

# The Medical Expert Witness

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1



2



**Jury is Trier of Fact**

Decides the facts of the case  
Decides the issues of liability  
Decides the amount awarded



**Expert is a witness**

A neutral witness  
Gives testimony to help the jury decide  
About subject matter that is beyond the knowledge of the average lay person  
Testimony relevant to establish the standard of care and causation

Introduction

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Legal Rules  
For Expert  
Testimony

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**Qualification**  
The witness must be properly qualified to be an expert

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**Necessity**  
The subject matter must be sufficiently complicated that expert testimony is needed to help the jurors

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**Scientific reliability**  
Techniques and theories used or relied on by an expert must be scientifically reliable

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**Opinion rule**  
Experts may testify to a wide range of opinions based on personal knowledge, reliable hearsay, or facts presented in a hypothetical question

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**Learned treatises**  
Experts may be cross-examined concerning inconsistent statements in learned treatises

4

## Qualifying an Expert



Witness must be qualified by reason of knowledge, skill, experience, training, or education in field of specialized knowledge



Witness is called to stand to elicit testimony credentials in order to lay the foundation for competency



Opponent has right to cross examine witness on qualifications – *voir dire* - before witness gives testimony



After qualifications have been elicited, attorney formally tenders witness to court as expert in field of specialty



Question of expert's competency is at the discretion of the judge

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## Qualifying an Expert - *Voir Dire*



6

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Must Be a  
Complex,  
Relevant  
Issue

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The relevant issues must be complex enough to warrant expert testimony before a qualified expert will be permitted to testify

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**Federal Rule of Evidence 702:**  
“If scientific, technical, or other specialized knowledge will assist the [jury] to understand the evidence or to determine a fact in issue, a witness qualified as an expert ... may testify.”

7

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Proposed  
Testimony  
Must Be  
Scientifically  
Reliable

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In conducting investigations and arriving at opinions, experts rely on scientific theories, principles, techniques and equipment

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The reliability of the doctor’s diagnosis depends on the underlying reliability of the tests conducted and the theories and procedures relied on

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Proving the scientific reliability of the evidence is part of the foundation for the opinion itself

8

3

What is Scientifically Reliable?

*Frye v. U.S.*  
(1923)

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In 1923, D.C. Circuit Court held that expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the scientific community

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The issue was related to a systolic blood pressure test, a forerunner of the polygraph and not widely disseminated at the time

9

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What is Scientifically Reliable?

Federal Rules of Evidence  
(1975)

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**Federal Rules of Evidence 702:**

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

10

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What is Scientifically Reliable?

*Daubert v. Merrell Dow Pharmaceuticals*  
(1993)

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What constitutes “proof” of scientific reliability?

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Court declined to set out a definitive test or checklist

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Four factors determine if testimony qualifies as “scientific knowledge”:

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Testing – Has the theory been tested?

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Peer review & Published – important but non *sine qua non* of admissibility

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Error rate – What is the known or potential rate of error?

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Widespread acceptance – Important for whether evidence admissible

11

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The Expert Opinion Rule

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Federal Rule 703: “Facts supporting an opinion may be known to expert before hearing and need not be independently admitted into evidence.”

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Federal Rule 705: “Expert may testify to his or her opinion without any prior disclosure of the underlying factual basis.”

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Expert opinion may be based on facts known to expert at or before trial

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Experts may give opinions in any manner as long as confined to expert’s specialty

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Facts and data need not be admissible in evidence

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Facts can be reliable hearsay

12

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Cross-Examination of the Expert

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Experts can be cross-examined and impeached like any other witnesses

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Can bring out facts to impeach expert's credibility

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Can use learned treatises to cross-examine and impeach the expert witness

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13

Expert Medical Witness Needed For:

