In the status quo, the majority of criminal and civil courts extend attorney-client privilege protections to cover communications between attorneys or their clients and expert consultants. These uses of attorney client privilege immunize the expert consultants communications from discovery, preventing the legal opposition from knowing about the existence of the expert’s communications, calling the expert to testify at trial, and even speaking to the expert before the trial. Imwinkelried writes.

Edward J. Imwinkelried, The Application of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection, 68 Wash. U. L. Q. 19 (1990). Available at: <http://digitalcommons.law.wustl.edu/lawreview/vol68/iss1/3>

There is, however, a notable exception… the expert by the opposition.

For all federal criminal and civil court circuits, the USFG will remove attorney-client privilege protections from all communications with expert consultants except in situations in which (1) consultants serve as necessary interpreters or translators of information exchanged between client and attorney or (2) an external consultant is determined by the court to represent the client in the delivery of the client’s information to the client’s attorney. Imwinkelried 2 writes.

“THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO INTERACTIONS AMONG CLIENTS, ATTORNEYS, AND EXPERTS IN THE AGE OF CONSULTANTS: THE NEED FOR A MORE PRECISE, FUNDAMENTAL ANALYSIS.” Professor of Law, University of California, at Davis School of Law and Associate, Reed Smith LLP. 48 Hous. L. Rev. 265. Spring 2011.

In some fact situations,… at the very heart of the legal privilege.

Contention 1: The current, excessively broad scope of attorney client privilege protections enables opportunistic litigants to effectively exclude unfavorable testimony from both trial and pre-trial investigation. Imwinkelried 3 writes.

Imwinkelried and Amoroso. “THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO INTERACTIONS AMONG CLIENTS, ATTORNEYS, AND EXPERTS IN THE AGE OF CONSULTANTS: THE NEED FOR A MORE PRECISE, FUNDAMENTAL ANALYSIS.” Professor of Law, University of California, at Davis School of Law and Associate, Reed Smith LLP. 48 Hous. L. Rev. 265. Spring 2011.

Several significant practical consequences… to a favorable opinion.

Thus, the ability of the criminal justice system to make accurate decisions is compromised by this use of attorney-client privilege. Litigants can cherry-pick an expert that supports them and claim in trial that the expert’s views are representative of the entire field that they represent by suppressing the testimony of experts that disagree.

This distorts the system toward favoring the wealthiest clients, potentially enabling them to suppress nearly all expert testimony in an effort to have cases dismissed before trial. Imwinkelried 4 writes.

Imwinkelried and Amoroso. “THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO INTERACTIONS AMONG CLIENTS, ATTORNEYS, AND EXPERTS IN THE AGE OF CONSULTANTS: THE NEED FOR A MORE PRECISE, FUNDAMENTAL ANALYSIS.” Professor of Law, University of California, at Davis School of Law and Associate, Reed Smith LLP. 48 Hous. L. Rev. 265. Spring 2011.

Worse still, this view enables wealthy… judgment as a matter of law.

Therefore, this use of attorney-client privilege (1) further limits the ability of the criminal justice system to accurately determine guilt and innocence by allowing litigant’s to game the system in order to avoid trials, and (2) creates inequality in the justice system because the wealthiest individual and corporate clients are most capable of exploiting the ACP protections for their own gain.

Contention 2: The lack of uniformity in the application of attorney-client privilege protections to the communications of experts creates a legal environment that is arbitrary, produces inaccurate decisions, and incentivizes government abuse. Beardslee writes.

Michele DeStefano Beardslee: Climenko Fellow and Lecturer on Law, Harvard Law School. “The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants.” 62 SMU L. Rev. 727. Spring 2009.

In addition to "duplicative work"… protection absent waiver. n289

Therefore, even if eliminating ACP protections for experts is not markedly better than allowing them to remain, the affirmative plan increases the legitimacy and accuracy of the criminal justice system by creating a standard that all courts will apply.