Advocacy v. Objectivity

by Bill Barrett

An expert witness is a court or arbitrator-approved authority in a particular field, industry, discipline or profession. The expert’s task is to ***evaluate*** the facts of the case and render a supportable professional or technical ***opinion*** about complex matters of cause and effect. All scientific, technical and professional evidence is based on probability, to a greater or lesser degree. Many times “something” happens between the tasks of evaluation and opinion rendering that turns and expert witness into an expert “hired gun”. Knowingly or not, the expert then becomes an advocate to the goals of the case, compromising proper methods, standards and procedures resulting in unethical conduct.

The “something” that happens typically falls within six segments of the litigation services engagement. These segments are: engagement interview, investigation process, attorney communications, reporting, depositions and testimony. While each may seem a progression built upon the prior area—and it is—it is the investigation process that is the key to keeping the expert an objective witness. A strong, thoroughly executed investigation gives the expert a satisfaction of independence that can withstand the pressures and outright manipulations inherent in the rest of the support process.

Here is a look at some of the ethical violations that can occur and tips to keep the investigative process objective.

*Conditional or Limited Engagement.* Usually through time and monetary constraints the expert may be conditionally engaged by counsel, or the scope is limited or becomes limited during the investigation. *Tip.* The scope of the engagement should be revealed through your case file. This will clarify for you and counsel where it would be unethical for you to offer opinions beyond the scope of the engagement.

*Data Issues.* Outright false data, altered data and selective factfinding have a way upon cross-examination of impeaching even the most seasoned expert. *Tip.* Understand that attorneys and clients come to you with facts which may be slanted. Keep an open mind. Do not permit yourself to form predetermined conclusions—use the Scientific Method of forming a hypothesis. Then carefully follow your own well-established investigative steps; develop forms, procedures and processes which will ensure that you prove or disprove your hypothesis and that you do not neglect, overlook or be taken in by data.

*Investigative Issues.* Where an investigation is not done or poorly done, or where a conclusion is reached before through research, the expert’s entire opinion may be inadmissible or stricken. *Tip.* Review your time records. Make sure they tie back to the case file, reports and the standard protocol for the type of engagement taken. Review your file to make sure your conclusions are supported through documentation and not vice versa.

Remember that *objectivity* is for the expert and *advocacy* is for the attorney. Judge David Schwartz, when of the U.S. Court of Claims, characterized the problem of advocacy in valuation experts as follows:

The trier must first judge the qualifications of the opposing experts, then try to understand their presentations, pass on their sincerity and credibility, and finally choose between opposing conclusions. Throughout, there is the uneasy doubt as to an appropriate discount for partisanship. Have the witnesses, both or one of them, anticipated a discount by the trier and hiked their opinions twice, once for discount and once for loyalty to their client, on only once, or even not at all.