

A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?

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ABSTRACT

THE UNCITRAL Model Law on International Commercial Arbitration, like other arbitration laws and rules, imposes ethical duties on arbitrators, most obviously the obligations of impartiality and independence and the related duty of disclosure. Unlike the case for arbitrators, though, the Model Law and other arbitration laws and rules are silent concerning whether party-appointed expert witnesses are subject to ethical duties such as impartiality and objectivity. What ethical standards, if any, should an arbitrator apply to the duties of an expert witness testifying before an international arbitral tribunal?

Surprisingly, as explained further in this article, the source for those standards is far more likely to lie within the experts' own professions rather than within international arbitration principles. Moreover, arbitrators can establish practical parameters for the conduct of party-appointed experts such as (1) a duty to disclose material relationships; (2) a duty to include in any written and oral evidence all material information, whether supportive or adverse; and (3) a duty to professionally assess the reasonableness of assumptions on which that expert relies in the expert evidence. Another creative proposal is the 'Sachs Protocol'. Dr Klaus Sachs recently proposed at the 2010 ICCA annual conference in Rio de Janeiro that the opposing parties in an arbitration could propose lists of possible experts. The tribunal would then select one expert from each list to serve on an 'expert team'. That team would be appointed by and responsible solely to the tribunal and compensated out of the common arbitration deposits.

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I. INTRODUCTION

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Arbitration laws and arbitration rules generally say nothing about the ethics duties of party-appointed experts. The same silence on these issues that characterises the UNCITRAL Model Law on International Commercial Arbitration also exists in the English Arbitration Act 1996, the US Federal Arbitration Act, the Swedish Arbitration Act and arbitration laws in other prominent jurisdictions.¹ Commonly employed arbitration rules also do not address the duties of party-appointed expert witnesses.

(a) Judicial Practice

Silence in arbitration law and rules stands in contrast with judicial practice. Courts, and their codes of civil procedures, do impose a code of conduct on party-appointed experts. For judicial proceedings, court rules in many countries establish whether (1) a party-appointed expert witness owes a principal duty to the party who engaged the expert or to the court; (2) the expert must render objective and impartial opinions in presenting evidence and opinions or can instead act as an advocate for the instructing party; and (3) the expert has a duty to disclose relationships affecting independence or impartiality.

For example, Part 35 of the UK Civil Procedure Rules (CPR) (Experts and Assessors) is applicable in the courts of England and Wales. Rule 35.3 of the CPR² expressly provides:

- (1) It is the duty of experts to help the court on matters within their expertise.
- (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Moreover, pursuant to CPR rule 35.10, experts must state that they understand and have complied with this duty to the court. The associated Practice Direction for CPR Part 35³ further specifies that ‘Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation’ and that ‘Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate’. Moreover, ‘Experts should consider all material facts, including those which might detract from their opinions’.

¹ Indeed, under some national arbitration laws, for example, s. 25 of the Swedish Arbitration Act, arbitrators are not even empowered to administer oaths or require truth affirmations from witnesses, whether factual or expert. SFS 1999:116. Under s. 26 of that Act, if a party wishes an expert to testify under oath, that party must obtain the consent of the arbitrators and then submit an application to the District Court for a hearing.

² Available at www.justice.gov.uk/civil/procrules_fin/contents/parts/part35.htm, last accessed 15 May 2010.

³ Practice Direction, Experts and Assessors, paras. 2.1, 2.2 and 2.3, available at www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm, last accessed 15 May 2010. *See also*, Civil Justice Council, Protocol for the Instruction of Experts to Give Evidence in Civil Claims, June 2005, amended October 2009, para. 4, available at www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf, last accessed 15 May 2010.

The approach taken in the English courts, however, is not universally accepted. Many civil law judicial systems, of course, prefer tribunal-appointed experts rather than party-appointed experts.⁴ As a result, civil law jurisdictions do not commonly consider the ethical duties of party-appointed experts as distinguished from the ethical duties of experts generally.

A number of common law judicial systems also follow a path different from the course chosen in England. The use of party-appointed experts in the US civil justice system is famously adversarial, although the partisan nature of expert evidence has in recent years become subject to greater judicial control under the standards established by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*⁵ and its progeny. *Daubert* interpreted rule 702 of the Federal Rules of Evidence (FRE) to call for the following guidelines for admitting scientific evidence:

- Court as gatekeeper: the role of determining whether proposed scientific expert testimony truly proceeds from ‘scientific knowledge’ lies with the trial court.
- Relevance and reliability: the court must ensure that the expert’s testimony is ‘relevant to the task at hand’ and that it rests ‘on a reliable foundation’. Moreover, pursuant to FRE rule 104(a), the court must find it more likely than not that the expert’s methods are reliable and reliably applied to the facts at hand.
- Scientific method and methodology: an expert witness’s conclusions will qualify as ‘scientific knowledge’ if the expert can demonstrate that it is the product of sound ‘scientific methodology’ derived from ‘scientific method’. The Supreme Court defined ‘scientific methodology’ as the process of formulating hypotheses and then conducting experiments to prove or falsify the hypothesis.

Further, as FRE rule 702 points out, the scientific knowledge must ‘assist the trier of fact’ in understanding the evidence or determining a fact in issue in the case.

The US Supreme Court extended the *Daubert* test beyond strictly scientific evidence to evidence based on ‘technical and other specialized knowledge’ in the

⁴ But see Karrer, ‘The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It’ in *Dispute Resolution Journal*, 1 February 2008, at p. 8, available at www.allbusiness.com/legal/labor-employment-law-alternative-dispute-resolution/8896704-1.html (‘Even though the arbitration law in many countries follows the UNCITRAL Model Law, which provides for the possibility of having tribunal-appointed experts, this is by no means a usual procedure, even in civil law countries, like France.’).

⁵ 509 U.S. 579 (1993). The US Supreme Court was not seeking to establish a ‘federal common law’ principle on its own authority for the administration of justice in *Daubert*. Rather, the Court interpreted existing Federal Rules of Evidence rule 702. The Federal Rules of Evidence are statutory in nature, having been adopted by the US Congress. Pursuant to that statutory authority, the US Supreme Court is empowered to amend the Rules, subject to congressional disapproval. The *Daubert* case did not involve the amendment process.

follow-on case of *Kumho Tire Co., v. Carmichael*.⁶ Accordingly, specialised evidence in the US federal courts related to, for example, damages computations is tested on the basis of the *Daubert* standards.⁷

The Reporters⁸ for the Principles of Transnational Civil Procedure,⁹ a joint project of the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT), have sought to establish ‘best practices’ for courts with respect to the conduct of expert witness in international disputes, both court-appointed and party-appointed. The ALI/UNIDROIT Principles themselves do not address the conduct of party-appointed experts. However, the Reporters appended their own proposed Rules of Transnational Civil Procedure to the Principles.¹⁰ Rule 26.1 of those Rules states that court-appointed experts must be ‘neutral’. Rule 26.3 further provides that party-appointed experts are to be subject to the same standards for objectivity and neutrality as a court-appointed expert.

26.3 A party may designate an expert or panel of experts on any issue. An expert so designated is governed by the same standards of objectivity and neutrality as a court-appointed expert. A party pays initially for an expert it has designated.

The Reporters’ commentary to rule 26 makes clear that ‘[t]hese Rules adopt the civil law rule and provisions of the modern English procedure according to which the courts appoint a neutral expert or panel of experts ... The court’s expert is neutral and independent from the parties and from other influence and ordinarily is expected to be sound and credible’.¹¹ Thus, pursuant to rule 26.3 of the Rules of Transnational Civil Procedure a party-appointed expert would be subject to the same neutrality and independence standards as are set out for court-appointed experts. Additionally, the commentary mentions that a party-appointed expert ‘is obligated to perform this task in good faith and in accordance with the standards of the expert’s profession’.¹²

England and the ALI/UNIDROIT Rules of Transnational Civil Procedure, on the one hand, and the United States, on the other, thus offer distinctly different frameworks for regulating the conduct of party-appointed expert witnesses in courts. The English approach attempts to prohibit partisanship by such experts. The US approach accepts the presence of partisanship, but seeks to control

⁶ 526 U.S. 137 (1999).

⁷ The Delaware Supreme Court has recently concluded that the same standards are applicable in the Delaware state courts. See *General Motors Corp. v. Grenier*, 981 A.2d 531 (Del. 2009). The Delaware courts are by far the most active US general forum for expert valuations, as a result of being the most common forum in the US for shareholder and mergers and acquisitions litigation.

⁸ Prof. Geoffrey Hazard, Prof. Rolf Stuner, Prof. Michele Taruffo and Prof. Antonio Gidi.

⁹ ALI/UNIDROIT Principles of Transnational Civil Procedure, as adopted by the American Law Institute in May 2004 and by UNIDROIT in April 2004 (Cambridge University Press, 2006).

¹⁰ Unlike the ALI/UNIDROIT Principles themselves, the Rules have not been formally adopted by ALI or UNIDROIT, but represent ‘the Reporters’ model implementation of the Principles, providing greater detail and illustrating concrete fulfillment of the Principles’. *Ibid.* App., p. 99.

¹¹ *Ibid.* Comments R-26A and B at pp. 139, 140.

¹² *Ibid.* Comment R-26D at p. 140.

expert evidence (whether impartial or partisan) on admissibility grounds tied to the existence of scientific foundations for the evidence. The English approach has been criticised for seeking to end partisanship in an inherently partisan relationship – an expert selected by, working closely with, and paid by one party to the dispute. The US approach has been criticised for creating an overly complex, expensive procedure. Also, the US system has attracted criticism for producing ‘hired guns’ – witnesses offering nakedly one-sided and partisan evidence.

(b) Arbitration Law and Rules, IBA Best Practices

Like arbitration laws, the most prominent arbitration rules in international use are also silent regarding the responsibilities of party-appointed experts. Many popular arbitration rules will specifically address the role of a tribunal-appointed expert, but not the role of a party-appointed expert. Illustratively, none of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the Swiss International Arbitration Rules, the ICC Arbitration Rules, the ICDR International Arbitration Rules, the LCIA Rules, the DIS Arbitration Rules or the ICSID Arbitration Rules sets out the ethical duties of a party-appointed expert witness.

So too, arbitral awards. The Republic of Ecuador recently urged a bilateral investment treaty (BIT) tribunal established under the UNCITRAL Arbitration Rules to disregard analyses performed by a petroleum expert in underlying Ecuadorian court proceedings on grounds of the expert’s alleged lack of independence and reliance on assumptions provided by the engaging investors, Chevron Corporation and Texas Petroleum Company. Indeed, Ecuador also requested the BIT tribunal to disregard the evidence of experts appointed by the Ecuadorian courts ‘where they were based on assumptions provided by counsel or where they opined on issues of law and contract interpretation’:

The Respondent argues that Mr. Borja’s analyses performed as the Claimants’ expert in the Ecuadorian courts cases suffered from a lack of independence and were premised on incorrect legal assumptions. Furthermore, they were performed in answer to ‘questions [that] were leading, compound, and/or intended to elicit a predetermined response’. The Respondent asserts that the Tribunal is entitled to decide for itself how independent and reliable Mr. Borja’s analyses were and asks the Tribunal to accord them little, if any, weight. Similarly, the court-appointed experts’ opinions should also be given little weight, particularly where they were based on assumptions provided by counsel or where they opined on issues of law and contract interpretation.¹³

The tribunal, however, made no further reference to these requests in its resolution of the related issues in the BIT dispute. Instead, the arbitrators relied primarily on the evidence of the criticised expert, Mr Borja, as the starting point

¹³ *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. Republic of Ecuador, In an Arbitration under the Treaty Between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment and the UNCITRAL Arbitration Rules*, Partial Award on the Merits, 30 March 2010, para. 520, available at <http://ita.law.uvic.ca>.

for their conclusions on barrels of crude oil at issue in the case and resulting damages.¹⁴

Of course, when an expert witness takes an oath (or affirmation of truth or belief) before testifying in arbitration, that commitment establishes ethical obligations for the witness. Breach of an oath may place the oath-breaker at legal risk, of course. Some jurisdictions do not, though, permit an arbitrator to administer an oath or affirmation, for example Sweden.¹⁵ Section 25 of the Swedish Arbitration Act specifies that ‘The arbitrators may not administer oaths or truth affirmations’.

The same is not the case in other arbitral systems. In contrast to the Swedish approach, section 38(5) of the English Arbitration Act 1996 authorises an arbitral tribunal to administer any necessary oath or affirmation. Section 38(5), though, does not prescribe the text of that declaration. Section 7505 of the New York Civil Practice Law and Rules also authorises arbitrators to administer oaths, but does not specify the text.

The ICSID Arbitration Rules take an intermediate position. ICSID Arbitration rule 35(3) obligates a testifying witness, including an expert, to make a declaration: ‘I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief’. In contrast to breach of a legally enforceable oath, breach of a declaration of honour and conscience in international arbitration triggers far less tangible sanctions.

The format of the oath or affirmation often administered in US domestic arbitrations (‘Do you swear to tell the truth, the whole truth and nothing but the truth’) arguably establishes a complete range of ethical duties for all witnesses, enforceable by the prospect of a criminal or civil perjury claim when breached. The commitment within the US oath to ‘tell the whole truth’ indeed picks up the witness’s obligation to provide a tribunal adverse, as well as supportive, information – one of the three core duties proposed in this article. Still, practical experience teaches that witnesses too often only honour such an oath in the breach. Perjury prosecutions for giving false testimony in arbitrations are rare indeed. More importantly, the line between false testimony and advocacy is too hard to find for the standard witness oath to offer much clarity regarding the ethical responsibilities of an expert witness. Thus, the presence or absence of an oath (or truth affirmation) by a testifying expert is unlikely to afford arbitrators much practical direction regarding the ethical parameters for that witness’s evidence.

Many international arbitrators do not in any event consider the administration of an oath to be part of international arbitration. One prominent arbitrator put it this way in a recent arbitration:

Arbitrator: There is no question of swearing a witness in these proceedings, but we do deliver the admonition that we expect you to tell the truth which we think you accept.

Witness: I accept that.

¹⁴ *Ibid.* para. 546 *et seq.*

¹⁵ *See supra* n. 1.

Accordingly, arbitration laws and arbitration rules offer little guidance here. However, 'arbitral best practices', at least as documented in the widely respected International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration,¹⁶ provide more guidance.

The IBA Rules are, as this article is being published, in the process of moving towards the English judicial approach. The 1999 version of the IBA Rules did not establish significant duties. Article 5 of the 1999 version of the IBA Rules set out a procedure for party-appointed experts to prepare and present reports. Article 5.2(a) of the 1999 Rules called for an expert report from a party-appointed expert to include a description of the expert's 'present and past relationship (if any) with any of the Parties'. Article 5.2(d) required the expert's report to contain 'an affirmation of the truth of the expert report'. Similarly, article 8.3 required any witness, including an expert witness, to 'affirm, in a manner determined appropriate by the arbitral tribunal, that he or she is telling the truth'. Notably, the 1999 version of the IBA Rules did not require a party-appointed expert witness to provide 'the whole truth' in the expert's evidence.

Under article 6 of the 1999 IBA Rules for tribunal-appointed experts, a tribunal-appointed expert must be independent from the parties and from the arbitral tribunal (there is no mention of independence from the legal advisors to the parties). There is no similar requirement in the 1999 IBA Rules governing party-appointed experts, nor is there a requirement that the expert provide impartial and objective evidence. Thus, the 1999 Rules permit partisan expert evidence.

However, the 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration, only recently circulated in the international arbitration community, proposes to modify these practices in significant respects. Importantly, revised article 5.2(c) requires a party-appointed expert to provide 'a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal'. Thus, unlike the 1999 version of the Rules, the revised 2010 IBA Rules extend to party-appointed expert witnesses a requirement of 'independence from the Parties [and] their legal advisors'. The 2010 revised Rules also impose on party-appointed expert witnesses (and, by the way, on tribunal-appointed experts as well) the duty to be independent from the legal advisors to the parties, not just from the parties themselves.

This prescription may conflate 'impartiality' and 'objectivity' with 'independence'. The 2010 IBA Rules do not themselves explain how a party-appointed expert can be 'independent' from a party (or counsel) who selects the expert and works in close quarters with that expert to develop the expert evidence for that side. Nor do the 2010 Rules address how the party-appointed expert can be considered 'independent' from the party who pays the bills.

Other ethics principles also employ the term 'independent', but perhaps not in the same fashion as the 2010 IBA Rules. The English judicial rule under CPR

¹⁶ Available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, last accessed 7 May 2010. The IBA Arbitration Committee submitted the revised Rules to the IBA Legal Practice Division and the IBA Council in March 2010, with approval occurring at the end of May 2010.

Part 35 employs three terms; ‘independent’, ‘objective’ and ‘unbiased’. As noted above, the Practice Direction for CPR Part 35 specifies that the party-appointed expert’s evidence ‘should be the *independent* product of the expert’ uninfluenced by litigation pressure and that experts ‘should assist the court by providing *objective, unbiased* opinions on matters within their expertise’. Paragraph 4.3 of the UK Civil Justice Council’s Protocol for the Instruction of Experts to give Evidence in Civil Claims explains that, ‘[i]n this context, a useful test of “independence” is that the expert would express the same opinion if given the same instructions by an opposing party’. CPR Part 35 thus requires the expert evidence to come from an independent process, and that the opinions of the expert must be objective and impartial.

Arbitration tenets also employ the principle of ‘independence’ to assess potential conflict relationships involving arbitrators (but not expert witnesses). The UNCITRAL Model Law, the UNCITRAL Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Arbitration utilise both ‘independent’ and ‘impartial’ to describe the ethical relationship between a party-appointed arbitrator and the nominating party. Article 7 of the ICC Arbitration Rules, in contrast, uses only the term ‘independent’ to characterise that relationship. However, party-appointed arbitrators have no unilateral contact with their nominating party once the tribunal is constituted. Moreover, the party-appointed arbitrator receives compensation through the ICC Court of Arbitration and from both parties, not solely and directly from the nominating party. As a result, it is more reasonable to describe the arbitrator-party relationship as one of independence than it would be to similarly describe the ongoing work and compensation arrangements between party-appointed expert and engaging party.

