

SCOPE OF DISCOVERY OF AN EXPERT'S WORK PRODUCT

by

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ABSTRACT: Clearly, the final report and opinions of a litigant's trial expert are discoverable. Less clear is the permissible scope of discovery of an expert's preliminary reports and opinions. Lawyers (yea) and experts (nay) have been heard to express absolute and opposite views. This paper will focus on the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

SCENARIO # 1: A notoriously fastidious **pack rat** is engaged as a trial expert. The expert's signed, final report is delivered to both counsel. *As is the expert's ordinary course of business, the final report is preceded by an unsigned, preliminary report only seen by the expert. The unsigned, preliminary report is viewed by the expert as a good faith effort at a final report. However, the expert fully expects to review and revise the preliminary report prior to submitting a signed, final report. During this review the expert makes major changes in his/her methods of analysis, conclusions reached, and opinions stated in the final report.* This pack rat's document retention policy is "Throw nothing away, later it might be useful."

SCENARIO #2: A **minimalist** is engaged as an expert as part of counsel's risk management program and by express contract the expert never will be called by the engaging counsel as an expert at trial. The expert's signed, final report is delivered to the engaging counsel prior to any specific litigation is anticipated (let alone initiated). *As is the expert's ordinary course of business, the final report is preceded by an unsigned, preliminary report only seen by the expert. The unsigned, preliminary report is viewed by the expert as a good faith effort at a final report. However, the expert fully expects to review and revise the preliminary report prior to submitting a signed, final report. During this review the expert makes major changes in his/her methods of analysis, conclusions reached, and opinions stated in the final report.* This minimalist's document retention policy is "Immediately throw everything away except the signed, final report, or later it will be damaging."

The pack rat's unsigned, preliminary report probably is discoverable, while the minimalist's unsigned, preliminary report probably is beyond the reach of discovery.

The Federal Rules of Civil Procedure at 28 USC 26 (a)(2)(B) establish the scope of discovery of an expert who shall issue a written and signed report as: "The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions [.]"¹

FRE 401 defines relevant evidence as evidence having any tendency to make the existence of a fact more probable or less probable than it would be without the evidence. FRE 501 is unlike the generic State rule. The generic State rules provide that ordinarily no one has any privilege to refuse to be a witness, disclose any matter, or produce any object or writing. FRE 501 provides for privileges as "governed by the principles of the common law as they may

¹ Hereinafter we will use the notation in the form FRCP 26 for the Federal Rules of Civil Procedure and FRE 501 for the Federal Rules of Evidence.

In whole, FRCP 26 (a)(2)(B) states: "Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or especially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

be interpreted by the courts of the United States in light of reason and experience." Further, FRE 501 provides for the use of the State privilege law is the State's civil law is to provide the rule for the case. As one might imagine, there is an extensive body of case law.

If an expert's unsigned, preliminary report is to fall outside the scope of discovery, then it is going to have be privileged, or not relevant, or protected in some other way.

At first blush, it certainly would appear that a preliminary report would be no less than "other information considered by the witness in forming the opinions", if not also part of "the basis and reasons" for the final opinion. It is very ordinary for an expert to form a preliminary opinion, and upon further reflection to deviate from that preliminary opinion. It seems odd that an expert might claim that the expert's own preliminary opinion was not "information considered" and was not part of the "basis and reasons" for the expert's signed, written final opinion.

This paper will first examine the question of privilege, then the question of relevance, and lastly another basis for shielding an expert's preliminary report from discovery.

PRIVILEGE

FRE 501 creates the possibility of a host of judicially recognized privileges. In general, privileges balance the social need for full disclosure in a judicial context against the social needs of preserving confidentiality in narrowly defined and special relationships. Federal privileges clearly exist for lawyer-client communications, lawyer work product, spousal communications, physician-patient communications, clergy-confessant communications, trade secrets, identity of informants, and state secrets. Communications with experts are not included; thus, an expert's privilege is excluded by inference. Absent some strong social justification, if the expert's work product is to be privilege it will need to piggyback on some other privilege.

