DWP Compilation of Responses

Designation of Expert by Attorney without Expert's Permission

(*or sometimes even knowledge!)*

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This document is a compilation of the responses received as a result of the following email sent to readers of our newsletter:

Expert News readers:

I am requesting your help on behalf of one of your fellow experts about what I call DWP -Designation Without Permission - an act by an attorney that basically constitutes thievery. This issue seems to be coming up more and more frequently (and is one reason we believe in non-refundable retainers).

But what if the attorney names you as the expert without ever having communicated with you to begin with?

One of our readers sent me the following:

"Recently, it has come to my attention, more so than previously, that attorneys are using my name and designating me as their expert without first formally retaining me, if retaining me at all. Many times, this works to their and their client's benefit in that they will reach a settlement when opposing counsel learns [an expert] has been brought in.

These attorneys are formally designating me as their expert with the court filings. Later, I learn of these tactics.

I am cheated out of my income and they are guilty of unethical practices. It clearly states in bold on my fee schedule that they may not designate me as their expert without formally retaining me. One attorney even called and said he was going to designate me. When I told him he then needed to send me my retainer his answer was that the case would not go that far.

[One party to a lawsuit] called and asked if she had the right address to send the documents for me to examine since trial was in two weeks. I told her I didn't have any knowledge of her case and had not been formally retained but my records did indicate that I had provided her attorney my CV and fee schedule.

What and how are other experts dealing with this situation? This is theft of services and monies. I am interested in knowing what can be done or should be done to avoid this ongoing practice by some

attorneys."

Can you help this expert? Is this a problem you have faced? Does it seem to be happening more often lately?

What are the options? ARE there any options? Do you have an idea or solution that may not currently exist but should?

Best of success to you,
Meredith

This expert's dilemma apparently struck a chord with readers. Responses came pouring in! I have compiled many of them below. Because we are very aware of the legal environment our experts operate in, I have deleted some possibly 'questionable' comments, as well as the names and any identifying information of the contributing experts. (Contact me if you would like the name(s) of anyone offering their services or assistance).

I hope you find the experiences, advice and recommendations of our generous readers as valuable and thought-provoking as we have.

- Meredith Hamilton, Expert Communications

This is a serious and increasingly all too common problem. Several months ago, I was contacted by an attorney who wanted to schedule my deposition in a case. I had never been contacted in the matter, simply designated as an expert without my knowledge or consent. I also discovered from an attorney in a different matter all together, that I had been designated in a case a year or so previously and that the case settled shortly after I was so designated. The attorney had been with opposing firm and so impressed with my CV they wanted to retain me. It might not be amiss for this issue to be brought to the attention of the American Bar Association and that some rules and ethics be established.

Understand that ethical breaches happen on our side too. I did a case recently where a colleague had been approached concerning a case. The firm was not impressed after having two hour plus face-to-face meetings and subsequently retained me. My “colleague” solicited and was retained by the other side. I have given up considerable fees in just this situation, feeling it was unethical and unwise, even if I was not retained after initial contact, to deal with the other side.

One approach is to first bill the attorney for your usual fee for “Designation” and include a demand letter. Then notify the Legal Ethics Board for the State in which the attorney practices with a copy of your bill and demand a letter explaining the “unethical” behavior. Send a copy to the offending attorney. Keep after the Ethics Board for a resolution. If the amount is high enough sue in the attorney’s local area.

Dear Meredith & Others Concerned (and you will be some day!),

In 35 years of expert witness work, it has happened to me twice. Each time the other side sent me a subpoena and sent me $15.00 (NY). In each case, my first knowledge of having been named was when I received the subpoena. I called the Clerk of the Court, explained I had not been named and that I would not be attending. The Clerk, of course, had to hold up the court's authority and warned I should be there. I didn't go and nothing happened.

I know others in my field of expertise who have had similar experiences and nothing happened. It does waste a lot of your time. If you call the attorney who named you, he'll be quite uncivil, if he even takes your call. Don't let it get to you or waste too much time on it. It's quite unethical, but lawyers are getting that way, more so every day.

Actually I had the same thing happen, but the difference is, I am both a practicing forensic expert and a practicing attorney. In Illinois, an attorney must report unethical practice to the appropriate body, or be guilty of violating the Rules of Practice (and be at risk for sanctions). I had no options.

Certainly I do not advocate threats, particularly threats amounting to coercion, but it is "possible" the attorney named the expert "now" (because the disclosure had to filed timely), with the intention of retaining the expert in the near future. The expert should call the attorney, point out that the attorney had no explicit or implied authority to name the expert without first retaining him formally, and ask that the oversight be rectified in "x" number of days.

If the problem is not resolved, or if the attorney makes it clear he never had any intention to retain the expert, the expert must immediately report the attorney to the appropriate authority. Realize, it is not just losing the possible billing from that attorney, it is possible an attorney on the same case was considering calling him, and then saw the expert listed for "Party A," so he decided to call someone else. So the expert does not get retained, does not get a call from someone on the other side of the case, PLUS his reputation is besmirched by virtue of the appearance of having lent his name to the case (perhaps at a "hired gun" fee, for all the people know who learn only some of the facts). Our reputation is our most valuable commodity and should be protected vigorously.

Attorneys dislike experts because we charge more than they do and get paid retainers from them who must then recover from their clients ---often an insurance company. Recently I had such a case where I was verbally retained to report and opine for one defendant in a complex multiple defendant case. Fees and all conditions were verbally agreed to subject to executing a written contract drafted by me to be imminently forthcoming along with the agreed retainer. Naturally time was of the essence for the report and was clearly stated in the agreement along with payment in full requirement before submitting it.

The time between the verbal agreement, perusal of the agreement, and its execution by the attorney, I received over 3,000 pages of transcripts, pleadings, and exhibits to examine. In good faith, I began to work on them. After spending 15 hours, I stopped until the retainer was received along with the exacted agreement (about 2 days work). I was advised the retainer would come directly from the insurance company, despite [the fact that] my law firm client was requested to bill them directly. I refused since I had no standing with them, they were not my client, and the short duration and intensive workload would expose me long after the report deadline and risk ever seeing my fee. My attorney-client claimed I was giving him Grief. I quit on the spot, returned the documents, and billed him for 15 hours. I have yet to be paid and am considering a law suit. My advice is when you suspect hesitancy, delay, and bad faith then walk away! I sure hope that you weren't the 'lucky' one to replace me…

Yes designation without permission – actually designation without RETENTION – is all too common in my practice.

I note in my proposal of service that I refuse the right of any prospect to name me to the court or opposing party as a witness in the case until AFTER I am retained… and that if I discover DWR, I reserve the right to contact the judge directly to report "a fraud upon the court" contrary to the interests of justice, and to invite the judge to impose sanctions.
I also reserve the right to testify for opposing counsel about the fraud, having no conflict of interest, since I was never retained by the defrauder.

I agree: DWP is just thievery by the attorneys. I had plenty of problems with attorneys and finally learned that calling the Grievance Commission of your state is an effective way to stop attorneys of doing "their thing".

On two different occasions I contacted the Grievance Commission, asked for a complaint form, filled it out and sent it back to them. In a couple of weeks the thief attorney called me back very concerned with all kind of excuses, etc. Attorneys are scared of the Grievance Commission. Try it, you'll like it!!

Suggest that the expert investigate whether the common law privacy tort "appropriation of name or likeness" is a viable cause of action in his or her jurisdiction. A little research may reveal a viable lawsuit for using his name without permission. It is included in the Restatement (Second) of Torts, section 652(c), which I have included here:

§ 652C Appropriation of Name or Likeness
One who appropriates to his own use or benefit the name of likeness of another is subject to liability to the other for invasion of his privacy.
Comments:

a. The interest protected by the rule states in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.
b. *How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when a defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.

It may or may not be available in the expert's jurisdiction.

I have only had this happen once. I only heard about it by accident and was never contacted by the attorneys. I did nothing at the time.

Should it happen again, I would call the bar association in the attorney's state and let them know what happened. I believe this is unethical and should result in some action by the bar association.

I agree that this is an increasingly significant problem! What I do is to:

1) state clearly on my cover sheet that providing my c.v. and fee schedule does not give them permission to use my name in any manner connected to their case unless my retainer agreement is signed and my retainer fee paid.
2) follow up with phone calls to check for the status of their case – after sending them my c.v. and fee schedule. I make it quiet clear that I do not just send out my c.v. and fee schedule without expecting some responsibility on their part to keep me informed as to whether they have decided to use me as their expert. I also reiterate what is on my cover sheet.
3) not send my c.v. and fee schedule again to a lawyer who I believe abused the privilege the last time.

However, since attorneys do not think that we experts will take the time to discover whether they have used our name or designated us – they continue to get away with it. What we need is a quick and easy way to find out whether our name has been used. Then we can write the opposing attorney and let them know that to our knowledge we have NOT been designated at all and are not planning on working on the case! Attorneys would stop doing this really quickly if they knew we would take action that they would be left with egg on their face in front of their opposing attorney.

The solution is quite obvious.

If the offending counsel represents that the MD is their designated expert without the permission of the expert, then the expert should offer to the opposing counsel to be retained at the same rate (there is no conflict of interest if the parties have not come to terms).

The opposing counsel is thus apprised of the fraudulent nature of the "representation" and will thus be dissuaded from settlement. The offending counsel will learn not to engage in such behavior. The offended expert can then offer in the next offense documents in the previous misrepresentation the appropriately blacked out names of previous parties and then submit to that offensive counsel his agreement to "settle" (as a contract) for the remittance of the retainer fee and the hours necessary to deal with misrepresentation. Sort of promissory estoppel in reverse. There is a tort solution in intellectual property law, but it has not, to my knowledge, been explored.

The problem described is called "The Phantom Expert." It has been discussed in detail in the forensic psychiatric literature, and it may be more common than one might think, since it is clearly underreported. This is discussed in a full chapter in the book, Mastering Forensic Psychiatric Practice," by Thomas Gutheild, MD and Robert Simon, MD, American Psychiatric Assoc. Press, 2002. They suggest that ethical complaints filed with the local bar association are probably worthless, but there may be cause to file for civil damages and loss of income. My own suggestion would be to threaten to contact the attorney on the other side of the case, against whom your phantom testimony is intended, immediately upon becoming aware of the situation, and either the offending attorney will immediately pay you appropriate retainer, or risk having his case disqualified or subject to appeal, and his client suing him for legal malpractice. If that doesn't stop this unethical behavior dead in his tracks, then a civil suit might prevent it from happening again.

I was surprised one day to receive a subpoena for all of my professional notes and materials related to a case in which I was not retained. I had sent my Engagement Agreement with my Fee Schedule to an attorney, but in very bold print it clearly stated they could not disclose me as a witness until I was retained. Naturally I was shocked that I was being subpoenaed by the opposing side, so I called the law office to inquire. They told me it was merely an oversight, and they rushed the retained to me by overnight mail. They were a little slow paying from time to time, (and they paid late fees,) but they paid off their final bills in a relatively timely manner. I wouldn't work with them again.

I have worked for 28 years as an insurance underwriting, agency operations and bad faith expert. Most of my clients, both plaintiff and defense are insurance companies. Until recently I had not required a retainer in insurance company assignments and had no problems. Recently I had a case where a law firm retained me in a big case and said they would send me the file shortly. I

was contacted by 2 other parties in this huge case and of course had to turn them down. The file never arrived. No more Mr. Nice Guy.

Although I and several of my consulting companies are prone to this kind of "Designation without Permission" we have worked out a reasonably effective means of dealing with it. Before we ever say we think we might be able to be helpful to any new client, we always tell the attorney to send the Complaint and Response. That way we can see what the matter involves and determine if we think we can help. We also charge on hour's time for this review and expect a check in the same envelope as the Complaint. While this may not be 100% effective, it puts the attorney on notice that we may not be willing to agree with their position if we were ever asked to do so. There simply is not any technique that is 100% effective in all cases if a consultant is forced to regularly deal with new clients of questionable reputations.

Of course we never do this with major law firms because they simply do not play these kind of games.

It does happen, mostly by defense firms, it might be perjury when they formally disclose you with out retaining you. Maybe we should start a database for these deadbeat lawyers.

An expert can always complain to the State Bar Association or the judge handling the case – or if you find out early enough, offer to work for the other side! On the other hand, since this probably doesn't happen very often you may be better off just forgetting about it.

The following is an excerpt from my dealer newsletter. In Michigan, at least, an attorney can be sanctioned!

