

Ethical Issues in the Practice of Testifying as a Vocational Expert

By Phillip Spergel, ED.D.

Introduction

- Vocational Experts offer opinions based on our education, training and experience
- We recognize our limitations and do not offer opinions beyond our expertise
- We know or should know our strengths and weaknesses
- There is a risk in what we do, knowing the stresses of dealing with lawyers and insurance companies
- A trial is theater. Shakespeare in his play "As you like it" states, "all the world's a stage."
The courtroom is the hall in which the trial is held and the stage.
The judge is the director of the play.
The actors are the lawyers – protagonist and antagonist.
We are also actors but play the role of teacher.
The jury serves as the critic.

Risk Management

- Not recognizing your limitations can cause you grief

We are not physicians nor any other profession for which we do not have the education or training for that discipline.

There are members of ABVE who have taken "2 or 3 day crash seminars" in economics but really do not have the formal training and education of economist.

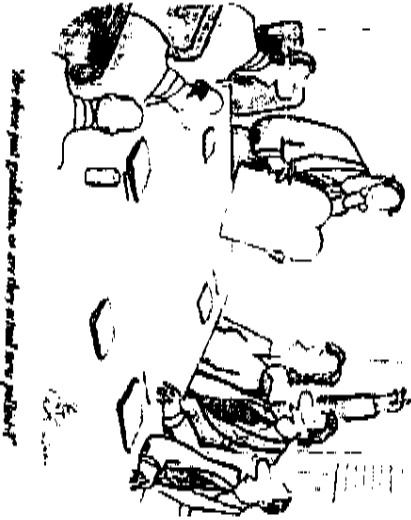
Testifying with the afore noted attendance at such seminars as your criteria is not an ethical violation, but could present a vigorous and trying cross examination.

- A common sense principle that is applicable

Only offer opinions on the areas you are asked to evaluate

Advise the attorney who seeks your service what is appropriate to ask with regard to your expertise

Risk Management



Risk Management and ethics are intertwined

To avoid an ethics violation we ~~make~~ carry-out appropriate decisions to minimize the adverse effects of our professional encounters

Our ABVE Ethics Code of Conduct helps guide the manner in which we practice

Risk Management

Who's the client?

Our code of conduct states we have no client

APA definition of client

The people we see are evaluatees, usually plaintiffs

Though you may disagree, I believe those who engage our services are our clients

Be careful of dual relationships

Rights of Evaluatees

Inform the evaluatee of the purpose of the evaluation and that it is not a doctor's counselor, or therapist relationship

Explain the process, interview, testing, review of records, your report and the possibility of testifying

Almost everything is discoverable – thus the relationship is not confidential

Still we recognize the standard of care and hopefully "do not harm"

Nevertheless, our report may influence the outcome of the litigation for better or for worse for the plaintiff

Ethics is commonsense and essentially knowing the difference between what is right and what is wrong

Of course there are gray areas and our ethics code provides us with guidance

Ethics should not be esoteric

Risk Management

- Lawyers want us to be on their side but we are neutral
- Our reports should be the same whether we are doing the evaluation for plaintiff or defense
- There are lawyers who would like to write your report
- Do not compromise your professionalism – doing so will make you look like a “hired gun”
- Be astute in accepting a referral because there are questionable and bad cases you should reject
- Remember – your credibility is all you have to trade on
- There will be cases where you will have to inform the lawyer after the evaluation that you cannot help him and question whether or not he wants you to send a report
- Have a document to send to the referring lawyer the process involved in the evaluation, the information you need, and your fee. Also enclose your C.V.

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Professionalism

- An expert shall not knowingly present opinions or testimonies that are false or misleading.
- An expert witness should not accept the client's characterizations or conclusions without exercising due diligence by inquiring into the underlying facts.
- The expert witness shall provide opinions that are reasoned and based on the expert's own analysis. The expert shall not reasonably exclude issues that are material to the client's purpose and within the expert's expertise.
- Our professionalism and our ethics differ from those of the attorneys.
 - In a trial, deposition or arbitration, the attorney is in a battle to win his case.
 - We, as Vocational Experts, are neutral and good teachers.
 - We must not let our bias effect our objectivity with regard to the case and those individuals we evaluate.
 - We know who's paying our bills but this shouldn't color our judgment and professionalism.