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Issues of Duty

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Breach of Duty

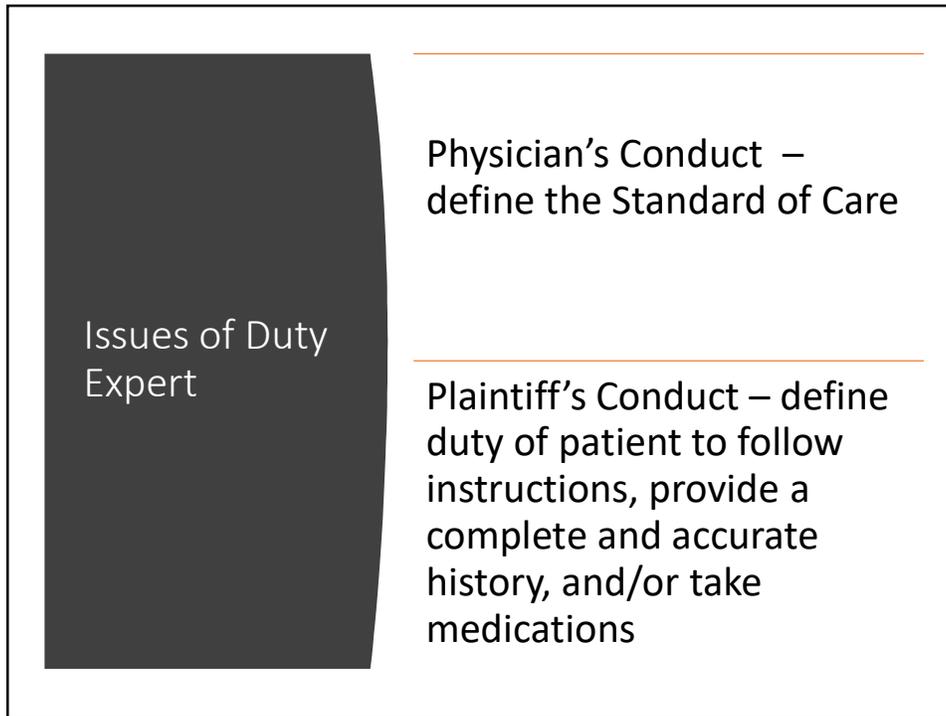
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Proximate Causation

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Damages

14



Issues of Duty Expert

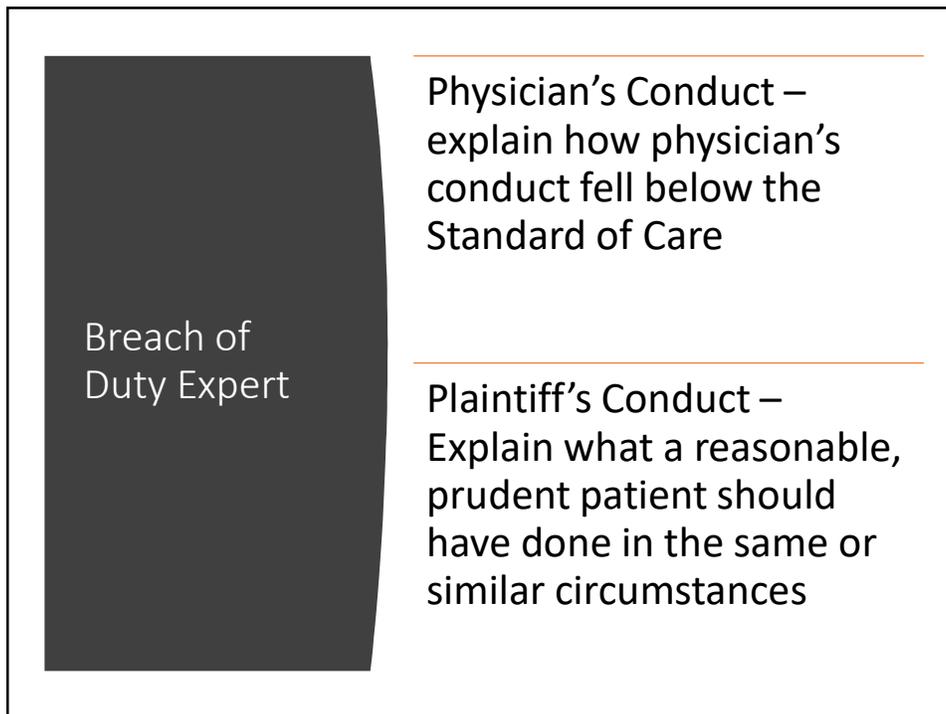
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Physician's Conduct –  
define the Standard of Care

