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Discovery of Expert's Reports

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DISCOVERY OF EXPERT'S REPORTS

In the course of litigation one may find it advantageous to obtain reports of experts from his adversary at the pre-trial stage. Quite often the discovery of such information would save considerable expense and delay. The original Federal Rules of Civil Procedure had no provision regulating the discovery of such opinions and conclusions. In 1946 the Advisory Committee proposed to amend Rule 26 in order to absolutely immunize from discovery the opinions of experts, save the findings of doctors governed by Rule 35.[1] Although the amendment was not adopted, courts were reluctant to allow inquiry beyond matters of objective fact. The denial of discovery of expert's reports was placed upon several grounds.

Some courts took the view that these matters came within the attorney-client privilege. Others brought these reports within the work product rule. Most courts, however, denied discovery upon the more general basis of inherent unfairness. Only under exceptional circumstances have courts allowed discovery of these reports. The purpose of this paper is to explore these views as they exist in the federal courts. Discussion will be limited to testimony of experts under Rule 26 and expert's reports under Rule 34.[2]

Attorney-Client Privilege

One of the earliest federal cases under the present procedure rules which used the label of privilege was *Lewis v. United Air Lines Transport Corporation*.[3] A third party defendant sought to compel an expert employed by United Air Lines to answer certain questions while taking his deposition. The interrogatories were calculated to determine the results of certain tests made on an airplane cylinder and to disclose communications made to the corporation or its attorneys. Judge McVicar decided the case initially and also heard it again upon re-hearing. Initially the court asserted that the burden of providing privilege rested upon the person claiming it. In the first Lewis case the judge said that the authorities relied upon by the defendant "relate to communications and reports between attorneys and clients. . . . These authorities are not applicable to the question under consideration as they do not involve any reports or communications from the deponent to the United Air Lines Transport Corp."[4] Thus the court distinguished between expert's reports given directly to the attorney and such reports directed to the client. But upon rehearing Judge McVicar mentioned authority for the proposition

1. 2A Barron & Holtzoff, Federal Practice and Procedure 153.
2. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26b.
   Upon motion any party showing good cause therfor . . . the court . . . may order any party to produce . . . designated documents, papers . . . or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b) . . . Fed. R. Civ. P. 34.
3. 32 F. Supp. 21 (W.D. Pa. 1940).
4. 31 F. Supp. 617 (W.D. Pa. 1940).

that evidence obtained by the attorney with an eye toward litigation should be protected. The expert witness was not required to answer these interrogatories because they were deemed privileged. The court added, "to examine an expert of the opposite party before trial . . . would be equivalent to taking another's property without compensation therefore."[5] The court actually gave two reasons for denying discovery, privilege and general unfairness.

Another case which relied heavily upon the concept of privilege was *Cold Metal Process v. Aluminum Company of America.*[6] Here the deponent, an expert, refused to answer certain questions relating to the results of his work. The court recognized that privilege would preclude certain agents of the attorney such as clerks from testifying about office activities. Relying upon the *Lewis* case, the court felt that the attorney-client privilege should be extended to protect not only the attorney's office help, but also the examination before trial of an expert employed by counsel. Its companion case[7] which originated in Ohio and taken to the Sixth Circuit[8] held that the expert's testimony did not come within the attorney-client privilege, hence the expert was subject to examination.

Referring to the *Cold Metal Process* case and to the *Lewis* case, Barron and Holtzoff in their Federal Practice and Procedure[9] believe that the language of privilege used in this context is not accurate. They argue that the courts mean immune from discovery under the work product concept rather than privileged.

WORK PRODUCT

Few cases used the attorney-client privilege to deny discovery. Rather the courts invoked the work product doctrine as conceived in *Hickman v. Taylor.* Professor Moore, summarizes *Hickman v. Taylor* as follows:[10]

1. Information as to facts of the case and statements of witnesses obtained by the adverse party's attorney are not within the common law attorney-client privilege.
2. Even the broader policy against invasion of the attorney's privacy and freedom in the preparation of the case does not make them absolutely immune, but
3. The party for disclosure is bound to show that the situation is a rare one having exceptional features which make disclosure necessary in the interest of justice; and
4. Where the party seeking discovery has obtained or is able to obtain the information asked for elsewhere, he has not met the burden.

