

FULL DISCOVERY OF AN EXPERT'S FILE REMAINS A QUESTION MARK UNDER INDIANA TRIAL RULE 26

Fifteen years after Rule 26 of the Federal Rules of Civil Procedure was amended to establish a “bright line rule” on the disclosure of experts and discovery of materials considered by experts, Indiana still lags behind and the uncertainty surrounding the discovery of experts and the bases for their opinions remains. To most litigators, the question seems rhetorical – are all materials provided an expert by counsel discoverable? Though most likely immediately think, yes, unfortunately, under Indiana’s Trial Rule 26(B), the answer is not so clear. The ambiguity and “imperfect alignment” between T.R. 26(B)(3) and 26(B)(4) can afford a safe harbor for attorney correspondence and an expert’s work product labeled opinion work product. Those litigators who have discovered this safe harbor the hard way realize that the problem lies more in the contradiction between T.R. 26(B)(3) and 26(B)(4) than in any court error.

Unlike FRCP 26, Indiana’s T.R. 26 does not contain an expert disclosure mandate like FRCP 26(a)(2)(B). As amended in 1993, FRCP 26(a)(2)(B) requires a disclosing party to produce an expert report that contains “a complete statement of all opinions . . . and the reasons therefor; [and] the data or other information *considered* by the witness in forming the opinions.” Fed. R. Civ. P. 26(a)(2)(B) (2008). As Magistrate Cosbey reflected in *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 635 (N.D.Ind. 1996), the drafters of the 1993 rule intentionally chose to use the term “considered,” as opposed to the term “relied.” (“‘Considered,’ which simply means to take into account, clearly invokes a broader spectrum of thought than the phrase ‘relied upon’ which requires dependence on the information.”). With some exception, federal courts have followed the Advisory Committee’s directive and defined the word “considered” to encompass not only documents upon which the experts relied in forming their opinions, but also those documents reviewed by the experts. *See e.g., Karn*, 168 F.R.D. at 638 (citing 8 Charles Wright & Arthur Miller, *Federal Practice & Procedure*, § 2016.2 (1994)).

The 1993 Advisory Committee notes leave little question that part of the intent in amending FRCP 26 to include mandatory disclosure of expert witnesses was to end the uncertainty surrounding the discoverability of an expert’s opinions and bases therefor:

The information disclosed under the former Rule in answering interrogatories about the substance of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. . . .

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied

upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Fed. R. Civ. P. 26(a)(2)(B) advisory committee note (1993 Amendment).

The post-1993 FRCP 26 and “its supporting commentary reveal[ed] that the drafters considered the imperfect alignment between 26(b)(3) and 26(b)(4) under the old rule and clearly resolved it by providing that the requirements of (a)(2) ‘trump’ any assertion of work product or privilege.” *Karn*, 168 F.R.D. at 639. The resulting effect of the new rule was the creation of a “bright line rule” that mandated full disclosure of those materials reviewed by an expert, “regardless of whether they constitute opinion work product.” *Id.* at 637.

Although Indiana’s Trial Rules were patterned after the Federal Rules of Civil Procedure, over the past 15 years, Indiana has not amended its T.R. 26 expert disclosure rules to include the equivalent to FRCP 26(a)(2)(B). Therefore, litigators are left to question whether all materials contained within an expert’s file – particularly correspondence and other materials provided by counsel – are discoverable, and, if so, which. The uncertainty unnecessarily imposes a burden on the courts to consider, on a case-by-case and document-by-document basis, what materials within an expert’s file constitute the opinion work product of an attorney who provided it to the expert, and decide whether the opposing party has a right to discover the material under T.R. 26(B)(3). Further complicating the issue, Indiana authority considering this issue is virtually non-existent, and does little to clear up the uncertainty. *See e.g., American Buildings Co. v. Kokomo Grain Co., Inc.*, 506 N.E.2d 56, 58 (Ind. Ct. App. 1987) (“The authorities construing Trial Rule 26(B)(4) are few.”).

As stated above, the confusion lies, like it did under the old Federal Rule 26, in the interpretation of T.R. 26(B)(3) and 26(B)(4). Indiana Rule 26(B)(4)(a) permits discovery of testifying experts as follows:

- (a) (i) A party may, through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, . . .

Under T.R. 26(B)(4)(a), there is no provision for or against the discovery of the materials considered or relied upon by the expert, but only permission to discover the substance of the opinions and a summary of the grounds for each opinion. The rule also prohibits discovery of a non-testifying expert, *i.e.*, a consultant. *See Ind. T.R. 26(B)(4)(b)* (2008). Those limitations or short-comings, combined with the work product protections afforded by 26(B)(3), and one can certainly appreciate why there is

uncertainty surrounding this issue. Rule 26(B)(3) expressly restricts the discovery of attorney work product:

3. Trial Preparation: Materials. Subject to the provisions of subdivision (B)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

Ind. T.R. 26(B)(3) (emphasis added).

