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The attorney work-product doctrine and experts

COMMUNICATION IS THE KEY

As any litigator is undoubtedly aware, expert witnesses are necessary whether to offer evidence required to meet your burden of proof or to offer evidence to combat attacks on causation. Likewise, communications with your expert witnesses are necessary. This includes (1.) communications to retain the expert witness, (2.) communications providing them with case-specific materials so they may formulate their opinions, and (3.) communications providing scientific, technical, professional texts, treatises, journals, or similar publications to assist the expert in forming their opinion. In addition, an attorney may communicate with an expert for the sole purpose of obtaining advisory opinions.

An expert witness is defined as someone who has "special knowledge, skill, experience, training, or education sufficient to qualify him[/her] as an expert on the subject to which his[/her] testimony relates." (Evid. Code, § 720.) Once qualified, an expert may offer an opinion "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[.]" (Evid. Code, § 801(a).) Such an opinion can be based on matters "perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code § 801(b).) The type of material an expert may rely upon is quite broad and encompasses inadmissible evidence, such as hearsay. Simply put, experts wield incredible power in litigation and the attorney's communications with them should be deliberate and strategic.

Protected communications

A primary issue in using experts is: What communications are protected by the attorney work-product doctrine? Pursuant to Code of Civil Procedure section 2034.210, subdivision (c), if a proper demand has been made under section 2034.210, subdivision (a), then a party must produce "all discoverable reports and writings, if any," made by an expert in the course of forming their opinion. However, no definition of "discoverable" is found in Code of Civil Procedure sections 2034.010-2034.710. Once an expert has been designated under Section 2034.210 all of the expert's present and previous opinions as well as any communications the expert might have had with the attorney, clients, other retained experts, and any expert notes or documents provided to the expert are discoverable. (See *Deluca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 690; *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1079; *County of Los Angeles v. Superior Court (Martinez)* (1990) 224 Cal.App.3d 1446, 1458; *Williamson v. Superior Court* (1978) 21 Cal3d 829, 835.)

Indeed, "[when] it becomes reasonably certain an expert will give his professional opinion as a witness on a material matter in dispute, then his opinion has become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated along with others. Such evaluation properly includes appropriate pretrial discovery." (*Swartzman v. Superior Court* (1964) 231 Cal.App.2d 195, 203.) An expert may be cross-examined on the "matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721(a).) This includes communications with the attorney rendering those communications discoverable. Such communications naturally would include written reports of an advisory nature.

What is discoverable?

The attorney work-product doctrine, codified in Code of Civil Procedure section 2018.030, sets the boundaries of what is discoverable with respect to section 2034.210. The Code states that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Code Civ. Proc., § 20180.030(a).) In addition, attorney work product beyond that described in subdivision (a), "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code Civ. Proc., § 2018.030(b).) This qualified work-product protection covers material that is derivative or interpretative in nature such as findings, opinions, and consulting expert reports. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 68.) One purpose of the work-product doctrine is to ensure attorneys have the privacy necessary to prepare cases "thoroughly and to investigate not only the favorable but the unfavorable aspects" of their cases. (Code Civ. Proc., § 2018.020(a).) Another purpose is to "prevent attorneys from taking undue advantage of their adversary's industry and efforts. (Code Civ. Proc., § 2018.020(b).) The limitation on expert discovery imposed by attorney work-product doctrine may be crucial to developing one's case. It may be necessary to consult with an expert to determine how to craft pleadings, how to cross-examine opposing experts, and other strategic considerations.

National Steel Products

The limitation on what is "discoverable" under the work-product doctrine with respect to experts is presumptively based on *National Steel Prods. Co. v. Superior Court* (1985) 164 Cal.App.3d 476 (decided under former Code Civ. Proc., § 2037). In *National Steel*, an expert had prepared an engineering report analyzing a metal building to aid counsel in prior unrelated New York litigation alleging a building was negligently designed and fabricated. (*Id.* at 481-482.) The expert report was never used in the prior New

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York litigation. (*Id.* at 482.) In *National Steel* the real party in interest ("Pantsmaker") alleged that National Steel had negligently "designed, drafted, fabricated and manufactured" a metal building in Banning, California. National Steel challenged the trial court's ruling allowing discovery of the expert's prior report based on attorney-client privilege, work-product doctrine, and relevancy. (*Id.* at 481.) The Court issued a writ of mandate to the trial court to conduct an *in camera* inspection of the expert's prior report to determine if it was subject to the work product doctrine and whether it was relevant. (*Id.* at 493.)