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Plaintiff's Conduct – define  
duty of patient to follow  
instructions, provide a  
complete and accurate  
history, and/or take  
medications

15



Breach of  
Duty Expert

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Physician's Conduct –  
explain how physician's  
conduct fell below the  
Standard of Care

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Plaintiff's Conduct –  
Explain what a reasonable,  
prudent patient should  
have done in the same or  
similar circumstances

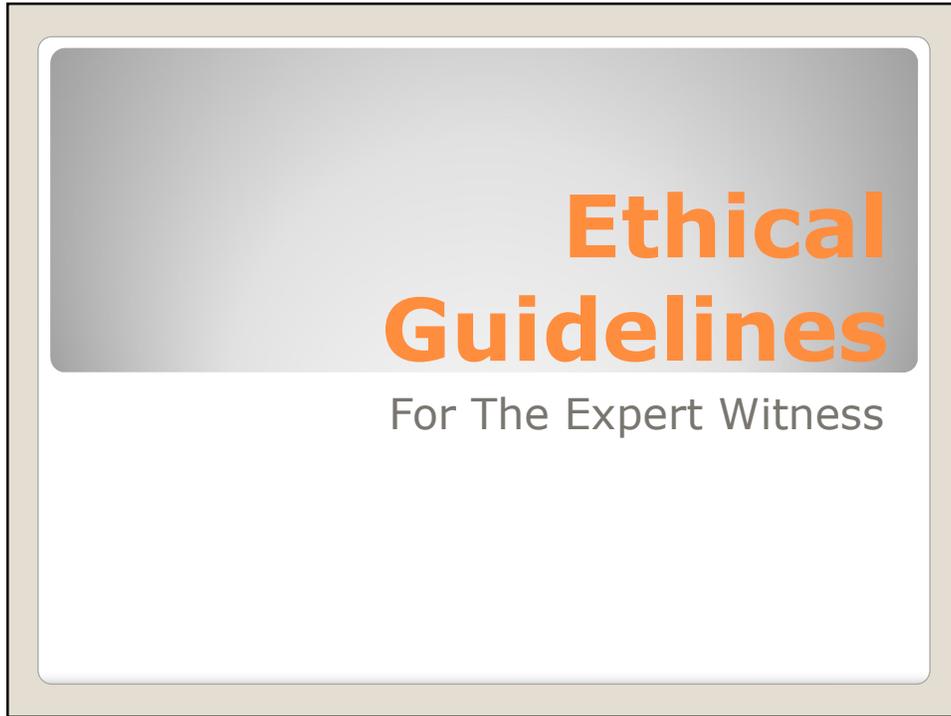
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Proximate Causation Expert	Affirmative Obligations – connect dots from “duty” and “breach” to “a proximate cause”
	Negative Obligations – discount or debunk defense that something unrelated to defendant’s conduct was proximate cause
	Plaintiff’s Conduct – that a reasonably prudent person would have done it or the unreasonableness that it could be the proximate cause

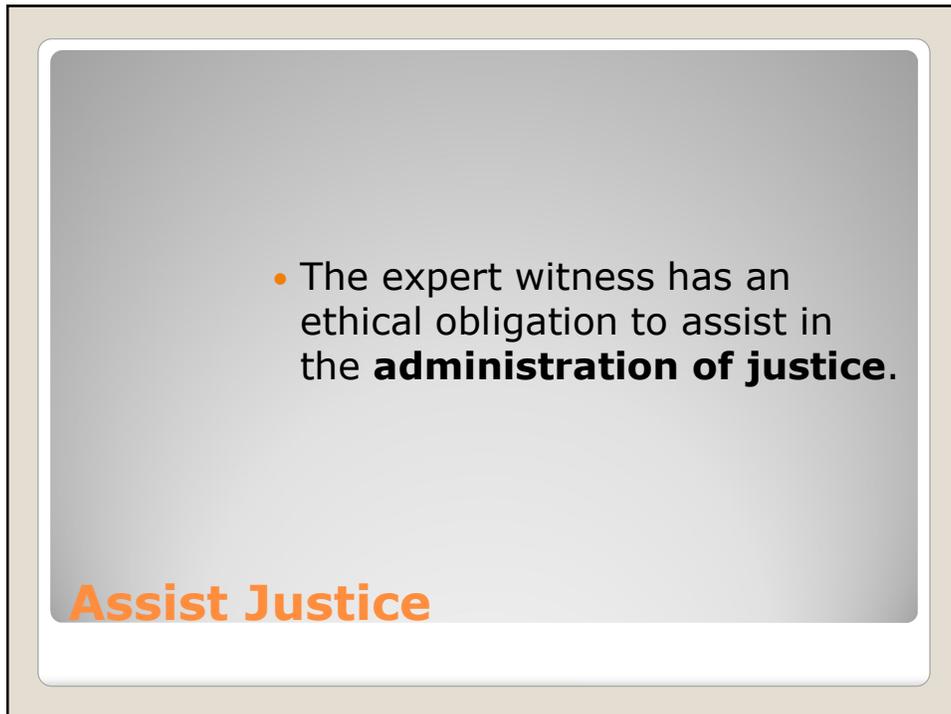
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Damages Expert	Expert to opine on current damages
	Specialized experts for future damages
	Must prove permanency of injury and reasonable certainty of future damages to occur (economist, vocational specialist, life care planner)

