Expert Disclosure in New York's Federal and State Courts

by Christine McInerney and Kimberly B. Mandel

Recent federal case law in New York concerning discovery of materials provided to testifying expert witnesses reflects a growing trend of decisions requiring disclosure of such material, even where the material constitutes attorney work-product.

By contrast, there is a surprising dearth of state case law on this issue. The little case law that does exist in New York state courts relevant to this issue suggests a bias toward protecting attorney work-product provided to expert witnesses from disclosure but offers no meaningful analysis and little guidance to practitioners.

Federal Case Law

The magistrate judge overseeing discovery in *Baum v. Village of Chittenango*, 218 F.R.D. 36 (N.D.N.Y. 2003), recently applied a bright-line rule that requires disclosure of materials provided to expert witnesses, even though it was "work-product." The *Baum* court recognized the divergence among federal courts regarding whether counsel's "work-product," or work prepared in anticipation of litigation, must be disclosed where it had been provided to an expert.

After weighing the competing principles involved, the court found that disclosure was necessary. The court noted that it is essential that a jury be able to evaluate an expert's opinion based on the information that is supplied to the expert.

Baum concerned a plaintiff's claim of unlawful discharge against the defendant village, her former employer. Pursuant to Rule 26(a)(2), the plaintiff disclosed to the defendant the report of a psychologist, a trial expert that she had retained. In his report, the trial expert identified the information that he used to conduct his investigation, including letters from plaintiff's counsel, in which counsel provided the history of the plaintiff's case

and the nature of her injuries.

Post-disclosure, the defense moved to compel the plaintiff to produce the letters from her counsel. Despite the fact that these letters were "unquestionably prepared in anticipation of litigation," the court held, after an in camera review, that the letters had to be disclosed to the defense.

The district court reached its decision in *Baum* by recounting the history of the work-product doctrine, and then by tracing the history of Rule 26 of the Federal Rules of Civil Procedure. In *Hickman v. Taylor*, 329 U.S. 495 (1947), and again in *Upjohn Co. v. U.S.*, 449 U.S. 383, 400 (1981), the U.S. Supreme Court articulated the importance of protecting attorney work-product and preventing opposing counsel from invading an attorney's privacy. Such privacy, the court reasoned, enables counsel to "prepare his legal theories and plan his strategy without undue and needless interference," *Baum* court wrote, quoting *Hickman* and *Upjohn Co*.

However, in 1993, the current version of Rule 26 was created to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information," and to require greater disclosure, particularly with regard to expert witnesses, than its predecessor. *Manufacturing Administration and Management Systems, Inc. v. ICT Group, Inc.*, 212 F.R.D. 110, 113 (E.D.N.Y. 2002). The *Baum* court interpreted the 1993 version of Rule 26 as an attempt to resolve differences in practice concerning the ways in which courts handled expert disclosure.

Moreover, the *Baum* court held that disclosure of materials provided to experts accomplished the goals of discovery, including avoiding surprise and narrowing the issues for trial, maintaining the integrity of the fact-finding process, and permitting effective cross-examination.

Rule 26(a)(2)(B) specifically requires disclosure of trial experts and their reports, including "a complete statement of all opinions to be expressed and the basis and reasons therefore; [and] the data or other information considered by the witness in forming the opinions and any exhibits to be used as a summary or support for the opinions." The Advisory Committee deduced that such disclosure would permit effective cross-examination, as well as an opportunity for opponents to counter with their own expert

witnesses.

Before 'Baum'
Even prior to *Baum*, there were an increasing number of cases in New York where the courts interpreted Rule 26 as requiring disclosure of all information shared by an attorney with a testifying expert, including core work- product.

In *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997), the court found that disclosure was consistent with the intent of the drafters of the 1993 amendments and supported the view that there should be a bright-line rule in favor of disclosure of the material consulted or generated by the expert in connection with his role as an expert. (Finding that the Advisory Committee Note "does not indicate that the material considered by the expert that must be disclosed is restricted to factual information; indeed, the consensus among federal courts since the 1970 Amendment had already been in favor of disclosure of factual information.")

In *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response*, *Inc.*, 563 F.Supp. 1013 (S.D.N.Y. 1983), prior to the 1993 amendments, the court held that "[t]he weight of authority is to the effect that the work-product rule does not apply to experts who are expected to testify."

Other federal courts in New York, however, held that core work-product was not discoverable despite the communication of such information to a testifying expert. For example, in *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627 (E.D.N.Y. 1997), the court held that "[h]aving reviewed the relevant case law, the text of Rule 26(a) and (b) and the associated commentary provided by the advisory committee . . . 'the data or other information considered by [an expert] witness in forming [his] opinions' required to be disclosed in the expert's report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work-product considered by an expert."

The court in *Manufacturing Administration*, a 2002 case in the Eastern District of New York, specifically noted the divergent case law and held that "notwithstanding the disagreements in the courts and in the literature, the

text of Rule 26 mandates disclosure of work-product given to a testifying expert."

