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Draft as of April 18, 2012

**AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts the Guidelines for Retention of Experts By Lawyers.

FURTHER RESOLVED, That the American Bar Association urges counsel to consider utilization of the Guidelines in retaining experts for client matters.

ABA GUIDELINES FOR RETENTION OF EXPERTS BY LAWYERS

INTRODUCTION

An ABA Section of Litigation Task Force was appointed by Section of Litigation Chair Hilarie Bass to explore the creation of guidelines for retention of experts by lawyers on behalf of their clients. While many experts have ethical codes applicable to their chosen professions, there are no uniform guidelines that apply to the retention and employment of experts. As a result, there are issues presented when experts are retained by lawyers on behalf of their clients in connection with litigated or contested matters. The lack of consistent guidelines has led to (a) inconsistent expectations of experts' conduct, (b) unnecessary surprises that have negatively impacted the lawyer-expert relationship, and (c) disqualification motions challenging the conduct of certain experts. At a minimum, such problems have distracted both lawyers and experts from focusing on the matters for which the experts were retained, have delayed proceedings and have added unnecessary expense.

The Guidelines that follow are an effort to create uniform best practices of what lawyers should seek from experts who are retained by lawyers on behalf of their clients for litigated or contested matters. It is hoped that the Guidelines will be promulgated to the legal profession for use in connection with retaining experts. Thereafter, lawyers will be able to refer to the Guidelines in their discussions with experts regarding the type of conduct they expect. Lawyers may even seek to incorporate them into their retainer letters, if appropriate. By utilizing these Guidelines it is hoped that lawyers, experts and clients will have a common understanding of what is expected and as a result that future problems can be minimized or avoided.

These Guidelines are not intended to impose a professional obligation on lawyers to use them and a failure to do so is not intended to be deemed a professional lapse. If a retaining lawyer chooses to use them in discussions with experts, they would govern only the relationship between the retaining lawyer and the expert, and, therefore, will not create any duties to or rights for the adverse party or its counsel. Accordingly, whether the Guidelines are followed or not should not be the subject of discovery by the adverse party. If a lawyer practices in a jurisdiction in which there is a risk of discovery relating to the use of the Guidelines, that risk should be taken into account in determining the extent to which the lawyer will seek to formalize the use of the Guidelines in his or her relationship with the expert. The Guidelines are also not intended to create standards for disqualification, which are a matter for continuing development by the courts.

PREAMBLE

These Guidelines apply to lawyers' retentions of experts in connection with services provided to assist the lawyer's client, in connection with an engagement regarding a litigated or contested matter. Experts are also subject to the applicable ethical codes of conduct of their professions or professional associations. These Guidelines supplement and are in addition to any such codes or standards and are not intended to create any lesser standards of conduct that otherwise govern the expert's profession. They are also intended

to address proceedings that take place in the United States or under United States law. They do not intend to address obligations that experts may have to foreign tribunals. They also do not govern the relationship between tribunals and experts hired by those tribunals, but we would expect them to be helpful to tribunals as well, for example, as a guide to the disclosures that may be required to be made to the tribunal or to counsel for the parties. They are intended to be interpreted with a rule of reason and with common sense.

Comment

The purpose of these Guidelines is to set forth appropriate guidelines for engagements by a lawyer of an expert on behalf of a client in litigated or contested matters. The intent is for them to apply where appropriate to all litigated matters, whether the expert is proposed as a testifying expert or simply retained as a consulting expert, and whether the matters are to be resolved in court, by arbitration, mediation or through any other recognized ADR procedure. They also are intended to apply to matters involving internal investigations but not to commercial transactions. The extent to which the lawyer chooses to ask the expert to agree to follow them will depend upon the nature of the engagement and the jurisdiction or jurisdictions in which the engagement will be performed.

The range of expertise required in connection with legal matters is obviously quite broad and experts may have ethical requirements governing their chosen profession or field of expertise. These Guidelines are not intended to supplant any such ethical requirements nor create any lesser standards of conduct. They are intended to create a set of best practices that lawyers should seek where appropriate with respect to experts retained by lawyers on behalf of their clients for the applicable matters. In so doing, it is hoped that clients, retaining lawyers and experts, will have a clear and common understanding of the expert's expected conduct.

I. INTEGRITY/PROFESSIONALISM

Lawyers should seek an expert who will act with integrity and in a professional manner throughout an engagement.