After the *Hickman* case there was much discussion regarding the extent

5. Lewis v. United Air Transport Corp., supra note 2 at 23.
6. 7 F.R.D. 684 (D.C. Mass. 1947).
7. Cold Metal Process Co. v. Alumnium Co. of America, 7 F.R.D. 425 (D.C. Ohio 1947).
8. Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948).
9. 2A Barron and Holtzoff op. cit. supra note 1 at 156.
10. 4 Moore, Federal Practice 1131.

to which the experts should be protected from discovery. Some courts extended the work product to immunize expert's reports and depositions from discovery. Others however were reluctant to extend the work product protection to the expert. In *Carpenter-Trent Drill Co. v. Magnolia Petroleum Corp.*,[11] the defendant made a blanket request for the production of certain technical reports prepared by a petroleum engineer hired by the plaintiff. Relying heavily upon *Hickman v. Taylor*, the court established that the reports constituted the attorney's work product. The court felt that when technical experts were retained to advise counsel as to the technical aspects of a case, the expert's reports and information assumed the nature of the attorneys' work product. Accordingly the court decided that a blanket request for the reports which an expert submitted to counsel in preparation of the case for trial is a request for the attorney's work product and denied discovery. *Hickman v. Taylor* allowed counsel to plan his strategy, assemble information, and prepare his legal theories without undue interference from his adversary. Upon this basis the court reasoned that in the *Carpenter-Trent* case protection must be extended to technical information assembled by the attorney and derived through the use of experts.

Sack v. Aluminum Co. of America,[12] however, holds to the contrary on the issue of work product. Counsel engaged an expert to make tests and X-rays of certain metal pieces. The court held the work product concept will not preclude the expert from answering certain interrogatories. Dr. Sacks was not an attorney, rather he was an expert engaged by counsel to make certain tests, the court argued.

The Montana District Court adopted the *Sack* reasoning.[13] There the expert was employed by the defendant. He refused to answer an interrogatory calculated to determine what chemical investigations and analysis were used. In refusing to adopt the work product concept, the court reasoned that since the chemical analysis was not perfomed by counsel, it cannot be his work product. But discovery was allowed on other grounds. The court noted that the plaintiff had likewise expended money for an anlysis and that the results of the analysis were made available to the defendant.

UNFAIRNESS

It is interesting to note that general unfairness was implicit in most of the cases even though the courts chose to deny discovery upon notions of the attorney-client privilege or the work product doctrine. There are a number of cases where discovery was denied which do not come within these two concepts. The basis for denying discovery was lack of good cause or general unfairness. An example is *Smith v. Hobart Manufacturing Co.*[14] The plaintiff attempted to inspect reports prepared by an engineer

11. 23 F.R.D. 257 (D.C. Neb. 1959).
12. 13 Stan. L. Rev. 461 (1962).
13. Leding v. U.S. Rubber Co., 23 F.R.D. 220 (D.C. Mont. 1959).
14. 188 F. Supp. 135 (E.D. Pa. 1960)

hired by the defendant. These reports contained a design analysis of a meat grinder which injured the plaintiff. Adopting Professor Moore's philosophy, the court stated that one party should not be permitted "to examine an expert engaged by an adverse party . . . in the absence of a showing that the facts or information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research."[15] Discovery was denied because the plaintiff's access to the information regarding the machine could be obtained through other means.

More recently *Maginnis v. Westinghouse Electric Corp.*[16] held that reports of experts were subject to discovery as to facts, but not as to conclusions. The plaintiff who was injured in an escalator accident sought access to certain reports which were prepared six months after the injury by an engineering firm hired by the defendant. Because routine maintenance had been performed on the escalator during this time, good cause had been shown said the court. The report was subject to discovery except for those portions which contained the conclusions of the engineers. The court mentioned that the attorney-client privilege did not exist and that the report was not immune under the work product rule. Yet discovery of the conclusions was denied.

In the light of the *Maginnis* case and of more recently reported cases the courts seem to be devoloping an attitude of immunity regarding the discovery of expert's conclusions. Rule 26b which defines the scope of discovery provides for disclosure of any relevant matter which is not privileged. And of course 26b is qualified by *Hickman v. Taylor.* But when experts opinions are not within the work product rule, courts still maintain reluctance to allow discovery. The basis for such reluctance is lack of good cause or general unfairness.

