Can “Sticks and Stones” Break Expert’s Credibility?

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Do you require that your experts be blemish free? Experts involved in today’s cases should expect to be challenged. In fact, motions to limit or completely exclude testimony are commonplace, but an expert’s past activity calls into question another issue regarding whether such activity crosses the line and becomes damaging to the expert’s future business.

We can all agree that if the expert is excluded because of “junk science” opinions, then he may be less useful to future cases, but what if the challenge is less black and white? Is it bad business for an expert witness to be called a “cokehead” during a deposition? No matter if the statement has validity, other law firms and litigants may pause before retaining such expert’s services. Even once the expert is vindicated and exonerated and the offender’s remark is retracted, it’s reasonable to wonder whether the derogatory label may linger- but for how long and to what extent?

The question for the attorneys who hire these experts is whether to avoid such an expert who has been challenged yet cleared and instead pursue a less-experienced, greener expert who may not have had the opportunity to be attacked.

For attorneys and litigants, perhaps the truth isn’t even a concern. Rather, it may be the risk of such allegations leading to appeals that is the deciding factor on whom attorneys should retain. So one must wonder how any “cokehead” comment, no matter how small and erroneous, could be monetarily non-injurious.

One Pennsylvania law firm says calling an expert witness a “cokehead” was wrong but not defamatory. Thomas Thomas & Hafer LLP filed a motion for summary judgment last month in the Philadelphia County Court of Common Pleas. The largest civil litigation defense firm based in Central Pennsylvania admits that partner James Tinnyo was wrong when he called an expert witness a “cokehead” during a deposition.

However, in its motion, the law firm says that there was no defamation because there were no damages to Dr. Lance Yarus, a well-regarded physician and orthopedic surgeon who often works as an expert witness.

“Discovery is now complete and there has been no evidence that plaintiff’s reputation has been diminished in the community or that any present or prospective contractual relationships have been affected by the comment,” stated the law firm in its motion.

Tinnyo admits that at a May 2013 deposition in the case of Yarus v. Tinnyo et al., he stated that Dr. Yarus “had a problem using cocaine and was a ‘cokehead,’” according to a Law360 report. Tinnyo later retracted that comment and said he had no personal knowledge of Dr. Yarus having ever consumed cocaine.

Despite sending Dr. Yarus a written apology, Tinnyo now claims that after examining the business records of Dr. Yarus, the evidence shows that the doctor’s work as an expert witness has not suffered since the “cokehead” comments and that other attorneys and professionals continue to rely on Dr. Yarus.

“The business did not suffer any damage due to the statements made by Tinnyo,” Tinnyo claims in his own separate summary judgment motion.

His law firm asked the court to consider additional affidavits filed by other attorneys, all stating that they didn’t...
believe Yarus was a cocaine-abuser and would still hire him as an expert witness. Yarus, however, alleges that he has not been hired as an expert witness on several occasions because of Tinnyo’s derogatory and defamatory remark, which plaintiff’s attorney, a court reporter, and several of the doctor’s employees heard.

The complaint alleges that “The community of physicians who ask plaintiff to serve as an expert witness is small, and the defamatory statement made by Tinnyo will undoubtedly be republished to these attorneys [and] because of the obligation that attorneys have to their clients, any attorney aware of the allegation made by Tinnyo against plaintiff will be unwilling to retain plaintiff as an expert witness.”

Courts will consider not only “actual damages,” which the defendants claim do not exist, but also “presumed damages,” which courts may infer in the absence of actual damages when plaintiff is embarrassed, humiliated, or shamed. In the case of an expert witness and medical doctor being called a “cokehead,” one might think the court will find that presumed damages were suffered even if no actual damages can be shown. Simple name-calling is one thing, but when damages may be involved, labels such as “cokehead” certainly challenge the black-and-white world of expert exclusion.

Where would you draw the line? Where have you drawn the line? Are labels like “cokehead” ultimately permanently damaging to an expert’s reputation and credibility?

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