"…This brings up the question of 'locking in' an expert without paying the expert a retainer. Every so often, an attorney asks me whether my name may be used as a "possible expert." If there is no conflict of interest, I may allow my name to be used without fee.
Why? First, I've never been "preempted" as an expert – I've never encountered a situation in which a litigant wanted to name me just to prevent the other side from doing so. Second, allowing a litigant to name me without fee is just good business.

The litigant that names me will likely use my services if any expert advice or testimony ultimately is needed. Even if they don't need my services in this case, they may need them in a future case. To charge a fee simply to be listed as a potential expert strikes me as inappropriate. After all, I don't charge any separate fee to be listed in a case where I do present testimony. (Some other experts, however, disagree with me on this, feeling that the very naming of an expert may prompt settlement, and that the expert should be compensated for this passive role.)

Naming an expert without the expert's permission is another matter entirely. This has never happened to me, but if someone did name me without permission I can see no reason to get overly excited about it, unless the naming prevented me from being retained by someone else, in which case I would protest. Also, I can always refuse the assignment if and when it's offered. I do think, as a matter of courtesy and good practice, that the expert should be asked before being named.

I delight in contacting the judge and telling him/her that he's/she's been lied to and that a false document has been knowingly filed with the court. That usually gets the attorney's attention, if not his/her bar membership or at least a censure.

This has happened to me. One learns the hard way. So many of these plaintiff attorneys are the scum of the earth. It's been said that 99% of lawyers give the other 1% a bad name.

As for designating you without a retainer – this is slime. You'll probably never find out they've used your name as a threat to promote a settlement. You could subpoena their records, their secretaries etc, or at least use it as a threat if you don't get your retainer for the use of your name and mention that what they're doing is theft, and the penalty is disbarment.

Ethical behavior seems unknown to them. They'll use their experts to their advantage and not pay them. I am suing two lawyers for never responding to my final bill. This was my error. I cared about this case of clear injustice. And I trusted these nice, sincere guys.

I should have told them the night before my court appearance that they will hand me a valid check for what they owe me before I walk in the courtroom, or I'll turn around and leave. "Nothing personal, just business."

Repeat the mantra: GET PAID UP FRONT!!! This wisdom was urged upon me by a plaintiff's attorney who is a friend. Worse, the bar associations do nothing when one complains.
I would urge your reader to press the issue, complaining to the state and local bar associations and to the civil authorities alleging theft. You'll likely get nothing but the satisfaction of trying. These guys know you won't go to the expense of hiring a lawyer to go after them. And for this they spend 3 years in law school!

I would have to say that's a pretty clear ethics violation. I would consider reporting it to the ABA. That's pretty outrageous.

I am an expert witness and consultant, and also an attorney, and I have practiced in four states at one time or another. The most direct manner to address any particular situation in which an

attorney designates you as an expert in court filings without having retained you is to file a complaint against the attorney with the attorney disciplinary committee in each state.

It happens all the time. I have been called by opposing counsel to schedule a deposition when I didn't know I'd been retained, etc. Attorneys are swine. Let me know what feedback you receive from others about how to handle this situation.

There is an attorney NOW who called me and said he was designating me. He's told me several times that I'm the designated expert. It's been a couple of months. Not a penny has arrived yet!!!

I suspect that this has happened to me in the past, but have no way to know. I have verbally agreed to work for attorneys only to never hear from them again. When I later call them to inquire about the status of the case and my being retained, they tell me the case was settled. I am at a loss on how to correct the situation.

Although I have not specifically, at least to my knowledge, run into the particular situation described of DWP, I will tell you that the firms I deal with practice a high level of ethics. Some firms have avoided sending me a retainer but have paid their bills when I send them. If I ever discover an attorney has named me as an expert without my permission I will call opposing counsel to set the record straight – if I can find out who he is – therein lies a small problem of whom to call if you can't find out. I would think eventually the opposing firm can be discovered, contacted, and made aware of the bluff. The correct procedure in my opinion would be to report these unethical actions to the State Bar Association or to the State Attorney General. My first recommendation would be to discuss this with a regular customer attorney whom he trusts.

In my experience reputable law firms do not deal in such underhanded tactics. For that reason, I think this expert needs to re-evaluate and catalog which firms he is unwilling to do business. I get the impression he is not dealing with an isolated case of DWP but rather an epidemic. Some introspection is called for here to answer why is this happening to me repeatedly? I also don't think it's worthy to whine about lost business. Once bitten by DWP I'd never do business with that attorney again – report it and move on – there are far too many ethical firms out there to worry about repeat business with a cheater. On the opposite hand, a "lethal hired gun" expert may indeed have a nasty reputation as viewed by the opposition and encourage such misuse by the less ethical side of the profession – proceed with care. The expert's own reputation for ethical behavior is all important.

I reply only because something similar happened to me a while ago, not because I have anything constructive to say on the issue. You can count me as another data point on the issue!!!

I hear a lot about non-refundable retainers precisely for this reason, but have no idea how to combat un-ethical situations such as the one you describe. I do look forward to ideas you solicit from us.

Maybe the expert in question should send the offending attorney a bill and see what happens and/or retain a lawyer of his/her own to pursue the matter.

It is probably not cost effective to go after the lawyer in a lawsuit but you can file a complaint with the State's lawyer licensing board usually that's a branch of the State's Supreme Court and can be found with the Internet search such as "file a complaint against a lawyer."

If the lawyer gets contacted by the Board, that gets the message across. If the Board actually finds enough evidence of wrongdoing, you'll have a basis for getting relief from the lawyer.

A related problem is subpoenaing records that include reports, without paying for the reports more than the legal copying/page (75 cents in NYS). This is accompanied by an authorization from the patient for records. In fact, they have the benefit of one's opinions without paying for them. The mechanism is simply a statement by the patient to the attorney that he/she was seen by a certain doctor. I have one impression that this is authorized by HIPPAS, although in fact there is no "medical necessity" for providing records. I would like to have an opinion. Otherwise, if an attorney says that one will be a witness, the doctor may never hear about it.

This problem has not come to my direct attention, but I probably would not know if it were happening to me. One of my colleagues within the same company has described this issue to me. He utilizes a non-refundable retainer to mitigate the concern for designation without a formal retainer and stipulating a non-refundable retainer.

There are many ways to address this issue which is part of a larger question of how to choose good clients. Once this had happened to me a couple times, I added a clause in agreement that said I needed a 'disclosure fee' of $300 that was nonrefundable if I was to be disclosed as an expert. I kept this for a while and typically used it as a negotiated item saying I would remove it if I was disclosed and really used. It then got too tedious and hard to enforce so I just dropped the clause entirety.

I now just say no if any attorney and I have had any such billing problems in past and they call me again. I know of no 'magic' formula to prevent the sort of problem the person mentions. I also differentiate between new clients with whom I have no prior working relationship and those I've worked with in the past. If I trust the person to treat me fairly, based on past experience, I

am more inclined to grant permission to disclose me even without paying retainer in advance though my contract says that. Then again, some insurance companies are getting tough about paying retainers in advance and slow to pay after that.

The toughest talking experts are MDs who can and do demand all sorts of payment arrangements the rest of us can rarely get such as very high retainers, a half day minimum on depositions or court appearances, portal to portal expenses at full rate, deposition checks in hand in their office before leaving for a deposition, etc. If there are local substitutes for the expertise provided, bargaining power is less.

I don't know what anyone else would do or if there is any legal recourse, BUT, I would have my personal attorney file an affidavit (or other appropriate document) with the court having jurisdiction over the matter, informing the court that the attorney has designated me without my knowledge and that I would not be the designated expert in the matter.

Believe me, the judge will get to the bottom of the matter and probably dispense appropriate penalties to the attorney. (And, I'll bet the attorney does not improperly designate an expert ever again.)

One thing I learned early on is that attorneys who are in a hurry or are very late in a case calling an expert are more likely than others to employ this unethical practice. I have a clause in my terms and conditions that prohibits the use of my name without prior approval. Many years ago I actually received a deposition notice from opposing counsel and I had no idea what it was about. I called opposing counsel and explained the situation; the call ended that specific issue promptly.

I do not refund retainers unless there is an agreement in advance and then only under special circumstances. There will always be those in an any profession that will take advantage of a situation. When ethics classes are commonly taught in college these days to helps students distinguish right from wrong I expect no less from a percentage of the work force regardless of their profession. I can tell a store clerk they returned too much change to me after a purchase and people in line applaud; there is something wrong with that picture. All we can really hope for is that attorneys who practice naming experts without their permission are in the minority.

In the past 10 years, I have been retained in some 60 cases. Two or three months ago I experienced my first DWP. I received a phone call to determine my qualifications, then a letter confirming my retention and disclosure. Upon the receipt of this letter, I smelled a rat and called the paralegal who had first called me. Initially, I thought I was just a candidate for retention.

On my call I was brushed off with a statement that they will keep me on file. When I protested their practice, it fell on deaf ears. I called an attorney in the same state and asked him about the legality of such an obnoxious practice and was told that it certainly was unethical but probably not illegal. A lesson learned without solution!

The judge is the ultimate arbiter of the case. In any case in which you find out that you have been designated without being retained, you could ostensibly write or call the judge and let him/her know of the bad behavior. To be sure, I have never had this happen to me, but I am aware of other cases in which judges require attorneys to pull out their checkbooks and write a check to the expert before the trial can proceed. The judge needs to know that your name was used without your permission.

I have experienced this in times past, and when I have, I noticed the court with the case number, etc. and sent the judge a formal letter explaining that we had not been retained, and that the attorney that falsely designated us without retaining us had done so in violation of the retainer agreement which states that no one can designate us without first agreeing to retain us. I have also reported these instances to the bar association. I would suggest to others in the field to also do the same.

I have also faced the same problem. The old "the check is in the mail" while they are touting to the other side that they have an expert, and then they tell you your services won't be required because the other side backed down. I don't know what they fix is but would sure like to hear other expert's ideas.

My Fee Schedule Agreement states:
"Payment of Advance Retainer and/or designation as an expert constitutes acceptance of this Fee Agreement and is fully earned-when retained-and not an estimate of the work to be performed irrespective of any awards, settlements or discontinuance of the subject litigation."

Hope this helps someone. It has worked for me.

We allow designation without monetary retention. I think it's good business. There is always the chance that a case will go forward and your service will be required, and it fosters a good relationship with the attorney and the opportunity for future business.

I don't think any of us could support our business on retention fees. The real value is in applying our expertise to the case. Anything that makes the more likely to happen is a good investment.

For an attorney to designate an expert without permission is foolhardy. Should that case go forward, and it was discovered during examination that he or she was 'recruited' without knowing it, the the expert opinion can be labeled as predetermined.

To our knowledge, such stealth designation has never happened to one of our experts.

This used to happen to me all the time–because I allowed it. I would send my C.V., so the law firm could decide if they wanted to retain me, and they would disclose me as an expert, or even as a potential expert, and use me as a bargaining chip to settle the case. They would call me to retain me only if the case was going to deposition or trial. I was none the wiser.

Now, when I first talk to them, I tell them that I require a non-refundable retainer to be retained or disclosed. I even explain that if my name and experience is used in negotiation to settle a case, I deserve compensation.

I haven't known of any violations, but if I were to hear of any, I would contact the judge and explain that I have not been retained, will not be available to testify, have not reviewed any documents or offered any opinion, etc. Hope that helps.

I recently had this happen to a friend of mine who I expected to see at court and later found he has not been advised that he has been designated. We agreed to provide each other with information if we hear that the other one has been designated. This surely is a problem. I know it happens all the time. I have not figured out how to deal with it.

Probably the biggest item on the list of things any attorney hates the most are complaints about him/her to the State Bar. In addition to dealing with a disciplinary action by the State Bar (that can result in a suspension of the attorney's license to practice law for a period of time), the attorney's legal malpractice rates can go up, and the complaint becomes a matter of public record in the attorney's public file with the State Bar. So, a complaint to the particular State Bar in the State where the attorney is located is the logical, first starting point.

Next, and assuming you routinely operate using a non-refundable initial retainer that is known by the DWP attorney, is filing a lawsuit. Both legal and equitable argument can be made that the DWP attorney, by designating you as an expert, has effectively retained you and therefore has agreed to pay your non-refundable initial retainer. Be sure to send the DWP attorney a letter to this effect, as it can be an important document for both the State Bar complaints process and in the event of litigation.

Before actually filing a lawsuit, I'd recommend trying to get the State Bar to act on your behalf as part of the complaint-disciplinary process. If this doesn't work (and there's a good chance it will), then filing a private lawsuit is the next step.

Now, to the issue at hand. We, as ADA experts have somewhat of a similar dilemma, but not to the extreme that is discussed below. So, I am willing to share what we have discussed, and at the same time, am anxious to hear others replies.

