

DOCKET NO.: FST-CV-15-5014808-S)	SUPERIOR COURT
)	
WILLIAM A. LOMAS)	JUDICIAL DISTRICT OF
)	STAMFORD/NORWALK
Plaintiff,)	
)	
v.)	AT STAMFORD
)	
PARTNER WEALTH MANAGEMENT, LLC,)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,)	
WILLIAM P. LOFTUS)	
)	AUGUST 22, 2016
Defendants.)	

**PLAINTIFF’S OBJECTION AND MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ MOTION FOR A PROTECTIVE ORDER**

I. INTRODUCTION

Plaintiff, William A. Lomas (“Lomas”) objects to Defendants’ Motion for a Protective Order Pursuant to Practice Book §§ 13-4(b)(3) and 13-5 (Dkt. No. 174.00) (the “Motion”). The Motion attempts to create a controversy where none exists. Accordingly, there is no justiciable dispute for this Court to decide. Further, despite Defendants’ unprecedented attempt to replace our Connecticut rules of expert discovery with Fed. R. Civ. P. 26(b)(4)(B) and (C), there is no reason to do so. Practice Book § 13-4(b)(3) is clear on its face, it applies equally to all parties, and “harmonizing” it with the Federal Rules is uncalled for because the Connecticut rule is unequivocally different from the federal rule. Accordingly, the Motion should be denied.

II. ARGUMENT

A. There is No Justiciable Dispute for Adjudication.

For an issue to be justiciable an actual controversy must exist requiring the Court’s determination. *Pamela B. v. Ment*, 244 Conn. 296, 323, 709 A.2d 1089 (1998). The Court is not a vehicle to obtain advisory judicial opinions on points of law. *Id.*; *see also Cumberland Farms,*

Inc. v. Groton, 46 Conn. App. 514, 517, 699 A.2d 310 (1997)(“Our Supreme Court has consistently held that our courts may not render advisory opinions.... Such an opinion is one of advice and not of judgment as there are no parties whose rights are adjudicated, and it is not binding on anyone.... Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable.”)

Here, an advisory opinion is precisely what Defendants seek. *See* Motion, p.1 (“Defendants are entitled to know – *in advance of causing such work-product to be created* – whether or not such work-product is protected from discovery in Connecticut’s courts” (emphasis added)), p. 2 (“Defendants should not have to wait until after they have caused such work-product to come into existence to find out whether Connecticut affords protection to such work product.”), p.3 (“Some of these discovery requests unquestionably seeks (sic) materials that – *if they were caused to come into existence* – would potentially be discoverable in the absence of a clear protective order that shields such work-product” (emphasis added)), p.4 (“if such materials were ever caused to come into existence...” and “The same concern is true of other RFPs ... which would arguably sweep within their ambit attorney-expert communications and draft reports *were they ever to come into existence*” (emphasis added)). Defendants want to know in advance how a discovery dispute involving expert reports and communications will be decided before such a dispute arises.

There is no bona fide issue for the court to resolve because the information and/or material sought to be protected does not yet exist. There is no discovery dispute because, at this point, there is no claim of work product. Whether there will be material subject to discovery under §13-4(b)(3) is entirely speculative. Unless and until there is a specific set of facts to consider, this issue has no context and this Court should exercise restraint.

B. Conn. Prac. Bk. §13-4 Is Clear, Fair and Should Not Be Swept Aside in Favor of the Federal Rules.

Even if the Court chooses to entertain this matter it should deny the Motion because it seeks to supplant the Connecticut rule concerning discovery of experts with the federal rule, which Defendants' out-of-state counsel apparently favors. But parties do not get to unilaterally rewrite our procedural rules and there is no basis for such extraordinary relief.

Effective January 1, 2009, Practice Book §13-4 was amended to make clear that “materials obtained, created and/or relied upon by the expert in connection with his or her opinions” are discoverable. The commentary to the 2009 amendment stated that the revisions were intended to “facilitate meaningful depositions of experts and discovery of the reports and records of such experts.” *See* Exhibit A, p. 188. The commentary additionally stated, “subsection (b) identifies specifically the content of the disclosure...” *Id.* The following year, Fed. R. Civ. P. 26(b)(4)(B) and(C) were amended to protect draft expert reports and communications between counsel and experts from discovery (except in limited circumstances). When the Practice Book section was again amended on June 24, 2016 (effective January 1, 2017), the judges of the Superior Court, despite knowledge, and likely discussion, of the amendment to Fed. R. Civ. P. 26, declined to follow the federal model. Instead, relying upon their earlier commentary that the requirements of §13-4 helped to facilitate meaningful expert depositions, they left Connecticut's broader scope of expert discovery intact.

Contrary to Defendants' claims, the express wording of Practice Book §13-4 leaves no room for confusion. Defendants are obligated to produce **“all materials obtained, created and/or relied upon by the expert”** without regard to whether those materials were provided by Defendants' attorney or are communications between Defendants' attorney and the expert. In Connecticut, a party is entitled to know the extent to which an expert's opinion has been

influenced by counsel. Likewise, a party is not limited in discovery simply to those materials that the expert says she “relied upon.” To the contrary, a party is entitled to challenge that assertion using “all materials obtained” by the expert; *i.e.*, all materials provided by counsel. Whether this represents a departure from the federal rule or not is irrelevant. This is the Connecticut rule. Moreover, the predicate to the Connecticut work product rule (“Subject to the provisions of 13-4....”), embodied in Practice Book §13-3, makes clear the intent to carve the provisions of 13-4(b)(3) from the scope of the work product rule. Thus, by the clear language of the Connecticut work product rule it does not extend to “all materials obtained, created and/or relied upon by the expert” under §13-4. In this regard the Connecticut work product rule at Practice Book §13-3 is distinctly and intentionally different from the work product rule found at 26(b)(3)(A) and (B) of the federal rules, which contain no carve-out for materials provided to experts.¹

The recent decision in *Meleney-Distassio v. Weinstein*, FSTCV136018746, 2016 WL 570048 (Conn. Super. Ct. Jan. 19, 2016)², is admittedly difficult to reconcile with the clear language of the Practice Book. Plaintiff submits that *Meleney-Distassio* should not guide the outcome here. But contrary to Defendants’ assertion at p. 7 of the Motion, *Meleney* is not the only Connecticut court to have confronted this issue. See *Barbierri v. Pitney Bowes, Inc.*, No. FSTCV126014221S, 2014 WL 6804459, at *1 (Conn. Super. Ct. Oct. 17, 2014) (holding that 13-4(b)(3) material is not protected by the work product doctrine and must be produced pursuant to this subsection); *Noble v. City of Norwalk*, No. CV094016996S, 2012 WL 3870634, at *4 (Conn. Super. Ct. Aug. 3, 2012) (resolving conflict between Practice Book § 13-4(b)(3) and a litigant’s

¹ At page 7 of the Motion Defendants argue that “the [t]hree exceptions set forth in Subsection (C)(i)-(iii) are consistent with Practice Book §13-4. They do not explain how and, indeed, they are not.

² A copy of all unreported decisions cited herein is attached as Exhibit B.

attorney/client privilege in favor of requiring disclosure and production of seventeen emails between defendant's employee and counsel because once the employee was disclosed as an expert, Practice Book §13-4(b)(3) "mandates the disclosure of documents which have been obtained, created and/or relied upon by the expert in connection with his or her opinions in the case," and the attorney-client privilege was at that point waived.); *Steel v. Bosse*, No. KNLCV136018504S, 2014 WL 5356704, at *1 (Conn. Super. Ct. Sept. 23, 2014) (holding that communications between expert and any attorney for the defendants or to any representative of any law firm representing the defendants regarding service as a consultant or expert witness were not privileged). Plaintiff submits that the clear language of §13-4(b)(3) and the foregoing authority should guide this Court.

Finally, Defendants argue that no prejudice will come to Plaintiff if Fed. R. Civ. P. 26(b)(4)(B) and (C) are incorporated into Connecticut practice in this case. But the absence of prejudice to the Plaintiff is hardly a reason to deviate from the Practice Book. The issue is what harm will come to the Defendants if they must live by the Connecticut rules. The answer is none. Practice Book §13-4(b)(3) applies equally to all parties. If Defendants and their out-of-state counsel are uncertain about its reach, they should consult their local counsel. But there is no reason in the law or otherwise to deviate from the express language of the rule under the circumstances that prevail here.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for a Protective Order, pursuant to Practice Book §§13-4(b)3 and 13-5 (Dkt. No. 174.00), must be denied.

THE PLAINTIFF,
WILLIAM A. LOMAS

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CERTIFICATE OF SERVICE

This is to certify that on August 22, 2016, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

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EXHIBIT A



3 0231 00309 8642



OFFICIAL

2009

CONNECTICUT PRACTICE BOOK

(Revision of 1998)

CONTAINING

RULES OF PROFESSIONAL CONDUCT

CODE OF JUDICIAL CONDUCT

RULES FOR THE SUPERIOR COURT

RULES OF APPELLATE PROCEDURE

APPENDIX OF FORMS

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2009*

tangible things otherwise discoverable under Section 13-2 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and 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 judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(b) A party may obtain, without the showing required under this section, discovery of the party's own statement and of any nonprivileged statement of any other party concerning the action or its subject matter.

(c) A party may obtain, without the showing required under this section, discovery of any recording, by film, photograph, videotape, audiotape or any other digital or electronic means, of the requesting party and of any recording of any other party concerning the action or the subject matter, thereof, including any transcript of such recording. A party may obtain information identifying any such recording and transcript, if one was created, prior to the deposition of the party who is the subject of the recording; but the person from whom discovery is sought shall not be required to produce the recording or transcript until thirty days after the completion of the deposition of the party who is the subject of the recording or sixty days prior to the date the case is assigned to commence trial, whichever is earlier; except that if a deposition of the party who is the subject of the recording was not taken, the recording and transcript shall be produced sixty days prior to the date the case is assigned to commence trial. If a recording was created within such sixty day period, the recording and transcript must be produced immediately. No such recording or transcript is required to be identified or produced if neither it nor any part thereof will be introduced into evidence at trial. However, if any such recording or part or transcript thereof is required to be identified or produced, all recordings and transcripts thereof of the subject of the recording party shall be identified and produced, rather than only those recordings, or transcripts or parts thereof that the producing party intends to use or introduce at trial.

(P.B. 1978-1997, Sec. 219.) (Amended June 29, 2007, to take effect Jan. 1, 2008.)

Sec. 13-4. —Experts

(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial, and all documents that may be offered in evidence in lieu of such expert testimony, in accordance with this section. The requirements of Section 13-15 shall apply to disclosures made under this section.

(b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition. In addition, the disclosure shall include the following information:

(1) Except as provided in subdivision (2) of this subsection, the field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; and the substance of the grounds for each such expert opinion. Disclosure of the information required under this subsection may be made by making reference in the disclosure to, and contemporaneously producing to all parties, a written report of the expert witness containing such information.

(2) If the witness to be disclosed hereunder is a health care provider who rendered care or treatment to the plaintiff, and the opinions to be offered hereunder are based upon that provider's care or treatment, then the disclosure obligations under this section may be satisfied by disclosure to the parties of the medical records and reports of such care or treatment. A witness disclosed under this subsection shall be permitted to offer expert opinion testimony at trial as to any opinion as to which fair notice is given in the disclosed medical records or reports. Expert testimony regarding any opinion as to which fair notice is not given in the disclosed medical records or reports shall not be permitted unless the opinion is disclosed in accordance with subdivision (1) of subsection (b) of this section.

(3) Except for an expert witness who is a health care provider who rendered care or treatment to the plaintiff, or unless otherwise ordered by the judicial authority or agreed upon by the parties, the party disclosing an expert witness shall, within thirty days of such disclosure, produce to all other parties all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case. If any such materials have already been produced to the other parties in the case, then a list of such materials, made with sufficient particularity that the materials can be easily identified by the parties, shall satisfy the

production requirement hereunder with respect to those materials.

(4) Nothing in this section shall prohibit any witness disclosed hereunder from offering nonexpert testimony at trial.

(c) (1) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness disclosed pursuant to subsection (b) of this section in the manner prescribed in Section 13-26 et seq. governing deposition procedure generally. Nothing contained in subsection (b) of this section shall impair the right of any party from exercising that party's rights under the rules of practice to subpoena or request production of any materials, to the extent otherwise discoverable, in addition to those produced under subsection (b) of this section, in connection with the deposition of any expert witness.

(2) Unless otherwise ordered by the judicial authority for good cause shown, or agreed upon by the parties, the fees and expenses of the expert witness for any such deposition, excluding preparation time, shall be paid by the party or parties taking the deposition. Unless otherwise ordered, the fees and expenses hereunder shall include only (A) a reasonable fee for the time of the witness to attend the deposition itself and the witness's travel time to and from the place of deposition; and (B) the reasonable expenses actually incurred for travel to and from the place of deposition and lodging, if necessary. If the parties are unable to agree on the fees and expenses due under this subsection, the amount shall be set by the judicial authority, upon motion.

(d) (1) A party shall file with the court a list of all documents or records that the party expects to submit in evidence pursuant to any statute or rule permitting admissibility of documentary evidence in lieu of the live testimony of an expert witness. The list filed hereunder shall identify such documents or records with sufficient particularity that they shall be easily identified by the other parties. The parties shall not file with the court a copy of the documents or records on such list.

(2) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness whose records are disclosed pursuant to subdivision (1) of subsection (d) of this section in the manner prescribed in Section 13-26 et seq. governing deposition procedure generally. Nothing contained in subsection (d) of this section shall impair the right of any party from exercising that party's rights under the rules of practice to subpoena or request production of any materials, to the extent otherwise discoverable, in addition to those produced under

subsection (d), in connection with the deposition of any expert witness.

(3) Unless otherwise ordered by the judicial authority for good cause shown, or agreed upon by the parties, the fees and expenses of the expert witness for any such deposition, excluding preparation time, shall be paid by the party or parties taking the deposition. Unless otherwise ordered, the fees and expenses hereunder shall include only (A) a reasonable fee for the time of the witness to attend the deposition itself and the witness's travel time to and from the place of deposition; and (B) the reasonable expenses actually incurred for travel to and from the place of deposition and lodging, if necessary. If the parties are unable to agree on the fees and expenses due under this subsection, the amount shall be set by the judicial authority, upon motion.

(e) If any party expects to call as an expert witness at trial any person previously disclosed by any other party under subsection (b) hereof, the newly disclosing party shall file a notice of disclosure stating that the party adopts the expert disclosure already on file, or a specified part thereof. Such notice shall be filed within the time parameters set forth in subsection (g).

(f) A party may discover facts known or opinions held by an expert who had been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Section 13-11 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(g) Unless otherwise ordered by the judicial authority, the following schedule shall govern the expert discovery required under subsections (b), (c), (d) and (e) of this section.

(1) Within 120 days after the return date of any civil action, or at such other time as the court may order, the parties shall submit to the court for its approval a proposed "Schedule for Expert Discovery" which, upon approval by the court, shall govern the timing of expert discovery in the case. The deadlines proposed by the parties shall be realistic and reasonable, taking into account the nature and relative complexity of the case, the need for predicate discovery, and the estimated time until the case may be exposed for trial. If the parties are unable to agree on discovery deadlines, they shall so indicate on the proposed Schedule for Expert Discovery, in which event the court shall convene a scheduling conference to set those deadlines.

