Ethical Issues Relating to Expert Witnesses

Ellen A. Yarrell
1900 St. James Place, Suite 850
Houston, Texas  77056
Telephone:  713-621-3332
Facsimile:   713-621-3669
e-mail:  ellen@eayatty.com

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Ethical Issues Relating to Expert Witnesses

I. Introduction:
Attorneys practicing in the State of Texas are regulated by strict and demanding canons of ethics, our Texas Rules of Disciplinary Procedure and Texas Disciplinary Rules of Professional Conduct. As a practical matter, the relationship between the attorney and the expert requires that the expert adhere to the same ethical guidelines as the attorney—and the expert must conform to his or her own professional ethical standards and requirements, as well. This rule applies in the case of retained testifying experts as well as retained consulting experts who will not testify.

Because compliance with ethical standards is of major consequence, both the attorney and the expert owe a responsibility of complete and detailed explanation of each professional’s ethical requirements. Ethical constraints, which indirectly apply to experts, include requirements such as preserving client confidences, avoiding conflicts of interest, protecting the client’s reputation and avoiding the appearance of impropriety when representing the client.

Failure to abide by the attorney’s code of ethics may result in an attorney’s removal from the case. As for the non-attorney expert, disregard for his/her own professional ethics may result in censure or loss of license. We, as attorneys, may be more at risk than our expert, in that the penalties for unethical conduct may be greater—however, the expert who breaches the attorney’s ethical standards may find his/her reputation damaged for any future employment opportunities.

The attorney-expert team is critical to the successful litigation of any case, from complex aviation cases, to a high dollar case or the emotional family law case. Because the stakes are usually high—and the attorney has selected the expert for the client, the potential for tension is ever present.

II. Guidelines for the Expert in Litigation
Experts must be objective, while attorneys are subjective. Understanding that, it is the attorney’s ethical obligation to advocate for his/her client and to zealously argue the evidence in favor of the client, just the opposite is true for the expert who is ethically bound to zealously search for facts and the truth.

Technical fact witnesses with special expertise are ethically required to tell the truth, however, are no enforceable rules to ensure that experts do, in fact, tell the truth. The ethical bottom line is reached upon taking the oath in deposition or at trial. The oath is the one enforceable guideline which must be followed when rendering opinions.

Retained testifying experts have additional ethical obligations. These include the duty to ensure that no conflict of interest exists between the confidences held by the expert for prior clients and the new client from whom one is accepting employment. As mentioned above, many professional organizations have codes of conduct for members. However, some organizations may simply attest to being “honest” and “truthful.” These statements are not laws, and are usually not enforceable by a court. The hiring attorney should not only provide the hired expert with a copy of pertinent Texas Rules of Disciplinary Procedure and Texas Disciplinary Rules of Professional Conduct, but he/she should also secure a copy of any and all statements about ethics from the expert’s professional organization. (Practice Tip—this information may make spirited cross-examination if you are not prepared to cover the issue first.)

III. Effective Consulting Experts
When an attorney hires an expert consultant, there is an expectation that the expert has specialized technical knowledge or significant experience in the field. A significant part of the consulting expert’s job lies in explaining to the attorney what evidence needs to be found, developed and preserved. The attorney knows the rules of evidence, but the expert knows what it takes to make the case. The consulting expert may also provide important research, reference manuals, regulations, industry standards and treatises relevant to the type of litigation. The consulting expert may also assist in deciding whether multiple experts...
are necessary to support the client’s claim. The ethical duty of the consultant to the attorney is to be brutally honest. As attorneys, our expertise lies in presenting the case. Our consultants should be the critics explaining the relative strengths and weaknesses of the case.

IV. **Expert Witness Locator Services—Ethical to Use?**

There are several services available which locate expert witnesses who are available to help in our cases and whose experience is appropriate for a client’s particular case. A panoply of experts is available in almost every area of science, sociology or any other discipline. The primary concern about expert witness locator services is compensation.

Common law rules in almost all states prohibit compensating an expert witness on a contingency fee basis. What about the consulting firm? After several states grappled with the issue, the ABA addressed the question in Formal Opinion 87-354 which involved a medical-legal consulting firm who provided the initial report, medical consultation, and assistance with depositions and trial. The service also included supplying experts to testify. The consulting firm negotiated a contingent fee while the testifying expert was paid a flat fee by the client. The opinion cites concern that the consulting firm retained too much control over the presentation of the case, and that the client may commit to pay the consultant part of the recovery before the attorney knew what the consulting firm’s experts would say in court.

Thus relying on the Model Rules for Professional Conduct 3.4(b) (forbidding inducement offers to a witness that is prohibited by law) and 5.4(a) (forbidding sharing of fees with a non lawyer, and 5.4(c) which requires the attorney to exercise independent judgment on the client’s behalf) the ABA does not endorse contingency fees to expert consulting firms and certainly not to individual experts.

New York State has taken an even more restrictive view of expert compensation. In a case wherein a consulting firm approached an attorney to take a malpractice case on a contingency basis as well as charge the client a separate contingency fee, the consultant, an M.D./J.D, would help the attorney evaluate the case, find and prepare expert witnesses, prepare direct and cross examination of opposing experts. For this service he charged 5-10% of the award. The opinion holds that an attorney may not take the case if he must promise to use that consultant. That arrangement would violate the rule against paying to recommend the attorney’s employment.