We are asked fairly often by design professionals to be put on their "teams" when they are submitting for a project. Often it is the case of the owner/client requiring or emphasizing ADA compliance as a major issue. Hence, putting an "ADA consultant" on your team makes your submission look better.

Now, fast-forward down the road. Sometimes, the firm gets the job, and we wind up getting cut out of the project entirely. Sometimes, they get the job and we get a fraction of what our proposal was originally written for the work we were to do. Their "excuses" range from the client changed the project, to we were moving so fast we didn't bring you in soon enough, yadadada.

We have had concerns that several firms have made it a habit of using us as "window dressing", never really intending to include us, but using our name, reputation, etc., and representing whatever work product they deliver to the client as something that we would have participated in producing and/or having signed off on.

We've considered several options:
1. Stating on proposals that if the project is awarded, we intend to realize the full scope as proposed, unless a change of scope has been negotiated with the client and we are made a part of the negotiation.
2. If that is not the case, and work proceeds without us us, etc., we will bill for the work that was stated in the proposal, OR
3. We state up front that we are guaranteed a % (yet to be determined) of the fee, regardless of the work we perform.

I'm anxious to hear how others respond.

Review your retention agreement and make sure it has the appropriate language regarding designation and retention.

1. Send demand latter to attorney for the amount of your retainer. Follow like any other collection matter.

2. Threaten (do not make threats you will not follow up on) to report to the State Bar and that you will file small court claim within X days if retainer not paid.

3. File complaint with the State Bar and sue the attorney in small claims court for the amount of your retainer.

I have had this occur on about six cases in 15 years of practice. I have filed in Small Claims court on one occasion and settled for one-half of my normal retainer 10 days prior or court hearing.

I have only recently experienced this happening, and very much like the description you have posted. Since all of the contract packets which we send out to prospective clients are email attachments, I have been toying with the idea of placing excerpted language from the contract in the body of the email...something like: "recipient of this email is hereby advised that...[insert section from contract which stipulates that retention must precede identification of expert]." In the instant case, I am also considering sending notification to the presiding Judge and to the opposing counsel, since the case settled shortly after I had been listed in filings as the expert of record (signed the same day they received my packet). Interestingly, the venue was one in which I had testified at trial on two occasions in opposition to the other identified expert in this case; in each of those cases the attorneys who had retained me prevailed in the verdict.
I don't yet have a solution with which I am satisfied, so I look forward to hearing of how others have handled this.

I run across this about every couples of years or so, at least those are the cases that I find out about, who knows how many times it has happened without my knowing.

It usually comes to a head when I get a subpoena to produce my file, or for a deposition on a case I have never heard of. I just call up the issuing subpoena attorney and tell him I never of this, he usually usually tells me I have been named as an expert, etc. Usually I will then give him a letter indicating that I have never been retained for the case, and that is it.

This has not happened to me, but I have heard of it. The best response I have seen is to simply put a fee in the rate sheet for designation as an expert. I have seen figures as high as $1,500 for designation as an expert. This can be discounted based on work done on the case, e.g. fee drops $0.25 for every $1 in consultation prior to designation, etc. Note that the fee applies whether or not the expert is retained, and the act of designating will subject the attorney to the fee.
I would also involve the state bar association if it has already happened in a specific case.

I've not had this problem that I know of. The chances of finding out about an attorney designating without your knowledge is slim and slimmer, I'd suppose. If I found out someone did that, I'd file a complaint with the appropriate bar association and make sure that the judge in the case knew of the act. It may seem like a lot to do for what may appear as a minor thing, but we need to send a message that we won't stand for any shenanigans. My 2 cents.

The solution is very simple - notify the applicable state bar association, and the attorney in question is subject to an ethics sanction or even loss of license.

I occasionally discover this happening too. You usually only find out by accident. I'm sure it happens way more than I discover.

The only way that I see this being resolved is with the implementation of 2 new rules / laws

Firstly, the court should immediately contact any and all experts listed in a case a the earliest possible stage. This way the expert becomes aware that he is used before things go too far.

Secondly, there needs to be an incentive for lawyers to pay. In N Carolina, if a lawyer refuses to pay an expert's invoice, the expert need only contact the bar association and the lawyer will be severely sanctioned. Apparently, this is the law in NC - I've not read it, just what a client told me.

Something else would help too. Every time an attorney is informed by the opposition that an expert is on the team, the attorney should contact the expert to confirm. This benefits the lawyer and the expert, so lawyers need to be 'trained' to do this.

If these measures were implemented the incidence of this happening would be greatly reduced due to the deterrent effect - sort of like burglaries dropping when thieves find out that everyone in the area owns a shotgun.

If anyone out there knows how to make this happen, please let me know. Perhaps we need a professional body to actively push this through.

It's come close to happening to me. I have two suggestions for your expert.

First, only send your CV accompanied by your Standard Agreement for services, which should include the particulars of the non-refundable retainer. My Standard Agreement calls for a $5000 retainer amount, although I don't define it as non-refundable. The retainer clause of the Standard Agreement could also state that the retainer amount is due and owing prior to the start of work or upon the attorney's designation of XYZ(name) as an expert in the referenced case.

Second, in conjunction with my previous recommendation, place a small notice at the bottom of your CV (page one)stating "NOTICE: attorney's designation of XYZ(name) as expert constitutes acceptance of retainer agreement and acknowledgment that specified retainer amount is owned."

Then, once you get your hands on the court filings showing you are the expert, you can promptly send out a cheerful (standard) cover letter stating that your are glad your retention as expert assisted the attorney in its resolution of the case, together with your invoice, and copies of your CV and Standard Agreement. This may or may not get the check in the mail, but it will likely discourage the practice of unauthorized designations, at least of you.

At the very least, this is unethical. I would report them to their State Bar Association. Of course by doing this, you will alienate them for future work, but that's probably a blessing.

I am a trial attorney as well as an expert. I would be happy to represent any of your experts in fee disputes or other matters such as the one indicated below. The problem is, the expert fee does not justify the cost of representation in most cases. There are a number of things that might be done to rectify the problem on a case-by-case basis, including filing motions for various forms of relief. A demand letter written by counsel (me) to the attorney abusing the expert's reputation might obtain results with regard to that particular attorney.

There is a difference, however, between relying on the reputation of a particular expert and actually claiming to have retained him. I know of cases where the very mention of my name as a potential expert caused the case to be resolved. That is a reputation matter, and I do not believe an expert is entitled to be paid. The Florida Rules of Civil Procedure, however, do not address this particular problem, and the rules only address paying for experts who have been DEPOSED. Filing grievances with the Florida Bar against the offending attorney for unethical practices may also achieve some results, but again, it would be on an attorney-by-attorney basis.

Anyways, I am available if your members would care to retain me.

I read, with great interest, the problems lawyers create when an expert has been designated, but not retained. I live in California and here is what can happen when this occurs. Call the state bar and tell them what happened. In California, unethical charges are taken very seriously. The California state bar enjoys destroying unethical lawyers. If a lawyer does use your name, find out the case number, then call the opposing attorney and tell him/her what happened. The judge will love to hear about this. Lastly, the states have to pass laws that prevent this from happening.

I have not had this specific problem that you discuss but ... I worked on the case for an insurance company ... [A] forklift operator was rather badly injured as a result of the fire and he had engaged his own attorney. His attorney contacted me and wanted to engage me as his expert in the case. I advised him of the retainer that I require and advised him that no advice would be forthcoming without my receiving my retainer. Weeks went by and, approximately once a week, the atty contacted me and asked for my assistance in the matter. At every contact, I informed him that I had not received my retainer and therefore, I would do nothing on the case. I was in the middle of another case in the Chicago area when he contacted me for the last time, he stated that the case was coming to trial and he needed my assistance. I advised him that I had not received my retainer and, therefore, I would not be available to work with him at trail. He threatened me with a subpoena and I simply laughed at him. I was not to give him in the case would, necessarily, be an expert opinion and, therefore, I would simply ignore the subpoena. I never heard anything more about the case.

This problem has arisen, but not to us. If someone uses your name for a purpose you did not authorize you may have a tort action against them. The person needs to retain a lawyer.

I have faced this problem a few times but have suspected it many, many times. The problem is insidious since you obviously do not have any idea when it is occurring or has occurred. However, on more than one occasion, I have been subpoenaed, with a modest travel expense check, by the opposing attorney. Since I had not been retained and knew nothing about the case, I informed the attorney(s) who subpoenaed me and their response was "Thank you, that's all we wanted to know."

The only remedy for unethical or unscrupulous conduct by attorneys is to report them either to the County Bar association or to the Office of the Attorney General in the appropriate state. With the easy availability of CV's on the Internet, and the sharing of CV's amongst attorneys, this behavior is becoming widespread and an expert must be eternally vigilant. Although it can sometimes be unpleasant to file a complaint against an attorney, this must be done when unethical behavior is brought to light.

I note that when I find out about such behavior, and the case is still ongoing, I refuse to get involved even if the attorney wants to retain me. I will not get involved with such sleaze since that attorney is clearly capable of other behavior which can prove detrimental to me or the case.

Regarding the issue of designation without permission, here are my thoughts:
Is this a problem you have faced?
No. But, I've heard of this problem from lots of expert witnesses. My take is that the frequency of concern greatly exceeds the frequency of actual "thievery." Analogy: stories of rape and murder in New Orleans during and after Katrina greatly exceeded the actual counts.

Does it seem to be happening more often lately?
No. It's not happening more frequently. But, as stories circulate among expert witnesses, the stories are circulated ever more frequently.

What are the options? ARE there any options? Do you have an idea or solution that may not currently exist but should?
In California, there is an easy solution. Every attorney in California must be a member of the State Bar of California. The Bar believes that designation without compensation is a breach of ethics. If an expert witness believes that designation h as occurred without compensation, he or she may file an online complaint to the Bar about the attorney in question. The Bar is then forced to take action. Each member of the Bar has a public page on the Bar's website, on which there are two listings: Disciplinary Actions and Administrative Actions. If, upon receiving a complaint from an expert witness, the Bar takes action against an attorney, that action remains on the

website as long as the attorney lives. Living with little fear of being designated without compensation,

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This is a great question. Thanks for raising the issue. I look forward to responses from others.

In most of my work I am a consulting expert and do not testify. I am well known nationally in my sub-specialty. Several attorneys have told me that they tell the opposing party I might be retained as an expert. If the other side settles on the issue, I am paid nothing or a small amount.

The oddest scenario was when both the plaintiff and defendant called me about being an expert, and then they settled the case before giving me any documents to review. They knew that [both had] both called me. I ended up getting paid zero on that case. This incident enhanced my reputation for those who knew what happened. I expect one or more of the attorneys will eventually hire me on some other case.

I decided that merely being mentioned as a possible expert is not something I can charge for. It would be nice if the attorneys retained me when they mention my name to the opposing party, but I cannot force them to. I do insist on a written engagement agreement before I provide any comments on documents provided to me. So far I have not insisted on non-refundable retainers, but I might do so in the future.

If an expert has been designated without permission, then they should consider whether they want to work with that law firm. That might be a red flag that the law firm will be slow to pay, hassle about fees, or fail to disclose all the risks and adverse facts in the case.

Yes, the same situation has happened to me on many occasions over the last 20 years or so. Most of the time the attorneys do not want to pay my fee but still want an expert listed because of court filing rules. I have had attorneys tell me some will use my name as their expert just to keep me from being hired by their opposition. This is a real problem for experts and I hope my solution can help others.

1. Have an expert "designation fee" on your rate sheet in plain view. My retainer fees are $2500 and I have a $1500 expert designation fee that is mandatory. Tell any prospective new client (old clients-don't use this tactic) that if you are named as their expert the fee is mandatory and non-refundable. The loop-hole here is that they will call you to "discuss" the case and then tie you up as their potential expert. Any court filing is considered an expert designation and my fee is required.

2. Most of the time I catch these rogue attorneys when their opponent sends me a deposition notice for written records only. When I find out about it I contact the opposing attorney and tell them I was not named and tell them of the unethical activity. I sometimes follow-up with a nasty letter to the judge of the court. That will stop that one attorney but there are many waiting in the wings to take his place.

3. Tell any "New" prospective client you are not officially "their" expert until there is an offer, an acceptance and money (your fee) exchanged. That way you can always go work for the other side if you really get pissed off.

4. My good name (and yours) is a valuable commodity and you must do everything you can to protect your business. I tried the State Board Complaint route, they will not take the case. Complaint letter to the attorney will accomplish nothing. If you find out about it then my best recommendation is file a complaint directly with the court in which the case is filed. If nothing else the judge will get mad at the attorney and maybe that will stop them in the future.

