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Expert Work Parameters & "Taking Sides"

We received a question about "taking sides" and the scope of expert work from an expert witness and asked our expert community to share their experiences, advice, and comments – and boy did they! The original question is below, followed by the responses.

Best wishes,
Meredith

It always seems that when I read over the depositions and other information provided by the attorney who hired me, I find all the facts, clues, discrepancies they need for their case. I am surprised to say that I truly believe no one actually sits down and READS in these lawsuits.

Anyway, I have provided this information to the attorneys to help them in their cases, as well my neutral interpretation/report of what happened, why, how, etc, etc.

But I always ask myself, am I doing the right thing gleaning and giving them the info they need to make their case? Recently, I made a list of contradictions the defendant made in deposition. In a case I'm working on now, I was able to point out that it was the city that had been negligent, not just the homeowner.

While these are all things that the attorney (and his clerks, office, etc) should be doing, they apparently are not. Don't get me wrong--they're thrilled with my work.

Part of me feels that it's my job to help and be a "team player;" part of me thinks it's not my job to do their work for them (in this way). On the other hand, in every case but one (turned out all information had not been provided to me) the information and feedback I've been able to provide has help the attorney settle the case out of court.

Can you give me some guidelines as to what is appropriate and within my bounds as an expert for me to do, and what is too much, crossing the line into "taking sides?"

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Below are the many responses we received to this question from readers of our newsletter.

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This is both a problem and a blessing, it depends on how you view you it and how you bill it. Rest assured most attorneys will be more than happy for any expert to do the heavy lifting for

them and make their case; that is one of the reasons they engage an expert. It is not generally that they studied the evidence carefully and then sifted for the best expert to judge the veracity of the claim, rather, they get a general sense of the case, feel around the substance of the case and based on instinct and economics decide if it feels right to pursue-remember, they are generally not in any way expert in the things they ask you or me to evaluate. They then send it out for (generally) approbation to an expert- sometimes they do not get validation of their impulses and either abandon the case because it is meritless, or seek a different expert that will tell them what they want to hear. That may help them feel better, possibly settle a case when opposing counsel is less informed than they are or risk being very embarrassed in court; in which case this expert may have a dry spell for a while. The truth is, we are a service industry and our service can be the review, advice, testimony or all of them. If you find that this good work you are doing is precluding valuable court time by bringing these cases to settlement, then charge more for the review. Alternatively, you can start with supplying the attorney preliminary findings on the case and see if he has a clue where things are going. If you feel he is looking for you to settle the case for him, let him pay for your time and give him a thorough reportage that will be well compensated. There is nothing wrong with that- he will get what he needs and you will get what you rightly deserve. Staying totally objective is impossible because you have already read the case and all the nuances of it and you know if it has merit in your field or not, but your opinion can and should be objective.

It's real simple, you read the material, form you opinions and share them with the attorney. That should be what the attorney wants from you. He/she doesn't want to be blind-sided. For an expert to stay an expert for a long time, integrity is their most important asset.

In response to the inquiry as to whether an expert should tell the client what they gleen from the file information that he (she) thinks the attorney should be doing, the answer to me is simple. What does the expert think he is being hired for? An expert is a consultant and it is his job and responsibility to advise the client as to his opinions and findings regarding anything in the file that falls within his area of expertise. That would include pointing out errors and contradictions. In my own area of premises security clients want and expect me to assist in any way that does not compromise my position as an expert witness.

While you are supposed to be a "neutral" expert, in fact your job is to give the side which retained you your best opinion(s), and the reasons for them. If part of the basis for your opinions is "contradictions" in testimony from the other side's witnesses, so be it. Remember, in most cases it is your expertise, not that of the attorney or staff, which allows you to draw expert conclusions from such "contradictions".

In my opinion, it is the expert's obligation to communicate whatever they find when reviewing the case to counsel.

I have often found that my technical perspective finds items of interest in transcripts and other discovery material that were not noted as substantive by those without a technical background. On more than one occasion, this information was crucial to the case.

The boundary you can't cross is being an advocate instead of an expert. Advocacy is the lawyer's job. I too find a lot of things the attorneys don't and when I question that I find they have a reason they don't want to go down that road.

I cannot claim any special wisdom in this challenging ethical domain, but your question brought to mind a question I was recently asked in a Federal court. "Why do you do expert work?" It's actually a good way to frame the ethical issue, since the motivation for doing the work is driven, at least in part, by one's moral compass. I answered that I enjoy the small part of my academic life devoted to expert work for three reasons. First, I was trained to do truly definitive evaluations of complex and interesting patients at the borderland between neurology and psychiatry. But, as we all learn the day we finish our fellowships, insurers do not reimburse for the eight hour interviews and examinations such patients require and deserve. Almost the only way to be paid to do comprehensive assessments is medico-legal work. Second, the cases are often genuinely extraordinary: dramatic puzzles of human psychobiology. And third--a factor closley related to the first--expert work is where you get paid a good wage to tell the truth.

That is, I can only relish this work so long as I feel engaged in the truth-seeking quest. So I admonish all the attorneys from the get go: I'm entirely willing to accept your money, but never imagine that I am working for the benefit of your case. I am working, as best as my knowledge allows me, to find the truth and report it, no holds barred. To work with that granite understanding is an intellectual delight. And, despite the fears I've heard others express that they're hamstringing their practice by demanding this understanding with attorneys, I've found that the majority of attorneys (and even more so, judges and jurors) regard this neutral enthusiam for truth-seeking as a refreshing departure from the toxic miasma of expert bias.

Please note, however, that the quest for the truth is not the quest for justice. As much as we care that justice occurs, I'm well aware of the literature warning experts not to think of themselves as makers of a just world. Sometimes truth and justice are two dogs quarelling over a bone. Since I fully acknowledge that my expertise in medicine in no way authorizes me to arbit justice, I settle for the role of the truth-seeking dog, and--sighing at the occasional mismatch between justice and law--let the chips fall where they may.

According to the Federal Rules of Civil Procedure, the purpose of an expert witness is to assist the trier of fact to decide a case by explaining the technical aspects.

It is my position that when an expert is retained, they are a consultant to the hiring attorney. The expert's job is to assist the retaining counsel. In some cases, experts are retained specifically to consult and not to testify.

An expert is "out of bounds" or taking sides when they begin to advocate for the position of the client of their retaining attorney.

This is what i do: what i do is ask them (the hiring entity/client) to define precisely what they want me to do, first verbally and then in written form, and then i do ***only that*** for my fee or my time.

Anything at all beyond this is another job. you are no less a team player for meeting your agreements. this is exactly how "good businessmen" attorneys operate. you be as wise. that's my "2 cents".

Helping my client interpret depositions and other documents is part of my job. I suppose some experts are hired only for their testimony, but that's never been true for me. Indeed, I'm often hired long before anyone is sure a trial or arbitration will occur.

I don't want to be too hard on your friend. It's great to see someone who worries about such ethical issues. But I think he or she may be confusing the role of an expert with the role of a judge or arbitrator. We experts have to tell the truth, and sometimes our testimony hurts our clients. To that extent we are objective. But we're not really neutral, and everyone in the courtroom knows it.

It's never wrong to help your client by pointing out the truth.

An independent consultant (expert) must be just that..."independent." You owe your attorneys and their clients the best that you can provide. That includes both the good news and the bad news. Both pieces of news bolster their case. The good news points out the strengths on which they want to build. The bad news helps them prepare where their case is weak. You may even find that you have to tell them that they have no case. Disappointing to them, but it saves a lot of energy and expense down the road.

Remember that the safest communication with them, especially in the initial stages, is verbal. That gives them the chance to do what they want/need to do without having been saddled with discoverable material.

As to discovering stuff they haven't seen, that's good (as long as they are paying for your time to discover it!) You may see things with a fresh eye (and ear) that somebody missed. You may see things that are obvious to you because of your expertise that they couldn't see at all because they don't have your expertise. And...they may be sloppy, tired, or too busy or focused elsewhere. Always take what you find as an opportunity to educate your attorneys. They will be able to handle their cases much better when they understand the technical detail.

After all your work you probably will end up with opinions that seem to take sides. Your emotions, knowledge, and values will definitely come into play. That's OK. The crossing-the-line point comes in if you forget to remain independent. You sure don't want to introduce elements or opinions that ignore or contradict your expertise just to bolster your emotions. You can get blind sided and/or sound like a hired gun if that happens.

And, good luck. Overall, ain't this a fun gig working with those legal folks!? I know I love it.

When I read info that is not helpful to the attorney that hired me, I call the attorney. I explain the problem and how I would have to testify. I let the attorney make the call. The attorneys like to know the good with the bad. Hopefully, I can provide this insight before they designate me as an expert. That way they can pay me for my work as a consultant and we both go our separate ways. I can usually tell if I can be of help early on. I will not take a case if I disagree with the lawyer hiring me. If I learn too late, I give him the bad news without putting it in writing which would be discoverable. That way they can decide if they need to settle.

There is never too much information, just make sure it is facts.

It seems to me that the attorneys who hired you must have taken the depositions and should know what is contained in them.

On the other hand, as an expert, it is your duty to render unbiased opinions to assist the court. Also, since you are employed by either the plaintiff or the defendant, you must also be somewhat of an advocate for your client. Being an advocate may be adverse to the facts of the case. So as an advocate you must sometimes dance around the obvious facts and search for ways to point out benefits to your client. This sometimes is mind boggling to find positive results for your client or vice-versa. In any case, always tell the truth. Even though it may be detrimental to your client it is the attorneys responsibility to defend his assumed position in regards to the client. It is your responsibility to be truthful in assisting the court with your expertise.

