Twelve Rules for Forensic Consultants and Experts

By Dr. John F. Sase

With Gerard J. Senick, Contributing Writer and Editor

Vinny Gambini: *I object to this witness being called at this time. We've been given no prior notice he would testify. No discovery of any tests he's conducted or reports he's prepared. And as the court is aware, the defense is entitled to advance notice of all witness who will testify, particularly those who will give scientific evidence, so that we can properly prepare for cross-examination as well as give the defense an opportunity to have his reports reviewed by a defense expert, who might then be in a position to contradict the veracity of his conclusions.*
Judge Chamberlain Haller: *Mr. Gambini?*
Vinny Gambini: *Yes, sir?*
Judge Chamberlain Haller: That is a lucid, intelligent, well thought-out objection.
Vinny Gambini: *Thank you, sir.*
Judge Chamberlain Haller: *Overruled.*

-- *My Cousin Vinny* (Twentieth Century Fox, 1992, 1:30/1:59)

In this month's column, we will explore a set of rules that are applicable to any consultant in any field of expertise working in any industry. However, as our primary readership includes members of the legal profession and those who serve as forensic expert witnesses and consultants, we will narrow our focus and address rules that apply, or should apply, to forensic consultants and experts.

Recently, I (Dr. Sase) sent a copy of our June 2011 column, which outlined qualities that an attorney should seek in an expert witness, to Allen Goodman, Ph.D., an academic colleague at Wayne State University. Dr. Goodman (allen.goodman@wayne.edu) is a former chair of the Department of Economics at WSU and an expert in the field of health-care economics. In response, he sent me a pithy PowerPoint presentation entitled *Rules for Consultants*. I contacted Allen and told him that this would make a good topic for our column. He agreed and gave me permission to build upon his PowerPoint presentation in this column.

I also solicited additional insights from Fatima Ismael (f.ismail@email.com), the Director of Litigation Support Group (PO Box 445, St. Clair Shores, MI 48080). She is also a demonstrative evidence expert whom many in our readership know and have retained. Fatima sent me her top-ten list on what she calls "being a decent consultant." As a non-testifying litigation support consultant, Fatima is not subject to all of the same constraints that are faced by expert witnesses. Therefore, I synthesized the contributions of Dr. Goodman and Ms. Ismael along with my own perceptions and created a "stone soup" that produced the following set of twelve rules.

1) **Return Calls and Show Up at Meetings, on Time and as Promised**

   Any kind of consulting is about communication: Face to face, telephone, e-mail, Skype, Twitter, or whatever media both parties prefer to use. Therefore, this first rule constitutes a matter of basic human courtesy and standard business practice. However, today's culture has seen a drop-off in this behavior. Even though most professionals are overscheduled, returning calls from clients in a timely manner and being punctual for meetings definitely will put you ahead of the pack.

2) **Look Professional, Sound Professional, and Act Professional**

   In the realm of work, the world is a stage, to paraphrase Shakespeare. All of us are actors. Therefore, we need to dress and act suitably in our roles. What we wear to a deposition or to court may not be the same as what we wear to a less formal meeting, most of which have evolved into seven-day casual Fridays. However, over-dressing may be as bad as under-

dressing. Remember what happened to the attorney who wore a suit to Jurassic Park? Personally, I (Dr. Sase) have developed an aversion to Port-a-Potties. In respect to examples of popular culture that show audiences how to look, sound, and be professional, we recommend a couple of key scenes from the courtroom comedy *My Cousin Vinny,* which stars Joe Pesci and Marisa Tomei. Six weeks after passing the bar exam (on his sixth attempt), Vinny LaGuardia Gambini (Pesci) arrives in the rural town of Wazoo, Alabama, to defend his nephew in circuit court. Vinny dresses in a black leather jacket and brown plaid shirt and spouts colloquialisms in a thick Brooklyn accent. Seated rather than standing at the defendant's table, Vinny begins by saying "Ya Honna" to Yale-educated judge Chamberlain Haller (played by Fred Gwynne). At this point, Judge Haller replies, "Don't talk to me sitting in that chair. When you're addressing this court, you will rise and speak to me in a clean, intelligible voice. What are you wearing? When you come into my court looking like you do, you not only insult me, but you insult the integrity of this court. Next time that you come into my court, you will look lawyerly. And I mean you comb your hair and wear a suit and tie. And that suit better be made out of some kind of cloth. You understand me?" Point made?

3) **Determine the Needs and Wants of Your Client**

Rather than assuming that you know the needs and wants of your client, ask open-ended questions in order to elicit this information from them in their own words. Once you have received this information, you are bound by ethics and law to prepare and render an objective, honest opinion based on this material. This means that you may not be able to fulfill the needs and wants of every client all of the time. Sometimes, this inability to serve results from a lack of our own innate or developed abilities, while at other times our nonfeasance comes through our obligation to remain within the limits of objectivity that are imposed by the American Bar Association as well as by Federal and State laws. However, if you are able to serve the attorney and client honestly, you will gather sufficient information and define realistic parameters. This will allow you to produce a determination and opinion that is up to professional standards.

