Culnane v. Johnson's of New Hampshire, Inc., et al., No. 13-1-05 Bncv (Howard, J., May 19, 2008)

STATE OF VERMONT
BENNINGTONCOUNTY

ROBERT A. CULNANE, Individually and as Executor of the Estate of Michelle R. Culnane, CHRISTOPHER M. CULNANE, and COURTNEY M. CULNANE,
Plaintiffs

v.

BENNINGTON SUPERIOR COURT
DOCKET NO. 13-1-05 Bncv

JOHNSON'S OF NEW HAMPSHIRE, INC., ULTRAMAR ENERGY, INC., Individually and as successor in Interest to Johnson's of New Hampshire, Inc.,
Defendants.

ORDER RE: PLAINTIFFS' MOTION TO COMPEL

In this wrongful death action, Plaintiffs and Defendants disagree as to whether documents provided by Defendant Ultramar Energy's counsel to expert witnesses retained by Defendants to testify at trial should be disclosed to Plaintiffs notwithstanding attorney-client and work product privileges. In its Expert Interrogatories and Requests to Produce served upon Defendant Ultramar Energy, Plaintiffs requested copies of the file maintained by each expert retained by Defendants. Defendants agreed to produce some of the requested information but, citing attorney client and work-product privileges, refused to provide (1) correspondence between counsel and experts concerning tactical issues; (2) information in the experts' file that reflects

and may have framed the experts' understanding of the case documents relation to an expert who was not retained to testify but may be called as a fact witness; (3) discussions pertaining to other experts; and (4) documents containing tactical information and analysis of plaintiff's experts. Defendant Ultramar Energy additionally refused to disclose documents which contain communications between Ultramar and its attorneys as well as communications between Ultramar, its attorneys and private investigators retained by Ultramar in anticipation of litigation, because such documents, while contained in an expert witness's file, were inadvertently and mistakenly sent to the expert by a claims specialist in Ultramar's in-house legal department. Plaintiffs have moved for an order to compel such disclosures. For the reasons set out below, Plaintiffs' Motion to Compel is **DENIED**.

Analysis

Attorney Work Product

Under the current version of the applicable Vermont discovery rule, it is unclear whether an attorney's mental impressions and legal theories, i.e. "core" work product, are protected from disclosure when the attorney has communicated those impressions and theories to an expert who will be testifying at trial. See V.R.C.P. 26(b)(3), (4). The Vermont Supreme Court has not addressed this issue, and the trial courts are divided with two Vermont trial courts holding that such communications are not protected, see *Scott v. Siva*, No. S0596-97 RcC (Teachout, J., Apr. 16, 1999); *T. Copeland & Sons v. Maska U.S., Inc.*, No. S118-92 OeC (Martin, J., Mar. 9, 1995), and one trial court holding that they are, see *Sargood v. Southwestern Vt. Med. Center*, No. 5-1-05 Bncv (Wesley, J., Feb. 22, 2006).[1]

[1] The parties also cite to *Rosa v. Dartmouth-Hitchcock Med. Center/Mary Hitchcock Memorial Hosp./Dartmouth-Hitchcock Clinic*, No. 93-2-06 Wmcv (Howard, J., Jan. 3, 2008). In *Rosa*, however, the Court reviewed the law related to this issue but refrained from deciding whether the rule adopted in *Scott* or the rule announced in *Sargood* should control in Vermont. *Id.*

