Sharp Practitioners Beware:
Strategic Dissuasion of Expert Testimony
May Lead to Court-Ordered Sanctions. . .or Worse.

By

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I. Introduction

Among the bedrock principles to which we adhere in the practice of tort law are the following: (1) our job, as lawyers, is to zealously advocate for our clients; and (2) our cases often rise and fall on the pedigree and performance of our retained experts. One question at the confluence of these principles is the focus of this article: at what point does the attempt to deter an opposing expert from testifying at all, either directly or indirectly, cross the line from zealous advocacy to improprietous and potentially unethical conduct? The answer, as with most such issues, is not black and white – rather, it depends on the manner and mechanism of exertion. Without question, however, attempting to dissuade an expert witness from testifying by intimating a likelihood of adverse repercussions with their professional affiliations or licensing authorities – or by alerting those affiliations or authorities to the expert's anticipated testimony with the expectation that pressure will be indirectly leveraged on the expert to withdraw – may result in court-ordered sanctions, or even professional misconduct allegations. The rule of thumb should be as follows: if an opposing expert's withdrawal from a case is a reasonably foreseeable consequence of your contemplated actions, think twice before you set that plan into motion.

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II. The Scenario

In a recently settled medical malpractice case, we retained a nationally renowned physician expert ("Expert"), who had been elected as the President of the preeminent national medical society ("the Society") for the Expert's specialty, a position of prestige commensurate with Expert's immense experience, numerous accolades, and impeccable résumé. Expert was expected to testify that the medical care rendered by the defendant was plainly negligent. During the course of litigation, we received a telephone call from Expert, who was, justifiably, quite upset: evidently concerned about the impact of Expert's testimony, defense counsel had – three months after the plaintiffs' expert disclosure, and a matter of weeks before Expert's scheduled deposition – contacted the Society to "inquire" whether Expert, as a member of the Society's Board of Directors, was authorized to testify as an expert in a medical negligence case. Immediately after being contacted by defense counsel, the Society instructed Expert to withdraw from the case, notwithstanding the fact that Expert had violated no bylaws, or even informal guidance, propounded by the Society. Although Expert was ultimately able to persuade the Society to allow Expert to testify, Expert suffered needless embarrassment, burden, and humiliation as a result of defense counsel's unsolicited disclosure to the Society at the outset of Expert's term as the Society's President.

When questioned about these communications, defense counsel indicated that the Society had been contacted merely to ascertain whether they had a policy governing the participation of members as experts in litigation. Upon being told, by e-mail, that there was in fact no policy, but that there had been no formal requests for Society leadership to provide such expert testimony, defense counsel advised the Society, also by e-mail, that the inquiry was being made because Expert had been identified as an expert in the case on behalf of the plaintiff.

For the purpose of assessing the risk of exposure to claims of ethical and discovery violations, it is worth pointing out that several negative inferences might reasonably be drawn from defense counsel's conduct and communications with the Society: (1) when defense counsel contacted the Society to inquire as to whether they had a policy regarding expert witness work by its members, defense counsel obtained the answer sought without having to reference Expert by name, or even represent that an active Society board member had been disclosed as an expert witness. Indeed, once defense counsel was informed that the Society had no policy precluding (or governing in any way) expert testimony by its board members, there was no reason to continue the dialogue, let alone mention Expert by name. Arguably, the only ostensible purpose for the gratuitous reference to Expert was to indirectly coerce Expert's withdrawal from the case through the pressure of the Society –

an endeavor in which defense counsel nearly succeeded; and (2) defense counsel possessed other, equally effective avenues by which he might obtain the same information, including a review of the Society's website, or by asking Expert directly at Expert's deposition, as the President-Elect of the Society, whether the Society maintains any policies which might limit or preclude Expert's ability to testify as an expert witness. That defense counsel instead chose to contact the Society and divulge Expert's name could suggest an intent to indirectly leverage Expert's withdrawal.

III. The Issues

The issues, as we examine them here, are twofold: first, is this type of conduct unethical? And second, does this type of conduct violate the New Hampshire Superior Court's Rules of Discovery? The answer to the latter is a resounding "yes," while the answer to the former is "possibly, depending on the circumstances."

