



BY RICHARD ALCORN

“It Would
Be Really
Great
If You
Could
Say...”

“The fact that experts are considered ‘whores of the Court’ necessitates that lawyers be considered the ‘johns.’”¹

The proffer of testimony from “experts” has become so customary that Melvin Belli once commented, “Counsel who chooses to proceed without an expert may be flirting with malpractice.”² Scientific and other expert evidence generally is given substantial credibility and weight by judges and juries, making the role of expert testimony of paramount significance.³

A lawyer’s presentation of expert witness testimony involves several important ethical rules, including some “not-so-common” ethical issues. This article discusses Arizona ethical requirements a lawyer should consider in presenting expert witness testimony. A lawyer’s failure to understand and adhere to these ethical rules can lead to decidedly adverse consequences, including court sanctions and ethics charges, as well as a potential malpractice lawsuit.

ETHICS AND EXP





Presenting Expert Witness Testimony

A lawyer has a general ethical obligation to attempt in good faith to present expert witness evidence in accord with the admissibility standards and procedural rules for such evidence. The admissibility standards vary depending on whether the matter is filed in federal court (in which case the *Daubert/Joiner/Kuhmo* trilogy will control) or in an Arizona state court (in which case the *Frye/Logerquist* tests will apply).⁴

Ethical Rules

Several ethics rules apply to the presentation of expert testimony, notwithstanding the court in which the litigation is pending. The primary ethical rule regarding a lawyer's presentation of expert witness testimony is ER 3.3 (candor to tribunal), although ER 3.1

(asserting meritorious claims or defenses) and ER 3.4(b) (presenting false evidence or assisting a witness to testify falsely) also provide guidance.⁵

The overarching ethical issue is whether—under the Rules of Professional Conduct or other aspirational “professionalism” goals—a lawyer must act as a “gatekeeper” regarding the reliability of expert witness testimony and evidence offered by the lawyer in an adjudicative proceeding.⁶ If a lawyer has doubts regarding an expert's qualifications, bias, methodologies or opinions, what ethical duties, if any, does the lawyer have to exercise additional diligence or to make further reasonable inquiry to resolve such doubts and to confirm the legal reliability of the expert's analysis?

These issues raise the recurring conflicts between an advocate's duty to make the best possible arguments supporting a client's case

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and the advocate's duties to the court. These issues also create tension on an ethical level between what the ethical rules may allow and what "professionalism" may not.⁷

ER 3.3(a)(3) unambiguously requires a lawyer to refuse to offer expert witness testimony or evidence the lawyer knows to be false. Yet, "A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."⁸ At the same time, however, ER 3.3(a)(3) states, "A lawyer may refuse to offer evidence ... that the lawyer reasonably believes is false." Accordingly, expert witness evidence known to be false cannot be offered. Expert witness evidence reasonably believed to be false is not precluded from presentation by that fact alone, but a lawyer also may refuse to offer such evidence. Note that ER 3.3 does not speak in terms of "reliability" or "validity" of witness evidence, which are the core concerns in determining the admissibility of both scientific and non-scientific expert testimony.⁹

When does a lawyer "know" that expert witness evidence is false? This issue is particularly daunting in the context of expert witness testimony because even experts may disagree regarding the validity or reliability of the evidence at issue. How is a lawyer to "know" expert evidence is false when confronted with two (or more) competing analyses, each supported by particular methodologies and theories?¹⁰

According to ER 3.3, "[T]he lawyer cannot ignore an obvious falsehood" (cmt. 8). Even though a lawyer may assert lack of actual knowledge that an expert is presenting or has presented false testimony or evidence, the lawyer subsequently may be deemed to have had such knowledge because of the circumstances. Knowledge of falsity "can be inferred from the circumstances."¹¹ In addition, the "reasonable belief" language in ER 3.3(a)(3) and in comment 8 has been interpreted to mean that the lawyer has "genuine and reasonable doubt" as to falsity.

