

## PROTECTING ATTORNEY-EXPERT COMMUNICATIONS, AVOIDING INADVERTENT DISCLOSURES, AND RELATED ISSUES

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### INTRODUCTION

Forensic accountants, forensic economists, valuation analysts and other financial experts retained to provide assistance in commercial litigation generally perform one of two fundamentally different roles:

- testifying expert—to give opinions during the course of the trial, or
- consulting expert—to advise the attorney about the facts, theory, strategy, and appropriate measure of (for example) economic damages or lost profits. In this role, the expert serves as an adjunct to the attorney who is rendering legal services.

This dichotomy of roles requires the financial expert to clearly identify his or her client as either (1) the law firm rendering legal services to the litigant or (2) the litigant. A great deal of care should be given to keeping these roles separate, particularly in light of the ever-evolving issues surrounding the legal concepts of (1) the attorney-client privilege and (2) the work product doctrine.

Generally, the consulting expert's communications and work product will be protected and nondiscoverable. In contrast, the communications, work product, and other sources of information considered by a testifying expert in rendering his or her opinion are properly discoverable.

There are, however, many scenarios in which the issue of privilege is unclear, resulting in conflicting court decisions in different jurisdictions. In navigating the murky waters of both (1) the attorney-client privilege and (2) the work product doctrine, financial experts should be cognizant of a myriad of practical issues. Several of these issues are described below.

### THE PRIVILEGE AND THE DUTY TO DISCLOSE

#### REQUIRED DISCLOSURES OF EXPERT INFORMATION

The Federal Rules of Evidence require specific disclosures to be made with respect to testifying experts. The purposes of these disclosures are (1) to afford the litigant parties a reasonable opportunity to prepare effective cross-examinations and (2) to arrange for the testimony of other experts, if necessary.

Therefore, in accordance with these purposes, the required disclosures are fairly comprehensive.

Rule 26 of the Federal Rules of Civil Procedure sets forth the requirements governing the disclosure of expert testimony. Generally, disclosure of the identity of an individual retained to provide expert testimony must be accompanied by a written report signed by the expert. This is true unless the parties stipulate otherwise or the court issues an order directing otherwise.

Rule 26 requires that specific information be disclosed in the expert witness written report. The expert report must contain the following information:

1. a complete statement of all his or her opinions, including the basis and reasons therefore;
2. the data or other information considered by the expert witness in forming those opinions;
3. exhibits to be used as a summary of, or support for, those opinions;
4. the professional qualifications of the expert witness, including a list of publications authored by the witness within the preceding ten (10) years;
5. a list of any other cases in which the witness has testified as an expert, either at trial or at deposition, within the preceding four (4) years; and
6. the compensation, monetary or otherwise, to be paid for the expert's testimony.

The testifying expert's disclosure is designed to be detailed and comprehensive in order to (1) avoid unfair surprises and (2) conserve resources. In addition, the expert report is designed to be written in such a way as to reflect the testimony to be given by the expert witness.

Generally, the court prescribes a time for the disclosure of experts and their reports in the court's scheduling order. However, in the absence of a court order, the expert disclosure is generally required to be made 90 days prior to the date of trial.

#### ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects from disclosure any confidential communications between an attorney and his or her

client. The attorney-client privilege applies where the attorney is acting in his or her professional capacity for purposes of providing legal advice to the client. The purpose of the attorney-client privilege is to encourage full and candid communication between a party and its counsel so as to enable an attorney to provide informed and sound legal advice.<sup>1</sup>

If an otherwise privileged communication is disclosed to a third party, however, the attorney-client privilege is waived. This is true regardless of whether the disclosure was explicit, intentional, or inadvertent. An exception to this general rule of waiver is where the information is provided to an attorney's agent for purposes of interpretation and analysis in connection with the client's legal representation.<sup>2</sup>

Known as the "common interest rule," this exception serves to protect the confidentiality of communications with a third-party representative, such as a financial expert, who is retained (1) in furtherance of a joint, strategic legal effort and (2) to assist the attorney in rendering legal advice.