5. For those cases you don't know about there is not much you can do except advise the attorney you have just placed his name on a "Black List" and you will never work for him in the future, at all, no matter how much he wants to pay you later on some really serious case.

6. Keep advertising your services because the 5 % bad attorneys are followed by 95 % honest ones.

The "designation without permission" has happened to me, and to most experts. It can be hard to discover, since the majority of cases settle prior to depositions or trial testimony. The listing attorneys are using the expert's name for an advantage, without compensation, i.e. "stealing."

When attorneys contact me about potentially using my services, I send a C.V. and a copy of my retainer letter. The letter explicitly states that to be listed as an expert I require a non-refundable retainer of $2,000 (with my hours applied to the retainer) and also a non-refundable minimum testimony fee ($1,000) to set a depo or trial date. If I do not receive a retainer and somehow do receive a subpoena or notice of deposition from the other side, then a call to the "retaining" attorney for an immediate $3,000 payment is in order. Once I receive and cash the check, I can drop the client (also in my retainer letter). If they resist payment, there is always small claims court. I doubt the judge will be happy with the attorney.

Sue for fees in small claims court, a $10K (or whatever the statutory limit) judgment against the attorney might get the attention of the legal profession.

I have used the small claims court successfully to handle these type of issues. You can handle the matter yourself, the court is prompt & fair, & attorneys don't like to have their name blackened. Plus payment is prompt.

My daughter, who is an attorney, advises me that the making of a filing in which an expert is named who has no knowledge of the case is cause for disciplinary action by the judicial district.

File a complaint with the judicial district in which the attorney is located. Have him disciplined. If it happens enough, the attorney will get the message that their license to practice law is on the line.

This, by the way, happened with me. An attorney named me as his expert and even, apparently, gave me an opinion. Defense Counsel attempted to subpoena me for a deposition. When I received the letter from Defense Counsel, I was incensed. Several of my attorney clients and my daughter (who is also an attorney) suggested that I file a complaint against the offending attorney.

I had a better idea. I called him, yelled at him, and told him what my daughter suggested. He was not happy at the prospect of being disciplined for having filed a false filing with the courts. So, he agreed to hire me. The retainer check of $1,000 made its way from Maryland to New York within 24 hours.

So, I suggest that if you find out that an attorney named you as their expert without you having even seen the case, file a complaint with the judiciary. I think the termination of several licenses will ensure that attorneys get the hint that they are not above the law.

I have not experienced this problem myself. However, I have recently become a member of the Consulting, Litigation, and Expert Witness (CLEW) Section of the CPCU Society. The current Chairman of that Section is Daniel C. Free, CPCU. His email address is dfree@insuranceaudit.com. He may be able to refer you to other expert witnesses who have experienced this problem.

I have also been designated by several unethical attorneys who attempted to gain leverage on the settlement of their case through the use of my name. I have a clause in my letter of engagement which deals with the unauthorized use of my name and states that the damages are the standard retainer amount, which in my case is $5,000. It's easy enough to prove from documents designating me as an expert. Very much like "assumed representation", this is a case which can be won in court, particularly if the venue is your own backyard. The larger problem is discovery, which usually occurs well after the settlement.

I overlay "sample only" on my cv in very large print (I use word for docs. Perhaps you might try that om both fee schedule and cv! This subject has been addressed in FEWA often without very good resolutions. Good luck!

I haven't had the problem to the same degree the other expert has, but I am finding attorneys who call, interview you, ask for CV and fee Schedule, and then call back and say they want to retain you. I then send out a professional services retention agreement with the requirement for a non-

refundable retainer and say it is required for designation. Right now I have a firm that has designated me, and scheduled my depo but has not yet returned my agreement and retainer. I don't think I will get stiffed but conveniently my depo was scheduled for two days before mediation and now it looks like it will be moved back after mediation.

Expert are in a tough position. Jokingly, we ought to organize and all agree to the same retention/payment practices. We all understand the bureaucracy of law firms and we want the designations and the work so we don't want to be too hard nosed to scared the attorneys off, but being reasonable seems sometimes to be taken as a sign of weakness.

I will be VERY interested to see if any other respondents have a great solution.

It's called interference with prospective economics advantages and could result in a disciplinary action by the state bar. May be general, specific and punitive damages could result from an action. Anyways, experts must remember whom we are dealing with.

Rule #1: Never do ANY work on a case without a signed Professional Services Agreement that specifies WHO will be paying you.....Rule #2 Report all ethics violations to the State and American Bar Association with a copy to the judge in the venue the case is being tried.

I would write the attorney, informing him that he is in breach of the Model Rules of Professional Conduct. I would inform him that if he does not remove you from any documents and inform all parties to the suit that you have not been retained by him, that you will report him to the state bar association and the state regulating authority (usually the state supreme court). He has violated, at the least, the following rules of professional conduct:

Model Rules of Professional Conduct
Advocate
Rule 3.1 Meritorious Claims And Contentions
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Information About Legal Services
Rule7.1 Communications Concerning A Lawyer's Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects a adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Good Luck

The practice you describe is widespread and I know that it has occurred many times to me. My practice is to notify the court jurisdiction and opposition that this has occurred since it has been rare that the guilty party has ever come around and then hired me. Unfortunately, it is also too rare that I have learned of the offense in time. I imagine that I could sue the guilty party, but I do not believe that the effort is worth it. Notifying the bar of this lapse in ethics is not necessarily effective either since this association tends to lean backwards to protect their own. The bottom line is try to hurt the offender as much as possible but don't hold your breath.

I am a physical security and investigation expert. I too, have the same problem. More often than not I never learn that I have been designated to "scare the other side into settlement". In the absence of the attorney signing my fee schedule and agreement and providing me with a retainer, how would I know I have been designated? So any information you develop, please share it with all of us.

The best way I heard of handling this situation has several parts:
1. Put on the fee schedule the cost to the attorney is $XXX, non- refundable, for designation. This must be received prior to designation or the designation will not be honored.

2. Put a watermark “SAMPLE” diagonally across on all copies of the CV and fee schedule sent to anybody until a retainer is received.. I would add to that something I have not yet done and that is to put the recipients name and date on all CVs and fee schedules sent out in response retainer.

3. Put a date of publication on all CVs and fee schedules

4. The above are by no means fool-proof, but they go a long way to a better solution.

Perhaps an attorney should address this question. I would probably talk to one with whom I have a good relationship before taking action, but here is what I would propose doing:

Call the designating attorney. Leave a message if he doesn’t take the call. “You appear to have designated me as an expert in the xxx case. Please recognize that I have not reviewed this case and have no opinion as to the merits of the case. I am willing to act as an expert consultant and possible expert witness if you send me a retainer of $xxxx. If I do not receive the retainer within 3 business days, I will assume that you have not retained my services and I will notify the court of record and the opposing attorney of this fact.”

Good luck. Only one time did it happen, that I know of, and I told both parties I was not retained and it was misrepresentation and regardless that the one attorney was about to retain me, I told him to forget it. I didn’t need the association with a jerk (more or less...)

I don’t know... I have similar languages in my fee agreement as well. Next time it happens, assuming I even know, I’ll report the attorney to the local bar association. Please let me know what others do as well.

First, because attorneys have never concretely defined the practice of law, I state at the outset that I am not practicing it without a license. What follows is merely a non-legal opinion.

I don’t see any crime here. Usually the forms say “Designate any person you may be using as an expert witness regardless of whether you will in fact be using him or her.” Therefore, the attorney can claim that they may be using him or her at a later date. The only way that this argument can not be made is if the expert has flatly refused to participate in the case under any circumstances.

It is unethical, but not criminal. And I also don't see a loss of income because there is no guarantee that the income was otherwise forthcoming–the expert performed no work to earn any income. So I don't see any victim loss, which is necessary for a theft.

Even if one were to argue that the presentation of a fee schedule constitutes an agreement not to use the expert's name without a retainer, then the only issue would be akin to a a breach of contract with no loss to the allegedly injured party.

It is unethical and ought to be dealt with by the bar association. But I don't see a crime and I don't see tort. I do, however, see a lot of whining.

I have some experience with this issue. My reaction to the problem:

I charge a designation fee. Without proof of payment of such fee, there is no 'gray' area for the atty to hide behind. I charge a 'late' fee, if the designation fee is not paid within ten days of my designation - this is punative to the atty which is my intent. If the fee is paid by the client, I clearly explain to the client how the atty has increased their cost.

Many times the atty will balk at paying the penalty - at that point I remind them that they have committed perjury, and that I am willing to bring such to the attention of the court and the client.

I think sometimes we have to just "suck it up." We can't control what the bottom of the barrel in the legal profession will do or say about us. Eventually, the word gets around in the marketplace. On the other hand, was this falsehood put into court documents? If so, isn't that misrepresentation to the judge grounds for a grievance or ethical complaint? Isn't that a clear example of "conduct prejudicial to the administration of justice?" Ethical complaints are a significant pain for everyone involved, regardless of the outcome. But sometimes, that investment is warranted to confront an abuse that seems to have become a new low as a community standard.

It is a great way for them to try to settle early - they get the expert's credentials, name him, and he is none the wiser! What happened was almost the same thing as occurred to me.

This is why I state in my cover letter or email with my documents that they are not authorized to use my name or credentials w/o having a written signed agreement with me.

In my case I advised the local Bar association of this violation. I don't think any action was ever taken.

Our firm includes a “designation fee” on our proposal to indicate a fee will be charged for that very action. We charge this fee at the time of designation of the expert witness (usually prior to deposition). In cases where the attorneys or client has actually hired us, we charge and usually collect this fee. In the case of the attorney using our CV’s to settle the case, we typically have no way of knowing this unless in the rare case, we find out about it through some random means.

This method has the disadvantage of charging those who pay for those who do not, so it is not perfect. But at least there is some avenue of compensation and the fee we charge is usually something nominal like $500.

Even if we did find out a particular attorney has “used” an expert's name, there’s really not much you can do about it. I have heard of experts taking this very issue to the bar, but it's reviewed as a weak complaint and nothing happens. Attorneys seem to much more flexible on their own than do engineering boards!

I do no know whether such designation without permission had been done on me. Of course, this designation is not only unethical but it is also unlawful. I suspect that it does happen, but I do not know the extent of such use. Please keep me informed.

I have had this happen to me on several occasions and it really stinks. It cost me about $5000 in fees. This is how attorneys protect themselves from someone on the other side using you against them in court. It’s a crummy thing to do, but it happens a lot I'm told.

I suspect that this (DWP) has happened to me, but I’ve never been able to verify it for myself. I have had attorneys retain me on a case and then ask for their money back after they settled a case without asking me to do any work on it (and in one instance I really was looking forward to doing the work, as the case really was of interest to me). I agreed that retainers should be nonrefundable for this and other reasons! How might one check to see if an attorney (whom one suspects of doing this) has listed you as expert on a case?

This is a shame that Attorneys will behave like this but like any other this is fraud and needs to be reported to the Bar association in the state where it takes place; as far as I know every state has an Ethical person or committee, which deals with unethical behavior on the part of the attorneys and they should fine the attorney or demand payment. I did not experience this issue but maybe I just am not aware of it.

My contract has an amount in it to cover this problem but if they designate you without a contract then they are liable.

We clearly state in our fee schedule, in order to designate me as an expert in a case, there is an immediate fee due and payable BEFORE I can be so designated. This is necessary because:
a. the case may settle before I am so designated
b. the case may not go to trial and settle now, so you don't get to any "work"
c. If someone does designate you without your permission, send him a bill and sue for the amount. Since you previously sent him a fee schedule, he has no excuse.

The fee is applicable to time spent on the case and can be deducted from the total, it is not in addition to work on the case.

Of course we always get called at 4:30 Friday that they must designate before 5, etc. but, turns out they can messenger over the fee.

Below is a section from my retention agreement which deals with one of the points you've mentioned:

"3. Payment to Consultant:

The Client will pay a fee to the Consultant based on the Consultant's published rate schedule at the time the services are performed. See ADDENDUM: (Current Rate Schedule). A retainer of $xxxx.xx is required before casework can commence, and is fully earned when client designates Consultant as their Expert Witness in the underlying court proceedings. All Retainers will be deducted from the Final bill. Each account will be billed on a monthly basis. The full amounts owed on outstanding accounts are due within 30 days on invoicing. Accounts overdue one moth or more will be charged an additional service charge of 1.5% of the unpaid balance per month. Delinquent accounts will be turned over for professional collection. The cost of collections including attorney's fees and expenses will be added to the client's invoice principal amount and be subject to the monthly service charge.

