UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 47 | Number 2 Article 9

2-1-1969

Civil Procedure -- Discovery of Expert Information

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Civil Procedure—Discovery of Expert Information

A party's effective preparation for trial may depend on his ability to discover facts and opinions from his adversary's experts. Although modern discovery in many respects is broad, discovery of experts' information often tends to be quite narrow. A recent case, *Security Industries, Inc. v. Fickus*,[1] rejected various arguments for protecting against such pre-trial disclosure. An analysis of the decision points up recent trends and approaches taken to the problem.

Plaintiff was injured and two family members were asphyxiated while using a camper unit that contained gas utilities manufactured by four separate companies. Upon suit for the resulting deaths and injuries, one firm moved under Federal Rule of Civil Procedure 34 for production of all parties' written reports concerning "any examination, testing, operation, or observation"[2] of any part of the camper unit, including the gas utility oven. The gas oven's manufacturer filed opposition, and the superior court denied the discovery motion. In reversing this ruling, the Alaska Supreme Court considered the three grounds most frequently advanced in advocating protection from discovery of expert information: the work-product doctrine, the attorney-client privilege, and the asserted unfairness of disclosure. The court rejected the applicability of the work-product rule, stating that discovery of an expert's opinions and conclusions does not violate the lawyer-privacy rationale of the *Hickman v. Taylor* rule.[3] In holding that no attorney-client privilege was being violated by the discovery, the court declared that "communication of relevant facts by an expert to an attorney should not place such facts beyond the ambit of discovery procedures."[4] Assertions of unfairness were dismissed as subordinate to the attainment of discovery objectives such as "elimination of surprise at trial, location and preservation of evidence, and the encouragement of settlement or expeditious trial of litigation."[5] The discovery rules invest in trial judges sufficient discretion and power, the court submitted, to minimize any actual unfairness.[6]

Other courts, both state and federal, have frequently been confronted

[1] 439 P.2d 172 (Alas. 1968).
[2] 439 P.2d at 173 (Alas. 1968).
[3] 329 U.S. 495 (1947).
[4] 439 P.2d at 177-78.
[5] *Id.* at 178. The court quoted from a previous decision, Miller v. Harpster, 392 P.2d 21 (Alas. 1964), in the disposition of this point.
[6] 439 P.2d at 178.

with the work-product rule, the attorney-client privilege, and considerations of unfairness as grounds for extending protection from discovery of expert information; widely disparate conclusions have been reached.

In considering the work-product contention, some courts have held expert information to be within the protection of the rule.[7] Of over thirty states that have substantially adopted the federal discovery system,[8] fifteen[9] have adopted either by rule or decision the "Hickman Amendment."[10] These provisions extend work-product protection to written trial preparations of attorneys, agents, and experts unless discovery is justified by a showing of unfair prejudice, undue hardship, or injustice. Four states[11] omit any provision for a showing that allows disclosure

[7] United Air Lines, Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148 (W.D. Mich. 1958); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 90 A.2d 672 (Super. Ct. 1952); Ford Motor Co. v. Havee, 123 So. 2d 572 (Fla. Dist. Ct. App. 1960). *See* Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