The federal courts are similarly divided on this issue, with a majority of federal courts holding that no work product protection applies and any and all communications between counsel and an expert who will testify must be disclosed. Compare *Dyson v. Technology Ltd. V. Maytag* 241 F.R.D. 247 (D.Del. 2007); *Baum v. Village of Chittenango,* 218 F.R.D. 36 (N.D.N.Y. 2003); *Weil v. Long Island Savings Bank,* 206 F.R.D. 38 (E.D.N.Y. 2001); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585 (S.D. Miss. 2000); *Lamonds v. General Motors Corp.,* 180 F.R.D. 302 (W.D. Va. 1998); *Musselman v. Phillips,* 176 F.R.D. 194 (D. Md. 1997); *Karn v. Ingersoll-Rand Co.,* 168 F.R.D. 633 (N.D. Ind. 1996); and *Intermedics, Inc. v. Ventritex, Inc.,* 139 F.R.D. 384 (N.D. Cal. 1991) (all holding that all communications from counsel to testifying expert must be disclosed, even if they contain "core" work product that would otherwise be protected); with *Bogosian v. Gulf Oil Corp.,* 738 F.2d 587 (3d Cir. 1984); *Krisa v. Equitable Life Assurance Soc.*, 196 F.R.D. 254 (M.D.Pa. 2000); *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7 (D.Mass. 1999); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627 (E.D.N.Y. 1997); and *Haworth, Inc. v. Herman Miller, Inc.,* 162 F.R.D. 289 (W.D. Mich. 1995) (all holding that "core" work product is protected from disclosure by testifying expert); see also *Crowe Countryside Realty Assocs. v. Novare Engineers, Inc.,* 891 A.2d 838 (R.I. 2006) ("clear language in … subdivision (b)(3) requires that a court protect all core or opinion work product of an attorney, whether or not shared with an expert."); *McKinnon v. Smock*, 445 S.E.2d 526 (Ga. 1994) (court must do *in camera* review to protect against disclosure of attorney work product). In adopting such a rule, the courts in the majority tend to reason that the need for the jury to fully understand the basis for an expert's opinion and determine the weight to give it, the desire for a trial without surprises, tricks or game-playing, and the attractiveness of a "bright-line rule", outweigh any detrimental effect on the adversarial system the fear of disclosure may have. See,

e.g., *Baum*, 218 F.R.D. at 40; *Weil*, 206 F.R.D. at 41. The first policy reason is by far the most important, and this has become more and more true as the role of experts has become more and more pivotal over time. See *Weil,* 206 F.R.D. at 41 ("Given the importance that expert testimony can assume, a jury is entitled to know everything that influenced an expert's opinion in order to assess his credibility, including legal theories or conclusions about a case that an attorney has shared that may have shaped the expert's opinion."); *Musselman,* 176 F.R.D. at 200 ("It cannot seriously be denied that the fact that an attorney has interjected himself into the process by which a testifying expert forms the opinions to be testified to at trial affects the weight which the expert's testimony deserves.") These courts also note that the threat to the adversarial system is far from compelling since, after all, counsel who do not want their theory of the case to be disclosed by the expert can refrain from communicating it to the expert, and instead give the expert everything and let the expert reach his or her own conclusion. See *Baum,* 218 F.R.D. at 40; *Lamonds,* 180 F.R.D. at 306.

As the *Sargood* Court points out, however, the federal discovery rules contain language that the Vermont rules do not contain. Indeed, F.R.C.P. 26 requires attorneys to provide opposing counsel with an expert report signed by the witness containing, *inter alia*, the opinions the expert will testify to and the bases for such opinion even if such disclosure requires divulgence of core attorney work product. F.R.C.P 26(a)(2)(B). The Vermont rules contain no such requirement, and indeed, the Vermont Supreme Court, while incorporating into the Vermont civil rules many of the substantial changes made to the federal discovery rules as part of the 1993 amendments to the Federal Rules of Civil Procedure, specifically did not adopt those portions of the federal discovery rules "requiring mandatory disclosure of discoverable information at the outset of the proceeding", which includes the above cited provision. See

V.R.C.P. 26; Reporter's Notes—1996 Amendment, V.R.C.P. 26 ("Rule 26 is amended in partial adoption of the extensive 1993 amendments to Federal Rules 26-37…The extensive 1993 amendments to Federal Rule 26, requiring mandatory disclosure of discoverable information at the outset of the proceeding, have not been adopted in view of the fact that implementation of these requirements is currently suspended in the United States District Court for Vermont and other federal districts."). The Court's decision not to amend Vermont's civil rules to include the requirement that attorneys submit expert reports to opposing counsel led the *Sargood* Court to conclude that Vermont continues to maintain a "continuing deference to the historical recognition of the general policy against invading the privacy of an attorney's course of preparation", and thus that Court held that under Vermont's civil rules core attorney work product shared with an expert retained to testify at trial is exempt from discovery. *Sargood v. Southwestern Vt. Med. Center*, No. 5-1-05 Bncv (Wesley, J., Feb. 22, 2006).

In reaching its conclusion, the *Sargood* Court relied on the Third Circuit's opinion in *Bogosian*, in which that Court held that, under the pre-1993 federal discovery rules, the attorney work product doctrine made it impermissible for the district court to grant a motion to compel which would permit discovery of opposing counsel's mental impressions and strategies contained in documents shared with an expert. *Id.* (citing *Bogosian*, 732 F.2d at 592-97. That Court reasoned that the purpose of the discovery rule is solely to permit discovery of facts known or opinions held by the expert and that "[e]xamination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory." *Bogosian*, 732 F.2d at 595. The Court further opined that even if inquiry into the lawyer's role in developing the experts theory is permissible, an issue not before the *Bogosian* Court, "the marginal value in

the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product." *Id.*

Despite the difference in language between the Vermont and federal discovery rules, some courts interpreting language such as that in our discovery rule have followed the majority approach. See *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278 (4th Cir. 2007); *Scott v. Siva*, No. S0596-97 RcC (Teachout, J., Apr. 16, 1999). In *Scott*, for instance, the Rutland Superior Court held that "the materials of testifying experts are excepted from the scope of the work product rule" in the Vermont civil rules by virtue of the introductory reference in V.R.C.P. 26(b)(4) permitting discovery from experts. *Scott v. Siva*, No. S0596-97 RcC (Teachout, J., Apr. 16, 1999). That Court opined that its analysis is "consistent with liberal discovery and the maximum opportunity of the Defendant to determine the basis for the expert's opinion." *Id.*

This Court recognizes that no clear consensus exists in Vermont as to whether the rule announced in *Sargood* or that announced in *Scott* should be followed. In the Court's view, the rationale employed by the *Sargood* Court is more persuasive than that adopted in *Scott*, because the *Sargood* analysis more accurately and completely captures the Vermont Supreme Court's public policy with regard to attorney work product. As was pointed out in *Sargood*, the Court's decision to amend Rule 26 to include some of the changes made to its federal counterpart in 1993 but specifically refrain from paralleling the federal requirement that an expert report be submitted is quite illustrative of the Court's continuing deference to the attorney work product doctrine. Much of the Vermont Rules of Civil Procedure reflect an almost verbatim consistency with the Federal Rules of Civil Procedure, and thus the Court's intentional decision to exclude

from amendment provisions, such as mandatory preparation of expert reports, which could result in invasion of the attorney work product doctrine indicates that, at the very least, the Court was reluctant to adopt a rule which would have the effect of abrogating the attorney work product doctrine. Moreover, in the several years since the Court first considered the 1993 amendments to F.R.C.P. 26, the Court has not revisited its decision, and never adopted any provision requiring the preparation of an expert's report. This Court finds such a history distinguishes many of the cases allowing disclosure, which involve different language than Vermont's Rule 26(b)

Plaintiffs urge the Court to adopt the *Scott* rule suggesting that since expert testimony largely contains scientific and technical information requiring the jury to rely even more on the specialized knowledge of the witness, it is integral that opposing counsel be able to discover all relevant information such that cross-examination can effectively uncover weaknesses, biases or lack of completeness in the expert's opinions and in the factual bases informing those opinions. While the Court certainly recognizes the importance of effective cross-examination of experts, there is no evidence that effective cross-examination of experts can occur only if the attorney work product rule is discarded and Plaintiffs are provided with opposing counsel's work product merely because it was shared with his expert. Indeed, much as was noted in *Bogosian*, there is marginal value at best in the revelation on cross-examination that the expert's view may have originated with or been significantly influenced by the attorney, and thus, it would be unwarranted to override the strong policy against disclosing documents that contain attorney work product. The Rhode Island Supreme Court in *Crowe Countryside Realty* dealt with its Rule 26, which still contains similar language as in the Vermont counterpart. It found that the "strong policy" and case law against disclosing attorney work product overcame concerns as to more

effective cross-examination of experts as relied on by courts allowing disclosure. 891 A.2d at 847. It stated:

> The very essence of trial preparation and strategy is that an attorney must take facts, sift them, decide what is relevant and what is not, develop theories based on applicable law, and prepare his or her client's witnesses accordingly. [citation omitted]. Without the ability to protect their own conclusions and theories from discovery, attorneys may not be able to fully and confidently prepare expert witnesses for their client's trials. Permitting full disclosure of everything revealed to expert witnesses might hamper the trial preparation process because attorneys would be reluctant to reveal their mental impressions, legal theories, trial tactics, and strategies to testifying experts. In our opinion it is the disclosure of just such information that Rule 26(b)(3)'s dictation of the work-product privilege was intended to prevent. *Id*.

Therefore, the Court concludes that the *Sargood* rule interpretation, which exempts from discovery core attorney work product including mental impressions of counsel and discussions of trial strategies, is the appropriate rule and shall be applied in the instant case. With this determination, the Court will examine the various specific requests.