Professionalism

- Although lawyers want to win, most behave in a professional and ethical manner.
- However here is how some famous people view lawyers:
 - *The Penalty for laughing in court is six months in jail; if it were not for this penalty, the jury would never hear the evidence.* – H.L. Mencken
 - *Lawyers occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing happened.* – Winston Churchill
 - Lorenzo Dow, a 19th century evangelist, was on a preaching tour when he came to a small town one cold winter night. At the local general store he saw the town's lawyers gathered around the potbellied stove. Dow told the men about a recent vision in which he had been given a tour of hell, much like the traveler in Dante's Inferno. One of the lawyers asked what he had seen.
 - *"Very much what I see here," Dow said. "All of the lawyers gathered in the hottest place."*
 - *Sometimes a man who deserves to be looked down upon because he is a fool is despised only because he is a lawyer.* – Montesquieu
 - *Lawyers are like rhinoceroses: thick skinned, short-sighted, and always ready to charge.* – David Mellor (b. 1949), British Conservative politician

Professionalism

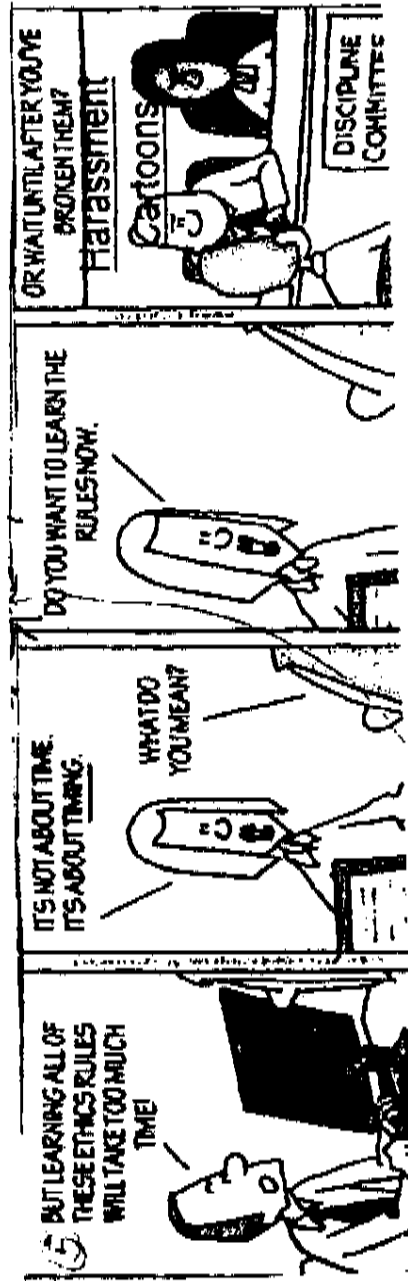
Reporting Ethics Violations

The ABVE Ethics Committee

- Don Jennings and I developed a procedure for reporting ethics violations
- At that time I recall only one ethics violation being reported. Hopefully this reflects how ethical members of ABVE are.
- The person reporting violation was to call the violator and discuss the matter and hopefully resolve the issue.
- If the violation persists then the ethics committee would investigate the matter.
- There will then be a hearing before the Board (the ethics committee).
- If the matter was felt to be egregious the violator would be barred from membership in the organization.

Professionalism

- The story of the ethics violator and his C.V.
- The importance of having an accurate and up-to-date C.V.

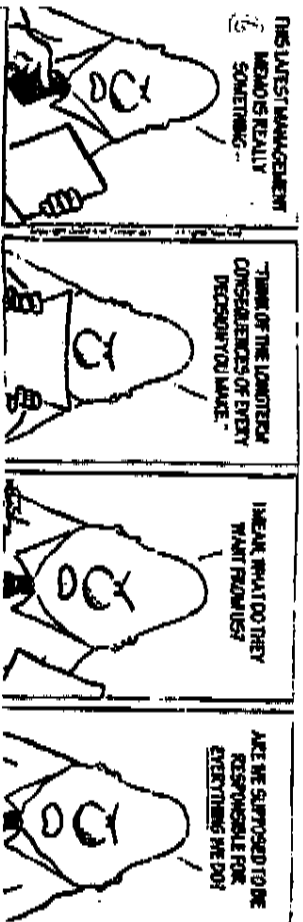


Records

- How long should records be retained and what should we keep? The latter is easier to deal with than the former.
 - Keep the records you generate: the interview notes, tests administered and scored as well as interpretation, and our report.
 - These are materials that can be subpoenaed and subject to cross examination.
- The importance of good record keeping and things that should be covered in the interview.
 - Medical History (past and present), including reason for the referral
 - Family History (nuclear and extended – medical and vocational)
 - Vocational and Educational History
 - Transportation Issues
 - Manual Skills
 - Locomotion and Balance
 - Activities of Daily Living
 - Limitations, if any, imposed by health professionals.
 - Clinical Observations
 - Additional Comments
 - A sample of the form I use is at the end of the presentation.

