ABSTRACT: Ethical quandaries routinely are generated via role conflict. Quandaries routinely arises when actions of the agent ethically are the actions of both the agent qua principal and the agent acting personally. Who controls choice of action in that context? What ethical responsibility flows to whom? Expert witnesses encounter both unique and routine role conflicts. These role conflicts spring from experts serving multiple masters (e.g., client v. court v. profession). The relative priority of these actors can be dynamic as well as conditional upon non-role attributes.

EXPERT: WHO ARE YOU?
Ethical criteria might be absolute (e.g., speak the truth), but application of those criteria invariably proves to be intensely context dependent. Accordingly, a person whose actions simultaneously must be ethically coherent across multiple roles encounters more, and more complex, ethical quandaries. That is, role conflict routinely is central to the analysis of ethical quandaries.

Experts necessarily occupy multiple roles. Four roles are of particular importance to this exploration. FIRST, the expert is a self, never escaping all the ethics attached to the self. SECOND, the expert is a member of the community (e.g., profession) that is the basis of the expertise. Not infrequently the expert is a member of multiple relevant communities. For example, many litigation experts are drawn from academe. Thus, both the expert community (e.g., economists) and the academic community lay claim to ethical obligation: if not also ethical primacy. Additionally, some experts hold multiple certifications (e.g., CPA and MBA). Importantly, some expertise communities have quite formal ethical standards while other expertise communities are deliberately informal (e.g., unwritten). Communities with informal ethics have at best a consensus on ethical criteria and application of those criteria. Communities favoring formal ethics tend to specify both analytic criteria and application. However, even communities favoring formal ethics vary from those with full blown commercial due process enforcement mechanisms (e.g., AICPA Code of

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1 For example, at Exodus 20:16 "You shall not bear false witness against your neighbor."; Exodus 34 silent as to false witness; or at ; or at Deuteronomy 5:20 "And you shall not bear false witness against your neighbor."

2 Henri, le Chat Noir "said" "We can not escape ourselves." [https://en.wikipedia.org/wiki/Henri,_le_Chat_Noir](https://en.wikipedia.org/wiki/Henri,_le_Chat_Noir) in his photographic opus The Existential Mussing of an Angst-Filled Cat edited by William Brandon for Ten Speed Press of Berkley, Calif. in 2013. See also, the Nuremburg Principles. [https://en.wikipedia.org/wiki/Nuremberg_principles](https://en.wikipedia.org/wiki/Nuremberg_principles) Especially, Principle IV: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."
Professional Conduct to those that leave enforcement to the individual or to the market (e.g., NAFE's Statement of Ethical Principles and Principles of Professional Practice [SEPPPP] and AAEFE's Ethics Statements). THIRD, this manuscript focuses upon the expert in litigation. Thus, the ethics of litigation also bind the expert. FOURTH, an expert always is a voluntary and/or involuntary member of a host of non-expert communities (e.g., family; religion). All experts in litigation always take up these four roles. But, these four are but the most obvious roles: there are more.

A central ethical quandary for experts in litigation is the telling of the truth for what is the truth routinely is dependent upon the role. That is, which truth to tell.

**Truth as It Is Known by an Expert**

Initially, everyone always is the self. Truth for the self is inescapably dependent upon the subjective reality created by the self's perceptions. In the litigation context this version of true is the province of fact witnesses and is not what motivates the law to accept expert witness testimony.

For the law, the expert is not the self but is instead "the expert". That is, the expert is a person with a way of knowing separate and distinct from the self. The scientific method is the primary mode of knowing that the law desires. But, not the only method of knowing (e.g., collector art expert versus conservator art expert).

Central to the scientific method is a refutable hypothesis. The empirical results from testing the hypothesis are facts. The accumulation of facts around related hypotheses might be stable enough to generate a scientific theory or a scientific law. A

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4. [http://nafe.net/Ethics](http://nafe.net/Ethics)
5. [http://aaefe.org/ethics-statement](http://aaefe.org/ethics-statement)
7. Federal Rules of Evidence (hereinafter FRE): Rule 701. **Opinion Testimony by Lay Witnesses.** If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

8. FRE 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.

FRE Rule 703. **Bases of an Expert.** An 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.