18



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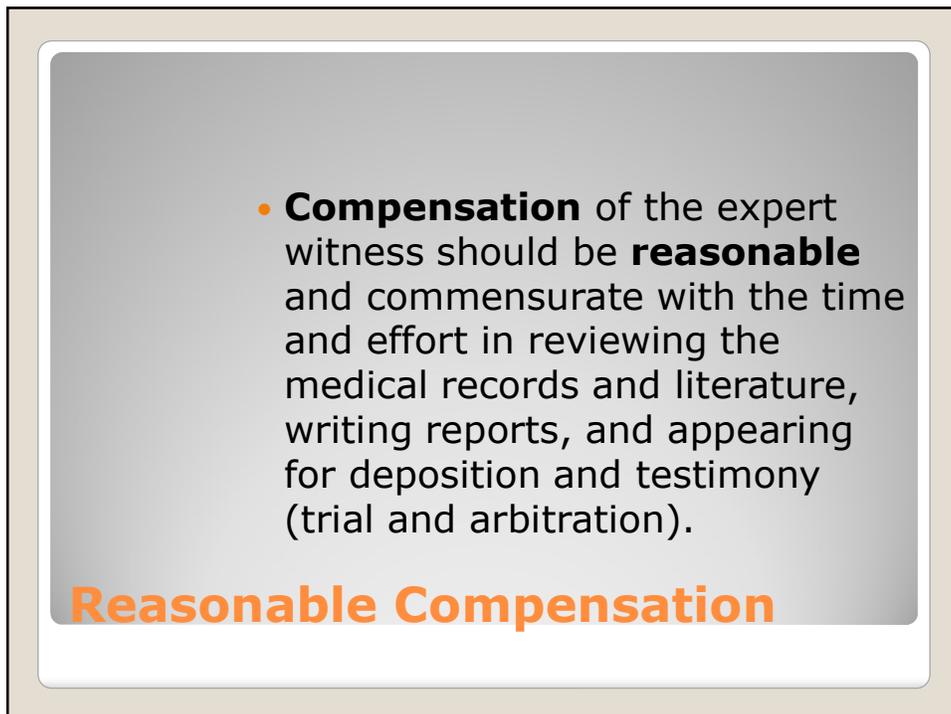
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• The expert witness fee shall not be **contingent** on the outcome of a case.

**No Contingency Fees**

21



• **Compensation** of the expert witness should be **reasonable** and commensurate with the time and effort in reviewing the medical records and literature, writing reports, and appearing for deposition and testimony (trial and arbitration).

