Conflicts of Interest for Expert Witnesses

By E. Sean Medina

Litigation attorneys despise betrayal.

We scream if opposing counsel backs out of a stipulation; we rant if a judge reverses a ruling that originally went in our favor; we fume if local counsel changes a brief before filing it. So imagine when an opposing attorney discloses an expert witness with whom the attorney already has a relationship. Maybe the attorney interviewed the expert but decided not to retain her. Perhaps the attorney used the expert in prior litigation for the same client or a related company. Most horrific, maybe the expert was retained by the attorney in the same litigation and changed her opinion. Under any scenario, an expert's "switching sides" can pose a serious conflict.

While the attorney's first instinct may be to move to disqualify the expert from testifying, attorneys need to examine whether this "betrayal" is even a conflict and, if so, whether disqualification is an appropriate remedy. The attorney also can take steps to prevent this situation.

The Problems a Conflict of Interest Can Cause

An expert's conflict of interest can pose serious problems for all involved. First, the attorney who has disclosed the expert has the potential of having that expert disqualified. This can spell disaster if the expert's testimony was necessary for an essential element of a claim or defense.

Second, the attorney seeking disqualification faces a situation where confidences may have been handed over to the other side. Depending upon the nature of the disclosure, opposing counsel may have been given an unfair advantage by obtaining key inside information of an opponent's facts and strategy.

Third, an expert's conflict of interest can exert extraordinary tension on the attorney's relationship with his or her client. Clients generally don't like surprises, and conflicts of interest with experts generally come as a surprise.

Finally, such conflicts of interest can damage an expert's reputation and impair the expert's ability to obtain new business. Many experts rely on repeat business or referrals from attorneys with whom they have worked. When an expert "switches sides," word spreads. It is the rare attorney who wants to engage an expert with a checkered past.

Not only does an expert face damage to his or her reputation and business when he or she becomes embroiled in a conflict of interest, but also the expert may face professional discipline. Many experts belong to professional associations that regulate the ethics of their members. For example, the American Institute of Certified Public Accountants has a Code of Professional Responsibility,[1] which includes a definition of a conflict of interest: "When a CPA's ability to objectively evaluate and present an issue for a client will be impaired by current, prior, or possible future relationships with parties to the litigation. As a professional, the CPA should avoid engagements that involve conflicts of interest."[2] Similarly, if the expert is an attorney, the expert is bound by ethical rules and could face discipline by the bar.

"Switching Sides"

So, you review your opponent's expert disclosure and see a familiar name—how can you determine when "switching sides" rises to the level of a true conflict of interest? Not surprisingly, courts consider the facts of each case to determine where the expert's behavior falls on a spectrum that ranges from a clear conflict to no conflict at all.

A clear conflict tends to exist where an individual was retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party during the earlier retention. As the court in *Wang Labs., Inc. v. Toshiba Corp.*[3] noted, "no one would seriously contend that a court should permit [such a situation]. This is a clear case for disqualification." But most cases are not so clear. For example, attorneys may consult several experts before engaging one. The fact that an expert who was consulted, but not retained, by one party is later retained by the opposing party is not always a conflict of interest worthy of disqualification.

To determine whether an expert witness should be disqualified in a case other than those in which the expert clearly switched sides, courts generally use a two-part test: (1) Was it objectively reasonable for the first party who claims to have retained the consultant to conclude that a confidential relationship existed; and (2) was any confidential or privileged information disclosed by the first party to the consultant?[4]

For the first prong, no formal retention of the expert is necessary to establish that it was objectively reasonable for the first party to conclude that a confidential relationship existed with the expert. Although the existence of a formal contractual relationship goes a long way to establish such a relationship, it is not required.[5] For example, in *Wang Labs.*, the plaintiff's counsel contacted an expert on a patent infringement issue and sent two letters containing various materials to the expert. The second letter included an outline of potential defenses to the plaintiff's suit that was labeled "CONFIDENTIAL ATTORNEY—WORK PRODUCT." The expert gave the plaintiff a report containing an opinion that the patent was not valid and that he was not interested in serving as a consultant. Later, the defendant in the same litigation retained the same individual. The plaintiff filed a motion to disqualify the expert, which the court granted. The court reasoned that the expert's failure to disavow a confidential relationship, even after receiving two letters informing the expert of the case issues and identities of the parties involved,

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reinforced the reasonableness of the plaintiff's assumption that a confidential relationship existed.[6]

For the second prong, courts look to whether the attorney disclosed work-product-(including particularly counsel's mental impressions) or attorney-client-privileged material to the potential expert. Non-trade-secret technical and business information are most likely not confidential for purposes of considering whether to disqualify an expert.[7] Strategy considerations and an analysis of claims and defenses, however, are much more likely to be considered confidential information. The key issue is the expert's *receipt* of the confidential information, not the expert's *disclosure* of that information to opposing counsel. Indeed, most courts do not address whether the expert actually disclosed such information to the opposing attorney. As one court stated: "[i]t is simply not possible for [an expert] to ignore what he learned from counsel."[8]

An attorney would do well to implement steps at the outset to avoid conflicts of interest.

