EVIDENCE LAW

De-desigation of Experts and Confidentiality

by Ian Fusselman, Column Editor

Ian Fusselman is an attorney at Thorsnes Bartolotta McGuire. His practice focuses on complex litigation, including catastrophic injury, aviation law, product liability, insurance litigation and construction law. He received his bachelor's degree in philosophy from California State University, Long Beach, and obtained his Juris Doctor degree from the University of Southern California Law School. Mr. Fusselman is the new column editor for the Evidence Law column. He can be reached via email at: ***fusselman@tbmlawyers.com****.*

One of the things I like the most about our list serve is that it often functions as an impromptu MCLE mini-course. Members posing even the most esoteric questions are sure to receive a chorus of well-reasoned responses from specialists in the field. I frequently find myself reading responses and then reviewing recent case law or turning to a practice guide to get a more detailed understanding of unique issues raised on the list serve. This column reflects the results of research prompted by a recent post.

One of our members explained that he had withdrawn a designated expert and questioned whether the expert's file was discoverable. Responses to the post universally suggested that the member continue to retain the expert as a consultant in order to maintain confidentiality of the file. While many of us are familiar with this practice and while the responses correctly stated the general rule, the importance of maintaining confidentiality is worthy of a more in-depth discussion. This article will discuss the basis for the general rule and some interesting exceptions to that rule. Further, this article will also review some not so common means of asserting privilege over portions of a retained expert's file.

Beginning at the Beginning – Confidentiality and the Pre-Retention Interview

While we all may have a number of "go to" experts in the cases we handle most frequently, we routinely find ourselves in need of testimony in specialty fields we have not previously encountered. These situations invariably result in a number of telephone calls to potential experts discussing the nature of the case, the factual and legal basis for the claims and the scope of anticipated expert testimony. These discussions oftentimes include analysis and impressions of the attorney that would normally qualify as work product. Recognizing this fact, the court in *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, extended work product protections to retention interviews with potential experts even if the experts are not retained, so long as there was a reasonable expectation of confidentiality. Once you have revealed privileged information to the expert, opposing attorney are prohibited from subsequently retaining that expert. So long as the contacts with the experts are not designed to completely eliminate the potential pool of experts available to testify for the defense, your contacts with potential experts will remain confidential.

Consultants, Experts, and the Work Product Doctrine

The attorney work product doctrine provides the protections necessary to avoid disclosures relating to true consultants. The opinions of consultants who have not been designated as trial witnesses are protected (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834-835; Code of Civil Procedure (C.C.P.") §2018.030) and their identity also remains privileged unless and until they are designated as trial witnesses. *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 37.

The logic behind this rule is that these consultants don't produce evidence and will not testify at trial, so their opinions and work they have performed are not relevant to any matter in the case. Their interactions with the attorneys are limited to reviewing what is provided to them and providing advice to the attorneys who have hired them. Work completed under this scenario fits squarely within the confines of the attorney work product doctrine. However, as will be discussed below, even this rule has exceptions.

In contrast, designated experts' files and work product providing the basis for their opinions is generally discoverable pursuant to C.C.P. §2034.210 *et seq*. However, this is not to say that the entirety of an expert's file is necessarily discoverable. To the extent that an expert also served as a consultant for an attorney, it is still possible to maintain confidentiality of work conducted solely in the role as a consultant. In a line of cases beginning with *Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195 and *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 527, and more recently in *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, California courts have shielded consulting work performed by designated experts from disclosure (see, also, C.C.P. §2034.270 requiring the parties to produce and exchange "all ***discoverable*** reports and writings"). So, for example, if a designated expert is also providing consulting services, such as assisting in drafting discovery, helping an attorney understand elements of the case, or assisting with cross-examination of another expert, conversations and writings relating to those efforts may still be privileged if the conditions set forth in *National Steel* (discussed below) are satisfied.