10. "2. a tentative assumption made in order to draw out and test its logical or empirical consequences*, Meriam-Webster (web) Dictionary.
scientific theory is an explanation of the known facts that never has been proven wrong. A far stronger statement is a scientific law: which is a theory that is known not to be ever wrong.\(^{11}\)

In part because science does not prove, but instead disproves, science yields up narrow truths. More importantly, the truths of science are quite narrow because of the simplifying assumptions imposed upon the testing of the hypothesis. These simplifying assumptions permit science to generate results that exhibit internal consistency across that narrow range within which the assumptions permit motion. This is not identical to Newton's simplicity,\(^{12}\) the simplicity of science is complexity assumed away.

There are two types of witnesses: fact and opinion. The fact witness testifies as to subjective perceptions of the facts.\(^{13}\) The expert witness is an opinion witness and is to provide answers grounded in the field of expertise. The expert witness is not to be motivated by personal benefits. The expert is to be an honest, neutral witness. Accordingly, contingent fees for experts are verboten. The expert is not to seek nor accept as well as the advocate is not to offer nor agree to a contingent fee for an expert witness.\(^{14}\) The expert’s compensation is to be solely dependent upon the expert’s efforts in reaching the opinion regarding this case’s specific context; and, not contingent upon the outcome of the case.

**TRUTH AS IT IS KNOWN BY THE LAW**

Just as assumptions blind science, so too justice is blind. Both choose deliberate ignorance to improve their acuity on particular items: but their blindness is not identical. Science chooses the deliberate ignorance generated by the blinders of the scientific method. The law chooses the deliberate ignorance of due process in all of its forms. The law chooses to see only that which due process permits the law to see. More particularly, the law only permits that truth that the rules of evidence permits.

The Federal Rules of Evidence (FRE)\(^{15}\) permit expert opinion testimony (i.e., opinion testimony that would be prohibited from a fact witness). The FRE permit expert opinion testimony because it will assist the trier of fact. The FRE exclude expert testimony when it will not assist the trier of fact. The FRE focuses on relevant

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\(^{11}\) Evolution is a theory. No known facts contradict the theory evolution. The law of supply is known not to ever be wrong (only when its very many assumptions hold true).

\(^{12}\) See footnote 6.

\(^{13}\) FRE Rule 601. **Competency to Testify in General.** Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.

FRE Rule 602. **Need for Personal Knowledge.** A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

\(^{14}\) See, ABA's Model Rules of Professional Conduct, section 3.4, "Fairness to Opposing Party and Counsel", at comment "[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."

\(^{15}\) Each jurisdiction has its own, unique rules of evidence. However, the FRE serve as this model for all other USA jurisdictions’ rules because the federal rules are approved both by Congress and by the USA Supreme Court.

\(^{16}\) See footnote 13.
But then promptly excludes vast swaths of relevant evidence on due process grounds. And, more particularly, the FRE excludes relevant evidence that due process forecasts as hampering rather than aiding the trier of fact. As but one example of excluding such relevant evidence, if any witness or litigator or court personnel utters the words "insurance" or "subrogation" in front of the jury that utterance routinely triggers a mistrial. That said, for an expert calculating damages including loss of insurance coverage as a material component of damages, what is the expert to say?

The law circumscribes the truth admissible and thus knowable to the law. Importantly, the law's method of knowing is an adversarial process guided by zealous advocates. The law limits expert testimony to the testimony elicited by those zealous advocates in their adversarial pursuit. As part of this adversarial due process the law skews the evidence presented to the trier of fact via the law's allocation of burden of proof and the burden of persuasion. These burdens of the law need not align with the similar types of burdens used by the expert.

The trier of fact resolves questions of fact. To the law, some questions are removed from the trier of fact because those are questions of law. Questions of law are to be resolved by the trial judge. The law further trims the permissible range of fact

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17  FRE Rule 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.

18  FRE Rule 402. **General Admissibility of Relevant Evidence.** Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

19  FRE Rule 403. **Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.** The court may exclude relevant evidence if its probative value is substantially outweighed 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.