(2) If a party is added or appears in a case after the proposed Schedule for Expert Discovery is filed, then an amended proposed Schedule for Expert Discovery shall be prepared and filed for approval by the court within sixty days after such new party appears, or at such other time as the court may order.

(3) Unless otherwise ordered by the court, disclosure of any expert witness under subsection (e) hereof shall be made within thirty days of the event giving rise to the need for that party to adopt the expert disclosure as its own (e.g., the withdrawal or dismissal of the party originally disclosing the expert).

(4) Any request for modification of the approved Schedule for Expert Discovery or of any other time limitation under this section shall be made by motion stating the reasons therefor, and shall be granted if (A) agreed upon by the parties and will not interfere with the trial date; or (B) (i) the requested modification will not cause undue prejudice to any other party; (ii) the requested modification will not cause undue interference with the trial schedule in the case; and (iii) the need for the requested modification was not caused by bad faith delay of disclosure by the party seeking the modification.

(h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions.

(P.B. 1978-1997, Sec. 220.) (Amended June 30, 2008, to take effect Jan. 1, 2009.)

HISTORY—2009: Prior to 2009, this section read: "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Section 13-2 and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

"(1) (A) 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. (B) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness disclosed pursuant to subdivision (1) (A) of this rule in the manner prescribed in Section 13-26 et seq. governing deposition procedure generally.

"(2) A party may discover facts known or opinions held by an expert who had been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only

as provided in Section 13-11 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

"(3) Unless manifest injustice would result, (A) the judicial authority shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (1) (B) and (2) of this rule; and (B) with respect to discovery obtained under subdivision (1) (B) of this rule the judicial authority may require, and with respect to discovery obtained under subdivision (2) of this rule the judicial authority shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

"(4) In addition to and notwithstanding the provisions of subdivisions (1), (2) and (3) of this rule, any plaintiff expecting to call an expert witness at trial shall disclose the name of that expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, to all other parties within a reasonable time prior to trial. Each defendant shall disclose the names of his or her experts in like manner within a reasonable time from the date the plaintiff discloses experts, or, if the plaintiff fails to disclose experts, within a reasonable time prior to trial. If disclosure of the name of any expert expected to testify at trial is not made in accordance with this subdivision, or if an expert witness who is expected to testify is retained or specially employed after a reasonable time prior to trial, such expert shall not testify if, upon motion to preclude such testimony, the judicial authority determines that the late disclosure (A) will cause undue prejudice to the moving party; or (B) will cause undue interference with the orderly progress of trial in the case; or (C) involved bad faith delay of disclosure by the disclosing party. Once the substance of any opinion or opinions of an expert witness who is expected to testify at trial becomes available to the party expecting to call that expert witness, disclosure of expert witness information shall be made in a timely fashion in response to interrogatory requests pursuant to subdivision (1) (A) of this rule, and shall be supplemented as required pursuant to Section 13-15. Any expert witness disclosed pursuant to this rule within six months of the trial date shall be made available for the taking of that expert's deposition within thirty days of the date of such disclosure. In response to any such expert disclosure, any other party may disclose the same categories of information with respect to expert witnesses previously disclosed or a new expert on the same categories of information who are expected to testify at trial on the subject for that party. Any such expert or experts shall similarly be made available for deposition within thirty days of their disclosure. Nothing contained in this rule shall preclude an agreement between the parties on disclosure dates which are part of a joint trial management order."

COMMENTARY—2009: The revisions to this section are intended to facilitate meaningful depositions of experts and discovery of the reports and records of such experts. Among the changes to the current rule are the following. Subsection (a) sets forth the affirmative duty of a party to disclose each person who may be called by that party to testify as an expert witness at trial and all documents that may be offered in evidence in lieu of such expert testimony. Currently, 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. Subsection (b) identifies specifically the content of the disclosure and allows the party to contemporaneously produce a written report of the expert witness. Subsection (d)

requires a party to file with the court a list of all documents or records that the party expects to submit in evidence in lieu of live testimony of an expert witness and sets forth the procedures for taking the deposition of any expert whose records are disclosed. Subsection (g) sets forth a schedule governing the expert discovery required under subsections (b), (c), (d) and (e). Subsection (h) sets forth sanctions that may be imposed on a party by the judicial authority for failure to comply with the requirements set out in this section.

Sec. 13-5. —Protective Order

Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the judicial authority; (6) that a deposition after being sealed be opened only by order of the judicial authority; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the judicial authority.

(P.B. 1978-1997, Sec. 221.)

Sec. 13-6. Interrogatories; In General

(a) In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sections 10-12 through 10-17 written interrogatories, which may be in electronic format, upon any other party to be answered by the party served. Written interrogatories may be served upon any party without leave of the judicial authority at any time after the return day. Except as provided in subsection (c) or where the interrogatories are served electronically as provided in Section 10-13 and in a format that allows the recipient to electronically insert the answers in the transmitted document, the party serving interrogatories shall leave sufficient space following each interrogatory in which the party to whom the interrogatories are directed can insert the answer. In the event that an answer requires more space than that provided on interrogatories

that were not served electronically and in a format that allows the recipient to electronically insert the answers in the transmitted document, the answer shall be continued on a separate sheet of paper which shall be attached to the completed answers.

(b) Interrogatories may relate to any matters which can be inquired into under Sections 13-2 through 13-5 and the answers may be used at trial to the extent permitted by the rules of evidence. In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the interrogatories shall be limited to those set forth in Forms 201, 202 and/or 203 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action. These forms are set forth in the Appendix of Forms in this volume. Unless the judicial authority orders otherwise, the frequency of use of interrogatories in all actions except those for which interrogatories have been set forth in Forms 201, 202 and/or 203 of the rules of practice is not limited.

(c) In lieu of serving the interrogatories set forth in Forms 201, 202 and/or 203 on a party who is represented by counsel, the moving party may serve on such party a notice of interrogatories, which shall not include the actual interrogatories to be answered, but shall instead set forth the number of the Practice Book form containing such interrogatories and the name of the party to whom the interrogatories are directed. The party to whom such notice is directed shall in his or her response set forth each interrogatory immediately followed by that party's answer thereto.

(d) The party serving interrogatories or the notice of interrogatories shall not file them with the court.

(P.B. 1978-1997, Sec. 223.) (Amended June 28, 1999, to take effect Jan. 1, 2000; amended Aug. 24, 2001, to take effect Jan. 1, 2002; amended June 30, 2008, to take effect Jan. 1, 2009.)

HISTORY—2009: Prior to 2009, subsection (a) read: "In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sections 10-12 through 10-17 written interrogatories upon any other party to be answered by the party served. Written interrogatories may be served upon any party without leave of the judicial authority at any time after the return day. Except as provided in subsection (c), the party serving interrogatories shall leave sufficient space following each interrogatory in which the party to whom the interrogatories are directed can insert the answer. In the event that an answer requires more space than that provided, it shall be continued on a separate sheet of paper which shall be attached to the completed answers."

COMMENTARY—2009: The changes to this section clarify the procedures to be followed when interrogatories are served

EXHIBIT B

2014 WL 6804459

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Daniel BARBIERRI,

v.

PITNEY BOWES, INC., et al.

No. FSTCV126014221S.

|
Oct. 17, 2014.

Attorneys and Law Firms

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Pitney Bowes, Inc., et al.

Opinion

JENNINGS, J.T.R.

