

# Experts That Excel

One challenging area of law practice is the lawyer–expert relationship. The need for experts spans all practice areas, and they can be invaluable for case assessment and courtroom testimony. But their necessity only makes more crucial the need for lawyers to select experts well and to foster associations with them.

- Do you always know when you need an expert?
- How do you find one?
- When you consult with experts, do you even ask the right questions?

In the following pages, we point to a few ways to get the best on your case. One author suggests how to negotiate conflicts of interest that may be obstacles to consultation. And we have asked experts themselves to speak on lawyers' strengths and weaknesses in the selection process.

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Expert witness testimony is often a critical part of modern litigation. It is virtually impossible to bring a professional malpractice case to trial without expert witnesses on both sides.<sup>1</sup> In addition, expert witnesses testify routinely on a variety of subjects in all kinds of civil litigation.<sup>2</sup>

It is not uncommon for a litigant to interview and even consult with several experts before choosing one to testify at trial. Given the number of cases and the sometimes limited pool of potential experts, it is inevitable that both sides will contact the same expert, or at least the same firm, occasionally. Questions then arise as to the circumstances, if any, in which an expert and/or a firm of experts can represent both sides to a litigation.

If one side contacts but chooses not to use an expert, is that expert free to work for the other side?

If one side has retained an expert or a member of the expert's firm in the past or even currently in matters unrelated to the current litigation, can the expert testify for the other side?

## Rules and Rulings Largely Silent

It is tempting to assume that the answers to these questions are provided by the Rules of Professional Conduct, which provide fairly specific guidance.<sup>3</sup> The problem is that those Rules apply only to lawyers who are members of the Arizona State Bar.<sup>4</sup> The Arizona Supreme Court has the power and jurisdiction to license and regulate attorneys practicing in Arizona.<sup>5</sup> It is not at all clear that the Court has that ability to regulate the conduct of nonattorneys. Equally important, attorneys and experts perform different functions at trial. Attorneys are advocates. An expert may promote a party's case, but the expert's primary role is as a source of information.<sup>6</sup> An expert is expected to use "scientific, technical, or other specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue."<sup>7</sup>

## Federal Courts Speak

Although there is very little Arizona law on these issues, there is a growing body of federal law on the subject. The federal courts uniformly take the position that, given the proper facts, they have the power to disqualify an expert.<sup>8</sup> The issue usually comes up in a situation in which one party discloses a trial expert with whom the opposing party had a previous relationship. The opposing party then moves to disqualify the expert. Most of the courts that have addressed this issue have applied a two-part test:

"First, was it objectively reasonable for the first party who claims to have retained the consultant . . . to conclude that a confidential relationship existed?

Second, was any confidential or privileged information disclosed by the first party to the consultant?"<sup>9</sup>

Only if both questions are answered in the affirmative should the expert be disqualified.<sup>10</sup> Some cases also consider a third factor: the public interest in allowing or not allowing an expert to testify:

"The policy objectives favoring disqualification include preventing conflicts of interest and maintaining the integrity of the judicial process. The main policy objectives militating against disqualification are ensuring that parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling. Courts have also expressed concern that if experts are too easily subjected to disqualification, unscrupulous attorneys and clients may attempt to create an inexpensive relationship with potentially harmful experts solely to keep them from the opposing party."<sup>11</sup>

These questions are, of course, factual in nature and will require the parties to submit affidavits and in some cases conduct an evidentiary hearing. The party seeking disqualification has the burden of proving both the grounds for disqualification and the nonwaiver of any confidentiality being asserted.<sup>12</sup> On appeal, the trial court's ruling is reviewed for an abuse of discretion.<sup>13</sup>

## Expert Confidential Information

Much, if not all, of the information given to a testifying expert to prepare for trial will be subject to discovery and disclosure.<sup>14</sup> Thus, an exchange of factual or technical information about a case will not meet a party's burden of showing

moved to disqualify the plaintiff's accounting expert and his firm, arguing that the firm had access to confidential information relevant to the litigation based on its prior relationship as defendant's auditor.<sup>19</sup> The trial court held an evidentiary hearing, entered detailed

the accounting firm any confidential information relating to the litigation.<sup>21</sup> The court recognized that the accounting firm was privy to confidential business and financial records relevant to the litigation, but it reasoned that the firm's possession of that knowledge was not sufficient to warrant the expert's disqualification, because there was no showing that any information had been shared with the individual who would testify and, in any event, such information would be discoverable in the litigation.<sup>22</sup>