In Florida, an attorney was contacted by a consulting service which offered to pay a medical expert an hourly fee to review the medical records of the attorney’s clients. If the consultant found that any physician did not meet the acceptable standard of care, the expert would provide an affidavit to that effect. The Opinion 98-1 (1998) concludes that the ethical problem is that the process requires the use of the services of its own medical consultant.

Pennsylvania Opinion 95-79 (1995) states that such behavior or conduct is unacceptable in that the attorney must “ assure that the court and jury will hear the honest conclusions of the expert unvarnished by the temptation to share in the recovery.”

V. **Compensation of the Expert**

Experts must be qualified. A testifying expert’s fee depends on whether the expert is retained to give expert testimony. If a technical witness is subpoenaed to appear and testify but has not been retained by the attorney, his/her fee will depend on what he/she is asked to do. If the testifying witness is asked to render opinions, formulate new opinions, analyze data in a deposition or trial, the expert should be paid an hourly fee.

Fees should be paid based on the level of expertise and past testifying experience. Rather like the rules for establishing a reasonable attorney fee, the expert witness should testify as to the complexity of the case and his/her own credentials. Normally, the attorney pays the expert fee.

As previously stated, most states follow the common law rule that prohibits compensating an expert on a contingency fee
basis. Early state opinions gave conditional approval to contingency basis fee arrangement with a medical/legal consultant if among other conditions, the consultant’s activity did not constitute the Unauthorized Practice of Law and the fees paid to the expert witness were not contingent on the outcome.

Illinois Ethics Opinion 86-03 (1986) states that an attorney may not hire a witness-hiring agency that will pay the expert it hires to testify and then take a percentage of the outcome. Nor may the client make this contract.

VI. Out of State Experts

In some cases, experts may come from across state lines. Expert Locator services may facilitate the selection of testifying experts who are from out of state. The Academy of Forensic Psychiatry addressed this issue because of concern that experts might cross state lines, offer testimony, get paid, deliver egregiously inaccurate “expert testimony”—and then return to his/her native state without contest or challenge. As a result, the AMA has taken the position that physician expert testimony is the practice of medicine and therefore opens the door for peer review and sanctions by the professional medical examiner board of each state.

VII. Experts and Conflicts of Interest

Attorneys can create problems with and for expert witnesses in several ways. For example, an attorney might communicate with an expert who is currently retained by the other side which action can get the attorney disqualified. In the event an attorney hires an expert who has previously served as an expert for the other side, the expert can be subject to disqualification. In some cases, one side may interview a consultant but decline to retain him/her. If the other side then hires the expert who was consulted but not retained, the party who hires the expert creates the possibility that the expert or the attorney, or both, may be disqualified.

The basis of the disqualification is the conflict of interest rules which affirm the duty of confidentiality and loyalty to the client. In reviewing conflict of interest allegations, courts commonly examine whether one of the parties will be prejudiced by the disclosure of confidences to and from the expert.

a) Attorney Disqualification:

Cases wherein an attorney was disqualified for either retaining or communicating with experts currently or formerly associated with the other side include the following:


United States, for the use of Grimm Const. Co., Inc. v. SAE Civil Construction, Inc. 1996 U.S. Dist. Lexis 3454 D. Neb. 1996 (hired former president of the other side);

Cordy v. Sherwin-Williams Co., 156 F.R.D. 575 (D.N.J. 1994);

MMR/Wallace Power & Indus., Inc. v. Thomas Associates, 764 F. Supp. 712 (D. Conn. 1991);


Shadow Traffic Network, v. Superior Court, 29 Cal. Rptr. 2d 693 (Cal. App. 1994);

County of Los Angeles v. Superior Court, 271 Cal. Rptr. 698 (Cal. App. 1990);

In re American Home Products Corp., 985 S.W.2d 68 (Tex. 1998).

b) Attorneys Not Disqualified:

Cases wherein the attorney was not disqualified include the following:

Erickson v. Newmar Corp., 87 F.3d 298 (9th Cir. 1996)(remanded for lesser sanction);

Cramer v. Sabine Transportation Co., 141 F. Supp. 2d 727 (S.D. Tex. 2001)(court believed lawyer's version of events; discussion of Texas Rule 4.02(b), which specifically forbids unauthorized contacts with other side's experts);

Proctor & Gamble Co. v Haugen, 183 F.R.D. 571 (D. Utah 1998);
English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F. Supp. 1498 (D. Col. 1993);

Toyota Motor Sales, U.S.A., Inc. v. Superior Court, 54 Cal. Rptr. 2d 22 (Cal. App. 1996);

Carnival Corp. v. Romero, 710 So. 2d 690 (Fla. App. 1998).

c) Expert Disqualified:

In the following cases, the court determined that the expert was disqualified because of his current or prior affiliation with the other party, disclosure of information to the other side, or receipt of information from the other side’s expert:

Koch Ref. Co. v. Jennifer L. Boudreau MV, 85 F.3d 1178 (5th Cir. 1996);

Campbell Industries v. M/V Gemini, 619 F.2d 24 (9th Cir. 1980);

