

# What Happens When Hired Guns Misfire

An Expert Witness Guide to Liabilities, Privileges and Immunities

BY DAVID D. DODGE



When Charles Seymour, the chairman of a Philadelphia real estate consulting company, made himself comfortable on the witness stand, everything seemed to be going according to plan. It was a case by a developer against a group of lenders for breaching a financing agreement. Seymour had been hired as an expert witness on the developer's claim of damages consisting of lost profits due to not being able to pursue the project contemplated, based on a calculation prepared by one of Mr. Seymour's employees using a computerized accounting spreadsheet. The case looked like an easy one, especially since the lenders' counsel hadn't even taken Mr. Seymour's deposition.

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But when the lenders' lawyer started his cross-examination of Mr. Seymour, things went south in a hurry. It was established that Mr. Seymour's lost profits projection contained a mathematical error that essentially destroyed his damage calculation, a fact he was forced to acknowledge in front of the jury. And because he had not done the challenged calculations, Mr. Seymour was not able to explain how they occurred or to recalculate his opinion. The trial judge granted the defendants' motion to strike Mr. Seymour's testimony and then instructed the jury to disregard it completely.

The developer was forced to settle for what the defendants had offered, which was a fraction of what had originally been sought. When Mr. Seymour sent a corrected damage figure to the developer, what he got in return was a lawsuit based on breach of contract and professional malpractice alleging that he had failed to exercise the degree of care and skill ordinarily expected of experts in the field of real estate counseling and computation of lost profits in real estate transactions.

Mr. Seymour and his company, now defendants in a new lawsuit, immediately moved for judgment based on the doctrine of witness immunity. This doctrine, sometimes referred to as a privilege, is a common law concept whose original purpose was to protect a witness from defamation liability for testimony given at trial. The immunity's scope has been expanded over time to include other theories of tort liability. In Mr. Seymour's case, the defense was upheld in the lower courts, and the Supreme Court of Pennsylvania eventually granted the developer's petition for appeal.

In an opinion that drew considerable comment<sup>1</sup> and included a dissent by two Justices, the court refused to extend the witness immunity doctrine to professional

negligence actions brought against expert witnesses "when the allegations of negligence are not premised on the substance of the expert's opinion."<sup>2</sup> The court stated that the:

goal of ensuring that the path to truth is unobstructed and the judicial process is protected, by fostering an atmosphere where the expert witness will be forthright and candid in stating his or her opinion, is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion. The judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession.<sup>3</sup>

The court concluded its opinion by cautioning that its holding had a limited application. The court emphasized that an expert witness may not be liable merely because his or her opinion is challenged by another expert or authoritative source, and that differences of opinion will not suffice to establish liability of an expert witness for professional negligence.

In other words, it's not what is said in the opinion or on the witness stand, but the care and skill by which the opinion was formulated.

### The Witness Immunity Doctrine

Most discussions on modern-day application of the witness immunity doctrine usu-

ally start with citation to the U.S. Supreme Court case of *Briscoe v. Lattue*.<sup>4</sup> There, the Court recognized the "absolute privilege" of all witnesses as well established in English common law and as "the immunity of parties and witnesses from subsequent damage liability for their testimony in judicial proceedings."<sup>5</sup> A few years later, a Washington case expanded the *Briscoe* immunity to include expert witnesses.<sup>6</sup> In that case, the damage estimates given by engineers to remedy lateral support problems on several properties turned out to be half of what they actually cost. The court equated the expert's testimony to be essentially "quasi-judicial" in nature and therefore entitled to judicial immunity, even if the expert was paid by one of the parties.

The holding in the Washington case has been credited for being the first one extending witness immunity to expert witnesses and is representative of the prevailing view in this country concerning the liability of expert witnesses who are participants in the court system. However, as is discussed below, that protection has been slowly eroding, and there are now at least six states, including California, Connecticut, Louisiana, Massachusetts, Missouri and Pennsylvania, that allow malpractice suits against expert witnesses by the people who hire them. There are two states—New Jersey and Vermont—that have held that even a court-appointed expert witness can be liable for negligence in certain circumstances.

