PRE-TRIAL DISCOVERY OF EXPERT OPINION

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The law with respect to discovery of opinions, conclusions and written reports of an adverse party's expert is in a state of flux in the federal courts and in many state jurisdictions as well. However, the Arizona Supreme Court settled the matter to a great extent in this jurisdiction by its recent decision in *State ex rel. Willey v. Whitman*,[1] in which it was held that facts and opinions acquired by the condemnee's expert appraisers who were proposed to be called at trial could be discovered by the condemnor through interrogatories. Many of the grounds frequently urged for denying discovery of such matter were considered by the court, and a review of those theories may be helpful in assessing the court's present position.

Discovery of Opinions of Witnesses

It has been urged that opinions or conclusions of witnesses in general are not subject to discovery under the federal rules,[2] on the grounds that discovery is limited to "relevant facts,"[3] and that opinions cannot be considered relevant facts. However, the better reasoning recognizes that opinions may be relevant in particular cases when they lead to evidence or to a narrowing of the issues, and that

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[1] 91 Ariz. 120, 370 P.2d 273 (1962). The case arose upon the condemnee's refusal to answer the condemnor's interrogatories requesting: 1) The identity of the condemnee's expert appraisers; 2) the expert's opinion as to the value of the property and improvements; 3) the date of appraisals; 4) the method and reasoning employed by the experts in making their appraisals; 5) whether the experts had prepared a written report or memorandum of their appraisal; and 6) if so, a brief description thereof.

[2] Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); General Motors Corp. v. California Research Corp., 8 F.R.D. 568 (D. Del. 1948).

[3] FED. R. CIV. P. 26(b) provides: Scope of examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including . . . the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

See also ARIZ. R. CIV. P. 26(b) which is identical to the federal rule.

no dogmatic rule should be formulated to exclude them.[4] In addition, the opinions of experts, in many cases, are themselves the facts upon which the litigation is resolved.[5] This is the view adopted by the Arizona court in the *Whitman* case.

Attorney-Client Privilege

It is the general rule that confidential communications transmitted by a client through an agent to his attorney are privileged and can not be discovered either by pre-trial procedure or inquired into on trial, but the privilege does not apply to information received by an attorney from third persons generally.[6] However, the privilege has been broadened in some jurisdictions to include communications *originating* with the agent while aiding the client's attorney to prepare for litigation.[7] The attorney-client privilege thus extended encompasses knowledge acquired by an agent-expert and his opinions based thereon.[8]

The purpose of this privilege is to encourage a client to make a full disclosure of facts to his attorney.[9] It is difficult to understand how a client would be encouraged to make a more complete disclosure of such facts by insuring that the opinion of an expert hired by the *client* would not be disclosed. It is even more difficult to understand how this purpose would be accomplished by applying the privilege to the opinion of an expert hired by the *attorney!* This would appear to be an unwarranted extension of the immunity.

In *Whitman,* the view presumably adopted was that opinions of an expert procured by counsel are not within the attorney-client privilege, for the court quoted with approval Professor Moore's reasoning[10]

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[4] Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F.R.D. 347 (S.D.N.Y. 1958); 4 MOORE, FEDERAL PRACTICE § 33.17 (2d ed. 1950).

[5] E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, 421 (D. Del. 1959); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 STAN. L. REV. 455, 469 (1962).

[6] MCCORMICK, EVIDENCE § 93 (1954); UDALL, ARIZONA LAW OF EVIDENCE § 94 (1960). See ARIZ. REV. STAT. ANN. § 12-2234 (1956).

[7] 8 WIGMORE, EVIDENCE § 2317 (McNaughton's rev. 1961).

[8] Brink v. Multnomah County, 224 Ore. 507, 356 P.2d 536 (1960); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951). *But cf.* Wilson v. Superior Court, 148 Cal. App. 2d 433, 307 P.2d 37 (1957) where it was held that knowledge and opinions of an agent who is also a party are subject to discovery, but not his communications with his principal or its attorney.

[9] It should be noted that the privilege is intended to benefit justice — not the client. See MCCORMICK, EVIDENCE § 91 (1954); 8 WIGMORE, EVIDENCE § 2291 (McNaughton's rev. 1961); Friedenthal, *supra* note 5, at 469.

[10] 4 MOORE, FEDERAL PRACTICE § 26.24 (2d ed. 1950):

> The Supreme Court decision in Hickman v. Taylor makes it difficult to sustain the argument that opinions of an expert, procured by counsel, are within the attorney-client privilege. . . . If memoranda prepared by counsel himself are not privileged, *a fortiori* reports prepared for him by experts are not.

that such is the rule to be deduced from *Hickman v. Taylor*.[11]

Attorney's Work Product

Another ground for refusing discovery of the opponent's expert's opinion is that the matter is the attorney's work product and, hence, subject to a qualified immunity. *Hickman v. Taylor*,[12] in which this concept first appeared, held that written statements of a witness taken by a party's attorney personally were the latter's work product and could be required to be produced only upon a showing of necessity and justificatiton.[13] The Third Circuit in *Alltmont v. United States*[14] extended the concept of work product to include statements of witnesses taken by a party for the attorney in anticipation of litigation or in preparation for trial.

