LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 482: March 23, 1995

SUMMARY

REPRESENTATIONS MADE TO OPPOSING COUNSEL AND THE COURT - EXPERT WITNESS. During negotiations, an attorney may inform opposing counsel that the attorney has retained an expert witness, and may designate that expert witness on court documents, where the attorney has had extensive discussions with the expert about the case, and has received a proposed engagement letter from the expert. However, once the expert witness withdraws any implied consent to designate, the attorney may not continue to represent to opposing counsel or the court that such an expert witness has been retained, absent an executed engagement letter or contract with the expert.

AUTHORITIES CITED

Alkow v. State Bar (1952) 38 Cal.2d, 257, 264
In the Matter of Farrell (Review Department 1991) 1 Cal. State Bar Ct. Rptr. 490
In the Matter of Lilly (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185.
McKinney v. State Bar (1964) 62 Cal.2d 194, 196.
In the Matter of Taylor (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576
California Business and Professions Code , Section 6068(d)
California Code of Civil Procedure 2034
California Rule of Professional Conduct , Section 5-200
Federal Rule of Civil Procedure 26(a)(2)
State Bar Formal Opinion No. 1979-48, 124

ISSUES

An attorney has asked for our opinion as to the following scenario:

An attorney telephones an expert witness to discuss a possible engagement. During the conversation, they discuss the case and the expert's fees. At the conclusion of the call, the attorney verbally agrees in good faith to retain the expert. The expert indicates that a written retainer contract will be coming in the mail. At this point, neither the attorney nor the expert mentions whether the attorney has the authority to "designate" the expert as the party's expert on court documents.

In a later conversation, the attorney advises the expert that the attorney has officially designated the expert in the case, and that the attorney has notified opposing counsel as to this designation. However, the attorney fails to execute the expert's retainer agreement or to make any payment until the attorney is sure the expert is actually needed. In response, the expert objects. During several later telephone conversations between the expert and the attorney, the attorney continues to equivocate as to the status of the case, settlement, and the retention of the expert, and does not execute the retainer. However, the attorney does not withdraw designation with the court, and continues to represent to opposing counsel that the attorney has retained the expert witness.

The issue presented to the committee is whether continuing to represent to opposing counsel that an expert has been retained, and court designation of that expert, on the facts given, is an ethical violation of Rule of Professional Conduct 5-200(B) and/or Business & Professions Code Section 6068(d).

DISCUSSION

This Committee limits its advice to whether the actions described violate the attorney's ethical obligations. The Committee does not address whether the proposed action could create liability in contract or tort.[1]

Rule 5-200 of the California Rules of Professional Conduct provides that: "In presenting a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; . . ."

In addition, Section 6068(d) of the California Business & Professions Code, states that it is the duty of an attorney:

"To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

Finally, both California Code of Civil Procedure 2034 and Federal Rule of Civil Procedure 26(a)(2), which deal with specific aspects of pre-trial discovery, require formal disclosure of the names of expert witnesses to be utilized in court. In addition, in both courts, when designating the use of an expert witness with the court and the opposing party, the attorney must sign the designation under penalty of perjury. Thus, there is a pressing need to be scrupulous as to truthfulness in these declarations.

Representing to opposing counsel that one has retained the services of an expert can be a bargaining chip, and therefore is a material statement of fact relevant to negotiations. So long as the attorney had a recent intention of utilizing the expert and the expert had agreed to this, there was no ethical impropriety in designating the expert to the court or representing to opposing counsel that the expert would be used.[2] At this stage, the attorney believed in good faith that he would utilize the services of the expert, and that he had the assent of the expert. Therefore, he was truthful when he informed opposing counsel as to the use of the expert.

At this initial stage, the attorney was also truthful with the expert, since it appeared that they had a "meeting of the minds" as to the expert's engagement.[3] Both the expert and the attorney believed that the expert would be used on an "as needed" basis.[4] Where the attorney honestly believed that he had been promised the services of a particular expert, and had no purposeful intent to misrepresent to opposing counsel, the expert or the court, there is no ethical violation.

By contrast, however, once the expert revoked the implied authority to designate him, the attorney may not continue to use the expert's name. In addition, once the expert explicitly informed the attorney that authority to designate him is revoked or explicitly conditioned on executing an agreement which has not been signed, the attorney had a duty immediately to inform the court and opposing counsel.

As stated above, the designation of an expert witness is the representation of a material fact regarding litigation. Continued use of the expert's name in discussions with opposing counsel, subsequent to the revocation of authorization to designate, would constitute a misrepresentation. Such a representation would violate both Business and Professions Code Section 6068(d) and Rule 5-200(B) of the Rules of Professional Conduct.

Furthermore, if the attorney allows the designation with the court to remain in place, after permission to designate has been revoked, a material statement of fact to a court, although true when made, has become

false. An attorney has a duty immediately to inform a court and counsel in these circumstances. Failure to do so violates both Business and Professions Code Section 6068(d) and Rule of Professional Conduct 5-200(B).

[1] Clearly, the State Bar Act does not impose liability upon attorneys for all unethical conduct. Thus, "With certain exceptions, the approach of the Act is to impose professional discipline only for professional misconduct." State Bar Formal Opinion No. 1979-48, 124. However, attorneys would be well-advised to consider several issues of contract and tort which could create liability in the scenario presented.

[2] Of course, the better practice is to obtain a written agreement before making any designation to the court.

[3] An analogous situation is discussed in Alkow v. State Bar, (1952) 38 Cal.2d 257, 264, as to the duty of an attorney to pay a court reporter. The court suggests that the attorney's failure to pay the court reporter's fees would be "dishonest" only if the attorney intended at the inception of the contract not to pay.

[4] An attorney's obligation for truthfulness extends to the public as well as to the court. In the Matter of Lilly (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185. See also, In the Matter of Taylor (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576 and McKinney v. State Bar (1964) 62 Cal.2d 194, 196.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as set forth in the questions submitted.