Expert Witness Disclosure and Privilege (Federal & New York)

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FEDERAL

Federal Rules of Civil Procedure (FRCP) Rule 26(A)(2) governs disclosure as related to experts. Before the 2010 amendment, FRCP 26 required disclosure of "data or other information" considered by an expert witness in forming his opinion. However, in 2010, FRCP 26 was amended. The amendment limits FRCP 26(A)(2)(B) expert disclosures to "facts or data[1]". Under the amendment, drafts and attorney communications are now specifically protected under the attorney work product privilege, with a few exceptions.

The exceptions to the scope of the privilege are:

- Communications relating to compensation;
- Facts or data given by the attorney to the expert to consider in forming the expressed opinion; and
- What assumptions the attorney told the expert to make

Draft reports, notes, oral conversations, etc. - are now explicitly protected from discovery by the work product doctrine and the usual requirements of that doctrine[2].

The amendment to the more specific term "facts or data" is meant to limit disclosure to factual material and to exclude things such as mental impressions of counsel, which were once questionable. However, the disclosure obligation extends to any facts or data "*considered*" by the expert in forming the opinions to be expressed, and not only those *relied* upon by the expert[3].

Also concerning experts, a new section was added to Rule 26. FRCP 26(a)(2)(c) relates to experts who are not retained by parties. The new section provides that they do not have to disclose a detailed report as a retained expert does, but the attorney who wants to call this expert as a witness will only have to describe what the anticipated testimony is[4].

Rule 26(b)(4)(B) and (C) deal with trial preparation of experts. (B) protects any drafts of the reports required under (a)(2) (mentioned above), since it is considered trial preparation.

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[1] Buckles, Greg, *Expert Disclosure- FRCP Rule 26(a)(2)(b) Amendment*. Ediscoveryjournal.com. (Nov. 2010)

[2] Beck, James, *Drug and Device Law: New Amendment to Rule 26 Concerning Expert Disclosure*. www.druganddevicelaw.blogspot.com (April 2010).

[3] *See,* 2010 Amendments to Fed. Rules Civ. Pro Rule 26.

[4] Id.

This protection applies to all witnesses identified under Rule 26(a)(2)(A) (any witness a party may use at trial to present evidence), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C) (non-retained witnesses). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise[5].

Amended Rule 26(b)(4)(C) protects, also as trial preparation, "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)...," The Notes of the Advisory Committee on the Rules make clear that the addition of this rule is "to protect counsel's work product and ensure that lawyers may interact with retained experts. The same exceptions that applied above apply to this portion of the rule (communications that relate to compensation, facts or data given to the expert by the attorney and considered in forming the expressed opinion and assumptions the attorney told the expert to make)[6]. In addition, the protection of this rule is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying[7].

As for the exceptions to these rules, more particularly the "facts or data" and the "assumptions" exceptions, the Committee states 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." This supports the notion that an attorney's theories, opinions or mental impressions about the provided fact or data are protected against discovery[8]. Note, that while the "facts and data" exception include all those considered, the "assumptions" exception is limited to only those that the expert actually relied on in forming the opinions to be expressed[9].

NEW YORK

In New York, the work product doctrine in civil cases is divided between two statutory provisions. First, C.P.L.R. 3101(c) gives the "work product of an attorney" an absolute

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[5] Id.
[6] *See*, Lieberman, George *Experts and the Discovery/Disclosure of Protected Communication*.
[7] 2010 Amendments to Fed. Rules Civ. Pro Rule 26.
[8] Lieberman, *supra*.
[9] *See,* Id.

exemption from discovery by providing that it, “shall not be obtainable[10].” Although CPLR 3101 does not, on its face, limit the privilege to work done in anticipation of litigation, this requirement has often been imposed by the court.[11] The immunity given to attorney work product has been narrowly restricted by courts to "those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy."[12] A lawyer's recollections and notes of interviews with witnesses also fall within this category.[13] The work product immunity has been held applicable not only to material prepared for the litigation in progress but also to that which was prepared for prior litigation or prior to the action[14].

The second type of work product immunity is described in C.P.L.R. 3101(d)(2) as "materials … prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent)." Unlike attorney work product, the trial-preparation materials encompassed by C.P.L.R. 3101(d)(2) are only conditionally immune from discovery[15]. If, for example an adversary shows “substantial need” for the material or that he is, “unable without undue hardship to obtain the substantial equivalent materials by other means,” then they may be discoverable.

Information compiled by experts who are consulted for litigation purposes generally falls within the immunity for trial preparation material[16]. Special discovery rules apply, however, with respect to an expert that a party expects to call as an expert witness at trial Subject to automatic, mandatory disclosure are : (1) the expert's identity; (2) the subject matter on which the expert is expected to testify; (3) the substance of the facts and opinions on which the expert is expected to testify and the grounds for each opinion; and (4) the expert's qualifications[17]. However, if the expert is not testifying at trial, his report is treated like other material in preparation of trial[18].

