March 23, 2015

ARTICLES

Conflicts, Ethics, and Experts

Although experts are not limited by the Rules of Professional Conduct, they may be disqualified under certain circumstances.

By John H. Bogart

Share this:

Use of experts in litigation is pervasive, but not quite yet ubiquitous. Nevertheless, there are a number of ways in which lawyers working with experts get by on luck. This article provides a short treatment of a set of topics that receive relatively little attention in litigation practice guides and cases: the ethical problems that may arise in use of experts in a litigation context.

Unless the expert is testifying in an attorney malpractice case, a lawyer and an expert are under different regimes when it comes to conflicts of interest. An expert is not limited by the Rules of Professional Conduct applicable to a lawyer. An expert does not owe a duty of loyalty to the client (or the lawyer). An expert may take positions in different matters that are inconsistent with the interests of the client. A confidential relationship and access to confidential information will not alone provide a basis for disqualification of an expert. The confidential information must be relevant to the case and it must be confidential litigation information, i.e., confidential information about litigation strategy (not merely confidential business information, even if it is at the heart of the case).

There is a widely used test for a court to determine whether to disqualify a testimonial expert: Disqualification is justified when the moving party demonstrates that: (1) it had an objectively reasonable belief that it had a confidential relationship with the expert, and (2) it disclosed confidential information to the expert that is relevant to the current litigation. *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501–02 (D. Colo. 1993). Disqualification of an attorney is grounded in the Rules of Professional Conduct, but for experts, the power to disqualify arises from the court's inherent powers to protect the trial or litigation process. *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004). Disqualification then may occur when the expert "switches sides" or of the expert had a prior confidential relationship with an adversary (e.g., senior management with access to confidential information). Thus, in cases involving very sensitive business information, an expert might be disqualified or barred because the expert works for a competitor of a party and access to confidential discovery records would risk disclosure of competitively sensitive

information. In at least some instances, even that may not suffice for disqualification. If the confidential information at issue is information that is or would be part of the discovery record in the case, then prior access to the confidential information may not warrant disqualification. The theory is that the expert's confidential information, although obtained in a confidential relationship, is just the information the expert will receive in the litigation. *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM/DJW, 2013 WL 501783, *7 (D. Kan. Feb. 8, 2013). It is when the expert has additional relevant confidential information that disqualification may arise.

Some things an expert may do that a lawyer could not:

> 1. Consult with a potential or actual client and appear as a testimonial expert for an adverse party, provided litigation strategy or similar confidential information is not disclosed during the prior consultation.
>
> 2. Switch sides in a subsequent case.
>
> 3. Be a former employee of the adverse party.

Consultants, i.e., any experts other than a testimonial expert, are subject to at least some of the same limited constraints. A testimonial expert may not rely on a consultant who, had he or she been a testimonial expert, would have been disqualified. Note that this is not imputation to a firm. The relationship has to be directly between the testimonial and nontestimonial experts, e.g., one as staff to the other.

Lawyers are barred from having their agents or employees do things the lawyer cannot do. Consultants can fall into that role for purposes of lawyer discipline. In other words, do not knowingly hire an expert or consultant who has relevant confidential information of a party with adverse interests. Make sure that experts or consultants disclose appropriate past and current relationships, and ensure that the expert or consultant abides by any applicable confidentiality agreement or order. If you solicit breach of such an agreement or order, there is potential liability both for the tort (or contempt) and for violation of the Rules of Professional Conduct (e.g., 1.6, 3.4, 4.4, and/or 8.4).

Keywords: litigation, expert witnesses, ethics, conflicts of interest, confidential information, disqualification, Rules of Professional Conduct

John H. Bogart is with TelosVG PLLC in Salt Lake City, Utah.