

# ***Expert Testimony and Ethics***

**The Anthony M. Kennedy American Inn of Court**

**Team 8**

**May 16, 2023**

*“There is scarcely a technical issue for which you cannot find  
expert witnesses of differing opinions.”*

~Samuel C. Florman

### LEGAL AUTHORITIES

**ATTORNEY'S OATH:** I, \_\_\_\_\_, solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability. As an officer of the court, I will strive to conduct myself at all times with **dignity, courtesy, and integrity**.

Expert Testimony: An expert witness qualifies as an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. (See Federal Rules of Evidence, Rules 702 and 703). The testimony must cover more than a mere recitation of facts. It should involve opinions on hypothetical situations, diagnoses, analyses of facts, drawing of conclusions, etc., all which involve technical thought or effort independent of mere facts.

### ZEALOUS ADVOCACY

“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law[.]” (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126; see also *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167–68.)

□

### CANDOR AND HONESTY

**Bus. & Prof. Code, § 6068:**

It is the duty of an attorney to do all of the following: . . .

- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client

to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

***Xanadu Maritime Trust v. Meyer* (N.D. Cal. 1998) 21 F.Supp.2d 1104** – In a design defect case, counsel offered expert witness testimony he admitted, when pressed by the court, he had suspected the testimony was false, but withheld this information from opposing counsel and elected to present it to the court knowing it would mislead the court. The court termed this “a grave breach of professional ethics,” called out the attorney and expert by their names, and cited to Business & Professions Code section 6068(d) and the Rules of Professional Conduct.

**Rules Prof. Conduct, rule 3.3 Candor Toward the Tribunal:**

(a) A lawyer shall not:

- (1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

**Rules Prof. Conduct, rule 3.4 Fairness to Opposing Party and Counsel:**

A lawyer shall not:

- (a) unlawfully obstruct another party’s access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other

material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

¶ ... ¶

- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case.

**Rules Prof. Conduct, rule 4.1 Truthfulness in Statements to Others:**

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

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

**Comment**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

## CONSEQUENCES FOR DISHONESTY

### **Bus. & Prof. Code, § 6106:**

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

### **Rules Prof. Conduct, rule 8.4 Misconduct:**

It is professional misconduct for a lawyer to: . . .

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

Comment . . .

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

**Pen. Code, § 132** – Every person who knowingly offers in trial or other proceeding a forged, altered, or ante-dated book, document, or records is guilty of a felony.

**Pen. Code, § 133** – Every person who knowingly makes or exhibits a false statement, representation, or writing to any witness with an intent to affect the testimony of the witness is guilty of a misdemeanor.

**Pen. Code, § 134** – Every person who prepares false documentary evidence is guilty of a felony.

## CALIFORNIA PENAL CODE: DISCLOSURE OBLIGATIONS

### CRIMINAL:

#### Prosecution's Responsibility: **Pen. Code, § 1054.1**

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witnesses whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

#### Defense's Responsibility: **Pen. Code, § 1054.3**

- (a) The defendant and his or her attorney shall disclose to the prosecuting attorney:
  - (1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
  - (2) Any real evidence which the defendant intends to offer in evidence at the trial.

### **ABA Model Rule 3.3, Candor Toward the Tribunal**

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

### ***Selected Comments***

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### **ABA Model Rule 3.4, Fairness to Opposing Party and Counsel:**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

As noted in Comment [3] to Model Rule 3.4, the law in most jurisdictions prohibits the payment of contingency fees to expert witnesses. See, e.g., *Person v. Ass'n of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977) [experts should be unbiased and objective witnesses, not swayed by the incentive of receiving a higher payout if their testimony is "successful"].

(e)... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal

knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused ....

*Privilege, Work Product and Confidentiality*

The application of the important issues of privilege, work product and confidentiality with respect to experts often depends on whether the expert is a testifying expert or a consulting expert. Consulting experts (i.e., those experts not designated as testifying witnesses) are those experts hired to help the litigators who hired them understand the complexities of a case; whereas testifying experts are hired to help the trier of fact understand the complexities of a case.

**CIVIL**

**Federal Rules of Civil Procedure 26(a)(2)(A):**

A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [certain specified] Federal Rule of Evidence.

**Federal Rules of Civil Procedure 26(b)(4)(D):**

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

**CRIMINAL**

**ABA Criminal Justice Standards for the Defense Function, Standard 4-4.4, Relationship with Expert Witnesses:**

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

(b) Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense



counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

**ABA Criminal Justice Standards for the Prosecution Function, Standard 3-3.5, Relationship with Expert Witnesses:**

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

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials

for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

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

role in the proceeding will be as an impartial witness called to aid the factfinders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

### **Additional Materials**

The article below illustrates how the misuse of expert testimony can lead to injustice.

<https://www.newyorker.com/magazine/2009/09/07/trial-by-fire>