

## **CHAPTER THREE**

### **Finding, Preparing, and Using Expert Witnesses Ethical Issues in Presenting Expert Testimony**

January 1999

by

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A[T]he question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession that should stand free from all suspicion . . . It is not by way of punishment; but the Court on such cases, exercise their discretion, whether a man whom they have formally admitted, is a proper person to be continued on the roll or not.<sup>1</sup>

## I. Introduction

Expert witnesses are, in many cases, subject to ethical rules and principles of their professions which apply to all of their engagements, including engagements to provide consulting or testifying expert testimony. Lawyers, in the retention, development, and presentation of the testimony of experts are, in turn, subject to the Rules of Professional Conduct. Although neither the ABA's Model Rules of Professional Conduct nor the Washington Rules of Professional Conduct mention expert witnesses explicitly, the courts have applied these rules, the discovery rules, and the inherent power of the court to the relationship between lawyers and experts and the testimony that experts present. Remedies for direct or indirect violation of these principles include sanctions, disciplinary actions, waiver of attorney client or work product privileges, exclusion of expert testimony, the grant of a new trial, and disqualification of experts and counsel. In some cases, ethical rule violations may even become an independent basis for tort remedies and other civil liabilities.

## II. Duty to Preserve Client Confidences (RPC 1.6)

### A. Testifying Experts

The duty to preserve client confidences is perhaps one of the most fundamental ethical principles of our profession. It is therefore critically important for attorneys and their experts to understand that these duties of confidentiality do not operate to protect information supplied to experts retained for the purpose of testifying.<sup>2</sup>

The reason that communication with experts is not privileged is fairly straightforward. Evaluation for testimonial purposes does not fall within the ordinary practice of a profession. Communications to and from a testifying expert, do not fall within the "zone of privacy"

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<sup>1</sup> *Ex parte* Brounsall, 98 Eng. Rep. 1385 (K.B. 1778) (Lord Mansfield).

<sup>2</sup> Even where the witness was not retained for the purpose of testimony, as in the case of a treating physician, most professional privileges are waived once the witness is called to testify.

necessary for invocation of the privilege. Consequently, attorneys should assume that all communications flowing to and from their experts from whatever source, including direct client communication, will be disclosed in the discovery process. The attorney and the expert must both assume that the expert's file will be an open book. The testifying expert's research files, work papers, notes, drafts, correspondence and similar materials will be produced in discovery.

As a practical matter, apart from a general engagement letter and actual documentary evidence, an attorney should allow very little, if any, written communication with the testifying expert. In many cases, there may be very little reason for the client to have any direct contact with the testifying expert. The attorney who provides chronologies, summaries of the case, summaries of client interviews or worse yet, allows the client to explain facts directly to his testifying expert has implicitly waived the protections of the attorney-client privilege and work product immunity and, as a result, violated the duty to preserve client confidences codified in RPC 1.6. Again, if the testifying expert has acquired any information from whatever source, that information will most likely be discoverable.

Based on these principles, it should be obvious that to even suggest to a testifying expert that it might be better if she destroyed parts of her file or earlier drafts of her opinion the attorney found disagreeable is unethical and perhaps even criminal.

Instead, experts should be encouraged to keep their files limited to what they actually need, and be aware of the potential for cross-examination on what they do keep. Experts should develop their initial impressions orally, rather than in writing. Expert opinions commonly evolve during the course of work on the case. Opinions that are committed to writing at an early stage before all the evidence is assembled will inevitably lead to problems, either because the expert changed her mind and can be cross-examined on the change, or because the expert reached an opinion too soon before reviewing all relevant information.

In the case of testifying experts, careful attention to all communications is essential to avoid violation of ethical duties and prejudicing the client's case.

## **B. Work Product Consultants**

By contrast to testifying experts, information provided to and gleaned from a work product consultant is generally protected from disclosure.<sup>3</sup> The rationale for this rule is again simple. Work product consultants are essential to the attorney providing effective counsel and communication to the client on complex matters. Work product consultants generally offer insight on issues attorneys cannot fairly understand without the aid of outside expertise. For these reasons, it is common for counsel in complex cases to retain both work product consultants and testifying experts to comply with the duty to provide competent counsel while at the same time preserving client confidences.

## **III. Conflicts of Interest and the "Tainted" Expert**

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<sup>3</sup> Special rules apply where the physical or mental condition of a party is at issue in the litigation. CR 35. For example, the Washington Supreme Court has recently affirmed that the work product doctrine does not protect from disclosure a psychiatrist who examines a criminal defendant, even though the psychiatrist is not designated to testify at trial. *State v. Hamlat*, 133 Wn 2d 314 (1997). See also CR 26(b)(4)(B) allowing discovery of consulting witness upon showing of substantial need and undue hardship.