When reading depositions and other materials you will gather facts. You should put these facts in your report to substantiate any opinions and conclusions you will later develop. You will need to put as much information in your report as possible in order to combat a possible "Daubert" challenge. A "Daubert" challenge can restrict experts testimony to ONLY what is contained in his report, therefore if you leave an important fact out you might be doing a disservice to the court and to your client.

My experience as an expert goes back to 1982 and I write about 15 to 20 expert reports per year with one or two actually getting into court. My testimony in Marine cases has stood up in appeals court with a few rulings being significantly reliant upon my opinions and conclusions.

If you feel as if you are being used as a law clerk, perhaps you should consider raising your engineering fee significantly. Revise your fee schedule for work related to legal matters, and date it. Provide all your legal clients with a copy. Your fee structure for legal work should be structured depending on the nature of the assignment. Rates for written reports, depositions and courtroom testimony are typically higher than for researching and defining the problem.

I too, frequently give advice to the hiring lawyer on what I see and read It is a part of the service I perform when hired. The use of the information is always up to the attorney. On occasion the attorney does not like the facts but as an impartial expert, all must be reviewed and reported though it is often done verbally. When I do it in writing I am very careful to be very emotionally distant but clearly factual. I look forward to reading how others respond.

Sounds to me like this expert is just doing his job, and a good one at that. As an attorney and Insurance Law and Claims Expert I can relate to his concerns and perceptions. I think the best service an expert can provide is a clear concise analysis based on the facts of the case as found in depositions and other documents . These are the factual points that form the basis for the experts opinions. Attorneys are not unaware of most of these factors,but need a knowledgeable expert to take the time to review the information and use their expertise to organize and assist the attorney who has other things to worry about as well. Plus you get paid well for providing that assistance.

As an expert, I see myself squarely in the court of team player. The contradictions I find may not be so obvious to the attorneys. They have hired me to help them with their case, and I see the discovery of those contradictions as one of the ways I contribute and demonstrate my value and expertise.

After all, you do want the attorney to feel your services are valuable, don't you?

This is a situation which can lead to bad relations, but I believe 'experts' must keep balance of avoiding bias. This may mean you lose a client. Such clients often are case 'losers' anyway, so you will be better to be rid of them, to avoid being connected to bad cases, or seen as saying anything the client pays for. Prostitution is illegal, but not with experts.

Two examples in my experience:

1. A plaintiff claimed about 400k in damages resulting from a rear ender that made him unable to finish a commercial development. I prevailed with the carrier to send me a couple hundred

miles, and check up on the guy. He was a scofflaw, locally much disliked, and I caught him with a telephoto moving lumber. His case went up in smoke. I was a hero.

2. Same lawyer sent me to another building locally as he was going to sue the neighbor for dumping water in his insured's property. He had already authorized payment. I found the insured was not truthful, and told him the suit was without merit. The insured's building was a couple of feet below the street and has been flooding for decades. I got fired. But I was not associated with bad judgment in a case bound to loose. The claim should have been thoroughly investigated first, not after payment.

Hope this helps. It is better to keep to sound analysis to maintain a reputation that can be damaged in a lot less time than it takes to make it.

Tell "the truth, the whole truth and nothing but the truth." Yea, yea, I know this sounds corny but that is what we have been hired to do.

I believe it is our obligation to advise our clients to the limits of our ability. This includes identifying errors they may have made, errors made by the other side, and errors we may have made. The only caveat is to do some in a responsible manner. As you are surely aware, any document we produce is discoverable, so it's important to keep that in mind when reviewing case materials.

I have developed a form that I use to review materials and do my best to limit my notes to those which trigger or remind me of important points. I do my best to limit the writing down of conclusions or questions which I might raise to opposing counsel.

I have also worked with attorneys who have asked me not to write anything down. I would advise you to establish the grounds at the start of any relationship with an attorney. Once you accept his retainer you owe him (or her) your best. They rely on us to see things from our perspective, one that's independent, insightful and inclusive.

Again, "the truth, the whole truth and nothing but the truth."

We get paid for doing our job, whether or not we think
"... these are all things that the attorney (and his clerks, office, etc) should be doing, they apparently are not."

Sir or Madame: per my article in the October *Trial* magazine ["Closing the Attorney-Expert Gap"], the expert must determine before moving forward with the case: precisely what does the attorney want from him or her? I have some legal background in my field and, during review of documents, usually discover what I see as key points, discrepancies, and directions for the attorney to pursue. I have gone so far as to suggest legal approaches, and cite relevant case law.

This is all very well IF the attorney *wants* the expert's thorough analysis; if the attorney wants only an expert opinion based on the facts, the expert must refrain from "coaching" or "advising" counsel. Even though it may be hard!

Yes, the natural instinct is to provide all possible assistance; however, the expert is NOT a team member, he or she is an independent, objective expert, and should render only the information and expert advice that the attorney wants. During the course of your work, you can always ask the attorney: "Do you want my thoughts [impressions, whatever] on this aspect?"

I have been frequently frustrated when counsel proceeds with discovery without my input; sometimes discovery has been essentially completed. In a current case, at least counsel retained me early on, before he deposed anyone, and I was able to suggest whom to interview and what to ask, and ask for. However, the expert can rarely control how (or how expeditiously) attorneys prosecute their cases.

Finally, these two things: (1) most attorneys are very bright, and have also gleaned the "facts, clues, discrepancies they need for their case" that you see. Your pointing these often serves only to ratify their own conclusions. I typically preface my thoughts with "I'm sure you already know this," or some such, so as not to seem to instruct the attorney. And (2), if your provided information and opinions help attorney settle or prevail in court, you have performed your role. Do not expect attorneys to gush with praise and gratitude; you are the professional expert, not the litigator. Fair payment is your reward; the attorney gets the credit for a positive outcome.

Lawyers are exceedingly busy, failed to take the depositions themselves -- assigning it to young associates who will never try the case -- and since I believe the case will settle and not go to trial they put in as little work as possible.

It is the obligation of an expert to review everything provided to him or her by the client and to evaluate what is received. If an opinion cannot be stated without the additional information required is essential that the expert advise the lawyer who retained him or her of the expert's findings, conclusions, and concerns.

The expert works for the court, even if paid by a lawyer or a party, and it is the expert's duty to assist the court in finding the truth. Keep doing what you're doing.

An expert's role includes educating the retaining attorney/client about all relevant facts and opinions of the case that are within the expert's scope of practice. This includes facts, clues and opinions that may help or hurt the attorney's efforts to win his/her case. This is not taking sides, its doing your job. I suggest that experts fully inform the attorney during pre-retainer discussions how they perform their duty as an expert.

Anything written is discoverable. If you notice key facts that can either help or hurt the retaining attorney, be sure to share to share those with him orally, especially if the facts or observations

are outside of your area of expertise. They will appreciate the information and the "value added" by retaining you. If the facts hurt his case, he may not want a written report from you or to testify, but that is OK and he or she will make the decision.

Your inquiring expert seems to have an inappropriately limited understanding of his or her responsibilities in assisting to analyze and present the case for the attorney and client. The attorney did not provide the documents and depositions for light bedtime reading—they were provided so that the expert could bring his expertise to bear in assessing the opponent's case and preparing his own views of the case with as complete an understanding of the facts as possible.

If he had been appointed by the court, neutrality would be his goal. As an expert hired by a party, objectivity, truth, and some fiduciary responsibility to the client is his job—not to the point of misstating the facts or the science, but to insure that theories and perspectives that assist the client are presented to the court and jury in a persuasive and understandable manner. If the expert reads the depositions and other materials and yet does not advise the attorney for the client of inconsistencies and errors by the opposing expert, one wonders whether he will reduce his rate, since he is doing something like half the job.

Perhaps this particular expert would be more comfortable as a consulting expert (a non-testifying expert adviser to the attorney); testifying experts need to make the lawyers aware of alternative theories, possible challenges, and contradictory facts, so that they can be presented in court and the trier-of-fact can choose how to consider them. If an alternative theory is less popular in the scientific field, the expert can point that out, while also pointing out the ways in which it fits in this particular case. Educating the attorney on the weaknesses and strengths of different approaches is part of the job.

I am surprised with the question. He is an expert in his field, that is why he was retained. When he reads the deposition he reads it with a brain that is loaded with special information acquired over the years through education and experience. Without that information he would not be qualified and not retained. That information is the "expertise" which qualifies him to be the expert witness in the case..

The attorney reads the depositions and information obtained through discovery with the brain of an attorney who is qualified by his education and experience to be an expert at law. He may also have experience in your field because he specializes in cases having to do with your specialty. He may do medical malpractice or insurance cases as a specialty and thus know more than the average person about these fields. But you are the expert.

The bottom line is that 95% of the time the expert knows more than the attorney and when he reads the same material he may see the case in a totally different way than his attorney client. I always tell the attorney to send me all of the material he has received in discovery and not to spoon feed me what he thinks is relevant. More times than not he has misdiagnosed the case.

The way he original described the case to me on the initial call is far from what the case really is. He doesn't know what he doesn't know. That is where the expert's greater knowledge comes in and why it is important to get all of the discovery information shipped to you to review. I have received 5 to 10 boxes of material and I spent hours reading every piece of paper. There are nuggets of information which will help or hurt your attorney client's case. You must tell him the good and the bad so that he knows everything you know after you have reviewed the case. That is why the expert is retained. You have a fiduciary duty, a position of trust and responsibility, which requires you to provide every piece of knowledge you have that applies to the case. To do otherwise is malpractice.