[8] ALAS. R. CIV. P. 26-37; ARIZ. R. CIV. P. 26-37; ARK. STAT. ANN. §§ 28-348 to -361 (1962); CAL. CODE CIV. PROC. §§ 2019-34 (West 1955); COLO. R. CIV. P. 26-37; DEL. CH. R. 26-37 and DEL. SUPER. CT. (CIV.) R. 26-37; FLA. R. CIV. P. §§ 1.280-.400 (1967); GA. CODE ANN. tit. 81A, §§ 126-37 (Supp. 1967); HAWAII R. CIV. P. 26-37; IDAHO R. CIV. P. 26-37; ILL. ANN. STAT. ch. 110A, §§ 201-19 (1967); IOWA R. CIV. P. 121-34, 140-44 (Supp. 1968); KY. R. CIV. P. 26-37; LA. CODE CIV. PROC. ANN. tit. 3, art. 1421-1515 (1960); ME. R. CIV. P. 26-37; MD. R.P. 400-22; MINN. R. CIV. P. 26-37; MO. R. CIV. P. 56-61; MONT. REV. CODE ANN. ch. 2701, Rules 26-37 (1960); NEB. REV. STAT. §§ 25-1267.01 - .44 (1956); NEV. R. CIV. P. 26-37; N.J. SUPER. CT. CIV. PRAC. R. 4:16-:27; N.M. STAT. ANN. §§ 21-1-1(26)- (37) (1953); N.D.R. CIV. P. 26-37; ORE. REV. STAT. §§ 41.615, 41.625, 45.181-.250 (1953); PA. R. CIV. P. 4001-20; S.D. CODE §§ 36.0501-.0532, 36.0601-.0607 (1939); TEX R. CIV. P. 167-70, 186a, 186b, 187-88; UTAH R. CIV. P. 26-37; VT. STAT. ANN. tit. 12, §§ 1231-67 (1959), *as amended*, (Supp. 1968); WASH. R. PLEADING, PRAC. & PROC. 26-37; W. VA. R. CIV. P. 26-37; WYO. R. CIV. P. 26-37. North Carolina's version, N.C. GEN. STAT. § 1A-1, Rules 26-37, becomes effective July 1, 1969.

[9] KY. R. CIV. P. 30.02, 37.02; IDAHO R. CIV. P. 26(b); IOWA R. CIV. P. 141(a); LA. CODE CIV. PROC. ANN. tit. 3, art. 1452 (1960); ME. R. CIV. P. 26(b); MINN. R. CIV. P. 26.02; MO. R. CIV. P. 57.01(b); NEV. R. CIV. P. 30(b); N.J. SUPER. CT. CIV. PRAC. R. 4:16-2; PA. R. CIV. P. 4011(d); TEX. R. CIV. P. 167, 186a; UTAH R. CIV. P. 30(b); WASH. R. PLEADING, PRAC. & PROC. 26(b); W. VA. R. CIV. P. 26(b), 34(b). MD. R.P. 410d is another such provision, but Rule 410c expressly subjects experts' reports to discovery. Illinois has superseded its "Hickman Amendment," ILL. ANN. STAT. ch. 110, § 101.19-5 (1956), with a provision for more liberal discovery: ILL. ANN. STAT. ch. 110A, § 201(b)2 (1967).

[10] ADVISORY COMM. ON RULES FOR CIVIL PROC., REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROC. FOR THE DISTRICT COURTS OF THE UNITED STATES 39-40 (1946). The United States Supreme Court, in deciding *Hickman*, implicitly rejected the proposed amendment, showing a preference for resolution by decision rather than by rule.

[11] MINN. R. CIV. P. 26.02; MO. R. CIV. P. 57.01(b); PA. R. CIV. P. 4011(d); TEX. R. CIV. P. 167, 186a.

and thereby absolutely preclude discovery of an expert's written trial preparation materials.[12] Several of the courts which extend work-product protection to expert information distinguish, however, between expert "opinion" and "fact," barring discovery of the former while permitting disclosure of the latter.[13] Other courts, entertaining the ultimate ascertainment of the truth and the correct adjudication as their primary concerns, have refused to apply work-product protection to expert information.[14]

Since hired experts' reports are usually made to aid attorneys in preparing for trial, these reports are ordinarily protected from discovery by the attorney-client privilege, unless a showing of special justification is made.[15] A distinction between communications and knowledge has often been noted;[16] with some exceptions[17] discovery of knowledge held by expert witnesses has been allowed.[18] Perhaps a fair statement is that the majority deny blanket application of the attorney-client privilege where such an application could operate to suppress admissible evidence.

