



Protecting Privileges and Confidentiality When Dealing with Experts

By C. Anthony Graffeo and Eric J. Artrip

Lawyers use experts for a variety of reasons: initial case evaluation, advice on drafting discovery requests and, of course, presenting testimony at trial. This article discusses the circumstances under which a party must disclose the name, opinion and correspondence of someone who has provided an expert opinion or consultation in a case and when it is proper to withhold such information.

As a general rule, communications with an expert are not confidential. ALA.R.CIV.P. 26(b)(1) “*In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...”; FED.R.CIV.P. 26(b)(1); *State v. Chicago Bridge & Iron Co.*, 261 So.2d 882, 885 (Ala. 1972) (“There is no privileged communication between an attorney and an employed expert, not a client.”). Therefore, the practitioner should carefully consider what to include in communications with experts. Stick to the facts and keep assessments of the case private. Whatever is disclosed to a testifying expert is likely to be discoverable. *See e.g. Ex parte Head*, 958 So.2d 860, 869 (Ala. 2006) (attorney-client privilege waived in turning over certain documents to a retained expert.) However, under certain circumstances, communications (along with the expert’s identity, opinions and basis for same) may be withheld from discovery under both the work-product and attorney-client privileges. Consider the following definitions:

1. **Testifying Experts**—One who provides expert testimony.
 - a. **Retained**—A retained expert is one who has agreed to provide expert testimony in exchange for consideration.
 - b. **Unretained**—This type of expert has first-hand knowledge about the facts of the case but no party has agreed to pay a fee for her to provide testimony in the case. Examples include treating physicians, investigating police officers and employees of governmental groups (e.g. EPA, OSHA, and the FDA).
2. **Consulting Experts**—One who is retained or specially employed to give advice or guidance in anticipation of litigation or trial, but who will not testify in the case. There are two special kinds:
 - a. **Connected with Testifying Expert**—Where the consultant’s factual knowledge and opinions serve as the basis for a testifying expert’s testimony
 - b. **With Firsthand Knowledge of Facts**—A consultant in the role of a fact witness if he obtained knowledge of facts firsthand, or outside the consulting role in some manner. For instance, if a consultant actually witnessed the accident at issue in the case, or participated in the development or testing of an allegedly-defective product, he will be treated as a fact witness as to his firsthand knowledge.

Protection under Various Privilege Doctrines

The ability to shield communications and expert-related materials (e.g. the expert's notes, memorandums, reports and correspondence) from discovery normally depends on which of the above roles an expert plays in the case. The strongest of these is the work product doctrine found in ALA.R.Civ.P. 26(b)(3) which protects "disclosures of the mental impressions, conclusions, opinions or legal theories of an attorney" representing a party. Here is how assertion of the work product doctrine privilege typically corresponds with the various categories of experts:

1. Testifying Experts—Full disclosure as per ALA.R.Civ.P. 26(b)(4). *But see Ex parte Morris*, 530 So.2d 785, 787 (Ala. 1988) (Expert not required to provide personal tax returns in discovery process.)

a. Retained—If this expert has developed opinions and acquired facts



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about the case *exclusively in anticipation of litigation or trial*, then parties are entitled to full discovery. If the expert received or obtained facts about the case *outside* the consultant role, then she is a fact witness, at least as to those facts gathered. Under these circumstances, a party is entitled to conduct discovery as to these facts just as the party would with a fact witness.

b. Unretained—While these experts are not required to submit a report or be subject to the usual expert disclosures under RULE 26(b)(4), the parties are entitled to obtain the same scope of discovery from these experts as a fact witness. If a non-retained expert is called to support the case at trial, identify the expert and the expected topics of testimony in RULE 26 disclosures.

2. Consulting Experts—Generally speaking, discovery of these experts is off-limits. However, the court may require disclosure of the identity of the consulting-only expert and the creation of a privilege log for documents that were created

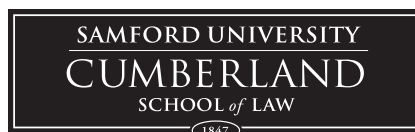
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as a result of the consultation as per FED.R.CIV.P. and ALA.R.CIV.P. 26(b)(5).

a. Connected with Testifying Expert—A party is entitled to obtain copies of the notes, reports and other materials generated by the consultant that were used by the testifying expert to formulate or support his opinions. To keep a consultant relationship truly confidential, avoid any contact, whether in person or through written materials, between the consultant and testifying experts.

b. With Firsthand Knowledge of Facts—As a practical matter, one cannot avoid disclosing the facts known by such an individual simply by paying him a consulting fee. Be suspicious of any employee or former employee of a party who is being paid a separate consulting fee. In such situations, pursue complete disclosure, and/or a privilege log, concerning the alleged consultant.