The writer is naive to be surprised that he finds all these "facts, clues and discrepancies they need for their case." That's why he was hired. It is common to find that the attorney client has sued the wrong party or not all the parties due to his lack of understanding of the case. In other cases the expert points out that the attorney's client is negligent and not the defendant. Often the attorney client is told by the expert that he can use the expert as a litigation consultant but not an expert witness who will write a favorable report and testify, because the expert's opinion does not support the attorney's case.

Another point about depositions, many times an associate attorney just out of law school will review depositions and answers to interrogatories and write up a summary of what he thinks are important points. His opinion is often based on no experience in your field of expertise. This analysis is then read by the lead attorney who also has no experience in your field. The lead attorney or the associate calls you to describe what the case is about. More than not they are both wrong. That is why you need to review everything they have before you write your opinion. And when you find they are wrong do not speak with them as if you believe they are dummies. They know they don't have the experience you do. Don't talk down to them or embarrass them. Be patient and polite to them and happy that you can help them. Don't be a smart ass.

To me The Expert Witness' concerns are based on "does he see himself as an Advocate or an impartial Expert?"

In my opinion I am an expert whose job is to research the matter carefully, present accurate findings, and be prepared to answer and support one's conclusions. As a result my retainer agreement says to the effect I am free to come to my findings and that they will not be changed except by further facts that had not been previously released. Thus I think that I am an expert and not an advocate. I was an advocate once in a case, not knowing better, and will never be in that position again.

Tell him to keep up being an Expert and not an advocate. An attorney recently told me that "an expert witness will tell the client things that he might not want to hear but needs to know."

Simple answer - Tell the truth, the whole truth and nothing but the truth. In my twenty years of Expert consulting experience I find that all you have to sell is your integrity and your knowledge - don’t compromise either.

As a retained Expert you become a team player. Part of being a team player is to divulge what is right and what is wrong with the case after you have reviewed the facts. If you feel you need more information ask for it. If the requested information is not made available to you, ask why and based on the quality of the answer you decide whether to continue or withdraw.

Yes, I have withdrawn from Expert assignments.

I too find it difficult to express my opinions fully without sounding biased one way or the other. Help.

You are hired to give your side all the information you can provide.

We routinely find information that to us appears to be right in front of our faces yet has gone un-noticed by all to date.

If you are being paid to work on a case then bill all your time and supply your team with all the (HONEST) information that you can find. Never make up anything and never lie.

The advice that I can offer is this: as a registered professional engineer and licensed home inspector, I am often called upon as an expert witness in many cases. I rely on the oath to uphold the code of ethics that I must take for each license and they are all basically the same. The common thread is upholding the public safety. Therefore, if there is something that I see that could possibly compromise the safety of the public, I am bound to speak up. Once one arms themselves with that mindset, it aids them in deciding what other things should be told to the client. I always try to put on my "Mr. Spock face" (or "Gil Grissom face" for those not old enough to remember the original *Star Trek*) and just state the all items I discover as objectively as I can. This method has served me well. There are no surprises for the client, which helps them to assemble their best case. Furthermore, if one ignores a surprise and it comes to light later, it could fracture the trust in the particular expert.

It is your job as a consultant to point out what ever discrepancies or inconsistencies are present in the records. You are a consultant because you have specialized knowledge that the attorney does not have. Therefore, whether he reads the depositions or medical records or not, you have an obligation to provide information to the attorney from your expert position, warts and all. The attorney needs all information even if you think it does not support his client. A reputable attorney does not want to be sandbagged by the expert from the opposite side who will probably notice the same thing that you did. I have never had anything but appreciations from reputable attorneys when I point out something that may potentially negatively affect their case. They need to know this information. How they deal with this information is not your responsibility. You are a consultant, not an attorney.

You are already "taking sides" if you are working for one side. That doesn't mean you are expected to falsify information, but you are on a team and should do your best in whatever way you can to help them win the case. I find myself working as a detective at least as much as an expert. If I am not sympathetic to my side, I shouldn't sign on as their expert. Of course I know that I can "spin" my expertise in ways that are more or less helpful, and I have to make those ethical decisions myself, and sometimes in motion (e.g., during a deposition).

Some attorneys don't want this help, and will let you know one way or another. It may even be wise to ask ahead of time if they want to hear anything but the expert opinions they hired you for. If they say No, it's their loss but they are paying and have the right to limit our work.

I assume the hiring attorney is paying you for this work. Therefore, is it not your duty to help them as you are able, due to your expertise? Is it "your job" to decide who helps with what aspect of the case? I believe it is the attorney's job and he is asking for your help and expertise.

It seems to me you are giving an honest and fair opinion and pointing out issues that will help (and hurt) with the case at hand. Besides providing expert testimony, isn't this doing what you are hired to do?

Attorneys know the law. In my field, I know nursing, medicine and life care needs. While many attnys are knowledgeable about medicine, often times the "devil is in the details" that can be easily overlooked.

I'd feel great about being a "team player" and do not understand your hesitancy.

I can't agree with you more about your observations regarding case files. However, I look at this issue a little differently and I hope it does not offend anyone reading my comments.

I am hired by the attorney to provide my expert opinion within the scope of my knowledge, expertise and academic preparation. That being said, anyone worth their weight in the "expert" business has life experiences, work experiences etc that lend themselves very nicely in the task at hand. What seems to work very well for me, in reviewing a case, either as an expert or behind the scenes is providing my opinion in two parts.

The first part is the "expert" opinion that is defensible, with all that goes with that part. The second part, is/are all the issues, facts, discrepancies that I've found in the records and files, which I compile to discuss with the attorney. I've found that the majority of observations made are appreciated by the attorney and he/she uses them in the case. I view my role as a detective, in piecing together what happened to whom, why, and what smells fishy or inconsistent, because by doing so, one may identify a potential area to pursue.

With respect to failure to read the case file by the attorney, his staff etc, this issue may be related to the lack of attention to detail that is prevalent in society as a whole. It is not unique to this attorney or firm, however, as the medical/nursing expert, we are not only experts in our respective fields, we HAVE the skill of microscopic attention to details that is absolutely required and can make the analytical connections needed.

Unfortunately few attorneys hire registered nurses to review their health related cases, which has always puzzled me. When I receive a case that the attorney states, "I've reviewed the medical records (like what qualifies him/her to understand the medical record) and I've had a physician review the record and we can't find any problems, but the family is insisting there's a problem" ; my review more times than not, reveals significant deviations from the standard of nursing care. Why this is? Neither the MD nor the attorney is qualified to speak to the standards of nursing practice and do not pick up the subtle hints that the medical record can reveal.

So the long and short of it, is, you are providing a service that can be as complete as you want it to be. But by providing "a little extra," you may find many more cases coming your way, because you are so detailed oriented.

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1. Although elementally neutral, I hold that a large part of my fee is earned for my impeccable attention to detail and my willingness to share all of my observations. That's why I'm being paid. It's my client's responsibility to manage my information and observations .... either use it, or not, where to apply it and to what degree.

2. And having said that, it is often the details, and my communication of the details, that allow me to more easily position myself as the "expert". Details often speak loudly. I then, can speak more softly to the underlying issue. It is much easier to argue a position (or, "persuade" or, educate, if you will) if the details are pointed out within a neutral environment. I to have the experience of avoiding court when reasonable folks lean on arguments I have presented. Especially when supported by minutia.

3. This is my role on this team. Each of us has a unique part to play. And this is mine. Should my work make it easier for my attorney/client to settle out of court, we have done worthwhile and satisfying work.

It has been my 30+ year experience as an expert witness that helping educate counsel as to the strengths, weaknesses, alternative theories or liabilities is part of your role as the expert. Counsel is not an expert in your particular field and is retaining you based on your education, experience, and knowledge gained from other cases that you have served as an expert. Second, provided you are being paid for the consultative nature of your "value added" services then you will always be perceived as a professional. The only qualification that I suggest is that you should communicate these additional items in telephonic or verbal communications versus email or in your reports, as all of this information is discoverable. Often, counsel will advise you how to handle the value added information, want it in your report, and/or keep it close until trial unless directly asked by counsel during a deposition that requires a direct and truthful response.

It seems to me that it's a matter of prudent use of billable time. Professionalism has no place for ego, so as an expert I wouldn't worry about correcting errors I saw, but I wouldn't take advantage of the system and charge up a lot of hours just being a proofreader without asking first.

If the corrections are things that you noticed while doing your research anyway, then pointing them out is essentially a free service (or takes an hour or so extra time). If you had to concentrate on Deposition A and found it full of errors, and thereby assume B and C are as well, but you didn't really have to read them carefully for your own research, then I would think it would be courteous and proper to ask the attorney that hired you if s/he wants you to apply the same scrutiny to B and C. They just might say "yes," in which case you've gotten yourself more paid work. If they say "no," then the errors truly are their responsibility.

And yes, I agree with your general comment, "Does anyone actually read this stuff?" Sadly it seems the answer is often "no."

You are being paid for that type of analysis. So, yes, you should analyze the case for the attorney and his staff. That's why they hire you as an expert - because in the realm of your expertise, they are NOT expert.

I always try to float ideas to my clients about either defending their case or successfully litigating a plaintiff's case.

First, what is the writer's expertise. Second, please welcome him/her to the club.