It found that Rule 26 "plainly requires" the disclosure of all information reviewed by an expert witness even if that information does not effect or impact that expert's ultimate position. The court supported that conclusion by relying on the language in the 1993 amendment to Rule 26, which now requires not only the information relied upon by the expert, but instead requires disclosure of "the data and information considered by the [expert] witness in forming the [expert's] opinions."

The *Baum* decision unquestionably follows the *Manufacturing Administration* line of reasoning.

While the trend of the federal courts in New York appears to favor an explicit and firm stance with regard to the obligation to disclose information provided to an expert witness, there is little case law by New York state courts addressing a party's disclosure obligations concerning materials provided to experts.

New York state courts recognize, based on the strong public policy favoring full disclosure, that "work- product" pursuant to CPLR 3101 is a concept that must be very narrowly construed.

However, the New York Court of Appeals has recognized that information and observations disclosed by an attorney and conveyed to an expert may be protected from disclosure pursuant to the work-product doctrine. See *People v. Edney*, 39 N.Y.2d 620 (1976).

While the Court found in *Edney* that the doctrine of attorney work-product did not apply in that case, it stated in dicta that attorney work-product would protect disclosures to an expert of facts and observations disclosed by the attorney.

Similarly, the Court in *Holmes v. Weissman, M.D.*, 674 N.Y.S.2d 215 (4th Dept. 1998), found that the lower court erred in requiring the plaintiff to furnish the defendant with a letter written by her attorney to the medical expert because the letter was protected by the work-product privilege, but

held that the error was harmless as the letter was not used.

There was little analysis in these cases to offer true guidance. However, based on the language of the foregoing cases, it appears that attorneys practicing in New York state courts have more leeway in their interactions with experts than those in New York federal courts.

Nevertheless, practitioners must be wary of the New York state courts' instruction that work-product be construed narrowly, as state courts will not find work-product protection if the information sought was "multimotivated," or was prepared for reasons in addition to preparation for litigation.

Rule Needed

As experts become more and more common in trials across the country, the necessity of a bright-line rule becomes more and more apparent, so that attorneys can meaningfully prepare their cases while knowing whether information disclosed to experts will be privileged.

Although important principles support both those favoring disclosure and those championing for work-product protection, who believe that privacy and the need for free exchange of information should prevail, the federal courts in New York seem to be moving toward a more uniform discovery-oriented approach. Meanwhile, few cases in New York state courts address this issue specifically, but the language of pertinent case law suggests that an assertion of attorney work-product may well protect material provided to an expert witness.

Obviously, counsel can insure protection of attorney work-product from discovery by choosing not to disclose such information to an expert witness. While this may be an unpalatable option as it impacts counsel's ability to prepare his or her case, the court's conclusion in *Baum* brings the federal courts in New York one step closer to solidifying the view that Rule 26(a)(2)(B)'s expert disclosure requirements are paramount. But, as the federal courts in New York come closer to setting forth a consistent single disclosure policy, the state courts have not followed this trend and may even be moving in the opposite direction.

Understanding this distinction between the courts is important for

practitioners on both sides of any legal battle. On the one hand, in federal court, counsel will need to make thoughtful decisions as to what and how much information to disclose to an expert, keeping in mind that the expert may be compelled to disclose such information.

Similarly, counsel should press for greater disclosure of letters, correspondence and other documents given to their adversary's expert witness, which may not have otherwise been disclosed as a result of the attorney work-product doctrine.

Conversely, in New York state court, plaintiff's counsel may be more willing to risk disclosure of such information to an expert, as defense counsel may be less likely to be successful in moving for such disclosure.

While there are strong policy arguments on both sides of the issue, it is essential that practitioners be aware of the distinctions between the rules in the federal and state courts in New York, so that they are able to evaluate the risks involved in disclosing information to trial experts that would otherwise be protected by the work-product doctrine.

For purposes of this article, references to experts and expert witnesses refer to expert witnesses who are expected to testify at trial or hearing.

See e.g. Central Buffalo Project Corp. v. Rainbow Salads, Inc., 530 N.Y.S.2d 346 (1st Dept. 1998) (finding that the CPA's report, which was based upon a review of petitioner's books and financial records, was prepared by a third party and thereafter conveyed to the attorney, and therefore did not come within the work-product exclusion); Zimmerman v. Nassau Hospital, 429 N.Y.S.2d 262 (2nd Dept. 1980) (finding that the doctor's report was not work-product or "material prepared for litigation, within the purview of CPLR 3101(d)", as the primary motivation for bringing the infant plaintiff to the doctor "was not for consultation with respect to litigation, but rather was for a thorough examination, diagnosis and treatment").

For treatises citing the Holmes decision, see 44 N.Y. JUR.2D Disclosure §76 (2003) and 7 CARMODY-WAIT 2D §4211.

Cf. Graf v. Aldrich, 463 N.Y.S.2d 124 (3rd Dept 1983) (letter written by the plaintiff to the expert was discoverable because the Court found the letter did not fall within the attorney work-product exemption).

See Graf, supra; Chemical Bank v. National Union Fire Insurance Co. of Pittsburgh, 418 N.Y.S.2d 23 (1st Dept. 1979); Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. 2003).

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