*1 Plaintiff seeks to compel production of notes taken by defendants' disclosed expert witness David Beckman on January 22, 2014 and March 14, 2014 of interviews of defendant Pitney Bowes' employees Patrick Brand (also a defendant), Rich Moratano and John McKenna concerning plaintiff's allegations of wrongful termination against Pitney Bowes. Attorneys Marc Zaken and Steven Cuff of Ogletree, Deakins, Nash, Amoak, & Stewart, P.C., Pitney Bowes' outside counsel and counsel of record in this lawsuit, were present at the interviews. David Beckman was disclosed by defendants as an expert witness in this case on April 18, 2014. Production of the Beckman notes was requested pursuant to Practice Book § 13-4(b)(3) which provides that "... the party disclosing an expert witness shall, upon request of an opposing party, produce to all other parties all materials obtained, created, and/or relied upon by the expert in connection with his or her opinions in the case within fourteen days prior to that expert's deposition ..." Defendant did not disclose the Beckman notes at any time prior to Beckman's deposition, or any time since, claiming that they are ordinary work product under Practice Book § 13-3 and plaintiff has failed

to show substantial need of the requested materials or inability without undue hardship to obtain the substantial equivalent of the materials by other means. Plaintiff does not claim to have satisfied those requirements of § 13-3, but argues instead that work product protection was waived by the act of permitting Beckman to interview Pitney Bowes employee witnesses and take notes and then disclosing him as an expert witness.

The above-quoted language of Practice Book § 13-4 is similar to Rule 26(a)(2) of the Federal Rules of Civil Procedure. It is therefore appropriate to look to federal law for guidance. But the opinions of District Courts cited by both parties show a split of authority on the issue of discoverability of materials provided to or generated by an expert as a basis of the expert's opinion. Compare, e.g., *Messier v. Southbury Training School*, Docket No. 3:94-CV-1706 (EBB) (D.Conn., June 29, 1998), 1998 WL 422858 (Documents even marginally belonging to the category of documents generated by an expert in connection with her role as an expert must be produced); and *C.P. Kelko U.S., Inc. v. Pharmacia Corporation*, 213 F.R.D. 176, 179 (D.Delaware 2003) ("It would be manifestly unfair to allow a party to use the privilege to shield information it had deliberately chosen to use offensively, as Pharmacia did in this instance when it used the allegedly privileged documents to arm its expert for testimony"). With *Krisa v. Equitable Life Insurance Society*, 196 F.R.D. 254 (M.D.Pa., 2000) (finding that disclosure of core work product to a testifying expert does not abrogate the privilege that attaches to such materials) and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D.Kan.1989) (Act of sharing ordinary work product information does not allow opposing party to avoid meeting its burden of establishing substantial need and undue hardship). The Sixth Circuit has held that communications with testifying experts are discoverable. *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 715 (6 Cir.2006) ("We agree with the district court and the majority view that Rule 26 now requires disclosure of all information provided to testifying experts").

*2 There is a similar split of authority among Superior Court opinions on this issue. Plaintiff relies on *Capalbo v. Balf Company*, Superior Court, Judicial District of Hartford New Britain at Hartford, Docket No. CV90-0377507S, (February 3, 1994, Corradino, J.), 11 Conn. L. Rptr. 166, 1994 WL 65214 (granting motion to compel production of letter from testifying expert to

other counsel, the court analogizing the situation to “the finding of waiver where the client calls the attorney as a witness to privileged communications”) and *Murchie v. Hurwitz*, Docket No. CV88–0095623, Superior Court, Judicial District of Stamford/Norwalk at Stamford (April 7, 1992, Rush, J.). 1992 Ct.Sup. 3311, 1992 WL 65214 (“The communication of information to an expert witness who is to be used at trial would appear to be done for the purpose of providing information relevant to opinions to be expressed by the expert. In appropriate situations the attorney work product privilege does not prevent discovery of materials provided to such a witness”). Defendant relies on *Garcia v. Yale New Haven Hospital*, Superior Court, Judicial District of New Haven, Docket No. 950373032S (July 2, 1999, Lager, J.), 1999 Ct.Sup. 8844, 25 Conn. L. Rptr. 78, 1999 Super. LEXIS 1821 (Discovery of work product information provided to a testifying expert is allowed only when the movant has satisfied the Practice Book § 13–3(a) requirements of substantial need and undue hardship of obtaining the information from other sources.) Judge Lager rejected the theory that work product privilege is waived when the materials are voluntarily provided to a testifying expert.

This court has twice gone on record as agreeing with the reasoning of *Capalbo v. Balf Company*, *supra*. See *Noble v. City of Norwalk*, Superior Court, Judicial District of Stamford/Norwalk at Stamford, Docket No. CV09–4016996S (August 3, 2012, Jennings, J.) [54 Conn. L. Rptr. 453], and *Brandt v. New England Basket et al.*, Superior Court, Judicial District of Stamford/Norwalk at Stamford, Docket No. CV04–4002331 (November 14, 2006, Jennings, J.) (Motion to compel production of materials sent by counsel to testifying expert granted over objection that materials were attorney work product). The court is not persuaded that I should abandon that position and follow *Garcia v. Yale New Haven Hospital*. Allowing discovery of information provided to a testifying expert, even if that information has been obtained by counsel in the course of trial preparation and would otherwise be protected as attorney work product, is grounded in fundamental fairness and represents the majority position of authority on the subject as expressed by the Sixth Circuit Court of Appeals in *Regional Airport Authority v. LFG, LLC*, *supra*.

Defendant argues that Beckman's notes are entitled to work product protection and are not subject to disclosure under Practice Book § 13–4(b)(3) because at the time he

attended the two interviews of Pitney Bowes employees Beckman was acting in a consultive role and not as an expert witness. “[W]hen an expert is retained both as a consultant and a testifying expert witness, the ‘work product doctrine’ may be invoked to protect work completed by the expert in her consultative capacity as long as there exists a clear distinction between the two roles.” *Quiros v. Elderhouse, Inc.*, Superior Court, Judicial District of Stamford–Norwalk at Stamford, Docket No. FSTCV13–601788S (April 25, 2014, Truglia, J.), 2014 WL 2255314, *3 [58 Conn. L. Rptr. 90], citing *Messier v. Southbury Training School*, *supra*, 1998 WL 422858 at *2. In this case Mr. Beckman created his notes of employee interviews on January 2, and March 14, 2014. He was disclosed as an expert for the defendant on April 18, the same day he issued his “Expert Rebuttal Report” in which (Section I, ¶ 3 and Section, preamble) he admits that conversations with Patrick Brand, Rich Moratano, and John McKenna were part of the bases for the expert opinions he intends to give. Once a person has been disclosed as an expert witness, the burden of proving that the information is only a consultive is on the party seeking to withhold the information. *Quiros*, *supra*, at *4. Pitney Bowes has failed to meet that burden. At best the evidence on that point is ambiguous which is insufficient to satisfy the burden. “Any ambiguity about which function was served by the expert when creating a document must be resolved in favor of discovery.” *Messier*, *supra*, at *3.

*3 There is no issue here of disclosure of attorney opinion work product. The defendant is objecting to disclosure of Beckman's notes solely on the ground of ordinary work product. The court has reviewed the notes in camera. They are entirely factual. There is no indication of counsel's or the defendant's mental impressions, conclusions, opinions, or legal theories. The notes contain no reference to anything said by the two Ogletree, Deakins, Nash, Amoak, & Stewart attorneys in attendance at the January 14, 2014 and March 22, 2014 interviews of Pitney Bowes employees.

Plaintiff's request for sanctions of defendant's refusal to voluntarily disclose the Beckman notes is denied. There was legal authority supporting defendant's position and it was entitled to a judicial determination.