There is, however, at least one author who finds the withholding of a consulting expert's name and opinions antithetical to the ultimate search for the truth. See Stephen D. Easton, "Red Rover, Red Rover, Send That Expert Right Over:" *Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses*, 55 SMU L.Rev. 1427 (Fall 2002); Stephen D. Easton, *Can We Talk? Removing Counterproductive Ethical Restraints Upon ex parte Communication Between Attorneys and Adverse Expert Witnesses*, 76 Ind. L.J. 647 (summer 2001).

As with any other work product protection, the protection afforded here is not absolute. If the party seeking discovery concerning the consultant can show exceptional circumstances, such as the inability to obtain the discovery in any other manner, discovery may be allowed. ALA.R.CIV.P. 26(b)(3); FED.R.CIV.P. 26(b)(3). An example of such exceptional circumstances is where the consultant is the only person who viewed an allegedly defective product before it was lost or destroyed. Because the party seeking the discovery is now unable to conduct their own examination, they are likely entitled to limited discovery on this issue from the consultant.

It should also be noted that although FED.R.CIV.PRO. 26(b)(4)(A), governing depositions of experts, appears to imply that some categories of experts may be exempt from the report requirement, that exemption is apparently addressed to experts who are testifying as fact witnesses, although they may also express some expert opinions (e.g. treating physicians). 4 James W. Moore, *et al. Moore's Federal Practice*, § 26.04[4] at 26-107 (2d ed. 1995), and Advisory Committee Notes at 125; *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993) ("Rule 26 focuses not on the status of the witness but rather on the substance of the testimony"); *Zarecki v. National R.R. Passenger Corp.*, 914 F.Supp. 1566, 1573 (N.D.Ill. 1996) (Rejecting plaintiff's argument that treating physician was exempt from report requirement where physician's testimony concerned professional opinion developed for trial and not simply information acquired through observation and care of patient).

Finally, in certain circumstances, the attorney-client privilege may play a role in the need for disclosures under ALA.R.CIV.P. 23(b)(4). The privilege generally provides that, "A client has a privilege to refuse to disclose and to prevent any other person



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from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” ALA.R.EVID. 502(b). The party asserting the privilege has the burden of establishing: 1) the attorney-client relationship existed; 2) the particular communications at issue were indeed privileged; and 3) the privilege was not waived. *Ex parte City of Leeds*, 677 So.2d 1171, 1173 (Ala. 1996).

Typically, courts have been reluctant to extend this privilege to outside consultants such as experts. However, in some narrow circumstances, confidential communications between an outside consultant and counsel for a party may be deemed protected by the attorney-client privilege. For instance, in the case of *In re: Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), the appellate court found an outside consultant was so intertwined with the Bieter Company as to be considered a representative of the company for purposes of



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applying the attorney-client privilege to confidential communications the consultant had with the company’s counsel. The Bieter Company had hired Dennis S. Klohs, an outside consultant, as an independent contractor to provide advice and guidance regarding certain retail developments the company was pursuing. As part of his duties he communicated with the company’s lawyers on a regular basis. When RICO litigation erupted over some of the real estate dealings the consultant had been involved with, Bieter asserted attorney-client privilege for communications Klohs had previously had with counsel. The court ruled that Klohs was an individual without which the Bieter Company could not exist, and so he was a representative of Bieter for purposes of applying the attorney-client privilege.

As noted earlier, if either the work product or attorney-client privileges are asserted, Rule 26 of both the *Alabama* and *Federal Rules of Civil Procedure*

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require the party asserting same to state the applicable privilege and produce a log of documents and information so covered. The federal rule reads as follows:

(5) Claims of Privilege or Protection of Trial Preparation Materials

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Special Cases

As is typical, there are a number of situations which do not fit neatly into one of the above expert classifications. For example, a party's employees sometimes are called to testify as expert witnesses by their employer. They are not automatically exempt from expert disclosure and reporting requirements. On the contrary, some courts agree that "allowing a blanket exception for all employee expert testimony would 'create a category of expert trial witness for whom no written disclosure is required' and should not be permitted." *Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004) quoting *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996).