While seemingly permitting disclosure of materials provided to an expert by making the subdivision subject to the provisions of 26(B)(4), T.R. 26(B)(3) implores courts to always “protect against the disclosure of mental impression, conclusions, opinions or legal theories of an attorney or other representative of a party.” As a result, documents provided by counsel and labeled as opinion work product may enjoy near absolute immunity if counsel claims and can show they contain the mental impressions, opinions, legal theories, or conclusions of an attorney or representative of a party to the litigation. *See Paul Howard d/b/a Paul's Truck and Auto Repair v. Stephen P. Dravet, et al.*, 813 N.E.2d 1217, 1222 (Ind. Ct. App. 2004) (“a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.”). Some may argue this is a fair protection of opinion work product, yet it unnecessarily creates discovery disputes and potentially bogs down the court with consideration of what is opinion work product versus what materials were necessarily relied upon by the expert in formulating his or her opinions and, thus, should fairly be granted access to opposing counsel. Whereas, a bright line rule leaves no dispute or confusion – once provided to an expert, the material is open to discovery regardless of privilege.

Complicating things further, the immunity afforded by the work product privilege is not limited to the attorney, but extends to the party or representative of a party, including consultants. *See* Ind. T.R. 26(B)(3); *American Buildings*, 506 N.E.2d at 64. Consequently, what is to stop counsel from asserting that a testifying expert, whose materials are otherwise discoverable, was initially retained as a “consultant” and, therefore, certain materials prepared in anticipation for the litigation and provided the expert by counsel, or, those prepared by the expert while wearing the consultant cap, are work product and not subject to discovery under 26(B)(3)? While such a situation seems unreasonable, in *American Buildings*, the Court of Appeal suggested that simply because items in an expert's possession are not protected by T.R. 26(B)(4) does not necessarily

preclude a determination that the same materials are protected from discovery under T.R. 26(B)(3). *See* 506 N.E.2d at 65 (citing *Virginia Electric & Power Co.*, 68 F.R.D. 397 (E.D. VA. 1975)). And, the Court of Appeals indicated that an argument could be made that a testifying expert retained by a party could serve a dual capacity as both expert and consultant. *Id.* The Court noted that in the context of T.R. 26(B)(3) a “consultant” does more than simply provide information; they provide advice. *Id.* In contrast, the primary function of an expert is to provide unbiased information. *Id.* (“An expert is expected to owe his allegiance to his calling and not to the party employing him.”). In *American Buildings*, because the expert was not a consultant his prior report and opinions did not constitute work product under T.R. 26(B)(3).

Unfortunately, that analysis leaves wide-open the dual capacity argument and invites the problems that a bright line rule would preclude. Under different circumstances where an adequate showing of consultation is made, are materials provided to or prepared by an expert in his consultant role protected work product? The argument that documents provided to experts are protected by the work product doctrine, highlights the tension existing between a court’s duty to prevent the disclosure of attorney opinion work product, on the one hand, and the rule’s mandate for expert disclosure, possibly including that same work product, on the other. The 1993 amendments to the federal rule made great strides to overcome this apparent friction and lead to the conclusion that work product protection should not apply to documents provided by counsel to testifying experts related to the subject matter of the litigation. *See Karn*, 168 F.R.D at 641. Yet, this dilemma still faces Indiana litigators and will continue to make the courts’ job more difficult until the rule is amended.

The unfortunate result of leaving the rule unchanged is a chilling effect on trial preparation and effective cross-examination of experts; ignoring the burden it imposes on the court. Testifying experts are supposed to serve as unbiased outside references retained to assist the court and triers of fact to understand some issue beyond their common understanding. Not being able to fully discover an expert’s file severely prejudices an adversary’s efforts to determine whether an expert is indeed unbiased or a hired gun. Moreover, permitting an expert to serve in a dual capacity as consultant when necessary to protect disclosure, and testifying expert when useful, permits gamesmanship and derides the goals of expert testimony. As Magistrate Cosbey recognized in *Karn*, without pretrial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert’s testimony. *See Karn*, 168 F.R.D. at 639-40.

Finally, the work product protection will not be lost. Instead, lawyers and judges will know exactly what is and what is not protected. It will not be left to the court to determine this issue and further burden courts with unnecessary discovery disputes. In the long-run, a “bright line rule” like the federal rule would better preserve opinion work product because there would be no lingering uncertainty as to what documents will be disclosed and discoverable. Counsel would easily be able to protect genuine work product by simply not giving it to the expert. *See Karn*, 168 F.R.D. at 641.

About the Author

Josh Fleming concentrates his practice in product liability defense and general commercial litigation. His experience includes defending clients in litigation involving product liability and premises liability claims, complex and mass toxic tort claims, as well as general commercial claims. He has assisted as national counsel to chemical companies in toxic tort litigation involving chemicals such as perchlorethylene, trichloroethylene, benzene, methylene chloride, hydrochloric acid, pentachlorophenol, chloroform, pesticides, lead-based paints and others. Josh has defended clients in both state and federal courts and represented clients at the appellate level.

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