VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
*Including professional corporations*

1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005
(202) 962-4800, Fax (202) 962-8300

MARYLAND • WASHINGTON, D.C. • VIRGINIA

VENABLE®
ATTORNEYS AT LAW

***Expert Witness Discovery: What You Give And Say To Your Expert Is Discoverable****

* **Damon W.D. Wright is an associate with Venable, Baetjer, Howard & Civilettti LLP and is based in the firm's McLean, Virginia and District of Columbia offices. His practice focuses on commercial and criminal litigation. He is admitted in and practices before state and federal courts in Virginia and the District of Columbia, as well as federal court in Maryland.**

Consider three hypotheticals in federal practice: (1) Your testifying expert sends you a "draft" expert report, which you revise, mark-up and return; (2) Your testifying expert speaks and corresponds by e-mail with your non-testifying expert, who plays the role of devil's advocate and thoroughly critiques your expert's analysis; (3) To bring your expert "up to speed", you give her a memo describing your mental impressions, your litigation strategy, and your client's privileged communications.

If you assume that such information received by a testifying expert is not discoverable, you might have been correct in 1993 -- but not today. Before 1993, many federal courts held that such information provided to a testifying expert was not discoverable on the grounds that either the information was privileged or the expert did not "rely" on the information. However, since 1993, federal courts overwhelmingly have ordered production of such information regardless of any preexisting privilege or the expert's lack of reliance.

Relying on the 1993 FRCP amendments, most federal courts have adopted a "bright-line rule" for determining when to order production: did the expert see, hear or consider the information?

## The 1993 Amendments

Counsel can no longer successfully argue that information reviewed by an expert is not discoverable because the expert did not "rely" on it. Enacted in 1993, FRCP 26(a)(2)(B) states that the expert report shall include: "the data or other information considered by the witness in forming the opinions." The Advisory Committee Notes to the 1993 amendments to FRCP 26 are equally explicit. The Notes state: "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." *See* 8 Wright, Miller & Marcus, Fed. Pract. & Proc. § 2016.2, at 252 (2 ed. 1994) ("At least with respect to experts who testify at trial, the

disclosure requirements of Rule 26(a)(2), adopted in 1993, were intended to pretermit further discussion and mandate disclosure despite [the work product] privilege").

**The Majority's Bright-Line Rule**

Relying on FRCP 26(a)(2)(B) and the Notes, most federal courts to address the issue have ordered production of all information and documents considered by a testifying expert, regardless of any preexisting privilege or lack of reliance. *See, e.g., In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *In re Air Crash at Dubrovnik*, 2001 WL 777433 **3-11 (D.Conn. 2001); *Suskind v. Home Depot Corp.*, 2001 WL 92183 *6 (D.Mass.); *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 646 (S.D.Inc. 2000); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585, 588-89 (S.D.Miss. 2000); *W.R. Grace & Co. Conn. v. Zolton International, Inc.*, 2000 WL 1843258, *4 (W.D.N.Y. 2000); *Oneida Ltd. v. U.S.*, 43 Fed.Cl. 611, 618 (1999); *Culbertson v. Shelter Mut. Ins. Co.*, 1999 WL 109566 (E.D.La.); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305-06 (W.D.Va. 1998); *Musselman v. Phillips*, 176 F.R.D. 194, 199-202 (D.Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co*., 171 F.R.D. 57, 62 (S.D.N.Y. 1997); *Barna v. United States*, 1997 WL 417847, *1-2 (N.D.Ill.); *Karn v. Ingersoll-Rand Co., et al.*, 168 F.R.D. 633, 637-38 (N.D.Ind. 1996); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.Mex. 1996).

Several policy reasons support the "bright-line rule".

First, because "hired guns" have become commonplace and because experts are given special deference under FRE 702 to testify on subjects of which the trier of fact knows nothing, the opposing party and trier of fact should know if counsel's opinion or case theory influenced the expert's opinion. Absent such discovery, testifying experts may be "nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired." *Karn*, 168 F.R.D. at 639.

