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Unringing the Bell

Expert Witnesses and Privilege

When you provide privileged materials to an expert witness, you waive the privilege, right? Not necessarily. Although Arizona courts traditionally have employed a bright-line rule that communications with a designated expert witness are fair game for discovery, the Court of Appeals has recently recognized an escape hatch in the rule. Litigants may now "unring the bell" by revoking an expert witness designation and thereby shielding from discovery the information and materials shared with the former expert.

The Expert Waiver Rule

The Rules of Civil Procedure make a marked distinction between litigation consultants and expert witnesses. Consultants (*i.e.*, persons hired to assist a party with the litigation, but who are not expected to testify at trial) fall within a party's work product protection. Consequently, Rule 26(b)(4)(B) provides that consult-

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ants are generally immune from discovery except "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[1]

Expert witnesses, on the other hand, are expressly subject to discovery. Rule 26(b)(4)(A) provides, "A party may depose any person who has been identified as an expert whose opinions may be presented at trial."[2]

But how far can discovery of an expert go? The Rules of Civil Procedure do not set forth the parameters of permissible discovery from an expert witness. For instance, are privileged materials provided by counsel to an expert fair game for discovery? Likewise, are the expert's communications with counsel or client discoverable? And what happens if the expert is also serving as a litigation consultant?

The Arizona Rules do not directly answer these questions.[3] Fortunately, the Arizona courts have filled these gaps.

In *Emergency Care Dynamics v. Superior Court*,[4] the Court of Appeals tackled these issues head on. Reasoning that Arizona courts have long favored full cross-examination of expert witnesses to test the truth and reliability of their expert opinions, the Court held that communications with an expert witness are discoverable, including communications that would otherwise be protected by the attorney mental impressions work product protection. The effect is the same even if the expert has been retained as a both a consultant and an expert. "An expert may be either a witness or a protected consultant, but not both. 'Counsel must choose.'"[5] By electing to designate the witness as an expert, a party and its counsel waive protection for communications with the expert that relate to the subject of her expert testimony.

Although *Emergency Care Dynamics* dealt only with waiver of the work prod-

uct protection, the Court made clear in a subsequent decision—*Arizona Independent Redistricting Commission v. Fields (Redistricting I)*— that the waiver rule extends to all waivable privileges.[6] The Court explained that shielding communication with an expert witness from discovery would thwart the goal of allowing full and fair cross-examination of the expert witness. "Such communications reflect the relations between expert, hiring client and counsel, which may reveal bias. Additionally, these communications may reveal an expert's sources and prior opinions on the subject of his or her testimony—all fodder for 'free-ranging, skeptical cross-examination of that expert.'"[7]

The Escape Hatch

In *Emergency Care Dynamics*, the Court of Appeals purposely created a bright-line "either/or rule workable for all concerned": Designation of an expert witness waives claims of privilege regarding communications with the expert.[8] But what the court giveth, it quickly taketh away.

Recently, the Court of Appeals has eroded its own bright-line rule by allowing litigants to revoke expert witness designations and thereby restore claims of privilege in information and materials previously shared with the formerly designated witness.

The first of these cases involved a subsequent, post-trial appeal in the *Redistricting I* case. In its *Redistricting I* decision, the Court of Appeals had ordered the Arizona Independent Redistricting Commission to "immediately produce" all documents the Commission had provided to its expert witness that related to the subjects of the expert's testimony.[9] Two days after issuance of that decision, the Commission "redesignated" its expert as a fact witness, apparently for the purpose of avoiding production of the previously privileged documents it had shared with the witness.[10]

The trial court ruled that the Commission could not regain its privilege in the documents by changing the designation of its witness. In addition, the trial court found that the witness would be testifying at trial at least in part as an expert, regardless of the designation given him by the Commission. Accordingly, the trial court compelled production of the documents, and the case proceeded to trial.