20  As Perry Mason's adversary, prosecutor Hamilton Burger, so oft asserted "I object, your honor, that question is incompetent, irrelevant, and immaterial!"

https://www.youtube.com/watch?v=1qn6b1_mYPag

21  If there is a jury, then the jury is the trier of fact. If there is no jury, then the judge is the trier of fact.

22  What is the law is not an appropriate topic for an expert. Questions of law are the province of the trial judge. However, when the law in question is foreign law beyond the ken of the trial judge, then the trial judge may elect to admit expert testimony on what is the law to aid the trial judge.
finding via the use of presumptions. Some presumptions merely are rebuttable\textsuperscript{23} while other presumptions are not rebuttable.\textsuperscript{24}

All presumptions are about which ought to be preferred: Type I error or Type II error?\textsuperscript{25} Experts almost never use heuristics remotely similar to the law’s presumptions. Often, the primary focus of the adversarial process is liability. Legally, fact finding of causal relationships are further constrained, beyond the presumptions, by the elements of the cause of action. The law requires sufficient proof of each element. Without sufficient proof of each element the claimed cause of action is not proved. Lastly, the law prefers form over substance. Which means something only happened if all of the i’s were dotted and all of the t’s were crossed.\textsuperscript{26}

Science relies upon an exchange of information. The scientific method relies upon disclosure and replication of previously disclosed results. Full disclosure of all relevant issues is central to the scientific method. Not so for the law.

The law recognizes two critically different types of non-disclosure: confidentiality and privilege. Generically, confidentiality yields up its secrets upon court ordered disclosure. Generically, privilege does not yield to a court order. Privileged\textsuperscript{27}

\footnotesize
\textsuperscript{23} Jurisdictions vary in their general approach to rebuttable presumptions as well as vary in the approach to specific presumptions. Some jurisdictions use the weakest of presumptions, that is the bursting bubble presumption. With the bursting bubble presumption rebuttal is achieved with no more than any contrary evidence. The generic federal civil presumption (also used in many USA States) requires much more for rebuttal. Rebuttal only is achieved with a preponderance of the evidence. And, of course, the presumption of the criminal defendant’s innocence continues until the finder of fact finds that there is no reasonable doubt of guilt.

FRE Rule 301. **Presumptions in Civil Cases Generally.** In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

FRE Rule 302. **Applying State Law to Presumptions in Civil Cases.** In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

\textsuperscript{24} Such presumptions serve two purposes: judicial efficiency and supporting an important public policy. For example, if a party destroys evidence, then the court might impose the judicial sanction of an irrebuttable presumption that both the missing evidence was adverse to the destroying party’s interests and was persuasive. Another irrebuttable presumption comes from antitrust law where proof of an 85% market share creates an irrebuttable presumption of monopoly and its monopoly power.

\textsuperscript{25} \url{https://en.wikipedia.org/wiki/Type_I_and_type_II_errors}

Type I error is a false positive (i.e., erroneously reject true null hypothesis) and Type II error is a false negative (i.e., erroneously accept false null hypothesis).

Recall, science disproves the null hypothesis, not proves it. Accordingly, the null hypothesis asserts there is no relationship. Rejecting the null hypothesis accepts that there is a relationship.

\textsuperscript{26} For example, in Nebraska it is not feasible to “sell” a car without using the paper title supplied by the State.

\textsuperscript{27} FRE Rule 501. **Privilege in General.** The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.
information might be far more than merely relevant. In fact, the privilege information often is dipositive for the question at hand (e.g., sacramental confession). And yet, the law will knowingly and willingly exclude such information from the trier of fact’s deliberations.28

Deliberate ignorance by the law takes multiple forms. Discovery processes mandate sharing of information so as to serve multiple purposes: [a] constrain the opposing party’s surprise to less than unfair surprise; and [b] foster various public policies (e.g., judicial efficiency). Disclosure is the norm. In many contexts deliberate concealment is expressly prohibited. Gradations of concealment exist, with spoliation in

FRE Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.
(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).
(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
(1) would not be a waiver under this rule if it had been made in a federal proceeding; or
(2) is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule:
(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

28 Generically, science does not do this; but, science does do this on occasion. For example, the prophylactic approach of Institutional Review Board (IRB) approval is enforced via a cultural prohibition on publication of results obtained without IRB approval. More specifically, the medical science results generated from war crimes (e.g., WWI Nazi and Japanese concerted scientific method on non-volunteer human subjects) are barred from providing scientific validation. Retesting consistent with IRB standards is required.
the form of destruction capable of generating an irrebuttable presumption against the destructor.\textsuperscript{29} Similarly, misrepresentation is prohibited.\textsuperscript{30}