**Reasonable Compensation**

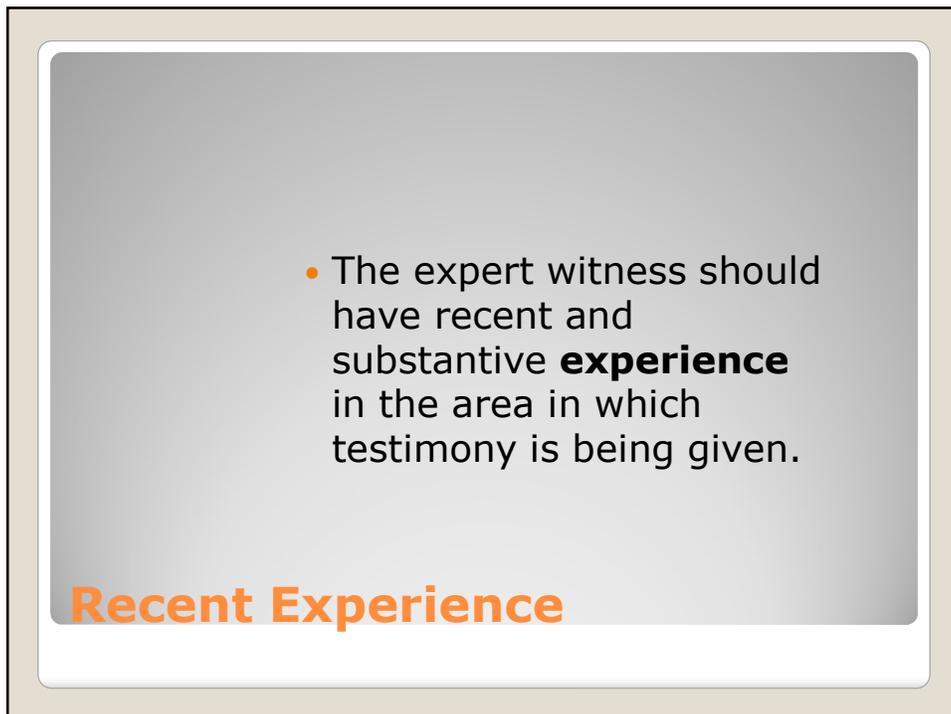
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• The expert witness must not be an **advocate** or partisan for either party in litigation.

**No Advocacy**

23



• The expert witness should have recent and substantive **experience** in the area in which testimony is being given.

**Recent Experience**

24

- The expert witness should be adequately **prepared** for testimony
- Opinions rendered should be unbiased.

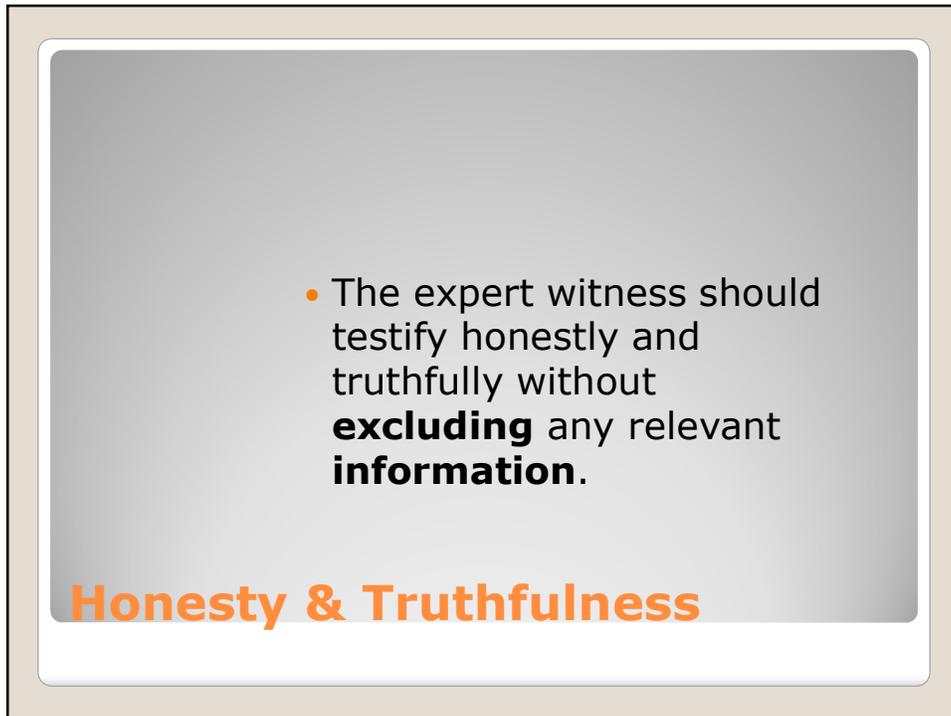
### Adequate Preparation – No Bias

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- Where possible, the expert should base opinions on medical **literature**.
- Those opinions that are based on **experience** should be so stated.

