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ETHICS AND EXPERT WITNESSES

I. INTRODUCTION

There is very little caselaw that examines the Rules of Professional Conduct (RPCs) and the use of expert witnesses. Most of our guidance on the ethical rules and expert witnesses come from cases involving discovery issues. The underlying reasoning is similar to the themes running throughout the RPCs – confidentiality, conflicts of interest, and candor to the tribunal.

THE RULES OF ETHICS AND CR 26(b)

II. CONFIDENTIALITY RPC 1.6

There are two types of expert witnesses – a testifying expert and a consulting expert. A testifying expert is one who has been identified by a party as giving expert testimony. A consulting expert is one, in general, who has been retained for advice, but not to give testimony at trial.

The distinction between a testifying expert and a consulting expert is critical when it comes to preserving client confidences. Disclosures made to a testifying witness are not protected communications. Inappropriate revelation of confidential information to such individuals may violate RPC 1.6.[1] It may also result in a waiver attorney-client privilege and work product protection. In contrast, revelations to a consulting expert are generally protected.

a) Testifying Expert Witnesses

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[1] **RPC 1.6 Confidentiality:**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Acting Competently to Preserve Confidentiality

Comment [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

CR 26(b) governs the discovery of facts known to, and opinions held by, experts. 15A Karl Tegland & Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure § 39.4 (2008-2009). Discovery of facts or opinions held by a testifying expert is relatively unrestricted. If confidential information is disclosed to a testifying expert, that information is generally discoverable by an opposing party.

CR 26(b)(5)(A)(i) – Discovery is appropriate for experts who will be called to testify at trial.

> (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
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> (A)(i) 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, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion . . . . (ii) A party may . . . depose each person whom any other party expects to call as an expert witness at trial.

Attorneys should be cautious about their communications with testifying experts. Direct communication between a client and a testifying expert should be monitored very closely or not done at all. An attorney should also be wary of communications between a testifying expert and a consulting expert. If a testifying expert basis his or her opinion on information obtained from a consulting expert, that information, is most likely discoverable by the opposing party.

b) Consulting Expert Witnesses and Work Product

Discovery of consulting expert witnesses is restricted by CR 26(b)(5)(B). Consulting experts are treated as a member of a party's team and their opinions are work product. Tegland, supra, sect. 39.4. Generally, disclosures to a consulting expert are protected. Communication of confidential information to a consulting expert may be deemed available to opposing counsel under certain conditions.[2]

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[2] **CR 26(b)(5)(B**) – Permits discovery of consulting experts when there are exceptional circumstances or as provided in CR 35(b)

(B) ***(Discovery Regarding Consulting Experts.)*** A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) [report of examining physician or psychologist] or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

i. Access to the Opposition's Consulting Expert

Exceptional Circumstances

Discovery of a consulting expert may be obtained as provided in CR 35(b) or when there are exceptional circumstances. A party must show that he/she cannot obtain the information needed by consulting his/her own expert witness.

Mothershead v. Adams

In *Mothershead v. Adam*, 32 Wn. App 325, 330 (1982), the court considered the plaintiff's motion to compel the deposition of the defendant's consulting expert witness.

Mothershead involved a slip-and-fall accident that occurred on property belonging to the defendant, William Adams. The plaintiff, Diane Mothershead, was examined by a physician at the request of Adams. A copy of the report was then sent to Mothershead. In return, as required under FRCP 35(b) [3], Mothershead then sent reports from her doctors to the defendant. She also noted the deposition of the physician retained by Adams. Subsequently, Adams obtained a protective order precluding the deposition. He then hired another medical examiner.

On appeal, Mothershead argued that she should have been permitted to depose the physicians hired by Adams to preserve his testimony for trial.

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[3] **FRCP 35 provides:**
"(a) Order for Examination. When the mental or physical condition … of a party … is in controversy, the court … may order the party to submit to a physical or mental examination…

"(b) Report of Examining Physician.

"(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his finding, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

"(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

"(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. **This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.**"

The court's analysis centered on the interplay between the FRCP 35(b) and FRCP 26(b)(4).[4]

In denying Mothershead's motion to compel the deposition of the defendant's physician, the court stated that FRCP 26(b)(4)(b) permits discovery of a consulting experts under "two circumstances: (1) where allowed under FRCP 35, or (2) where exceptional circumstances are shown." *Mothershead at 330.* The court found that (1) the physician discharged by Adams was not a testifying expert, and (2) that Mothershead did not establish that exceptional circumstances warranted the deposition. Mothershead failed to show exceptional circumstances because she did not need the testimony of the physician; she had access to his report and had had her own experts. *Mothershead at 332.*

Crenna v. Ford Motor Co.

In *Crenna v. Ford Motor Co.*, 12 Wn. App. 824 (1975), Division 1 of the Court of Appeals, expanded the discovery protections granted under CR 26(b)(5) to prevent the calling of consulting witnesses during trial. *Crenna v. Ford Motor Co.*, 12 Wn. App. at 828.

The plaintiffs in Crenna brought an action against Ford Motor Company for damages that they suffered when they lost control of their Ford truck and hit a barricade. In response to interrogatories, the plaintiffs stated that they had consulted an expert to examine the axel of the truck, but that they had not decided who, if anyone, would be called as an expert at trial. Nine months later, shortly before trial, the plaintiffs informed Ford that an expert was examining the axel and that Ford could review the expert's report and interrogate him. Ford refused the offer. It then inquired if the plaintiffs would be calling an expert witness. The plaintiffs stated that they were still uncertain as to whether they would be calling a testifying expert witness.

Defense counsel subpoenaed the witness that the plaintiffs' named in their responses to interrogatories. The plaintiffs successfully quashed the subpoena. At trial, the defense again attempted to call the plaintiff's consulting expert. The trial judge asked the defense if they had not had an opportunity to examine the axel. To which Ford responded, that they had examined it, but did not have the chance to re-examine it after the plaintiffs' second expert viewed it. The trial judge refused Ford's request to call the consulting expert. On appeal, Ford argued that they should have been permitted to examine the consulting witness.

The appellate court found that because Ford did not attempt to depose the Crennas' expert and had the opportunity to examine the car part; it failed to demonstrate that there were exceptional circumstances warranting the testimony of the witness, thus the trial court properly denied access to the expert.

ii. Compelling Identification of Opposing Party's Consulting Expert Witnesses

Detwiler v. Gall

[4] FRCP 26(b)(4) is similar to Washington's CR 26(b)(5)

In *Detwiler v. Gall, Landau & Young Co*, 42. Wn. App. 567 (1986), the Washington State Court of Appeals held that a party may not be compelled to disclose the identities of their consulting experts where no exceptional circumstances are demonstrated. *Detwiler v. Gall, Landau & Young Co*, 42 Wn. App. at 572.

Detwiler based its ruling on factors considered in *Ager v. Jane C. Stormont Hosp. & Training Sch. For Nurses*, 622 F.2d 496 (10th Cir, 1980):

1. it would result in a decrease in the number of candid opinions available.;

2. experts could be contacted or their records obtained; and

3. experts might be compelled to testify at trial

4. a party would be able to call his opponent to the stand and ask if certain experts were retained but not called as witnesses, thereby leaving the jury to believe that unfavorable facts or opinions are being suppressed;

Detwiler at 571, quoting *Ager v. Jane C. Stormont Hosp. & Training Sch. For Nurses*, 622 F.2d at 503.

Pimentel v. Roundup Co.

A party may waive the right to prevent the admission of a consulting expert's deposition at trial. *Pimentel v. Roundup Co.*, 32 Wn. App. 647 (1982). In *Pimentel*, the defendant permitted the deposition of its expert witness for any purpose allowed under the civil rules. Ultimately, the defendant chose not to call its expert and the plaintiff attempted to enter the deposition into the court record. The trial court denied the request because the expert was a consulting expert and was not called by the defense.

The Court of Appeals held that a party waives its right to prevent the admission of the deposition at trial by stipulating that the deposition of its expert can be used for all purposes allowed by the civil rules.

III. CONFLICT OF INTEREST AND DISQUALIFICATION

An attorney may not represent a client if there is a conflict of interest. Additionally, an attorney my not switch sides and represent an opposing party during the representation. (See RPC 1.1, 1.7, 1.8, 1.9 and 1.10). Although, expert witnesses are not held to the same ethical rules as lawyers, an expert may not "switch sides" if the expert has obtained confidential information pertaining to a party.

Courts have the power to disqualify experts and counsel. (See, *In Re Firestorm*, 129 Wn. 2d 130, (1991); and *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980)). When a conflict of interest develops, whether it is between experts hired by the parties, or between

counsel and opposing experts, courts may disqualify the individuals involved to protect the integrity and fairness of the proceedings. *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984). Courts will first consider if a less severe sanction would be more appropriate. (See, *In Re Firestorm*, 129 Wn. 2d 130 (1991). See, also *Washington State Physicians Ins. Exch. And Ass'n v Fisons Corp.*, 122 Wn.2d 299, 355-356 (1993) ("The purpose of sanctions orders are to deter, to punish, to compensate and to educate.") Disqualification is an extreme measure that courts are reluctant to use unless there is a "legitimate claim of prejudice to the party seeking disqualification."*Proctor & Gamble, Co. v Haugen*, 184 F.R.D. 410, 414 (D. Utah, 1999).

a) Disqualification of Counsel Due to Exparte Contact with Opposing Party's Expert

There is no express ethical prohibition against contact with an opposing party's expert witness. (ABA Comm. On Ethics and Prof. Resp., Formal Op. 378 (1993)). An ABA Ethics Opinion determined that exparte communications circumvent the discovery rules and thus violate an attorney's duty to obey the obligations to the tribunal. ABA Comm. On Ethics and Prof Responsibility, Formal Op. 93-378 (1993). [5]

In Re Firestorm

In Re Firestorm, 129 Wn. 2d 130 (1991) was the first case in Washington to address the issue of exparte contact with an opposing party's expert witness.

In *Firestorm*, the plaintiff filed a lawsuit for damages sustained in a series of wildfires. The plaintiff's attorneys were contacted by an expert that had been hired by counsel representing several utility companies. These companies were potential defendants in the lawsuit, but had not yet been named as defendants. The expert identified himself as a consulting expert for the potential defendants. He had been hired to investigate the possible role of the utility companies in the fires. The expert was concerned that information that he had gained during his investigation would be concealed by the utility companies. He shared that information with the plaintiff's attorneys. The following day, he also gave pictures and notes that he had taken to the plaintiff's attorneys.

After the utility companies were named as defendants, defense counsel moved to have the attorneys for Firestorm disqualified. The trial court determined that the plaintiff's attorneys had violated CR 26(b)(5) and disqualified them.

On appeal, the Washington State Supreme Court deemed that the exparte contacts violated CR 26(b)(5), but it refused to disqualify the attorneys. It stated that "[t]he drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party." *Firestorm* at 140. Since the expert at issue (1) did not have access to privileged

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[5] **RPC 3.4(c): Fairness to Opposing Party and Counsel**

"A lawyer shall not: (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

information; (2) was not an essential employee of the potential defendant; and (3) did not have any knowledge of the utility company's litigation strategy, the Court determined that disqualification of plaintiff's counsel was not necessary. *Firestorm* at 140-141.

Erickson v Newmar Corp.

Erickson v. Newmar Corp. 87 F.3d 298 (9th Cir. 1996), was a case about an attorney's monetary inducement to an expert witness of an opposing party before the witness gave testimony. In *Erickson v. Newmar*, the court sanctioned the defense counsel for his exparte communication with the expert. The court found that the attorney's violation of the discovery rules pertaining to expert witnesses: (1) breached an attorney's duty to obey the obligations of the tribunal, and (2) was conduct that was prejudicial to the administration of justice.[6] *Erickson* at 300 -301.

The plaintiff in Erickson purchased a motor home manufactured by Newmar Corporation. He later filed an action against Newmar claiming that the motor home was defective. The defendant noted the deposition of two of the plaintiff's expert witnesses. Prior to the depositions, defense counsel asked one of the experts if he would examine a lock which was a piece of evidence in an unrelated case. Defense counsel offered to pay the expert $100 per hour. After the deposition, defense counsel and the expert went into a separate room to examine the lock.

