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DEPOSITION BOOT CAMP 2018
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From The Editor

I was recently informed that my status as an attorney has been called into question. Specifically, my middle schooler reported that a certain little charmer at school told him that his mother was not a "real lawyer." My eldest, being a good son, is a staunch defender of my professional virtue. He politely and articulately (I am sure) informed the offender that of course I am. He's been to court with me and seen it himself! Nonetheless, his argument failed to persuade. You see, I quite clearly do not meet the definition of a "real lawyer." What is a "real lawyer" to a middle schooler? Not surprisingly, it is someone who has a television commercial. I do not advertise, therefore, apparently to the middle school mind, I am something less. "Real lawyers" yell from atop trucks, aim firearms at cameras and manifest salvation with a snap of the fingers. Being a lawyer requires no real work, it's that easy. I merely sit quietly behind a desk, or not so quietly in Court, doing my best to advocate for my clients. No yelling, no weaponry, no dramatic reenactments.

While I have lost no sleep over the opinion of this child, he raises an important question. At what point do we stop allowing attorney advertising to define our profession? Attorney advertising is not in and of itself the problem. It is the content of some of this advertising. That content continues to devolve and is shaping the perception of our profession. Do we really have that much credibility to lose? Are we to continue to attract the best and brightest to our profession when these commercials are the face we present? Perhaps it is time that we as an organization and as a profession take a stand to bring back some professional integrity. We have the best and the brightest of the civil defense world among our membership. They publish here, they speak at and attend our educational programs and conferences. We are made entirely of "real lawyers" doing great and important things. Why do we continue to allow others to muddy how we are all perceived? I respectfully suggest that lest we do something to stop the absurdity that has become attorney advertising, we are going to continue to devolve as a profession.

Christina Bolin
Editor

Fortunately, we can prove that we have the best and the brightest right here in this edition of the *Journal*. An integral part of our professional integrity is our professional ethics. We are thrilled to be featuring a new ethics article series from **Craig Alexander**. We also have articles on overtime or wage and hour issues by **David Canupp** and **J. Bradley Emmons**; additional insured endorsements by **Daniel Weber** and **Howard Glick**; and an article entitled "Protect Yourself: How to Avoid Common Contracting Pitfalls" by **Brooks Proctor** and **Akya Rice**. Thank you to all our outstanding authors for continuing to take the time to contribute.

If you would like to submit an article for the Spring 2018 edition of the *Journal*, please contact me at cbolin@alfordbolin.com or 251-415-9280. Submissions are due by January 15, 2018.

ETHICAL CONSIDERATIONS IN ENGAGING AND WORKING WITH EXPERT WITNESSES

By: Craig A. Alexander

Expert Witness Fee Agreements

There are two rules of professional conduct in Alabama that pertain to the payment of fees to an expert witness. Rule 3.4(b), Ala. R. Prof. Cond., states in part that "[a] lawyer shall not … offer an inducement to a witness that is prohibited by law," and Rule 5.4 (a), Ala. R. of Prof. Cond., states in part that "[a] lawyer or law firm shall not share legal fees with a nonlawyer."

A formal opinion by the General Counsel of the Alabama State Bar - Alabama State Bar Ethics Opinion RO-97-02 - addresses generally the circumstances under which an attorney can pay or compensate a witness, lay or expert, for testifying at trial or by deposition. As to expert witnesses, the opinion states simply that "[a]n attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding."

Besides creating a risk of disciplinary action against the lawyer, a violation of these ethics rules could result in the exclusion of the expert's testimony at trial, or possibly "only" the lesser penalty of an instruction to the jury that the contingency fee agreement can be considered in weighing the credibility of the expert. The exclusion of the expert's testimony has been ordered by federal judges in Maryland and New Jersey. *See Farmer v. Ramsay*, 159 F.Supp. 2d 873 (D. Md. 2001) and *J&J Snack Foods v. Earthgrains Co.*, 220 F. Supp.2d 358 (D.N.J 2002). In contrast, the Seventh Circuit Court of Appeals has opined that while employing an expert witness on a contingency-fee basis is clearly unethical, the expert's testimony need not be excluded, because "[t]he trier of fact should be able to discount for so obvious a conflict of interest." *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988).