Is it Unethical? See Rule of Professional Conduct 3.4(a)

The ethical standards governing the practice of law in the state of New Hampshire are defined by the New Hampshire Rules of Professional Conduct (the "New Hampshire Rules"), which, in turn, are modeled after the American Bar Association's Rules of Professional Conduct. According to Rule 3.4(a), "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." *New Hampshire Rules of Prof'l Conduct, Rule 3.4(a)* (hereafter "Rule 3.4(a)" or the "Rule"). Thus, the threshold question is whether a discernible attempt to dissuade an expert from testifying by indirectly leveraging that expert's withdrawal from the case would violate the Rule's proscriptions.

Despite a dearth of New Hampshire jurisprudence on the breadth and scope of the Rule, courts and ethics committees in several other jurisdictions have opined on its applicability to analogous facts. One such opinion ("LEO No. 1678"), published by the Legal Ethics Committee in the state of Virginia – which has adopted a virtually identical version of New Hampshire's Rule of Professional Conduct 3.4(a), both derived from the ABA's model rules[2] –

[2] New Hampshire Rule of Professional Conduct 3.4(a) reads as follows:

> A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such an act.

N.H. Rules of Prof'l Conduct, 3.4(a). Virginia Rule of Professional Conduct 3.4(a) reads, in pertinent part:

directly addresses the rule's applicability to a party's interference with an opposing party's expert witness.[3]

The facts underlying LEO No. 1678 are both comparable and distinguishable, in some important respects, to those presented here. There, in a medical malpractice action, plaintiff's counsel designated Dr. D., a junior member of Medical Practice Group G, as an expert witness. Several weeks after plaintiff's counsel made this designation, defense counsel designated Dr. K, a senior member of Medical Practice Group G, as his expert. Defense counsel had used Dr. K as an expert in previous cases and was aware that Dr. D was Dr. K's subordinate in their medical practice group. After being retained by defense counsel, Dr. K had conversations with Dr. D in which he admonished his younger associate about the disadvantages of testifying against another physician from the community, as well as the inappropriateness of taking a position contrary to that of one of his partners. Subsequently, Dr. D informed plaintiff's counsel that he would be unable to testify.

Asked to consider whether defense counsel had an ethical obligation to advise his expert, Dr. K, not to communicate with or otherwise put pressure on Dr. D, the Legal Ethics Committee concluded that he did not. In reaching this conclusion, the Committee cited this controlling ethical precept:

> It is not ethically permissible for a lawyer directly to advise the other party's expert witness not to testify, or indirectly, through another acting at the lawyer's request to cause the other party's expert witness not to testify. A lawyer may not do indirectly what he is prohibited from doing directly.[4]

In the absence of any evidence that Dr. K's communications with Dr. D had been made with the knowledge, or at the prompting, of defense counsel, the committee held that the shepherding ethical standard had not been violated.[5]

> A lawyer shall not: (a) [o]bstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

VA Rules of Prof'l Conduct, 3.4(a).

[3] *LEO No. 1678*, 1996 Va. Legal Ethics Ops. Lexis 19 (September 5, 1996).

[4] *Id.* at *4-5.

[5] *Id.*

Importantly, courts have added gloss to LEO No. 1678's guiding principle, by holding that specific intent is not a requisite element of a Rule 3.4(a) violation. That is, an inquiring court need not find that the offending attorney specifically *intended* the adversarial expert's withdrawal from the case; rather, the expert's withdrawal need only have been a "reasonably foreseeable consequence of the acts in which he deliberately engaged" in order to contravene the Rule.[6]

In the scenario presented in Section II above, unlike the facts in LEO No. 1678, it is readily apparent that the Society's intervention to foreclose Expert's continued service as an expert witness was caused, albeit circuitously, by defense counsel. Therefore, the determinative question under Rule 3.4(a) is simply whether this consequence was *reasonably foreseeable*.