A specific form of misleading that the law bars is coaching the witness.\textsuperscript{31} The skilled advocate will prepare the expert witness so as to minimize unnecessary stress of testifying. The skilled advocate will prepare the expert witness with reasonably anticipated questions so that the witness can promptly provide the trier of fact with the expert's cogent and concise answers. That is not coaching. Coaching over steps those preparations by the advocate steering the expert's answers towards the advocate's desired replies rather than the expert's own opinion testimony.

The zealous advocate seeks to portray reality in the manner most favorable to the advocate's client. In stark contrast, the testifying expert is to be an honest neutral: not an advocate.

Necessarily, courtroom time is limited. Accordingly, the advocate must omit. The advocate must trim the presentation to fit within the available time.

The law permits more omission than what is required by the press of time, however. The advocate's work product is privileged; and, in certain circumstances so too is the work product of the expert.\textsuperscript{32} That is, components of analysis that the expert has actual knowledge of and considers more than merely relevant might be excluded by the law from permissible inclusion in the expert's formation of the expert's opinion. Critically, these exclusion choices are those of the advocates and not of the neutral expert.

Both science and the law emphasize objective knowledge; but, not in the same way. The law prizes subjective knowledge (a.k.a., actual knowledge) because of the ethical underpinnings of the law and the law's desire to correctly ascribed both ethical and legal responsibility. The law's objective knowledge (a.k.a., receipt of notice and reason to know) is a mere proxy for subjective knowledge. Whereas, for experts (whose knowledge springs from the scientific method) subjective knowledge is to be minimized and objective knowledge is the gold standard.

This distinction between how experts and the law view and use objective knowledge will be an intense point of contention between the expert and the zealous advocate. The zealous advocate will seek to elicit from the expert a "fact" so that the advocate might artfully use that "fact" to persuade the trier of fact. The advocates task is persuasion whereas the neutral expert's task is the pursuit of truth.

The law's knowing ascribes different intensities to different items of knowledge and to different means of knowing. One purpose of those variations of intensity served is the law's concept of material. Sometimes material is as weak as merely relevant; other times the significance of material is the knowledge changes the mind of the Reasonable Person.\textsuperscript{33} Advocates will key in on those facts which the law's method of knowing categorize as material beyond mere relevance. Advocates will seek to extract testimony

\textsuperscript{29} See also footnote 24.
\textsuperscript{30} The zealous advocate is free to characterize, within rational (read: objective) bounds, the evidence so as to create in the mind of the trier of fact that version of the truth most advantageous to the advocate's client.
\textsuperscript{31} See also, text accompanying footnote 14 regarding prohibition on contingent fees.
\textsuperscript{32} See FRE 502 at footnote 27; noting especially the opening language and the closing subjection (g).
\textsuperscript{33} E.g., a horse of a different color.
from experts on such narrow facts. Note that the advocate's narrowness is not of the same ilk as the narrowness of science's assumed simplicity.  

**QUANDARIES**

We now have set the stage for exploring some ethical quandaries that confront experts who serve as expert witnesses in litigation. Fundamentally, the ethical problem will be of knowledge. As noted above in the discussion of work product, the law might require the expert to make a material exclusion. That is, the law might require the expert to opine "false" when the expert's non-litigation opinion as an expert is "true".

Is this to "lie"?  To "lie" requires both subjective knowledge of the true and an intent to misstate that known truth. Ignorant persons speaking honestly do not lie even though they often do not speak the truth.  

**Conflicts of Interests: Adequately Managed versus Not**

Many unschooled in ethical analysis start with the novice's assumption that all conflicts of interests can be reduced to zero. More accurately, conflicts either can be adequately managed or can not be adequately managed. If adequately managed, then conflicts are sufficiently likely to not materially distort the decision maker's analysis and conclusions. If not adequately managed, then material distortions are likely. Note, neither is adequate management certain to avoid distortion nor is failure to adequately manage a conflict certain to result in distortions. Adequate management can accomplish no more than skew the likelihood of distortion into zones of acceptable risk.

