



Objectivity, Bias, and Advocacy in Expert Forensic Testimony Concerning the Standard of Care

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Abstract

Expert witnesses are allowed to provide opinion testimony for the purpose of aiding judges or juries in answering questions the domains of which are outside the areas of knowledge of normally competent lay people. The arena within which expert witnesses act is often one of dispute, argument, and adversity. An expert may be asked to express an opinion concerning another professional's performance relative to the "standard of care," which can be thought of as the boundary between negligence and non-negligence. An expert witness's testimony may be favorable to one side over another, and expert witnesses may testify for either side, yet the expert is expected to be objective and unbiased. There are some who contend the expert witness must not be an "advocate" for one side of a matter at trial. This paper first presents a definition of the standard of care, then describes the role and limits of objectivity, bias, and advocacy on the part of the expert witness.

Keywords: standard of care; professional negligence; expert witness, objectivity, bias, advocacy.

1 Introduction

In the United States, a professional engineer, who is an individual licensed by each State to practice or offer engineering services in that State, is allowed to err when providing those services without incurring liability for injuries arising from that error [1]. Some level of error, however, is beyond an acceptable level, and can be characterized as "negligence." The boundary between negligent error resulting in liability on the part of the engineer, and non-negligent error which does not result in the engineer's liability, is called the "standard of care." The identification of an engineering error, the assessment of the standard of care, and the evaluation of an engineer's performance relative to the standard of care are facts which are outside the areas of

knowledge of a normally competent trier of fact (a jury or a judge).

2 Definition of the Standard of Care

In US legal procedures, after a jury has heard all the evidence and before it starts its deliberations to answer the ultimate questions of the defendant's negligence and liability, the jury receives instructions from the court regarding the specific questions of fact raised during the trial which the jury is to answer. Standardized (or "pattern") jury instructions have been created in many States, and those standardized instructions change over time as case law changes. In 1986, West Publishing Company published the Book of Approved Jury Instructions [2]. Instruction 6.37, "Duty of a Professional," read: