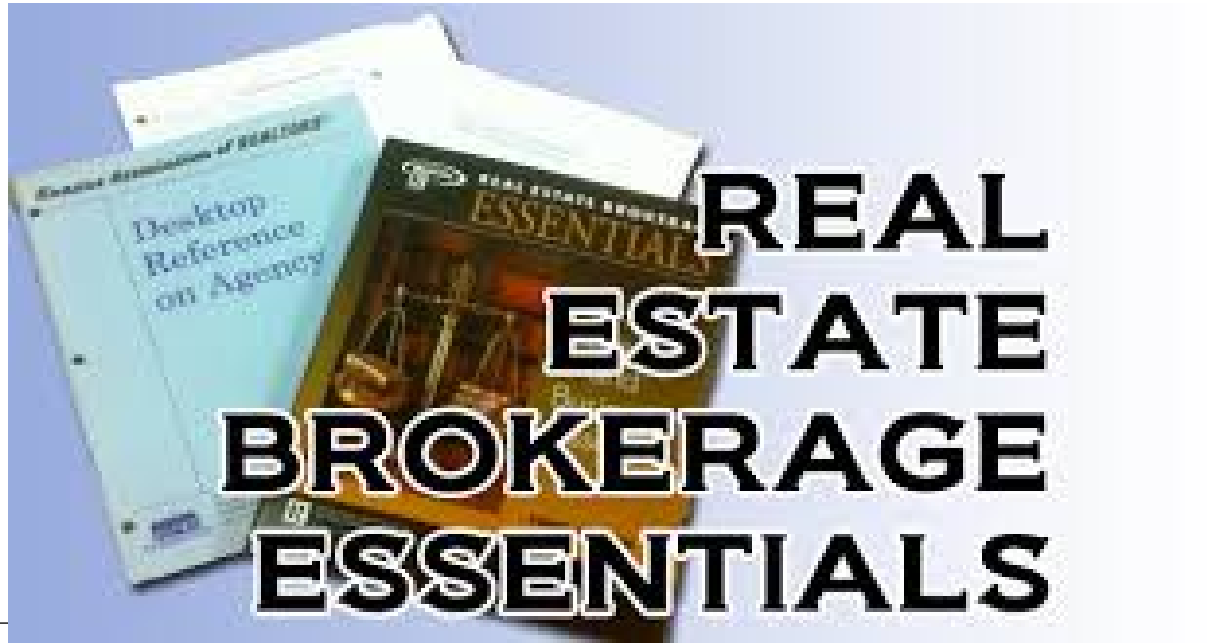


Law Professors as Expert Witnesses: The Trial Lawyers' Views

A Catalog of Professorial Expertise

Real Estate

- I have served as an expert witness in hundreds of cases dealing with real estate issues. I testify primarily on the standard of care of real estate brokers and agents (I hold a CA Broker's License), and the standard of care of escrow agents and title companies.



Credit Reporting

- I've been deposed a couple of times in Fair Credit Reporting Act matters

Class Action Procedure

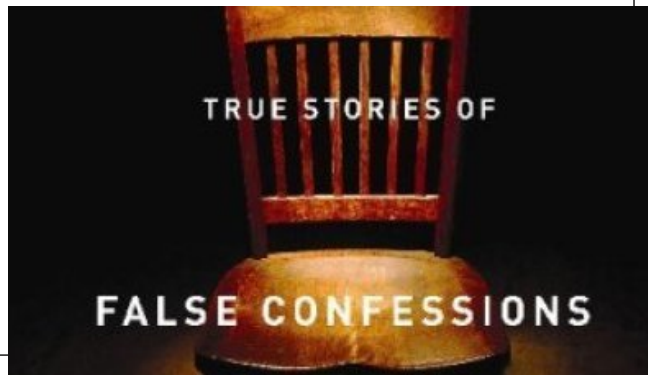
- I have testified, by affidavit and deposition, in a hearing about notice issues in a class action settlement. I had participated in a study on this issue.

Foreign Law

- I have used [a] law professors in one case in which Canadian law provided the rule of decision to give his opinion about limitations on liability recovery under Canadian law.

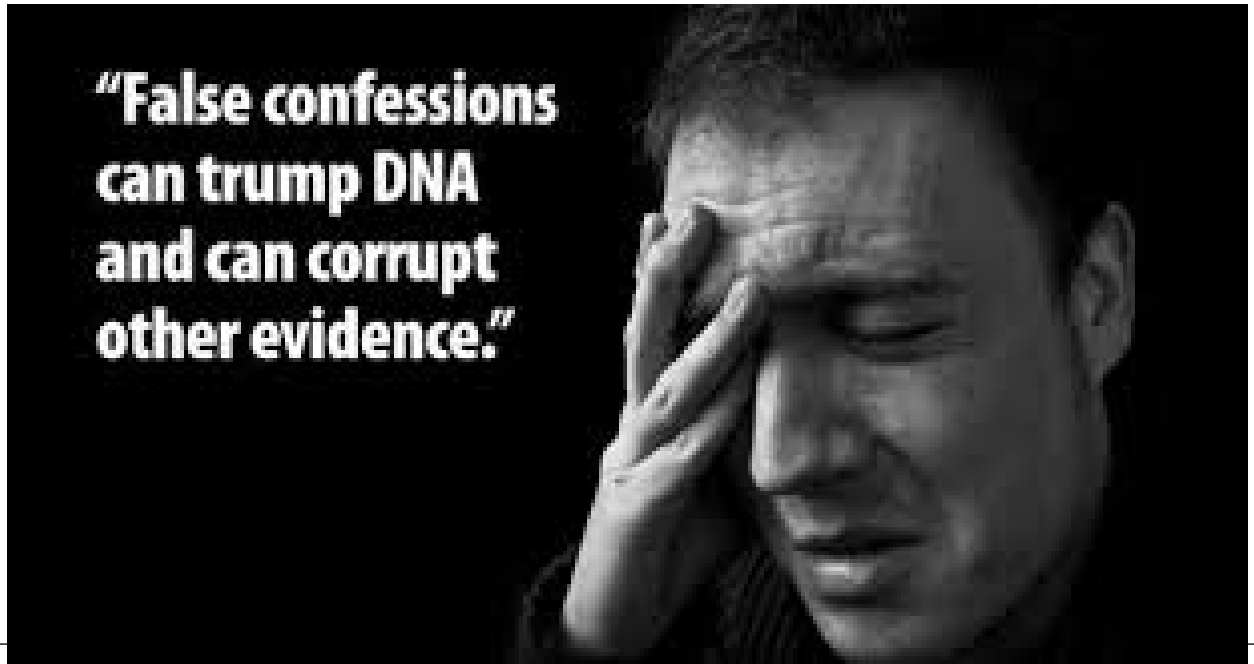
False Confessions

- I am aware of two law professors who testify in the area of false confessions.
- One testifies for the defense on the reality of false confessions, cause and correlates, and specializes in the vulnerability of youth.
- The other purports to be able to judge that the science underlying this testimony is inadequate.



False Confessions – Wearing Two Hats

- I've worked on almost 2,000 cases of disputed interrogations and confessions as a consultant and testified as an expert witness in almost 300 of them, and I am a law professor, but like many law professors I also have a PHD and, like some, I identify first and foremost as a social scientist.



