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ATTORNEY CLIENT PRIVILEGE AND EXPERTS

Thomas H. Watkins

Author contact information:
Thomas H. Watkins
Husch Blackwell, LLP
111 Congress, Suite 1400
Austin, Texas 78701

Tom.watkins@huschblackwell.com
512-703-5752

ATTORNEY-CLIENT PRIVILEGE AND EXPERTS

One of the major problems in dealing with the use of experts at trial is attempting to protect work product and attorney-client privileged material. This is particularly true when the expert is your client or employee of your client.

I. Attorney-client privilege and work product.

The attorney-client privilege is created by Rule 503 of the Texas Rules of Evidence. Confidential information is created by Rule 1.05 of the Texas Rules of Disciplinary Conduct. Attorney-client privileged material is created to protect communications between an attorney and the client so that the client can be totally frank with the attorney. Work product is created in order to protect the attorney's work from being used against the attorney's client. Work product, originally a creation of case law, is now embodied in Rule 192.5 of the Texas Rules of Civil Procedure.

The attorney-client privilege can be visualized as a box in which such material can be placed and be protected from any kind of discovery, but any kind of experience will teach the practitioner that there are many holes in the side of this box, and that under current case law and regulatory pressure, the ability to protect attorney-client material is under attack.

II. Experts

These distinctions cause great confusion when we start dealing with experts. Experts come in two flavors - consulting experts and testifying experts.

Consulting experts are used to provide help and guidance to attorneys in technical areas. They are not intended to testify. And as a result, no discovery is allowed concerning the consulting expert.

Testifying experts are expected to testify in court and often create the foundation of the cause of action or defense. Complete discovery in state court is allowed concerning the testifying expert. All communications, drafts of reports, and oral conversations are proper subjects of discovery.

Oftentimes attorneys will designate an expert as a consultant expert in order to determine if this expert can be used as a testifying expert. This allows the attorney to delve into the thought processes and expertise of the expert before committing to use the expert as a testifier. However, this is a dangerous practice. Once an expert has been re-designated as a testifying expert, all of the communications between the attorney and that expert become discoverable. Consequently, if an attorney chooses to use the technique of designating an expert as a consulting expert with the possibility of later re-designating that expert as a testifying expert, then the attorney must treat that expert with kid gloves and guard all communications with that expert. All communications might become discoverable upon the re-designation of the expert.

III. Employee Experts

The problem compounds when you need to use an employee as an expert or you are defending a professional whose professional judgment has been called in question.

There are two Texas Supreme Court cases that start our guidance and confusion when considering the use of employee experts. The first is *Axelson Inc.* v. *Mcllhany,* 798 SW 2d 550 (Tex. 1990). The court says:

> "The factual knowledge and opinions acquired by an individual who is an expert and an active participant in the events material to the lawsuit are discoverable. The information is not shielded from discovery by merely changing the designation of a person with knowledge of relevant facts to 'a consulting-only expert.'" At page 554.

The Court further states in a footnote on page 555:

> "An employee who was employed in an area that becomes the subject of litigation can never qualify as a consulting only expert because the employment was not in anticipation of litigation."

However, it seems that if an employee expert is employed in a different area that has nothing to do with the subject matter of the lawsuit and becomes part of the trial team, that employee expert can be a consulting expert since their work is done in anticipation of litigation.

The court goes on to hold that an employee's mental impressions, opinions, and facts could be discoverable, if the employee was both a fact witness and an expert. Logically, this would seem to include any communications between the attorney and the employee thus effectively blowing by the attorney-client privilege.

The second case is *In re: Christus Spohn Hospital Kleberg*, 222 S. W. 434 (Tex. 2007). This case deals with inadvertently produced documents that are privileged to a testifying expert. The court holds that none of the snapback rules which allow you to retrieve inadvertently produced privileged documents apply if they are produced to a testifying expert. The only way the party can get the inadvertently produced documents back is to change the testifying expert to a consulting only expert and not use the expert at trial.

In a spectacular Mississippi case quote apparently quoted with approval, the Court says:

> "Only the most naive of experienced lawyers or judges could fail to realize that in our present legal culture money plus the proper marching orders will get an expert witness who will undertake to prove most anything." At page 442.

These cases and their progeny create a great uncertainty as to what to do with a client or the employee of a client who has an expertise and who you want to testify. Is particular, a problem exists if that employee's previous opinions are under attack such as drawings, designs, estimates,

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