"Confidential business information, however, may be distinguished from communications or documents pertaining to litigation. The defendants have not submitted any evidence to the court to suggest that such confidences were ever exchanged between [defendant and the accounting firm]."<sup>23</sup>

In contrast, in *Mitchell v. Wilmore*,<sup>24</sup> a personal injury case, the court granted defendant's motion to disqualify an expert he had previously retained and used as a pretrial consultant. The defendant in *Mitchell* submitted both a general affidavit intended for open court and a second affidavit for *in camera* review. The first affidavit provided a generic description of defense counsel's discussions with the expert and stated that they had discussed counsel's mental impressions of the case and litigation strategies. The *in camera* affidavit went into detail as to the confidential mental impressions and gave examples of several topics counsel recalled discussing with the experts.<sup>25</sup> The *Mitchell* court concluded that the *in camera* affidavit established that defendant's counsel had, in fact, shared their mental impressions, as well as their discovery and trial strategies, with the experts at a time at which they reasonably believed a confidential relationship existed.<sup>26</sup> The court, therefore, ordered the experts' disqualification.

## Arizona Case on Point

Although there are no Arizona cases directly on point, what little authority there is seems consistent with these general rules. In *Granger v. Wisner*,<sup>27</sup> the

# expert witnesses & conflicts of interest



BY JEFFREY MESSING

that the expert received or gave confidential information.<sup>15</sup> In the context of expert disqualification, "confidential information" is defined as information that relates specifically to the litigation and includes such things as a party's litigation strategy, assessment of the case or plans for additional experts that would not ordinarily be subject to discovery.<sup>16</sup>

Some examples illustrate the application of these rules. *United States ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*<sup>17</sup> was a *qui tam*<sup>18</sup> action filed by a nursing home charging a rehabilitation service provider with Medicare fraud. The defendant

findings and denied the disqualification motion. The court found that plaintiff's expert had, in fact, rendered a variety of accounting services to defendant, including five independent annual audits of defendant's financial condition. Defendant had terminated its relationship with the accounting firm prior to the suit, but the firm retained documents relating to defendant in its possession.<sup>20</sup>

The *Cherry Hill* court concluded that defendant had established the existence of a confidential relationship; however, it denied the disqualification motion because defendant had not disclosed to

Arizona Supreme Court affirmed a trial court's refusal to disqualify a defense expert who had previously reviewed the medical malpractice case as plaintiff's pretrial consultant. The Court's opinion assumed that upon a proper showing of discovery misconduct, the trial court could have excluded the expert's testimony "even though no rule expressly provides for such a sanction."<sup>28</sup>

In *Granger*, the parties framed the issue as whether the expert's testimony was barred by either the attorney-client privilege or ARIZ.R.CIV.P. 26(b)(4)(B). The *Granger* Court rejected both bases for exclusion. The Court rejected the attorney-client privilege argument because the expert "was not questioned about and did not testify to any confidential communication he may have received from or given to the plaintiff or her previous counsel."<sup>29</sup> With respect to the Rule, the Court held that although the rule limits discovery of nontestifying consultants, it does not deal with the admissibility at trial of such an expert's testimony that is elicited by the opponent.

*Granger's* precedential value is weakened by its procedural history. The defendant in *Granger* listed the expert without objection in the joint pretrial statement and mentioned him during his opening statement. Plaintiff raised no objection until the third day of trial, when the expert was scheduled to testify. As the Supreme Court recognized, at that point, it would have been impossible for defendant to hire a new expert. The trial court allowed the expert to testify, and the Supreme Court affirmed.<sup>30</sup> Therefore, *Granger* can be viewed as a waiver case, although the Court did conduct an extended analysis of the disqualification issue.

*Granger* predates virtually all of the expert disqualification cases discussed in this article. The parties and the Court framed the issues in terms of attorney-client privilege and the discovery of pretrial consultants under Rule 26(b)(4)(B) rather than in terms of the existence of a confidential relationship

and the exchange of confidential, nondiscoverable information. Nonetheless, much of *Granger's* analysis is consistent with the general rules set out here. The Court rejected the per se disqualification rule that would have resulted from application of the Rules of Professional Conduct.<sup>31</sup> At the same time, however, it implicitly recognized that a trial court does have discretion to disqualify an expert if there is a disclosure of privileged, confidential information relevant to the litigation. The Court also questioned the extent to which information disclosed to an expert can remain confidential.<sup>32</sup> In short, the *Granger* Court seems to have anticipated the general thrust of subsequent case law, which should provide guidance to Arizona litigators in the absence of any direct authority from the Arizona courts.

