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Don't let your tongue trip you up

As an expert witness, avoid implicating in hypothetical examples

Certified Fraud Examiners build solid careers by considering all potential legal pitfalls, anticipating problems and taking opportunities to educate others about CFEs' roles and responsibilities.

For example, we're precluded from opining about the legal guilt or innocence of any party in any of our cases. The CFE Code of Ethics states, "A Certified Fraud Examiner, in conducting examinations, will obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. No opinion shall be expressed regarding the guilt or innocence of any party."

This is more than just a good idea; it's the ethical obligation of every CFE. However, how does this tenet practically apply to expert witnesses in court?

Hypothetically speaking

The U.S. legal world has commonly held that a prosecutor can't use a criminal defendant's name in a hypothetical example posed to an expert because, obviously, the example then wouldn't be hypothetical. A recent New Jersey court case has clarified this obligation even farther for the expert witness. An expert witness's intimation during a court trial hypothetical scenario that a defendant was probably guilty resulted in the reversal of the subject's conviction.

In *State of New Jersey v. Coley* (A-0190-11), the New Jersey appellate court clarified that the prosecutor and expert witness are precluded from using a term that clearly points to the defendant as the person referred to in the hypothetical situation. In this case, law enforcement officers went to Marcus Coley's apartment, served him with a search warrant and charged him with drug possession with intent to distribute after they discovered crack cocaine, digital scales, glassine baggies and hollow-point bullets.

At trial, the Gloucester County prosecutor called a detective as an expert witness and outlined a hypothetical situation that nearly mirrored the raid of Coley's apartment. The prosecutor didn't refer to Coley by name, but the prosecutor repeatedly used the word *target* in the hypothetical, and other detectives had already told jurors that Coley was the *target* of the investigation. Indeed, although other people were present at the apartment, officers only arrested Coley.

When the prosecutor asked, "Now, could you think [of] an opinion as to why our hypothetical target in the situation would have possessed all these items, the rock of crack cocaine, the number of unused baggies, and digital scales?" The expert witness answered, "Probably to distribute drugs." Coley



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subsequently was found guilty of possession with intent to distribute and sentenced to 14 years in prison.

Upon appeal, the court stated that the prosecutor impermissibly suggested that Coley was the *target* in the hypothetical situation, and the judge mistakenly failed to issue a corrective instruction to the jury after defense counsel's objection. The court reversed Coley's conviction.

In other cases, courts have made similar reversals after holding that expert witnesses in criminal cases may not opine, even indirectly, that the defendants were guilty of the crimes as charged.

In *State of NJ v. Miraballes*, the court observed that the prosecutor used a hypothetical as a summation of the entire case against the defendant, a

61-year-old Cuban woman, and then solicited an expert to opine on the credibility of the state's case. The "thinly-veiled reference to the defendant as the 'hypothetical 61-year old Cuban woman' did nothing to dispel any error, because it was clear beyond a doubt who that person was," the court stated.

In each of these cases, the prosecutor erred by constructing a hypothetical situation that so similarly mirrored the situation or virtually named the defendant so as to elicit the expert's opinion that the defendant was guilty.

Ideally, during preparation, the CFE expert witness can assist the prosecutor or defense attorney in constructing a hypothetical situation that will be more general and wouldn't result in reversible error. In many cases, however, that opportunity doesn't exist, and the expert will have to answer the question posed — however imperfectly.

So what can you say?

This isn't to say that you may not express a professional opinion as an expert witness or in a written report. However, you must be careful to ensure that your words are within ethical boundaries, completely truthful and based on facts and evidence.

A CFE may state that a given circumstance is consistent with red flags of fraud and describe flags that are consistent or inconsistent with a case's facts. A CFE can cite sections of the ACFE's *Fraud Examiners Manual* as a "learned treatise" to educate the court and the jury about aspects of fraud that pertain to the circumstances of the case. For example, the CFE may point out that all of the red flags of bid rigging listed in the

Fraud Examiners Manual are present in a particular case. A CFE can also discuss fraud cases in his or her experience with similar facts but must be careful that the choice of words doesn't rise to giving an opinion as to the defendant's actual guilt or innocence.

I find that it's helpful to spend time educating the court and the jury

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1) about fraud in general, 2) that fraud is concealed by its very nature and 3) about the aspects of fraud as it applies in the case.

I also find it helpful to take time to explain to jury members that as CFEs our ethics preclude commenting about the guilt or innocence of any person or party and remind them that their judgments about the person's guilt or innocence is the only opinion that matters.

Educating counsel about these ethical obligations in advance can be helpful to ensure that counsel won't construct a hypothetical situation for the expert witness that puts them at odds with their ethical obligations, whether those obligations are those of a CFE, CPA or any other professional.

When writing a report or referral for prosecution, a CFE may include a probable cause statement that it's his or her opinion that the facts and evidence outlined in the report constitutes probable cause to believe that a felony, such as embezzlement, has been committed by the listed subject. For example, our firm recently completed a 23-page referral for prosecution, which contained hundreds of pages of supporting documents and photographic evidence and

concluded with the following probable cause statement requesting prosecution for embezzlement:

Statement of probable cause

Based on the facts, evidence and investigation outlined in this report, there is probable cause to believe that (*the listed subject*) had been entrusted with access to cash

and had a fiduciary duty to her employer, and took cash without the permission of her employer and converted it to her own use, or to some other unauthorized use. There is also probable cause to believe that (*the listed subject*) took affirmative and intentional steps to conceal her actions from her employer by falsifying documentation, destroying or altering documentation, including the use of white-out to obscure cash totals which were not deposited.

Of course, regardless of the case or the strength of the facts that the CFE reports, the legal guilt or innocence of any party is always the jury's decision or the judge's in a bench trial. Carefully choose your words to ensure that you work within your ethical obligation as a CFE. ■ FM

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