Revised article 5.2(a) of the 2010 IBA Rules additionally extends the scope of the party-appointed expert’s disclosure of present or past relationships beyond the parties themselves to include the arbitral tribunal and the legal advisors to the parties. The 1999 Rules limit that disclosure duty to relationships with the parties. This disclosure obligation, whether in its 1999 formulation or its broader 2010 formulation, creates the foundation for enforcing the duty of independence. Thus, both versions of the IBA Rules include a disclosure duty as recommended in this article, with the 2010 IBA Rules extending the reach of that obligation to relationships with counsel and with members of the arbitral tribunal.

Article 8.4 of the revised 2010 Rules also requires an expert witness to affirm ‘his or her *genuine belief* in the opinions to be expressed at the hearing’, not the ‘truth’ of the testimony.¹⁷

Interestingly, the IBA Rules on the Taking of Evidence have specified since 1999 that a tribunal-appointed expert must be independent from the arbitral

¹⁷ 2010 revision, IBA Rules on the Taking of Evidence in International Commercial Arbitration, DOCSMTL: 3700957\2, available at www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx, last accessed 7 May 2010. *See also*, art. 5.2(g) of the 2010 revision of the Rules, requiring the expert report of a party-appointed expert to contain an affirmation of the expert’s genuine belief in the opinions expressed in the report.

tribunal, not just from the parties, a duty now extended to party-appointed experts in the 2010 revision. CPR Part 35, in contrast, makes clear that the party-appointed expert owes an overriding duty to the court. It is thus not necessarily clear from the 2010 version of the IBA Rules what duties, if any, an ‘independent’ party-appointed expert owes to the arbitral tribunal.¹⁸

Additionally, neither the 1999 nor the 2010 versions of the IBA Rules speak directly to the questions of whether the evidence presented by the independent party-appointed expert must be ‘the whole truth’ (and thus not omit material adverse information) and whether the expert must assess the reasonableness, to the extent qualified to do so, of any assumptions provided by the engaging party or counsel. An argument can be made that both obligations are subsumed within the ‘overriding duty’ to the English court under CPR Part 35, although there is no precedent to guide us. It is less obvious whether those obligations are also included within an expert’s duty under the 2010 IBA Rules to be ‘independent’ of the arbitral tribunal. No commentary appears yet to explore this distinction.

The ‘best practices’ requirement that an expert be independent of the parties and counsel has been in place for tribunal-appointed experts since publication of the 1999 version of the IBA Rules. Consequently, it seems likely that the same standards will now apply under the 2010 IBA Rules to both party-appointed and tribunal-appointed expert witnesses. Moreover, if history is any guide, the members of the IBA Drafting Committee may publish a commentary on the 2010 revisions to the IBA Rules, explaining these changes to the arbitral community.

(c) Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration

The London-based Chartered Institute of Arbitrators (CI Arb) stepped into this field before the IBA, in an effort to document ‘best practices’ for party-appointed expert witnesses. In September 2007, the CI Arb issued a Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.¹⁹ That Protocol, which is optional, establishes a ‘complete regime for the giving of ... evidence [by party-appointed experts] and provides a procedure for ... the independence of

¹⁸ Article 6 of both the 1999 and 2010 versions of the IBA Rules requires that tribunal-appointed experts be independent of the parties and the arbitral tribunal, and the 2010 version requires as well that the tribunal-appointed expert be independent of the legal advisors of the parties. Both versions establish a disclosure and objection procedure to enforce those obligations. Neither version, however, creates an objection procedure for party-appointed experts. Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade (UNCITRAL) in principle agreed to include provisions permitting challenges to tribunal-appointed experts for lack of impartiality or independence in the upcoming revision of the UNCITRAL Arbitration Rules. See Proposal by the Government of the Plurinational State of Bolivia, UN Doc. A/CN.9/WG.II/LII/CRP.2 (21 January 2010) and *Draft Report of the Working Group on Arbitration and Conciliation on the Work of its Fifty-second Session*, UN Doc. A/CN.9/WG.II/LII/CRP.1/Add.2 (2 February 2010), p. 3 (draft art. 29, Experts appointed by the arbitral tribunal). Nothing in the proposed revised UNCITRAL Arbitration Rules addresses the duties of party-appointed experts.

¹⁹ Available at www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf, last accessed 15 March 2010.

the experts, the contents of the expert's opinions ... and the manner of expert testimony'. Unsurprisingly, the CIArb Protocol follows English judicial practice in its treatment of these issues, including impartiality, a duty to disclose relationships, a duty to disclose party instructions and assumptions, and a duty to disclose adverse information. Article 4 contains the same core ethical principles as CPR Part 35:

Article 4 Independence, Duty and Opinion

1. An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party. ...
3. An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced. ...
 - (b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;
 - (c) contain a statement setting out all instructions the expert has received from the appointing Party and the basis of remuneration of the expert; ...
 - (e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;
 - (f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based on; ...
 - (k) contain a declaration in the form set out in Article 8.

Article 8 of the CIArb Protocol sets out expressly the terms of the expert declaration called for by article 4.5(k). Notably, the text of the required declaration specifies in clause (d) that a party-appointed expert has disclosed all relevant matters, including information adverse to the expert's opinions:

Article 8 Expert Declaration

1. The expert declaration referred to in Article 4.5(n) [*sic*] shall be in the following form:

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- (a) I understand that my duty in giving evidence in this arbitration is to assist the arbitral tribunal decide the issues in respect of which expert evidence is adduced. I have complied with, and will continue to comply with, that duty.
- (b) I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.
- (c) I confirm that all matters upon which I have expressed an opinion are within my area of expertise.
- (d) I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and have drawn to the attention of the arbitral tribunal all matters, of which I am aware, which might adversely effect [*sic*] my opinion;
- (e) I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion.
- (f) I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify the parties to this arbitration and the arbitral tribunal forthwith.

Additionally, article 7.1 of the Protocol provides that '[t]he expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently use the expert evidence'.

As a result of these provisions, the CI Arb Protocol makes clear that a party-appointed expert's opinion must be impartial and objective, and uninfluenced by pressure from the proceedings. Experts owe their overriding duty to the arbitral tribunal, not to the party engaging the expert. Further, experts are obligated to draw to the attention of the tribunal matters adverse to their opinions. The expert is also required to describe past and present relationships with parties, counsel and others involved in the arbitration. The CI Arb Protocol therefore includes the three core duties discussed in this article, but additionally includes a duty of impartiality and objectivity and an overriding duty to the tribunal.

(d) Appearances versus Reality

The CI Arb Protocol has not yet been widely adopted in international arbitrations, particularly outside England. Indeed, some have criticised the Protocol for being 'too English' – following too closely the practice in the English courts rather than integrating practice from a more diverse range of civil and common law jurisdictions. If international arbitration is in fact a 'bridge', finding a path, *inter alia*, between a civil law inquisitorial system and a common law adversarial system, and between a preference for documentary evidence and a preference for oral testimony,²⁰ then it is not surprising that some members of the international arbitration community are uncomfortable with a solution that copies primarily one national approach.

Moreover, critics question whether elaborate regulation of a party-appointed witness's conduct changes anything in practice. Many civil law systems contend that the inherent interest a party-affiliated witness has in the outcome of the dispute creates a fundamentally adverse impact on that witness's credibility, whether that witness is a fact witness or an expert witness. Thus, civil law practitioners are known for consistently discounting the value of direct evidence from party-affiliated witnesses, in contrast to the common law adversarial system.

Interestingly, the proliferation of journal articles, arbitration decisions and court cases about arbitrator disclosure of potential conflicts of interest has not been matched by a parallel proliferation about an expert witness's duty in arbitration to disclose potential conflicts of interest, even though such a duty is found in the IBA Rules and the CI Arb Protocol. One may speculate that is because the engaging party is paying and working side-by-side with the party-appointed expert. Thus, any additional evidence of entangling relationships seems superfluous in the circumstances.

²⁰ See generally, Elsing and Townsend, 'Bridging the Common Law–Civil Law Divide in Arbitration' in (2002) 18 *Arbitration International* 59.

The late Prof. Thomas Walde argued in an OGEMID conversation that independence of a party-appointed expert witness is ‘largely (but not completely) a fiction’. Prof. Walde noted that the party-appointed expert is paid by and communicates with only one side. Additionally, the expert is subject to the pressure created by the desire for future engagements. On the other hand, reputation and personal ethics can pull the expert away from client influence. The reality is thus complex:

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[T]here is a tradition (English?) that the expert is presented as ‘independent’ and with only obligations to the court. But that is largely (not completely) a fiction. The expert that is hired by one side and communicates in preparing his or her expertise exclusively with one party cannot be completely independent. Independence is a relative, not an absolute concept. The expert will be pulled between the forces from one party (which can be pretty strong and insistent) and, on the other side, personal/ethical and in particular reputational concerns over appearing ‘professional’ (and that means also ability to stand up to demands, subtle or not subtle signals from clients). The more business and clients one has, and the less one needs, the greater presumably the forces favoring greater (never absolute) independence. Dr Schuetze, in the *Festschrift II for KH Boeckstiegel*, has therefore expressed quite reasonable doubts on the independence of the party-appointed experts, though the actual dynamics is more complicated and one can not use the binary independence/no independence matrix but rather think of concepts such as ‘relative independence’ and ‘professionalism’.²¹

Consequently, as Prof. Walde argued, one can doubt that most experts acting in good faith are ever entirely free from litigation-related pressures, no matter how much they seek to preserve their independence and objectivity. For example, the limits on ‘discovery’ of materials employed in the preparation of expert reports in international arbitration, as compared with substantially broader discovery rights under the US judicial system, can create an opportunity for counsel and expert to work more directly together than is the case in US litigations. Comparing US litigation with international arbitration, one well-known US advocate has explained this situation in the following terms:

The relative lack of discovery into the preparation of expert evidence also means that counsel is more free to work with expert witnesses in the preparation of their expert reports. While there is no doubt that lawyers in litigation proceedings also find ways to influence the style and approach of expert reports (but of course, not the substance), they often seek to do so in ways that will not be subject to the discovery process. The communications between lawyers and experts in litigation proceedings will generally be oral and it is unusual for the lawyers and the experts to exchange edited drafts of an expert’s report. In international arbitration proceedings, by contrast, it is common for experts and counsel to exchange e-mails or other written correspondence, even regarding substantive points in the expert report, and it is not uncommon for lawyers to edit draft expert reports (again, as to style, not substance).²²

²¹ Posting by Prof. Thomas Walde, 2 February 2006 to ‘Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) Discussion List’, archived for subscribers at www.transnational-dispute-management.com/members/ogemid/welcome.asp (quoted with permission from the late Prof. Walde).

²² Kent, ‘Expert Witnesses in Arbitration and Litigation Proceedings’ in (2007) 4 *Transnational Dispute Management Issue 3* at p. 4.

Moreover, no protocol or code can regulate the ability of a party to hire an expert who is just a good actor or actress, with the advocacy skills to appear objective while at the same time carefully testifying in a manner that is fundamentally partisan. Prudent counsel will advise their clients to seek out experts with the ability to testify persuasively, to communicate effectively to the three-person tribunal. Those communication skills serve advocacy objectives just as well as they serve educational objectives.

Further, the process of engagement as an expert witness by a disputing party carries with it inevitable 'moral hazards'.²³ Illustratively, as discussed below in this article, many professional bodies prohibit their members from accepting contingent or success fees for work as an expert witness. The purpose of those bans is, arguably, to remove an incentive for the expert to offer less-than-objective testimony. But it is surely rare that a party or counsel engages an expert without first undertaking sufficient questioning and other diligence to obtain comfort as to that expert's opinion on the topic at issue in the dispute. For counsel to fail to undertake such diligence might even be a violation of the lawyer's own ethical duty 'to advance a client's objectives diligently through all lawful measures'. Accordingly, the ban on contingent fee compensation may very well be immaterial to the prospective expert witness's objectivity or lack thereof. The incentive (the moral hazard) to present an opinion harmonious to the engaging party is in fact present from the very first contact with the party or counsel regarding the expert's possible engagement, regardless of the obligation to maintain objectivity. Some prospective experts resist that lure while others succumb.

Accordingly, Dr Karrer writes with scepticism about the impact of oaths and protocols on the actual conduct of party-appointed experts:

In common law jurisdictions, using party-appointed experts is the tradition. However, many people believe that party-appointed experts are just hired guns, so what they say should have no more weight than testimony by a party. The experts' organizations and the Chartered Institute of Arbitrators are trying to change the practice of using non-neutral party-appointed experts. They say party-appointed experts should be neutral. (My friend Peter Rees has prepared an elaborate 'protocol' [the CI Arb Protocol] on this point.)

²³ Despite the hyperbolic use of the term by some advocacy groups, to call the impact of a practice a 'moral hazard' is not, of course, to say that the practice is immoral or must be prohibited. Virtually all institutions are structured to the benefit of certain interests and to the detriment of others, and changing the rules of an institution usually just shifts the allocation of risks among those interests. For example, barring party-appointed expert witnesses entirely in favour of tribunal-appointed experts to eliminate this 'moral hazard' in international arbitration would likely just exacerbate for arbitrators the 'moral hazard' of unduly relying on 'their' expert as the 'fourth arbitrator'. As the 'authoritative' source Wikipedia points out: 'According to research by Dembe and Boden, the term [moral hazard] dates back to the 1600s, and was widely used by English insurance companies by the late 1800s. Early usage of the term carried negative connotations, implying fraud or immoral behaviour (usually on the part of an insured party)'. Dembe and Boden point out, however, that prominent mathematicians studying decision-making in the 1700s used 'moral' to mean 'subjective', which may cloud the true ethical significance in the term: 'The concept of moral hazard was the subject of renewed study by economists in the 1960s, and at the time did not imply immoral behavior or fraud; rather, economists use the term to describe inefficiencies that can occur when risks are displaced, rather than on the ethics or morals of the involved parties'. See http://en.wikipedia.org/wiki/Moral_hazard (footnotes omitted), last accessed 15 March 2010.

Personally, I do not believe that all party-appointed experts are just hired guns. Nor do I believe that formal measures, such as an oath of office or a protocol, will turn what these experts say into something intrinsically more believable. If you look at the IBA Rules of Evidence, it is quite clear that it is for the arbitral tribunal to decide how much to believe a party-appointed expert's report.

In my experience, some party-appointed experts show signs of being objective, and some appear biased. Even those who are biased may still be helpful to the arbitrators. There is not all that much difference between a party-appointed expert witness and a fact witness. What does an expert witness say? The expert says what normally happens based on his experience. And a fact witness says what actually happened. Some fact witnesses have experience in what normally happens and some do not.²⁴

Dr Karrer tells us, 'some party-appointed experts show signs of being objective, and some appear biased' and 'formal measures, such as an oath of office or a protocol, will [not] turn what these experts say into something intrinsically more believable'. One could, of course, resolve that dilemma by banning party-appointed experts altogether in favour of tribunal-appointed experts. After all, the litigation-related pressures that give rise to moral hazard are inherent in the process of being engaged by one of the parties to the dispute.

But that approach carries with it its own hazards. Those problems include the legitimate concern that the tribunal-appointed expert will become *de facto* the fourth arbitrator, unconstrained by reliable scrutiny in the absence of party-appointed experts. In addition, by being denied the ability to present an expert witness of its own choice, a party is arguably being denied the right to fairly present its case. Moreover, if denied a party-appointed expert, well-schooled counsel will as a practical matter instead seek out a fact witness with sufficient expertise to testify as to the matters in question. The evidence of the party-appointed expert will then simply be proffered under another guise. The compromise solution, of permitting the tribunal to engage its own expert while also accepting evidence from party-appointed experts, is only appropriate if the issues and amounts at stake in the arbitration justify the noticeable additional expense and procedural complications resulting from adding a third expert.

A very creative way of closing these gaps was proposed by Dr Klaus Sachs at the 2010 ICCA annual conference in Rio de Janeiro. The suggestion has quickly been dubbed the 'Sachs Protocol' in international arbitration circles. Dr Sachs proposed that the arbitral tribunal select, as tribunal-appointed experts rather than party-appointed experts, an 'expert team' comprised of one expert from each list put forward by the opposing parties. The members of the 'expert team' would, like any tribunal-appointed expert, have duties of independence and impartiality and be responsible to the tribunal, not to the party who named the expert on its list. The experts would be compensated out of the deposits made by the parties, in the same manner as arbitrators are themselves compensated.

The following explanation of the Sachs Protocol is based upon a paper entitled 'Experts: Neutrals or Advocates' prepared by Dr Sachs with the assistance of Dr Nils Schmidt-Ahrendts, and kindly shared with me. The Sachs Protocol seeks

²⁴ Karrer, *supra* n. 4 at p. 8.

to respond to concerns expressed about tribunal-appointed experts. As Dr Sachs notes in the paper, 'In fact, the instrument provides for an effort to combine the advantages of party-appointed and tribunal-appointed experts'.

In his proposal, Dr Sachs recommends that, once the parties have made their first submissions, the arbitrators should invite each party to create a list of three to five persons that party considers appropriate to serve as an expert. The tribunal could then invite each party to comment on the experts proposed by the other party's list. Then, the tribunal would itself select two experts, one from each of the two lists. Those two experts would be appointed jointly by the tribunal as an 'expert team' and compensated out of the common fund of deposits for the arbitration paid by the parties. Dr Sachs contemplates that the expert team will prepare a preliminary joint report to be circulated to the tribunal and the parties for comment, and then prepare their final joint report taking account of those comments. The expert team would also, if requested, testify at the hearings themselves.

To begin the development of the expert evidence, the arbitrators would meet with the 'expert team' and the parties to prepare terms of reference. Dr Sachs proposes that the terms of reference should specify:

inter alia, (i) the matters and questions which shall be submitted for determination by the expert team; (ii) the documentation and information required by the expert team and to be submitted by the parties; (iii) the form and mode of communication among the tribunal, the expert team and the parties; (iv) the remuneration of the expert team; and (v) the duties of the expert team vis-à-vis the tribunal and the parties.

The Sachs paper sets out the duties of the members of the 'expert team', including duties of impartiality and independence commonly expected from tribunal-appointed expert witnesses. Additionally, Dr Sachs contemplates that the 'expert team' would be entitled to seek whatever assistance it required from the parties. No member of the team, however, would communicate separately with the parties or others. Accordingly, the 'expert team' would prepare its report 'from scratch' and based only on its own expertise:

[I]t is advisable that the terms of reference provide, *inter alia*, that (i) both experts retained must be impartial and independent; (ii) the task of the expert team is to assist the tribunal in deciding the issues in respect of which expert evidence is adduced; (iii) the expert team shall only address issues identified in its terms of reference; (iv) the expert team is expected to submit a joint report providing only the joint and mutual findings; (v) each member of the expert team shall refrain from communicating separately with the parties, the tribunal or any third party; (vi) the expert team shall prepare its report 'from scratch' and shall rely only on its own expertise; (vii) the expert team shall seek any input and assistance required from the parties; (viii) in preparation of the report, the expert team shall carefully examine all briefs and documents submitted by the parties and shall address the parties' views and concerns; and (ix) the expert team shall be prepared to testify during an oral hearing and to respond to questions asked by the tribunal and the parties and their counsel and consultants.

