STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1422

Bonnie Berthiaume, et al., Plaintiffs,

Robert Berthiaume, et al.,
Respondents,

vs.

Allianz Life Insurance Company of North America,
Appellant,

Imeriti, Inc., d/b/a Imeriti Financial Network, Defendant.

Filed June 1, 2020
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-17-15118

Amy S. Conners, Katherine S. Barrett Wiik, Jennifer L. Olson, Brian J. Linnerooth, Best & Flanagan LLP, Minneapolis, Minnesota (for respondents)

Aaron D. Van Oort, Jeffrey D. Hedlund, Larry E. LaTarte, Jeffrey P. Justman, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

S Y L L A B U S

An attorney whom one party in litigation has identified to serve as an expert witness to testify against the attorney's former client should be disqualified from serving as an expert witness if it was objectively reasonable for the former client to believe that a confidential relationship existed between it and the attorney and if the client disclosed to

the attorney confidential information that either regards the same subject matter or is directly related to the subject matter about which the attorney proposes to testify.

O P I N I O N

ROSS, Judge

The plaintiffs in this class-action lawsuit against a life-insurance company alleged that the company is liable for losses they suffered from an elaborate fraud perpetrated by an independent insurance agent affiliated with the company. The plaintiffs identified as their testifying expert witness an attorney who previously represented the insurance company. The company moved the district court to disqualify the expert based on his prior relationship with the company, asserting that the attorney had advised the company on regulatory and litigation matters, including the company's monitoring of its independent insurance agents, and claiming that confidential information relating to the case had been disclosed to him during the prior representation. The district court denied the motion to disqualify. This interlocutory appeal requires us to decide the proper standard governing a motion to disqualify an attorney from serving as an expert witness adverse to his former client. Because we now adopt an expert-disqualification standard that differs from the standard the district court applied, we reverse the district court's decision and remand for it to decide the disqualification motion anew.

FACTS

The class-action plaintiffs—respondents in this appeal—assert in their civil complaint that Sean Meadows, who is now serving a 25-year sentence in federal prison, defrauded his retirement-age clients (including respondents) of more than $10 million.

See United States v. Meadows, 866 F.3d 913, 915–17, 921 (8th Cir. 2017) (affirming Meadows's sentence to 300 months in prison following his 2014 guilty plea to a Ponzi scheme that violated various federal statutes). The complaint alleges that Meadows was an agent of appellant Allianz Insurance Company and that Allianz knew about his illegal practices but failed to properly supervise him or warn Allianz customers. Meadows sold annuity products for Allianz from roughly 2004 to 2014. The complaint also alleges that Meadows illegally and unethically encouraged his clients to surrender annuities early and to invest in new annuities, costing the clients thousands in charges and netting Meadows high commissions from Allianz. The complaint asserts claims for consumer fraud, false statements in advertising, deceptive trade practices, deceptive acts against senior citizens or disabled persons, negligence, and aiding and abetting fraud. The plaintiff class comprises individuals who bought an Allianz annuity or product from Meadows and were defrauded.

During discovery, the respondents identified attorney Michael Rothman to serve as their expert witness. They also disclosed Rothman's expert report, which indicated his intent to testify as to whether Allianz complied with industry standards and whether its practices caused the respondents' losses. This was the flashpoint of the current dispute and is the focus of this appeal. According to Allianz (and not contested by the respondents), Rothman had served as Allianz's attorney for a decade beginning in 2000.

When Allianz first retained Rothman as outside counsel in 2000, he was practicing with the law firm of Barger & Wolen in Los Angeles. Rothman joined the Minneapolis law firm of Winthrop & Weinstine in 2002 and continued to represent Allianz. Rothman

advised and represented Allianz on a variety of regulatory, compliance, and litigation issues. He frequently handled matters related to Allianz's annuity business, including reviewing its annuity-product marketing materials, advising Allianz about market-conduct examinations, negotiating a settlement in a lawsuit brought by the Minnesota Attorney General about the suitability of the company's annuity products, and coordinating strategies to defend against class actions. Rothman represented Allianz until he left Winthrop in 2010.

