

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)	
)	
BASIC RESEARCH, L.L.C.,)	
A.G. WATERHOUSE, L.L.C.,)	
KLEIN-BECKER USA, L.L.C.,)	
NUTRASPORT, L.L.C.,)	
SOVAGE DERMALOGIC)	
LABORATORIES, L.L.C.,)	
dba BASIC RESEARCH, L.L.C.,)	
OLD BASIC RESEARCH, L.L.C.,)	
BASIC RESEARCH, A.G.)	DOCKET NO. 9318
WATERHOUSE, BAN, L.L.C.,)	
dba KLEIN, BECKER, USA,)	
NUTRASPORT, and SOVAGE)	
DERMALOGIC LABORATORIES,)	
DENNIS GAY,)	
DANIEL B. MOWREY,)	
dba AMERICAN PHYTOTHERAPY)	
RESEARCH LABORATORY, and)	
MITCHELL K. FRIEDLANDER,)	
)	
Respondents.)	

**RESPONDENT DENNIS GAY'S MEMORANDUM IN OPPOSITION
TO COMPLAINT COUNSEL'S MOTION TO COMPEL**

ARGUMENT

When Respondents initially retained two expert witnesses, including Professor Lawrence Solan, a meeting was held with these witnesses attended by a number of counsel for Respondents. After the meeting, one of Respondents counsel, Jeffrey D.

Feldman (“Feldman”), prepared and circulated to counsel a memorandum with respect to the meeting which included his mental impressions, opinions and legal theories that are clearly protected under the work product privilege. Feldman also e-mailed a copy of that memo to Professor Solan.

Complaint Counsel subsequently served a subpoena upon Professor Solan. In response to the subpoena, Professor Solan produced the memorandum to counsel. The work product privilege was asserted with respect to the memorandum and a privilege log was provided to Complaint Counsel. Complaint Counsel then requested a copy of the memorandum and a redacted copy was produced to Complaint Counsel by Feldman. The copy produced redacted material concerning counsel’s mental impressions, opinions and legal theories.

Despite the fact that Complaint Counsel does not challenge that the memorandum would otherwise be protected under the work product privilege, Complaint Counsel nevertheless ask this court to order that an unredacted version of the memorandum be produced. Complaint Counsel argue that Professor Solan considered the memorandum in reaching his opinions expressed in his expert report and they are entitled to any documents considered by him in reaching his opinions. It is respectfully submitted that Complaint Counsel’s motion should be denied. Professor Solan did not consider the memorandum in reaching his opinions. Moreover, even if he had considered the memorandum, the weight of authority holds that the work product privilege attaching to

an attorney's mental impressions, opinions and legal theories is not waived by disclosure to a testifying expert

**A. PROFESSOR SOLAN DID NOT CONSIDER THE MEMORANDUM
IN REACHING HIS OPINIONS.**

Complaint Counsel mistakenly argue that Professor Solan "considered" the memorandum within the meaning of Rule 26(a)(2)(B) merely because he acknowledges having read the memorandum. However, Professor Solan simply testified that he "casually read" the memorandum, that it was not of much interest to him and that he did not know what the redacted portions of the memorandum stated. [Solan Depo., pp. 47-48]

In particular, the following dialogue took place during Professor Solan's deposition:

Ms. Richardson: Do you recognize that document?

Prof. Solan: That appears to be a redacted version of a memo that I received by e-mail.

....

Ms. Richardson: Can you share with me what the rest of the document said?

Prof. Solan: I don't remember what the rest of the document said.

Ms. Richardson: So you have no recollection of the rest of the document?

Prof. Solan: That's right. It was notes. These were notes of what happened in the meeting. I couldn't tell you what was the rest of that.

Ms. Richardson: Did you read the document when you received it via e-mail?

Prof. Solan: I read it casually, because I was at the meeting and I wasn't terribly interested in what the summary of it was.

Ms. Richardson: But you did have an opportunity to review this document?

Prof. Solan: Well, "reviewed." I don't know reviewed. The thing came. I kept it, which is why I produced it. I looked at it. But it really wasn't of much moment to me.

Ms. Richardson: Did anyone call you to discuss this document?

Prof. Solan: No.

Ms. Richardson: So you didn't receive any call from Mr. Feldman after this documents was produced or after this documents was sent to you?

Prof. Solan: I never received any call from Mr. Feldman to discuss this document.

Ms. Richardson: Did you receive any call from anyone in connection with this case to discuss this document?

Prof. Solan: No.

There is no evidence that Professor Solan took the contents of the memorandum into consideration in forming and expressing his opinions in his expert report. It is obvious from Professor Solan's testimony that he did not do so. Thus, the factual predicate of Complaint Counsel's motion - - that Professor Solan considered the memorandum in reaching his opinion - - is simply incorrect. Accordingly, Complaint Counsel's motion should be denied.