Except in the oddest of situations, the only likely piggybacking of the expert on another's privilege will be for the expert to claim an extension of the lawyer-client privilege.²

FRE 501 judicially recognizes the lawyer-client privilege. This is the client's privilege, not the lawyer's. As a legal fiction, the lawyer is seen as the being the client. Thus, communications between the client and lawyer are seen as communications by the client to the client, and are not intended by the client to be heard by the world. The minimum sweep of the lawyer-client privilege would be your judicially recognized rights as a part of your USA *Constitution* Sixth Amendment right to assistance of counsel.

At the core of the lawyer-client privilege are the direct communications between the lawyer and the client. The clarity and the strength of the privilege weaken as one moves away

² An example of an odd privilege for an expert might be an expert on marriage counseling who also is a member of the clergy shepherding the lawyer's client. Then, what the expert/clergy learned could be cloaked by the clergy privilege. Since the privilege is owned by the confessant, the confessant could partially waive the privilege for some but not all purposes. It would then be up to the discretion of the court as to whether the partial cloak infringed the rights of the opposing party or the interests of justice.

from that core. Two major extensions of direct communications are the lawyer's use of assistants and the lawyer's work product (e.g., legal research and strategy).

Persons who assist the lawyer may, for purposes of the lawyer-client privilege, be "the lawyer". Thus communications between the assistant and the client will become cloaked by the lawyer-client privilege. The lawyer must create the reasonable expectation of all the parties that the assistant is acting for and on behalf of "the lawyer".³ In contrast, the expert is engaged by the lawyer to provide an independent evaluation of facts. **A critical point to keep in mind is that these assisting persons must be assisting the lawyer in the performance of legal professional services.** Lawyers can not simply deputize the world into silence. There must be a nexus between the assisting and the lawyer's delivery of legal professional services. Ordinarily, assisting persons would be limited to other lawyers, legal secretaries, and paralegals. That is, persons acting merely as extensions of "the lawyer". It is feasible, but unlikely, that an expert would be assisting the lawyer in the performance of legal professional services. **Legal professional services focus on the law. In contrast, experts focus on the facts.**

Routinely, but not always, Courts rule that no one can attain the status of "expert on the law" for the purposes of assisting the trier of fact in a trial. That role already is assigned to the judge. Whether legal expert can attain the status of "expert on the law" outside of the context of assisting the trier of fact is not settled. There are at least two situations where a legal expert might be able to attain the status of "expert on the law". First, a legal expert such as an economist in the area of antitrust law enforcement may be engaged by the lawyer to assist the lawyer in anticipation of litigation or in crafting risk management strategies. Second, the judge as judge routinely requests and allows expert assistance on the law via legal briefs for the parties' lawyers. It is not great leap in a summary judgement context to envision the parties' deferring to a mutually agreeable expert on the law so that there is one legal brief. Clearly, if a person attained the status of "expert on the law" that expert could be covered by the lawyer-client privilege's extension for assistants and representatives.⁴

Since the expert is not likely to be an expert on the law, but rather will be an expert of the facts, it will be difficult for a subject matter expert to routinely fit within the classification of a person assisting the lawyer in the delivery of legal professional services. Therefore, routinely the expert will not be covered by the lawyer-client privilege via assistance. Can the expert fit within the lawyer's work product extension, which is the outer reach of the lawyer-client privilege?

"Work product" can be a term of art in the law. When used to identify a "lawyer's work product" it is a term of art describing the outer reaches of the attorney-client privilege. Except for the potential for real confusion, "expert's work product" is not (yet) a term of art in the law.

As a term of art, a "lawyer's work product" typically includes research, interviewing legwork, and strategies in preparation to delivering legal professional services to the client.

³ This is simple to do, but often is left undone: ask Hillary Clinton.