From a practice perspective, it certainly makes sense to insulate your experts from otherwise privileged information that you wouldn't want revealed during discovery. Doing so limits the likelihood of inadvertent disclosure and time consuming oppositions to motions to compel. However, under the right circumstances, it is possible to consult with and receive advice from experts that is still protected from disclosure. Certainly, it is vital to make sure the expert is aware of this dual role and that certain safeguards are in place (such as separate billing, correspondence and research files) to ensure that privileged communications are not revealed.

The Impact of Withdrawing a Designated Expert

Moving on to the question of what portions of an expert file revert to being confidential after designating and then withdrawing the witness as an expert, our list serve posters correctly stated the general rule: when an expert designation is withdrawn and the witness continues to be retained in a consulting capacity, the protections afforded by the attorney work product doctrine are reinstated. *Shooker v. Superior Court* (2003) 111 Cal.App.4th 923; *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647. However, to the extent that the expert has disclosed opinions, reports or other information, the privilege is waived as to that information.

While the general rule extends confidentiality to a de-designated expert, there are a number of exceptions that must be kept in mind. Perhaps most importantly, confidentiality of medical consultants can be waived when plaintiff makes a demand for production of a defense medical examination report under C.C.P. §2032.610. By making the demand for a copy of the defense medical report, plaintiff puts at issue all prior examinations, including those by consultants not named as experts. As a consequence, plaintiff is obligated to produce all reports relating to those examinations. C.C.P. §2032.630; *Queen of Angels Hospital v. Superior Court* (1976) 57 Cal.App.3d 370. Also, plaintiff is further obligated to promptly exchange any ***future reports*** of examination relating to the same condition. C.C.P. §2032.640. This rule does not require past consultants to prepare reports if they had only previously provided verbal reports, so it is advisable to get a verbal report and authorize a written report only when it will be completely favorable.

The second and perhaps most confusing exception to the rules affording confidentiality to expert reports applies when there is "substantial need" for the information and there is no alternative means for obtaining the same information. C.C.P. §2018.030(b). One such "substantial need" is the ability of the opposing party to impeach a witness. In such cases, "the court must weigh carefully the power of impeachment as a valuable tool... against the benefits of protecting the privilege of work product." *Jasper Construction, Inc. v. Foothill Junior College Dist.* (1979) 91 Cal.App.3d 1.

Under this exception to the general rule, courts have ordered production of past "advisory reports" prepared by experts because they might include inconsistent prior statements. *National Steel Products Co. v. Superior Court, supra,* 164 Cal.App.3d at 491. So, for example, if your expert has provided confidential consulting services to you in the past relating to a particular condition or defect, reports and testimony relating to those services may be discoverable in subsequent litigation on the same issues.

Courts apply a three-part test to determine whether past reports are discoverable. First, the judge determines if the report, in whole or part, "... reflects an attorney's impressions, conclusions, opinions, or legal research or theories ...." To the extent that the report cannot be sanitized from this absolutely privileged work product, the report cannot be discovered. *National Steel Products, supra,* at 489–490.

The court next determines which portions of the report are purely "advisory" and which portions fall under the scope of expert opinion. The advisory portions of the report are conditional work product; the portions that are not advisory are discoverable if easily severable from the privileged material. *Id*.

Finally, the court determines whether good cause for discovery outweighs the principles supporting the conditional work product privilege, which usually requires some "compelling reason" for discovery. If a compelling reason is provided, the portions of the report subject to conditional work product privilege may be ordered disclosed. *Id.*

Proceed With Caution

As noted above, insulating your experts from privileged information may be the safest practice, especially in light of the fact that a strong showing of a "compelling reason" might force disclosure of conditional work product. However, to the extent that you have direct discussions relating to your own impressions, opinions and legal theories, these conversations and resulting work product should remain privileged. Consequently, so long as you are diligent in identifying which portions of an expert's work are purely advisory, it is possible to have frank discussions with your experts about your theories of the case without fear of disclosure during expert discovery.