IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Peter Wenk, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:12-cv-474
Edward O'Reilly, et al.,	:	JUDGE ALGENON L. MARBLEY Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

If a testifying expert witness makes notes in the margins of depositions or other documents as he or she reviews them, are those notes discoverable? That is the question posed by the parties' memoranda regarding discovery from one of Defendants' experts, Dr. Ronald C. Hughes. For the following reasons, the Court's answer to that question is a qualified "probably," but the Court will defer providing a definitive answer until the factual record is more well-developed.

I.

For a more complete description of the nature of this case, the Court refers to Judge Marbley's recent Opinion and Order granting in part and denying in part the parties' cross-motions for summary judgment (Doc. 124). See Wenk v. O'Reilly, 2014 WL 971939 (S.D. Ohio March 12, 2014). Although it is impossible to summarize the facts in a few sentences, as Judge Marbley noted, "Plaintiffs commenced this action on June 4, 2012, alleging First Amendment retaliation and violations of substantive Due Process against [employees of their daughter's school]" based on a report of child abuse made by the school to Franklin County Children's Services. Id. at *6. Judge Marbley held that factual disputes exist about key elements of this claim, including whether the report was false, whether the school officials actually believed they were required by law to make it, and whether they were

motivated to make the report (or to include many of the comments in it) by what they perceived to be the Wenks' aggressive behavior with respect to the way in which the school was dealing with their daughter's education.

With respect to the discovery matter which is the subject of this Opinion and Order, the facts which the parties have presented to the Court are sparse but apparently undisputed. Defendants retained Dr. Hughes as one of their experts, disclosing his identity under Fed.R.Civ.P. 26(a)(2) and proposing to use him to testify at trial. They also made the other disclosures required under that rule, including providing the Wenks with a copy Dr. Hughes' report. The Wenks then served discovery, asking about every document Dr. Hughes reviewed or created which was relevant to his opinion, and requesting any notes he made.

Among the documents Dr. Hughes reviewed are depositions of other witnesses in this case. He took notes while reading them and also made some marginal notes on the transcripts. Defendants did not provide these documents in response to the discovery requests. Rather, they objected, claiming that such notes are "draft reports," which are specifically protected from disclosure under the current version of Fed.R.Civ.P. 26(b)(4)(B)("Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded"). Alternatively, Defendants argue that an expert need only produce the "facts and data" underlying the expert's opinion, and these kinds of notes are neither facts nor data. The Wenks, in turn, assert that courts have routinely ordered the production of experts' notes since Rule 26 was amended, and that the purpose of the amendment - to protect an attorney's mental impressions - is not furthered by shielding an expert's own notes from production. These arguments set the

stage for the legal issue presented.

II.

Rule 26(b)(4)(B), part of a set of 2010 amendments to the Rules of Civil Procedure, is clear as far as it goes. It exempts "drafts of any report or disclosure" required to be made by a testifying expert "regardless of the form ...." Rule 26(a)(2)(B)(ii), which was amended at the same time, also seems fairly clear, requiring, as part of expert witness disclosures, the production of "the facts or data considered by the witness in forming [expert opinions]...." But are notes made by an expert as he or she reviews the documents upon which an opinion will be based actually "draft reports" in some form or other, and are they part of the "facts or data" that the expert has relied on? The language just quoted from amended Rule 26 does not directly answer either of these questions.

As a secondary source of interpretation, the Advisory Committee Notes are usually very helpful in resolving issues surrounding the meaning and intent of the Rules of Civil Procedure. It is well-established that some courts, by interpreting the prior version of Rule 26 to require experts to produce all of the drafts of their reports and any communications they had with counsel, created numerous issues, not the least of which were making experts reluctant to commit any opinion but the final one to paper (or the electronic equivalent of paper) and forcing experts and counsel to communicate orally so that the details of their discussions would not have to be revealed to opposing parties. The Advisory Committee Notes to the 2010 amendments talk about these problems in considerable detail.

As an overall description of the changes made to this subsection of Rule 26, the Notes state that the amendments "provide work-product protection against discovery regarding draft expert disclosures or reports ...." The motivation for the

change was, according to the Advisory Committee, frequent complaints "that routine discovery into attorney-expert communications and draft reports has had undesirable effects" which included increased costs, the need to hire a second set of non-testifying experts who could be spoken to freely without fear of disclosure, and impeding communication between counsel and testifying experts. These considerations also explain the change made to Rule 26(a)(2)(B), which formerly mandated disclosure of the "data or other information" relied on by testifying experts, but which now requires disclosure only of "facts or data" which the expert considers when formulating the report. Courts could, and did, construe the phrase "other information" to include draft reports and communications with counsel, but, according to the Notes, should not do so after that phrase was written out of the Rule.