After Rothman left Winthrop, he began serving as Minnesota Commissioner of Commerce, a position he held from January 2011 through November 2017. His duties included overseeing the administration and enforcement of state insurance laws and regulations. He stepped down from his position as commissioner to campaign for the position of Minnesota Attorney General. He currently operates his own law firm, Rothman LLC.

Allianz moved the district court to disqualify Rothman as an expert witness based on his representation of Allianz from 2000 to 2010. Allianz argued that disqualification was necessary because, during his representation of Allianz, Rothman had received extensive confidential information about the company's annuity business and had participated in its annuity litigation strategies, and he now intended to testify about some of the same annuity policies and procedures on which he had previously advised Allianz. In a declaration opposing Allianz's motion to disqualify, Rothman stated that he did "not possess confidential documents" from his prior representation, did not rely on any

confidential information in forming his opinions, and did not use information relating to the prior representation to Allianz's disadvantage.

The district court observed that Minnesota caselaw is silent on the standard governing disqualification of an attorney-expert adverse to a former client. Allianz proposed the expert-disqualification standard that some federal courts have adopted. Under this test, an expert with a prior relationship to an adverse party should be disqualified if it is objectively reasonable for the adverse party to believe that it had a confidential relationship with the expert and the adverse party disclosed confidential or privileged information to the expert during the course of the prior relationship. The respondents proposed a standard based on Minnesota Rule of Professional Conduct 1.9(c). Under this standard an attorney could testify as an expert witness against a former client as long as he does not reveal information relating to the prior representation or use the information to the former client's disadvantage.

The district court adopted the respondents' proposal and analyzed Allianz's motion under the rule 1.9(c) standard. It opined that the federal standard would create a "blanket disqualification" preventing attorneys from taking on an adverse role to a former client. Applying the attorney-conduct standard, the district court reasoned that Allianz did not identify any part of Rothman's expert report showing that he "used or revealed confidential information" relating to his prior representation. The district court therefore determined that Rothman's disqualification was not required.

Allianz successfully petitioned this court under Minnesota Rule of Civil Appellate Procedure 105 for discretionary interlocutory review of the district court's order denying

Allianz's motion to disqualify. We decided that Allianz had "identified the important, unsettled, legal issue of what standard applies in Minnesota to determine when attorneys seeking to offer expert testimony adverse to former clients should be disqualified," and we now answer that question.

ISSUE

What standard should the district court apply to determine whether to disqualify an attorney identified as an expert witness adverse to the attorney's former client?

ANALYSIS

Allianz appeals from the district court's denial of its motion to disqualify Rothman as the respondents' expert witness. We ordinarily review a district court's decision whether to disqualify an expert witness for an abuse of discretion. *Williams v. Wadsworth*, 503 N.W.2d 120, 123 (Minn. 1993). But the issue of determining the standard that the district court should apply to a disqualification motion presents a legal question that we review de novo. *See State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 817 (Minn. 2014) (determining that the district court did not consider "all legally relevant factors" under the correct legal standard for attorney disqualification). The standard governing expert-witnesses disqualification is an issue of first impression in Minnesota regardless of whether the proposed expert is an attorney.

The parties urge us to adopt different standards. Allianz urges us to adopt the expert-disqualification standard adopted by many federal courts (the "federal standard"), which would apply to all potential experts regardless of the expert's profession. Allianz summarizes the standard as follows:

> [A]n expert must be disqualified when: (1) the moving party had an objectively reasonable expectation that it had a confidential relationship with the expert; and (2) privileged or confidential information of the party was disclosed to the expert. Implicit in most cases, and explicit in some, is the requirement that the expert's prior engagement for the party, or the confidential or privileged information the expert received, must relate to the subject matter of the current litigation.

