Disqualifying an expert witness

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The Federal Rules of Civil Procedure do not specifically refer to motions to disqualify experts, but a handful of reported cases offers a great deal of guidance for lawyers.

Long ago, a trial lawyer's moment of truth came when the opponent's case unfolded in the courtroom. Only then could the lawyer assess the strengths and weaknesses of the opponent's position.

With the advent of modern discovery tools, a lawyer can judge an opponent's strength far earlier in the litigation. Since expert testimony is needed to establish or rebut a prima facie case in many areas of the law, the lawyer's day of reckoning often comes when the opponent discloses the identity of the expert retained to testify at trial. The trial lawyer's reaction to the disclosure may take several forms:

- "Oh, no." The expert is a Nobel laureate who has never testified before. You call your client and your opponent and hope there are common grounds for settlement.
- "Can't they do any better than that?" The opponent's expert is one you have seen many times. This expert holds a degree from Matchbook Cover State University and testifies for the same attorneys time after time. You roll up your sleeves and begin the (easy) task of preparing for impeachment.
- "That's not fair!" Your opponent's expert once worked closely with your client, perhaps even giving him or her medical treatment.

Resolutions to the first two scenarios are clear. But even in the third case plaintiff lawyers have a remedy.

Although the Federal Rules of Civil Procedure do not expressly provide for motions to disqualify opposing experts, a small but fairly consistent body of reported case law will allow for disqualification in narrow circumstances to protect the integrity of the litigation process.

An analysis of these decisions proves that courts are generally reluctant to disqualify expert witnesses because to do so on a regular basis would set an undesirable precedent. For example, the party with better resources could retain many experts and greatly narrow the opponent's choices.

Before the drastic remedy of disqualification is ordered, the courts usually require that

- the opponent had an actual relationship with the expert (as a paid consultant or expert witness at trial, in a physician-patient situation, or by employment); and
- confidential information was disclosed to the prospective expert.

Beyond these situations, courts will not usually disqualify an expert over conflicts of interest.

What standard applies?

The first question to ask when considering a disqualification motion is what standard will the court apply? A small number of cases have held that an expert witness must conform to the same conflict-of-interest standards as attorneys.[1]

These courts have reasoned that the expert acts as an attorney's agent and should be held to the same standards of protecting client confidences. Under this strict standard, there is no need to prove the expert

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received confidential information; breach of confidence is presumed as soon as the expert is retained, as it is when an individual retains an attorney.

Another approach is to hold the witness to the standards of his or her profession. This seems logical but may be difficult to administer as courts are required to interpret the ethical standards of diverse professions. Few authorities, therefore, apply this test.[2]

The most widely accepted standard requires the attorney seeking disqualification to show an actual breach of confidence between the expert and your client or firm.[3] These courts have rejected a "bright line" rule based on whether a contractual relationship existed between the opponent and the expert. The key factor is the transmission of significant information, not whether the formalities of a contract have been met.

As a practical matter, though, if the opponent has not actually retained the expert, few courts will disqualify him or her. Nothing in the language of Rule 26(b)(4)(B) requires automatic disqualification just because the opponent consulted with an expert. As a corollary to that rule, however, an expert who has a conflict of interest and is compensated for services by an opponent will be disqualified even if the compensation is later returned.[4]

Finally, attorneys who serve as expert witnesses are generally not held to higher conflict-of-interest standards just because they are attorneys.[5]

Procedural issues

A motion that raises these conflict-of-interest questions presents several procedural issues that have been tackled in reported decisions. Although an objection normally takes the form of a motion to disqualify the expert, other motions can accomplish the same goal.

For example, motions for an injunction to prevent the expert's testimony and to bar the use of confidential information have been treated as the equivalent of motions to disqualify the expert. In the federal system, a magistrate can decide these motions under the Federal Rules.[6] It is unclear whether disqualification is governed by federal or state law in diversity cases.[7]

In a pre-trial order or similar document, the mere designation of an expert who has a conflict of interest does not mean a court will automatically disqualify him or her.[8] Again, that is because most courts look to either the substance of the communication or the existence of a contractual relationship with the witness, or both.

A party having grounds to disqualify an opposing expert should not delay in filing the proper motions. The disqualification right can be waived by delay or by showing acquiescence to the other party's choice of expert.[9]

Obtaining disqualification

Motions for disqualification in most reported decisions have been denied. They have been granted when courts relied on the unique facts presented in the case, rather than on broad public policy reasons favoring disqualification.