If a lawyer's belief that the expert's evidence may be false is sufficiently certain that the lawyer can have no "genuine or reasonable" doubt as to its falsity, then the lawyer "knows" that the evidence is false and is precluded from presenting it to the court.¹² A lawyer's reasonable doubts regarding the reliability or falsity of an expert's testimony also may be transformed into actual or constructive knowledge of falsity if the lawyer's exercise of due diligence and inquiry would have confirmed the falsity of the expert's testimony.

A lawyer cannot ignore doubts or questions regarding the validity or reliability of his or her expert's evidence where reasonable and diligent inquiry would confirm the falsity of the expert's analysis and opinions.¹³ Lawyers have an ethical duty, for example, to reassess the reliability, validity, integrity and relevance of proffered expert evidence in light of fallacies, deficiencies and erroneous assumptions that may be revealed in discovery or in a *Daubert* or *Frye* challenge to the expert's testimony.¹⁴

One obvious indicator of falsity exists when the expert witness offers contradictory testimony. The expert's contradictory statements may occur within the same litigation, or the expert may offer testimony that differs from prior testimony (affidavits, depositions or trial) in an unrelated proceeding. If the circumstances are

such that the lawyer should have known of the contradiction, the lawyer knows of the falsity of the expert's evidence, and thus may not offer it. Contradictory testimony from an expert indicates "an obvious falsehood" that a lawyer cannot ignore.¹⁵

In *In the Matter of Peasley*,¹⁶ the Arizona Supreme Court disbarred a prosecutor who presented contradictory lay witness testimony during two separate trials, thus violating ER 3.3(a)(3) by presenting false and misleading testimony. Justice Ryan, writing for the court, observed that "even the most inexperienced lawyer knows that he or she should not elicit false testimony."¹⁷ These ethical principles obviously should be of equal force where false expert witness testimony knowingly or recklessly is offered.

One commentator advocates "the full recognition of the lawyer's professional obligation to carefully scrutinize the integrity of his own expert's proposed testimony. ... "It is clear that ... the lawyer must ... test the accuracy and reliability of ... expert testimony ... he wishes to introduce."¹⁸ Pointing to ER 3.1 (duty to assert only meritorious claims or defenses), this commentator contends that lawyers are ethically required to ascertain that "there is a good faith basis to believe that [the expert's testimony] is reliable scientific evidence."¹⁹ In the extreme case of a lawyer exercising no due diligence or failing to make a reasonable inquiry to ascertain the reliability of the expert's evidence, sanctions pursuant to Rule 11 also may be sought.²⁰

These views obviously would shift to lawyers considerable responsibility for the nature and quality of expert witness evidence adduced in adjudicative proceedings. Nonetheless, many if not most lawyers remain of the narrow view that courts are the "gatekeepers" and lawyers, as advocates, have no gatekeeper responsibility regarding the admissibility or reliability of expert evidence. The prevailing attitude appears to be that lawyers do not (and cannot) vouch for the truth and validity of expert evidence.

Although lawyers perhaps cannot "vouch" for such truth and reliability, certainly lawyers can—and should be required to—perform a limited gatekeeper role. The lawyer offering expert testimony is the person best situated to assess issues such as whether:

- the expert's qualifications and experience are sufficient
- the theories or methodologies used are scientifically sound or accepted in the industry or profession
- the theories or opinions of the expert witness exceed the reasonable limits of his or her expertise or experience
- the inductive or deductive reasoning employed by the expert is reasonable and trustworthy
- the expert's data and investigation are adequate
- and other such issues relevant to the credibility and reliability of the expert's evidence.

A lawyer has an ethical duty to scrutinize his or her own expert's testimony and to refrain from offering expert evidence that would be untruthful, unsupported, unreliable, invalid or misleading to the trier of fact. If a lawyer has doubts or questions regarding the valid-

ity or reliability of his or her expert's testimony (or reasonably should have such doubts based on the facts and circumstances), the lawyer must pursue a reasonable and diligent inquiry that will resolve such doubts and questions.