(Citation omitted.) The respondents ask us to adopt a standard that would apply only to attorney-experts, leaving open the question of the standard (or standards) that should apply to experts in other fields. The standard the respondents advocate arises from Minnesota Rule of Professional Conduct 1.9(c) (the "attorney-conduct standard"), which provides as follows:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

For the reasons we state below, we believe that the federal standard is better suited than the attorney-conduct standard to govern attorney-expert disqualification motions.

Because Minnesota caselaw has not addressed this issue, we may look to other jurisdictions for guidance. *See State v. Willis*, 898 N.W.2d 642, 646 n.4 (Minn. 2017). We begin by outlining how the federal standard first emerged. The earliest cases discussed the standard for expert disqualification in the context of experts generally, not specifically

attorneys serving as experts, but they nonetheless looked for guidance from rules governing attorney conduct. In an early case, *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr.*, a New Jersey trial court addressing an expert-disqualification issue characterized the question as whether the expert acted as an agent of the attorney involved in the litigation in which the expert was identified to provide testimony. 405 A.2d 487, 489–90 (N.J. Super. Ct. Law Div. 1979). Finding that the expert became an agent for the attorney when the expert was hired for the litigation, the court then applied the rules for attorney-client privilege and determined that the expert should be disqualified. *Id.* at 490–92. Several years later, a federal district court in Minnesota facing an expert-disqualification motion cited *Conforti* and applied similar reasoning. *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 590–91 (D. Minn. 1986). In holding an expert witness to the same disqualification standard as an attorney, the district court reasoned that "there is no sound basis for application of any different rule on the sole rationale that an expert, rather than an attorney, is the subject of the [disqualification] motion." *Id.* at 591.

As more federal district courts confronted the issue, they began to move away from a direct parallel between attorneys and other classes of expert witnesses. The first district court to do so, in *Paul v. Rawlings Sporting Goods Co.*, reasoned that its authority to disqualify an expert witness derived from its inherent power to ensure the fairness and integrity of judicial proceedings. 123 F.R.D. 271, 277–78 (S.D. Ohio 1988). The *Paul* court declined to apply "bright-line" rules that would disqualify an expert based solely on the existence of a contractual relationship between the expert and the adverse party. *Id.* at 278. It instead crafted a two-part inquiry that looked at "first, whether the attorney or client

acted reasonably in assuming that a confidential or fiduciary relationship of some sort existed and, if so, whether the relationship developed into a matter sufficiently substantial to make disqualification or some other judicial remedy appropriate." *Id.* The *Paul* court went on to explain that the "crucial focus" regarding the second inquiry was the nature of the communications between the attorney and the expert, and the extent to which the parties viewed those communications as significant or confidential. *Id.* at 279–80. Turning away from earlier courts' standard based on attorney-client privilege, the *Paul* court considered that the rationales for protecting attorney-client confidentiality do not apply equally to communications with an expert. *Id.* at 280–81. This was especially so for two reasons: because many communications between an expert witness and a client are not privileged, and because an attorney occupies a "position of higher trust" than an expert, so there is less of a stigma with an expert who switches sides in litigation than with an attorney. *Id.* at 281.

Many federal courts have adopted some version of the two-part standard that the *Paul* court articulated. Although courts have described the standard using varying language, the two elements are essentially the same: whether a confidential relationship existed between the expert and the adverse party, and whether confidential information was disclosed during that relationship. This standard has been formally adopted by the Fifth Circuit and applied by federal district courts in at least six other circuits. *See Koch Refining Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1181 (5th Cir. 1996); *Grioli v. Delta Int'l Mach. Corp.*, 395 F. Supp. 2d 11, 13–14 (E.D.N.Y. 2005); *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092–93 (N.D. Cal. 2004); *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001); *Cordy v. Sherwin-Williams Co.*,

