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## Using Professional Ethics to Discredit Opposing Expert Witness Testimony

By [Ben Rubinowitz](#) and [Evan Torgan](#)

All attorneys must abide by the Rules of Professional Conduct. But many attorneys fail to realize that similar professional ethics requirements apply to most individuals providing expert testimony. If utilized correctly, these professional ethical standards can provide strong ammunition for impeachment when expert witnesses fail to abide by the ethical requirements of their field.

The opportunity to impeach expert witnesses using their own professional ethics requirements arises often in personal injury litigation. In this context, experts are retained to opine as to liability, causation, or damages. Although attorneys often send prospective experts materials to review for a given case, experts do not always review that information in its entirety (or request the information they are missing) before providing an opinion. Meanwhile, many professional organizations require that those providing expert testimony in their given field consider all available relevant information before rendering an opinion. Thus, when an expert forms an opinion before reviewing all relevant information, the expert may be in violation of his or her own ethical obligations, and the expert's opinion and credibility may be challenged.

For example, The American Academy of Orthopaedic Surgeons (AAOS) requires that an "orthopaedic surgeon who provides oral or written medical testimony or expert medical opinions

shall seek and review all pertinent medical records and applicable legal documents, including relevant prior depositions, before rendering any statement or opinion on the medical or surgical management of the patient”<sup>1</sup> (quoting AAOS Standards of Professionalism (SOPs), Section A: Impartial Testimony). Similarly, the American Academy of Neurology requires that the “medical expert should carefully and thoroughly review relevant medical and scientific data before offering an opinion. If an expert is unsure whether the information that has been provided is incomplete or inaccurate, the expert should request additional information or clarification from attorneys or other relevant parties before agreeing to render an opinion”<sup>2</sup> (quoting The American Academy of Neurology, Code of Professional Conduct, Section III. Guidelines for the Conduct of the Medical Expert). Similar requirements apply to other medical experts including radiologists<sup>3</sup>, urologists<sup>4</sup>, gynecologists/obstetricians<sup>5</sup>, and cardiologists<sup>6</sup>.

Professional ethics requirements also apply to fields outside the realm of medicine. For instance, the National Society of Professional Engineers (NSPE) Code of Ethics requires that “engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony,

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<sup>1</sup> American Academy of Orthopaedic Surgeons, *Standards of Professionalism Orthopaedic Expert Opinion and Testimony, Section A.6 (Adopted April 18, 2005; Amended May 12, 2010)* [https://www.aaos.org/globalassets/about/standards-of-professionalism/sop-orthopaedic\\_expert\\_opinion\\_and\\_testimony\\_5-12-2010.pdf](https://www.aaos.org/globalassets/about/standards-of-professionalism/sop-orthopaedic_expert_opinion_and_testimony_5-12-2010.pdf)

<sup>2</sup> American Academy of Neurology, *Qualifications and Guidelines for the Physician Expert Witness* (June 25, 2005) [https://www.aan.com/siteassets/home-page/footer/membership-and-support/member-resources/professionalism--disciplinary-program/05expertwitnessguidelines\\_ft.pdf](https://www.aan.com/siteassets/home-page/footer/membership-and-support/member-resources/professionalism--disciplinary-program/05expertwitnessguidelines_ft.pdf)

<sup>3</sup> American College of Radiology, *Practice Parameter on the Physician Expert Witness in Radiology and Radiation Oncology, Section III: Requisites of the Expert Witness* (2002, revised 2022) <https://www.acr.org/-/media/ACR/Files/Practice-Parameters/ExpertWitness.pdf>

<sup>4</sup> American Urological Association, *Expert Witness Affirmation Statement* (May 2006) <https://www.auanet.org/documents/about/policy-statements/Expert-Affirmation.pdf>

<sup>5</sup> Expert testimony. ACOG Committee Opinion No. 374. American College of Obstetricians and Gynecologists. *Obstet Gynecol* 2007; 110:445–6.

<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2007/08/expert-testimony>

<sup>6</sup> *American College of Cardiology Code of Ethics, Section 6.4* (December 2021) <https://www.acc.org/About-ACC/Our-Bylaws-and-Code-of-Ethics/Code-of-Ethics>

which should bear the date indicating when it was current” (quoting NSPE Code of Ethics References: II.3.a.)<sup>7</sup>

In promulgating these codes of ethics, these organizations recognize that it is imperative to uphold the integrity and reputation of their profession. Thus, the organizations’ standards require members who seek to serve as expert witnesses to provide fair, thorough, complete, and accurate assessments and opinions, making it clear that they are professionals first, parties to the action second. In theory, an expert should not be just a “hired gun” for the defense or plaintiff. Rather, the expert should be an impartial, independent reviewer of facts and data who reaches a conclusion based on the materials reviewed without first choosing a side. Of course, in most cases, nothing could be further from the truth.

When attorneys recognize that an expert has failed to review the entire record before rendering an opinion (or has otherwise violated his or her professional ethical standards), they should take great care to utilize this information as effectively as possible in conducting a cross examination. Consider this scenario: a man was struck by a car while crossing the street. As a result of the collision, the man alleges that he suffered a herniated disc. Following the accident, the man was taken to the emergency room where he received x-rays and an MRI. In preparation for trial, the attorney for the defense sends the man’s accident report, emergency room reports, and x-rays to an orthopedic expert who will testify about whether the collision caused the man’s injuries. The attorney does not, however, send MRI scans. The expert writes a report and opines that the man did not suffer a herniated disc in the accident, but notes that he would like to review any MRI scans taken of the plaintiff. An attorney’s cross examination concerning the failure to review the MRI before rendering an opinion becomes markedly less effective by failing to address the expert’s departure from his own professional ethical requirements.

