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LITIGATION REVIEW

Disqualifying Experts Based on Conflicts of Interest

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Recent cases in Long Island's state and federal courts have been instructive in clarifying the circumstances under which an expert witness may be disqualified from working for a party in litigation based on a conflict of interest.

New York state and federal courts both find their authority to disqualify an expert witness in the so-called "inherent power of the court" derived from the judicial duty to protect the fairness and integrity of the legal process. While the standards for disqualifying an expert are not identical in the state and federal courts, some recent Long Island decisions show that there is little meaningful difference in the courts' analysis.

In *Grioli v. Delta International Machinery Corp.*, 2005 WL 2838130 (E.D.N.Y., 2005), decided on Oct. 29, Eastern District Judge Arthur R. Spatt was faced with a unique situation where the expert was also a licensed attorney. In *Grioli*, a carpenter and his wife brought a products liability action against a bench saw manufacturer, alleging the saw was defective in failing to disengage without a safety guard in place, causing three fingers of the plaintiff's left hand to be severed.

Plaintiffs found the perfect expert for their claims — a licensed engineer who also happened to be an inventor who actually devised his own "patented interlocked blade guard system." The expert intended to offer his own design "as evidence of a feasible and safer alternative design" and to opine that "an in-place guard would have prevented" plaintiff's injury.

The problem for plaintiffs, however, was that their expert also happened to be the defendant's attorney in more than 100 products liability lawsuits involving table saws and other power tools from 1976 to 1992. In fact, he was lead counsel for defendant in approximately 12 to 15 cases that went to trial, conducting lay and expert witness depositions, preparations and trial examinations as well as participating in meetings with defendant's principals, in-house counsel, engineers and risk managers.

Defendant moved to disqualify plaintiffs' proposed expert, therefore, not because he had previously been retained as an expert witness by the defendant, but because of his role as defendant's attorney.

In surveying decisions in state and federal courts addressing the grounds for disqualifying experts, Judge Spatt found that "courts that have encountered the issue of an expert who formally had a relationship with an adverse party have employed a three part test to determine whether the expert should be disqualified: (1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to the expert; and (3) does the public have an interest in allowing or not allowing the expert to testify."

Judge Spatt further noted that the burden of establishing these elements is on the party seeking disqualification.

In applying this standard, Judge Spatt found that the expert/attorney's prior representation of the defendant as an attorney was "extensive and lengthy" and that while acting as an attorney for the defendant, the expert undisputedly had a "confidential relationship" with the defendant as its trial counsel. He also found that the expert, while defendant's attorney, "had access to confidential information that [was] particularly relevant to the instant case," including "the litigation strategies for the defense of bench saw and table saw personal injury products liability cases; the assessment

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of the strengths and weaknesses of these types of cases; and the anticipated defenses for these types of cases."

Given that the expert had obtained such critical, confidential information from the defendant in an attorney-client relationship and that his proposed testimony about his own patented interlock blade guard system would necessarily involve "a consideration of his experience with the saw and the confidential information he was privy to as counsel for the defendant," Judge Spatt ruled that the expert must be disqualified.

In a short review of the final element of the standard — the public interest — the judge found "there is no showing [the expert] is a testimonial expert who is being deprived of his livelihood."

State Standard

The standard applied on the state side was first announced in the leading Appellate Division, Third Department, decision in *Roundpoint v. V.N.A. Inc.*, 207 A.D.2d 123, 125, 621 N.Y.S.2d 161, 163 (1995):

To resolve the issue of whether a claimed conflict of interest disqualifies an expert, courts have used a two-step analysis, first seeking to determine if it was objectively reasonable for the party claiming to have initially retained the expert to conclude that a confidential relationship existed between them and then, secondly, to ascertain if any confidential or privileged information was disclosed by said party to the expert.

The court continued that if both of the elements were present, the expert must be disqualified, while the absence of either one would likely result in no disqualification. (New York courts have not addressed the "third" prong of the federal standard articulated by Judge Spatt — the general "public interest.") In *Pazooki v. Richard Obreza Trucking, Inc.*, Index No. 9573/04, Supreme Court, Nassau County (Sept. 19, 2005), counsel for the owner and driver of a truck involved in a car accident telephoned an automotive engineer with experience in accident reconstruction with whom he had worked in the past. Counsel had lengthy discussions with the engineer revealing his view of "the accident, the operation of the vehicles at the time of the accident, issues regarding the operation of [defendants'] business and the maintenance of the vehicles as well as their defenses in the action."

Defense counsel also alleged that he had discussed privileged information that he had obtained from his client with the engineer and noted the importance of obtaining information from the truck's event data recorder. Counsel and the engineer also exchanged materials, and a letter had been sent by counsel confirming that he retained the expert on behalf of defendants.

Thereafter, the expert contacted defendants' counsel to inspect the truck on behalf of the insurance company for the defendant driver of the other car. When the expert refused to recuse himself, defendants moved to disqualify him based on a conflict of interest arising from his earlier discussions with defense counsel and his alleged retention.

Applying the standard announced in *Roundpoint*, Justice Roy S. Mahon granted defendants' motion to disqualify the expert, noting that the expert failed to refute that he discussed with the other defendants' counsel "the facts and circumstances of the accident, the privilege[d] information set forth by the client, the potential involvement of the vehicle driven by the [co-defendant] and the issue of the inspection of the . . . event data recorder."

Similarly, in *Seslowsky v. Royce Union Bicycle Company*, Index No. 99-7383, Suffolk Supreme Court Justice Mary M. Werner applied the *Roundpoint* two-prong analysis in determining whether to disqualify defendant's expert. In *Seslowsky*, plaintiff alleged she was injured when the front wheel of the bicycle on which she was riding disengaged from its frame, causing her to fall over the handlebars.

The third-party defendant hired an engineering consultant as a technical expert in the area of bicycle accident reconstruction, bicycle design and bicycle testing. Plaintiff moved to disqualify the expert, alleging that he had reviewed photographs of the bicycle at plaintiff's counsel request two years before.

At the evidentiary hearing ordered by the court, plaintiff's attorney testified that he had several conversations with the expert on four different dates in which details of the accident and the technology of the bike's mechanics were discussed as well as the "possibility" of the expert serving as plaintiff's expert. The conversations were corroborated with faxes and letters as well as contemporaneous notes of the attorney.

Plaintiff's attorney also sent the expert about 100 photographs of the subject bike, which were examined by the expert and returned. On the other hand, the expert only recalled a very general conversation with plaintiff's counsel, the receipt of the photographs, his telling plaintiff's attorney that he could not handle the case and referring him to another expert.

Justice Werner found that even though the expert was not formally retained, there was indeed a confidential relationship formed between the expert and plaintiff's counsel "such that it was 'objectively reasonable' for plaintiff's counsel to have assumed the existence of such a relationship, and that [confidential] information had been transmitted from plaintiff's counsel to [the expert]."

Thus, she disqualified the expert from representing the third-party defendant.

Conclusion

As these cases show, to minimize significant problems arising from expert witness conflicts of interest, counsel should consider certain basic steps when evaluating and engaging experts:

• Thoroughly investigate any and all contacts or relationships that the expert may have had with any adverse parties — before hiring the expert and investing any meaningful time and resources in him or her.

• Set forth the terms of the expert's retention in a fully executed written agreement in which the relationship and expectations of the parties are made clear.

• Have the expert agree to keep all information about the case confidential and to refrain from working in any capacity for any other party in the subject litigation.