156 F.R.D. 575, 580 (D.N.J. 1994); *W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61, 64–65 (D. Md. 1993); *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1502 (D. Colo. 1993); *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 337–38 (N.D. Ill. 1990). The federal district court in Minnesota has also applied this standard in unpublished orders. *See CarboMedics, Inc. v. ATS Med., Inc.*, No. 06-cv-4601, 2008 WL 5500760, at *3 (D. Minn. Apr. 16, 2008); *United States v. Larkin, Hoffman, Daly & Lindgren*, No. 3-92-789, 1994 WL 627569, at *1–2 (D. Minn. Apr. 12, 1994). Although the standard has been applied primarily by federal courts, some state courts have also adopted it. *See Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo. 1999); *Roundpoint v. V.N.A. Inc.*, 621 N.Y.S.2d 161, 163 (App. Div. 1995); *Formosa Plastics Corp., USA v. Kajima Int'l, Inc.*, 216 S.W.3d 436, 448 (Tex. App. 2006); *Turner v. Thiel*, 553 S.E.2d 765, 768 (Va. 2001); *State ex rel. Billups v. Clawges*, 620 S.E.2d 162, 167 (W.Va. 2005).

In addition to the two-part inquiry, many courts also consider "the public interest in allowing or not allowing an expert to testify." *Koch*, 85 F.3d at 1181. Although a few courts list the public-interest consideration as a separate, third element of the inquiry, *see, e.g.*, *Grioli*, 395 F. Supp. 2d at 13–14, most merely consider it as part of the two-step analysis, *see, e.g.*, *Hewlett-Packard*, 330 F. Supp. 2d at 1093 (listing the two factors and also analyzing policy considerations). The policy interests that would favor disqualifying an expert are to prevent conflicts of interest and to maintain the integrity of the judicial process. *Koch*, 85 F.3d at 1182. The policy interests against disqualifying an expert are to

ensure that the parties have access to expert witnesses with specialized knowledge and to allow experts to pursue their professional calling. *Cordy*, 156 F.R.D. at 580. Courts are particularly concerned that, "if experts are too easily subjected to disqualification, unscrupulous attorneys and clients may attempt to create an inexpensive relationship with potentially harmful experts solely to keep them from the opposing party." *English Feedlot*, 833 F. Supp. 2d at 1505. Consideration of the public interest allows courts to balance the competing interests and determine the extent to which the parties may be prejudiced by ordering or not ordering disqualification.

Although most courts applying the federal standard have done so in the context of non-attorney experts, a few have applied the standard to attorneys serving as experts adverse to former clients. *See, e.g.*, *Domercant v. State Farm Fire & Casualty Co.*, No. 1:11-cv-02655, 2013 WL 11904719, at *3 (N.D. Ga. May 15, 2013) (applying federal standard to plaintiffs' expert who had served as outside counsel to defendant insurance company and performed mostly insurance defense work); *Ross v. Am. Red Cross*, No. 2:09-cv-905, 2012 WL 2090511, at *1–2 (S.D. Ohio Jan. 11, 2012) (applying standard to expert who had previously served as adverse party's general counsel); *Grioli*, 395 F. Supp. 2d at 12–14 (applying standard to plaintiffs' expert in products-liability lawsuit who had previously represented adverse party in defending products-liability lawsuits). In choosing to apply the federal standard to an attorney-expert, the district court in *Grioli* relied on the same reasoning originated by the *Paul* court when it first adopted the standard for a non-attorney expert. 395 F. Supp. 2d at 13 (reasoning that the expert-disqualification standard should differ from the attorney-client conflict standard).

