Managing Risks When Working with Experts and Consultants

by J. Randolph Evans, Shari L. Klevens, Lino S. Lipinsky, and Lauren P. Carboni

Selecting and working with consultants and experts are routine aspects of modern law practice. Many complex matters may turn on the opinions of consultants and experts. In determining what information to share with a consultant or expert, the attorney must carefully balance the need to disclose sufficient facts to allow the consultant or expert to provide meaningful assistance with the risk of waiving the attorney–client privilege or the protections for attorney work product.[1]

Even though consultants and experts may be privy to important information and decisions, including legal strategy and theories of the case, they do not function as attorneys and should not be treated as such. This makes the selection of consultants and experts an important task involving risk management issues. This article recommends strategies for mitigating the risks associated with selecting, paying, and working with consultants and experts. The Interprofessional Code (IPC)[2] serves as a guide to appropriate interaction between attorneys and other professionals and is a valuable resource for navigating these risks.[3]

Counsel Should Hire Experts

Risk management begins with the hiring process. Attorneys working with consultants or experts should hire the expert or consultant themselves rather than allow the client to do so. It is not uncommon, however, for counsel to request that the client physically sign the agreement with the consultant or the expert, so that the client at least shares the responsibility to pay the consultant's or the expert's fees and costs. Alternatively, the lawyer may assume sole liability for paying the consultant or expert, particularly in contingency fee engagements. In some instances, a client may have a professional in mind based on a work history or a previous relationship, or a colleague may have recommended the expert or consultant to the client. In other instances, because clients are typically responsible for costs in any representation, the client may want to hire the expert or consultant directly.

Certainly, the attorney should give the client's preferences and thoughts great deference in deciding whom to hire as an expert or a consultant. But completely delegating this responsibility to the client is not advisable. The IPC states that the attorney has the ultimate duty to determine the expert's legal competency to render an opinion on a given issue.[4] For many reasons, the better course is for counsel, and not the client, to retain consultants and experts directly. This is both a practical and an ethical practice.[5]

The first step in retaining a consultant or an expert often involves a written request that (1) fully informs the expert concerning the purpose for which the opinion is sought; (2) identifies the parties to the claim and the party requesting the opinion; (3) specifies the information and documentation provided to the expert upon which the expert opinions should be based; (4) provides a brief summary of the case; (5) specifies the issues to be addressed by the expert and the legal terminology, if any, involved or required; and (6) lists all information that the expert will be required to disclose by court rule. In addition, the request may recite the financial arrangements to

About the Authors

Randy Evans is an author, litigator, columnist, and expert in the areas of professional liability, insurance, commercial litigation, entertainment, ethics, and lawyer's law, and handles complex litigation throughout the world—randy.evans@dentons.com. Shari Klevens is a partner in the Atlanta and Washington, DC offices of Dentons US LLP, where she specializes in the defense of legal malpractice claims—shari.klevens@dentons.com. Lino Lipinsky is a partner in the Denver office of Dentons US LLP. He represents clients in real estate, trade secrets, professional liability, creditor's rights, employment, and contract cases—lino.lipinsky@dentons.com. Lauren Carboni is an associate in the Denver office of Dentons US LLP. She focuses her practice on all areas of litigation and represents clients in commercial, employment, civil rights, contract, and healthcare matters—lauren.carboni@dentons.com.




This Department is sponsored by the CBA Lawyers' Professional Liability Committee to assist attorneys in preventing legal malpractice. For information about submitting a manuscript or topic suggestion, contact Chris Little, (303) 773-8100, clittle@montgomerylittle.com; or Reba Nance—(303) 824-5320, reban@cobar.org.

which the expert and the attorney have agreed.[6] The typical expert retention agreement outlines who pays, who communicates, and who directs.

Who Pays?

Most consultants and experts prefer that the law firm remain responsible for their bills, but the better course (and one consistent with the ethical rules in most states) is for the client to accept responsibility for paying the experts.

Who Communicates?

Clients should not communicate with experts or consultants without counsel being present. The risks of admissions, misdirection, mistakes, and privilege waiver are simply too great. In addition, when litigating in a jurisdiction such as Colorado, which allows certain communications between a non-testifying or consulting expert and an attorney to be protected by the attorney–client privilege[7] or work product protection,[8] the ability to assert the privilege with respect to such communications becomes much more challenging if the client has communicated with the expert without attorney involvement. But the attorney can take steps to maximize the likelihood that such communications will be protected from disclosure. Colorado courts have held that the attorney–client privilege will protect communications between the client and agents of the attorney (i.e., consulting experts) where the assistance of these agents is indispensable to the attorney's work.[9] In any event, all information that is shared with a testifying expert, including attorney work product, is discoverable under CRCP 26(a)(2).[10]

Who Directs?

As a result, for both legal and practical reasons, attorneys should implement communication protocols for experts. Each person has a role to play. The attorney must make all strategic legal decisions and may direct the consultant or expert to communicate exclusively with counsel. This militates against the risks of unwarranted disclosure when the client communicates directly with a consultant, because the communications may no longer be protected if counsel has been bypassed.

