

*Young Lawyers***PROTECTING ATTORNEY WORK PRODUCT IN COMMUNICATIONS WITH TESTIFYING AND CONSULTING EXPERTS***By: Margaret W. Tindall and Stewart D. Friedl*

You are defending your first expert deposition when opposing counsel starts questioning the witness about your communications with the expert: What did you tell the expert about the plaintiff's claims? What documents did you send to the expert? What were your comments on the draft expert report? You instinctively object and instruct the witness not to answer, claiming the answers are protected by the attorney work product doctrine. When faced with a motion to compel, however, most courts would permit discovery into the scope and extent of counsel's communications with the expert and would allow these types of questions.

Young lawyers often are surprised to learn that opposing parties generally are permitted to inquire into all matters that were considered by a testifying expert in forming his or her opinions, including communications from the attorney to the expert. Although there is nothing inherently improper about an attorney assisting an expert in developing opinion testimony for trial, opposing counsel are permitted to discover the nature and extent of the collaboration in order to probe whether the expert's opinions and conclusions have been influenced by the attorney. As one court put it, "[t]he trier of fact has a right to know who is testifying."²

While communications with an expert who is not expected to testify generally are not discoverable,³ at least some and possibly all attorney communications with a testifying expert are discoverable. The extent to which a court will permit discovery of attorney communications with a testifying expert depends on the nature of the communication and, because courts are divided on the issue, on the applicable jurisdiction. Young litigators need to be sensitive to whether they are communicating with a consulting expert or a testifying expert in order to avoid unintentional disclosure of attorney work product to opposing counsel.

Rule 26(a)(2)(B) Requires Disclosure of All Materials Considered By a Testifying Expert

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires a testifying expert to file a report that contains, among other things, a "complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions."⁴ The scope of discoverable material includes all information considered by the expert, even if the expert did not rely on the information in forming his or her opinions. The Advisory Committee notes explain that the Rule is intended to prevent litigants from arguing that materials furnished to a testifying expert to be used in forming his or her opinion are privileged or otherwise protected from disclosure, whether or not those materials were ultimately relied upon.⁵

Because a testifying expert is required to disclose materials the expert considered in formulating his or her opinion, it follows that the expert is also required to retain those materials so that they can be produced in discovery.⁶ This obligation has been interpreted to include draft reports.⁷

The failure to disclose information considered by a testifying expert can subject a party to sanctions, up to and including exclusion of the witness at trial.⁸ The reasoning behind the rule is clear: the failure to disclose the information specifically required under Rule 26(a) "undermines opposing counsel's ability to prepare for trial."⁹

Discovery disputes have arisen regarding the interplay between the liberal discovery provided by Rule 26(a)(2) and the strong protection traditionally afforded to attorney work product as expressed in Rule 26(b)(3). While federal courts generally agree that "fact" work product communicated to a testifying expert is discoverable, they sharply disagree regarding the discoverability of "opinion" or "core" attorney work product comprised of the attorney's mental impressions, conclusions, opinions or legal theories.¹⁰

Many courts have adopted a "bright line" approach and held that Rule 26 requires disclosure of all attorney work product shared with a testifying expert, including the attorney's mental impressions or legal conclusions.¹¹ These courts reason that providing work product to a testifying expert generally does not further the core purpose of the work product doctrine, namely developing new legal theories or strategies of the case. Rather, when an attorney discloses opinion work product to an expert, counsel is informing the expert what he or she believes are the most significant facts or attempting to influence the expert to reach a favorable opinion. The attorney foresees or even intends that the information and opinions ultimately will be communicated to the fact finder through the testimony of the expert. The goals promoted by the work product doctrine are not served when work product is communicated to a testifying expert and, therefore, permitting discovery into such communications does not undermine those goals.

On the other hand, a significant minority of courts have held that opinion work product is not discoverable, even if the information is communicated to a testifying expert.¹² These courts distinguish between "fact" work product and "opinion" work product and have refused to compel disclosure of the latter. These courts reason that absent clear and unambiguous authority, Rule 26(b)(4) should not be construed as vitiating the strong protection afforded to an attorney's mental impressions and opinions.¹³

When an attorney uses the same expert both as a consultant and to present opinion testimony at trial, the issue becomes even more complicated. Communications that are clearly related only to the expert's role as a consultant may be protected from discovery.¹⁴ Where the delineation between consulting expert and testifying expert is not clearly made, however, all communications with the expert may be subject to disclosure.¹⁵ Any ambiguity as to the role played by an expert when reviewing or generating documents is generally resolved in favor of the party seeking discovery.¹⁶

Use of Consulting and Testifying Experts in Environmental Litigation.

