DISCOVERY OF COMMUNICATIONS WITH THE EXPERT WITNESS

Written by:
J. SCOTT TARBUTTON, ESQUIRE
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
Ph: (215) 665-2000
Fax: (215) 665-2013
starbutton@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Dallas, TX
Denver, CO
Las Vegas, NV*
Los Angeles, CA
New York, NY
Newark, NJ
San Diego, CA
San Francisco, CA
Seattle, WA
Trenton, NJ
West Conshohocken, PA
Washington, DC
Wichita, KS
Wilmington, DE
London, UK

**Affiliated with the Law Offices of J. Goldberg & D. Grossman.*

DISCOVERY OF COMMUNICATIONS WITH THE EXPERT WITNESS

I. The Work Product Doctrine And Federal Rule of Civil Procedure 26

In 1993, Federal Rule of Civil Procedure 26, *General Provisions Governing Discovery; Duty of Disclosure*, underwent certain amendments to resolve apparent tension existing between a court's duty to prevent the disclosure of attorney opinion work product on the one hand, and Rule 26's mandate for expert disclosure, possibly including that same work product, on the other.

A. Rule 26 – Pre-1993 Amendment

Under old Rule 26, the courts held widely conflicting views as to the discovery of work product that had been shared between counsel and the testifying expert. On one side, the courts held that opinion work product was absolutely protected from discovery, but that factual work product could be discovered. Bogosian v. Gulf Oil Co., 738 F.2d 587, 594-95 (3rd Cir. 1984). Other courts held, however, that the opinion work product rule was no exception to discovery under circumstances where documents which contain mental impressions are examined and reviewed by expert witnesses before their expert opinions are formed. Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983). Another approach depended on a showing of substantial need and an inability to obtain the equivalent without undue hardship. Hamel v. General Motors Corp., 128 F.R.D. 281, 282-84 (D. Kan. 1989). Finally, one court found it necessary to balance the interests championed by the work product doctrine and those sought to be advanced through the disclosure of expert testimony. Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 391-92 (N.D. Cal. 1991). The Intermedics court held that "absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product." 139 F.R.D. at 387.

B. Rule 26 – Post 1993 Amendment

Under the 1993 revisions to Rule 26, litigants are now required to disclose to their adversaries a written report prepared and signed by any witness retained to furnish an expert opinion. Rule 26(a)(2)(B) states in pertinent part:

> " … [requiring disclosure of expert] with respect to a witness who is retained or specially employed to provide expert testimony in a case … [shall] be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinion …." (Emphasis added).

The Advisory Committee Note accompanying the 1993 Amendments states, with regard to Rule 26(a)(2)(B), that in light of this obligation,

> "[this paragraph] requires that persons retained or specially employed to provide expert testimony … must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefore … [the Rule] does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, … this assistance may be needed …. The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinion – whether or not ultimately relied on by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." (Emphasis added).

II. The Work Product Doctrine – Division Among The Federal Courts As To Whether, And To What Degree, The Work Product Privilege Applies To Discovery Material Presented To An Expert Witness Who Will Testify At Trial

A review of the federal case law on the issue of discovery and the work product doctrine reveals that the federal courts are in sharp disagreement about whether a party must produce the mental impressions, opinions, or legal conclusions of its attorney ("opinion" work product, often known as "core work product") when the attorney communicates those opinions to a testifying expert.

Some courts have adopted a bright-line rule, maintaining that Rule 26 mandates disclosure of all the information shared with a testifying expert, including the mental impressions and opinions of the attorney. See, e.g., TV-3, Inc. v. Royal Insur. Co., 194 F.R.D. 585, 589 (S.D. Miss. 2000) (finding that correspondence between expert witnesses and counsel was discoverable, notwithstanding the defendant's work product objection); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 647 (S.D. Ind. 2000) (ruling that "an intentional disclosure of opinion work product to a testifying expert effectively waives the work product privilege"); Lamonds v. General Motors Corp., 180 F.R.D. 302, 305-06 (W.D. Va. 1998) (holding that when an attorney provides work product material to a retained expert to be considered in the formulation of the expert's opinion, the information is discoverable); B.C.F. Oil Refining v. Consol. Edison Co. of N.Y., 171 F.R.D. 57, 63 (S.D.N.Y. 1997) (holding that documents reviewed by the plaintiff's expert which contained the mental impressions, opinions and litigation strategies of the plaintiff's attorneys were not protected by the work product doctrine); Musselman v. Phillips, 176 F.R.D. 194, 199 (D. Md. 1997) (holding that "when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial – whether factual in nature or containing the attorney's opinions or impressions -- that information is discoverable if it is considered by the expert"); Karn v. Rand Co., 168 F.R.D. 633, 639 (N.D. Ind. 1996) (stating that "the new Rule 26 and its supporting commentary reveal that the drafters considered the imperfect alignment between