Employment Law

- I testified as a statistical expert in an employment discrimination case in Texas.

Intellectual Property

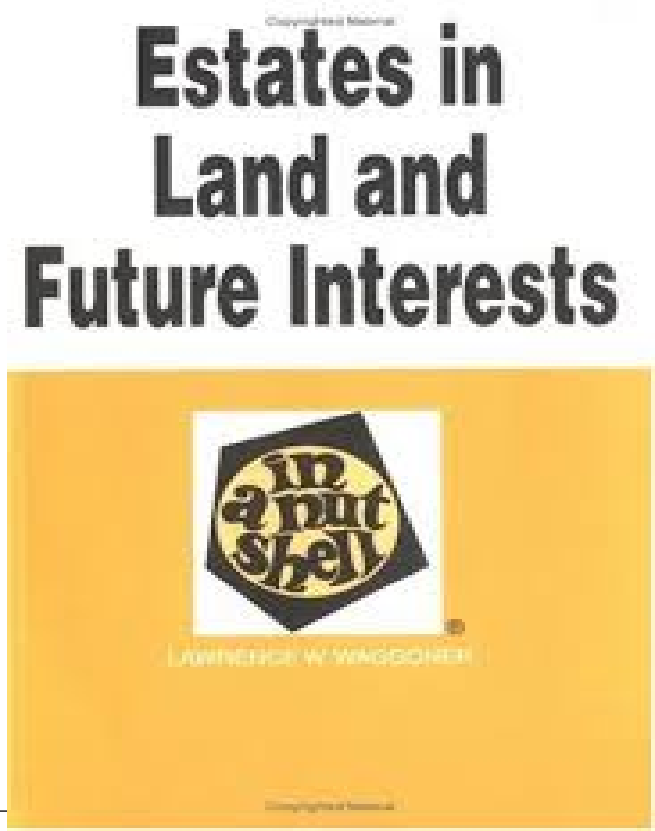
- I've been a damages expert in TM cases and copyright expert on the protectability of photos . . . and on the validity of a copyright registration . .

Forensics and Criminal Law

- A law professor was an expert on the general acceptance of forensic document examination in the relevant scientific fields,
- The district court admitted the testimony in a *Daubert* hearing on toolmarks in firearms identification of a criminal justice professor whose "academic background would not appear to give her any particular expertise in whether the discipline adheres to scientific precepts" but who was sufficiently "conversant with the relevant literature.
- I spend about 80% of my time as an expert witness, on computer forensics and breath testing machines primarily

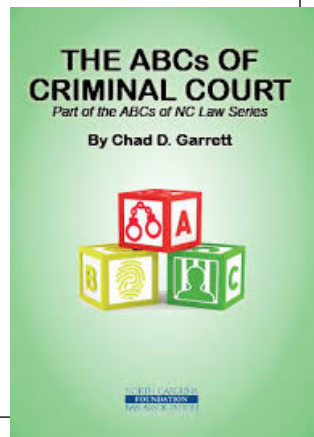
The Rule Against Perpetuities

- I have served as an expert witness in Wills and Trusts cases, sometimes on such complex issues as Rule against Perpetuities violations and at other times on matters relating to breach of fiduciary duty.



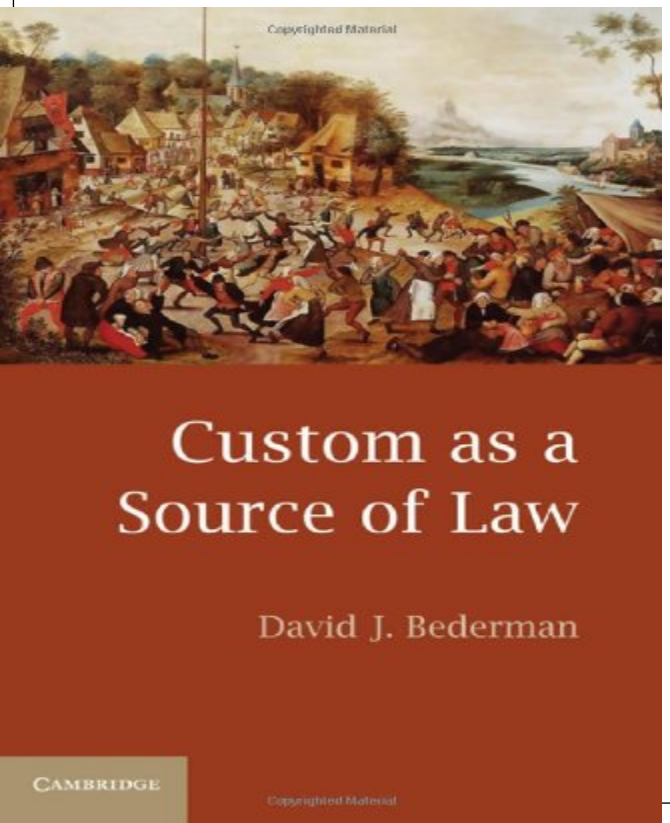
Expert on State Criminal Law

- I once testified in the civil trial of the local Catholic Archdiocese for allowing one of its priests to molest altar boys.
- One element of the conspiracy charge was that the Archdiocese had to have committed a crime in the process.
- I was called as an expert in Texas criminal law to testify that the Church authorities had a criminal duty to report known or suspected child abuse to the police or the child protective agency.



International Law

- International law is an interesting category because there is a "customary" element to much of international law,

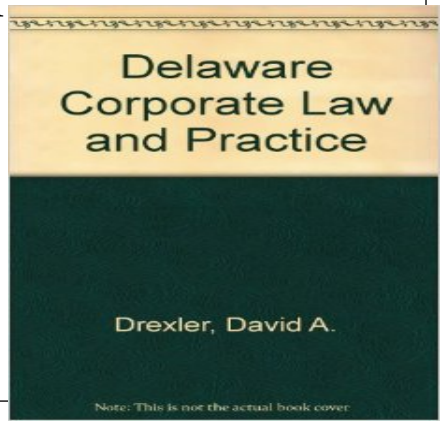


A Potpourri of Topics

- One unusual one was to opine not only on attorney malpractice but also whether the transaction at issue was fraudulent (something that the other side should have objected to during the deposition but never did).
- Another one was whether the statute of limitations had passed on a bankruptcy issue.

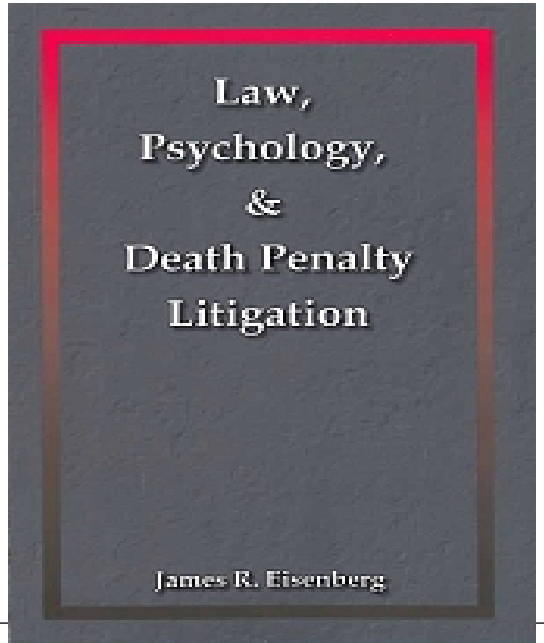
Delaware Corporate Law

- Law professors have testified (at deposition or final hearing or both) as expert witnesses on Delaware law issues in cases in
- federal bankruptcy court in New York,
- Superior Court in California,
- arbitration in London, Boston, and New York,
- federal court in Delaware, New York and Cleveland,
- the Public Service Commission in Maryland, and
- the US Tax Court.