Recently a third contention based on assertions of unfairness has gained headway. Two theories underlie this contention. Arguably the information is the expert's property, and hence belongs to the party who "buys" it from him.[19] Also, it is asserted that a system of unlimited

[12] For an extreme result reached through applying this rule, see *Ex parte* Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959), where a driver-compiled list of names and addresses of witnesses to a bus accident was protected as work-product.

[13] Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148 (W.D. Mich. 1958); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

[14] Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948); United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); Leding v. United States Rubber Co., 23 F.R.D. 220 (D. Mont. 1959); *cf.* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

[15] Schuyler v. United Air Lines, Inc., 10 F.R.D. 111 (M.D. Pa. 1950); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 90 A.2d 672 (Super. Ct. 1952); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[16] *E.g.*, Guilford Nat'l Bank v. Southern Ry., 24 F.R.D. 493 (M.D.N.C. 1960); Lewis v. United Air Lines Transp. Corp., 31 F. Supp. 617 (W.D. Pa.), *modified*, 32 F. Supp. 21 (W.D. Pa. 1940).

[17] American Oil Co. v. Pennsylvania Pet. Prods. Co., 23 F.R.D. 680 (D.R.I. 1959); Cold Metal Proc. Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947); City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[18] *E.g.*, United States v. McKay, 372 F.2d 174 (5th Cir. 1967); Cold Metal Proc. Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947); United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952). For a complete analysis, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

[19] *See* Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

discovery would promote laziness and encourage parties, by waiting for the other to hire the necessary experts, to jockey for position.[20] As regards the "property right" concept, where a party subpoenas an expert as an ordinary witness, the majority of courts hold that the expert must give knowledge already acquired,[21] but not information that requires additional research.[22] A number of courts apparently are greatly influenced by arguments that expertise is property, and compensation must be made for its taking; these courts permit the expert to refuse to testify as to his opinions and conclusions[23] unless compensated for such testimony.[24] The fear that laziness and tactical sparring would result from open discovery of experts' reports seems justified where the discovering party seeks to use the expert's disclosures to support his case at trial. But where discovery is sought to prepare for cross-examination of the expert at trial, this fear is not well-founded; several cases have allowed the motion for discovery on this basis.[25]

Confusion and disagreement obviously pervade existing case law; the Advisory Committee on Civil Rules recently proposed amendments to the Federal Rules to clarify the situation and resolve discovery problems.[26] One amendment would require a showing of "good cause" for obtaining discovery of all trial preparation materials, except that statements con-

[20] *See* Schuyler v. United Air Lines, Inc., 10 F.R.D. 111 (M.D. Pa. 1950).

[21] *E.g., Ex parte* Dement, 53 Ala. 389 (1875); City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); *In re* Estate of James, 10 Ill. App. 2d 232, 134 N.E.2d 638 (1956); *In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

[22] *Ex parte* Dement, 53 Ala. 389 (1875) (dictum); Brown County v. Hall, 61 S.D. 568, 249 N.W. 253 (1933) (dictum); Ealy v. Shetler Ice Cream Co., 108 W. Va. 184, 150 S.E. 539 (1929).

[23] Hoagland v. TVA, 34 F.R.D. 458 (E.D. Tenn. 1963); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); Buchman v. State, 59 Ind. 1 (1877); People *ex rel.* Kraushaar Bros. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1947); Cooper v. Norfolk Redev. & Housing Auth., 197 Va. 653, 90 S.E.2d 788 (1956) (dictum).

[24] City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Buchman v. State, 59 Ind. 1 (1877). Other cases, *e.g.*, Boynton v. R.J. Reynolds Tob. Co., 36 F. Supp. 593 (D. Mass. 1941), allow an expert to refuse to testify concerning his opinions and conclusions even when offered compensation therefor.

[25] United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Franks v. National Dairy Prods. Corp., 41 F.R.D. 234 (W.D. Tex. 1966); Seven-Up Bottling Co. v. United States, 39 F.R.D. 1 (D. Colo. 1966); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963); United States v. 62.50 Acres of Land, 23 F.R.D. 287 (N.D. Ohio 1959).

