

EXPERTS AND THE  
DISCOVERY/DISCLOSURE OF PROTECTED  
COMMUNICATION

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# EXPERTS AND THE DISCOVERY/DISCLOSURE OF PROTECTED COMMUNICATION

## I. INTRODUCTION

One issue of much importance is the interrelationship between the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and the Federal Rules of Evidence (FRE) and how that interrelation impacts on discovery before trial and disclosure at trial of attorney-client communications and attorney work product material. The courts have taken different views on the questions raised in this area. Compare *Bogosian v. Gulf Oil Co.*, 738 F.2d 587 (3d Cir. 1984) (*Bogosian*) and *Duplan Co. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974) (*Duplan*) (denying production) with *Intermedics, Inc. v. Ventritex*, 139 F.R.D. 384 (N.D. 1991) (*Intermedics*) and *James Julian v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982) (*Julian*) (ordering production). Further, Fed. R. Civ. P. 26 makes even more acute and pressing this issue of discovery and what is considered privileged protected information and material.

A ruling compelling pretrial discovery or production/disclosure or a preclusion order may well mean the difference between winning and losing a lawsuit. Consequently, you need to recognize the issues, be knowledgeable concerning the decisions concerning those issues and be sensitive to how best to proceed.

In Sections II through IV below, the case law preceding the December 1, 2010 amendments to the Fed. Rs. Civ. P. directed to the issue of discovery of communications between counsel and her expert is explored. In Section V, the Fed. Rs. Civ. P. December 2010

amendments and how those amended rules impact the scope of expert discovery are examined.

## **II. PROTECTED COMMUNICATION**

Fed. R. Civ. P. 26(b)(3) protects work product of both the attorney and the party -- a showing of substantial need is required before production will be ordered. Note: the rule refers to documents only. Are oral communications discoverable? Are they given more, less or the same protection? See, e.g., *Intermedics* and *William Penn Life Assur. v. Brown Trans. & Storage*, 141 F.R.D. 142 (W.O. Mo. 1990) (*Brown*) (ordering disclosure of oral communications of counsel with expert witnesses).

Concerning "mental impressions, conclusions, opinions or legal theories of an attorney or a party," the "courts shall protect against disclosure." Fed. R. Civ. P. 26 (b)(3). This type of material has been referred to as core or opinion work product. Is it discoverable? If so, under what standard? See *Upjohn v. U.S.*, 449 U.S. 383, 400 (1991) ("Special protection" without (1) ruling whether core work product is always protected or (2) articulating a detailed standard); *Bogosian* at 593; *North Carolina Electric Membership v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985) (absolute privilege) (*Carolina*). Fed. R. Civ. P. 26(b)(1) also protects against discovery of "privileged" communications. FRE 501 looks to common law and, in cases decided by state law, to state law to determine what is privileged communication. Most states consider attorney-client communication as privileged.

### **III. LOSING THE PRIVILEGE/PROTECTION**

Now let us examine how the discovery/disclosure issues arise. You are assisting/preparing your witness and having her formulate her opinion. You obviously talk to her and share documents. Have you relayed attorney-client communications? Have you provided some of your opinions, thoughts, mental impressions? Have you given her some work product documents? Have you orally communicated attorney-client communications? Are these discoverable? Under what procedural or evidentiary rules might your opponent claim they are? And under what circumstances might they be discoverable, *i.e.*, has the expert relied upon/considered the information given to her in formulating her opinion? And when are they discoverable? During pretrial proceedings? At trial? At both stages? Are the rules governing production/disclosure the same during both trial and pretrial proceedings?

These issues are raised because you have provided either in written or oral form "sensitive" information to your expert. If you have not done so, the issue of discovery/disclosure would not have arisen. Moreover, if you have not provided sensitive information, such as attorney-client communication or work product, but documents which were available to the other side (and there is no question of core work product being disclosed as a result of your selection of the documents), you probably do not care whether such documents are provided, or provided again.

The various issues can and should be identified. Did the expert rely upon/consider the

information in reaching her opinion? Did she (or a lay witness) use it to refresh her recollection before testifying or while testifying? At a deposition? At trial? Is the material at issue in written or oral form? Is the information/document within the ambit of the attorney-client privilege or work product doctrine, or both? If work product, is it core work product?

An important, indeed critical, question is whether the expert relied upon or considered the information in reaching her opinion, i.e., are there facts or data upon which she relied or which she considered in reaching her opinion? If not, even courts inclined to order production/disclosure probably will (and should) not. *Intermedics; Brown; Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983) (*Boring*).

