NYPRR | March 2010

May Former In-House Lawyers Testify as Experts Against Their Former Employers?

BY ROY SIMON

Justice Alice Schlesinger of the New York County Supreme Court has issued a fascinating decision about the confidentiality duties of former in-house lawyers. In *Bear Stearns Asset Management Inc. v. Keefe, Bruyette & Woods Inc.*, 114802-2009 (N.Y. County Supreme Ct., Jan. 6, 2010), Justice Schlesinger refused to disqualify an expert witness from testifying against Bear Stearns even though the expert had spent twenty-nine years, from 1975 to 2004, as an in-house lawyer at Bear Stearns.

The Underlying Dispute and the Petition to Disqualify

In 2007, Keefe Bruyette purchased $21 million worth of a "factored" security from Bear Stearns. When an investor buys a factored security, the initial trade is completed at a "placeholder" factor and the purchase price is later adjusted up or down after the correct factor is determined. In this case, the initial factor paid by Keefe Bruyette turned out to have been about $818,000 higher than the correct purchase price. Keefe Bruyette demanded a refund, but Bear Stearns refused, so Keefe Bruyette commenced an arbitration under the auspices of FINRA.

Keefe Bruyette's claim depended in part on industry practice regarding factored securities, so Keefe Bruyette's counsel (Eiseman Levine Lehrhaupt & Kakoyiannis) retained Raymond Aronson as an expert witness on industry practices concerning "prime brokerage" and "clearing transactions." Aronson had started his career by working for seven years as counsel for the American Stock Exchange, and had then worked for three years as Director of Compliance and General Counsel for Edwards & Hanly, a member of the New York Stock Exchange. In both of those positions, Aronson had dealt with securities issues on a daily basis and developed legal and practical expertise in the customs and practices of the securities industry regarding trade execution and clearing issues.

In 1975, Aronson moved to Bear Stearns, where he spent the next 29 years in the company's legal and compliance department. In 2002, while Aronson still worked at Bear Stearns, the company entered into a "prime brokerage clearance services agreement" with Keefe Bruyette, but Aronson did not negotiate or draft the agreement.

In 2004, Aronson left Bear Stearns to join a consulting business at Sutter Securities, but he continued consulting with Bear Stearns until September 30, 2005. While working at Sutter, Aronson worked with industry groups such as the Clearing Firms Committee of the Securities Industry and Financial Markets Association, the Broker/Dealer Subcommittee of the ABA's Securities Regulatory Committee, and the FINRA Clearing Firm Committee. He also testified as an expert about various aspects of prime brokerage transactions in various judicial and arbitration proceedings.

When Aronson left Bear Stearns in 2004, he signed an Agreement and Release promising not to act on matters adverse to Bear Stearns until the expiration of his consulting services agreement on September 30, 2005. The agreement did not prohibit Aronson from acting adversely to Bear Stearns after its expiration. Moreover, the Agreement and Release specifically provided that the restriction on Aronson's use of confidential information would not preclude Aronson from providing services relating to the "general application of existing or contemplated rules, regulations or business conventions."

In 2007, more than two years after Aronson had left Bear Stearns, Keefe Bruyette and Bear Stearns entered into the $21 million factored securities transaction that ultimately led to the dispute between the firms. Aronson had nothing to do with that transaction, but the transaction was governed by the prime brokerage clearance services agreement that Bear Stearns and Keefe Bruyette had entered into in 2002, when Aronson was still an in-house lawyer at Bear Stearns.

In 2008, after Bear Stearns refused to refund the $818,000 overpayment that Keefe Bruyette claimed, Keefe Bruyette filed an arbitration claim against Bear Stearns. In 2009, Keefe Bruyette retained Aronson as an expert. Bear Stearns, however, did not learn that Keefe Bruyette had retained Aronson until the parties exchanged witness lists in October of 2009, about a month before the arbitration was scheduled to commence. Kramer Levin, which represented Bear Stearns, immediately filed a petition in New York County Supreme Court seeking "emergency relief to prevent further harm from egregious misconduct" by Aronson.