Lawyers, we all know, may not “switch sides.” The conflicts rules of the Rules of Professional Conduct, Rules 1.7, 1.8, 1.9, and 1.10, protect clients from the lawyer who would attempt to serve two masters. The risks are divided loyalties, lack of zealousness, and breach of client confidences. Experts, as well, may not serve two masters. An expert, and the lawyers that hired her, may be disqualified if the expert has relevant confidential or privileged information about one party to a case and switches sides to serve that party’s adversary. This confidential or privileged information may have been acquired through work done on other matters, acquired through pre-retention interviews, or acquired by virtue of past employment with a party. Whatever the source, if an expert has acquired relevant, confidential information about one party, she may be “conflicted out” of work for an adversary. Moreover, if she is retained by the adversary, the court may conclude that confidential information was shared with the adversary’s lawyers, imputing the expert’s “taint” to them, and exposing the lawyers to disqualification along with the expert.

State and federal courts invoke their inherent power to disqualify experts for “conflicts.” The purpose is to protect the various privileges which may be breached if an expert changes sides, and to preserve the fairness and integrity of judicial proceedings. *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 277-78 (S.D. Ohio 1988); *Roundpoint v. V.N.A. Inc.*, 621 N.Y.S.2d 161, 163, 207 A.D.2d 123 (1995); *Wang Laboratories, Inc. v. Toshiba Corporation*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). The standard applied by most courts in evaluating an expert’s conflicts is more lenient than that applied to lawyers.<sup>4</sup> Experts perform a different function in litigation. They are not advocates, but are sources of information retained to assist the parties and the trier of fact to understand complex evidence. See *English Feedlot v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993).

The most often-applied standard for evaluating expert conflicts was first set forth in *Paul v. Rawlings Sporting Goods, Co.*, *supra*. In *Paul*, the plaintiff sued Rawlings claiming that a baseball helmet was badly designed and led to his severe brain injuries. Rawlings’ national coordinating counsel for product liability claims contacted an expert, Goldsmith. Their discussions over the next several months principally involved the possibility that Goldsmith might supervise product testing for Rawlings, but also at least touched on the evaluation of the *Paul* case. Goldsmith was paid a small amount by Rawlings, but was not formally engaged as an expert in the *Paul* case. Eventually, Goldsmith was retained by the plaintiff and Rawlings moved to disqualify him based upon its counsel’s discussions with him.

The *Paul* court defined the relevant inquiry as:

(1) Did Rawlings and Dr. Goldsmith enter into a relationship (whether it rose to the level of a contract for services, or not) which gave rise to an objectively reasonable expectation on Rawlings’ part that it could, without risk, impart confidential information to Dr. Goldsmith; (2) Did Rawlings take advantage of its opportunity to disclose confidential information to Dr. Goldsmith; and (3) Is there a showing that Dr. Goldsmith has used or may use such information to Rawlings’ disadvantage?

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<sup>4</sup> A few courts have applied the more stringent standard applicable to attorney disqualifications for conflict of interest. See *Marvin Lumber & Cedar Co. v. Norton Company*, 113 F.R.D. 588, 591 (D. Minn. 1986); *Conforti v. Eisele, Inc.*, 405 A.2d 487, 491 (N.J. Supp. 1979).

*Paul*, 123 F.R.D. at 277.

In the formulation offered by most courts since *Paul*, the first two inquiries are the key ones. See, e.g., *Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*, 994 F. Supp. 244 (D. New Jersey 1997); *English Feedlot*, *supra* at 1302. The burden of proof is uniformly placed on the party seeking disqualification of an expert. See, e.g., *English Feedlot, Inc.*, 833 F. Supp. At 1501-02. The court will also consider policy objectives which militate against disqualification. The primary objectives are ensuring that parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling. *English Feedlot*, 833 F. Supp. At 1505.

#### **A. An “Objectively Reasonable” Confidential Relationship**

When is it “objectively reasonable” to assume that a confidential relationship exists with an expert? As a general statement, it is objectively reasonable to assume that a confidential relationship exists when an expert knows or should know that he is expected to keep what he learns confidential. Prior management-level employment by a party or a formal engagement as a consultant or expert on other matters is frequently deemed to satisfy the first prong of the *Paul* test. Management-level employees and formally retained consultants know or should know that the information they learn should be kept confidential. See *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp., 651 (M.D. Fla. 1992), *aff’d*, 43 F.3d 1439 (11th Cir. 1995) (former CFO hired as trial consultant). Technical and nonmanagerial level former employees may be bound by a confidentiality agreement signed during employment. See *Wang Laboratories, Inc. v. CFR Assoc., Inc.*, 125 F.R.D. 10 (D. Mass. 1989) (former employee who developed software program could be called as a fact witness but not as an expert, particularly as he had signed a confidentiality agreement); *Space Systems/Loral v. Martin Marietta Corporation*, 1995 WL 686369 (N.D. Cal 1995) (former employee privy to confidential information directly related to case disqualified; another former employee expert limited to testifying only based on information acquired after he left employment). Other experts are obligated by law to hold client communications confidential. See *Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*, 994 F. Supp. 224 (D.N.J. 1997) (certified public accountant required to maintain client confidences by statute). In other cases, confidentiality is implied, or not, from the particular circumstances.