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Finally, it has been suggested that the language of ER 3.4(b), which precludes false evidence or assisting a witness to testify falsely, imposes ethical requirements for expert witness testimony. The suggestion is that ER 3.4(b) “forbids an attorney to permit an expert witness to testify as an expert in an area that is not scientifically valid.”²¹ Obviously, this statement may be accurate where the testimony will be offered based on indisputably invalid scientific theories or methods.

In addition, it has been argued that ER 3.4(b) “forbids the lawyer to coax opinions from the expert that are beyond the realm of the expert’s specialized knowledge.”²² Advocacy obligations notwithstanding, a lawyer obviously should not attempt to elicit opinions from an expert witness that the lawyer knows or reasonably should know are beyond the witness’s expertise. According to one commentator, however, these positions represent an extreme view of the obligations imposed under the ethical rules.²³

The prohibitions of ER 3.4(b) do clearly appear to apply to a situation in which the lawyer actually knows or should have known the falsity of an expert’s testimony, as where the expert offers contradictory testimony.²⁴ Once the expert gives contradictory testimony, the lawyer has actual or constructive knowledge of its falsity. Appropriate remedial measures would become necessary under ER 3.3(a)(3) and the lawyer must, pursuant to ER 3.4(b), refrain from “assisting” the expert witness to testify falsely.

Cross-Examining Expert Witnesses

Effective cross-examination of an expert witness is a formidable undertaking under even the most favorable circumstances. In Arizona, misconduct in cross-examining an expert witness will lead to very serious disciplinary consequences. Several specific ethics rules are implicated: ER 3.1 (assertions made without a good faith basis in law or fact), ER 3.4(c) (knowing disobedience of an obligation under court rules), ER 3.4(e) (trial tactics unsupported by admissible evidence), and ER 8.4(d) (conduct prejudicial to the administration of justice).

Zawada

The Arizona Supreme Court in 2004 in *In the Matter of Zawada* suspended a Pima County prosecutor for six months and one day for ethical misconduct during his cross-examination of a defense mental health expert in a first-degree murder trial.²⁵ The specific misconduct in *Zawada* consisted of the prosecutor’s cross-examination. Chief Justice Jones, writing for the Court, found that the cross-examination (1) implied the expert had fabricated his diagnosis to coincide with the defendant’s theory of the case, (2) insinuated that the expert’s diagnosis was fabricated as a consequence of payments from defense counsel, and, (3) improperly argued to the jury that mental health experts in general merely create excuses for

criminals.

On *sua sponte* review, the Court sent an emphatic message condemning what the Court characterized as the prosecutor’s “grossly improper” cross-examination that violated several ethical rules. The Court initially reaffirmed the Hearing Officer’s finding that the prosecutor’s cross-examination was “wholly unsupported by evidence of any kind.”²⁶ As a consequence, the Court concluded that Zawada breached ER 3.1 (contentions made without a good faith basis in law or fact) and ER 3.4(e) (trial tactics not supported by admissible evidence). These ethics rules were violated by Zawada’s “impeachment by insinuation”—cross-examination of

the expert witness by posing questions for which there is no basis in fact. The Court also found a violation of ER 8.4(d), which proscribes conduct prejudicial

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Significantly, the prosecutor’s improper cross-examination also was determined by the Court to be a violation of ER 3.4(c). That rule specifies “A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” The Court explained that Arizona court decisions (as opposed to procedural rules) make it clear that a prosecutor cannot imply unethical conduct on the part of an expert witness without having evidence to support the accusation. As the court wrote, “Zawada knowingly disobeyed this obligation *under the rule*, placing him in direct violation of ER 3.4(c).”²⁷

The Court’s broad definition of “rules of a tribunal” under the language of ER 3.4(c) is noteworthy. Based on the Court’s holding in *Zawada*, ER 3.4(c) includes not only formal court procedural rules, but also “rules” established by the courts in the common law governing the presentation of trial testimony and evidence. The Court observed that a lawyer “cannot attack the expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury.”²⁸ Rather, lawyers when cross-examining expert witnesses “must ... adhere to established rules and standards in the presentation of evidence and argument in the courtroom.”²⁹ In addition, under this reasoning, it would seem that a lawyer’s violation of ER 3.4(e) (trial tactics unsupported by admissible evidence) would, by force, always also violate the proscription of ER 3.4(c) (knowing disobedience of an obligation under court rules).

