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Special Investigations Practice Group E-Alert

Counsel Privileged Materials Given to Experts

It is now very likely in federal civil cases that, in the absence of a contrary agreement, any counsel-privileged materials provided to an expert witness must be disclosed to opposing parties.

The assertion of a disclosure requirement for counsel-privileged materials in connection with expert testimony arises from the 1993 amendment to Federal Rule of Civil Procedure 26(a)(2)(A), which now requires production with an expert's report of "the data or other information considered by the witness in forming the opinions."

While there has been a split among courts considering the issue – compare *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995) (attorney opinion work product need not be disclosed) with *Regional Airport Authority of Louisville and Jefferson County v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006) (opinion work product provided to an expert must be disclosed) – three circuit courts have now held that counsel privileged material provided to an expert must be disclosed with the report.

Some have argued that privileged materials provided to an expert need not be produced if the expert did not rely on them. The Advisory Committee Notes, however, elaborate on the rule's use of "considered:" "[L]itigants 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 or otherwise protected from disclosure" At least one court has held that this broad disclosure requirement includes oral, as well as written materials. See *Synthes Spine Co. v. Walden*, 232 F.R.D. 460 (E.D. Pa. 2005).

To the extent that there appears a conflict between the disclosure rule for expert materials and the protection of both types of attorney work product in Federal Rule 26(b)(3), at least one court has ruled that the expert disclosure provisions override those work product protections. See *Regional Airport Authority*, 460 F.3d at 713-717.

Thus, in planning for expert testimony, particular care should be taken to control the information provided to the expert; and it should be assumed that, in the absence of an agreement of counsel or a protective order, all such information will be subject to disclosure.

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