In doing so, the *National Steel* court set forth a three-part test to evaluate the applicability of the attorney work-product doctrine. The first part requires an *in camera* review by the judge to determine if the expert report meets the statutory definition of Section 2018.030(a). If so, then the report "cannot be discovered under any circumstances." (*Id.* at 489.) Those portions of the report that are not the attorneys' "impressions, conclusions, opinions, or legal research or theories" are subject to parts two and three of the *in camera* inspection. (*Id.* at 490.) In part two, a determination should be made whether portions or all of the report is advisory in nature and thus covered by the qualified work-product doctrine. (*Ibid.*) Those portions of the report that are advisory are not discoverable. (*Id.* at 488 (citing *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 527, 531).) An expert report is advisory if its purpose is to assist the attorney in preparing the pleadings, with the method of presenting proof, and with cross-examining opposing expert witnesses. (*Id.* at 489.) Portions that are not advisory, if easily separated, are discoverable. In part three of the test, whether any advisory portions of the report subject to the qualified work product are discoverable is determined by balancing good cause for discovery against the principles of the work-product doctrine. (*Id.* at 490.) Such good cause may include unfair prejudice or injustice. (Code Civ. Proc., § 2018.030(b).) Good cause, of course, necessarily includes calling the expert as a witness. (*Id.* at 488 (citing *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 835.).)

The *National Steel* court further noted in its opinion, despite the apparent advisory nature of the prior report, that the expert may be cross-examined on the prior report under part three of the test because there were two compelling reasons. First, it was "reasonable to infer that the expert considered his prior engineering report in his preparations for trial[]" and under Evidence Code section 721 "an expert witness may be cross-examined regarding any scientific, technical, or professional publication if: '(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion[.]'" (*Id.* at 490-491.) Second, there was "no adequate substitute for the report . . . because the potential impeachment value of the report lies in the fact that it was prepared by the expert identified as a witness[.]" (*Id.* at 491-492.)

What's clear from this three-part test is that a designated expert may still provide an advisory report that is not discoverable and entirely separate from a discoverable report generated for trial. As set forth below, however, counsel should proceed with such advisory reports with caution. The *National Steel* court's decision to allow discovery of the expert's advisory report is based in part on the opinion set forth in *Petterson v. Superior Court* (1974) 39 Cal.App.3d 267.

Petterson

In *Petterson*, an executor was informed by claimant A's attorney that a handwriting expert had determined a holographic will was a forgery. (*Id.* at 270.) The executor's attorney sought to depose the expert but claimant B's attorney objected because claimant B had hired the expert as a consultant and did not intend to call the expert as a witness at trial. (*Id.* at 271.) The court held that the attorney work-product doctrine had been waived due to claimant A informing the executor's attorney. (*Id.* at 272-273.) In doing so, the Court noted that when an expert is retained solely for advising an attorney those expert's observations and opinions are normally not discoverable "unless there is some other compelling reason." (*Id.* at 272; see also *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834-835.) Here, it was clear to the Court that claimant B had hired the expert as an advisor for the sole purpose of preventing the expert's testimony. The Court was concerned with "setting a precedent which eventually could lead to subtle but deliberate attempts to suppress relevant evidence." (*Petterson v. Superior Court*, supra, 39 Cal.App.3d at p. 273.) Thus, counsel must not automatically assume an expert's advisory opinions are precluded from discovery and in fact they may be subject to part three of the *National Steel* test. Under *Petterson*, this is true even though the expert may not be a prospective witness.

Attempts at gamesmanship such as in *Petterson* can have serious consequences. In *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, an entire law firm was disqualified. *Shadow Traffic* involved plaintiff's attorney meeting with an expert for consultation which included the communication of confidential information. (*Id.* at 1071.) Plaintiff's attorney ultimately did not retain the expert. (*Id.* at 1072.) Subsequently, defendant's attorney met, retained, and designated the same expert. (*Id.* at 1072.) Plaintiff's attorney moved to disqualify defendant's attorney and law firm for wrongfully obtaining privileged and confidential communications from the expert. (*Ibid.*) The Court upheld the trial court's ruling disqualifying the defendant's attorney and law firm. (*Id.* at 1088.)

Importantly, *Shadow Traffic* arguably expands the realm of communications precluded from discovery beyond the attorney-client privilege and the attorney work-product doctrine. The Court concluded that "communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from

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subsequent disclosure even if the expert is not thereafter retained as long as there was a reasonable expectation of confidentiality." (*Id.* at 1080.) A reasonable expectation of confidentiality appears on its face much broader than communications enveloped by the attorney-client privilege and attorney work-product doctrine. Indeed the Court did not state that confidential communications must contain attorney-client or attorney work-product material. The Court was concerned with depriving clients of their choice of counsel weighed against the "'fundamental interest in preserving confidential information"' and ultimately determined that "'protecting confidentiality is an imperative to be obeyed in both form and substance.'" (*Id.* at 1088 (citing *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 602).)

Conclusion

The takeaway from these cases is that the attorney work-product doctrine may be a powerful shield in protecting an attorney's development of strategies, theories, and understanding of a case. However, the Court will not entertain the attempted use of attorney work product as a sword to exclude experts and expert testimony. A clear understanding of what is and is not discoverable is fundamental in successfully litigating your case.

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