I have always found that my job as an expert is to provide **all** of the information, good and bad so that the trier of fact can make an informed decision. It doesn't matter to me who has hired me. The information speaks for itself and omitting something that I had found and not disclosing or ignoring it, could come back to bite me and the attorney, especially when one is under oath. There are many times when the attorney or their assistants really do not understand what the point is or what it means to the case. Hence there is a need for the expert to educate them. That is also why we, are the experts in a particular discipline and they are not.

An attorney needs to know all of the information so that they can provide the best possible assistance to their clients. Being surprised and not knowing the answer to a question and its ramifications, could seriously and negatively affect their case and your credibility.

At any rate, I believe you should always tell and where necessary educate the attorney on all the salient points of the case and let them decide what they want to do about it.

My first question for this individual is: is the scope of your engagement activities spelled out in your engagement agreement? If not, the time to define such activities clearly with the potential client is before an engagement agreement is executed. A "catch-all" phrase regarding engagements activities may be a final sentence regarding the assignment: "And such other activities as may be requested by client."

The answer is "YES!" -- help those attorneys out all you can (and make sure you get paid for your time.) If an attorney spends hours taking a deposition, why would he go back to read the transcript? He's got his notes. Of course you may see things the attorney missed during the deposition, but for an attorney it probably feels like a inefficient use of limited time to revisit a deposition. I sometimes go as far as preparing questions I'd like to see answered in deposition, especially by opposing experts. After nearly 30 years of experting, I personally feel like attorneys benefit from hearing a range of ideas. I'll even tell them (privately) opinions in areas where I have expertise but haven't been hired to cover that particular topic (for example, talking about injury mechanisms when I've been hired to do reconstruction. Of course, I wouldn't say a word to the other side about my opinions outside the area where I've been hired to testify.) I tell attorneys what I know about opposing experts and help them locate pertinent publications or depositions by those opposing experts or their colleagues.

I used to assume that attorneys knew all about their cases and knew what they were doing. I don't assume that anymore. Some do know their cases inside-out, most don't, some only think they do. Often they're too harried to keep track of everything. I offer my thoughts and help. They're free to use it or not. It's their case.

I think that a major part of the job is to be a "consultant" to the attorney involved with the case, particularly in areas where s/he has limited knowledge. As an expert, you have insights that the attorney may well lack in addition to which you are a fresh pair of eyes. While it is important to be objective as a witness, the expert needs to provide input such as weaknesses in both sides of a case, theories or approaches that the retaining attorney may not have considered. The attorney may need help in determining how to conduct his cross-examination of the opposing expert. In most cases, there are going to be two divergent opinions from the experts, so providing this kind of help to the attorney can help to bolster your opinion at the expense of the opposition.

I think that many, if not most, experts are really advocates at heart which makes it very difficult to stay out of the fray.

I believe (and have probably read in many places) that an expert should not be an advocate for one side or the other, but should be a forceful advocate for his/her opinion. The reality is that if an expert's opinion is not helpful to the retaining attorney, that opinion will (probably) never see the light of day. Thus the expert and the retaining attorney are (or will) ultimately on the same side; and as a forceful advocate for your opinion, you may be the best person to identify the flaws in the other side's arguments. As long as you are true to your opinion, I don't believe you are "taking sides." Rather you are properly advocating for your opinion and are, I hope, being properly compensated for your time while doing so.

I believe that it all depends on the terms of the engagement letter. I am often retained as a consulting expert at the beginning of a case. My engagement letter states that I will review depositions, financial information and other documents and assist the attorney with the preparation of interrogatories and trial strategy. As a financial analyst, I look at things differently from attorneys. Everything that I read has to make sense or it becomes suspect and lands on a list for additional follow up. Oftentimes the attorney can explain the discrepancies to my satisfaction; other times I have discovered items that attorneys and paralegals have not noticed because they have made assumptions that I have not made.

The danger in my approach materializes if my role changes from a consulting expert to a testifying expert where everything that I have done is discoverable. The attorney must then decide whether my consulting role is so valuable that another expert should be retained as a testifying expert or whether discovery of my work is not harmful to the case.

I believe that any analyst who looks at documents with "blinders" on, ignoring discrepancies because they are not part of the essential ingredients of a testimony is NOT a competent expert. I point out everything that I find whether it helps or hurts the retaining attorney's case. Perhaps my years as a consultant forces me to ask the hard questions that are often ignored by others. We must never be afraid to say "I do not understand this; please explain it to me".

Trial advocacy is the purview of the attorney, not the expert. Nevertheless, to intentionally overlook or ignore glaring facts that have a bearing on a case, in my opinion, borders on malpractice. One does not have to be a "team player" to do what is right.

That's my two cents!

I am lawyer as well as an expert witness. It sounds to me like the writer is being an excellent expert.

Although the question is asked in terms of "what is too much, crossing the line into taking sides", I think the answer hinges on two other issues: (a) be sure that the work you are doing is understood by the lawyer to be within the scope of your assignment (so they are happy and you get paid); (2) use a neutral tone in your analysis. For example when finding inconsistencies one could write either "the scum bag lied again" or "testimony A does not match fact B." The former damages an expert's credibility, the latter does not.

If one does work within the scope of the assignment and uses a neutral tone, one is not doing too much and is not crossing the line.

It seems to me that an expert has more than just the role of a testifier to perform, and more than the role of independent report writer. One other reason you are hired is to assist counsel by bringing your subject matter / industry expertise to bear on the facts of the case, so it may not be that you are doing the work that you believe your counsel should be doing, but that you are finding things based on your specialized knowledge that they are not recognizing.

And let's face it, each side in a dispute hires an expert, so while you may be independent, your opinions support your client's view of the case, otherwise, you would not be hired.

I suggest you keep on doing what you are doing, keeping your independence while at the same time adding value for your clients.

Dear "team player" -

My opinion on your commentary is that it is not the job of an expert to become involved in the case beyond his/her own level of expertise. If something in your own or an opposing expert's deposition (opposing expert in your own field) merits consideration, then it is very much an your job to comment on that. Outside of that, it is not appropriate or proper. And, actually, according to the "law of unintended consequences" this could be damaging to the client's case in a number of ways:

1. Your extra participation could be discovered and used to impugn your testimony, thereby robbing the client of some of the value that was supposed to come from your testimony.
2. The attorney might rely upon you instead of his own staff, and this could cause an unforseen problem.
3. Something that seems relevant when you call attention to it may prove to be a problem later on, and would have been better left alone.

My view is that an expert should stick to his/her expertise, and let the attorney and his/her office do the same. Our best contribution is to do our best in our own field, and our time should be spent on improving our own skills in that field.

I do not intend this to be critical. Clearly your goal is a lofty one, but I do think my comments are on target.

Assuming that you are billing (and you should) for the time spent reviewing information provided by the attorneys, it seems to me that you should bring to their attention anything you think impacts the case. The more useful of these thoughts would also be documented in your expert report.

If the attorneys or their clerks had the expertise required to see things as you do, what would they need you for? If the answer to this question is simply that you are paid to testify on their behalf as someone with the right set of credentials, then clearly the client could do better elsewhere. Moreover, most cases are settled before going to trial, so it is the up-front work by a

team of attorneys and experts that usually decides the outcome. So, if I were an attorney, I would be looking for experts who will read, interact, and disclose their thoughts as they review information.

One final thought. Is it possible that the information provided to experts by attorneys has been already reviewed, and selectively provided so that the expert comes to the "right" conclusion on his own?

I can only speak to this issue by my experience and what I have done and what I will do.

First, when retained by counsel I view my role as being a consultant UNTIL I am declared to the court as an "expert witness". The good news is that there is an obligation to "pick a side", namely, the attorney that hired you. You are getting paid as a consultant to provide information FOR your sponsor/employer. My duty and allegiance is to the facts and truth, which may help or hurt my sponsor/employer. The bad news is that everything you find and write down is discoverable. At this time I stay away from opinions.

Second, once I am declared to the court that I am an "expert witness", my duty and allegiance are still to the facts and truths but now these truths and facts belong no only to the attorney that retained but also to the court.

Third, somewhere in the process of going from consultant to expert witness, I determine exactly what the assignment is regarding opinions. The opinions I formulate, which must be within my area of expertise, will be available not only to the attorney that hired me, but also to the court. When the attorney that retained me understands what my opinions are, he/she may decide not to use me any further in the case. Truths and facts are exactly that: truths and facts. I have no control over the facts and truths that serve as a basis of my opinions and my opinions are independent of the person (or side) that retained me.

Fourth, as I begin reviewing information for a case for which ultimately I am going to formulate opinions, I have no idea what facts and truths are going to be important to my opinion(s). So I obtain as much information that is necessary to formulate those opinions. I do not review all of the facts of the case, on those for which my professional experience and judgment tells me are important for me to formulate opinions. Consequently, I may find information that may be contradictory and I have an obligation to resolve any contradictions that I find because they may be important to the foundation of my opinions. If what I find, contradictions, inconsistencies etc., are helpful to the attorney that retained me but do not affect my opinion, then so be it. My focus is on providing opinions within my area of expertise that are defensible. I avoid situations where I discover a known inconsistency that I cannot resolve or explain, whether or not those inconsistencies or directly related to my opinions. Once resolved, an inconsistency may affect my opinion, but I won't know that until it is resolved. The picture from which I derive my opinions has to make sense to me.

This is an excellent question, and is one that we do (and should) struggle with all the time. Really what this problem is is a blurring of the lines between an objective (potentially testifying)

expert and an advocacy-based consultant. While in theory the different roles of expert and consultant is something we can conceptually separate, in practice this can be challenging to accomplish.

