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IN PRACTICE

EVIDENCE

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Dealing With an Expert's Conflict of Interest

Your client advises you that the expert retained by your adversary is the same expert your client used in a prior matter. Your client is concerned that the confidential information previously provided to the expert in the earlier suit will be used to its detriment in the present case. Can you prevent your adversary from using the expert?

A court may disqualify an expert from serving as a trial witness or consultant in various ways. Before doing so, however, a court must consider several competing policies.

Among the policies considered by the court are a party's right to prevent the disclosure of confidential information and an expert's right to pursue his vocation. That is, the economic harm the expert may suffer if disqualified versus the harm the party may suffer if the expert discloses such information to a party's adversary. See *Conforti & Eisele, Inc. v. Division of Building and Construction*, 170 N.J. Super. 64, 67 (Law Div. 1979). Other policy considerations include assuring that parties have access to experts with specialized knowledge as well as "preventing conflicts of interest and maintaining the integrity of the judicial process." *Cordy v. Sherwin-Williams Company*, 156 F.R.D. 575, 580 (D.N.J. 1994) (citations omitted). These competing policies are balanced by the court when determining whether to disqualify an expert.

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Extension of Attorney-Client Privilege

There are several tests a court may use in determining whether to disqualify an expert. First, the court may disqualify an expert based on an extension of the attorney-client privilege to the expert. The attorney-client privilege extends to communications made to an attorney's agent, such as an expert. *Conforti*, 170 N.J. Super. at 67. "The policy behind the [attorney-client] privilege is to promote full and free discussion between a client, his attorney and the attorney's agents in order to prepare one's case. To further that policy, the privilege should enable a client to take appropriate action to protect such discussions from disclosure to his adversary." Id. at 69 (citation omitted). The application of the privilege, therefore, depends on whether the expert ever acted as an agent for the party seeking disqualification, the length of that relationship and whether confidential communications were made during that period. Id.

The plaintiff in *Conforti* constructed two phases (Phases III and V) of a construction project for the defendant. A dispute concerning which party was responsible for extra work done by the plaintiff on behalf of the defendant led to plaintiff's suit. The plaintiff retained an expert for the litigation. Id. at 66.

The defendant moved to bar the plaintiff from using the expert because the defendant had previously retained the same expert to provide engineering services on another phase (Phase II) of the same project. Although the plaintiff was not involved in Phase II of the project, defendant's position was that the expert should be barred from serving as the plaintiff's expert to preserve the attorney-client privilege and to protect the confidential information that defendant disclosed to the expert. Id.

The court held that the defendant's counsel did retain the expert for Phase II. Id. at 68-70. It further held that there were confidential communications between the defendant and the expert. Id. at 70-71. In so holding, the court noted that the defendant's lawyer disclosed confidences to the expert, including information on Phases III and V, and that defendant allowed the expert free access to its files, including those concerning Phases III and V. Id. at 68-69. Therefore, the expert was disqualified by the court to maintain the attorney-client privilege. Id. at 70-71. See also *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 277 (S.D. Ohio 1988) (citing *Conforti*) ("once an attorney retains an agent to assist the attorney in representing a client, and thereafter discloses privileged matter to the agent, the agent, like the attorney, is precluded from using such confidences to the detriment of the client").

It may be argued that the result in *Conforti*

was clear given its facts. The court noted that Phases III and V were discussed with the expert before, during and after defendant retained the expert for Phase II. Trial strategy on all phases was discussed with the expert and there was also the possibility that defendant would retain the expert for the other phases of the project. *Conforti*, 170 N.J. Super. at 68-69.

Confidential Relationships And Confidential Information

The court may disqualify an expert based on a two-part test somewhat similar to the attorney-client privilege rationale espoused by the court in *Conforti*. "First, was it objectively reasonable for the first party who retained the expert to believe that a confidential relationship existed? Second, did that party disclose any confidential information to the expert?" *Cordy*, 156 F.R.D. at 580. The court noted that both parts of the test must be satisfied to disqualify an expert. Thus, there would be no disqualification "if any confidential disclosures were undertaken without an objectively reasonable expectation that they would be maintained (effecting a waiver of confidentiality), or if, despite a relationship conducive to such disclosures, no significant disclosures were made." Id. (citations omitted). See also *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991) (citations omitted) ("Disqualification ordinarily should not occur where a confidential relationship existed but no privileged information was communicated, or, alternatively, where no confidential relationship existed but privileged information was nonetheless disclosed").

The facts in *Cordy* are as follows. The plaintiff's law firm contacted an expert, executed a retainer agreement with the expert and sent the expert a compilation of documents, including counsel's impressions of the case. The expert reviewed the documents and rendered an oral opinion. *Cordy*, 156 F.R.D. at 576-77. Thereafter, the expert resigned as the plaintiff's expert and was subsequently retained by the defendant. Id. at 578-79.

