Objectivity, Bias, and Advocacy in Expert Forensic Testimony Concerning the Standard of Care

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Abstract

Expert witnesses are allowed to provide opinion testimony for the purpose of aiding judges or juries in answering questions the domains of which are outside the areas of knowledge of normally competent lay people. The arena within which expert witnesses act is often one of dispute, argument, and adversity. An expert may be asked to express an opinion concerning another professional’s performance relative to the “standard of care,” which can be thought of as the boundary between negligence and non-negligence. An expert witness’s testimony may be favorable to one side over another, and expert witnesses may testify for either side, yet the expert is expected to be objective and unbiased. There are some who contend the expert witness must not be an “advocate” for one side of a matter at trial. This paper first presents a definition of the standard of care, then describes the role and limits of objectivity, bias, and advocacy on the part of the expert witness.

Keywords: standard of care; professional negligence; expert witness, objectivity, bias, advocacy.

1 Introduction

In the United States, a professional engineer, who is an individual licensed by each State to practice or offer engineering services in that State, is allowed to err when providing those services without incurring liability for injuries arising from that error [1]. Some level of error, however, is beyond an acceptable level, and can be characterized as “negligence.” The boundary between negligent error resulting in liability on the part of the engineer, and non-negligent error which does not result in the engineer’s liability, is called the “standard of care.” The identification of an engineering error, the assessment of the standard of care, and the evaluation of an engineer’s performance relative to the standard of care are facts which are outside the areas of knowledge of a normally competent trier of fact (a jury or a judge).

2 Definition of the Standard of Care

In US legal procedures, after a jury has heard all the evidence and before it starts its deliberations to answer the ultimate questions of the defendant’s negligence and liability, the jury receives instructions from the court regarding the specific questions of fact raised during the trial which the jury is to answer. Standardized (or “pattern”) jury instructions have been created in many States, and those standardized instructions change over time as case law changes. In 1986, West Publishing Company published the Book of Approved Jury Instructions [2]. Instruction 6.37, “Duty of a Professional,” read:
6.37 Duty of a Professional

(1) In performing professional services for a client, a [insert type of professional] has the duty to have that degree of learning and skill ordinarily possessed by reputable [insert type of professional(s), practicing in the same or similar locality and under similar circumstances.

(2) It is his or her further duty to use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or similar locality under similar circumstances, and

(3) to use reasonable diligence and his or her best judgment in the exercise of professional skill and in the application of learning, in an effort to accomplish the purpose for which he or she was employed.

(4) A failure to fulfill any such duty is negligence.

The Book of Approved Jury Instructions was revised since its 1986 publication, including the removal some years ago of the “similar locality” criterion, and in fact is no longer principally used in the California Courts. In its place, The Judicial Council of California has published [3] “Judicial Council of California Civil Jury Instructions,” which includes the following:

600. Standard of Care

[A/An] [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

[You must determine the level of skill and care that a reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses[,] including [name of defendant],[,] who have testified in this case.]

The pattern jury instructions were derived from interpretations of case law, and are not laws themselves. A Judge may allow the use of different jury instructions if a litigant makes a legal case for such use [4]. Regardless of the specific instructions, the jury will likely be asked to decide on questions of fact regarding the exercise of “care” by the defendant.

3 The Role of the Expert Witness

United States Federal Rule of Evidence 702 [5] addresses the sufficiency of the basis of an expert’s testimony and states:

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 upon sufficient facts or data;

c) the testimony is the product of reliable principles and methods, and

d) the witness has reliably applied the principles and methods to the facts of the case.

4 Objectivity, Bias, and Advocacy

The American Society of Civil Engineers Code of Ethics [6], Canon 3, exhorts ASCE members to be objective and truthful, and includes the following:

3. b. Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony.

3. c. Engineers, when serving as expert witnesses, shall express an engineering opinion only when it is founded upon adequate knowledge of the facts, upon a background of technical competence, and upon honest conviction.

4.1 Objectivity

Merriam-Webster defines “objectivity” as the expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations. To be objective is to be not influenced by feelings, to make judgments based on observable phenomena and uninfluenced by emotions or personal prejudices.
The expert can maintain objectivity by presenting opinion testimony dispassionately, and by assuring that the expert’s perceptions are not clouded by prejudice or unduly influenced by unacknowledged bias.

A possible source of a loss of objectivity on the part of an expert witness lies the difference between the roles of the attorney and of the expert the attorney retains. About this difference, Gutheil and Simon [7], psychiatric expert witnesses, wrote:

*The goals and the ethical mandates of the psychiatric expert witness and of the retaining attorney differ in essential ways: these differences always create an enduring tension between the parties. The attorney is ethically obligated to embark on zealous, vigorous, and partisan advocacy on behalf of the client. While objectivity may govern case selection, the attorney need not be objective in presenting the case in court. In contrast, the expert is committed to honesty and to striving for objectivity throughout, even when those goals are accomplished at the cost of disappointing the retaining attorney by, in essence failing to be sufficiently partisan.*

Engineering expert witnesses face the same situation.

Historian J. M. Kousser wrote about his view of objectivity of historian expert witnesses [8], and points out that the expert’s objectivity can be influenced by the expert’s own values, tastes, talents, and circumstances. The expert’s exposure to and appreciation of currently popular trends or ideas in the profession can influence objectivity.

