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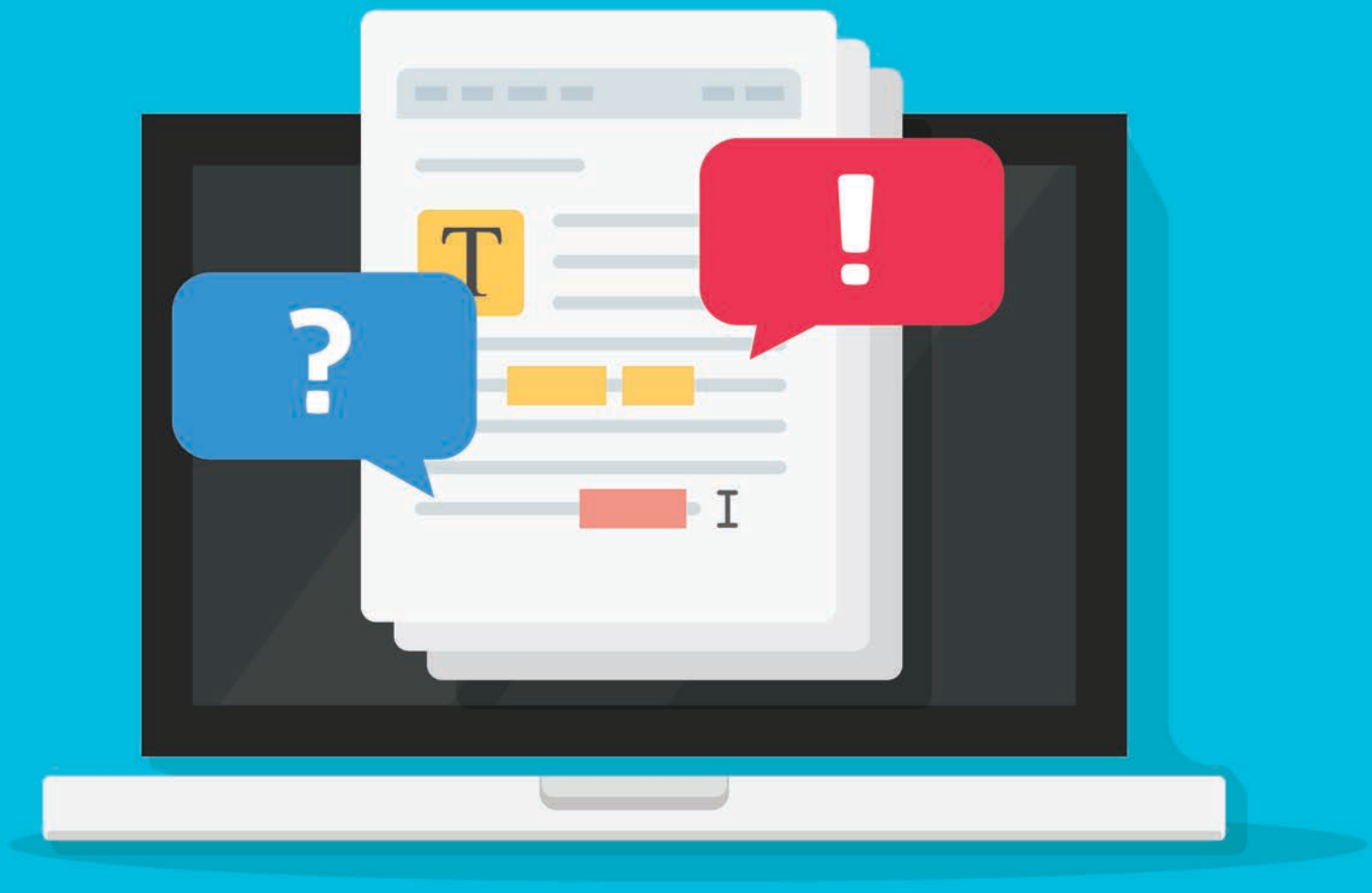

# Don't Let the Expert's Communications Become Discoverable

*By Allen Levine and Darren Goldman*

For attorneys practicing in Florida State and in federal courts, a typical litigation consists of two discovery phases: fact discovery and expert discovery. Most litigators are familiar with fact discovery and what must and must not be disclosed under the applicable rules of procedure. For example, communications between a client and the client's attorney can be withheld under the attorney-client privilege. Similarly, an attorney's internal working papers, memoranda, and communications can be withheld under the work-product doctrine.

While there are exceptions to both the attorney-client privilege and the work-product doctrine, the exceptions are narrow and well defined. The same is not true with respect to expert discovery, where a number of variables will determine what must be disclosed to the opposing party.

The first question a litigator must ask is whether the expert is a "testifying expert" or a "consulting expert." If the expert is hired to consult, and will not be providing testimony, then the opposing party is not entitled to any discovery, absent exceptional circumstances. If the expert is going to testify, the discovery rules become trickier and more perilous.

