

Protecting documents given to testifying experts from becoming discoverable

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In preparation for trial, expert witnesses are often retained and briefed based upon reports and documents provided to them from counsel. Two types of work product may be used to prepare documents and internal memorandum which are subsequently given to an expert witness: 1) fact work product, and 2) opinion work product. If memorandum prepared by a law firm in anticipation of litigation contains the attorney's opinions relating to potential theories of liabilities, references to the expert's opinions, and factual summaries of his client's records, the attorney's personal notes and records about the proposed arguments constitute protected work product. *Whealton v. Marshall, et al.*, 631 So. 2d 323, 325 (Fla. 4th DCA 1994) (holding the law firm's internal memorandum used in preparation for litigation were not discoverable work product).

In *Whealton*, the law firm prepared a memorandum which included the attorney's theory of liability, factual summaries, personal notes and proposed arguments. *Id.* The court held that while the portions containing factual information may be discoverable, the opposing party was denied as to the remaining portions of the document. *Id.* Furthermore, in order for the opposing party to obtain access to the factual information, they must allege and show a need and hardship in order to compel production of the factual information. *Id.* (citing *State Farm Mutual Automobile Ins. Co. v. LaForet*, 591 So. 2d 1143, 1144 (Fla. 4th DCA 1992)). The court found that the requesting party had access to better and more probative versions of the expert's opinion because they had obtained copies of the expert's files, written opinion, and had the opportunity to depose the expert regarding his opinion. *Id.* Based on the foregoing findings, the court ruled that the requesting party lacked a showing of need, lack of access to factual information, or undue hardship, and thus, the memorandum was protected by the work product privilege. *Id.*

The underlying rationale as to the discoverability of an attorney's work product is also applicable to testifying witnesses, not necessarily limited to consulting expert witnesses. If material is used to prepare a witness before testifying and is privileged, then it is protected from discovery. *Proskauer Rose, LLP v. Boca Airport, Inc.*, 987 So. 2d 116, 118 (Fla. 4th DCA 2008) (If a witness reviews work product before testifying, the documents remain protected and discoverable only upon a showing of need and undue hardship.) In *Proskauer*, the court found that "[w]hile the individual documents ordered produced, along with others, had already been disclosed to [the opposing party], the effect of the discovery order now challenged would be to disclose to the opponent which documents petitioner's counsel thought were most relevant, which, along with the summaries it prepared for [expert's] deposition, were clearly work product and privileged attorney-client communication." *Id.* Furthermore, the court noted that FLA. STAT. §90.613 only requires discovery if the witness used the document "while testifying" if used to refresh the memory of a witness. *Id.*

Although opinion work product given to an expert in preparation for trial is generally protected, the work product created by the *expert* is not afforded the same privilege. In Florida, "[a] party may ... discover both facts and opinions held by experts if they are relevant to the

subject matter and are not privileged even if required or developed in anticipation of litigation or for trial.” *Mims v. Casademont*, 464 So. 2d 643, 644 (Fla. 3d DCA 1985) (thereafter holding the report of an expert retained to testify is not protected by the work product privilege). Thus, any reports prepared by the expert will not be protected throughout the discovery process.

Lastly, if a report is opinion work product, prepared and disclosed to a testifying witness, and is not intended to be introduced at trial, the report will be afforded the protection of opinion work product. *Smith v. State*, 873 So. 2d 585 (Fla. 3d DCA 2004). In *Smith*, defense counsel prepared a 22-page psycho-social report and an addendum including a summary of witness statements italicizing certain portions. *Id.* at 588. In this case, with no reasonable expectation that the report would be used at trial, the court held that the report and addendum constituted opinion work product. *Id.* Furthermore, the court held that the act of disclosing the report to an expert witness did not alone waive the work product privilege. *Id.* at 591.

In sum, if opinion work product is disclosed to an expert witness in anticipation and preparation for trial, and that work product is not intended to be used or disclosed at trial, then the document(s) are protected under the work product doctrine to the extent that they constitute opinion work product. If fact work product is disclosed, it will be discoverable if the opposing party alleges and shows both a need and an undue hardship if they are not provided the information. Therefore, disclosure of any case chronology or litigation analysis created by counsel which includes strategy, opinions, and summaries which would reveal counsel’s thought process would constitute opinion work product and thus would be privileged even if disclosed to a testifying expert.

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