Cordy v. Sherwin-Williams Co., 156 F.R.D. 575 (D.N.J. 1994);

Sells v. Wamser, 158 F.R.D. 390 (S.D. Ohio 1994);


Marvin Lumber & Cedar Co. v. Norton Co., 113 F.R.D. 588 (D. Minn. 1986);

Miles v. Farrell, 549 F. Supp. 82 (N.D. Ill. 1982);

Conforti & Eisele, Inc. v. Div. of Bldg. and Const., 405 A.2d 487 (N.J. Super. 1979);


d) Expert Not Disqualified:

In the following cases, the Court ruled the expert was not disqualified:

Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719 (7th Cir. 2000)(other side’s lawyer merely served subpoena on expert to get fact testimony);

In re Ambassador Group, 879 F. Supp. 237 (E.D.N.Y. 1994);

English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F. Supp. 1498 (D. Col. 1993);

Palmer v. Ozbek, 144 F.R.D. 66 (D. Md. 1992);

Mayer v. Dell, 139 F.R.D. 1 (D.D.C. 1991);

Procter & Gamble Co. v. Haugen, 184 F.R.D. 410 (D. Utah 1999);

Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990);


Riley v. Dow Chemical Co., 123 F.R.D. 639 (N.D. Cal. 1989);


Western Digital Corp. v. Superior Court, 71 Cal. Rptr. 2d 179 (Cal. App. 1998);

Nelson v. McCready, 694 A.2d 897 (D.C. 1997);

Graham v. Gielchinsky, 599 A.2d 149 (N.J. 1991)(no new trial, but court enunciated rule that consultants who change sides should not be allowed to testify);

Roundpoint v. V.N.A., Inc., 621 N.Y.S.2d 161 (N.Y. App. 1995);

Connors v. Dawgert, 38 Pa. D. & C.4th 367 (Lackawanna County, Common Pleas 1998);

Donovan v. Bowling, 706 A.2d 937 (R.I. 1998);
In re American Home Products Corp., 985 S.W.2d 68 (Tex. 1998);

In re Firestorm 1991, 916 P.2d 411 (Wash. 1996);


In Nikkal Industries, Ltd. v. Salton Inc. 689 F. Supp 187 (S.D.N.Y. 1988) the District Court defined the rule concerning when an expert is hired for purposes of exclusion. The attorney consulted the expert regarding a marketing issue. The expert was not paid for the consultation, nor was he offered employment at that time. Later, the attorney for the other side retained the expert for his expertise on the marketing techniques in question. The court identified the issue as “whether a party who has consulted with an expert, contemporaneously expressing an interest in a possibly retaining him, but not doing so, is entitled to preclude the opposing party from utilizing the expert’s testimony based on asserted privilege.”

The result was that the expert was not precluded from accepting employment by the second to ask.

e) Expert Contact in Violation of Court Rules

ABA Op. 93-378 (1993) addresses the ethical ramifications of ex parte contact with the opposing party’s expert. Such conduct specifically violates Rule 26(b)(4) of the Federal Rules of Civil Procedure and most state court rules. The opinion further states that the conduct is also a violation of the Model Rule 3.4(c), which states:

A lawyer shall not: “knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . .”

VIII. Special rules for Attorneys Hired as Experts or Consultants

Questions arise when an attorney is hired as either an expert or consultant. Does the attorney have a client? What is the relationship when the attorney is hired as a consultant but not to testify? Can an attorney serve as both expert and consultant in the same case?

The ABA Ethics Committee tackled this complex issue in Op. 97-407 (1997). In its opinion, the committee concluded that an attorney/expert retained to testify does not have an attorney/client relationship with the party retaining him/her. Further, the opinion states that rendering an opinion is not a “law-related” service, which exempts the expert from the stricture of Model Rule 5.7. Much caution is given to the attorney serving as an expert by stating that the status of the relationship should be reduced to writing. In that writing it should be clear that agency law confirms that there is no question that the retained attorney/expert must protect the confidences of the retaining party.

At least three judicial opinions exist concerning attorneys as testifying experts.

1. Commonwealth Ins. Co. v. Stone Container Corp., 2001 U.S. Dist. Lexis 21293 (N.D. Ill. December 20, 2001). In that case the court ruled that the testifying expert did not have a client and that the attorney and his firm were not subject to Rule 1.7(a).

2. Grant v. Lewis/Boyle, Inc., 557 N.E.2d 1136 (Mass. 1990). There an engineer, who was also an attorney was challenged because the defendant in connection with other matters had previously retained the expert. The motion to disqualify was denied based on the fact that the expert had not provided legal representation to either party.

3. W.R. Grace & Co. v. GraceCare, Inc., 152 F.R.D. 61 (D. Md. 1993). Under the facts, a trademark lawyer retained by the defendant had been previously interviewed by the plaintiff’s attorney to be an expert in the same case. Although there was no substantiation that any confidential information was divulged, the court granted the disqualification stating that since the expert was an attorney, all suggestion of impropriety must be resolved in favor of disqualification.
IX. Conclusion

Perhaps the best conclusion is to quote the court in the Nikkal case as follows:

The court stated:

In considering whether [plaintiff] is entitled to its claim of privilege, the court will be guided by the Supreme Court admonitions on the issue of privilege. In general, testimony privileges are not looked upon with favor by the federal courts. The reluctance to broaden the scope of privilege reflects a strong concern with the fundamental precept of American law. Our system of law recognizes that ‘the public . . . has every right to every man’s evidence.’ Furthermore, ‘these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the truth.’

