Conflicts of Interest for Individuals Retained as Expert Witnesses

Some Governing Rules

I. The duty for retained testimonial experts generally to avoid conflicts of interest – some principles of agency law (and a few case examples):

Restatement (2d) Agency:

"§ 394. Acting for One with Conflicting Interests

Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed. ..."

* * *

"§ 395. Using or Disclosing Confidential Information

Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed..."

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"§ 396. Using Confidential Information after Termination of Agency

Unless otherwise agreed, after the termination of the agency, the agent: ...

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to [the principal’s] injury, trade secrets, written lists of names, or other similar confidential matters given to [the agent] only for the principal’s use ...

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation."

See, e.g., LaCroix v. BIC Corp., 339 F. Supp.2d 196 (D. Mass. 2004) (“Disqualification of an expert is appropriate when a party retains an expert who previously worked for an adversary and received confidential information from the first client... Although most expert disqualification cases involve a testifying expert, courts employ the same test in determining whether to disqualify a consulting expert...To resolve a motion to disqualify an expert in cases other than where an expert has clearly switched sides, the court undertakes a two-step inquiry...The court must determine whether, (1) it was objectively reasonable for the moving party to believe that it had a confidential relationship with the expert; and (2) whether the moving party disclosed confidential information to the expert that is relevant to the current litigation”).

Commonwealth v. Harris, 32 A.3d 243 (Penn. 2011) (in convicted capital defendant’s habeas challenge of sentence, commonwealth’s lawyers proposed to hire the psychologist who had testified for the defendant at the sentencing hearing; court held there was a limited waiver of physician-patient privilege by the filing of the habeas petition so psychologist could be called to testify, but could not be hired by commonwealth because he “was privy to confidential communications between [defendant] and trial counsel...many of which may
have no bearing on [defendant’s habeas] claims, [so] he may well be in possession of privileged material that...has not [been] placed in issue”).

II. The duty for retained lawyer testimonial experts specifically to avoid conflicts of interest -some applicable rules of professional conduct (and a few case examples):

1. Does a lawyer’s being retained as an expert witness for a party create duties for the lawyer to the party under the ethics rules – e.g., do the MRPC conflicts rules apply?

“ABA Model Rule 1.7 Conflict Of Interest: Current Clients
(a) Except as provided in paragraph (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.”

So is acting as a retained testimonial expert for a party a representation of that party as a client?

“ABA Formal Opinion 97-407
Lawyer as Expert Witness or Expert Consultant
A lawyer serving as an expert witness to testify on behalf of a party who is another law firm’s client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a 'law-related service’ to the party within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct...

[but MRPC 1.7 nevertheless applies to representations of clients with interests adverse to those of a party concurrently retaining the lawyer as expert:]

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify. Accordingly, if the testifying expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party’s confidences or by other duties he owes the party, Model Rule 1.7(b) applies to that concurrent representation. At least in circumstances where the party’s material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert's own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b)
and by Model Rule 3.7(b). Under Model Rule 1.10(a), the testifying lawyer's disqualification would be imputed to his law firm."

See Outside the Box Innovations v. Travel Caddy, 369 Fed. Appx. 116, denial of reconsideration 2010 WL 2160753 (Fed. Cir. 2010)(disqualifying law firm under Georgia R. 1.7 and R. 3.7 from representing party on appeal because partner in firm had submitted expert's affidavit for opposing party in the trial court).

Contrast Commonwealth Insurance v. Stone Container Corp., 178 F. Supp. 2d 938 (N.D. Ill. 2001) (lawyer retained to testify as expert by an adversary of one of his firm's current clients not disqualified because "Rule 1.7...speaks to the situation where a lawyer first incurs 'responsibilities' to a client or third party, and while those responsibilities are still ongoing, seeks to represent a client in an attorney-client relationship...But that scenario does not describe this case, because the representation of the client...came first").

So does that mean that MRPC 1.9 would also apply after the expert retention is concluded because of these "responsibilities as a subagent to maintain the party's confidences or by other duties"?

ABA Formal Opinion 97–407 again:

"If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert's law firm on an unrelated matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a) would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c) would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service."

2. Does a lawyer's prior representation of a client preclude the lawyer, or a member of the lawyer's firm, from being retained as an expert by an adversary of the former client?

ABA Model Rule 1.9, Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

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(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**ABA Model Rule 1.10, Imputation Of Conflicts Of Interest**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a **client** when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 ...

See, e.g., *Old Republic National Title Insurance v. Warner*, 2011 WL 3648070 (N.D. W. Va. 2011) (lawyer whose partners previously represented in a separate matter corporate entities controlled by the individual defendants in this matter not disqualified from being retained as testifying expert by individual defendants’ adversary because “the Court does not find [the lawyer’s] engagement and appearance as [an] expert...constitutes...representing [that adversary] in its claims” in second matter under R. 1.10; matters were also held not to be “substantially related” under R. 1.9).

*In Re Nat’l Century Financial Enterprises Financial Investment Litigation*, 2010 WL 1257598 (S.D. Ohio 2010) (lawyer who formerly represented defendant investment bank in its offering of some of a series of related securities was retained as expert witness by plaintiff purchasers of some of the securities; plaintiffs “de-designated” expert when conflict was discovered, and the court and parties alike seem to accept there was a R. 1.9 violation; defendant also moved to disqualify plaintiffs’ law firm, but no disqualification because of excessive delay in raising the conflict with plaintiffs’ firm).

*Cf. Grioli v. Delta Int’l Machinery*, 395 F. Supp. 2d 11 (E.D.N.Y. 2005)(court disqualifies lawyer/engineer hired by plaintiffs as expert on design defects because lawyer/engineer had previously represented defendant as lawyer; court did not rely on, or even cite, ethics rules because “the reasons behind disqualifying an expert witness are similar to those behind disqualifying an attorney...the two scenarios are distinguishable and subject to different standards”).