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Product Liability Update

August 2006
Volume II, Number 8

The Ethics Expert: Argument From the Witness Box

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Imagine the typical hard-fought products liability trial: The defendant vigorously defends itself and its product, and the plaintiff tenaciously argues that the defendant should have warned about the harm the product could cause. Certain products—aircraft, heavy machinery, prescription drugs, and a host of others—always come with a risk of injury, and a manufacturer's failure to warn of risks can result in liability.

Imagine now that the plaintiff's next witness is a proclaimed expert on "ethics." What on Earth is an "ethics" expert and what is he going to say? Ethics experts are by no means new, but they are appearing in product liability lawsuits with greater frequency in recent years, making their introduction a most unwelcome trend for the targets of their "opinions." Ethics experts are often physicians, industrial hygienists, corporate ethicists, or philosophy professors; and plaintiffs' lawyers retain them to give opinions on whether a defendant company conducted itself in a "good" and ethical way. That often includes forming opinions on what a defendant knew, when it knew it, and how it conducted itself with its purported knowledge. Usually based on a selective review of company documents, the plaintiff's ethics expert, if permitted to testify, likely will say that the defendant knew all about the dangers of its products, intentionally kept that information from hapless consumers, and conducted itself in a despicable and unethical manner, which is to be expected of "industry" and "big business."

Here are some examples of "ethics" opinion offered into evidence in product liability cases:

- A manufacturer's duty-to-warn goes "beyond a legal duty; [it is also] a moral obligation." *In re Welding Fume Prods. Liab. Litig.*, Order, No. 1:03-CV-17000 (E.D. Ohio Aug. 6, 2005).
- The defendant's alleged failure to warn adequately against the risks of a prescription drug was "in conscious disregard of the health and safety of its customers." *In re Diet Drug Prods. Liab. Litig.*, Memorandum and Pretrial Order No. 1685, No. MDL 1203 (E.D. Pa. Feb. 1, 2001).
- A manufacturer's failure to fully and completely report any "signal" that a drug "might be dangerous would be unreasonable and unethical behavior." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 542 n.26 (S.D.N.Y. 2004).

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- "[T]hrough a series of deceptive practices, the Company violated accepted standards of clinical trial practice, regulatory guidelines, obligations, trust and codes of ethics." *Id*.

Despite the tenor and argument, the above quotes are not from attorney argument, but are examples of testimony offered as *evidence* through expert witnesses. Quite appropriately, most courts have been more careful and judicious in admitting (and excluding) expert opinion on "ethics." One discerning district judge described the proffer of opinion by "ethics" experts as follows:

> A practice reminiscent of wager of law has become fashionable among some well-financed litigants—the engagement of "expert" witnesses whose intended role is more to argue the client's cause from the witness stand than to bring the fact-finder specialized knowledge or expertise that would be helpful in resolving the issues of fact presented by the lawsuit. These "experts" are loosely analogous to compurgators, also known as oath helpers, in that they lend their credentials and reputations to the party who calls them without bringing much if any relevant knowledge to bear on the facts actually at issue.

In re Rezulin, 309 F. Supp. 2d at 538. Generally speaking, there are three grounds for excluding such evidence.

First, expert opinion on "ethics" is unreliable and speculative. Normative opinions about what a defendant should have done, or should now do, are, at bottom, personal, subjective views of the "expert" witness. As such, they fail to satisfy the basic requirement that expert opinion rest on "knowledge" of a specialized variety, which connotes "something more than subjective belief or unsupported speculation." *See In re Rezulin*, 309 F. Supp. 2d at 541.

Subjective opinion on the "ethics" of a company's conduct also is not susceptible to verification by any recognized methodology. An ethics expert in the *Rezulin* multidistrict litigation admitted that there is "no standard methodology for ethics." *See id*. at 543 n.27. The district judge presiding *In re Diet Drugs* likewise noted that a medical ethicist's proferred methodology was "inherently susceptible to subjective personal influence and lack[ed] indicia of reliability." The offered testimony was excluded in both of those cases.