4) Maintain Communication, Provide Updates as You Work, and Deliver as Promised. In Fact, Deliver More than Promised.

This rule has been iterated and reiterated throughout the lessons of Total Quality Management (TQM), the integrative philosophy to improve quality continuously. TQM functions on the premise that the quality of products and processes is up to everyone who is connected with creating or using the goods or services. In other words, TQM seeks to meet or exceed customer expectations. Expounded upon by management gurus W. Edwards Deming, Phillip B. Crosby, and others, TQM has become standard best practice throughout the world. The process of communicating and updating in order to develop a deliverable often resembles the back-and-forth method used by eye doctors who ask, "Which lens is clearer, A (pause) or B? A (pause) or B?" Due to the time constraints of the legal team in a case, too much communication seldom surfaces as the problem, especially as a case rapidly approaches a settlement conference or trial. However, under normal conditions, posting relevant updates every week or even every few days by phone or e-mail remains an appropriate course of action as a case heads toward resolution.

5) **Do Not Assume That Your Deliverable Constitutes the Final Work Product. Always Leave Room for New Information and Changes.**

For a moment, let us reflect upon the immortal words of John Blutarsky (aka Bluto, portrayed by John Belushi in *Animal House* (Universal Pictures, 1978): "What? Over? Did you say 'over'? Nothing is over until we decide it is! Was it over when the Germans bombed Pearl Harbor? Hell, no!" New data is likely to surface before and after a deposition, all the way up to the hour of trial and the moment of testimony at that trial. The wonderful part

about working on laptops and using Excel, Word, and similar software is that, once one makes the investment of time to compose the preliminary draft, making minor changes on the fly becomes easy. Even though major changes demand more time, they often can be accomplished during recesses at the courthouse. Therefore, we emphasize the importance of keeping all analytical work in reports as fluid as possible.

6) **Be Prepared to Present the Results of Your Work Before and at Trial**

In estimating the cost of case-time commitments, many of us use this general rule of thumb: approximately 15% of all cases make it to deposition, while approximately 5% make it to trial. We have seen some cases literally settle on the courthouse steps, moments before the commencement of these trials. There is another way to express these probabilities: in 85% of cases, the value of the work product by experts and attorneys culminates during the discovery phase. Furthermore, we generally recognize that plaintiff attorneys tend to retain expert witnesses more often than defense attorneys do. Therefore, we can assume that, because most cases can be settled before deposition, a good strategy for attorneys is to have experts produce work in a form and with timeliness. These practices are proven to be effective in controlling the cost of cases. In simpler terms, case work resembles sales work in which the primary directive for any salesperson is to close early and to close often.

In terms of written or oral presentations, the best way to prepare lies in the production of a thorough report with well-organized spreadsheets that cover a full range of data. In addition, the expert should produce a self-explanatory narrative with sections of the most critical documentation embedded in the text. Furthermore, the expert should cite all of the relevant source material with page and line references in standard detail. In other words, the presentable work product should resemble a doctoral dissertation or a comparable body of work.

7) **Practice All Presentations to Perfection**

Expert witnesses must maintain a position of objectivity rather than advocacy in their determinations and opinions. However, we must remember that we are part of a cast and that the retaining attorney functions as the producer/director. In forensic work that extends beyond the normal discovery phase, the two major events that require some form of presentation by the expert are the deposition and the trial (or comparable settlement forum). Depending upon the time that elapses between the composition of the preliminary written report and the deposition or trial, less or more time may be needed to prepare for a face-to-face discovery or examination. However, given the investment in preparing a thorough report that embodies numerical determination and a full narrative, less time is needed to prepare the presentation. The prep here mostly requires the review of well-organized materials. As suggested above, when the case comes to a deposition or trial, the retaining attorney takes the role of producer/director. However, unlike the obsessive David O. Selznick, who would remain awake all night rewriting script lines for Rhett and Scarlett in *Gone with the Wind* (Selznick International/MGM, 1939), by law an attorney cannot change the substance of a determination and the opinion to be given by an expert, lest s/he turn the expert into a hired gun or, worse, into the "w" word. Beyond these constraints, one expects the expert witness to work as part of a team. The directing attorney decides if or when to put the expert on the stand, which questions to ask during direct and re-direct examination, and how to integrate the determination and opinion of the expert into the entire fabric of the case.