The expert must actively manage the conflicts between each of the expert's roles as well as each of the ways of knowing. This is easier said than done. The expert must be vigilant.  

**Who is the Client: Organization versus Human**

The expert has a client. Who is the expert's client? After the self, the client ranks high on the list of those owed duties and of those who present conflicts of interest. Wise expert witnesses insist upon the client being the zealous advocate. Why? FIRST, the advocate is an officer of the court owing primary allegiance to the court and the law. Unlike other clients, the advocate is both formally ethically and legally bound to engage with the expert in a manner that necessarily facilitates the expert's management of the expert's conflicts of interest. SECOND, the advocate has a host of incentive structures that will encourage payment of the expert's bills. The concern with payment is not the venal concern with cash, but with avoidance of even the appearance of contingent fee compensation. It is fully predictable that a non-advocate client who was not "successful" in litigation after using the expert's services will seek to share with the expert that lack of "success". Sharing an adversarial party's litigation success of lack thereof calls into the question the expert's neutrality. And, ethically, the expert may not do that. THIRD, having the advocate's firm as the client creates an attenuation of

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34 See text and footnote 6 regarding Newton's simplicity as well as text accompanying footnote 12 regarding sciences' simplicity.

35 To "lie" requires both subjective knowledge of the true and an intent to misstate that known truth. Ignorant persons speaking honestly do not lie even though they often do not speak the truth.

36 And what heuristics ought the expert use? Albert Camus said there was but one: "Integrity has no need of rules." [http://www.brainyquote.com/quotes/authors/a/albert_camus.html](http://www.brainyquote.com/quotes/authors/a/albert_camus.html) Generically, lawyers prefer rules because of the law's need for objectively proving that subjective integrity.
ethical awareness and sense of personal responsibility relative to the expert having a
direct relationship with the advocate. This attenuation is certain to cause ethical
laxitude across a wide array of contexts. That attenuation also will create new conflicts
of interest as well as increase the difficulty of the expert adequately managing all
conflicts of interest.

Can the client protect the client? A corporation\(^{37}\) can not act for itself. A
corporation must act through the actions of others. Thus, if the expert’s client is not a
human, then the expert has advance knowledge that the client can not protect the
client’s interests without the expert’s assistance.

Some expert engagements only are feasible if the client is an organization (e.g.,
Department of Justice).\(^{38}\) One ethical hazard an organization as client creates is an
overlay of employment status on top of the role of expert. Employment status adds a
new layer of conflicts of interest. The reason the expert is not to take contingent fee
engagements is the expert is to be a disinterested participant in the litigation. However,
if the expert is an employee of an adversarial party, then the expert’s independence\(^{39}\) is
doubly called into question. How doubly? Both the employee’s financial fate is tied to
the employer (read: contingent fee) and the employer has legal authority to alter the
employee’s qua expert’s methods of reaching an opinion.

One employee context is distinctive for an expert witness: that of employee in a
litigation support firm (LSF). This too is problematic and requires vigilance: but both
less so and more so. The financial interest of the expert qua employee of LSF,
generically, is not materially different from the expert as independent contractor.
However, if the client in question is a material fraction of the LSF’s total revenue, then
financial pressure of significance is to be expected. That is, others in the LSF might seek
to exert influence in a manner analogous to contingent fee pressures. Also materially
different are ethical threats of a supervisory nature. In a LSF the direct manager of the
expert likely also is an expert. A supervisor as an expert, at a minimum, is likely to be
far more familiar with the ethical requirements of litigation expert witnessing. That is to
the good. But, that supervisor’s expert experience coupled with a directive will tend to
carry far more weight than a mere employer’s directive. That is to the bad. Both the
financial and the supervisory pressures could challenge the expert’s independence.

Regardless of role, whether the expert is an employee or independent contractor,
the expert still is first and foremost the self. The self is personally responsible for

\(^{37}\) Technically, since all general partners simultaneously are both principal of all other general
partners as well as agent to all other general partners, a general partnership as an organization has the
most protection. Also, a general partnership is not recognized by the law as a separate legal person.
However, that extra protection comes at the expense of great magnification of conflicts of interests as well
as diminution via dilution of the socially experienced responsibility of each individual agent qua general
partner. Accordingly, any organization (be it corporation, LLC, LLP, or general partnership) as client of
the expert exposes the expert to the ethical duty to protect the organization during the delivery of the
expert’s services to the organization.