As a matter of first impression, we see the developing and well-reasoned federal standard as the proper standard to apply to expert-disqualification motions in Minnesota's state district courts. The standard is now widely accepted in federal courts and also recognized in a number of state courts. More importantly, the federal standard fairly balances the policies for and against expert disqualification. The primary policies favoring disqualification are to protect a party's confidential information from being disclosed and to preserve the fairness and integrity of the judicial proceedings. *See Paul*, 123 F.R.D. at 277–78. These interests are paramount regardless of whether or not the proffered expert is an attorney who previously represented the opposing party. And they are even more significant when the expert is an attorney testifying against his former client in light of the value of attorney-client confidentiality and its aim to prevent an attorney from disclosing confidential information learned during prior representation. The federal standard does not require a showing that the attorney-expert intends to actually *use* confidential information gained during prior representation; rather, it ensures that an attorney-expert is disqualified if there is even a *risk* that the attorney will rely on that confidential information. As one federal court applying the standard insightfully remarked, "the human brain does not compartmentalize information" in a way that parses out previously obtained confidential information from information obtained in present litigation. *Pellerin v. Honeywell Int'l Inc.*, No. 11cv1278, 2012 WL 112539, at *3 (S.D. Cal. Jan. 12, 2012). The mere risk that an attorney might disclose confidential information tends to undermine both the attorney-client relationship and the integrity of the adversarial process. The federal expert-disqualification standard serves to prevent this type of risk.

We clarify that, on the other side of the balance, the federal standard does not preclude an attorney from ever serving as an expert witness adverse to a former client. Allianz acknowledges this limitation and advocates for a rule that the subject of the attorney-expert's testimony must be "related" to the confidential information that he received during the prior representation. Early cases applying the federal standard did not incorporate this caveat into the language of the standard because they involved a non-attorney expert switching sides in the same litigation. *See, e.g.*, *Cordy*, 156 F.R.D. at 576–78, 582–83 (disqualifying expert who consulted with one party during pretrial stage of litigation and was later retained by opposing party to testify at trial); *Wang Labs.*, 762 F. Supp. at 1247, 1250 (same).

A review of cases applying the federal standard in the attorney-expert context reveals that courts will disqualify an attorney-expert when the confidential information disclosed during the prior representation dealt with a subject matter that is at least directly related to the subject matter of the expert's proposed testimony. In *Grioli*, for example, the district court disqualified the plaintiffs' expert in a products-liability action because he previously represented the defendant company in products-liability actions involving the same types of products, defects, and injuries caused. 395 F. Supp. 2d at 14–15. The district court in *Ross* similarly determined that the attorney-expert should be disqualified because his prior work as the adverse party's general counsel involved oversight of litigation that "relate[d] directly" to the present litigation—namely, the types of injuries that claimants allegedly incurred due to the company's negligence. 2012 WL 2090511, at *2. And in *Domercant*, the district court reached the same conclusion when the plaintiffs'

attorney-expert, during his prior representation of the defendant insurance company, had regularly reviewed "time-limited demands" and advised the company on how to respond to those demands. 2013 WL 11904719, at *3. Because the expert intended to testify about the company's handling of those demands, the district court disqualified him on the basis that the proposed expert testimony "stem[med] from and relate[d] directly" to the prior confidential relationship. *Id.* For these reasons we are satisfied that the proper inquiry is whether the confidential information disclosed to the attorney-expert during the prior representation involves the same subject matter or directly relates to the subject matter of the attorney-expert's proposed testimony in the present litigation.

We choose the federal standard on its own merits, but we also see weaknesses in the attorney-conduct standard that the respondents urge us to follow. For starters, the standard does not seem to boast wide support. The respondents cite only one case that has applied the attorney-conduct standard to an expert-disqualification motion. *See Commonwealth Ins. Co. v. Stone Container Corp.*, No. 99 C 8471, 2002 WL 385559, at *3–4 (N.D. Ill. Mar. 12, 2002) (declining to disqualify an attorney-expert because the party seeking disqualification did not show that the attorney had used or revealed confidential information in violation of attorney-conduct rule 1.9(c)). More difficult for the respondents' position, their attorney-conduct standard would apply only to attorney-experts—a clear disadvantage when a rule of general application exists to cover any challenge regardless of the expert's profession. Experts come from myriad professions, and each already has (or can develop) its own set of ethical rules governing client relationships. If we follow the attorney-conduct standard proposed by the respondents,

the district court would have to determine a different disqualification rule on a case-by-case and profession-by-profession basis, identifying the ethical rules that govern the expert's profession and then developing and applying an industry-specific standard of disqualification. The approach would burden the district court with conducting satellite-litigation proceedings that would necessarily lead to different results depending on the expert's profession and that profession's rules. We do not believe that the standard for expert disqualification should vary based on the nature of an expert's profession, and we are not aware of any court that has taken that approach. We are further persuaded by the interest in holding expert witnesses to a uniform standard of disqualification, an interest fulfilled by applying the federal standard.

We are not persuaded otherwise by the respondents' contention that it would be inappropriate to apply the federal standard to attorney-experts given that the standard arose from courts attempting to address conflicts of interest for non-attorney experts who were not governed by attorney rules of professional conduct. It is true that early expert-disqualification cases developed by referring to attorney professional-conduct rules as applied to non-attorney experts. *See Marvin Lumber*, 113 F.R.D. at 591 (applying the same rule for expert disqualification as attorney disqualification). And when applying the federal standard, courts have sometimes emphasized the differences between attorneys and experts. *See, e.g.*, *Great Lakes*, 734 F. Supp. at 338 ("Experts perform very different functions in litigation than do attorneys. Experts are not advocates in the litigation sense but sources of information and opinions."). The reason for emphasizing these differences and adopting a separate standard for experts was because an expert switching sides in

litigation need not be held to the same standard as an attorney who switches sides in litigation. But here the attorney not only switched sides in litigation but also switched roles by serving as an expert. In this situation, the ordinary differences between an attorney and an expert are of less significance, and we believe the district court should hold an attorney-expert to the same standard as an expert in any other field.

The respondents also argue that following the federal standard would lead to the "absurd result that would allow an attorney to act as opposing counsel against a former client, but not as a testifying expert." We do not see how this is the case. An attorney may not represent a person in "the same or a substantially related matter" adverse to a former client, absent the former client's informed consent. Minn. R. Prof. Conduct 1.9(a). The federal standard precludes an attorney from serving as an expert witness adverse to a former client when the client disclosed to the attorney confidential information that is the same as or directly related to the subject of the proposed testimony in the present case. Although we need not delineate the extent to which rule 1.9(a) and the federal standard overlap, it seems clear that, if an attorney received confidential information directly related to the subject matter of the present litigation, he would be barred from serving both as an adverse expert and as an adverse attorney.

The respondents maintain that we need not apply a separate standard to govern attorneys' roles as expert witnesses because attorneys' duties to former clients are already governed by the Minnesota Rules of Professional Conduct. Our holding today does not supplant the professional-conduct rules or diminish attorneys' duties to follow them. Our holding recognizes that the professional-conduct rules are not the *exclusive* standards

governing attorneys' conduct. The rules of professional conduct themselves recognize that they "presuppose a larger legal context shaping the lawyer's role," including "substantive and procedural law in general." Minn. R. Prof. Conduct preamble. When an attorney serves the role of expert, he is governed not only by the rules of professional conduct but also by the same standard for expert disqualification that applies to all other experts.

For all of these reasons, we choose the federal expert-disqualification standard. We hold that the district court should disqualify an expert witness—including an attorney—seeking to offer testimony against a party with whom the expert had a prior relationship if (1) it is objectively reasonable for the adverse party to believe that it had a confidential relationship with the expert, and (2) the adverse party disclosed to the expert confidential information regarding the same subject matter or directly related to the subject matter about which the expert proposes to testify in the present litigation. In determining whether disqualification is warranted, a district court may also weigh the relevant policy interests in the case, such as the potential prejudice to the parties.

Having determined the standard governing expert disqualification in this case, we believe the district court is in the best position to apply the standard to resolve Allianz's motion. We therefore remand the case to the district court to evaluate the evidence in light of the standard.

D E C I S I O N

Because we hold that the federal standard is the proper standard governing a disqualification motion for an attorney-expert witness, we reverse the district court's order

denying Allianz's disqualification motion, and we remand for the district court to apply the standard we have adopted.

Reversed and remanded.