#### WORK PRODUCT DOCTRINE

Rule 26 of the Federal Rules of Civil Procedure (1) sets forth the scope of the work product doctrine and (2) protects from discovery tangible things, or documents, containing mental impressions, conclusions, opinions, or legal theories concerning litigation. In order to invoke the work product doctrine, a party must demonstrate that the information sought to be protected from disclosure was prepared or created "in anticipation of litigation," or, put another way, created because of existing or expected litigation.<sup>3</sup>

Unlike the attorney-client privilege, the work product doctrine is not a privilege. Therefore, the prohibition to access to these materials may be overcome. Rule 26 specifically allows disclosure of work product upon a showing of (1) a substantial need for the material for the preparation of a party's case (2) where there would be undue hardship in obtaining the information elsewhere.

The protection afforded by the work product doctrine is not limited to the mental impressions and theories of an attorney, often referred to as "core" work product. Rather, the work product doctrine also protects materials prepared by the party itself or its representative.<sup>4</sup>

This tenet necessarily accounts for the exchange of ideas and strategies between attorneys and consulting experts with whom an attorney may consult in order to aid in the presentation of a case.

#### ISSUES RELATED TO EXPERT COMMUNICATIONS

The protections afforded by (1) the attorney-client privilege and (2) the work product doctrine are not absolute. Indeed, there are a myriad of ways in which to waive either privilege. For example, a party may not partially disclose communica-

tions protected by the attorney-client privilege. A party's disclosure of a communication regarding a particular topic or subject area constitutes a waiver of all other privileged communications regarding that subject.<sup>5</sup>

Such waiver is premised on the belief that it would be fundamentally unfair to allow a party to disclose select communications while asserting the attorney-client privilege to prevent the disclosure of other less favorable information. In essence, subject matter waiver prevents (1) such self-serving disclosures and (2) the use of the attorney-client privilege as both a sword and a shield.

Work product may likely be discoverable, and constitute admissible evidence, if a party makes evidentiary use of its substance, particularly when shared with an expert. As previously discussed, the expert disclosure requirements of Rule 26 prescribe, rather specifically, what expert information must be disclosed, including any data or information considered by, but not necessarily relied upon, a testifying expert.

The conflict between (1) the liberal discovery requirements of the Federal Rules and (2) the work product doctrine has resulted in a sharp divergence among federal courts. This conflict has been in the context of whether the doctrine protects work product materials provided to a testifying expert.

One judicial conclusion is a bright line rule in favor of disclosure. Given the obligation under Rule 26 to disclose any data or other information considered by a testifying expert, a party may not assert a claim of privilege with respect to materials provided to an expert witness. This is true for materials used in forming his or her opinion—regardless of whether the information was ultimately relied upon by the expert witness.<sup>6</sup>

In adopting this rule, some courts have relied upon policy reasons underlying disclosure, such as affording an adequate opportunity (1) to prepare effective cross-examinations, (2) to avoid unfair surprise, and (3) to provide overall trial efficiency.

Other courts, however, have ruled that an attorney's mental impressions and legal theories remain protected by the work product doctrine—notwithstanding their disclosure to a testifying expert. This judicial view affords greater weight to the underlying purpose of the work product doctrine, namely: to preserve a zone of privacy protecting the development of legal theories and strategies from an attorney's adversaries. These courts have opted to distinguish the facts supplied to an expert from core work product, ordering disclosure of the former while protecting the latter from disclosure.

In light of these competing interests and the resulting opposing views, there is no steadfast rule concerning the protection of work product when these materials are disclosed to a testifying expert. Attorneys and experts alike should be cognizant of the danger of proceeding under the assumption that materials exchanged between them are protected by the work product doctrine.

The attorney and the expert may discover that the exchanged materials are not protected, resulting in their disclosure to an adversary. Therefore, to ensure the protection

and integrity of work product materials, an attorney is effectively left with the option of choosing not to share any work product materials with the testifying expert.

It is important to note, however, that the disclosure requirements under the Federal Rules of Civil Procedure only apply to testifying witnesses. Therefore, to the extent that an expert is retained in a nontestifying capacity—that is, as a consultant—no disclosures are required.