*From time to time our rates and billing policies may change. Services and expenses are billed according to the published rate schedule in effect at the time the services are rendered.

Upon termination of this agreement, payments under this section shall cease; provided, however, that the Consultant shall be entitled to payments for periods that occurred prior to the date of termination and for which the Consultant has not been paid. Any unused overages, such as the Retainer (when Consultant has not been designated as Expert Witness), shall be reimbursed to the Client."

This is unacceptable.

One time I heard I was designated as an expert on a case for which I did not receive a retainer fee. The person I heard it from was the opposing expert, whom I informed I was not retained on the case. I never heard anything further. ... as your reader said an attorney who does this is "guilty of unethical practices".

If there's a tight deadline date to name an expert and I agree, I recommend they have my fee in my account before the deadline date as their needed documentation that I have been retained on the case before their deadline.

To my knowledge, this has never happened to me, but I don't track what everyone does with my CV. If there has been a prior review or work for the law firm, the lawyer may think that there is a business relationship in place. Probably the first step is to contact that attorney and let him/her know there has been a misunderstanding. If there is no prior relationship, then clearly the attorney is misrepresenting you as their expert. Maybe a complaint letter to the Bar is in order.

It has happened to me a few times. I haven't fought it as about 50% of the time, I actually did work on the case and that made up for the retainer I didn't get on the other ones. I figure it's just part of the cost of working with attorneys. If you want to swim with the sharks, you have to risk being bitten now and then.

You would not believe this but the same thing happened to me-today. I actually received a letter that a case had settled, a case I had never head of and then find out I have been named. This is the third time I have had this happen recently. I have a call in to an attorney friend of mine to find out if I can bill them for my retainer fee for use of my name. I will let you know what I find out.

This is right on the spot. I have several cases like this right now, where I find myself without retainer and without assigned agreements. Our standard practice is to not release a CV until we've been retained. Info on our services, sample fee schedules (basic items you might find on our website) are all we send out until the retainer arrives. As for the non-refundable part, we've had several clients get bent out of shape about it, but my standard response is – "We intend to do anything we can to keep you as our client, and will do what it takes to accommodate your concerns."

In cases were there are multiple plaintiffs on the same claim of damage, Attorneys for each plaintiff will generally use the same expert – this is problematic. I have not yet had a problem because the opposing counsel will depose me and I am paid and any other plaintiff attorneys in the same case can use the recorded transcript as evidence for their plaintiffs.

Attorneys (like everyone else) try and cut corners – if it is unethical report them to their state bar – at least there will be a record. Experts must do their part to make the court system work and reporting a unethical Attorney is a un-paid necessity.

I have the same warnings in my retainer agreement, but fortunately, I have not had anyone designate me without permission. At least I have not found out about one. I would suggest you contact the judge in the case as if it may make any legal agreement or settlement void if the other side was misinformed which could result in sanctions against the attorney. I would also contact the opposing council whom I am sure would be very happy to catch his opponent providing false documents. Finally, a complaint to the State Bar Association will top of your response. That should keep the crook busy for a few months.

The story does not surprise me at all. Keep in mind that there are many lawyers out there that practice "unprofessional." The only way to cope with the situation is "don't take on any case without a retainer" I have situations where I don't get paid for 6-9 months. Know the law firm you're working for, and don't take just any case thrown at you. It may seem great to get the work but you may end up working for "$0."

Interesting point. This has not happened to me, and I do not have language in my proposal or fee quote that precludes their identifying me without retaining me. Which I shall change. Immediately. Thanks for the idea.

I have not experienced DWP. An attorney could state that since no services were rendered, perhaps no fee is due; however, the service is in agreeing to be the expert for that attorney. Consider that if I agree to be a witness for one attorney, I cannot also be a witness for another attorney on the other side of the same case (this happened to me before – I have allegiance to the one I make the deal with and get a retainer from); therefore, there is some cost to me for agreeing to be the expert for an attorney – it prevents me from working for the other side, and I want to be paid for that service. I suppose I would accept an hour's wage to discuss the case as my minimum fee.

We've never tried to affirmatively prevent designation without being engaged (to the extent that it may have occurred), but we're very clear up-front that we must have an executed engagement letter and a retainer in-hand before we'll perform any work. This ensures that we get paid for the work we actually perform.

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1. Nobody cares!
2. The judges don't care.
3. The opposing attorney doesn't care.
4. The state bar doesn't care.
5. The District Attorney doesn't care.
6. The State Attorney General doesn't care.
7. The attorney's client doesn't care, especially if they "win". If they lose they will sue the expert for blowing the case.
8. "Experts charge way too much anyways", says the judge before he/she goes private and charges $12,000 for a two-day arbitration.

You can at least have some perverse enjoyment by showing up at the deposition, collecting your deposition fee, and say "I know nothing about this since I was never retained, and was never provided any information!" Beyond that we have in our fee schedule that if we do work after this has been pulled, it is billed at $650/hour. But nobody cares (except the expert, who will go on living masochistically anyway)!

Blessedly, I have not faced this. My information on my website is general and does not have a CV for this very reason. When I get a call about a case I usually have a very in-depth conversation with the attorney to see if there's a match. I usually do a Martindale search on the attorney and firm as well. It's not till then that I send a CV and, always, a signed, formal Letter of Agreement (including a description of the work to be done and the fee structure) for the attorney to sign. If that is not returned, I do a follow-up call. To my knowledge, neither my name nor my CV has been used without permission.

As far as remedy, it seems to me the place to start would be with the state bar. Martindale might be a source as well. Also sending a bill might get someone's attention. If all else fails… hire an attorney.

I have had this happen a couple of times. However, when an attorney calls me, I ALWAYS tell them that I do not agree to be named as an expert until I receive the retainer fee. Since I have been adamant about that, I have not had any more problems.

You could call the opposing counsel and tell them that you were not retained on the case. This would cause embarrassment and possibly court sanctions to the attorney who did it. You could also report them to the State Bar.

We have it in our retainer agreement that the designation within itself will have the same force and effect as if they had signed the retainer agreement. Follow up with a bill and reminder of CCP(statute sign)2034 (6(c).

Two thoughts:

1. There's nothing you can do about the situations where they don't contact or interview you, and just list you as their expert, because you don't know; however -
2. If an attorney does call to interview an expert, or ask for a copy of his CV and fee schedule, the expert should ask who opposing counsel is on the case, then fax opposing counsel an informational notice after the phone interview, which states that the expert was interviewed for the case by the calling attorney, and as of the phone call date, had not yet been formally retained. This keeps the inverviewing attorney honest, and motivates the opposing attorney to keep checking on the expert's status, which sometimes even leads to retention by the other side.
   Works for me!

I don't know specifically that this has been done to me, but some chance it has and I never knew. I'm getting smarter as the months go by. If he knows a certain attorney(s) had done this, I would suggest he call their State Bar with an inquiry followed by a complaint, write to the judge in the case requesting update as to his/her status, and possibly contact opposing counsel to inform them he has not been retained—though this would take some thought to avoid litigation with the unethical attorney. The last thing they want is to lose their law license. Sad to say, but you fight fire with fire.

This can be a lucrative profession, but it's a lot, lot of work, and we don't need them, their egos, or their unethical practices yanking our cord.

This sort of stopped me in my tracks. I was only used once in a legal case and I have never been used again (the attorney who retained me won the case, BTW) but I am now wondering how often he and perhaps others have used my name to stifle any litigation. Interesting. How would I even find it out? Thanks for bringing this up.

In 1990, I brought suite against 8 law firms for designating me without my permission or knowledge in a number of asbestos injury cases here in southern California. We went to trial in January of 1992… I lost. It appears that I should be pleased by the unauthorized designations (8000 of them!) as these, according to the defense, should be considered as free advertising.
(I also have reason to believe that my attorney sold me out.)

Sorry, to say this has happened to me a well. I generally do not accept matters from sole proprietor's lawyers. This eliminates the problem almost in entirety. Call if I can help.

I have retained my own lawyer in these circumstances and threatened to go to the Bar with the entire situation. That fear works.

I have only one situation in which this was a problem. I just called my attorney and told him that I was going to sue the next SOB that said I was going to be an expert and I did not get a retainer. I'm retired and if they want me to be on their team my retainer fees START AT $10,000.00. Screw the SOB's who are Attorneys. They are, as far as I'm concerned the SCUM OF THE EARTH anyways, and hide under the guise of professionals. Ethics is NO LONGER TAUGHT in school nor is it a requirement to practice a profession. Thank the gods I no longer have to deal with the garbage of super experts and the ROBED BASTARDS calling themselves JUDGES. It was bad enough dealing with the sharks calling themselves attorneys and self righteous District Attorneys who would hide exculpatory evidence and the shiesters who would go along with the DAs in the "interest of justice".

I have not noticed any problem with this. However, it may be difficult to detect unless someone eventually contacts you about the case. The bigger losers may be the clients of the attorneys who are using this tactic. They may be charging the client for your retainer and/or fees for contacting you under false pretenses.

This happens to me frequently. If I become aware of it, I immediately contact the attorney and insist that a retainer be sent. Even if I do no work on a case, he has used my name possibly to intimidate the opposition, and he has prevented me from generating income. When I notice that an attorney I'm working for has listed more than one expert [in my field], I always ask how he intends the work to be divided up so that I don't duplicate the work of another expert. If the attorney tells me he just listed a bunch of experts so they are not available to work for the opposition , I ask if he has actually retained the experts. If the answer is "no", I call the experts and tell them to send an invoice.

If it happened to me I would call the ethics commission as well as the attorney general and seek to get the attorney's license revoked or at the very least have the attorney reprimanded. Also, if my disclosure helped settle the case, I would demand a substantial fee.

This is really a topic of interest to me – a topic that makes me furious enough to stop and write. What I have done, with very limited results:

1. Threatened to report to the bar association.
2. Threatened to report to the presiding judge.
3. Threatened to tell the opposing attorney.

None of the above work because (1) the bar has no teeth, (2) I've never heard back from two presiding judges, and (3) the opposing attorney is too busy to make an issue out of it, particularly if the case is settled and he/she isn't getting paid anymore.

My best result has been from timely checking on contract packages I have outstanding, e.g., "I have an open file and was wondering if you filled the assignment." If they've designated, then I claim foul and use the threat to tell the opposing attorney. If the question is asked right, it's tough for the attorney to lie because he/she might actually need you if the case doesn't settle. Regardless, it happens several times a year (that I know of).

Yes, I face this all the time. The courts need to sanction attorneys who do this. Other then that, I do not have an answer.

This is a conundrum. Of course, I strive for more business on a continued basis and certainly don't want to step on anyone's toes. But that's just it – business is business.

I like to pride our company with the fact that most of our clients are return clients AND referrals. With this, I certainly don't want to offend anyone. Yet, recently DWP has actually happened. I think. I mean, how the heck does one prove such a thing? It's not as if the opposing counsel is going to call to check, right? I would like to think it's done non-deliberately, but……..

So recently, I have "watermarked" and "pass-word" protected (for sending via e-mail, which we do often) a few documents that could possibly be used to designate retention of our company, i.e., CV's. When asked for a CV and not yet retained, in my correspondence I note that, "When we are officially retained (i.e., signed Engagement Letter and/or retainer), I will be happy to send another clean copy of the CV, if needed". Additionally, signatures on the contract – only when both signatures; the attorney/firm representative or insurance company representative AND our company expert have signed the contract – is the contract valid. This must be stated in the contract itself.

Actually, I'm more concerned about the contract than the retainer. As mentioned in a previous e-mail from you Rosalie, there has to be some "gut" feeling too. If it's a client you work with continually- you know they're good for it – then that's that. But when working with new clients, and there is no working history, take measures to protect yourself. If DWP is done blatantly, i.e., without your permission and/or knowledge, this is needs to be addressed to the Florida Bar Association. You may lose a client/customer, but did you want them to being with – if this is how they do business? I say no.

This has also happened to me on a number of occasions that I know about. Once or twice I have just set bills to the attorney for my normal retainer fee. They laugh.

It would be a real service to publish the names of lawyers or firms who have done this – although I understand your probably reluctant to do so.

When you present my report without compensation to me, Don't think you got it for free, you should start to worry because I will get to you in a hurry. Feel free to spruce up this limerick.

You gave me food for thought in addition to having given me many lessons before. Because of you I designed a retainer agreement. Usually when a lawyer calls and asks for the CV I say I will email the CV with the retainer Agreement – both attached. As of yesterday I started putting a note in that email staying : "The attached CV may not be used for any professional use until a retainer agreement is signed and the retainer fee is paid." At least that way you can sue him for the retainer, I would imagine.