Dr Sachs thus recommends that a member of the 'expert team' not engage in *ex parte* contacts with the party who nominated the expert in the initial lists. Two

possible approaches are in fact available with respect to contacts with the parties. In Dr Sach's proposal, the two members of the 'expert team' would not have *ex parte* communications following appointment, in much the same manner as party-appointed arbitrators and tribunal-appointed experts conduct themselves in international arbitration. One may presume that pre-appointment *ex parte* contacts might also be restricted in the same manner, and for the same reasons, that pre-nomination contacts between a prospective party-appointed arbitrator and the nominating party are currently restricted under applicable arbitrator ethics principles.

In the second alternative, even though appointed by the tribunal and compensated from a common fund, the individual members of the expert team could have contact with the respective parties who nominated them on exactly the same basis as traditional party-appointed expert witnesses.

The first alternative, espoused by Dr Sachs, contemplates that the 'expert team' would proceed after appointment in the same manner as traditional tribunal-appointed experts. Indeed, the proposal seeks to place each member of an 'expert team' in a position very similar to a party-appointed arbitrator. Unlike a traditional party-appointed expert, experts selected by means of the 'Sachs Protocol' would not receive instructions and assumptions from any one party, nor would they work more closely with one side than the other in developing their expert evidence.

However, two serious practical challenges for such a 'Sachs Protocol' team of experts would be (i) how to obtain access to the broad scope of information within the possession of the parties from which a party-appointed expert ordinarily selects relevant and material information for use in the expert's report; and (ii) how to identify and select the necessary legal and business assumptions upon which expert opinions are based in the absence of deep consultation with the parties.

These are issues faced by any system that relies principally on tribunal-appointed experts rather than party-appointed experts. The ability of a traditional tribunal-appointed expert to function without relying on detailed work first done by party-appointed experts depends to a considerable extent on the expert's access to the underlying information held by the parties. In civil law jurisdictions, where a tribunal-appointed expert is common and party-appointed experts are rare, the supervising judge has significantly more investigative responsibility than is the case in common law jurisdictions. In such a civil law forum, therefore, well-tested mechanisms exist for overcoming those challenges by means of the judge's active participation in the investigation.

In common law jurisdictions, however, if a court appoints its own expert, that court-appointed expert will normally work closely with, and rely to a considerable extent on the work product of, the competing party-appointed experts. Many international arbitrations, particularly investment treaty arbitrations, follow that approach: the tribunal-appointed expert complements, rather than supplanting, the party-appointed experts. The tribunal's expert relies to a considerable extent for the foundation of his or her own work on spade work done *ex parte* by the individual party-appointed experts and presented in their individual expert reports.

In the absence of traditional party-appointed experts, though, ‘Sachs Protocol’ experts under this alternative may potentially find themselves facing serious practical barriers to developing on their own useful evidence because of impediments to unrestricted information access. The close working relationship among party expert, counsel and party behind the walls of privilege will ordinarily produce far more raw information than the information exchange between a potentially protective party and the tribunal’s ‘investigator expert team’. Arbitrators may perhaps therefore be called upon to enforce information requests by their ‘team of experts’. Additionally, arbitrators may be asked more often to draw negative inferences when one party or the ‘expert team’ claims the other party was not forthcoming in providing responsive information to the team.

Moreover, arbitrators may be uncomfortable providing the ‘expert team’ in advance of the merits hearing with the necessary legal and business assumptions that must underlie an expert report, for fear of being accused of prejudging the case. Dr Sachs recommends that, in the course of preparing their joint report, the expert team should ‘carefully examine all briefs and documents submitted by the parties and shall address the parties’ views and concerns’. Since many legal and business assumptions are controversial or lie outside the expertise of the experts, it is nevertheless likely that important bedrock assumptions still need to be provided before the expert report can be prepared. The arbitrators may find themselves instructing the ‘Sachs Protocol’ team to prepare an ‘on-the-one-hand, but on-the-other-hand’ expert report, containing several analyses based on competing assumptions provided by the opposing parties. Those practical hurdles can be overcome by the second alternative, under which the ‘Sachs Protocol’ experts proceed after appointment on exactly the same basis as traditional party-appointed expert witnesses, working closely with the party and counsel who nominated them and preparing competing reports. The price of the second alternative, however, is that the ‘independence’ of the experts is compromised by that continuing close relationship with one party. If the second alternative is employed, the only enhanced comfort with the independence of a ‘Sachs Protocol’ team of experts results from the involvement of the tribunal in the experts’ appointment and the use of a common fund for compensating the two experts. While those are important structural changes, one may question the extent to which they resolve the ‘independence’ issue without more.

Only actual experimentation with Dr Sach’s innovation will determine the extent to which these speculations proved substantive or unfounded.

Before leaving this subject, it is also helpful to consider the impact on counsel of the ‘impartiality’ and ‘independence’ principles embodied in CPR Part 35, the CI Arb Protocol and the Sachs Protocol. The duties of the expert witness affect as well the manner in which counsel approach the evidentiary contest, most particularly the tasks of developing expert evidence and preparing the expert witness for trial. The absence of expert discovery in international arbitration may mean that, as noted above, ‘counsel is more free to work with expert witnesses in the preparation of their expert reports’.

But if counsel embrace the principles of expert objectivity and independence and an overriding duty to the tribunal, then those principles serve as a check on the extent to which counsel treat the expert witness process as an extension of partisan advocacy. Anecdotally, it appears that the introduction of Lord Woolf's reforms into the English judicial system has in fact altered how English counsel approach the expert witness process, whether in English courts or before international arbitral tribunals.²⁵ That is especially the case, of course, when both counsel, as well as the tribunal, are groomed in that approach.

But would that same change play out in a similar manner in international arbitration, where in any particular case the counsel, parties and arbitrators alike may come from widely differing legal and cultural traditions? If one side in the dispute approaches expert witness preparation as an extension of the advocacy process, while the other side adopts the notions of impartiality found in the CI Arb Protocol, and the three arbitrators themselves hold to widely different notions of what is proper, is there a level playing field for all participants in the dispute resolution process?

Judicial requirements that experts testify with objectivity contain their own enforcement mechanisms: the powers of the court itself and the disciplinary authority of local legal self-regulatory associations. Further, in some arenas the closely-knit nature of the community also creates its own 'soft law' enforcement mechanism. That is, arguably, true for the elite solicitor and bar communities in London. The enforcement tools for international arbitration, however, are notably weaker, even for the 'repeat player' environment found in investment treaty arbitration.

Moreover, international arbitration generally is undergoing an extraordinary expansion today. That expansion is driven by globalisation. Arbitration is extending wider in terms of geography and culture, and deeper as well within jurisdictions where international arbitration is already accepted. That expansion surely encompasses the dreaded (or vaunted, as the case may be) 'Americanisation' of international arbitration. Equally, though, it encompasses the surge of international arbitration in Central and Eastern Europe and in Latin America, as well as Asia, the Middle East and Africa. Additionally, even in the more mature arbitral environs of the United Kingdom, Western Europe and the United States, new law firms are quickly moving into the field of arbitration in response to client demands and declining caseloads in commercial courts. Those new participants bring their preconceptions with them; they do not check them at the door like a coat.

These developments bring into the international arbitral community new players with backgrounds and attitudes that diverge widely. Efforts to harmonise by 'formal measures' face an uncertain fate when many of the new players do not share a common background towards the use of party-appointed experts. Over a period of years, attitudes among 'repeat players' may harmonise but, within the confines of any one particular arbitration, significant disparities may continue to

²⁵ I am indebted to Ms Judith Gill QC for explaining this point to me.

exist for a long time to come as international arbitration continues on its expansionary course.

These critiques lead one to focus on the tribunal's task of weighing the credibility of the evidence, rather than on establishing a regulatory system to bar overtly one-sided behaviour by a party-appointed expert witness. That is the course taken in the US courts. The judge in a US federal court takes the evidence of party-appointed experts, if challenged, after a so-called *Daubert* hearing testing whether the proffered expert evidence has a reliable foundation, a basis in scientific knowledge and a scientific methodology. If the expert evidence survives that test, then it is admitted like any other evidence regardless of partisanship and weighed in the balance for its credibility.

Observers, however, charge that these *Daubert* hearings have become expensive and time-consuming mini-trials on the scientific foundations of the expert evidence. Too often, *Daubert* hearings duplicate the evidence, examinations and cross-examinations to be heard at trial. They are also frequently used as an element in a party's advocacy strategy to attack the persuasiveness of the other side's expert evidence. The original purpose of the *Daubert* hearing – to exclude expert evidence lacking a proper scientific underpinning – is lost in such circumstances.

While *Daubert* hearings are occasionally used in US domestic arbitration proceedings, they have not found a foothold in international arbitration. Instead, international arbitrators have generally followed Dr Karrer's advice 'that it is for the arbitral tribunal to decide how much to believe a party-appointed expert's report', but without adopting the 'formal measures' of a US-style special *Daubert* hearing into the foundations of the expert evidence. The 2010 revisions to the IBA Rules on the Taking of Evidence, though, demonstrate increasing acceptance in the international arbitration community of the approach taken by the CI Arb Protocol towards the ethics duties of party-appointed experts. Only time will tell if that approach is as successful in the diverse world of international arbitration as it has been in the judicial environs of England and other states following the path blazed by the Woolf Report.

In addition to demonstrating below that expert witnesses are often bound in their presentation of evidence by a specific code of conduct imposed by their own professional bodies, this article proposes an approach in international arbitration that may effectively address the criticisms of both the English and the American approaches: a disclosure duty with respect to the expert witness's relationships, a duty for the expert to provide the tribunal full information, even if adverse, and a duty for the expert to professionally assess the assumptions upon which that expert has been asked to rely by the instructing party or counsel.

II. PROFESSIONAL CODES OF CONDUCT

Is that, then, the end of the matter? Are we left to conclude that the only sources for a 'code of conduct' for party-appointed experts are the occasional administration of an oath or truth affirmation, the expanded duties set out in the

2010 revision of the IBA Rules, the possible employment of the optional CIARB Protocol, and experimentation with ‘expert teaming’ under the newly christened ‘Sachs Protocol’?²⁶ Or, does it all come down in the end to what evidence and what witnesses the arbitral tribunal believes? No, that is not the case; the codes of conduct of professional organisations to which the experts belong come into play as well.²⁷

Of course, there is no across-the-board obligation on the part of an expert to be a member of any particular professional organisation. Many professionals, though, become members of important professional bodies as part of their career development. Damages experts in international arbitration may, for example, be accountants required to join national accounting professional organisations, such as the American Institute of Certified Public Accountants (AICPA) in the United States or the Institute of Chartered Accountants in England and Wales, or appraisers who routinely join such organisations as the American Society of Appraisers, the Appraisal Institute of Canada, the German BIIS, the Royal Institution of Chartered Surveyors or the Instituto Brasileiro Avaliadores.²⁸ Or, the testifying damages expert may be an investment banker, for whom no broad-based professional organisation exists, or an academic economist.²⁹

Financial professionals are not the only professionals, of course, from whom expert testimony is often sought. For example, professionals in the petroleum industry routinely offer testimony about the value of petroleum resources, the costs of exploration, production, transportation, refining and distribution, and the

²⁶ Of course, the ethics duties of arbitrators are also important here, particularly the arbitrator’s conflict of interest and disclosure responsibilities with respect to the witness.

²⁷ See generally, Crain, ‘Professional Standards for Experts’ in Fannon (ed.), *The Comprehensive Guide to Lost Profits Damages for Experts and Attorneys* (Business Valuation Resources LLP, 2009), ch. 2. An interesting issue, for purposes of determining the ethics standards of expert witnesses, is whether the code of conduct of a dominant organisation in a profession sets the ethics standards for all members of that profession, regardless of whether the witness is formally affiliated with that particular organisation. Prof. Michael Davis, Senior Fellow at the Center for the Study of Ethics in the Professions and Professor of Philosophy, Illinois Institute of Technology, has pointed out in an email exchange with the author that some codes seek to bind all members of the profession, not just members of the organisation in question: ‘You assume that these codes can only apply to members of the organization (such as AICPA) – unless part of licensing system. That’s often true, but in some professions, especially engineering, the codes, though drawn up by profession associations, bind all engineers, not just members. (Check out NSPE code, ASCE’s, or ASME’s, for example.) ... I’ve also noticed that in some professions, for example, architecture, the association’s (AIA’s) code, though officially only applying to AIA members, is treated by most architects as the appropriate standard of conduct for any architect, AIA member or not. Like the ABA, the AIA no longer can be said to have most members of the profession as members’. Davis email to the author, 18 February 2010, on file with author. Davis’s conclusion could have significant consequences for the duties owed by party-appointed expert witnesses in many circumstances, including for such practical matters as cross-examination and impeachment of a witness.

²⁸ See the listing of worldwide valuation and appraisal organisations at www.ivsc.org/members/index.html, last accessed 15 March 2010.

²⁹ See generally, Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), ch. 9. For those with a sense of the absurd, see Alan Morris, *EG Practice: The surveyor as expert witness: Building and development play, A Bruce Shaw Play* (Estates Gazette Books, 2005), a play authored by Alan Morris for the Royal Institution of Chartered Surveyors. The conduct of the expert in the play is premised on the assumption, derived from CPR Part 35, that ‘the expert’s function is to assist the court’. *Ibid.* p.viii. Do not expect West End or Broadway quality.

costs of building and operating refineries and other facilities to exploit petroleum resources. Construction and engineering expertise is also regularly sought in arbitrations.

Many construction and engineering professionals join associations, including the Royal Academy of Engineering, the UK Institution of Civil Engineers, the UK Institution of Mechanical Engineers, the Institution of Engineers, Australia, the Association of Professional Engineers Scientists and Managers Australia, the Association of Consulting Engineers Australia, the American Oil Chemists Society, the American Society of Civil Engineers, the American Society of Mechanical Engineers, the American Institute of Chemical Engineers, the American Association of Petroleum Geologists, the American Institute of Consulting Engineers, the US National Society of Professional Engineers and the Society of Petroleum Evaluation Engineers. A number of these petroleum and engineering professional organisations have established codes of conduct that set out ethical rules for their members when serving as witnesses in dispute resolution proceedings.

Expert testimony about public international law or about national law in an applicable jurisdiction is another common circumstance in international arbitration. Experts offering such testimony will, naturally, be members of bar associations and law societies. If those experts come from the world of academia, as many do, then they may also be members of professional associations for academics or subject to rules established by their own educational institution. Academic organisations do not, however, ordinarily address in their codes of ethics such mundane matters as serving as an expert witness before a tribunal.

(a) Accounting Professionals

Let us first turn to the accounting professionals. Parties regularly engage qualified accountants as expert witnesses in connection with accountancy issues in, for example, joint venture disputes and in the damages phase of an international arbitration. The codes of practice adopted by professional accountancy bodies impose ethical duties on accountants covering all aspects of their professional activities, including serving as a testifying party-appointed expert. To illustrate, the Ethics Standards Board of Accountants of the International Federation of Accountants (IFAC) has promulgated a revised Code of Ethics for Professional Accountants, intended to be effective at the beginning of 2011. While that Code of Ethics does not set out detailed prescriptions regarding the engagement of accountants as party-appointed expert witnesses, the Code does identify ‘advocacy’ as a significant ‘threat’ to the integrity of accountants. In particular, the IFAC Code specifies acting as an audit client’s advocate in litigation as creating an ‘advocacy threat’.³⁰

³⁰ See s. 200.6 ‘Examples of circumstances that create advocacy threats for a professional accountant in public practice include: • The firm promoting shares in an audit client. • *A professional accountant acting as an advocate on behalf of an audit client in litigation or disputes with third parties*’. See www.icaew.com/index.cfm/route/166834/icaew_ga/en/Technical_and_Business_Topics/Topics/Ethics/Advancing_the_debate/IFAC_issues_revised_Code_of_Ethics, last accessed 15 March 2010 (emphasis added). See also, s. 200.3 of the revised IFAC Code of Ethics.

The major accountancy professional bodies in the United Kingdom (including the Institute of Chartered Accountants in England and Wales) are all members of IFAC³¹ and will be revising their individual Code of Ethics to comply with the principles included in IFAC's revised Code of Ethics in due course.

The situation in the United States is the same. The AICPA, like IFAC and other accountancy organisations throughout the world, has enacted a Code of Professional Conduct³² encompassing all aspects of a member's professional duties, including service as an expert in dispute resolution proceedings. Rules 102 and 201 of the Code of Professional Conduct are particularly important in that regard.

³¹ IFAC is comprised of 157 members and associates in 123 countries and jurisdictions, representing over 2.5 million accountants.

³² Available at www.aicpa.org/about/code/index.htm, last accessed 2 October 2009. In addition to the provisions of rules 102 and 201 discussed in the body of this article, several other provisions of the AICPA Code of Professional Conduct will have an impact on the AICPA member's conduct as a party-appointed expert witness. Among them are the following.

Rule 202, Compliance with standards. A member who performs auditing, review, compilation, management consulting, tax, or other professional services shall comply with standards promulgated by bodies designated by Council.

Rule 301, Confidential client information. A member in public practice shall not disclose any confidential client information without the specific consent of the client. This rule shall not be construed (1) to relieve a member of his or her professional obligations under rules 202 [ET section 202.01] and 203 [ET section 203.01]; (2) to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations; (3) to prohibit review of a member's professional practice under AICPA or state CPA society or Board of Accountancy authorization; or (4) to preclude a member from initiating a complaint with, or responding to any inquiry made by, the professional ethics division or trial board of the Institute or a duly constituted investigative or disciplinary body of a state CPA society or Board of Accountancy.

Members of any of the bodies identified in (4) above and members involved with professional practice reviews identified in (3) above shall not use to their own advantage or disclose any member's confidential client information that comes to their attention in carrying out those activities. This prohibition shall not restrict members' exchange of information in connection with the investigative or disciplinary proceedings described in (4) above or the professional practice reviews described in (3) above.