Some courts used this latter case as a springboard for holding that the written report of an expert containing information compiled or prepared for an attorney in anticipation of litigation or preparation for trial falls within the protected work product category.[15] But, even if it is conceded that the written report of the expert is subject to a qualified immunity, the courts find no obstacle to deposing the expert when the expert's opinions and conclusions are facts.[16]

Another line of authority rejects the applicability of the work product concept to the expert's deposition or report altogether on the ground that the only matter intended to be protected is that which is produced by the lawyer personally through work which involves his professional skill and experience.[17]

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[11] 329 U.S. 495 (1947).
[12] *Ibid.*
[13] *Id.* at 512.
[14] 177 F.2d 971 (3d Cir. 1950).
[15] Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 90 A.2d 672 (Super. Ct. 1952). *But see* United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1953) (factual data contained in expert's written report may be discovered but not his opinions based thereon); Shell v. State Road Dept., 135 So. 2d 857 (Fla. 1961), *reversing* 122 So. 2d 215 (Dist. Ct. App. 1960) (work product applies to expert's reports, except in eminent domain proceedings).
The condemnee's argument that an expert's opinion cannot be discovered because such information is within the knowledge of the plaintiff was rejected by the court in State *ex rel.* Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962). Some courts have given credence to this argument, possibly on the basis of language in Hickman v. Taylor, 329 U.S. 495, 511 (1947), to the effect that sufficient necessity or justification cannot be shown to require production of written statements of witnesses when the witnesses are still available. See United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425, 427 (N.D. Ohio 1947.
74 HARV. L. REV. 940, 1029 (1961).
[16] Friedenthal, *supra* note 5, at 473. See generally Annot., 86 A.L.R.2d 138 (1962).
[17] E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959); Leding v. United States Rubber Co., 23 F.R.D. 220 (D. Mont. 1959).

In *Dean v. Superior Court*[18] Arizona adopted the rule of *Hickman v. Taylor*[19] as broadened by *Alltmont*,[20] holding that written statements of witnesses obtained by or for the attorney in anticipatiton of litigation or preparation for trial were the work product of the attorney and could be discovered only by showing that the information could not be obtained elsewhere.[21]

There would appear to be no objection in Arizona to deposing the expert with respect to his opinions and conclusions which constitute facts in the case.[22] But, the work product concept as applied in *Dean* would seem to include an expert's written report. However, the court in *Whitman* rejected this argument, apparently on the ground that a contrary holding would not be in keeping with the spirit of the discovery rules, and required the interrogatories to be answered. Thus, it would appear that if a party may be required to divulge the contents of the expert's report, the report itself may be required to be produced.

Unfairness

The final basis for objection, stated in a number of federal district court opinions, is that it would be unfair to permit a party to obtain free of charge information for which the opposing party has paid a substantial amount of money.[23] But as State's counsel pointed out in *Whitman*,[24] both sides generally make similar expenditures for expert services in appropriate cases and the spirit of the discovery procedure — to shorten and facilitate adjudication — is frustrated by denying discovery of the adverse party's expert testimony.

Nevertheless, the unfairness argument is particularly appealing in a case where the expert renders an opinion adverse to the interests of the party employing him. In that case, if discovery is permitted, the other party has a double-barrelled weapon. He not only

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[18] 84 Ariz. 104, 324 P.2d 764 (1958).

[19] 329 U.S. 495 (1947).

[20] Alltmont v. United States, 177 F.2d 971 (3d Cir. 1950).

[21] The court in Dean v. Superior Court, 84 Ariz. 104, 111, 324 P.2d 764, 769 (1958) (dictum) went even farther than the *Alltmont* case by stating that the attorney's memoranda, briefs, and related writings which reflect an attorney's mental impressions, conclusions, and legal theories are absolutely immune from discovery. See 1 ARIZ. L. REV. 112 (1958).

[22] A case involving the refusal of an expert-deponent to answer questions concerning his opinions is now pending before the Arizona Supreme Court. State v. Hollis, No. 7391, Ariz., July 7, 1961.

[23] *E.g.*, United States v. Certain Acres of Land, 18 F.R.D. 98 (M.D. Ga. 1955); Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940).

[24] Reply Brief for Appellant, pp. 18-19, State *ex rel.* Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962).

has a favorable expert witness without expense to himself,[25] but he can also point out that even experts hired by the adverse party have no sympathy for that party's contentions. The Arizona Supreme Court effectively precluded such a result by limiting discovery to those experts proposed to be used at trial and excluding others who were consulted but whose testimony is not intended to be used. Thus, if we may assume that a party will not use an unfavorable expert as a witness, neither his report nor identity will be revealed to the other side through discovery procedures.

Conclusion

The state of the law in Arizona with respect to this matter appears to be that: 1) Opinions of witnesses are subject to pre-trial discovery when they would lead to evidence or narrow the issues. 2) The *attorney-client privilege* has no application to either written reports or depositions of an adverse party's experts. 3) The *work product* concept does not preclude the disclosure of the contents of the expert's written report by interrogatories submitted to a party, and presumably does not preclude either deposing the expert or requiring production of his written report. 4) The *unfairness* argument does not preclude discovery of the adverse party's experts intended to be used at trial. Thus, the need for pre-trial discovery to allow study of the experts' testimony in order to curb their tendency toward excessive oratory and partisan bias has been satisfied, with the result that the experts' testimony will be made as non-partisan and objective as possible.[26] The *Whitman* decision accords with the spirit of the discovery rules by permitting "the parties to obtain the fullest possible knowledge of the issues and facts before trial,"[27] subject to a common-sense limitation which will prevent needless injury to the opposing party.

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[25] "[W]hile the court has no power to compel the witness to educate himself, the court does have the power to compel him to state an opinion already formed." Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593, 594 (D. Mass. 1941).

[26] Kemeny v. Skorch, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959) (dictum).

[27] Hickman v. Taylor, 329 U.S. 495, 501 (1947).