Second, expert opinion on "ethics" is not helpful to the jury. The well-known benchmark for admission of expert opinion is that the testimony will assist the trier of fact. Yet subjective opinion on a company's "ethics" promises no help to a jury charged with finding facts and determining liability under set legal standards. The issue in product liability cases is not whether the defendant acted ethically or whether the defendant conducted itself in accordance with an expert's beliefs. The issue is whether the defendant or its products complied with the applicable law. Expert (or non-expert) opinion on the ethical nature of the defendant's actions is not germane to the issues that a jury will have to decide. *In re Rezulin*, 309 F. Supp. 2d at 544 (excluding expert opinion on the ethical nature of defendant's activities as irrelevant to the parties' legal rights and duties). As the district court observed in *In re Diet Drugs*, "[T]he pertinent issues… are the obligations of a pharmaceutical company in testing, surveying and

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labeling medications…. [P]roof that a pharmaceutical company has fulfilled all ethical requirements is not an essential element…."

Moreover, the subjective nature of "ethics" opinions makes them too general and vague to be of any use. In *Rezulin*, the ethics expert's intended testimony boiled down to the opinion that companies should be honest when conducting clinical trials and analyzing data. The court excluded that opinion because it was "so vague as to be unhelpful to a fact-finder." 309 F. Supp. 2d at 543. The district court likewise was critical of expert opinion that used the terms "ethical" and "reasonable" interchangeably. *Id.* at 545 n.37. Juries are perfectly capable of determining whether conduct is reasonable based on their collective knowledge and instructions given by the court. It is, of course, perfectly appropriate for counsel to argue his or her favored interpretation of the evidence and urge the jury to come to a particular conclusion. But no expert can "supplant the role of counsel in making argument at trial, and the role of the jury [in] interpreting the evidence." *Highland Capital Management, L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005).

Third, expert opinion on "ethics" is likely to confuse jurors and cause unfair prejudice to the defendants. Testimony on a company's "ethics" carries great potential for confusing the jury and causing prejudice because it injects often-virulent rhetoric into trial, with the imprimatur of "expert" credentials. Such opinion also offers juries alternate standards for determining liability—standards other than the applicable legal standards set forth in the court's jury instructions. The district judge presiding over the *Welding Fume* multidistrict litigation excluded expert opinion on "ethics" partly for this reason, noting that "standard jury instructions usually do a fine job of explaining to jurors what duties a reasonable corporation is legally required to undertake…. It is this standard, and not what an ethical corporation 'should have done,' that

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matters." The court concluded that because the expert's opinions "are all premised on a moral compass, not a legal one, confusion is almost assured."

The *Rezulin*, *Diet Drug*, and *Welding Fume* cases are particularly prominent cases in dealing with ethics experts, but they are not alone in applying these legal principles. Other cases excluding expert testimony on company ethics include *DePaepe v. General Motors Corp.*, 141 F.3d 715 (7th Cir. 1998) (holding it was an error to allow expert to testify on automobile manufacturer's motive in making a design change ("to save money") because it was speculation) and *Dibella v. Hopkins*, No. 01 Civ. 11779, 2002 WL 31427362 (S.D.N.Y. Oct. 30, 2002) (excluding testimony of a business ethics expert because "his report is largely a factual one that seeks to advocate for Hopkin's version of the facts" and because "conclusions and speculations are not proper [expert] testimony").

These well-reasoned authorities rest largely on the principle that an expert can give an opinion that will be *helpful* to the jury, but cannot usurp the trial court's role in instructing the jury on the law or the jury's role in applying the law to the facts. Aging rocker Bob Dylan said it best: "You don't need a weather man to know which way the wind blows." (Bob Dylan, *Subterranean Homesick Blues* on Bringing It All Back Home (Columbia 1965).) And a jury doesn't need an expert to know the difference between right and wrong or to know how to follow its instructions.

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