Second, production of information that was "considered" but ultimately rejected and not "relied" upon by the testifying expert may be even more relevant to exploring the bases for and validity of the expert's opinion. Thus, production of all information provided to a testifying expert promotes full and fair cross-examination and the truth finding process at trial. *Musselman*, 176 F.R.D. at 201.

Third, because the "bright-line rule" is clear and easy to apply, parties and counsel will have a better understanding (as compared to pre-1993 practice) of what materials will be discoverable. If counsel wants to retain a privilege for certain information, counsel will know to not give that information to the testifying expert. *Lamonds*, 180 F.R.D. at 306.

**Risks For The Unwary**

For counsel who fail to heed the bright-line rule and limit free-ranging strategy sessions with testifying experts, there have been serious, case-damaging consequences. There are many examples.

In *Lamonds*, the U.S. District Court for the Western District of Virginia ordered production of counsel-prepared documents, containing fact and opinion work product, that had been furnished to two testifying experts. While plaintiff argued against production on the ground

that neither expert "relied" on the documents, the court emphasized that this was not the test. *Lamonds*, 180 F.R.D. at 306. Instead, the court held that both experts "considered" the documents by receiving and reading them prior to forming their expert opinions. *Id*.

In *Barna v. United States*, 1997 WL 417847, *3-4 (N.D.Ill.), the court ordered the government and three testifying experts to produce "all documents concerning any conversations between themselves or the government" and reopened the experts' depositions to allow questions regarding "what, if anything was told [by counsel] to the government's experts that might have been considered by them in forming their opinions."

In *The Herrick Company, Inc. v. Vetta Sports, Inc.*, 1998 WL 637468, *3 (S.D.N.Y.), the court ordered production of materials exchanged between defense counsel, Skadden, Arps, Slate, Meagher and Flom, and its testifying legal ethics expert in prior engagements concerning related subject matter. The court also compelled production of defense counsel's notes to the testifying expert about an opposing expert's opinion. *Id*. at *4.

**The Minority View**

While all courts agree that all fact information considered by a testifying expert must be produced, a substantial minority of federal courts have held that the FRCP 26 amendments do not require production of core or opinion attorney work product considered by a testifying expert, because of the protection afforded by FRCP 26(b)(3).

In *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D.Mich. 1995), the court read the Advisory Committee Notes to FRCP 26 "as meaning only that all factual information considered by the expert must be disclosed in the report" and held that the "the high privilege accorded attorney opinion work product" could not be overcome without clear and unambiguous language in the rules. Finding no such language, the *Haworth* court held that counsel's mental impressions, conclusions, opinions or legal theories, even when shared with a testifying expert, remain privileged as core or opinion attorney work product (relying on FRCP 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495, 514 (1947)).

Other courts have followed this analysis and held that core or opinion attorney work product considered by the testifying expert retains a privilege and is not discoverable. *See, e.g., Estate of Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648, 650 (N.D.Iowa 2000); *Smith v. Transducer Technology*, 197 F.R.D. 260, 262 (D.V.I. 2000); *Krisa v. Equitable Life Assurance Society*, 196 F.R.D. 254, 259 (M.D.Pa. 2000) *Nexxus Products Co. v. CVS New York, Inc*., 188 F.R.D. 7, 9-11 (D.Mass. 1999) (rejecting application of "bright-line rule" requiring production of opinion attorney work product, because rule could encourage counsel to withhold material from an expert out of fear that it would be discoverable which would hamper experts in forming their opinions); *Ladd Furniture, Inc. v. Ernst & Young*, 1998 WL 1093901, **12-13 (M.D.N.C.); *New Mexico Tech Research Foundation v. Ciba-Geigy Corp.*, 1997 WL 576389, **5-6 (D.R.I.); *Magee v. Paul Revere Life Insurance Co.*, 162 F.R.D. 289, 294 (W.D.Mich. 1995).

**Predictions For The Fourth Circuit**

The Fourth Circuit has not yet spoken on the issue, and there is a clear split among its district courts.