Order

For the foregoing reasons Plaintiff's Fifth Motion for Order of Compliance and Sanctions is granted as to the Order of Compliance by disclosure of the Beckman notes of January 14 and March 22, 2014, but is denied as to the request for sanctions by award of attorneys fees.#

All Citations

Not Reported in A.3d, 2014 WL 6804459, 59 Conn. L. Rptr. 140

2016 WL 570048

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Anne MELENEY–DISTASSIO et al.

v.

David WEINSTEIN, M.D. et al.

No. FSTCV136018746.

|
Jan. 19, 2016.

Synopsis

Background: In medical malpractice action, defendant doctor filed motion to compel production of correspondence between plaintiffs' counsel and expert witness.

Holding: The Superior Court, Judicial District of Stamford-Norwalk, Taggart D. Adams, Judge Trial Referee, held that work-product doctrine protected attorney-expert communications except those involving compensation, facts, data, and assumptions.

Ordered accordingly.

West Headnotes (1)

[1] Pretrial Procedure

Work Product Privilege; Trial Preparation Materials

Connecticut's work-product doctrine protects disclosures of attorney-expert communications except those involving compensation, facts, data and assumptions provided to the expert and used by the expert in forming an opinion. Fed.Rules Civ.Proc.Rules 26(a)(2)(B)(ii), 26(b)(4)(B),

(C), 28 U.S.C.A.; Practice Book 1998, §§ 13–3(a); 13–4(b)(3).

Cases that cite this headnote

Attorneys and Law Firms

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TAGGART D. ADAMS, Judge Trial Referee.

I. Discussion

*1 In this medical malpractice action, the plaintiffs have disclosed an expert witness, Dr. Marc Engelbert, who prepared a report, also disclosed, containing a discussion of the facts in the case and Dr. Engelbert's opinions on the appropriate standard of care. The report also described the materials he reviewed and relied upon in forming his opinions. See Exhibit A to Dkt. Entry 152.00. Subsequently, counsel for the defendant Weinstein, pursuant to Practice Book § 13–4(b)(3), sent a letter to plaintiffs' counsel requesting “production of all materials obtained/created and/or relied upon by [Engelbert] in connection with his opinions in this case.” *Id.*, Exhibit B.¹

Plaintiff's counsel responded, sending Engelbert's CV, invoices rendered by Engelbert for his services as an expert, and setting forth a list of thirteen sets of records, test results and deposition transcripts, including his own experience and knowledge, that Engelbert relied upon for his opinions. *Id.* Exhibit C. Plaintiffs' counsel objected to the request for “correspondence and e-mails between counsel and Engelbert” and to the request for all “notes, statements or drafts prepared by Engelbert because they contain mental impressions of counsel and are protected as work product.” *Id.* Counsel for Weinstein has moved to compel the production of the documents sought in the Section 13–4(b)(3) request, and co-defendant Stamford Hospital has joined that motion. The plaintiff opposes the motions.

Practice Book Section 13–3(a) which is the Connecticut version of the work-product doctrine provides for discovery of materials “prepared in anticipation of litigation or for trial” by another party only on a showing of “substantial need” and an inability to obtain the equivalent without undue hardship. However, even with this showing, the court may not order disclosure of the “mental impressions, conclusions, opinions or legal theories of an attorney” for a party. Practice Book 13–4(b)(3) requires a party disclosing an expert witness, upon request, to produce “all materials obtained, created and/or relied upon by the expert in connection with [the disclosed opinion].”

In support of the motion to compel, the defendant correctly contends that the burden of establishing that protections of work-product doctrine apply is on the party seeking the protection. *Lindholm v. Lindholm*, Superior Court, FA 98 0167299 (October 5, 1999, Hodgson, J.) 1999 WL 97095; *Carrier Corporation v. The Home Insurance Company*, Superior Court, judicial district of Hartford–New Britain at Hartford, Dkt. No. 35 23 83 (June 12, 1992, Shaller, J.) [6 Conn. L. Rptr. 478]. The defendant further asserts that Connecticut courts have found that the work-product doctrine does not protect communications from an attorney providing information to an expert witness citing several cases. In *Murchie v. Hurwitz*, Superior Court, judicial district of Stamford–Norwalk at Stamford, CV88 0095623 (April 8, 1992, Rush, J.) [6 Conn. L. Rptr. 300] 1992 WL 91675 the court stated,

*2 The communication of information to an expert witness who is to be used at trial would appear to be done for the purpose of providing information relevant to the opinions to be expressed by the expert. In appropriate situations, the attorney work product privilege does not prevent discovery of materials provided to such a witness.

* * *

The defendant shall not however, be required to discuss information concerning the mental impressions, conclusions, opinion, or legal theories by a party, the attorney for a party or other representative of a party concerning the litigation.” (Citations omitted.)

The plaintiff cites to *Quiros v. Elderhouse, Inc.*, Superior Court, judicial district of Stamford/Norwalk, CV13 6017788 (April 25, 2014, Truglia, J.) 58 Conn. L. Rptr. 90, 2014 WL 2255314, which held that all materials encompassed in P.B. § 13–4 must be produced except “material inextricably linked with the mental impressions, conclusions, opinions or legal theories of counsel.”

Because there are strong similarities between Connecticut discovery rules and the discovery rules contained in the Federal Rules of Civil Procedure, Connecticut courts often look to federal court interpretations. See e.g. *Nobel v. Norwalk*, Superior Court, judicial district of Stamford–Norwalk at Stamford, CV 09 4016996, (August 3, 2012, Jennings, J.T.R.); *Garcia v. Yale New Haven Hospital*, Superior Court, judicial district of New Haven, CV 95 0373032 (July 2, 1999, Lager, J.) [25 Conn. L. Rptr. 78].

The defendants cite *Barbieri v. Pitney Bowes, Inc.*, Superior Court, judicial district of Stamford–Norwalk, CV 126014221 (Jennings, J.T.R., October 17, 2014). Judge Jennings, relying on *Capalbo v. Balf Company*, Superior Court, judicial district of Hartford–New Britain, CV 90 0377507 (February 3, 1994, Corradino, J.) reasoned:

Allowing discovery of information provided to a testifying expert, even if that information has been obtained by counsel in the course of trial preparation and would otherwise be protected as attorney work product, is grounded in fundamental fairness and represents the majority position of authority on the subject as expressed by the Sixth Circuit Court of Appeals in *Regional Airport Authority v. LFG, LLC*, [460 F.2d 697 (6th Cir.2006)]

In *Barbieri* Judge Jennings noted a split of authority in the Connecticut Superior Court, but declined to follow an earlier case, *Garcia v. Yale New Haven Hospital*, *supra*. Judge Jennings also noted that the *Barbieri* case did not involve disclosure of attorney opinion work product.

In *Regional Airport Authority* the federal Sixth Circuit Court of Appeals considered two lines of federal cases dealing with the issue of whether attorney work product, including attorney's opinions, shared with experts should

be disclosed, and held that Federal Rule of Civil Procedure 26 “creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.” 460 F.3d 697, 717.

*3 It does not appear to be often noted in Connecticut Superior Court cases that the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure were specifically aimed at overruling the holdings of some federal courts, specifically that of the Sixth Circuit in *Regional Airport Authority*. See *Republic of Ecuador v. Mackey*, 742 F.3d 860, 868–870 (9th Cir.2014).

The 2010 amendments altered Rule 26(a)(2)(B)(ii) to require disclosure of all “facts and data” considered by the expert witness in forming an opinion rather than what was formerly required: “data or other information.” As the Advisory Committee Notes on Rules–2010 Amendment state: “This amendment is intended to alter the outcome in cases that have relied on the [earlier language] in requiring disclosure of all attorney-expert communications and draft reports.”² Other changes wrought by the 2010 amendments were the provisions of Rule 26(b)(4)(B) that added work product protection for drafts of expert reports and Rule 26(b)(4)(C) which does the same for communications between the attorney and the expert, except for communications that (1) relate to the expert's compensation, (2) identify facts or data provided by the attorney and used by the expert in forming an opinion, and

(3) identify “assumptions” provided by the attorney to the expert and relied upon by the expert for the opinion. It appears to this court that under federal law and procedure, the protection given to attorney-expert communications has increased with the advent of the 2010 amendments to F.R. Civ. P. 26.

