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*Experts and Ethics*

*June 18, 2021*



## Agenda

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- I.** Conflicts of Interest – Experts
  - » Preserving Confidential Information
  - » Preserving Consulting Experts
  - » Attorneys as Experts
  - » Sidelining an Expert
- II.** Expert Witness Compensation
- III.** Preparing an Expert Report



## Conflicts of Interest – Switching Sides

### Fact scenario No. 1:

- Plaintiff injured while wearing Defendant's batting helmet
- Defendant's attorney contacts expert, who has previously published on helmet safety, and discusses:
  - 1) potential helmet safety research lab, and
  - 2) facts of Plaintiff's case; no confidential information or legal theories
- Expert invoices 1.5 hours for discussion and is paid
- Defendant's attorney tells expert his client approved retaining him, though no written agreement
- Plaintiff's attorney later retains expert – written agreement and \$1,000 retainer

## Conflicts of Interest – Switching Sides



**Issue:** Could expert testify for Plaintiff despite previous work for Defendant?

**Answer:** Yes.

- Whether formal agreement exists is not determinative
- No confidential information revealed seemed most important

*Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988)

## Conflicts of Interest – Protecting Client’s Confidential Information



### Fact scenario No. 2:

- New barge fails, and Builder cannot fix it
- Buyer turns to third party to fix it, which uses A as independent consultant
- Buyer then sues Builder, retains A as testifying expert
- Builder retains B, of Firm X, as testifying expert
- BUT: A also works for Firm X – and B is his supervisor on several projects

## Conflicts of Interest – Protecting Client’s Confidential Information



**Issue:** Can B testify at trial for Builder?

**Answer:** No problem.

- Two attorneys working at same firm cannot represent opposing parties
  - but that rule does not apply to experts
- A and B each owed duty to their separate clients to not reveal confidential info to anyone – and both complied
  - “[I]t is primarily the duty of each side’s attorneys to take necessary steps to prevent possible future disclosures of their clients’ confidential or privileged information.”
- Court will protect integrity of judicial process, not violated here

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

## Conflicts of Interest – Protecting Client’s Confidential Information



### Illinois Rule of Professional Conduct 1.6: Confidentiality of Information

“(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . . .”

- *See also* Rule 1.6 cmts. [18] & [19]

## Conflicts of Interest – Consulting Experts



### Fact scenario No. 3:

- Therapist is retained as expert in medical malpractice action by Defendant; confirmed in letter
- Defendant's attorney discloses medical records to expert; attorney has several discussions with expert on case theories and other expert witnesses; expert spends 20 hours and is paid \$4,000; Defendant stops using this expert
- 3 months later Plaintiff's attorney contacts same expert; when expert receives medical records, realizes this is same case, and discloses that to Plaintiff's attorney
- Plaintiff retains expert anyway; did not ask about conversations with Defendant's attorney
- Expert's report produced to Defendant's attorney



## Conflicts of Interest – Consulting Experts



### **Issue 1:** Disqualify expert?

3-part test:

1. Reasonable in assuming a confidential relationship? – writing not required
2. Confidential information exchanged with expert?
3. [If needed:] Protect integrity of judicial proceedings

**Answer:** Yes.

- Contributing factor: Plaintiff's attorney knew up front that expert worked with opponent; court noted that attorney could have raised the issue then, or used another expert

## Conflicts of Interest – Consulting Experts



**Issue 2:** Disqualify Plaintiff's attorney?

3-part test:

1. Did expert receive confidential information?
2. If so, was it disclosed to counsel?
3. If so, does that information threaten future proceedings?

**Answer:** No – it was possible, but no evidence that confidential information disclosed

*Simons v. Freeport Memorial Hospital*, 2008 WL 5111157 (N.D. Ill.)

## Conflicts of Interest – Attorney Experts



### Fact scenario No. 4:

- Manufacturer retained Law Firm to represent it in a corporate transaction relating to China; transaction closes in 1999, small amount of clerical work in 2000
- In 2001, Insurer is in lawsuit against Manufacturer
- Insurer retains Attorney A from Law Firm as a testifying expert on issue unrelated to China transaction

## Conflicts of Interest – Attorney Experts



**Issue:** Manufacturer asks court to disqualify A, asserting that as partner at Law Firm he is conflicted – motion granted?

**Answer:** No.

- Attorney acting as expert does not create attorney-client relationship

ABA Formal Opinion 97-407

- No confidential information relevant to litigation was disclosed during Chinese corporate transaction
- Chinese corporate transaction was sole representation by Law Firm – different outcome if “outside general counsel”?

*Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938 (N.D. Ill. 2001)



## Sidelining an Expert

Can an attorney hire an expert to prevent that expert from working for the other side?

- Illinois Rule of Professional Conduct 3.4:

“A lawyer shall not ... unlawfully obstruct another party’s access to evidence” or “offer an inducement to a witness that is prohibited by law”

- Restatement (Third) of the Law Governing Lawyers § 116

“A lawyer may not offer threats or financial or other inducements to a witness not to cooperate with another party.”



