§240 Your Expert's Documents

§241 Attorney-Client Privilege

Be thoroughly familiar with the rules relating to the production of documents of your jurisdiction in order to protect against the unnecessary disclosure of your expert's documents to the opposing side. Unless your expert is also an employee of your client, communications between the expert and yourself ordinarily would not be protected by the attorney-client privilege. There may be occasions where it is necessary for the client to utilize the expert to communicate information to the attorney because of his expertise in such cases the attorney-client privilege may apply on the theory that the expert is simply a conduit through which the client is communicating information to the attorney.

§242 Attorney Work Product Privilege

Depending upon the nature of the communication, writings by the expert might fall within the protection of the attorney's work product exclusion. The privilege relates to the work and effort of the attorney in the preparation of the case for trial. The documents, data and reports that the expert has compiled pursuant to your request and direction to aid you in the litigation and which are in fact communicated to you may be protected from disclosure to the opposing attorney unless he is able to demonstrate a compelling need for the documents. Care must be taken by the expert and yourself to first establish the existence of the privilege and secondly to make certain that neither you nor the expert inadvertantly waive the privilege, generally by the disclosure of the work product to a third party. To corroborate that the privilege does exist advise the expert in your letter retaining him that he is being retained to assist you in the pending or contemplated litigation. You might also request that any communications from the expert to you refer to the fact that the document is to assist you in the litigation. However, most courts in ruling on the applicability of an exclusion will look to the substance and not the form; the fact that a document is labelled "work product" does not necessarily make it exempt from discovery by your opponent.

§243 Written Communication With the Expert

The nature of the retention of your expert under federal rules as well as many states may determine the extent to which the opposing side may

obtain your expert's documents. If the expert has been retained only as a consultant and is not designated as an expert who will be called to testify at trial, his communications to you should be protected from discovery unless there is a showing of exceptional circumstances under which it is impracticable for your opponent to obtain facts by any other means. The writings or documents of an expert whose information concerning the issue was not acquired in preparation for trial, for example an employee of the client, would likely be discoverable as with any ordinary witness.

Because of the possibility that writings and communications will be discoverable by the opposing side, some discretion in the type and contents as to what is committed to writing should be exercised. Preliminary and tentative opinions of your expert should probably be expressed orally; he might be less inclined to change an early conclusion once it had been reduced to writing. Often an expert may have a preliminary opinion before he has received all of the required data or before he has conducted the tests and experiments that are required in order to arrive at a definitive position. If his preliminary thoughts are contained in a document that the opposing side has access to, it might be difficult for him to explain any changes in his position that he might make after further experiments or after he receives additional data.

The possibility that documents and correspondence might be disclosed to the other side does not mean that you and your expert should not communicate in writing. To be effective the expert needs to have available all documents, facts and information relevant to his proposed conclusions. You should not withhold unfavorable data from your expert so that his opinion is based upon incomplete information and subject him to embarrassment during cross-examination when he might be compelled to admit that he did not take certain crucial facts into consideration in arriving at his conclusion. You should communicate with your expert as discovery progresses so that he is kept current as to new developments that could have an effect on his opinion.

§244 Expert's Work Product

Simply because a witness is an expert does not protect him from disclosing facts and information. The facts acquired by an expert that were not obtained for the purpose of preparing for the trial are generally subject to discovery. A party may generally discover facts known or opinions held by an expert who has been retained or specially employed in anticipation of litigation. Similarly, documents prepared by an expert not in anticipation of litigation are generally discoverable.

Tests that are performed by a party in the course of business are generally not protected from discovery as work product. Simply designating an employee as an expert ordinarily not does change his status and change the information he has into protected "expert work product."

The expert may be a percipient witness, that is, one who actually observed the events about which he is to testify—the data used to generate a computer result, the material used in an alleged defective product. On the other hand, a consulting expert witness may provide information regarding the area of his expertise based upon information provided to him. The discoverability of a consultant-expert's work product depends largely upon the context under which the consultant was retained and the source of his information.

Although a witness is an expert, if his contact with the case is not in his capacity as an impartial observer, but as a percipient witness or as an employee of a party, ordinarily he would be treated as an ordinary witness for the purpose of discovery. An expert who acquires his information as an "actor or viewer" of the transactions or occurrences that are the subject matter of the lawsuit should be treated as a lay witness.