8) **Backup Your Backup: If Something Can Go Wrong, It WILL Go Wrong**

A former colleague of mine (Dr. Sase) served in the U.S. Navy as the Facilities Officer on a nuclear submarine. One day, he explained the concept and importance of redundant systems to me: If any critical system aboard a nuclear submarine goes down while the vessel is on patrol in the middle of the ocean, the sub not only is stranded, but the lives of its crew

members may be in jeopardy. Therefore, a nuclear sub always carries and maintains duplicates of critical-system technology that can be brought on line immediately in case of a failure in the primary resource. Therefore, the navy considers redundant systems to be a high priority.

Going to court, especially out of town or at a great distance from the home office, places a legal team in a situation similar to that of a naval crew. Thumb and external hard drives, extra computers, projectors, cords, and cables (as well as a clean suit) represent some of the critical systems that need to be maintained in redundancy.

9) Keep Learning. New Knowledge and Skills Translate into Satisfied Clients, and Satisfied Clients Translate into New Referrals.

Why do we refer to graduation from high school or college as commencement? The word commencement means the beginning, not the end, of some event. Therefore, school commencement suggests the beginning of lifelong continuing education—life as a living learning experience. Ongoing education includes the acquisition of additional general knowledge, professional knowledge in respect to the arena of practice, and new developments within one's field of expertise. Increasing substance in these areas draws clients to know and respect a consultant better. In turn, "know" hopefully leads to "like," and "like" paves the way to "trust." One of the age-old elements of human nature is that people prefer to do business with others that they know, like, and trust.

10) Always Ask for Permission from Your Retaining Attorney Before Interacting with the Opposing Counsel and His/her Team

Professionals act courteously and are friendly to one another. However, this does not mean that members of the opposing legal team are your friends. Even if a member of the opposing team is your friend, you must treat the time together in court like a squash match more than like a walk in the park. An expert has a fiduciary duty, both to his/her own team and to the client. Furthermore, we must bear in mind that we are the work product of our retaining attorneys. Whether a member of the opposing team has a question, gives advice, or makes a quip, we must remember that old saying "You go home with the one with whom you came to the dance." For a current example of this theme, see the film *The Lincoln Lawyer* (Lionsgate, 2011). In this movie, the defense attorney played by Matthew McConaughey operates his practice out of a Lincoln Continental. He goes up against a prosecutor, portrayed by Marisa Tomei, who is his ex-wife. Needless to say, sparks ensue.

11) Avoid Working with Trial Lawyers/Litigators Who Prepare Poorly and Do Not Maintain Communication with You

Expert witnesses who prepare poorly, who fail to communicate, or who fall down on the job can severely affect the practice of their retaining attorneys. Similarly, attorneys who fail to prepare adequately, do not communicate well with their experts and their clients, and generally mismanage a case are like ill-prepared students who do not study for a test, fail to prepare for a class presentation, or do not submit their term papers on time. These students tend to blame their poor performance or failure in the course on the professor rather than on themselves. Attorneys with similar shortcomings (often carried over from their days as students) may select a scapegoat in the form of one or more of their experts in order to save face with their clients as well as with superiors and colleagues at their firms. No matter how diligently responsible experts perform, and no matter how well they strive to maintain communication and understanding with such attorneys, these experts may find themselves saddled with the blame. Unfortunately, this behavior remains a widespread flaw of human nature. In short, the inability (or refusal) of your retaining attorney to prepare and manage his/her case reflects on you or I, the expert witness.

12) **Perform Pro Bono Work. It Is Good for the Soul and Good for Business.**

During the 1990s, I (Dr. Sase) invested ten years of my professional life doing near-Pro Bono work (i.e. ten cents on the dollar to cover expenses) for Fr. William Cunningham and Eleanor Josaitis at Focus: HOPE in Detroit. However, because of the intrinsic value of the experience, I would not have traded my time spent at Focus: HOPE for the other ninety cents earned somewhere else.

My general rule is that, if the retaining attorney is doing a case Pro Bono, I may be able and willing to do the same for a cause that I consider worthwhile. However, there are also many Pro Bono opportunities closer to home within one's own field of expertise. Doing direct consulting or taking public-speaking engagements on behalf of a wide range of community groups offer a sense of personal satisfaction that cannot be bought at any price.

In conclusion, we hope that we have shed some light upon the concept of consultancy, especially for those who serve as—or hire—forensic expert witnesses. Although many of the points made above are examples of basic professionalism and courtesy, implementing them will provide you with effective tools to put you ahead of your competition. Finally, I (Dr. Sase) have just released *Expert Witnesses: Tips to Find the Best Expert Witness* (http://www.youtube.com/watch?v=Nbhbf805i6Q), an educational video that helps our readers to search for and to select economists and other forensic expert witnesses who possess the best qualities for the work. This video complements our June 2011 column on the same subject.

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