If an expert is retained in both a consultative capacity and a testifying capacity, the work product doctrine may be invoked to protect material completed by the expert in his or her role as a consultant. Nonetheless, there should be a clear distinction between these two roles (that of a consultant and that of a testifying expert).

As the Federal Rules provide for liberal discovery, any ambiguity will likely be resolved in favor of permitting discovery.<sup>7</sup>

## PRACTICAL CONSIDERATIONS

### RETENTION

It is imperative that the expert clearly understand the type of engagement he or she is embarking upon, whether it be in a consulting or testifying capacity. The expert should be extremely cautious if there is a potential that his or her retention may be converted from a consulting assignment to a testifying assignment.

Should that possibility exist, it would be wise to identify (1) one member of the expert's firm as a consultant and (2) another member of the firm as the testifying expert. And, a "Chinese wall" should be created to preclude the possibility of communication between the two experts.

On a practical level, however, experienced attorneys may prefer to have the consultant and testifying experts reside in two separate firms. This would avoid the possibility of actions that may appear to waive the attorney-client privilege or work product doctrine.

The expert should also have separate letters for consulting and testifying engagements which clearly set forth (1) the nature of the engagement and (2) the type of services to be rendered. The AICPA Technical Practice Aid #95-2, "Communicating Understandings in Litigation Services: Engagement Letters," is a valuable repository of sample engagement letters covering a myriad of different litigation assignments.

It is also recommended that the criteria outlined in *United States v. Kovel*<sup>8</sup> be included in all litigation support consulting expert letters.

Generally, when an expert is retained in a consulting capacity, the expert will bill counsel and counsel will treat the expert fees as disbursements. Counsel will, in turn, bill his client for the disbursed expert fees. With this arrangement, however, the

expert's fees can sometimes go unpaid (1) if the client discharges the attorney or (2) if the outcome of the litigation is not favorable to the expert's side.

Expert fees can also go unpaid if the client disavows responsibility for the retention of the consulting expert by effectively asserting that the attorney, not the client, retained the expert. These billing difficulties can sometimes be avoided by having the client sign an acknowledgement of the terms of the engagement with counsel. This signed acknowledgement may be on the face of the engagement letter between the attorney and the consulting expert.

Finally, contingent fees should be avoided in any litigation assignment so as to maintain the credibility and independence of the financial expert. It is also important that the financial expert ascertain that he has (1) the necessary skill level and (2) the appropriate credentials and experience to accept and perform the assignment.

### BILLINGS

Both (1) billings to clients and (2) related engagement letters for testifying experts are generally discoverable. Experts are often put on the horns of a dilemma in describing their services in their invoices rendered during the course of a case.

Some clients require detailed invoices outlining, step-by-step, day-to-day, to every tenth of an hour, what the expert has done. However, these detailed billing statements may prematurely disclose the strategy roadmap and theory of the case. Therefore, both legal counsel and counsel's client should be forewarned about this problem.

In one particular matter, an expert alleged that he was the author of a crucial, detailed financial memorandum setting forth certain opinions. However, the expert's very detailed invoices, which specified precisely each task performed, revealed that there were no billings for the preparation of this memorandum. Upon subsequent cross-examination, the expert admitted (1) that the memorandum was, in fact, prepared by counsel and (2) that he merely adopted his opinions from counsel. The expert was hoisted on the petard of his own invoices. This was an embarrassing situation that could have been avoided.

### DRAFT REPORTS

Once counsel has identified an individual as a testifying expert, opposing counsel may generally discover (1) all work product and documents reviewed and/or considered by the expert, as well as (2) all the expert's communications, e-mails, notes, and memorandums related to the case. The testifying expert (and his or her staff) should conduct themselves under the assumption that the entirety of their files, electronic and hard copy, will be subject to discovery by the adversary.