\(^{38}\) More frequently, however, an organization as the expert’s client is imposed on the expert by a
powerful upstream consumer of the expert’s litigation opinion (e.g., insurance company exercising
subrogation rights).

\(^{39}\) Recall, a prime legal difference between an employee and an independent contractor is the
independence of the contractor with respect to how to complete the contract. An employer has the legal
authority to order the employee to complete the tasks in the employer’s preferred method. A principal of
an independent contractor lacks this legal authority.
sustaining an ethical posture (read: Nuremberg Principles) even when acting within a role.\textsuperscript{40}

**The Expert Takes Up a Mantle**

Rarely is the Reasonable Person an expert. But, the expert qua expert must act as the Reasonable Person qua expert. Thus, the expert must act as reasonable experts in litigation act.

As noted above, sometimes the law will require the expert to adhere to the law's methods of knowing. The law might edit the array of permissible criteria for analysis, both including what the experts would exclude as well as exclude what the experts would include. Further, the degree of certainty ascribed by the law to inputs and outputs of that analysis might be at material variance from that of experts independent from litigation. And yet, with these constraints, the expert must give oath or affirmation that the expert's testimony is the truth, the whole truth, and nothing but the truth.

The expert lacks complete control over the processes of information gathering and interpretation. Time pressures on other participants in the litigation process radiate through to the expert constraining the expert's ordinary processes for reaching an opinion. Only two such pressures will be noted here. Science does not have deadlines.\textsuperscript{41} Litigation is fraught with deadlines. Those deadlines impinge on those providing inputs for the expert's consideration. Inevitably, some persons responsible for providing inputs to the experts will give delayed reports. Those deadlines also impinge on the deliberations of the expert creating incentives for a rush to judgement. The combination of delayed inputs and the rush to opinion formation challenges the quality of the expertise the expert can bring to bear. Let's give one example of how these might interact to truncate what is knowable by the expert. The DCA (Digital Copyright Act) creates for ISPs (Internet Service Provider) a safe harbor from criminal abetting liability. To keep that safe harbor, an ISP must be reasonably vigilant. However, if the ISPs employees are looking for prohibited X (e.g., porn; defamation) that does not assure you will see prohibited Y (e.g., copyright violation). Especially so if X is more obvious than Y. And, in fact, looking for X might make Y less likely to be seen. So, what does an expert witness do? An expert witness narrows focus to match the needs of the law, thus the expert takes up the blinders of the law in addition to the blinders of science.

**Codes of Ethics**

Some experts are certified. Some certifying bodies have formal codes of ethics.\textsuperscript{42} Rarely do these codes firmly entertain the individual expert being certified by multiple bodies with formal codes of ethics. Thus, each code typically claims primacy. It is the individual expert's task to harmonize the expert's actions with the sometimes mutually exclusive code requirements.

\textsuperscript{40}Least we forget the wisdom of Bo Diddly, do recall "Before you accuse me, take a look at yourself." By McDaniel, Ellas (a.k.a., Bo Diddley). [https://en.wikipedia.org/wiki/Beföre_You_Accuse_Me](https://en.wikipedia.org/wiki/Beföre_You_Accuse_Me)

\textsuperscript{41}Astronomers might challenge that assertion of no deadlines on the grounds of some celestial events are quite rare. But, they are confusing their ability to personally participate in the observational science with science independent of the scientist.

\textsuperscript{42}See text accompanying footnotes 3 to 5.
As their foundation all codes of ethics have the individual and the importance of the individual saying "No." Each code anticipates that some persons will seek a hired gun instead of an honest, neutral expert. And, it is the duty of the individual expert to reject that assignment. Such codes seek to act as an affirmation of alternative to the hired gun so that the expert is not so lonely in the rejection. Such codes seek to create institutional resistance to the notion of the expert as a hire gun. Such codes seek to create an explicit peer concurrence on rejecting the hired gun engagement. Such codes seek to entice the individual expert to act in the truly public fashion versus merely formally public fashion.43

**Hypotheticals**

Zealous advocates seek to weave a tapestry for the trier of fact. Experts doing science very often do not create all of the facts needed by the advocate. For example, either the facts created via expertise might not directly address elements of a cause of action or the facts might fail to trigger a needed presumption. Or, worse glaring inconsistencies are forced into the advocate's tapestry by the expertise created facts. Regardless, advocates routinely resort to hypotheticals so that they might complete a more pleasing tapestry.

