Outline of Ethical Issues Related to Expert Witnesses

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Chapter 19.1
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Amon Burton has taught professional responsibility at the University of Texas School of Law for the past thirteen years; his law practice today primarily involves advising law firms on legal ethics and professional liability issues. Since 1993 he has served on the Texas Supreme Court’s Professional Ethics Committee that issues ethics opinions interpreting the Texas Disciplinary Rules of Professional Conduct. Mr. Burton was an active member of the American Law Institute’s committee that drafted the recently published *Restatement of the Law Governing Lawyers* and he currently serves by appointment of the National Council Bar Examiners as one of the six members of the committee that drafts the Multistate Professional Ethics Examination (MPRE) used by states in the licensing of attorneys.
A recent law review article referred to the ethics and professionalism of expert witnesses as an “undeveloped field” in modern litigation.\(^1\) A major reason is that the ethics rules adopted by most professional groups simply do not address ethical issues that can arise when members of a profession are retained to serve as an expert in litigation. Existing case law that has addressed these issues has focused primarily on confidentiality. Since confidentiality is a fundamental element in conflicts of interest standards, courts have often decided these cases by referring to conflict of interest rules.

I. Ethics Rules

The Texas Disciplinary Rules of Professional Conduct provide limited guidance in dealing with ethical issues related to expert witnesses. Disciplinary Rule 3.04 (b) prohibits payment of compensation to any witness that is contingent upon the content of the testimony or the outcome of the case; however, this rule expressly permits a reasonable fee to be paid for professional services of an expert witness. Disciplinary Rule 4.02(b) prohibits a lawyer from communicating about the subject of the representation with non-fact witnesses--persons who the lawyer knows is currently retained by the opposing side for the purpose of conferring with or obtaining advice, unless the prior consent is obtained from the lawyer who retained the expert or unless the communication is otherwise authorized by law. Texas Disciplinary Rule 4.02(b) states:

“In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

The Comments to Rule 4.02(b) clarify that experts are included within the scope of this Rule. Correspondingly, the ABA Model Rules do not expressly prohibit *ex parte* contacts with a retained expert, but ABA Formal Ethics Opinion 93-378 (1993) held that such conduct may violate Model Rule 3.4(b), which prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-378 (1993).

An unpublished opinion issued in 1998 by the Houston Court of Appeals [14th District] affirmed a trial court’s denial of a new trial to a party who later learned that her retained expert witness had been concurrently employed as an expert in an unrelated case

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by the law firm representing the opposing party. *Patterson v. Landua*, 1998 Tex. App. LEXIS 3694 (Tex.App.-Houston [14th Dist] 1998). The party seeking a new trial argued that this constituted a conflict of interest and because of Disciplinary Rule 4.02(b) she was entitled to a presumption that confidences had been shared between her expert and the law firm who representing the opposing party (and concurrently had hired her expert in an unrelated case).

The law firm representing the opposing party stipulated that it did not employ a screening process when selecting and retaining trial experts, and the attorney in such firm who represented the opposing party denied any knowledge of the expert’s involvement in the other case being handled by her firm.

The court of appeals articulated several reasons for denying a new trial: 1) a dearth of precedent, noting that movant did not cite any statutes or case law that applies a presumption of impropriety in the concurrent hiring of an expert witness; 2) Rule 4.02(b) states that “a lawyer shall not communicate or cause another to communicate about the subject of representation with a person ... a lawyer knows to be ... retained for the purpose of ... advising another lawyer about the subject of the representation.” (italics in court opinion); further, the Comments to Rule 4.02(b) explain that the rule “provides...experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter....” (italics in court opinion); 3) movant presented no evidence that supported an assertion that the law firm had any improper contact as defined in Rule 4.02(b) with the expert at any time during the case; and 4) the trial court had granted movant’s request to depose the expert to fully investigate the situation and movant did not pursue or obtain the expert’s testimony.

II. Disqualification of Lawyers, Law Firms and Experts

A. *Shadow Traffic and Gracecare* Cases

The opinions in two cases illustrate how courts have addressed confidentiality and conflicts of interest involving expert witnesses and the lawyers who hired them.