Rule 302, Contingent fees. A member in public practice shall not (1) Perform for a contingent fee any professional services for, or receive such a fee from a client for whom the member or the member's firm performs,

- (a) an audit or review of a financial statement; or
- (b) a compilation of a financial statement when the member expects, or reasonably might expect, that a third party will use the financial statement and the member's compilation report does not disclose a lack of independence; or (c) an examination of prospective financial information;

or (2) Prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client. The prohibition in (1) above applies during the period in which the member or the member's firm is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in any such listed services. Except as stated in the next sentence, a contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for the purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. A member's fees may vary depending, for example, on the complexity of services rendered.

Rule 501, Acts discreditable. A member shall not commit an act discreditable to the profession.

Rule 102 of the Code requires that an AICPA member ‘in the performance of any professional service ... shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others’. This rule thus establishes duties of objectivity and integrity. The rule also prohibits AICPA members from knowingly subordinating their judgment to others. That latter obligation may have significant consequences for the ability of an AICPA member accountant to accept, in the course of preparing expert evidence, assumptions from counsel or a party that the accountant knows are unreasonable in the circumstances.

The AICPA has issued a number of interpretations of these obligations. Interpretation 102-6 (professional services involving client advocacy)³³ makes clear that these ethical duties extend to consulting services engagements (such as litigation support) that ‘involve acting as an advocate for the client’. Interpretation 102-6 further comments that some advocacy conduct may compromise the accountant’s integrity:

Moreover, there is a possibility that some requested professional services involving client advocacy may appear to stretch the bounds of performance standards, may go beyond sound and reasonable professional practice, or may compromise credibility, and thereby pose an unacceptable risk of impairing the reputation of the member and his or her firm with respect to independence, integrity, and objectivity. In such circumstances, the member and the member’s firm should consider whether it is appropriate to perform the service.

Rule 102 also requires AICPA members to ‘be free of conflicts of interest’. The application of that duty in a litigation context is unclear. The AICPA has issued Interpretation 102-2 (conflicts of interest).³⁴ That Interpretation describes the AICPA accountant’s obligation to disclose relationships that ‘could, in the member’s professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the member’s objectivity’.

Interpretation 102-2 does not, however, offer guidance as to whether an arbitral tribunal would be an ‘appropriate party’ for purposes of the member’s conflicts of interest duties. As is clear from even a cursory review of the illustrations in Interpretation 102-2, though, that Interpretation is aimed at conflicts adverse to the interests of the engaging party and the accountant’s employer. The Interpretation does not focus on disclosure to a tribunal of relationships that may affect the impartiality or objectivity of the accountant’s expert evidence.

More broadly than rule 102, rule 201 of the AICPA Code³⁵ establishes additional general standards of ‘professional competence’, ‘due professional care’, ‘planning and supervision’ and ‘sufficient relevant data’ for all members:

³³ Available at www.aicpa.org/about/code/et_102.html#et_102.07, last accessed 15 March 2010.

³⁴ Available at www.aicpa.org/about/code/et_102.html#et_102.03, last accessed 15 March 2010.

³⁵ Available at www.aicpa.org/about/code/et_102.html, last accessed 15 March 2010.

Rule 201 – General standards.

A member shall comply with the following standards and with any interpretation thereof by bodies designated by Council.

- A. Professional Competence. Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.
- B. Due Professional Care. Exercise due professional care in the performance of professional services.
- C. Planning and Supervision. Adequately plan and supervise the performance of professional services.
- D. Sufficient Relevant Data. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

The 'due professional care' and 'sufficient relevant data' standards can be particularly important for expert witness engagements.

Rule 201 requires that a member shall 'exercise due professional care in the performance of professional services ... [and] obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed'. These duties arguably address the situation in which an accountant serving as a party-appointed expert witness must consider the reasonableness of assumptions provided to that expert by counsel.

Importantly, the AICPA has gone well beyond these 'black letter' ethical rules. The AICPA has also issued two detailed and binding Statements of Standards directly relevant to expert evidence, a 2004 Statement on Standards for Consulting Services No. 1 (SSCS 1)³⁶ and a Statement on Standards for Valuation Services No. 1 (Valuation of Business, Business Ownership Interests, Securities, or Intangible Assets) (SSVS 1).³⁷ Those Statements are binding pronouncements, covering the responsibilities of accountants when delivering consulting or valuation services, including in the course of testimony as an expert witness. In addition, the AICPA has issued Special Report 03-1, *Litigation Services and Applicable Professional Standards* ('Litigation Special Report').³⁸ That Report specifically focused on the application of the AICPA Code of Professional Conduct and related materials to litigation engagements, again including service as a party-appointed expert witness.

³⁶ Available at <http://fvs.aicpa.org/Resources/Laws+Rules+Standards+and+Other+Related+Guidance/AICPA+Professional+Standards/Statement+on+Standards+for+Consulting+Services+No.+1.htm>, last accessed 15 March 2010.

³⁷ Available at <http://tax.aicpa.org/Resources/Professional+Standards+and+Ethics/Other+AICPA+Ethical+Standards/AICPA+Statement+on+Standards+for+Valuation+Services.htm>, last accessed 15 March 2010.

³⁸ Available to AICPA members at <https://fvs.aicpa.org/Admin/CSCLogin?ReturnURL=%2fResources%2fPractice%2bAids%2band%2bSpecial%2bReports%2fAICPA%2bConsulting%2bServices%2bSpecial%2bReport%2b03-1%2bLitigation%2bServices%2band%2bApplicable%2bProfessional%2bStandards.htm>, last accessed 2 October 2009.

To follow the spheres of application for the two Statements on Standards, it is important to appreciate that the AICPA distinguishes between two common measures of damages: ‘lost profits’ and ‘loss of value’. The term ‘engagements to estimate value’ is defined in SSVS 1 as ‘an engagement, or any part of an engagement (for example, a tax, *litigation*, or acquisition-related engagement), that involves determining the value of the business, business ownership interest, security, or tangible asset’ (emphasis added). SSVS 1 thus applies to accountants estimating loss of value in, *inter alia*, litigation engagements. SSVS 1 does not, however, address lost profits damages computations unless the accountant is calculating the lost profits as part of an engagement to estimate loss of value.

Even though a lost profits damages engagement may be outside the scope of the valuation services statement, SSVS 1, that engagement will still fall within the scope of the general consulting services statement, SSCS 1. For the AICPA, the term ‘consulting services’ encompasses a wide range of services, specifically including ‘litigation services’. Thus, both of these binding Statements address expert witness engagements, whether more generally (SSCS 1) or with respect particularly to valuation services (SSVS 1).

SSCS 1, a five-page document, restates the application of, *inter alia*, rules 102 and 201 of the AICPA Code of Professional Conduct to all consulting services provided by a member, including litigation engagements. Accordingly, the duties of impartiality and objectivity, professional competence, due professional care, planning and supervision and sufficient relevant data all apply specifically to litigation services undertaken by an AICPA accountant.

SSVS 1, a much more detailed 76-page document, imposes duties on AICPA member accountants serving, among other matters, as expert witnesses in connection with an engagement to ‘estimate value’.³⁹

An analysis of all arbitration-related aspects of SSVS 1 is beyond the scope of this article. Nevertheless, SSVS 1 reiterates an AICPA member’s duty in connection with a valuation engagement to deliver services with ‘objectivity’, which the AICPA defines to require the accountant to be ‘impartial, intellectually honest, disinterested, and free from conflicts of interest’.⁴⁰ SSVS 1 also calls for

³⁹ In the course of developing SSVS 1, the AICPA received a number of questions from members regarding the application of the proposed Statement of Standards to litigation engagements. The AICPA codified its responses to some of those questions in several illustrations found in Interpretation No. 1 to SSVS 1. Interpretation No. 1, ‘Scope of Applicable Services’ of the Statement on Standards for Valuation Services No. 1 (Valuation of Business, Business Ownership Interests, Securities, or Intangible Assets), appended to SSVS 1 at p. 55 *et seq.* The illustrations in Interpretation No. 1 make clear the application of SSVS 1 to expert witness engagements, as well as the distinction between ‘lost profits’ assessments and ‘loss of value’ assessments.

⁴⁰ ‘14. Objectivity and Conflict of Interest. The AICPA Code of Professional Conduct requires objectivity in the performance of all professional services, including valuation engagements. Objectivity is a state of mind. The principle of objectivity imposes the obligation to be impartial, intellectually honest, disinterested, and free from conflicts of interest. If necessary, where a potential conflict of interest may exist, a valuation analyst should make the disclosures and obtain consent as required under Interpretation No. 102-2, “Conflicts of Interest”, under Rule 102, Integrity and Objectivity (AICPA, Professional Standards, vol. 2, ET sec. 102.03): SSVS 1, para. 14.

any assumptions and scope restrictions accepted by the valuation expert to be disclosed.⁴¹

Moreover, paragraph 29 of SSVS 1 calls for the valuation expert to evaluate the financial information on the subject entity (including budgets, forecasts and projections) used for the valuation ‘to determine that it is reasonable for the purposes of the valuation’.⁴² Paragraph 29 does not distinguish, for this purpose, between elements of forecasts and projections developed by the accountant and elements developed by the engaging party.

A few years earlier than the promulgation of SSVS 1, the AICPA in 2003 issued its Litigation Special Report. The purpose of the Litigation Special Report was to provide AICPA accountants with guidance ‘on the existing professional standards and the related responsibilities that affect the litigation services practitioner’.⁴³

The Litigation Special Report points out that AICPA Code of Professional Conduct Rules 102 (integrity and objectivity), 201 (general standards), 202 (compliance with standards), 301 (confidential client information), 302 (no contingent fees) and 501 (acts discreditable) ‘have particular applicability to the practice of litigation services’. The Report, additionally, notes that rule 101 (independence relating to ‘attestation’ services such as formal audits) and rule 203 (accounting principles) also apply.

With respect to integrity and objectivity, the Litigation Special Report makes clear that an AICPA member serving as an expert witness does not act as an advocate for the client’s position in the litigation process. Rather, the expert’s function is to ‘assist the trier of fact in understanding complex or unfamiliar concepts after having applied reliable principles and methods to sufficient relevant data’:

11. Rule 102, Integrity and Objectivity. To maintain integrity is to adhere to an ethical code and be free from corrupting influences and motives. Service and public trust should not be subordinated to personal gain and advantage.
12. The roles of practitioners differ from attorneys in the litigation process, which is an adversarial proceeding in which the best case for each party

⁴¹ ‘18. Assumptions and Limiting Conditions. Assumptions and limiting conditions are common to valuation engagements. Examples of typical assumptions and limiting conditions for a business valuation are provided in Appendix A, “Illustrative List of Assumptions and Limiting Conditions for a Business Valuation”. The assumptions and limiting conditions should be disclosed in the valuation report (paragraphs 52(1), 68(g), and 71(m)).

19. Scope Restrictions or Limitations. A restriction or limitation on the scope of the valuation analyst’s work, or the data available for analysis, may be present and known to the valuation analyst at the outset of the valuation engagement or may arise during the course of a valuation engagement. Such a restriction or limitation should be disclosed in the valuation report (paragraphs 52(m), 68(e), and 71(n)). *Ibid.* paras. 18–19.

⁴² *Ibid.* para. 29.

⁴³ *Litigation Services and Applicable Professional Standards*, AICPA Consulting Services Special Report 03-1 (2003), available at www.cpa2biz.com/AST/Main/CPA2BIZ_Primary/BusinessValuationandLitigationServices/LitigationServices/PRDOVR~PC-055297PDF/PC-055297PDF.jsp, last accessed 15 March 2010.

is put before the trier of fact. The litigation attorney is the client's advocate.

13. The expert does not serve as an advocate for the client's position and, therefore, should not subordinate his or her judgment to the client. The expert is engaged as someone who has specialized knowledge, skills, training, and experience in a particular area and presents conclusions and judgments with integrity and objectivity. The expert's function is to assist the trier of fact in understanding complex or unfamiliar concepts after having applied reliable principles and methods to sufficient relevant data.⁴⁴

By concluding among other matters that '[t]he expert does not serve as an advocate for the client's position', the Litigation Special Report challenges the notion that an expert accounting witness is a 'member of the team' for the engaging party. Those observations in the Report parallel a number of the principles underlying CPR Part 35 in the United Kingdom and the CIArb Protocol, in particular the obligations of impartiality and objectivity and the overriding duty owed to the tribunal.

The Litigation Special Report further reminds the AICPA accountant engaged in litigation services that he must exercise 'due professional care'. As the Report explains, the concept of 'due professional care' applies to the obligation of experts to assess the assumptions underlying their opinions.⁴⁵

The Litigation Special Report additionally addresses the requirement that experts must rely on 'sufficient relevant data' to provide a reasonable basis for their conclusions. Thus, the Litigation Special Report discusses the responsibility of a consulting accountant to obtain information 'that is sufficient to provide a reasonable basis for conclusions or recommendations'. In applying this principle, the accountant expert 'should consider analyzing key assumptions to determine whether they are reasonable'.

In these prescriptions, the AICPA Litigation Special Report takes a nuanced view of whether the expert has a professional duty to evaluate the reasonableness of assumptions provided by counsel. The Litigation Special Report acknowledges the primary role of counsel in providing 'assumptions that may be proved from other evidence'. The Report also qualifies the extent to which the accountant must assess the reasonableness of those assumptions: the expert '*should consider*

⁴⁴ *Ibid.* paras. 11–13.

⁴⁵ '18. Due Professional Care. A practitioner exercises due professional care in the performance of professional services. Due care requires diligence and critical analysis of all work performed. It also requires that all work be completed in accordance with the provisions of the applicable professional standards of the AICPA, including the Code of Professional Conduct.

19. In a litigation engagement, practitioners are often the only professionals capable of quantifying the impact of the events that led to the dispute. Their work product is therefore important in the litigation process. Each party to the proceedings may retain professionals to quantify and analyze the economic impact of events. Practitioners need to be able to evaluate and challenge the assumptions and calculations of other professionals as well as defend their own assumptions and calculations under rigorous cross-examination'. *Ibid.* paras. 18–19.

analyzing key assumptions to determine whether they are reasonable' (emphasis added). While the willingness of US courts to exclude evidence based on unreasonable assumptions is noted, in the end the Litigation Special Report only concludes that 'the trier of fact will determine the reasonableness of the assumptions'.

(b) Appraisal Professionals

Accounting is, of course, one of the most highly regulated professions, due in large measure to the special role accountants play in auditing financial statements of public companies. Other professionals offering expert financial or damages evidence, however, are also subject to codes of conduct governing their engagements. For example, the American Society of Appraisers' Principles of Appraisal Practice and Code of Ethics⁴⁶ states that the appraiser's 'primary obligation to his client is to reach complete, accurate, and pertinent conclusions and numerical results regardless of the client's wishes or instructions in this regard'.⁴⁷ Additionally, if the purpose of the appraisal includes a specific use by a third party (including, one may argue, reliance by arbitrators on the appraisal), then the appraiser owes a responsibility to that third party. The third party is entitled to rely on the objectivity of the appraiser's findings:

[T]he third party has a right to rely on the validity and objectivity of the appraiser's findings as regards the specific stated purpose and intended use for which the appraisal was originally made. Members of the Society recognize their responsibility to those parties, other than clients, who may be specifically entitled to make use of their reports.⁴⁸

In confirming an appraiser's responsibility to third parties who are expected to rely on the appraiser's work product, the ASA focuses on the same dynamic that underlies the English judicial rule that testifying experts owe their overriding duty to the court, not the engaging party.

In addition to these general obligations, the ASA's Principles of Appraisal Practice and Code of Ethics contain several specific ethical canons aimed squarely at the role of the expert in dispute resolution proceedings. An appraiser is proscribed from being an 'advocate' as an expert witness. Thus, sections 4.3 and 7.5 of the ASA Code deem it unethical for an appraiser to suppress adverse information, overemphasise favourable information or 'in any other particulars to become an advocate'. Those sections further impose a duty to provide the tribunal with 'the whole truth'. Section 4.3 forcefully concludes that '[i]t is the appraiser's obligation to present the data, analysis, and value without bias, regardless of the effect of such unbiased presentation on his client's case':

⁴⁶ Available at www.appraisers.org/Files/Professional%20Standards/Principles%20of%20Appraisal%20Practice.pdf, last accessed 15 March 2010.

⁴⁷ *Ibid.* para. 4.

⁴⁸ *Ibid.* para. 3.6.

4.3 Appraiser's Obligation Relative to Giving Testimony

When an appraiser is engaged by one of the parties in a controversy, it is unethical for the appraiser to suppress any facts, data, or opinions which are adverse to the case his client is trying to establish; or to overemphasize any facts, data, or opinions which are favorable to his client's case; or in any other particulars to become an advocate. It is the appraiser's obligation to present the data, analysis, and value without bias, regardless of the effect of such unbiased presentation on his client's case. (Also, see Sec. 7.5)

...

7.5 Advocacy

If an appraiser, in the writing of a report or in giving an exposition of it before third parties or in giving testimony in a court action suppresses or minimizes any facts, data, or opinions which, if fully stated, might militate against the accomplishment of his client's objective or, if he adds any irrelevant data or unwarranted favorable opinions or places an improper emphasis on any relevant facts for the purpose of aiding his client in accomplishing his objective, he is, in the opinion of the Society, an advocate. Advocacy, as here described, affects adversely the establishment and maintenance of trust and confidence in the results of professional appraisal practice and the Society declares that it is unethical and unprofessional. (Also, see Sec. 4.3)⁴⁹

Under the ASA Code, appraisers must also adequately document the basis for their testimony.⁵⁰

Additionally, contingent fees for a dispute resolution engagement are prohibited under the ASA Code. To justify this prohibition, paragraph 7.1 of the Code points out that 'anyone considering using the results of the appraiser's undertaking might well suspect that these results were biased and self-serving and therefore, invalid. Such suspicion would militate against the establishment and maintenance of trust and confidence in the results of appraisal work, generally; therefore the Society declares that the contracting for or acceptance of any such contingent fee is unethical and unprofessional.⁵¹

(c) Commercial and Investment Bankers

Unlike accountants and appraisers, however, many damages expert witnesses do not belong to general self-regulatory professional organisations. In specific, commercial and investment bankers do not commonly join any one particular or dominant self-regulatory professional body.⁵² Accordingly, a sharp contrast may exist between categories of professionals engaged in providing expert damages evidence; regulated professionals such as accountants and appraisers may owe a duty to the arbitral tribunal and be subject to specific ethical obligations of impartiality and objectivity, whereas bankers may not be bound by professional codes of conduct when serving as party-appointed experts.