The difficulty in affording the cost of expert witnesses in complex cases has led litigants to consider a "package deal" with a consulting firm that is designed to avoid these ethical prohibitions. The consulting firm offers its services on a contingent-fee basis, with these services including locating and hiring one or more expert witness, and with the proviso that the consulting firm will compensate the expert witness on a per diem or other non-contingency basis.

In some jurisdictions, this arrangement is regarded simply as an artifice that does not solve the inherent problems with fee-splitting and the integrity of the civil litigation process. *See, e.g., Florida Professional Ethics Committee Opinion 98-1* (March 27, 1988) and *Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion 95-79* (1995). This arrangement has been permitted in other jurisdictions, including our neighboring State of Mississippi, at least so long as the fees are not paid out of the lawyer's contingency fee award and the lawyer's client approves the arrangement. *See, e.g., Mississippi State Bar Opinion No. 91* (March 23, 1984); *see also Schackow v. Medical-Legal Consulting Service, Inc.*, 416 A.2d 1303, 1313 (Md. 1980).

Finally, a contingency-fee agreement with a consulting expert who is not engaged to testify at trial does not implicate the concern about offering an improper inducement to a witness. Any concern about the splitting of fees between a lawyer and a non-testifying consultant can be avoided by an agreement that the consultant's fee will be paid out of the client's recovery. This type of arrangement has been approved in Michigan and in the District of Columbia. *See Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Opinion R1-104* (October 31, 1991); *see also District of Columbia Ethics Opinion No. 233* (January 1993).

Protecting the Confidentiality of Client Information

Rule 1.6 of the Alabama Rules of Professional Conduct obligates a lawyer to keep a client's confidences, stating that "[a] lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

Rule 1.6(a), Ala. R. Prof. Cond. The comments to this rule observe that the "principle of confidentiality is given effect in two related bodies of law, the attorney client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics."

Maintaining the confidences of a client is important when communicating with potential expert witnesses. Before beginning the search for an expert witness, a lawyer should confer with his client about the information that can be shared with a potential expert. The execution of a nondisclosure agreement should be carefully considered, particularly if the lawyer expects to disclose information that is protected by laws such as HIPAA, the Fair Credit Reporting Act, and state privacy laws. A lawyer should continue to attend to the obligation of confidentiality once an expert has been engaged. While most jurisdictions recognize that expert witnesses have their own duties to maintain the confidentiality of information learned during the engagement, a non-lawyer expert should not be responsible for making determinations about legal privileges. *See, e.g., Crenshaw v. MONY Life Ins. Co.*, 318 F. Supp. 2d 1015, 1027 (S.D. Cal. 2004).

Courts have recognized that "[l]awyers bear a burden to make clear to consultants that retention and a confidential relationship are desired and intended." *State ex rel. Billups v. Clawges*, 620 S.E.2d 162, 168 (2005) (quoting *Wang Labs., Inc. v. Toshiba Corp*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991)). In considering whether a confidential relationship existed between a lawyer and a consulting expert, a Texas Court of Appeals identified a number of factors that had been recognized as important, including:

(1) Whether a formal confidentiality agreement existed;

(2) Whether the relationship was a long-standing one involving frequent contacts, or if there had been only a single interaction;

(3) Whether the expert was paid a fee;

(4) Whether work product was discussed with the expert; and

(5) The extent to which the expert learned about litigation strategies.

Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 216 S.W.3d 436 (Tex. App. 2006).

In sum, the lawyer's duty of keeping a client's confidences extends to the lawyer's disclosures to a potential or actual expert witness, and the lawyer has an ethical obligation to ensure that the expert recognizes that information provided to the expert must be treated confidentially. The lawyer should address confidentiality at the outset of the engagement, and take care to draft an engagement letter that sets out the duties of the expert and the expectation of the lawyer and the lawyer's clients about the expert's handling of confidential information.

Expert Witness Conflicts of Interest

Where expert witnesses are concerned, issues of loyalty and conflicts of interest tend to involve a couple of scenarios. One such scenario is an expert witness who undertakes at one time to work both for and against a party in two different lawsuits, or at least for and against a particular lawyer in two different lawsuits. The second scenario is an expert who "switches sides" in a single case.

There is no question that it is ethically improper for a lawyer to undertake the representation of a client in a matter that is directly adverse to another of the lawyer's existing clients. And, certainly, a lawyer cannot undertake to represent a plaintiff in a lawsuit, then withdraw and become the lawyer for the defendant in that case. The rules of professional conduct that govern lawyers do not apply, however, to expert witnesses. Indeed, an expert is not expected to act as an advocate for the client, but rather is expected to be an independent and objective witness on matters outside a jury's collective common sense and knowledge.

When, then, do conflict of interest questions arise for expert witnesses? If an expert received confidential information from a litigant in one lawsuit, and then the expert is engaged in another lawsuit in which that confidential information could be used against that same litigant, this litigant certainly would alarmed about the potential violation of its confidential relationship with the expert. A litigant who is distraught about its "cheating" expert can be expected to demand a divorce, but ending the relationship does not eliminate the threat of the discharged expert's misuse of the litigant's confidential information.

The solution is to obtain an order barring the expert

witness from testifying. Courts have employed a three-prong analysis in considering whether such an order is appropriate: (1) whether the party's belief that a confidential relationship existed between it and the expert witness was objectively reasonable; (2) whether confidential information was provided to the expert; and (3) whether public policy interests will be served or disserved by barring the expert witness from testifying. The components of a public policy analysis include (1) the prejudice to the opposing party that might occur if the expert is disqualified, and (2) the availability of, and the burden of, obtaining a replacement expert if a disqualification is ordered. *See, e.g., Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994). One other aspect of the analysis is particularly interesting, and that is the public interest in prohibiting unscrupulous attorneys and their clients from engaging, inexpensively and perhaps only temporarily, a potentially harmful expert just for the purpose of making that expert's services unavailable to an adverse party. *See, e.g., Paul v. Rawlings Sporting Goods*, 123 F.R.D 271, 278 (S.D. Ohio 1988).

In Alabama and elsewhere, it is unethical to engage in conduct that is "prejudicial to the administration of justice" and that involves "dishonesty, fraud, deceit or misrepresentation." Rule 8.4, Ala. R. Prof. Cond. It is expected that a lawyer will provide competent representation to a client, employing the "legal knowledge, skill, thoroughness and preparation necessary for the representation." Rule 1.1, Ala. R. Prof. Conduct. Vetting a proposed expert for any possible conflict is what a competent and professional lawyer should do. Engaging an expert for the sole purpose of making that expert unavailable to the other side is something that such a lawyer should not do.

"Ghost-Writing" the Expert's Report

Significant problems can arise if the lawyer plays too great a role in the preparation of an expert's report. Reports that are subject to characterization as having been "ghostwritten" by the lawyer can result in court sanctions, if not also a charge of an ethics violation. *See, e.g., Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611 (D.N.J. 1989) (describing the lawyer's drafting of a medical expert's report as "attorney misconduct undermining the integrity of [the truth-finding] process"). It can also result in the loss of a favorable judgment for the client. *See, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245–46 (1944) (a ghostwritten expert report resulted in the vacating of a judgment based on the conclusion that a fraud on the court had been committed), overruled in part on other grounds by *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976).

A lawyer should avoid the temptation to play a significant role in the drafting of an expert report. Courts are not likely to ignore a substantial showing that an expert's report was "ghost-written."

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