26(b)(3) and 26(b)(4) under the old Rule, and clearly resolved it by providing that the requirements of (a)(2) 'trump' any assertion of work product or privilege"); Furniture World, Inc. v. D.A.V. Thrift Inc., 168 F.R.D. 61, 62 (D.N.M. 1996) (holding that the plaintiff was entitled to discovery of documents that defendant's counsel furnished to the defendant's expert who was expected to testify at trial, notwithstanding the defendant's work product objection).

Other courts have held that "core attorney work product," comprising the mental impressions and opinions of the attorney are protected from discovery, notwithstanding communication of that information to a testifying expert. See, e.g., Krisa v. Equitable Life Assurance Soc'y, 196 F.R.D. 254, 260 (M.D. Pa. 2000) (stating that disclosure of core work product to a testifying expert does not abrogate the protection accorded such information, and such information is not discoverable); Nexuss Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999) (concluding that "the required disclosure under 26(a)(2)(B) & (b)(4)(A) does not include core attorney work product considered by the expert"); Magee v. Paul Revere Life Insur. Co., 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997) (holding that the scope of "data or other information" considered by an expert that must be disclosed does not include "core attorney work product," which is protected and not discoverable regardless of whether it was communicated to the expert); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 294-95 (W.D. Mich. 1995) (holding that core work product is not discoverable, notwithstanding disclosure of such material to a testifying expert)[1]; West Pet Supply Co.v. Hill's Pet Prod., 152 F.R.D. 634, 638 (D. Kan. 1993) (holding that protection afforded by Rule 26(b)(3) for attorney work product was not waived by sharing the documents in question with expert witnesses); Bogosian v. Gulf Oil Co., 738 F.2d 587, 593-94 (3rd Cir. 1984) (stating that "[e]ven if examination into the lawyer's role [in framing an expert's opinion] is permissible … the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product").

In addition, an analysis of the nation's legal commentators reflects a comparable split as to the discoverability of communications with an expert witness. See 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2016.2 (2d ed. 2002) (stating that "[a]t least with respect to experts who testify at trial, the disclosure requirements of Rule 26(a)(2) … were intended to pretermit further discussion and mandate disclosure despite privilege"); Michael E. Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 Temp. L. Rev. 451, 483 (1996) (stating that the Federal Rules, "when read in conjunction with the work product doctrine, … dictate that attorney work product given to an expert is discoverable"); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 Creighton L. Rev. 773, 808 (1994) (stating "[t]hat the conflict within Federal Rule 26 therefore should be resolved in favor of allowing discovery of work product materials disclosed to a testifying expert …").

---

[1] The Hawthorn court interpreted the Advisory Committee Note to the 1993 amendments to Rule 26(a)(2) as clarifying only that factual material contained in privileged documents considered by an expert must be disclosed. 162 F.R.D. at 295.

Compare Christa L. Klopfenstein, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 Ind. L. Rev. 481, 502-07 (1999) (stating that work product materials provided to testifying experts should not be discoverable under Rule 26); 6 James Wm. Moore et al., Moore's Federal Practice, § 26.80[1] (3rd ed. 1998) (stating that "[t]he Hawthorn holding is correct, because nothing in the advisory committee notes to the 1993 amendments (citation omitted) suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383, 401 (1981)"); Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 103-04 (1996) (stating that mental impression communications between an attorney and the expert do not constitute "data or other information" under the Federal Rules); Katherine A. Staton, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 Colum. L. Rev. 812, 835 (1985) (writing, prior to the 1993 amendments, that courts should require a showing of substantial need and undue hardship before ordering production of attorney work product disclosed to an expert witness).

