Moyns v. Creviston, Discovery Commissioner Opinion #1 (June, 1988)

PRODUCTION OF WITNESS STATEMENTS

The case at bar is a relatively routine personal injury claim, common to every trial court in the land and, as personal injury cases go, it is simple in that it involves the question of negligence and the damages are of a moderate nature. Even such a routine case as this, however, has not been spared the intermin-able argument over the claim of "work product." The facts of the case are simple. In May of l987 Plaintiff went into Defendant's beauty salon and had her hair treated. Plaintiff claims that as a result of said treatment she had damage to her hair and scalp and she suffered physical damage, emotional and mental stress, as well as loss of income because of inability to perform her job with the public in a proper fashion. Defendant beauty salon has disputed the liability and damage portions of the claim. The discovery question arose when the Plaintiff requested copies of statements given by witnesses to the incident other than the Plaintiff, these witnesses being employees of the Defendant and the Defendant owner himself. According to the Defendant, the statements were taken approximately two months subsequent to the incident. Plaintiff filed suit in January of l988, and the case has proceeded according to N.R.C.P. l6.l.

At the early case conference Plaintiff requested copies of

the statements taken by an insurance adjuster for the Defendants, and counsel refused production of such statements, claiming attorney/client privilege and the "sanctity of the work product privilege." The Defendants argue that immunity for work product materials came as a result of the statements being made in anticipation of litigation. Finally, Defendants argue that because Plaintiff did not make the required showing of substantial need to justify an order compelling production of the work product statements, the Defendants do not have to provide those statements.

ATTORNEY-CLIENT PRIVILEGE

The concept of attorney/client privilege requires little comment, when discussing the production of a witness statement. A party cannot refuse to testify as to facts, merely because he has communicated them to an attorney. Upjohn Company v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.E.2d 584 (1981). The secrecy of communications between a party and its attorney is an exception to the investigation of the truth, but the value of legal advice and assistance is based upon the recognition that full disclosure to counsel will often be unlikely if there is fear that others may force a breach of confidence. Nevertheless, Dean Wigmore still said of the attorney/client privilege, "It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 Wigmore, Evidence § 2291 at p. 545 (McNaughton

Revision 1961). A simple statement of facts given to an adjuster is not within the scope of the attorney/client privilege, especially when it is clear the witnesses did not conceive of the insurance adjuster as a legal adviser. The essence of the privilege is that a client has consulted the lawyer (or his agent) in the latter's capacity as an attorney. State v. Pavin, 494 A.2d 834 (N.J.Super. 1985)

WORK PRODUCT IMMUNITY

As of January 1, l988, the Nevada Rules of Civil Procedure demand of parties and counsel cooperation in the litigation of a lawsuit, as never before contemplated. The object of the discovery rules is to obtain full disclosure with a minimum of time and expense consumed in procedural bandying, with the goal of using professional and judicial time in analyzing, evaluating, arguing and resolving the legal significance of disclosed evidence. [For initial commentary on the new rules see Frederick, Expediting Discovery: Recent Amendments to the Nevada Rules of Civil Procedure, 53 INTER-ALIA 10 (l988)]. An integral goal of the new rules is to deal with the delay of discovery, previously engendered in form sets of interrogatories, all-encompassing requests to produce and endless depositions. With the discovery abuses came the concomitant motions to compel, motions to produce and motions for protective orders. Discovery had become a cat and mouse game, leading to delay and in many cases resulted in a

devastating impact to litigants on both sides of the case.

The chief offender among frequently litigated discovery issues has been the refusal to produce on the grounds of work product immunity. This opinion deals with a small area of this alleged immunity, that of witness statements. The statements with which we are concerned are those which are substantially verbatim recitals of facts, either a recorded oral statement or a written statement signed or otherwise adopted or approved by the person making it. As the eminent professor Wright has stated, "A powerful argument can be made that all statements of witnesses should be routinely discoverable." Wright & Miller, Federal Practice and Procedure: Civil, §2028 (1970). As professor Wright further points out, it is clear the law has been moving in the direction of making statements of witnesses routinely discoverable, but in the federal and other courts, it is not there yet and the courts are trying to live with the curious provisions of Rule 26(b)(3), where a party can obtain the statement of a witness only on a showing of necessity or an inability to obtain the facts elsewhere, while a party or a witness himself can have a copy as a matter or right on a simple request. Wright & Miller, supra.

The Supreme Court of the State of Nevada has taken the bull by the horns and made dramatic changes in the rules of civil procedure and particularly in the area of discovery. N.R.C.P. 16.1(b)(1) mandates the attorneys on opposing sides to

meet early in the litigation process and do the following in regard to documents:

> Exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations or denials of the pleading filed by that party, including rebuttal or impeachment documents;

As we are all aware, a witness statement would certainly be considered a document, whether in recorded or written form, and it would certainly be something that would be contemplated to be used in support of one or the other party's position, either as direct or impeaching evidence. If this were not true, why would a witness statement be taken.

While many courts have paid lip service to the concept of "work product," which has its origins in the landmark case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), judges have found many exceptions to get around the rule in regard to witness statements. e.g., statements given shortly after an occurrence are unique and must be produced. Johnson v. Ford, 35 F.R.D. 347 (D.Ct.Colo. 1964); statements by insured to insurer are not protected. Butler v. Doyle, 544 P.2d 204 (Ariz. 1975); a statement taken in the ordinary course of business is not protected. Soder v. General Dynamics Corporation, 90 F.R.D. 253 (D.Ct.Nev. 1980); once a statement is used to refresh recollection, it must be produced. Prucah

v. M & N Modern Hydraulic Press Company, 76 F.R.D. 207 (W.D. Wis. 1977); the requesting party has shown substantial need for the statement even if a conditional privilege applies. Teribery v. Norfolk & Western Ry. Co., 68 F.R.D. 46 (W.D.Pa. 1975); a party is entitled to production of documents that would be useful to impeach a witness. Southern Railway Co. v. Lanham, 403 F.2d 119 (5th Cir. 1969); Young v. United Parcel Service, 88 F.R.D. 269 (D.Ct.S.D. 1980).