For example, in *Shadow Traffic Network v. Metro Traffic Control, Inc.*, 29 Cal. Rptr. 2d 693 (1994), Metro’s lawyers had several preliminary discussions with Deloitte & Touche about undertaking a damages analysis but Deloitte was not retained. Deloitte was later retained by Shadow to perform its damages analysis. In Metro’s motion to disqualify Shadow’s lawyers, Latham & Watkins, Metro’s lawyers testified that they expressly cautioned the Deloitte representatives that all information provided to Deloitte in the preliminary discussions should be kept confidential. In granting the motion to disqualify, the court noted that formal retention of an expert is not required, nor is a formal, written confidentiality agreement. What is required is that the lawyer’s or client’s expectation that information would be kept confidential be objectively reasonable. *Shadow Traffic Network*, 29 Cal. Rptr. at 700.

In *Wang Laboratories, Inc. v. Toshiba Corporation*, 762 F. Supp. 1246 (E.D. Va. 1991), Wang moved to disqualify Toshiba’s expert in patent infringement litigation. Counsel for Wang had telephoned the expert with a view towards retaining him to consult on the case. Following the call, the lawyer sent the expert a letter enclosing various materials, including materials which

were prominently labeled “work product.” There were several additional phone calls to discuss technical aspects of the case. About a month later, the expert notified the lawyer that he could not agree with Wang’s position and therefore could not pursue work as a consultant. The expert was later retained by a defendant as a testifying expert in the case. In ruling on Wang’s motion to disqualify the expert, the court concluded that the facts clearly gave rise to an objectively reasonable expectation that information flowing from the lawyer to the expert would be kept confidential. *See also Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D. N.Y. 1994) (prospective expert reviewed binder of discoverable and nondiscoverable material; reasonable expectation of confidentiality).

On the other hand, if a prospective expert receives only information which is discoverable in the case in any event, an expectation of confidentiality is not reasonable. *Palmer v. Ozbeck*, 144 F.R.D. 66 (D. Md. 1992); *English Feedlot*, 833 F. Supp. at 15031 (expert had been testifying expert in former case and all information or which he relied was discoverable). Likewise, a prospective expert may caution the interviewing lawyers not to provide him with any confidential information thereby undercutting any colorable claim of privacy. *See Advanced Cardiovascular Systems, Inc. v. Medtronic, Inc.*, 1998 WL 230981 (N.D. Cal. 1998) (not reported in F. Supp.).

If the first of the *Paul* court’s questions is answered affirmatively, the courts move to the second question. Was confidential information of substance actually provided to the expert?

## **B. An Exchange of Confidential Information**

The information which the courts will protect from disclosure to an adversary comes in three forms. The first is confidential or proprietary business information and is often an issue in patent, trade secret and competitive tort cases. The second and third are attorney-client privileged information and work product. Attorney client and work product information may include discussion of case strategy, or strengths and weaknesses, anticipated defenses, and the strategic and tactical role of the expert. The challenged expert may have acquired this information during the course of prior work for a party or during the course of pre-retention discussions. The information must be important, not trivial, and relevant or helpful to an opponent in the current litigation.

In *Carnival Corporation v. Romero*, 710 S.2d 690 (Ct. App. Fla. 1998) the Romeros asserted claims arising out of Ms. Romero’s alleged rape while on a Carnival cruise. The Romeros hired two former security officers for Carnival as experts and Carnival moved to disqualify them, and the plaintiffs’ attorney. Carnival argued that, while employed by Carnival, the security officers had investigated similar claims and allegedly knew the procedures used by Carnival in evaluating, analyzing and defending claims. The security officers acknowledged investigating claims, but denied ever speaking to attorneys for Carnival or performing management level responsibilities. The court concluded that the former security officers offered the plaintiffs no informational advantage warranting disqualification. Neither were employed by Carnival when the Romero incident occurred. Neither were high-ranking employees. Neither had access to work product, attorney-client or other confidential information. The security officers general familiarity with the company’s security procedures were facts which were not protected by any privilege.<sup>5</sup> *Cf.*, *Rentclub, Inc. v. Transamerica Rental Finance Corporation*, *supra* (defendant’s

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<sup>5</sup>The court noted that no attorney for Carnival testified that she had protected communications with either

counsel hired plaintiff's former CFO creating appearance of impropriety and inducing employee to disclose confidential matters relating to managerial practices, strategies, theories and mental impressions).

In *English Feedlot*, the issue was an allegedly faulty vaccine. The challenged expert retained by English Feedlot had previously been retained by defendant Smith-Kline to evaluate other vaccine-related claims. Although the court found that the defendant had a reasonable expectation of confidentiality, it concluded that no substantial confidential information from the defendant had been passed on to the expert by virtue of the expert's earlier work. Rather the expert had evaluated claims, rather as a claims adjuster, and presented claims analyses to the defendant. The information flow was from expert to defendant, not from defendant to expert.