Ten minutes after your email came an attorney called and asked if he could list me as an expert prior to retaining me (i.e. for free). If the case does not settle soon, he will retain me. At least he asked for permission. This situation comes up a lot and deserves further discussion.

I would suggest to opposing counsel, if it were known to me who they were, that I was not asked to be an expert, just named. If they choose to retain me as well I would be happy to testify that I was never asked by the thieving counsel to be an expert.

I have had a number of cases where Attorneys have named [me] as an expert in letters to their clients and in the same letter asking me what my retainer fee would be, but then never following up with a retainer. The last time this happened I wrote to the Attorney informing him that if I did not receive my retainer fee within two working days I would phone his client and the insurance company against whom the claim was being made and inform them that I am not (and will not) be the expert on this case. Two days later, I received my retainer check.

Given my large staff, this event is common. (It is less common since I have been taking a no nonsense position.) In summary:
- I bill the criminal (I mean the attorney who committed perjury) $2000.00 in Sanctions. About ninety percent of the time, I collect it.
- I notify the other attorneys of record on the case of the bad act
- I notify the state Bar
- I share the names of the attorney with my fellow experts.

Should that attorney depose me in the future, I state their act on the record.
Bottom line, a lot less attorneys do this to me now compared to years ago.

I'm certain by now you have had dozens, if not hundreds, of responses outlining the legal action that can be taken by an expert whose name and reputation has been 'high jacked.' I am also certain that most responders will touch upon the difficulty of determining when, and if, such a theft of services has taken place. I doubt that I could add anything of significance to the insightful advice you will have already received. There is, however, one issue that I would like to focus upon.

As a method of marketing, almost every expert has registered with more than one internet service with makes his/her name, CV and sometimes fee schedule available to lawyers nationwide. Obviously, this is very beneficial from the standpoint of the experts, but it also, potentially, opens the door to a theft of professional identity.

I can think of no way to solve this problem; if indeed it is a problem. Perhaps this is a situation that falls into the category of "grin and bear it."

I was recently contacted by a [defendant's attorney]. After some discussion I agreed to review his case file, after I received a retained check. He noted during the conversation that I had once been retained by the opposing attorney in a similar matter.

Two weeks go by, no retainer check arrives, but I hear from the opposing (plaintiff) attorney who says that he had already named me in court filings as HIS expert and that the defendant was now opposing him using me on the basis of his (defendant attorney's) telephonic discussion with me two weeks earlier. Plaintiff attorney then tells me that he had "discussed" the case with me months ago and had "assumed" I was retained. I directed him to re-read my fee agreement where it specifically spells out that I may not be named as representative of a matter until I am PAID…

A check was immediately dispatched and a court battle begun over whether or not I was "tainted" by my telephone discussion of the case with defendant attorney. During out initial conversation I told the defendant attorney that I would agree to review the file for a minimum non-refundable fee; that I did not want to get involved in a detail discussion until I was retained.
In essence, this is what saved the day, at least for the Plaintiff Attorney. The judge ruled that he could use me.

Bottom line: My name is used fairly regularly without my consent and, often, I never find out about it. The only reason I caught this guy was because, luckily, both sides tried to retain me. A few times I learned of my "designation without retention" years later after an out-of-court settlement.

If someone out there has a way of preventing this without taking a lawyer to court, please advise. I suppose there was one lesson learned by accident: Don't discuss case particulars until you are paid.

Interestingly enough, I ended up taking an attorney to Small Claims Court and our hearing was yesterday. What I didn't expect was that each of us, myself as the Plaintiff, and the attorney from New York as the Defendant, was sworn in and each of us got to examine the other, under the rules established by the Court. This included Closing Arguments as well. Needless to say, this isn't something I expected, and I am awaiting the court's decision/verdict regarding this matter.

In this situation, the attorney received my proposal, fee schedule, and CV last June. In November, I received 19 documents and a letter asking me to review these materials. We placed a call to the attorney's office and we were informed a check was en route. Needless to say, after spending 7.5 hours reviewing the materials and developing my opinions, none of which were favorable to the attorney's case, we starting our collection process which included sending faxes of invoices and threats that we'd escalate our collection means if payment was not received for the 7.5 hours. The attorney refused to pay, which is why we took him to court yesterday.

Should we set up an "Attorney Watch List?

I don't know that it has happened to me. It's certainly theft. Frankly I don't know what you do about it.

I will be interested to hear the response. When I talked to the CA state bar about it, they said the expert should file a complaint. In CA, we [attorneys] must declare under penalty that the expert has agreed to testify. Therefore, if pushed far enough, the attorney could open him or herself up to perjury charges.

This may be formally unethical – the Rules of Professional Conduct for each state will tell you more. You can formally "grieve" or file a complaint against an attorney for unethical behavior. How this is done and who polices the legal community varies from state to state; however, the boards responsible for professional discipline take their duties seriously and on the whole I feel the profession is well regulated.

Here's the rub – a grievance filed is at least one less client, I suppose. Attorneys are human and they do gossip about their experts – I have heard them – and news about your complaint might get around in the legal community. You might sue in small claims court for the lost fees – but it might have a similar result, whether or not you win your case.

Perhaps the resolution lies in refusal to be the victim of theft. A call to the offender by you or your attorney could yield an apology, corrected behavior, or your rightful fees. At the very least you have taken some action to protect your business – believe me, attorneys would if they were in a similar situation! This is an appalling story, but one I have been expecting to hear sooner or later.

I am only aware of it happening to me on two occasions, neither within the past two years. I was told that the negotiations went easier if they thought I was on board. This attorney paid my retainer when the case settled.

I guess we should have some way to discover if we have been named as an expert. Seems they are stealing our reputation and knowledge and using that as a threat to their adversary. In addition, the adversary will not call us an expert because they think we are already retained by the other side. Definitely needs to be addressed. Maybe by the Florida Bar. I hate to see legislation regarding these issues; they always cover more than expected.

"We are surrounded by insurmountable opportunities." Pogo

This problem is not new! I first became aware of the practice about 20 years ago. I tried sending invoices after I learned this happened, but as should have been expected the thief did not pay and denied liability.

I have no real good solution other than to let the opposing side know of this unethical practice. I also do not send out my resume or CV to anyone who merely asks for it. I simply refer them to my website for general statements of services provided and qualifications. This doesn't stop the practice, but at least I'm not [encouraging] it. I do include the current copy after I have been retained along with my Fee Schedule and Conditions. Wherein it is succinctly stated that this practice is contrary to our conditions. I will provide copies of my Fee Schedule and Conditions freely in response to inquiries.

It is obvious that mere use of the names of known and reputable experts will have significant value for negotiating settlements. Use of such an expert's name deprives that expert of the possibility of being retained by the opposing side, gives him/her no compensation for the value received, is highly unethical, and if not illegal, laws should be changed to make it so.

Exposure of this practice, and of the individuals who do so, is the only way I know of dealing with it. It will not take care of the instance in which it happens, but it should help to curtail it in the future. In most regions the number of readily available forensic experts is not too large and most of us know how the major players are in our area. I believe in helping each other out by sharing names of the bad apples by word of mouth and unrecorded phone calls. Personally, I stop short of doing so in writing.

I had my first experience. I was told I was retained and we were trying to schedule a site visit that was always delayed. My non refundable retainer was not sent nor my agreement signed and returned. Then I got a call that the case was settled and I would not need a site visit.

I just sent them an invoice for the 2 hours I spent setting up a file, checking flight availability and phone time. I will let you know the outcome – I'm not holding my breath.

I like the clause they may not designate me unless retained. I will add that to my fee schedule.

First charge them, bill and go to collection. Second, a Bar Association complaint is often very helpful. Thirdly, a letter to opposing counsel or the court can be very damaging. All of this done appropriately and carefully, of course.

Simple, contact the state bar for your state, this will get the attorneys undivided attention, I assure you, works every time.

I have never seen this practice, but I think it would be actionable. I would think of making a complaint to the District Attorney. I would think of writing the cognizant District Attorney to request assistance in taking action or warning the cheating attorney, as well as consulting my own counselor. As I say, I have had no experience with this fraud!

I have had similar situations occur at least a couple of times per year. Not only is it stealing our income it can also be an embarrassment in Federal cases where you are required to disclose all cases in the last four years. You are put at a extreme disadvantage because you are defending your CV and attachments before you even get to present your Report.

I have had experiences in which I was listed on the IDEX.com database as having been involved with cases in which I was never retained. I only discovered this because an attorney assisting a major corporation in preparing for possible litigation contacted me, asking if I could review some toxicity data and possibly serve as an expert. Then he called back and said that his client had some concerns after reviewing the IDEX database which showed that I had been involved in certain cases. I asked for specifics, and to my surprise, the IDEX entries were *all* erroneous. I responded to the attorney as follows (with specific names removed):

Case 1. I have never been contacted by anyone about any litigation against XXXXX, and I should not have been listed as an expert or possible expert in any such litigation. I had talked

about another case with a plaintiff's firm, but they did not want to pay me for the time it would have taken for me to properly review the facts in their case, and I never heard more from them. I suspect that they named me in XXXXX case because they had the CV I had sent them previously.

Case 2. I called the defense attorney, D.B., and it turns out that the ZZZZZ case is part of the YYYYY litigation. However, although I have spoken with some of the defense attorneys, I have tno been retained by anyone in any of the included cases, and I do not know why I was in the IDEX database on this. It is rather puzzling as I do not recall ever having spoken with any plaintiff attorneys in this litigation, and can't imagine why I would be listed as a plaintiff's expert.

Case 3. I had spoken with an attorney for a defense firm, regarding AA et al. v BBBBB et al. and CCCCC et al., but have not been retained. I have never been involved in any litigation on behalf of the named plaintiff firm, X,Y & Z. I contacted someone with the IDEX database, explained the situation, and asked that the erroneous information be expunged from their records. I don't know if that actually happened, but I was ultimately retained by the attorney whose client had the initial concerns. However, I would not be at all surprised if I have been named in other cases without my knowledge or if more wrong information about me is now in the IDEX.com database.

If the case in which one has been named as an expert without one's consent is still in progress, I suspect that calling the situation to the attention of the opposing attorneys, the court, or both would cause great consternation for those who have improperly listed experts. ☺

It happens more often and it must be stopped. Your reader should simply report the lawyer to the local Bar Association since they are placed in the position to discipline lawyers. The action is one of the moral turpitude and will get the lawyer disciplined.

The last time it happened to me I learned of it when I was served with a deposition subpoena. I don't know how often it has happened when I am not told or do not learn by some other means.

Interesting timing, I had a version of this today, but it was almost the opposite. I was called by a plaintiff who was working *Pro Se* who was going into a mediation session and wanted permission to advise opposing counsel that he was "in the process" of retaining me. I had actually issued an engagement letter, which had not yet been signed and returned. I may end up "losing" the fees if he turns out to be successful, but I was able to make the decision as to telling him what he should and should not say in this regard.

Since the issue could explode in someone's face (if there was a case where you were touted as "their" expert and had actually been retained by the other side, or where the other side had "consulted" with you) it would seem to be clearly unethical, which could lead to disciplinary action. The original writer should check with his state bar or court system (whoever does the disciplinary actions) to see if there is a specific ruling on the issue. Certainly, putting an attorney

on notice in writing should also allow the expert to sue for damage if it was to occur, but again, an attorney would be in a better position to answer.

Something like that happened to me recently and we wrote a little article for our newsletter that we did not publish (yet).

My assistant took a call and sent out my resume and fee schedule to Associate Y at firm X. Partner P called a day later, left a voicemail. I called back and left a voicemail.

Then 2-4 weeks later I was called by a secretary at firm X. She asked me a question. I said I would need to know something about the case and if there might be a conflict. She has Associate Y call me back. He describes the case and I say that the matter is not something I'd want to get involved with, it was not directly in my sphere of expertise although as it was so basic, I could deal with it but I was far more then they needed and they could find someone at half my fee and who had the time and would love to do it, suggesting any manager of a property casualty agency would be fine. He says thank you it was a pleasure to talk with someone who was so candid.

Ten minutes later Secretary calls up and puts on Partner P. She apologizes but said they had named me and the deadline had passed to name new experts, the other expert they also named had a conflict and even though I was not anxious to do it would I please help them out. The retainer check is coming by Fedex (the amount is what was 2 days work several years ago and is still my minimum). The check cleared.

Check comes. File comes, I read the material and it is about as bad a case as I ever saw. Partners come to my office to interview me. I tell them their case sucks. They spent weeks taking depositions and countless dollars. I ask them why did you take this case – you're an insurance defense firm that is handling a plaintiff in an XXX matter against a major XXX defense firm. They acknowledge it is weak, it's not what they do ("but we do know how to work a file") and attribute the matter to a former associate who persuaded the firm to take it on as a favor and then moved out of state.

