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United States District Court, D. Connecticut.

Richard MESSIER, et al.
v.
SOUTHBURY TRAINING SCHOOL, et al.

No. 3:94–CV–1706 (EBB). | June 29, 1998.

Opinion

RULING ON PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS

BURNS, Senior J.

***1** Plaintiffs, three advocacy organizations and seven individual residents or former residents of Southbury Training School ("STS"), bring this class action for injunctive relief against defendants STS, Connecticut Department of Mental Retardation ("DMR"), Department of Public Health and Addiction Services and Department of Social Services. Plaintiffs allege violations of the Due Process Clause of the Fourteenth Amendment, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Social Security Act. This Court denied a motion to dismiss by defendants DMR and STS on February 9, 1996, and granted plaintiffs' motion for class certification on July 8, 1996.

Now the plaintiffs move the Court to compel production of certain documents prepared by the defendants' experts at the request of the defendants' counsel. For the following reasons, the plaintiffs' Motion to Compel and for Sanctions (Doc. No. 340) is DENIED. The defendants' related Motion for Reasonable Expenses in Opposing the Plaintiffs' Unjustified Motion to Compel (Doc. No. 365) is also DENIED.

I. Background

The current controversy relates to a request by the defendants' counsel to the defendants' experts to analyze the reports of the plaintiffs' experts and indicate which points each expert believes he or she can rebut. The plaintiffs contend that the "written analyses of plaintiffs' experts' reports," Plaintiffs' Mot. to Compel at 1, which resulted from this request, are discoverable as material considered by an expert in forming his or her opinion pursuant to FED.R.CIV.P. 26(a)(2)(B). The plaintiffs also argue that the defendants failed to assert a privilege in a timely manner and improperly directed their experts not to answer questions about the documents at issue during the defendants' experts' depositions.

The defendants disagree, contending that the documents in question are protected work product. The defendants claim that far from being written reports, the documents are simply questions and strategy suggestions. As such, the argument continues, they were written by the experts in a consultative role in this highly technical litigation and have nothing to do with the formation of their expert opinions about which they will testify at trial. Furthermore, the defendants assert that this claim of privilege was timely advanced, both during depositions and in writing in a letter from the defendants' counsel to the plaintiffs' counsel.

In order to fairly resolve this issue, the Court ordered the defendants to submit the documents for an *in camera* inspection. Review of the documents convinces the Court that the defendants are correct in their assertion that these papers were generated by the defendants' experts in a consultative capacity. Accordingly, the documents are not subject to discovery by the plaintiffs.

II. Legal Analysis[1]

A. Discovery

The 1993 amendments to FED.R.CIV.P. 26(a)(2)(B) contemplate that all materials "considered" by a testifying expert witness in forming her opinion are fully discoverable by the adverse party, notwithstanding the work product doctrine. *Karn v. Ingersoll Rand,* 168 F.R.D. 633, 639 (N.D.Ind.1996). This mandate of full disclosure stems from several policy concerns relating to expert testimony.[2] Underlying these concerns is a recognition that expert testimony is often determinative of one or more central issues in a case. *Intermedics, Inc. v. Ventritex, Inc.,* 139 F.R.D. 384, 394 (N.D.Cal.1991). Therefore, it is critical that an adverse party have an opportunity to explore any biases or unreliabilities that might affect an expert's objectivity. *Id.* at 390.

***2** Such broad discovery does not, however, completely foreclose application of the work-product doctrine to material provided by experts to counsel.[3] If an expert is retained as both a consultant and a testifying witness, the work-product doctrine may be invoked to protect work completed by the expert in her consultative capacity as long as there exists a clear distinction between the two roles. *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.,* 563 F.Supp. 1013, 1014 (S.D.N.Y.1983). Any ambiguity about which function

was served by the expert when creating a document must be resolved in favor of discovery. *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.,* 171 F.R.D. 57, 62 (S.D.N.Y.1997).

In *B.C.F. Oil,* the Court placed documents related to experts into five categories: (1) documents created by or reviewed by an expert which are unrelated to her opinion or testimony; (2) documents generated by an expert in connection with her role as an expert; (3) documents given to an expert by counsel which contain data for the expert's review; (4) documents containing the mental impressions of attorneys presented to the expert by counsel; and (5) documents created by counsel to record oral conversations with an expert. *Id.* at 60–61. Only the first two categories are implicated by the present factual situation since the documents in question were generated by experts rather than counsel.

It is the Court's task to determine whether the submitted documents fall into the first or second category. In other words, the Court must decide which role the experts were pursuing when they created these documents, that of consultant or testifying expert. The distinction is crucial because documents falling squarely within the first category are not discoverable by an adverse party, *Id.* at 62, whereas those documents belonging even marginally in the second category must be produced. *Id.* The Court finds that the submitted documents are exactly as the defendants' counsel represented them to the plaintiffs; they were clearly created by several of the defendants' experts in a consultative role, dealing strictly with strategy recommendations. Accordingly, the defendants are under no obligation to disclose them to the plaintiffs.

B. Sanctions

Each party asks the Court to grant sanctions against the other party. These requests are inappropriate inasmuch as both parties advanced principled arguments in support of their positions. The defendants' objections to the plaintiffs' discovery request were "substantially justified." FED.R.CIV.P. 37(a)(4)(A); *The Bank of New York and JCPL Leasing Corp. v. Meridien BIAO Bank Tanzania Ltd.,* 171 F.R.D. 135, 143 (S.D.N.Y.1997) (applying Rule 37).

Similarly, the Court finds that the plaintiffs' requests for these documents was not unreasonable given the intention of the Federal Rules of Civil Procedure to make all documents considered by an expert in the formulation of her opinion discoverable. Indeed, the application of the work-product doctrine to material created or reviewed by expert witnesses is extremely narrow as explained above. It was only after an *in camera* inspection of the documents in controversy that the Court could resolve this dispute fairly. Under those circumstances a grant of sanctions against either party would be unfair.

III. Conclusion

***3** For the foregoing reasons, the plaintiffs' Motion to Compel and for Sanctions (Doc. No. 340) is DENIED. The defendants' related Motion for Reasonable Expenses in Opposing the Plaintiffs' Unjustified Motion to Compel (Doc. No. 365) is likewise DENIED.

SO ORDERED

Footnotes

1 The Court notes briefly that the defendants' assertion of privilege was timely made. The defendants' argument that their written response of March 6, 1998 was within the thirty day period required under FED.R.CIV.P. 34(b) is persuasive since the documents in question could only have been requested by the plaintiffs as part of the rebuttal deposition phase and the March 6th letter was written within thirty days of the rebuttal deposition notices.

2 These policy issues include effective cross-examination of expert witnesses, the negligible impact on the underlying purposes of the work-product doctrine, and the desirability of litigation certainty, i.e. counsel will know what documents reviewed by their experts must be disclosed. *Karn,* 168 F.R.D. at 639.

3 The Court need not consider the application of the work-product doctrine to information provided by counsel to experts since the defendants' counsel provided all such material to the plaintiffs. *See* Defendants' Brief in Opp'n at 2.