In *Paul v. Rawlings Sporting Goods Co.*, *supra*, the court ultimately concluded that the second prong of the test was not met because no matters of particular substance relating to the *Paul* case were ever communicated by Rawlings counsel to the expert. Most of the communications concerned a possible business deal between Rawlings and the expert by which the expert would evaluate its baseball helmets. At best, the discussions centered on anticipating the plaintiff's theories of the case, not relating the defense's theories. *See also Shadow Traffic Network*, *supra* (in pre-retention interviews, Metro's counsel discussed theories and analysis of damages which constituted confidential information); *Western Digital Corp. v. Amstrad*, 71 Cal. Rptr. 2d 179 (Cal. Ct. App. 1998) (plaintiff's lead attorney stated that he had provided proposed experts with his views of the progress of litigation, his evaluation of strengths and weaknesses of the liability case, his prognosis for the remainder of the case, and his analysis of strengths and weaknesses of the damages issues).

### **C. Improper Use of Confidential Information**

If an expert acquired confidential information about a party important to the current case which must be kept confidential, she will be disqualified from acting as an expert for an adversary. The courts generally conclude that the possession of confidential information by an expert will give that expert and, derivatively, the adversary, an unfair "informational advantage," warranting disqualification of the expert. The question then becomes, must the lawyers be disqualified as well?

A tainted expert may be presumed to have passed on confidential or protected information to the lawyers who retained him thereby necessitating their disqualification along with the disqualification of the expert. Disqualification of the lawyers was the key issue in *Shadow Traffic Network v. Metro Traffic Control*, *supra*. The court had found that confidential information was disclosed by Metro's lawyers to Deloitte & Touche which it was reasonable to believe would be kept confidential. The court then went on to apply a rebuttable presumption of disclosure of that confidential information from Deloitte & Touche to Latham & Watkins. The purpose of the presumption was to implement the public policy of protecting confidential communications. The presumption affected the burden of proof and imposed upon Latham & Watkins the burden to prove that no confidential information had been received by it.

On the record in the case and its own analysis of the testimony, the court on appeal concluded that the trial court had not abused its discretion in disqualifying Latham & Watkins because the

presumption of disclosure from Deloitte & Touche to the law firm remained un rebutted.<sup>6</sup> *See Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994) (forensic engineer who switched sides during litigation led to disqualification of defendant's counsel to maintain the fairness and integrity of the judicial process).

Although there are no Washington cases, case law involving attorney disqualification suggests that the Washington courts may not employ the *Shadow Traffic* presumption of disclosure of confidential information from the tainted expert to the lawyers. In *First Small Business Investment Company of California v. Intercapital Corporation of Oregon*, 108 Wn.2d 324, 738 P. 2d 263 (1987), the Washington Supreme Court, interpreting the former Code of Professional Responsibility, reversed a Court of Appeals decision which disqualified a law firm because its co-counsel for a short period had been interviewed by the opposing party. The Court of Appeals presumed that confidential information had passed from the co-counsel to the firm. In reaching its decision, the Supreme Court distinguished cases in which the conflict of one lawyer in a firm disqualifies all members of the firm. The relationship of members of a firm may be close with an everyday exchange of ideas and problems which can lead to the inadvertent release of confidential information. 108 Wn 2d at 330. This type of relationship is simply not present where the disqualified attorney is not a member of the same firm. The Court concluded that proof of actual knowledge of confidential information by the firm was appropriate where the disqualified attorney is not a member of the challenged law firm, but only associated as co-counsel.

The relationship of experts to the lawyers who retain them is more analogous in most cases to the relationship between co-counsel than to the relationship between members of a law firm. The presumption that an expert has shared confidential information with the lawyers operates in practical effect in the same way as vicarious disqualification of all of the members of a law firm because of the conflict of one of them. *First Small Business Investment Company of California* suggests that the party seeking to disqualify the lawyers as well as the expert carry the burden to show the actual dissemination of confidential information to the lawyers without aid of a presumption. *See also Western Digital Corporation v. Superior Court*, 71 Cal. Rptr. 2d 179 (Cal. Ct. App. 1998)(consulting firm screened Atainted@ expert; court refused to disqualify firm or counsel deeming screen adequate to prevent the disclosure of confidential information by the tainted expert).

#### **D. Other Issues**

Related issues can arise. For example, in *Teleconnect Co. v. Ensrud*, 55 F.3d 357 (8th Cir. 1995), a telecommunications company brought an action against a former employee for breach of a confidential relationship, breach of his employment contract, and misappropriation of trade secrets after the former employee agreed to serve as an expert witness for a competitor. The district court had granted summary judgment in favor of the employee which was reversed by the Eighth Circuit on the grounds that fact issues precluded summary judgment on the misappropriation of trade secrets claim. Hence, an expert who switches sides may be exposed to claims by her former employer.