⁴⁹ *Ibid.* para. 4.3

⁵⁰ *Ibid.* para. 4.4.

⁵¹ *Ibid.* para. 7.3.

⁵² Many investment bankers are qualified as securities or commodities broker-dealers. Broker-dealers in the United States are subject to supervision by a variety of regulatory and self-regulatory bodies, including the US Securities Exchange Commission, the US Commodities Futures Trading Commission, the Financial Industry Regulatory Authority and the securities and commodities exchanges. None of those bodies, to the author's knowledge, prescribes codes of conduct apart from mandatory legal requirements.

Occasionally, a banker may have obtained a certification of expertise from a professional organisation that imposes ethical duties on its members. For example, a banker in the United States may seek to qualify as, *inter alia*, a ‘Certified Trust and Financial Advisor’, a ‘Certified Lender Business Banker’ or a ‘Certified Corporate Trust Specialist’ with the American Bankers Association’s Institute of Certified Bankers (ICB). However, parties and counsel commonly engage as party-appointed expert a US banker from a larger financial institution with experience in complex international transactions. In contrast, local and community US bankers are the individuals who often seek ICB credentials.

Still, it is worth noting that a banker who seeks ICB credentials must agree in the application for certification to abide by the ICB’s Professional Code of Ethics.⁵³ ICB’s Code of Ethics provides in paragraph 3 that the banker must ‘exhibit a high degree of loyalty to [the banker’s] employer and to whomever [the banker is] rendering a service’. Additionally, under paragraph 10 of the Code the ICB-credentialed banker must ‘use reasonable care in expressing opinions ... and obtain sufficient evidence to warrant an opinion’.

The duty of loyalty found in paragraph 3 of the ICB Code of Ethics emphasises the loyalty owed by the certified banker to the banker’s employer. Further, though, the certified banker owes a duty of loyalty ‘to whomever I am rendering a service’. Arguably, that includes an arbitral tribunal before which the banker is testifying, but there is no interpretation of the phrase to confirm or reject that reading. The manner in which the ICB Professional Code of Ethics expresses this duty of loyalty to the bankers’ employer and others was clearly not drafted with attention to the ethical tension found in dispute resolution proceedings: the competing duties owed by a party-appointed expert to the party engaging the expert and to the tribunal.

The ICB Code also addresses the responsibility of a certified banker to review underlying assumptions for an opinion. The banker must ‘[u]se reasonable care in expressing opinions involving and related to the performance of [the banker’s] professional duties, and obtain sufficient evidence to warrant an opinion’. Accordingly, the expert banker’s opinion should be expressed using ‘reasonable care’ and subject to obtaining ‘sufficient evidence’.

While the ICB Code of Ethics certainly imposes obligations applicable to circumstances where a banker serves as an expert witness, it is unusual for US commercial bankers to seek ICB certifications. Accordingly, international arbitrators will only rarely receive evidence from an ICB-credentialed commercial banker.

(d) Engineering and Oil and Gas Professionals

The oil and gas community offers up many party-appointed expert witnesses, on questions as wide-ranging as geology, reserve estimates, E&P expenditures, cash

⁵³ The ICB Professional Code of Ethics is included in all applications for certification issued by the ICB. See the applications at www.aba.com/ICB/Application.htm, last accessed 15 March 2010.

flow estimates and, of course, damages calculations. In the United Kingdom, petroleum engineers are often members of the Institution of Civil Engineers (ICE). Rule 1 of the ICE Code of Professional Conduct⁵⁴ requires member engineers to ‘discharge their professional duties with integrity’. Consistent with CPR Part 35, ICE’s Guidance note for rule 1 specifically speaks to the ethical responsibilities of an engineer acting as an expert witness, including the duty to testify impartially and independently and owing their primary duty to the tribunal:

The manner in which members could breach this Rule might include the following: ...

- When acting as expert witnesses, failing to ensure that the testimony they give is both independent and impartial. In such a role, members must be mindful that their prime duty is to the Court or Tribunal, not to the client who engaged them to give evidence, and they should not give any professional opinion that does not accurately reflect their honest professional judgment or belief. To do otherwise would not only place members in danger of perjury but would clearly breach the requirement in the Rules of Professional Conduct to discharge their professional duties with integrity.⁵⁵

In the United States, the National Society of Professional Engineers (NSPE) early on took the lead in developing guidelines for ethical engineering practices. Indeed, the NSPE’s attention to engineering ethics generally has stimulated the constituent states of the United States to develop mandatory ethical codes for engineers subject to their licensing jurisdiction. ‘States are beginning to make ethics training a prerequisite to licensing [for engineers] ... Following the lead of NSPE, nearly all states have published their own code of ethics for engineers.’⁵⁶

The NSPE Code of Ethics for Engineers⁵⁷ obligates engineers to be ‘objective and truthful’ in testimony. Additionally, the testifying engineer must include ‘all relevant and pertinent information’ in that testimony – a duty to provide ‘the whole truth’:

II. Rules of Practice

3. Engineers shall issue public statements only in an objective and truthful manner.

- a. Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.

⁵⁴ May 2008, available at www.ice.org.uk/downloads//ICE%20CODE%20OF%20PROFESSIONAL%20CONDUCT%20Final%20May%202008.pdf, last accessed 15 March 2010.

⁵⁵ *Ibid.* p. 5.

⁵⁶ Society of Petroleum Evaluation Engineers (SPEE), *Discussion and Guidance on Ethics* (May 2005), Preamble p. 1, available at www.spee.org/images/PDFs/ReferencesResources/SPEE%20Discussion%20and%20Guidance%20on%20ethics.pdf, last accessed 15 March 2010 (‘SPEE Ethics Guidance’). In the United States, all states license engineers. Many license geologists as well. The licensing regulatory scheme may include a mandatory code of ethics. Oil-producing US states with mandatory engineering codes of ethics include Arkansas, Alabama, California, Colorado, Kansas, Kentucky, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Texas, Utah and Wyoming. *Ibid.* p. 19. Consequently, for engineers licensed in such jurisdictions, the ethics duties of the licensed engineer may be established by statute or regulation, not solely by industry codes of conduct.

⁵⁷ Available at www.nspe.org/Ethics/CodeofEthics/index.html, last accessed 15 March 2010.

- b. Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.
 - c. Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters. ...
5. Engineers shall avoid deceptive acts.

...

III. Professional Obligations

- 1. Engineers shall be guided in all their relations by the highest standards of honesty and integrity.
 - a. Engineers shall acknowledge their errors and shall not distort or alter the facts. ...
- 3. Engineers shall avoid all conduct or practice that deceives the public.
 - a. Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.

As these Rules of Practice make clear, an engineer who is an NSPE member is obligated to (i) be 'objective and truthful' in testimony; (ii) 'include all relevant and pertinent information in ... testimony'; (iii) make no 'arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters'; (iv) 'acknowledge their errors and ... not distort or alter the facts'; and (v) 'avoid the use of statements containing a material misrepresentation of fact or omitting a material fact'.

The NSPE Board of Ethical Review has authored several volumes of opinions interpreting the NSPE Code. Many of those opinions consider expert witness engagements.⁵⁸ Of particular interest is the Board's opinion in Case No. 98-4.⁵⁹ In that case, a manufacturing company retained an engineer to render an opinion in a patent litigation matter. Several years later, the same engineer was retained by plaintiff's counsel in an unrelated product liability case against the same manufacturer. And several years after the second matter, the manufacturing

⁵⁸ Opinions of the NPSE Board of Ethical review are available at www.nspe.org/Ethics/EthicsResources/BER/index.html, last accessed 15 March 2010. As one of those Opinions states, 'Over the years, the Board of Ethical Review has considered a variety of difficult cases involving conflicts of interest and the scope of the engineer's ethical obligation to past and present clients. The Board of Ethical Review has also considered several cases involving the question of engineers providing and performing forensic engineering services and the ethical issues that arise in that context (see BER Cases 92-5, 82-6, 76-3). These cases have involved such issues as performing such services on the basis of a contingency fee, licensure requirements when serving as an expert witness, the qualifications of the individual who is being considered to perform the expert services, relationships with attorneys, and examining the conflict of interest questions that may arise'. Case No. 98-4, at p. 1, available at www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/1998/BER98-4-app.pdf, last accessed 15 March 2010.

⁵⁹ *Ibid.*

company again engaged the same engineer in a third unrelated dispute, this time another patent litigation. During cross-examination by opposing counsel in the third dispute, the engineer's prior engagements became the subject of controversy: had the engineer acted improperly?

The NSPE Board ruled that the engineer had not acted improperly. The Board determined:

by the very nature of the role of the engineer in society, conflicts of interest were virtually an immutable fact of professional engineering practice and that it was generally impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, codes were changed, and engineers were implored to disclose all known or potential conflicts of interest to their employers or clients, by promptly informing them of any business association, interest, or other circumstances that could influence or appear to influence their judgment or the quality of their services.

After considering the facts of the claim, the Board held that 'engineers do not have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client'. Additionally, the Board pointed out that '[b]eing a "faithful agent and trustee" to a client does not obligate an engineer to a duty of absolute devotion in perpetuity'.⁶⁰

The Board concluded by drawing an important distinction between the role of an attorney and the role of an expert engineering witness – the engineer is not an advocate and should not compromise her professional independence and autonomy:

In this connection, the Board is also concerned by the attorney's implication under the facts that Engineer A may have acted improperly, with the suggestion that Engineer A's action may have constituted a conflict of interest. It appears that the attorney was attempting to draw a parallel between the legal profession, where there is an institutionalized 'plaintiff's bar' and 'defense bar', and the engineering profession. However, while engineers may find themselves at times working within the confines of the legal adversarial profession, unlike attorneys, they are not 'advocates' in rendering their professional services, they should not be expected to compromise their professional independence and autonomy.⁶¹

Unsurprisingly in light of the US focus of the organisation, the NSPE has based the obligations in the NSPE Code and its opinions upon the unstated assumption that US courts will hear the dispute, rather than an international arbitration tribunal. As a consequence, the ethical responsibilities set out in the NSPE Code and the opinions generally conform to the principles of the 1993 US Supreme Court decision in *Daubert*, rather than the approach taken by, say, the UK CPR Part 35 or the CIArb Protocol. Still, in Case 98-4 the NSPE emphasised that engineers acting as witnesses are not advocates for the engaging party.

⁶⁰ *Ibid.* p. 2.

⁶¹ *Ibid.* p. 3.

In addition to the NSPE, the Society of Petroleum Evaluation Engineers (SPEE) has also offered detailed guidance to its members regarding ethical considerations for expert witnesses. Petroleum evaluation engineers estimate, among other matters, reserves and recovery rates and associated cash flows. As a consequence, petroleum evaluation engineers regularly serve as resource experts in oil and gas project disputes, and as damages experts as well.

SPEE members agree to uphold the NSPE Code of Ethics for Engineers, as well as the SPEE's own Principles of Acceptable Evaluation Engineering Practices.⁶² Several articles of the SPEE Principles bear directly upon the obligations of an SPEE member when testifying before a tribunal. Those Principles obligate evaluation engineers, *inter alia*, to issue public statements in an 'objective and truthful manner', to 'make oral and written statements that are honest and fair, avoiding exaggeration and sensationalism', to give legal testimony 'only after adequate preparation' and to disclose the extent of that preparation.⁶³

While the SPEE Principles provide general guidance to evaluation engineers when testifying, the SPEE has recognised the need for more specific standards when an engineer serves as an expert witness:

The Code of Ethics of Engineers and the Principles of Acceptable Evaluation Engineering Practice ... set a reasonable and comprehensive standard of conduct for engineers engaging in the various aspects of reserve evaluation. Are any other standards needed for an engineer serving as an expert witness in civil litigation? In theory no, but in practice yes. Both the logic and procedures involved in civil legal proceedings are foreign enough to the inexperienced engineer as to create numerous pitfalls even for the most conscientious person.⁶⁴

Accordingly, in addition to binding its members to the NSPE Code of Ethics and the SPEE Principles, the SPEE has also offered specific guidance to its members on the ethics considerations involved in 'expert witnessing'. In a 2005 paper entitled 'Discussion and Guidance on Ethics' (SPEE Ethics Guidance), an SPEE committee drew an important distinction between the ethics duties of an attorney and the ethics duties of an expert engineering witness; attorneys are not impartial, but the expert witness should be impartial, rendering independent opinions based on facts:

Attorneys are not impartial. In contrast, an expert witness brings some specialized skill, knowledge, experience, education, or training into the courtroom or hearing room to assist the trier-of-fact. The expert should be impartial, rendering independent opinions based on the facts.⁶⁵

The SPEE Ethics Guidance points out that ethics considerations 'start with the decision on whether or not to accept the engagement as an expert witness'.⁶⁶

⁶² Principles ('SPEE Principles') set out in SPEE Ethics Guidance, *supra* n. 56 at p. 5 *et seq.*

⁶³ SPEE Principles, arts. I, III.1 and III.3.

⁶⁴ 'The Ethical Considerations Involved in Expert Witnessing' in SPEE Ethics Guidance, *supra* n. 56 at p. 8.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* p. 9.

These considerations include whether the prospective witness is qualified to offer the requested opinions: 'Are you qualified by training and experience to evaluate and opine on the technical issues that are involved?'. Additionally, the SPEE advises its members to consider both direct and potential conflict of interest arising out of existing relationships, and prohibits success-based compensation arrangements.⁶⁷

The SPEE Ethics Guidance advises engineers to pose hard 'potential conflicts of interest' questions to themselves, but does not make recommendations about how to answer the questions. The SPEE Ethics Guidance thus offers no detailed advice on disclosing potential conflicts of interest along the lines of the Green, Orange and Red Lists for arbitrators found in the IBA Guidelines on Conflicts of Interest in International Arbitration. But occasionally the SPEE does go beyond just putting the question. For example, the SPEE Ethics Guidance offers practical homespun advice to engineers when the engaging party has an unsatisfactory reputation or places the expert under pressure to 'slant' opinions: 'if you lie with dogs, you're liable to get fleas':

There are other less tangible issues to be considered before accepting the assignment. Are you comfortable with the reputation of the party you would be representing? An expert can be a completely ethical witness even working for someone of questionable repute. In America everyone has the right to hire the best available legal counsel and technical assistance for their 'day in court'. But if you lie with dogs you're liable to get fleas. There can be undue pressure to slant your opinions and less than full disclosure of all the facts and data. At best it is an uncomfortable situation and can become a quagmire, particularly for the inexperienced witness.⁶⁸

As discussed above, CPR Part 35 in the United Kingdom and the CI Arb Protocol enjoin an expert to disregard the pressures of the dispute resolution process. The SPEE Ethics Guidance offers the same recommendation:

Expert witnesses get into questionable ethical positions unknowingly by not clearly understanding their role in relation to the attorney's role. Remember that attorneys are advocates for their clients. Short of knowingly putting on false testimony attorneys are largely free to explore every alleged fact, conceivable theory or half-baked opinion that would support their client's position, while questioning the credibility of every aspect of the opposition's case. ...

The main danger an expert faces is from his client's attorney who may pressure you about your opinions or suggest revisions in your testimony to be more 'responsive'. You may be asked to stretch your expertise into areas where you aren't fully qualified. There is nothing necessarily illegal or unethical about attorneys doing this. They are fulfilling their advocate role, but the expert as an unbiased, independent party has the professional responsibility to decide what subjects he can opine on and to state his opinions clearly and fully. If you are not able to withstand the power of suggestion from an aggressive attorney, it would be wise not to serve as an expert witness.⁶⁹

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* p. 10.

In particular, the SPEE points out that a testifying expert is not truly part of a ‘team’ with the engaging party and counsel. Instead, the testifying expert must be independent and impartial notwithstanding ‘team spirit’ and ‘aggressive advocacy by the client’s lawyer’:

While in theory an expert is an unbiased, independent party, it is human nature to invest in your own credibility and to want your side to win with you contributing to their success. After all you are part of the ‘team’. This is particularly true in complex cases where you have spent many long hours in the presence of clients and attorneys, serving both as consultant and testifying expert. The team spirit can really thrive under these conditions, but an ethical expert cannot let this impair his professional judgment even if it strains relationships. You are not really a member of a support team in the sense that a purely consulting expert who is not testifying would be. While a consulting engineer is always held to a professional code of conduct, he can qualify his opinions by disclaimers, disclosures and limited usage clauses in the report. The lack of such a safe harbor, places a special burden on a testifying expert witness to evaluate information, interpret facts and render opinions in an impartial manner that will help the court understand technical issues. The dual role of consulting and testifying expert along with aggressive advocacy by the client’s lawyer create the major pitfalls for a would-be ethical witness.⁷⁰

The SPEE Ethics Guidance acknowledges one difficulty inherent in all areas where professional expertise is required: the role of subjective judgments in fields where absolute certainty does not exist. The SPEE recommends that its members neither over- nor under-state the accuracy of evaluations.⁷¹ Consistent with the US Supreme Court’s *Daubert* decision, the SPEE also advises engineers to follow generally accepted industry procedures, rather than ‘some nonstandard approach for the occasion of the litigation’.⁷²

⁷⁰ ‘In the area of reservoir engineering and reserve evaluation, the subject matter often tends to be more gray than black and white, requiring varying degrees of subjective judgment by the practitioner. How does the expert reconcile this subjectivity with the duty to help the court understand technical issues? Opposing attorneys love to play to the jury by expressing “shock” at an expert’s admission that reserve volumes are estimates rather than exact measurements. This response conveniently overlooks the fact that industry uses such estimates to conduct its normal business. It’s up to the expert to convey this to the court without over or understating the accuracy involved.’ *Ibid.* p. 11.

⁷¹ *Ibid.*

⁷² ‘Subjectivity also requires that the expert stick to procedures generally accepted by industry as opposed to utilizing some nonstandard approach for the occasion of the litigation. The growth of the contingency fee litigation industry in the 1980s gave rise to hundreds of lawsuits claiming certain products caused harm to the plaintiffs. Often these claims were based on little more than junk science. ... The subdiscipline of reservoir engineering is based on valid scientific principles and industry accepted practices that are the subject of continuous peer review and publication. It requires more subjective judgment than most other engineering disciplines due to the lack of sampling from the object, *i.e.* the reservoir, being analyzed. The difficulty this presents depends on the quantity and quality of the information in relationship to the heterogeneity of the reservoir. Daily, engineers successfully analyze reservoirs and evaluate reserves using training, experience and sound judgment. Expert witnesses unable to apply these attributes competently tend to demonstrate a “the exact answer isn’t known so my opinion is as good as your opinion” attitude which does not help the court to understand technical issues. Certainly two competent, unbiased engineers can look at the same set of facts and derive different conclusions, but they would also understand and be able to verbalize where and why the differences occur. This gives the court a basis for making a decision rather than being faced with two intractable opinions. There are many engineers evaluating reserves that have never advanced beyond the “cookbook” approach. They may be able to function quite capably within restricted conditions, but they do not belong in court as expert witnesses’. *Ibid.* pp. 11–12.