The answer to this question is fact-specific, depending largely upon such factors as offending counsel's experience, his awareness of how specialty medical boards and professional affiliations operate, and the context of the communications themselves. For example, when Expert's Society's representative told defense counsel that no board members had been asked to testify as an expert, this arguably made it more foreseeable that Expert would be improperly discouraged from fulfilling the antecedent obligation to testify on behalf of the plaintiffs. Moreover, the context of the communications could be interpreted to undermine any claim that Expert was identified in the normal "ebb and flow" of the conversation – the revelation was made by e-mail, in response to an e-mail, which provided counsel with the appearance of adequate time to contemplate the nature and potential impact of his response. Based on the applicable law, it should be no defense that counsel lacked a specific intention to cause Expert's withdrawal, or that the Society was openly contacted without any attempt at guile or deceit. In any event, several courts and legal ethics committees have found such conduct, or similar conduct, to be violative of Rule 3.4(a).[7]

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[6] *Sanderson v. Boddie-Noell Enters.*, 227 F.R.D. 448, 454 (Va. East. Dist. 2005) (finding, under similar facts, that attorney who engaged in communications with adverse expert's employer with reasonably foreseeable consequence that the employer would pressure its employee to withdraw as an expert had violated Virginia Rule of Professional Conduct 3.4(a); "[w]hether [the attorney] intended [the expert's withdrawal] is not dispositive of the issue because [he] is chargeable with knowledge of the reasonably foreseeable consequences of the acts in which he deliberately engaged"); *see also WellStar Health Sys. V. Kemp*, 324 Ga. App. 629 (Ga. Ct. App. 2013) (finding that Rule 3.4(a) can be violated where "the natural and foreseeable result of [the violator's conduct] was to have the [opposing expert] pressured into withdrawing from the case").

[7] *See, e.g., Sanderson v. Boddie-Noell Enters.*, 227 F.R.D. 448, 454 (Va. East. Dist. 2005) (finding that plaintiff's attorney in personal injury case who engaged in communications with adverse experts' employer with reasonably foreseeable consequence that the employer would force its employee to withdraw as an expert had violated Virginia Rule of Professional Conduct 3.4(a)); *Sutch v. Roxborough*

We take no concrete position on the ethical issue posited here, as we believe that it is highly fact-determinative. In our case, we expressed our concerns, in private, and gave defense counsel the opportunity to consider the issue and respond before initiating corresponding litigation. The expert witness ultimately testified; the damage was minimized; the case was settled; defense counsel submitted a thoughtful explication and apologized to the expert witness during deposition for any undue embarrassment caused; a subsequent court order in a separate case, discussed more fully below, provided some helpful guidance on the question; and thus no complaints were made nor litigation pursued. Nevertheless, there certainly exists the risk that a Court could, under the right circumstances, deem such conduct a breach of Rule 3.4(a).

Does it Violate Discovery Rules? See Superior Court Rule 21(d)(1)(A)

In civil cases, and particularly medical malpractice cases, the battleground is often drawn by expert witnesses; they are crucial to the

