

Northern District Of California Allows Limited Cross-Examination Regarding Use Of Jury Consultant

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In a consolidated case pending in the Northern District of California, three manufacturers alleged that Rambus, Inc. had monopolized or attempted to monopolize certain technology markets relating to memory chips. *Hynix Semiconductor, Inc., et al. v. Rambus, Inc.*, 2008 U.S. Dist. LEXIS 109955 (N.D. Cal. February 10, 2008). Rambus filed a motion seeking to prevent counsel from asking any witnesses at trial about any meetings with jury consultants, including any meetings in which jury consultants helped the witnesses prepare to testify. Rambus argued, among other things, that such cross-examination would impinge upon both the attorney-client privilege and work-product protections. In support of its position, Rambus cited to *In re Cendant Corp. Securities Litigation*, 343 F.3d 658 (3d Cir. 2003).

"[T]he parties may ask the witness whether he or she met with a jury consultant, the purpose of any such meeting, who was present, the duration of the meeting and whether the witness practiced or rehearsed his or her testimony. However, questions about counsel's or the consultant's views on important facts of the case, trial themes or strategy, strengths or weaknesses of the witness, or advice to the witness as to how to improve his or her appearance or credibility are forbidden."

Hynix Semiconductor, Inc., et al. v. Rambus, Inc.

The district court first considered Rambus' arguments relating to attorney-client privilege. Relying on *In re Cendant*, the court concluded that "if the witness is a client, the substance of any communication between the jury consultant, the client, and the attorney is probably privileged." *Id.* at *24. However, several of Rambus' witnesses were former Rambus employees who, at the time of trial, had been retained as paid consultants for Rambus. Accordingly, the district court concluded that the witnesses' status as "clients" would have to be determined on a case-by-case basis and turned instead

to an analysis of the overall issue under the work product doctrine.

The court stated that "even if the witnesses are now only consultants with no attorney-client relationship with Rambus, their preparation to testify may still be protected by the work-product doctrine." *Id.* at *27. The manufacturers had argued at a hearing on the motion that "any communication with a non-client waives the work-product protection." *Id.* However, the court concluded "that is not the law. The work-product protection continues to adhere where the non-client shares a financial or legal interest, for example, as parties to a joint defense agreement. In this context, the court believes that Rambus' witnesses share a sufficient interest with Rambus to preserve the work-product privilege." *Id.* The court went on to conclude that "questions going to how the consultant told the witness to improve his or her testimony seems to intrude on the values underlying the work-product doctrine and the adversarial system." *Id.* at *28. The court also observed that "it is clear that the proposed line of questioning will create a sideshow and distract the jurors from the factual issues in this case raising FRE 403 concerns." *Id.* at *29.

Ultimately, the court held that only limited cross-examination would be allowed regarding witness preparation. Specifically, the district court ordered that "the parties may ask the witness whether he or she met with a jury consultant, the purpose of any such meeting, who was present, the duration of the meeting and whether the witness practiced or rehearsed his or her testimony. However, questions about counsel's or the consultant's views on important facts of the case, trial themes or strategy, strengths or weaknesses of the witness, or advice to the witness as to how to improve his or her appearance or credibility are forbidden." *Id.* at *29-30. In support of its order, the court pointed to the work-product doctrine as well as the potential for unfair prejudice, confusion, and delay.