DEMOlidISHING EXPERT WITNESSES AND EXPERT WITNESS MALPRACTICE

Marshall Grossman
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Demolishing the Expert Witness and Expert Witness Malpractice

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Roadmap

I. Expert Checklist
II. Demolishing the Opposing Expert
III. Expert Malpractice

How do you find an expert?
$350 per hour, expert witness on homelessness
Retaining an Expert

- Finding the best expert
  - Verifying your expert's background — publications, expert testimony, articles, job history
  - Experienced versus inexperienced experts
  - Availability

- Discoverability
  - Federal Rule 26(h)(3)(A) & (B)
  - Instructions about note-keeping and draft creation
  - Review of related documents and depositions
  - Involvement of assistants
  - Communicating with your expert

- Compensation

- Education and background
  - What juries really care about

- Written reports

Preparing Your Expert

- Can expert clearly explain assignment?

- Explain your theory of case, opponent's theory of case, expert's role in overall case presentation

- Can expert concisely describe documents and depositions reviewed?
  - Contact with other experts. Knowledge of predecessor(s)
  - Documents provided

- Description of opinions
  - Clarity
  - Key words to use or avoid
  - Consistency with prior opinions or other opinions

- Notes and drafts

- Dealing with hypotheticals

- Compensation

- Preparation for questions about preparation

Core Areas of Deposition Examination

- Parameters of assignment — implicit bias?

- Contact history
  - When retained
  - Relationship with law firm
  - Contact with other experts. Knowledge about predecessor(s)
  - Documents provided

- Full description of opinions
  - Completion status
  - Time spent
  - Involvement of assistants
  - Details of each opinion

- Notes and drafts

- Compensation

- Education and background
  - Employment history
  - Publications, speeches, professional organizations, licenses
  - Expert testimony
Demolishing the Opposing Expert

- **Homework**
  - Preparation, preparation, preparation
  - Be prepared to use documents produced by other witnesses
  - Review expert’s other publications and press articles mentioning expert
  - Investigate colleagues’ experiences with this expert

- **The examination**
  - Expose known weaknesses first
  - Inquire about preparation sessions
  - Blend of intensity and composition; demonstrate patient persistence in face of non-responsiveness
  - Permit narratives
  - Adopt expert’s ill-chosen words and descriptions
  - Formulate stand-alone questions
  - Shut every door
  - Real time

- **Documents, drafts and notes not produced**
- **Use of consulting expert before and at deposition**

Experts from Heaven and Hell

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**How to Testify About His Sept. 13 Report (Which Was Not Produced)**

Expert’s Testimony BEFORE Report Produced

[Image of a person giving testimony]
Experts from Heaven and Hell

"...our opinions had crystallized into a final form by then..."
Testimony of Financial Expert

Q: How confident are you, sir, of the numbers that you used in arriving at your unjust enrichment analysis?
A: Less confident than I was when I walked in here.
Q: Have you ever before in your entire career come out of a deposition less confident than you are now with respect to the conclusions you reached on this assignment?
A: No.

Who hired me?

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Expert Malpractice

| Theory: | • Expert has duty to the party who hired him/her or another party if he/she most likely to suffer damage from expert's negligence
  • Expert owes a duty similar to that of other professionals in his/her field of expertise |
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<td>Demonstrating Causation:</td>
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| Expert's Potential Liability: | • General rule
• Limiting liability |
| Attorney's Potential Risks: | • Waiver of attorney-client privilege
• Loss of the expert
• Liability to expert or client |
Experts and Waiver of the Attorney-Client Privilege

"We hold in this writ proceeding that the designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege. If the designation is withdrawn before the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; if the party produces privileged documents or testifies as an expert (such as by stating his opinion), the privilege is waived."

Shooker v. The Superior Court of Los Angeles County, 111 Cal App. 4th 923

Closing Argument Demonstration of Opposing Expert
OVERVIEW OF LEADING CASE AUTHORITIES ON EXPERT MALPRACTICE*

I. EXECUTIVE SUMMARY

Expert witnesses who provide litigation services to clients no longer enjoy absolute immunity from suit. Recent developments reveal a gradual shift away from traditional immunity. By way of summary, six states allow expert witness liability claims against “friendly” expert witnesses: California, Connecticut, Louisiana, Massachusetts, Missouri, and Pennsylvania. New Jersey and Vermont allow expert witness liability for court-appointed or neutral experts. Two states have dealt with the issue of suing an adverse expert witness: West Virginia and New Jersey. California and New York have addressed attorney liability as a result of expert witness negligence.

