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MARRIAGE OF WINTERNITZ **REMINDS THAT EXPERTS REQUIRE ACTIVE HANDLING**

By Gregory W. Herring; 2015

The California Court of Appeal recently published *Marriage of Winternitz* ((2015) 235 Cal.App.4th 644). The pertinent holding was that a court-appointed expert's (1) failure to adhere to all the requirements of the California Rules of Court and (2) admission that he made significant procedural errors did not require the trial court to automatically disqualify him or exclude his written report. Rather, trial courts are allowed discretion to consider those types of failures in potentially giving an expert's reports and testimony less weight in the overall balance of the evidence.

At one level, the case provides commonsense permission for trial courts. They can still choose to benefit, at least to some extent, from an experts' insights and opinions even if the underlying work might have been flawed.

At another, it reminds us that experts are human. The *Winternitz* expert is an otherwise reputable psychologist (custody evaluator) with a national practice. But he admitted on cross-examination to personnel difficulties in his practice, a loss of phone records, other "problems galore" in his office and "a variety" of record-keeping of errors.

Trial attorneys routinely need experts. Some are court-appointed under Evidence Code section 730. Others are hired as private consultants or witnesses for hearings and trials. They provide analysis, insights and opinions beyond the abilities of lay witnesses. (*Compare* Evidence Code sections 800 & 801).

They can also help trial attorneys to streamline courtroom presentations. In a family law case, for example, an expert witness accountant can efficiently

present community balance sheets and backup documentation in a fraction of the time a lay party might consume.

But they require affirmative handling and oversight. Attorneys are charged with managing their client's cases. As such, they are also responsible for overseeing and understanding experts' methodologies, analyses and conclusions. As Justice Sheila Sonenshine (ret.) puts it, we need to keep in mind "who's driving the bus" … and it needs to be us.

With our busy practices, the impulse towards over-delegating to experts can be strong. Even in court, counsel have been heard to explain that that they are merely forwarding the *expert's* legal arguments, as opposed to their own. No wonder a judicial officer in that situation might be skeptical!

Steps towards taking proper control include:

* Review the expert's engagement letter, rather than automatically forwarding it to the client "as is." These letters have been seen to include "first class travel" clauses, provisions for the client to defend and indemnify the expert (in case the other party might sue the expert) and "minimum billing blocks." These are not likely in a client's best interests, and they should be deleted. No matter how chummy an attorney's ongoing relationship with the expert may be, her primary duty is to the client.

* Ensure that documents are organized, indexed and electronically filed only once. Experts often have staffs who are most willing to do this work and at substantial cost. But no client wants to pay for her lawyer to do it and then see the expert's office duplicate the task, even if it might be done to suit the expert's particular "system." Rather, coordinate with the expert to determine who is going to do the work – only once -- and how it is going to be done so that counsel, the expert and the client can easily access and use the documents and data.

* Assert communications limits. Attorney-expert communications are non-confidential and become discoverable once counsel might designate the expert under Code of Civil Procedure section 2034 or otherwise submit the expert's opinion in a declaration. Suddenly, previously "funny" and "chatty" emails with the expert about "crazy" clients and "dense" judicial officers, as well as sensitive substantive discussions, can thus be "outed."

Keep the communications professional, minimize emails and pick up the phone.

* Monitor the work. Stay on top of the process to avoid a *Winternitz* disaster. Ensure that the expert understands the fine points of the law, or at least a reasonable interpretation favoring the client's position. Bring it to the court's attention if he exhibits disdain for "cumbersome" notions of Due Process.

* Demand responsive communications. Too often it seems that certain experts are inaccessible or that they feel that they are doing the system a favor. Rather, they exist to serve counsels' and the court's inquiry, not *vice-versa*. Communicate that and clarify that prospective future assignments are contingent on the expert's availability and attention to the current one.

Winternitz reminds that experts are not infallible. "Between the lines," it also cautions attorneys to stay alert and avoid subcontracting their professional duties.