

## PROFESSIONAL LIABILITY UPDATE

### DISQUALIFICATION

By Jennifer A. Becker

#### ***DeLuca v. State Fish Co., Inc. (2013) 217 Cal.App.4th 671***

*The Second District holds neither the attorney-client privilege nor work product protection precludes counsel's contact with an opposing expert who has already testified, and disqualification is not warranted.*

State Fish Company, Inc. (State Fish), a seafood business owned and operated by the DeLuca family sued its former director, John DeLuca, who opened a competing business. The dispute was about ownership and rental value of a fish storage plant. DeLuca cross-complained for unlawful detainer.

At trial State Fish offered the testimony of a commercial real estate broker, Leo Vusich who opined on the rental value of the plant. Vusich confirmed that DeLuca's appraiser's valuation of the fair rental value was reasonable and implied that DeLuca's appraiser had undervalued the property.

After an appeal, DeLuca prevailed and the case was remanded to the trial court to try DeLuca's unlawful detainer action. DeLuca's counsel told State Fish's counsel, Michael Leight, DeLuca would retain Vusich on his behalf. State Fish filed a motion to disqualify DeLuca's counsel supported by Leight's declaration he had initially retained Vusich as a consultant, had shared his work product, and his co-counsel disclosed Vusich as an expert. State Fish also claimed it had consulted with Vusich on its own behalf, and shared confidential, proprietary

information with him. State Fish argued DeLuca and his counsel had conspired with Vusich to breach Vusich's "duty of loyalty" to State Fish, which arose from Vusich's employment by State Fish.

DeLuca countered with Vusich's declaration that he was retained to testify, not consult. Vusich said he had only one non-substantive contact with Leight prior to his deposition. He agreed to testify for DeLuca in the retrial because his testimony would be the same regardless of which party hired him.

The trial court granted the motion, finding Leight to be more credible than Vusich. Although the attorney-client privilege was waived with respect to the basis for Vusich's opinions, the court concluded Leight imparted work product to Vusich that went beyond the formation of an opinion. The court also concluded Vusich learned State Fish's confidential information when it retained him independent of the litigation. Thus, there was a rebuttable presumption DeLuca's counsel was in possession of that information.

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On appeal the Court noted disqualification motions implicate several important interests, including the clients' right to counsel of their choice, the attorney's interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. The most important concern is the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. This must be balanced with recognition that disqualification is a drastic course of action. A party seeking disqualification due to improper expert contacts must show the expert possesses material, confidential information. If so, there is a rebuttable presumption the information has been used or disclosed in the current employment.

There were three types of confidential information at issue: (1) confidential information obtained by Vusich when independently employed by State Fish; (2) confidential information obtained by Vusich when employed by Leight as a consultant, but prior to his designation as a testifying expert; and (3) confidential information obtained by Vusich as a testifying expert.

The Court disagreed Vusich owed State Fish any duties due to its independent retention of him. He was never an employee, had not agreed to confidentiality, and, as a real estate agent, owed no duty of confidentiality. This contact could not support a disqualification order.

Experts can be either consulting experts or testifying experts. Communications with consulting experts are protected by the attorney-client privilege and work product protection. By contrast, neither the attorney-client privilege nor work product protection will protect information transmitted to a testifying expert. When an agent of an attorney testifies about matters learned in the attorney-client relationship, there is a waiver of the privilege, just as if the attorney were to testify. The decision to use the expert as a witness manifests

the client's consent to disclosure of attorney-client and work product information.

Although an expert may be retained as both a consultant and an expert, case law has drawn a bright line at the point where it becomes reasonably certain that the expert will testify: the attorney-client privilege and work product protection apply prior to the point, but not subsequent to it. Since a testifying expert's opinions are no longer protected by the attorney-client privilege or work product protection, the expert does not possess confidential information. Thus, there is no reason opposing counsel cannot retain the expert.

A dual capacity expert's advice rendered solely as a consultant is subject to conditional work product protection. A trial court is required to conduct an *in camera* review of a written report prepared by an expert both consulting and testifying to separate out information provided as a consultant from information provided a testifying expert. The latter information is discoverable; the former is discoverable only a showing of good cause.

The court would not extend this concept to preclude contact by an opposing counsel to prevent disclosure of work product information orally conveyed to the expert in his or her consultant capacity. Such parsing would swallow the bright line rule and is impractical. Work product is only conditionally protected, and there are strong arguments that good cause exists to overcome the conditional privilege because an opponent has an undisputed right to discuss all information relayed to and from the dual-capacity expert in his or her testimonial capacity.

Moreover, State Fish did not provide sufficient information about the nature of the information and its material relationship to the case in order to evaluate its claim confidential, protected information was conveyed to Vusich. Thus a