

***CURRENT ISSUES RE: THE
ATTORNEY-CLIENT
PRIVILEGE AND WORK-
PRODUCT PROTECTION
FACING MAGISTRATE
JUDGES***

***A PRESENTATION USING
HYPOTHETICALS***

**TENTH CIRCUIT JUDICIAL
CONFERENCE
Park City, Utah
July 22, 2004**

***Robert B. Collings
United States Magistrate Judge
United States District Court
District of Massachusetts
Boston, Massachusetts***

Hypothetical #1

Plaintiff sues defendant alleging a number of claims under products liability law. Plaintiff hires an expert to render opinions on the design defects in defendant's product. The expert prepares a report pursuant to Rule 26(a)(2)(B), Fed. R. Civ. P., and that report is disclosed to defendant's counsel.

Defendant's counsel wishes to depose plaintiff's expert pursuant to Rule 26(b)(4), Fed. R. Civ. P., but seeks additional discovery before taking the deposition.

Specifically, defendant seeks copies of all correspondence and documents exchanged between plaintiff's trial counsel and plaintiff's expert up to the date on which the report was prepared. Plaintiff's counsel objects on the ground that these documents contain his "mental impressions, conclusions, and opinions or legal theories".

What result?

During the time that the expert was preparing his report, he would send draft copies to plaintiff's attorney. Plaintiff's attorney would make changes to the drafts by writing the changes on the drafts which the expert sent. The attorney would make other notations on the draft. However, plaintiff's attorney never sent the drafts with the suggested changes back to the expert; rather, he would tell the expert of the changes over the telephone.

Defendant's counsel seeks the drafts with the suggested changes and notations which were prepared by plaintiff's counsel. What result?

At the expert's deposition, defendant's counsel seeks to question the expert on the changes to the drafts suggested by the attorney. Plaintiff's counsel objects. What result?

Defendant's counsel seeks to depose plaintiff's counsel as to what he changes he suggested to the expert. Plaintiff objects. What result?

Hypothetical #2

"A" corporation has a patent; it alleges that "B" corporation's product infringes the patent and further alleges that the infringement was wilful which entitles A to

multiple damages and an award of attorney's fees and costs.

In response to the allegation of wilful infringement, B interposes the defense of reasonable reliance on an opinion letter from a patent attorney whom it retained (not B's trial counsel) to the effect that B's product does not infringe A's patent and, further, that A's patent is invalid.

A seeks discovery on the B's asserted defense.

First, A seeks all documents which B provided to the author of the opinion letter and all documents which the author of the opinion letter furnished to B up until the time the opinion letter was written.

Can B interpose either the attorney-client privilege or the work-product protection as to these documents?

Second, A seeks all documents in the custody, control and/or possession of B, whether received by B or generated by B, up until the date of the opinion letter, which in any way relate to the question of whether A's patent is valid or invalid and/or whether B's product infringed A's patent.

B objects because a number of these documents contain the "mental impressions, conclusions, and opinions or legal theories" of its trial counsel.

How would you rule on B's objection?

B further objects on the ground that a number of the other documents which A has specifically requested are privileged and do not relate in any way to the issue of infringement or validity of A's patent.

Should B be required to submit a privilege log?

Hypothetical #3

The state as *parens patriae* sues three supermarket chains charging anti-trust violations in connection with an alleged agreement to cease simultaneously offering a double coupon program.

Before suit was filed, one of the chains got wind of the possibility that such

charges would be brought. The chain hired an outside attorney to conduct an investigation. The attorney interviewed numerous persons both within and without the supermarket chain and prepared a report for the Board of Directors.

After suit is brought, the state moves to compel an answer to an interrogatory seeking to know whether an investigation was conducted and, if so, the name of each witness interviewed and the date, time and place of the interview.

The supermarket objects on work product grounds. The state moved to compel. What result?

When one of the officers of one of the supermarket chains got wind that the anti-trust claims might be brought against the chain, the officer, with the approval of the attorney whom the chain had retained to represent it, commenced keeping a detailed diary of all events which occurred which in any way bore on the question of offering or not offering double coupons. The officer would forward sections of the diary to the attorney as they were completed. The attorney read them, kept them in his file, and sometimes spoke to the officer about various entries in the diary. At his deposition, the officer, in response to questions by the state's attorney, reveals the existence of the diary. The state moves to compel its production. What result?

The attorney gives the diary back to the officer for the officer to read prior to his deposition, and the officer does so. The state demands a copy before proceeding further with the deposition. What result?

During the deposition, the officer refers to the diary in order to refresh his recollection. The state demands a copy. What result?

During the course of the litigation, the state calls as a witness a former officer of the supermarket chain who has not worked for the chain for five years but has some knowledge respecting the question of halting the double coupon program. On the morning of the deposition, trial counsel for the supermarket chain spends about twenty minutes with the former employee discussing his knowledge of the events about which he is to testify.

At the deposition, counsel for the state establishes that the witness is not represented by counsel but that, prior to the deposition, the witness spoke with the supermarkets' attorney. Counsel for the state asks the witness to relate the conversation between him and the attorney.

Counsel for the supermarket chain objects on the grounds of attorney-client privilege and work-product. What result?

Hypothetical #4

A is the driver of an auto and B, C, and D are passengers. An accident occurs. B, C and D are injured. It is fairly clear that the accident was due to A's negligence.

Interstate Insurance insured A; the policy limits were such that an injured person could obtain no more than \$20,000 for an accident and the total liability for any accident was \$40,000.

Interstate settled the claims of C and D for such amounts that the only coverage available to settle B's claim was \$15,500. Whether B's attorney advised Interstate of the extent of B's injuries before Interstate settled with C and D is disputed.

B sues A. Interstate hired an attorney to represent A. During the discovery phase of the case, B seeks discovery of Interstate's claims file regarding the accident.

What result?

B's suit against A results in a \$300,000 verdict. A is without assets and judgment proof. A assigns to B all of his rights against Interstate on account of it handling of B's claim. A also executes a waiver of the attorney-client privilege between him and the lawyer whom Interstate hired to represent A.

B's attorney sends a demand letter to Interstate alleging unfair practices; this is a prerequisite to suit under the state's unfair practices statute.

Interstate rejects B's demand; B sues Interstate in federal court alleging negligence, breach of duty of good faith and fair dealing and unfair practices.

B issues a subpoena duces tecum to the attorney whom Interstate hired to represent A seeking all documents in his file respecting B's suit against A. Interstate claims attorney-client privilege and work product protection as to forty-one of the documents.

What result under the attorney-client privilege?

What result as to work-product as to:

- (1) Documents prepared before the demand letter?
- (2) Documents prepared after the demand letter?

Would it make any difference if A's attorney himself claims either the attorney-client privilege or work-product protection?