The court concluded:

In reviewing the record, there is no evidence that the meeting constituted anything more than an employment style interview. There was a flow of information which is essentially technical. [Plaintiff] itself characterizes the information as technical. [The expert’s] suggestions to the plaintiff’s counsel were technical and quite specific. Communications based on technical information as opposed to legal advice are not considered privileged. This conclusion is particularly appropriate in the instant case since [plaintiff] has utterly failed to show the court how this technical information is privileged.

The message is clear—attorneys must familiarize themselves with the rules of ethical conduct in order to navigate the treacherous waters of experts and ethical considerations. The selection, retention, preparation and presentation of an expert may make or break the case. However, the attorney who is unprepared or who fails to ensure ethical compliance may be calling his or her liability carrier to assert its duty to defend.
### Table of Authorities

*In re Ambassador Group,*

*In re American Home Products Corp. ,*
985 S.W.2d 68 (Tex. 1998)................................................................................... 4, 6

*American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc. ,*

*Campbell Industries v. M/V Gemini,*
619 F.2d 24 (9th Cir. 1980); .................................................................................... 4

*Carnival Corp. v. Romero,*
710 So. 2d 690 (Fla. App. 1998) ........................................................................... 4

*Commonwealth Ins. Co. v. Stone Container Corp. ,*

*Conforti & Eisele, Inc. v. Div. of Bld’g. and Const. ,*
405 A.2d 487 (N.J. Super. 1979) ........................................................................... 5

*Connors v. Dawgert,*
38 Pa. D. & C.4th 367 ............................................................................................... 6

*Cordy v. Sherwin-Williams Co. ,*
156 F.R.D. 575 (D.N.J. 1994); ............................................................................... 3, 4

*Cramer v. Sabine Transportation Co. ,*
141 F. Supp. 2d 727 (S.D. Tex. 2001) .................................................................. 4

*Donovan v. Bowling,*
706 A.2d 937 (R.I. 1998) .......................................................................................... 6

*English Feedlot, Inc. v. Norden Laboratories, Inc. ,*
833 F. Supp. 1498 (D. Col. 1993) .......................................................................... 4, 5

*Erickson v. Newmar Corp. ,*
87 F.3d 298 (9th Cir. 1996)(remanded for lesser sanction) ..................................... 4

*In re Firestorm 1991,*
16 P.2d 411 (Wash. 1996) ...................................................................................... 6

*Godby v. General Motors Corp. ,*
2000 U.S. App.Lexis 17945 (9th Cir. 2000) ............................................................. 3

*Graham v. Gielchinsky,*
599 A.2d 149 (N.J. 1991) .......................................................................................... 6

*Grant v. Lewis/Boyle, Inc. ,*
557 N.E.2d 1136 (Mass. 1990) ............................................................................... 7

*Great Lakes Dredge & Dock Co. v. Harnischfeger Corp. ,*
734 F. Supp. 334 (N.D. Ill. 1990) ........................................................................... 5

*Koch Ref. Co. v. Jennifer L. Boudreau MV,*
85 F.3d 1178 (5th Cir. 1996); .................................................................................... 4
Marvin Lumber & Cedar Co. v. Norton Co.,
113 F.R.D. 588 (D. Minn. 1986) .......................................................... 5

Mayer v. Dell,

Miles v. Farrell,
549 F. Supp. 82 (N.D. Ill. 1982) .......................................................... 5

Mitchell v. Wilmore,
981 P.2d 172 (Colo. 1999) .......................................................... 5

MMR/Wallace Power & Indus., Inc. v. Thames Associates,

Nelson v. McCreary,
694 A.2d 897 (D.C. 1997); .......................................................... 6

Nikkal Ind., Ltd. v. Salton, Inc.,

Palmer v. Ozbek,

Paul v. Rawlings Sporting Goods Co.,

Procter & Gamble Co. v. Haugen,
184 F.R.D. 410 (D. Utah 1999) .......................................................... 4, 5

Riley v. Dow Chemical Co.,
123 F.R.D. 639 (N.D. Cal. 1989) .......................................................... 6

Roundpoint v. V.N.A., Inc.,
621 N.Y.S.2d 161 (N.Y. App. 1995); .......................................................... 6

457 N.W.2d 549 (Wis. App. 1990) .......................................................... 6

Sells v. Wamser,

Shadow Traffic Network, v. Superior Court,
29 Cal. Rptr. 2d 693 (Cal. App. 1994) .......................................................... 3, 4

Stanford v. Kuwait Airways Corp.,

Tidemann v. Nadler Golf Car Sales, Inc.,
224 F.3d 719 (7th Cir. 2000) .......................................................... 5

Toyota Motor Sales, U.S.A., Inc. v. Superior Court,
54 Cal. Rptr. 2d 22 (Cal. App. 1996) .......................................................... 4

United States, for the use of Grimm Const. Co., Inc. v. SAE Civil Construction, Inc.