In Florida courts, Florida Rule of Civil Procedure 1.280(b)(5)(A)(i) requires disclosure of "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Though no Florida case has explicitly addressed the issue, they strongly suggest that an expert's draft reports, notes, communications and working papers are discoverable.

The courts also require disclosure of documents and communications that would normally be withheld under the attorney work-product doctrine and/or attorney-client privileges if those documents were "relied on" by the expert or "used as a basis for the expert's opinion." What constitutes "relied on" or "used by" is not well-defined. For example, an argument can be made that simply reviewing a document or communication from an attorney constitutes reliance, even if the expert ultimately rejected its value because the expert did review it and based his or her conclusion in some way on the evaluation.

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Case law is also not entirely clear as to whether an attorney's written impressions are discoverable if they are provided to an expert. Once again, the issue may be whether the expert "relied" on those impressions. The only way to be certain a document given to an expert will not be subject to disclosure is for the expert to testify he or she did not even look at the document.

In federal court, the Federal Rules of Civil Procedure protect expert drafts from being disclosed as part of expert discovery. Rule 26(b)(4)(B) "specifically protect[s] drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." The rules are not quite as clear with respect to attorney-client privileged communications and work-product documents. Rule 26(b)(4)(C) does "protect communications between the party's attorney and any witness required to provide a report," but leaves an exception for communications that "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed" or that "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."

Thus, the same questions as to what the expert "considered" and "relied on" are present here as well. Indeed, some federal courts have used these exceptions to require disclosure of otherwise privileged documents.

## PRACTICE TIPS

The upshot of the Florida and Federal Rules of Civil Procedure is if an expert considered and/or relied on a document or communication in forming his or her opinion, that document or communication is likely discoverable, regardless of whether it would otherwise be privileged. No litigator wants to go before a court to defend why a document or communication should not be disclosed. This is especially true when the argument will turn on convincing a judge that even though the attorney felt it necessary to share the document or communication with the expert, the expert did not consider or rely on it.

To avoid this somewhat sticky situation, there are certain best practices litigators can adopt in communicating with their expert witnesses. Note that observing these practices will not prevent deposition and/or cross-examination questions related to an expert's communications with counsel; but they will, generally speaking, prevent disclosure of documents and written communications that would otherwise be privileged and/or work product.

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Most attorneys prefer to have a written record. With experts, however, this preference can open the door to unwanted discovery. Tell the expert not to communicate substantive matters via email at the first meeting and reinforce that direction after the expert is hired. Explain that notes and worksheets will be discoverable.

Communicate with an expert by phone, not email. Verbally express any disagreements with an expert's opinion or evaluation of an issue rather than laying it out in a memorandum. The same information is being conveyed, but there is no record that must be produced. Although the communication may be protected from discovery anyway because it is an attorney's mental impression rather than a fact, it avoids a court fight. It also could avoid having to produce redacted documents that may give the impression something untoward is being said — even if everything is in order.

## USE SCREEN SHARING TECHNOLOGY

Most experts will share a draft of a report with an attorney before submitting a final version. The attorney will often want to comment on the draft. These comments can range from minor to substantive edits regarding the

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expert's ultimate opinion. As discussed above, these drafts are discoverable in Florida courts.

While the amended Federal Rules of Civil Procedure prevent discovery of drafts in federal court in theory, in practice, many courts still look for ways around the Rule to order disclosure.

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To avoid this risk, take advantage of video conferencing technology such as Zoom, WebEx, Skype Meetings or Microsoft Teams. Set up a video call so the attorney can review the draft in real time. The attorney can then either dictate proposed edits or have the expert turn over control of the screen and do it personally. This accomplishes the same goal as emailing and reviewing drafts but avoids the discoverable paper trail of prior versions.

Don't give the expert a document dump. Attorneys often give experts full access to their internal database to avoid insinuations that the expert was only given favorable information to support his or her opinion. The flip side of this strategy is that if some of the documents in the database are privileged, it could open those documents up to production if the expert reviewed them.

Rather than give the expert unfettered access, ask what types of documents are needed, and provide only those documents. Periodically ask if there are any other documents that would be helpful and provide them. Inform the expert at the outset that if documents are needed, they will be provided. This allows the attorney to ensure that privileged documents and communications are not being provided, and thus are not subject to discovery. It has the added benefit of the expert being able to testify that every document necessary or helpful was provided.

The uninformed litigator who assumes that the same rules apply to expert discovery as they do to fact discovery is walking into a trap. This mistaken assumption can lead to privileged communications and/or attorney work product being disclosed to the opposing party. By being mindful of the differences and taking the simple precautions detailed above, litigators can be sure privileged materials remain protected from forced disclosure. ■



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