In environmental litigation, the line between consulting and testifying experts often can become blurred. Remediation consultants and contractors may be working on a site long before litigation arises or an attorney becomes involved. While counsel may later decide to use these consultants and contractors as testifying experts, any communications that do not clearly qualify as pure consultative activity may be subject to disclosure.

For example, *W.R. Grace & Co.-Conn. v. Zotos, Int'l Inc.*¹⁷ involved a CERCLA § 113¹⁸ contribution action by a landowner against a product manufacturer for response costs incurred by the plaintiff in remediating hazardous wastes which resulted from the manufacture of the defendant's products.¹⁹ The defendant used the same expert to provide both affirmative opinion testimony that the plaintiff's selected remedy was not consistent with the National Contingency Plan and also as a consultant to assist defense counsel in evaluating the plaintiff's expert report and in preparing for trial. In granting in part the plaintiff's motion to compel discovery, the court ordered disclosure of written communications between the attorney and expert unless a document was "clearly related to [the expert's] services as a non-testifying technical consultant," reasoning that the documents were generated by or reviewed by the expert in connection with developing the expert's opinions.²⁰ Documents subject to disclosure included draft reports prepared by defense counsel and e-mailed to the expert, memoranda prepared by the expert after his report was provided that were intended to buttress the expert's opinions, and invoices that did not differentiate between fees associated with work as a testifying expert and work as a consulting expert.²¹

Practical Advice for Young Lawyers

Young litigators should be aware of the distinction between testifying and consulting experts in every oral and written communication with the expert. In communicating with testifying experts in particular, counsel should consider the following suggestions:

- Limit written communications with a testifying expert, **including e-mail**. There is no duty to create exhibits for your adversary.
- If a written communication with a testifying expert is necessary, draft the communication while keeping in mind how it will appear to opposing counsel.
- Resist the temptation to reveal your entire thought processes and case strategies to a testifying expert. You can lay out your client's theories of the case without revealing opinion work product.
- Although some supervision of the preparation of the expert's report is appropriate to insure that disclosure of required information occurs, refrain from rewriting the entire report and returning it for the expert simply to sign and resubmit. The most persuasive expert reports are those that contain the expert's freely adopted opinions, are not ghostwritten by counsel, and are not a product of "intimidation" or "undue influence" by the party or counsel that retained the expert.²² An expert witness must "bring to the jury more than the lawyers can offer in argument."²³

- Advise your expert not to destroy draft reports. Circulated drafts, especially if comments were received, are almost certainly discoverable. You do not want to be on the receiving end of a motion for sanctions based on spoliation of evidence.
- To the extent the same expert is serving in both a testifying and consulting capacity, maintain a clear delineation in the expert's functions, including in any communications with the expert. Be sensitive to the argument that any perceived blending of the expert's roles may be construed in favor of disclosure.

Conclusion

Counsel can avoid unintentional disclosure of attorney work product by understanding that some or all attorney communications with a testifying expert will be disclosed to opposing counsel and by structuring their communications accordingly. To the extent that an expert is serving both as a consultant and to present expert testimony, counsel can avoid inadvertent disclosure of attorney work product by maintaining a clear delineation between the expert's consulting and testifying roles.

¹ Ms. Tindall and Mr. Fried are Co-Chairs of the Young Lawyers Subcommittee of the Environmental Litigation Committee. Ms. Tindall is a member in the Environmental & Energy and the Litigation Departments of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, located in Baltimore, Maryland, and concentrates her practice in environmental law and general business litigation. Mr. Fried is a senior associate in the Litigation Practice Group in the Washington, DC office of Kilpatrick Stockton LLP and concentrates his practice in the areas of environmental and commercial litigation.

² *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 396 (N.D. Cal. 1991).

³ A party may discover facts known or opinions held by the opposing party's consulting expert only upon a showing of "exceptional circumstances" or as permitted under Fed. R. Civ. P. 35(b) (relating to physical or mental examinations). Fed. R. Civ. P. 26(b)(4)(B).

⁴ Fed. R. Civ. P. 26(a)(2)(B).

⁵ Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26(a)(2).

⁶ *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) (citing *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 288-89 (E.D. Va. 2001)).

⁷ See *Trigon*, 204 F.R.D. at 282-83. The court did not decide whether an expert is required to retain, and a party to disclose, drafts prepared solely by the expert while formulating the precise language to articulate the expert's own opinion. *Id.* at 283 n.8.

⁸ *Smith v. Botsford Gen'l Hosp.*, 419 F.3d 513, 516 (6th Cir. 2005) (affirming exclusion of expert's testimony for failure to disclose conversations with deceased third party that were considered in forming the expert's opinions), *cert. denied*, 126 S. Ct. 1912 (2006); *Kern River Gas Transm. Co. v. 6.17 Acres of Land*, 156 Fed. Appx. 96, 102-03 (10th Cir. 2005) (affirming district court's exclusion of expert testimony and documents for failure to produce complete expert report by discovery deadline). *Cf. Fidelity Nat'l*, 412 F.3d at 751 (reversing exclusion of expert's testimony for failure to disclose interview notes because lesser sanctions would have been more appropriate).