Underlying this concept of unfairness are two factors. The courts recognize some sort of property right in the opinions of an expert, and to allow access to these reports would be equivalent to the taking of another's property without compensation. The fear that a lazy attorney will depend upon his opponent's preparation also prevails.[17]

These underlying notions of unfairness or lack of good cause are not the same notions under the nominal good cause requirement of Rule 34. In allowing inspection under Rule 34, courts have found a sufficient showing of good cause if the documents contained material evidence, if a witness whose statements were sought was no longer available, that a party was unable because of injuries to obtain evidence which the defendant readily procured, or that where information cannot be had from other sources. This showing of good cause under Rule 34 is not a formal burden of persuasion; a more liberal construction is desirable. Considerations of

15. Id. at 136.
16. 6 Fr. Serv. 2d 34.411, Case 1.
17. 203 F. Supp. 75 (E.D. N.Y. 1962).

practical convenience are of importance, and the court should be satisfied that the production of the requested document is necessary to enable a party to prepare his case.[18]

This distinction between the good cause requirement for discovery of expert's conclusions and the mere nominal good cause requirement for the production of facts within a report is apparent in the *Maginnis* case. *United States v. 284, 398 Square Feet of Floor Space*[19] is a further illustration. Here the government moved to dispense with the taking of oral depositions of officers who may have had knowledge of the value of the property involved. The proceeding was governed by Rule 26, accordingly the good cause requirement of Rule 34 was not present. Opinions of experts did not come within the scope of Rule 26b, said the court, as it denied discovery of expert's opinions yet granted discovery of facts.

Since Rule 26b provided for discovery of all relevant, non-privileged matters, then one may conclude that courts have clothed expert's conclusions with an immunity from discovery. This immunity is not the work product rule yet it qualifies the scope of Rule 26b. In some instances, however, the courts have allowed discovery of expert's conclusions, but only when these opinions assume the nature of ultimate facts. In a patent infringement case the chemical properties of a certain polyethylene product was a major issue.[20] It was impossible for the plaintiff to establish infringement or for the defendant to attack the validity of the patent except from expert testimony. In the ordinary law suit, the court said discovery should not be allowed where the moving party's objective is to probe the basis of the expert's opinion thus enabling a more effective cross examination. But in this case the opinions of experts were more in the nature of ultimate facts. Hence, discovery was granted.

More recently in *United States v. Nysco Labs., Inc.*,[21] the court stated that discovery should be granted where the necessities of a case warrant it. Here the government attempted to enjoin the defendant from introducing certain drugs into interstate commerce. The defendant objected to certain interrogatories which presumably were being used to elict the results of chemical analysis and the medical effect of this drug. Discovery was granted. "Realistically speaking the resolution of the entire case depends upon medical and expert testimony and opinion. The necessities of such a case transcend the usual limitations which may otherwise be imposed upon discovery proceedings . . . the government is entitled to know what the defendant's position and contentions are on the relevant points."[22]

CONCLUSIONS

As the cases indicate courts maintain divergent attitudes in the course

18. 2A Barron and Holtzoff op. cit. supran ote 1 at 415.
19. 203 F. Supp. 75 (E.D. N.Y. 1962).
20. Dupont DeMours and Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D.C. Del. 1959).
21. 26 F.R.D. 154.
22. Id. at 159.

of regulating the discovery of expert's reports. Most courts today feel that expert's reports by themselves do not come within the attorney-client privilege.[23] Only if the traditional elements of the attorney-client privilege are present, should the report be protected. And this protection should extend to facts as well as opinions.

To provide immunity for the expert's reports some courts have invoked the broad scope of the work product rule. There is much authority however which doesn't regard expert's reports as coming within the work product rule. The purpose of the work product rule is to protect legal theories. One court in refusing to recognize work product protection stated that these opinions and scientific theories were far beyond the capacity of most lawyers and that to intermeddle would be disasterous.[24] However there may be some justification in applying the work product rule when the expert's report is incorporated into the legal theory of the case and a *Hickman v. Taylor* situation exists.

There are a number of cases which don't come under the attorney-client privilege or the work product rule where courts have denied discovery of these reports for lack of good cause. Upon some nominal showing of good cause the factual content apart from conclusions, contained within the report becomes subject to discovery. The showing of good cause required to force disclosure of an expert's opinion is not the nominal showing requirement in Rule 34. Rather this good cause requirement is more substantive and tends to limit the scope of discovery under Rule 26b.

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23. 2A Barron and Holtzoff op. cit. supra note 1.
24. Dupont Demours and Co. v. Phillips Petroleum Co., supra note 18.