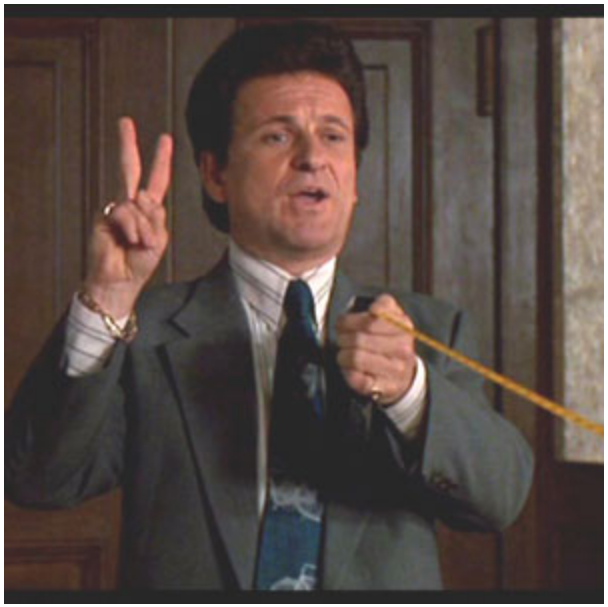
Race and the Death Penalty

- Served as expert in the Connecticut death penalty litigation (on the question of racial bias in prosecution, conviction, and sentencing).
- Expert on the failure of death penalty appeals in Pennsylvania.



Eyewitness Evidence and Trials

- Expert on whether cross-examination is sufficient to show the fallibility of eyewitness testimony.



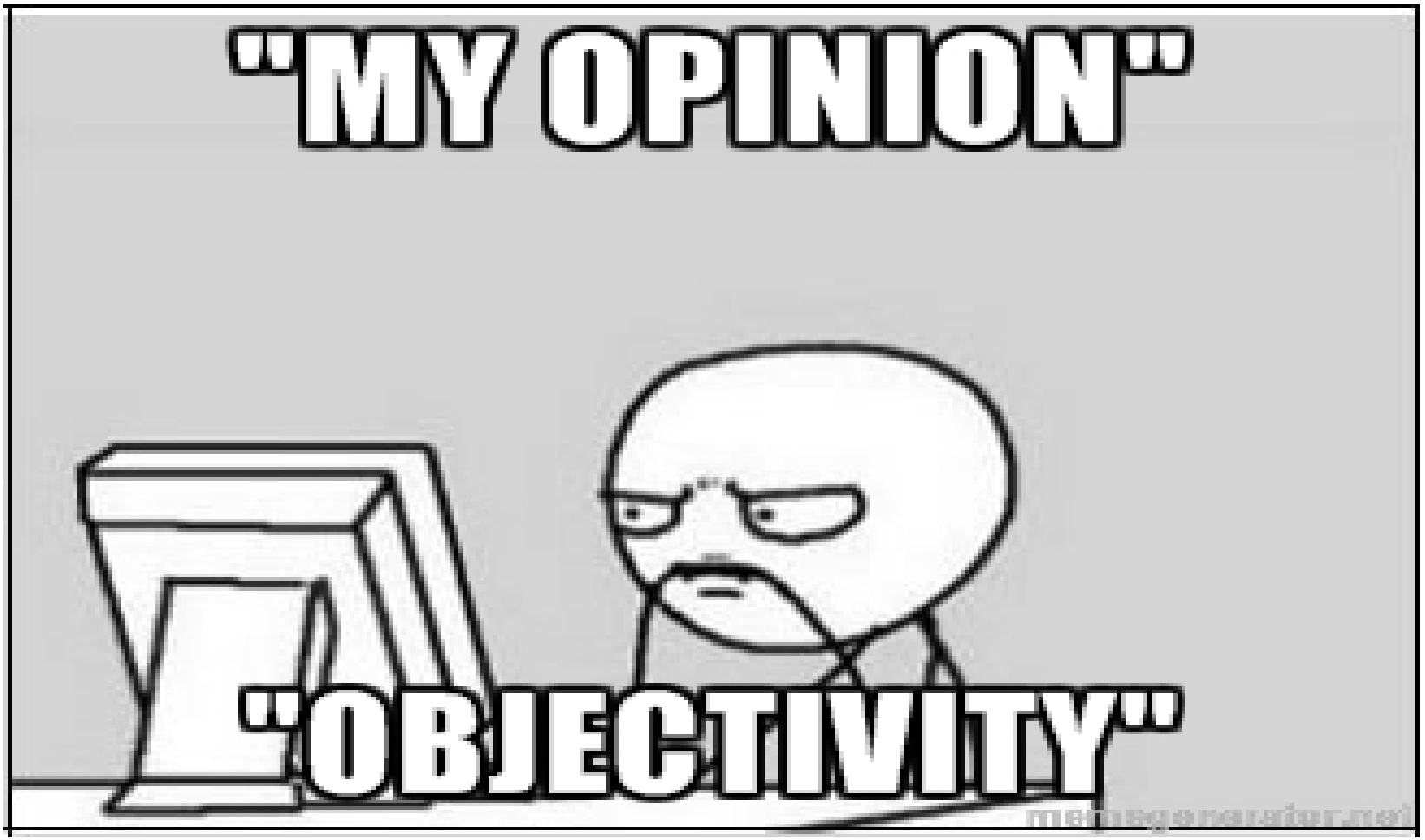
Today's Talk

Which Cases Warrant An Expert?

- Type of case(s)?
- Jury?
- Bench Trial?