Comment

Lawyers and their clients are entitled to expect all experts to act with integrity and in a professional manner in any engagement and to maintain the highest standards of ethical conduct. This set of guidelines will not be able to address every possible area of concern in the lawyer-client-expert relationship, but certain minimum expectations seem not only essential but also obvious. If the expert has accepted some or all of these Guidelines, the expert should not knowingly violate them, knowingly assist or induce another to do so, or do so through the acts of another. An expert should not commit any act that reflects adversely on the expert's honesty, trustworthiness or fitness to serve as an expert. An expert should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. An expert should disclose to the retaining lawyer any facts or actions bearing upon the above conduct, including pending investigations, indictments or criminal charges, and any disciplinary action taken against the expert by any credentialing, licensing, accrediting, or other professional organization.

II. COMPETENCE

The lawyer should take appropriate steps to assure that the expert is not undertaking an engagement unless the expert is competent to do so.

Comment

The lawyer must assure herself that the expert: (1) is competent to perform the entire scope of an engagement or (2) be capable of acquiring any additional necessary competencies to perform the engagement; failing that the lawyer should not retain the expert or if already retained, terminate the retention.

Being Competent

Prior to accepting an engagement the lawyer and expert together should determine whether the expert can perform the engagement competently. Competency requires:

1. The ability to properly identify the problems or issues to be addressed;
2. The specialized knowledge, training or experience to complete the entire scope of the engagement in a professional manner; and
3. Recognition of and compliance with the laws and regulations that apply to the expert and/or the engagement.

Competency may apply to factors such as the expert's familiarity with a specific field of endeavor, specific laws, rules and regulations, an analytical method, or an industry, if such factors are necessary for an expert to develop credible and objective conclusions, opinions or observations. The expert is responsible for having the competency to address those factors or for following steps to supplement the expert's current level of knowledge through additional reliable sources including the use of other experts.

Acquiring Competency

If an expert determines that he or she is not competent to complete an entire engagement, either at the outset, or during the course of the engagement, then the expert should:

1. Disclose to the retaining lawyer the area or areas in which he or she may lack knowledge, training or experience;

2. Take all steps necessary or appropriate to complete the engagement competently; and
3. Disclose to the retaining lawyer the steps the expert undertook to complete the engagement competently, including the identification of all sources relied on for completing the engagement.

Competency can be acquired in various ways including association with another expert or other person whom the retained expert reasonably believes has the necessary knowledge, education, training or experience. If the engagement cannot be completed competently, then the lawyer should not retain the expert or cause the expert retention to be terminated.

III. CONFIDENTIALITY

The lawyer must assure that the expert treats any information received or work product produced by the expert during an engagement as confidential, and secure an understanding from the expert that he or she shall not disclose any such information except as required by law, as retaining counsel shall determine and advise, or with the consent of the client.

Comment

This Guideline requires that the lawyer take steps to ensure that all information received and work product produced during an engagement to be treated as confidential except as required by law or with the consent of the client.

The common law has long recognized that client confidences shared with legal counsel must be protected from disclosure to third parties. Confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship.” Comments, ABA Model Rules of Professional Conduct, Rule 1.6 “Confidentiality of Information,” Comment 2.

Similarly, expert witnesses who are engaged on behalf of clients in legal matters must generally protect confidential information from disclosure to third parties. Disclosure of confidential information can serve as grounds for disqualification of an expert witness. *See, e.g., Northbrook Digital LLC v. Vendio Services, Inc.*, 2009 WL 5908005, at *1 (D. Minn. Aug. 26, 2009); *Koch Refining Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1182-83 (5th Cir. 1996). “Courts have inherent power to disqualify expert witnesses both to protect the integrity of the adversary process and to promote public confidence in the legal system,” *BP Amoco Chemical Co. v. Flint Hills Res., Inc.*, 500 F. Supp.2d 957, 959 (N.D. Ill. 2007). Disqualification of experts, nonetheless, is viewed as a drastic measure not to be taken lightly. *Id.* at 960.

A two-part test is generally followed when a court determines whether an expert should be disqualified because he or she has improperly disclosed confidential information: (1) the retaining party and the expert must have had a relationship that permitted the retaining party to have a reasonable expectation that its communication with the expert would remain in confidence; and (2) confidential information must have been provided to the expert by the party

seeking disqualification. *Koch Refining*, 85 F.3d at 1182-1183. See also *Northbrook Digital LLC*, 2009 WL 5908005, at *1. This test also is employed when an expert has a prior relationship with an opposing party. See *Ascom Hasler Mailing Systems, Inc. v. United States Postal Service*, 267 F.R.D. 9, 12 (D.D.C. 2010).

The determination of whether a party has a reasonable expectation of a confidential relationship with an expert depends on a wide range of factors, including “whether the expert met once or several times with the moving party; was formally retained or asked to prepare a particular opinion; or was asked to execute a confidentiality agreement.” *Northbrook Digital LLC*, 2009 WL 5908005, at *2. The conduct guideline set forth above concerning confidentiality reinforces and is consistent with the rules generally applied by courts.

Lawyers should secure the agreement of experts, preferably in writing, to recognize their obligation to maintain the confidentiality of confidential information. And lawyers and/or clients should identify information as confidential at the time it is provided so there can be no confusion as to an expert’s obligations.

Because confidentiality is so important to a lawyer’s relationship with his or her client, as well as to the integrity of the judicial process as a whole, information regarding the engagement should only be disclosed to third parties when explicit consent is provided by the client or when disclosure is otherwise required by law. Lawyers should require that requests for such information directed to the expert by third parties, either informal or by legal process, should be referred to retaining counsel or the client so that confidentiality may be protected. Certain engagements may never become public and the expert should not be placed in the position of making determinations regarding what documents or information should be deemed confidential. It is preferable that a client’s consent to the disclosure be provided in writing, although this is not required.

Certain matters are required by law to be disclosed in certain experts’ reports. Federal Rule of Civil Procedure 26 requires certain disclosures regarding expert testimony in the form of written expert reports, and in other circumstances, in lawyer disclosures. Written reports are to include the identity of the expert, all opinions the witness will express and the basis and reasons for them, the facts or data considered by the witness in forming them, exhibits that will be used to summarize or support them, the witness’s qualifications, including a list of all publications authored in the previous ten years, a list of cases in which the witness testified at trial or by deposition in the past four years, and a statement of expert compensation. Fed. R. Civ. P. 26(a)(2)(B). Many state courts have similar requirements. Certain other lawyer disclosures must be made with respect to testifying experts not required to provide written reports. Fed. R. Civ. P. 26(a)(2)(C). Examples of situations in which disclosure to a third party may be required by law include direct court orders requiring disclosure and ethical rules imposed on experts under the law, such as an engineer’s obligation to notify authorities of conditions that may put human life in jeopardy. Other examples may exist as well. The expert should be advised that the expert should not be making the decision of what is required by law to be disclosed, but should refer all requests for information and defer all decisions on what to disclose to retaining counsel.

IV. CONFLICTS OF INTEREST AND DISCLOSURE

Unless the client provides informed consent, the lawyer should take steps to assure that the expert's acceptance of the engagement will not create a conflict of interest, *i.e.*, that the expert's provision of services will be materially limited by the expert's duties to other clients, the expert's relationship to third parties, or the expert's own interests. To facilitate a determination of whether a conflict of interest exists, the lawyer should ascertain from the expert all present or potential conflicts of interest. Among the matters that need be determined are the following:

- 1. Financial interests or personal or business relationships with lawyers, clients, or parties involved or reasonably likely to be involved in the matter.**
- 2. Communications or contacts with any adverse party or lawyer.**
- 3. Prior public testimony, published writings or opinions of the expert in the last 7 years in other matters that directly bear on the subject matter of the engagement.**
- 4. Determinations in the last 7 years in which a judge has opined adversely on the expert's qualifications or credibility, or in which any portion of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility.**

The duty of the expert to share this information is a continuing obligation. Therefore, the expert should be asked to supplement all these disclosures as needed.

Comment

Although there are no studies available to document the frequency of conflict of interest problems arising with respect to expert witnesses, the concern is raised by anecdotal evidence as well as numerous court decisions treating expert disqualification issues in particular cases.

The recommended Guidelines are not intended to prescribe criteria to determine whether and when experts should be disqualified, a subject that the evolving case law will continue to address. Nor are the proposed Guidelines intended to supplant standards that some professions have defined for their own members concerning conflicts of interest and disclosure issues. To the extent this Guideline contains more expansive disclosure obligations than the expert's profession requires, the Guideline's standards should be followed. The Guidelines require disclosure so that conflicts can be addressed by clients and lawyers based on sufficient disclosure of the issues prior to any engagement.