In addition to the two-part test, some courts look to a third factor—the public interest in allowing or not allowing the expert to testify. This inquiry is based mainly on "preventing conflicts of interest and maintaining integrity of the judicial process."[9] Thus, disqualification is more likely if it is shown that the expert is a member of a professional organization with its own ethical rules or code of conduct. Such rules often proscribe conduct that results in conflicts of interests or even the appearance of impropriety. If the expert has violated the rules of such a professional organization—which were presumably created to instill a sense of confidence in the profession—the court may consider that fact as tipping the scales in favor of finding an impermissible conflict of interest.

Ties to Subsidiaries or Parent Companies

A conflict of interest may exist when an expert accepts work against the sibling or parent of a company for which he or she previously provided expert services. Such conduct implicates whether the attorney or client disclosed confidential information to the expert that is relevant to the current litigation. As an example, if, in the first litigation, the expert received confidential information concerning the parent company and that information is relevant to subsequent litigation involving a subsidiary or sibling company, the expert may be disqualified. Obviously, this is a fact-intensive issue, turning on a variety of factors including the similarity of the cases, the relationship between the companies, and the type of information involved.

Changing an Opinion During Litigation

An attorney undoubtedly will be annoyed by learning that an expert that he or she interviewed has been retained by opposing counsel. Even more disturbing, however, is when a disclosed expert changes an opinion during the course of litigation. To add insult to this injury, there is no hard and fast rule preventing the opposing party from calling such a position-switching expert as a witness. Once a party discloses an expert, that expert's opinions are discoverable. If the expert's opinions favor the other side, then the other side may be able to call that expert to testify.

For example, in *Peterson v. Willie*,[10] the plaintiff's expert witness disclosed at his deposition that he had changed his opinion. Plaintiff's counsel withdrew the expert and filed a motion in limine to prevent the defendant from calling that expert at trial. The district court denied the motion in limine and allowed the expert to testify about his new opinion *and* that he had been previously retained by the plaintiff. On appeal, the Eleventh Circuit held that the district court did not abuse its discretion in permitting the expert to testify. Although finding that the district court erred by allowing the defendant to elicit testimony regarding the plaintiffs' previous retention of the expert, the Eleventh Circuit found the error caused no substantial prejudice and affirmed the defense verdict. *Peterson* is not the uniform rule, and other courts have taken a contrary view, barring such testimony as cumulative and unfairly prejudicial.[11] That said, even the possibility of having a party's own expert testify against that same party is serious.

What to Do When You Think the Expert Has a Conflict of Interest

If you know or suspect that your opponent's expert has a conflict of interest, it is important to address the issue promptly. The "betrayed" party should not wait until the eve of trial to take action for tactical reasons (such as thinking that it will then be too late for the opponent to get a new expert). Such a strategy could easily backfire, with the court finding waiver for failing to raise the issue sooner.

As a first step, notify the other side of the conflict. Outline to the opposing attorney (and expert) that a conflict of interest exists and cite any applicable professional rules, confidentiality agreements, and other authority. The potential for professional discipline or litigation over breach of a confidentiality agreement could be enough for the expert to reconsider and withdraw. Assuming that the expert (or, more likely, the opposing attorney) refuses to withdraw the opinion and testimony, counsel may need to move the court for disqualification. Raising the issue in writing before filing such a motion makes a record of the issue, shows an attempt to resolve the issue without judicial involvement, helps satisfy any "meet and confer" obligation, and also may help paint the other side as unreasonable.

If a motion to disqualify the expert is required, recognize that courts may look to whether disqualification would be a fair result to promote the integrity of the judicial process. Factors to consider include whether: (1) the expert knew of the conflict of interest before offering an opinion for the opposing attorney, (2) the opposing attorney or party knew of the conflict of interest

before retaining the expert, and (3) whether the opposing party would be prejudiced by disqualification. As movant, also be prepared to show the court how your client will be damaged and prejudiced if the expert is not disqualified. Lay the foundation for the motion. Have the expert's written report or testimony in hand so that you can demonstrate an actual conflict to the court as opposed to only the potential for a conflict. Creating a proper record of the conflict will not only help to support the motion for disqualification, but it will also create a record for appeal should the court refuse to disqualify the expert.