Still, the Advisory Committee realized that any effort to cut back on the amount of information accompanying an expert report could have negative implications to the fairness of the trial process. Consequently, it took pains to distinguish between "theories and mental impressions of counsel," which ought not to be subject to disclosure or discovery, and "facts or data" on the other hand, a phrase which should be "interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." As the Notes to subdivision (b)(4)(C) explain, that rule "is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery" but should not be interpreted to "impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions...." As one example of the breadth of the discovery still permitted, the Advisory Committee cited "the expert's

testing of material involved in litigation, and notes of any such testing....” The cases which both parties cite in support of their positions are more easily understood in light of this backdrop.

The only Court of Appeals decision either side identifies (and they both cite this case) is Republic of Ecuador v. Hinchee, 741 F.3d 1185 (11th Cir. 2013). There, the District Court had compelled production of certain documents prepared by Dr. Hinchee, who had served in a related case as an expert witness for Chevron Corporation. Forty documents which Chevron and Dr. Hinchee withheld from production were submitted to the District Court for *in camera* review; the District Judge ordered 39 of them to be produced, excepting from the order only a draft report. The balance of the documents were described as “Dr. Hinchee’s notes” and email communications between him and other experts or with non-lawyers on Chevron’s staff. Id. at 1188.

Chevron first argued that both the emails Dr. Hinchee exchanged with non-lawyers who were not members of his own staff and his personal notes deserved work product protection. The Court of Appeals rejected this reading of Rule 26, finding that the language added by the 2010 amendments “reflects a calculated decision not to extend work-product protection to a testifying expert's notes and communications with non-attorneys” and limiting such protection to “[d]raft expert reports and attorney-expert communications ....” Id. at 1191-92. As an alternative argument, Chevron contended that the change in the language of Rule 26(a)(2)(from “data or other information” to “facts or data”) protected these documents from disclosure. The Court of Appeals read that language, though, as simply insuring that there was no conflict between what Rule 26(a)(2) required to be disclosed and what Rule 26(b)(4)(C) protected from discovery or disclosure - in other words, that the change in Rule 26(a)(2)

was meant to redefine the disclosure requirement to eliminate any reference to draft reports or attorney-expert communications. The Court saw no intent on the part of the drafters of the 2010 amendments, nor any language in those amendments, which was designed to "shield the theories of Dr. Hinchee and his fellow testifying experts" from disclosure or discovery. Id. at 1195. The District Court's order compelling disclosure of both the emails and the personal notes was therefore affirmed.

The litigation which spawned the Hinchee decision has produced additional case law on this issue. In Republic of Ecuador v. Mackay, 742 F.3d 860 (9th Cir. 2014), the notes of two other Chevron experts were ordered to be produced, and Chevron also appealed that order, raising the same arguments it presented in Hinchee. The Ninth Circuit Court of Appeals, reviewing the same textual language and Advisory Committee Notes laid out above, concluded that "the driving purpose of the 2010 amendments was to protect opinion work product — i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery" and that "[t]he protections for draft reports and attorney-expert communications were targeted at the areas most vulnerable to the disclosure of opinion work product." Id. at 870. Because Chevron's argument was premised upon the existence of work-product protection for the experts' own notes, the Court of Appeals rejected that argument and concurred with Hinchee and a third case involving the same issues, Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a), 735 F.3d 1179, 1187 (10th Cir. 2013), which also held that work-product protection did not extend to materials prepared by expert witnesses and that the phrase "facts and data" should be interpreted broadly to include any documents containing "factual ingredients," which, according to the court, "include far more than materials made up solely of 'facts or data.'"

These three cases seem to this Court to be fully consistent with the language of Rule 26 and the intent of the drafters of the 2010 amendments, as expressed in the Advisory Committee Notes. They stand for two propositions: that notes made by an expert witness are not work product, and that such notes typically contain "factual ingredients" and are therefore included in the type of "facts or data" an expert has considered in formulating opinions and therefore must disclose. Here, Defendants do not appear to be advancing a work product theory, so the first of these propositions is not directly germane to this case. Defendants do, however, argue that Dr. Hughes' notes, which they describe as including "his observations about and the analysis of facts and data that came directly from other sources, such as deposition transcripts, exhibits, and industry articles" do not "themselves contain independent facts or data" and are not subject to disclosure under Rule 26(a)(2)(B)(ii). Defendants' Memorandum, Doc. 117, at 7.