Many of the disqualification controversies have arisen when experts are consulted by one side but later hired by another. In general, "side-switching" disputes turn upon factors such as whether there was an objectively reasonable expectation of confidentiality and whether confidential information was disclosed to the expert who was later retained by the opposing

party. *See Paul v. Rawling Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988). Another scenario occurs with respect to an expert who, prior to the conclusion of the engagement, joins or is affiliated with an organization that also has members working for the opposing side. The Guidelines take no position concerning the extent to which one professional's knowledge would be imputed to another member of the same firm. Should such problems arise, and irrespective of whether disqualification is requested or granted, the expert should be asked to agree that the expert's organization will build a firewall between any professional, with past or present involvement on one side of an engagement, and those with any such involvement on an opposing side. Whether this will be sufficient protection to prevent disqualification is an issue for the courts. These Guidelines do not suggest that the same issues would be presented in an academic setting or by memberships in professional societies of experts.

Relationships that should be determined include financial interests, and personal or business relationships with adverse or other lawyers, clients or other parties, all of which have the potential for creating conflicts of interest. This of course would not require disclosure of casual contact in professional settings but if there is doubt as to whether the relationship is sufficiently casual, the expert should err on the side of disclosure. To the extent these relationships are covered by confidentiality agreements, that fact should be disclosed along with enough information that may properly be disclosed to allow the retaining lawyer to make an informed judgment. This disclosure requirement not only pertains to relationships with the existing parties but also relates to relationships with other parties who are reasonably likely to become involved. Thus, for example, if the expert has an ongoing relationship with a manufacturer of a given product and the engagement relates to an action against another manufacturer of the same type of product, the relationship with the first manufacturer is the one that should be disclosed.

Communications with the adverse party or its lawyer are another area of essential disclosure. The adverse party might have contacted the expert to explore retention of that expert before the expert was approached by the current retaining lawyer. Or the expert may be approached by the adverse party to retain the expert for another matter during the course of an engagement. These contacts should be promptly disclosed so that they may be fully explored by the retaining lawyer.

The Federal Rules of Civil Procedure currently require the disclosure of all matters in which the expert testified in the past four years and a list of all publications authored in the past ten years. But the disclosure obligation to retaining lawyers and their clients should go beyond those required disclosures. The retaining lawyer is entitled to know about all prior public testimony, published writings or opinions of an expert, at least in the last 7 years, that directly bear on the subject matter of the engagement. This of course would not require disclosure of testimony, unpublished writings or opinions protected by confidentiality orders or agreements or require the expert to search materials not accessible to the expert. The goal is to inform the retaining lawyer of materials that may be useful to the other side in cross examination. Inconsistent positions, whether in testimony, writings, speeches, or otherwise, to the extent discovered by the adverse party, will likely be the subject of cross-examination by the adverse party. The retaining lawyer should be aware of these positions from the outset of the engagement. Surprises are never helpful. To the extent positions were not necessarily

inconsistent but directly bear on the subject matter of the engagement, those differences may also have the potential to impact the expert's credibility. Accordingly, these positions also should be disclosed to the retaining lawyer. By referring to opinions that directly bear on the subject matter of the engagement, the Guideline again refers to opinions that could be used in cross examination.

Court rulings that reflect unfavorably upon the expert's earlier testimony should also be disclosed. These include determinations by a court that an expert was not qualified in a field of engagement. Retaining lawyers should also be advised of prior rulings in which all or part of an expert's opinion was excluded on substantive grounds going to the soundness of the opinion or its credibility, or in which a judge commented adversely on an expert's qualification or credibility. Again, the goal is to make the lawyer aware of materials reasonably likely to be discovered by the adverse lawyer. It is not intended to require experts to retain materials they would not ordinarily retain or to breach any confidential relationships. These disclosures would not be required if an expert witness were excluded because the testimony was cumulative or not a proper subject for expert testimony, reasons which do not challenge the underlying soundness of the expert's opinion or expertise. Adverse court determinations may not be insurmountable obstacles but the retaining lawyer should be informed of such facts from the outset so that the lawyer can make the required evaluation.

These disclosure obligations are continuing throughout the engagement. Relationships may change during the course of an engagement or contacts by an adverse party may occur with respect to a new potential matter. Accordingly, all of the above disclosures should be supplemented as needed.

V. CONTINGENT COMPENSATION OF EXPERTS IN LITIGATED MATTERS

No lawyer may offer compensation that is contingent on the outcome of litigation.