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<sup>6</sup> The court did go on to note that if Latham & Watkins had suggested it, the court would have considered disqualification only of those lawyers who had been in communication with Deloitte & Touche representatives. Because Latham & Watkins had declined to request a partial disqualification and taken an "all or nothing" position, the court had no choice but to disqualify the entire firm.



In *The Beam System, Inc. v. Checkpoint Systems, Inc.*, 42 U.S.P.Q.2d 1461 (1997), the court disqualified an expert and took under consideration dismissal of the plaintiff's complaint with prejudice for violation of the terms of a protective order protecting trade secrets and other highly confidential information. The grounds for the court's ruling arose from the terms of a protective order which permitted highly sensitive information to be divulged only to attorneys and to "independent" experts. Plaintiff's expert, Luther, in fact, was not "independent" in the view of the court because Luther had a long history of engagements with the plaintiff. As stated by the court,

[W]hat matters is that plaintiffs disclosed defendant's software and related materials to a person who, instead of being independent, was in fact subject to being influenced by the plaintiffs because of his long profitable, and ongoing business relationship with them.

The court considered Luther's lack of independence to be a flagrant violation of the protective order by both the client and its counsel and in addition to disqualifying Luther awarded the defendants their attorneys' fees and costs.

#### **IV. Ex Parte Expert Contacts (RPC 3.4(c) and CR 26(b)(5))**

CR 26(b)(5) prohibits *ex parte* contact with an opposing party's expert regardless of whether the expert is a consultant or trial witness. *In re the Matter of Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996). While the court in *Firestorm* did not reach the ethical issue, it noted that ABA Formal Opinion 378 (1993) finds that Model Rule 3.4(c) (knowingly violating an obligation of a tribunal) may be violated by *ex parte* contact with an expert witness. *Firestorm*, 129 Wn.2d at 137, n.2.

The facts of *Firestorm* are instructive. Plaintiffs brought a tort action against Washington Water Power related to over 90 wildfires that created a firestorm in eastern Washington in 1991. Counsel for Washington Water Power, Paine Hamblen, represented a number of utilities, and had hired an expert for one of them, Inland Power, even though Inland Power was not a party to the lawsuit.

An expert, Norman Buske, contacted plaintiffs' counsel and told them he had been hired by Paine Hamblen to investigate the firestorm for Inland Power. Buske told plaintiff's counsel he had important information relevant to the fire at issue in the lawsuit, but Buske feared Paine Hamblen and its clients would conceal or hide this information.

Apparently not realizing that they might be looking at a Trojan horse instead of a smoking gun, plaintiff's counsel met with Buske and gathered a great deal of valuable information from him. When the news of this meeting got back to Paine Hamblen, they immediately brought a successful motion to disqualify plaintiffs' counsel.

In *Firestorm*, the Washington Supreme Court held that, "*ex parte* contact with an opposing party's expert witness is prohibited by CR 26." The court further found that "when faced with an expert employed by opposing counsel, who may or may not be technically employed by an opposing party, counsel should always comply with CR 26(b)(5) in proceeding with any discovery or contacting that expert." However, the Washington State Supreme Court reversed the order disqualifying plaintiffs' counsel as too severe of a sanction under *Washington State*

*Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 336-56, 858 P.2d 1054 (1993). The court distinguished the circumstances of *Firestorm* from the more severe situation where counsel actively seek to induce an expert to switch sides in litigation.

The rule of *Firestorm* is simple. If counsel has any reason to suspect an expert has been retained in any fashion by another party to the lawsuit, *ex parte* contacts with that expert are strictly prohibited, will result in sanctions under CR 26(g) and may constitute a violation of RPC 3.4(c).

Another interesting case presenting similar facts but a different result is *In re American Protection Insurance Co. v. MGM Grand Hotel B Las Vegas*, 1986 WL 57464 (D. Nev. 1986). This case pitted the MGM Grand Hotel against one of its insurers arising out of a disastrous hotel fire. MGM successfully moved to disqualify its opposing counsel based upon *ex parte* meetings between defense counsel and plaintiff MGM's sole trial expert.

It appears that MGM's expert, George Morris, was motivated more by greed than pursuit of a noble profession. Mr. Morris offered to testify in favor of the insurance defendants for the paltry sum of \$1,000,000. Counsel for the insurance company countered -- as they typically do -- with a much lower offer of \$495,000, which was rejected.

The Disciplinary Board of Pennsylvania determined that the insurance company's attorney, who was a member of the Pennsylvania Bar, had not engaged in unethical conduct.<sup>7</sup> However, the Pennsylvania Bar's opinion did not prevent the Nevada court from disqualifying the insurance company's counsel for violation of Canon 9: "A lawyer should avoid even the appearance of professional impropriety." The Nevada court attached little importance to the fact that MGM's expert first approached the insurance attorney, finding instead the insurance attorney's participation in the expert's scheme to collect a bonanza for his disloyalty to be reprehensible.