### Basis for Opinion

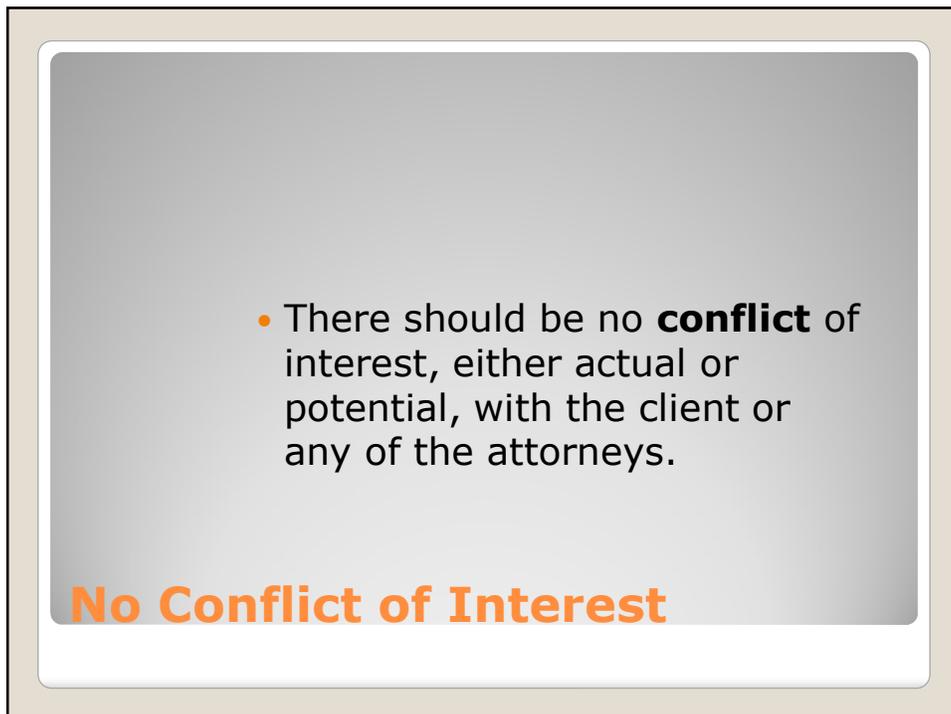
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• The expert witness should testify honestly and truthfully without **excluding** any relevant **information**.

**Honesty & Truthfulness**

27



• There should be no **conflict** of interest, either actual or potential, with the client or any of the attorneys.

**No Conflict of Interest**

28

- The expert witness shall protect the **privacy** of records and communications.

## Maintain Privacy of Records

29

## Deal With the Devil

- The devil offers three men, a doctor, a bus driver and a legal expert, each a free pass to heaven as long as they can answer a simple question.
- “What does 1+2 equal?”
- Both the doctor and the bus driver immediately answer “3” and receive a pass.
- The legal expert hears the question and thinks for a minute. He then closes all the doors and blinds and pulls the devil in close.
- His answer: “First let’s discuss my fee and then you can tell me what you want 1+2 to equal.”



30

## Expert Fees & Other Witness Compensation Issues

- Assume that attorney Jackie Chiles wants to retain Java Joe, a world renowned expert in coffee cup top design defects, to perform the tests on a sample cup top from Java World for Kramer's case and to serve as an expert witness at the trial of the case.
- When discussing his fee structure, Java Joe explains that his standard fee is a flat fee or ten percent (10%) of the amount recovered in the case, which ever is greater.
- Can Jackie agree to Java Joe's fee structure?

31

## Diamonds are an Expert's Best Friend

- Greedy and Grabby are heirs to a diamond fortune and are locked in heated litigation.
- Wanda Witness is a former VP and long time employee diamond company.
- Greedy hires Wanda to testify to the business practices of the diamond company in hopes of gaining a larger share of the estate.
- Greedy and Wanda enter a contract where she can would receive a flat fee, but could receive bonuses of up to \$1,000,000 depending on the "usefulness" of the information provided.
  - Is this agreement acceptable if she is an expert witness?

32

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