Specifically, Bear Stearns sought both to enjoin Aronson from testifying against Bear Stearns and to disqualify Eiseman Levine Lehrhaupt & Kakoyiannis from continuing to represent Keefe Bruyette in the arbitration. The petition said:

> In his work as an expert against Bear Stearns, in direct violation of the New York Rules of Professional Conduct and other legal restrictions, Aronson has *inevitably* drawn on and disclosed confidences of Bear Stearns that he learned during nearly three decades at the firm, and will continue to do so. Indeed, *it appears that* Eiseman improperly retained Aronson precisely because of his many years of access to Bear Stearns' confidences, and with the intention that Aronson would use those confidences for the benefit of Eiseman's client KBW [*i.e.*, Keefe Bruyette]. [Emphasis added.]

Later paragraphs of the petition elaborated in even harsher language, stating:

> There can be *no doubt that*, in consulting with Eiseman [Keefe Bruyette's counsel] concerning strategy for the arbitration against Bear Stearns, Aronson has already made use of Bear Stearns confidences. Aronson will continue to make use of those confidences at the upcoming hearings, when he testifies on behalf of KBW and assists Eiseman in the cross-examination of Bear Stearns witnesses. Rules 1.6(a) and 1.8(b) of the Rules of Professional Conduct … prohibit this blatant misuse of client confidences. Moreover, Aronson's work on the arbitration *presumptively* has already involved improper communication of Bear Stearns' confidences to Eiseman, violating the ethical obligations of both Aronson and Eiseman. Even if that were not so, Eiseman's retention of Aronson… gives rise to the *appearance of impropriety*. [Emphasis added.]

Initial Proceedings Before Justice Schlesinger

The matter was assigned to Justice Schlesinger. By order to show cause dated October 22, 2009, she set the matter down for a hearing on January 6, 2010 and stayed the evidentiary hearing in the arbitration until after that date. However, Justice Schlesinger refused to issue a TRO barring Keefe Bruyette and Eiseman Levine from communicating with Aronson concerning the arbitration, and she refused to bar them from utilizing any information or material supplied by Aronson. She also denied Bear Stearns' request for discovery, instead directing Keefe Bruyette to submit a proffer of Aronson's anticipated testimony to the court for in camera review.

Prior to the January 6, 2010 hearing, Aronson submitted both a "public" and a "private" affidavit to Justice Schlesinger. In the public affidavit, Aronson swore that (a) he had not disclosed any confidential information of Bear Stearns during any of his consultations with Eiseman Levine, (b) Eiseman Levine never asked him to disclose any confidential information, and (c) he had no need to disclose confidential information in order to provide his expert opinion on the customs and practices of the securities industry in this matter. Aronson admitted that he would be testifying in part about the 2002 Prime Brokerage Agreement between Bear Stearns and Keefe Bruyette, but he swore that he never saw that agreement until 2009, never consulted with anyone at Bear Stearns about the 2002 agreement, and never received any confidential information concerning it. Finally, Aronson swore that Bear Stearns had never before raised a confidentiality objection to his work as an expert witness in cases against parties other than Bear Stearns.

Based on Aronson's affidavit, Eiseman Levine argued that Aronson was not violating any duties of confidentiality to Bear Stearns because he was not disclosing any confidential information. Nor was Aronson violating the rules that apply to conflicts of interest with former clients because he was not functioning as Keefe Bruyette's attorney.

Even if the Rules of Professional Conduct did apply, Eiseman Levine argued, Bear Stearns could not satisfy the "substantially related" test because – according to *Lightning Park, Inc. v. Wise Lerman & Katz, PC*, 197 A.D.2d 52, 55, 609 N.Y.S.2d 904, 906 (1st Dep't 1994) – the term "substantially related" means "identical to" or "essentially the same as." The Keefe Bruyette matter was not the same as any matters that Aronson had worked on at the Bear Stearns legal department.

Finally, Eiseman Levine argued that in the absence of any improper conduct, its retention of Aronson did not create any "appearance of impropriety" and was insufficient to warrant disqualification. On that point, Eiseman Levine cited *Develop Don't Destroy Brooklyn v. Empire State Development Corp.* 31 A.D.3d 144, 153,816 N.Y.S.2d 424,432 (Ist Dep't 2006) ("if the representation does not violate another ethical or disciplinary rule there can be no appearance of impropriety"). If Bear Stearns was correct that Aronson would "inevitably" disclose confidential Bear Stearns information when consulting and testifying about securities industry customs and practices, then he could *never* serve as a consultant/ expert on securities matters even when Bear Stearns was not a party – even though the Agreement and Release that he signed upon his departure expressly permitted him to do so.