That argument is inconsistent with the Advisory Committee Notes and the three Court of Appeals cases, however. Defendants here, as Chevron did in those cases, urge a narrow reading of the phrase "facts or data" appearing in Rule 26(a)(2), but the intent of the drafters was just the opposite. Apart from shielding attorney work product from disclosure, there is no reason to prevent an opposing party from finding out how an expert arrived at his or her conclusions, including discovering the thought processes which led the expert there. Drafts are protected because, as noted above, the drafting process ordinarily entails communications between the expert and counsel and usually involves feedback from counsel, a process which is likely to include revelation of attorney work product. Notes made independently by an expert do not fall into that category, and notes which contain observations about facts or analyses of facts

have “factual ingredients,” making them subject to disclosure or discovery. Although the Court has not seen these notes, from Defendants’ descriptions of them, they appear to qualify as “facts or data,” as that phrase is read broadly, and cannot be withheld from production on that ground.

The only case cited by Defendants on this precise point, D.G. ex rel. G. v. Henry, 2011 WL 1344200 (N.D. Okla. April 8, 2011), is not only inconsistent with the later authorities the Court has found persuasive, but its statement that “notations or highlights on the case files do not constitute facts or data and do not need to be provided under Fed.R.Civ.P. 26(a)(2)(B)(ii)” is *dictum* because, in that case, Plaintiffs had told the court “that there are no notations or highlights” and the Court made no contrary finding. Id. at *2. Given that the Henry court also provided no reasoning before making that categorical statement, even if that were the court’s holding, this Court would not be inclined to adopt it.

In addition to relying on Henry, Defendants attempt to distinguish Hinchee on the grounds that the notes which the court ordered to be produced in that case were “personal in nature, for the expert’s own use,” apparently attempting to differentiate such notes from the type of notes made by Dr. Hughes. See Defendants’ Reply, Doc. 119, at 3. However, the Court does not read the District Court’s decision in Hinchee (In re Application of Republic of Ecuador, 2012 WL 5519611 (N.D. Fla. Nov. 2, 2012)) quite the same way. There, the District Judge described the notes in question as “notes on matters of substance made by Dr. Hinchee apparently for his own use” including “handwritten notes on other materials” which had been provided to him in connection with his work as an expert witness. Id. at *2. It is difficult to equate the concept of notes made by an expert “for his own use” in the litigation with “personal” notes - clearly, they are

not the same - and notations made on other materials are precisely the same type of notes at issue here. There is nothing "personal" about such notes other than the fact that they were apparently made, both in Hinchee and here, by the expert without express direction to do so by counsel, but both clearly related to the subject of the litigation rather than some personal and unconnected matter - otherwise, they would be irrelevant. Further, Defendants' assertion that the notes made by Dr. Hughes' constituted a "draft" of his expert report means that they were considered by him in formulating his opinion, so the two prerequisites for disclosure under Rule 26(a)(2)(B)(ii) - that the notes are "facts or data" and they were "considered" by the expert in the opinion-forming process - have been satisfied here.

Defendants' other argument is that these notes are properly viewed as a "draft report." Citing to In re Application of Republic of Ecuador, 280 F.R.D. 506 (N.D. Cal. 2012), which, on appeal, was Republic of Ecuador v. Mackay, supra, Defendants contend that any notes used by an expert to compile and prepare the final expert report are the type of "draft reports" which Rule 26(b)(4)(B) protects from discovery "regardless of the form in which the draft is recorded."

As to the issue of whether such notes constitute "draft reports," the Ecuador court found Chevron's attempt to characterize their experts' notes that way to be unsupported. The District Court apparently reviewed the notes and found that "at most, the notes appear to compile information that might later be used in preparing to testify or in compiling a report or might never be used at all." Id. That court found that they simply were not part of a draft report and were not protected from disclosure by Rule 26(b)(4)(B).

There is not an abundance of case law which helps the Court distinguish between notes which are simply a compilation of

information for possible later use in a case, and notes which truly are part of the draft of a final expert report. There is a tangential reference to notes made by a testifying expert in Graco, Inc. v. PMC Global, Inc., 2011 WL 666056, *14 (D.N.J. Feb. 14, 2011), where an expert was ordered to produce "notes of ... testing," but that seems simply to be a reference to the same language found in the Advisory Committee Notes. A more direct statement can be found in Dongguk University v. Yale University, 2011 WL 1935865, *1 (D. Conn. May 19, 2011), where the court said that "as a general matter, an expert's notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party's attorney and the expert witness." The Court has been unable to locate any cases, however, which attempt to formulate a test to be used to distinguish "notes" from "drafts," and perhaps it is appropriate that there be no bright-line standard, since most cases will turn on their facts and this appears to be a fact-dependent issue.