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<sup>7</sup> NSPE Code of Ethics References: II.3.a (July 2019)

<https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/NSPECodeofEthicsforEngineers.pdf>

Consider the following line of questioning:

**Q:** Doctor, you reviewed the plaintiff's 2022 medical records in forming the opinion on which you're testifying today, correct?

**A:** Yes, I reviewed the relevant documents that were shared with me.

**Q:** Doctor, you concluded that our client did not suffer a herniated disc, true?

**A:** Correct.

**Q:** You never reviewed the MRI scans, true?

**A:** I did not review the MRI scans at the time, but I reviewed the records necessary to form my opinion and was able to conclude based on those materials that the plaintiff did not suffer a herniated disc in the collision.

Here, the attorney has lost control of the witness by allowing him to provide a rationale for his failure to review the requested record. The better approach is to carefully set the witness up by first establishing the importance of thorough record evaluation, and only then confronting the witness with his failure to review. Further, by highlighting the expert's failure to comply with the ethical mandates in his field, the attorney can enhance her final argument by pointing out what was not done, and at the same time, undermining the expert's integrity and credibility. An example may look like this:

**Q:** Before rendering an opinion, you take the time necessary to review the relevant reports, true?

**Q:** Indeed, that is the way you have been practicing throughout your professional career, correct?

**Q:** You take the time necessary to evaluate the records carefully before ever rendering your opinion, true?

**Q:** You conduct a thorough review of the records?

**Q:** You review the records for an independent medical examination (IME) in the same manner you would for treating one of your own patients?

At this point, the attorney should work with the negatives --- the things that if not done, would undermine the integrity of the opinion:

**Q:** To the extent that you failed to take the time to review the relevant records, that would be improper?

**Q:** That would not be in keeping with the way you conduct your evaluation of this patient's injury, true?

**Q:** In fact, you would never take shortcuts while conducting an IME, true?

**Q:** Just like you would never take shortcuts in treating one of your own patients?

Once the negatives have been established, the attorney should begin the impeachment of the expert witness by confronting him with the relevant professional ethical standards that he is required to follow:

**Q:** Doctor, you are familiar with the American Association of Orthopedic Surgeons (AAOS) correct?

**Q:** In fact, you are a member of this organization, true?

**Q:** As a member, you agreed to follow its ethical guidelines and standards, right?

**Q:** You understood that you must follow these standards while you are testifying as an expert witness, correct?

**Q:** You are aware that the AAOS sets forth certain requirements in rendering expert opinions, true?

**Q:** Specifically, the AAOS requires that you conduct a "thorough, fair and impartial review of the facts, not excluding any relevant information," correct?

Next, the attorney should confirm the relevant omissions with the expert:

**Q:** Here, you understood that an MRI was taken of the plaintiff's spine, true?

**Q:** You wanted to review the MRI, correct?

**Q:** You even stated in your report that you would like to evaluate the MRI scans?

**Q:** Yet, at no point before you rendered your opinion did you review the MRIs, true?

To enhance the cross, the attorney should now strengthen the line of questioning by highlighting the importance of the omission:

**Q:** We can agree the MRI is both important and relevant to a complete diagnosis, true?

**Q:** In fact, you train your residents to always review the MRIs before rendering a diagnosis, true?

**Q:** To do otherwise would be completely unacceptable, right?

**Q:** That MRI can provide information that a clinical evaluation cannot provide, true?

**Q:** That's why you wanted to see the MRI scans, true?

**Q:** But here you chose to render an opinion without ever reviewing the MRI itself, true?

Finally, the attorney should confront the expert directly with the omissions, showcasing why the failure to review those records violates the very ethical standards the expert is bound to uphold, rendering the expert's opinion unreliable and discrediting the expert's integrity:

**Q:** You made the choice to render an opinion knowing that you had not seen the MRI scan?

**Q:** Your own ethical standards, as provided in the AAOS, mandate that you review all relevant records, true?

**Q:** There is no exception for MRI scans, is there?

**Q:** There is no exception for IME exams, is there?

**Q:** In fact, you would never allow one of your own residents (students) to take short cuts by failing to review the MRI scans, would you?

**Q:** We can agree that what you did, in failing to review the MRI scan, was not in keeping with what you teach, true?

**Q:** We can agree that failing to review the MRI scan was not in keeping with the AAOS's ethical standards you agreed to follow, true?

To the extent the expert tries to minimize the failure to review a record by suggesting that the plaintiff is not his patient, the relevant ethical standards can again be used to defeat that excuse. Often, this can be accomplished through low risk open ended questions:

**Q:** Doctor, where in the AAOS ethical standards does it say that it's good to review some of the relevant records but not all of them?

**Q:** Where does it say there is a different standard for your patients as opposed to those

you examine as part of an IME?

**Q:** When did you learn that there was a different medical standard for your patients as opposed to those who you were examining for purposes of litigation?

**Q:** From what medical text did you learn anything like that?

**Q:** How often have you taught your students that the ethical standards of the AAOS do not apply to IMEs?

Although underutilized, professional ethical standards of expert witnesses can be an source of ammunition in discrediting a witness. By making clear to the jury that the expert witness is obliged to conduct a thorough and complete evaluation of all relevant documents, the attorney is well on her way to creating a powerful and compelling argument in summation that will allow the witness to be characterized as less than honest, less than scrupulous, and less than believable.

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