For example, in *Miles v. Farrell*, it was revealed during depositions of the plaintiff's parents that the plaintiff was undergoing treatment at a certain clinic.[10] The defense counsel then contacted a physician who treated the plaintiff at that clinic and asked him to serve as a consultant on the case. The physician continued to treat the plaintiff after he was retained and even after he was designated an expert. The physician claimed he had not knowingly acted both as an expert and treating physician.

The district court held that the physician-patient privilege barred the expert from testifying for the defense. The court said the privilege was not waived by the plaintiff putting his medical condition at issue. The court noted that the physician's failure to disclose his dual capacity, even if unintentional, created a conflict of interest.

The *Miles* decision rests on the unique public policy reasons behind the physician-patient privilege. As such, the case is of limited precedential value for motions to disqualify experts who are not physicians. Other decisions in which experts have been disqualified have been based on general considerations of fairness relating to expert witnesses in all disciplines.

In *Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, the defendants had previously consulted the plaintiff's proposed expert in a related case, a case in which he was disqualified for having a conflict of interest.[11] The expert said he could not remember any of the defendants' confidences from the first case, but the court observed that the witness could be "subliminally affected" by conversations from that case.

The court wrote that the "potential exists" for the expert to be influenced by confidential information and that that potential outweighed any prejudice to the plaintiff from having to hire a new expert.

Michelson demonstrates the competing interests courts must balance in deciding motions to disqualify. It is difficult to prove that an opposing expert actually received confidences without disclosing what those confidences were. *Michelson* resolves this controversy in favor of disqualification, requiring only that the movant show a contractual relationship between the party and the witness on a similar matter from the past.

This standard was applied in *Marvin Lumber & Cedar Co. v. Norton Co.*[12] There, the court said the test should be whether the matters in the current suit are "substantially related" to the movant's previous relationship with the expert. It has been suggested that the *Marvin* decision is of little analytical value in setting the standard since the parties effectively stipulated to it.

In *City of Westminster v. MOA, Inc.*, one party's expert recommended another expert in his firm to the opposing party.[13] This recommendation was deemed sufficient to warrant disqualification of the first expert. The court explained that two members of the expert firm were involved in a complex subject in which the parties retaining them had adverse interests.

The same standard was followed in *Conforti & Eisele, Inc. v. Division of Building and Construction*.[14] There, the defendant retained a consultant/expert on the second phase of a construction project that was in litigation. The defendant's attorneys discussed their general strategy with the expert and mentioned the third and fourth phases. However, they did not retain him as an expert for the later phases.

When the plaintiff designated that person as its expert for the third and fourth phases, the defendant moved to enjoin the

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expert from serving. The court agreed, noting that the expert could be "consciously" or "unconsciously" affected by his prior service to the defendant.

Wang Laboratories, Inc. v. Toshiba Corp. demonstrates that a misunderstanding about the scope of an expert's retention can lead to disqualification.[15] Plaintiff's counsel asked an expert to serve as a consultant on a patent case. Counsel sent him documents and also mentioned confidential information.

The expert received an outline from the plaintiff's counsel setting out the theories of the case. The expert said he made no use of the information because he would not agree to serve as an expert unless he first determined that the plaintiff's patents were valid. He determined that they were invalid, so he declined to serve as a consultant.

The court held that the defendant's retention of the same expert was improper because the plaintiff had, in fact, disclosed confidential information to him and that it was reasonable to conclude that the plaintiff had a contractual relationship with the expert.[16]

The court explained that if experts doubt a lawyer's intent to retain them, they must resolve these doubts before receiving confidential information.

Finally, in *Wang Laboratories, Inc. v. CFR Associates, Inc.*, the defense expert once worked for the plaintiff developing software using the plaintiff's computer systems. The systems were governed by the patent at issue.[17]

The court held that the expert must be disqualified since he had signed an employment agreement that barred disclosure of confidential information relating to the plaintiff's business. The court also said the plaintiff could nevertheless contact the proposed expert and show him documents he wrote or received, since the expert may be an appropriate fact witness. The court did not need to reach the issue of whether the proposed expert should be disqualified by virtue of the fact that he was plaintiff's business competitor.