[26] See COMMITTEE ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROC. FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY, 43 F.R.D. 211 (1967).

cerning the action previously given by the party seeking discovery would require no showing to be discovered.[27] The Advisory Committee omits the "good cause" showing from Federal Rule 34, effectively transposing the requirement, as developed by case law, from the production of documents generally to the area of trial preparation materials alone. This proposal would protect from discovery materials prepared for litigation by attorneys, consultants, sureties, insurers, indemnitors, and agents, unless the required showing of good cause could be made. While the Advisory Committee purports to give greater protection to some trial preparation materials (especially those of attorneys) than to others,[28] the probable effect of implementing the new proposal might well be a constriction of the scope of discovery of trial preparation materials in those more "liberal" jurisdictions.

The Advisory Committee further proposes changes specifically relating to discovery of experts' trial preparations;[29] they distinguish between experts who have been retained or specially employed and those whom a party expects to call as trial witnesses. As to the former, a showing that denial of discovery would result in undue hardship or manifest injustice is required. The Advisory Committee asserts that discovery of material acquired outside trial preparation (*i.e.*, knowledge previously acquired) is not thereby precluded, but only discovery from experts informally consulted is barred.[30] As to experts expected to testify at trial, due notice of their identity and field of expertise is required. Discovery of both fact and opinion relevant to the stated subject matter is permitted, and such discovery as would be allowed could be conditioned upon payment of a portion of the expert's fees and expenses.

The Advisory Committee submits that any unfairness would thereby be minimized, as discovery would usually be limited to witnesses, and "obtained at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his own case out of his

[27] *Id.* at 225, Proposed Rule 26(b)(3).
[28] *Id.* at 232 (Advisory Comm.'s Notes).
[29] *Id.* at 225-26, Proposed Rule 26(b)(4).
[30] *Id.* at 234. The Advisory Committee, *id.* at 233, purports to "reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine," yet the required showing for discovery of specially retained experts, said to be based on the doctrine of "unfairness," is substantially the same as that required under work-product.

opponent's experts. Discovery is limited to opinions previously given by the expert or to be given by him on direct examination at trial."[31] The courts, of course, have power to regulate any abuses.

The proposed amendment in relation to expert trial witnesses appears to be a useful addition to federal discovery procedures; where expert testimony is crucial it will be allowed; and the proposal adequately provides for fairness to the respective parties. The amendment in relation to retained experts not expected to appear as witnesses, however, seems to threaten an increased protection from disclosure. Any foreclosure of discovery of expert information by rule is unwarranted. Numerous cases have been resolved on the basis of experts' findings; pre-trial discovery of such findings will be vital in future cases, and could be curtailed by the proposed rule's comparative inflexibility. The proposed amendment has been criticized in a recent decision,[32] which postulated that the showing required for discovery of retained experts is too harsh. Since a party does not know what such experts have learned or what opinions they have formed, how can he show that denial of discovery will result in "undue hardship" or "manifest injustice?" The first party to reach and "buy" an expert, because of the stringent showing required for discovery of non-testifying experts, would be able to suppress unfavorable findings of that expert simply by declining to offer his testimony at trial. This possibility should compel further consideration of the proposed amendment. Premature adoption of the provision might lead courts out of the confusion of the present case law, but the discovery system could be damaged in the extrication.

Confrontation with the morass of case law on discovery of expert information should dispel a court's temptation to resolve a case solely on the basis of precedent. Surely decisions can best be reached through consideration of each case's individual circumstances in the light of underlying discovery policy. The *Fickus* court found that, where expert information was needed for correct ajudication, "[g]ood cause has been demonstrated in the need to eliminate surprise at trial, and the related need for full and effective cross-examination of opponents' expert witnesses."[33] The finding is to be commended.

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[31] *Id.* at 235.
[32] United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).
[33] Security Indus., Inc. v. Fickus, 439 P.2d 172, 180 (Alas. 1968).