Another important source of ethics obligations for US engineering expert witnesses in international arbitration is the Code of Ethics of the American Society of Civil Engineers.⁷³ That Code contains a number of observations about the ethical responsibilities of civil engineers serving as expert witnesses, including before arbitral tribunals. Perhaps surprisingly given the partisan reputation of expert evidence in US court proceedings, the ASCE Code of Ethics again parallels English witness rules by requiring an engineer to ‘be objective and truthful in ... testimony’ and to ‘express an engineering opinion only when it is founded upon adequate knowledge of the facts, upon a background of technical competence, and upon honest conviction’:

Canon 3.

Engineers shall issue public statements only in an objective and truthful manner.

- a. Engineers should endeavor to extend the public knowledge of engineering and sustainable development, and shall not participate in the dissemination of untrue, unfair or exaggerated statements regarding engineering.
- b. Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony.
- c. Engineers, when serving as expert witnesses, shall express an engineering opinion only when it is founded upon adequate knowledge of the facts, upon a background of technical competence, and upon honest conviction.
- d. Engineers shall issue no statements, criticisms, or arguments on engineering matters which are inspired or paid for by interested parties, unless they indicate on whose behalf the statements are made.
- e. Engineers shall be dignified and modest in explaining their work and merit, and will avoid any act tending to promote their own interests at the expense of the integrity, honor and dignity of the profession.⁷⁴

The ASCE Code of Ethics clearly imposes an obligation for the expert engineering witness to be ‘objective and truthful in ... testimony’. Additionally, the Code requires the testifying engineer to provide ‘the whole truth’ (‘all relevant and pertinent information’), whether supportive or adverse. The ASCE Code of Ethics further requires that an engineer’s expert opinion be founded on ‘a background of technical competence’. As a result, the ASCE Code also arguably imposes a duty on the engineer to assess professionally the reasonableness of assumptions provided by the engaging party or counsel.

Turning ‘down under’, the Code of Ethics for the Institution of Engineers Australia (Engineers Australia)⁷⁵ also expressly addresses the ethical responsibilities of a member testifying as an expert witness. The Engineers Australia Code of Ethics adopts the approach taken in England’s CPR Part 35, as do the Australian courts.

⁷³ Available at www.asce.org/inside/codeofethics.cfm, last accessed 15 March 2010.

⁷⁴ *Ibid.* canon 3.

⁷⁵ The Councils of the Institution of Engineers, Australia, the Association of Professional Engineers Scientists and Managers, Australia, and the Association of Consulting Engineers, Australia, have each adopted the provisions of this Code as binding on their members. Available at <http://temp.onlineethics.org/codes/IEAcode.html>, last accessed 15 March 2010.

Accordingly, the Code provides that an 'expert witness owes the proceedings total objectivity'. Consistent with that approach, the Engineers Australia Code states that 'An expert is not an advocate'. The expert 'is to be completely non-partisan'. Moreover, Engineers Australia argues that the duty to testify impartially is not adverse to the interests of the client: 'This duty to the tribunal is not inconsistent with the duty the expert owes to the client. In fact the best way to discharge this duty is to be completely non-partisan'.⁷⁶ The Code therefore instructs that '[t]he role of expert witness is to give the tribunal the benefit of his or her special training and experience in order to help the tribunal understand matters which it would not otherwise understand and thus help the tribunal to come to the right decision'. Applying these principles, the Engineers Australia Code establishes the following obligations:

It follows that:

- a. member's reports, statements or testimony before any tribunal shall be objective and accurate. They shall express an opinion only on the basis of adequate knowledge and technical competence in the area, but this shall not preclude a considered speculation based intuitively on experience and wide relevant knowledge;
- b. members shall reveal the existence of any interest, pecuniary or otherwise, that could be taken to affect their judgment in a technical matter about which they are making a statement or giving evidence;
- c. members should ensure that all reports and opinions given to a client prior to a hearing include all relevant matters of which they are aware, whether they are favourable or unfavourable;
- d. members giving evidence as experts should listen very carefully to the question put, and ensure that each answer is given objectively, truthfully and completely and covers all matters relevant to the question of which they have knowledge; and
- e. when discharging these responsibilities, members should have regard to the normal practice at the time of the occurrence of the incident which gave rise to the call for advice.

Other codes of ethics applicable to petrochemical industry professionals have been promulgated by bodies such as the American Oil Chemists Society, the American Association of Petroleum Geologists, the Royal Academy of Engineering, the UK Institution of Civil Engineers, the American Institute of Consulting Engineers, the American Society of Mechanical Engineers and the American Institute of Chemical Engineers. Unlike the codes promulgated by the NSPE, ASCE, SPEE and Engineers Australia, however, the general principles set out in many of these codes do not specifically address expert witness testimony in disputes.⁷⁷

⁷⁶ *Ibid.*

⁷⁷ An extraordinarily good source for industry codes of ethics in 24 different professions is the Center for the Study of Ethics and the Professions, Illinois Institute of Technology. The CSEP online collection can be found at <http://ethics.iit.edu/index1.php/Programs/Codes%20of%20Ethics>, last accessed 15 March 2010. Other excellent sources for professional codes of ethics are the Online Ethics Center for Engineering and Science at Case Western Reserve University, available at <http://temp.onlineethics.org/codes/index.html#others>, last accessed 15 March 2010, and J.A.N. Lee, 'Codes of Conduct/Practice/Ethics from Around the World', available at <http://courses.cs.vt.edu/~cs3604/lib/WorldCodes/WorldCodes.html>, last accessed 15 March 2010. See also, the codes of ethics in Robinson, Dixon, Preece and Moody, *Engineering, Business and Professional Ethics* (Butterworth-Heinemann, 2007), ch. 4.

(e) *Economists and Academics*

Even economists and academics may in some cases belong to professional organisations that impose ethical duties on expert witnesses. Thus, some economists in the United States who regularly serve as experts in judicial proceedings belong to the National Association of Forensic Economics (NAFE). NAFE too has adopted a Statement of Ethical Principles and Principles of Professional Conduct.⁷⁸ That Statement covers NAFE's members, including when serving as party-appointed expert witnesses. Unlike the other professional codes discussed above, the NAFE Statement does not impose duties of impartiality and independence. Section 3 of the NAFE Statement does, though, impose a qualified duty of diligence and reasonableness:

3. Diligence

Practitioners of forensic economics should employ generally accepted and/or theoretically sound economic methodologies based on reliable economic data. Practitioners of forensic economics should attempt to provide accurate, fair and reasonable expert opinions, recognizing that it is not the responsibility of the practitioner to verify the accuracy or completeness of the case-specific information that has been provided.

Section 4 of the Statement further obligates NAFE members to disclose sources of information and assumptions. That section, however, says nothing about verifying the reasonableness of assumptions provided by counsel:

4. Disclosure

Practitioners of forensic economics should stand ready to provide sufficient detail to allow replication of all numerical calculations, with reasonable effort, by other competent forensic economics experts, and be prepared to provide sufficient disclosure of sources of information and assumptions underpinning their opinions to make them understandable to others.

Most business academics and economists testifying as expert witnesses do not belong to NAFE or other professional bodies with applicable codes of conduct.⁷⁹ Consequently, those professionals fall closer to bankers than to accountants and

⁷⁸ Available at www.nafe.net/about-nafe/nafe-ethics-statement.html, last accessed 15 March 2010.

⁷⁹ This statement is based on the author's research and on confirmation from faculty members at the following educational institutions specialising in the study of ethics: Center for Business Ethics, Bentley University; Wharton Ethics Program, University of Pennsylvania; Association for Practical and Professional Ethics, Indiana University; and Center for the Study of Ethics in the Professions, Illinois Institute of Technology. Many business and economics professors worldwide are members of the Academy of Management (www.aomonline.org), which does have a Code of Ethics (www.aomonline.org/aom.asp?ID=&page_ID=240, last accessed 15 March 2010). However, that Code 'applies to Academy officers and members and nonmembers participating in Academy activities. Member activities outside of the Academy are not covered by the Code but guidance, education, and referral services will be made available' (www.aomonline.org/aom.asp?ID=&page_ID=242). The Code also sets out 'aspirational principles' for the conduct of its members beyond Academy activities. As part of those principles, members conducting research are advised that '[i]t is the duty of Academy members to minimize the possibility that results will be misleading ...': AOM Code of Ethics, Professional Principle 2. However, the 'aspirational principles' of the AOM Code of Ethics do not specifically address service as an expert witness.

appraisers on the scale of express ethical duties when testifying. That is particularly true when we turn from business professionals to academics.⁸⁰

University professors in the United States generally belong to the American Association of University Professors (AAUP). The AAUP approved a Statement of Professional Ethics in 1987.⁸¹ Most of the guidance in that Statement addresses the circumstances of university life, scholarship and teaching. Article V of the Statement, though, describes the rights and obligations of professors as members of the community generally: 'professors have the rights and obligations of other citizens'. Still, the AAUP Statement of Professional Ethics gives little specific guidance to university professors regarding their ethical responsibilities when appearing as a party-appointed expert witness in an international arbitral proceeding.⁸²

Similarly, individual universities will promulgate policies addressing conflicts of interest, but those policies typically deal with research misconduct and with conflicts between outside commitments and duties owed to the university, not with testimony before tribunals.⁸³ The author is not aware of any universities that

⁸⁰ Damages experts in the United States may also belong to other member organisations with ethics guidelines, among them the National Association of Certified Valuation Analysts, the Institute of Business Appraisers, the CFS Institute and the Association of Certified Fraud Examiners. Similarly, damages witnesses from other countries will also often be members of professional bodies in their own countries with codes of conduct. See Kantor, *supra* n. 29.

⁸¹ Available at www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm, last accessed 15 March 2010.

⁸² The Research Misconduct Policy of the US government may have some value as an analogy, even though it is clearly not applicable by its terms. The Office of Science and Technology Policy, then a part of the White House, promulgated the Policy in 2000. See Office of Science and Technology Policy, Executive Office of the President, Federal Policy on Research Misconduct, Preamble for Research Misconduct Policy, Fed. Reg. 76260-64 (6 December 2000), p. 65. The Policy 'applies to federally funded research and proposals submitted to Federal agencies for research funding. It thus applies to research conducted by the Federal agencies, conducted or managed for the Federal government by contractors, or supported by the Federal government and performed at research institutions, including universities and industry' (emphasis added). Research conducted by university academics relying on US federal grants is thus clearly covered. The Policy defines 'Research Misconduct' as follows: 'Federal Policy on Research Misconduct I. Research Misconduct Defined. Research misconduct is defined as fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. – Fabrication is making up data or results and recording or reporting them. – Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record. – Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit. – Research misconduct does not include honest error or differences of opinion'. *Ibid.* p. 76262 (footnotes omitted). Individual US government bodies have promulgated their own research misconduct policies based on this Policy, including the National Endowment for the Humanities, the National Science Foundation, the US Department of Energy and others. The description of 'falsification' in the above definition, which encompasses 'manipulating materials or ... processes, or changing or omitting data or results such that the research is not accurately represented in the research record', has some arguable relevance by analogy to, *inter alia*, suppression by a partisan expert of information inconsistent with that expert's opinions as expressed in the testimony. Similarly, the US Research Misconduct Policy protects 'honest ... differences of opinion'.

⁸³ See illustratively Stanford University's Faculty Policy on Conflict of Commitment and Interest (RPH 4.1), 2 December 2004, available at <http://rph.stanford.edu/4-1.html>, last accessed 15 March 2010. Importantly, universities with faculties that undertake research have also established their own 'research misconduct policies', based on the federal policy. Those university policies may have been motivated by the need to comply with federal research funding requirements. However, university policies typically extend to all research conducted by faculty at the university, not just federally funded research. The Stanford University policy, found in the University's *Research Policy Handbook*, is illustrative. See <http://rph.stanford.edu/2-5.html>.

have established codes of ethics or policies specifically governing the conduct of faculty members serving as party-appointed expert witnesses in a dispute resolution proceeding.

To illustrate the differences between professional ethical codes and the approach taken by some academics, the author had occasion to attend a symposium at a well-known American law school at which several attorneys involved with investment treaty arbitrations spoke. One of those speakers was a prominent law professor, who had served as an expert witness for a respondent state in a number of arbitrations on certain questions of customary international law and the interpretation of US BITs. The professor recounted his experiences in those proceedings, referring repeatedly to 'our team' and to 'our position'. That type of identification with the interests of the engaging party stands in marked contrast with the SPEE's ethical injunction to testifying engineers, which is worth repeating here:⁸⁴

The team spirit can really thrive under these conditions, but an ethical expert cannot let this impair his professional judgment even if it strains relationships. You are not really a member of a support team in the sense that a purely consulting expert who is not testifying would be ... The dual role of consulting and testifying expert along with aggressive advocacy by the client's lawyer create the major pitfalls for a would-be ethical witness.

Interestingly, that particular academic was a law professor, and thus bound by the attorney code of professional responsibility for the jurisdiction in which he was a member of the legal profession. As discussed in more detail in the next section of this article, some legal ethics committees concur with the view of the SPEE that experts, even attorney experts, are not 'members of the team'. Instead, as the American Bar Association Standing Committee on Ethics and Professional Responsibility has stated, a lawyer serving as a party-appointed expert witness 'is presented as an objective witness and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates'.⁸⁵

One final thought before turning to other professionals. It is startling to see that accountants, appraisers, engineers, lawyers and even the occasional economist and banker are more prepared to establish ethics standards governing their conduct as testifying witnesses before tribunals than academics.

(f) *Attorneys*

The ethical duties of an attorney are another important source of authority for rules of conduct governing evidence presented by party-appointed expert witness. Two potential sources exist: (i) the obligations imposed on attorneys when they are themselves serving as expert witnesses; and (ii) the obligations imposed on attorneys in their capacity as counsel for the party engaging a party-appointed witness for arbitral proceedings.

⁸⁴ *Supra* n. 70.

⁸⁵ See text associated with *infra* n. 98 *et seq.*

Unlike most other professionals, attorneys have an option to participate in arbitration as a testifying ‘expert’ or as ‘co-counsel’. The question of whether a legal expert should be presented to an international arbitral tribunal as an expert witness providing evidence or should instead sign briefs and memorials as co-counsel is regularly discussed at legal conferences and by attorneys in trial preparation. If an expert witness is bound by a duty to testify objectively, and to present full information even if adverse to the interests of the engaging party, then perhaps more law professors and other ‘legal experts’ will find themselves participating as co-counsel. As co-counsel, they would be obligated by attorney codes of professional responsibility to diligently represent the engaging party’s interests as an advocate, rather than perhaps instead being bound by duty of objectivity as set out in the rules assessed above.

Attorney professional responsibility codes in most countries do not specifically address the duties of an attorney serving as an expert witness. Of course, CPR Part 35 binds all expert witnesses in English judicial proceedings. The Law Society of England and Wales and the Solicitors Regulation Authority (SRA), for solicitors, and the Bar Council and the Bar Standards Board, for barristers, have not added their own instructions on top of those judicially binding rules. As a result, other than as set forth in CPR Part 35, the duties of a solicitor or barrister testifying before an international arbitral tribunal are addressed solely under the general provisions of the Code of Conduct of the Solicitors Regulation Authority or Bar Standards Board, as applicable.⁸⁶ Thus, as the Head of Standards and Quality at the Bar Standards Board advised the author with respect to barristers:

I am afraid that there is no specific guidance issued by the Bar Council/Bar Standards Board on barristers acting as expert witnesses in arbitration proceedings. The barrister, although not technically acting as a practising barrister when giving expert testimony, would be bound by the fundamental principles in the Bar’s Code of Conduct such as not bringing the bar into disrepute, or engaging in discreditable conduct etc, see para. 301 of the Bar’s Code of Conduct which can be found on the Bar Standards Board’s website, www.barstandardsboard.org.uk.⁸⁷

Similarly, the Solicitors Regulation Authority considers that the rule 1 core duties of the Solicitors’ Code of Conduct 2007 apply to a solicitor serving as a party-appointed expert witness. Rule 1 specifies the following core duties, including duties of integrity and independence as well as the duty to act in the best interests of the client:⁸⁸

⁸⁶ As discussed at the text associated with *infra* n. 107, the Law Society of England and Wales has published a Law Society Directory of Expert Witnesses to assist lawyers in finding expert witnesses. In order to be included in that Directory, individuals must subscribe to a code of conduct that incorporates the terms of CPR Part 35.

⁸⁷ Email from Mr Oliver Hanmer, Head of Standards and Quality, Bar Standards Board, dated 9 February 2010, on file with the author.

⁸⁸ Available at www.sra.org.uk/solicitors/code-of-conduct/rule1.page, last accessed 15 March 2010.

1.01 Justice and the rule of law

You must uphold the rule of law and the proper administration of justice.

1.02 Integrity

You must act with integrity.

1.03 Independence

You must not allow your independence to be compromised.

1.04 Best interests of clients

You must act in the best interests of each client.

1.05 Standard of service

You must provide a good standard of service to your clients.

1.06 Public confidence

You must not behave in a way that is likely to diminish the trust the public places in you or the legal profession.

However, the SRA also considers that service as an expert witness does not fall within the term 'legal practice'. As a result, the rules of conduct related to litigation and advocacy (rule 11),⁸⁹ including rule 11.01 specifically prohibiting solicitors from deceiving or knowingly or recklessly misleading the court or knowingly allowing the court to be misled, do not apply. A professional ethics advisor at SRA explained the situation as follows:⁹⁰

Rule 1 (core duties) of the Solicitors' Code of Conduct 2007 sets out standards expected of solicitors and lawyers who are regulated by the Solicitors' Regulation Authority. These duties apply whether you are in England and Wales or overseas. ...

I am of the view that appearing as an expert witness does not fall within the definition of legal practice and therefore the specific rules of conduct relating to litigation and advocacy (rule 11) will not apply. If you are working overseas rule 15 will be the relevant rule, but as already outlined, if all you are doing is acting as an expert witness rather than advising on the law as a lawyer it will just be the core duties which you must comply with.