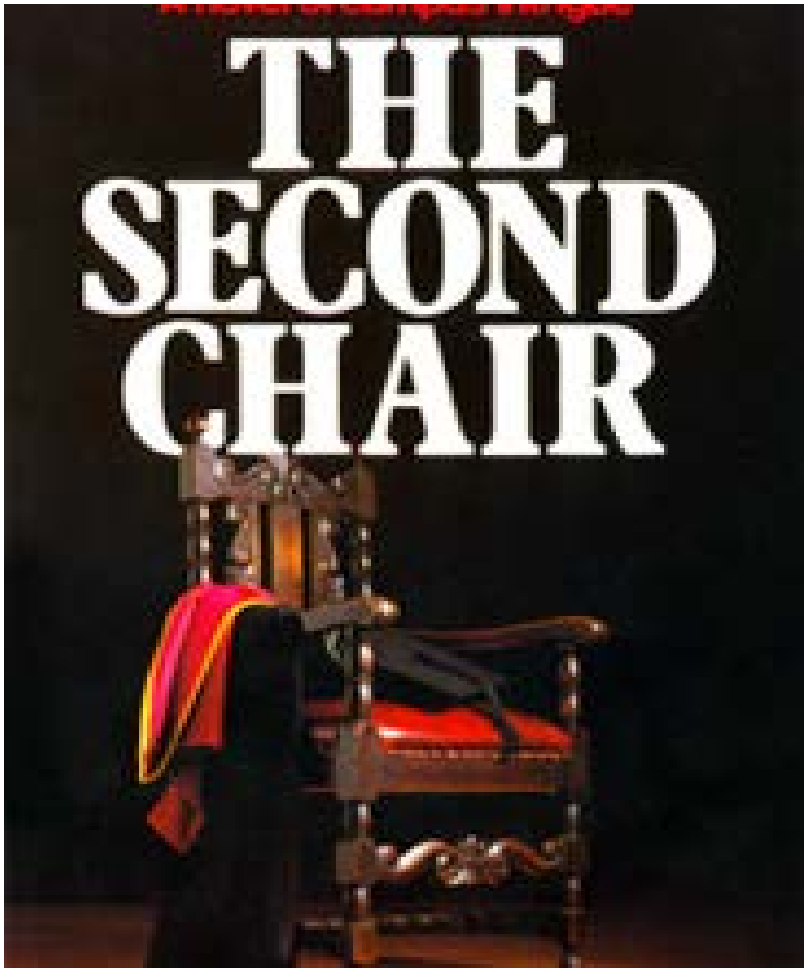
How To Select The Expert

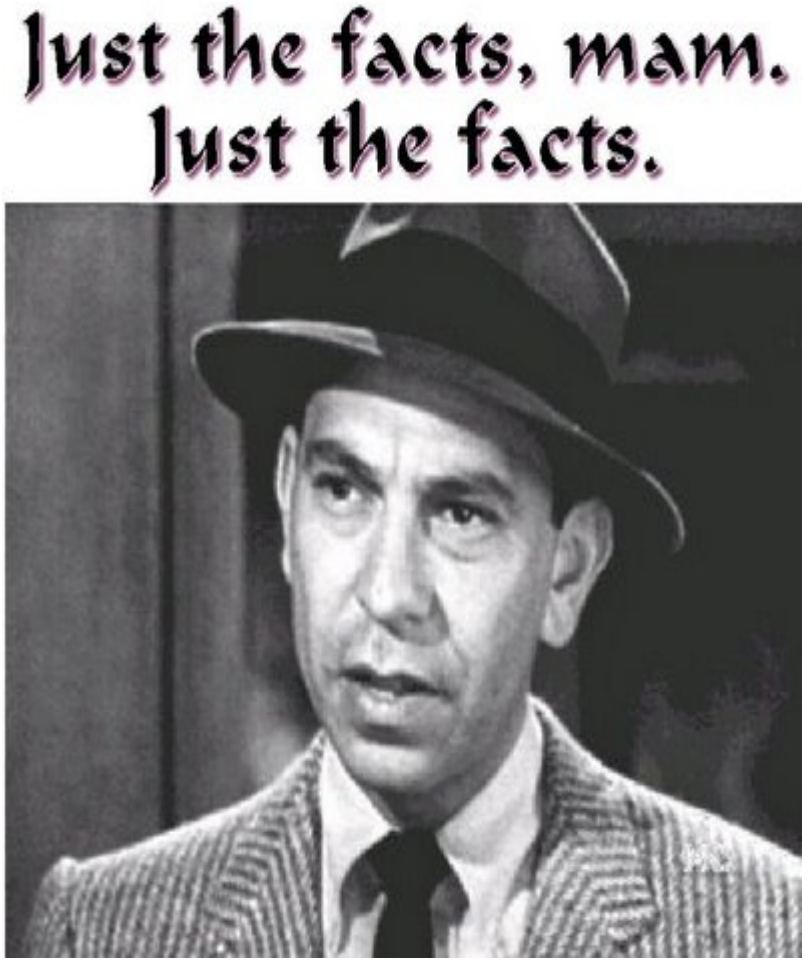
Objectivity(?)



Dealing With The Paper Trail

The Law Professor's Role





What About Dueling Experts?

- Keep them both?
- Agree to no expert testimony?
- Let each hear the other's testimony?

What's The End Result?

Benefitting One Side?

Facilitating the Search for Truth?

One Last Issue - Skills

Experts and Their Sources - 1

- An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.

Experts and *Inadmissible* Sources

- If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
- But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

LAW PROFESSORS AS EXPERT WITNESSES

THE VIEW FROM ACADEMIA

HYPOTHETICAL #1: TESTIFYING CONTRARY TO THE INTERESTS OF A MAJOR DONOR TO THE INSTITUTION

- Professor Aronson teaches and writes on criminal procedure and forensics issues at Jersey University Law School. In connection with the forthcoming trial of 22 year-old Bert "Buzz" Frankel on charges of vehicular homicide, the State Attorney General has asked Prof. Aronson to testify as an expert witness on the admissibility and reliability of a breathalyzer test widely used in the State, and central to the State's case against Mr. Frankel. Mr. Frankel's father Bart is a major donor to and member of the board of advisors of Jersey Law School's Institute for the Study of Financial Regulation.

HYPOTHETICAL #1A: TESTIFYING AGAINST A MAJOR DONOR TO A PROGRAM ADMINISTERED BY THE PROFESSOR

- Same facts as the previous hypothetical, but Bart Frankel is donor to and member of the advisory board of Jersey Law School's Institute for Criminal Studies, of which Prof. Aronson is co-director, along with her colleague Professor James McGinnis.

HYPOTHETICAL #1B: DUMPING A FORTHCOMING PAPER CONTRARY TO TESTIMONY

- Same facts as in hypothetical #1, except (a) Buzz Frankel's father has never supported, and has no relationship to, Jersey Law School, and (b) until being contacted by the Attorney General, Prof. Aronson had been preparing an article for a forthcoming symposium pointing out scientific and constitutional flaws in the State's breathalyzer testing equipment and processes. To appear in the symposium, Prof. Aronson will have to complete and submit the draft of her article before Mr. Frankel's trial begins. Prof. Aronson could arrange, however, for a friend who is a professor at another law school to fill in for her on the panel at the symposium.

HYPOTHETICAL #1C: CONFLICT BETWEEN PROFESSORS IN THE SAME PROGRAM

- Same facts as in hypothetical #1A (donor to the program administered by the prof). In addition, Prof. McGinnis has been asked by the Frankel family to testify about the scientific and constitutional flaws in the State's breathalyzer testing equipment and processes.

HYPOTHETICAL #2: DOING FUNDED SCHOLARLY RESEARCH

- The Council of Institutional Investors has long advocated that the positions of chief executive officer and board chair be held by different individuals in public companies. Professor Rockerby of the Delaware Law School wishes to engage in an empirical evaluation of the effect of separating the two roles on the stock prices of public companies. The Council of Institutional Investors invites Prof. Rockerby to prepare such a study on its behalf, for a fee of $25,000.

HYPOTHETICAL #2A: PUBLICATION OF FUNDED RESEARCH

- Prof. Rockerby's study finds a reasonably strong positive correlation between stock price performance and separation of the chair and CEO roles. Prof. Rockerby proposes to publish that study in the Delaware Journal of Corporate Law.
- [Alternative: The study finds no correlation.]

HYPOTHETICAL #3: BALANCING THE PROFESSOR'S ROLES

The Delaware Law School has no formal written policy on compensated outside work by professors. Professor Edwards seeks the Dean's approval to be retained as an expert witness by Block Energy, Inc., in a case in which a personal injury victim seeks to hold it liable for the negligence of a wholly owned subsidiary that is incorporated in Illinois. The proceeding is in arbitration in Illinois. Prof. Edwards would testify concerning the doctrine of piercing the corporate veil. Prof. Edwards tells the Dean the following: (a) the pertinent legal doctrine is settled, and is of no relevance to Prof. Edwards' scholarly work; (b) the matter is likely to require some 30-50 hours of work, mostly reviewing documents and deposition testimony, during September and October, the first two months of the next semester; (c) Prof. Edwards will be teaching two three-credit courses during that semester; (d) Prof. Edwards' pre-existing consulting commitments include expert witness work that is likely to require another 40 hours of work during September and October; (e) Prof. Edwards' most recent scholarly article was published three years ago; and (f) Prof. Edwards' teaching evaluations have become less favorable in the last two years, in part due to complaints about delays in responding to emails from students and lack of "sizzle" in the classroom.

Law Professors as Expert Witnesses

Panel One: The View from the Bench

Federal Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence *or* to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Delaware Rule of Evidence 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, if

(1) the testimony is based upon sufficient facts or data,
(2) the testimony is the product of reliable principles and methods, and
(3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

- Admissibility of scientific expert testimony (whether mother's ingestion of anti-nausea drug caused birth defects)
- *Held*: Federal Rule of Evidence 702 superseded old *Fry* rule that scientific expert opinion must be based on technique "*generally accepted*" as reliable in relevant scientific community
- "Nothing in the text of [Rule 702] establishes general acceptance as an absolute prerequisite to admissibility."
- Under Rule 702, "trial judge must ensure that any … scientific testimony or evidence admitted is not only **relevant** but **reliable**."

Daubert's Rule 702 scientific reliability inquiry is "flexible"

- Trial judge is gatekeeper to ensure reliability and relevancy of expert testimony
- Trial judge determination at outset per Rule 104(a)
- *Daubert*'s list of reliability factors is neither exclusive nor dispositive:
  - whether expert's theory can be tested
  - whether theory subject to peer review
  - known rate of error when theory applied
  - existence of standards and controls
  - theory "generally accepted" in scientific community

Federal Rules of Evidence

Rule 104. Preliminary Questions

(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Delaware Rules of Evidence, Rule 104 (same)

Daubert on the gatekeeping role of the trial judge:

"Scientific conclusions are subject to perpetual revisions. … The balance that is struck by Rules of Evidence [is] designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."

Kumho Tire Co. Ltd. V. Carmichael, 526 U.S. 137 (1999)

- *Daubert*'s flexible non-exclusive test for assessing reliability also applies to admissibility of non-scientific expert testimony ("engineers and other experts")

- Trial judge's gatekeeping obligation "applies not only to testimony based on scientific knowledge, but also to testimony based on "technical" and "*other specialized" knowledge*." (*quoting* F.R.E. 702)

- *Held*: trial court did not abuse it discretion in excluding testimony of expert in tire failure analysis where expert failed to satisfy *Daubert* factors "or any other set of reasonable reliability criteria."

M.B. Bancorp., Inc. v. Le Beau, 737 A.2d 513 (Del. 1999)

- Appeal from Court of Chancery decision in statutory appraisal case involving cash-out merger
- Delaware Supreme Court adopts holdings of *Daubert* and *Kumho* "as the correct interpretation of Delaware Rule of Evidence 702."
- Trial judge has "broad latitude" applying *Daubert* factors and is reviewed on appeal under abuse of discretion standard.
- *Held*: Court of Chancery properly excluded "capital market " valuation opinion of financial expert that (1) was premised on approach not "generally accepted" in financial community and (2) included an "inherent minority discount" that is not permissible in Delaware statutory appraisal proceeding.

Daubert and *Kumho* say expert testimony must be reliable and ***relevant*** …

Federal Rule of Evidence 401.
Test for Relevant Evidence

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

"The Rule's basic standard of relevance thus is a ***liberal*** one." *Daubert*, 509 U.S. at 588. ….. ***But***…..

Not ***all*** relevant evidence gets admitted ….

Federal Rule of Evidence 403.

Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence <u>if its probative value is substantially outweighed</u> by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Delaware Rules of Evidence, Rule 403 (same)

Issues Concerning Law of a Foreign Country

Federal Rules of Civil Procedure
Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Court of Chancery Rule 44.1 (same)
Superior Court Civil Rule 44.1 (same)

Law of a Foreign Country (continued)

Federal Rules of Evidence
Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

Delaware Rules of Evidence, Rule 706 (same)

Sampling of Cases with Expert Testimony on Law of Foreign Country

Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc., 623 F. Supp. 2d 518 (D. Del. 2009)

- Court refused, under Uniform Foreign Money–Judgment Recognition Act, to enforce judgment obtained in Mexico on contract dispute because U.S. District Court for D. Del. was not satisfied that the Mexican judgment was not obtained by fraud.

- Evidence showed that Court in Mexico appointed an expert in manner that deviated from usual alphabetical order for selection of such experts and that appointed expert allegedly solicited a bribe.

- District Court in Delaware admitted and gave weight to declaration of experienced legal practitioner in Mexico (1) explaining operation of Mexican law and (2) opining that that Mexican Court's appointment of expert in that case deviated from standard practice.

Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446 (3d Cir. 1999)

- Breach of contract action by Italian manufacturer of orthopedic medical devices against its exclusive U.S. distributer where contract called for application of Italian law to any disputes on the interpretation of their distribution agreement.

- Parties on both sides offered and trial court properly admitted affidavits of Italian law professors on the existence and content of an implied contractual duty of good faith and fair dealing in the distribution agreement under Italian law.

- Third Circuit ruled that District Court did not err when it accepted the position of Italian manufacturer's Italian law expert that U.S. distributor had an implied duty of good faith and fair dealing not to over-order manufacturer's products.

Pallano v. The AES Corp., No. 09C-11-021-JRJ, 2011 WL 291097 (Del. Super. Jan. 24, 2011)

- Personal injury and wrongful death claims arising from alleged unlawful dumping of toxic coal ash waste in the Dominican Republic by defendant corporation and its affiliates.

- Because parties' experts submitted conflicting opinions regarding several key aspects of Dominican law, Court acted under Del. Rule of Evidence 706 to appoint an independent expert on Dominican law, Professor Keith S. Rosenn from the University of Miami School of law.

- Accepting Prof. Rosenn's expert opinion on various aspects of Dominican law, Court substantially denied defendants' motion to dismiss, concluding that complaint (1) adequately alleged tolling of applicable Dominican statute of limitations ; and (2) stated causes of action (subject to repleading for more specificity) under Dominican law for intentional wrongdoing, negligence and strict liability.

Legal Expert Opinion on Domestic Law?

Itek Corp. v. Chicago Aerial Indus., Inc., 274 A.2d 141 (Del. 1971)

- "Pennzoil" style breach of contract action by Itek against CAI, as seller of assets with whom Itek had a "letter of intent," and tortious interference claim against Bourns, Inc., successful buyer of corporate assets from CAI.

- Defendants introduced testimony of "a Wall Street lawyer " that a letter of intent is basically an agreement to agree, also known by deal lawyers as a "hunting license."

- Del Supreme Court: "Testimony from an expert is inadmissible if it expresses the expert's opinion concerning applicable domestic law.

- "[I]t is nevertheless entirely proper for [legal expert]to define an uncommon term according to the customs and usages of the trade or business with which he is familiar.

Delaware Court of Chancery Cases

Some examples of law professors offering expert opinions ….

In re Cox Communications, Inc. Shareholders Litig., 879 A.2d 604 (Del. Ch. 2005)

- Approval of substantially reduced attorneys' fee award ($1.275 million instead of $4.95 million requested) to counsel for shareholder plaintiffs in class action settlement arising from going private merger with 74% controlling stockholder.

- Professor Guhan Subramanian's expert opinion based on empirical study supported proposition that *Lynch* deals (special committee and entire fairness review) generate higher final premiums than *Siliconix* deals (tender offer to 90% and short-form merger, all without entire fairness review).

- Court found "less convincing" law professor's additional opinion that shareholder lawsuits in *Lynch* deals are "material factor" in producing these higher final premiums.

In re The Walt Disney Company Deriv. Litig., *907 A.2d 693* (Del. Ch. 2005)

- Decision after trial in favor of Disney directors on shareholder fiduciary claims challenging executive compensation and severance package -- claims included assertion that Disney's former President Michael Ovitz could (and should) have been fired "for cause" instead of receiving "no-fault" termination that included $90 million in added severance benefits.

- Expert witnesses at trial included two law professors and two practicing litigators:

  - Prof. Deborah DeMott opinion interpreting Disney's certificate of incorporation, bylaws, etc. of "*no value to the Court*" because "[i]nterpretation of the Company's internal governing documents *is a matter exclusively for the Court*."

Disney Litig. (continued)

- Prof. DeMott opinion on the custom and practice of corporate governance in Delaware publicly traded corporations at time of challenged transactions "*little, if any … benefit for the Court*" because relevant question is not directors' compliance with custom and practice of the time "but whether they complied with their fiduciary duties."

- Prof. John Donohue opinion that Ovitz could (and should) have been fired for cause *rejected by Court* because opinion premised on flawed factual determinations about Ovitz's performance which Court rejected after weighing evidence.

- Litigator Larry Feldman opinion that Disney had no grounds on which to fire Ovitz for cause of "*some value to the Court*" because opinion premised on sound factual determinations but relied on questionable legal standards.

Disney Litig. (continued)

- Litigator John C. Fox opinion that Ovitz conduct fell well short of supporting a "for cause" termination was "*of significant value to the Court*" where Fox (1) reached factual conclusions highly consistent with Court's findings and (2) "testified in great detail regarding the definition of gross negligence and malfeasance." (key language in Ovitz contract justifying termination for cause)

Onti, Inc. v. Integra Bank, 751 A.2d 904 (Del. Ch. 1999)

- Statutory appraisal and common law entire fairness action arising out cash-out mergers of related businesses (cancer treatment centers) with transactions involving controlling 60% stockholder and interested board

- Entire fairness claim included "fair price" dispute over the value, if any, of pending shareholder derivative suits filed on behalf of company against controlling stockholder and two directors

- Court of Chancery admitted expert testimony of a Delaware practitioner/former Chancellor and one law professor on the value of these contingent claims at time of merger:

Onti (continued)

- Former Chancellor Grover C. Brown offered opinion that shareholder derivative claims had value of $19.7 million.

- Prof. Lawrence Hamemesh offered opinion that value of the derivative claims should be discounted for, among other variables: the likelihood that such claims would fail; attorneys' fees that would need to be paid; and the cost of any indemnification the company would have to its board members.

- Court of Chancery accepted Prof. Hamermesh opinion and reduced contingent claims to net value of $0.

Other Possible Settings for Expert Legal Opinion

- Arbitration proceeding: Delaware corporate or LLC law (and fiduciary principles) is often in issue for arbitrated disputes among investors in privately owned Delaware entities.
- Bankruptcy Court: law of foreign country on effect of a judgment in that country as relates to rights of judgment creditor in Bankruptcy proceeding in Delaware.
- Law of foreign country (other contexts).
- Patent litigation: expert opinion on whether patent valid in foreign jurisdiction?

Other Possible Settings (continued)

- Attorney disciplinary proceeding: expert on professional responsibility and/or customs in particular practice area.
- Motion to disqualify counsel: expert on professional responsibility (*e.g.*, related prior representation).
- Novel legal issue: law professor's survey of law of all states.
- Criminal case: any role, for example, on a motion to suppress evidence?

[redacted] UNIVERSITY

POLICIES AND PROCEDURES MANUAL

Title: Presidential Policy Implementing [redacted] Regulations on Extra Compensation
Policy Number: [redacted]
Effective Date: [redacted]
Issuing Authority: Office of the President

Scope of Policy

This policy applies to all full-time members of the faculty.

Definitions

One Day Per Calendar Week. The Policy on Extra Compensation provides that "such activities may not exceed an average of one day per calendar week during the contract period." One day per calendar week shall be defined as follows: (1) a calendar day on which activities for extra compensation occur, and such activities should therefore not occur, on average, on more than one calendar day in any calendar week over the course of the academic year or other contract period, or (2) a total of eight hours in any calendar week.

Calendar Week. A calendar week is defined as the seven-day week beginning on Sunday and concluding on the following Saturday.

College. Any school or college at [redacted] created pursuant to University policy.

Contract Period. The *Faculty Handbook* provides that the academic year commences with Fall Registration and ends on the day of Commencement exercises. The fiscal year commences on July 1 and ends June 30. Where another University policy, such as a collective bargaining contract, establishes a different academic year, that policy shall define the contract period for purposes of this policy. The Policy on Extra Compensation applies during those respective periods for faculty members who hold academic year appointments or fiscal year appointments.

Compensation. Compensation includes any thing of value a faculty member receives for services he/she renders to any person, entity, or party. As a general rule, compensation is anything of value that is defined as earned income, whether taxable or pre-tax income, by the United States Internal Revenue Service. However, compensation does not include

reimbursement for actual expenses for travel for professional activities or professional service in the discipline(s) in which the faculty member holds faculty appointment.

Faculty Member. The Policy on Extra Compensation applies to full-time members of the faculty.

The University's Best Interests. In determining whether an activity undertaken by a faculty member for extra compensation is consistent with the University's best interests, the Dean or other decision maker has discretion to determine whether the activity is related to the professional expertise of the faculty member and the academic discipline in which he/she holds appointment.

The Faculty Member's Capacity to Serve the University Effectively. A faculty member has the normal responsibility of performing teaching, scholarship or creative work, and service, as defined by the University's policies on tenure and promotion for a person of his/her rank, on a full-time basis. Additional responsibilities for extra compensation should not be undertaken by a faculty member and should not be approved by the Dean or other decision maker if the faculty member is not fulfilling his/her normal responsibilities. Under these circumstances, additional responsibilities should be regarded as a diversion from the faculty member's normal University responsibilities.