Fed. R. Civ. P. 26(a)(2)(B) requires that a party provide a report disclosing in detail the opinions to which the expert is expected to testify and the basis for such opinions. FRE 705 provides that an expert may be required to disclose the facts or data upon which her opinion rests during cross-examination. "On cross-examination" may include a deposition of an expert since the "[e]xamination and cross-examination [during depositions] may proceed as permitted at trial under the . . . Federal Rules of Evidence. . . ." Fed. R. Civ. P. 30(c). *See Boring* at 406-408, in which the court ordered protection of documents, including opinion work product which the expert had identified as being used to prepare him for his deposition on the basis that such production is essential to the preparation of a case and necessary for the purpose of effective impeachment and corroboration. The *Boring* court did not invoke FRE 612 as basis for its decision. *See also Occulteo v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J.

1959) (same) (*Occulto*); *Intermedics* (same).

In *Derderian v. Polaroid Co.*, 121 F.R.D. 13 (D. Mass. 1988) (*Derderian*), the court denied a request for production of documents falling within the attorney-client privilege and work product doctrine even though such documents were reviewed by the expert before the deposition. The court believed that the examining party would get the information it needed at trial, thus distinguishing the process for discovery from the trial process. The Court of Appeals for the Third Circuit in *Bogosian* denied production of core attorney work product documents which had been shown to experts before their trial depositions, emphasizing the special protection afforded such material. 138 F.2d at 592-595. Further, the Court of Appeals, *in dictum*, stated FRE 612 did not serve as a basis for production. *Id.* at 595 n.3. In *Carolina*, the court denied the request for documentary opinion attorney work product reviewed by the expert who was to be disposed. Observing that such material "is absolutely privileged under Rule 26(b) (3)," *id.* at 286, the court denied production. The *Duplan* court, 509 F.2d 731, 736, also considered such material absolutely immune from discovery.

In *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (*Sporck*), the Third Circuit did not order production of core attorney work product material because the evidentiary foundations of FRE 612 were not satisfied. *Id.* at 317-319. This opinion is difficult to harmonize with the court's year-earlier opinion in *Bogosian*. See also *Hamel v. General Motors Co.*, 128 F.R.D. 281, 284-285 (D. Kan. 1989); (*Hamel*); *Julian*. Under FRE 612(1), a cross-examining party is entitled to have a writing produced if it is used to refresh the memory of the witness during his testimony.

If it was used before testifying, then the court may order its production if such production is "in the interest of justice." FRE 612(2).

Regarding attorney-client communications, courts are inclined to order disclosure on the basis of the waiver of the privilege when such communications are provided to third parties. *Coastal States Gas Co. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Consequently, providing them to an expert may result in a court ordering disclosure, even if the expert did not rely on such communications in formulating her opinion solely on the basis of waiver of the privilege. If the expert did rely upon such communications in formulating her opinion or refreshing her recollection, production/disclosure probably will be ordered.

In summary, some courts will not permit discovery of core work product even if relied upon by an expert witness or used to refresh her recollection. *Bogosian; Duplan; Carolina*. Other courts will order production if expert witness used it to formulate her opinion -- *Intermedics; Brown; Occulte; Boring* -- or if used to refresh the witnesses memory in connection with her testimony at a deposition. *Sporck; Julian*.

Some courts are more inclined to order production on the basis of FRE 612 if the witness uses the document to refresh her memory during her deposition than if used before testifying. *Derderian*. Of course, either basis -- Fed. R. Civ. P. 26(B)(4)(A)(i) coupled with FRE 705 (used to formulate opinion) or FRE 612 (used to refresh recollection) -- or both can and is used to support disclosure. *Hamel*.

An interesting question is what constitutes opinion/core work product? Suppose your case involves a substantial amount of documents and you select several to show your witness, expert or otherwise. The selection process arguably reveals your mental process, opinions, and perhaps legal theories. The Third Circuit so found in *Bogosian* and *Sporck*. See also *Julian*. In the context of court-ordered disclosure of exhibits to be used during depositions, the First Circuit concludes to the contrary. *In Re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016-18 (1st Cir. 1988).

#### **IV. FED. R. CIV. P. 26 – AUTOMATIC DISCLOSURE**

The issue of having to disclose privileged/protected communications is even more acute as a result of the automatic disclosure requirements under Rule 26.

Fed. R. Civ. P. 26(a)(1) and (2) require automatic disclosure of relevant information and production of relevant material before discovery requests are made, including documents that may be used to support a claim or defense, subsection (1)(A) and (B), and documents upon which a party's computation of damages is based. Subsection (a)(1)(C). Further, as to opinions of experts, a party must provide a complete report detailing the data that the expert considered in forming her opinion and any exhibits she used in support of her opinion. Fed. R. Civ. P. 26(a)(2).