The court found that the plaintiff clearly retained the expert. Id. at 581. It then inquired "whether [plaintiff's counsel] acted reasonably in assuming that a confidential or fiduciary relationship existed with [the expert]." Id. In this regard, the court answered in the affirmative, noting that some of the documents sent to the expert were clearly confidential and not subject to disclosure; that the process of selecting, assembling and organizing the documents represented the mental impressions of the plaintiff's attorney and were protected by the work product doctrine; and that plaintiff's counsel informed the expert of plaintiff's theory of the case as well as potential defendants. Id. at 581.

Finally, the court noted that "[a]lthough the law will presume a relationship of confidence when it is just to do so, the evidence here of a direct confidential relationship between [the expert] and [plaintiff's counsel] is overwhelming." Id. at 582 (citing *Conforti*, 170 N.J. Super. at 73).

Based on its findings, the court disqualified the expert from serving as the defendant's expert witness at trial as well as serving as a consultant for defendant in the litigation. Id. at 582. Further, the court disqualified the defendant's counsel because the lawyer hired the plaintiff's former expert. Id. at 583-85.

Court's Inherent Power Or Fundamental Fairness

The court may also disqualify an expert on the grounds that it would be "fundamentally unfair" for a party to retain the services of an expert previously retained by its adversary. See *Conforti*, 170 N.J. Super. at 72. Drawing an analogy to a employee being enjoined from disclosing trade secrets of his former employer, the court in *Conforti* held that "[j]ust as a former employee should be prevented from disclosing that which took time and expertise to develop, so too should a litigant be prevented from reaping similar benefits within the context of a lawsuit." Id. See also *Paul*, 123 F.R.D. at 277 (citing *Conforti*) ("if one party to the litigation pays an expert for the time spent in developing specific knowledge or expertise with respect to the issues involved in the case, the opposing party should be precluded from reaping the benefits of that work"). It has been noted that *Conforti* involved the court's exercise of its "inherent power to preserve the public confidence in the fairness and integrity of the judicial proceedings." Id. at 278 (citation omitted).

Additionally, in the absence of exceptional circumstances, the court, under *Graham v. Gielchinsky*, 126 N.J. 361 (1991), may disqualify an expert originally consulted by an adversary. There, the plaintiff originally consulted the expert but did not disclose the identity of the expert. Id. at 364. The defendant somehow obtained a copy of the expert's report prepared on behalf of plaintiff and, on the eve of trial, asked the expert to testify on behalf of the defendant. Id. The expert requested a subpoena; however, he "was anything but a compelled witness." Id. at 372.

In light of the facts therein, the Supreme Court held that in the absence of exceptional circumstances (as provided in the court rules), an expert originally consulted by an adversary should not be allowed to offer opinion testimony at trial. Id. at 373. On this basis, the adverse party could move to disqualify the expert that it originally consulted but decided not to use as an expert witness in the same case.

Preliminary Meetings

Finally, in contrast to *Graham*, it should be noted that a preliminary meeting with an expert may not be enough to disqualify the expert, even if the expert was paid for his time. The rationale is that it is unlikely that a confidential relationship was created or that confidential information was disclosed to the expert. See, e.g., *Mayer*, 139 F.R.D. at 4; *Nikkal Indus., Inc. v. Salton, Inc.*, 689 F. Supp. 187 (S.D.N.Y. 1988). Even extensive discussions about the issues of the matter and the expert's qualifications and prior experiences may not be sufficient to disqualify an expert if no confidential relationship was created and no confidential information was disclosed to the expert. See, e.g., *Paul*, 123 F.R.D. at 280.

It should be clear that the disqualification of an expert is a fact-sensitive determination. It requires an examination of the relationship with the expert and the nature of the disclosures made to the expert. It should be noted that the expert may be disqualified from serving as both a trial witness as well as a non-testifying consultant.

There are several ways that an expert may be disqualified by the court in light of a possible conflict of interest. First, by protecting prior disclosures made to an expert under the attorney-client privilege. Second, by showing a confidential relationship and the disclosure of confidential information to the expert. Third, by requesting the court to exercise its inherent power to prevent fundamental unfairness. Fourth, by requesting the court to prohibit the testimony under *Graham*. Finally, the court may also use the ethical standards of the expert's profession to help resolve the issue. See, e.g., *In re Ambassador Group, Inc.*, 879 F. Supp. 237 (E.D.N.Y. 1994) (court considered the ethical standards of the American Institute of Certified Public Accountants). ■