

BY DAVID D. DODGE

Ethical Pitfalls for Expert Witnesses and the Lawyers Who Retain Them



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We are all no doubt familiar with the fact that, as lawyers, we operate under a rather elaborate set of ethical and procedural rules regarding our relations with clients, the courts and the public. But ours is not the only profession that has a code of ethics: Doctors, accountants, appraisers and other professions have rules concerning their relations with patients, clients and the people they serve.¹ While it's helpful for us to be aware generally of their rules, the cases discussed below demonstrate that it is essential that testifying experts also fully understand our rules too—particularly those dealing with confidential communications and conflicts of interest.

Arizona's Rules of Professional Conduct² touch occasionally on expert witnesses: Comment [3] to ER 3.4 provides that it is improper to pay an expert witness a contingent fee; an Arizona ethics opinion makes it clear that it is improper to communicate with the other side's expert³; ER 1.7(a) (2) prohibits us from representing a client if our relationship with one of the parties or witnesses in a case (like one of the experts) materially limits or prevents us from adequately serving as the client's lawyer; and ER 5.3 requires us to ensure that the independent contractors we retain in a case comply with our professional obligations toward our clients and the courts.

These rules, while they help to clarify some areas, still do not address the very real problems created by the fact that expert witnesses are a different

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breed of cat from the normal everyday witness usually encountered in the courtroom. Expert witnesses are hired to consult and testify on issues that often require that they be given information and documentation about the lawyer's client that is confidential and might be prejudicial if disclosed to the opposing side, and which may be further protected by privilege and work-product immunities.

The problems outlined above can create complications for lawyer and expert alike and have been the subject of academic concern for a number of years.⁴ Yet until recently, no attempts had been made to propose ethical standards addressing these situations.

In August 2011, the American Bar Association's Section of Litigation drafted a document titled "Standards of Conduct for Experts Retained by Lawyers."⁵ Noting that the lack of consistent standards had led to a number of issues for lawyers and experts, including inconsistent expectations of each other and expensive disqualifications, the litigation task force appointed by the ABA drafted a set of five basic standards, somewhat similar to many of the Model Rules of Professional Conduct for lawyers, together with well researched Comments.

For reasons apparently having nothing to do with the issues presented and the authorities cited by the drafters, the Standards were not accepted by the powers that be at the ABA.⁶ The document, consisting of a very manageable 10 pages, continues to be available online, however, and is an excellent "primer" for any lawyer (or expert) facing issues involving confidentiality, conflicts of interest or expert compensation disputes in litigation contexts. It should be required reading for any lawyer facing situations involving the prosecution or defense

of motions to disqualify experts and/or the lawyers who have retained them.

This article discusses the three basic areas addressed in the draft Standards document. It accepts the document's premise that the areas of confidentiality of communications with experts, potential conflicts of interest involving the expert, and issues concerning expert compensation, will continue to be the most bothersome for lawyers who retain experts. The article addresses these issues as the draft Standards articulate them, and provides authorities that may be helpful to Arizona lawyers confronted with these problems.

Competence and Professionalism

The first two Standards deal with proscriptions against experts engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, similar to the rules regulating lawyers' conduct.⁷ They also warn against the expert undertaking an engagement for a matter the expert is not competent to handle. All of this should go without saying but is important because such matters reflect on a lawyer's competence if the expert who is hired is either incompetent, dishonest, or both. Remember that clients often rely on their lawyer to find the right expert for the engagement. One of the Comments here suggests that an expert should either

(1) have the specialized knowledge, training and experience to complete the engagement professionally; (2) disclose to the retaining lawyer any area where such may be lacking, the steps the expert needs to take to complete the engagement competently and, when completed, what the expert did to complete the job; or (3) decline, withdraw from, or

limit the engagement. The Comment specifically approves the association with another expert as a means by which the retained expert can acquire the competence required in a given matter.

Confidentiality

Much like our obligations under ER 1.6 (Confidentiality of Information), any information received by or work-product given to the expert during an engagement is generally considered to be confidential and may not be disclosed to others except as either required by law, as directed by retaining counsel, or with the consent of the client if it is the contracting party. The Comment for this topic emphasizes that protection of client confidences is not only required of the retaining lawyer but of the expert as well, and that an expert who discloses confidential information without the consent of the retaining lawyer or the client risks disqualification.