The problem usually manifests when we are undertaking our role as an objective evaluator, and either: 1) we run across information (outside the scope of our evaluation) that could have a significant bearing on the litigation; or 2) we are asked by the attorney to "help out" with some consultant-type tasks that are outside the scope of our evaluation. It is easy to understand why the attorney would want to use us for such a role - we already know the case, and likely have the answers to the questions. The problem for us (and the attorney) lies in the biasing effect of functioning as part of the "litigation team."

A general rule of thumb that I use (and teach to my students), is that once the expert has performed an advocacy-based consultation service, the expert cannot then function as an objective expert -- once the advocacy bell rings, it cannot be unrung. Our objectivity (or appearance thereof) will have been compromised, and we could be eviscerated by competent opposing counsel in a deposition or at trial.

What the expert who posed the question appears to be doing is advocacy-based consultation (that should be able to be completed by competent counsel, as it does not appear to be related to particular expertise). In the example, unless the evaluation itself called for an assessment of memory functioning of the defendant or an assessment of exaggeration/symptom magnification, going through a deposition transcript to find inconsistencies appears to be an advocacy-based function.

That said, there is little chance of harm in suggesting to counsel that he/she closely examine the deposition transcript of the defendant, as you found a number of inconsistencies when reviewing the information. Similarly, in one's report the issue of shared liability with the city could be gently broached (if relevant to the report), or a comment about other potentially liable parties could be made. The challenge is when to stop. Providing a suggestion or a clue is one thing - doing the work for the attorney is something completely different. In the expert's inquiry, it appears the expert had crossed the line and was doing the attorney's advocacy-based work for him/her. To then try to portray oneself as an objective expert after undertaking such a task is ethically questionable.

I am reminded of the story about the gentleman who stops to pick up a hitch-hiker. As they continue to travel together they come up to an intersection. After coming to a stop the gentleman starts forward and just as he gets to the middle of the intersection a large tractor trailer hauling 80,000 pounds of steel slams into the passenger side of the car and instantly kills both the gentleman and his hitch-hiker passenger.

As their spirits ascended towards heaven together, the gentleman exclaimed with shock that he couldn't believe that the truck seemed to come out of nowhere. The hitch-hiker responded that

if the gentleman had not be talking on his cell phone he might have noticed that the truck was bearing down on them at a high rate of speed because he (the hitch-hiker) had certainly seen the truck coming at them. With great surprise the gentleman immediately asked why the hitch-hiker had failed to inform him of this very important fact. To which the hitch-hiker responded, "You never asked me about it."

Experts get paid for information whether it is the good news or the bad news. If you intend to bill the client for your services you owe the client the full measure of your effort and ability. How would you feel if your mechanic failed to disclose a malfunction in your brakes observed when changing your oil?

I am a member of the Forensic Engineering Practice Committee of the Technical Council on Forensic Engineering of the American Society of Civil Engineers (and as I've noted in other responses, a practicing attorney). The Committee's publication is "Guidelines for Forensic Engineering Practice" (available from ASCE - currently in "re-write" with the next edition likely available in 2010).

The Guidelines address the issue raised by your expert's inquiry. Generally speaking it is the role of the expert to provide knowledgeable opinion testimony without bias or prejudice on the matters presented to him or to her, and not to be an advocate for one side or the other.

Admittedly that is difficult when the retaining attorney is inexperienced and does not "ask the right questions," "does not follow-up during deposition," "does not draft adequate written discovery," or "misuses the work product of his own expert." The Guidelines, nevertheless, based on the ethical imperatives of the Canons of Ethics of ASCE or NSPE, or most other Professional Engineering Societies, requires that you do your work without being an advocate.

It may be that you cannot adequately articulate your position without stating, "you need to get me more information, you need to ask this in written discovery, or ask this when deposing witness A," and so forth. But you are in the domain of the lawyer, and you have operate within his boundaries and ground rules. Do not be surprised to have your offer spurned. When I lecture other experts, I tell them that the most difficult part of going to trial is getting the attorney to tell you what the first 10 questions will be. Attorneys, and particularly trial attorneys are strange people.

Now on the other hand, as a practicing attorney, I want to know everything you know or opine on the matters at hand, and to the extent you can help me fashion discovery, help me fashion cross examination of the other expert for deposition and trial, to the extent you can assist me by pointing out "the errors of my ways," I'm a bottomless pit. Pour it on. I can't get enough. I've been working on this case for years, invested a lot of time and money, and will try the case over the course of a week or two. That's my only opportunity to convince the trier of fact to find in

favor of my client, and anything you can provide that can improve my chances of success is greatfully accepted. That's my function as a lawyer - find a way to win (lawfully and ethically; but the Canons of Ethics I live by as a lawyer are very different than those I live by as a Forensic Engineer).

It is just this sort of information that the expert is getting paid to find. The more experienced and expert you are, the more likely you are too frequently find yourself analyzing the case as a whole. Unfortunately, you get to see the errors and omissions. I charge by the hour for my time and point these aspects of the case out as part of my analysis of the case. Usually this makes you even more valuable as an expert because you are making money for your client. The attorneys who can play in a collegial sandbox will love you and recommend you to their friends and colleagues. I also phrase the suggestions as a question . ie: "I was curious about the city's negligence in ignoring this warning". The attorney will then say something along the line that the city is exempt from a lawsuit or they considered it but decided the standard of proof was too high, etc. Or, I might say, "I had a lawsuit very similar to this in the past where they decided to look at the city's role instead of the individual's role in the negligence." In many cases they go back and amend the lawsuit. You made them think you are a genius or a superb professional scholar and they get to take credit. Some attorneys will give you the credit with their colleagues and tell their friends to hire you and listen to what you have to say about the case. I have a long list of clients who rehire me over and over again because of my ability to see the greater issues and how we accomplish settling this case to their benefit. You will also encounter attorneys who never heard of collegial discussion and feel that their genius was insulted.

On my part, I never work for an attorney again who cannot treat me as a member of the problem solving team because they don't value me for my knowledge but rather internally feel they have hired a mouthpiece. That attitude on their part means that if the case goes south, I become the wolf meat. In summation, you are hired for and valued for that ability to see the big picture and to bring it to the team. Unfortunately, it also means that you get to see which lawyers are sloppy or shortsighted or just plain phoning it in. A real professional with his client's best interest at heart, will really value you and your input.

It is appropriate for you to comb through and look for discrepancies, etc. in terms of what is relevant to your own task/discipline. In other words, analyzing the opposing expert's credentials, professional practice, report, etc. You could also note discrepancies that affect YOUR work (e.g., if physician doing IME gives two conflicting sets of restrictions - you'd need that cleared up as a vocational expert). Anything else and I think you've crossed the line, not to mention that you should only be billing for the job you were assigned to do. Quite honestly, I don't even think it advisable to think of yourself as a "team player." You are hired to give your honest analysis and that's it. "Team player" suggests bias or lack of objectivity.

Regarding the confused expert witness who writes below, I have three thoughts. First, helping the retaining attorney is the role of the expert witness. An expert witness wouldn't be hired if he chose to harass the attorney. In addition, going the extra mile for the attorney often leads to

billable hours that wouldn't be there if the expert witness chose just to answer questions and to not "help" the attorney.

Second, an expert witness often has insight into the case that will assist the attorney make his case. That insight is usually greater than that of the attorney. An attorney may choose to accept or reject insight from the expert witness. If the attorney routinely rejects all offers to provide insight, then the expert witness may choose to back off. But, not until then.

Third, most cases settle out of court. But, they don't settle until all the work is done. That means that they settle after most of the depositions are taken and expert reports are written and submitted. Attorney and author Steve Babitsky reports that 20-to-30 years ago, perhaps half of all cases proceeded to court, but today, less than five percent of cases proceed to court. Over 95 percent of cases settle prior to trial.

Learn what you learn, spend all the time that is required, get information from the files and other sources (sometimes we get a lot of latitude concerning research) and then ask retaining counsel if they would like to know about things you have learned that may not be directly pertinent to forming your opinion It is possible, and even likely with larger firms where attorneys obtain assistance from associates, interns and paralegals, that the attorneys know more than you realize, and may find your input unwelcome or even annoying. If so, they'll get over it, and you will know your boundaries.

After over 21 years, I have finally determined that the deposition is for "discovery" by the opposing council. If they don't ask you don't have to tell them! What they miss is their problem. Also any corrections should be made to your answers only i.e. what you said. Sometimes I check with my client attorney to determine if he wants me to explain things to the other side during my depo answerers. That is their call. If they plan to go to trial they usually do not want to reveal all information. If they think they can settle out of court they may have some other thoughts.

Essentially, the deposition is for the opposing council to discover what you are going to say at trial. If they don't ask the right questions, that is their problem.

As expert witness, you do the best you can to help identify the deficits in the Standard of Care. If the standard of care has not been followed and you find the deficits it is your responsibility to provide a complete work product, this is what you are paid to do. Do don't feel bad just do your job and stay within the ethical guidelines and everything will be ok.

In my opinion, a true expert witness CANNOT be an advocate for either side, but must be a presenter of provable facts, be they from scientific research or based on qualified experience. I read depositions in this frame of mind. IF ASKED by the attorney of the side who is paying me to prepare questions he/she might ask either at deposition or trial, I prepare such questions, or if further documentation can assist me in my role as an expert, I present this for consideration to the attorney. I am never a "team player", since I feel by assuming that role, I become an advocate.