Another case which is instructive of the courts' attitude toward *ex parte* contacts with experts is *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996). The *Erickson* case involved a *pro se* plaintiff suing a mobile home manufacturer for alleged defects to the frame and body of the motor home. Before commencing the deposition of plaintiffs' metal expert, defense counsel asked the expert if he would evaluate a lock which was evidence in an unrelated case defense counsel was handling. After concluding the deposition, defense counsel met with the metal expert outside the presence of plaintiff to view a videotape and photographs of the lock.

Although the metal expert resigned from his job with defense counsel, plaintiff fired the metal expert because plaintiff did not know if he could trust him. The next day, the *pro se* plaintiff filed a motion for judgment against the mobile home manufacturer for tampering with a material witness.

The district court denied plaintiff's motion and five days later plaintiff went to trial without his expert witness. Plaintiff lost. The Ninth Circuit Court of Appeals granted the plaintiff a new trial and held the district court abused its discretion in failing to impose appropriate sanctions and disciplinary action upon defense counsel. The court found a clear violation of Nevada's

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<sup>7</sup> It appears that the Pennsylvania Board felt that MGM's expert might actually be a fact witness concerning the fraudulent insurance claim by MGM. However, the opinion does not consider the separate ethical issue raised by the attorney offering a fee to a fact (as opposed to expert) witness.

equivalent to RPC 3.4(c), RPC 8.4(d) (the prohibition against engaging in conduct that is prejudicial to the administration of justice) and FRCP 26(b)(4).

The message of these cases is that if an attorney has any reason to believe an expert, whether testifying or consulting, may be employed by the opposition, the attorney is subject to sanctions and possible disciplinary action if he or she engages in any *ex parte* communications with that expert.<sup>8</sup>

## V. Expert Witness Fees (RPC 3.4(b))

### A. Contingency Fees

RPC 3.4(b) states, “A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

Based on this rule, attorneys generally understand that an offer to pay a fact witness a few thousand dollars to encourage him to testify would subject the lawyer to disciplinary action and a possible criminal prosecution for bribery. Nevertheless, legal ethics generally allow an attorney to pay an expert large sums of money in order to induce him to testify. Apparently, ethics pundits have concluded that experts, including those that are not independently wealthy, are less susceptible to financial inducement than ordinary factual witnesses.

Although there is no explicit prohibition in the Rules of Professional Conduct, it is generally considered unethical to pay an expert contingent fees.<sup>9</sup> *See, e.g.*, American Bar Association Model Rules of Professional Conduct, Rule 3.4(b), comment. *See also* American Bar Association Model Code of Professional Conduct, DR(7)-109(C). The rationale appears to be that an expert who will be paid only upon a favorable verdict may lose his or her objectivity and be induced to give stronger or more positive testimony than would otherwise be appropriate.

There is some degree of controversy surrounding the prohibition of paying a contingency fee to an expert. At least one commentator has argued that this contingency fee prohibition prevents poor claimants from obtaining fundamental access to justice, or at least to the more qualified experts. Jim Douglas, The Ethical Problems in Paying Witnesses for their Testimony (Journal of the Legal Profession, No. 20, 1995-96).

### B. Payment of Contingency Fees to Expert Witness Finders

The rise of expert witness finder organizations further confounds the contingency fee quandary. Some of these finder organizations offer to find an expert witness for the client based on a contingency fee. However, the finder “organization” agrees to pay the expert on an hourly basis regardless of the outcome of the litigation.

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<sup>8</sup> Special rules apply in personal injury cases. *Ex parte* communications with the plaintiff’s treating physician are prohibited even after the physician-patient privilege is waived. *Louden v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). However, defense counsel may communicate *ex parte* with the claimant’s treating physician in workman’s compensation proceedings. *See Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 822 P.2d 271 (1992).

<sup>9</sup> Presumably, the same rationale would prohibit an expert from “value billing” because it provides a similar incentive for the expert to generate more favorable testimony.

The courts and bar associations are split on whether such an arrangement is a violation of the attorney's legal ethics. Arizona, California, Maryland and Idaho have all found this arrangement to be ethical.<sup>10</sup> Other states have held these arrangements unethical.<sup>11</sup>

So long as the expert provided by the finder organization is truly independent, there are good reasons to allow payment of a contingency fee to the finder. Where the expert witness receives only a flat fee, he is arguably as free from influence on his testimony as he would be if the contingency fee attorney had hired him directly without utilizing the finder organization. Provided that the overall contingency fee remains reasonable, the finder organization may provide a broader avenue for every litigant, regardless of financial resources, to obtain independent and effective expert witnesses.

## **VI. Duty to Prevent False Testimony (RPC 3.4)(b)**

As previously discussed, experts generally rely on their client's lawyer to supply relevant information to them about the case. Failure to provide the expert with complete information by, for example, withholding test results or notes from investigators that are unfavorable, is not only dangerous to trial presentation but may be unethical as well. Deliberate manipulation of the information an expert relies upon would appear to be creation of false evidence in violation of RPC 3.4(b).