In conclusion, Eiseman Levine said:

> At bottom, Bear Stearns' claim of impropriety rests on the contention that Eiseman Levine hired Aronson knowing that he had spent 30 years at Bear Stearns and that it is unreasonable to assume that Aronson can banish from his mind confidences he gained while at Bear Stearns. … [I]f carried to its logical conclusion, Bear Stearns 'reasoning would mean that a lawyer could never testify as an expert, an absurd result. …

Justice Schlesinger had also asked Keefe Bruyette to submit a proffer of Aronson's planned testimony, so Aronson also submitted a "private" affidavit directly to Justice Schlesinger outlining his testimony. The private affidavit was given only to the judge, not to Bear Stearns, so the judge reviewed the private affidavit in camera.

The Hearing Before Justice Schlesinger

On January 6, 2010, the matter came on for a hearing. The 36-page transcript makes absorbing reading. Justice Schlesinger began by reviewing the procedural background. In particular, she noted that Bear Stearns and its lawyers had objected to her order allowing Aronson to give the proffer of his proposed testimony only to her because "they felt that it would hamstring them in their ability to fully respond." Justice Schlesinger said she disagreed because (a) she did not think lack of access to Aronson's private affidavit would hinder Bear Stearns, and (b) granting access would have given Bear Stearns "an unfair advantage" by giving them the kind of discovery (a detailed account of an opposing expert's testimony) to which they would ordinarily not be entitled. (Expert witnesses in federal courts are required to submit detailed reports, including a summary of their opinions and the basis for those opinions, but experts in litigation in New York State courts do not submit reports – rather, pursuant to CPLR § 3101, the lawyers submit reports that are often too vague and general to be useful to the opposing party.)

Next, Justice Schlesinger made certain that both parties agreed on the scope of the Agreement and Release that Aronson had signed when he left Bear Stearns in 2004. It did not give Aronson "unlimited" permission to take a position adverse to Bear Stearns –- Aronson was barred from doing so for one year after leaving Bear Stearns (until 2005). But Justice Schlesinger also noted that the Agreement and Release was "unlimited forever, ever, ever, ever" regarding the prohibition on Aronson's giving testimony or aid to anyone if he had to in any way "reveal confidential information or deal with confidential information or anything of that sort." Eiseman Levine accepted that characterization.

That narrowed the issues considerably. "So really the issue is not whether or not he can testify and be a consultant and use confidential information which he acquired during his long tenure at Bear Stearns; everyone says he cannot do that, as well as the case law," Justice Schlesinger said. "The issue is here whether in fact what he's going to testify to falls within that kind of category of confidential information; that's as I see it." At that point Stephen Sinaiko of Kramer Levin, representing Bear Stearns, interjected. He asked the court to distinguish between Aronson's obligations under the Agreement and Release, on one hand, and Aronson's obligations as a former lawyer for Bear Stearns, on the other hand. "It's not just that he's barred from disclosing confidences that he learned as Bear Stearns' counsel; that's clear," Mr. Sinaiko said. "But I think you have to look at Rule 1.6 and 1.8 of the Rules of Professional Conduct …." (Sinaiko was referring to a lawyer's general duty of confidentiality under Rule 1.6 of the New York Rules of Professional Conduct, and an overlapping duty under Rule 1.8(b) not to use information relating to a

representation to the disadvantage of a client unless the client gives informed consent, except as permitted or required by the Rules of Professional Conduct.) "His obligations as a lawyer are relevant to what he can and cannot do as an expert."

Justice Schlesinger seemed to agree with Sinaiko's point. "Right.

He can't … use any kind of privileged communication. He can't use any kind of confidential communication. He can't exploit the specific information … which he acquired during that employment relationship because that would give him an unfair advantage, and it wouldn't be consistent with the ethics required of a lawyer in good standing." But Sinaiko was driving for an even broader prohibition:

> MR . SINA IKO: The distinction that I think I want to draw is the distinction between disclosing and using information. … If you look at the Rules of Professional Conduct … you'll see it's not just disclosure; it doesn't have to be Mr. Aronson's position that he's going to go into the arbitration and testify about the precise communications that he heard while he was at Bear Stearns; it's enough if he's using that information. …

At this point, Justice Schlesinger seemed to part company with Mr. Sinaiko.

