Ethical Issues For Lawyers And Experts

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A. Retaining The Testifying Expert

• A written engagement letter accepted by both the attorney and his or her client should clearly set forth the expectations of the expert. ABA Formal Op. 97-407 (1997).

  o The engagement letter should define the relationship, including the scope and limitations, such as whether the expert may accept potentially adverse engagements for the duration of the retention and the expert’s options in the event he or she is discharged or released from the engagement.

  o The engagement letter should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences.

  o The engagement letter should set forth the fee agreement with the expert.

  o It is the attorney’s responsibility to make sure his or her client is fully informed as to the nature of the testifying expert’s role. Model Rule of Professional Conduct 1.4.

B. Independence and Objectivity of Experts

• Expert testimony rests on the assumption that expert witnesses are independent of retaining counsel, and that they have to testify sincerely.

• Expert testimony is only permitted if the expert’s “specialized knowledge will assist the trier of fact to understand the evidence.” Fed. R. Evid. 702. The fact finder’s understanding of the evidence, however, will not be assisted if the expert’s opinion is not candid and based on his or her own investigation, research and understanding.

• An independent expert is not affected by the goals of the litigant by whom he or she is retained and is not hesitant to reach an opinion that fails to support the client’s legal position.

What Is Ethically Acceptable When An Attorney Works With An Expert?

1 Special thanks to Professor Steven Lubet of Northwestern University School of Law, upon whose article, “Expert Witnesses: Ethics and Professionalism,” 12 Geo. J. Legal Ethics 465 (1999), this presentation is based, with his permission. Professor Lubet also authored a valuable book published by the National Institute of Trial Advocacy entitled, Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them (1998), which contains a chapter on Ethics and Professionalism. Additional thanks to Katherine Grosh, my associate at Beermann Swerdlove LLP, for her research assistance with this presentation.
• Experts depend on retaining counsel to provide them with: an explanation of the case; a description of the questions to be addressed by the expert; and the documents or other sources needed by the expert.
  o The attorney may advise the expert of the test for admissibility of an expert’s opinion in the jurisdiction in which the expert will testify.
  o The attorney may work with the expert to make sure that the expert’s opinion is formed in a manner that will be admissible in court.
  o The attorney may request the expert to “assume” certain facts, so long as the assumptions are reasonable and clearly identified. This often occurs where the facts in a case are disputed or contingent upon facts to be provided by other witnesses.
  o The attorney may ask an expert to disregard certain information on the basis that it may be legally irrelevant or inadmissible.

• What may the attorney ethically do with respect to the expert’s opinion?
  o The attorney may ask the expert to reconsider his or her opinion in light of additional information.
  o The attorney may suggest ways in which the expert’s opinion can be strengthened or supported.
  o The attorney may ask direct questions to make sure the expert’s position is well-founded and thorough.
  o The attorney may assist the expert in preparing for a trial or deposition by advising him or her of potential questions to be asked on cross-examination as well as the questions to be asked on direct.
  o The attorney may advise the expert that his or her testimony is confusing, misleading or unclear, and to use powerful language, avoid narratives and jargon.

• What is unethical for an attorney to do with respect to the expert’s opinion?
  o An attorney may not pressure an expert into changing his or her opinion.
  o An attorney may not attempt to expand or extend the expert’s opinion, or persuade the expert to exaggerate his or her qualifications to give opinions outside of his or her expertise.
An attorney may not influence the content of an expert’s testimony by either “ghost writing” an expert’s report or instructing the witness as to how to testify.

- Kenall Manufacturing Co. v. Genlyte Thomas Group, (N.D.Ill. 2006) (noting that while Fed. R. Civ. P. 26 does not prohibit a party’s attorney from providing assistance to the expert, “preparation implies [an expert’s] involvement other than perusing a report drafted by someone else and signing one’s name at the bottom to signify agreement”).

- Reliance Insurance Co. v. Keybank U.S.A., 2006 WL 543129 (N.D. Ohio 2006) (noting that “expert who can be shown to have adopted the attorney’s opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion” and further ordering the production to opposing party of notes taken and used by attorney to type up expert’s opinion, as they constituted a “draft” opinion rather than work product).

- Sud-Chemie Inc. v. CSP Technologies, Inc., 2006 WL 2246404 (S.D. Ind. 2006) (questioning technical expert’s credibility when, inter alia, plaintiff’s attorney typed up expert’s report for him and when expert did not perform any independent testing).

