Whose Side Are You On?

By Robert Ambrogi

May an expert witness switch sides in a lawsuit? Unlike the lawyers in a case, no rule expressly stops an expert from "hopping the fence". After all, the expert's allegiance is to the truth, not to any one party, right?

But just because an expert may switch sides doesn't necessarily make it the right thing to do. Switching sides can have unpleasant consequences. For one, the expert could be disqualified. For another, the lawyer could be sanctioned. And if either of those happens, the case could be kaput.

Yet, judging by the reported cases and the comments of lawyers, it happens with surprising frequency. The typical scenario runs something like this: One side – we'll say plaintiff – retains expert. Expert arrives at opinion unfavorable to plaintiff. Plaintiff discharges expert. Defendant snags expert.

For the courts that have confronted this scenario, concerns about preserving confidentiality and privilege often lead them to keep side-switching experts from taking the witness stand. And if a court finds that a lawyer inappropriately lured an expert from one side to another, it could slap the lawyer with severe sanctions.

Needless to say, lawyers share this concern for preserving confidentiality. But some also see an opportunity when an expert switches sides. They see it as an opening to question credibility – not of the expert, but of the lawyer who discharged the expert and the integrity of that lawyer's underlying case.

Questions of Credibility

"Experts are required to give an honest professional assessment opinion on issues and not consider the party that hired them when providing their result," explains Yolanda Marsili, an employment lawyer with Freeman, Borthwick & Marsili in Los Angeles. "When they do this the process works as it should. When one side that hired that expert initially chooses to ignore the opinion given and shop for a new expert, that is where ethical considerations come into play – not as to the experts, rather to the lawyers involved.

"Attempting to force a result by dropping viable experts allows the other party to pick up that expert to effectuate the right result and thwart the game of litigation that does not belong in our courts," Marsili says.

Still, in addition to examining why the first party discharged the expert, lawyers should also consider the expert's motive in switching sides. As lawyer Richard Durfee of the Arizona firm Durfee & Phelps explains, he sees two kinds of experts who will switch sides.

The first he describes as the honest expert, the expert who cannot be bought. "When they discover that the side that hired them is advocating something contrary to their view, they will 'switch' sides but remain consistent in the positions they take."

The other is the expert who lacks scruples. "Their opinion is for sale to the highest bidder. They will advocate on behalf of whichever party is paying their check. If switching sides is in their best interest, they will. They are consistent in looking out for themselves first, making the truth a casualty."

Disqualifying the Expert

These cases come up with enough regularity that courts have set standards for deciding whether to disqualify the side-switching expert. Most apply the two-part test set out by the 5th U.S. Circuit Court of Appeals in a 1996 decision, *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, a tangled case in which a tugboat owner and a barge owner were at odds over which was at fault for the barge's 1987 sinking.

The appeal to the 5th Circuit focused on the trial court's decision to disqualify an expert witness, Richard Vinas. The barge's insurer, Continental Insurance Company, originally retained Vinas in connection with insurance-coverage claims brought against it by the barge's owners. Continental paid him some $8,000, received two detailed written reports of his opinions, and listed him as a "will call" expert for trial.

However, well before trial, Continental settled the coverage claims and effectively switched sides in the litigation, joining with the barge owners in their claims against the tug owners. Later, Continental released Vinas as an expert.

Meanwhile, the tug owners approached Vinas and ultimately retained him in August 1993, just a month ahead of the trial. When the barge owners found out, they asked the judge to disqualify him, which the judge did.

As the 5th Circuit noted in its opinion, the case was unusual because it was the party that retained the expert that switched sides, not the expert himself. Still, the court based its reasoning on other side-switching cases and established a two-part test for disqualification.

"First, was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed? Second, was any confidential or privileged information disclosed by the first party to the expert? … Only if the answers to both questions are affirmative should the witness be disqualified."

In Continental's case, it had a reasonable expectation of confidentiality with Vinas and Vinas did in fact receive confidential information from Continental's counsel pertaining to his theory of the case and his tactics for trial, the court concluded. Thus, it affirmed his exclusion.

Sanctions for the Lawyer

Another danger in these cases is a sanction on the attorney who hires the expert away. A decision that illustrates this is *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996).

This was a pro se defective-product case brought by Donald C. Erickson against the manufacturer of his motor home. After a trial judge dismissed Erickson's case, he

appealed, arguing that the defense counsel had tampered with his metal expert, Dr. Steven Grimm.

While preparing to depose Dr. Grimm in his law office, defense counsel Leslie Combs had asked him if he would accept $100 an hour to evaluate a lock that was an important piece of evidence in another case. After the deposition was over, Combs took Dr. Grimm alone into another room to show him photos and video of the lock.

Pro se though he was, Erickson realized this was not right. The next day, he filed a "Motion for Judgment against Newmar for Tampering with a Material Witness." He also fired Dr. Grimm, believing that he could no longer trust him. Soon after, another of Erickson's experts resigned, explaining that he did not want to be involved in a case where "the attorneys [were] bothering the witnesses."

In denying Erickson's motion, the district court treated this as a side-switching case. It reasoned that Erickson was effectively seeking to disqualify his own expert so that the court would enter judgment against the defendant as a sanction.

But the 9th Circuit said the case was not about side-switching, it was about legal ethics. "The present case is about an attorney who offered a monetary inducement to an expert witness prior to the expert giving his testimony."

Defense lawyer Combs "entirely circumvented the discovery rules" by achieving "unsupervised access to plaintiff's expert," the court said. This conduct interfered with Erickson's ability to present his case and was "particularly disturbing because Combs took advantage of the fact that Erickson was acting pro se."

In the end, the defense lawyer's conduct earned the plaintiff a second chance at trial. But the case also suggests one final danger when experts switch sides – that outsiders may attribute fault to the expert and be less likely to hire the expert in future cases.

As one expert who asked not to be identified explained, "If an expert switches sides, it could be an uphill climb to re-establish credibility. It would have to mean that the other side released the expert and they may have had a good reason to do so."

So, go ahead, switch sides. But do so at your peril.

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