> THE COUR T: The problem, I think, with your position here is…, Mr. Sinaiko, …if Mr. Aronson had a life before he went to Bear Stearns; he had a life after Bear Stearns .... Let me just make it clear. I think the petitioner's burden here is a very tough one, a tough one to ultimately prevail on, because it's not enough, it seems to me, to be able to say, "Well, you know, he must be using some of this;" I don't think that's really enough to do that. And in the cases which disqualify … the Judge makes findings of very specific use of material or potential use of material; and don't think you're really able to show that; because here's a man, Aronson, who left … six years ago; who was never involved in this particular controversy at all …

Justice Schlesinger then turned to an affirmation that Bear Stearns had submitted in support of its petition to disqualify. The affirmation was from another former Bear Stearns employee, a Mr. Freilich, who had worked closely with Aronson when they were both at Bear Stearns, and it said that if a dispute like the one with Keefe Bruyette had arisen while Aronson was working at Bear Stearns, then Aronson would have been one of the principal lawyers consulted to advise Bear Stearns. The judge was not impressed. She said: But it's all hypothetical. [W]hat that said to me was that there weren't any cases like this because if there were cases like that, then I'm sure, Mr. Sinaiko, you're an excellent lawyer; I'm sure you would have said: And we had cases such as this, in fact, where … this kind of strategy was used ….

At this point Sinaiko shifted to a more general and intuitive argument:

> MR. SINAIKO: What is happening here is truly outrageous. There are probably dozens or hundreds of people who could have been selected to give this testimony, testimony in this area of the law. KBW determined, on its own, to pick a guy where the first line in his resume is: I've been in the securities industry for 35 years and 29 years of that experience was at Bear Stearns as a senior lawyer handling matters exactly identical to the type of matter that's involved in this particular case.
> THE COURT: I don't interpret it that way.

> The fact is, first of all, Mr. Sinaiko, that is really the thrust of your argument: That this thing smells, you know; and why did they go and hire somebody else. This just isn't sort of right.
>
> But that's not good enough.
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> Frankly, I can't take judicial notice of the fact that there are hundreds of people out there who can testify to this particular – prime brokerage and clearing transactions.… I don't know if this is so widespread that you could find hundreds or thousands of people.

Now Mr. Sinaiko pressed harder on the appearance of impropriety, painting a picture of what he expected to happen at the arbitration:

> MR . SINA IKO: [O]bviously, what KBW wants to do here, and what is so outrageous, they would like to get this guy, who worked for Bear Stearns for thirty years: Look, Arbitration Panel, Mr. Aronson, who was at Bear Stearns for 30 years, he says Bear Stearns should have paid the money.

Justice Schlesinger parried this argument in two ways. First, Mr. Aronson's credentials were "not just the twenty years he was with Bear Stearns but the things he did before and after that tenure." Second, Bear Stearns would present its own expert, who would contradict Aronson, and the judge thought that "any kind of intelligent and sincere arbitrator would …weigh the substance of the opinions and evaluate those as to which make sense and which were more consistent with the practice in that field."

Mr. Sinaiko persisted with the theme of appearance of impropriety: "[T]he very idea that Mr. Aronson is putting himself in a position which – knowing full well that that's exactly what KBW's lawyers intend to do – creates, at a minimum, the appearance of impropriety." Justice Schlesinger again resisted. "I'm afraid I don't see it," she said. "You have to understand that, generally, a party should be able to hire the lawyer that they want and get the expert that they want; and that's why the burden shifts to the other side to say, No, no, no; this is unfair." Mr. Sinaiko responded by trying to show why it was unfair for Aronson to testify against Bear Stearns:

> MR . SINA IKO: But it's the prior relationship that makes this improper, that indicates the appearance of impropriety; that is at least part of the reason why disqualification is appropriate here.
>
> THE COUR T: Simply by being a lawyer for Bear Stearns and dealing with, we'll say, agreements such as this is not enough; and in the cases which you cite … there's much, much, much more. …
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> You have to do more than to merely talk about an appearance of impropriety. I don't think there's even an appearance of impropriety because of the dates in question. He stopped his employment in 2004. The agreement with him and Bear Stearns, Mr. Aronson, ended in 2005, except, of course, for confidential use or disclosure of material. This happened in 2007. He had nothing whatever to do with this transaction and in Freilich's affidavit, he's unable to show there was anything comparable to it when Mr. Freilich and Mr. Aronson worked together for Bear Stearns.

> Here there's nothing that you can show where Aronson was involved in this particular issue or this particular client or any of that. And in all the other cases, there's a direct connection; and the Court has to decide: Well, can this person really separate himself from the conversations and the information that he received on this very case or issue ….

