

# EXPERTS BEWARE: What You Say Can Be Used Against You In A Court Of Law



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*“Whoever fights monsters should see to it that in the process he does not become a monster.”*

*- Friedrich Nietzsche  
Beyond Good and Evil  
Epigrams and Interludes no. 146.*

# Overview

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# I. The Good News And Bad News: Increasing Demand For Experts

- The demand for expert witness testimony has grown exponentially over the last 15 years.
- In 1995 there were 299 judicial opinions that cited to the Supreme Court's seminal *Daubert* decision.
- In 2007 that figure nearly quadrupled.



# Good News and Bad News

- The good news: Business is booming.
- The bad news: Expert witnesses also increasingly are becoming litigation targets.



# Good News and Bad News

- **The Problem:**
  - Complex subject matters.
  - Key testimony.
  - Good testimony angers opponents and their experts.
  - Bad testimony angers the expert's client.
  - When testimony is barred it can anger everyone.
- There always is a motive to pursue the expert.



## II. The Testimonial Privilege: It's Not What It Used To Be

- The testimonial privilege generally shields a witness from any liability for any statements made in testimony or pleadings in a judicial proceeding.
- The testimonial privilege applies to all witnesses – for now.
- Litigants now argue that the privilege should not apply to expert testimony *MacGregor v. Rutberg*, 478 F.3d 791 (7<sup>th</sup> Cir. 2007).

# *MacGregor v. Rutberg*

- *MacGregor* began with a malpractice lawsuit.
- Dr. Rutberg testified as an expert witness against Dr. MacGregor in the malpractice litigation.
- But Dr. MacGregor not only won the malpractice suit, she obtained summary judgment.
- She then sued Dr. Rutberg for defamation.

# The Issue in *MacGregor*

- Dr. MacGregor's defamation claims were based on Dr. Rutberg's testimony in the malpractice case.
- But "Illinois, like other states, recognizes an absolute privilege for statements in testimony or pleadings" in judicial proceedings.
- Dr. MacGregor attacked the testimonial privilege directly, arguing that it should not protect paid experts who testify as witnesses.

# Court's Comments In *MacGregor*

- The Court ultimately refused to recognize an exception to the testimonial privilege in Dr. MacGregor's case.
- BUT the Court's comments should give experts pause:
  - other courts have recognized exceptions to the absolute privilege for witness testimony.
  - the testimonial privilege “is especially designed” so that “disinterested lay witnesses” do not have to assume the risk of being sued for defamation simply for testifying as a witness.
  - Expert witnesses, on the other hand, “could be paid to assume the risk” of potential defamation claims.

# The Reasoning In *MacGregor*

- The Court did not lift the testimonial privilege for expert testimony because it believed:
  - “throwing open the door to defamation suits against expert witnesses” will “tend to turn one case into two or more cases (depending on the number of expert witnesses), but also drive up expert witnesses’ fees . . . .”
  - Court screening under Rule 702 “is a better check on the abuses [of expert testimony] than allowing every unsuccessful lawsuit to be turned into two or more lawsuits as the winner goes after the expert witnesses who testified unsuccessfully against him.”

# *MacGregor* – Between The Lines

But:

- *MacGregor* cited no other decision in which a state's highest court had evaluated the public policy behind the application of the absolute privilege to paid expert testimony.



# *MacGregor* – Between The Lines

And:

- In rejecting Dr. MacGregor's argument the federal court commented that "a person who wants a novel ruling of state law should sue in state court rather than federal court."
- Dr. MacGregor's challenge to the testimonial privilege did raise a novel question of Illinois state law.
- Dr. MacGregor could have filed suit in Illinois state court but chose to file suit in federal court instead.

## *MacGregor* – Same Conclusion In Illinois?

Would Illinois courts reach the same conclusion?

Maybe . . . Maybe not

- *MacGregor* reasoned that Rule 702 had led to increased vigilance by courts to “screen out expert testimony that does not satisfy reasonable standards of scientific accuracy.”
- But Rule 702 does not apply in Illinois.

## *MacGregor* – Same Conclusion In Illinois?

- The Court in *MacGregor* was concerned that excepting expert witnesses from the testimonial privilege would allow “every unsuccessful lawsuit to be turned into two or more lawsuits.”
- But Dr. MacGregor had won the malpractice suit at summary judgment - presumably based on a deficiency in Dr. Rutberg’s methodology.

## *MacGregor* – Same Conclusion In Illinois?

- Not every unsuccessful lawsuit fails during summary judgment.
- Not every unsuccessful lawsuit involves a finding that an expert's methodology is deficient.
- The First Amendment would shield experts from defamation claims based on opinions that do not also imply untrue facts.

# *MacGregor* – The Lesson

- Very few states have considered the question raised by Dr. MacGregor.
- Reasonable minds could disagree over whether the public policy of protecting lay witnesses also justifies protecting paid expert witnesses.
- Some courts in some jurisdictions might be receptive to the argument that the testimonial privilege should not apply to experts.

# III. Are Your Credentials Safe?

- Experts' credentials ironically are another source of vulnerability.
- Example: *Bundren v. Parriott*, 2006 WL 1805867 (D. Kan. June 29, 2006).

## *Bundren v. Parriott*

- This case also started with a malpractice claim.
- Both doctors were members of the American College of Obstetricians and Gynecologists (“ACOG”).
- Dr. Bundren previously testified as an expert for the malpractice plaintiffs against Dr. Parriott.
- Dr. Parriott settled the malpractice suit, then filed a complaint with the ACOG against Dr. Bundren.

## *Bundren v. Parriott*

- Dr. Parriott believed Dr. Bundren had violated ACOG ethics requirements to review all the facts and “respond accurately” to questions about the standard of care.
- Dr. Parriott submitted a preprinted ACOG grievance form on which he answered “yes” to the question: “Does the complaint involve a factual misrepresentation and/or perjury on fact-based issues as part of an expert witness’ testimony.”

## *Bundren v. Parriott* - Outcome

- Dr. Bundren had an opportunity to contest Dr. Parriott's grievance – and that probably would not be a public matter.
- Dr. Bundren accused Dr. Parriott of defamation in a federal lawsuit.
- The district court entered summary judgment in favor of Dr. Parriott on alternative grounds including a finding that Dr. Parriott's allegations were “substantially true.”

# *Bundren v. Parriott* – Lessons

- Even a “substantially true” grievance can get you sued.
- Be wary of filing grievances against opposing experts.
- Professional organizations often have rules that apply to testimony in a professional capacity. Know the professional standards that apply to your testimony and the testimony of the other expert(s).
- The National Fire Protection Association does not have standards applicable to expert testimony right now.
- But there is a similar risk: a judicial finding that a fire investigator failed to comply with NFPA 921.

## IV. The Hand that Feeds You

- Suits by the same people who hired the expert.
- The relationship between an expert witness and the party who hires them is essentially contractual.
- What happens when things go wrong?
- *Pace v. Swerdlow*, No. 06-4157 (10<sup>th</sup> Cir. Mar. 4, 2008)

# *Pace v. Swerdlow* - Background

- The plaintiffs in *Pace* had sued the doctors who had treated their daughter.
- The plaintiffs hired Dr. Swerdlow as their expert in the medical malpractice lawsuit.
- Dr. Swerdlow first said that if the plaintiffs' daughter "had been monitored overnight it is very likely that she would be alive today."

# *Pace v. Swerdlow* – The Deposition

- Opposing counsel suggested that Dr. Swerdlow had violated the ethics guidelines of the American Society of Anesthesiologists by not reviewing the deposition transcript of the doctor against whom he was testifying.
- Dr. Swerdlow later agreed that he:
  - should have seen the transcript, and
  - could not state to a reasonable degree of medical probability that the plaintiffs' daughter would have lived had she been admitted to the hospital.

# *Pace v. Swerdlow* – Post Deposition

- After his deposition Dr. Swerdlow:
  - reviewed the transcripts from his deposition and from the depositions of the defendant physicians.
  - “made edits and drafted a two-page ‘Addendum’ to his deposition” which “directly opposed Plaintiffs’ malpractice claims and supported [the defendants’] defense.”
  - did not communicate with the attorneys who hired him.
  - simultaneously submitted his Addendum by facsimile to the attorneys who hired him and to opposing counsel about two weeks prior to the trial setting.

## *Pace v. Swerdlow* – Suit Against Dr. Swerdlow

- The plaintiffs withdrew Dr. Swerdlow as their testifying expert in the malpractice case and eventually lost on a summary judgment motion.
- Plaintiffs did not appeal - Instead they sued Dr. Swerdlow.
- Plaintiffs alleged that Dr. Swerdlow’s “abrupt change of position, on the eve of trial, caused the state court to dismiss their medical malpractice case.”

## *Pace v. Swerdlow* – Dr. Swerdlow's Defenses

- Dr. Swerdlow moved to dismiss:
  - (1) based on the testimonial privilege.
  - (2) arguing that his change of opinion was not the sole ground for the dismissal of the malpractice case.
  - (3) arguing that each of the plaintiffs' claims failed upon other independent grounds.