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1) We work in an adversarial system, therefore, by being hired, you have already taken a side..... which is not to say that you then must perjure yourself, or anything like that. Just that you are retained to help your client in any legal ways that you can. You are not hired to help the other side. Before you object to strongly to this statement, consider, when in deposition yourself, or on the stand, do you blurt out voluntarily with all the bad points of your clients case?? Your role is to be objective when reviewing the evidence, NOT in presenting your opinions. You answer the questions as directly as possible regarding the bad points, you volunteer the good points, or the mitigating factors to the bad points.

2) While you might think you are doing the attorney's work for them, what you are really doing is applying your expertise to finding the inconsistencies. Therefore, you are doing the work you are hired to do.

3) If the client has not asked you to not do this, then there are no problems.

4) In the end, you are only making suggestions, it is still up to the client which suggestions are pursued, and which are not. Further, if you have helped to settle the case, you have performed appropriately in the ultimate role for which you were hired.

To my mind, what you have described is proper behavior of "Consultant first, (testifying) expert second".

If the discrepancies were discovered using your experience and training as an expert, then I would consider what you're doing as a normal part of the work that you've been asked to do in forming opinions and writing reports. If the discrepancies are outside your area of expertise, but something the lawyers should know, such as legal conclusions, then I would consider any advice on those discrepancies to be purely optional. If you happen to notice something, fine. But don't waste the client's time and money hunting for it.

That said, I try to keep such conversations about topics outside of my area of expertise to a minimum with the lawyers. It is too easy for me to slip into the role of an advocate when doing that. It's the lawyer's job to be the advocate. My job is to weigh the evidence and form opinions within my area of expertise, even if I reach a conclusion that goes against the client. Better they hear it from me than from a jury.

In a nutshell: you provide what you asked for by the attorney who pays your fee. The other insights are provided to the opposing attorney in answer to his questions. Your expression of those other insights may become influenced by the attorney you work for and you have to wrestle with the different way to express yourself. Spin takes on many forms. When the jury gets to decide then they figure out what happened with your help.

In my experience lawyers read and listen to deposition very attentively and seldom skip a opportunity to capitalize on the treasures they find.

Let this note reference the final question an expert recently posed to you in re.: "Can you give me some guidelines as to what is appropriate and within my bounds as an expert for me to do, and what is too much, crossing the line into "taking sides?"

The very instant anyone accepts an engagement known to result in the potential designation as an expert, whether they like it or realize it, they have "taken sides," nearly by definition. Only the naïve would believe differently. Perhaps the intended question has to do with the line that separates acts of partiality and impartiality or that separates candor from deceit. Most adults are able to understand these lines, but there are shades of gray to every topic that litigates: otherwise there would be no need for experts and little need for litigation!

A consultant is a servant with relevant and credible training, experience, and information (presumably) with the ability to analyze facts and situations, applying known and conventional standards to actual or hypothetical events and who generally is compensated for each hour of effort. An expert is that same consultant who becomes designated by an attorney for the purpose of advancing someone else's legal battle another step closer to the courtroom. A consultant with the willingness and expectation of becoming a designated expert is retained for the purpose of assisting an attorney (usually the client) to determine the strengths ***and weaknesses*** of the attorney's client's technical bases.

Using the foregoing lens, it becomes easier to see whether the service activities contemplated are appropriate, either as the consultant or as the designated expert. These service activities may be very different before and after designation, and to a large extent determined by the attorney's instructions and timing. Prior to the "designation of experts" the consultant needs to determine the goals of the attorney: whether the attorney expects the case to proceed to deposition and if so, to trial, whether he or she expects that the consultant may become designated, if and how deeply he or she desires the consultant to examine the evidence and deposition record of testimony and exhibits now existing, and whether he or she wants the consultant to size up or describe the pros and cons of the technical facts of the case from the point of view of each litigant. At trial, the attorney is best served by having an expert fully conversant with all of the information. Every trial attorney wants strongly supported testimony

from a credible expert. The rub is whether the case the attorney wants to put on is worth the time and money associated with the analysis. So, often the scope and magnitude of the consultant's work is framed by the value of the case: that is how much money is ultimately at stake. (Attorneys usually do not authorize $50,000 worth of consultant or expert work on a $100,000 claim, for example.) It is probably a valid presumption that if the attorney-client provides evidence or documents, there is an unsaid expectation the expert is authorized to and will read them and verbally report relevant and noteworthy facts gathered. But why leave this as a presumption? ASK the attorney-client! If the investigation leads to tentative conclusions, the consultant should tell the attorney, fully characterizing all sides of the various arguments and facts developed. If the attorney has a complete understanding of tentative opinions of the consultant, he or she will be fully prepared for (some might say 'completely warned' about) designating or not designating the consultant as an expert in the case. If those disclosures and tentative conclusions help the attorney see more of the pitfalls of the client's case, or frame the sides of the case more clearly, you must believe he or she will discuss the case with the client and possibly revise the goals, objectives, strategies, and direction of the case. He or she may decide that the tentative conclusions are either key to or irrelevant for the case. He or she may choose to utilize your services as an undesignated consultant through the pendency of the case, and have you continue in your investigation, if it has particular relevance. He may designate the consultant out of an abundance of caution, believing the case will never try. The attorney is in control, not the expert-nee-consultant!

What is relevant to the consultant or expert may or may not be relevant to the retaining attorney or his or her case. It is the arrogant expert who presumes the case rises and falls with his or her work product or testimony. The attorney's challenge is to apply the law to the facts of the case and convince the Trier-of-fact of the superiority of the client's case using the law and contracts and assembling other relevant information and testimony; this is ***not*** the expert's job. The consultant should frame the relevant technical facts of the case using the technical knowledge and principles he knows (which ultimately qualify him or her as an expert anyway) so the attorney better recognizes and understands the facts relevant to that expert's retention, the gray areas, and the flaws, contradictions, and areas of impeachment in the approach of opposing experts who may not be as ethically constrained. The expert should proceed to serve the attorney only if he believes the attorney was advised of enough of the expert's opinions and their basis, and the host of things that may change those opinions, if any. This is because more facts will surely come out through the legal process. The expert should identify the bright line facts and the gray areas of technology and be prepared to adopt a genuinely held core opinion that he can hold to through trial, barring the unforeseen or unforeseeable.

The question ***really*** asked by this expert contains its own self evident flaws by failing to differentiate self serving from client serving, by interposing the "too much work" question with the completely unrelated "taking sides" question. The attorney needs to state his or her desired scope of investigation and provide guidance about the level of effort and the degree of confidence that should arise from the investigation expected from the expert: the expert needs to buy into the attorney's objectives or present alternate ones that are more realistic. Some basis of agreement between the attorney and expert must be established to define the "too

much work" question. How doing "too much work" relates to "taking sides" is in the eye of the questioner, but defies logic or reality. "Taking sides" suggest advocating a position for a client that the expert may or may not believe, for money, fame, prestige, or some other benefit. This form of "Taking sides" is clearly unethical. However "taking sides" with positions you hold or have developed based upon your own analysis and clear thinking, and consistent with your own prior testimony and beliefs held, based upon factual, authoritative and supporting material is neither client advocacy, nor unethical. It is good expert work. It is simply advancing your own opinion in a clear, concise, believable and credible manner with sound basis. If the expert works hard finding more facts to support or refute his core opinion, it only makes his analysis and testimony more credible, hardly rising to the point of an ethical dilemma. If the expert developed and owns the conclusions, it is hardly advocating the position of others: it is the pure essence of "expert work" and of which the expert should be proud.

The answer is in "**The Top Five Mistakes Expert Witnesses Make**" you sent us long time ago.

MISTAKE #5
Sounding too much like an "expert."

"*Everyone is an expert, only on different subjects." So, they may not be experts in the same field as you, or as each other, and they certainly may not have the same level of education or letters after their names, like C.P.A., J.D., or PhD. for example, but they ARE experts in what they do*.

Tell him:

You have to assume that they are looking for other things than what you are looking for when reading documents. Obviously, you are an expert in your field and therefore can discover in the documents items which other experts don't find. Good for you. You are an expert but read the title of MISTAKE #5.

The lawyers responsibility to their client is to tell them, "how to do what they want done." The expert's responsibility to their client is to tell them, "how to do what they want done." Sometimes, in both cases, the client's objective is not attainable. The lawyer and the expert both have to advise their respective clients accordingly.

I don't see pointing out discrepancies as "taking sides". As long as you are presenting the facts you find in the case in a neutral way, I see no problem. It takes a village to raise a child and it takes a team to resolve a case. It is always helpful to point out things that may be detrimental to the case too so that the attorney can research the issue and find out if it is valid and then prepare to address it.

It sounds to me, based on 28 years of expert experience, that this expert is doing exactly what an expert should do. While lawyers may not read depositions cover to cover, bear in mind that the attorney who took the deposition has already heard the deponent's answers orally, and may have made mental or written notes on it.

The law firm's clerks and support staff are not paid to make analyses and format expert opinions; that's the expert's job. They typically would not read through voluminous documentation, but might index it for later easy reference.

If this expert is encountering attorneys who are unprepared (e.g., not seeming aware of a witness's contradictions), this is something to bring to their attention as diplomatically as possible, by pointing out the downside risk of relying entirely on expert analysis and testimony. Every case has fact witnesses and legal argument, too. An expert can help by offering to write deposition or trial questions for the other side's witnesses; most attorneys welcome this type of pro-active support.

Since the attorneys are "thrilled" with this expert's work, I would say, "If it ain't broke, don't fix it."

