IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LUTRICIA BARNETT BUCKLEY, as Administratrix of the Estate of DENVEY BUCKLEY, for the use and benefit of KATRINA and LATRICE BUCKLEY, as Next of Kin and Heirs at law of DENVEY BUCKLEY, deceased

Plaintiff,

v.

CITY OF MEMPHIS, THE CITY OF MEMPHIS POLICE DIVISION, OFFICER PHILLIP PENNEY, OFFICER KURTIS SCHILK, and OFFICER ROBERT T. TEBBETTS, Individually and in their Representative Capacities as City of Memphis Police Division Officers,

Defendants.

No. 03-2874 DP

ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S EXPERT WITNESS

Before the Court is Defendant City of Memphis's (the "City") Motion to Disqualify Geoffrey P. Alpert as an Expert Witness and to Exclude His Testimony, filed on November 24, 2004 (dkt #82). Plaintiff filed a response on December 3, and the City filed its reply on December 30. On February 3, 2005, the motion was referred to the magistrate judge for determination. For the reasons below,

the City's motion is DENIED.

## I. BACKGROUND

Plaintiff Lutricia Barnett Buckley brings this lawsuit on behalf of the heirs of Dunvey Buckley, who was allegedly beaten by officers of the Memphis Police Department, resulting in his death. On September 16, 2004, J. Ashley Mills, a paralegal with defense counsel's law firm, called Dr. Geoffrey P. Alpert, the chair and a professor in the Department of Criminology and Criminal Justice at the University of South Carolina, to discuss the possibility of retaining him as an expert in this case.[1] (Mills Affidavit ¶ 4.)

There are some discrepancies in the accounts of what was discussed during this telephone conversation. Mills claims to have "relayed the facts of the case, the City's theory of the case, Plaintiff's allegations and the City's defenses against the allegations." (Mills Affidavit ¶ 4.) Dr. Alpert, however, states that Mills gave him "a general overview of the pertinent facts in the case" but "did not discuss the City's legal strategies" or reveal other confidential information. (Alpert Affidavit ¶ 4.) In any event, there is no indication that the parties entered into a confidentiality agreement during the course of the conversation, or that Dr. Alpert was asked or agreed not to discuss the case with the Plaintiff. Later that same day, Dr. Alpert e-mailed his fee

[1]Apparently, at the time Mills was a paralegal, but has since become an associate with defense counsel's law firm.

schedule and curriculum vitae to Mills, and informed Mills that he had testified as an expert witness against the City in a prior lawsuit. At this point, Dr. Alpert had not been paid a fee, provided documents, or retained as an expert by the City.

On October 8, 2004, counsel for the Plaintiff contacted Dr. Alpert, to determine if he might be interested in serving as an expert witness for the Plaintiff. (Parker Affidavit ¶ 4.) During the conversation, Dr. Alpert informed the Plaintiff's attorney that he had spoken with someone on behalf of the City about the case. Dr. Alpert stated that he had not been retained by the City and had not received any confidential information from the City. On October 13, Plaintiff's counsel sent Dr. Alpert a signed agreement, a retainer of $3500, and an extensive array of documents for him to review. (Parker Affidavit ¶ 7.)

Counsel for the City did not contact Dr. Alpert again until November 8, at which time Dr. Alpert informed the City that he had been retained by the Plaintiff and could not discuss the case. The City then sent a letter to Plaintiff's counsel, indicating that it wished to exclude Dr. Aplert's testimony. This motion followed. The City contends that because it discussed with Dr. Alpert its confidential information, including its theory of the case and defenses to Plaintiff's allegations, Dr. Alpert should not be allowed to testify on behalf of the Plaintiff.

## II. ANALYSIS

Courts have the inherent power to disqualify expert witnesses. Hewlett-Packard Co. v. EMC Corp., 330 F.Supp.2d 1087, 1092 (N.D. Cal. 2004); Sells v. Wamser, 158 F.R.D. 390, 393 (S.D. Ohio 1994). Nevertheless, courts should be hesitant in disqualifying an expert because it is a drastic measure. Hewlett-Packard Co., 330 F.Supp.2d at 1092.

In a case such as this, where the allegation is that the expert witness has effectively "switched sides" between two adversaries, the Court's determination as to whether the expert should be disqualified focuses on (1) whether it was objectively reasonable for the party seeking disqualification to conclude that a confidential relationship existed; and (2) whether any confidential or privileged information was disclosed by that party to the expert that is relevant to the current litigation. Koch Refining Co. v. Boudreaux, 85 F.3d 1178, 1181 (5th Cir. 1996); Hewlett-Packard Co., 330 F.Supp.2d at 1092-93. The party seeking disqualification bears the burden of demonstrating that disqualification is appropriate. See Mayer v. Dell, 139 F.R.D. 1, 3 (D.D.C. 1991). Disqualification may not be warranted if only one of these factors are present. See id. (citing Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 429 (E.D. Pa. 2001); English Feedlot, Inc. v. Norden Labs., Inc.,