As to automatic disclosure, you must now judge whether by transmitting documents to your expert you have waived/lost the privilege or protection. If you do not produce or at least

identify the documents and then claim immunity from discovery, you might be precluded from having your expert testify concerning her opinion based upon the non-produced/disclosed material she considered in forming her opinion. *See* Rule 37(c)(1).

Fed. R. Civ. P. 26(a)(2)(B) expands greatly the type of information/documents you arguably have to provide or produce. No longer are the documents limited to those upon which the expert relied in forming her opinion, but, rather, also those merely "considered" by the expert. Rule 26(a)(2)(B). "Consider" is defined as "to think about seriously," "to regard," "to take into account," and/or "to bear in mind." *Webster's New Riverside University Dictionary*. Assuredly, "to consider" is vastly broader and more encompassing than "to rely upon."

Must you thus disclose/produce documents or other evidentiary material considered by your expert in forming an opinion? If you do not have to disclose, must you not, at least, identify the material in the expert's complete report? Fed. R. Civ. P. 26(a)(2)(B). And when the inevitable request for production is served, will you not have to produce it? And if at the expert's deposition, a matter of right under Fed. R. Civ. P. 26(b)(4)(A), your expert identifies this material as that which he/she "considered" or "relied upon," will you not have to produce it? Indeed, the Advisory Committee Notes strongly support that Fed. R. Civ. P. 26's disclosure requirements eliminate claims of privilege concerning materials experts consider in forming an opinion. Fed. R. Civ. P. 26, Advisory Committee Notes, reprinted in 146 F.R.D. 627, 634 (1993).

## **V. AMENDMENTS TO FED. R. CIV. P. 26 – EFFECTIVE DECEMBER 1, 2010**

As the above discussion and the canvas of just some of the many, many cases show, Rule 26 diverted the focus of litigation from the merits of the case to such matters as the discovery of oral/written communications between counsel and the expert, the existence of such written communications, the details surrounding the destruction of same, and who had written or contributed to the written report of the expert. Rule 26 and case law interpreting it interfered significantly with counsel's ability to work effectively and efficiently with the expert and also had the effect of increasing the cost of litigation. Further, the work product of counsel, once vigorously protected against discovery, and rightly so, was now being required to be produced on a virtually regular basis.

Sensitive to these problems being caused by Rule 26, in December 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Judicial Conference") recommended to the United States Supreme Court that Rule 26 be amended "to extend work-product protection ... to the discovery of communications between testifying expert witnesses and retaining counsel." See Memorandum of the Judicial Conference to Chief Justice John C. Roberts, dated December 16, 2009.

The amendments to Rule 26, in particular Sections 26(a)(2)(B)(iii), (b)(4)(B), and

(b)(4)(C), significantly alter Rule 26, and much for the better.<sup>1</sup>

Amended Rule 26(b)(4)(B) essentially provides that an expert's draft report constitutes trial-preparation material which is generally protected from discovery. The Committee Notes reinforce that draft reports are to be immune from discovery, stating that "Rule 26(b)(4)(B) is added to provide work protection... for draft of expert reports." With one notable exception, below discussed, this amended Rule should be easy to apply by the Courts and give counsel solid assurance that draft reports will not wind up in the hands of her opposing counsel.

Amended Rule 26(b)(4)(C) affords protection from discovery "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)...," i.e., a retained expert, with certain exceptions.<sup>2</sup> The Notes of the Advisory Committee state that the "addition of Rule (b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." But caution in this area must be observed because of the exceptions to this Rule.

First, subsection (i) carves out from this protection communications that "relate to

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<sup>1</sup> The amendment to Section (a)(2)(C) relieves a party from having to provide a Rule 26(a)(2)(B) report of a non-retained testifying expert, e.g., treating physician, but does require that as to any such non-retained expert, a disclosure must be provided detailing the subject matter on which the witness is expected to testify, subsection (i), and a summary of the facts and opinions to which the expert witness is expected to testify. Subsection (ii). In recognition that a party or his counsel may not have the same type of relationship as exists between counsel and a retained expert, the Advisory Committee cautions that "[c]ourts must take care against requiring undue detail, keeping in mind that...[a non-retained expert] may not be as responsive to counsel as ..." a retained expert. Whether a treating physician's office records will suffice as the required disclosure under amended Rule 26 will assuredly be addressed in the not too distant future.