Experts usually develop their ideas and opinions through preparation of work papers and draft reports. Generally, these

draft reports may change over time for a variety of valid reasons, such as:

1. new evidence is provided to the expert;
2. new, previously unknown facts became available;
3. depositions were incomplete prior to the issuance of the draft;
4. previously subpoenaed documents became available;
5. computer forensics provided new data related to documents and e-mails not available prior to the issuance of the draft;
6. new information became available after court hearings and conferences but prior to trial; and/or
7. the expert's internal quality review was not completed until issuance of the final report.

Documentation of the evolution of the expert report is important. Very few experts produce a final report as their first draft. Rather, it is common practice to change the draft report based on new information and findings. Testifying experts should be sensitive as to (1) the wording of draft reports and (2) the related documentation supporting any changes made to draft.

Draft reports in the hands of an able cross-examiner (1) can raise doubts as to the expert's skill and credibility and (2) can be a source of embarrassment if:

- the draft reports set forth unsupported findings which were different from the final report;
- the draft report was authored by counsel or parties other than the expert; or
- the draft reports were altered after the fact.

Generally, opposing counsel can discover anything the expert commits to a tangible form. A few jurisdictions, such as the State of New Jersey, designate preliminary draft reports as trial preparation materials. Such materials are discoverable only upon the special showing necessary to obtain work product.

There is inconsistency among federal and state jurisdictions as to the protection offered to (1) preliminary and intermediate drafts of expert reports and (2) rough notes that are prepared internally and not communicated to anyone outside of the expert's office.

In most jurisdictions, draft reports are discoverable if they are printed and delivered (or e-mailed) to counsel or to other parties. However, in circumstances where changes are made to one master working file, overriding the existing text, it is uncertain (1) whether the road map to each change is required to be disclosed and (2) which party would bear the costs of retrieving the information.

It is noteworthy that, if opposing counsel believes that the roadmap to the internal changes are necessary, he or she may be successful in obtaining a court order allowing for a computer forensic expert. The computer expert may retrieve and reconstruct those changes from an expert's hard drive.

In light of the advancements of electronic discovery, a testifying expert should assume that all documents he or she produces could be read by the adversary. Therefore, they should be written in a professional manner which will not unduly prejudice his client's case.

Staff analysts should also be sensitive to writing in a professional manner. As an example, a work paper which identifies unexplained cost variances as a "plugged balance" as opposed to "unreconciled differences" will play out very differently for a jury. Financial experts should be cognizant of the language contained in draft reports, or they may find themselves in situations that undermine their credibility.

Some attorneys will ask for reports and work product to be electronically transmitted to them in an effort to preclude them from discovery. Other attorneys may simply request that the expert use evasive tactics to avoid discovery. These tactics are not only improper, but they will not work.

If the expert participates in this type of stonewalling, (1) it can adversely effect his reputation and credibility and (2) it can seriously prejudice the case at bar. It should also be noted that documents received from third parties (i.e., documents received from brokerage firms and banks), even by consulting experts, are discoverable.

#### E-MAIL

E-mail communications present substantial risks in litigation. This is because users of e-mail tend to be more casual than they would be with traditional forms of communications. E-mail users often engage in reckless exchanges, saying things they would never otherwise commit to in writing.

E-mail users often have the erroneous assumption that their exchanges, once deleted from the computer, are no longer retrievable. However, experts, counsel, and litigants cannot let their guards down in the preparation of e-mails.

For example, in one recent matter, the defendant's CFO e-mailed the president stating, "Why buy the company for \$X when we can squeeze them to death and pick it up for a song." That e-mail, which turned out to be the proverbial "smoking gun," appeared prominently on a blow-up chart in front of the jury every day of the trial.

Because of the advanced state of computer forensics, deleted e-mails can easily be reconstructed and retrieved from computer hard drives. Therefore, experts should be very judicious in the use of e-mail. If an e-mail is required, the same care in drafting written correspondence should be exercised.

