

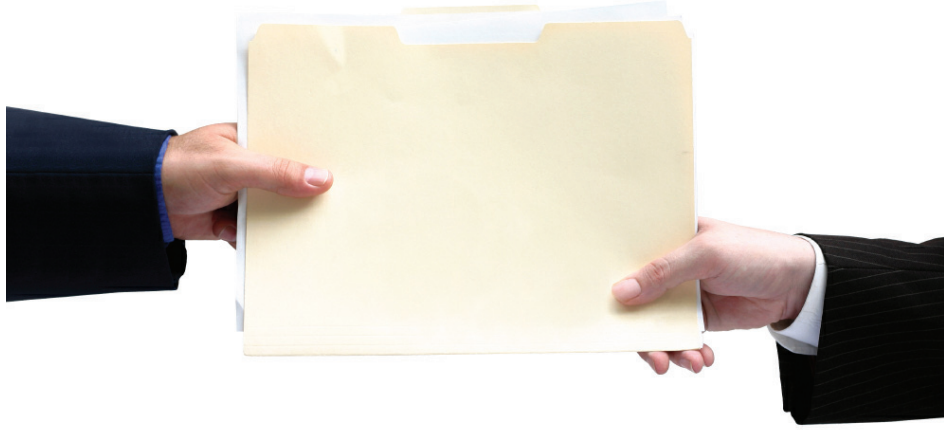


MINNESOTA LAWYER

# IN-HOUSE COUNSEL

QUARTERLY SPECIAL FOCUS

## Watch your words when communicating with experts



**Written exchanges with a testifying expert are probably discoverable — whether it's considered sensitive or not.**

By James G. Bullard and I. Daniel Colton

Two recent developments have made it clear that all lawyers involved in litigation — inside and outside counsel — need to be extremely careful in managing their communications with expert witnesses. The majority rule is now this: Anything



James Bullard



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you exchange in writing with a testifying expert is probably discoverable, whether or not it reveals your most sensitive work product. This includes draft reports exchanged with an expert and, particularly, those drafts that reveal the lawyer's questions, suggestions and edits.

As counsel, you need to assume that anything sent to or received from a testifying expert will end up in the hands of your adversary. Therefore, you need to be extremely careful about what is put into writing.

The first of these developments is the August 2006 decision by the 6th U.S.

Circuit Court of Appeals in *Regional Airport Authority v. LFG, LLC*. In this decision, the 6th Circuit adopted a bright-line rule requiring "disclosure of all information provided to testifying experts," regardless of the fact that this would require disclosure of attorney work-product materials.

The second development also occurred in August 2006. This was the adoption by the American Bar Association of a resolution calling for lawmakers to promulgate

new rules to prevent the discovery of draft expert reports and other work-product communications between lawyers and testifying experts. The resolution takes the position that litigation counsel need to be free to explore with their testifying experts a variety of different theories, fact scenarios and options in order to properly prepare a case for trial. That work product, the resolution states,

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### GUIDELINES

#### Protecting communications with a testifying expert

- In cases that can afford the additional expense, consider using consulting experts to explore different hypotheses and engage in a free exchange of work product impressions and analyses before deciding what ideas should be taken to the testifying expert.
- Be careful about taking notes or putting anything in writing.
- If you need to discuss work-product issues with a testifying expert, do so in person.
- If it is necessary to comment on or edit a draft of an expert report, do so at the same time and on the same document as the expert, and avoid creating separate drafts.
- Assume that if you ask for an adversary's written communications or other work product involving experts, the same will be asked of you.
- Consider stipulating with opposing counsel that both sides can share work-product materials with their testifying experts, and that such work product and draft reports will not be discoverable.

— James G. Bullard and I. Daniel Colton



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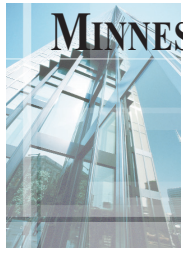
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## No silver lining on the issue of privilege waivers

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through current 10Q and 10K filings.”

Even though there were state auditor-client privilege protections in place, the court ordered that the information provided by the plaintiff to its auditors would be discoverable, enabling AES to test the validity of the reported 10Q and 10K filings and to have access to what would otherwise have been privileged.

Texas is not alone in addressing this issue, although the various courts — as expected — are divergent on their conclusions regarding this waiver argument. In *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, the court declined to find a waiver of the attorney-client privilege after internal investigation reports had been provided to Merrill Lynch’s outside auditors for their use in preparing its annual audit and SOX 404 attestation. The court reasoned that finding a waiver would discourage companies from conducting investigations and disclosing those results to auditors.

However, in *Medinol, Ltd. v. Boston Scientific* and numerous other cases, courts have taken the opposite approach and found that disclosure to auditors results in waivers of the privilege. In *Medinol*, the court stated that “in order for auditors to properly do their job, they must not share common interests with the company they audit.” It went on to say that in order to perform properly, there must be adversari-

al tension between the auditor and the company. Additionally, by certifying the financial statements, the court found that the independent auditor assumed a public responsibility that transcended any relationship with the company.

### A legal crap shoot

At this time there is very little silver lining to this issue. Proposed legislation regarding the selective waiver doctrine has been limited to production of materials to governmental agencies and remains just that — proposed legislation.

Confidentiality agreements have also been inadequate to protect the privileged nature of the materials, and sec. 105 of SOX — which specifically addresses the protection of privileged status for material provided to the Public Company Accounting Oversight Board — is inapplicable to the company’s own auditor’s requests for information.

The Securities and Exchange Commission has taken an affirmative role in advocating, although unsuccessfully, for the maintenance of privileged status

for materials turned over to its investigators by filing amicus briefs when court challenges are received regarding the waiver issue.

In the 8th U.S. Circuit Court of Appeals, there is argument under the *Diversified* line of cases that selective waiver is appropriate when privileged materials are provided to the government. However, these arguments may be unpersuasive when advocating their applicability

to materials provided to auditors.

Additionally, with the emergence of a national, if not global, economy and industry that transcends jurisdictional lines, the limited jurisdictional applicability of *Diversified* continually narrows with time as Minnesota companies face litigation in venues far from home.

Facing potential litigation in venues all over the country, and with this issue in such a state of legal flux, any determination of whether the release of privileged information to the auditors will constitute a waiver is nothing more than a legal crap shoot. Accordingly, the waiver of privilege over such materials and subject matters released to the auditors should generally be expected, and its appearance in the hands of litigation adversaries assumed.

For any relief on this subject, attention must be brought to this issue through a concerted effort by corporate advocates to address it legislatively on the federal level, so as to eliminate a smorgasbord of state laws and court decisions.

Unfortunately, as a result of the same underlying corporate conduct that produced this problem, Congress is unlikely to be sympathetic to arguing the need to withhold certain material from financial auditors, even for necessary and legitimate reasons. ☐

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“If the privilege is later determined by a court to have been waived through release to the auditors, then this material will likely be available to third parties for their use in litigation against the company or its management.”

## Reasoning behind the 6th Circuit’s bright-line rule may be suspect

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can and should be protected from disclosure while still providing fair notice of the full scope and factual basis of the expert’s expected testimony. This is an acknowledgment by the ABA that the current majority position is to the contrary and that, as litigation counsel, you are acting at your peril if you continue to communicate in writing with a testifying expert about sensitive subjects.

These developments are best understood in perspective. The 1993 amendments to the Federal Rules of Civil Procedure changed significantly the rules for obtaining discovery from expert witnesses. For experts who are “retained or specially employed to provide expert testimony” or “whose duties as an employee ... regularly involve giving expert testimony,” a detailed report “prepared and signed by the witness” became mandatory.

Such testifying experts are also freely available for depositions. However, it was not widely recognized at the time that these rule changes would make available for discovery virtually all written communications exchanged between litigation counsel and their testifying experts.

Unless the case can afford the luxury of consulting experts or experts who are not expected to testify, litigation counsel must communicate with their testifying experts for many important reasons. Such reasons include assisting the expert in learning the facts of the case, exploring with the expert different approaches to handling scientific and

technical issues, discussing with the expert what discovery or other investigative efforts may be needed, deciding with the expert how to prepare the case for trial, and helping the expert to explore different hypotheses or to refine the presentation in light of the key facts and applicable law. Such communications are likely to encompass “core” or “opinion” work product, including the “mental impressions, conclusions, opinions, or legal theories” of trial counsel.

Counsel’s opinion work product — including strategies, assessments of the strengths and weaknesses of the case, and the significance attached to key evidence — can be vital to your case. Its disclosure to a litigation adversary could be as disastrous as allowing battle plans to fall into the hands of the enemy on the eve of a decisive engagement. For this reason, opinion work product ordinarily receives a very high level of protection in the litigation process. It is essentially immune from discovery.

And, prior to the 1993 amendments, opinion work product that was shown to or shared with a testifying expert as a way of expediting the communication process remained immune from discovery, unless the expert relied on counsel’s work product in forming opinions.

However, the 1993 amendments mandate that a testifying expert’s report must include “the data or other information

considered” by the expert in forming opinions. The advisory committee notes indicate that the purpose of this requirement was to ensure that litigants could no longer “argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.” It is in response to this language that the courts developed the bright-line rule recently adopted by the 6th Circuit in *Regional Airport Authority*.

The reasoning behind the bright-line rule may be suspect — and it clearly sidesteps Rule 26(b)(3)’s prohibition against disclosure of the “mental impressions, conclusions, opinions, or legal theories” of counsel — but it has the virtue of simplicity. It saves the courts from having to sort out precisely what “data or other information” should be disclosed pursuant to the report requirement of Rule 26(a)(2)(B).

It also saves the courts from having to decipher precisely what Rule 26(a)(2)(B) intends by limiting the disclosure requirement to just that subset of data or other information “considered” by the expert. Indeed, it is notable that when stating the bright-line rule, most courts substitute some other word for “considered.” For example, in *Regional Airport Authority*,

### Analysis

the 6th Circuit formulated its statement of the rule in terms of information “provided” or “given to” the testifying expert. In other words, the courts do not want to be in the business of separating opinion work product from ordinary work product or simple factual information — nor do they want to be in the business of figuring out what “consideration” the expert gave such information. Any written exchange with a testifying expert will automatically be deemed discoverable.

For practitioners, the simplicity of the bright-line rule can also be a virtue. You may not like the rule, but you know exactly where the boundaries are: If you care about disclosure of communications made to a testifying expert, do not make them in writing. This includes draft reports.

Practitioners also need to keep in mind that the scope of discovery under the bright-line rule potentially includes the lawyer’s notes of meetings and telephone conversations with the expert. Such notes are obviously “writings,” and they reveal the contents of “data or other information” provided to the expert every bit as much as counsel’s annotations on a draft report. Therefore, caution must be exercised by counsel as well as the expert in deciding when to take notes and what to record. ☐

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