In the United States, some bar associations in fact have rules that address aspects of the duties of an attorney serving as a party-appointed expert. Indeed, four years after the US Supreme Court handed down its *Daubert* ruling, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 97-407 interpreting the ABA's Model Rules of Professional Conduct. In that Opinion, the ABA Standing Committee made clear that the party engaging an attorney serving as party-appointed expert is not that attorney's 'client' for purposes of the ethics rules binding on attorneys generally.⁹¹

ABA Formal Opinion 97-407 makes an important distinction for ethical purposes between an attorney serving as an expert consultant, who is in a client-lawyer relationship with the engaging party for ethical purposes, and an attorney

⁸⁹ Available at www.sra.org.uk/solicitors/code-of-conduct/rule11.page, last accessed 15 March 2010.

⁹⁰ Letter from Ms Justine Allen, Ethics Advisor, Professional Ethics, Solicitors Regulation Authority, dated 1 March 2010, on file with the author. Ms Allen further asked the author on 8 March 2010 to '[p]lease bear in mind however that the question you posed was very general in nature and therefore our guidance was given on that basis only'.

⁹¹ The headnote for that Opinion explains: 'A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with that party': ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-407, *Lawyer as Expert Witness or Expert Consultant* (13 May 1997), p. 1.

testifying as a party-appointed expert witness, who is not in such a relationship with the engaging party.⁹² As a result, the Standing Committee concluded that the attorney can testify to one position as expert and then take an adverse position later, even in the same proceedings.

In the same Opinion, the ABA Standing Committee concluded that lawyers serving as expert witnesses are bound by the same principles as non-lawyer experts:

A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony, and exchange with the law firm legal authority applicable to his testimony with the law firm. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates.⁹³

Importantly, as referred to briefly in the comments about law professors in the previous section of this article, under ABA Formal Opinion 97-407, a lawyer serving as a party-appointed expert witness 'is presented as an objective witness and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates'.⁹⁴ That conclusion may be surprising to some, in light of the commonly held view that US court practice permits a party-appointed expert witness to engage in partisan conduct. The ABA Standing Committee, though, asserted that the expert must instead be 'objective', and provide adverse opinions 'if frankness so dictates'. In the Committee's opinion, the attorney's obligation to represent the client diligently would not be consistent with the ethical duties of an expert witness:

A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert.⁹⁵

By describing an expert witness's duties to include serving as an 'objective witness' and providing adverse opinions 'in the interest of frankness', the American Bar Association offered principles surprisingly similar to the duties of an expert witness under the UK CPR Part 35. However, the ABA also stated, contrary to CPR Part 35, that the testifying expert 'is expected to present his testimony in the most favorable way to support the law firm's side of the case'.

One author, Prof. Carl M. Selinger, has written about lawyers testifying as experts on ethics in attorney malpractice cases ('ethics scholars'). Prof. Selinger

⁹² For a critical discussion of whether that conclusion is correct, see Richmond, 'Lawyers as Witnesses,' in (2006) 36 *New Mex. L. Rev.* 47.

⁹³ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-407, *supra* n. 91 at p. 4.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

concludes that ABA Formal Opinion 97-407 bars the testifying expert from ‘presenting conclusions that are biased in favor of the party’:

Because the ethics scholar who is serving as an expert witness is not in an attorney-client relationship with the party for whom the expert is testifying, the expert cannot justify presenting conclusions that are biased in favor of the party, even though the ethics codes may allow such conduct on the part of advocates. Thus, statements in the ethics codes that an advocate can argue ‘any permissible construction of the law favorable to his client’, and that ‘a lawyer is not required to make a disinterested exposition of the law’ are inapplicable to legal ethics expert witnesses. Indeed, Professor Monroe Freedman has argued that for a legal ethics expert witness to testify under oath contrary to the expert’s true opinion would violate the expert’s ethical obligations as a lawyer, under Model Rule 8.4(c), not to engage in dishonesty or misrepresentation, and under Rule 3.3(a)(1), not to make false statements of law to a tribunal.⁹⁶

The ABA Standing Ethics Committee noted that a number of state bar ethics committees shared the ABA’s core conclusion: that an attorney engaged as an expert witness did not thereby establish a lawyer-client relationship with the engaging party.⁹⁷ In 2006, the District of Columbia Bar followed ABA Formal Opinion 97-407, with one notable exception. In DC Bar Legal Ethics Committee Opinion 337, the DC Bar repeated the ABA Standing Committee’s conclusion that the attorney expert witness is ‘presented as an objective witness’ and must provide adverse opinions ‘if frankness so dictates’. Significantly, though, the DC Bar Legal Ethics Committee *omitted* the statement found in ABA Formal Opinion 97-407 that the testifying expert ‘is expected to present his testimony in the most favorable way to support the law firm’s side of the case’. In words almost, but not quite, identical to the comparable provisions in the ABA’s Opinion 97-407, the DC Bar’s Opinion 337 stated:

A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The expert provides evidence that lies within her special area of knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. Towards this end, the lawyer serving as an expert witness may review selected discovery materials, suggest factual support for her expected testimony, and exchange legal authority applicable to her testimony with the law firm. The testifying expert also may help the law firm to define potential areas for further inquiry.

She nevertheless is presented as an objective witness and must even provide opinions adverse to the party for whom she expects to testify if frankness so dictates. A duty to advance a client’s objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, see D.C. Rule 1.3, is inconsistent with the role of an expert witness.⁹⁸

⁹⁶ Selinger, ‘The Problematical Role of the Legal Ethics Expert Witness’ in (2000) 13 *Geo. J Legal Ethics* 405 at p. 414 (footnotes omitted).

⁹⁷ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-407, *supra* n. 91 at p. 5, citing specifically to ethics opinions from the bars of Virginia, South Dakota and Pennsylvania. The DC Bar Legal Ethics Committee asserted in Opinion 337, discussed *infra*, that ‘most state bar committees’ follow the ABA opinion in this regard.

⁹⁸ District of Columbia Bar Ethics Committee Ethics Opinion 337 (approved: 19 December 2006; published: February 2007), available at www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion337.cfm, last accessed 5 February 2010.

DC Bar Legal Ethics Committee Opinion 337 addresses compliance with mandatory ethics rules, unlike the advisory ABA Opinion regarding the Model Rules. It is therefore binding on members of the District of Columbia Bar. The omission in the DC Bar Opinion of the statement from the ABA Opinion that an expert is expected to testify in a fashion to support the engaging party's side of the dispute is thus striking. That omission appears to have been deliberate, as Opinion 337 expressly referenced ABA Formal Opinion 97-407 almost verbatim in support of several other conclusions in Opinion 337.

It is also important to note that, as DC Bar Opinion 337 points out, a lawyer acting as a party-appointed expert witness remains subject to the rules of professional responsibility governing the conduct of lawyers generally:

[T]he lawyer who serves as an expert witness is still subject to the D.C. Rules of Professional Conduct that govern lawyers generally. For example, were the expert witness to testify falsely, discipline under D.C. Rule 8.4 would be warranted. See generally ABA Formal Op. 336 (1974); ABA Formal Op. 97-407.⁹⁹

The conclusions of ABA Formal Opinion 97-407 and DC Bar Opinion 337 are not followed in their entirety by all state bar associations in the United States. To the contrary, see Massachusetts Bar Association Opinion 99-3, holding that a testifying expert *is* subject to lawyer-client obligations relating to conflicts of interest.¹⁰⁰ The Massachusetts Bar did not speak to the impact of the ruling on the objectivity of the witness's testimony, but a duty of loyalty to the engaging party would clearly undermine any competing duty to testify impartially.

The international arbitration community should be cautious when relying on ABA Formal Opinion 97-407 and DC Bar Opinion 337 in this area. The question addressed by both ethics committees was whether a lawyer engaged as an expert witness may undertake a representation adverse to the engaging party, not what ethical duties the attorney expert witness owed to the tribunal or to the dispute resolution process when offering evidence. Consequently, the remarks by the two committees that the attorney expert witness 'is presented as an objective witness' and must 'provide opinions adverse to the party for whom [he/she] expects to testify if frankness so dictates' and that '[a] duty to advance a client's objectives diligently through all lawful measures ... is inconsistent with the duty of a testifying expert' were arguably *obiter dicta* (not necessary to answer the question presented to either committee). Those duties exceed the US Supreme Court-imposed standards from the *Daubert* decision. Still, the comments in ABA Formal Opinion 97-407 and DC Bar Opinion 337 are the only guidance available to help observers understand what views the ABA Standing Ethics Committee or

⁹⁹ *Ibid.*

¹⁰⁰ Massachusetts Bar Association Committee on Professional Ethics Opinion 99-3, permission to publish granted by the Board of Delegates on 16 April 1997, available at www.massbar.org/for-attorneys/publications/ethics-opinions/1990-1999/1999/opinion-no-99-3, last accessed 15 March 2010. This Opinion notes that 'As stated in the Rules of the Committee on Professional Ethics, this advice is that of a committee without official government status'.

the DC Bar Legal Ethics Committee would express if asked to specifically visit the question of whether an attorney acting as a party-appointed expert witness must testify with objectivity and proffer full information to an arbitral tribunal.

In addition to the comments in these Opinions, the general ethics principles for attorneys also provide some information. Rule 8.4 of the ABA Model Rules of Professional Conduct proscribes conduct by a US attorney involving ‘dishonesty, fraud, deceit or misrepresentation’. Noted American legal ethics scholar Prof. Monroe Freedman has argued that ‘falsely presenting an advocate’s contentions as if they were the scholar’s own disinterested judgments’ is a breach of a lawyer’s ethical duties under rule 8.4, as well as rule 3.3. In a post to the Legal Ethics Forum blog about dishonest trial tactics, Prof. Freedman asserted that these Model Rules provisions ‘adequately preclude a lawyer from ... serving as an advocate, rather than giving his true opinion, when testifying as an expert’:

Stuart Taylor has written an article in *American Lawyer*, ‘Sleazy in Seattle’, about a case involving dishonest discovery tactics designed to cover up smoking-gun documents, and about the expert testimony that sought to justify the tactics. I have also seen expert testimony that directly contradicts what the expert himself has written in a treatise or article on ethics.

I once talked with an ethics professor about a colleague who often seems to be serving as an advocate, rather than giving his true opinion, when testifying as an expert. I disapproved, saying that the roles are significantly different – that there are arguments that I could readily make as an advocate that I couldn’t present under oath as my expert opinion. But the other professor demurred. In his view, our colleague and I simply have a ‘philosophical difference’ about whether an expert witness is nothing more than a [*sic*] advocate who happens to be sitting in a witness chair.

At one point, I considered proposing a special code of ethics for expert witnesses on lawyers’ ethics. But such a code would be redundant. Both the Model Code of Professional Responsibility (1969) and the Model Rules of Professional Conduct (1983) proscribe conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(A)(4); MR 8.4(c). Also, a lawyer is forbidden to make a false statement of fact or law to a tribunal. DR 7-102(A)(5); MR 3.3(a)(1). Those provisions adequately preclude a lawyer from engaging in the kinds of improper conduct described in the *American Lawyer* article, or from falsely presenting an advocate’s contentions as if they were the scholar’s own disinterested judgments.¹⁰¹

Prof. Freedman and his unnamed colleague hold a ‘philosophical’ difference as to whether a testifying legal expert witness is ‘nothing more than a [*sic*] advocate who happens to be sitting in a witness chair’ or a source for the tribunal of ‘disinterested judgments’. Prof. Freedman’s colleague thus would consider the legal expert to be ‘a member of the team’. On the other hand, Prof. Freedman would regard the expert to have a duty to testify objectively and offer ‘the whole truth’ to the tribunal, including adverse information. ABA Formal Opinion 97-407 and DC Bar Opinion 337 lend support to Prof. Freedman in this debate.

Turning to the impact of codes of professional responsibility on counsel’s duties with respect to witnesses presented by that counsel, those codes normally control the conduct of the attorney, whether practising before a court, an arbitral tribunal

¹⁰¹ Freedman, 28 October 2009 comments in Legal Ethics Forum, www.legalethicsforum.com/blog/2009/10/the-ethics-of-experting.html, last accessed 15 March 2010, quoting from Freedman, ‘Trials of an Ethics Expert Witness’, *Legal Times*, 23 May 1994. See also, Freedman, ‘Ethical Ends and Ethical Means’ in (1991) 41 *J Legal Ed.* 55.

or any other dispute resolution forum. Accordingly, ethical duties found in attorney codes of professional responsibility bind the conduct of the attorneys when representing clients before arbitral tribunals. The principles in those codes directly govern the conduct of the attorney, but they can also indirectly affect the conduct of an expert witness being presented by the attorney to the tribunal.

As pointed out above, in England the duties of a solicitor or barrister testifying before an international arbitral tribunal are governed by the general provisions of the Code of Conduct of the Solicitors Regulation Authority or Bar Standards Board, as applicable. Similarly, the duties of testifying US attorneys will also include those imposed by the general principles of their governing bar associations. While rules of attorney professional conduct may vary from state to state in the United States, the American Bar Association's Model Rules of Professional Conduct¹⁰² impose several relevant obligations, including a duty under model rule 3.3 of 'candor to the tribunal' and a duty under model rule 8.4 not to 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation'.

As part of a US lawyer's duty under rule 3.3, the lawyer shall not 'offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal'. As a result of model rule 3.3, which has been adopted as binding in virtually all US jurisdictions, counsel has a professional duty to correct false testimony by that party's expert witness. However, 'Rule 3.3(a) applies only when a lawyer knows (as opposed to suspects) that evidence beneficial to his client is false'.¹⁰³

Similarly, if counsel provides to the expert witness only favourable information, that too may be a violation of the attorney's ethical duty. Model rule 3.4(b) requires that a lawyer shall not 'falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law'. At least one author argues that providing selective information to a party-appointed expert witness may breach this obligation:

[E]xperts generally rely on their client's lawyer to supply relevant information to them about the case. Failure to provide the expert with complete information by, for example, withholding test results or notes from investigators that are unfavorable, is not only dangerous to trial preparation but may be unethical as well. Deliberate manipulation of the information an expert relies upon would appear to be creation of false evidence in violation of RPC 3.4(b).

Despite this somewhat obvious ethical issue, it is a somewhat common practice to provide the expert material generated only by the party he or she serves. Indeed, some trial practice commentators condone the practice of withholding 'materials that would open the door ... to cross-examination ... in order to assure that only helpful opinions are reached.' *See, e.g.,* James E. Daniels, *Managing Litigation Experts*, ABA Journal, Dec. 1984 at 64-66. Nevertheless, providing selective information to your client's expert may be nothing more than deliberately manufacturing false evidence.¹⁰⁴

¹⁰² Available at www.abanet.org/cpr/mrpc/mrpc_toc.html, last accessed 15 March 2010.

¹⁰³ Elvins and Stephens, 'Finding, Preparing, and Using Expert Witnesses: Ethical Issues in Presenting Expert Testimony', p. 14, available at www.tousley.com/downloads/ExpertEthical.pdf, last accessed 15 March 2010.

¹⁰⁴ *Ibid.* p. 12.

Expert testimony is not often explicitly false, though, even if it may be too one-sided to be credible or professionally reliable. ‘Most litigation is premised on a debate over which competing facts are true. It is the responsibility of the trier of fact to determine the “truth”’.¹⁰⁵ Model rules 3.3, 3.4(b) and 8.4, and their counterparts in other jurisdictions, will therefore not often provide assistance to arbitral tribunals seeking a black-and-white rule of attorney ethics obligations upon which to base a decision.

(g) *Professional Expert Bodies*

In addition to profession-specific organisations, professionals who regularly hold themselves available for expert witness engagements have developed associations of their own. Many ‘professional experts’ belong to organisations such as the Expert Witness Institute, the Academy of Experts, EuroExpert (the organisation for European expert associations), the Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger e.V. (the BVS, a German umbrella organisation, representing 13 regional associations and 11 professional associations), and the Society for Expert Witnesses. Those associations serve as training and credentialing bodies, as well as enabling professionals to market their expertise for use in disputes.

5

The Academy of Experts, the Expert Witness Institute and EuroExpert, for example, have jointly promulgated a Code of Practice for Experts.¹⁰⁶ That Code of Practice provides:

The Code of Practice for Experts

Preamble

This Code of Practice shows minimum standards of practice that should be maintained by all Experts.

It is recognized that there are different systems of law and many jurisdictions in Europe, any of which may impose additional duties and responsibilities which must be complied with by the Expert.

There are in addition to the Code of Practice, General Professional Principles with which an Expert should comply.

These include the Expert:

- Being a ‘fit and proper’ person;
- Having and maintaining a high standard of technical knowledge and practical experience in their professional field;
- Keeping their knowledge up to date both in their expertise and as Experts and undertaking appropriate continuing professional developments and training.

¹⁰⁵ Elvins and Stephens, *supra* n. 103 at p. 15.

¹⁰⁶ 22 June 2005, available at www.ewi.org.uk/files/the%20law%20and%20you/CodeofPractice.pdf, last accessed 15 March 2010 (footnote omitted).

The Code

1. Experts shall not do anything in the course of practicing as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following:
 - (a) the Expert's independence, impartiality, objectivity and integrity,
 - (b) the Expert's duty to the Court or Tribunal,
 - (c) the good repute of the Expert or of Experts generally,
 - (d) the Expert's proper standard of work,
 - (e) the Expert's duty to maintain confidentiality.
2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent of the outcome of the case nor should he accept any benefits other than his fee and expenses.
3. An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule, if full disclosure is made to the judge or to those appointing him, the Expert may in appropriate cases accept instructions when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his appointment.
4. An Expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity.
5. Experts shall not publicize their practices in any manner which may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way.
6. An Expert shall comply with all appropriate Codes of Practice and Guidelines.

Individuals who are members of these organisations have thus agreed to act with independence, impartiality, objectivity and integrity, and to take no act that would compromise the expert's duty to the arbitral tribunal. They have also agreed with these expert bodies to comply with the obligations found in the professional codes of other organisations by which they are bound.