II. EXPERT WITNESS LIABILITY GENERALLY

A. Categorization of claims

Expert liability cases may be categorized into four distinct fact settings.

1. “Friendly” expert witness liability, or expert malpractice, arises when a client sues an expert witness who was retained to provide litigation services or testimony in an underlying action for that client. *LLMD of Michigan Inc. v. Jackson-Cross Co.*, 740 A.2d 186 (Pa. 1991).


B. Traditional Expert Witness Immunity

The U.S. Supreme Court, in *Briscoe v. Lahue*, 460 U.S. 325 (1983), granted immunity to fact witnesses in criminal proceedings for their testimony during judicial proceedings. The principle of witness immunity was expanded over time to cover expert witness testimony. *Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc.*, 776 P.2d 666 (Wash. 1989). More recently, several state courts have held that expert witnesses are no longer afforded absolute immunity from liability if they are found to have negligently carried out their professional duties. These state courts have largely addressed claims of liability against “friendly” expert witnesses.
III. “FRIENDLY” EXPERT WITNESS LIABILITY

A. State Case Law

The following six states have allowed clients to sue “friendly” expert witnesses retained for litigation related services:

1. California

A civil rights action brought by a subcontractor was voluntarily dismissed after the subcontractor was sanctioned for document fabrication with the help of its forensic accountant. The subcontractor brought an expert malpractice claim against the accountant for professional negligence, fraudulent misrepresentation and fraudulent concealment. The court rejected the applicability of witness immunity to the “friendly” expert witness and established criteria for malpractice by an expert accountant: “(1) the professional was negligent in the handling of the prior lawsuit; (2) the professional’s negligence was a substantial factor in the plaintiff's loss of the prior lawsuit; and (3) the proper handling of the prior lawsuit by the professional would have resulted in a collectible judgment in plaintiff’s favor.” Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780 (Cal. App. 1997).

Insured homeowners brought a negligence action against an expert they hired, claiming that the “friendly” expert failed to adequately define the correct standard of replacement cost during insurance appraisal process, resulting in inadequate replacement costs for their home which was destroyed by a fire. The court held that the litigation privilege is inapplicable to an expert witness being sued by someone who hired the expert to testify at a judicial proceeding. Lambert v. Carneghi, 70 Cal. Rptr. 3d 626 (Cal. App. 2008).

2. Connecticut

In an underlying personal injury action, a man was allegedly rendered quadriplegic as a result of excessive force used by a police officer during the course of an arrest. The man and his counsel hired a spinal biomechanics expert to prove that the officer’s force caused the man’s injury. The expert conducted experiments in preparing his report in the underlying action. These experiments were incorrectly performed and not admissible at trial. In a subsequent negligence action brought by the man against the “friendly” expert, the court held claims related to the expert’s alleged failure to provide adequate services were not barred by witness immunity. Pollock v. Panjabi, 781 A.2d 518 (Conn. Super. 2000).
3. **Louisiana**


4. **Massachusetts**

A business valuations expert was hired by plaintiff in an underlying divorce proceeding. The expert witness substantially understated the value of a major marital asset and plaintiff sued the expert for negligence alleging the inadequate valuation led to an unfavorable divorce settlement. The court held that the expert was not immune from the subsequent malpractice suit. *Boyes-Bogie v. Horvitz*, 2001 WL 1771989 (Mass. Super. Oct. 31, 2001).

5. **Missouri**

A subcontractor brought a negligence action against an expert witness retained by the subcontractor in an underlying action. The expert negligently performed professional services involving preparation and documentation of the subcontractor’s claims for additional compensation from a contractor. The court, in a limited holding, stated that privately hired experts who negligently provide pretrial litigation support services are not immune from suit. The court did not address the issue of expert witness immunity for trial testimony. *Murphy v. A.A. Mathews*, 841 S.W.2d 671 (Mo. 1992).

6. **Pennsylvania**

In an underlying case, defendants breached an agreement. Plaintiffs in the underlying case hired an expert witness to provide services on the issue of lost profits as a result of the defendant’s breach. The expert was not immune from a negligence action as a result of a mathematical error that completely undermined the lost profits calculation and compromised the accuracy of the testimony he gave at trial. *LLMD of Michigan, Inc., v. Jackson-Cross Co.*, 740 A.2d 186 (Pa. 1999).