When disqualification won't work

Courts generally will not disqualify an expert when:

- opposing counsel had a preliminary consultation with the expert;
- the expert worked on similar issues in the past; or
- the opposing expert is employed by the same firm as the plaintiff's expert or client.

An opponent's preliminary consultation with the expert. Several cases have held that mere exploratory meetings between a party and an expert will not bar the opponent from retaining that expert. In *Brooks Shoe Manufacturing Co. v. Suave Shoe Corp.*[18] and *Secura Insurance Co. v. Wisconsin Public Service Corp.*,[19] a single meeting between a party and an expert resulting in no exchange of confidential information was held insufficient to require disqualification. The same result has been reached even where the party paid the proposed expert for attending the meeting.[20]

Taking this rule one step further, the court in *Paul v. Rawlings Sporting Goods Co.* considered whether an expert who spoke generally with the defendant about baseball helmet tests and about obtaining research grants from the defendant should be barred from testifying for a plaintiff.[21]

The court concluded that even though the defendant may have believed it retained the expert about the case at bar, any discussions about the case were secondary and no confidential information was exchanged. The court said most of the discussion amounted to the expert's non-case-specific advice to the defendant based on his previous research.

The *Paul* decision demonstrates a strict interpretation of the policy behind disqualifying an expert based on the transmission of client confidences. It draws the line at the client's discussion about the case, not at general discussion of issues that may arise.

An expert's work or testimony on similar issues. Several cases have held that an expert's work or testimony on issues similar to those in the case before the court do not alone warrant disqualification. This result is largely a matter of common sense, since an expert develops expertise by working in a specific field.

To disqualify on this basis would mean that many highly qualified experts would be barred from testifying by virtue of being specialists.

A more difficult situation is when prior work or testimony places the expert almost, but not quite, in the position of being a fact witness on the issues at bar.

Most courts considering this situation have been reluctant to disqualify the expert, even if the prior work or testimony is closely related to the issues before the court. For example, in *Panama Processes v. Cities Service Co.*, the court refused to disqualify a lawyer expert who had previously represented the opponent in matters relating to the parties' dealings under a letter agreement. The same agreement was at issue in the case before the court.[22]

Courts also have denied motions where the expert previously testified for the opponent in a suit involving a similar piece of equipment;[23] where the expert developed licensing and commercial expertise for various products of the opponent;[24] where the expert audited a different insolvent insurer for the same state insurance commissioner;[25] and even where an expert appraiser who evaluated one class of common stock had evaluated another class of the same common stock for the opponent in another dispute.[26]

The rationale for these decisions is that even though the expert gained expertise working for the opponent, that proficiency did not give the expert an advantage over others with similar experience. In other words, the expert must apply his or her

general experience to the facts of the suit in order to testify.

The *Viskase Corp.* standard is a good general rule for deciding whether to move to disqualify an expert based on the expert's previous work or testimony.[27]

If that work or testimony somehow gives the expert an "edge" over another expert with similar experience, disqualification may be warranted. But if the expert, like any other, must simply apply his or her general experience to the facts of the case, without calling on inside information from an opponent, a motion to disqualify will likely fail.

An opponent's job with the same firm as the plaintiff's expert or client. Several courts have considered motions to disqualify based on this scenario, but none have resulted in disqualification.

Courts have not required disqualification of accountants working for the same firm as an opposing party[28] or an opposing expert.[29] Nor was disqualification required when a party retained as an engineering expert a person who worked for the same consulting firm as the opponent's expert and supervised that expert on projects.[30]

All these cases focused on the fact that the mere employment of experts in the same firm as an opposing party or expert does not mean that confidential information about the case was "leaked" in the course of the normal employment relationship. This conclusion is particularly logical in disciplines such as accounting, where the expert may be employed in a firm with satellite offices and hundreds of partners, and may have little or no contact with the opposing party or expert.

Thus, the use of motions to disqualify is limited to the situation in which the opponent selects an expert who may have inside information about the other side's business or operations.

Courts are willing to step in to prevent this kind of unfairness. But they are generally not willing to disqualify experts based merely on the appearance of unfairness. Courts normally view the appearance of impropriety as a matter that should be taken up during cross-examination.