Based on the cases and consideration noted above, the court finds that Connecticut law protects disclosures of attorney-expert communications except those involving compensation, facts, data and assumptions provided to the expert and used by the expert in forming an opinion. Furthermore, earlier drafts of Dr. Engelbert's opinion are protected. *Powerweb Energy, Inc. v. Hubbell Lighting, Inc.*, (D.Conn.2014, USMJ Fitzsimmons) 2014 WL 655206.³

Conclusion

The court ORDERS that plaintiff's counsel submit all documents and things covered by defendant's P.B. 13–4(b) (3) request but withheld on the basis of the work-product doctrine, for an *in camera* review.

All Citations

Not Reported in A.3d, 2016 WL 570048, 61 Conn. L. Rptr. 657

Footnotes

1

In the event the request was not broad enough, the letter from plaintiff's counsel elaborated to include: “Engelbert's CV and a list of medical records, deposition testimony and any other materials ... provided to Dr. Engelbert for his review ... [and his] file materials and source materials.” Particularly this request encompasses:

- All correspondence, emails and bills/invoices, to and from Dr. Engelbert from any person or entity regarding this case;
- All notes and statements prepared by Dr. Engelbert;
- All literature, articles, journals, research studies, books, papers or other scientific, technical or popular writings, data, correspondence, treaties, testimony or transcripts relied upon by Dr. Engelbert in conjunction with his review and opinions;
- All documents provided to Dr. Engelbert by plaintiff's counsel;
- All “other evidence” reviewed by Dr. Engelbert as referenced on page 1 of his report; and, Expert Disclosure dated September 1, 2015, up to and including the day of his deposition.”

2

Advisory Committee Notes are "a reliable source of insight into the meaning of a rule ..." *United States v. Vonn*, 535 U.S. 55, 64 n. 6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).

3

Earlier draft opinions were not explicitly sought in the defendant's P.B. 13-4(b)(3) demand but their production was claimed in the motion to compel. Dkt. Entry 152.00, 6.

2012 WL 3870634

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Ruth NOBLE et al.

v.

CITY OF NORWALK.

No. CV094016996S.

|
Aug. 3, 2012.

Opinion

ALFRED J. JENNINGS, JR., Judge Trial Referee.

*1 This is an administrative appeal pursuant to Conn. Gen.Stat. § 12-117a from the decision of the Board of Assessment Appeals of the City of Norwalk which declined to change the valuation assessments made by the Office of the Assessor of the City of Norwalk on the Grand List of October 1, 2008 of certain real property owned by the applicants located in the City of Norwalk. The real property in question consists of “whole units” and “half units” in 400 recreational bathhouse condominium units housed in a single structure on 12.8 acres of land designated as District 6, Block 1A, Lot 1 having a street address at 15 Pine Point Road, Norwalk, Connecticut. The bathhouse units are declared condominium units pursuant to the Connecticut Common Interest Ownership Act. Conn. Gen.Stat. §§ 47-200 through 14-295. The declaration of condominium establishes The Roton Point Association, Inc., a Connecticut nonstock corporation, as the association of unit owners at the condominium. The owner(s) of each unit own a bathhouse or locker structure within the building as well as a 1/400th undivided interest in the common areas and improvements at the site. The trial of this appeal is scheduled to commence in this court during the week starting August 6, 2012.

The issue now before the court relates to a deposition subpoena duces tecum served by the plaintiffs on an expert witness noticed by the defendant pursuant to Practice Book § 13-4. The expert witness is William O'Brien, who is and has been at all relevant times also an employee of the City of Norwalk as its Assistant

Tax Assessor. The disclosure of expert witness (No. 118) indicates that Mr. O'Brien “will testify as to his opinion of the proper methodology of valuation for condominium units, including common elements. He will testify as to his opinion of relevance of other property sales in this evaluation; the recent sales of Roton Point units; as well as the applicability of the cost, income, and sales comparison approaches ... Mr. O'Brien has experience with numerous valuations of condominiums. He has significant knowledge of the Methodologies used during the 2008 Real Property Revaluation in the City of Norwalk. Mr. O'Brien is preparing a valuation summary report analyzing the valuation of the Subject Property. He has also reviewed the Plaintiffs' appeal and the Plaintiffs' appraisal report.” The referenced valuation summary report was thereafter disclosed to the plaintiffs as part of Defendant's Supplemental Expert Disclosure (No. 120).

The deposition subpoena duces tecum served on Mr. O'Brien called for him to produce in request No. 5: “Any and all communications and correspondence between the deponent [O'Brien] and the Defendant and/or Defendant's Counsel concerning this action.” Mr. O'Brien appeared as commanded for his deposition on May 22, 2012, accompanied by Norwalk City Attorney Brian McCann, who represents the City in this appeal. Mr. O'Brien and Atty. McCann acknowledged that documents responsive to the subpoena did exist, but they failed to bring them to the deposition, citing the attorney-client privilege. (O'Brien Deposition Transcript (TR), pp. 33–35.) During the deposition the City Attorney agreed to reconsider the defendant's purported privilege claims (TR. 34). Plaintiff's counsel proceeded to commence the deposition but noted that the absence of the requested documents would require the suspension of the deposition. Thereafter the defendant City filed a Privilege Log dated June 19, 2012 (No. 122) in which it listed 40 emails exchanged from December 4, 2011 through May 21, 2012 between Mr. O'Brien and Attorney McCann, seventeen of which were claimed to be exempt from disclosure as privileged material under the attorney-client privilege. Defendant has filed its Objection to Motion for Order of Compliance dated July 18, 2012 (No. 129) in which it states that most of the communications requested in the Motion for Order of Compliance were made prior to defendant's disclosure of William O'Brien as an expert witness, and claims there is no authority supporting compelled disclosure of the contested documents under these circumstances. At oral argument on July 27, 2012 the City Attorney further

advised the court that the seventeen documents claimed to be privileged as attorney-client communications were being withheld from disclosure but the other twenty-three documents on the privilege log had been disclosed to the plaintiffs. He also argued that all of the documents which were helpful to Mr. O'Brien in forming his opinion have been disclosed with a waiver of the privilege.

*2 Plaintiffs cite Practice Book § 13-4(b)(3) which provides that "... unless otherwise ordered by the judicial authority or agreed upon by the parties, the party disclosing an expert witness shall, upon the request of an opposing party, produce to all other parties all materials obtained, created, and/or relied upon by the expert in connection with his or her opinions in the case ..." Noting that the subpoena duces tecum called for communications between O'Brien and the City or its attorney concerning this case, plaintiffs claim the materials would have to be either "created" or "obtained" by him and would have to concern this case and therefore be relied upon by him. They claim that the Practice Book makes no exception for materials covered by the attorney-client privilege, and that they are entitled to the contested documents to use by way of cross examination to completely and fully explore the basis of the opinion of the City's disclosed expert. The defendant City of Norwalk argues that the attorney-client privilege does apply and there is no authority—and plaintiffs have cited no authority—which would compel a party under these circumstances to produce privileged materials.