Experts are frequently given confidential information to consider, or are present during conversations with the retaining lawyer in the presence of the client that may be protected by the attorney-client privilege. What is learned in this process must be considered confidential, and courts have disqualified experts who have ignored this obligation in order to "both to protect the integrity of the adversary process and to



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promote public confidence in the legal system.”⁸

In *BP Amoco Chemical*, the seller and buyer of a refinery plant were litigating various issues concerning the sale, during which the seller sought to have its expert inspect the plant as part of discovery proceedings. The buyer objected to inspection and to the seller’s use of Packer Engineering as its “inspection consultant, litigation consultant, and possibly its expert at trial.” The buyer claimed that before the sale, Packer had performed testing and analysis work at the plant for the seller, and that the buyer had entered into a contract with Packer after the sale for the same kind of work.

Finding that the standards for disqualification of experts were different from that of lawyers because each performed different functions in the litigation process, the court applied a two-part test to determine whether

disqualification of Packer in that case was justified. First, the court should determine whether the party seeking disqualification (in this case the buyer) acted reasonably in assuming that a confidential relationship existed between it and the expert; and second, whether any confidential information was actually exchanged between it and the expert that could be used to its disadvantage by the seller. The court cited a number of cases addressing the issue, which hold generally that once it is shown by the proponent of the motion to disqualify an expert that confidential information was given in confidence to the expert, a presumption arises that the information was disclosed to the opponent of the motion, who then has the burden of proof to show that no confidential information was in fact received. The Packer matter essentially involved only the second part of the inquiry, and the court

found that the seller was able to show that any confidential information relevant to the case was already known to it prior to the sale and discoverable anyway. The court also noted that Packer had offered to “screen” the employees used by the buyer so that they would have no part in participating or assisting in the seller’s case.

The Comment to the draft Standard on this topic notes that confidentiality of the information learned by the expert is so important that a confidentiality provision should be considered by the retaining lawyer to be included in the expert’s engagement agreement, a practice approved by other authorities.⁹

Conflicts of Interest and Disclosure

Not unlike the rule for lawyers, an expert may not accept an engagement that would create a conflict of interest, described in the draft Standards as a situation where the expert’s “provision of services” would be materially limited by the expert’s duties to other clients, the expert’s relationship to third parties (including the opposing party), or the expert’s own interests. The draft Standard is notable in that it would require the expert to disclose to the client, or the retaining lawyer, all of the expert’s present and potential conflicts of interest—something good practice requires a retaining lawyer to discuss with the expert anyway. In this regard, the Standard would require disclosure concerning:

- the expert’s financial interests or business relationships with the lawyers or parties either involved or reasonably likely to be involved in the matter
- any communications or contacts with opposing parties or their lawyers¹⁰
- any of the expert’s prior testimony, writings or positions taken by the expert within the last 10 years that bear on the subject matter of the engagement
- any determination in the last 10 years in which a judge has opined adversely

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on the expert's qualifications or credibility, or in which any portion of the expert's opinion was excluded

As a practical matter, the 10-year period requirement suggested in the draft may be excessive, but the information described is not, and it should be disclosed by any expert who may potentially be a testifying witness. The duty of disclosure is a continuing duty, requiring supplementation by the expert as needed, and should be in sufficient detail to allow the retaining lawyer to make informed judgments on whether the matters disclosed might cause trouble later. The Comment to the draft Standard sets forth several excellent examples of what sorts of trouble that might be:

- There are quite a few cases of disqualification controversies when an expert has been consulted initially by one side of a dispute, is not retained, but is later hired by the other side.¹¹ As we saw in the discussion of confidentiality, these "side-switching" cases turn on whether confidential information was given to the expert in confidence and, if so, whether the expert can overcome the presumption that the information was subsequently disclosed to the party opposing disqualification.
- In a case where the expert, prior to the conclusion of the engagement, joins an organization whose members have been employed as experts for the other side in the litigation, the drafters of the Comment to this Standard endorse the concept of screening we know in our ethics rules. The effec-

tiveness of the screen, however, would be up to the court to decide.

- While it is important to determine whether the expert has any presently discernable conflicts, it is just as important to examine whether any other persons or organizations may become involved in the case who have a relationship with the expert. This is where the retaining lawyer, who will have the best sense of potential

sources of liability in the matter, will need to have an effective disclosure of potential conflicts when he consults initially with the expert.

- In a case where the expert is approached during the engagement by the adverse party or its counsel for possible retention in an unrelated matter, this should be considered a "communication" with the adverse party and promptly disclosed to the retaining lawyer.¹²

There are, of course, conflicts that might arise after the start of an engagement that could not have been foreseen initially. But for the conflict that should have been disclosed by the expert but wasn't, a later disqualification can result in financial consequences for everyone involved. If it could have been avoided with proper disclosure by



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the expert, the situation could well result in claims against the expert for damages. The retaining lawyer might consider diplomatically stressing this possibility to the expert prior to the engagement.