Zawada forcefully communicates that “impeachment by insinuation” of expert witness testimony is unethical in multiple respects and will not be countenanced by Arizona courts. The *Zawada* Court set forth the lawyer’s options in confronting adverse expert witness testimony:

- (1) Rebut the testimony with controverting evidence, which presumably could include controverting expert and/or lay testimony and other evidence;

- (2) Stipulate to the accuracy of the testimony;
- (3) Ignore the testimony, or
- (4) "Attack the ... expert through legitimate cross-examination."³⁰

Such "legitimate cross-examination" presumably would include, as examples, disputing and/or disproving the factual predicate on which the expert's testimony rests; attacking the expert's qualifications or experience; criticizing opinion testimony as beyond the scope of the witness's expertise; impugning the expert's methodology for gathering evidence or investigating the underlying facts; establishing the inherent limits and assumptions of an expert's discipline and/or the expert's specific opinions; and disputing the inductive or deductive reasoning used in formulation of the expert's opinions or inferences. *Zawada* reaffirms that it is improper to "attack [] the experts, their profession and credibility through disingenuous, baseless argument and cross-examination."³¹

The key factor in the *Zawada* Court's imposition of sanctions appears to concern the lack of evidentiary support and castigating manner in which the prosecutor cross-examined the mental-health expert.

Clark v. Arizona

In an ironic twist, the United States Supreme Court recently decided *Clark v. Arizona*,³² in which the Court extensively discussed the evidentiary limitations inherent in the use of mental-health expert evidence. The *Clark* Court, by a 6-3 vote, upheld as constitutional Arizona's statutory scheme and common law (the "*Mott* rule"), which together essentially provide that the testimony of a professional psychologist or psychiatrist regarding a defendant's mental capacity owing to mental disease or defect is admissible, and can be considered, only with regard to an insanity defense, but may not be considered to negate the *mens rea* element of a crime.

Writing for the *Clark* majority, Justice Souter expressed several "less than kind" observations regarding mental-health expert evidence. The Court found that Arizona's limitation on mental-health expert evidence—the *Mott* rule—satisfies due process requirements for several reasons: (1) the "potential of mental-disease expert evidence to mislead," (2) the "dan-

ger of according greater certainty to [mental] capacity evidence than experts claim for it," and (3) the "controversial character of some categories of mental disease."³³ Justice Souter bluntly observed that "opinions about mental disease may confuse a jury into thinking the opinions show more than they do."³⁴ He concluded, "These empirical and conceptual problems add up to a real risk that an expert's judgment in giving [mental] capacity evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have."³⁵

Viewed in context, it therefore seems clear that the prosecutor's ethical "sin" in *Zawada* centered more on the manner of his attack—unsupported attempts to impeach the expert by insinuation and innuendo—rather than on his object of undercutting the credibility and weight to be given to mental-health expert witness evidence generally, or to the mental-health expert's opinions specifically. No ethical impropriety would appear to exist from a lawyer's "legitimate" cross-examination that attempts to fairly establish the limitations, assumptions, fallacies and ultimate boundaries of an expert's field or specific opinion testimony.

Sharman v. Skaggs Cos.