W.R. Grace & Co. v. Gracecare, Inc.,
152 F.R.D. 61 (D. Md. 1993) .......................................................... 5, 7
Wang Laboratories, Inc. v. Toshiba Corp.,

Western Digital Corp. v. Superior Court,
71 Cal. Rptr. 2d 179 (Cal. App. 1998) ................................................................. 6
APPENDIX A

Opinion 513
June 1995

QUESTIONS PRESENTED

Can a Certified Public Accountant employed as an internal controller by a law firm, ethically testify as an expert in a case in which the law firm is employed?

DISCUSSION

Texas Disciplinary Rule 3.08 states that a lawyer shall not act as attorney in a case in which he or she knows or believes that the lawyer is or may be called as a witness, unless the testimony falls within one of the exceptions set out in the rule. Although this rule does not precisely address the service of attorneys as expert witnesses, the rule is applicable here as described in Warrilow v. Norrell, 791 S.W.2d 515 (Tex.App.--Corpus Christi 1989, writ denied). In this case, the appeals court found that the trial court abused its discretion by allowing one of the party's attorneys to testify as an expert witness. The court stated that a different expert witness could have and should have been used.

Rule 5.03 of the Texas Disciplinary Rules makes such rules applicable to nonlawyers who are employed by, retained by or associated with a lawyer. Such lawyer shall make reasonable efforts to ensure that the non-lawyer is in compliance with these rules. Therefore, under Rule 5.03, if an attorney may not testify as an expert witness, neither may an employee of that attorney serve as a testifying expert witness.

Furthermore, as a testifying expert witness, the accountant's working papers, reports and any material reviewed by the accountant would be subject to discovery. The use of the law firm's in-house Certified Public Accountant could lead to a waiver of attorney-client privilege once he is designated a testifying expert. According to Texas Disciplinary Rule 1.05, no exceptions exist in this situation for the lawyer to waive that privilege. As discussed above, if the lawyer cannot waive the attorney-client privilege, neither can an employee of that lawyer. Therefore the naming of the employee as an expert witness could constitute a violation of Rule 1.05 because of the waiver of the attorney-client privilege.

CONCLUSION

A lawyer who uses an in-house accountant as a testifying expert witness would be in violation of Texas Disciplinary Rules 5.03, 3.08, and 1.05, unless the accountant's testimony is the same nature as would permit an attorney to testify as an expert on a case in which he is representing a party.
United States District Court,  
S.D. New York.

NIKKAL INDUSTRIES, LTD., Plaintiff,  
v.  
SALTON, INC., Defendant.  
No. 87 Civ. 6092 (CHT).  

Plaintiff filed complaint alleging that defendant's advertising violated the Lanham Act and New York's General Business Law. Defendant filed counterclaims asserting similar allegations about the plaintiff's advertising. Plaintiff filed a motion to disqualify a prospective defense witness. Upon the magistrate's report and recommendation, the District Court, Tenney, J., held that: (1) the clearly erroneous or contrary to law standard governed review of magistrate's ruling; (2) the magistrate's factual findings were not clearly erroneous; and (3) the plaintiff failed to establish that any communications made during a consultation with the expert were privileged or that it had not waived any possible privilege attaching to the communications. Motion to disqualify witness denied.

West Headnotes

[1] United States Magistrates k29  
394k29

Clearly erroneous or contrary law standard applied to reviewing magistrate's denial of plaintiff's motion to disqualify prospective expert witness for defense; magistrate's decision did not dispose of litigation. 28 U.S.C.A. ss 636, 636(b)(1), (b)(1)(A).

[2] Evidence k545  
157k545

Evidence supported magistrate's finding that plaintiff did not intend to retain market research expert, for purposes of plaintiff's motion to disqualify expert as prospective defense witness.

[3] Evidence k545  
157k545

Magistrate acted reasonably in assessing credibility for purposes of ruling on plaintiff's motion to disqualify prospective defense expert witness; parties differed sharply about whether plaintiff had imparted any privileged information to expert during earlier consultation.

[4] Evidence k545  
157k545

Magistrate's finding that plaintiff's consultation with market research expert did not involve privileged communication was not clearly erroneous, for purposes of plaintiff's motion to disqualify expert as prospective defense witness.

[5] Evidence k545  
157k545

Evidence supported magistrate's finding that plaintiff did not retain market research expert, for purpose of plaintiff's motion to disqualify expert as prospective defense witness; expert had emphasized to plaintiff that he wished to be paid for his advice at meeting, expert continually testified that he was never retained by plaintiff, and there was no evidence to contradict expert's testimony.

[6] Evidence k545  
157k545
Plaintiff had burden of showing that it did not waive any privilege for purposes of plaintiff's motion to disqualify market research expert as prospective defense witness; defendant did not have burden of showing that privileged information was not communicated at meeting between plaintiff and expert.

Plaintiff failed to show how technical information it provided to market research expert during employment-style interview was privileged, for purposes of plaintiff's motion to disqualify expert as prospective defense witness.

Whatever relationship market research expert had with plaintiff during consultation, relationship was not one of attorney and client and, thus, attorney-client privilege never existed.