Despite this somewhat obvious ethical issue, it is a somewhat common practice to provide the expert material generated only by the party he or she serves. Indeed, some trial practice commentators condone the practice of withholding "materials that would open the door . . . to cross-examination . . . in order to assure that only helpful opinions are reached." *See, e.g.*, James E. Daniels, Managing Litigation Experts, ABA Journal, Dec. 1984 at 64-66. Nevertheless, providing selective information to your client's expert may be nothing more than deliberately manufacturing false evidence.

## **VII. Duty of Candor toward the Tribunal (RPC 3.3(a))**

### **A. Accurate Expert Witness Designations**

RPC 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. This ethical rule may put the attorney in danger of violating his or her ethical obligations if the attorney parts ways with the expert after informing opposing counsel that the expert has been retained.

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<sup>10</sup> Arizona Op. 84-9, California Op. 84-79, Idaho Op. 128; *Schackow v. Medical-Legal Consulting Service, Inc.*, 46 Md. App. 179, 416 A.2d 1303, 15 ALR 4th 139; *Ojeda v. Sharp Cabrillo Hosp.*, 10 Cal. Rptr. 2d 230 (Ct. Apps. 1992). Legal Ethics Comm. of the D.C. Bar Ass'n. op. 233 (1993). (As D.C.'s version of Rule 3.4 permits payments of contingent fees to expert witnesses so as long as they are not based on percentage of recovery, a law firm may, with client's consent, contract with non-lawyer consultants to share "success fee" the client pays law firm in the event of favorable outcome of client's case).

<sup>11</sup> *Sherman v. Burton*, 165 Mich. 293, 130 N.W. 667, *Griffith v. Harris*, 17 Wis. 2d 255, 116 N.W. 2d 133, *cert. den.*, 373 U.S. 972, 10 L. Ed. 2d 425, 83 S. Ct. 1530 (19\_\_); Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Ass'n, op. 95-79 (1995).

At least one bar association has found that the designation of an expert witness is a representation of material fact to a tribunal and opposing counsel. *See, e.g.*, Los Angeles County Bar Association Ethical Responsibility and Ethics Committee Formal Op. No. 482 (March 23, 1995). If the expert resigns or is terminated, the Los Angeles County Bar Association found it to be unethical for an attorney to continue to negotiate a settlement of the case without correcting this misimpression with opposing counsel.

Designating experts before they are hired or failing to amend expert witness disclosure statements timely may constitute a basis for disciplinary action. In order to avoid misunderstandings, the attorney should have a written engagement and termination agreement with every expert, whether testifying or consulting.

## **B. Cross-Examination of Expert Witnesses**

While the law permits cross-examination of expert witnesses based on hypotheticals, the hypothetical must not assume facts the attorney knows cannot be supported with admissible evidence. An older case that reads like a Perry Mason episode, *In re Metzger*, 31 Haw. 929 (1931), illustrates this point.

In *Metzger*, an attorney was charged with misconduct for cross-examining a handwriting expert based on false evidence. The expert had previously testified that the criminal defendant had written a document based upon an exemplar of the defendant's handwriting. During a trial recess, the defense attorney copied the document and substituted the copy for the genuine exhibit. He then cross-examined the handwriting expert at some length on the forged exhibit.

The attorney's trick worked. The expert never noticed that the substitute exemplar was a forgery. The expert was completely impeached. The court, with one judge dissenting, was less impressed with the attorney's antics than the jury:

There can be no doubt that it was the right and the duty of the respondent, who was entrusted with the defense of two men who were on trial for their lives, to expose if he could what he believed to be a lack of ability and a lack of credibility or accuracy on the part of the witness who had testified as an expert on handwriting; but there was a limitation upon that right and that duty and the limitation was that the test and the exposure must be accomplished by fair and lawful means, free from falsehood and misrepresentation. The so-called "necessities of the case," the keenness of the desire of the attorney to defend the accused to the best of his ability, cannot in our judgment justify falsehood or misrepresentation by the attorney to a witness or to the clerk of the court, whether that falsehood or misrepresentation be expressed in direct language or be conveyed by artful subterfuge. We are unwilling to certify to the younger attorneys who are beginning their experience at the bar of this court, or to any of the attorneys of this Territory, that it is lawful and proper for them to defend men, even though on trial for their lives, by the use of falsehood and misrepresentation, direct or indirect. The conduct of the respondent was unethical and unprofessional.

Despite the fact that the attorney's motives were good and that he clarified with the court and the jury that the evidence was false after the fact, there appears to be nothing in the Rules of Professional Conduct that allows for even the temporary use of false evidence. RPC 3.3(a).

