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## **Court of Appeals Finds Trial Consultant Work Privileged**

Over the past few years we have seen a tremendous acceptance among our client base of the value of preparing witnesses for deposition. At the same time, many of you have expressed concern regarding the discoverability of such work (and trial consulting in general). The absence of case law on this topic is both reassuring and frustrating. We have, on occasion, referenced Stan Davis and Tom Beisecker's 1994 article in the American Journal of Trial Advocacy: (Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?) as being perhaps the most comprehensive gathering of views on the subject.

We are pleased to report that the Third Circuit Court of Appeals (Judges Scirica, Ambro, and Garth\*) recently issued a well-reasoned opinion concluding the work product of a non-testifying trial consultant is privileged.

A senior manager and auditor of an accounting firm was asked during deposition about his interaction with a trial consultant. (The questions were very specific, suggesting the examining attorney knew in advance of the deposition that the deponent had worked with a specific consultant.) In reversing the decision of the District Court (work product doctrine should be cabined to lawyers and be strictly limited when applied to a lawyer's agent), the Court of Appeals held that "litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work product doctrine. . . . Moreover, a litigation consultant's advice that is based on information disclosed during private communications between a client, his attorney, and a litigation consultant may be considered 'opinion' work product which requires a showing of exceptional circumstances in order for it to be discoverable."

The Court of Appeals noted that in retaining a trial consultant, the accounting firm had an expectation that all counsel's communications with him would be confidential and protected from discovery, and would not have hired him absent this belief. Having participated in frank and open discussions with counsel regarding trial themes, theories, and strategies, the trial consultant's private communications with the lawyers and the witness merit protection under the work product doctrine, "as they reflect and implicate [the client's] legal strategy regarding a deposition taken as part of this litigation" and are only discoverable upon a showing of rare and exceptional circumstances.

It would seem reasonable to conclude that there are aspects of trial consulting, beyond witness preparation, that are similarly protected. As always, we welcome your comments and suggestions.

A copy of the opinion, filed September 16, 2003, is available from Litigation Insights upon request.

*\*Judge Garth concurred, and found attorney-client privilege also protected communications between the witness and the consultant*