Plaintiff's decision not to retain market research expert waived any right to claim privilege with respect to communications made at consultation with expert, for purpose of plaintiff's motion to disqualify expert as prospective defense witness.

Whatever relationship market research expert had with plaintiff during consultation, relationship was not one of attorney and client and, thus, attorney-client privilege never existed.

Plaintiff had burden of showing that it did not waive any privilege for purposes of plaintiff's motion to disqualify market research expert as prospective defense witness; defendant did not have burden of showing that privileged information was not communicated at meeting between plaintiff and expert.

Evidence

12

Plaintiff failed to show how technical information it provided to market research expert during employment-style interview was privileged, for purposes of plaintiff's motion to disqualify expert as prospective defense witness.

Whatever relationship market research expert had with plaintiff during consultation, relationship was not one of attorney and client and, thus, attorney-client privilege never existed.

Plaintiff's decision not to retain market research expert waived any right to claim privilege with respect to communications made at consultation with expert, for purpose of plaintiff's motion to disqualify expert as prospective defense witness.

**BACKGROUND**

In early October 1987, Beth Rosenbloom ("Rosenbloom"), an attorney for Nikkal, contacted Dr. Robert C. Sorensen ("Sorensen") in reference to this litigation. Transcript [FN1] ("Tr.") at 10-11. Sorensen is a market research expert. Tr. at 6-8.

Rosenbloom's objective was to ascertain whether Sorensen would be interested in becoming employed by Nikkal as an expert witness. [FN2] Tr. at 11. Rosenbloom also made it clear that Nikkal was contacting other possible experts as well. Id. Shortly thereafter, Rosenbloom telephoned Sorensen again and arranged for a meeting to take place. Id. Sorensen voiced concern that his advice would go uncompensated and therefore requested remuneration. Tr. at 11-12, 22-23. Rosenbloom agreed to pay Sorensen for his attendance at the meeting and forwarded various publicly available documents to him. Tr. at 11-13.

**OPINION**

TENNEY, District Judge.

This case involves advertising claims for home ice cream makers. Plaintiff Nikkal Industries, Ltd. ("Nikkal") filed a complaint against defendant Salton, Inc. ("Salton") alleging that defendant's advertising violated the Lanham Act, 15 U.S.C. s 1125 (1982 & Supp.1987), and sections 349 and 350 of the New York General Business Law (McKinney 1968 & Supp.1987). Defendant made counterclaims asserting that Nikkal's advertising violated the same statutory provisions. Nikkal's complaint seeks damages, and preliminary and permanent injunctive relief. Judge Leonard B. Sand previously ruled that Nikkal was not entitled to any preliminary relief. Nikkal then made a motion to disqualify a defense witness who may testify as an expert.

The issue was sent to Magistrate James C. Francis IV for a Report and Recommendation ("Report"). In the interim, the case was transferred to this court. Magistrate Francis recommends that Nikkal's motion be denied. For the reasons set forth below, the court finds that Magistrate Francis's Report was correct. Accordingly, Nikkal's motion is denied.

FN1. The Transcript refers to the proceedings at the evidentiary hearing held on March 3, 1988 presided over by Magistrate Francis. Parts of the hearing
were held in camera because Nikkal claimed the testimony was confidential.

FN2. Sorensen had worked in the past for both Nikkal and Salton. Tr. at 24, 27-28.

On October 13, 1987, Sorensen attended the meeting which was held at the offices of Nikkal's counsel. Those present included three of Nikkal's attorneys and its vice president for marketing, Charles J. Johnson ("Johnson"). Johnson furnished Sorensen with information about Nikkal useful in conducting a market survey. Tr. at 49-50. He also gave to Sorensen information concerning marketing and sales methods which he considered privileged. Tr. at 54-56. Sorensen advised Nikkal on how to perform market research and provided Nikkal with an estimate of the cost. Tr. at 37-38. In addition, some of the contested advertising was displayed at the meeting. Tr. at 64. The remainder of the meeting involved discussions of the essential issues of the case, and potential techniques for conducting a market survey. Tr. at 14-16, 26, 35-42. The meeting lasted about ninety minutes. Tr. at 16, 49. At the conclusion, Nikkal informed Sorensen that if they wished to utilize his services they would contact him within a couple of days. Tr. at 16.

*189 After waiting ten days, Sorensen called Jonathan Ginsburg ("Ginsburg"), an attorney for Nikkal, and inquired about the status of his relationship with Nikkal. Ginsburg told Sorensen that Nikkal had retained another expert. Tr. at 16-17. Ginsburg offered to pay Sorensen for his attendance at the meeting and for any time spent reviewing the case. Tr. at 19.

Sorensen declined to accept the offer since he felt that his relationship with Nikkal was insufficient to justify compensation. Id. This final contact between Sorensen and Nikkal ended with Ginsburg suggesting that Sorensen might be retained in the future. Tr. at 18.

On November 24, 1987, David Koenigsburg ("Koenigsburg"), an attorney for Salton, telephoned Sorensen regarding his possible retention by Salton as an expert witness. Sorensen informed Koenigsberg of his prior contact with Nikkal in regard to this litigation. Tr. at 8. A few days later Salton contacted Sorensen and both sides entered into an oral agreement. Tr. at 9. Sorensen's primary duty was to evaluate the reliability of any market research techniques offered at trial by Nikkal. Tr. at 9-10.