As explained previously, pursuant to ER 3.4(e) it is unethical to conduct cross-examination so as to imply the existence of facts that are not relevant or "that will not be supported by admissible evidence." In an interesting expert case in the civil context, *Sharman v. Skaggs Cos., Inc.*,³⁶ the Arizona Court of Appeals reaffirmed that expert witness cross-examination may not be used to allude to matters not supported by admissible evidence. In *Sharman*, the testimony of defendant's expert witness was suppressed for failure to timely identify him in response to discovery requests. Imaginative defense counsel then attempted to introduce into evidence the defense expert's *curriculum vitae* and report for the ostensible purpose of cross-examining plaintiff's expert witness.

Division Two of the Court of Appeals held it was reversible error to allow the *curriculum vitae* and report of the disallowed defendant's medical expert to be placed before the jury for cross-examination of the

plaintiff's expert and by reading the documents to the witness and the jury. Significantly, the defendant's expert report had not been used by the plaintiff's expert in formulating his opinion testimony and was not made available to him until trial. The defendant's expert report and *curriculum vitae* were inadmissible hearsay as to which cross-examination of plaintiff's expert was impermissible.³⁷

The prohibition of ER 3.4(e) should not be interpreted or applied to preclude full cross-examination regarding the underlying bases for an expert's opinions or inferences, even where the expert's testimony is based on inadmissible evidence. Expert witnesses in forming opinions or inferences may rely on inadmissible evidence "if of a type reasonably relied upon by experts in the particular field," pursuant to Rule 703 of the Arizona Rules of Evidence. Further, Rule 705 allows the expert to testify in terms of opinions or inferences without prior disclosure of the underlying facts or data, unless the court requires otherwise. The cross-examining attorney also may require that the expert disclose the underlying facts or data, including otherwise inadmissible evidence. Yet ER 3.4(e) says, "A lawyer shall not ... in trial, allude to any matter ... that will not be supported by admissible evidence." Effective cross-examination of the expert may require not only that the cross-examining lawyer "allude to" potentially inadmissible evidence, but that the lawyer carefully and thoroughly interrogate the expert regarding inadmissible evidence upon which the expert may have relied.

Under Rule 705, if the basis for the expert's conclusions is not disclosed, the opposing attorney should be permitted to inquire into the matter on cross-examination, even if inadmissible evidence is involved. Such cross-examination would not involve "impeachment by insinuation," the disallowed examination technique that is the primary object of the prohibitions of ER 3.4(e).

Although substantial latitude is given to a cross-examiner to attack the expert witness's credibility, it is "wholly improper and highly prejudicial" to attempt to impeach an expert witness through questions for which there is no evidentiary basis. On this, Arizona case law is definite: "It is improper

for counsel to imply unethical conduct on the part of an expert witness without having evidence to support the accusation.”³⁸ “[W]hile [the lawyer] may strike hard blows, he is not at liberty to strike foul ones.”³⁹


Questioning Amounts Paid to the Expert

Finally, a lawyer may, and should, cross-examine the opposing party’s expert regarding the amounts paid to the expert for providing services in the case at issue. In some circumstances, such as where an expert earns a substantial portion of his or her income from providing expert services, discovery also may be obtained regarding amounts earned by the expert from testifying generally. The expert witness’s personal finances may be subject to discovery and cross-examination to demonstrate bias and lack of credibility. One court explained that “exposure of financial interest bias may sometimes be the most effective challenge that can be made to an expert’s testimony, especially that of a witness skilled in the act of testifying.”⁴⁰

From the ethics perspective, however, any financial information sought from the expert and cross-examination based thereon must legitimately relate to the expert’s credibility and objectivity. ER 4.4(a) states, “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.” Accordingly, discovery of an expert witness’s personal finances, if obtained at all, and cross-examination regarding those finances, should be “no more intrusive than necessary” and “never permitted to harass, badger and humiliate the proposed witness with inquiries not strictly necessary to the discovery of matters relevant to professional objectivity.”⁴¹

The examining lawyer should merely note the compensation and its implications as to objectivity, bias and credibility. For example, the examiner may not, without supporting evidence, accuse an expert who testifies for a fee of “being nothing but a paid expert who will say anything whatsoever without regard to what is right, without regard to what is truthful.”⁴²