Plaintiffs' first request on the instant motion is that the Court require Defendants to produce their correspondence with their experts concerning tactical issues as well as some other documents containing tactical information and analysis of plaintiffs' experts. In the Court's view, discovery of these documents would certainly violate the *Sargood* rule as the documents requested are likely to contain significant amounts of core attorney work product in the form of Defendants' attorney's mental impressions and strategies on the instant case. Furthermore, Plaintiffs fail to provide the Court with any evidence that there is a substantial need for the requested evidence such that it would be appropriate for the Court to grant the motion to compel notwithstanding the work product issue. Moreover, the Court notes that while the documents requested would perhaps provide significant illumination as to the Defendants' trial strategy, in the Court's view very little would actually be learned by Plaintiffs that would enhance their ability to effectively cross-examine Defendants' experts. Therefore, the policy reasons cited in

both *Scott* and *Sargood* would not be served by granting the instant motion, and as such, the motion to compel is denied as to these documents.

Plaintiffs' next request involves documents relating to an expert who was not retained to testify as an expert who may be called as a fact witness, and discussions pertaining to other experts. Plaintiffs' request for these documents also must fail because even under the broader test announced in *Scott*, Plaintiffs' right to these documents has not yet attached because the subject witnesses have not been designated to testify as an expert. Indeed, as was noted in *Scott*, a party is free to employ a non-testifying expert for the purposes of consulting with the attorney on legal strategy without fear that such communications are subject to discovery because the right to discover such communications hinges on the designation of an expert as a testifying witness under this broader test. Unless and until the expert is designated as a testifying witness Plaintiffs' request for documents is premature. Moreover, under the governing *Sargood* rule, the documents requested, which almost certainly contain the attorney's mental impressions regarding the case, are exempt from discovery.

Next, Plaintiffs seek an order requiring Defendants to produce documents containing information in the expert's file that may have framed the expert's understanding of the issues. To the extent that such information does not contain statements by Defendants' attorneys on issues of strategy or their own legal analysis of the case, the information requested appears to fall squarely within the ambit of material specifically subject to discovery under V.R.C.P. 26(b)(4). As such, the work product rule does not bar discovery of such information, but as discussed *infra,* such information is protected from discovery by the attorney-client privilege.

Plaintiffs' final request involves investigation information that Defendants' claim was inadvertently sent to an expert, raising the issue of whether an unauthorized and accidental

transfer of documents containing work product to the expert can waive the privilege such that the information is subject to discovery. The controlling Vermont case on this issue is *Hartnett v. Medical Center Hosp. of Vermont*, in which the Court held that where a medical report prepared in anticipation of litigation and treated as work product was inadvertently sent to plaintiff without authorization or knowledge of defendant's counsel, the trial court properly held that no waiver of the work product rule occurred.146 Vt. 297, 297 (1985). But see *Barnhart v. Doherty*, No. 561-9-04 Rdcv (Norton J., June 29, 2006) (Rutland Superior Court held that waiver of work product privilege occurred where plaintiffs' counsel knew the documents were in the experts file, he did not believe his copy to be the sole copy, he already provided the document to a third party and knew the document ended up in expert's file). The Court reasoned that there was no credible showing that the defendant's attorney handled the document is such a way to know it would be disclosed to plaintiff's attorney, and in fact, indicated that he believed the only copy of the document was in his file. *Id.* Similarly, in the instant case, the investigation information sought by Plaintiff was inadvertently sent to Defendants' expert by a claims specialist in Defendant Ultramar's headquarters without authorization from Defendants' counsel. Defendants' counsel also reports to the Court that they were unaware that the documents sought were even in the possession of their expert until they were preparing their expert disclosures. As such, there is no credible evidence before the Court establishing that Defendants' counsel handled the documents sought in such a way that they must have known that the documents would be disclosed. Therefore, the Court concludes that Defendants have not waived their work product privilege and the motion to compel as to these documents cannot be granted.

Attorney Client Privilege

The discovery requests also raise issues of attorney client privilege distinct from work product privilege. Plaintiffs contend that they should be granted discovery of (1) the information in the expert file that reflects and may have framed the expert's understanding of the case; (2) the investigation information that was allegedly sent to an expert witness inadvertently and (3) documents containing tactical information and analysis of plaintiffs' expert, despite Defendants' claim of attorney-client privilege. In Vermont, "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client…between representatives of the client." V.R.E. 502(b). A communication is considered confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of the professional legal services...". V.R.E. 502(a)(5). Additionally, a representative of the client includes an individual, "who while acting in the scope of their employment for the client, makes or receives a confidential communication necessary to effectuate legal representation for the client." V.R.E. 502(a)(2)(B); *Baisley v. Missisquoi Cemetery Ass'n*, 167 Vt. 473 (1998) ("Courts have recognized the confidentiality of lawyer-client communications for centuries. [citation omitted]" .