Further, if a client retains the expert directly, there is a risk that the relationship will be characterized as a business rather than a legal one, and the business relationship may not be covered by the attorney–client privilege or the work product doctrine.[11] For this and the other reasons stated above, it is a best practice for counsel and not the client to hire and communicate with experts and consultants.

Run a Conflict Check

Conflict checks on all potential consultants or experts are a must. Sometimes even the most diligent attorneys forget this critical step.

The failure to run a conflict check could significantly impact the case. For example, if the attorney retains a consultant to provide an opinion on the value of an asset that is subject to a sale, the con-

sultant's credibility could be undermined if it is later disclosed that the consultant participated in earlier litigation involving the property's value or advanced a legal theory contrary to that being currently advanced. Or, if the consultant or expert has relationships with the parties or counsel in the new matter, these relationships could be the subject of discovery and claims of bias.

Accordingly, an attorney retaining an expert or consultant should seek all information that might be relevant to the expert's or consultant's history and independence. The attorney should include any information that could operate as a conflict of interest when running the conflict check on the expert or consultant. Because clients typically rely upon their attorneys to select an expert or consultant, it is important that this process be thorough.

Treat Non-testifying and Testifying Experts Differently

Attorneys working with consultants or experts should treat non-testifying and testifying experts differently in litigation matters.[12] Both the Federal Rules of Civil Procedure (Federal Rules) and the Colorado Rules of Civil Procedure (Colorado Rules) recognize this distinction.[13]

Many litigators use non-testifying consultants in addition to testifying experts. Non-testifying experts are not subject to the same disclosure obligations set forth in the Federal and Colorado Rules. This means that they are not required to prepare reports or to disclose their opinions.[14] They can be very helpful to an attorney by providing an off-the-record analysis. Communications with a non-testifying consultant are typically protected by the work product doctrine, because such communications are almost always in anticipation of litigation (or, more likely, during ongoing litigation).[15] However, these communications may become part of the claimant's chart or record. Attorneys must therefore use caution in discussions with such professionals.[16]

Under both the Federal and Colorado Rules, the materials that a consultant prepares in anticipation of litigation may be discoverable if the party seeking the discovery has substantial need of the information that is unavailable without undue hardship and is not obtainable by other means.[17]

If using a testifying expert in litigation, consider early in the case whether the expert's drafts are protected from disclosure or discovery. The 2010 amendments to the Federal Rules, specifically Fed.R.Civ.P. 26(b)(4)(B), now protect draft expert reports from discovery.[18] This rule change resolved a split in the federal courts regarding what information and materials were required to be disclosed to an opposing party under Rule 26. The Colorado Rules similarly protect draft expert reports from disclosure.[19] However, even in jurisdictions that protect draft reports from disclosure, some materials are still discoverable.[20] For instance, notes, outlines, lists, letters, and memoranda prepared by an expert or non-attorney concerning or relating to draft expert reports are not protected and must be disclosed.[21] Indeed, many federal courts have found that the work product doctrine only protects from discovery those materials that would reveal attorney opinions.[22] Thus, materials that support the factual basis for the expert's opinion may be discoverable, even if counsel selected them.

Likewise, attorney work product provided to a designated expert may be discoverable. And there is still a risk that communications between an attorney and a designated expert will be discoverable because there is no statutorily recognized privilege for such relationship.[23]

Conclusion

Consultants and experts play an important role in the success of many cases. Even before retaining an expert, it is critical that the attorney identify and understand the applicable rules regarding expert testimony and discovery so the attorney can adjust how he uses and communicates with the expert.

In selecting and retaining a consultant or an expert, it is important for counsel to hire the consultant or expert, run a conflict check on all potential consultants or experts, and treat non-testifying and testifying experts differently. These practices can mitigate the risks of waiving the attorney–client privilege or the protections for attorney work product associated with retaining a consultant or expert.

Reader feedback on this article is welcomed and appreciated. Any references in this article to "safest courses to proceed," "safest course," or "best practices" are not intended to suggest that the Colorado Rules require such actions. Often, best practices and safest courses involve more than just complying with the Rules. In practice, compliance with the Rules can and should avoid a finding of discipline in response to a grievance or a finding of liability in response to a malpractice claim. However, because most claims and grievances are meritless, effective risk management in the modern law practice involves much more. Hence, best prac-

tices and safer courses of action do more: they help prevent and more quickly defeat meritless claims and grievances.

Notes

1. *See* CRS § 13-90-107(b) (the attorney–client privilege statute). The attorney should also be cognizant of the legal restrictions on the sharing or disclosure of medical records or information. *See*, *e.g.*, 45 CFR Parts 160 and 164 (the privacy and security rules promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996); CRS § 18-4-412 (creating the crime of theft of a medical record or medical information).