It's not entirely clear when the witness immunity rule as concerns expert witnesses began to show signs of fracture. A fairly recent compilation of expert witness liability cases,<sup>7</sup> most of them addressing claims



## When Hired Guns Misfire

against “friendly” experts (i.e., those hired by the client who is suing them), include the following:

- In a Missouri case dating back to at least 25 years ago,<sup>8</sup> a subcontractor sued an expert witness hired to provide pretrial litigation support services intended to document the subcontractor’s claims for additional compensation from the contractor. The opinion sets forth a list of deficiencies in the expert’s report that had resulted in the subcontractor’s arbitration case being dismissed. Although it was urged as a defense, the court refused to extend witness immunity to privately hired experts providing litigation-related services, offering suits brought against lawyers as an analogous example. Note that the case involved pretrial litigation services and not court testimony.
- In a 1997 California case,<sup>9</sup> a subcontractor

sued its forensic accountant after it was forced to dismiss its case when it was discovered the accountant had fabricated documents, resulting in sanctions against the subcontractor. The court rejected the accountant–defendant’s claim of “friendly” expert witness immunity and held that if the professional’s actions in the underlying dispute were below the standard of care, were a substantial factor in the client’s loss of that dispute, and if a proper handling of the professional’s duties would have resulted in a collectible judgment in the client’s favor, an action for professional malpractice would lie.

- In a later case from California<sup>10</sup> an appraiser, hired by a law firm on behalf of an insured homeowner having a dispute with its insurance company after a fire loss, was found to be subject to liability for allegedly having been negligent in

not sufficiently explaining the meaning of “replacement cost” to the arbitrator hearing the matter. Note that this was a case where the client complained of an expert’s actions while testifying at trial.

- A spinal biometrics expert in a Connecticut case<sup>11</sup> was held not to be immune from liability to the plaintiff who had hired him to prove that excessive force by a police officer had rendered him a quadriplegic. The experiments the expert performed were shown to have been done incorrectly and were ruled not admissible at trial.
- A business valuation expert who had been hired as a witness in an underlying divorce proceeding was held not to be immune from liability in a subsequent malpractice suit brought against him in Massachusetts.<sup>12</sup> The plaintiff there claimed that the expert had understated the value of a major marital asset, resulting in an unfa-

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avorable divorce settlement.

- A medical billing expert hired by a doctor who claimed a university hospital had underpaid him was found to be liable and not entitled to witness immunity in a Louisiana case<sup>13</sup> that had been certified to the court by the Fifth Circuit to address that issue. It was noted that the expert admitted making mistakes in his report and had refused to participate in an ongoing deposition or provide further expert services.

### The Court-Appointed or Neutral Expert

In contrast to the “friendly,” client-hired expert, the court-appointed or neutral expert stands on a different liability footing than the experts in the examples we reviewed above. Here, we talk about “judicial immu-

nity,” where immunity is granted to those who perform functions intimately related to or that amount to an integral part of the judicial process and whose expertise is relied on by the courts in their determinations. This immunity, which concerns a different class of experts, provides the same result for the expert as does witness immunity, described above. Arizona has long recognized this immunity for court employees.<sup>14</sup>

It also has been applied to court-appointed “outsiders.” In *Lavit v. Superior Court*,<sup>15</sup> the court held that a psychologist, Dr. Lavit, who had been contacted by, paid by and agreed to by the parties in a domestic relations matter involving child custody

issues, was entitled to immunity. The parties had entered into a “Stipulation for Entry of Temporary Order” concerning the hiring and use of Dr. Lavit, which the court then adopted as its own, signed and docketed. When the husband later filed suit alleging that Dr. Lavit’s report was biased because of his relationship with one of the lawyers involved in the case, the issue became whether Dr. Lavit had been appointed by the court or was in fact privately hired by the parties. The court held that whether judicial immunity exists is a question of law for the court and, citing cases concerning immunities extended to other mental health professionals from Arizona and other jurisdictions,



## When Hired Guns Misfire

held that Dr. Lavin was entitled to judicial immunity because (1) at least some of his evaluations and recommendations aided the trial court in determining the child custody issues and (2) his services were performed pursuant to a court order.