- Solaia Technology LLC v. ArvinMeritor, Inc., 361 F.Supp.2d 797 (N.D.Ill. 2005) (noting that an expert’s affidavit should not merely regurgitate the lawyer’s arguments)

- Manning v. Crockett, No. 95 C 3117, 1999 WL 342715 (N.D.Ill. May 18, 1999) (noting that “ghost writing” of the expert’s report by the attorney is impermissible under Fed. R. Civ. P. 26, which requires an expert report to be prepared and signed by the witness). 


- See also Annotated Patent Digest §41:159: “Who must actually prepare the expert report - - Extent of attorney ghost writing” (noting that it is “generally improper for attorneys to ghost write an expert report” and that to show ghost-writing has occurred, a “party must show that the lawyer, or other individual assisting the
expert, “provided the substance of the opinions of the testifying expert, not just editorial assistance”).

C. **Confidentiality**

- Expert witnesses should assume that all of their communications, either with the client or retaining lawyer, may be subject to disclosure through discovery. *Fed. R. Civ. P. 26(a)(2)(b).*
  
  o Thus, the expert’s research files, work papers, notes, drafts, correspondence, and other materials may have to be revealed to opposing counsel.

- Under the principles of agency law, however, an expert witness must take reasonable steps to safeguard client confidences and to refrain from using confidential information for self-enrichment or other improper purposes. *Restatement (Second) of Agency §§ 388, 395.*

- Most jurisdictions prohibit attorneys from contacting opposing experts outside the process of formal discovery. *Fed. R. Civ. P. 26(b)(4)(A)*
  
  o *Carlson v. Monaco Coach Corp.*, 2006 WL 1716400 (E.D.Cal. 2006) (defendant was sanctioned after defendant’s counsel had an improper *ex parte* communication with plaintiff’s expert witness involving the expert’s potential testimony in other cases, which resulted in a breakdown in trust between plaintiff and his expert such that plaintiff was required to retain other counsel).

  o *In the Matter of Kenneth C v. Delonda R.*, 2006 WL 47429 (N.Y.Fam. Ct. 2006) (attorney who submitted documents to court appointed forensic psychologist and asked him to reconsider his opinion “pressed the limits of providing zealous representation within the bounds of the law” although court did not find counsel’s conduct to be unethical)

  o *Sanderson v. Boddie-Noell Enterprises, Inc.*, 227 F.R.D. 448 (E.D.Va. 2005) (plaintiff’s attorney violated Virginia Rule of Professional Conduct 3.4(a) which provides that a lawyer shall not obstruct another party’s access to evidence, after he had an *ex parte* communication with the employer of defendant’s expert witness, who subsequently withdrew as defendant’s expert witness).

  o *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996) (attorney engaged in misconduct prejudicial to the administration of justice following an *ex parte* meeting with opposing counsel’s witness)
D. Loyalty and Conflicts of Interest

- While attorneys owe a duty of loyalty to their client, and may not, under the Rules of Professional Conduct, represent a party who is “directly adverse” to a current client (Model Rule 1.7 of the Rules of Professional Conduct), there is no general ethical principle that prevents an expert from accepting concurrent engagements both for and against the same party.

- Experts do not owe a duty of loyalty to their clients. To the contrary, an expert is supposed to be objective and independent from the client’s goals. ABA Formal Op. 97-407 (1997) (noting that a duty to advance a client’s objectives diligently through all lawful measures “is inconsistent with the duty of a testifying expert”); State Bar of South Dakota Ethics Op. 91-22 (1992); Philadelphia Bar Association Professional Guidance Inquiry No. 88-34 (1988).

- Therefore, an objective expert could opine that a party is correct in one case and incorrect in another.
• In addition, courts have refused to impute a conflict of interest on other members of an expert’s firm, choosing instead to apply safeguards such as screens to prevent the transmission of confidential information. *BP Amoco Chemical Company v. Flint Hills Resources, LLC*, 2007 WL 1655258 (N.D.Ill. 2007); *In re JDS Uniphase Corporation Securities Litigation*, 2007 WL 2845212 (N.D.Cal. 2006); *Formosa Plastics Corp, USA v. Kajima International, Inc.*, 216 S.W.3d 436 (Tex.App. 2006).

• An expert may concurrently work with a lawyer or law firm in one case and against that lawyer or law firm in another case.

• Under the laws of agency, however, the expert may not exploit a client’s confidences for the benefit of another client. For that reason, the expert should not accept conflicting engagements, either concurrently or successively, that are factually related.

  o *Theriot v. Parish of Jefferson*, 1996 WL 392149 (E.D.La. July 8, 1996) (disqualifying expert in a case which amounted to “an outgrowth of . . . prior litigation” in which the expert was previously consulted by, and had testified for, the adverse party during which he received confidential information).