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Mem. Hosp., 151 A.3d 241 (Pa. Super. Ct. 2016)) (upholding trial court's sanctions of defense counsel in medical malpractice case – including monetary sanctions and disqualifying defense counsel from the retrial – for violating Rule of Professional Conduct 3.4(a) by sending letter to general counsel for the plaintiff's expert physician's employer (a non-party) stating that the expert's position reflected poorly on the image and reputation of the employer, resulting in the employer pressuring the expert to withdraw from the suit); *WellStar Health Sys. V. Kemp*, 324 Ga. App. 629 (Ga. Ct. App. 2013) (upholding trial court's sanctions against defense counsel in a medical malpractice suit for violating Rule 3.4(a) by contacting the plaintiff's expert physician's employer with the objective of interfering with the expert's appearance as an expert witness; sanctions included disqualification of defendant hospital's trial counsel, co-counsel, and their law firm; striking the defendant hospital's answer; and entering default judgment against the defendant hospital as to liability); *State ex rel. Okla. Bar Ass'n v. Cox*, 2002 OK 23 (Ok. Supr. Ct. 2002) (sanctioning defense counsel by suspending law license for 60 days where defense counsel contacted plaintiff's physician expert, who was also a close personal friend, and told him that if he did not abstain from testifying in the case, he would "dig up dirt" on the expert, thereby attempting to dissuade the expert from testifying); *Mass. Inst. of Tech. v. ImClone Sys.*, 490 F.Supp.2d 119 (D. Mass. 2007) (finding that attorney violated Massachusetts Rule of Professional Conduct 3.4(a) – which is nearly identical to New Hampshire Rule 3.4(a) – and imposing sanctions, where outside and inside counsel engaged in a deliberate stratagem to deprive the opposing party of its expert's services by disclosing information to the expert's employer, as a reasonably foreseeable consequence of which the employer instructed its employee to withdraw from the case as an expert); *Brown v. Hamid*, 856 S.W.2d 51, 54 (Mo. Supr. Ct. 1993) (noting in *dicta*, in medical malpractice case, that indirectly pressuring an opposing expert not to testify through the intimation of indirect punishments "may constitute a violation of an attorney's ethical duties or the criminal law"); *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (sanctioning defense attorney in medical malpractice case for telling non-party treating physician that he could be sued too, and that without his testimony, the plaintiff's suit would probably not be successful); *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (suspending a lawyer who attempted to influence a potential witness not to testify); *Oregon State Bar Op. 2005-132, Communicating with Adverse Expert Witness: Dissuasion of Witness from Testifying* (finding it unethical for a lawyer to attempt to dissuade an opposing expert witness from testifying; "[a]ttempting to persuade a witness not to testify would be prejudicial to the administration of justice, because, if successful, it would obviously constitute substantial harm to the functioning of the proceeding as well as to the substantive interest of a party. [. . . .] Even if unsuccessful, the attempt is prejudicial to the administration of justice."); *Oregon State Bar Op. 1992-132* (lawyer may not attempt to dissuade an expert witness from testifying).

outcome for each party, and the withdrawal of a vital expert can put a party at a significant, and sometimes insurmountable, disadvantage. Conversely, one strong expert can make the case, rendering high the stakes of expert witness involvement. Yet, the appropriate way to dilute the opposition's impact is to skillfully cross-examine the expert during the expert's sworn deposition and, if necessary, pursue exclusion as a remedy through a *Daubert* hearing. Had defense counsel identified, and obtained, a Society testimonial policy being violated by Expert (which, of course, did not exist), its use might even be arguably permissible for purposes of impeachment. However, indirectly exerting pressure on Expert to withdraw, or making Expert's professional life generally uncomfortable, by informing the national medical association of which Expert is the newly elected President that Expert is testifying as an expert on behalf of a plaintiff, is not the proper way to abate Expert's testimonial value. Defense counsel's disclosure to the Society could be perceived as designed to embarrass and annoy Expert, and to cause Expert undue burden.

Employing a discovery method "in a manner or to an extent that causes unwarranted annoyance, embarrassment, or undue burden or expense" is an expressly prohibited discovery abuse under New Hampshire Superior Court Rule 21(d).[8] Defense counsel's attempt to embarrass, annoy, and burden Expert by alerting the Society to Expert's work as a plaintiffs' expert violated the Rule. When such a violation occurs, "the court should normally impose sanctions unless . . . counsel can demonstrate substantial justification for the conduct at issue or other circumstances that would make the imposition of sanctions unfair."[9] In imposing attorney sanctions, a trial court generally maintains unfettered discretion.[10] Among other factors, courts should consider the following in determining the appropriate sanction to impose: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors."[11]

Under such circumstances, aggrieved counsel might argue that the Court should permit the plaintiffs, at trial, to elicit testimony regarding opposing counsel's misconduct, and should further instruct the jury that they may draw an inference regarding the expert's credibility in light of opposing counsel's

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[8] *N.H. Super. Ct. Rule 21(d)(1)(A).*

[9] *N.H. Super. Ct. Rule 21(d)(1).*

[10] *Daigle v. City of Portsmouth*, 131 N.H. 319, 325 (N.H. 1988).