Law firms have their own personalities. Some, typically small, do not have the resources to even understand what they are reading, others have their own ideas of the case and will ignore your opinion. You have to become skilled in gleaning their interest in the global picture and those who are simply interested in answering the particular question that supports whatever facts they are trying to establish. It's tricky. I generally ask if they would like a more global assessment but pay attention to the hours you'll spend and whether or not you'll be paid to expand on the core issue on which you were asked to opine.

Also, reading the motions will help give a feeling about what they are asking you to do. Some will be so vague as to give you a license to peruse the file, others are very specific about what they expect and want you to find.

It is certainly intellectual "candy" to do a more comprehensive report but it is not always appreciated, or needed. And, after all, it is the client that is paying the bill so keep their best interests at the top. It is also worth noting that the more you drift from the central points the more exposed you are to opposing counsel attempts to diminish your opinion by finding flaws in your expanded report. Not too pleasant in a deposition to say nothing of a waste of time to answer questions about your opinions on facts not central to the case at hand.

The true expert's job is to tell the whole truth. If facts become evident in the course of working up a case that are material to issues in the suit, it should be the expert's duty to fully disclose all matters upon which the expert opinion is based. All things that should fairly be considered to reach a complete understanding of the case should be disclosed by the expert, with nothing held back.

Playing hide the ball or allowing an attorney to cherry-pick facts and issues from the expert's work does not serve either the attorney for whom the expert works, nor the larger issue of finding a right result for the case.

The expert that takes on an advocate's role for one side or the other in the preparation of their report prostitutes their expertise. Playing stupid games should be restricted to attorneys and the use to which they put all the information. Experts are not involved in the contest and should remain above the fray.

The expert who actively plays hide the ball (or tries to play hide the salami) on her own account or at the direction of the attorney employing them is simply not ethical. For them, some level of hell awaits, or more immediately, if they're caught, the shit-hammer of the court system should descend quickly.

This expert has had good experiences being forthright and fair. Hence: a great example for experts. Keep up the good work.

While I believe that at all times an expert needs to maintain objectivity, I as an expert will

1. Ask the attorney what question(s) they want answered or on what aspects they need my opinion(s)
2. Respond to the task given to me by the attorney
3. If there are aspects (within my area of expertise) of the case seemingly ignored by the attorney I will mention them

Item 3 will either be ignored by the attorney or accepted and acted upon. If acted on I may see my roll expand. Having said all this I don't couch my opinions as to what the attorney would like to hear. I either support the position or I don't.

An expert's job is not to "make the case." It is the expert's job to apply all aspects of the expertise possessed to the case. It might be within the task assigned and it might not be. A professional will fully and completely apply their expertise however.

Keep in mind that as an expert, you are a friend of the court, not your side in the case. You are hired in order to give instruction, which is exactly what you are doing. Your job is to get to the truth, albeit one way or the other. Sometimes it's the other. By providing analysis and information to your attorney to allow the case to settle faster, or at all, you are a valuable asset to the court and jury system. Besides, that is also the reason why YOU are making more than the attorney per hour in most instances, just in case anybody asks. That's why you're worth it. I cannot count how many times I have pointed out what seemed to me to be the obvious, only to find that no one noticed. That's because the attorneys often times delegate too much to associates who don't have either the experience or perspective. Keep doing what you are doing and you are serving the system in the best possible way by reducing cases and costs. The icing on the cake is that your reputation will flourish.

I believe it is our duty to provide our clients with our complete analysis of a case, within the boundaries of our expertise, whether it is good or bad news for the client. That's what they pay us for.

If your clients like your work and they are paying you for your time, why are you troubled? You "attack of conscience" makes no sense. You are the expert, and you read the Depositions with a trained eye which the attorney and his/her staff do not have. When you read a passage in a Deposition, it may have a special meaning for you since, as an expert, you can truly realize the implications of what was said. And that is why they are paying you to read the Depositions and make heads and tails out of what has been said.

As an aside, you may want to offer to your clients to write-up questions which you would liked to have asked of the witnesses. Often, I am frustrated on the lack of relevant data which could have been secured during a Deposition, but was not.

In my view, there is a very fine line between being a retained expert for one side of a dispute and becoming an advocate for that party's position. The expert should stay on the retained expert side of the line, and the attorney should not entice him or her across the demilitarized zone, because the great risk is that the expert's objectivity and then credibility are seriously in question.

How to avoid it? Be very clear in the scope of the assignment, and get it in writing, and map it out and stay there. Don't stray. If other issues come up, or areas of doubt or that are uncharted, as in the question, stop and consult with the attorney and see if the scope of work should be changed. Then, if so, the attorney needs either to decide to dedesignate and use the expert as a consultant, and hire another testifying expert...assuming time and docket control orders permit...or, fall back position, cover it in the report and on direct by asking the expert if during his or her due diligence were additional elements, issues, questions, and so forth discovered that broadened the initial scope of work, how so, what were they, how do they play into the expert's opinions or findings, and so forth.

I have had this come up only once, so others may have a much better idea about how to handle the matter. But, the bottom line is if the expert can demonstrate the logic trail that led him or her to the new areas, and how that became a part of the methodology, AND it is brought out first by the offering attorney, rather than on cross for the first time, then credibility and objectivity issues should be okay.

In my opinion, if you're being paid to review the depo, you should provide whatever information you glean from it. What's the point of holding it back?

I am a medical expert and find that what you are asking is the rule and not the exception.

I look at it this way. My job is to give the court the best and most expert opinion that I can give, the best neutral opinion.

I am also under the obligation by my societies to which I belong to provide a complete and unbiased and ethical assessment of the information given to me.

Therefore if you or I are given the information to read and form opinions on I find it an obligation to provide my assessment of all the information, in my case within the medical records provided to me.

I am also paid by the requesting attorney depending on the amount of material and sometimes given more and sometimes less instructions as to the scope of my review and therefore despite a more all-inclusive set of opinions that I may have, the request is to a specific part of that record.

It is not infrequent that I find information not discovered by either attorney or felt not to be important and I make my opinion known as to what the full impact of that information could be in terms of the big picture of the case.

You asked a good question and I hope this answers part of your question.

There is a line between an expert witness and a consulting expert. As an expert I give my opinions and answer questions but I do not cross the line to developing legal strategies.

When I do a medical malpractice review, I consider it my obligation to present *all* aspects of the case to the retaining attorney, either in terms of merit (for a plaintiff's attorney) or defensibility (for a defendant's attorney) plus any mitigating circumstances on the other side that I might be able to discern from the records, especially from deposition testimony, such as failure to follow up on recommended tests.

If the defendant physician deviated, but there is little or no proximate causation, or damages, the retaining plaintiff's attorney needs to know this up front. And you need to make it clear at such a time whether or not you will testify as an expert in what will probably be a frivolous or nuisance suit - and hopefully you won't.

If you find contributory negligence on both sides, it is your obligation to advise the retaining attorney of this, as soon as you know. A plaintiff's attorney may instruct you not to mention his client's contributory negligence in your expert report, but you must also make it clear that when it comes to testimony, if you are directly asked, under oath, whether or not there was contributory negligence by the party for whom you are testifying, you will not engage in a cover up - or you will do so at the risk of your own professional reputation - which is discoverable, and will come back to haunt you.

In one memorable case, I reviewed partial medical records for a plaintiff who lost most of his small intestine to thrombosis from a hypercoagulable state while in the hospital. At first I thought there might be some deviations, but when the attorney sent me more records, I ascertained that the patient was being anticoagulated adequately by the defendant specialist, but suffered a thrombosis anyway, at which point I told the plaintiff's attorney I didn't think there was any malpractice, but the attorney had me review the rest of the records anyway. During the course of my 3rd review, in the progress notes I discovered a "confidential" note by the non-party attending physician that the patient had admitted to him he was bisexual, and thereupon consented to an HIV test. The progress note concluded with a warning not to disclose this information to the patient's wife. When I told the plaintiff's attorney about this note, and suggested that it would certainly be discovered by the defense, and subsequently revealed to the plaintiff's spouse, the attorney agreed to drop the case - with his client's blessing.

I agree that most attorneys do not read everything they send you, but on the other hand, beware of the plaintiff's attorney who does read everything - and deliberately does not provide you with documents that exculpate the defendant(s). I include in my retainer agreement a clause that it is the retaining attorney's responsibility to provide me with copies of any document(s) that would substantially change my opinion, as soon as the attorney becomes aware of such information - and failure to do so is grounds for me to withdraw from the case, with no financial penalty to me.

Lawyers work in a parallel (bizarro) world, and everyone working with lawyers needs to understand that, essentially, every a lawyer does is 1 legal 2 ethical (to lawyer standards) & strictly speaking 3 immoral.

I am not saying that every lawyer is immoral.

For instance, as a licensed Professional Engineer, by rule my primary responsibility must be what is in the best interest of public welfare and specifically, my interests and the interest of my clients are secondary.

But lawyers are sometimes put in the position of always placing the interest of their client first, regardless of the immediate effect upon society.

If a murderer tells his lawyer, "I did kill that guy and it's likely if I get acquitted I'll kill again" and the evidence supports that BUT the lawyer gets the murderer found not guilty, probably on a legal technicality, then the lawyer is praised as being a "great lawyer," even if the murderer goes out and murders again.

The point being, whether the lawyers are reviewing all the facts is irrelevant to what they may be trying to do,so, once within legal proceedings, do the best you can and don't sweat the outcome.