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## endnotes

1. *E.g.*, *Rudy v. Meshorer*, 706 P.2d 1234 (Ariz. Ct. App. 1985) (affirming grant of summary judgment in malpractice case brought against psychiatrist based on plaintiff's failure to present testimony from a competent expert that defendant's conduct fell below the applicable standard of care).
2. *E.g.*, *Continental Bank v. Wa-Ho Truck Brokerage*, 595 P.2d 206 (Ariz. Ct. App. 1979) (testimony of banking experts on reasonable commercial standards for handling checks); *Dunham v. Pima County*, 778 P.2d 1200 (Ariz. 1989) (testimony of traffic and safety engineer on dangerousness of intersection); *Brown v. Sears, Roebuck & Co.*, 667 P.2d 750 (Ariz. Ct. App. 1983) (testimony of professor of electrical engineering as to design of power sander).
3. See ARIZ.R.S.CT. 42, E.R. 1.6, 1.7, 1.9.
4. See ARIZ.R.S.CT. 41 and 42 (Preamble and Scope).
5. See *Hunt v. Maricopa County Employees' Merit System Commission*, 619 P.2d 1036 (Ariz. 1980) (practice of law is a matter exclusively within authority of the judiciary); ARIZ.R.S.CT. 31 (establishing State Bar and limiting practice of law to active members).
6. *E.g.*, *In re Ambassador Group*, 879 F. Supp. 237, 242 (E.D.N.Y. 1994) (refusing to apply attorney disqualification rules to experts based on differences in their respective roles and out of concern that if experts are too easily disqualified, unscrupulous attorneys and clients might attempt to disqualify all potential experts); *English Feedlot v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993) (distinguishing between attorney and expert roles); *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 281 (S.D. Ohio 1988) (attorneys occupy "a position of higher trust, with concomitant fiduciary duties, to a client than does an expert consultant"); *contra Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 590 (D. Minn. 1986) (applying attorney disqualification rules based on parties' stipulation that court should disqualify expert if it found that firm was retained by both parties on matters relevant to litigation). See *Smart Industries Corp. v. Superior Court*, 876 P.2d 1176 (Ariz. Ct. App. 1994) (refusing to apply attorney disqualification standards to nonattorney in law firm).
7. ARIZ.R.EVID. 702.
8. *E.g.*, *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 579 (D.N.J. 1994) ("any analysis properly begins with a recognition of the Court's inherent power to disqualify experts"); *Wang Lab. Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991) (power to disqualify "exists in furtherance of the judicial duty to protect the integrity of the adversary process and to promote public confidence in the fairness and integrity of the legal process"); *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. at 277-278 (court has power to disqualify expert to protect privileges that may be breached if expert changes sides during litigation or as part of the court's inherent power to preserve public confidence in the fairness and integrity of the judicial process). See *Granger v. Wisner*, 656 P.2d 1238 (Ariz. 1982) (assuming trial court would have power to disqualify expert based on a proper showing of discovery misconduct).
9. *Mitchell v. Wilmore*, 981 P.2d 172, 1999 WL 343943, at \*3 (Colo. en banc 1999) (quoting *Wang Laboratories*, 762 F. Supp. at 1248); *accord United States ex rel. Cherry Hill Convalescent Center*, 994 F. Supp. at 244; *In re Ambassador Group*, 879 F. Supp. 237 (E.D.N.Y. 1994); *Sells v. Wamser*, 158 F.R.D. 390 (S.D. Ohio 1994); *Cordy*, 156 F.R.D. at 575; *Paul v. Rawlings Sporting Goods*, 123 F.R.D. at 271; *contra Marvin Lumber*, 113 F.R.D. at 588; *Conforti v. Eisele, Inc. v. Div. of Building & Construction*, 405 A.2d 487 (N.J. Super. Ct. 1979).
10. *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991).
11. *English Feedlot, Inc.*, 833 F. Supp. at 1504-1505 (citations omitted).
12. *Mitchell v. Wilmore*, 1999 WL 343943, at \*3; *English Feedlot, Inc.*, 833 F. Supp. at 1501-1502; *Hansen v. Umtech Industrieservice Und Spedition GMBH*, 1996 WL 622557, at \*6 (D. Del. 1996); *Paul v. Rawlings Sporting*

