EXPERT DISCOVERY:

Does a Testifying Expert's Consideration of Attorney Work Product Vitiate the Attorney Work-Product Privilege?

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As high-stakes, complex litigation has increasingly become a "battle of the experts," litigants seek whatever advantage they can gain through discovery of all materials considered by their adversaries' designated experts. The target of such discovery is not confined to materials generated by the expert himself but includes any materials provided, or information conveyed, to the expert by retaining counsel that could demonstrate that the expert's opinions have been influenced by the opinion work product of counsel. The success of the party attempting to obtain this material and information has centered on courts' interpretation of Fed. R. Civ. P. 26(b)(3), which codifies the qualified attorney work-product privilege, and Rule 26(a)(2)(B), which requires the disclosure of "the data or other information considered by the witness in forming the opinions." Although a few courts find that attorney work product is not discoverable, even if disclosed to testifying experts, the tide of judicial opinion is clearly in the opposite direction.

In *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit recently determined that attorney work-product materials lose any privilege once disclosed to a testifying expert. In *Elm Grove*, an action arising under the Black Lung Benefits Act, 30 U.S.C. §§ 901–945, defendant sought all draft reports and communications between claimant's counsel and his testifying expert witnesses. Claimant argued that the materials were attorney work product and thus immune from discovery. Although the action was governed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, the court analyzed the issue under Rule 26 of the Federal Rules of Civil Procedure, noting that the rules were "essentially identical." *Id*. at 30. Relying on the plain language of Rule 26(a)(2)(B), which requires the disclosure of "the data or other information considered by the witness in forming the opinions," as well as the Advisory Committee notes, the court held that "draft reports prepared by counsel and provided to testifying experts,

and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Id.* at 303. The court reasoned that such disclosure is necessary for adequate cross-examination:

> [I]t is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

Id. at 301. The court noted that although a lawyer's participation in the preparation of an expert's report does not render the report inadmissible, it can affect the weight to be accorded the expert's opinions and that "[t]he interplay between testifying experts and the lawyers who retained them should … be fair game for cross-examination." *Id*. at 301 n.23.

The Fourth Circuit's decision in *Elm Grove* is in accord with the handful of circuit courts that have considered the issue. *See, e.g., Regional Airport Author. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) ("Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.") (effectively overruling *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292–96 (W.D. Mich. 1995), the seminal case finding that attorney opinion work-product disclosures to experts were privileged); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (attorney-client privilege and work-product protection waived by disclosure of confidential communications to testifying experts: "[D]ocuments 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.").

The importance of disclosure of all materials "considered" by a testifying expert has caused one court to refuse to carve out an exception for attorney work product that was inadvertently disclosed to a testifying expert. *In re Vioxx Prods.*, MDL No. 1657, 2007 WL 1558700 (E.D. La. May 30, 2007). In that case, the plaintiffs produced the materials considered by their experts, including a document that constituted undisputed attorney work product, to the defendant. *Id.* at *1. The plaintiffs moved to compel the return of their attorney work product, arguing that the disclosure was not intentional. The court denied the motion, finding that any work-product privilege had been waived because the document was disclosed, albeit inadvertently, to opposing counsel and to the plaintiffs' testifying experts, and because the document was relevant to the experts' testimony.

A minority of district courts, however, have refused to find that the attorney work-product protection is lost when attorney work product is disclosed to a testifying expert. *See, e.g., Krisa v. Equitable Life Assur. Soc.*, 196 F.R.D. 254 (M.D. Pa. 2000); *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659 (S.D. Iowa 2000); *Smith v. Transducer Technology, Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000) ("[W]here documents considered by Defendants' experts contain both facts and legal theories of the attorney, Plaintiff is entitled only to discovery of the facts."); *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10–11 (D. Mass. 1999); *but see Suskind v. Home Depot Corp.*, No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349 (D. Mass. Jan. 2, 2001). Noting the high degree of protection traditionally accorded to attorney work product, these decisions are grounded on the fact that Rule 26 does not explicitly state that materials protected by the attorney work-product privilege are discoverable if provided to a testifying expert and that, without clear authority to the contrary, the privilege should be upheld. *See Krisa*, 196 F.R.D. at 260; *Moore*, 194 F.R.D. at 663–64 ("opinion work product has nearly absolute immunity from discovery"). Thus, the court in *Krisa*, *supra*, criticized the so-called "bright-line rule" requiring disclosure as "abridg[ing] the attorney work product privilege without specific authority to do so." 196 F.R.D. at 260. At least one court adhering to the work-product privilege has also rejected the argument that disclosure is necessary for proper cross-examination, finding that the focus should be on the basis for the expert's opinion:

> The central inquiry on cross examination of an expert witness, however, is not the question of if and to what extent the expert was influenced by counsel; rather it is this: what is the basis for the expert's opinion. Cross examination on the adequacy and reliability of the stated basis for the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert.