⁹ *Peña-Crespo v. Puerto Rico*, 408 F.3d 10, 13 (1st Cir. 2005).

¹⁰ See *Wilson v. Wilkinson*, No. 2:04-CV-00918, 2006 U.S. Dist. LEXIS 32113, at *10-*17 (S.D. Ohio May 19, 2006) (recognizing disagreement among federal courts); *Lacy v. Villeneuve*, No. C03-2442JLR, 2005 U.S. Dist. LEXIS 31639, at *18-*19 (W.D. Wash. Nov. 21, 2005) (same); *Manufacturing Admin. & Mgmt. Sys. Inc. v. ICT Group, Inc.*, 212 F.R.D. 110, 113-14 (E.D.N.Y. 2002) (same).

- ¹¹ See, e.g., *Wilson*, 2006 U.S. Dist. LEXIS 32113, at *10-*17 (S.D. Ohio May 19, 2006); *Lacy*, 2005 U.S. Dist. LEXIS 31639, at *18-*19 (W.D. Wash. Nov. 21, 2005); *Manufacturing Admin. & Mgmt. Sys. Inc.*, 212 F.R.D. at 115 (Rule 26 “mandates disclosure of work product given to a testifying expert.”); *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18096, at *11-*28 (W.D.N.Y. Nov. 2, 2000) (requiring disclosure of attorney work product provided to testifying expert); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998) (requiring disclosure of documents prepared by attorney’s legal team and provided to testifying expert); *Musselman v. Phillips*, 176 F.R.D. 194, 201-02 (D. Md. 1997) (requiring disclosure of plaintiff’s attorney’s letters to expert conveying factual information and potential bases for expert’s opinion supporting plaintiff’s claim); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63-66 (S.D.N.Y. 1997) (requiring disclosure of documents reviewed by expert containing attorneys’ mental impressions and litigation strategies); *United States v. City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995) (requiring disclosure of letters from counsel and consulting expert to testifying expert); *Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 640-41 (N.D. Ind. 1996) (requiring disclosure of plaintiff’s medical history and deposition summary prepared by plaintiff’s attorney and reviewed by expert). See also 8 Wright, Miller & Marcus, *Federal Practice & Procedure* § 2016.2 (1994).
- ¹² E.g., *Krisa v. Equitable Life Assurance Soc’y*, 196 F.R.D. 254, 260 (M.D. Pa. 2000) (core work product is not discoverable); *Nexus Prods. Co. v. CVS N.Y. Inc.*, 188 F.R.D. 7, 8-11 (D. Mass. 1999) (same); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-44 (E.D.N.Y. 1997) (same); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 293-96 (W.D. Mich. 1995) (same).
- ¹³ *Nexus Prods. Co.*, 188 F.R.D. at 10; *Magee*, 172 F.R.D. at 642-43; *Haworth*, 162 F.R.D. at 294.
- ¹⁴ E.g., *B.C.F. Oil Refining, Inc.*, 171 F.R.D. at 61-62.
- ¹⁵ E.g., *Wilson*, 2006 U.S. Dist. LEXIS 32113, at *9-*10 (granting motion to compel deposition testimony of expert, including questions regarding communications with counsel containing counsel’s mental impressions and strategies where it was “impossible to clearly delineate [the expert’s] service as a consultant from his service as an expert witness.”).
- ¹⁶ *B.C.F. Oil Refining, Inc.*, 171 F.R.D. at 61.
- ¹⁷ 2000 U.S. Dist. LEXIS 18096 (W.D.N.Y. Nov. 2, 2000).
- ¹⁸ 42 U.S.C. § 9613.
- ¹⁹ The court subsequently held that because the plaintiff had not been sued for cost recovery or abatement under CERCLA, the plaintiff did not have a claim for contribution under CERCLA § 113 in light of the U.S. Supreme Court’s decision in *Cooper Indus. v. Aviall Svcs., Inc.*, 543 U.S. 157 (2004). *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 2005 U.S. Dist. LEXIS 8755 (W.D.N.Y. May 3, 2005).
- ²⁰ *W.R. Grace & Co.-Conn.*, 2000 U.S. Dist. LEXIS 18096, at *19-*28.
- ²² *Id.* at *16-*28.
- ²² See *Marek v. Moore*, 171 F.R.D. 298, 302 (D. Kan. 1997).
- ²³ *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (citing Fed. R. Evid. 702).