If your sensibilities can't handle this, i.e., the lawyers are using you (that's their job) or the specifics of your case concern you, then you need to withdraw from the case.

Sorry, I'm at the point o my career that to me, things are what they are.

I can say that although I might agree with his feelings that the legal merits should be discovered and handled by the attorneys and their clerks, "team play" dictates that they are best served if the expert they hired advises them on any and all items they find in depositions and other materials that might help. I have had similar experiences and feel that it is within the the time I am giving (and being paid for) so if it helps, be happy to advise.

Well, I have had the same thoughts from time to time about that issue. I have come to the personal conclusion that as a consulting expert witness in the field of accident reconstruction, there are three activities:
1. the actual reconstruction, or related tasks
2. the consultation
3. the testimony

If we are true to our craft, the reconstruction activity and result is ALWAYS absolutely objective. It's a good news / bad news deal. We're not helping our client by just setting out to benefit his case. As I often say, I'm being paid not so much to make an attorney's case as I am being paid to show him "which rocks the snakes are under", so to speak. Even relatively ineffective attorneys know what to do with good news; The good attorneys want to hear the bad news so they can properly evaluate their position. So having said that, part of our job is to consult and help the attorney understand the crash sequence so that he/she can make decisions on how to "package" the case. That may have some subjective undertones, but MUST be based on our objective work and opinions. As long as we hold the line on objectivity in our opinions, the good faith consultation has credibility and integrity, I think. I don't think there's anything wrong with helping an attorney by pointing out beneficial points in consultation, as long as we don't compromise our objective opinions to accommodate how the attorney wants to package his product. Bottom line: While the consultation product MAY be somewhat subjective and have a little bit of a "teamwork" concept, the reconstruction product and the testimony product absolutely cannot. It's a little bit slippery, and we have to be very careful. In the consulting phase, the attorney client must understand (we must make it very clear to him or her) that we will not withhold pertinent truth when asked pertinent questions, and we will not misrepresent truth in the testimony phase.

Just my 2 cents worth.

Just because they earn the title "Attorney", doesn't mean they have the analytical skills that an expert may have. If the facts are placed in front of you and you organize them into an understandable format, that doesn't mean you are taking sides or crossing "over" the line. After all, they are the facts and just as you do in an expert witness role, you deal with facts. I believe that my greatest asset is to organize and present the "obvious" that no one else has recognized, even though they have the same data as I do. Maybe we just have the ability to see the facts clearly, in a manner that many others can't. However, if you have the gut feeling that the

information you are providing is inappropriate, and is also not within the scope of your work, then by all means, don't go any further. If you are uncomfortable with the "out of scope" work, then discuss the issue with the attorney.

As has been noted frequently and often by the two of you (and others), an expert is an advocate for the truth and the facts. Attorneys and their staffs are incredibly busy people. These professionals are counting on the engaged/retained expert to do precisely what has been described by the requester.

Our client attorneys count on us (within our respective areas of expertise) to communicate to/with them what they must know in order to make good/objective decisions about a given case. The twin desirable outcomes/pay-offs (as acknowledged by the expert) are that a given case settles out of court and that there is repeat work from the same client attorney.

Experts are in the credibility business. We either know what the answer to a given question is, or (given adequate time and resources) we have a reasonable probability of finding the answer, or we say, "I don't know." The ethical obligation to be "absolutely honest" trumps all else.

We (engaged/retained experts) are entrepreneurs whose business/livelihood depends on always doing the right/ethical things for our clients. Any failure in our role as the "deliverer of facts" will very likely be exploited (possibly destroyed) by opposing counsel in deposition and/or cross examination. Our reputations and careers are at stake whenever we open up our mouths and/or when we put our thoughts into writing.

The vast majority of attorneys (I've shared some "shaggy dog" stories with the two of you about the "minority") that I have worked with over the years would not want matters to be handled any other way. Our client attorneys want the information "straight up."

As I tell my client attorneys, you are "driving the bus." My expert role is to function as the motor and/or the transmission. Should my role (inadvertently) become the brakes, I need you to promptly let me know.

The requester is doing the right things and the results clearly indicate that this is so. A collegial/friendly relationship (based on clear, well-articulated two-way communications) with our client attorneys is worth its weight in gold.

I trust that this information is helpful to the expert whose request for guidance was sent through the two of you.

The expert who expresses his dismay over the discovery and analytical chores he performs for his clients fails to see the two reasons for the raw materials he is given:

1. Objectivity. Here is the pertinent discovery info. Read and tell us what you find. They are not there to coach him.
2. Fresh eyes. They want his mind to draw the conclusions. Perhaps they are conclusions or angles the client hasn't discovered or connected.

They are not aiming the weapon for the hired gun. His client knows more than they are telling him. Most likely,but perhaps....

The truth is the truth. It should be digested raw, uncooked, unfrozen, unrefrigerated, without spices or preservatives.
Truth is rarely kind enough to align perfectly with any narrative spin or partisan viewpoint we'd like to put on it. In fact, it's rarely simple enough to state in a sound byte. This causes problems sometimes. People hope the truth will unequivocally support their side of an argument; often the reality is that such support is mixed. People like to think in simplistic sound bytes; the reality is that truth is rarely so simple, and may take several sentences to tell. Truth is a funny beast. Judges, juries, and attorneys deal with it and pursue it. It may not be sexy, simple, kind, or partisan, but it's got one thing going for it.
It's the truth.

I find that I also spend much time in thoroughly reviewing depositions, reports, affidavits, disclosures, etc. to understand the complaint/defense arguments, the complexity of the case and the strengths of the opposing arguments. At first I highlighted critical sections of the above but in a subsequent deposition I was nailed as to why I had only highlighted the arguments favorable to the attorney that retained my services. Now I simply tab the sections and remove the tabs was I write my report. As I provide expert opinions in a specialized field that many of the plaintiff attorneys have little expertise (aviation) I spend a fair amount of time educating the attorneys. As a number of the cases have to do with aircraft accidents it is not unusual to receive a disc with 95,000 pages or a box weighing 40 pounds. My experience tells me I have to read/digest and be ready to respond to questions during a deposition/trial relative to any of the information I have read. My opinions have to stand the test as the opposing attorney has his/her own bank of experts to call upon. I will provide general guidance on areas to be researched, provide questions for subsequent depositions, I shy away from attempting to develop strategies for the attorney. 60% of my cases are for the plaintiff, 40% for the defense.

It is my firm belief that when you are taken on as an expert it is to sift through all of the files, asking for more if appropriate, and then come to your best conclusion, whether it " makes" the case or tears it apart. If you do this properly and document why there IS NO CASE, you have saved the attorney time and untold $$, allowing the attorney to get out early on and rather inexpensively. The expert has to be able to clearly enunciate and document his/her opinion so that the attorney and the client are confident in your conclusion. Of course, you charge for every minute of your time, and, if you are "hired by the plaintiff's attorney, you must get an up-front respectable retainer just in case they are "disappointed" in your negative conclusion.

I really try my best to ignore so-called facts or opinions that the attorney's office provides in their cover letter or at least put myself in the position that I am not relying on it.

Attorneys are extremely overwhelmed with stuff to read...my take is that yes, attorneys actually have read the depos...as experts, we must remember that we are focused to ***causation*** and all the supporting information is just that, *supporting information*. Next, attorneys are looking for experts to read the depos without guidance. That said, if the depo is mostly fluff and provides little causation support, and not to waste time, I have and will ask for specific passages germane to the matter. The attorney has always agreed and is total sync with this approach as well.

I also had the exact same questions. I finally (being a business major) decided to write down what my job description was as a Forensic Economist. Well, that helped a lot. The job description said nothing about doing the job of an attorney...not strategy, not reading, not research. And, we are not allowed to be attorneys. I have found some attorneys share strategy more than others. Some attorneys will tell you everything, including settlement amounts, some tell you nothing, even if it is something you need to know. Sometimes I feel the attorney may not have read everything, but it the attorney is not the sharing type, you really don't know.

I started to add a "Notes" column as the last column in all my spreadsheets. If I read something in the depos or other data that is important to my calculations, that is where I will put it. The attorney will see that. Otherwise, I do the job I was asked to do. Very hard to draw a line when my job is done and the attorney's job begins. If I see something critical, I put it in my report, and that should give the attorney an idea of where I got my info from.

I no longer lay awake nights wondering if the attorney has read all his materials. Not my job. My job is to read everything necessary, and to form independent ideas. My job is not to do the attorney's job.

I found the whole idea of writing down my job description a very easy way to finally know where to draw that line.

I find the attorney that hires me appreciates anything I have to offer that helps his case. By doing that, you increase your value to that attorney.

A few years ago I was hired by a defense attorney to examine a paraplegic in another city who was injured in an MVA. Reviewing his medical records before the IME revealed he was HIV positive 15 years before the MVA and had refused treatment. He was residing in a skilled nursing facility but had made several trips to the hospital recently, but those records were not provided by the plaintiff attorney. I examined him in a near by therapy facility. When asked about his past medical history he did not mention the HIV status until I made it clear that I had

the records from years ago to prove it, then he admitted to it. He coughed and expectorated throughout the entire IME process.

I suspected the person had AIDS and they were hiding it. I convinced the defense attorney to hire an Infectious Disease consultant because the life expectancy issue would be less for AIDS then paraplegia. The attorney took my advice, the person had advanced AIDS disease with a significant reduction in lefe expectancy. The attorney saved his client $ 5 Million by me offering that bit of assistance.

That attorney has sent me many complex cases because he knows I can handle them and I will help put them in the right direction.