DISCUSSION

A. Standard of Review

[1] Plaintiff argues that "[a]s is well settled, the Magistrate's fact findings are fully reviewable by the court." Plaintiff's Memorandum of Objections ("Pl.Mem.") at 11. This mistaken assertion is rejected by the court. In reviewing Magistrate Francis's findings, the court will be guided by the Judicial Procedure Act, 28 U.S.C. s 636 (1986), which directs that one of two standards are applicable in the instant situation. Either a de novo review or a clearly erroneous standard will be employed. The standard depends on whether the issue decided by the magistrate is dispositive or non-dispositive.

A district judge is authorized under 28 U.S.C. s 636(b)(1) to have a magistrate decide any pretrial matter except certain specified motions. These motions are ones deemed by Congress to be dispositive. See United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Under Section 636(b)(1)(A) the magistrate's decision does not dispose of the litigation. As a result, Congress vested the magistrate's findings with a substantial degree of authority. Therefore, a district court will only reverse a magistrate's findings if they are "clearly erroneous or contrary to law."

However, if the issue referred to a magistrate is made pursuant to section 636(b)(1)(B), then the matter is deemed a dispositive one and the court's review is governed by a de novo standard. A de novo review involves the court making its own determination based upon "[the] ... record [developed before the magistrate], without being bound to adopt the findings and conclusions of the Magistrate."
Ethical Issues Relating to Expert Witnesses

Chapter 19


The matter referred to Magistrate Francis was non-dispositive and therefore a clearly erroneous standard governs. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." Agricultural Services Ass'n Admin. v. Ferry-Morse Seed Co., 551 F.2d 1057, 1071 (6th Cir.1977), quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 541-42, 92 L.Ed.2d 746 (1948). Consistently, it has been held that a magistrate's report resolving a discovery discourse between litigants should be afforded substantial deference and be overturned only if found to be an abuse of discretion. See Empire Volkswagen, Inc. v. World Wide Volkswagen Corp., 95 F.R.D. 398, 399 (S.D.N.Y.1982), judgment aff'd, 814 F.2d 90 (2nd Cir.1987); Detection Systems, Inc. v. Pittway Corp., 96 F.R.D. 152, 154 (W.D.N.Y.1982). Accordingly, the court will not overturn Magistrate Francis's Report unless the ruling is clearly erroneous or contrary to law.

B. Alleged Errors

1. Factual

Magistrate Francis found that Nikkal's meeting with Sorensen amounted to no more than "a comprehensive employment interview." Report at 6. Furthermore, "counsel did not supply Dr. Sorensen with data specific enough for him to form even a preliminary view of the merits of the litigation." Id. "Finally, since Dr. Sorensen was not retained by Nikkal, any disclosure to him of plaintiff's legal theories constituted a waiver of protection otherwise afforded to work product." Report at 9.

Nikkal vehemently opposes the Report for the following reasons. First, the Magistrate erred in concluding that Nikkal informed Sorensen that his services were not desired. Second, the Magistrate used an "unseemly" approach by presuming he had to resolve a credibility contest between both sides. Third, the Magistrate erred in finding that the consultation did not involve privileged communications. Fourth, the Magistrate was wrong in finding that Nikkal did not retain Sorensen.

(a) Alleged error regarding Nikkal's intent to hire Sorensen

[2] Nikkal's contention is rejected because there was evidence to support the Magistrate's finding. Tr. at 16-18, 24, 32. In addition, it is beyond question that Nikkal never in fact utilized Sorensen's services. Tr. at 17-18. During the first and final communication subsequent to the meeting, Sorensen was told that Nikkal had hired someone else. Tr. at 17. After being so informed, Sorensen discarded the materials which Nikkal had furnished him. See Affidavit of Robert C. Sorensen, p 19, sworn to February 11, 1988 attached to Exhibit ("Exh.") E of Pl.Mem. Consequently, Magistrate Francis's finding was supported by the evidence.

(b) The Magistrate's weighing of credibility

[3] The court will not dwell for any great length upon this contention since it borders on the frivolous. To suggest that Magistrate Francis acted in an unseemly fashion by taking credibility into account is absurd because there were in fact sharply differing versions of what occurred at the meeting. It was for this very purpose, namely to determine whether Nikkal had imparted any privileged information to Sorensen, that Judge Sand referred the matter to Magistrate Francis. Accordingly, Magistrate Francis acted quite reasonably in taking credibility into account.

(c) The finding of non-privileged communication

[4] This contention is equally meritless. The court has studied the record and finds that
Magistrate Francis had ample familiarity with this litigation in its pretrial stage. The Magistrate presided over various settlement and pretrial conferences. Thus, Magistrate Francis's knowledge of the litigation allowed him to resolve the question of whether the communications between Nikkal and Sorensen were privileged.

(d) The finding that Nikkal did not retain Sorensen

[5] There is sufficient evidence in the record to support the Magistrate's finding. Sorensen had emphasized to Nikkal that he wished to be paid for his advice at the meeting. Tr. at 11. This supports the finding that the meeting was a type of informal consultation rather than the commencement of a long term relationship. Moreover, Sorensen continually testified that he was never retained by Nikkal. Tr. at 17-18, 23-24, 29-30. He was in fact told that someone had been hired. Tr. at 17. Sorensen's unrebutted testimony coupled with the complete absence of any evidence to the contrary supports the Magistrate's finding. Accordingly, the court finds that there is evidence in the record to support the finding.

