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Certain Communications Between Attorney And Expert Witness Are Discoverable

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Federal Rule of Civil Procedure 26(a)(2)(B), provides that unless stipulated or directed by the court, a party's expert disclosure must be accompanied by a report containing a complete statement of all opinions to be expressed, as well as the basis, reasons, and data or other information considered by the expert in forming the opinions. The Advisory Committee Notes concerning this 1993 amendment provide that this disclosure obligation should prohibit litigants from arguing that materials furnished to experts in forming an opinion are privileged, or otherwise protected from disclosure, when experts are testifying or being deposed.

Based upon this rule, U.S. Magistrate Judge Foschio held that an attorney's comments and work product received by an expert in the course of formulating that expert's opinion are discoverable, even if comments constitute "core" work product, *W.R. Grace and Co. v. Zotos Int'l., Inc.*, 2000 WL1843258, *4 (WDNYNov. 2, 2000). In *Grace*, written communications consisting of correspondence and memoranda between the expert and attorney related to the expert's role as a testifying witness were discoverable.

The court exempted from discovery documents received by an expert for the purpose of preparing questions as a "consultant" for an attorney examining an opponent's expert unless such documents were reviewed in the capacity as a testifying expert. Notes made during meetings with an attorney that relate to information used in formulating the expert's opinions are also discoverable. Lastly, Magistrate Fochio held that prior drafts of expert reports, including substantive written comments from the attorney, are discoverable if drafted for the expert's consideration.

In other words, any information, either oral or written, provided to an expert and used in forming that expert's opinion is subject to disclosure if requested by the opposing party.

The *Grace* reasoning was adopted by U.S. District Court Judge Curtin in *Herman v. Marine Midland Bank*, 207 FRD 26 (WDNY 2002). Judge Curtin adopted *Grace*'s requirement that communications between an attorney and an expert are discoverable if used for the purpose of formulating that expert's opinion. Judge Curtin agreed that the expert disclosure requirement trumps the work product of an attorney.

However, not all of the district courts in New York are so willing to require disclosure of attorney work product. In *Magee v. Paul Revere Life Insurance Co.*, 172 FRD 627 (EDNY1997), U.S. Magistrate Judge Orenstein limited disclosure to only factual materials revealed to an expert, and not to "core attorney work product" considered by the expert. According to Judge Orenstein, an attorney's legal opinions and mental process are still protected work product even when provided to an expert.

As a result, the U.S. district courts in New York are at odds with one another concerning the application of Rule 26(a)(2)(B) to privileged materials, and the Second Circuit Court of Appeals has yet to resolve this split of authority.

In New York State, however, pursuant to CPLR 3101(c) and (d)(2), an attorney's work product shall not be obtainable, unless the required showing of substantial need and undue hardship is met. The Appellate Division, Fourth Department, in *Cushing v. Seeman*, 238 AD2d 950 (4th Dept. 1997), held that the work product of an attorney and materials prepared for litigation — insofar as they contain or reflect mental impressions, conclusions, opinions or legal theories of an attorney — are protected against disclosure, even if documents contain or reflect communications between the expert and the attorney.

Likewise, in *Holmes v. Weissman*, 251 AD2d 1078 (4th Dept. 1998), the Fourth Department ruled that an attorney's written communications with an expert witness are protected from discovery by the work product privilege.

Therefore, in federal court, the practitioner must realize that any communication made to an expert may ultimately have to be produced. In practice, Rule 26(a)(2)(B) is seldom utilized as practitioners fear that once the privileged documents are demanded, they will have to produce their own communications. Asolution may be to stipulate early in the case that these types of communications are protected, thus alleviating the fear of having to produce valuable communications, and allowing the practitioner to freely discuss the case with the expert.

Some gamesmanship may be undertaken when one side relies heavily on experts, and the other does not. In this case, Rule 26(a)(2)(B) may be used as a sword to obtain useful cross-examination fodder.

It is important to be aware of the consequences of producing or providing work product to a testifying expert pursuant to the FRCP. Apractitioner must be careful with respect to what work product is disclosed to the testifying expert, and should consider distilling the attorney's thoughts to the bare essentials that will assist the expert on the one hand, but not be of particular assistance to one's adversary.

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