

DOMINALAW Group pc llc

*Trial Practice. Not Just Talk.™*

# So You are An Expert Witness? Want to Be A Defendant, Too?

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# *The Wheel of History Turns....*



- From Absolute Immunity
  - Absolute testimonial privilege is gone
  - Matters not pertinent are not privileged
  - No longer ends at credibility
- To Common Liability
  - Exposure same as engaged professional
  - Care requires investigation, analysis
  - Assumptions require articulation

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# Experts Are Nothing New

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## The Role of the Expert Witness

- Expert evidence: Not “ordinarily admissible”
- Experts : For Extraordinary Things.

Ordinary things:

Marriage. Divorce. Parenting. Child Abuse.

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*“If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns”*

*Buckley v Rice Thomas (1554)*

# Duty, Honor, Valor

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Expert's Duty: Help Judge of Facts Where Qualified

- ~ This overrides any Obligation to Engaging Party
- ~ Duty overrides compensation & loyalty

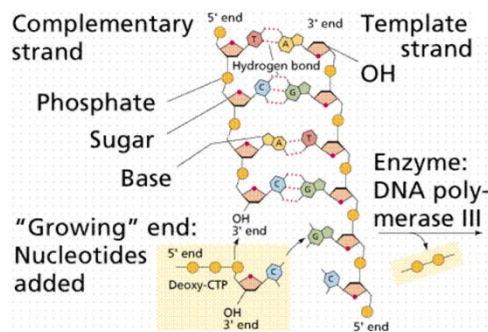
Adherence to Duty Makes Reputation. It Requires:

- ~ Genuine Qualifications
- ~ Objectivity
- ~ Informed, Testable Opinions
- ~ Proven or Provable Methods

# Expansive Scope of Expert Service

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- Risks of Expert for Anything
- Evidence Rule 702
  - ~Subject matter
  - ~Witness qualified
  - ~Testimony assist fact finder
  - ~Reliable testimony



# Risks of Expert Malfeasance

- Mistakes Happen
  - ~ Misunderstood facts
  - ~ Mis-scheduled events
  - ~ Misplaced data
  - ~ Mis-distributed data
  - ~ Inadvertent disclosures
- Errors In Judgment Happen, Too
  - ~ Exuberance
  - ~ Professional diagnosis, analysis errors



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# Standards: Impartiality

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## I. Expert Impartiality

A. Serve with independence and objectivity, without regard to consequences.

B. Impartially assist the court on relevant matters within area of expertise.

C. Fully cooperate with retaining counsel, but shall remain independent and professional; avoid advocacy.

D. Present complete and unbiased research relevant to the case and to expert's opinions.

# Standards: Confidentiality

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## II. Confidentiality

A. Understand rules of confidentiality applicable to case and jurisdiction.

B. Assume all communications are subject to discovery unless instructed otherwise by retaining counsel on ethical grounds.



# Standards: Fees

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## III. Fees

A. Seek fair reimbursement . Charge hourly fees  
Consider flat fee if based on reasonable value.

B. No contingent fees.

C. Use nonrefundable retainer where expert may be precluded from other work.

D. Do not allow money to interfere with truthfulness or impartiality.

# Standards: One Sided Talk

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## IV. Ex Parte Communications

A. Do not communicate with adverse counsel except through formal discovery and judicial procedure.

B. Do not engage in communications with the judge or jurors.

# Standards: Never Two Masters

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## V. Conflicts of Interest

A. Do not accept conflicting engagements – with inconsistent opinions.

B. Do not switch sides and violate a Client's reasonable expectation of confidentiality.

C. Do not withhold interests held in the outcome.

# Professionalism I

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- A. Accept only engagements within area of competence.  
*Do not stretch.*
- B. Ensure all tests, analysis , opinions are based on adequate , accepted methods. Disclose reliance, on experimental things.
- C. Be clear about the strength of each conclusion. Disclose inconclusive aspects, limitations or data insufficiencies.
- D. Update opinions for new information, and promptly report changes of opinions on any material matter.

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# Professionalism II

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- E. Understand standards applicable to use of expert's opinion.
- F. Report expert's independent opinion. Discuss only contours, scope and methods. Make final product be the expert's.
- G. Do not hide or destroy discoverable documents or evidence.
- H. Do not present false, misleading opinions or data.
- I. Do not accept client conclusions; diligently investigate.
- J. Write Opinions that are a) are reasoned, b) based on analysis c) include material issues.

# Children & Divorce

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- APA Guidelines For Child Custody Eval
  - ~ Help decide what is best
  - ~ Child welfare is paramount
  - ~ Focus on parenting attributes & child needs
  - ~ Develop specialized professional competence
  - ~ Be impartial
  - ~ Be Culturally Informed

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# APA Guidelines II

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- ~ Avoid Conflicts
- ~ Be timely & establish scope of evaluation
- ~ Use multiple methods
- ~ Use & assess data consistently
- ~ Never forget best interests of children
- ~ Create & maintain professional records

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# Liability Standards & Experts



- Immunity is Gone
- Responsibility has Arrived

The judicial process will be enhanced only requiring that an expert witness render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession.

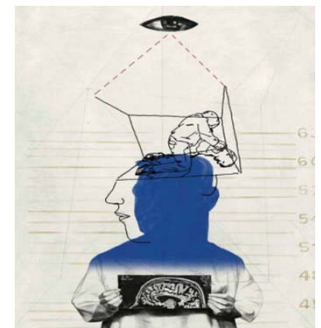
*LLMD of Mich, Inc., v Jackson-Cross Co.*, 740 A2d 186, 191 (Pa 1999).



## Family, Children : **Expert & Med Mal Issues**

- Michigan: *Dyer v Trachtman* (2004)
  - Limited MD – Patient Relationship.
- Nebraska: *Yoder v Cotton* (2010)
  - Unlimited Relationship. Full malpractice standards used.
- Johnston, MD *Neurology Today* (2005)
  - 11 Standards. (Paper, pp 7-8)

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# What Is Expert Malpractice?

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- Duty: Arises from Relationship.
- Standard of Care: What would reasonable expert in field do, or not do?
- Was the Standard met?
- If not, were Damages caused?
- What are the Damages?



# Lawyers & Experts: How?

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- Understand the Case
- Identify the Expertise Needed
- Make a Reasonable Search for a Witness
- Refrain from Hiring Charlatans
- Avoid Tampering: Incentives. False Facts
- Do Not Falsify Identities, Opinions
- Disclose the Expert's Warts



# Witness Tampering, Intimidation

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- Blackballing
- Subscribing to blackballing services
- Contributing to blackballing processes
- Be honest
- Test the expert within the rules
- Refrain from diversionary tactics

It's A Courtroom, Not A Political Campaign!

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# Time Have Changed

- Experts Owe Duties.
- Standards Apply to them & All Individuals
- When Breached, Experts Have Exposure
- If Breaches Cause Damages, Experts Pay

**What's Wrong with That?**



Experts, Lawyers, Courts Matter.  
So, Let's Do It Well.

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