<sup>2</sup> Under the amended Rule, communications with a non-retained expert do not enjoy this protection, if they ever did.

compensation for the expert's study or testimony." This exception is clear and should produce no problem for counsel.

The exceptions provided in subsections (ii) and (iii) are not quite as simple. The subsection (ii) exception applies to "facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed." Note the use of the word "considered." See Section IV, at 9 above. Subsection (iii) carves out from the protection against discovery the "assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Note the use of the words "relied on."

As to subsection (ii), the "facts or data" exception, the Advisory Committee explains that "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." However, the Committee further explains that "the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert...that contains factual ingredients." (emphasis added)

It would appear that counsel should be reasonably comfortable that her theories, opinions or mental impressions about the provided fact or data are protected against discovery. The Committee's Notes lend support to such comfort by stating that "communications 'identifying' the [provided] facts or data" are subject to discovery, while "further communications about the potential relevance of the facts and data are protected." Although

the application of this Rule by the courts to the innumerable, myriad and varied ways counsel-expert communications take shape remains to be determined, it would seem that if counsel is cautious to adhere to the language of the Rule and the courts enforce the Rule in accordance with the intention of the framers, core work product of counsel communicated to a retained expert should be protected against discovery.

Explanation of the breadth and intent of subsection (iii) is provided by the Committee in its Notes, wherein it is stated that "...the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside the exception." However, the Committee emphasizes that counsel "...are also free to question expert witnesses about alternative analysis, testing, methods or approaches to the issue on which they are testifying, whether or not the expert considered them in forming the opinions to be expressed." These statements of the Committee can be harmonized in that the former – the hypotheticals or possibilities based upon hypothetical facts – concern protection of work product from discovery, while the latter – alternative analysis, testing methods or approaches – deal with the scope of discovery. The subsection (iii) assumption exception may prove to be the source of interesting discovery motion practice. Finally, whether counsel can protect from discovery facts or data considered by or assumptions relied upon by a retained expert by providing same

in a draft report remains an open question, i.e., can counsel use Rule 26(b)(4)(B) to trump Rule 26(b)(4)(C)(ii-iii)? It would not seem that courts would be receptive to such a practice and caution dictates against embarking upon such a course.

Rule 26, even in its amended form, poses a challenge for litigators. Failure to produce the material arguably within the ambit of Fed. R. Civ. P. 26's automatic disclosure requirement or considered/relied upon by an expert may result in preclusion of expert testimony. Preclusion of the introduction of certain documents can be very harmful to the presentation of a case; preclusion of expert testimony usually will be devastating. And that is the critical problem -- the duty to disclose/produce and the draconian sanction of preclusion resulting from failure to satisfy that duty. A possible if not directly satisfactory solution is the employment of a motion in limine whereby you ask the court to determine if you need to produce/disclose the material. Such a motion offers at least the chance of protecting the material from production while at the same time avoiding the all-too-grave risk of a preclusion order.

## **V. PRACTICAL SUGGESTION**

I submit the following suggestions for your consideration to aid in protecting against discovery of your work-product:

1. Limit communications to your expert to the "facts or data" to be considered or the assumption he/she is to rely upon.
2. Do not provide written communications to an expert containing mental impressions,

opinions or theories with the facts/data or assumption you offer the expert.

3. Label draft expert reports with the words "Privileged/Protected Rule 26(b)(4)(B) Draft Report."

4. Object to document requests that seek all your communications with experts.

5. Object to document requests seeking draft expert reports.

6. Object to questions at depositions as to your general communications with your expert.

7. Object to questions at depositions as to your input as to draft reports.

8. Object to discovery as to facts/data you provided the experts which she did not consider.

9. Object to discovery as to assumptions you gave your expert upon which she did rely.

10. Object to a request for production/provision of documents at a deposition of your expert which she did not use to refresh her recollection or did not refresh her memory, assuming it is not a document considered or relied upon. Also, if need be, argue the interests of justice do not support disclosure and, if advisable, demand an in camera inspection by the Court.

## **VI. CONCLUSION**

The only sure way to protect attorney-client/work product information and material from being ordered disclosed/produced when working with an expert is not to share it with her or, at least, limit any such communication to non-sensitive material, to the extent possible, and to communicate orally, rather than in writing. To the extent you provide written facts or data for an expert to consider or ask the expert in writing to rely upon certain assumptions, make sure you are providing material in a form and in a manner that strictly adheres to the language of the amended Rule and provide "protected written material" in a form and in a manner emphasizing and making clear its protected nature and provide it separately from the writings which are subject to discovery.