

Experts are liable, too
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BY MARK HANSEN

Not long ago expert witnesses were considered to be friends of the court, people whose willingness to take time out of their busy professional lives and participate in the judicial process entitled them to absolute immunity from civil liability for anything they said on the witness stand.

But somewhere along the way, we stopped viewing them as the courts' friends and started seeing them as hired guns, people who were willing to testify on just about anything for a buck. And short of a vigorous cross-examination, the risk of professional sanctions, and the threat of a criminal prosecution for perjury, there was virtually nothing anybody could do to hold them accountable for the consequences of their testimony.

That is until the last decade or so, when the relatively new tort of expert witness malpractice came along. Here's the idea: Expert witnesses owe their clients certain duties by virtue of their specialized knowledge, skills or training, which, when breached, can be grounds for a cause of action by a client who has been damaged.

To date, only eight state courts are known to have addressed the issue of expert witness immunity. And so far no court has allowed an expert witness to be sued by an adverse party over testimony.

But lawsuits against so-called friendly experts, while still relatively rare, are multiplying. And those efforts have been meeting with increasing success.

"The law has been moving in the direction of holding friendly experts liable for their professional errors for the past 10 or 15 years," says Andre Moenssens, a University of Missouri-Kansas City law professor who writes and lectures frequently on expert witness liability. "The courts are doing away with expert witness immunity."

Both Moenssens and Carol Henderson, the Nova Southeastern University law professor who wrote what is believed to be the first law review article on expert witness malpractice in 1991, see that trend as a positive development.

"If expert witnesses can charge thousands of dollars for their expertise and the expertise they render is faulty, they ought to be held accountable for consequences of their acts," Moenssens says.

According to Henderson, expert witnesses should be treated like other professionals who have to contend with the possibility of getting sued if they do something negligent.

"If expert witnesses are professionals," she says, "why shouldn't they be held to the same standard of care of their profession as doctors or lawyers?"

In five of the seven states where friendly experts have been sued over their testimony-California, Connecticut, Missouri, Pennsylvania and Texas -litigation has been allowed to proceed. Only in Louisiana and Washington have the courts held that friendly experts are absolutely immune from liability.

Jersey Stands Alone

The eighth state known to have addressed the issue, New Jersey, is unique. It is the only state in which a court-in this case, the state supreme court-has held that even a court-appointed expert is not immune from liability for deviating from the accepted standards applicable to his or her profession. *Levine v. Wiss & Co.*, 97 N.J. 242.

At the other extreme is Washington, which has what is probably the broadest declaration of expert witness immunity to date. In 1989, the state supreme court held that two property owners could sue an engineer they hired in connection with their suit against the owner of the excavated property. They claimed the engineer had underestimated the cost of stabilizing the soil on some land adjacent to an excavation site.

In that case, the court held that the fact that the engineer had been retained and compensated by the plaintiffs, rather than appointed by the court, did not deprive him of witness immunity. The court also held that witness immunity applied not only to the engineer's testimony at trial, but to any action he took before trial that helped form the basis for his testimony. *Bruce v. Byrne-Stevens & Associates Engineers Inc.*, 113 Wash. 2d 123.

Louisiana joined Washington in that regard in June when a federal judge in New Orleans dismissed a doctor's suit against an expert who had been hired to analyze billing records. The expert had been hired in connection with the doctor's failed suit against his former employer over wages.

In that case, U.S. District Judge Helen G. Berrigan said she was "unable and unwilling" to become the first judge in Louisiana to recognize an exception to the long line of cases affirming absolute immunity for all nonparty witnesses, including experts. *Marrogi v. Howard*, Civil Action No. 00-368 Section C.

Others Embrace Immunity Exception

But other state courts have not been nearly as reluctant to recognize an exception for experts under the witness immunity doctrine.

The Texas Supreme Court weighed in on the issue in 1982, when it held that the witness immunity doctrine protected three doctors from liability for allegedly having testified that a woman was incompetent in a competency proceeding that was eventually dropped. At the same time, though, the court expressly rejected extending a blanket grant of immunity from all civil liability for doctors who testify in mental health proceedings.

The court also stated that experts can be sued for negligence resulting from their misdiagnoses. And the mere fact that those diagnoses became the subject of testimony in a lawsuit did not insulate the doctors from liability in a negligence action, the court said. *James v. Brown*, 637 S.W.2d 914.

A decade later, a California appeals court drew a distinction between neutral third-party witnesses and experts hired expressly to assist in the preparation of a case for trial. And it said the witness immunity doctrine was established not to protect a litigant's own expert, but to protect experts from harassment claims by adverse litigants. *Mattco Forge Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392.

"Applying the privilege in this circumstance does not encourage witnesses to testify truthfully; indeed, by shielding a negligent expert witness from liability, it has the opposite effect," the court said.

Later that same year, the Missouri Supreme Court held that privately retained professionals who negligently provide litigation-related support services should not be covered by witness immunity. That protection should only cover defamation suits and retaliatory actions against adverse witnesses, the court said. *Murphy v. A.A. Mathews*, 841 S.W.2d 671.

Last year, the Pennsylvania Supreme Court came on board. It held that an expert hired by a developer to calculate lost profits from a failed real estate venture could be sued for negligence. The expert allegedly made a mathematical error that completely undermined the basis for his calculations, forcing the developer to settle a lawsuit against the lender for a fraction of its actual losses.

Connecticut became the fifth state to recognize an exception to the witness immunity doctrine for a friendly expert in May. A Superior Court judge in New Haven refused to dismiss a lawsuit against a Yale University professor accused of failing to competently provide litigation support services. The expert had

been hired in connection with a personal injury suit against a police officer by a man who claimed to have been rendered quadriplegic by the officer's excessive use of force during an arrest.

In an unreported decision, Judge Bruce Levin said the policy on which witness immunity is based-allowing witnesses to speak freely-was not implicated by the allegations against the professor, who essentially was accused of not doing what he had been hired to do. *Pollock v. Panjabi*, No. 402199, May 17, 2000.

Henderson and Moenssens say they hope the growing judicial recognition of a cause of action for expert witness malpractice will eventually have a positive effect on the quality of courtroom expertise. But both say it's too early to predict with any confidence.

Henderson, who speaks regularly to groups of experts about witness immunity, says she is constantly amazed to find out how many of her listeners aren't even aware of their potential liability.

"They come up to me afterward and say, 'You mean I can be sued for this?' "