DEAR EXPERT, CAN WE TALK? EXPERT WRITTEN OPINIONS AND THE ATTORNEY WORK-PRODUCT DOCTRINE

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What do you do when defense counsel prepares an expert for deposition, and the expert’s opinions somehow include otherwise privileged information which defense counsel imparted when preparing the expert for deposition? In an effort to be thorough, the expert (hopefully unintentionally) discloses information which the defense is entitled to keep away from other parties.

California Evidence Code section 721(a)(3) states that an expert witness may be fully cross-examined as to the matter upon which his or her opinion is based and the reasons for all such opinions. Once the defendant calls an expert to the stand, the expert loses his or her status as a consulting agent of the attorney, and neither the attorney-client privilege nor the attorney work-product doctrine applies to matters relied on or considered in the formation of his opinions.¹

The attorney work-product doctrine is stated, but not defined, in Code of Civil Procedure section 2018.030. That scope is understood according to the circumstances and conditions under which the work product of an attorney is discoverable. From this nebulous foundation, we shall explore whether and when expert reports are discoverable and when expert reports are protected by the attorney work-product doctrine.

The written opinion of an expert retained by counsel solely as a consultant, to aid an attorney in the evaluation and preparation of a case, and not designated as a trial witness, is entitled to qualified attorney work-product protection. This protection encompasses communications with the attorney, the consulting expert’s reports, and the consulting expert’s diagrams and/or drawings.²

The rationale for this protection of a consulting expert’s opinions is to encourage parties to seek expert advice in evaluating cases. However, there are limits to this protection; hence, the qualified attorney work-product doctrine. The limits are largely based upon common sense principles. For example, a party cannot “corner the market” on experts by retaining all reasonably available experts as consultants; a consulting expert who inspected or tested an object or thing which is now lost or destroyed and unavailable for inspection and testing by an opposing party’s expert, etc.

Once the expert is designated to testify at trial as an expert under Code of Civil Procedure section 2034.010, et seq., and after a demand for the exchange of expert witness information and reports, all reports containing findings and opinions that go to the establishment or denial of a principal issue in the case must be turned over to the opposing party.³

¹ People v. Milner, 45 Cal.3d 227, 241 (1988).
² Williamson v. Superior Court, 21 Cal.3d 829, 834 (1978).
Advisory reports rendered by an expert before that expert’s designation as a trial witness do not automatically lose their protected status as attorney work-product once the expert is designated. These pre-designation writings and reports of opinions could remain protected after a demand for designation of experts because they often reflect the retaining attorney’s mental thought processes, under whose direction the expert worked.

However, courts are willing to allow an opposing counsel access to pre-designation writings and opinions for impeachment purposes upon a showing of good cause. The California Court of Appeal held that there can be cases where the trial expert’s reports and opinions as a consultant contain information that could be used for potential impeachment purposes and, in such cases, the court must weigh carefully the power of impeachment as a valuable tool in the process of truth ascertainment against the benefits of protecting the privilege of the attorney work-product.4

Reviewing courts have held that it will often be necessary for a judge to conduct a three-step in camera inspection of the report of an expert witness in order to rule on whether the report is protected by the attorney work-product privilege.

- Does the report reflect, in whole or in part, the attorney’s impressions, conclusions, opinions, or legal research or theories?
- With respect to the portions of the report not excluded by the query above, (1) was the report made by an expert designated as a trial witness (in which case the report is fully discoverable) or (2) was the report merely advisory to the attorney (in which case, the report is conditionally discoverable if “unfair prejudice” to the part seeking discovery is shown)?
- With respect to a report deemed advisory to the attorney, does “good cause” exist for discovery of the report outweigh the policies supporting the attorney work product privilege? For example, could the advisory report serve as possible impeachment of the expert’s testimony at trial?

It should be anticipated that opposing counsel will seek disclosure of your expert’s pre-designation advisory writings and reports of opinions. While a trial expert’s pre-designation oral reports are not immune from discovery, a written report is concrete, can be passed to the opposing expert for comment and criticism, and will certainly arise during trial as impeachment material. If an expert provides any opinion in written form, those writings must be reviewed carefully before designating that expert as a trial witness and the cost of the possible discoverability of the writings must be weighed against the benefits of proceeding with designation of that particular expert.

Electronic messaging has made it easier for the busy expert to communicate with retaining counsel after office hours, between cases, and at other unconventional times and relieves the expert from having to make time in his or her professional schedule to speak with retaining counsel directly. However, these electronic messages are writings and unilateral writings at that. In the statement and reply format of electronic

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messaging, it is foreseeable that it would be much easier to tweeze out expert opinion and statement from the retaining attorney’s thought process.

Despite the ease and speed of electronic messaging, it remains our firm’s practice to encourage and have direct conversations with our experts to preserve the natural jumble of questions and answers, revisiting of medical records and deposition testimony, and all the other innumerable things that underpin a good advisory conversation.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.