The Western District of Virginia in *Lamonds* and the District of Maryland in *Musselman* have applied the majority's bright-line rule and required production of fact and opinion work product. In *Musselman*, 176 F.R.D. at 200, the court explained: "it is essential that parties be able to discover not only what an expert's opinions are, but also the manner in which they were arrived at, what was considered in doing so, and whether this was done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position." *See also Lamonds*, 180 F.R.D. at 305 (emphasizing importance of knowing whether "expert arrived at his opinion after an independent review of all relevant facts or whether he relied on 'facts' chosen and presented by an attorney advocating a particular position").

The Middle District of North Carolina, in *Ladd Furniture, Inc.*, 1998 WL 1093901 *13, rejected *Lamonds* and *Musselman* as inconsistent with Fourth Circuit precedent in other contexts and held that opinion work product is not waived by disclosure to a testifying expert. The court explained that "the Fourth Circuit has been the most steadfast in protecting against the disclosure of attorney opinion work product." *Id.* The *Ladd* court added that, to the extent that other courts are concerned about counsel improperly influencing an expert's opinions, this concern remains checked by the adversarial system and a party's ability to offer rebuttal expert testimony. *Id.*

**Proceed With Caution**

Every federal court to address the issue agrees that, after the 1993 amendments, all fact information seen, heard, or considered by the testifying expert in forming her opinion is discoverable even if the expert did not rely upon it. Although counsel may prevail in arguing that opinion work product shared with a testifying expert is not discoverable, it is best to assume that a court will also compel the production of opinion work product received by a testifying expert. Simply put, when meeting or talking with a testifying expert, counsel may want to speak as if opposing counsel were in the room or on the phone.

Thus, three governing rules should be clear: (1) counsel and client should not communicate or give any information to the testifying expert unless they are prepared to share the information with the opposing party; (2) counsel should provide the testifying expert with a copy of FRCP 26 and the Advisory Committee Notes and explain that any information seen, heard, or considered by the expert in forming her opinion is most likely discoverable; and (3) counsel should pursue discovery of all information (including internal memos, the specifics of conversations with the client or counsel and marked-up draft expert reports) shared with the opposing party's testifying expert.

To the extent that counsel wants to emphasize certain facts or mental impressions for his testifying expert's benefit (for instance, in response to a draft expert report), it may be prudent to do this orally and not in writing. Of course, an oral communication considered by the expert is just as relevant and discoverable as a writing considered by the expert. Nonetheless, the expert's accurate description of a conversation with counsel may have less evidentiary value and jury appeal for the opposing party than a writing making the same points. Counsel may also be able to effectively inform his testifying expert of certain facts or issues by directing the expert's attention to key pleadings. The critical point is that, if counsel wants to protect certain privileged information from disclosure, he should limit the extent and nature of communication with the testifying expert.

In addition, while few clients can afford the luxury of a non-testifying or consulting expert, counsel remains free under FRCP 26(b)(4)(B) to have uninhibited communication with such an expert without waiving any privilege. Thus, if counsel must consult with an expert in order to formulate theories of the case or to understand the evidence, he should consider retaining a consulting expert. To retain the privilege, however, it is important that the consulting expert not change roles and later become a testifying expert. *See B.C.F. Oil Refining, Inc.*, 171 F.R.D. at 62 (where expert first served as consulting expert and later as testifying expert, materials considered in both capacities must be produced "since it is not clear whether the expert reviewed them solely as a consultant or whether they informed his expert opinion as well.")

Notwithstanding the 1993 amendments to FRCP 26, counsel should not be inclined to hide bad facts from his testifying expert or to screen the testifying expert from having access to relevant, non-privileged information. Effective case preparation and presentation always requires that the testifying expert be well-informed. As recommended in *Lamonds*, 180 F.R.D. at 306, an attorney "can choose to provide the expert with all relevant facts instead of directing the expert's attention to certain facts and instead of including opinions and conclusions drawn by the attorney." At the same time, counsel should be circumspect to protect privileged information and should not engage in case strategy sessions with his testifying expert. By avoiding disclosure of privileged information and creation of potentially case-damaging impeachment material, this approach protects counsel, the client, and the testifying expert.