Comment

Compensation of experts in litigated matters should be determined at the outset of an engagement and should be structured to preserve the integrity of the expert's opinion. The arrangement for a contingent fees has the great potential to undercut the opinions to be offered and interfere with the objectivity of the expert. Contingent fees are so universally rejected that many codes that govern particular fields of expertise already prohibit compensation dependent upon or contingent on the outcome of the matter.

The ABA Model Rules of Professional Conduct prohibit offering an inducement to a witness that is prohibited by law. Rule 3.4(b). Comment 3 explains that, under the common law in most jurisdictions, it is improper to pay an expert a contingent fee. As the Annotated Model Rules explain, the expert's fees may not be contingent on the outcome "because of the improper inducement this might provide to an expert to testify falsely to earn a higher fee. *See New England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E.2d 263 (Mass 1984) (majority rule 'is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy')." Annotated Model Rules at 329 (6th Ed. 2007). The prior Code of

Professional Responsibility expressly prohibited contingent fees for expert witnesses. DR7-109. While some cases have permitted contingent fees to consulting experts, such as those who located testifying experts, *see Ojeda v. Sharp Cabrillo Hospital*, 10 Cal. Rptr. 2d 230 (Ct. App. 1992); *Schackow v. Medical-Legal Consulting Service, Inc.*, 416 A.2d 1303 (Md. Ct. Spec. App. 1980), the better view is expressed in those cases finding such fees against public policy. *See, e.g., First Nat'l Bank v. Malpractice Research*, 688 N.E.2d 1179 (Ill. 1997) (against public policy to permit a consulting firm to be paid pursuant to a contingency fee arrangement where the firm would locate and retain expert witnesses as well as act as a consultant); *Dupree v. Malpractice Research, Inc.*, 445 N.W.2d 498 (Mich. 1989) (against public policy to pay a consulting firm on a contingency fee basis where that firm provided “access to several medical experts....and provided considerable advice on trial techniques with suggested supporting expert testimony”); *see also Polo by Shipley v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987) (contingent fee consulting contract inconsistent with court rules, statutes and public policy).

In addition, it is unethical for lawyers to share legal fees with experts. Rule 5.4 of the ABA Model Rules of Professional Conduct dictates that a lawyer or law firm shall *not* share legal fees with a non-lawyer. Similarly, Rule 1.5 of the Model Rules of Professional Conduct addresses fees. Subsection (e) describes the requirements for the division of fee between lawyers who are not in the same firm may be made. None of those requirements could be met by a fee arrangement with an expert witness.

Furthermore, other professions bar contingent fees to experts. For example, Opinion 9.07 (medical testimony) from the American Medical Association states as follows:

Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Similarly, Opinion 6.01 (contingent physician fees) states as follows:

If a physician's fee for medical service is contingent on the successful outcome of a claim, such as a malpractice or worker's compensation claim, there is the ever-present danger that the physician may become less of a healer and more of an advocate or partisan in the proceedings. Accordingly, a physician fee for medical services should not be based on the value of the service provided by the physicians of patient and not on the uncertain outcome of a contingency that does not in any way relate to the value of the medical service.

A physician's fee should not be made contingent on the successful outcome of medical treatment. Such arrangements are unethical because they imply that successful outcomes from treatment are guaranteed, thus creating unrealistic expectations of medicine and false promises to consumers.

The American Society of Appraisers recently revised their Principles of Appraisal Practice and Code of Ethics. Section 7 addresses unethical and unprofessional appraisal practices. The first area they addressed under unethical and unprofessional practices are contingent fees (Section 7.1). The wording of Section 7.1 is somewhat similar to the way that the American Medical Association has dealt with doctors' acting as expert witnesses. Section 7.1 concludes by stressing that "[t]he Society declares that the contracting for or acceptance of any such contingent fee is unethical and unprofessional.]"

The American Society of Questioned Document Examiners has a code of ethics for their members. Each member of the Society is to abide by certain rules of conduct. One of the rules of conduct is that "no engagement shall be undertaken on a contingent fee basis." There are other groups that have adopted similar language.

Contingent fees should be contrasted to other fee arrangements which are certain or fixed at the outset of an engagement but payment is deferred to the conclusion of the matter. Such arrangements, however, should not make payment of the arranged fee dependent on the success or outcome of the matter. In addition, this Guideline is limited to experts retained in litigated matters in recognition of the fact that certain experts in transactional matters, such as investment bankers, commonly have fee arrangements which provide that a portion of their compensation is contingent on the completion of the transaction.