Conclusion

The mere fact that expert witness evidence is offered suggests that the trier of fact lacks the necessary knowledge and expertise to correctly decide an issue. Lawyers, as officers of the court, should serve a limited gatekeeper function to assist the courts in attempting to exclude unreliable expert testimony that may be the result of partisanship, bias or incompetence. Expert testimony should be evaluated and screened by lawyers to attempt—to the extent possible—to ensure that only reliable, valid expert evidence is presented to the trier of fact. 

endnotes

1. Robert Haun, *Truth for Hire With a Ph.D.: The Abuse of Expert Witnesses*, 8 MACALESTER J. PHIL. (1998).

2. Melvin M. Belli, Sr., *The Expert Witness*, TRIAL, July 1982, at 35, 35.
3. Carol Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C. L. REV. 39, 45 (1991) (scientific evidence viewed as “more credible” by approximately 75 percent of jurists and lawyers).
4. See generally Paul F. Eckstein & Samuel A. Thumma, *Novel Scientific Expert Evidence in Arizona State Courts*, ARIZ. ATT’Y, June 1998, at 16; Paul F. Eckstein & Samuel A. Thumma, *Getting Scientific Evidence Admitted in Federal Court: The Daubert Hearing*, Vol. 24, No. 2 LITIG. (Winter 1998). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on remand, 43 F.3d 1311 (9th Cir.) (“*Daubert II*”), cert. denied, 116 S. Ct. 189 (1995); *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000).
5. The client obviously should be informed and consulted regarding the selection of an expert (or experts), as well as the anticipated scope of the expert’s investigation and testimony. ER 1.2(a), Rule 42, ARIZ.R.S.Ct. (“[A]s required by ER 1.4, [a lawyer] shall consult with the client as to the means by which [the objectives of representation] are to be pursued.”); ER 1.4 (a) (“A lawyer shall ... (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; [and] (3) keep the client reasonably informed about the status of the matter.”). Such consultation would include obtaining the client’s informed direction regarding whether a challenge (usually in the form of a motion *in limine* and/or evidentiary hearing) should be pursued under *Daubert* (in federal court) or *Frye* (in Arizona state court) regarding an opposing expert’s testimony. ER 1.4, cmt. [5] (“A lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense.”).
6. David S. Caudill, *Advocacy, Witnesses and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert’s Testimony?*, 39 IDAHO L. REV. 341 (2003).
7. *Id.*
8. ER 3.3, cmt. 8.
9. See note 4 *supra*.
10. Caudill, *supra* note 6, at 352.
11. ER 3.3, cmt. 8.
12. Caudill, *supra* note 6, at 344.
13. As “officers of the court,” lawyers must assist the courts in performing their gatekeeper role regarding the admissibility of expert evidence. Discredited and unreliable expert testimony should not be offered, both because of the lawyer’s ethical obligations and as a matter of trial strategy.
14. ER 3.3, 3.1, and 3.4(b).
15. ER 3.3 cmt. 8.
16. 90 P.3d 74 (Ariz. 2004).
17. *Id.* at 81.
18. Dick Thornburgh, *Junk Science—The Lawyer’s Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449, 469, 462 (1998).
19. *Id.* at 462-63.
20. *Id.* at 467, 468 n.106 (“In the case of junk science, it is arguable that Rule 11 is violated by an attorney who files a complaint which is based entirely on junk science.”). At the same time, filing a motion to exclude an expert or to limit testimony (a *Daubert* or *Frye* challenge) also must have a good faith factual and legal basis, and must be filed for a proper purpose. Filing such challenges to expert evidence for strategic purposes *only*, with no real hope of disqualifying the expert or limiting the expert’s evidence, would be improper. *Daubert* or *Frye* challenges should not be used merely to increase the adversary’s costs, to “prime” the judge as to certain issues, or as a supplemental discovery device.
21. Justin P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics?* 14 GEORGETOWN J. LEGAL ETHICS 217, 230 (Fall 2000).
22. *Id.* In presenting expert testimony the lawyer obviously must refrain from exerting improper intellectual influence or offering economic “encouragement” that could impinge upon the expert’s opinions.
23. Caudill, *supra* note 6, at 348.
24. It is unclear under current Arizona law whether an ER 3.4(b) violation may rest upon negligent, as opposed to knowing, conduct. The language of ER 3.4(b) does not contain a “knowledge” requirement, although the Arizona Supreme Court in a 1994 opinion held that ER 3.4(b) “expressly or implied-