IS there anything in the file I can say that may help them? Not in what I saw so far but there are new transcripts and I'll take a look. The new depos are even worse [and I tell them] I can't see anything to help. Do I know anyone who might be able to help. No, the only people I associate with are competent and honest and I can't imagine anyone could help them. I felt like saying perhaps OJ needs some work. (No, I did not say that.)

They call back and say they are not going to be using an expert at trial and "thank you" we needed a reality check. We are in settlement talks.

Had I not had a fee minimum and a retainer up front, and I charged by the hour, I would have earned about half the minimum, even if they paid.

To the expert whose expertise was alleged to have been stolen by the attorney:

I have experienced this situation several times before in my career. In my opinion, this constitutes theft of the expert's services and is in my opinion evidence of unethical conduct. Attorneys take an oath to uphold high ethical standards in their work. This action, in my opinion, is clearly outside the realm of ethical practice.

I have found that a conversation with the attorney explaining that you need to be paid your minimum retainer for using your name to settle his case is required. Usually, this will work. If this doesn't work, a call followed with a strong, well written letter detailing the alleged unprofessional conduct sent to the attorney's bar association has been very effective. Two attorneys who have attempted this stunt with me have received a suspension of their licenses.

Another approach that I have taken is to take up a legal action in the form of a lawsuit against the attorney in small claims court. It is easy to do, time consuming, although the odds of you winning are not with you. The attorney will often not show at court, by faxing the court and asking for an adjournment without telling you. It may take several appearances before case is heard. Worse, it has been my personal experience, perhaps, over generalized, that judges in these courts (often practicing attorneys by day and judges at night) are more likely to try to help the fellow attorney, than the expert by siding with his case. Bringing an attorney is helpful but may not be cost justified.

However, the good news is if you get a judgment against the attorney, it is much more likely that he will receive sanctions including possible suspension of his/her license when this is presented to the bar association.

Put your complaint to the bar in writing. Get a copy of the oath or canons of ethical practice supported by the bar association in writing for your presentation of the case. Request that the matter be investigated and responded to in writing.

For me it is a matter of right and wrong and not just a matter of the loss in earnings allegedly stolen by the offending attorney. Therefore, in deciding a path of action for your case, you must consider if the personal loss of time involved in pursuing the matter outweighs the chance, probably 50/50, of you being reimbursed for the stolen income thorough legal actions. If the loss in income is your only concern, you probably would be better to avoid spending time to pursue the matter legally as the same time spent on working on other cases would probably be much better spent in terms of dollars recovered. It is important to learn to pick your battles.

There are several matters to be considered on the matter of designation of expert witnesses, without contractual agreement with the expert.
#1 an expert does not want to be used and use of his or her name as an expert when not retained constitutes a theft of services possibly, along with several possible civil remedies (see below).

#2 an expert does not want to become offensive to the extent that they get on lists as a ‘hothead’ "so don’t even use this expert" (there are no such lists I’m sure, but I’m talking about word of mouth).

Therefore, upon learning that one has been designated, without consultation, a form letter should be used. If there is a formal ‘Expert Association’ (which I am unaware if there is such an organization – if not, maybe I should start one), such organization should have a ‘policy statement’ or ‘creed’ or some form of standard language, so that it is not the ‘expert’ who is saying those things, but the trade association policy, which could then be sent out with a courteous letter.

Such ‘policy’ or other ‘manifesto’ or such, should state with specificity:
1. an expert may not be designated, unless there is a contract with that expert for the expert’s services. 2. designation of a member, as an expert, without contract, is a civil tort for theft of the services of the expert, and hence is actionable at civil law. 3. that a member of the Association is mandated, if this occurs and after contacting the offending attorney to notify such attorney of the Association is mandated, if this occurs and after contacting the offending attorney to notify such attorney of the Association’s position and allowing the attorney to notify the Court and opposing counsel that such attorney did not have the right to list that expert OR in the alternative, to retain and pay the expert for use of the expert. Upon failure of the attorney to respond in a suitable manner in one of these two ways, should then result in the expert notifying the State Bar Association Grievance Committee of the actions of the attorney. Each state has certain elements in the Grievance articles, and the one or ones appropriate to this violation, should be cited, so as to give legal authority for filing the grievance.

I believe most State Bar Associations, made up of professionals themselves, will see the merit in not allowing member attorneys to utilize the services of experts, by listing such expert as designated, when in fact they have not been so designated.

Another matter might make this more palatable. In many cases, the amount in controversy may not make the use of an expert initially, something that a conscientious attorney feels he can do to his client. Therefore, experts may have a stair-stepped fee arrangement, whereby they may be retained, a reasonable fee paid, with provision, that if services of a certain level thereafter are not needed, a prompt refund of a certain amount will be made. This guarantees the higher fee is in hand before the expert allows the use of his or her name, as the designated expert, but allows the attorney to know if he or she can get the case promptly settled without having to go into extensive expert services, that the expert fee is not going to be so large that the attorney cannot retain an expert at all. I hope these suggestions are helpful. Thank you.

The complaint of DWP has happened to me a number of times, and according to the Code of Civil Procedures 2034 (Deering’s California 1993-1994) the designation of an expert has to signed only by the attorney designating that expert, but it must contain “(C) a representation that the expert has agreed to testify at the trial.” This declaration shall be under the penalty of perjury…”

In an incident going back a number of years, an attorney in California designated me as an expert in a slip and fall case and I had no knowledge of the designation until I received a notice to appear at a deposition. I called the designating attorney and he indicated that I had agreed to be designated in a phone call we had the previous December. I said I didn't remember the call, but if he would send a copy of his telephone invoice from December, showing my number, I would appear at the deposition. I also told him he owed me a designation fee but he refused to agree to payment. I then told him I was going to file a complaint against him with the California State bar Association and he told me, if I did so, he would sue me in court. (He never mailed the phone invoice to me.)

While I was preparing the complaint, I received a letter from this attorney, again repeating his threat to take me to court, if I filed the complaint with the State Bar. I put a copy of the letter in the complaint which I mailed to the State Bar. Some time later, a State Bar representative called me and told me they could do nothing about the complaint, because they were short-handed and overloaded with work.

I then filed a complaint in the Small Claims Court in XXXX, California in which I appeared at the appropriate time, but the attorney did not appear. Instead he sent his wife who was also an attorney. The judge however, ruled against her giving testimony because she did not work for the attorney's firm. The judge ruled in my favor, but warned me that the attorney could ask for another appearance to argue against the award. The attorney did file for a second appearance, but when I entered the court area on the second date, he was not there, but his wife was. The minute she saw me, she left the court house. My assumption was that she was there, to see if I would appear. If I didn't appear, she would call her husband, who would then hustle over to the court from his nearby office to argue against my claim.

At my second appearance, the judge again ruled in my favor, but I had to get my own attorney to write a threatening letter in order to finally collect my money. The entire procedure lasted for over a year.

I was the original founder and first president of the Forensic Expert Witness Association (Initially called the Forensic Consultant's Association of Orange County.) I formed that organization to fight such excesses that attorneys take when using Expert Witnesses. I am still a member but do not participate in any of the activities because of the long distance my office is from FEWA Orange County. Although FEWA is growing, nothing much has happened in the area I discussed. I hope that FEWA and other like organizations will someday address this problem, and others like it, to give strength to the Expert Witness cause.

This has happened to me on at least three occasions that I know about.
Since becoming aware of the problem (about five years ago), I specifically let the attorney(s) know on our first contact that they are NOT to declare me their expert without signing my agreement and providing the non-refundable retainer noted in the agreement. I say this as nicely as I can.

Usually, after this is said, there is silence on the other end of the line, but once in a while the attorney will say that he/she would never do that. By then, of course, they already have my CV and agreement, so they are aware of the dynamics at work and must make a decision as to what they want to do.

I suspect that this up-front honesty has caused some attorneys not to engage me because they think I am too up-tight or rigid, yet I am sure that my name has been declared as an expert more times than I know about. My expert witness work is very industry-specific and focused, which is both a blessing and a curse in regard to this issue.

I have no fail-safe solution to this problem an, in fact, believe it happened to me in the past week – coincidental to your email broadcast. I'd be interest in hearing about solutions from others in your network.

Yes, I have had this happen. It took too much time to track down the case and confirm the designation, the attorney called and indicated they would designate and I informed them they could not without a retainer. I have a minimum fee required if I am designated and never used for any other purpose. Any suggestions on this matter would be great.

While I don't run into this problem of designating me as an expert without my knowledge, a thought or two come to mind:

Put a "Designation Fee" on the fee schedule. The supporting language can include rules that protect the right to bill when designated, yet not offend the forthright client who will pay the fees. Then invoice when you find out that name has been used without consent. The Fee should be sufficient to accommodate normal billing if the case is legitimate, but prohibitive [penalty] if not.

Include language on the fee schedule that you only consider yourself designated when formally agreed in writing. A statement that allows you to settle all conflicts, such as which party you represent, may be a barrier to improper usage; lawyers don't like to name experts who may be representing the other side.

You could go to the Bar Association that governs the attorney(s) that have named you in the past. A letter to them, opposing counsel and to the judge in the case should shake things up. Exposing wrongdoing will have a tendency to stop the practice, however it may stop referrals as well.

I have never had the situation that he happen to me. I think it would help if all the experts would come up with the basically the same format for fee agreements and stick too it then we could at least present a standard of sorts that all attorneys have to go by. Just a thought.

I can only agree: I do have the same situation frequently. My reaction has become, that I never send a CV and/or fee schedule without having received a brief outline of a respective case and without having responded that I would be interested in accepting instruction according to our conditions.

Thank you for this email. It has never happened to me that I know of but frequently attys act surprised that a fee is required. Moreover, clients of attys are clueless, and don't understand that declaring an [expert] means that you are hiring an [expert]. I think this is an important issue and that it needs attention. What do they teach them in law school anyway?

Tell this expert to contact the court in which suit was filed and tell the judge, in writing, the full story. Also, contact opposing counsel and tell him, in writing, the full story.

I have had this happen one time and I sent opposing counsel an affidavit stating that I had not been retained. This not only put a stop to this practice with this attorney, but it placed him in an uncomfortable position with the court.

When word gets out that the expert will take action that will be embarrassing to attorneys who practice this chicanery, the practice will cease.

I have a quick tale on point. Approximately four month ago I received a call from a potential client who was "the other" spouse in a domestic relations case ... Her husband was the boyfriend of the wife of the original client who retained us to perform a significant amount of ... forensic analysis and expert testimony in court. The potential client stated that she received my report and evidence from my original client and that she needed to have me designated as an expert witness by the following day. I emailed my contract which requires a retainer.

I received a call from the original client a couple weeks later. I advised him that he should talk to the potential client and advise them that my analysis was not relevant to their specific case and that I was tempted to write a letter to both legal teams stating that I was not retained.

Approximately a month later, the potential client re-contacted me and stated that she never received my contract. This surprised me because I never received a notification that the email was not received. The potential client stated that she needed to execute the contract because the court date was coming up. It was obvious that she was holding out to see if the case would settle off of our good name prior to paying our retainer.

I executed the contract and testified on the new clients behalf but felt a level of distrust knowing that my services would not be retained had they settled. Additionally, I was not fully prepared

since I was not advise to conduct any case specific analysis and only testified off of the original report.

The problem of my name being used as an expert for a case without ever even calling me has happened to me. On one occasion I caught it, and I wouldn't doubt if it has been done of a number of other occasions that I have no knowledge of. I don't have an answer and would be interested in whatever you come up with from others.

I too have the details re my fees and services, retainer, etc., that I send along with a vita when I am contacted re a case within my area of expertise. I too also state that my vita, etc. may not be used without my services being retained and my retainer fee being paid. There remain the sleezes that use this information, declare me as their expert, prevail in the particular case and hope I never find out what happened. Now, for all contacts, I have the attorney send to me, via fax or e-mail, the identity of the case, a summary of the case and a request for my help/services.

One problem I had was with attorneys calling me at the last minute, wanting to use me as their expert… and then, again, using my credentials to attempt to prevail in a case before trial. I have almost stopped that by not responding to last minute calls as I feel that those attorneys may be losers to begin with…and I may never get paid if they use my credentials.