When you use an in-house expert to assist in the litigation, in order to protect his conclusions from discovery on the basis of the attorney-client privilege, you must carry the burden of establishing that the material is not something that he would have prepared in the ordinary course of the employer's business.

You should define the nature and the scope of the expert's assignment carefully. Anything an expert has seen or considered in reaching his opinion may be subject to discovery by the opposing party. Often the line between the types of experts is unclear. You should recognize the ramifications of a change in the expert's status before you decide to use a consulting expert as an expert trial witness. In ruling on discovery many courts do not fully appreciate the distinction between the different categories of experts. The role of your expert should by clearly defined; the failure to define the expert's role at the outset of the assignment may have serious consequences as to the work product rule and the discovery of the expert-consultant's material.

Federal Alaska Follows Federal Rules in most cases.

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides for the general rules of discovery of documents and other tangible things otherwise discoverable and prepared in anticipation of litigation or for trial, upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable

without undue hardship to obtain the substantial equivalent of the materials by other means.

Rule 26 (b) (4) *et seq.* sets forth the procedures for the discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of the rule and acquired or developed in anticipation of litigation or trial.

Cases

State of Arizona v. Ybarra, 777 P.2d 686 (1989) discussed the attorney work product analysis particularly in view of the attorney's need for assistance in litigation and for immunity from discovery. The court noted that a lawyer needs the assistance of experts to prepare an effective legal defense, particularly in light of complex litigation. The court observed that "gas chromatography by Dubowski's technique to analyze soil samples for chemicals to determine whether they fall within the category of hazardous waste material is a skill not usually learned in law school." Consequently, the court observed that few lawyers can learn, much less litigate, such matters without the assistance of expert consultants. Lawyers should be encouraged to make the necessary investigations without fear that their diligence will provide ammunition for their opponent.

Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) involved an attempt by the defendant to disqualify the plaintiff's expert on the ground that the expert had once been consulted by the defendant to establish a laboratory to evaluate the safety, design and testing of baseball helmets. Although the court declined to disqualify the expert, the court noted that privileged material may be precluded on the grounds of fundamental fairness—if one party to litigation pays an expert for the time spent in developing specific knowledge or expertise with respect to the issues involved in the case, the opposing party should be prevented from reaping the benefits of that work.

(Text continued on page 2-17.)

Rule 34 of the Federal Rules of Civil Procedure provides that a party may serve on another party a request to produce, inspect and copy any designated documents including writings, drawings, graphs, charts, photographs and other data compilations from which information can be obtained. The request may be served without leave of court and must specify a reasonable time, place and manner of making the inspection. This procedure would only be applicable if the expert was an employee of the party. The rule, however, does not preclude an independent action against a person not a party for production of documents.

Rule 45(b) of the Federal Rules of Civil Procedure sets forth the procedure for production of documentary evidence of a person who is not a party by means of a subpoena duces tecum which may command the person to whom it is directed to produce the books, papers, documents or things designated in the subpoena.

Rule 501 of the Federal Rules of Evidence provides in part that the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Cases

In Re International Systems and Controls Corp., 693 F.2d 1235, 1238 (5th Cir. 1982) was a shareholders derivative action. A party sought several documents from an independent accounting firm regarding certain sensitive payments that were allegedly made to bribe contacts in the Middle East in order to secure contracts. The court found that there was sufficient anticipation of litigation to trigger the work product immunity; the mutuality of interest between the corporation and the shareholders was destroyed. The discovery of the work product is denied if a party can obtain the information by deposition; the principle protects the documents themselves and not the underlying facts.

Xerox v. I.B.M., 64 F.R.D. 367, 381 (S.D. N.Y. 1974) involved an alleged patent infringement and the misappropriation of trade secrets. The discovery of certain documents was sought and the work product doctrine was asserted in opposition to the discovery. The court stated that the work product of an attorney and the attorney's thoughts, impressions, strategy, conclusions and similar information produced by the attorney in anticipation of litigation are protected when feasible, but not at the expense of hiding the non-privileged facts from the adversaries. The right of privacy of the attorney's notes must be balanced against the critical need for facts by the parties. The court stated that when non-critical material is intertwined with other sources the court must seek a balance. A party should not be allowed to conceal critical, non-privileged discoverable information uniquely in the knowledge of a party and not available to the other party from any other source simply by imparting the information to its attorney and then hiding behind the work product doctrine.

