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To be conflicted or not to be conflicted, that is the question

By Hillary Frommer

One tactic a litigant may use to bar its adversary's expert witness from testifying at trial is to disqualify that expert on the grounds that the litigant had previously retained the expert who will now testify against it. In other words, the expert has a conflict of interest.

The case law establishes, however, that while disqualification may be appropriate "to preserve the fairness and integrity of the judicial process,"[1] a party must do more than simply claim that it hired the expert first. In *Roundpoint v V.N.A., Inc.*, the Appellate Division, Third Department adopted the two-prong test applied by federal courts in New York and around the country, and set forth the standard for disqualification that is now uniformly utilized in New York.[2] The court stated that it must first "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."[3] Disqualification is appropriate only if both elements — (1) the existence of a confidential relationship and (2) the disclosure of privileged materials — exist.

As the case law reveals, this is a strict standard not easily satisfied unless the party puts forth concrete evidence establishing both factors. In fact, in *Roundpoint*, the court denied disqualification upon finding that the defendant failed to satisfy the two-prong test. In that personal injury action, the plaintiffs intended to call an expert architect to testify that a handicap entranceway to the defendant's premises, where the plaintiff allegedly fell and sustained injury was hazardous and dangerous. The defendant moved to disqualify that expert on the grounds that the defendant had previously hired him to design renovations to that very entranceway. The court denied disqualification. It first found that the expert completed his work for the defendant well before he was ever retained by the plaintiffs as a trial expert, and moreover, the scope of his work did not encompass any matter involved in the litigation. Thus, the court concluded that there was no "objectively reasonable grounds" for the defendant to conclude that it had established a confidential relationship with the architect. The court then found that the defendant failed to show that it had provided any confidential information to the expert, or that the expert had access to any such information.


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In March 2012, two Supreme Courts faced with very different fact patterns applied this two-prong test and denied disqualification. In *Brandon v Witbeck*,[4] the plaintiff brought suit to recover money damages for injuries the decedent sustained at the defendants' work site[5], and sought to present expert testimony that the condition at the work site was inherently unstable and that the danger was reasonably foreseeable. Each party retained their own engineering expert. The plaintiff's expert had previously worked for the defense expert engineering firm and, without knowing that his former employer was involved in the litigation, asked that firm to analyze soil samples that he had collected at the site and intended to relay use in testifying at trial. The plaintiff then sought to preclude anyone from the defendants' expert engineering firm from testifying at trial. The Supreme Court, Rensselaer County denied disqualification. First, the court found that the *plaintiff* failed to establish that *it* had a confidential relationship with the defendants' expert firm. The court then found that no confidential or privileged information belonging to the plaintiff was in fact disclosed to the defendants' expert.[6] Thus, notwithstanding the relationship between the two experts, the court found that the two-prong test was not satisfied and that disqualification was not warranted.

In *Winzelberg v 1319 50th Street Realty Corp.*,[7] the plaintiff brought suit when her apartment building was damaged by construction occurring on adjacent property. The defendant construction company[8] moved to disqualify the plaintiff's expert, Mr. Flynn. It argued that a confidential relationship existed because before any litigation began, the defendant Synagogue paid Mr. Flynn to conduct controlled inspections of the construction site. The defendants offered evidence that Mr. Flynn believed that he had been retained to protect the plaintiff's property, that he had been privy to plans prepared by the construction company's architect for the construction project, which were publicly filed, and that Mr. Flynn had "the ultimate say in what the project should look like."[9] The Supreme Court, Kings County denied the motion. It stated that even where, as in the case before it, an expert is retained by both parties *seriatim*, there is no reason to deviate from the established two-prong inquiry. The court then found that because all of the parties knew from the onset of Mr. Flynn's employment that he served in a dual capacity, the defendants did not establish a reasonable belief that a confidential relationship existed. The court also found that the disclosure of publicly filed information to Mr. Flynn did not rise to the level of confidential information to satisfy the second prong of the test.

This test is applied equally as vigorously in federal courts. For example, in *Rodriguez v Pataki*,[10] the court denied the defendants' motion to disqualify the plaintiff's expert witness upon finding that the defendants made only conclusory assertions that they had provided the expert with confidential information, but provided no actual evidence of any such disclosure.

Contrast the aforementioned decisions with *Friedrich v Blasz*,[11] where the Supreme Court, Erie County was persuaded by numerous affidavits from the defendant's counsel in which the attorneys attested that they had previously consulted with the plaintiff's expert for the purpose of hiring him, and that the expert had provided counsel with a verbal report during that consultation. The court concluded that that evidence sufficiently established that the defendant's attorneys reasonably believed that they had a confidential relationship with the plaintiff's expert, and had provided privileged information to him. Finding the two-prong test satisfied, the court granted the motion for disqualification and precluded the plaintiff's expert from testifying at trial.

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

1 *Roundpoint v V.N.A., Inc.*, 207 AD2d 123 [3d Dept 1995].
2 *See, e.g., Friedrich v Blasz*, 11 Misc3d 1068[A] [Sup Ct, Erie County 2006]; *Towers Ins. Co. of New York v State of New York*, 20 Misc3d 698 [NY Ct Cl, 2008]; *Rodriguez v Pataki*, 293 FSupp2d 305 [SDNY 2003]; *Bristol-Myers Squibb Co. v Rhone-Poulenc Rorer, Inc.*, 2000 WL 42202 [SDNY Jan 19, 2000]; *In re Drier LLP*, 482 BR 863 [SDNY 2012].
3 *Id.* at 125, *citing Wang Labs. v Toshiba Corp.*, 762 FSupp 1246, 1248 [ED Virginia 1991]; *Great Lakes Dredge & Dock Co. v Harnischfeger Corp.*, 734 FSupp 334 [ND Illinois 1990].
4 2012 NY Slip Op 30911 [Sup Ct, Rensselaer County March 2012].
5 The plaintiff was the Administratrix of the Estate of Vincent Van Winkle. Van Winkle was the injured party.
6 *Id.*
7 35 Misc3d 715 [Sup Ct, Kings County 2012].
8 The plaintiff sued the construction company as well as the owners of the property, 1319 50th Street Realty Co. and Haichus Avrechim of Vein Synagogue, who both joined the motion.
9 *Id.* at 717.
10 *Supra.*
11 *Supra.*

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