Hiring Experts to Keep Them from the Opposition

By Robert Ambrogi

Do lawyers ever retain experts just to lock them out from being hired by the other side? If so, is the tactic fair play in the hardball game of litigation? Or are lawyers who would do this – as one court suggested – short on scruples?

Ask either lawyers or experts whether they see this done and their answers range from "often" to "never." Ask them whether they approve of the practice and their answers vary just as widely. But ask lawyers whether they do it themselves and no one's hand goes up.

"Lawyers do occasionally contact or 'retain' experts solely to disqualify them from working for the other side," says Erik Anderson, senior attorney in the corporate legal department of Safeco Insurance Company of America. He should know: he faced this situation in a case not long ago in which one party sought to disqualify the other's expert.

Another lawyer who has seen it done is David W. White, a trial attorney in Boston who is also president of the Massachusetts Bar Association. Although he would never do it himself, he once found himself the victim of this tactic.

"It was an antiques case, where fraud was alleged," White says. "There wasn't an available independent expert on the east coast of the U.S. because the plaintiff had consulted them all."

This tactic of "locking out" experts occurs most commonly in either of two scenarios, lawyers and experts agree. Either the field is highly specialized and there is a limited pool of qualified experts or the expert is so uniquely distinguished that he or she is highly sought after.

Consider Werner Engelmaier, for example. He is one of only a handful of experts who specialize in the design, manufacturing and reliability of electronic packaging. When he first became an expert witness, colleagues warned him of the practice. And then something similar happened to him.

"The law firm contacted me and made disclosures to me about the case before ever retaining me," he says. "They never did retain me, but they had disclosed so much that I had to recuse myself from working with anyone else in the case."

Ever since, Engelmaier has structured his retainer agreement in a manner designed to insulate himself from similar taints. He requires a steep retainer, $10,000, and blocks potential clients from disclosing anything about the case to him until the retainer is paid.

If the client retains him, then once his billing exceeds $10,000, he returns the retainer. Of course, if the client does not retain him, he refunds the retainer. "This serves to discourage preemptive disclosures that would disqualify me from the case," he says.

Is it Ethical?

Most agree, then, that the practice exists. But that begs the question, "Is it ethical?"

One federal appeals court alluded to lawyers who would do this as "unscrupulous." The dictum from the 5th U.S. Circuit Court of Appeals came in *Koch Refining Company v. Boudreaux*, a 1996 case in which it considered the standard to apply when weighing disqualification of an expert.

The standard for disqualification should not be too liberal, the court reasoned, for fear that "unscrupulous attorneys and clients may attempt to create an inexpensive relationship with potentially harmful experts solely to keep them from the opposing party." But the issue at bar in that case was a different scenario: one party's retention of an expert with whom the other party still had a relationship.

Of the lawyers and experts contacted for this article, no one considered the practice unethical in the strict sense of the word. But several made clear their distaste for the practice as one they would never do.

Bob Kraft, a trial lawyer in Dallas, Texas, and principal of the firm Kraft & Associates, says he has only heard of the practice anecdotally but knows it occurs. "In my opinion, it is not widespread, and I do not approve of it," he says. "There's nothing illegal or unethical about it, but it just seems a bit shady to me."

Boston trial lawyer David White sounds a similar note. To call the practice unethical would be too harsh an assessment, he says, adding: "It is certainly a hardball litigation technique."

And on the list of lawyers' hardball tactics, this is not even one of the worst, says David C. Winton, a lawyer in San Francisco. "It's just another in a very long list of frustrations that we have to live with in litigation," he says. "But I wouldn't say it's anywhere near the top of that list. It falls under the category of 'getting skunked' and is something I try very hard to avoid."

Deep Pockets Required

More than ethical concerns, economic ones may be the greatest reason the practice is not more widespread.

"You need deep pockets to hire an expert witness for the sole purpose of keeping him from the other guy, and it can sometimes backfire since his 'honest' expert opinion may come out in discovery, at which point you just paid someone to give a damning opinion of your case," says Alexander J. Hay, a business and finance lawyer in Houston, Texas.

Expense is precisely the rationale behind Werner Engelmaier's decision to charge a high retainer fee as a way of discouraging the practice. But he admits that if the client's pockets are deep enough and its will strong enough, even the retainer may not dissuade them.

A native of Austria, Engelmaier believes a better way to prevent misuse of experts would be for the courts to hire the experts, as is common in Europe. But he concedes that could raise other problems and is unlikely ever to happen here.

"I'd rather have a system that produces justice rather than huge incomes for lawyers and expert witnesses," Engelmaier says.

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