



Of No Assistance

Precluding the Testimony of Ethics Experts

By Stephen J. Imbriglia

Jury trials are about assigning blame. I know that because Tom Cruise said so in *A Few Good Men*. (In fact, Lieutenant Daniel Kaffee had never tried a case to a jury, but his father had been a great trial lawyer, so the wisdom was handed down, I suppose.) To assign blame to a defendant, plaintiffs' attorneys have engaged experts in ethics to testify that the defendant's conduct was not only tortious but unethical. Ethics experts have been proffered in product liability cases and in a professional liability action I recently defended. These experts review the defendant's documents and deposition testimony and then opine that the defendant acted in an immoral or unethical manner. This evidence can provide the foundation for a punitive damages claim. There are compelling and persuasive arguments that this testimony is inadmissible.

Opinions offered by ethics experts do not fulfill the requirement of FRE 702, and many similarly worded state rules, that, to be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Ethics experts provide no such assistance. Rather, they seek to tell the jury what to think and how to decide the case. A jury is empaneled so that the jurors' experience, including their collective sense of right versus wrong, can be applied to the facts of a dispute. The testimony of an expert in ethics is an attempt to substitute the expert's judgment for the jurors. As such, it does not assist the jury in coming to a decision; it attempts to substitute the expert's analysis for that of the jury's. "When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's." *U.S. v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (emphasis in original); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004). In the *Rezulin* decision, the court held that proposed expert testimony that a pharmaceutical company acted unethically in its presentation of, and its reaction

to, clinical data and the conduct of clinical trials was inadmissible.

In the diet drug litigation, plaintiffs engaged an expert in medical ethics to opine that a defendant pharmaceutical company failed to warn in conscious disregard of the health and safety of its customers and put its own interests above the interests of patients. A federal court found that the testimony would not assist the jury and noted the expert's statement that anyone who understood English could interpret and apply the voluntary codes of conduct he was employing. His testimony, therefore, was "unnecessary." *In re Diet Drugs Prods. Liab. Litig.*, 2001 WL 454586 *10 (E.D. Pa. 2001). In my recent case, one of the ethics experts, when pressed at his deposition as to how his expertise informed his opinion, responded that "my fifteen-year-old son could connect those dots."

The opinions offered by ethicists almost inevitably lead to conjecture about a defendant's motives or intentions. This evidence is inadmissible, because the expert's training in ethics does not lead to any specialized skill in discerning why a defendant did or did not do something. *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (engineer not permitted to testify as to manufacturer's motive for designing visor as it did).

Opinions of ethicists are subjective and speculative. They therefore run afoul of Rule 702's requirement that an expert testify to "scientific, technical or other specialized knowledge." Rule 702 conditions the admissibility of expert opinions on those opinions being the product of reliable principles and methods and the witness' reliable application of those principles and methods to the facts of the case. Opinions about what a defendant should have done and what its motivations were are inherently personal. Academic credentials in the field of philosophy, ethics or corporate responsibility do not elevate one individual's opinion about moral issues above another's. An expert in one reported case acknowledged that there is "no standard methodology for ethics." *Rezulin* at 543, n. 27. In my professional liability case, when I asked a spectacularly credentialed expert in medical ethics how to distinguish an ethical financial-incentive system from an unethical one, he replied "consequential reasoning," which he described as "deciding if something is ethical

Defense Ethics, continued on page 77



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Defense Ethics, from page 72

or unethical on analysis of the consequences of the act.” To determine if the defendant’s system was ethical, one would analyze how people acted within it. If they behaved responsibly, the system was ethical; if they did not, it was not. In other words, it was not possible to determine the system’s ethicality until it was implemented and conduct was analyzed. Even then, the analysis of the conduct would be subjective.

By injecting into a trial the issue of whether a defendant has acted unethically, opinions from ethics experts distract a jury from its real purpose: determining the facts and applying the law to those facts. The admission of “ethics” testimony might suggest to the jury an alternative basis for deciding a case. Moreover, the admission of such opinions, while not assisting the jury to determine a fact in issue, ratchets up the

rhetoric at the risk of juror distraction and unfair prejudice to the defendant.

To exclude the testimony of an ethics expert, defense counsel must take a good deposition that reveals the expert’s opinions to be argument, not opinions based on specialized knowledge, and the product of personal beliefs, not the reliable application of established principles to facts. **FD**