After trial, the Commission appealed the trial court's order compelling production. The Court of Appeals ruled—in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission (Redistricting II)*—that litigants can revoke a witness's designation as a testifying expert, and thereby reinstate privilege in materials provided to, and communications with, the formerly designated expert.[11] The Court explained that "the mere act of designating a consultant as a testifying expert witness" does not permanently waive a privilege[12]:

> [P]rivilege is waived when a consultant has been designated as the party's expert *and* will testify as an expert. Thus, a party who has named a consultant as an expert can reinstate the privilege by removing that designation before expert opinion evidence is offered through production of a report, responses to discovery, or expert testimony.[13]

A few months later, the issue rose again in *Slade v. Schneider*.[14] In *Slade*, the Corporation Commission submitted the affidavit of an investigator in support of an application for an *ex parte* temporary restraining order. After the TRO issued, the defendants sought production of notes and memoranda prepared by the investigator. The Commission refused to produce the requested materials, claiming the requested materials were privileged, and the privilege was not permanently waived because the investigator would only testify further in the case as a fact witness.

The trial court denied the motion to compel, and the Court of Appeals affirmed. Quoting its *Redistricting II* decision, the Court of Appeals reasoned that the Commission could choose whom to call as its experts, and could reinstate the privilege in its documents by revoking the designation of a witness as an expert.[15]

Redistricting II and *Slade* were both issued by Division 1 of the Court of Appeals. Division 2 added its support for allowing litigants to unring the bell and restore privileges previously waived in *Green v. Nygaard*.[16] In that decision, the Court of Appeals addressed a somewhat unusual set of facts. In a divorce proceeding, spouse Lisa designated an accountant to testify as an expert witness about distribution of liquid assets. Spouse James subpoenaed the expert's entire file, but no part of the file was produced before the expert testified at a preliminary hearing to address the parties' distribution of liquid assets *pendente lite*. Following the hearing, Lisa produced portions of the expert's file related to the subject of his testimony at the hearing, and James moved to compel production of the remainder of the file. Before the motion to compel was heard, the spouses settled their dispute regarding distribution of the liquid assets *pendente lite*, and Lisa then withdrew her designation of the accountant as an expert. Nevertheless, the trial court ordered production of the accountant's entire file, reasoning that by offering expert testimony at the earlier hearing, Lisa waived any privilege that may have existed regarding communications with the accountant.[17] Lisa then filed a special action to the Court of Appeals.

Interestingly, instead of deciding the appeal on mootness grounds, the Court of Appeals not only addressed the appeal on the merits, but did so in a published decision. The Court ruled that Lisa's withdrawal of her designation of the accountant as an expert witness restored work product protection in the accountant's file, and therefore the trial court abused its discretion by ordering production of the file.

The Court reasoned that under Arizona law, waiver of privilege in communications with a designated expert witness "is not necessarily irrevocable," and that the scope of disclosure even as to designated experts is "limited to documents 'relating to the subject of the expert's testimony.'"[18] Although the accountant actually testified as an expert witness, the Court ruled that revocation of the expert designation was effective to restore work product protection because the parties settled the particular dispute on which the accountant testified and that testimony would not have "any bearing on the final resolution of any issue at trial."[19]

Unringing the Bell

Dealing With Experts Today

The bright line rule set forth in *Emergency Care Dynamics* still exists. But the rule now comes with the huge caveat that litigants may revoke their designations of expert witnesses and thereby reinstate privileges that otherwise would be waived. The parameters of that caveat remain unclear. For instance:

- **Are the reasons for a party's revocation of an expert designation important?**

Apparently not. The Court of Appeals has allowed restoration of privilege even where a party withdrew its expert witness designation for the apparent purpose of preventing production of documents provided to the witness.

- **When can redesignation occur?**

The Court of Appeals said in *Redistricting II* that the designation of an expert can be revoked until "expert opinion evidence is offered through production of a report, responses to discovery, or expert testimony."[20] Yet *Redistricting II* allowed redesignation after the witness had been deposed,[21] *Slade* allowed redesignation after the witness submitted an affidavit and a TRO was entered, and *Green* allowed redesignation after the witness testified at an evidentiary hearing. Evidently, the Court of Appeals is willing to allow reinstatement of privilege at any time before actual disclosure of the information or materials to the opposing party. To paraphrase Yogi Berra, privilege evidently ain't waived until it's waived.

