

The Dark Side — An Ethical Dilemma

by Tommy R. Michaels, CPCU, AIC, ARM, ARe



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I worked at The Hartford for 36 years, with the last 15 very much involved in coverage litigation. When my co-workers heard I was retiring to become an expert witness, they cautioned me not to go to the "dark side." As opposing attorneys learned of my pending retirement and future work, they asked if I would be coming over *from* the dark side. Nobody defined the dark side, but an image of Darth Vader, from the original *Star Wars* movie trilogy, quickly comes to mind.

For those who are familiar with insurance coverage litigation, there is a dark side. The forces of evil fill the dark side. The dark side is the person or entity not on *your* side. If you are a policyholder or policyholder counsel, then the dark side is the insurance company. Conversely, the dark side for the insurance company is the attorney on the other side of the litigation along with his/her client. Following the CPCU Society Creed, the CPCU Society Code of Ethics and the American Institute for CPCU's Code of Professional Ethics will keep you from the dark side.

Role of Expert Witness on the Dark Side

The dark side really exists in the minds of all those who are advocates and have a stake in the outcome of the litigation. An attorney recently asked if I felt I could be a zealous advocate. This was even before he told me any facts of the case. I replied that his role is that of zealous advocate and the role of the expert witness is to give insight and help others understand matters that are not common knowledge. I also explained that prior to reducing any opinion to written form, I would talk with the attorney. In this way, the attorney knows about the weaknesses of the case and has the opportunity to end the engagement. This happened when I received a call from a person, representing a tenant, who was seeking an expert who could refute the property owner's claim that the day care facility run by his tenant increased his liability. It was necessary for me to tell him that

from the description he provided, it did seem that the property owner would have increased liability exposure.

Be True to Yourself

Athletes often speak of "staying within themselves" as a reason for their success. The expert must also stay within his/her area of expertise and possibly recommend a more appropriate expert for the attorney, if necessary. An attorney called and wanted to use me because of my prior employment with The Hartford. As we discussed the case, it became clear that he needed an experienced underwriter — not my claims experience. I have given him names of two other persons who may be able to help him. A similar situation occurred with an attorney preparing for a class action regarding homeowner policies. Holding yourself out as an expert in an unfamiliar area cannot only damage your credibility in that specific case, but in future cases as well. The American Institute's Code of Ethics Rule R6.3 requires, "In rendering or proposing to render professional services for others, a CPCU shall not knowingly misrepresent or conceal any limitations on the CPCU's ability to provide the quantity or quality of professional services required by the circumstances."



Expert Witness Must Remain Objective

If the expert does accept an engagement, it is paramount that the expert be objective in the analysis and formulation of a professional opinion. The expert should review all necessary documents, including deposition transcripts and not just deposition summaries. It is necessary to communicate with the attorney as the review progresses, request other documents if needed, and clarify any facts that may bear on the opinion and remain unclear. As the expert begins to form an opinion, or several opinions, based on expert knowledge and document review, consult with the attorney, especially if the opinion is not helpful to the attorney. The expert must resist any temptation or request by the attorney to modify or change an opinion to make it more favorable. Slanting an opinion transforms the expert from Jedi hero Luke Skywalker to Darth Vader. The attorney has the option to let the expert continue or to stop work rather than have the expert distort an opinion. A report does not have to be prepared unless requested. Additionally, the attorney becomes more aware of potential weaknesses and can become more prepared. One of the unspecified unethical practices in the CPCU Society Code of Ethics states: "A member shall not engage in practices which tend to discredit the Society or the business of insurance and risk management."

Payment Not Dependent on Outcome

The role of the expert is not to advocate, but to use expertise to enlighten the judge and jury in understanding matters that are not otherwise common knowledge. The expert's compensation should never be contingent on the outcome of the case, but should always be on an hourly basis, a flat fee or other similar method — not outcome based. The payment to the expert is for the time and experience rather than for a certain outcome. The amount and method of compensation

is not a secret and is part of the expert's report if the litigation is in federal court (and some state courts). Even if the rules of evidence do not require disclosure in a report of the amount and method of compensation and any payment already received, it is often a topic in a deposition. Canon 1 of the American Institute's Code of Professional Ethics admonishes CPCUs to "endeavor at all times to place the public interest above their own." When the expert witness provides insight with testimony and does not advocate a specific position, the expert has placed the public interest above his or her own.



Confidential Information and Conflicts

The documents the expert reviews and information the expert receives are often of a confidential nature. Many cases may have a protective order in place that affects all documents, even those otherwise considered not confidential. If the expert is unsure about the confidential nature of documents, the expert should consider the information confidential until a determination is made. The main concern is release of documents outside the case or dissemination to third parties not connected to the case. An expert needs

to have an agreement with the attorney at the beginning of the assignment regarding custody of documents during the engagement and the disposition of documents once the engagement has ended. This may include shredding the documents or returning them to the attorney.

Future assignments are another concern arising from documents and information the expert receives. The CPCU Society Creed states: "... I will only engage in practices which reflect well on the Society and the business of insurance and risk management." Prior to accepting an assignment, the expert must determine if accepting the assignment would be a conflict of interest because of current relationships and assignments or past relationships and assignments. If another interest or obligation makes it difficult for the expert to fulfill his or her duties fairly, there is a breach of ethics.

Ethics Strengthen the Expert

Ethics do not interfere with the work of an expert or hinder the expert, but strengthen the expert. A better opinion will result from an expert who honestly and fairly evaluates all of the facts without trying to slant an opinion. The expert can more strongly defend the opinion and withstand cross-examination. The credibility and future work of the expert increases when the expert adheres to ethical practices. Finally, ethical behavior not only reflects favorably on the expert, but also on the CPCU designation and the industry. ■