The opposite result occurred in an earlier Arizona case<sup>16</sup> concerning governmental employees where Pima County probationary authorities had allowed, contrary to court-ordered conditions of release, a sex offender to rent a room from the plaintiff, whose minor children were subsequently molested. The defendants were probation officers with expertise in the investigation and submission of presentence reports concerning probationers, thus exercising what the court found to be tasks arising out of and constituting a continuation of a judicial proceeding. The court stated that although officers, employees and agents who assist the court in the judicial process are entitled to absolute immunity, that part of a probation officer's duties that are merely administrative and supervisory are not, such duties being administrative and not judicial in character. The court found that the probation officers had ignored court-ordered conditions of probation in allowing the probationer to rent a room where he would have contact with children and reversed lower court rulings which had granted them immunity.

A similar result is found in *Griggs v. Oasis Adoptive Services, Inc.*,<sup>17</sup> where an "outside" certified adoption services provider, working on behalf of prospective adoptive parents under a court order to investigate and file the required adoptive home study with the court, was held not to be immune from liability for sending an *ex parte* letter to the court that allegedly stated facts which led the court to deny the adoption application. The provider had been terminated by the prospective parents in favor of another

service provider, and the *ex parte* letter apparently detailed concerns the provider had about the parents before stating that it was withdrawing from the home study process. The Court of Appeals noted that the letter was not part of the home study report ordered by the lower court, was not sent pursuant to any delegated judicial authority, and had been sent after the provider's services had been terminated. Noting that "a generalized connection to the judicial process does not confer immunity for all activ-

a binding valuation. Judicial immunity was not, the court concluded, available in this instance.

Compare this holding to the result in *Lavit* discussed above. And in a case from Vermont,<sup>19</sup> a licensed psychologist was hired to do an evaluation in a child custody dispute. The lower court had ordered the parties to hire an expert and report back who it was they had chosen and then report the results of the investigation. The parties hired and paid the expert. When the mother later

brought suit alleging negligent performance on the part of the psychologist expert, the expert raised the defenses of both judicial and witness immunity. The court held that judicial immunity was not available because the lower court had merely ordered the parties to agree on a single expert and that their contract

was with the expert, whom they had agreed to pay. The court also held that it wasn't the expert witness's testimony in court that was complained of but the investigation and written pretrial report, making the expert liable for any malpractice in performing those obligations, thus also denying the psychologist witness immunity.

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ities," the appellate court vacated the lower court's granting of a summary judgment that had been based on judicial immunity and remanded the matter for further proceedings, which, at the time of this writing, have yet to be concluded.

The distinctions here are not exactly clear ones, and cases asserting liability against court-appointed experts are probably going to have to turn on their facts. In a New Jersey case,<sup>18</sup> a court-appointed expert in a domestic relations matter was charged with rendering a binding valuation of the husband's interest in a business. When it was shown that the expert had deviated from accepted accounting standards in performing his tasks, the husband sued for damages alleged to have occurred because of what he determined to be an unfavorable settlement prompted by the valuation. The Supreme Court of New Jersey held that the expert could be held liable for negligence, noting that the expert had been hired by the parties and that the lower court had merely signed a consent order appointing the expert, which embodied the agreement of the parties to

## Actions by Opposing Parties

In a recent review of cases brought against adverse experts,<sup>20</sup> it is noted that the courts are in agreement that civil suits against adverse experts (experts who testify "for the other side") are barred by the witness immunity doctrine, including cases alleging defamation, fraud and negligence.

