

## **EXPERT WITNESSES AND ETHICAL CONSIDERATIONS – MISSOURI**

### **§ 490.065, RSMo – Expert Witnesses**

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

### **Mo. Sup. Ct. R. 56.01(b)(4) – Discovery (Trial Preparation Involving Experts)**

**4. Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule **56.01(b)(1)** and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

- (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such experts name, address, occupation, place of employment and qualifications to give an opinion, or if such information is available on the expert's curriculum vitae, such curriculum vitae may be attached to the interrogatory answers as a full response to such interrogator, and to state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee.
- (B) A party may discover through a deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.

**5. Trial Preparations: Non-retained Experts.** A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a

party, whom the other party expects to call at trial who may provide expert witness opinion testimony by providing the expert's name, address, and field of expertise. For the purpose of this Rule **56.01(b)(5)**, an expert witness is a witness qualified as an expert by knowledge, experience, training, or education giving testimony relative to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence. Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses.

### **Considering Mo. Sup. Ct. R. 4-1.7 when retaining an Expert.**

**(a)** Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1)** the representation of one client will be directly adverse to another client; or
- (2)** there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

**Comment 8:** Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

**Comment 24:** Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the

significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

### **Case Law Considerations**

*Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D. Va. 1991).

Plaintiff brought a patent infringement action against defendant. Plaintiff's counsel retained an expert witness to determine whether plaintiff's patents were valid. The expert reviewed confidential information belonging to plaintiff and then determined that plaintiff's patents were not valid. The expert then terminated his relationship with plaintiff. Thereafter, the expert was retained by defendants. Plaintiff then filed a motion to disqualify the expert and a motion to conduct discovery on the expert to determine what if any use the expert made of plaintiff's confidential information. The court granted the motion to disqualify and denied the motion for discovery. The court held that the expert was disqualified because he had been retained by plaintiff and had reviewed confidential information belonging to plaintiff in rendering his opinion regarding plaintiff's patents.

*Wang* was recognized and incorporated in the 8<sup>th</sup> Circuit's ruling in *Alien Tech. Corp. v. Intermec, Inc.*, No. 3:06-cv-51, 2007 U.S. Dist. LEXIS 89635 (D.N.D. Nov. 30, 2007).