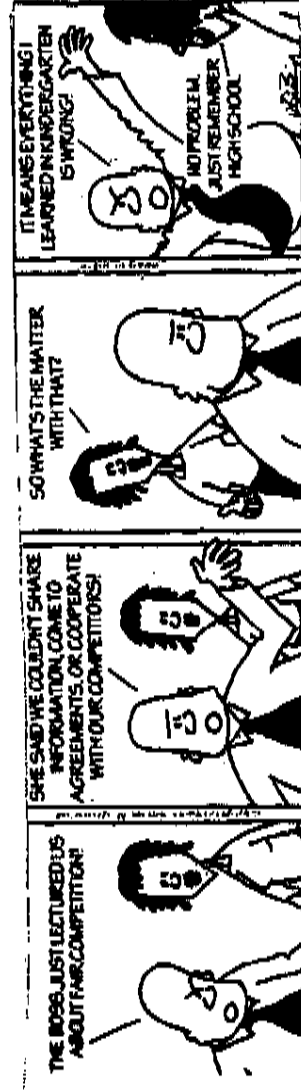
Records

- Having such information in your notes if subpoenaed demonstrates your professionalism and serves to help you write your report.
- No reference or indication how long records should be retained in the 2007 revised code of ethics.
 - There are standards set by states and professional organizations.
 - Maintain records for lengthy periods of time.
 - What should we do with the records sent to us by the referral source.
 - Cartons of paper records
 - CDs and emails
 - Weeding out the documents we receive.
- Maintaining and using those records which help us with our tasks.
 - Determining the individual's employability.
 - Identify transferable skills (variables).
 - Appropriate jobs and salaries.



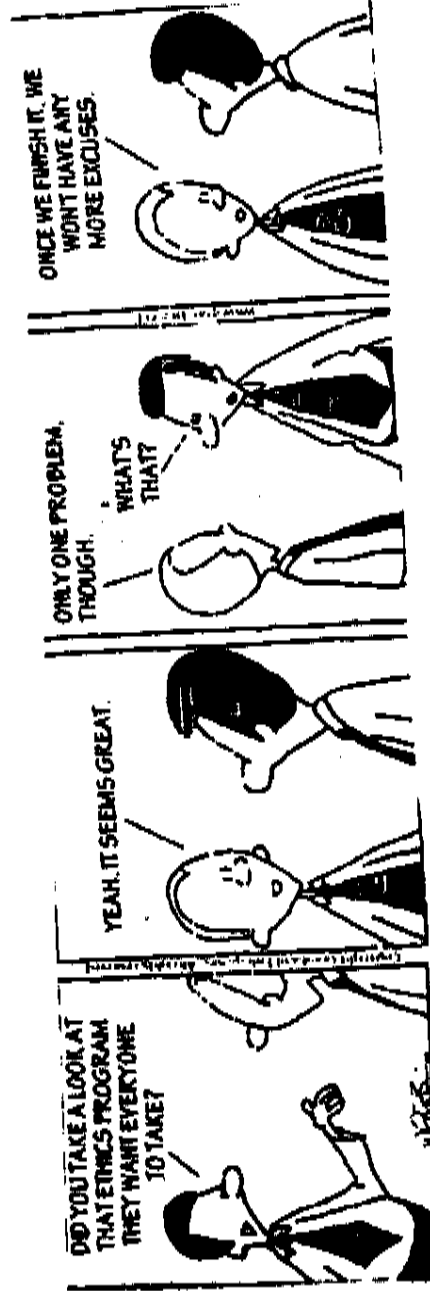
Records

- Remember the four corners of your report.
 - Your report should be inconclusive, it will help you testifying at trial.
 - Even though you may receive boxes of records, request everything that is discoverable.
 - You, rather than the referral source, should determine what is and what is not relevant.
 - Being asked on cross-examination about a report you did not receive can be embarrassing.
 - To resolve such issues it is important to have a pre-trial conference with the attorney to assure you have all the pertinent records.
- Testifying can be a trying experience and we should not make it more difficult than it should be.