- **Does redesignation restore the attorney–client privilege?**

Redistricting II involved legislative privilege, *Slade* involved the confidentiality statute applicable to Corporation Commission investigations, and *Green* involved the work product rule. These cases state that waiver of such privileges is not "permanent" and can be revoked. But does this reasoning apply to the attorney–client privilege: Can the attorney–client privilege be restored once waived? At least one court has said no.[22] It remains to be seen how this issue will be handled in Arizona.

Is the New Rule a Good One?

The bright-line rule set forth in *Emergency Care Dynamics* was intended both to provide guidance to counsel in dealing with experts, and eliminate discovery battles over communications with expert witnesses.[23] Unfortunately, the new rule resurrects both of those ills. The new rule raises many questions regarding its scope, and it will generate needless discovery disputes over its applicability.

Moreover, the new rule undermines the law of waiver. The new rule is premised on both the rationale that a party should have discretion to decide which experts it will call to testify at trial, and on Rule 26(b)(4)(B), which allows interrogatories to and depositions of non-testifying consultants only upon a showing of exceptional circumstances.[24] But neither basis supports allowing parties to revoke a waiver of privilege. Waiver of privilege is separate from testimony at trial. Once privilege is waived, a party has a duty under Rule 26.1 to disclose the withheld documents and information, regardless of whether the witness testifies at trial.

We can hope that the Supreme Court will have the opportunity to close the hole the Court of Appeals has created in its own bright-line rule. Until then, counsel have been given a means to shield information from discovery.

endnotes

1. ARIZ.R.CIV.P. 26(b)(4)(B).
2. *Id.* Rule 26(b)(4)(A).
3. The Federal Rules require testifying experts to submit a written report, which must include "the data or other information considered by the witness in forming the opinions." FED.R.CIV.P. 26(a)(2)(B). The federal Advisory Committee Notes explain that this requirement was intended to foreclose the argument "that materials furnished to … 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." 1993 Advisory Committee Notes to FED.R.CIV.P. 26.
4. 932 P.2d 297 (Ariz. Ct. App. 1997).
5. *Id.* at 301 (quoting *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 63 (D.N.M. 1996)).
6. *See Arizona Independent Redistricting Commission v. Fields*, 75 P.3d 1088 (Ariz. Ct. App. 2003) (extending the *Emergency Care Dynamics* waiver rule to claims of legislative privilege).
7. *Id.* at 1102 (quoting *Emergency Care Dynamics*, 932 P.2d at 300-01).
8. *Emergency Care Dynamics*, 932 P.2d at 301.
9. *Arizona Independent Redistricting Commission*, 75 P.3d at 1103 ¶ 51.
10. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 121 P.3d 843 (Ariz. Ct. App. 2005).
11. *Id.* at 843.
12. *Id.* at 865 ¶ 89.
13. *Id.* at 865 ¶ 83 (emphasis in original).
14. 129 P.3d 465 (Ariz. Ct. App. 2006).
15. *Id.* at 469 ¶ 27.
16. 143 P.3d 393 (Ariz. Ct. App. 2006).
17. *Id.* at 395 ¶ 5 (quoting Superior Court ruling).
18. *Id.* at 398 ¶ 17 (quoting *Slade*, 129 P.3d at 469).
19. *Id.* at 398 ¶ 15.
20. *Arizona Minority Coalition for Fair Redistricting*, 121 P.3d at 865 ¶ 83.
21. *See Arizona Independent Redistricting Commission*, 75 P.3d at 1093 ¶ 7.
22. *See CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003) (holding that attorney–client privilege cannot be restored by changing designation of witness from testifying expert to non-testifying consultant); *cf. In re G-I Holdings Inc.*, 218 F.R.D. 428, 432 (D.N.J. 2003) ("Once a party waives the attorney–client privilege, it relinquishes the privilege for all purposes and circumstances thereafter.").
23. *Emergency Care Dynamics*, 932 P.2d at 301.
24. ARIZ.R.CIV.P. 26(b)(4)(B).