The reasons are readily apparent: Adverse experts have no contractual or professional obligations to opposing parties and, in addition, immunities serve a useful purpose in preventing impediments to the promotion of full and frank testimony of all participants



## When Hired Guns Misfire

in the litigation process. Immunity is not available, however, where the claims arise against the expert for a role other than as a witness.

An Arizona case<sup>21</sup> is a good example. There, an appraiser for the City of Phoenix in a condemnation action was sued by one of the condemnees alleging that he, the City and several city employees had conspired to give perjured testimony and to submit false and fraudulent documents in order to acquire the property being condemned at below fair market level. Among the causes of

action asserted was a “RICO” claim under A.R.S. §13-2301. The court granted the appraiser immunity on all claims relating to his deposition and trial testimony relating to his appraisal, but denied the appraiser’s attempt to avoid the RICO claims, stating that the plaintiff might still have a cause of action if he could present independent evidence of a conspiracy to defraud the property owners affected by the condemnation.

Similar rulings are found in cases where the expert is accused of spoliation of evidence in a judicial proceeding<sup>22</sup> and where the expert is before a professional self-reg-

ulatory panel determining professional discipline.<sup>23</sup>

## Are Lawyers Liable for Their Experts?

Of course, no discussion of successfully sued expert witnesses in a Bar publication would be complete without a discussion of what might happen to the lawyers who hired them. Like the situations where a lawyer might be called to account for negligently referring a client to another lawyer,<sup>24</sup> clients rely on their lawyers to make the right decisions when hiring others to assist them in the representation and may accuse them of negligence if they make a mistake in picking an expert.

The cases are not exactly uniform.

In a New York case,<sup>25</sup> a disgruntled mother sued her lawyer for using as an expert witness in a medical malpractice case a doctor who was unable to pinpoint the exact

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## When Hired Guns Misfire

time her unborn child contracted a disease she claimed was preventable but for the defendant doctor's malpractice. The lawyer presented testimony that the expert he picked was appropriate, but the case against him was ultimately dismissed because the mother could not show that anything the defendant in the underlying case might have done could have prevented the injury to her child.

But in two California cases,<sup>26</sup> when the experts hired by the plaintiffs' lawyers were sued, they were allowed to seek indemnity via cross-complaints against the lawyers who originally hired them. In *Forensis*, one of the California cases, the expert claimed that the lawyer who hired him had waited too long to retain him, had not provided him with adequate information, and had failed to rehabilitate him after he had been rigorously cross-examined at deposition.

### What To Expect in Arizona

The cases denying immunity to expert witnesses are based essentially on the premise that a professional who becomes a compensated witness is still a professional and is expected to conduct herself with the same skill and care ordinarily exercised by other members of that profession. This notion is buttressed by the American Medical Association's adoption in 1998 of a resolution that a physician's expert testimony is and constitutes the practice of medicine.<sup>27</sup>

Compare this to the opinion expressed by the American Bar Association in 1997 that lawyers who serve strictly as testifying experts are not practicing law, and are accordingly not subject to the Rules of Professional Conduct.<sup>28</sup> The opinion cautions that this would not apply to lawyers serving in both a consulting and testifying capacity in the same matter.

How will an Arizona court decide? We've seen what the Arizona courts have done

with the court-appointed or "neutral" expert. But how about the "friendly" expert, like our unfortunate Charles Seymour? A clue might be in *dicta* found in the *Lavit* case, discussed above. The court there, in granting Dr. Lavit the immunity he sought, said this in closing:

We note some limitations to the scope of this immunity. Lavit's role in this child custody proceeding differs from that of a private psychologist. Absolute immunity does not reach private psychologists working exclusively for a party and serving as an advocate only for that party or even attempting to help both parties reach a custody resolution. Such psychologists are not answerable to the court nor truly independent.<sup>29</sup>

In other words, experts may not be immune from liability to clients who privately hired them. A final answer on the point will have to await another day.

