Arkansas Association of Defense Counsel

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Protection and Disclosure of Expert Communication Under Rule of Civil Procedure 26

Before a 1993 amendment to the Federal Rules of Civil Procedure, communications between a lawyer and his or her client's expert witness were protected from discovery on the grounds that the communications were either attorney work product or were not relied upon by the expert.

In Bogosian v. Guilf Oil Corp., 738 F.2d 587 (3rd Cir. 1984), the Court held that there was nothing in Rule 26(b)(4) (as it was at the time), which first appeared in 1970, that could "justify the production" of mental impressions or legal theories of the attorney. "(Expert discovery) is expressly limited to interrogatories." Id. at 594. The Court further held that "examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory." Id. at 595. Opinion work product was held to be "absolutely immune from discovery even if shared with an expert witness" in North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283 (M.D.N.C. 1985), a case in which the Court found the ruling in Bogosian to be persuasive.

As one court noted at the end of the 1980s "the word product protection, of course, is (was) not absolute." Occulto v. Adamar of New Jersey, Inc., 125 F.R.D. 611 (D.N.J. 1989). Work product could be discovered by showing a "substantial need" (see also Bogosian). Also, there was "no doubt" that a party was entitled to discover facts relied upon by the expert witness, as distinguished from opinion work product of the attorney. Occulto, at 615. Further, a year before Bogosian, a Colorado court ruled that "the opinion work product rule is 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). Stances taken between those in Bogosian and Boring are found in SiLite, Inc. v. Creative Bath Prods., Inc., No. 91 C 5920 (Northern District of Illinois) (discoverability depended on whether the work product could have influenced the expert); Hamel v. General Motors Corp., 128 F.R.D. 281 (D.Kan.1989) (discoverable upon a showing of a substantial need and an inability to obtain the equivalent without undue hardship); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y.1977) and James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D.Del.1982) (allowing for discovery of materials used to refresh a witness' recollection, per Fed.R.Evid. 612); and Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D.Cal.1991) (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).

These cases showing different positions were cited by the Court in Karn v. Ingersoll-Rand Co., 168F.R.D. 633 (1996), which held that work product protection does not apply to documents provided by counsel to testifying experts related to the subject matter of the litigation. The Court relied in part on the text of Rule 26, which was amended in 1993 to require the disclosure of an expert report that contained "the data or other information considered by the witness in forming the opinions" and to expressly permit the

deposition of an identified expert. The Court also emphasized the 1993 Advisory Committee Notes that included the statement that "given (the expert disclosure obligation), litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." The Court concluded that the "'bright-line' view actually preserves opinion work product protection in that there is no lingering uncertainty as to what documents will be disclosed. Counsel can easily protect genuine work product by simply not divulging it to the expert." Id. at 641.

In 2001, while still operating with the 1993 version of Rule 26, the United States Court of Appeals ruled in In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370 (2001) that "the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report." See also Herman v. Marine Midland Bank, 207 F.R.D. 26, 29 (W.D.N.Y. 2002), finding that Rule 26, as it then was, required "a party to disclose core work product, or other privileged or protected material, supplied by the party to its testifying expert."

The Advisory Committee reasoned that this broad discovery under the 1993 amendment revealed the extent and nature of a lawyer's involvement in the formation of the expert's opinion. This discovery informed the trier of fact so that it might be able to differentiate unbiased and independent experts from an expert who would report and testify to anything requested by the party and attorney hiring him or her. See the Advisory Committee's Report to Standing Committee, June 2008, "June 2008 Standing Committee Report".

In 2010 Federal Rules of Civil Procedure 26(a)(2) and (b)(4) were "amended to address concerns about expert discovery," as the Advisory Committee Notes explain. The Notes indicate that the Committee was made aware that courts read the disclosure provision of 26(a)(2) as it was to "authorize discovery of all communications between counsel and expert witnesses and all draft reports" with "undesirable effects." A costly result was that counsel often hired two experts—one with whom to consult confidentially and another to serve as a testifying witness. Also, attorney communication with testifying experts was hindered for fear that such communication would be discoverable.

The current language of Rule 26(a)(2) is, as the Notes continue, "meant to limit disclosure to material of a factual nature" that include disclosure of any factual material considered by the expert, from any source, but not to include mental impressions of counsel.