The plaintiff fired the expert the following day. Additionally, the plaintiff's other expert resigned because he did not want to be part of a case where there were problems between counsel and experts. The plaintiff went to trial without any expert witnesses and lost.

On appeal, the pro se plaintiff claimed that defense counsel had "tampered" with his expert witness. The court agreed. It referenced ABA Formal Op. 378 in support of its conclusion:

> "[a]lthough the ABA Model Rules do not specifically prohibit exparte contacts with an opposing party's expert witness, an attorney who engages in such contacts may violate the duty to obey the obligations of the tribunal" *Erickson* at 302

Additionally, the court found that the exparte contact prejudiced the plaintiff's ability to present his case because he could not use the testimony of either of his expert witnesses. *Id.*

b) Disqualification of an Expert Witness Due to "Switching Sides"

An expert witness who switches side is one who:

1. has been retained by one party to testify at trial who then gives testimony in favor of the other party, or

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[6] 8.4 **Misconduct**
"It is professional misconduct for a lawyer to:
(d) engage in conduct that which is prejudicial to the administration of justice;

2. was initially retained by one party, dismissed, and employed by the opposing party in the same or related litigation. *Erickson v. Newmar Corp.* at 300.

Has the Expert Witness Been "Retained"?

As a preliminary matter, one must determine if the expert has actually been retained by a party. A formal written contract is advisable, but most attorneys do not use them. The court in *Paul v Rawlings* 123 F.R.D. 271, 279 (S.D. Ohio 1988) stated that:

> "there is no "right" way for an attorney to retain an expert for purposes of litigation. While a formal, written contract establishing both the existence of the relationship and prohibiting the disclosure of any information gained by the expert during the course of the relationship would be an ideal way to eliminate questions of the sort which have arisen in this case, neither lawyers nor experts always, or even often, go to such lengths.) *Paul v Rawlings* 123 F.R.D. at 279.

In *Proctor & Gamble, Co. v Haugen,* 184 F.R.D. 410 (D. Utah 1999), the court held that "mere payment for consulting time does not make an expert *per se* a 'retained' expert." *Proctor & Gamble, Co. v Haugen,* 184 F.R.D. at 413. It stated that the entire relationship should be examined before concluding that an expert has been retained by a party. *Proctor* at 413. The court recommended that "Each party to the communication or consultive relationship must understand the obligation of confidentiality which should normally be spelled clearly, precisely, and, if possible, in writing." *Proctor* at 411.

Should the Expert Witness Be Disqualified?

Paul v Rawlings

Paul v Rawlings 123 F.R.D. 271 (S.D. Ohio 1988) is the seminal case on the disqualification of a side switching expert. In *Paul,* a baseball player suffered a severe brain injury when he was hit by a baseball while wearing a baseball helmet manufactured by the defendant. The plaintiff sued Rawlings claiming that the helmet was poorly designed. Counsel for Rawlings had several discussions with an expert witness from January of 1987 until April of 1987. The majority of their conversations pertained to the possibility that the expert would be retained to set up a testing laboratory to test helmets designed by the defendant. He would also provide the defendant with the results of his tests. The expert did not review any documents pertaining to the case. In July of 1987, Rawling's counsel sent a letter to the expert expressing his continued desire to have the expert set of a laboratory for testing. Apparently, there was no other communication after that time.

In September of 1987, plaintiff's counsel contacted the same expert witness. The expert was given details of the case and he agreed to act as an expert witness for the plaintiffs. The plaintiff then sent an extensive packet of information along with a retainer to the expert. The expert witness prepared a report on behalf of the plaintiff.

The court applied a three part test to determine whether disqualification was appropriate:

1. Did Rawlings and the expert enter a relationship which gave rise to an objectively reasonable expectation on Rawling's part that it could, without risk, impart confidential information to the expert?

2. Did Rawlings take advantage of its opportunity to disclose confidential information to the expert?, and

3. Was there a showing that the expert had used or may use such information to Rawling's disadvantage?

Paul v Rawlings 123 F.R.D. at 277.

The court held that (1) Rawlings had entered a confidential relationship, but (2) Rawlings did not take advantage of the opportunity to disclose confidential information, and that (3) Rawlings was not prejudiced by allowing the expert to testify on the plaintiff's behalf.