In *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693, 699 (Cal. Ct. App. 1994) lawyers at Andrews & Kurth (“A&K”) met with certain accountants at Deloitte & Touche (“Deloitte”) to consider hiring Deloitte to provide expert testimony in certain litigation. At this meeting A&K conveyed confidential client information to Deloitte. Ultimately, Deloitte was not retained by A&K, but rather by the adversary’s law firm, Latham & Watkins (“Latham”). When A&K’s objected, Deloitte agreed to withdraw, in part because of the confidentiality issues. A&K then sought to disqualify Latham on the grounds that it had gained access to privileged and confidential communications through its contacts with Deloitte.
The trial court disqualified Latham, and the appellate court affirmed:

Deloitte was privy to confidential information about Metro’s action against Shadow, including counsel’s theories on damages. Damages was the very topic [the Latham attorney] conceded he had discussed with [Deloitte]. Even assuming that [the Latham attorney] did not expressly ask [Deloitte] about the contents of his discussion with A&K and that [Deloitte] did not explicitly disclose the information to [the Latham attorney], [Latham] could still obtain the benefit of the information because the data, consciously or unconsciously, could shape or affect the analysis and advice [Deloitte rendered]. Given that both Metro and Shadow consulted [Deloitte] on the same issue—Metro’s damages—it is highly unlikely that [Deloitte] could consciously discharge his duty to Shadow as its retained expert and at the same time discharge his duty not to divulge confidential information received from Metro. 29 Cal. Rptr. 2d at 704.

Similarly, in W.R. Grace & Co. v. Gracecare, Inc. 152 F.R.D. 61 (D. Md. 1993), the court disqualified a trademark attorney (Mr. Allen) whom the defendant had retained only as an expert witness for trial, and who had not entered an appearance as an attorney in the case. Prior to being retained as an expert for the defendant, Mr. Allen had two telephone conversations about this matter with the plaintiff’s attorney in which issues of trademark law in the case were discussed, including the possibility and appropriateness of expert testimony on legal issues, and arguments defendants were making. Mr. Allen billed for this time. He could not recall the content of the conversations.

The court reiterated the well-established principles that the attorney-client relationship is a confidential one in which attorneys are held to a high standard, that an attorney may not represent a client against a former client if the subject matter of the litigation is substantially related, and that a substantial relationship is presumed where there is “a reasonable probability that confidences were disclosed” which could be used adversely later. Id. at 65. Applying these principles to the facts before it, the court disqualified the attorney-expert. The court held that, under these circumstances,

... it was reasonable for [plaintiff’s counsel] to assume that the relationship he was developing was confidential. The duration of that relationship may have been minimal. No confidences regarding a substantially related matter may have passed. The contact may have been nothing more than a job interview. Regardless of these possibilities, the duties of an attorney-expert are greater than the ordinary expert. [Plaintiff’s counsel] was speaking to another attorney and it is reasonable to assume that the contact took on a confidential character because of Mr. Allen’s
profession and proposed role alone.... Indeed, it is the scenario and Mr. Allen’s status as an attorney which counsels resolving all doubts in favor of disqualification to avoid the appearance of impropriety and to preserve the integrity of this proceeding. Accordingly, Mr. Allen is disqualified. 152 F.R.D. at 65-66.

B. Texas Supreme Court Opinion in In re American Home Products Corp.

A defendant in the Norplant litigation filed a motion to disqualify two plaintiff lawyers because they designated a physician as a testifying expert who previously had met on several occasions with defendant’s counsel. Moreover, the physician had previously accepted a retainer of $1,000 to act as a consultant to the defendant in this particular litigation. The defendant contended that it had conveyed confidential information to the consultant and these confidences presumably had been shared with the plaintiffs’ counsel. The physician subsequently returned the $1,000.

So why did the Texas Supreme Court affirm the trial court’s refusal to grant a motion to disqualify plaintiffs’ lawyers under these facts? The Court’s opinion in In re American Home Products Corp. 985 S.W.2d 68 (Tex. 1998) revealed an additional crucial fact: namely, that the defendant had been unaware when it retained the physician as a consultant that he was a treating physician for at least some of the Norplant plaintiffs.

Guidance for determining when and the extent to which communications with an expert are discoverable are found in the civil procedure rules. Rule 166b(2)(e) of the Texas Rules of Civil Procedure provided, in part, that the discovery of facts know, mental impressions and opinions of experts relevant to a pending matter and that were acquired or developed in anticipation of litigation may be obtained only as follows:

“(1) In General. A party may obtain discovery of the identity and location . . . of an expert who may be called as an expert witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert.”

The Court pointed out that since the physician was a treating physician for some of the plaintiffs, he was subject to being called as an expert witness by the plaintiffs. Even though some of the earlier communications between the defendant and plaintiffs’ expert witness may have been in anticipation of litigation, under the specific language of 166b(2)(e) the facts known to this expert were subject to discovery “regardless of when the factual information was acquired.” Accordingly, the Court held: “It follows that if communications with an expert may be discovered during the course of litigation by opposing counsel, that information cannot be considered confidential, and the fact that it

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2 Rule 166b was superseded by Rule 195.4 of the revised Texas Rules of Civil Procedure, effective January 1, 1999. However, new Rule 195.4 includes the same language on discovery, i.e. “…the facts known to the expert (regardless of when the factual information was acquired).”
has been shared with opposing counsel cannot be the basis for disqualification.” 985 S.W.2d at 73.