As a general rule, communications between client and attorney are privileged when made in confidence for the purpose of receiving legal advice. *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330 (2004). However, it is commonly accepted that the attorney-client privilege does not extend to communications between counsel and a disclosed testifying independent expert. See, e.g. *Capalbo v. Balf Company*, Superior Court, Judicial District of Hartford–New Britain at Hartford, Docket No. CV90-0377507S (February 23, 1994, Corradino, J.), 11 CLR 166, 1994 WL 65214 (granting motion to compel production of letter from testifying expert to other counsel for the plaintiffs, the court analogizing the situation to "the finding of waiver where the client calls the attorney as a witness to privileged communications"). The essence of that waiver was articulated by the court in *CP Kelco U.S., Inc. v. Pharmacia Corporation*, 213 F.R.D. 176, 179 (D.Del.2003) where the court said "It

is not relevance alone that constitutes the waiver in this case. It is the disclosure of the allegedly privileged information to an expert that Pharmacia put forward to give expert testimony ... It would be manifestly unfair to allow a party to use the privilege to shield information which it had deliberately chosen to use offensively, as Pharmacia did in this instance when it used the allegedly privileged documents to arm its expert for testimony."¹ But that reasoning does not apply squarely in all respects in a situation such as this where the disclosure to the expert Mr. O'Brien, an employee of the defendant City, does not itself destroy the confidentiality of the communication from or to the attorney since the employee—unlike an independent expert—is not a third party to the communication. "It is true, of course, that the privilege accorded communications between attorney and client is not limited to direct communications between the two. It extends to communications made through agents for communication." *State v. Hannah*, 157 Conn. 457, 465 (1963). "The presence of certain third parties, however, who are agents or employees of an attorney or client, and who are necessary for consultation, will not destroy the confidential nature of the communications," *State v. Gordon*, 197 Conn. 413, 424 (1985).

*3 The situation then, represents a clash between an adversary's right under Practice Book § 13-4(b)(3) to discover and use in cross examination the bases of a disclosed expert's opinion[s], and a client/litigant's common-law right to confidentiality of communications that it and its employees have with the client's attorney for the purpose of receiving legal advice. Both parties agree that there is no Connecticut precedent to resolve this conflict, nor has the court found any relevant Connecticut authority for the situation where the disclosed expert is also an employee or agent of the client/litigant. As our appellate courts have often done, the court looks to the federal rules and interpretations for further guidance. See, e.g., *Jacobs v. General Electric Co.*, 275 Conn. 395, 407 (2005) ("[w]here a state rule is similar to a federal rule we review the federal case law to assist our interpretation of our rule" [internal quotation marks omitted]); *State v. Swinton, supra*, 268 Conn. 811 ("[a]s we have in the past, we look to the federal rules for further guidance"). "[W]here a state rule is similar to a federal rule we review the federal case law to assist our interpretation of our rule" (Internal quotation marks omitted). Although Practice Book § 13-4(b)(3) and the Federal Rules of Civil Procedure (Rule 26(a)(2) and (4) and Rules 30 and

34) are not identical with regard to pretrial disclosure of expert testimony, they follow a similar scheme. Both require that disclosure be given of the identity of each expert witness to be called, with information about the subject matter of the opinion. The federal rules place a lesser burden in the case of employee experts whose duties do not regularly involve giving expert testimony. (Rule 26(a)(2)(B).) The Practice Book places a lesser burden if “the expert is not being compensated in that capacity by or on behalf of the disclosing party.” Both the Practice Book and the federal counterparts give the adversary party the right to depose a disclosed expert witness and to issue a subpoena duces tecum for the production of documents at the deposition. Neither rule makes express reference to disclosure of materials which are covered by the attorney-client privilege or disclosure of otherwise privileged materials provided for consideration to a disclosed expert who is an employee of the party disclosing the expert. But the federal courts considering the latter issue have generally resolved the conflicting doctrines, coming down on the side of disclosure by implied waiver of the privilege. In *Euclid Chemical Company v. Vector Corrosion Technologies, Inc.*, 2007 WL 1560277 (N.D. Ohio, Eastern Div.2007) the court ordered disclosure of such documents, saying:

The parameters are not so clear where the testifying expert is also an employee of the litigant or previously served as a consultant or non-testifying expert. But for the person's designation as a testifying expert, privileges might apply. The courts have made it clear, however, that a testifying expert cannot fall back upon his status as an employee or consultant to defeat appropriate Rule 26(a)(2) discovery. *Id.*, *4.

*4 Other federal cases reaching the same result include *United States v. American Electric Power Service Corp.*, 2006 WL 3827509, (S.D. Ohio, Eastern Div.2006) (Employee expert must disclose redacted portions of a report which he reviewed and which is relevant to the subject matter of his opinion, the attorney-client privilege having been waived by his designation as an expert); *Monsanto Company v. Aventis Cropscience, N.V.*, 214 F.R.D. 545 (E.D. Missouri, Eastern Div.2002) (when defendant chose to use a former employee as a testifying expert it assumed the risk that it would waive the work

product privilege with respect to anything the expert considered in his non-expert capacity of employment that related to the substance of his expert capacity; plaintiff's motion to compel granted). The court has also identified a state court decision out of Texas supporting the principle. *Aetna Casualty & Surety Company v. Blackmon*, 810 S.W.2d 438 (Texas App.-Corpus Christi, 1991 (“[W]e believe that it is beyond question that the designation of Fernandez [an Aetna employee] as an expert on Aetna's claims handling procedure waived any privilege that Aetna might assert as to the specific matters that Fernandez relied upon as the basis for his testimony ... We view the present case as analogous to disclosure to a third party of information claimed to be privileged”). See also, George Brent Mickum IV and Luther L. Hajek, *GUISE, CONTRIVANCE, OR ARTFUL DODGING? THE DISCOVERY RULES GOVERNING TESTIFYING EMPLOYEE EXPERTS*, 24 *Review of Litigation* 301 (University of Texas School of Law Publications, Inc., 2005) Part III A, *The Majority View: Experts Who Give Expert Opinions Must Provide Expert Reports*, and authorities cited therein. Although there is a minority view² this court accepts and applies the majority view expressed by the authorities cited above and holds that the City of Norwalk's disclosure of its employee William O'Brien as a testifying expert on the subject of the proper methodology of valuation for condominium units, including common elements, worked as a waiver of the City's attorney-client privilege with respect to the seventeen attorney-client communications claimed to be privileged, which have been identified by the City as being otherwise responsive to the plaintiff's subpoena demand for communications between Mr. O'Brien and the City or its attorney concerning this action.

The City has argued that most of the seventeen contested documents were made prior to defendant's disclosure of William O'Brien as an expert witness (Objection, ¶ 3), and that all of the documents which helped Mr. O'Brien form his opinion have been waived [and disclosed] (oral argument). These claims are of no avail. In *Western Resources, Inc. v. Union Pacific Railroad*, 2002 WL 181494 (D.Kansas, 2002) the plaintiff Western Resources had retained the expert in question as a consultant/non-testifying expert in anticipation of litigation.³ Six years later Western Resources converted the expert from consulting to testifying status. In response to extensive discovery requests from the defendant Western Reserve claimed privilege for certain documents relating to his

capacities as a consulting expert before he was disclosed as a testifying expert. The court concluded that materials authored, received, read, or reviewed by the expert, dating back to the inception of his work as a consultant and/or nontestifying expert must be disclosed as considered by the expert under F.R.C.P. Rule 26(a)(2)(B).

*5 The fact that the counsel for the City states that all of the documents which helped Mr. O'Brien form his opinion have been produced, (implying that the seventeen contested documents were not helpful to Mr. O'Brien in forming his opinion) does not excuse noncompliance with the subpoena duces tecum. Practice Book § 13-4(b)(3) mandates the disclosure of documents which have been "obtained, created, and/or relied upon by the expert in connection with his or her opinions in the case." The fact that the documents are disclosed at all on the Privilege Log establishes their "connection" with Mr. O'Brien's opinions in the case. The rule does not require reliance.⁴ The three criteria, obtaining, creating, or relying upon, are expressed in the alternative "and/or ." Any one of the three is sufficient to require disclosure. The self-serving statement of counsel or even the statement of the expert himself that he did not rely on a particular document in forming his opinion are insufficient to justify withholding the document.