Current Two-Part Standard for Disqualification

Courts now generally apply a two-part test to determine whether disqualification of an expert is warranted. This test is based on part one and part two of the Rawling's standard.

1. Was it objectively reasonable for the party requesting disqualification to believe that a confidential relationship existed?

2. Did the party desiring disqualification disclose confidential information to the expert?

If the moving party can show that the answers to both question are affirmative, the court will disqualify the expert or take other actions.

Cordy v Sherwin-Williams Co.

Cordy v Sherwin-Williams Co, 156 F.R.D. 575 (D.N.J. 1994), was a negligence suit arising from a bicycle accident that occurred on the property owner's railroad track. Plaintiff's counsel consulted with an expert witness. The attorney gave materials to the expert and explained the plaintiff's theory of the case. The expert witness and the attorney entered a retainer agreement. The expert was paid $3,000. However, the expert witness did not prepare a written report and eventually returned the retainer. Approximately three months later, defense counsel contacted the same expert witness. The witness informed the defense attorney that he had previously been consulted by the plaintiff. Even so, the expert witness entered retainer agreement with the defense and gave a report on their behalf. The plaintiff filed a motion to disqualify the expert.

The court applied the two part test derived from *Rawlings.* It determined that plaintiff's counsel reasonably assumed that a confidential relationship existed and that the expert witness had been given confidential information by the plaintiff. Therefore, the witness was disqualified.

Public Policy Considerations

Some court have analyzed public policy issues to determine if an expert should be disqualified such as: (1) fundamental fairness and prejudice to the parties. *Conforti &Eisele, Inc, v Div. Of Bldg. & Constr.*, 405 A.2d 487, 491-492 (N.J. Super. 1979) (Expert initially retained by the moving party could not switch sides during a multi-phase litigation after being exposed to the moving party's files and litigation strategies due to fundamental fairness.), and (2) the public interest in having an expert witness testify. *Koch Ref. Co. v. Jennifer L. Boudreux M/V,* 85 F.3d 1178, 1182 (5th Cir. 1996).

Disqualification Based on "Fairness"

Campbell Indus v M/V Gemini

In 1971, Campbell Industries constructed a fishing ship for M/V Gemini. In 1972 and 1973, Gemini brought the ship to Campbell for repairs. Gemini did not pay the charges so Campbell sued for payment. Gemini counterclaimed that the ship was poorly constructed.

Campbell hired an expert to examine the ship and give testimony at trial. One month prior to trial, Gemini moved the court for an order permitting it to depose Campbell's expert. A declaration submitted by Gemini's counsel stated that he had had several exparte communications with Campbell's expert. The expert desired to testify on behalf of Gemini. The court denied the request and excluded the expert from testifying.

The appellate court upheld the decision of the trial court because it did not prejudice Gemini's case; It was able to call one or more of its three experts, who examined the ship at the same time as Campbell's expert.

Testimony by Expert Witnesses Who Have Switched Sides

Although courts may permit an expert to testify who has switched sides, they will generally not allow any reference to the expert's initial retention by the other party. *Peterson v. Willie,* 81 F.3d 1033, 1037-1038 (11th Cir. 1996) (permitted plaintiff's testifying expert witness to give testimony on behalf of defense, but prohibited reference to prior employment by plaintiff as it was too prejudicial.)

IV. FEES FOR EXPERT WITNESSES (RPC 3.4(B)

According to RPC 3.4(b), "A lawyer shall not (falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;). Therefore, an attorney may not offer compensation to a fact witness other than that permitted by statute. The Rules of Professional Conduct do not include a specific prohibition against paying an expert witness a contingency fee, but the comments make it clear that doing so is improper. The underlying concern is that the expert would be less objective than if he or she were paid a an hourly or flat fee. As a consequence, the lawyer could be interpreted as presenting false testimony in violation of RPC 3.4(b) or not be candid to a tribunal.

V. CONCLUSION

Attorneys must consider the issues of confidentiality and conflicts when hiring and working with expert witness. Expert witnesses serve an important role in the judicial system. They educate lawyers, judges and juries. Without them it would be difficult to determine if certain cases had merit or the value of the damages sustained by a plaintiff.