



Jurisprudence Section – 2009

E10 Reducing the Probability of Mistake, Misunderstanding, and Conflict Between Experts and Attorneys

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After attending this presentation, experts who wish to serve as consultants and witnesses should expect to understand some of the major sources of mistake, misunderstanding, and conflict between themselves and attorneys. Attorneys should expect to understand the procedural, linguistic, and economic differences between their views of a case and those of the expert that lead to mistake, misunderstanding, and conflict. All participants should acquire a better understanding of how to avoid or to resolve mistakes, misunderstandings, and conflict.

This presentation will impact the forensic community by reducing mistakes, misunderstandings, and conflicts between attorneys and experts.

Experts who contract to consult with attorneys or who testify at the request of an attorney acquire certain rights and undertake certain responsibilities. As a result, questions and conflict may arise about the expert's performance of his or her obligations and the attorney's obligation to compensate the expert for his efforts. For example, may an attorney who obtains answers to interrogatories or deposition testimony from an expert use that material in other cases without compensating the expert? For example, may the attorney "cap" the expert's preparation time or fee? Should an expert "reserve the right to change my opinion" should additional information come to light? What obligation does the expert have to advise the attorney about the need for additional information upon which to base an opinion? How should the expert respond to an attorney who wants the expert to offer opinions the evidence will not support?

Misunderstanding about the rate or manner of compensation causes much of the conflict between experts and attorneys. The engagement letter or contract should resolve those issues in advance to reduce the probability of conflict. For example, whether the client or the attorney will underwrite payment should be clear before the expert performs. Whether a retainer is refundable, non-refundable, or partially refundable should be clear before the expert undertakes to perform.

The scope of the expert's opinion should be clear as well. The expert should inform the attorney about any general qualifications or limitations to the expert's opinion or methodology before any contract is executed or payment exchanged. For example, if a court has refused to qualify an expert or if an appellate court has rejected the expert's testimony, then that information should be provided to the attorney before the expert comes on board.

Expert Witnesses, Expert Compensation, Expert Opinion