One other scam, in my opinion, is being called by an attorney or broker for an attorney well in advance of the trial date and wanting my help re a case. In this scenario the attorney seems to be the good, "on the ball," well prepared, organized, ethical, etc. then, after reviewing the case materials and giving the attorney sufficient help to prevail (before or at trial), having the attorney settle the case (perhaps the award being very large, to cover all of the plaintiff's past, current and future medical costs and other possible losses, etc.), and the attorney receiving his/her "big" payoff. Then, despite having told the attorney to allow for my expert fees to be covered by the settlement, having the attorney not wanting to cover my fees or only to pay a token payment re my fees… claiming I was never declared to be his/her expert, therefore I do not warrant my expert fees. Next, after threatening to take the attorney to small claims court and to file a professional complaint, the attorney wants to pay some much smaller fee than due to fully settle with me… while keeping most of the $ I earned to provide him/her with the information he/she needed to help assure the plaintiff would prevail before or at trial.

My answer to this, after getting burned, is to let anyone who contacts me, needing and wanting my expertise to (a) send to me a note on their letterhead requesting my vita and fees, noting my retainer must be paid if my vita is used in the case; (b) if asked to do work for an attorney, I have the attorney send an official letter noting that I am being retained for this work and will be paid for my work at my fee schedule as an expert (in my area) before I do any work for them, and (c) I have them pay my retainer to do expert work for them before I give them any information.

I believe that's about all an expert can do… and have the "guts" to file a court claim and a complaint with the state bar vs. the attorney if he/she does not perform re the agreement. Most

attorneys are good, honest and hold up their end of the agreement; however, I believe that if one let's any attorney get away with "cheating" an expert for personal gain, the attorney will continue this practice until stopped. Thanks for allowing this input.

"Thievery" is a big word, and in legal proceedings for which experts are used, such a word would technically "call for a legal conclusion" which experts are usually excluded from making. It is a word which is way to incendiary and pejorative! Among experts, I would agree that when experts are "designated without permission," or DWP, an improper, immoral, and unethical act has occurred. In my experience, in a courtroom such an act is usually relegated to a mistake or an oversight. Due to this disconnect, it is worth considering the genesis of such mistakes and identifying the patterns that may give clues to the greater situation of the expert.

DWP has occurred to me way more times than I can count. Over time, experts become more secure in the work they do with respect to the **expert** part of their profession, trade, practice or specialty. With wisdom to guide and train us, and time and experience to see **beyond** the issues of a given project, experts naturally become more accustomed to the terminology, the fight, the parties, the stages of litigation, the consequences of their actions and inactions, and the individual needs of their clients.

Given sufficient depositions and enough trial preparation events, an epiphany often develops in the expert's life that reveals there is **something more** than the apparent or plain motives and personality types of those they serve. Revelation and consideration of the wide range of **client** [the attorney client(s) and the represented party (ies)] **motives** need to be gained by the expert. At first, these epiphanies reveal the great indignation of DWPs. Thereafter, the expert should carefully consider client motives with respect to significance of the case, its moral and dollar value, the import of the part of expert plays, the project's budgetary needs, demands for expediency, the client's strategy and its implications, attorney prestige and (vast and unknown) relationships, likelihood for it to go to deposition or trial, client willingness or desire to skirt deadlines or other presumptive rules, whether legal, special or actual, and other proclivities the client may have.

Such considerations make it easier to recognize strategies, shortcuts and/or cost saving techniques employed by some attorneys (and/or their offices) who are, may be, presume or otherwise think they are our clients. As the expert's understanding of the process matures AND as such client methods and motives are truly understood, they become much easier to recognize, **and then** to understand. Then, such recognition grows concerning the forces and objectionable practices which have always been present; they are finally identified and can be articulated by the maturing expert. A pattern of and motive for the taking of shortcuts then becomes very evident even with new clients and arguments. Finally, a heightened understanding usually diffuses the indignation and outrage of the expert about the DWP.

Specifically, in answer to your questions, the incidence rate of improper designation of experts is not up, its practice has been around as long as there have been experts and case law. It increases with logjams in the court that delay proceedings seemingly without end. It increases as the

percentage of cases that go to trial falls. (Fewer than 2 cases in 100 result in a trial, and trials, after all, are the fundamental reasons experts are retained and designated.) With new sorts of litigation, new experts, and more litigation, DWP has the same rate, but more cases and people are around to recognize it!

Every expert needs to toughen up and realize that this may happen, an practically speaking, there is little that can be done to prevent it, though each jurisdiction has different degrees of tolerating and/or punishing improper acts. If the experts uses his most overt powers, like suing the errant attorney in small claims court or making a direct claim against his license through the relevant bar association, there may or may not be monetary justice. There will be widespread recognition of the expert who brings such action, and that expert's reputation may or may not be enhanced, and may or may not be worsened. An expert who responds in such a manner may not like the results monetarily or professionally: he will certainly dislike the potential adverse affect on his business and reputation. Many times experts are sued for malpractice when they challenge their (apparent) attorney clients in court or in bar complaints. In such instances, the costs of defense of that expert pale in comparison to those of the errant attorney.

Alternatively, the wise expert may note that when an attorney makes a designation of experts, he does so under an oath of perjury he makes to the court, generally validating to the court that he has contacted the expert and that the expert is willing to, and he will be prepared to testify. Most attorneys do not want to risk the embarrassment of revealing perjury in front of the trial judge. The cost of paying the (disputed) retention fee is smaller that the consequences of dealing with the judge. Once known or presumed to exist, most designations are fairly easy to get. At such a time as the judge may find out about the situation, the errant attorney is usually willing to pay the subject fees, rather than have the court involved in some distraction which may show that the office of the errant "attorney made a clerical mistake " or some such thing. I have found in such occasions that payment is forthcoming prior to some showing of some presumed "technical mistake."

If the expert believes that the lost revenues are preventable, and are worth fighting about, he needs to make sure that his standard retainer and fee agreement defines the situation, and includes all the time dealing with the attorney's mistake situation and some reasonable amount for the designation. But the cost of lost business and gaining the reputation for having an "uncooperative attitude" should be weighed in as well. Another solution is to make your clean CV less readily available for use, and that the advertising CV shows some watermark that says the CV has not been released for inclusion into a designation. Some experts turn the offense into a new client using forgiveness and gaining a promise of future paying work.

Whatever the strategy, there is much more to consider than apparently lost fees and the indignation factor.

Your DWP blurb sure was timely. I just received, yesterday, a subpoena to appear for deposition on a case on which I have absolutely no knowledge. I have never had a conversation with any of the attorneys on this case nor have I ever heard of this case.

Earlier this year I had something similar happen in which an attorney sent me a notice that my deposition was taken off calendar. This was extremely interesting to me considering I had a conversation with the opposing attorney, but no verbal or written engagement materialized. The attorney simply asked me about my rates and indicated she would get back to me. I did send an e-mail to complain and the attorney was very vague in her response.

It seems to me that if we are being used as bargaining chips in matters that have financial consequences, we should be given some compensation since our names and likenesses carry some amount of goodwill, which likely motivates an early settlement.

In my Agreement For Services I state a designation fee of $1,000. I have had a couple of attorneys try to fight this but I have collected on most.

We have just about stop sending out CV's unless we first talk to the attorney and (feel them out) so-to-speak.

Yet at least 3 times this year I have received calls from people wanting to know our address to send documents about cases that we know nothing about, yet we have been named experts in these cases. After talking this over with our attorney we are waiting until it happens again then we will file a grievance with the State Bar Association against the attorney. If anyone has a better answer we would love to hear it.

What action can you take when you are stiffed by a lawyer. Will reporting him to the ABA do any good?

I was surprised to receive a request from a defense attorney ... for dates to take my depo. I had not heard of the case or the plaintiff's attorney, and had not been retained by him. The defendant was a company in a trial at which I had testified two years earlier with a favorable jury verdict for my attorney/client and the plaintiff. Obviously the unethical attorney must have liked my effort and listed me as his expert without any contact with me.

Thank you so much for addressing this in your forum. I have knowingly had trouble with DWP since about 10 years ago. It seems to be a curse on the experts with the more formidable reputations; probably with the idea that the expert's name alone will help settle the case.
I have developed the following protections for myself, but I would love to hear about other ideas. While a brief version of my c.v. appears on my website, it has been restricted so that it cannot be printed out (tested by 20-something year olds).

My statement of fees lists an "Expert Witness Designation Fee" and says that my name may not be submitted without my having agreed to accept the case, my receipt of a signed contract between us to that effect, and my receipt of the required retainer for the project, or I will pursue them for the damages.

When I receive a mysterious subpoena from the other side, or when a colleague casually mentions that we are opposite sides of an upcoming case, I immediately telephone the opposing attorney and tell them the truth: that I have never heard of the case. I then ask them to immediately FAX me a copy of the designation statement where the offending attorney has sworn under penalty of perjury that I am prepared to testify about the matter. They are always delighted to do it since the opposing attorney is unexpectedly in a better position than before my call.

I then telephone and write to the liar, telling him that he owes me my designation fee, that I will not take his case, and if I do not receive my witness designation fee, I will turn him in to the Bar Association and pursue him in Small Claims Court. I have always gotten my money.

But the big question is: how many of these designations of my name are made that I never find out about? I really should turn the bad guys into the Bar Association anyway, shouldn't I?

An attorney sent me a $1000 retainer after talking about sending it for about a month. He did not send any documents. The next afternoon, he called to say the case had settled. His comment--"That's the easiest thousand you ever made." Which I found insulting and untrue. Without thinking, I responded, "I'll return the check." He said, "Well, keep something--how about $250?" Later, it occurred to me that he probably used my reputation and CV to settle, in which case he really owes me the whole fee, but I doubt he'll tell the truth if I ask him if that's what happened.

FYI with regard to designation without permission. In response to this type of problem, a portion of our otherwise refundable retainer is designated as not refundable if I am identified to any third party as having been consulted by my client. In one instance, a client of ours was told I was working for his opposition, with whom I had a social relationship, but not a business relationship. In this instance I sent a letter to the offending individual detailing the situation and instructing him not to repeat the offense, My client was copied on the letter, but the deception had gone on long enough that my client had retained another expert and our relationship was permanently damaged.

This issue relates to another problem -- a request for consultation (for free or otherwise) with the intent of conflicting us to prevent our working for the opposition. Some attorneys and firms appear to engage in this practice as a matter of course. Since we work in a narrow field, they could easily and inexpensively conflict many, if not all, of the most experienced experts who might be asked to work against them. Some have even tried to do this with a short phone call beginning with "I want to tell you about my case, but of course this is confidential." I then decide

whether to accept this condition or not. My usual response is to request that they speak in terms of a hypothetical and not tell me anything that they consider to be confidential or otherwise protected.

It would be interesting to know the individuals or firms that have done this to others. I have not had this problem arise in conversations with in-house corporate contacts whether attorneys or not.

This has happened to me infrequently, and in one instance, disturbingly. A few months ago I got a call from an attorney about a matter. After he told me a little about the case, I asked him the name of opposing counsel. Turns out it was a lawyer with whom I was currently working on a totally unrelated case. I told him of the situation and that I usually don't accept engagements when opposing counsel is or has been a client, but I'd consider asking the other attorney if it was okay with him. The potential client said he'd think about it and call me back.

Well, an hour later he called me back to let me know he'd just received his mail and in it was an expert witness designation pleading from the other attorney who had named me as his expert in the case. I was flabbergasted because I knew nothing about it. I saw the other attorney a couple of days later and asked him about it. He started to deny it, but I'd downloaded a copy of the pleading, so I had him dead to rights. He said he was sure the case would settle before he needed me to do any work and was going to tell me if it didn't go that way and he needed me later, sort of an insurance policy. He actually thought it was no big deal and a common practice among lawyers. I finished the case we had together, but turned him down the next time he called. I think he knows why.

Of course, the other side of the coin is there may be some work down the line; you've just got to ask yourself if you're willing to put up with this type of nonsense to get it. And, then, there's the risk of discovering a conflict of interest or an inability to do the work and then you've got a real mess on your hands.

I won't accept work on these terms and I don't think there are many of us who would, but other than getting this issue on front of the litigation section of the state bar to get the word out, I don't think there is much that can be done except on a case-by-case basis.

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www.rottenlawyers.com is the place these lawyers need to be listed.

I'm not a lawyer but it sounds like "officers of the court are perpetrating a fraud" which could be grounds for some reprimand from the bench up to being disbarred. There are potential felonious behavior charges which can be brought as well.

Put a line in the other office documentation that you intend to sue for "theft of services" if you are named without pay, since the attorney is utilizing your name and expertise and CV.

... It may be appropriate to have a review by one of the expert organizations of how "designation without permission" can be monitored and penalized, and whether stronger regulations (or an attorney awareness campaign) are needed to make this possible. This might also help experts feel more comfortable adding a nonrefundable clause to their contracts so that this became an industry-wide standard.

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