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Beyond CVs: ensuring your expert doesn't disqualify you

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When an attorney seeks to hire an expert to consult or testify in a case, the initial concern is, of course, finding the right expertise. Issues of professional responsibility and ethics, however, may rise to the forefront when opposing parties find themselves communicating with the same expert.

Consider the following situation: a plaintiff's attorney finds the perfect expert, Mr. X. Mr. X discloses, however, that he had two prior calls with defense counsel about the same case. Mr. X says that the conversations with defense counsel were brief, involved nothing confidential (though there is nothing in writing showing this to be so), and defense counsel never retained Mr. X. What is the plaintiff's attorney to do with this information?

Several California cases have identified the specific ethical duties of an attorney who discovers that the expert he or she wants to hire had previous communications with opposing counsel regarding the same case. First, the attorney should cease any contact with the expert and "clarify the situation" with opposing counsel. *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1082 n.10. If opposing counsel does not consent, the attorney may either "turn to other experts ... or fashion an application to the trial court" to resolve the matter.

Similarly, when an attorney discovers he or she may have already inadvertently retained an expert previously interviewed or hired by opposing counsel, the attorney should resist the natural urge to check with the expert about what happened. To the contrary, the attorney is "duty bound to refrain from talking directly with that expert until the court resolved the problem." *Collins v. State*, 121 Cal. App. 4th 1112, 1132 (2004).

The concern animating the courts is that an expert who has had access to the confidential information of one party to a lawsuit who is hired on behalf of an opposing party may — either deliberately or inadvertently — pass along or make use of that information. In rare cases, the expert may gain such access by working for both sides in a single case: in *Collins*, for example, the expert "had completely forgotten" that he had consulted for the defense when he signed on to work for the plaintiff. More commonly, the expert is retained by one party after initial interviews with the opposing party that did not result in retention. Pre-retention communications may or may not involve the transmission of confidential information, and without a written agreement that confidential information will or will not be disclosed, there is substantial room for disputes.

Nevertheless, from the perspective of our hypothetical plaintiff's attorney, the guidelines described above may be deeply troubling. They require the attorney to disclose who he selected as an expert, perhaps long before such disclosures are required, and to give opposing counsel an initial veto over his or her choice of expert. If opposing counsel is uncooperative, the attorney must then seek relief from a court that may have little time to devote to this issue between counsel.

The alternative — to simply plow ahead after making a judgment call that the engagement of the expert is proper because the communications with the opposing party were not confidential without court involvement — is risky. California courts have in recent years given attorneys increasingly strong incentives to take affirmative steps out of concern for the confidences of opposing parties. For example, an attorney who comes into possession of an opposing party's privileged documents risks disqualification for "excessively reviewing" those documents, or failing to inform the opposing party immediately of the situation. See, *e.g., Clark v. Superior Court*, 196 Cal. App. 4th 37, 52 (2011). As the cases discussed here demonstrate, courts are applying the same paradigm when the medium for transmission of confidences is the mind of an expert, rather than a document.

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Failure to follow the ethical guidelines regarding communications with experts does not necessarily result in disqualification of counsel. See, *e.g., Orr v. HSBC Bank USA*, No. B189852 (Cal. App. Feb. 26, 2007) (affirming trial court's denial of disqualification motion despite lack of compliance with standard articulated in Collins). The guidelines provide an important safe harbor, however, for the attorney who follows them: at least where no privileged information was actually transmitted by the expert, it is an abuse of the trial court's discretion to disqualify an attorney who has "acted with high ethical standards." In *Collins*, for example, the Court of Appeal reversed the trial court's disqualification of such an attorney. By contrast, in *Shadow Traffic*, the Court of Appeal upheld the trial court's disqualification of the entire firm of the attorneys who had failed to follow the guidelines (though it left open the possibility that on different facts, perhaps only the particular attorneys involved should have been disqualified).

Federal courts have expressed similar concerns with respect to experts who gain access to the confidential information of one party and are retained by another party in the same case. See, *e.g., Hewlett Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092-93 (N.D. Cal. 2004). Motions to disqualify expert witness are generally analyzed under similar standards in federal courts, and can similarly result in disqualification of both expert and counsel. One difference from the California case law is the federal courts' emphasis that disqualification of even the expert is a "drastic measure that courts should impose only hesitantly, reluctantly, and rarely." Nevertheless, especially in California federal courts, where the judge is likely to look to California state law for guidance, attorneys and experts should not rely on this hesitation or reluctance to save them from disqualification. See, e.g., *North Pacifica, LLC v. City of Pacifica*, 335 F. Supp. 2d 1045, 1051-52 (N.D. Cal. 2004) (disqualifying both expert and counsel).

It is normally not a problem for an attorney to hire an expert *formerly* employed adversely to the attorney's client in an unrelated case involving a different opposing party. But see *Rhodes v. E.I. DuPont De Nemours & Co.*, 558 F. Supp. 2d 660, 670 (S.D.W. Va. 2008) (suggesting that separate cases with some different parties may sometimes be so "intertwined" as to constitute the same case for purposes of disqualification analysis). Indeed, a number of courts have cautioned that adopting excessively broad standards of relatedness could sharply limit the ability of experts to practice their trade and be inimical to the integrity of the judicial process. See, e.g., *Life Techs. Corp. v. Biosearch Techs., Inc.*, No. C-12-00852, 2012 WL 1604710, at *9 (N.D. Cal. May 7, 2012).

It may be wise to first confirm, however, that the expert's previous engagement has been completed. Otherwise, the attorney risks disqualification or other sanctions not under case law regarding experts who "switch sides" in a case, but for conduct prejudicial to the administration of justice. See, e.g., *Erickson v. Newmar Corp.*, 87 F.3d 298, 303-04 (9th Cir. 1995) (remanding for imposition of sanctions and disciplinary action). *Erickson* is something of an extreme case, in which counsel for the defense offered a pro se plaintiff's expert a job on an unrelated case immediately prior to deposing the expert, giving rise to the appearance of an "improper attempt to influence a witness who is about to testify." But is not implausible that courts might similarly frown on an attorney who hires an expert who is currently engaged in a separate matter adverse to the attorney's client, even given a somewhat less egregious set of facts.

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