[11] *In re Richmond's Case*, 152 N.H. 155, 160 (N.H. 2005).

attempt to cause the expert's withdrawal.[12] Aggrieved counsel should also request that the Court strike opposing counsel's anticipated reciprocal expert, in complementation of their informal attempt to do the same.[13] Finally, aggrieved counsel should argue that the Court hold opposing counsel responsible for the costs associated with engaging in unnecessary defensive litigation.[14]

IV. Analogous Circumstances Led to Sanctions[15]

During the pendency of a recent New Hampshire medical malpractice case, one of the plaintiff's three disclosed experts ("Expert 2") was deposed. One week after the deposition had concluded, defense counsel contacted plaintiff's counsel to explain concerns regarding Expert 2's testimony – specifically, that Expert 2 had failed to identify the literature supporting Expert 2's opinion, and therefore that Expert 2's opinion was not grounded in reliable medical science, sufficiently tested, or generally accepted in the medical community. A few days later, shortly before trial, defense counsel filed a motion to exclude Expert's testimony, and the parties agreed to a *Daubert* hearing, which was scheduled five days prior to jury selection.

The morning preceding the *Daubert* hearing, defense counsel indicated that, on one previous occasion, defense counsel had reported a physician for failure to provide testimony consistent with that physician's Board's ethical requirements, consequent to which the physician had lost his hospital privileges and been subjected to an investigation by the Medical Board. Accordingly, defense counsel urged, Expert 2 should reacquaint with the Board's ethical requirements and provide a clear distinction between Expert 2's personal opinions and what is commonly accepted in Expert 2's professional community. If Expert 2 maintained that Expert 2's opinions are commonly accepted by his professional community, defense counsel warned that Expert 2's Board would clarify Expert 2's role in serving as an expert – in essence, a

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[12] *See Mass. Inst. Of Tech. v. ImClone Sys.*, 490 F.Supp.2d 119 (D. Mass. 2007) (imposing as one (of several) sanctions that plaintiffs were permitted to offer evidence of improper conduct of opposing attorneys in attempting to force the withdrawal of plaintiff's expert).

13 *See In re Gainor-Ghobashi*, 2017 N.H. LEXIS 250 (N.H. 2017) ("The trial court has broad discretion in . . . imposing discovery sanctions."); *Qureshi v. Amann*, 2015 N.H. LEXIS 155 (N.H. 2015) (the imposition of sanctions is a matter left largely to the discretion of the trial court, and will not be disturbed absent an "unsustainable exercise of discretion").

[14] *See, e.g., Sanderson v. Boddie-Noell Enters.*, 227 F.R.D. 448, 454 (Va. East. Dist. 2005) (sanctioning counsel for Rule 3.4(a) violation by ordering counsel to compensate opposing party for any related fees of litigation arising from Rule 3.4(a) violation); *Sutch v. Roxborough Mem. Hosp.*, 151 A.3d 241 (Pa. Super. Ct. 2016)) (similar); *WellStar Health Sys. V. Kemp*, 324 Ga. App. 629 (Ga. Ct. App. 2013) (similar).

[15] For the sake of sanctioned counsel, identifying details regarding the case have been omitted.

thinly veiled threat to report Expert 2 to the governing Medical Board.

Upon reviewing defense counsel's e-mail to plaintiff's counsel, Expert 2 declined to testify and refused to participate in the case. A motion for sanctions was filed.

In the Court's ensuing Order, it stopped short of finding an ethical violation of Rule 3.4(a), in part on grounds that such a violation was not being alleged by plaintiff's counsel; and in part because the conduct, although egregious, was neither repetitive nor enough to violations in the existing caselaw to constitute an ethical violation. Yet the Court did find that defense counsel had "employed a discovery method 'in a manner or to an extent that causes unwarranted annoyance, embarrassment, or undue burden or expense'" in violation of New Hampshire Superior Court Rule 21(d)(1)(A), with a corresponding sanction, stipulated by the parties, of $20,000.

V. Conclusion

Eliminating a crucial opposing expert from the equation is an understandably appealing prospect, which might change the outcome of a case for your client – but do it the right way: effectively depose the witness, render their anticipated testimony incredible, and seek a *Daubert* hearing. Trying to scare and intimidate the opposing expert into withdrawing from the case will more likely than not expose you, at the very least, to sanctions for discovery violations, and perhaps even allegations of unethical conduct. Overzealous practitioners beware.