Lawyers who keep in mind this "actual breach of confidence" standard will be better able to determine whether a motion to disqualify an opposing expert is worth the effort. And lawyers who take all the appropriate precautions when retaining an expert can frustrate an opponent's disqualification efforts. □

Notes

1. *See, e.g.*, Marvin Lumber & Cedar Co. v. Norton Co., 113 F.R.D. 588, 591 (D. Minn. 1986); Conforti & Eisele, Inc. v. Division of Bldg. & Constr., 405 A.2d 487, 490 (N.J. 1979); Berkowitz v. Berkowitz, 574 N.Y.S.2d 829 (App. Div. 1991).

2. *See, e.g.*, Estate of Halas, T.C. Memo 1989-536, 58 TCM (CCH) 280, T.C.M. (P-H) 89, 536 (applying Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers); *In re* Ambassador Group, Inc., Litig., 879 F. Supp. 237 (E.D.N.Y. 1994) (applying standards of the American Institute of Certified Public Accountants as an alternative

basis for decision).

3. *See, e.g.*, Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 716 F.2d 854 (11th Cir. 1983); Viskase Corp. v. W.R. Grace & Co., 1992 WL 13679 (N.D. Ill. 1992); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334 (N.D. Ill. 1990).

4. *See, e.g.*, Cordy v. Sherwin Williams Co., 156 F.R.D. 575, 581 (D. N.J. 1994).

5. Panama Processes v. Cities Serv. Co., 796 P.2d 276 (Okla. 1990) (attorney retained as expert on foreign law); Grant v. Lewis/Boyle, Inc., 557 N.E.2d 1136 (Mass. 1990) (witness was registered mechanical engineer and attorney, but was retained as engineering expert); *but cf.* W.R. Grace & Co. v. Gracecare, Inc., 152 F.R.D. 61, 65 (D. Md. 1993) ("The duties of an attorney-expert are greater than [those of] the ordinary expert.").

6. Pub. L. No. 90-578, tit.I, 82 Stat. 1113 (1972) (codified as amended at 28 U.S.C. §636(b)(1)(A) (1994)).

7. *Cordy*, 156 F.R.D. 575, 579 (declining to reach the issue, assuming that federal and New Jersey law would be the same).

8. *See generally* Secura Ins. Co. v. Wisconsin Public Serv. Corp., 457 N.W.2d 549, 551 (Wis. Ct. App. 1990).

9. *Brooks Shoe*, 716 F.2d 854, 861 (eight-month delay after grounds for motion first raised; motion made one month before trial); Granger v. Wisner, 656 P.2d 1238 (Ariz. 1982) (motion not made until trial and pre-trial stipulation listed opposing expert). English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498 (D. Colo. 1993) (failure to object to testimony of same expert in similar suit).

10. 549 F. Supp. 82 (N.D. Ill. 1982).

11. No. 83 CIV 8898, 1989 WL 19514 (S.D.N.Y. Mar. 28, 1989).

12. 113 F.R.D. 588, 591-92.

13. 867 P.2d 137, 139-40 (Colo. Ct. App. 1993).

14. 405 A.2d 487, 492.

15. 762 F. Supp. 1246 (E.D. Va. 1991).

16. *Id.* at 1248.

17. 125 F.R.D. 10 (D. Mass. 1989).

18. 716 F.2d 854, 861.

19. 457 N.W.2d 549, 551.

20. *See, e.g.*, Nikkal Indus., Inc. v. Salton, Inc., 689 F. Supp. 187, 190 (S.D.N.Y. 1988).

21. 123 F.R.D. 271 (S.D. Ohio 1988).

22. 796 P.2d 276, 293.

23. *Grant*, 557 N.E.2d 1136, 1138 (products did not include those at issue); *English Feedlot, Inc.*, 833 F. Supp. 1498, 1503 (products included those at issue, but expert received no confidential information from movant).

24. *Viskase Corp.*, 1992 WL 13679, *3.

25. *In re Ambassador Group, Inc., Litig.*, 879 F. Supp. 237, 244-46.

26. *Estate of Halas*, T.C. Memo 1989-536, 58 TCM (CCH) 280, 281.

27. *Viskase Corp.*, 1992 WL 13679, *3.

28. Mayer v. Dell, 139 F.R.D. 1 (D. D.C. 1991).

29. Teacher's Ins. and Annuity Assoc. v. Coopers & Lybrand, 583 N.Y.S.2d 413 (App. Div. 1992).

30. *Great Lakes Dredge & Dock Co.*, 734 F. Supp. 334, 339.