It should be pointed out that access to information possessed by consulting experts, as contrasted to testifying experts, is treated differently. The Supreme Court stated in In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001) that Rule 192.3(e) of the revised Texas Rules of Civil Procedure provides that a party is not required to disclose the identity, mental impressions, and opinions of consulting experts. This language was deemed “sufficiently clear that information about consulting experts was confidential.” In an earlier opinion the Supreme Court stated that the consulting expert privilege applies to a person who has been informally consulted or who has been retained in anticipation of litigation or preparation for trial if the expert will not be called to testify at trial and no testifying expert has reviewed the consulting expert’s conclusions. In re Ford Motor Co., 988 S.W.2d 714 (Tex. 1998).

C. Lawyers Disqualified. Attorneys were disqualified for retaining, or communicating with, experts currently or formerly associated with the opposing side in the following cases:


D. Lawyers Not Disqualified. Attorneys were not disqualified for retaining, or communicating with, experts currently or formerly associated with the opposing side in the following cases:


In the Cramer case decided in 2001, a federal district court in Galveston refused to disqualify an attorney who allegedly communicated with the plaintiff’s expert. The court refused to disqualify the attorney because the plaintiff did not allege that any confidential information, or any specific information beyond vague generalities, was discussed and the court indicated it believed the attorney’s version of the facts.

3 Cases listed in subsections C, D, E and F are referenced in William Frievogel’s excellent web site on conflicts of interest: www.frievogelonconflicts.com.
D. Expert Disqualified. In the following cases, a court disqualified an expert because of his or her current or prior affiliation with the opposing side, or because of having disclosed information to the other side, or because of having obtained information from the opposing side's expert:


F. Expert Not Disqualified. In the following cases, the court did not disqualify the expert:


G. Recent Law Review Articles.

There are several recent law review articles that have insightful discussions of this topic. See Richmond, Expert Witness Conflicts and Compensation, 67 Tenn. L.R. 909 (2000); Murphy, Expert Witnesses at Trial: Where Are the Ethics, 14 Geo. J. Legal Ethics 217 (2000); and Lubet, Expert Witnesses: Ethics and Professionalism, 12 Geo. J. Legal Ethics 465 (1999).
III. Attorney Who Serve as Expert Witness

What is the status of an attorney who serves as an expert witness in litigation and is he subject to the attorney conflicts of interest rules?


ABA Formal Ethics Opinion 97-407 (1997) of the ABA Standing Committee on Ethics and Professional Responsibility deals with issues related to an attorney’s role as an expert witness. This opinion distinguishes between attorneys testifying as an expert witnesses and those serving as a consultant, and states than an attorney serving solely as a testifying expert witness does not establish a client-lawyer relationship with the party or provide a “law-related service” as defined in ABA Model Rule 5.7. Hence, the attorney expert witness in that role is not subject to the current client or former client conflicts of interest rules set forth in the ABA Model Rules. The opinion recommends that the testifying expert make his role clear at the outset of the engagement to avoid any misunderstanding. The opinion, however, goes on to caution that the attorney expert may be limited in a concurrent representation of a client in a matter adverse to the party for whom the expert is to testify.

B. Recent Federal District Court Case on Attorney Expert Witness

In Commonwealth Insurance Co. v. Stone Container Corp., 2001 U.S. Dist. LEXIS 21293 (N.D. Illinois Dec. 2001), a federal district judge addressed the issue of whether the conflicts of interest rules which are binding upon attorneys precludes an attorney in a law firm from serving as a testifying expert for a third party who is currently engaged in unrelated litigation with one of the law firm’s current clients.

The facts in this case were: the Heller Ehrman law firm represented Stone in a joint venture transaction in China. Stone was simultaneously engaged in unrelated litigation with a party named Aon; in that lawsuit Stone was represented by other legal counsel. After the China transaction closed (but while the Heller Ehrman firm was continuing to do follow up work on that China transaction for Stone), Aon hired a partner at Heller Ehrman who had not performed any work on the China joint venture transaction to serve as a testifying expert for Aon in its litigation with Stone. Stone moved to disqualify the attorney expert, as well as the law firm representing Aon in the litigation.

The court held that an attorney who is hired as a testifying expert in a case does not have an attorney-client relationship with the attorney or party who hired him as a testifying expert because there were no expectations of confidentiality in the relationship. In addition, the opinion stated that state professional ethics rules governing conflicts of interest in the circumstance where an attorney serves as a testifying expert.