As explained more fully below, the Court will require Defendants to submit the notes in question for *in camera* review before making a decision about whether they can be legitimately characterized as "draft reports." However, explaining some general principles may assist Defendants in deciding either to do so or to conclude that it may not be worth the effort.

Experts review many things in preparation for writing a report. In a case where any kind of testing, analysis or observation of a tangible item is involved - for example, testing the braking system of a vehicle to see if it is working properly, or analyzing the chemical composition of a medication - the notes taken by the expert during that procedure are clearly not "draft reports." If it were otherwise, everything an expert writes down, no matter when in the opinion-forming process that occurs, and no matter what the reason, would qualify as a "draft." That

is simply not consistent with either the language of the Advisory Committee Notes or with the concept that full discovery of the bases of expert opinions (setting aside attorney work product) is the norm and furthers the search for the truth.

It is not immediately apparent why an expert's notes in a case not involving a tangible item should be viewed differently. The type of note-taking which typically occurs in that kind of case seems to be the equivalent of what an engineer does when, for example, he or she observes a machine or a mechanical process and jots down notes or preliminary observations while doing so. In a case where the factual matter to be examined and analyzed consists of witness statements, depositions, or written policies, why should the notes or preliminary observations made by a reviewing expert be treated differently? And there is a substantial risk in interpreting the concept of "draft report" too broadly. While an expert may legitimately believe that every thought which occurs to him or her from the beginning of the assignment onward is a nascent report or portion of one, if the law makes all of these materials drafts, a substantial portion of the expert's actual thought process will be shrouded in secrecy, and opposing parties will have to rely on the expert to recount that process fully and truthfully without having the means to test the expert's narrative through contemporaneously-created notes. Finally, it is important to remember that the protection against disclosure in the context of draft reports and communications with counsel is designed not to shield the expert's reasoning process from discovery, but to guard against the disclosure of attorney work product and to facilitate the communication process between attorney and expert. Having to turn over notes taken by an expert which did not result from or reflect any attorney-driven communications does not implicate the work product doctrine, and the fact that such notes may be

subject to discovery does not appear to impact the attorney's ability to communicate effectively with the expert as the drafting process gets underway in earnest.

This is not to say that in order to obtain protection of an expert's written product as a draft report, that writing must be so labeled or be in any particular format. Rule 26(b)(4)(B) explicitly says otherwise. But there must be a reasoned and principled way to draw the connection between a written note and the final expert report which protects actual drafts but allows disclosure of the preparatory material which is used to make a draft, and it is difficult to draw that line in the absence of any salient facts. To answer the precise question presented in this case - not the larger legal question, but simply to decide if the notes made by Dr. Hughes are really drafts of his report - the Court would need to see his final report, to see his notes, and to determine how significant the notes appear to be in the context of his final set of opinions. It would also help the Court to know how well-formulated the notes are, and how much time elapsed between when he took the notes and when he began to draft an opinion in earnest. It will also be useful to explore whether the notes appear in any subsequent or final draft in substantially the same language, or whether they appear simply to have formed the basis for Dr. Hughes' conclusions in a manner similar to other materials - like the deposition testimony or the content of other documents he reviewed - which cannot be considered "draft reports."

Ordinarily, the only way to accomplish all of this is to require an *in camera* inspection, accompanied by whatever arguments Defendants might want to make about why these particular notes ought to be deemed drafts of Dr. Hughes' final report. In the absence of any other resolution of the issue presented, that is what the Court will order.

It may be, however, that having received some guidance from the Court, Defendants will concede the issue, knowing that they face a difficult road ahead of them in persuading the Court that notes which are almost presumptively not "drafts" might be viewed as such here. If they choose that route, they should so advise the Court and arrange to make the required disclosures. If not, the Court will conduct an expeditious review of the various documents needed and will provide a prompt decision.

III.

For the reasons set forth above, the Court directs Defendants, if they wish to continue to withhold the notes in question, to submit those notes to the Court *in camera* within seven days of the date of this order. They shall also submit a copy of Dr. Hughes' final report, any drafts of that report (also *in camera*), and any additional argument they wish to make about the question of whether the notes are a "draft report," focusing on the factors set forth in the preceding section. Otherwise, they shall arrange to disclose the notes to Plaintiffs in a timely fashion.

IV.

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 14-01, pt. IV(C)(3)(a). The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect even if a motion for

reconsideration has been filed unless it is stayed by either the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge