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The Expert of My Enemy Is My Expert: Conflicts of Interests Amongst Expert Witnesses*

by Maya M. Eckstein and Paul Nyffeler

Every litigator knows that the right expert can be the difference between winning and losing. This makes good experts rare commodities. Over time, top experts develop specialties and work for one party after another in dozens of cases, a perfect recipe for developing conflicts of interest. As a result, it is critical for experts and the attorneys considering hiring them to conduct thorough conflicts checks to identify potential problems, such as an expert's prior or even current engagement with an opposing party.

But what standards should experts apply when considering conflicts? Surprisingly, while attorneys are governed by strict ethical rules, conflicts-of-interest rules for experts are virtually nonexistent. In fact, the "Guidelines for Conduct for Experts Retained by Lawyers," recently drafted by the American Bar Association's Task Force on Expert Code of Ethics, were withdrawn from consideration by the ABA's House of Delegates.[1] Among other things, the proposed Guidelines included an unremarkable prohibition that precluded an expert from accepting an engagement, absent informed consent, "if the acceptance would create a conflict of interest, i.e. that the expert's provision of services will be materially limited by the expert's duties to other clients, the expert's relationship to third parties, or the expert's own interests."[2] Notably absent, though, from even this proposal is a prohibition on an expert accepting an engagement that could materially harm a current client's interests.

So what standards apply? Virginia courts apply the same standards to expert testimony that they apply to any other testimony: "where the probable prejudice exceeds the probative value of the evidence, the evidence *should* be excluded."[3] In assessing whether relevant testimony is admissible, a court is "always balancing the probative value of the evidence against the disadvantages (delay, confusion, prejudice, surprise, etc.) which may attend its admission."[4] For example, a party has the right to challenge a witness's credibility by cross-examining the witness with prior inconsistent statements.[5]

These standards, though, do not provide sub-

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stantial guidance in the expert-conflict-of-interest scenario. This is particularly true in the situation in which an adverse party hires a client's expert as its own, and even more so when the expert already has been retained by the client in a pending, separate, ongoing litigation. In other words, the expert would be testifying for a client in one case, but against the same client in concurrent litigation.

These situations raise thorny issues of confidentiality. Take, for example, the situation in which Client ABC hires Expert to testify in Case 1, which was filed by Opponent Bad Guy. Expert is then hired by ABC's opponent (Opponent Shrewd Guy) in Case 2, to testify against ABC. Because the Expert may have been privy to ABC's confidential information in Case 1, or even trial strategy or other attorney work product, Shrewd Guy potentially has obtained an unfair advantage, as Expert has information he would not have but for his retention by ABC in Case 1. Moreover, any action taken in Case 2 to either remove Expert or effectively cross-examine him by impeaching his credibility will harm ABC's efforts in Case 1. Legitimate efforts to attack Expert in Case 2 would be ready ammunition for Bad Guy to use against ABC's expert in Case 1. This predicament effectively eliminates ABC's right to challenge Expert's opinions and credibility in Case 2, for fear of harming ABC's position in Case 1. To make matters worse, this situation undermines ABC's trust in Expert, making it wonder in every meeting for Case 1 whether Expert is there to assist ABC's interests in Case 1 or as Opponent Shrewd Guy's agent in Case 2, obtaining unfettered access to ABC which no one else could obtain. A crafty adversary might even seek out an opponent's expert to put it in just such an impossible situation.

Two options are available to parties faced with this scenario. First, courts across the country typically apply a traditional three-pronged test to the expert-conflict of interest analysis. Second, if an expert was working for a client in one litigation but against the client in another litigation, rules prohibiting *ex parte* contacts with opposing experts potentially can be used to sanction opposing counsel.

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Three-Pronged Analysis

Courts across the country have applied a three-pronged test to such situations. Under the traditional analysis applied to expert-conflict situations, courts consider, first, whether it was "objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed" and, second, whether "any confidential or privileged information [was] disclosed by the first party to the expert."[6] Courts often also apply a third element: "the public interest in allowing or not allowing an expert to testify."[7]

In analyzing the first prong—whether it is objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed—courts consider "whether the relationship was one of long standing and involved frequent contacts instead of a single interaction . . . whether the expert is to be called as a witness . . . whether alleged confidential communications were from expert to party or vice-versa, and whether the moving party funded or directed the formation of the opinion to be offered at trial."[8] Additional factors include entering into formal confidentiality agreements, exchange or discussion of work product, whether the expert was asked not to discuss the case with an adverse party, and whether the expert's opinion was derived from or related to work conducted while working for the previous party.[9] If the expert "met but once with counsel, was not retained, was not supplied with specific data relevant to the case, and was not

requested to perform any services," the first prong cannot be met.[10]

Regarding the second prong—whether any confidential or privileged information was disclosed by the moving party to the expert—courts consider whether the expert and moving party discussed the moving party's "strategies in the ligation, the kind of expert [the moving party] expected to retain, [the moving party's] views of the strengths and weaknesses of each side, the role of each of the [moving party's] witnesses to be hired, and anticipated defenses."[11] Purely technical information is not considered confidential information.[12]

Finally, in analyzing the third prong—the public interest—courts consider such issues as (1) whether any prejudice might occur if an expert is or is not disqualified,[13] (2) the appearance of a conflict of interest,[14] (3) the availability of a replacement expert and the burden associated with obtaining a new expert,[15] (4) "ensuring parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling,"[16] and (5) prohibiting "unscrupulous attorneys and clients [from creating] an inexpensive relationship from potentially harmful experts solely to keep them from the opposing party."[17]

Even if the three-pronged test is met, some exceptions have been made for experts concurrently serving for and against a party when the subjects of the case and their testimony are sufficiently unrelated.[18]

Ex Parte Communications

In Virginia courts, the only proper method for obtaining discovery of an expert witness is by interrogatory or deposition.[19] Courts around the country have interpreted similar rules to implicitly prohibit any *ex parte* communications with an adverse party's expert witness.[20] In fact, courts have deemed such *ex parte* contacts an ethical violation under ABA Model Rule of Professional Conduct 3.4(c), which states that "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal."[21] Even state bars have opined on the permissibility of *ex parte* contacts with adverse experts.[22]

Violation of this prohibition has resulted in severe sanctions. For example, a finding of *ex parte* communications can result in exclusion of a party's expert witness.[23] The United States Court of Appeals for the Ninth Circuit reversed a judgment because the appellee's attorney engaged in an *ex parte* meeting with an adverse expert, the court remanded the case for retrial and sanctions.[24] In California, a one-hour meeting discussing the hiring of an adverse expert resulted in disqualification of both the expert and the law firm.[25] Thus, an attorney knowingly takes a risk of disqualification when engaging in *ex parte* communications with an adverse party's testifying expert witness. No case has dealt with whether a party may speak to their expert serving as an opponent's expert in another litigation without the opponent's counsel present, but caution is warranted.

Conclusion

The potential for conflicts of interest for experts should be a concern for litigators and experts alike. Experts trade in their credibility and reputations, providing enormous incentive for self regulation. Yet the lack of national ethics standards for experts and reliance on experts to monitor themselves for potential conflicts of interest could expose attorneys and their clients to unforeseen risk. Additional research may be the difference between having a testifying expert and leaving your client without an expert—or even its chosen counsel. ✦

*__Editor's note:__ The authors prepared this article before the Supreme Court of Virginia decided *Arnold v. Wallace*, ___ Va. ___, 725 S.E.2d 539 (2012). *Arnold* addresses some of the expert-witness conflict-of-interest issues that Ms. Eckstein raises in her article. A summary of the facts and holdings of *Arnold* appears at page 33 of this newsletter.

ENDNOTES

1. *See* American Bar Association, http://www.abanow.org/2012/01/2012mm300/ (withdrawing resolution to adopt Standards of Conduct For Experts Retained By Lawyers) (January 2012).

2. *Id*. § IV.

3. *Wynn v. Commonwealth*, 5 Va. App. 283, 291 (Va. Ct. App. 1987) (citing *Cumbee v. Commonwealth*, 219 Va. 1132, 1138 (1979)) (emphasis added).

4. *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 197 (Va. Ct. App. 1987) (citation omitted).

5. *Smith v. Commonwealth*, 15 Va. App. 507, 511 (Va. Ct. App. 1992).

6. *Koch Ref. v. Jennifer L. Boudreaux MV*, 85 F.3d at 1182 (citing *Mayer v. Dell*, 139 F.R.D. 1, 3 (D. D.C. 1991)); *see also Rhodes v. E.I. Du Pont De Nemours & Co*., 558 F. Supp. 2d 660 (S.D. W. Va. 2008); *Paul v. Rawlings Sporting Goods, Co*., 123 F.R.D. 271, 281-82 (S.D. Ohio 1988); *Shadow Traffic Network v Superior Court of Los Angeles County*, 29 Cal. Rptr. 2d 693, 699-700 (Cal. Ct. App. 1994).

7. *Id*. (citing *English Feedlot, Inc. v. Norden Lab., Inc*., 833 F. Supp. 1498, 1504-05 (D. Col. 1993); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp*., 734 F. Supp. 334, 336-37 (N.D. Ill. 1990)).

8. *Stencel v. Fairchild Corp*., 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2000).

9. *Hewlett-Packard Co. v. EMC Corp*., 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004).

10. *Mayer*, 139 F.R.D. at 3-4 (internal quotations and citations omitted); *see also Wang Laboratories, Inc. v. Toshiba Corp.,* 762 F. Supp. at 1246, 1249 n.5 (E.D. Va. 1991); *Nikkal Ind., Ltd. v. Salton*, 689 F. Supp. 187, 190 (S.D.N.Y. 1988).

11. *Koch Ref*., 85 F.3d at 1182 (quoting *Mayer*, 139 F.R.D. at 4).

12. *Id*. (citing *Nikkal Ind*., 689 F. Supp. at 191-92).

13. *Stencel*, 174 F. Supp. 2d at 1083.

14. *Hewlett-Packard*, 330 F. Supp. 2d at 1095.

15. *United States ex rel., Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc*., 994 F. Supp. 244, 251 (D.N.J. 1997).

16. *English Feedlot, Inc. v. Norden Labs., Inc*., 933 F. Supp. 1498, 1505 (D. Colo. 1993).

17. *Paul v. Rawlings Sporting Goods Co*., 123 F.R.D. 278.

18. *See Bone Care Int'l LLC v. Pentech Pharma. Inc*., 2009 U.S. Dist. LEXIS 7098, *4-5 (N.D. Ill. Feb 2, 2009) (three different experts testifying about different medicinal compositions for treating different disorders were allowed to testify adversely to client); *Atlantic City Assoc. LLC v. Carter & Burgess Consultants, Inc*., 2007 U.S. Dist. LEXIS 1185, *4 (D.N.J. Jan. 5, 2007) (two experts for one client were allowed to testify against their client in another litigation because subjects were unrelated and no confidential information was shared).

19. *See* Virginia Supreme Court Rule 4:1(b)(4).

20. *See Erickson v. Newmar Corp*., 87 F.3d 298, 301-02 (9th Cir. 1996); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26-27 (9th Cir. 1980); *Plasma Physics Corp. v. Sanyo Elec. Co*., 123 F.R.D. 290, 291-292 (N.D. Ill. 1988); *In re Firestorm*, 916 P.2d 411, 415-16 (Wash. 1996); *Heyde v. Xtraman, Inc*., 404 S.E.2d 607, 611-12 (Ga. Ct. App. 1991).

21. *See Erickson*, 87 F.3d at 301-02; *see also*, Va. R. Professional Conduct 3.4(d).

22. *Compare* Alaska Bar Ass'n Ethics Comm., Op. 84-8 (1984) *with* Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985) (bar association reversing its own decision, ultimately prohibiting *ex parte* contacts with adverse experts).

23. *See Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1183 (5th Cir. 1996) ("[W]e are troubled that . . . counsel for the tug interests made several *ex parte* contacts with [the expert] and apparently employed him as their consultant . . ."); *Campbell Indus*., 619 F.2d at 26 (affirming denial of defendant's request to call plaintiff's expert as its own expert witness after revealing defense counsel's *ex parte* contacts with the expert); *Heyde v. Xtraman*, 404 S.E. 2d at 611-12 (affirming exclusion of defendant's testifying expert witness because witness was plaintiff's non-testifying expert before defendant engaged in *ex parte* contacts with him).

24. *Erickson*, 87 F.3d at 304.

25. *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693, 694-95 (Cal. Ct. App. 1994). ✦