Nexxus, 188 F.R.D. at 10. The minority view finds that:

> through continued protection of core work product, communication between expert and attorney will remain unconstrained, and will thus better serve both the ultimate truth-seeking function of the trial process and the goal of assisting the trier of fact pursuant to F.R.E. 702, 703, and 704 within the framework of our adversarial system.

See, e.g., id., 188 F.R.D. at 10–11.

The quest for discovery from experts that could show that their opinions were tainted by the influence of retaining counsel has extended beyond testifying experts to experts who were originally designated as testifying experts but were then redesignated as consulting experts. Relying on *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236 (N.D. Iowa 1996), one leading treatise states that once a witness is designated as a testifying expert, all information provided to the expert is discoverable, even if the designation is later withdrawn:

> Once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert's testimony at trial. Furthermore, if a party is deemed to have waived the privilege as to documents provided to its named expert, that party may not avoid production of those documents under Rule 26(b)(4)(A) by later changing the designation of that expert from "testifying" to "non-testifying" expert.

6 *Moore's Federal Practice* § 26.80[1](a) (3d ed.). Several courts, however, have held to the contrary, depending on the timing of the redesignation.

For example, in *Estate of Douglas L. Manship v. U.S.A.*, 240 F.R.D. 229 (M.D. La. 2006), the defendant initially designated two witnesses as testifying experts but redesignated them as consulting experts before they provided reports disclosing their opinions. The plaintiff sought to take their depositions, arguing, *inter alia*, that the witnesses had participated in depositions of certain of the plaintiff's employees and that the defendant should not be permitted to "retroactively cloak the information provided by and between the [defendant] and its experts with the work product and/or consultative privilege" through an "eleventh hour" redesignation. *Id*. at 233. The defendant argued, *inter alia*, that the experts' opinions were protected from disclosure because they were no longer testifying experts. *Id*. at 231. The court agreed. The court noted that Rule 26(b)(4)(A) permits the depositions of testifying experts only after their reports have been provided and that under Rule 26(b)(4)(B), discovery against experts who are not expected to testify is permitted only upon a showing of exceptional circumstances. *Id.* Because the experts had not provided expert reports and were not going to testify at trial, the court concluded that there was no need for their depositions:

> [T]he purpose underlying Rule 26(b)(4)(A), which permits discovery from a testifying expert witness to facilitate cross-examination of that expert and elimination of surprise at trial, is simply not implicated in a case such as this, where [the experts] will not testify at trial and have never produced expert reports.

Id. at 237. Thus, in order to depose these experts, the plaintiff would have to satisfy the "exceptional circumstances" requirement set forth in Rule 26(b)(4)(B) for nontestifying experts. *Id.* at 238–39. *See also Bradley v. Cooper Tire & Rubber Co.*, 2007 U.S. Dist. LEXIS 2458 (D.N.H. 2007) (Where the witness has been redesignated as a consulting expert from a testifying expert after his report has been produced, "[f]airness requires the deposition go forward and there is no prejudice.").

While the *Manship* court seemed to find important the fact that experts were redesignated before they had provided reports, a number of courts have held that the work-product protection is restored to redesignated experts as long as they had not yet been deposed. These decisions are based on the common-sense determination that such experts are not "testifying" experts unless and until they have given testimony. *See Ross v. Burlington Northern R.R.*, 136 F.R.D. 638, 639 (N.D. Ill. 1991) ("Since plaintiff changed his mind before any expert testimony was given in this case, the witness never actually acted as a testifying expert witness."); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023 (E.D. Cal. 2002). *See also Netjumper Software, LLC v. Google, Inc.*, 2005 U.S. Dist. LEXIS 27813, *3 (S.D.N.Y. 2005) ("The purpose of Rule 26(b)(4)(A),

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which permits discovery from a testifying expert witness, is to facilitate cross-examination of that expert at trial. That purpose is not implicated where, as here, the expert will not testify, has never been deposed, and has never produced a report.") (citation omitted).

The critical role the testifying expert plays in the outcome of bet-the-company litigation can be irretrievably undermined by any suggestion that the expert's opinions are the product of improper influence by retaining counsel. Yet the input of retaining counsel, who will have gained an in-depth understanding of the subject matter of the expert's testimony and with whom rests the ultimate responsibility for the presentation of the case at trial, is simply unavoidable. Because all communications and materials provided to a testifying expert are discoverable in the overwhelming majority of jurisdictions, all members of the case team (*e.g.*, junior associates and legal assistants) must receive proper instruction concerning information exchange, whether oral or written, with experts. Such precautions will go a long way toward preventing opposing counsel from portraying the expert's opinions as not the product of his own independent analysis. Finally, to the extent retaining counsel wishes to restore the attorney work-product protection by redesignating a testifying expert as a consulting expert, the redesignation should be made prior to the expert's deposition. ■

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