Hypotheticals are not inherently bad. But, hypotheticals are fraught with ethical danger.

At a minimum, to be appropriate, the hypothetical must be fully disclosed. To be fully disclosed there must be successful communication to the trier of fact. There is a material difference between the expert's opinion based upon the specific facts of the case versus an extrapolation from that opinion. Importantly, the expert must be cautious regarding fact substitution and/or fact insertion by the advocate crafting the hypothetical. Full disclosure with failure to communicate the limits of the hypothetical to the trier of fact can be worse than no disclosure: but, full disclosure always is a must.

Some advocates will use hypotheticals not for the purpose of clear communication but for the purpose of muddying previously clear communication by the expert that was not advantageous for the advocate's client. The advocate seeks a temptingly presented intentional distraction that might be clearly fanciful to the expert but plausible to the trier of fact. The expert's duty of providing the truth, the whole truth, nothing but the truth might include requiring the expert to place the hypothetical in context so that full disclosure is achieved: even if adverse to the expert's engaging advocate.

Framing is one purpose of hypotheticals. Framing is psychological process. Framing is a form of subliminal suggestion. An advocate might use a hypothetical question to activate framing in the mind of the trier of fact. For example, with framing, if an advocate asks an expert a hypothetical with a large dollar amount, the trier of fact is more likely to think of similarly sized dollar amounts when asked to value the plaintiff's damages.

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43 "No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee." John Donne.
Framing is one of the advocate's tools of persuasion. The honest, neutral expert's task is to assist the trier of fact; not to persuade the trier of fact. Another of the advocate's tools of persuasion applied via hypothetical is for the advocate to speak in parables versus hewing closely to the case's facts. That is, the advocate seeks to persuade by analogy rather than by facts in evidence. Again, the expert answering an advocate's hypothetical questions must be vigilant in making sure the expert's opinion is not transformed by the zealous advocate.

IN SUMMARY

What is truth? Is it absolute or is truth relative? To answer that question please consider a pile of gravel made up of river pebbles, each small, round, and smooth. Is the pile of gravel "solid"? Or, is the pile of gravel a liquid because the pile easily flows when subjected to pressure far less than sufficient to lift the pile? Which determines whether the pile is solid: the solidity of the constituent parts or the plasticity of the whole? Much disparagement of relative truth has been made when comparing it with absolute truth. But note, relative truth is absolute truth: but in smaller contexts. That narrow context thus permits relative truth to be applied, quite appropriately, more broadly.

Much of expert opinion is compelled by the law to reside in the realm of the expert's art rather than science. An expert unfettered by the law would see untruth via the expert's lens but will testifies true when using the lens of the law. This is but one reason it is labeled opinion testimony. How the expert knows as well as when the expert knows varies between the fettered and unfettered expert. Also changed for the testifying expert are the motivations for knowing and speaking. Taking up the mantle of expert witness creates new forms of conflict of interest requiring adequate management. The expert's navigation of the ethical shoals of litigation will be far surer if the expert seeks to participate in truth, purposefully avoiding moral harm and physical harm. Again, easier said than done.

44 This is a subtle distinction. The expert seeks to persuade the trier of fact of the expert's opinion. However, the expert does not seek the same persuasion objective of either of the zealous advocates (i.e., my side wins). The expert's goal is to have truth win. The zealous advocate's goal is to have my client's version of truth win.

45 See footnote 6 and Newton's simplicity.

46 Lao-Tzu said "Practice not-doing, and everything will fall into place."

http://www.transformleaders.tv/the-taoist-to-do-list-practice-not-doing/

Yoda "said" "No! Try not. Do, or do not. There is no try." with the help of George Lucas in The Star Wars Trilogy. https://en.wikipedia.org/wiki/Yoda