In the instant case, the documents requested in (1) and (3) appear to fall squarely within the attorney-client privilege in that they contain analysis and observations made by experts in the course of their employment for Defendants, which were likely intended to be confidential and shared only with Defendants, their attorneys or any other representatives of Defendants as was necessary for legal representation in this matter. Plaintiffs fail to provide the Court with any evidence that such documents were created with any intention other than confidential

communications in furtherance of Defendants' legal representation, and thus, the Court concludes that the attorney-client privilege attaches to the documents in (1) and (3).

Plaintiffs' request for documents in (2), however, raises the issue of whether the inadvertent disclosure of documents to an expert retained to testify can constitute a waiver of the attorney-client privilege. The Vermont Supreme Court has not considered this issue, but Courts in other jurisdictions have reviewed the issue and as such, there are three approaches routinely applied: (1) the lenient approach; (2) the strict approach; or (3) the "middle of the road" or moderate approach. See, e.g. *Harp v. King*, 835. A.2d 953, 966-67 (Conn. 2003) (discussing at length the different approaches to be applied and holding that the moderate approach should be applied where privileged material was inadvertently disclosed to opposing party). But see *Corey v. Norman, Hanson, & DeTroy*, 742 A.2d 933, 941 (Me. 1999) (adopting the lenient approach and rejecting the strict approach as adopted by Maine federal courts). Under the lenient approach, the privilege can only be waived knowingly, and thus, a finding of inadvertence ends the inquiry. *Harp*, 835 A.2d at 966. While this approach certainly enforces the principle that only the client can waive the privilege, it ignores the importance of confidentially and provides an obvious disincentive for attorneys to carefully maintain confidentially because a simple finding of inadvertence can undo the effects of carelessness by counsel. *Id.*; *Corey*, 742 A.2d at 941-42. The second approach, known as the strict approach, holds that "any document produced either intentionally or otherwise, loses its privileged status with the possible exception of situations [where] all precautions were taken." *Harp*, 835 A.2d at 966. Unlike the lenient approach, this test certainly holds attorneys and clients accountable for their carelessness, but such a rule where privileged documents inadvertently released may lose their privileged status even if measures to protect privilege are employed, may cause "clients to have much greater

hesitancy to fully inform their attorneys" resulting in a chilling of communications between attorneys and clients. *Id.* It also unduly punishes the client for their attorney's carelessness. Finally, under the moderate test the trial court employs a five-step analysis of the inadvertently disclosed document to determine the scope and extent of the privilege: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosures in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error." *Id.* at 966-67. But see *Corey*, 742 A.2d at 42 (rejecting moderate approach because it creates "an uncertain, unpredictable privilege, dependent on the proof of too many factors concerning the adequacy of the steps taken to prevent disclosure").

In recognition of the fact that the moderate approach most appropriately balances the "competing policy interests of preserving confidential attorney-client communications and encouraging the party seeking the benefit of the attorney-client privilege to take care in the handling of otherwise privileged material", this Court holds that the moderate approach shall be applied in the instant case. *Harp*, 835 A.2d at 967. Further supporting the Court's adoption of the moderate approach is *Harnett v. Med. Center Hosp. of Vermont*, discussed *supra*, in which the Court upheld the trial court's conclusion that there was no waiver of the work product privilege after the trial court considered many of the same factors to be considered under the moderate approach here. 147 Vt. at 300. As such, in applying the logic of that case by analogy, the Court concludes that since the inadvertently disclosed documents were never authorized by Defendants' counsel to be released, such documents were released to only one expert, and upon discovery of the inadvertent disclosure of the documents, counsel took action to retrieve said

documents, the inadvertent disclosure of the documents does not constitute a waiver of attorney-client privilege. Moreover, in applying the moderate approach test, it is apparent to the Court that Defendant Ultramar's claim specialist merely made a clerical mistake in including the affected documents in the group of documents sent to one of Defendants' experts, and that this accidental disclosure, particularly when the voluminous amount of documents involved in the instant case are considered, was not careless and thus, cannot work a waiver of attorney-client privilege on the facts presented. Accordingly, Plaintiffs' motion to compel documents upon which attorney-client privilege is claimed cannot be sustained.

ORDER

Plaintiffs' motion to compel is **DENIED.**

Dated at Bennington, VT, this _____ day of May 2008.

_____
David Howard
Presiding Judge