III. Discovery Of Oral Communications Between The Attorney And Expert Witness

One of the more complicated issues facing the courts is whether a party may take discovery of oral communications between an attorney and the expert witness who is expected to testify at trial. Unfortunately, there are only a few cases that specifically address this issue. The majority view taken by the following cases appears to be that oral communications between an attorney and the expert witness are discoverable insofar as they are related to the opinions the expert is likely to express at trial.

A frequently cited case addressing discovery of oral communications is Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991), which used a fairness standard to hold that oral communications from a lawyer to an expert that were related to matters about which the expert would have offered testimony were discoverable. In the patent infringement case, the defendant sought discovery of oral and written communications made by the plaintiff's counsel to their expert concerning the expert's testimony and opinion. At the deposition of the plaintiff's expert, the defendant asked certain questions about what counsel had communicated to the expert about in regards to certain issues of the case, presumably in an attempt to determine whether those communications affected the expert's opinion. Plaintiff's counsel instructed the expert not to respond to the questions, arguing that the communications were opinion work product protected from disclosure.

Reviewing Rule 26, the court concluded that it was designed to advance "the integrity and reliability of the truth finding process." 139 F.R.D. at 394. The court further stated:

> "It would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an 'expert' in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know who is testifying. If it is the lawyer who really is testifying, surreptitiously

> through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed."

Id. at 395-96. The court held that "absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product." Id. at 387.

Similarly, in Baxter Diagnostics, Inc. v. AVL Scientific Corp., 1993 U.S. Dist. LEXIS 11798 (C.D. Cal. 1993), the court held that neither the attorney-client privilege nor the work product doctrine protected oral communications from discovery once trial expert designations have occurred. After considering all papers filed in support of, and in opposition to, the defendant's motion to compel production of communications between the plaintiff's attorney and expert witness, the court ordered that the following oral communications were discoverable: (i) all oral statements made by the trial experts in connection with the litigation, where the oral statements relate to matters about which the experts are expected to testify at trial; and (ii) all documents and oral communications considered by the experts in formulating the opinions the experts are expected to express at trial. The word "considered," the court ruled, was "intended to encompass: (a) all oral communications relied upon by the experts in formulating their opinions; and (b) all documents and oral communications reviewed by the experts in connection with the formulation of their opinions, but ultimately rejected or not relied upon." 1993 U.S. Dist. LEXIS at *1-2.[2]

In William Penn Life Ins. Co. of America v. Brown Transfer and Storage Co., Inc., 141 F.R.D. 142 (W.D. Mo. 1990), the defendants sought to compel the plaintiff's expert witness to respond to questions regarding the nature and extent of the expert's conversations with plaintiff and the plaintiff's counsel. The conversations allegedly concerned the expert's opinions of the case. The plaintiff objected to the questions and asserted attorney-client privilege and work product immunity. Citing the decision in Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983),[3] and

---

[2] See also Barna v. United States, 1997 U.S. Dist. LEXIS 10853 at *10, n.2 (D. Ill. 1997) (holding that oral communications were discoverable because there is no difference whether the attorney shows the expert a document that the latter considers in forming his opinion or whether the attorney communicated the information orally).

[3] The court in Boring noted that although opinion work product is normally entitled to a high level of protection from discovery, an exception to the general rule exists when opinion work product is provided to an expert witness before the witness forms his opinion. 97 F.R.D. at 407. According to the court, the Federal Rules provide for the discovery of the materials upon which an expert witness bases his opinion. When the thoughts and observations of an attorney form a part of those materials, the attorney's opinion becomes discoverable. Without discovery of such material the adversary is deprived of the opportunity to adequately explore the extent to which

the dissenting opinion in Bogosian v. Gulf Oil Co., 738 F.2d 587 (3rd Cir. 1984),[4] the court stated that although those cases "dealt with the discovery of documents containing opinion work product and the motion here seeks to compel deposition answers, the distinction does not override the principles discussed above." 141 F.R.D. at 143. The court concluded that "[i]nsofar as the questions at issue in the instant case sought to elicit matters that plaintiff's counsel had communicated to the expert witness, the third-party defendants are entitled to explore the effect those communications had on the expert's formation of his opinion." Id. Therefore, the court ordered the plaintiff's expert to answer questions concerning information or opinions that plaintiff's counsel provided to assist him in forming his expert opinion.