In the meantime, assuming that other kinds

of experts are subject to the same considerations as psychologists are, expert witnesses might consider provisions for binding arbitration of disputes in their engagement agreements, signed by the clients, assuming the ethics codes for their respective professions allow it.<sup>30</sup> They might also consider the purchase of expert witness liability insurance, policies that, for lawyers at least, provide more expansive coverages than those provided in their professional errors and omissions insurance. 

## endnotes

1. *See, e.g.*, Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253, 286 et seq. (Summer 2001).
2. *LLMD of Michigan Inc. v. Jackson-Cross Co.*, 740 A.2d 186, 191 (Pa. 1999).
3. *Id.*
4. 460 U.S. 325 (1983).
5. *Id.* at 330.
6. *Bruce v. Byrne-Stevens & Associates Engi-  
neers, Inc.*, 776 P.2d 666 (Wash. 1989).
7. *See* Marshall Grossman & Bingham McCutchen, *Demolishing Expert Witnesses and Expert Witness Malpractice* (Aug. 5, 2011) at trial.com/cle/materials/2011-ca/grossman.pdf
8. *Murphy v. A. A. Matthews*, 841 S.W.2d 671 (Mo. 1992).
9. *Mattco Forge Inc. v. Arthur Young & Co.*, 60 Cal. Rptr.2d 780 (Cal. App. 1997).
10. *Lambert v. Carneghi*, 70 Cal. Rptr. 3d 626 (Cal. App. 2008).
11. *Pollock v. Panjabi*, 781 A.2d 518 (Conn. Super. 2000).
12. *Boyes-Bogie v. Horvitz*, 14 Mass. L. Rptr. 208 (Mass. Super. 2001).
13. *Marrogi v. Howard*, 805 So.2d 1118 (La. 2002).
14. *Burk v. State*, 156 P.3d 423 (Ariz. Ct. App. 2007) (court employee making child custody recommendation); *Desilva v. Baker*, 96 P.3d 1084 (Ariz. Ct. App. 2004) (probation officers filing revocation petitions).
15. 839 P.2d 1141 (Ariz. Ct. App. 1992); *see also* *Widoff v. Wiens*, 45 P.3d 1232 (Ariz. Ct. App. 2002) (court-appointed guardian *ad litem* in family court proceeding).
16. *Acevedo v. Pima County Adult Probation Dept.*, 690 P.2d 38 (Ariz. 1984).
17. Case No. 1 CA-CV 15-0289 (Ariz. Court of Appeals Div.1) (Oct. 6, 2016).
18. *Levine v. Wiss & Co.*, 478 A.2d 397 (N.J. 1984).
19. *Politi v. Tyler*, 751 A.2d 788 (Vt. 2000).
20. ABA Section of Litigation, Expert Witness Committee, Expert Alert (Winter 2007).
21. *Darragh v. Superior Court*, 900 P.2d 1215 (Ariz. Ct. App. 1995).
22. *Trigon Insurance Co. v. U.S.*, 204 F.R.D. 277 (E.D. Va. 2001); *aff'd*, 234 F. Supp. 2d 592 (E.D. Va. 2002).
23. *See* cases collected in Harrison, *supra* note 1, at 290.
24. *See Referring Clients to Other Lawyers*, ARIZ. ATT'Y (October 2006), at 10.
25. *Healy v. Finz & Finz PC*, 918 N.Y.S.2d 500 (2011).
26. *Mattco Forge*, 60 Cal. Rptr.2d at 780; *Forensis Group Inc. v. Franz, Townsend & Foldenauer*, 29 Cal. Rptr. 3d 622 (Cal. App. 2005).
27. AMA Defines Medical Testimony as the Practice of Medicine, Diet Drugs Litigation Rep., May 1998 at 17.
28. ABA Formal Op. 97-407, Lawyer as Expert Witness or Expert Consultant (May 13, 1997).
29. *Lavit*, 839 P.2d at 1146.
30. This is allowed for Arizona lawyers provided certain conditions are met. *See* Ariz. Ethics Op. 94-05, Retainer Agreement; Arbitration (March 1994).