- Goods*, 123 F.R.D. at 278.
13. *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1181 (5th Cir. 1996); *Granger v. Wisner*, 656 P.2d at 1243.
  14. See ARIZ.R.Civ.P. 26.1(a)(6) (requiring disclosure of "the substance of the facts and opinions to which the expert is expected to testify [and] a summary of the grounds for each opinion").
  15. See *Nikkal Industries v. Salton, Inc.*, 689 F. Supp. 187, 191-192 (S.D.N.Y. 1988) (information technical in nature); *Palmer v. Ozbek*, 144 F.R.D. 66, 68 (D. Md. 1992) (information routinely discoverable).
  16. E.g., *Koch Refining Co.*, 85 F.3d at 1182; *United States ex rel. Cherry Hill Convalescent Center*, 994 F. Supp. at 249; *Mayer v. Dell*, 139 F.R.D. at 4.
  17. 994 F. Supp. 244 (D.N.J. 1997).
  18. A *qui tam* action "is one brought by an informer under a statute which establishes a penalty or forfeiture for the commission or omission of some act, and which additionally provides for the recovery of the same in a civil action with part of the recovery to go to the person bringing the action." *United States ex rel. Robert Burnette v. Driving Hawk*, 587 F.2d 23, 24 n. 4 (8th Cir. 1978); see generally 70 C.J.S. Penalties, § 11.
  19. *Cherry Hill Convalescent Center*, 994 F. Supp. at 246.
  20. *Id.* at 247.
  21. *Id.* at 250.
  22. *Id.* at 250-251.
  23. *Id.* at 251.
  24. 1999 WL 343943, at \*3 (Colo. 1999).
  25. *Id.*
  26. *Id.* at \*4.
  27. 656 P.2d 1238 (Ariz. 1982).
  28. *Id.* at 1242.
  29. *Id.* at 1241.
  30. *Id.* at 1243.
  31. See also *Smart Industries Corp.*, 876 P.2d at 1176.
  32. *Granger v. Wisner*, 656 P.2d at 1241 and n. 2.

## the practitioner's toolbox

### finding and keeping experts

*Expert Rules: 100 (and More) Points You Need To Know About Expert Witnesses* (2nd ed.),

by David M. Malone and Paul J. Zwier

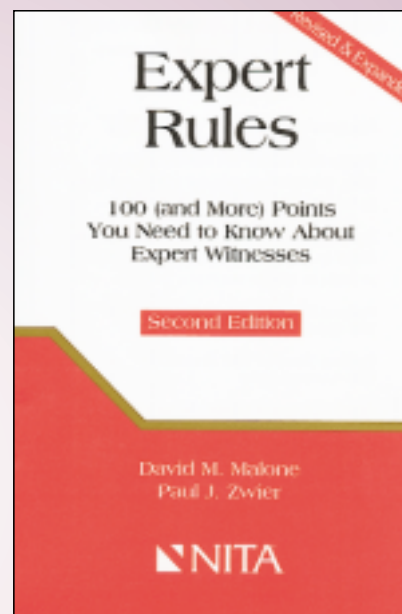
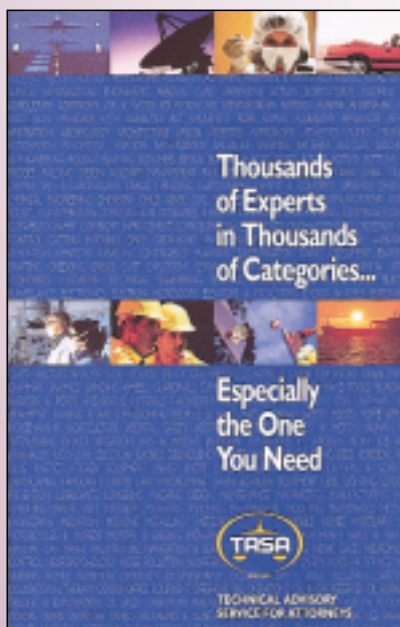
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