How to Avoid Expert Conflicts of Interest

The best way to address expert conflicts of interest is to avoid them in the first place. Courts have warned that, because attorneys have the knowledge, experience, and ability to avoid conflicts, they bear the consequences for failing to take appropriate precautions.[12] This warning applies even where the client selects the expert without attorney input. Given the gray areas in what constitutes a conflict of interest for an expert and when disqualification is appropriate, an attorney would do well to implement steps at the outset to avoid conflicts of interest.

When interviewing potential experts, attorneys should take proper steps to protect their clients. Disclose the names of the parties and counsel to the expert up front so that he or she can run a proper conflict check. Provide the expert with a copy of the complaint and even the opposing expert's opinion (if available and if permitted) so that the expert can determine if he or she has previously rendered an opinion on those facts or circumstances. Ask the expert if he or she has been consulted in the action or any other actions by the opponent or its counsel. Along with providing a good general protocol for expert vetting and retention, these steps should help avoid expert conflicts of interest.

An attorney should be extra cautious that the expert does not have a prior relationship with opposing counsel. Although this may seem like a superfluous worry early in the case, there are several issues that compel this preparation. First, the attorney may lose the expert through disqualification. Second, the attorney could be disqualified from the representation for either not delving into the expert's past relationship with opposing counsel, or improperly receiving confidential information.[13] Third, the attorney may be subject to discipline; knowingly discovering facts or opinion held by opposing experts other than through Federal Rule of Civil Procedure 26 may violate Model Rule of Professional Conduct 3.4(c). Fourth, and quite apart from any actual conflict or disqualification request, the client may become dissatisfied and fire the attorney.

The attorney considering the retention of an expert should, at a minimum, discover whether (1) the expert was consulted by opposing counsel, or (2) testified for the opposing counsel or party in the past. If the answer to either of those questions is yes, the attorney should consider whether that expert has a conflict of interest. The attorney then should weigh the benefits of using that expert, especially if another expert is available to consider the issue and render an opinion.

Along with the attorney's obligations, potential experts need to be alert to the issue. The expert should carefully check for potential conflicts of interest and should disclose conflicts as soon as they are apparent. Doing so will not only save the embarrassment of the disqualification process, but it will also avoid professional discipline, avoid possible litigation, keep referral relationships intact, and avoid forfeiture of fees and related monetary remedies.

When an expert is retained, an engagement letter should confirm the lack of conflicts and include an explanation of the duty of confidentiality.[14] It may be appropriate (and, indeed, required) for the expert to sign a confidentiality agreement and a protective order. Such actions could prove to be very helpful should the expert later seek to testify for an opponent or a competitor based on information received that is subject to such an agreement.

For example, if an attorney in a first litigation had the expert sign a confidentiality agreement and included parent or sibling companies in the scope of the agreement, the attorney would have a range of options for later dealing with possible conflicts of interest involving the expert in a second litigation. Not only could the attorney seek disqualification of the expert based on receipt of confidential information relevant to the second litigation, but the attorney could demand that the expert withdraw an opinion pursuant to the agreement and even bring a suit against the expert for breach of the agreement. The confidentiality agreement can even specify the remedies that would be appropriate in the event of a breach (e.g., injunctive relief). Where parties willingly define the scope of the remedies available in the event of a foreseeable breach, courts are likely to enforce them.

In addition to fully vetting the expert and protecting against disclosures of client confidences, it is worth noting that an attorney should refrain from creating conflicts of interest with experts for the sole purpose of disqualification. Having proper access to qualified expert witnesses who possess specialized skill is an important factor when deciding whether to disqualify an expert. Courts have expressed a concern that attorneys "will be encouraged to engage in a race for expert witnesses holding adverse opinions and . . . to create some type of inexpensive relationship with those experts" to create a conflict of interest in those experts.[15] Thus, attorneys should not actively seek out experts to interview with the sole purpose of creating conflicts and limiting the pool of experts for the opposing attorney. If the court suspects that an expert was contacted to create a conflict, the court may refuse to disqualify the expert. In that case, the intentional disclosure of confidences to the now-other side's expert may boomerang.