While there is no requirement in CPLR 3101 that a party produce a report prepared by

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[10] *See,* CPLR 3101 *McKinney’s 2011*

[11] 5 N.Y.Prac., *Evidence in New York State and Federal Courts* §5:14; Lichtenberg v. Zinn, 243 A.D.2d 1045, 663 N.Y.S.2d 452 (3d Dept. 1997); Mahoney v. Staffa, 184 A.D.2d 886, 585 N.Y.S.2d 543 (3d Dept. 1992).

[12] 5 N.Y.Prac., *Evidence in New York State and Federal Courts* §5:14; Bloss v. Ford Motor Co., 126 A.D. 2d 804, 510 N.Y.S.2d 304 (3d Dept. 1987)

[13] 5 N.Y.Prac., *Evidence in New York State and Federal Courts* §5:14; Beller v. William Penn Life Ins. Co. of New York, 15 Misc. 3d 350, 828 N.Y.S.2d 869 (Sup. Ct. Nassau Cty. 2007);

[14] 7 Carmody-Wait 2d § 42:119

[15] *See,* CPLR 3101*, Mckinney’s 2011*

[16] Santariga v. McCann*,* 161 A.D.2d 320*,* 555 N.Y.S.2d 309 (1st Dept. 1990); Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 899 N.Y.S.2d 29 (1st Dept 2010).

[17] 5 N.Y.Prac., *Evidence in New York State and Federal Courts* §5:14

[18] Id.; Santariga v. McCann*, supra*.

his expert, opposing counsel may be able to issue a subpoena ordering the production of such reports, including drafts[19].

The attorney-client privilege applies only to confidential communications with counsel, not to information obtained from or communicated to third parties or to underlying factual information[20]; Furthermore, courts have noted that the party opposing discovery must submit more than "conclusory assertions" that the material in question was prepared in anticipation of litigation and thus protected from discovery[21].

In an interesting case, Beller v. William Penn Live Insurance Co. of New York[22], Defendant insurance company hired a witness as both a testifying expert witness and a litigation consultant. Defendant did not differentiate the witness's role as expert from role as consultant. Plaintiff therefore argued the expert witness route and said that restrictions on an expert are liberal and disclosure should be available "practically for the asking". The Supreme Court agreed with plaintiff, but defendant relied on the attorney work product protection and argued that even though expert disclosure is broad, it is always trumped by attorney work product protection. Plaintiff argued that work product is limited to, "only materials that are prepared by an attorney who is acting as an attorney and which contain the attorney's analysis and trial strategy" (See, Doe 244 A.D.2d at 451).

Defendant countered and argued that, "communication between counsel and expert during which counsel reveals her mental impressions, conclusions, opinions or legal theories are wholly undiscoverable attorney work product whether the witness is a testifying expert or not. The privilege is unqualified and absolute. The court noted that party declaring the privilege has the burden of proving it and eventually held that when otherwise privileged communication contains non-privileged communication, this does not destroy the immunity. The Court further went on to hold that, work product (mental impressions and legal theories) combined with what otherwise would be "facts" from a witness could provide "absolute immunity" to said facts if they were inextricably intertwined.

Defendant also argued that the conversation was protected under 3101(d)(2) which gives conditional immunity to materials that would otherwise be discoverable if the asserting

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[19] 3 N.Y.Prac., Com. Litig. in New York State Courts § 28:7 (3d ed.) (2010).

[20] 3 N.Y.Prac., Com. Litig. in New York State Courts § 28:7 (3d ed.); Morgan v. New York State Dept. of Environmental Conservation, 9 A.D.3d 586, 779 N.Y.S.2d 643 (3d Dep't 2004).

[21] See, e.g., Friend v. SDTC-The Center for Discovery, Inc., 13 A.D.3d 827, 787 N.Y.S.2d 163 (3d Dep't 2004) (holding that the burden lies on the party resisting disclosure to show that the material was prepared solely for litigation, and that this burden cannot be satisfied with wholly conclusory assertions);3 N.Y.Prac., Com. Litig. in New York State Courts § 28:7 (3d ed.)

[22] 828 N.Y.S.2d 869 (Sup. Ct. Nassau Cty 2007)

party can show that they were prepared in anticipation of litigation. The Court stated that the anticipation of litigation exemption includes:

- The trial prep of an attorney or those working for the attorney that are not classified as attorney work product (don't involve revelation of legal analysis and strategy
- Materials created at the lawyers request by the client
- Materials prepared in contemplation by non lawyers or lawyers acting in a non-legal capacity

Once it is shown that it falls under one of these the burden shifts to the other party to show a substantial need for the material in preparation of the case and unable without undue hardship to obtain substantial equivalent material without other means

Additionally, in Hudson Ins. Co. v. M.J. Oppenheim[23], the Court held that attorney work product privilege extends to experts retained as consultants to assist in analyzing or preparing the case. Such privileges extend to experts retained as consultants to assist in analyzing or preparing the case as adjunct to the lawyers strategic thought process, thus qualifying for complete exemption from disclosure.

It seems as if the ability to discover correspondence prepared by an expert depends on the role the expert has. If an expert merely remains a litigation consultant, it is more likely that the Court will deem his work to be protected under the work product privilege, whereas those with an expert become more open to being discovered.

[23] 899 N.Y.S.2d 29 (1st Dept. 2009)