B. **Federal Case Law**

1. **Fifth Circuit**

A doctor who was employed by a university sued the university for not billing or under billing his professional medical services. In that underlying action, the doctor hired a medical billing expert to provide an expert report and to testify at the deposition as well as the trial. The expert admitted to making mistakes in his report, told the doctor’s attorney that he was “disgusted” by his own errors and would not participate in the remainder of an in-progress deposition or provide any other litigation support.

The doctor unsuccessfully brought a subsequent suit against the expert in the United States District Court for the Eastern District of Louisiana alleging that the expert’s negligence caused the prior suit to be dismissed. The District Court noted that no court applying Louisiana law had addressed the issue of witness immunity in the context of expert witness malpractice and dismissed the suit on the expert’s 12(b)(6) motion. *Marrogi v. Howard*, No. Civ. A. 00-368, 2000 WL 777914 (E.D. La. June 15, 2000).

On appeal, the Fifth Circuit certified the question to the Louisiana Supreme Court (*Marrogi v. Howard*, 248 F.3d 382, 386 (5th Cir. 2001)), which held that witness immunity did not bar the doctor’s claim.
Marrogi v. Howard, 805 So.2d 1118, 1129-1133 (La. 2002). Based on this holding, the Fifth Circuit reversed and remanded the case to the District Court. Marrogi v. Howard, 282 F.3d 854 (5th Cir. 2002).

IV. COURT APPOINTED & NEUTRAL EXPERT WITNESS LIABILITY

The following states have addressed the issue of liability for court-appointed or neutral expert witnesses.

A. State Case Law

1. New Jersey

In an underlying matrimonial case dealing with equitable distribution, an expert was appointed by the court to render a binding valuation of husband’s interest in a business. The court-appointed expert deviated from accepted standards applicable to the accounting profession. The husband filed suit against the court-appointed expert accountant, arguing that the expert’s incorrect valuation led to an unfavorable settlement with his former wife. The Supreme Court of New Jersey held that the court-appointed witness could be held liable for negligence. Levine v. Wiss & Co., 478 A.2d 397 (N.J. 1984).

2. Vermont

In a child custody dispute, the court ordered a forensic evaluation to determine the best interests of the child. A licensed psychologist contracted with the mother and father of the child to carry out the forensic evaluation, with all fees to be paid equally by each party. The expert witness prepared a report and testified as to the findings of the report. Thereafter, the mother and father of the child stipulated to a joint custody agreement. The mother of the child subsequently brought a malpractice claim against the expert alleging that the expert’s negligent performance of the forensic evaluation forced her to stipulate to joint custody and continue fighting for custody of her son. The court cited Briscoe which extends immunity to expert witness testimony during a judicial proceeding. However, the expert witness in this case not only testified at the judicial proceeding, but also prepared a pre-trial report, and therefore was not protected by witness immunity. Politi v. Tyler, 751 A.2d 788, 792-93 (Vt. 2000).

V. ADVERSE EXPERT WITNESS LIABILITY

West Virginia and New Jersey courts have touched on the issue of adverse expert witness liability, or liability which results when the adverse party sues the other side’s expert witness.

A. State Case Law

1. West Virginia

In Davis v. Wallace, 565 S.E.2d 386 (W. Va. 2002), a convicted woman, by her next friend, brought an action against the State’s expert witnesses from the underlying case. She alleged that the experts for the State negligently performed tests, negligently prepared for testimony, negligently testified and failed to meet the “standards of science and medicine as it existed at that time.” The expert witnesses
successfully filed motions to dismiss and motions for sanctions against the convicted woman and her counsel. On review, the Supreme Court of Appeals cited to *Levine, Mattco* and other case law establishing that expert witnesses are not shielded by absolute immunity. The Supreme Court of Appeals held that the trial court abused its discretion in sanctioning the convicted woman, reversed and remanded.

2. **New Jersey**

An unpublished opinion, *Reilly, Supple & Wischusen, LLP v. Malcolm Blum v. Michael Ambrosio* (NJ App. Div. March 9, 2011), addressed the issue of whether an expert witness report prepared for a case that was eventually dismissed could be the subject of an expert liability claim. In a legal malpractice action, the attorney being sued by his former client was represented by counsel. The legal malpractice action was dismissed on summary judgment despite the former client having a legal malpractice expert report. The attorney’s counsel subsequently sued the attorney for unpaid legal fees related to the underlying case. The attorney filed a third party complaint alleging negligence and legal malpractice against the unsuccessful plaintiff’s expert in the underlying case. The court held that the attorney did not have the right to sue the adverse expert and that the adverse witness did not owe a duty to the attorney in the underlying case.
VI. ATTORNEY LIABILITY AND EXPERT WITNESS LIABILITY

California and New York cases have addressed the issue of whether attorneys may also be liable for expert witness negligence.