Mr. Sinaiko tried to get his point across another way: "If you look at Mr. Freilich's application, you see … that Mr. Aronson had the specific responsibility for advising Bear Stearns with respect to prime brokerage issues. Those are the very same issues that are involved in this case. " But the judge, distinguishing the facts here from the facts in the cases Bear Stearns had cited in its petition, wasn't buying:

> THE COURT: But that's such a general kind of statement. The fact that he was involved with similar agreements; so what? We don't know that there were any kind of similar controversies that arose during his tenure where he had to advise his clients; and that's what you have in these other cases where the issues are precisely the same.

Mr. Sinaiko picked up on the invitation to be more specific, pointing out that the agreement between Keefe Bruyette and Bear Stearns was a "form agreement." The court perked up:

> THE COURT: A form 151.
>
> MR. SINAIKO: It's an agreement that's identical to countless other agreements – and Freilich is very specific about this – countless other agreements as to which Mr. Aronson did advise Bear Stearns.

Now, for the first time in the hearing, Justice Schlesinger turned to Keefe Bruyette's counsel, Eric Levine:

> THE COUR T: Mr. Levine, how do you deal with that particular argument? For example, this very form and, presumably, that he would be giving advice in arguably situations such as this.
>
> MR . LEVINE: It's very simple. Mr. Freilich points out that 151 is a common form. The whole world has it. It's not particular to Bear Stearns. He's giving advice on this particular document in the public domain. As your Honor points out, there's no dispute relating to 151.

Now that he had gotten the podium, Mr. Levine made a new point. If the problem was that Aronson's testimony about industry practices would reveal confidential information, then Aronson could never testify as an expert in any securities dispute. That made no sense because the Agreement and Release allowed him to testify as an expert. Therefore, Levine implied, the real objection must not be confidentiality – it must instead be that Aronson was testifying against Bear Stearns. When Justice Schlesinger seemed satisfied with Levine's argument, Sinaiko tried again to fit Aronson's proposed testimony into a forbidden category:

> MR . SINA IKO: We're not saying, and the agreement doesn't say, that Mr. Aronson can never testify against Bear Stearns as an expert. What he's not allowed to do is testify against Bear Stearns as an expert with respect to matters where advice he gave to Bear Stearns and knowledge that he gained of Bear Stearns' internal operations and practices might color his opinions ….

> THE COURT: "Coloring" is just not good enough. … [T]he best you can do is say, "It doesn't look right and it's just not fair" and … "he must have gotten some of his knowledge and expertise there, and it just isn't fair."
>
> What I'm suggesting to you is all the cases which lead to disqualification, the proponent of that has to go a lot further and show with specificity that certain information was gleaned or attempted to be used or at least there's a tremendous presumption that that would have been gleaned, and that's why it would be unfair to allow the expert to testify. I just don't think, frankly, Mr. Sinaiko, that you're able to do that in your papers. …

Justice Schlesinger closed by summing up her findings and her ruling:

> THE COUR T: I think that there has been absolutely no showing that the specific issues that are extant in this arbitration were issues that Mr. Aronson acquired confidential information about and that he's going to use any of that in his testimony. I find that has not been shown in any way and that, therefore, it would be inappropriate and unfair for this Court to grant the extraordinary relief, which would be to deprive the respondent here of the expert of their choice, as well as to disqualify the law firm by making a presumption where there's no basis for it that they have received confidential information. ….

Justice Schlesinger then denied the application "in all respects." Her one-page handwritten opinion simply says that the Bear Stearns petition is denied and the proceeding is dismissed "in accordance with the reasons stated on the record on this date." It also orders that Aronson's "private" affidavit be kept under seal.

Implications of the *Bear Stearns* Opinion

The *Bear Stearns* opinion is rich with implications, both substantive and procedural. In terms of substance, the opinion suggests to me that the opinion will encourage many litigants –not just in the financial industry –to seek out former in-house lawyers to serve as experts against their former employers. The former employers, in turn, will often file motions to disqualify based on Rule 1.9(c)(1) and (2), which provides as follows:

> (c) 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 confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> >
> > (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

However, the linchpin of Rule 1.9(c) is the definition of "confidential information" in Rule 1.6(a). That definition provides as follows:

> “Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. *“Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.* [Emphasis added.]