Policy

I. Policy

The basic policy of [redacted] on extra compensation is set forth in the *Faculty Handbook*, section VIII.C, which provides as follows:

> During the period of their contracts, faculty members may carry additional responsibilities either internally or externally for extra compensation, provided that: (1) such activities may not exceed an average of one day per calendar week during the contract period, (2) do not interfere with their assigned University responsibilities, and (3) payment for the extra responsibilities is compatible with the policies of their college and University policy as stated elsewhere. In all cases, such activities are subject to the approval of the cognizant Dean.
>
> Full-time faculty who intend to become engaged in an outside supported research project should clear their acceptance with their Dean and with the Provost.
>
> The purpose of the above clearances is to determine whether the type and volume of work proposed is consistent with the University's best interests, whether it will interfere with the faculty member's capacity to serve the University effectively and whether there is a specific conflict of interest, or contract violation, between the proposed undertaking and his or her present program at the University,

including work for an outside agency or agencies which support the various parts of his or her time.

Faculty members who intend to undertake activities for outside compensation should also be aware of other University regulations and policies that may affect or limit such activities. These include, but are not limited to, *Faculty Handbook*, section VIII.D relating to internal compensation, section VIII.G. relating to overload duties, section IX.A relating to faculty conflict of interest, and section IX.C relating to misconduct in research and creative work. Further, faculty with federal grants or contracts or who are otherwise subject to federal regulations concerning additional employment or compensation should adhere to those regulations even if their activities for extra compensation conform to this or other University policies.

II. Approval for Extra Compensation

As provided by the *Faculty Handbook*, all additional activities undertaken by a full-time faculty member for extra compensation are subject to the approval of the Dean. Approval should be obtained before beginning the additional responsibilities.

In addition, as provided by the *Faculty Handbook*, a faculty member who intends to become engaged in an outside supported research project should obtain the prior approval of the Dean and the Provost.

The Dean and, as necessary, the Provost will approve requests for extra compensation on a standard form provided by the University (see attachment) when they conclude that the request, pursuant to the *Faculty Handbook,* meets the following conditions:

1. The requested activities do not exceed an average of one day per calendar week during the contract period;

2. The requested activities do not interfere with the assigned University responsibilities of the faculty member;

3. The payment for the extra responsibilities is compatible with the policies of the college and with University policy as stated elsewhere;

4. The requested activities are consistent with the University's best interests;

5. The requested activities will not interfere with the faculty member's capacity to serve the University effectively;

6. The requested activities do not entail a specific conflict of interest, or contract violation, with the faculty member's program at the University;

7. The activities for external extra compensation by a faculty member and any internal extra compensation he/she is receiving, pursuant to the

Faculty Handbook, section VIII.D, will not, in combination, exceed an average of one day per calendar week, will not interfere with the faculty member's assigned University responsibilities, and will not be incompatible with college or University policies as stated elsewhere;

8. The requested additional responsibilities do not violate the University's policies on Overload (*Faculty Handbook*, section VIII.G), Faculty Conflict of Interest *(Faculty Handbook,* section IX.A*)*, Misconduct in Research and Creative Work *(Faculty Handbook*, section IX.C) or other applicable University policies.

III. Exceptions

1. This policy does not apply to members of the faculty engaged in professional activities as part of a University approved practice plan. Approval for work for extra compensation shall, in such cases, be deemed to have been authorized by the faculty member's letter of appointment or his/her specific assignment to undertake practice plan activities made by the Dean or other official responsible for the operation of the practice plan.

2. This policy is not intended to restrict or prohibit faculty professional service for which only nominal compensation is received. Faculty professional service is defined as service as a member of government review panels, or as a reviewer for books or journals, or as a referee in promotion and/or tenure cases at other institutions, or as a member of regional or professional accreditation teams, or as a program reviewer or site visitor for other nonprofit institutions, or as a speaker or panelist at conferences relating to the discipline(s) in which he/she holds faculty appointment. Nominal compensation is defined as compensation that does not exceed $300 per day. Faculty members who wish to receive nominal compensation for professional service, as provided in this paragraph, shall obtain the prior approval of the Dean in the same manner as requests to work for extra compensation specified elsewhere in this policy. But the time devoted to such activities shall not be counted as part of the one calendar day per week that is allowed for employment for extra compensation.

Notes

1. Dates of official enactment and amendments:

Adopted by the President on [redacted]

2. History:

none

EXTRA COMPENSATION APPROVAL FORM

The *Faculty Handbook* sets forth the [redacted] policy on extra compensation as follows: "During the periods of their contract, faculty members may carry additional responsibilities either internally or externally for extra compensation, provided that: (1) such activities may not exceed an average of one day per calendar week during the contract period, (2) do not interfere with their assigned University responsibilities, and (3) payment for the extra responsibilities is compatible with the policies of their college and University policy stated elsewhere. In all cases, such activities are subject to the approval of the cognizant Dean.

Full-time faculty who intend to become engaged in an outside supported research project should clear their acceptance with their Dean and with the Provost.

The purpose of the above clearances is to determine whether the type and volume of the work proposed is consistent with the University's best interests, whether it will interfere with the faculty member's capacity to serve the University effectively and whether there is a specific conflict of interest, or contract violation, between the proposed undertaking and his or her present program at the University, including work for an outside agency or agencies which support the various parts of his or her time."

The administrative policy for implementing this policy is found at [redacted] as policy [redacted]

The administrative policy provides, among other things, that (1) activities for extra compensation must be approved in advance by the Dean, as provided by the University policy, (2) extra compensation includes any form of earned income, (3) one day per calendar week includes a 24-hour calendar day or eight hours in any calendar week, and (4) certain listed professional activities that involve only nominal compensation do not constitute activities that must be counted as time spent for extra compensation, but must nonetheless be approved in advance by the Dean. Faculty members considering undertaking activities for extra compensation should be fully familiar with the administrative policy.

Please describe the activity to be undertaken for extra compensation:

Is this activity an outside supported research project: Yes _____ No _____

(continued on next page)

Please indicate the calendar day or eight hours in the calendar week during which the activity will be undertaken:

Does the proposed activity constitute a conflict of interest or contract violation as defined in the University policy: Yes _____ No _____

Will this proposed activity interfere with your assigned University responsibilities, such as scheduled teaching hours, service meetings or responsibilities, scheduled office hours, responsibilities for institutional or externally supported research, or other scheduled University responsibilities: Yes _____ No _____

If yes, please explain and indicate how these responsibilities or duties will met in some alternate way:

Faculty member's name _____

Faculty member's signature _____Date: _____

. . . . . .

Approved _____ Not approved _____

Dean's signature _____ Date:

Provost's signature _____ Date:
(For outside supported research projects only)

One copy should be retained by the faculty member; one copy Should be retained in the files of the Dean's Office

When Law Professor Experts Testify:
Considering the Implications of Fed.R.Evid. 703

Professor Jules Epstein

A law professor expert, in formulating an opinion, may have done so on her own and then confirmed it with others in the field, or may have formed an opinion only after speaking with or reading the publications of others. Each is reasonable, but each raises a predicament both for report writing and for testimony – what others wrote or reported to the testifying expert is [potentially] hearsay.