As other courts which have dealt with this issue have noted, the party disclosing the expert may not simply rely on a self-serving declaration of the expert himself that in formulating that opinion he neither considered nor relied upon certain information which he reviewed

or which is relevant to the subject matter of his opinion ... The only way in which the plaintiff can effectively cross examine [the expert] concerning his opinion is to see a full copy of [the non-redacted] report. *United States v. American Electric Power Corp.*, *supra*, *3.

Conclusion

It is well established that the attorney-client privilege is strictly construed because it tends to prevent a full disclosure of the truth in court. *Ullmann v. State*, 230 Conn. 698, 710 (1994). When a waiver of the attorney-client privilege is the issue, the burden of establishing non-waiver rests on the party seeking to invoke the privilege. See *Harp v. King*, 266 Conn. 747, 769-70 (2003). In this case the defendant has failed to meet that burden. With the guidance provided by reference to the Federal Rules of Civil Procedure and interpretations thereof by the federal courts the defendant City has failed to show that its decision to disclose its employee William O'Brien as its testifying expert witness was not a waiver of the attorney-client privilege as to emails between Mr. O'Brien and the City Attorney relating to the subject matter of this appeal. Accordingly, the plaintiffs' motion for order of compliance is granted and the defendant's objection thereto is overruled.

All Citations

Not Reported in A.3d, 2012 WL 3870634, 54 Conn. L. Rptr. 453

Footnotes

1

See also the Advisory Committee Note to Rule 26 of the Federal Rules of Civil Procedure stating that litigants may not: "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 otherwise being deposed." *CP Kelco*, *supra*, at 178.

2

See *Planalto v. Ohio Casualty Insurance Company*, 256 F.R.D. 16 (D.Me, 2009) and Part III B, George Brent Mickum IV and Luther L. Hajek, *supra*.

3

The reports and communications of such experts are generally exempt from disclosure except in the case of "exceptional circumstances." Practice Book § 13-4(f); F.R.C.P. Rule 26(b)(4)(B).

4

The federal rule likewise does not require that the expert must have relied upon a document for it to be disclosed under a waiver of attorney-client privilege. See fn. 1, *supra*.

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2014 WL 5356704

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.

Arlis STEEL

v.

Katelyn BOSSE, et al.

No. KNLCV136018504S.

|
Sept. 23, 2014.

Attorneys and Law Firms

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Opinion

COLE–CHU, J.

*1 The subject objection based on Practice Book § 13–4, particularly § 13–4(b)(3) and § 13–4(c)(1), was filed by the defendants on June 26, 2014, without the exhibit to which it refers.

The plaintiff filed a reply on July 7, 2014, to which the defendants filed a “sur-reply” on July 24, 2014. The plaintiff argued in opposition to the objection on September 22, 2014. The defendants did not attend the argument. Later that day, the plaintiff filed the discovery requests that were missing from the objection.

“[T]he rules of discovery, by facilitating an intensive search for the truth through accuracy and fairness, provide procedural mechanisms designed to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.” (Internal quotation marks omitted.) *Picketts v. International Playtex, Inc.*, 215 Conn. 490, 508, 576 A.2d 518 (1990); see also *Sturdivant v. Yale–New Haven Hospital*, 2 Conn.App. 103, 106, 476 A.2d 1074 (1984), citing *United States v. Proctor & Gamble*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). The granting

or denial of discovery requests rests in the sound discretion of this court. See *Barry v. Quality Steel Products, Inc.*, 280 Conn. 1, 16–17, 905 A.2d 55 (2006).

The objection is overruled on the ground stated. There is nothing in Practice Book § 13–4 stating an intent that any part of that section limits either the scope of discovery under Practice Book § 13–2 or the methods of discovery provided in sections of the Practice Book other than § 13–4. On the contrary, Practice Book § 13–4(c)(1) provides that “[n]othing contained in subsection (b) of this section shall impair the right of any party from exercising that party's rights under the rules of practice to subpoena or to request production of any materials, to the extent otherwise discoverable, in addition to those produced under subsection (b) of this section, in connection with the deposition of an expert witness ...” The drafters of § 13–4, and the judges who approved it, could easily have made it clear in § 13–4 that production of “all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case within fourteen days prior to that expert's deposition”; Practice Book § 13–4(b)(3); was the exclusive method of obtaining such materials. They did not. That is one reason why this court regards the phrase “in connection with the deposition of an expert witness,” in § 13–4(c)(1) not to modify “to the extent otherwise discoverable,” as the defendants contend, but only to modify the phrase which immediately precedes it, which is “produced under subsection (b) of this section.” A second reason for the court's rejection of the defendants' interpretation of the quoted part of § 13–4(c)(1) is that the materials which are required by § 13–4(b)(3) to be produced before the expert witness's deposition — “all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case” — are obviously, and as § 13–4(c)(1) contemplates, not all the materials within the full scope of discovery set forth in Practice Book § 13–2. For example, the expert may not *rely* on her or his *curriculum vitae*, let alone on any discoverable impeachment material or material supportive of an opinion contrary to that relied on by the defendants. But such materials cannot reasonably be argued to be beyond the scope of discovery just because the witness has been identified as an expert witness, whether or not a deposition has been requested. A third reason for rejecting the defendants' interpretation of § 13–4(b)(3) and § 13–4(c)(1) is obvious from the result of accepting that argument: to hold that a party has to depose an expert witness in order to obtain material

about that witness, what she or he did, and the basis for her or his opinions would be to make litigation unnecessarily costly in every case where the party seeking such information is able to avoid deposing the expert. The cost of litigation is of great concern to most litigants and to the Connecticut Judicial Branch. To sustain the defendants' objection without an unequivocal basis in statute or court rule would be unfair to parties seeking the most expeditious discovery and give parties with the funds or other resources to obtain expert witnesses a new weapon of oppression due to the cost of discovery.

*2 For the above reasons, the defendants' objection is overruled on the ground stated. However, nothing in Practice Book § 13-4 expands the general scope of discovery under § 13-2 or modifies the rules regarding requests for production under § 13-9 and § 13-10. Treating the defendants' objection as a motion for a protective order against overbroad or otherwise improper discovery requests; see Practice Book § 13-5; the court's order on the defendants' objections to the plaintiff's May 23, 2014, request for production is as follows:

No documents which do not exist are required to be created so as to comply with the plaintiff's request.

Request # 3 on page 6 need not be produced.

Request # 8 on page 6 is limited by the court to contracts concerning this case.

Request # 3 on page 7 need not be produced: only final reports and any supplemental reports need be produced. See Practice Book § 13-15 (continuing duty to disclose).

Defendants' attorneys' work product, if specifically claimed in a privilege log, need not be produced, provided communications by Mr. Monzingo to the defendants, to any attorney for the defendants or to any representative of any law firm representing the defendants regarding service as a consultant or expert witness in this case shall not be privileged.

The following requests to produce are limited to the lesser of a) all described material in the four years preceding May 23, 2014, or b) the most recent twenty (20) of the described material prior to May 23, 2014: page 6 # 6 (reports or summaries of testimony); page 6 # 7 (testimony); page 7 # 9 (list, if extant, of civil actions in which Mr. Monzingo served as expert witness, four-year maximum, though five is requested).

This being a request to the defendants to produce documents, and no oath being required by Practice Book § 13-10, Mr. Monzingo is not required to sign the response, let alone do so under oath.

All Citations

Not Reported in A.3d, 2014 WL 5356704, 59 Conn. L. Rptr. 1