Thus, the first hurdle for a former employer when challenging a former in-house lawyer’s right to serve as an opposing expert witness will be to show that the expert will necessarily use or reveal confidential information that the lawyer gained (or would have been likely to gain) as an in-house lawyer. That showing will be easy in some cases (as where the lawyer worked on the transaction in question, or on one just like it, or heard others at the company talk about the matter over lunch or at the coffee machine). It will be hard in other cases (like the *Bear Stearns* case, where the former in-house lawyer did not work on the transaction or one like it, and there was no evidence that the expert talked to anyone about the specific matter while working in-house).

Even if the expert will be using information related to her work as an in-house lawyer, those hiring the former in-house lawyer as an expert will argue that the information falls within Rule 1.6’s express carve out for “a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.” Just how broad is that carve-out? Comment [4A] to Rule 1.6, which was written by the NY SBA’s Committee on Standards of Attorney Conduct (“COSAC”) especially for the New York Rules of Professional Conduct, explains, in relevant part, as follows:

> The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a *proprietary interest* in a particular product of the lawyer’s research. Information that is *generally known* in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the *public domain* is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process. [Emphasis added.]

If a former in-house lawyer is retained as an expert to opine on the customs and practices of the industry, the former employer cannot have a “proprietary interest” in that information, and the information will often be “generally known” (though not an appropriate subject for judicial notice), and the information will typically be in the “public domain.” Since the party opposing the expert has the burden of disqualifying the expert, this will often be a heavy burden, as Justice Schlesinger recognized.

Turning to the procedural implications, I think Justice Schlesinger’s method in the *Bear Stearns* case should be a model for other judges confronted with the same problem. Certainly the expert should be required to submit a “public” affidavit stating that (a) he had not disclosed any of his former employer’s confidential information in the course of his work as an expert, (b) the lawyers who retained him have

never asked him to disclose any confidential information, and (c) he doesn't need to use or disclose confidential information in order to provide his expert opinion.

It will also often make sense for the court to order the expert to submit a "private" affidavit laying out the essence of his anticipated testimony. Rather than speculate about the content of the former in-house lawyer's expert testimony, the court can study this private affidavit *in camera*, as Justice Schlesinger did, and keep it permanently under seal unless extraordinary circumstances are present. The judge should scour this affidavit for indications that the expert is using confidential information, and should hold a hearing if the testimony appears to reveal or be based on confidential information so that she can grill the lawyer who retained the expert (and perhaps the expert as well). In ambiguous cases, the judge may even want to allow discovery (which Justice Schlesinger considered unnecessary in *Bear Stearns*) so that the lawyers opposing the expert can determine whether he was exposed to the underlying matter or similar ones while working in house.

Conclusion: *Bear Stearns* Is a Yellow Flag, Not a Green One

In my view, in *Bear Stearns* Justice Schlesinger used effective procedures and arrived at the correct ruling. But lawyers should not take her decision in that case as unbridled license to hire an adversary's former in-house (or outside!) lawyers as expert witnesses against the former employer. At a minimum, despite the ruling in *Bear Stearns,* the in-house lawyer's former employer is likely to challenge the expert testimony, and fending off that challenge will be expensive and time consuming. Hiring an adversary's former in-house lawyer is therefore a significant risk.

Justice Schlesinger found no "appearance of impropriety" in *Bear Stearns*, but in closer cases – cases where it is difficult to prove (or disprove) that the expert obtained relevant confidential information or is using it – a court may well find at least an appearance of impropriety. In those cases, the court should not disqualify the lawyers who retained the former in-house lawyer, but the court may decide to disqualify the expert in order to ensure the sanctity of confidential information, even if the lawyers and their client have already paid the expert substantial fees.

In rare cases, a court may uncover actual impropriety, such as the actual or attempted exploitation of the former employer's confidential information by the expert or by the lawyers who retained the expert. In those cases, the court should disqualify both the expert and the lawyers who retained the expert – the expert for professional misconduct, and the retaining lawyers either for professional misconduct (if they deliberately solicited confidential information) or for being tainted with confidential information that gives them an unfair advantage (if they obtained the confidential information negligently or innocently). In cases of deliberate misconduct by either the former in-house lawyer or the retaining lawyers, a referral to the disciplinary authorities may also be appropriate.

All of this adds up to a large yellow caution flag. A lawyer may hire an adversary's former in-house lawyer as an expert witness, but the risks are high. Bottom line: before hiring an adversary's former in-house lawyer as an expert, be sure that the expert will be able to formulate an opinion and testify without using or revealing confidential information.

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