2. CBA Interprofessional Comm., Interprofessional Code, Preface to Third Edition (3d ed. 2010), www.cobar.org/portals/repository/Interprofessional Code Guidelines.pdf. The CBA, the Denver Bar Association, the Boulder County Medical Society, and the El Paso Medical Society, but not the Colorado Medical Society or the Denver Medical Society, have endorsed the IPC.

3. The IPC was originally intended to address the medical and legal communities, but later editions have extended its purview to include other professions, such as engineers and certified public accountants.

4. IPC Rule 4.2.

5. *See* Colo. RPC 3.4, cmt. [3].

6. IPC Rule 4.1.

7. In Colorado, the attorney–client privilege can protect communications between an attorney and an expert who serves as the attorney's agent. For example, the privilege covers an attorney's communications with "a psychiatrist retained by defense counsel to assist in the preparation of the defense." *See Miller v. Dist. Court*, 737 P.2d 834, 837 (Colo. 1987) ("we have held that the privilege may be applied to communications between the client and agents of his attorney"), *superseded by statute as stated in Gray v. Dist. Court*, 884 P.2d 286, 291 (Colo. 1994) (finding that statutory attorney–client privilege does not extend to communications made to physicians or psychologists who are eligible to testify concerning a criminal defendant's mental condition once that mental condition has been asserted as a plea or defense). *See also Bellman v. Dist. Ct.*, 531 P.2d 632, 634 (Colo. 1975) (finding that attorney–client privilege extends to insurance investigator because he was, in effect, an agent of the attorney for the purpose of acquiring and transmitting information to him).

8. *See Gall v. Jamison*, 44 P.3d 233, 240 (Colo. 2002) ("an attorney may consult on a confidential basis with as many non-testifying experts as she deems necessary to develop legal theories and to test their scientific viability") (citing *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 392 (N.D. Cal. 1991)). *See also* CRCP 26(b)(4)(D) ("Rule 26(b)(3) . . . protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications . . . .").

9. *See* authorities cited in note 7, *supra*.

10. *See Gall*, 44 P.3d at 240–41 (holding that attorney work product shared with a testifying expert witness is discoverable under Rule 26, provided the expert witness considers the work product in forming an opinion); *Clements v. Davies*, 217 P.3d 912, 916 (Colo.App. 2009) (same). *See also* IPC Rule 4.3.

11. *See In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994) (quoting Sexton, "A Post-Upjohn Consideration of the Corporate Attorney–Client Privilege," 57 *N.Y.U. L.Rev.* 443, 498 (1982)). The Colorado Supreme Court adopted the reasoning of *Bieter* in *Alliance Constr. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 865–70 (Colo. 2002) (case concerned the independent contractor of a governmental entity, although its reasoning should apply equally to private entities).

12. CRCP 26(a)(2)(B)(I) (requiring, among other things, a testifying expert to produce before trial a written report or summary containing a complete statement of all opinions to be expressed and the bases and reasons therefor, and a list of the data and other information considered by the witness in forming the opinions); CRCP 26(a)(2)(B)(II) (requiring, among other things, a witness who may be called to provide expert testimony to make a written report containing a complete description of all opinions to be expressed and the basis and reasons therefor, and a list of the qualifications of the witness). *See also Clements*, 217 P.3d at 916.

13. *See, e.g.*, CRCP 26, cmt. [8] ("[T]wo types of experts are contemplated by Fed.R.Civ.P. and CRCP 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by CRCP 26(a)(2)(B)(I) for CRCP 26(a)(2)(B)(II) type experts.").

14. Fed.R.Civ.P. 26(a)(2)(B); CRCP 26(a)(2)(B).

15. *See Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1024 (7th Cir. 2012) ("[Rule 26(b)(4)(D)] is simply an application of the work product rule. The consultant's work will, by definition, be work product because the party uses the consultant 'in anticipation of litigation.'").

16. *See* CRCP 26, cmt. [18] ("'Other' (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a 'statement' must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure.").

17. Fed.R.Civ.P. 26(b)(3); CRCP 26(b)(3).

18. Fed.R.Civ.P. 26(b)(4)(B).

19. CRCP 26(b)(4)(D).

20. *See, e.g.*, *Garrigan v. Bowen*, 243 P.3d 231, 236 (Colo. 2010) (citing *Gall*, 44 P.3d at 239 ("we adopted a bright-line rule favoring broad disclosure, concluding that 'opinion work product that is reviewed or considered by an expert in preparation for testimony at trial is discoverable'") (applying the prior version of the Colorado expert discovery rules).

21. *See, e.g.*, *Republic of Ecuador v. Bjorkman*, No. 11-cv-01470-WYD-MEH, 2013 WL 50430, at *2 (D.Colo. Jan. 3, 2013).

22. *See, e.g.*, *Hickman v. Taylor,* 329 U.S. 495 (1947); *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) ("courts must still protect against the disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney and his agents"); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

23. *See* CRS § 13-90-107 (Colorado privilege statute). ■