• In order to avoid the potential credibility problems which could arise from the expert’s dual position, and to avoid putting counsel in the uncomfortable position of extolling the expert’s opinion in one case while attacking it in another, the lawyer may reasonably request at the outset of the case that the expert refrain from accepting potentially adverse engagements, at least for the duration of the retention.

**May An Expert Switch Sides?**

• May an expert retained by the plaintiff in a lawsuit, who has conducted his or her research and arrived at an opinion that is unfavorable to the plaintiff, then turn around and “switch sides,” testifying for the defendant?

• The short answer is that an expert may not switch sides, even after being discharged or released, if it would violate the original client’s expectation of privacy.

  o “No one would seriously contend that a court should permit a consultant to serve as one party’s expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention.” *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178 (5th Cir. 1996) (citing *Wang Lab, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D.Va. 1991)).
• Not every case for expert disqualification is clear cut. In determining whether an expert who has switched sides may be disqualified, it has been noted that federal courts have the inherent power to disqualify expert witnesses to protect the integrity of the adversary process; to protect privileges that otherwise may be breached; and to promote public confidence in the legal system. *Hewlett-Packard Co. v. EMC Corp.*, 330 F.Supp.2d 1087 (N.D.Cal. 2004).

• Courts have not adopted a “bright line” rule for determining whether an expert should be disqualified from conflicting engagements which are factually related. Instead, when an expert has not blatantly switched sides (in which case disqualification is clearly warranted), courts have adopted a two-part test, which the party seeking disqualification bears the burden of proving. *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178 (5th Cir. 1996).²

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Part One: Was it objectively reasonable for the first party who retained the expert to believe that a confidential relationship existed?

- Was the expert requested to perform services?
- Was the expert paid a fee?
- Was the expert supplied with specific data relevant to the case?
- Were there long-standing and frequent contacts between the expert and counsel or did the expert just meet once with counsel and was not requested to perform any services?
- Did the parties enter into a formal confidentiality agreement? Was the expert asked to agree not to discuss the case with the opposing parties or counsel?
- Did the expert derive any of his specific ideas from work done under the direction of the retaining party?

Part Two: Did the party disclose any confidential or privileged information to the expert, including attorney work product?

- Was the expert privy to discussions regarding the retaining party’s strategies in the litigation, such as anticipated defenses?
- Was the expert included in discussions regarding the party’s views of the strengths and weaknesses of each side? Or the role of each of the witnesses?
- Purely technical information is not confidential.

The majority view is that only if the answers to both questions are in the affirmative should the expert be disqualified. The minority rule does not require an affirmative response to both questions, but rather, only to Part One, after which the burden shifts to the party opposing disqualification. *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588 (D.Minn. 1986); *Conforti & Eisele, Inc. v. Division of Bldg. & Const.*, 405 A.2d 487 (N.J.Super.1979).

• Courts also look at issues of fundamental fairness and whether any prejudice might occur if the expert is or is not disqualified. *Hewlett-Packard; Koch Refining.* These considerations include:

  o Ensuring that parties have access to expert witnesses who possess specialized knowledge.

  o Allowing experts to pursue their professional calling.

  o Deterring unscrupulous attorneys/clients from attempting to create a relationship with potentially harmful experts solely to keep them from the opposing party.

  o Whether another expert is available and whether the opposing party had time to hire him or her before trial.

• The difficulties with an expert switching sides can be avoided from the outset of the engagement with a well-drafted retention letter spelling out the expert’s duties and the client’s expectations concerning confidential information as well as the expert’s options in the event he or she is discharged or released.

E. **Fee Agreements With Experts**

• Most expert witnesses charge on an hourly basis. Various ethics issues arise with respect to fee arrangements with experts, including contingency fees, flat fees, minimums, and lock-up fees.

**Contingency Fees**

• Contingency Fees, meaning a fee which is contingent upon the outcome of the case, are considered unethical in virtually every jurisdiction. When payment is contingent upon the success of the litigation, it creates the unacceptable incentive for the expert to tailor his or her opinion to the needs or interests of the retaining party, thereby impairing the expert’s independence and objectivity.

  o Rule 3.3(a)(15) of the Illinois Rules of Professional Conduct provides that a lawyer shall not “pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’ testimony or the outcome of the case.” Rule 3.3(15) does, however, allow a lawyer to “advance, guarantee, or acquiesce in the payment of . . . a reasonable fee for the professional services of an expert witness.”