DuPont v. Phillips Petroleum, 24 F.R.D. 416, 421 (D. Del. 1959) was a patent infringement action in which the opinion of the expert witnesses was crucial to the determination of the case. The court stated that the adequacy of the procedures used by the expert to determine the chemical properties of the product was impossible to establish without the expert opinion and the ground work of the expert depended upon obtaining records of actual tests. The expert's data was orginally not connected with litigation and hence was subject to

discovery as with any witness, but after the prospect of litigation arose the reports were transmitted to the attorney and different rules might then become applicable.

Hoover v. United States, 611 F.2d 1132, 1142 (5th Cir. 1980) was a condemnation case in which the party sought to compel discovery of an expert's appraisal report. The court stated that discovery of an expert's documents is not a matter of right; a compelling need for the documents must be demonstrated. A party must show unique or exceptional circumstances to require the production of an expert's reports.

Quadrini v. Sikorsky Aircraft, 74 F.R.D. 594 (D.C. Conn. 1977) involved the determination of the cause of the crash of a helicopter and both sides intended to rely extensively upon expert testimony. Expert testimony was crucial to the resolution of complex and technical factual disputes. In anticipation of the deposition of experts a party made an extensive request for document production requesting all worksheets, data, charts, tabulations, graphs and charts. The court granted the request for discovery, despite the contention that the documents were not discoverable unless they were intended to be used at trial or that there was a showing of substantial hardship.

Virginia Electric & Pow. Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397 was a case in which the court ruled that documents derived from regular employees of the defendant were not entitled to qualified immunity from discovery simply because the employees are experts and the documents contain their expert opinions, findings and factual analysis. The court commented that if expert opinion is not discoverable then the trial will consist of one ambush and one surprise after another.

Checklist

1. Research carefully the rules of your jurisdiction as to the attorney-client privilege and the work product exclusion that may preclude the opposing side from obtaining your expert's documents.

2. Be certain that your expert is aware of the necessity for the confidentiality of all of his written products. A disclosure of his data could cause a waiver of the exclusion.

3. Advise your expert as to the necessity of submitting oral rather than written reports of his preliminary and tentative opinions.

4. Consider the capacity in which your expert is serving so that his opinions and documents are not subject to discovery. You might find it advisable to retain more than one expert—a consultant and an expert who will be called upon to testify.

Tactics

- Impress on your expert the necessity for discretion. Advise him that virtually anything concerning the case that is put in writing might be discoverable by the opposing party; even informal notes might find their way into the opposing counsel's hands and be used during his cross-examination.

and e-mail

• Often a written report of an expert is later introduced into evidence. If your expert is to prepare a written report, advise him that the report should set forth in simple, comprehensive terms the opinion and the supporting reasons. Because it might be considered by the jury, it should be concise, well organized and should not contain technical jargon. The ultimate opinion should be stated and the basis for the conclusions should be described (*i.e.*, the calculations, experiments performed, research undertaken). If the report has been produced during discovery and there is a deviation between the report and the anticipated testimony of your expert, your adversary will likely question your expert closely as to the changes. Make certain that the expert is well prepared to provide a logical and rational basis for the modification of the position.

• Be careful in your communications to the expert. For example, an observation by you that this is a "very tough case" or that the expert will have to "stretch to come up with a favorable opinion" obviously could be disastrous.

• Where the documents of your expert may be used in companion cases research the rules of your jurisdiction relating to the duration of the work product exclusion. The question as to whether the work product exclusion continues beyond the conclusion of the case in which it was asserted may be a consideration if there are multiple cases involving the same issue. Although you might be successful in precluding the discovery of your expert's data and documents in one case, the exclusion might not be effective as to subsequent cases where the same issue is involved, for example, an air crash case with many separate claimants or an expert's opinion in litigation involving the deleterious effects of asbestos.

• Many states provide for the supplementation of responses after deposition testimony has been given. Experts frequently modify their conclusions based upon additional information obtained during the course of discovery. When required, be sure to timely supplement responses regarding changes in expert testimony so that your expert is not precluded from testifying by a failure to timely comply with rules relating to disclosure. Be alert to your opponent's failure to comply with requirements for supplementary responses. If the opposing expert has testified at his deposition that he is continuing to conduct tests and experiments, calendar future discovery to determine the results of the additional tests and whether the expert's conclusion has modified.

• Many states as well as the Federal Rules of Civil Procedure require the supplementation of inquiries regarding the identity of expert witnesses. For example, Rule 26 (e) (1) of Federal Rules of Civil Procedure provides that a party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to