2. Legal Errors

Having dealt with the factual objections, the court now focuses on the legal objections. *191 The objections are numerous and can be tersely characterized as Nikkal's assertion that the "Report subverts and perverts the objectives of the rules of law...." Pl.Mem. at 12.

The issue presented is whether a party who consulted with an expert, contemporaneously expressing an interest in possibly retaining him, but not doing so, is entitled to preclude the opposing party from utilizing the expert's testimony based on asserted privilege.

(a) Federal or State Law

[6] As an initial matter, the court must determine whether the privilege sought to be invoked by Nikkal is governed by either federal or state law. The complaint herein alleges violation of the Lanham Act as well as pendent state law claims. The dispute over the potential testimony of the expert witness would be relevant to both claims. The Second Circuit has held that in such situations the claimed privilege is controlled by rules of federal rather than of state law. von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir.), cert. denied, --- U.S. ----, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987). Therefore, the court will apply federal law to decide whether Nikkal's asserted privilege should be recognized.

It is axiomatic that a privileged communication, even if highly relevant to the litigation, is non-discoverable pursuant to Fed.R.Civ.P. ("Rule") 26(b). Under Rule 26(b)(1) "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." (Emphasis added).

Nikkal argues that the burden falls on Salton to show that privileged information was not communicated at the meeting. Pl.Mem. at 11-12. To the contrary, it is well settled that the party in civil litigation who claims a privilege has the burden of establishing the existence of the privilege. "That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." In re Bonanno, 344 F.2d 830, 833 (2d Cir.1965). See 8 C. Wright & A. Miller, Federal Practice & Procedure s 2016 at 126 (1970). Moreover, the party seeking to invoke a privilege has the burden of establishing non-waiver of the privilege. Id. One need not show the intent to waive a privilege since a waiver may occur absent intent. In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C.Cir.), cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979). A legal scholar has stated:

A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.

8 Wigmore, Evidence s 2327 at 636 (McNaughton rev. 1961). This places the
burden of establishing non-waiver squarely on Nikkal.

(b) The Asserted Privilege

[7] In considering whether Nikkal is entitled to its claimed privilege, the court will be guided by Supreme Court admonitions on the issue of privilege. In general, testimonial privileges are not looked upon with favor by federal courts. The reluctance to broaden the scope of privilege reflects a strong concern with a fundamental precept of American law. Our system of law recognizes that "the public ... has a right to every man's evidence." United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed.2d 884 (1950). Furthermore, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974).

In reviewing the record there is no evidence that the meeting constituted anything more than an employment style interview. There was a flow of information which was essentially technical. Nikkal itself characterizes the information as technical. Sorensen's "suggestions to plaintiff's counsel were technical and quite specific...." Pl.Mem. at 8 n. 6. Communication based upon technical information as opposed to legal advice is not considered privileged. Status Time Corp. v. Sharp Electronics, 95 F.R.D. 27, 31 (S.D.N.Y.1982); Eutectic Corp v. Metco, 61 F.R.D. 35, 40-41 (E.D.N.Y.1973). This conclusion is particularly appropriate in the instant case since Nikkal has utterly failed to show the court how this technical information is privileged.

[8] Nikkal claims that Sorensen should be held to the standard of an attorney. [FN3] Pl.Mem. at 21-22. The court is cognizant that an attorney-client relationship results when legal advice is sought from a legal adviser. 8 Wigmore, Evidence s 2292 (McNaughton rev. 1961). However, there is no evidence that Sorensen offered legal advice of any kind. Whatever association Sorensen had with Nikkal in October of 1987 it was not that of an attorney and client but merely a consultation. Nikkal's allegations amount to little more than bare assertions. None of Nikkal's witnesses at the hearing which occurred a mere five months after the alleged relationship was consummated could identify any legal advice furnished by Sorensen. Therefore, the court concludes that an attorney-client relationship never existed.

FN3. Yet Nikkal also states "Sorensen is not a lawyer ... and it was not his job to opine on the merits of the litigation." Pl.Mem. at 17 n. 9 (emphasis in original). This inconsistency need not be addressed since the record is void of any evidence that privileged information of any type was discussed at all during the October 13, 1987 meeting. Consequently, regardless of what standard of privilege would apply to Sorensen, the court agrees with Magistrate Francis that no privileged information was divulged at the meeting.

[9] Finally, the Magistrate found that since Nikkal had decided not to retain Sorensen it waived any right to claim privilege. As mentioned above, Nikkal has the burden of proving non-waiver. Nikkal has failed to meet its burden because it has not brought forth any evidence of non-waiver.

CONCLUSION

The court finds that there was sufficient evidence to support the Magistrate's factual findings. In addition, the court also finds that the Magistrate's recommendation was not clearly erroneous. The court agrees with Magistrate Francis that the record is void of any evidence that privileged communication was discussed. Accordingly, the court will not disqualify the defendant's witness. So ordered.

END OF DOCUMENT