## Sidelining an Expert

### Fact scenario No. 5:

- Patent litigation over testosterone replacement gel settled – generic agreed to stay off market for several years
- Direct purchaser Plaintiffs sue, claiming settlement was a sham
- Two settling Defendants each retained a consulting expert
  - Each expert signs retention agreement requiring confidentiality
  - One bills 24 hours, other bills 10 hours
  - Defendants’ attorneys assert they shared mental impressions and legal theories with consulting experts
- Two Plaintiff firms each contacted several potential experts but did not retain them, until they found the two consulting experts for Defendants



## Sidelining an Expert

**Issue:** Could consulting experts switch sides and work for Plaintiffs?

**Answer:** Yes.

- General allegations of sharing confidential information, mental impressions, case strategy are not sufficient, need “specific communications”
- Public policy weighs in favor of allowing switch because “topical drug delivery is a narrow and specialized field”

*In re Androgel Antitrust Litig. (No. II)*, 2011 WL 1882516 (N.D. Ga. May 17, 2011)

## Sidelining an Expert – What if your expert’s opinion hurts your case?



### Fact scenario No. 6:

- In responding to an interrogatory, Plaintiff’s attorney identified an expert’s name and stated he would opine on a medical test to be performed on Plaintiff
- The test was performed, but before an expert report was issued, and one year before trial, the expert was reclassified as a consulting expert
- No report was written, and Plaintiff’s attorney refused to produce the expert’s notes or even the test itself
- Trial court required the test and notes to be produced; Plaintiff appealed



Sidelining an Expert –  
What if your expert's opinion hurts your  
case?



**Issue on Appeal #1:** Could a party change its mind regarding who it presents as a testifying expert where the written report has not yet been disclosed?

**Answer:** Yes

**Issue on Appeal #2:** Is the medical test performed by that expert, performed while expert was deemed a testifying expert, itself discoverable?

**Answer:** No

*Dameron v. Mercy Hosp. & Med. Ctr.*, 2020 IL 125219 ¶33 (Nov. 19, 2020)

## Sidelineing an Expert – What if another party’s expert hurts your case?



### Fact scenario No. 7:

- Natural gas well blows out, rages for a year
- Owners of mineral rights and neighboring properties sue well operator
- Well operator files third-party claims against suppliers
- Suppliers each retain a testifying expert, six in total
- On morning of expert depositions, well operator settles with suppliers on condition that control over their experts is given to well operator and they all are redesignated as consulting experts for the well operator
- Owners of mineral rights did not settle, and sought to depose the six experts; trial court denied deposition requests

## Sidelining an Expert – What if another party’s expert hurts your case?



**Issue on Mandamus:** May a party obtain an adversary’s testifying experts and redesignate them as consulting-only experts to avoid discovery?

**Answer:** No.

“The redesignation of the experts in this case was **an offensive and unacceptable use of discovery mechanisms intended to defeat the salutary objectives of discovery**. ... The legitimate purposes and policies behind the consulting expert privilege do not countenance this conduct.”

*Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)



## Permissible Expert Compensation

“A lawyer shall not ... offer an inducement to a witness that is prohibited by law.”

- Illinois Rule of Professional Conduct 3.4(b).

“The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that **it is improper to pay an expert witness a contingent fee.**”

- ABA Model Rule 3.4, cmt. 3.

- Can you pay a contingent fee to an agency that locates experts?
- Can you pay a contingent fee to a non-testifying expert?



## Preparing the Expert Report

### Fact scenario No. 8:

- Expert was M.D. who had never before provided expert testimony
- Expert previously prepared report in same case that was unusable
- Counsel drafted expert report in its entirety
- Counsel met with expert before writing the report to discuss expert's opinions and conclusions
- Expert then "reviewed, corrected, and added to" report



## Preparing the Expert Report

**Issue:** May the expert testify at trial?

**Answer:** Yes.

“. . . not based on who actually penned an expert’s report, but, rather, whose opinions and analysis the report contains.”

“[I]t is the responsibility of the attorney to ensure that the expert’s report contains complete opinions that are properly and thoroughly set forth and supported, or risk the imposition of sanctions under Rule 37.” [citing *Salgado v. GM*, 150 F.3d 735, 741 n. 6 (7th Cir. 1998)]

*Hoskins v. Gunn Trucking*, 2009 WL 2970399 (N.D. Ind. Sept. 14, 2009)



## Preparing the Expert Report

### Fact scenario No. 9:

- Expert report submitted on issue of “obviousness” in patent lawsuit – what was known to a person of ordinary skill in the art
- 64-page report drafted by counsel
- Expert reviewed report with counsel for 8 hours, making only minor changes
- Expert stated that if he had drafted the report it would have been 5 pages, and he would have taken “the legalness out of it”
- Expert was unable to discuss depositions listed in the report as documents he supposedly relied on
- Report concluded that patent claims were obvious, but expert admitted he did not know what obviousness meant in context of a patent lawsuit



## Preparing the Expert Report

**Issue:** Can the expert testify at trial?

**Answer:** No.

*Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934 (E.D. Mich. 2014)





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