The current Rule 26(b)(4) is intended to provide work product protection to attorney-expert communications, subject to three exceptions per Rule 26(b)(C). First, attorney-expert communication is discoverable if it relates to the compensation to the expert for the expert's study or testimony. This exception is not limited to compensation for forming the opinions to be expressed. Second, attorney-expert communication is subject to discovery if it identifies facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed. This exception applies only to that part of communications that identify the facts or data provided. Communication on the relevance or potential relevance of these facts or data is protected from disclosure. Third, attorney-expert communication may be discovered if it identifies assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. An example given in the Advisory Committee Notes is that counsel may tell the expert to assume the truth of certain testimony or evidence or the correctness of another expert's conclusions. This exception is also limited. The expert must actually rely on the assumption in forming the opinion to be expressed. Attorney-expert discussion considering possibilities based on hypothetical sets of facts do not fall within the exception. The Advisory Committee Notes

make clear, though, that the discovery "authorized by these exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics."

Rule 26(b)(4)(D) further limits the effects on the exceptions noted above and provides that absent exceptional circumstances a party may not discover facts known or opinions held by a consulting expert retained in anticipation of litigation and who is not expected to testify.

Even with their limits, these substantial exceptions to Federal Rule 26, as amended in 2010, mean that counsel must be careful in communicating with experts. The Advisory Committee Notes to the 2010 amendment stress that Rules 26(b)(4)(B) and (C) "do not impede the discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions." By way of example, the Committee notes that the expert's testing of material involved in litigation and notes of the testing is subject to discovery; counsel may question the expert on communications the expert had with anyone other than the party's lawyer about the opinions expressed; and, counsel may inquire of the expert about alternative analyses, testing methods, or approaches to the issues on which the expert testifies, whether or not the expert considered them in forming the expressed opinions.

Tips to avoid unintended and damaging disclosures include the following:

1. Omit attorney analysis from "facts or data" communications to the expert;
2. Make sure testifying experts knows that communications and correspondence with those other than counsel may be discovered;
3. Understand that any attorney-client privileged communication may be waived if the lawyer shares the privileged communication with the expert;
4. Label draft expert reports and attorney-expert communication as "privileged" and as protected by Rule 26(b)(4);
5. Generally limit email or other written correspondence to testifying experts when a phone call or in-person communication is sufficient;
6. Object to opposing counsel's broad requests for the expert's entire file.

See N. Lee Cooper and Scott S. Brown, Pretrial Communications With Experts, 3 Bus. & Com. Litig. Fed Cts. §29:13 (4th Ed.); Damon W.D. Wright, Expert Discovery Returns to the Past, 58-JAN Fed. Law 32; and George Liberman, Experts and the Discovery/Disclosure of Protected Communication, 78 Def. Couns. J. 220

Tactics for lawyers seeking discovery from opposing testifying experts include:

1. Seek production of all correspondence between counsel and the retained testifying expert regarding compensation, facts or data or assumptions;
2. Request the expert's own notes;
3. Ask for correspondence between the expert and those other than counsel and ask the expert about any conversations he had with others (which conversations may have resulted in the expert's own notes).

See Expert Discovery Returns to the Past.

Analysis Under Arkansas Rule of Civil Procedure 26

Arkansas has not adopted the Federal Rule's 2010 amendment language. Neither have Arkansas courts ruled that its Rule 26 should be interpreted as being consistent with the Federal Rules before 2010. Arkansas Rule 26(b)(3) provides that documents prepared in anticipation of litigation are not discoverable unless the party seeking discovery shows a "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

This starts us out with the idea that materials formed in the anticipation of litigation are protected as work product. Arkansas Rule 26(b)(4) goes on that the discovery of "facts known and opinions held by" testifying experts acquired or developed in anticipation of litigation may be obtained only through interrogatories or deposition. Disclosure of documents, through a request for production of documents or a subpoena duces tecum associated with a deposition is not expressly mentioned.

Holt v. McCastlin, 357 Ark. 455, 182 S.W.3d 112 (2004) was of course decided before the 2010 Federal Rule amendment but is still current Arkansas law and is listed in the Case Notes to Arkansas Rule 26. In Holt, the Supreme Court applied Rule of Evidence 502 Attorney-Client Privilege to a testifying expert witness' report. In making its ruling, the Supreme Court noted that the expert's report was not to be disclosed by the expert without the party's express consent and the party, his lawyer and the expert had "consistently claimed attorney-client privilege" on behalf of the party. The Court further explained that "confidentiality is a characteristic of the communication *at the time* it is made." Id. at 463 (emphasis in original).

Those in Arkansas state court looking to protect expert communication may argue that silence on the issue of expert discovery in the rule does not make the rule more or less restrictive, just less detailed.

Though the language of the Arkansas is not identical to the Federal Rule, state court practitioners could still benefit from adopting the careful habits suggested above.

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