Contingent Fees

Most jurisdictions have authorities that provide that an expert should not accept compensation that is contingent on the outcome of litigation. This should come as no surprise to Arizona lawyers: Comment [3] to Arizona's ER 3.4 states quite clearly that in most jurisdictions (presumably including Arizona) it is improper to pay an expert witness a contingent fee. It also might be noted that fee sharing with an expert as a way to increase the expert's compensation is prohibited by ER 5.4(a). In addition, Arizona has its own take on expert compensation: An Arizona ethics opinion states that it is acceptable for a trial consultant to be paid a base fee plus a bonus if the case is settled or won at trial, if the bonus is paid by the retaining lawyer's client, and if the consultant does not testify in the litigation.¹³

Lawyers need to pay attention to the ethical requirements relating to the use of

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experts in litigation. Any breaches of confidentiality that the expert may be accused of by the other side may be imputed to the retaining lawyer, resulting in not only disqualification of the expert but of the retaining lawyer as well. In a recent Nebraska case,¹⁴ a law firm who hired an expert who had previously discussed the case with opposing counsel, but who had not fully disclosed to retaining counsel the extent of what was said, found itself defending a motion to disqualify it from further representation in the matter. The court found that the expert had not disclosed any confidential information to the retaining firm, and the motion was denied. The expert, however, was disqualified.

An entirely different result was found in a California case,¹⁵ where the plaintiff's lawyers had interviewed members of an accounting firm to be experts in a contract dispute, decided not to use them, and then found them

testifying as experts for the defendant. The court found that confidential information concerning the plaintiff's case had been disclosed to the experts by plaintiff's counsel. The experts voluntarily agreed to withdraw, and the defendant's counsel was disqualified.¹⁶

The draft ABA Standards may never have the force of law or even serve as aspirational considerations, but they do serve as an excellent resource that clearly articulates the issues confronting testifying experts and the lawyers who retain them. They also provide a thoughtful discussion of the matters that experts need to disclose before they are retained. What we see from the authorities is that the sins of the expert can be visited upon the lawyer who retains him.¹⁷ At the heart of the matter in most of the reported cases is the unauthorized disclosure by an expert of confidences that should have been, but were not, kept confidential. ■

endnotes

1. Examples are the codes of ethics for the American Medical Association: www.ama-assn.org/go/codeofmedicalethics; the American Society of Appraisers: www.appraisers.org/.../the-asa-principles-of-appraisal-practice-and-code-of-ethics; and the American Society of Questioned Document Examiners: www.asqde.org/about/code_of_ethics.html.
2. Rule 42, ARIZ.R.S.CT.
3. Ariz. Ethics Op. 88-01 (1/11/88); *see also* ABA Formal Op. 93-378(11/8/93). The Arizona opinion, which is 21 pages long, concludes that such contact violated Rule 26(b)(4), ARIZ.R.CIV.PROC., as it existed in 1988, and would accordingly violate a lawyer's obligations under ER 3.4(c) and ER 8.4(d).
4. *See, e.g.*, excellent treatments of this subject in Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465 (1999) and Douglas R. Richmond, *Regulating Expert Testimony*, 62 Mo. L. Rev. 486, 557-571 (1997).
5. Found at: <http://ow.ly/X53mc>
6. Email correspondence on Dec. 9, 2015, with Stephen Weiss, Esq., current Chair of the ABA's Section on Litigation.
7. *See* ER 8.4(c), ARIZ.R.PROF.CONDUCT.
8. *BP Amoco Chemical Co. v. Flint Hills Resources, LLC*, 500 F. Supp. 2d 957, 959 (N.D. Ill. 2007).
9. Va. Ethics Op. 1787 (Dec. 22, 2003).
10. This would include prior contacts with opposing counsel who tries to contaminate the expert pool by contacting potential experts who might become adversarial. This practice is apparently quite common, and has been universally condemned. *See* Richmond, *supra* note 4, at 563.
11. *See, e.g.*, *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988).
12. This is what happened in *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996), with disastrous consequences for the opposing party.
13. Ariz. Ethics Op. 93-05 (1993).
14. *Mid America Agri Products/Horizon LLC v. Rowlands et al.*, 835 N.W.2d 720 (Neb. 2013).
15. *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693 (Ct. App. 1994)
16. *See also Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994), for an example of a retaining lawyer who knew of his expert's prior relationship with the other side but did not take the time to discover how extensive it was.
17. *See Erickson v. Newmar Corp.*, 87 F.3d at 298 (discussing potential ethical violations that can result for lawyers from improper expert witness communications).