Conclusion

Potential conflicts of interest with expert witnesses may derail a successful litigation plan, adding unnecessary time and money into an already contentious and expensive process. Analyzing potential conflicts early in litigation will protect the client and avoid headaches for the expert and attorneys on both sides. By taking precautionary steps when vetting and retaining an expert witness, attorneys can avoid unnecessary drama that has little to do with the merits of the dispute. The last thing an attorney needs is to waste time and the client's money on avoidable disqualification motions and sending letters to the expert

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reminder is often sufficient to stop the practice. If the practice continues, an objection should be made on the record and court involvement sought if necessary. Another effective strategy may be to mark an applicable standard of conduct relating to deposition practice as an exhibit to the deposition and ask the offending lawyer to comply with the standard on the record.

If problems are anticipated at a deposition, it may be worth the additional cost to have the deposition electronically recorded. An audio or a video record of the deposition often deters improper objections and harassment at depositions. In addition to preserving the improper conduct for the future court assistance, there might even be some circumstances in which the improper conduct may be brought to the attention of the jury.

Build Trust

There is an old saying that "trust begets trust." Trust can be built by suggesting to opposing counsel mutually beneficial strategies for streamlining trial preparation or trial itself. For example, an offer to stipulate to certain facts may obviate the need for the opposing counsel to seek costly depositions or certain witnesses for trial. This simple offer may start the "horse trading" and shift an adversarial dialogue to one of mutual problem solving to streamline the case for resolution—formally or informally.

Break Bread

Getting to know an opponent personally is a good step toward heading off or dealing with any unprofessional conduct that may occur. Unprofessional conduct is far less likely to occur among friends or acquaintances. Thus, have a meal or coffee with opposing counsel early in the case and at reasonable intervals.

Get Involved

Involvement in bar association or other professional activities is another strategy for heading off unprofessional conduct. In addition to the benefit of building personal relationships, bar associations generally serve as a reminder to our legal community at large that we are a tightly knit profession. As such, a lawyer's daily conduct should reflect that lawyers work together to serve client interests as well as the public good in a manner that is respectful to everyone.

Conclusion

Beyond ensuring the public trust, professionalism improves the public's perception of lawyers and furthers the quality of our professional and personal lives. Professionalism among lawyers and the court also makes the practice of law a more fulfilling life. A lawyer's good reputation—an immortal remnant of one's life—will be the better for having acted with professionalism.

Endnotes

1. Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, Dedication of William W. Knight Law Center: "Professionalism" (1999), in 78 Or. L. Rev., Summer 1999, at 385, 390.
2. *Available at* www.ord.uscourts.gov/Rules/2006/AppendixofForms/F23_StatementProfessionalism.pdf (last visited September 14, 2009).
3. See *The Sedona Conference Cooperation Proclamation* (2008), *available at* www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf; *see also* William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.").

Useful Links

www.thesedonaconference.org
This website provides valuable publications for practitioners seeking tools for more effective discovery, particularly in the discovery of ESI.

www.osbar.org/onld/professionalism.html
The Oregon State Bar has collected numerous writings on the issue of professionalism.

www.innsofcourt.org
The American Inns of Court is dedicated to improvement of the skills, professionalism, and ethics of the bench and bar.

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witness, asking that the expert withdraw his or her opinions. Both attorneys and expert witnesses can prevent such sideshows by taking appropriate steps early in the litigation, including a proper analysis of potential conflicts and the consequences of those conflicts.

Endnotes

1. www.aicpa.org/About/code/index.html.
2. AICPA Special Report, Conflict of Interest in Litigation Services Engagements, 72/100-1 (1993).
3. 762 F. Supp. 1246, 1248 (E.D.Va.1991).
4. *See, e.g.*, Paul v. Rawling Sporting Goods Co., 123 F.R.D. 271, 277–278 (S.D. Ohio 1988).
5. Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 581 (D.N.J. 1994).
6. *Wang Labs.*, 762 F. Supp. at 1247.
7. Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 191-192 (S.D.N.Y. 1988); U.S. ex rel. Cherry Hill Convalescent Ctr. v. Healthcare Rehab Sys., Inc., 994 F. Supp. 244, 251 (D.N.J. 1997).
8. *Cordy*, 156 F.R.D. at 582.
9. English Feedlot, Inc. v. Norden Labs, Inc., 833 F. Supp. 1498, 1504–1505 (D. Colo. 1993).
10. 81 F.3d 1033 (11th Cir. 1996).
11. For cases and a further discussion, see Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 Tenn. L. Rev. 909 (2000).
12. Wyatt v. Hanan, 871 F. Supp. 415, 421 (M.D. Ala. 1994).
13. *Cordy*, 156 F.R.D. at 584.
14. *Wang Labs.*, 762 F. Supp. at 1250.
15. *Paul*, 123 F.R.D. at 281–282.