Also, in England, the Law Society Directory of Expert Witnesses is a directory published by the Law Society of England and Wales to assist lawyers in finding expert witnesses. Listing in the Directory requires the expert to agree to a practice code as a condition for being included. That Code of Practice¹⁰⁷ again stresses the objectivity and impartiality of the expert: 'It is the duty of an expert to maintain professional objectivity and impartiality when advising a party, preparing a report for proceedings and when giving oral evidence in court'. Relevant provisions of that Code contain requirements that the expert 'comply with the Code of Conduct of any professional body of which he/she is a member', disclose material relationships and testify with objectivity and impartiality.

However, the expert's disclosure duties under the Law Society Directory of Expert Witnesses Code of Practice are directed at enabling a party to assess whether the prospective witness has relationships adverse to the client. Those disclosure duties do not focus on assisting a tribunal to assess the credibility of the expert's evidence.

¹⁰⁷ Available at www.legalhub.co.uk/legalhub/app/info/prop?docType=expert_entries&rs=Bol1.0&vr=1.0&bctocguid=Ie2a652a002c711db85b9d734e660a063&ststate=S&mode=expertcode, last accessed 15 March 2010.

Occasionally, a party to an international arbitration may approach the International Chamber of Commerce (ICC) International Centre for Expertise to request an expert pursuant to the ICC Rules for Expertise;¹⁰⁸ or, an arbitral tribunal may itself seek the name of an expert from the ICC Centre. If such a requesting party seeks an expert from the ICC Centre, the terms of the engagement with the expert become a matter for discussion between that expert and the engaging party. Article 1.1.A of the ICC Rules for Expertise sets out the limited role of the ICC International Centre for Expertise when presented with a request for proposal of an expert:

Upon the request of any physical or legal person(s) or any court or tribunal (a 'Person'), the Centre can provide the name of one or more experts in a particular field of activity, pursuant to Section II of these Rules. The Centre's role is limited to proposing the name of one or more experts. The Person requesting a proposal may then contact directly the proposed expert(s), and, as the case may be, agree with such expert(s) on the scope of the appropriate mission and fees. ... A person may require an expert in connection with its ongoing business activities or in connection with contractual relations. A party to an arbitration may wish to obtain the name of a potential expert witness. A court or arbitral tribunal which has decided to appoint an expert may seek a proposal from the Centre.¹⁰⁹

When the Centre receives a request about possible experts, accordingly, the Centre's task is only to propose the name of an expert. The Centre does not automatically provide administrative support for the dispute resolution proceeding. Despite the fact that the terms of engagement are solely between the engaging party and the prospective expert, the ICC Centre will nevertheless require that the proposed expert execute a 'statement of independence' and disclose facts or circumstances that may give rise to questions about the expert's independence. Article 3.3 of the Rules specifies that, before the Centre offers the name of a prospective expert, the expert:

shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the Person filing the Request for Proposal.¹¹⁰

Once the expert has been proposed by the ICC Centre, though, then the engaging party and that expert will agree on the terms of the engagement without further involvement of the ICC Centre. Thus, use of the ICC Centre to locate a party-appointed expert witness for an international arbitration does not by itself compel that expert to remain independent once the appointment has been agreed. Like the approach taken by the Law Society Directory of Expert Witnesses Code of Practice, this 'statement of independence' thus addresses only

¹⁰⁸ ICC Rules for Expertise, ICC Pub. No. 649, in force as from 1 January 2003, available at www.iccwbo.org/drs/english/expertise/pdf_documents/rules/rules_expert_english.pdf, last accessed 15 March 2010.

¹⁰⁹ *Ibid.* art. 1.1.A.

¹¹⁰ *Ibid.* art. 3.3.

relationships adverse to the engaging party, not relationships affecting the credibility of the witness in the eyes of a tribunal.

In contrast to situations where the ICC Centre does not administer the proceeding, if the Centre is administering the 'expertise' proceeding under its Rules for Expertise then the expert selected by the Centre must remain independent for the duration of that expertise proceeding, unless otherwise agreed in writing by the parties.¹¹¹

Organisations for 'professional experts' such as the Expert Witness Institute, the Academy of Experts, EuroExpert and the ICC International Centre for Expertise have multiplied in the past decade, but their use is still not widespread internationally. The growth of professional expert witness organisations with codes of conduct is less far advanced in many jurisdictions. Broad-based membership in such expert witness bodies is common in only a few countries, notably the United Kingdom and civil law countries where use of tribunal-appointed experts (rather than party-appointed experts) is customary.

III. CONCLUSIONS: THREE CORE DUTIES

Arbitration laws and arbitration rules do not offer guidance as to a party-appointed expert witness's ethical responsibilities. The new 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration will require party-appointed experts to be independent of the arbitral tribunal, the parties and the legal advisors to the parties. The Chartered Institute of Arbitrators has produced a detailed Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration offering specific solutions, but that Protocol is not yet widely followed. The CI Arb Protocol in any event mirrors English judicial practice rather than reaching beyond the British Isles for inspiration. It remains to be seen whether the 'Sachs Protocol' will be adopted in international arbitrations and, if so, in what fashion. However, many professional bodies have adopted codes of professional ethics that directly or indirectly do give direction to their members when serving as expert witnesses. Thus, the international arbitration community is not left entirely without guidance.

But, as discussed in the initial parts of this article, there may be a serious gap between appearance and reality. Parties may engage experts who are good actors, appearing impartial but in fact partisan. The process of selecting, educating and paying a party-appointed expert creates an environment that inherently puts pressure on the expert's independence. Participants in the arbitration may not share a common perspective on the duties of a party-appointed expert witness, particularly in light of the global expansion of international arbitration. Some, if not all, of those concerns may endure even if 'expert teaming' under a list procedure like the 'Sachs Protocol' is adopted.

¹¹¹ *Ibid.* art. 7.3.

If all that is correct, and it certainly seems so, then in the end the tribunal must perform the fundamental function of arbitrators, deciding the facts based on the evidence presented. If formal barriers to partisanship prove ineffective in practice in those circumstances, what should constitute the bottom line ethical duties of a party-appointed expert? Can any ethics obligations at all provide assistance in international arbitration if independence is, as Prof. Walde instructed us, ‘largely (but not completely) a fiction’?

Clearly, professionals giving evidence to an international arbitral tribunal should be bound by the codes of conduct established by their professional bodies in doing so. As the Reporters’ commentary to rule 26.3 of the ALI/UNIDROIT Rules of Transnational Civil Procedure points out, a party-appointed expert witness ‘is obligated to perform this task in good faith and in accordance with the standards of the expert’s profession’.¹¹² The Code of Practice governing the Law Society Directory of Expert Witnesses and the joint Code of Practice for the Academy of Experts, the Expert Witness Institute and EuroExpert make the same point.

That is not, however, a fully satisfactory result. As is apparent from the discussion above, the ethical duties imposed by those codes vary from profession to profession and from jurisdiction to jurisdiction. It is anomalous for an expert witness appearing who is credentialed under UK professional standards to be subject to different ethical duties than a professional credentialed in, say, the United States, France, China or Brazil who is appearing before the same arbitral tribunal. It is equally anomalous for some professionals offering expert evidence in an arbitration to be subject to one standard of conduct while experts in another profession testifying in the same proceeding are subject to a different code of conduct.

I therefore propose for discussion three core duties on the part of the expert, in addition to whatever further duties are imposed by the expert’s professional associations:

- (1) a duty of ‘disclosure’: to disclose material relationships with respect to the parties, their affiliates, counsel or the dispute, including compensation arrangements;
- (2) a duty to provide ‘full information’ even if adverse: to include in any written and oral evidence all material information, whether supportive or adverse to the professional analyses and conclusions found in that expert’s evidence; and
- (3) a duty to ‘assess reasonableness’: a duty to use diligence to assess, to the extent the expert has the professional background to do so, the reasonableness of assumptions provided by counsel or a party on which that expert relies in the expert evidence.

¹¹² Comment R-26D, *supra* n. 12 at p. 140.

If these three obligations bind an expert, then even a partisan expert's report or testimony can be of significant evidentiary value to an arbitral tribunal. Arbitrators can establish these obligations in their initial procedural order, whether or not the arbitral proceedings are subject to the IBA Rules or the CI Arb Protocol. As a result, parties will be aware from the beginning of the proceedings of the parameters for the experts they engage. Experts also will be aware from an early state in their engagement about the expectations of the tribunal. Thus, surprise and the potential for misunderstandings based on differences in national practices may be avoided.

Arguably, all three of these obligations are incorporated into the obligation of 'independence' established under the 2010 IBA Rules on the Taking of Evidence and the duty of impartiality and objectivity and the overriding duty owed to the tribunal under the CI Arb Protocol. For arbitrations proceeding under the 2010 IBA Rules or the CI Arb Protocol, therefore, these obligations merely implement in an enforceable fashion some of the duties prescribed by those measures. For arbitrations not governed by the 2010 IBA Rules or the CI Arb Protocol, these obligations, if implemented in a procedural order, will make an expert's evidence helpful to the tribunal even when the expert is motivated by 'team spirit'.

Many of the professional codes of conduct assessed in this article contain these 'disclosure' and 'full information' duties. Some but not all of those codes also contain variations on the third, the duty to 'professionally assess the reasonableness of assumptions'.

The first of these duties, the obligation to disclose relationships with interested persons, will assist the tribunal in testing the credibility of assertions by experts that they are not biased in favour of their instructing party. While valuable, though, such disclosure is not sufficient as a policing device. Nor is the presence of a material relationship necessarily a basis for refusing to treat the expert's evidence as credible. Bearing in mind the advice of Prof. Walde and Dr Karrer that partisanship is, perhaps, inevitable and is not an assuredly negative circumstance, the fulfilment of a disclosure duty is just one step in setting an ethical framework for party-appointed experts.

A second important step would be to require expert witnesses to tell not only 'the truth', but 'the whole truth'. That duty would apply the same ethical principles to expert witnesses that we impose on, for example, public companies in the offering and sale of their stock and bonds. Famously, rule 10b-5 of the US Securities Exchange Commission provides (emphasis added):

It shall be unlawful for any person, directly or indirectly, ...

- b. To make any untrue statement of a material fact or *to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, ...*

in connection with the purchase or sale of any security.

The failure by the expert to share with the tribunal material adverse information can be as much an ethical lapse as is the provision of affirmatively

false information. In fact, public prohibitions on omitting material adverse information are not limited to securities law. In a somewhat different ethics area, the US government's Federal Policy on Research Misconduct defines 'falsification' in connection with US government-funded research to include 'omitting data or results such that the research is not accurately represented in the research record'.

Indeed, many professional codes of ethics incorporate the duty not to omit material facts. For example, as discussed earlier in this article, article II.3.3.a of the NSPE Code of Ethics for Engineers subjects engineers to a 'rule 10b-5 like' obligation in all of their professional activities:

Engineers shall avoid all conduct or practice that deceives the public.

- a. Engineers shall avoid the use of statements containing a material misrepresentation of fact or *omitting a material fact*.¹¹³

Principle II.3 of the NSPE Code also provides that engineers 'shall include all relevant and pertinent information in such ... testimony'. Similarly, canon 3.b of the American Society of Civil Engineer's Code of Ethics requires that engineers 'shall include all relevant and pertinent information in ... reports, statements, or testimony'. The Australia Engineers Code of Ethics reaches a similar conclusion: 'members should ensure that all reports and opinions given to a client prior to a hearing include all relevant matters of which they are aware, whether they are favourable or unfavourable'.

To the same effect, sections 4.3 and 7.5 of the American Society of Appraisers Code deem it unethical for an appraiser to suppress adverse information, overemphasise favourable information or 'in any other particulars to become an advocate'. If omission of material adverse information is a form of advocacy, as the ASA concludes, then the AICPA instruction that accountants too should not act as advocates for a party when engaged as that party's expert also applies. The AICPA Litigation Special Report points out that 'The expert does not serve as an advocate for the client's position'.

ABA Standing Committee on Ethics and Professional Responsibilities Formal Opinion 97-407 and DC Bar Legal Ethics Committee Opinion 337, addressing the responsibilities of an attorney serving as a party-appointed expert witness, offer support for this duty as well. As noted above, both consider that an expert 'is presented as an objective witness' and must 'provide opinions adverse to the party for whom [the expert] expects to testify if frankness so dictates'. These responsibilities are embodied in the most basic of oaths taken by many judicial and arbitral witnesses; 'to tell the truth, the whole truth and nothing but the truth'. Experts (and indeed all witnesses) understand the applicability of the rule not to give affirmatively false testimony ('to tell the truth ... and nothing but the truth'), although sadly compliance may be erratic. An expert witness, however,

¹¹³ Emphasis added.

may too often neglect to testify about information known to the expert that is adverse to the proffered testimony ('to tell the whole truth'). The expert (or the instructing party) may instead seek to rely on the adversarial process, opposing counsel and opposing experts to bring that adverse information to the attention of the arbitrators. Particularly in international arbitration, in which pre-hearing information exchange is limited and cross-examination is often far less extensive than in US court proceedings, one may be sceptical that the adversarial process is sufficient as the sole bulwark against expert witnesses omitting material adverse information from their expert reports and other evidence.

Imposing on a party-appointed expert the responsibility to comply with at least the ethics standards we impose on multinational corporations in rule 10b-5 will offer the arbitral tribunal significant help in assuring that the material differences between the parties are fairly presented to the tribunal.

Moreover, the adversarial process of arbitration then provides a practical means for arbitrators to determine if the expert is fulfilling, or failing, this duty. Cross-examination, documentary evidence and the evidence of opposing witnesses will enable the tribunal to assess the expert's integrity and compliance with ethics duties. Unlike the less 'testable' standards of objectivity and impartiality, the failure by an expert witness to comply with the duty to provide the tribunal 'the whole truth' can more easily be exposed through documents and testimony of an opposing expert witness, cross-examination and impeachment. Consequently, the tools available to the international arbitrator, even if less powerful than the sanctions available to a judge, may still be sufficient to enforce this duty.

The third element in an ethical framework would be a duty on the part of the expert to assess the reasonableness of assumptions provided by the instructing party or counsel. Naturally, there are some assumptions for which the expert witness lacks the professional background to assess their reasonableness – many rules of law and the resolution of disputed facts may fall into this category. But that is certainly not the case for all assumptions. Many assumptions provided to an expert by the client or counsel can surely be tested through that expert's own expertise, or even by simple commonsense.

For example, the author heard damages testimony once from a commercial banker acting as a party-appointed witness to calculate the economic value of an equity interest in a power project, in a case involving breach of a shareholders' agreement. The banker applied a 2 per cent discount rate to 17 years of future revenues from the project and to the residual terminal value of the project. When questioned about that discount rate, the banker stated that he had been provided the 2 per cent number by claimant's counsel, based on counsel's instruction to use discount rates from US personal injury and employment disability court cases. The use of such a low discount rate, which of course dramatically increased the requested damages amount to the benefit of the claimant engaging the expert's services, was clearly not justifiable for a commercial venture. The banker had the requisite expertise and (one hopes) commonsense to assess the reasonableness of the 2 per cent discount rate assumption in the circumstances, but apparently did not consider that he had an ethics obligation to do so.

As discussed earlier in the text of this article, if the banker had been ICB-certified, he would have been obligated under the ICB Professional Code of Ethics to '[u]se reasonable care in expressing opinions involving and related to the performance of [his] professional duties, and obtain sufficient evidence to warrant an opinion'. Similarly, if the expert banker had been an AICPA-credentialed accountant, he would not have been able to accept such an assumption without question. Accountants are bound to evaluate financial information, budgets and forecasts used in valuation engagements in litigation matters for reasonableness. Paragraph 29 of SSVS 1, as discussed earlier in this article, thus calls for the valuation expert to evaluate the financial information on the subject entity (including budgets, forecasts and projections) used for the valuation 'to determine that it is reasonable for the purposes of the valuation'.

This expert also then would more generally have also had a duty under AICPA Code of Professional Conduct rule 201.D to 'obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed'. Rule 102 of AICPA's Code imposes a further related obligation, prohibiting AICPA members from knowingly subordinating their judgment to others. As the AICPA Litigation Special Report states, 'The expert does not serve as an advocate for the client's position and, therefore, should not subordinate his or her judgment to the client'. Knowingly accepting a professionally unreasonable assumption from counsel would surely have constituted improper subordination of judgment.

The AICPA Litigation Special Report further describes a duty to disclose assumptions and recommends the expert consider reviewing key assumptions for reasonableness, while leaving the ultimate assessment of their reasonableness to the trier of fact. 'The practitioner should consider analyzing key assumptions to determine whether they are reasonable ... Ultimately, the trier of fact will determine the reasonableness of the assumptions',¹¹⁴

Presuming the requisite commonsense, though, this particular banker apparently chose 'to become an advocate' contrary to the injunctions of section 4.3 of the Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers, yet another professional code which abjures partisan expert evidence.

Recall as well Prof. Freedman's story quoted above about the legal ethics professor who 'often seems to be serving as an advocate, rather than giving his true opinion, when testifying as an expert'. Clear duties to assess the reasonableness of assumptions and to not omit material adverse information would resolve to a great extent the differences between Freedman and his legal ethics colleague – no

¹¹⁴ Also, para. 3 of Statement of Ethical Principles and Principles of Professional Conduct of the National Association of Forensic Economists expressly concludes that expert witnesses should 'attempt to provide ... reasonable expert opinions' but are not obligated to assess the accuracy or completeness of case-specific information: 'Practitioners of forensic economics should attempt to provide accurate, fair and reasonable expert opinions, recognizing that it is not the responsibility of the practitioner to verify the accuracy or completeness of the case-specific information that has been provided'. That prescription is aimed principally at verifying factual details (case-specific information) provided by counsel or a party to the forensic economist, but could be construed to encompass other factual and legal assumptions as well.

longer would Freedman and his colleague simply have a ‘philosophical difference’ about whether an expert witness is nothing more than an ‘advocate who happens to be sitting in a witness chair’.

This particular expert witness was not, however, bound by any of those professional codes. The chair of my tribunal accepted the evidence into the record without a blink.

If experts are bound to assess the reasonableness of assumptions within their competence, here too the adversarial process of documentary evidence, opposing witnesses, cross-examination and impeachment will serve as a means of enforcing this obligation. Party-appointed expert witnesses who fail this duty will suffer the consequences with respect to the persuasiveness of their evidence: ‘If you lie with dogs, you’re liable to get fleas’.

And so, the answer to the question with which we started this article is ‘yes, there are standards for the international arbitrator to apply’ in determining the ethical duties of party-appointed expert witnesses. But those standards may need to accommodate complex reality, rather than requiring an idealised state of impartiality and objectivity from the expert witness. Perhaps this article will make that task easier to fulfil.