### C. "False" Expert Testimony

Rule 3.3, Rules of Professional Conduct, mandates candor towards the tribunal. Lawyers may not knowingly mislead the court by presenting evidence known to be false, allow a client to do so or procure an advantageous result by perpetuating a court's ignorance of directly applicable law. The rule requires lawyers to police themselves and also explicitly limits a lawyer's duties to his client. The "zealousness" which lawyers must exhibit on behalf of their clients is confined to "the bounds of the law."

Rule 3.3 states:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclose by opposing counsel;
  - (4) offer evidence that the lawyer knows to be false.

These duties are expressly limited in time. Subsection (b) states:

The duties stated in Section (a) continue to the conclusion of the proceeding.

"Conclusion," though, is not defined. Rule 3.3 also imposes a duty to correct a false record. Subsection (c) states:

- (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

Rule 1.6 governs confidentiality and prohibits a lawyer from revealing confidences or secrets relating to representation of a client unless the client consents after consultation.

Rule 3.3(a) applies only when a lawyer knows (as opposed to suspects) that evidence beneficial to his client is false. *See generally*, Hazard and Hudes *The Law of Lawyering*, § 3.3:201. Most litigation is premised on a debate over which competing facts are true. It is the responsibility of the trier of fact to determine the "truth." Nevertheless, a lawyer may not evade the duties of

Rule 3.3 by crediting a witness' statements at face value. "Knowledge" of false testimony may be inferred from circumstances as well as actual knowledge.

Evidence presented not just by client, but by other witnesses, including experts, is at stake. In *United States v. Schaefer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), an EPA suit to recover hazardous waste clean-up costs, the EPA's coordinator for the cleanup misrepresented his academic credentials. The district court found that the EPA attorneys failed to reveal the misrepresentations and obstructed the defendants' efforts to discover them. Finding the attorneys' conduct "most egregious and disturbing" the trial court dismissed the EPA's case with prejudice and awarded fees to the defendants as a sanction. On appeal, the Fourth Circuit affirmed the ethical violation but remanded for reconsideration of the sanctions.

The court on appeal also affirmed the district court's application of a general duty of candor, independent of Rule 3.3. This duty was described more broadly as the duty attendant to the attorney's role as an officer of the court with an ongoing obligation to inform the court of developments which may affect the outcome of the case. *Schaefer Equipment*, 11 F.3d at 457. As the *Schaefer* court said:

Our adversary system for the resolution of disputes rests on the unshakeable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions - all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

11 F.3d at 457. Lawyers, the court stated, have the first-line task of assuring the integrity of the process. The system cannot harbor clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. In short, the duty of candor trumps a lawyer's duty of zealousness. *Id.*

The *Schaefer* court's analysis is instructive because the EPA representative was, for purposes of the case, an expert. His academic credentials were material to the case because the representative selected and supervised the clean-up technologies based upon his education and expertise. The costs of those technologies were the basis for the EPA's claims. The appropriateness of the chosen technologies were a principal ground for the defense.

Under Rule 3.3, a lawyer simply may not offer evidence she knows to be false. This duty is extended under Rule 3.1 to the obligation to refrain from asserting or controverting an issue unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. Rule 3.4 further prohibits falsifying evidence or assisting a witness to testify falsely or the reference at trial to any matter that the lawyer does not reasonably believe will be supported by admissible evidence.

Collectively, these rules define an ethical responsibility to refrain from offering expert testimony that a lawyer believes to be false, unfounded or unreliable under Evidence Rules 702 and 703 and applicable law, or otherwise inadmissible.



## Appendix to CLE Presentation

1. Advice:
  - 1.1 WSBA Hotline regarding ethics: Chris Sutton B (206) 727-8284
  - 1.2 Written submission of inquiry for informal or formal opinion from RPC committee (call (206) 727-8284 for information)
2. Consultants:
  - 2.1 Professor Robert Aronson, University of Washington Law School, (206) 543-7423
  - 2.2 Kurt G. Bulmer, Esq., (206) 343-5700
  - 2.3 Professor John Straight, Seattle University School of Law, (253) 591-2252
3. Resource Tools:
  - 3.1 ABA Compendium of Professional Responsibility, Rules and Standards (1997).
  - 3.2 Annotated Model Rules of Professional Conduct (ABA 3<sup>rd</sup> Edition, 1996).
  - 3.3 Freedman, Monroe H., Understanding Lawyers' Ethics (Mathew Bender, 1990).
  - 3.4 Hazard and Hodes, The Law of Lawyering (Prentice Hall, 2<sup>nd</sup> Edition, 1994).
  - 3.5 Lubet, Steven, Expert Testimony: A Guide for Expert Witnesses and Lawyers and Who Examine Them (National Institute of Trial Advocacy, 1998).
  - 3.6 Mallen and Smith, Legal Malpractice (West Publishing Co., 4<sup>th</sup> Edition).
  - 3.7 Tanford, J. Alexander, The Trial Process: Law, Tactics and Ethics (The Michie Co., 2<sup>nd</sup> Edition, 1993).