

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 676**

August 2018

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from retaining an expert or intentionally disclosing confidential information to a prospective expert when the lawyer has no substantial purpose other than to attempt to disqualify or otherwise prevent the expert from being used by an opposing party including testifying on the opposing party's behalf?

STATEMENT OF FACTS

In representing a client in a litigation matter, a lawyer retains an expert to testify on behalf of the lawyer's client. The subject matter of the litigation is highly specialized, requiring analysis and possibly testimony that is only available from a small number of persons with the requisite expertise. Although the lawyer has no intention of using another expert, the lawyer contacts a second expert and represents that the lawyer is interviewing prospective experts to work and possibly testify on behalf of the lawyer's client. The lawyer does not reveal that the lawyer has no intention of using the second expert. With no substantial purpose other than disqualifying or otherwise preventing the expert from working for the opposing party, including testifying on the other party's behalf, the lawyer either retains the second expert or intentionally shares confidential information with the second expert.

DISCUSSION

In handling litigation matters, lawyers often retain experts to provide analysis and possibly testimony to assist the trier of fact. Depending on the nature of a case, a litigant may not be able to pursue or defend a matter successfully without retaining one or more experts. This poses special challenges when only a small number of individuals possess the expertise necessary to provide informed and credible assistance including testimony on a given subject.

Lawyers who determine that an expert is necessary or desirable routinely contact prospective experts to discuss the possibility of the expert assisting, and potentially testifying on behalf of, the lawyer's client. If the lawyer shares confidential information with the prospective expert during these preliminary discussions, in some cases the expert may be disqualified from providing testimony on behalf of or otherwise assisting the opposing party. This can occur if the expert is retained and even when the expert is not retained. Although the rules for disqualification of non-attorney experts may differ depending on the forum, some Texas federal and state courts have used the following two-factor test for determining whether to disqualify a

non-attorney expert witness based on a prior relationship with an adversary: (1) whether it was objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship exists, and (2) whether any confidential or privileged information was disclosed to the expert. *See, e.g., Koch Ref. Co. v. Jennifer L. Boudreaux M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996); *Formosa Plastics Corp., USA v. Kajima International, Inc.*, 216 S.W.3d 436, 450 (Tex. App.—Corpus Christi 2006, pet. denied). The test for disqualification does not require formal retention by the first party. *Formosa Plastics Corp., USA v. Kajima International, Inc.*, 216 S.W.3d at 449. Apart from the issue of disqualification, the mere act of retaining an expert may effectively prevent the expert from being available to work for the opposing party.

Rule 4.04(a) of the Texas Disciplinary Rules of Professional Conduct provides: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” Professional Ethics Opinion 585 (September 2008) concluded that a lawyer would violate Rule 4.04(a) by counseling a client to hire all the local lawyers in a community where a lawsuit is filed if the lawyer had no substantial purpose other than to delay or burden the opposing party. The reasoning and conclusion of Opinion 585 apply to the present scenario. Thus, Rule 4.04(a) prohibits a lawyer from retaining an expert or communicating confidential information to a potential expert when the lawyer has no substantial purpose other than to delay or burden the opposing party by impeding the opposing party’s access to a limited pool of potential experts.

Whether the only substantial purpose for a lawyer’s action is to delay or burden another person depends on the circumstances and is a question of fact to be decided in each case. It is not necessarily improper for a lawyer who has already retained an expert to interview additional experts on the same topic, provided the lawyer actually is considering using additional experts in the case. But a lawyer who retains or intentionally shares confidential information with an expert with no substantial purpose other than to create a possible disqualifying circumstance violates Rule 4.04(a). Further, if the only substantial purpose for a lawyer’s conduct is to impede and possibly prevent the opposing party from using and potentially offering testimony from the expert, such conduct violates Rule 4.04(a) without regard to whether the expert is actually disqualified. As Opinion 585 states, “If the only substantial purpose for a lawyer’s actions in a particular case is to embarrass, delay or burden another person, such conduct violates Rule 4.04(a) without regard to whether the other person was actually embarrassed, delayed or burdened.”

In addition to violating Rule 4.04(a), the lawyer may violate Rule 4.01 if, in the course of representing a client, the lawyer knowingly “make[s] a false statement of material fact or law to a third person.” For example, the lawyer could violate Rule 4.01 by telling the second expert that the consultation was for the purpose of using the expert in a particular matter if the lawyer had no intention of using that expert in the matter. Using misrepresentations and deceit to disqualify a prospective expert could also violate Rule 8.04(a)(3), which prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from retaining an expert or disclosing confidential information to a prospective expert when the lawyer has no substantial purpose other than to attempt to disqualify or otherwise prevent the expert from being used by, including testifying on behalf of, an opposing party.