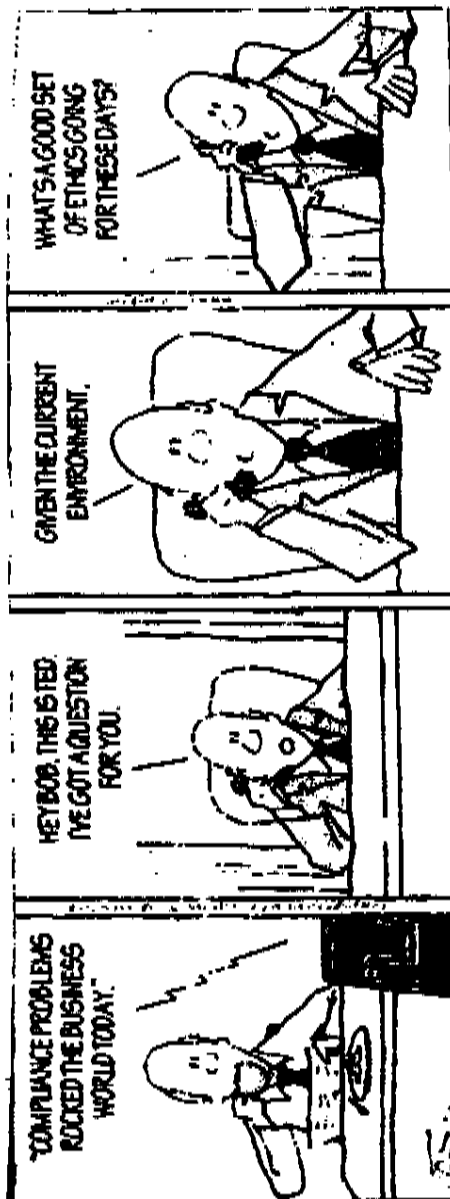
A Final Word (or more)

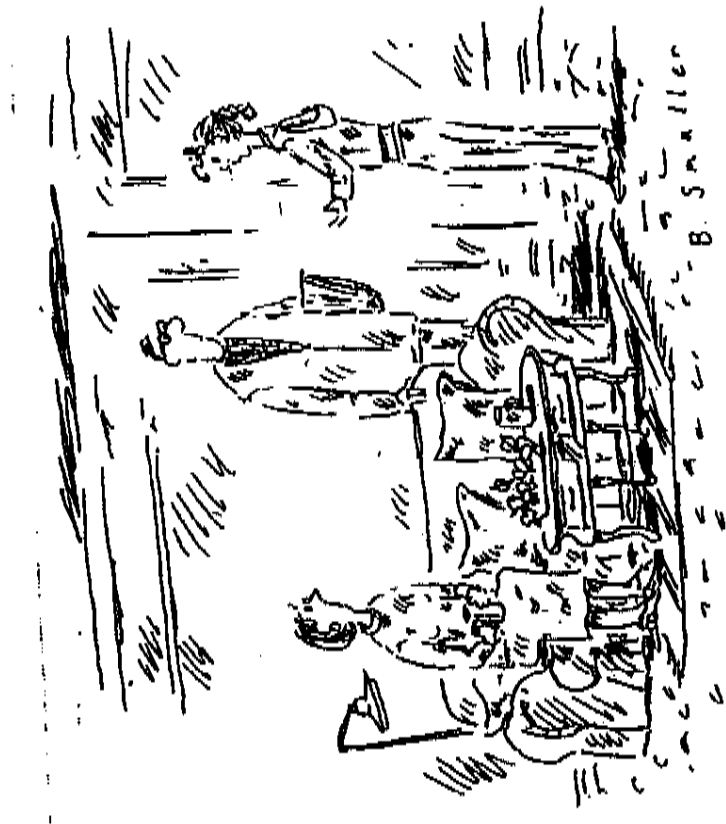
- Make sure you have malpractice insurance.
- You could be the most ethical person in the world and still be sued.
- There are associations that provide legal council, for their members regarding legal-ethical issues.
- I wonder if ABVE would consider such a service?



Thank You

I want to thank you for your attendance and for listening to what can be a boring topic. However if you are one who can't help being an ethical screw-up you may feel like one or both of these individuals.





B. Spangler

"All I ask is a chance to ruin my life in my own way."

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