**B. IN ANY EVENT, COUNSEL’S MENTAL IMPRESSIONS, OPINIONS
AND LEGAL THEORIES ARE PROTECTED BY THE WORK PRODUCT
PRIVILEGE EVEN IF DISCLOSED TO AND CONSIDERED BY A TESTIFYING
EXPERT.**

In their motion, Complaint Counsel cite a few cases to support their argument that if otherwise protected work product material is considered by a testifying expert the work product privilege is lost. Complaint Counsel fail to bring to the court’s attention the fact that the weight of authority is to the contrary. Indeed, Complaint Counsel’s own cited case of *Musselman v. Phillips*, 176 F.R.D. 194, 198 (D. Md. 1997), recognizes that “there remains a considerable body of authority which strongly maintains that at least opinion work product is not discoverable” even if disclosed and considered by a testifying expert.¹

The majority of courts that have faced this issue have taken a position which distinguishes between facts communicated by an attorney to a testifying expert which constitutes ordinary work product and “core” attorney work product consisting of mental impressions, opinions and legal theories communicated by an attorney to a testifying

¹ Furthermore, the holding in *Musselman* can be distinguished from the case at bar because the *Musselman* court required the disclosure of information “if it is considered by the expert.” *Id.* at 199. The deposition testimony cited to above clearly proves that Professor Solan gave the e-mail nothing more than a cursory perusal. Complaint Counsel has failed to show that Professor Solan actually “considered” the email in reaching his opinion.

expert. The courts have held that the work product privilege is waived only as to facts communicated to an expert. The mental impressions, opinions and legal theories of an attorney are entitled to special protection from disclosure under Rule 26(b)(3). See *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688 (1981); *All West Pet Supply Co. v. Hill's Pet Prod. Div.*, 152 F.R.D. 634, 637 n.5 (D. Kan. 1993).

Accordingly, the better reasoned cases have refused to find a waiver of the privilege with respect to an attorney's mental impressions, opinions and legal theories.

For example, in *All West Pet Supply, supra*, the court rejected the contention that by sharing a memorandum containing counsel's mental impressions, opinions and legal theories with an expert counsel had waived the work product privilege. The court noted that the "weight of authority" is that sharing documents containing core work product with an expert witness does not waive the privilege. 152 F.R.D. at 638. The court stated:

The defendants' burden under Rule 26(b)(3) cannot be avoided simply because the attorney's work product document in question was transmitted to his client's expert witness and considered in the course of preparing an expert opinion for purposes of testifying at trial. To hold otherwise would substantially diminish the protection Rule 26(b)(3) affords to the disclosure of attorney work product. *Id.* at 639.

The *All West Pet Supply* court went on to reject the notion that the 1993 Advisory Committee Notes mandated disclosure of such documents, explaining:

The 1993 Advisory Committee Notes indicate that the obligation to disclose the data and other information considered by the expert in the report means that "litigants should no longer be able to argue that

materials furnished to their experts to be used in forming their opinion - - whether or not ultimately relied upon by the expert - - are privileged” This court interprets the revised rule and comment to mean only that the data or information, i.e., the facts, considered by the expert must be disclosed notwithstanding the assertion of work product protection or privilege. It does not compel the production of the *documents* that transmitted the data or information to the expert, which may well, as here, contain protected work product other than data or information. 152 F.R.D. at 639 n.9.

Similarly, in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-596 (3rd Cir. 1984), the Third Circuit recognized the special protection afforded to core work product consisting of mental impressions, opinions and legal theories of counsel and held that disclosure of documents containing such information to an expert witness did not constitute waiver of the privilege.²

In *Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D. N.Y. 1997), the court rejected a claim that the work product privilege had been waived by disclosing the privileged material to an expert witness, stating:

Having reviewed the relevant case law, the text of Rule 26(a) and (b) and the associated commentary provided by the advisory committee, the Court holds that “the data or other information considered by [an expert] witness in forming [his] opinions required to be disclosed in the expert’s report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by the expert.

Similarly, in *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995), the court held that discovery of expert witness opinions and the bases for the

² *Bogosian* was decided before the 1993 amendment to Rule 26(a) but continues to be cited by the courts as authoritative on the issue.

opinions does not include discovery of mental impressions and opinions of counsel who retained the expert even though the mental impressions and opinions were communicated to the expert. *See also Hamel v. General Motors Corp.*, 128 F.R.D. 281 (D. Kan. 1989); *Dominguez v. Syntex Labs., Inc.*, 149 F.R.D. 158, 164-65 (D. Ind. 1993); *Gregory P. Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 103-104 (1996) (The communication of mental impressions and opinions by an attorney to an expert do not constitute “data or other information” within the meaning of the federal rule that must be disclosed).

It is one thing to permit discovery of facts disclosed to a testifying expert. It is quite another thing to permit discovery of an attorney’s mental impressions, opinions and legal theories disclosed to a testifying expert, especially where - - as in the case at bar - - the testifying expert did not consider those mental impressions and opinions in forming the expert’s opinions. Core work product such as involved in the case at bar is subject to special protection and the privilege simply is not waived by disclosure to a testifying expert.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Complaint Counsel's motion to compel should be denied.

DATED this 6th day of January, 2005.

BURBIDGE & MITCHELL

By


ANDREW J. DYMEK
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT DENNIS GAY'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL** was provided to the following parties on the ____ day of January, 2005 as follows:

- (1) an original and two paper copies filed by Federal Express and one electronic copy in PDF format filed by electronic mail to:

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- (2) one paper copy served by Federal Express to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-106
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- (3) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

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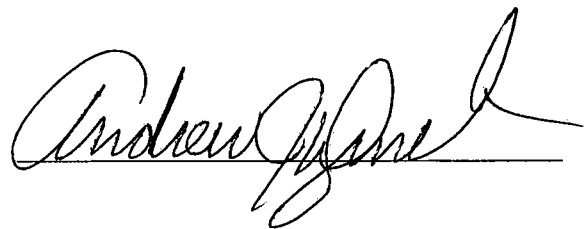
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A handwritten signature in black ink, appearing to read "Andrew J. Glines", written over a horizontal line.