

# LIABILITY LESSONS



"CPAs' work products are their property, and they have well-established arguments for why they cannot be compelled to testify."

## Keeping Your Thoughts to Yourself

By Jonathan S. Ziss, JD

*Insightful lessons can be learned by reviewing professional liability issues. With this in mind, Mather & Co. provides this column. For more information, contact Mather at [info@mather-co.com](mailto:info@mather-co.com).*

A dreaded subpoena has been served, but, in this instance, the subpoena does not seek your client's property, but instead is looking for your property: your thoughts, conclusions, methods, and opinions. Can you be forced to the witness stand to testify as to your expert conclusions and opinions? The answer may surprise you. The hypothetical situations presented below demonstrate what your options are when lawyers come looking for your personal thoughts and opinions.

### Taking Sides

Years ago, you were engaged by a chain of automobile dealerships owned by partners Barry Glibb and Hy Finance. You handled a variety of projects for the partnership, and at Glibb's request you participated in some e-mail discussion threads and performed some tentative calculations concerning the value of Glibb's partnership interest. You also compared Glibb's compensation package against some industry norms. One day, Glibb and Finance decide to go their separate ways, but the negotiations fail. Glibb wants you to testify on his behalf, but you want to remain neutral. His attorney sends you a subpoena that demands that you appear in his office for a deposition, and that you bring all documents reflecting your valuation calculations and communications, along with data concerning the propriety of Glibb's compensation. You know what he's interested in: He wants to use your expert opinion to shore up his litigation position.

You consult with your counsel, and you learn that you cannot be forced to express an opinion in court as to the value of Glibb's interest. Because you have not consented to testify as Glibb's expert, and you have not previously reached an opinion in this matter, you cannot be compelled under subpoena to do so. Your work product may be fair game, for what it is worth, but it may not be worth much if it does not come with your endorsed opinion. You wind up producing documents only. Eventually, Glibb's counsel decides that it is not worth his time or his client's money to sift through your documents without your stated opinion, so you stay clear of the firing line. You later learn that neither partner hired an expert, and they settled their dispute.

### Up in Smoke

You were engaged by Captive Adjusters on behalf of Good Faith Insurance Co. to value the business inventory, income, and interruption loss of More Than Toothpicks, a retail establishment that was damaged by fire. You completed the assignment and prepared a report for Captive, documenting your findings and conclusions concerning the loss. The insurance claim was settled, but More Than Toothpicks' owners Paul and Mary Spice separate and file for divorce soon after the fire. Counsel for Mary serves you with a trial subpoena, requiring that you bring along the report you authored for Captive as well as all of your work papers. Mary likes the conclusions you reached in the report to Captive, and she plans on co-opting your conclusions in the service of her claim for equitable distribution.

You ask your counsel why you have to participate. subpoena or no subpoena. After all, you were never engaged by More Than Toothpicks or by the Spices. You are delighted to learn that you cannot be forced to express an opinion against your will. As an expert in your field, you cannot be compelled to express your opinions concerning the applicable methodology or to express the result of that methodology as

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applied to the facts made known to you. As would be the case with any other fact witness, you can be compelled to testify as to what you did, what you saw, what you read, and what you heard, but you cannot be forced to testify as an expert witness as to what it all means.

The first thing your counsel does after you fax her a copy of the subpoena is call Mary's lawyer, Jack Dour, who is incredulous to learn that you refuse to testify. Dour argues that your loss-valuation report is relevant to his client's equitable distribution claim, and that it would be unfair if Mary had to hire someone to recreate your work product from scratch, if that could even be done at this point in time. What's more, Dour argues, he has a copy of your report sitting on his desk. He just needs you to read it from the witness stand. So really, he claims, you will be like just another fact witness, relating what you did relative to the fire loss.

Your counsel reminds Dour that, in Pennsylvania, it has long been held that a witness may not be compelled to offer opinion testimony, and that is what Dour is looking for. Your counsel cites the Pennsylvania Supreme Court, saying "The private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things." Dour does not relent, so your counsel files a motion to quash the subpoena, arguing that it is a subterfuge for Dour to refer to you as a fact witness, and that the truth of the matter is that Mary Spice wants the benefit of your opinion. Your counsel also points out that this is not a gambit to negotiate a favorable fee arrangement for you to testify, but that you do not consent to be a part of this dispute at any price. The motion goes as expected. The judge, relying on 90 years of Pennsylvania precedent, rules your way.

## Out of Stock

The shareholders of a dental practice arrived at a stock-valuation formula, but your own personal opinion is that the formula is weak. As the CPA to the practice, you agree to calculate the valuation

in the event of a shareholder withdrawal. Sure enough, there is an adversarial split, which triggers your obligation to run the numbers. The outcome is not what the ousted shareholder had hoped, so he rejects the formula on various grounds and engages a traditional business-valuation expert. Your client asks you to take the witness stand to explain your valuation and criticize the opinion of the adversary's expert. You say that you will testify to defend your work product and opinion from criticism as a shield, but you will not agree to go on the offensive as the sword of the practice. The client is disappointed and cannot understand your inflexibility.

Your counsel tells you that you are not obliged to sign on as an offensive expert, even assuming that your client is willing to pay you a fair wage for your efforts. In fact, in this instance, your client may be

better served by an independent expert, as a matter of trial tactics. With a little diplomacy, you manage to keep the peace and keep the client.

## Conclusion

The conclusion reached through all three scenarios is that your analytical work product is, generally speaking, your property, and unless you consent to testify as an expert as to your opinions, you have some powerful and well-established arguments as to why you should not be compelled to do so. ■

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