    ▪ *New England Tel. & Tel. Co. v. Board of Assessors*, 468 N.E.2d 263 (Mass. 1984) (“The majority rule in this country is that an expert witness may not collect compensation which by agreement
was contingent on the outcome of the controversy.”); Swafford v. Harris, 967 S.W.2d 319 (Tenn. 1998) (contingency fee contract for services of physician acting as medical-legal expert is void against public policy). See also Kentucky Ethics Opinion E-394 (1996).

Nor may the lawyer’s client pay a contingency fee to an expert, as Rule 8.4(a)(2) of the Illinois Rules of Professional Conduct prohibits a lawyer from inducing “another to engage in conduct . . . when the lawyer knows that the conduct will violate these Rules.” See also Model Rule 8.4(a) of the Model Rules of Professional Conduct.

Similarly, the majority view is that it is unethical to pay an expert witness finding service or a consulting firm involved in locating expert witnesses on a contingency fee basis.


The minority view permits payment of a contingency fee to firms which provide expert consulting services and which locate expert witnesses. See Ojeda v. Sharp Cabrillo Hosp., 10 Cal. Rptr.2d 230 (Ct. App. 1992) (acknowledging validity of a contingent fee contract between a medical malpractice plaintiff and a medical-legal consulting service wherein the service reviewed relevant medical records and located expert witnesses in exchange for 20% of any recovery received, and experts would be paid on a flat, hourly basis); Schackow v. Med-Legal Consulting Serv., Inc., 416 A.2d 1303 (Md. Ct. Spec. App. 1980); District of Columbia Bar Opinion 233 (1993) (allowing payment of a “success fee” to consulting firm of nonlawyer experts).

The “rule against employing witnesses on a contingency-fee basis is a rule of professional conduct rather than of admissibility of evidence . . . and it does not follow that evidence obtained in violation of the rule is inadmissible.” Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988). See also Milfam II LP and Trust v. American Commercial Lines, LLC, 2006 WL 3247149 (S.D.Ind. 2006); United States v. Dawson, 425 F.3d 389 (7th Cir. 2005); Valentino v. Proviso Township, 2003 WL 21510329 (N.D.Ill. 2003) (payment to expert in the nature of a contingency fee affects expert’s credibility but not the admissibility of his report and testimony); In re Joy Recovery Technology Corp., 286 B.R. 54 (N.D.Ill.)

• “Value billing,” where the expert’s fee is eventually determined by the value or benefit of the work, rather than by the number of hours devoted to the task, is equally problematic. For example, an expert engaged in “value billing” might rebate fees in the event that his or her opinion cannot be used by the retaining party in order to avoid excessive billing for unproductive work. As this would result in additional compensation when the expert’s opinion is favorable to the client, it is close to charging on the basis of the content of the testimony and, like contingency fees, should be avoided.

Flat Fees, Minimums, Retainers

• In addition to hourly billing, other expert fee arrangements may include flat fees, minimums or retainers, all of which are ethically permissible so long as they are reasonable. Such arrangements provide a sense of security to the expert and are the opposite of contingent fees, since a guaranteed payment becomes disengaged from the contents of the expert’s opinion.

  o A flat fee compensates the expert for all or some defined portion of the work, including: (a) the entire engagement, all the way through trial testimony; or (b) in stages, including a set amount for initial research and work-up, another amount for a written report, and another amount for deposition and trial time.

  o A minimum fee, often in conjunction with an hourly rate, ensues that the expert will be compensated at a certain level regardless of the amount of work ultimately involved in the case.

  o A retainer provides the expert with some or all of his or her payment at the outset of the engagement.

Lock-Up Fees

• A lock-up fee is a non-refundable payment to the expert at the outset of the engagement in order to compensate the witness for agreeing to forego retention by the other parties in the litigation. A lock-up fee is ethically permissible as long as it is reasonable.

  o Note that attorneys are generally not permitted to collect non-refundable retainers for their services, since it is perceived as chilling the client’s unfettered right to discharge counsel at any time without cost or penalty. See Wong v. Michael Kennedy, P.C., 853 F. Supp. 73 (E.D.N.Y. 1994) (noting that a nonrefundable retainer agreement is unenforceable as it is a
per se violation of public policy); Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir. 1988) (holding that law firm not entitled to fees for services performed after the date of firing).

- By contrast, these public policy considerations do not apply to experts. While a client is always free to terminate an expert’s services, there is no comparable public policy served by ensuring that there is no financial loss to the client who does so.