## *Pace v. Swerdlow* – Round #1 – Dismissed

- Whether the testimonial privilege applied to expert witnesses had not been decided under Utah law.
- So the district court did not address Dr. Swerdlow's argument based on the testimonial privilege.
- The court found that Dr. Swerdlow's change of opinion did not cause the dismissal of the malpractice suit.
- District court dismissed suit against Dr. Swerdlow.

## *Pace v. Swerdlow* – Round #2 – Reversed

- Tenth Circuit reversed that dismissal.
- Held that the district court's causation conclusion was wrong.
- Even then, there would be no reason to reverse IF Dr. Swerdlow was shielded by the testimonial privilege.
- But the Tenth Circuit said that the record was not clear enough to rule on the basis of the testimonial privilege.
- Case was sent back to the district court.

## *Pace v. Swerdlow* – Round #3 – Still Going. . .

- Dr. Swerdlow moved to dismiss the suit again, this time based on witness immunity.
- He asked alternatively that the federal court certify the immunity question to the Utah Supreme Court.
- Briefing on Dr. Swerdlow's motion is scheduled to close on May 16, 2008.

# *Pace v. Swerdlow* Is Not Alone . . .

- *Anesthesia Associates of Topeka, P.A. vs. Diggs*, 99 P.3d 150 (Kan. Ct. App. 2005) (unpublished)
  - Plaintiff sued his expert for failing to “cooperate” and for intentionally interfering with prospective civil action.
  - Plaintiff claimed expert’s testimony (that he had no opinion on causation) conflicted with expert’s statements in an earlier letter.
  - Case dismissed because Kansas does not permit a civil suit against a witness who allegedly commits perjury.
- *Crans vs. Totonelly*, Case No. 08CV463 (Kan. Dist. Ct., Wyandotte County, KS) (Petition filed Feb. 25, 2008) (claims based on expert’s failure to appear for trial).

# V. Good Old Fashioned Exposure

- Remember, courts also can sanction experts where the expert's conduct violates a court order or rule.
- For example: *Doblar v. Unverferth Manufacturing Company*, 185 F. R. D. 258 (D.S.D. 1999) (plaintiff's expert sanctioned for failing to disclose 200+ prior lawsuits in which he had been deposed or testified ).
- Ironically, plaintiff's counsel brought the sanctions motion on themselves by asking the court to publish an Order denying a motion to bar the expert.

## *Doblar v. Unverferth*

- A third party saw the published Order and notified defense counsel of the 200+ matters where the expert had testified.
- Defense counsel investigated and then used that information to impeach the expert at trial.
- After winning at trial defendant moved for sanctions.
- The court sanctioned the expert, modestly, noting that defendant likely won the case due to the expert's non-disclosure.

# *OMI Holdings, Inc. v. Howell*

- Another example: *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274 (Kan. 1996).
- In a prior trial the plaintiff's expert witness had conversations with several members of the jury during recesses while the trial was in progress.
- OMI, the defendant in the prior trial – moved for and was granted a mistrial.
- Then OMI moved for and was denied reimbursement of its attorney's fees in the aborted trial.

# The Outcome In *OMI*

- OMI sued the plaintiff's expert (Howell) for “embracery” arguing that Howell breached his duties to refrain from improper influence of jurors in the prior suit.
- The district court dismissed the suit and OMI appealed.
- The Tenth Circuit affirmed the dismissal on the ground that Kansas has no tort of “embracery.”
- But some states **DO** have a separate tort for embracery (i.e., North Carolina and Georgia).

# **VI. Hope For the Best . . .**

- **What is an expert to do?**

# VI. Hope For the Best . . .

- What is an expert to do?

God grant me the  
serenity to accept the things I cannot change;  
courage to change the things I can;  
and wisdom to know the difference.

-- *Reinhold Niebuhr*

# The Things You Cannot Change

- Nothing can make an expert lawsuit-proof: Anybody can sue anybody for anything.
- As expert testimony becomes more important, those unhappy with an expert's testimony have a greater incentive to sue the expert.

# The Things You Can Change

- Be clear about qualifications and topics within your expertise.
- Make full and accurate disclosures to your clients.
- Use well drafted written engagement agreements.
  
- Always employ proper methods and methodologies.
- Always comply with court orders and instructions.
  
- Consult with insurance agents and advisors regarding possible insurance coverage.
- Experts who testify frequently or otherwise are exposed to significant risk would be well advised to consult with their personal attorney.

# The Wisdom To Know The Difference



# QUESTIONS

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