833 F.Supp. 1498, 1502 (D. Colo. 1993)).[2]

**A. Confidential Relationship**

The moving party must demonstrate that it was reasonable for that party to believe that a confidential relationship existed. Hewlett-Packard Co., 330 F.Supp.2d at 1093; see also Koch Refining, 85 F.3d at 1181. In evaluating the reasonableness of the party's assumption, the Court may consider several factors, including, among others, the extent of any prior relationship with the expert; whether the parties entered into a formal confidentiality agreement; whether the expert was retained to assist in the litigation; the number of meetings between the expert and the attorneys; whether work product was discussed or documents were provided to the expert; whether the expert received any payment; whether the expert was asked or agreed not to discuss the case with the opposing party or counsel; and whether the expert derived any of his specific ideas from work done under the direction of the retaining party. Hewlett-Packard, 330 F.Supp.2d at 1093 (citing Stencel v. Fairchild Corp., 174 F.Supp.2d 1080, 1083 (C.D. Cal. 2001); Mayer, 139 F.R.D. at 2-3; Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 278 (S.D. Ohio 1988)). "The emphasis . . . is not on whether the expert was retained per se but whether there was a relationship that would permit the litigant reasonably to

[2] Additionally, courts often consider the prejudice to the parties and the policy concerns protecting the integrity of the judicial process. Hewlett-Packard Co., 330 F.Supp.2d at 1092.

expect that any communications would be maintained in confidence." Id. (citing In re Ambassador Group., Inc., Litig., 879 F.Supp. 237, 243 (E.D.N.Y. 1994)).

Applying these factors to the case at bar, the Court finds that it was not reasonable for the City to conclude that a confidential relationship existed between the City's counsel and Dr. Alpert. In reaching this conclusion, the Court finds particularly pertinent the following factors. First, the only communication between Dr. Alpert and defense counsel was the initial September 16 telephone conversation between Dr. Alpert and Mills, and two short e-mails that Dr. Alpert sent to Mills on the same day. There is no indication that the City had a longstanding relationship with Dr. Alpert that would even suggest a confidential relationship. Quite to the contrary, Dr. Alpert testified as an expert witness against the City in a prior lawsuit. Although Mills's position (at the time) as a paralegal certainly does not preclude a finding of a confidential relationship, it further demonstrates to the Court that the September 16 telephone conversation and e-mails were preliminary in nature, an informal consultation by the City to determine whether it would retain Dr. Alpert as an expert. Hewlett-Packard, 330 F.Supp.2d at 1094 (distinguishing between an informal consultation and the commencement of a long-term relationship).

Second, defense counsel and Dr. Alpert did not enter into a

confidentiality agreement, defense counsel did not ask Dr. Alpert to keep their conversation confidential, and there is no indication that Dr. Alpert voluntarily agreed not to discuss the substance of their conversation with the Plaintiff. Third, the City did not provide Dr. Alpert with any documents, nor did it pay Dr. Alpert any fees.

The only factor that might weigh in favor of a confidential relationship is the City's claim that Mills disclosed "the City's theory of the case, Plaintiff's allegations and the City's defenses against the allegations." (Mills Affidavit ¶ 4.) As discussed below, however, the City's vague assertions that it disclosed its theory of the case and defenses to Dr. Alpert does not sufficiently demonstrate to the Court that work product was disclosed to Dr. Alpert. Moreover, even assuming, *arguendo*, that Mills disclosed work product to Dr. Alpert during the September 16 telephone conversation, the Court nevertheless concludes that such a disclosure, without more, does not demonstrate that defense counsel's belief that a confidential relationship existed was reasonable. See Hewlett-Packard, 330 F.Supp.2d at 1093 (disclosure of work product to expert is only one of several factors for the court to consider in evaluating the reasonableness of the party's assumption that a confidential relationship existed). To conclude otherwise would mean that any time a party discloses work product to a potential expert during an informal consultation, the party can reasonably assume that a confidential relationship has been

established. This result would be completely contrary to the policy concerns of protecting the integrity of the adversary process and of promoting public confidence in the legal system. See, e.g., Hewlett-Packard, 330 F.Supp.2d at 1095.

**B. Confidential Communications**

Given the conclusion above, the Court need not decide whether confidential communications were disclosed to Dr. Alpert. However, as stated earlier, the City has failed to "point to specific and unambiguous disclosures that if revealed would prejudice the party." Hewlett-Packard Co., 330 F.Supp.2d at 1094 (citing Mays v. Reassure Am. Life Ins. Co., 293 F.Supp.2d 954, 957 (E.D. Ark. 2003)(requiring more than "vague assertions"); In re Ambassador Group, 879 F.Supp. at 243)). Mills's affidavit merely states, without any specificity, that she "relayed the facts of the case, the City's theory of the case, Plaintiff's allegations and the City's defenses against the allegations." See, e.g., Mayer v. Dell, 139 F.R.D. 1, 4 (D.D.C. 1991) (moving party's reliance on one conclusory sentence in an affidavit concerning the disclosures of counsel to the expert was insufficient). No supplemental documents were filed *in camera* with the Court, nor has the City pointed the Court to any portion of Dr. Alpert's expert report that the City claims was derived from the September 16 conversation. Consequently, the City has not met its burden of demonstrating that confidential information was disclosed to Dr. Alpert.

## III. CONCLUSION

Accordingly, the City's Motion to Disqualify Plaintiff's Expert Witness is DENIED.

IT IS SO ORDERED.

[redacted]

TU M. PHAM
United States Magistrate Judge

2/9/05
Date

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

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This notice confirms a copy of the document docketed as number 108 in case 2:03-CV-02874 was distributed by fax, mail, or direct printing on February 9, 2005 to the parties listed.

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