Engineering experts may have personal preferences for particular analysis methods or evaluation criteria; building code sections may be open to various interpretations or assessments of applicability; the types of projects with which the engineer has been involved over the course of the engineer’s practice, and the outcomes of those projects, can differ among experts. All these and more can result in differences of engineering judgment or opinion. Those differences might be interpreted as indications of a loss of objectivity if one assumes that there is only one possible interpretation of evidence developed by various expert’s investigations. However, the reason a dispute goes to trial is that there are differences of opinions and shadows of doubt concerning the facts and circumstances surrounding the incident or condition that led to the dispute. The experts for each party can retain objectivity while serving the retaining party by maintaining awareness of differing views, and by understanding and appreciating the positions of the experts helping other parties to the dispute.

Another threat to objectivity is the fact that the expert is providing and being paid a fee for professional services, and may want to continue doing so for the attorney in future cases. An expert’s opinion contrary to the position of the retaining attorney might be misinterpreted as being against the client’s best interest. The expert should realize, however, that the value the expert provides is in carrying out competent and thorough investigation. If that results in an opinion that the attorney’s position is weak or incorrect, it may be in the client’s best interest for the expert to inform the attorney of that opinion so the attorney can pursue settlement in the most favorable terms for the client.

The attorney who retains the expert can also influence the objectivity of the expert by framing the question at the root of the dispute. Controlling the framing of the expert’s area of concern, the attorney might be selective regarding information provided to the expert.

These and other influences can emerge as a loss of objectivity, or a bias on the part of the expert, but, as Kousser points out [8], although that bias may be a “predisposition” or “proclivity,” it need not be an “unalterable presupposition.”

### 4.2 Bias

Bias is a tendency of people to utilize cognitive shortcuts [9]. It is the subject of many areas of intellectual pursuit, including psychology, statistics, and economics. There are several types or sources of bias which can affect the testimony of an expert witness, including but not limited to the following:

- **...**
Confirmation bias: The tendency to search for, interpret, focus on and remember information in a way that confirms one’s preconceptions [10].

Curse of knowledge: When better-informed people find it extremely difficult to think about problems from the perspective of lesser-informed people [11].

Hindsight bias: The inclination to see past events as being more predictable than they actually were; also called the “I-knew-it-all-along” effect.

Outcome bias: The tendency to judge a decision by its eventual outcome instead of based on the quality of the decision at the time it was made.

Reactive devaluation: Devaluing proposals only because they purportedly originated with an adversary.

Selective perception: The tendency for expectations to affect perception.

Semmelweis reflex: The tendency to reject new evidence that contradicts a paradigm [12].

Random error results from sampling variability and decreases as sample size increases. Bias, however, is independent of both sample size and statistical significance. The source of many biases may be inherent in the normal human functioning of the mind and consciousness [9]. Because biases are normal and expected tendencies of human consciousness, the forensic expert should be aware of the possible influence of bias on an observation or opinion. The expert should be able to detect biases in his own or in others’ observations and opinions, acknowledge their presence, accommodate, overcome, or compensate for them.

4.3 Advocacy

Advocacy can be defined as the act or process of supporting a cause or proposal. The purpose of expert witness testimony in a trial setting is to “aid the trier of fact” [5] in answering the ultimate questions in dispute, where knowledge necessary to effectively answer those questions is beyond that of normally competent jurors or judges. Because each party of a dispute may present expert testimony in support of its own position, it should not be unexpected that experts for different parties can arrive at differing opinions, and testify in support of different positions [13]. To be helpful and admissible, the expert testimony should be valid and reliable. If the expert witness testifies without a valid and reliable basis for the opinion testimony, the court may exclude that testimony, or the opposing side may discredit the testimony on cross examination.

If thorough, objective investigation by the expert results in the expert’s opinion that the party who retained him is on the “wrong” side of the dispute, or results in the expert developing a credible argument the opposing side might also arrive at without there being a valid counter argument, it is the expert’s responsibility to inform the retaining attorney. The weakness of the client’s case may result in losses which the expert may help mitigate, by for example, suggesting the attorney discuss with the client a consideration of settling the case prior to trial. This is a kind of “advocacy” that is within the purview of an expert. The expert provides that advice in support of the client, for the purpose of reducing the risk of a large decision against the client.

5 Conclusions

When a forensic engineer expert witness testifies regarding the standard of care, and whether a defendant engineer’s services were provided in conformance with a particular level of care, the witness should be attentive to maintaining objectivity, and be aware to the presence and influence of bias.

Threats to objectivity inherent in the expert-attorney relationship, and threats arising from the expert’s own particular preferences and experience, can be controlled and accommodated.

Confirmation bias may slant the expert’s opinion testimony towards a position developed prior to subsequent evidence which objectively could support a different position. Hindsight bias may blind the expert to the situations and circumstances that may reasonably have influenced the defendant at the time of the alleged negligence. Reactive devaluation and selective perception may act to prevent an expert
from reasonably appreciating the other side’s argument simply because they originate from the opponent, and differ from the expert’s opinion. Biases can be overcome or accommodated by thorough investigation and vetting of opinions and conclusions.

An expert may reasonably advocate for a truthful position, developed through valid and reliable means, in favor of the retaining party. In fact, that is the ethical duty of a forensic engineer.

6 References