A. State Case Law

1. California

In *Mattco*, the “friendly” accountant expert witness who was sued by his former client, filed a cross-complaint against the attorneys who represented the former client in the underlying action and who retained the expert. The expert sought indemnity against the attorneys, but subsequently the attorneys and former client entered into a purported good faith settlement even though the client had not sued the attorneys, thus barring the expert witness’ cross-complaint. *Mattco Forge, Inc.*, 60 Cal. Rptr. 2d at 784.

In an underlying products liability and wrongful death action, plaintiffs’ counsel retained an expert. The expert’s trial testimony contradicted his earlier deposition testimony and summary judgment was granted in favor of the defendants in the underlying case. Plaintiffs subsequently filed an expert witness malpractice action against the “friendly” expert. The expert filed a cross-complaint for equitable indemnity against counsel for plaintiffs in the underlying action, arguing that counsel waited too long to obtain a suitable expert, failed to provide the expert with sufficient information to allow him to provide adequate services, failed to provide relevant information before and after the hiring the expert, and failed to rehabilitate the expert at his deposition. The court found that the expert was entitled to seek equitable indemnification by filing a cross-complaint against counsel. *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*, 29 Cal. Rptr.3d 622 (Cal. App. 2005).

2. New York

Plaintiff in an underlying medical malpractice action was represented by a law firm. The law firm hired an expert witness who was unable to provide testimony sufficient to establish the proximate causation element required to prevail and the underlying medical malpractice claim. Plaintiff subsequently commenced a legal malpractice action against the law firm alleging the law firm failed to exercise the care and skill commonly exercised by members of the legal profession, because its attorneys did not find an appropriate medical expert. The court found that “[a]ttorneys are free to select among reasonable courses of action in prosecuting clients’ cases without thereby exposing themselves to liability for malpractice” and the law firm’s choice of experts in this case was reasonable. The law firm was not held liable for its selection of an allegedly negligent expert witness. *Healy v. Finz & Finz PC*, 918 N.Y.S.2d 500 (2011).

*Compilation prepared by Sara Rezvanpour, Esq., Bingham McCutchen*
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Marshall Grossman has both prosecuted and defended major commercial litigation throughout his distinguished career.

Marshall has been honored with No. 1 rankings by Chambers Global in Litigation (National Trial Lawyers) and by Chambers USA in Commercial Litigation, and a top ranking in Entertainment and Media Litigation. For over 20 years, he has been listed in the Best Lawyers in America (Bet-the-Company Litigation and Commercial Litigation). For several years, including 2011, he has been listed among the “100 Most Influential Lawyers” in California by the Daily Journal. Marshall is named one of LawDragon’s 500 “Leading Lawyers in America” and has also been named as a Southern California Super Lawyer since 2004. Marshall is profiled as the cover story in the 2010 edition of Southern California Super Lawyers magazine. Marshall is among the few lawyers to be top ranked by Chambers in three different areas of litigation.

From 2001–2010, he served as a commissioner (and also served as chair) of the California Commission on Judicial Performance.

Having represented clients throughout the U.S. for more than 40 years, Marshall is admitted to practice in numerous state and federal courts.

**Awards and Honors**

- Chambers USA, leading lawyer in General Commercial Litigation and Media and Entertainment Litigation (California) (2008–2011)
- Chambers Global, ranked No. 1 in Litigation: Trial Lawyers (2009–2011)
- Litigator of the Year, Century City Bar Association (2010)
- Who’s Who Legal USA, Commercial Litigation (2010)
- Super Lawyers, Southern California, Top Vote Recipient (2004–2011)
- PLC Dispute Resolution Handbook, leading dispute resolution lawyer (2009)
- International Who’s Who, Commercial Litigators (2009-2011)
- Honoree, Anti-Defamation League (2007)
- Honoree, Los Angeles Jewish Federation Legal Division (2004)
- Honoree, American Jewish Committee (2002)
- Lawdragon 500, “Leading Lawyers in America”
- Guide to the World’s Leading Litigation Lawyers
- Up-and-Comers: Attorneys, BizAz magazine (September 2003)