Below is a list of other considerations for counsel and experts when using e-mail communications:<sup>9</sup>

- Review e-mail addresses for accuracy and to confirm that the content of the e-mail and its attachments is directed to the specific matter at hand. There are a multitude of accounts detailing situations where privileged information in e-mails and/or attachments to e-mails were inadvertently sent to the wrong people.
- Proofread all e-mails sent to clients and to opposing counsel to ensure that they are clear, concise, and unambiguous. Cursory answers to questions, such as “yes” or “no” answers, without repeating the posed question, may be confusing and unclear to the receiver of your message. Copying questions in your responses is advised.
- Consider the tone and nature of your e-mails. Seemingly neutral information may be read in an unintended manner. E-mail senders should be wary of sensitive messages that may be taken in the wrong context. Perhaps asking your client to phone you to discuss a matter may minimize the negative emotional response to a message. If you communicate to a client using the client’s work e-mail address, verify that you are permitted to send private or sensitive information to that address as well.
- Confidential information shared between the attorney and client can be inadvertently shared with the wrong people by a quick false reply to—or by the forwarding of—an e-mail. Note that some matters may be best shared via traditional written mail.

#### SECURITY

A breakdown in security within the office environment of the expert (1) can result in drastic consequences to the client and (2) can expose the expert to malpractice claims. Staff analysts should be trained to avoid idle chatter with friends and acquaintances related to any matter within the office.

It is very tempting at cocktail parties or other social settings where peers are exchanging “war stories” for analysts to speak about their company and the details of certain high profile, challenging assignments. This is also true of idle chatter on elevators, airplanes, commuter trains, and cell phones. These conversations, if overheard by the wrong party, may effectively waive the attorney-client privilege and potentially damage the client’s case.

Furthermore, the handling of confidential documents requires that they be kept in a safe and secure environment, with access limited only to authorized individuals on a need-to-know basis.

#### NOTES, PHONE MEMORANDUMS, AND CORRESPONDENCE

As previously discussed, all of these items will likely be discoverable. Experts should be very sensitive when wording these documents so as not to open any doors for fertile cross-examination.

These documents should be prepared only when absolutely necessary, and great care should be given to their contents. Such care should minimize the chance of negative inferences.

#### SUMMARY AND CONCLUSION

In order to operate successfully as a litigation consultant, whether as a consulting expert or a testifying expert, the financial expert should be knowledgeable of (1) the attorney-client privilege and (2) the work product doctrine. This is especially true in light of the courts’ inconsistent interpretation of these legal concepts.

The solution for the financial expert is to:

- work closely with counsel and to address potential disclosure issues as they occur;
- apply common sense and proceed with caution, assuming all of the expert’s work will be discoverable;
- avoid unnecessary communications;
- be familiar with the law of the jurisdiction in which the testimony is offered and adhere to the rules of professional conduct applicable to the expert’s professional certification; and
- to have established policies and procedures regarding these issues.

#### Notes:

1. See *Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 103 (S.D.N.Y. 2002).
2. See *Lugosch v. Congel*, 219 F.R.D. 220, 235 (N.D.N.Y. 2003); *United States v. United Tech. Corp.*, 979 F. Supp. 108, 110-11 (D. Conn. 1997).
3. See *United States v. Adlman*, 134 F.2d 1194, 1198 (2d Cir. 1998).
4. Fed. R. Civ. P. 26(b)(3); *Lugosch*, 219 F.R.D. at 240.
5. See *In re Grand Jury Proceedings*, 219 F.3d 175, 182-83 (2d Cir. 2000); *In re Von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987).
6. See *Baum v. Village of Chittenango*, 218 F.R.D. 36, 40 (N.D.N.Y. 2003); *Mfg. Admin. & Mgmt. Sys., Inc.*, 212 F.R.D. 110, 113-14 (E.D.N.Y. 2002).
7. See *Messier v. Southbury Training Sch.*, No. 3:94CV1706, 1998 WL 422858, at \*2 (D. Conn. June 29, 1998).
8. 296 F.2d 918 (2d Cir. 1961).
9. “Top Ten Legal Issues in Cyberspace: What Every Connecticut Lawyer Needs to Know,” Connecticut Bar Association—Annual Meeting, June 16, 2003, Diane Duhaine, Jordan Burt LLP.

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