⁴ Did Paul Drake and Perry Mason appear to act as if Paul was an expert who assisted the lawyer Perry in the delivery of legal professional services? Did Paul ever get called to testify? Did he ever (successfully?) claim an expert's privilege?

While many of the same physical acts could and would be done by the lawyer and by the expert (e.g., legwork), these identical tasks are done with fundamentally different motivations.

These differing motivations (i.e., **zealous advocacy versus impartial pursuit of factual truth**) are material to the law's granting of privilege. The zealous advocate seeks to sculpt the truth from the perspective of the client. The expert's impartial pursuit of factual truth should be independent of either client's perspective. Inherent to the zealous advocate's motivation is the righteous desire to determine when, how, and if each piece of information is added to the mosaic presented to the trier of fact. In stark contrast, inherent to the motivation for an impartial pursuit of factual truth is the righteous desire to include all evidence. So revered are experts that they are allowed to include all evidence; including forms of evidence that the court ordinarily would exclude as untrustworthy. Such ordinarily untrustworthy evidence is wholly appropriate in the hands of an expert because of the expert's motivation: impartial pursuit of factual truth.

At their cores, the lawyer chooses when to conceal and the expert unwaveringly unveils.

Not surprisingly, an expert's work product ordinarily is not cloaked by a privilege. Appropriately, there is deference by the statutes and the courts to the expert's process of reaching an opinion. This deference can be seen in FRCP 26 (b)(4)(A) which **frees the expert from the burden of deposition until such time as the expert delivers a signed, written report pursuant to FRCP 26 (a)(2)(B)**. However, once the report is finalized the expert is to be an open book.

The expert does not have a work product privilege. The expert gets to say what is or is not the expert's opinion. The expert gets to say what most influenced the expert. Does the expert get to unilaterally exclude preliminary reports by the slight-of-hand of merely stating the preliminary report did not influence the expert?

RELEVANCE

Since it is ordinary for an expert to form and to material revise preliminary methods of analysis as well as the resulting opinions, one could argue that preliminary reports are not "relevant". However, that would require an ordinary meaning of relevant rather than the legal meaning of relevant.

We must recall both the role of the expert at trial and the legal definition of "relevant". Pursuant to FRE 702 the role of the expert is to assist the trier of fact in understanding the questions of fact by the expert's use of scientific, technical, or other specialized knowledge. Relevant evidence is defined by FRE 401 as evidence having any tendency to make the existence of a fact more probable or less probable than it would be without the evidence.

While the comfort of the expert is enhanced by the exclusion of a preliminary report, that is not enough.

The preliminary report appears relevant. The expert found the preliminary report's methods and the conclusions initially attractive. Would not a jury also be drawn to such error? Would not the jury benefit from the expert's wisdom on which attractive errors to avoid, and

why? How then can the expert say that exploration of the preliminary report does not assist the trier of fact?

Let's look at this from a different angle. Credibility is central to the role of the expert. Alone, deviations between the preliminary and the final report would not impeach the expert. Surely, the expert will have well founded justifications for such deviations, and surely the expert will explain why the attractive errors of the preliminary report should be avoided upon full reflection. Impeachment will flow more swiftly from the failure to explain deviations. However, these expressions of trust in the quality of the expert's final report also argue forcefully for the inclusion, rather than the exclusion, of an expert's preliminary report.

OTHER BASES FOR EXCLUSION

The law treats differently a trial expert and a consulting expert. The "other" party's right to discovery springs from the right to a fair trial. A trial expert's opinions and the basis for those opinions are of far greater importance to a fair trial than are the opinions and basis for opinions of a consulting expert. The consulting expert is closer to assisting the lawyer in the delivery of professional legal services.

FRCP 26 (b)(4) discusses three types of experts: (A) an expert who is expected to testify; (B) first, an expert who is engaged in anticipation of litigation rather than in anticipation of testimony, and second, employees of the client whose ordinary job is to act as an expert.⁵ The permissible scope of discovery of testifying experts is near total. **Consulting experts are subjected to far less discovery since, at the time of creation of the expert's final report, the "other" parties' right to a fair trial is not in play.**

FRCP 26 (b)(4)(B) points the courts to FRCP 35 (b) for additional limits on discovery of consulting experts who will not testify at trial. FRCP 35 is focused on physical and mental examinations of persons. An understanding of FRCP 35 (b) is helpful in understanding the generic rule for the scope of discovery of a consulting expert found in FRCP 26 (b)(4)(B).

The ordinary standard for discovery of a consulting expert's reports and opinions is in FRCP 26 (b)(4)(B) is stated after the referral to FRCP 35 (b). The ordinary scope is: "... upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

Since FRCP 35 (b) is focused on physical and mental examinations of persons, this type of expert examination may not be capable of being replicated. That is, other experts may not be able to examine the "same" evidence. The physical and/or mental condition of a person is likely to be materially different at different times due to either/or both biological processes of healing or deterioration. Expert's reports of such mental or physical conditions, therefore, are more discoverable than the ordinary consulting expert's report.

⁵ Unmentioned, and thus rightfully in a fourth category, are experts who are not employees of the client, and are engaged neither to testify nor in anticipation of (specific?) litigation. This fourth class of experts come closest to being covered by "lawyer's work product" extension of the lawyer-client privilege since the output of such experts tends to be used by the lawyer in a strategic, risk management fashion.

At first one is drawn to the conclusion that an inability to replicate is necessary to trigger an expanded scope of discovery of a consulting expert. That would be an error. The focus is on whether it is "impracticable ... to obtain facts or opinions on the same subject by other means."

Full discovery is ordinarily justified by the opposing party's right to a fair trial. Is there an alternative, adequate basis for reaching a non-testifying consulting expert's preliminary report? Perhaps to prove the client's state of mind, by showing what the expert had not told the client. Note, that ever this (weak?) reed will be to no avail if the consulting expert in question has a sufficiently long deposition and testimony history, since that history would create the "other means" which extinguishes the right to discovery.

Trade secrets are privileged. Might the expert claim trade secrets in the preliminary report? Yes, that may be done with respect to particular methods of analysis. However, often disclosure to the court still is required, as is viewing by the parties albeit restricted by court order and with secrecy protected by bonding. Trade secrets could not easily cover and shield a preliminary report if the final report were disclosed. If the purpose of the expert's investigation changed markedly between the preliminary report and the final report, so that the two reports addressed fundamentally different investigations, then perhaps trade secrets contained within the preliminary report would be beyond the reach of discovery motivated by the final report.⁶

The scenarios for the pack rat and minimalist differed in the expert's roles and in the expert's document retention policies. **A lawful, effective, and efficient document retention policy may be the best justification for excluding preliminary reports from the scope of discovery.** All discovery is predicated on the existence of the files. If the file does not exist, it can not be discovered. Of course, your document retention policy must be focused on your legitimate business interest of conserving storage and staff resources, rather than focused on obstruction of justice. If, in the ordinary course of business, either a testifying expert or a non-testifying consulting expert immediately destroys all preliminary reports upon the creation of the final report, then such destruction will be far more justifiable than immediate but selective destruction of a preliminary report. Absent a request from the engaging lawyer to preserve the preliminary report and/or absent the expert's reasonable expectation that any of the parties' lawyers would request a preliminary report, such an ordinary business practice probably would avoid falling into the realm of obstruction of justice.

⁶ But, in that context, we are making more of a relevancy argument. However, recall footnote 1 that quoted FRCP 26 (a)(2)(B) and laid out the scope of discovery rule for testifying experts with written reports and engaged in anticipation of litigation. If an expert also falls outside of FRCP 26 (b)(4)(B) non-testifying expert engaged in anticipation of litigation, then that consulting expert may fall into the general scope of discovery in FRCP 26 (b)(1), to wit: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the custody, conditions, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonable calculated to lead to the discovery of admissible evidence." Hardly firm ground for shielding a preliminary report from discovery.