This issue was considered to be one of first impression within the Middle District of Alabama several years ago in *K.W. Plastic v. U.S. Can., Co.*, 199 F.R.D. 687 (M.D. Ala. 2000). The defendant in that case argued that its expert-employee was not "retained or specially employed to provide expert testimony" and his duties did not entail "regularly ... giving expert testimony," such that the witness was not obligated to prepare and submit a signed expert report. *Id.* at 689. The Court rejected both premises, citing two prior cases where identical arguments were rejected by other federal courts, *Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D.Minn.1998) and *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y.1996). In rejecting the defendant's argument, the Court stated:

Rather than reinvent the wheel, the court quotes from the persuasive opinion in *Day* regarding the interpretation [of Rule 26(a)(2)(b)] advanced by the defendant in that case: 'The reading proposed by defendant would create a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information. The logic of defendant's position would be to create a category of expert trial witness for whom no written disclosure is required—a result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulated policy.'

More recently, the Eleventh Circuit Court of Appeals in *Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004), also relied heavily upon *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996), in requiring an expert disclosure and report from the defendant's expert-employee. In *Prieto*, an excessive force case under §1983, the appellate court found that the defendant's



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employee, who had no connection to the specific events underlying the case, and who the defendant had proffered as an expert in the use of force and police procedures, was required to submit an expert report and subject to full disclosure under Rule 26. In that case, the appellate court agreed with the logic used in *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996), which flatly rejected the defendant's argument that their employees were exempt from disclosure and report requirements, emphasizing the broad provisions for expert discovery in the *Federal Rules of Civil Procedure*.

Another special circumstance occurs when a party designates an expert but subsequently asserts that the expert will not testify in the case. Under this scenario, the expert has been effectively "de-designated." A de-designated expert should be considered a consulting-only expert for purposes of discovery if, before the de-designation took place, no discovery was taken



A de-designated expert should be considered a consulting-only expert for purposes of discovery if, before the de-designation took place, no discovery was taken of the expert and the expert had not conducted a personal medical examination of a party under Rule 35.

of the expert and the expert had not conducted a personal medical examination of a party under Rule 35. If the expert divulged facts known or opinions held *prior to the de-designation* then the opposing party may be entitled to limited discovery of the expert by deposition or subpoena.

Yet another set of criteria is considered when addressing the issue of a dual-role expert who was retained for purposes of both testifying at trial on certain issues and providing confidential (non-testifying) consulting services on other issues. This kind of expert will be treated as a retained, testifying expert for discovery purposes (full and complete disclosure) *unless a clear distinction can be made* between the expert's testifying role and his consulting services. *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F.Supp. 1013, 1014 (S.D.N.Y. 1983). Any ambiguity about whether or not a document or communication took place during the testifying-versus-consulting role should be resolved in favor of providing

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full disclosure. *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997). The burden of showing that an expert did not consider certain documents in forming her opinion cannot rest on the expert's testimony exclusively. *Id.* This burden is generally met when the documents could not have been relied upon (e.g. same were created after an expert's testimony is taken or report is written.) *Aktiebolag v. Andrx Pharm, Inc.*, 208 F.R.D. 92, n. 12 (S.D.N.Y. 2002).

Finally, we come to one of the most commonly-used experts—the non-retained consultant. Typically this type of expert is informally consulted by one of the parties in anticipation of litigation. In determining whether a consultation is truly “informal” for the purposes of discovery, courts will typically look at: (1) how the consultation was initiated; (2) the type and extent of the information obtained from or provided to the expert; (3) the intensity of the relationship; (4) the terms, such as whether payment was provided; and (5) whether a confidentiality agreement was entered into. *Ngo v. Standard Tools & Equip., Co.* 197 F.R.D. 263, 266 (D.Md. 2000). If a party has established that the consultant is truly non-retained, not even the identity of the expert is subject to discovery. *See Ex parte Cryer*, 814 So.2d 239, 248 (Ala. 2001) (Defendant physician established that consultation with an independent physician immediately after procedure in question was done in anticipation of litigation. Absent a showing of substantial harm by the plaintiff, court upheld trial court's decision to not require disclosure of physician's identity).

Lawyers continue to rely upon experts on a regular basis for consultation, testimony and other purposes. Knowing when and how to protect informal communications and withhold certain opinions from disclosure is a crucial part of this process. We hope this article will prove beneficial. ▲▼▲



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