Federal Rule of Evidence 703 addresses this predicament, tolerating reliance but limiting repetition. It provides that

> [a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

What this entails for the law professor expert includes the following.

The third party information that the expert considers must be of the type experts in her field would rely on. That determination is not the expert's *ipsi dixit* but an assessment by the Judge. As explained by the Third Circuit, "the district court must make a factual inquiry and finding as to what data experts in the field find reliable." In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 277 (3d Cir. Pa. 1983). A slightly different articulation, made by an evidence scholar [and federal judge], is that Rule 703 "implicitly requires that the information be viewed as reliable by some independent, objective standard beyond the opinion of the individual witness." 3 J. WEINSTEIN & M. BERGER, § 703 [03] at 703-25. Thus, the proponent of the expert must be prepared to defend these third party sources as typically relied upon in the field *and*, possibly, as reliable.

As to what Rule 703 means by "prejudicial effect," the concern is grounded in the ban on hearsay. The feared prejudice is that the finder of fact will accept *as true* what the third parties said.

> Although Dr. Lobel may have relied on Pilz's statement as part of the basis of his expert opinion pursuant to Rule 703 of the Federal Rules of Evidence, the statement itself would still be inadmissible. Otherwise inadmissible evidence cannot be admitted under Rule 703 unless its probative value in helping the finder of fact evaluate the expert opinion substantially outweighs its prejudicial effect. Fed. R. Evid. 703. Rule 703 was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving

> expert testimony, to in effect become the mouthpiece of the witness on whose statements or opinions the expert purports to base his opinion.

Curtis v. Hartford Life & Accident Ins. Co., 2014 U.S. Dist. LEXIS 116646, 46-47 (N.D. Ill. Aug. 20, 2014)(internal quotations and citation omitted).

Next, what must be assessed is the content of the expert report. Whether third party information was relied upon to help generate the opinion, or was used to confirm the testifying expert's conclusion, the fact of consulting other sources should be acknowledged and the role of the source(s) identified. However, the content of what third party sources stated or wrote should be excised from a report, especially one that will be submitted to the trier of fact. For example, the report might state that

> This conclusion, that there was a breach of duty, is based on my own analysis as reported above. After reaching this conclusion, and before preparing my final draft of the report, I then consulted with three other experts in this field.

What the report may not state is the following:

> This conclusion, that there was a breach of duty, is based on my own analysis as reported above. After reaching this conclusion, and before preparing my final draft of the report, I then consulted with three other experts in this field *and they all agreed with me*.

The expert may chose to prepare an appendix, to be provided to opposing counsel *but not to the Court*, that contains what each consulting expert stated or wrote. Opposing counsel then must face the conundrum – the more the testifying expert is challenged in testimony, the more she may be permitted to repeat what the consulting experts said or wrote in order to explain *why* she reached her opinion and/or to show how through her research and preparation were.

The same 'tightrope' must be walked in testimony. If the statements or writings relied on by the testifying expert meet a hearsay exception then the contents may be admitted, on direct examination, for their truth. The likely hearsay exceptions pertinent to the testifying law professor expert, in terms of sources that establish or bolster the opinion, are "Market Reports and Similar Commercial Publications, 803(17); Statements in Learned Treatises, Periodicals, or Pamphlets, 803(18); and Public Records (803(8)**.**

Where the statements meet no hearsay exception, they should not be disclosed on direct examination unless it is clear to the trier of fact that the purpose for disclosure is not to argue the truth of the statements but to demonstrate what information the testifying expert relied upon, As explained by one court, which permitted disclosure, "[w]hile, normally the Report itself would be inadmissible under Federal Rule of Evidence 703 as hearsay, the Court finds it is admissible to explain the basis of Mr Davison's opinion, not as substantive evidence. In re Moyer, 421 B.R. 587, 596-597 (Bankr. S.D. Ga. 2007). Thus, for example, in a bench trial the latitude may be greater (and the reasonableness of asking the trier of fact to hear this information "not for its truth but to explain what the expert did" is also greater).

Where this cannot be accomplished, the expert should confine her testimony on direct to statements such as

> “I also spoke with several other professors, explaining the facts and seeking their input, before I reached my conclusion”
>
> Or
>
> “After I reached my initial conclusion, I shared the data and my concerns with three other professors. After hearing what each had to say, I prepared my final report.”

Neither of these statements discloses the content of what the others said, and thus the hearsay concerns of Rule 703 are addressed while ensuring that the trier of fact is aware of the thoroughness of the testifying expert.

The interplay between the testifying expert’s own observations and her reliance on information and/or conclusions of another, non-testifying expert, was detailed in 2001:

> F&D's next objection, although not crafted as such, is essentially a Rule 703 objection. F&D claims that Malcolm's opinion as to cause and origin was based on unreliable data, viz, data provided by the late Fred O'Donnell and not that which was collected through Malcolm's own personal observation.
>
> A major problem with this argument is that Malcolm himself had visited the fire scene and examined the evidence there side by side with O'Donnell. Besides looking at burn patterns and studying the electrical system, he took measurements and photographs and wrote his own report. He also interviewed the vessel's engineer. Many photographs of evidence at the scene were entered into evidence by stipulation. Hence, it is simply not the case that Malcolm's cause-and-origin opinion rested mainly upon O'Donnell's investigations.
>
> To be sure, Malcolm's opinion coincided with O'Donnell's and he testified that he read O'Donnell's report in preparation for his expert testimony, along with the report of the local fire department. But the opinion he rendered was his own, and, as said, he had first-hand knowledge of the fire scene and the observable facts there upon which to base that opinion. Federal Rule of Evidence 703 allows Malcolm to have taken O'Donnell's report and opinion into account when forming his own expert opinion. So long as the basis of Malcolm's opinion did not extend beyond facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703. We think a cause-and-origin expert like Malcolm could be expected to examine the report of another expert like O'Donnell as well as the fire department's report in the course of forming his own opinion derived from a variety of sources, including his own first-hand knowledge of the primary evidence at the fire scene.
>
> This court has said that when an expert relies on the opinion of another, such reliance goes to the weight, not to the admissibility of the expert's opinion...In the present case, the jury understood that Malcolm's observations coincided with those of the deceased

> expert hired by defendant and that, until recently, Malcolm's only job was to advise and supplement O'Donnell's conclusions as to the cause and origin of the fire with his own opinion concerning the role of the vessel's electrical system in the fire. Thus, in weighing and evaluating Malcolm's opinion, the jury was able to determine whether it was in some way weakened by reliance upon O'Donnell's.

Ferrara & Dimercurio v. St. Paul Mercury, 240 F.3d 1, 8-9 (1st Cir. Mass. 2001)(citations omitted).

In sum, Rule 703 permits reliance on third party sources, and law professors rely on other professors (and lots of other professionals). Understanding Rule 703 and its interplay with the ban on hearsay is essential, but the exclusion of the substance of what was said in no way should prevent the law professor expert from relying on others and letting that be known to the trier of fact.