- ly require[s] some sort of knowledge on the part of the attorney.” *In re Shannon*, 876 P.2d 548, 560 (Ariz. 1994). *But see In re Clark*, 87 P.3d 827, 831 (Ariz. 2004) (“If the Ethical Rules require a higher mental state, they usually specify the mental state required”).
25. *In re Zawada*, 92 P.3d 862 (Ariz. 2004); *see also State v. Hughes*, 969 P.2d 1184 (Ariz. 1998). The suspension for six months and one day will require that the suspended lawyer apply for reinstatement. *See* Rule 64(e)(1), ARIZ.R.S.C.T.
 26. 92 P.3d at 865.
 27. *Id.* at 867 (emphasis added).
 28. *Id.* *See also Sipsas v. State*, 716 P.2d 231, 234 (Nev. 1986) (improper to refer to physician expert as “The Hired Gun from Hot Tub Country” and to characterize his testimony as “Have stethoscope, will travel”).
 29. *Id.*
 30. *Id.*
 31. *Id.* at 868. *See also Shemman v. Am. S.S. Co.*, 280 N.W.2d 852, 857 (Mich. Ct. App. 1979) (“improper innuendos” regarding expert witness testimony constituted a “studied purpose to prejudice the jury and divert the jurors’ attention from the merits of the case”).
 32. 548 U.S. ____ (2006).
 33. *Id.*, slip op. at 33-38.
 34. *Id.*, slip op. at 36.
 35. *Id.*, slip op. at 38.
 36. 602 P.2d 833 (Ariz. Ct. App. 1979).
 37. *Id.* at 837. Similarly, a testifying expert witness may not use his testimony to inject the views of other, nontestifying experts. The testifying expert may not corroborate or bolster his testimony by showing other experts concur. *See, e.g., In re James Wilson Assoc.*, 965 F.2d 160 (7th Cir. 1992) (one expert cannot act as the “spokesman” for nontestifying expert).
 38. *Zawada*, 92 P.3d at 867, *quoting Hughes*, 969 P.2d at 1198.
 39. *Berger v. United States*, 295 U.S. 78, 88 (1935).
 40. *Wroblewski v. de Lara*, 727 A.2d 930, 934 (Md. 1999). *See also* Russell G. Donaldson, Annotation, *Propriety of Cross-Examining Expert Witness Regarding His Status as “Professional Witness,”* 39 A.L.R. 4th 742, 758-63 (1985, 1997 Supp.) (and collected cases).
 41. *State ex rel. Creighton v. Jackson*, 870 S.W.2d 639, 643 (Mo. Ct. App. 1994), *quoting State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 65 (Mo. Ct. App. 1992). *See also State v. Coulter*, 594 N.E.2d 1163 (Ill. App. Ct. 1992) (attorney cannot insinuate witness is untruthful because the witness is being paid by opposing party); *Hunter v. Sukkar*, 443 N.E.2d 774, 777-78 (Ill. App. Ct. 1982) (counsel may not go beyond noting that expert was compensated and its implications as to credibility; improper to suggest parallel between television character in “Have Gun Will Travel” and physician expert who has “medical testimony will travel”).
 42. *Clark v. New York City Transit Auth.*, 580 N.Y.S.2d 222 (App. Div. 1 Dept. 1992).