In contrast, the United States District Court for the District of Rhode Island in The New Mexico Tech Research Foundation v. Ciba-Geigy Corp., 1997 U.S. Dist. LEXIS 14698 (D.R.I. 1997), held that oral communications from counsel to the expert retained to testify are not discoverable. The plaintiff foundation filed a motion to compel production of certain documents and deposition testimony from the defense expert, to which the defendant corporation claimed the work product privilege. During the deposition of the defendant's expert witness, counsel instructed the witness not to answer questions about whether counsel had expressed to the witness their views on the patent infringement and their interpretation of various terms that appeared in the patent's claim language. Counsel based the objection on the fact that the questions sought mental impressions or work product. Citing favorably to the analysis in Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995),[5] the court denied the plaintiff's motion to compel. Noting that it was dealing with statements containing mental impressions, opinions, conclusions and/or legal theories of defendant's counsel, the court found that the defendant's counsel maintained a justifiable expectation that these mental impressions would remain private. Thus, the court held that Rule 26 did not require the expert to disclose their communications.

IV. Discovery Of The Expert's Draft Reports

Finally, one of the issues that attorneys often overlook while working with the expert witness is whether there is an affirmative duty on the part of the attorney to retain a copy of the expert's draft report for production to opposing counsel during discovery. A review of the federal case law shows that courts are extending the scope of Rule 26 to permit disclosure of drafts to show how experts developed the opinions they will present at trial. Indeed, some

---

counsel's observations affected the expert's opinion, and to impeach the expert on that basis. Id. at 408.

[4] In his dissent, Judge Becker concluded that when the possibility exists that the attorney's opinion was instrumental in the formation of the expert's opinion, the need to reveal that possibility to the trier of fact outweighs the need to protect the attorney's work product. 738 F.2d at 598.

[5] "Opinion work product protection is not triggered unless 'disclosure creates a real, nonspeculative danger of revealing the lawyer's mental impressions' and the attorney had a 'justifiable expectation that the mental impressions revealing the materials will remain private.'" Haworth, 162 F.R.D. at 296.

federal courts have held that draft reports prepared by testifying experts are subject to disclosure pursuant to Rule 26(a)(2)(B), thus creating a duty on the part of the attorney to retain such drafts.

A recent case to discuss this issue is Trigon Inc. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001). Trigon was an action for the recovery of federal income taxes and interest assessed against plaintiff Trigon. To assist in the complex litigation, defendant United States employed Analysis Group/Economics ("AEG") as a litigation consultant. Certain principals of AEG were retained as testifying experts. Trigon requested additional discovery concerning communications between the United States's experts, including their draft reports. However, many of the draft reports and other documents were destroyed as a result of AEG's document retention policy.

Discussing the consequences of the 1993 amendments to Rule 26, the court pointed out that some courts have discussed the issue of whether drafts of expert reports are discoverable. Citing to several cases, the court stated that the "[c]ourts have even extended the scope of the rule to allow disclosure of 'drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial.'" 204 F.R.D. at 283. [6] Furthermore, the court noted that "draft documents are not considered work product." Id. "Given that drafts may be used for cross-examination and other purposes, and are not protected by another doctrine of privilege, drafts should be disclosed where, as here, they are not solely the product of the experts own thought and work." Id. The court concluded by stating that in the face of the requests made by plaintiff Trigon, including the requirements of Rule 26, "the United States was on notice that it would have to produce communications between AGE and the testifying experts … such as draft reports exchanged between the experts and AGE." Id. at 284. The court held that the United States had a duty to preserve the evidence and the loss of the evidence severely prejudiced the plaintiff's ability to cross-examine the experts.

PHILA1\2017489\1 099995.000

[6] See B.C.F. Oil Refining, Inc. v. Consolidated Edison Co., 171 F.R.D. 57, 62 (S.D.N.Y. 1997); Hewlett-Packard Co. v. Bausch & Lomb, 116 F.R.D. 533, 536 (N.D. Cal. 1987) (stating that it is "clear that Rule 26 does not include within the definition of 'work product' documents generated or consulted by experts in connection with the litigation"); W.R. Grace & Co.-Conn. v. Zotos International, Inc., 2000 U.S. Dist. LEXIS 18096, *30 (W.D.N.Y. 2000) (stating that "[c]ourts have held that drafts of reports prepared by testifying experts are subject to disclosure pursuant to Fed. R. Civ. P. 26(a)(2)(B)").