Other modern thinking courts and commentators have advocated production of all witness statements, even without new liberalized rules of discovery, as found in Nevada. Miller v. Harpster, 392 P.2d 21 (Alaska 1964); Monier v. Chamberlain, 221 N.E. 2d 410 (Ill. 1966); Waits, "Work Product Protection for Witness Statements: Time for Abolition," 1985 Wis.L.Rev. 305. The reasons for unrestrained production of witness statements are logical, workable and useful. Denying access to the statements can only be considered an arbitrary rule. It should also be reiterated that with discovery of such materials as witness statements, there would be no incursion into the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. Henry Enterprises, Inc. v. Smith, 592 P.2d 915 (Kan. 1982). If such impressions, opinions or conclusions are mixed in with a statement of facts from a witness, the document can be submitted to the court or Discovery Commissioner in

camera who will make the appropriate deletions of such protected materials from the statement. Anderson v. St. Mary's Hospital, 428 N.E.2d 528 (Ill.App. 1981).

Full access to the truth should be a hallmark of the litigation process. The judicial system and rules of procedure should provide litigants with all reasonable means of determining the truth. Jacobi v. Podevels, 127 N.W.2d 73 (Wis. 1964). Access to statements of a witness may provide the only meaningful opportunity to provoke legitimately vanished memory or to allow a witness to explain apparent discrepancies between a former statement and intended testimony. Access to such statements may allow an attorney to curb the fancy of a witness and pave the way for effective cross-examination. Cooper, "Work Product of the Rules Makers," 53 Minn.L.Rev. 1269 (1969). In the particular circumstances of collecting the witness statement of the employee type, such as in the case at bar, it is obvious that such a relationship creates a situation of inequality between the parties with respect to gathering accurate statements. Branca v. Shore Memorial Hospital, 440 A.2d 1165 (N.J. Super. 1981); Southern Railway Co. v. Lanham, supra. Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so all parties are conversant with the available facts.

Delay can have a devastating impact on one or both parties

to a case, and delay in the resolution of a case engenders disrespect for the legal system. Delay often translates directly into expense for a litigant. Work product has become a haven for adversarial gamesmanship, as information, such as witness statements, is collected by both sides and then secreted under the work product cloak. The other side must make the attempt to gain the same information so as to be on an equal footing in the litigation; therefore, requests for production, depositions and endless motions to compel are the result. On most occasions the witness statements contain no "smoking guns," but only after the adversarial gambit has been run will a party have the opportunity to find out the opponent's facts. Even then, on many occasions the witness statement is forever withheld unless needed by the party who obtained it. Abolition of this practice can only be consistent with the philosophy and goals of our new discovery reform.

Cost is clearly one of the most oppressive subdoctrines of work product. In most cases the burden is on the one time litigant Plaintiff as opposed to the "repeat players," such as insurance companies, railroads and other large institutions which handle numerous claims on a regular basis. These are the people most likely to take witness statements, as they have the resources, experience, personal and incentive to engage in early and extensive investigation. 1985 Waits, supra, at 305. Even those who say the preservation of the adversary system is

more important than full disclosure must concede there is a resource imbalance between the parties which has nothing to do with the diligence of one party or the other in seeking discovery. The work product rule in regard to uncovering facts encourages game playing by the "haves" and discourages fair and expeditious settlement discussion. Thomas Organ v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972); Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982). Expenses mulitply quickly from the need to review each case to find or not find an exception to the rule precluding discovery of a witness statement. The production of witness statements will not put a burden on the person who obtained them in the first instance and, if need be, the Court can apportion costs for obtaining such statements if that should become an issue in a particular case. Interest in protecting the adversary nature of the proceedings and the privacy of the work product assembled in preparation for trial does not require sublimation from the ultimate objective, the ascertainment of the truth. Powers v. City of Troy, 184 N.W.2d 340 (Mich. App. 1970). No longer should courts deny production of witness statements with the admonition to the attorney seeking the production that "this is for your own good." The fear that some attorneys will sit back and let the other side do all the work has been magnified out of proportion. Slothful attorneys can easily miss evidence or arguments which could help their case. If attorneys let the

other side do their work, in most cases that attorney's client will suffer.

Will the required discovery of witness statements cause litigants to stop taking such documentation? Hardly, as such statements are usually essential to the proper investigation and management of a case. A party will always seek discoverable evidence, rather than lose a case. Counsel on both sides will continue to independently seek such statements, as in taking such statements they are able to guide the course of questioning, and elicit more favorable information. Statements allow counsel to pursue other leads before the evidence trail is cold and aid in preparation of cross-examination. The sooner both parties are aware of the observations of the witnesses, the sooner the litigation can proceed along the usual lines towards settlement or trial. Even when opposing counsel could obtain statements from the witnesses without undue inconvenience and expense, such statements would still not be the same in every detail, as those taken earlier, and as long as earlier impressions of a witness have been recorded, they should be made available to all. Miller v. Harpster, supra; Hayes v. Xerox Corporation, 718 P.2d 929 (Alaska 1986).

In any event the question should not be decided on the basis of what is fair or unfair to counsel, but what is most likely to obtain the objectives of discovery, that is to

eliminate surprise, preserve all available evidence concerning the facts in a reasonably convenient method for the parties and to encourage settlement or an expeditious trial. It should not be the purpose of the rules to reward diligent counsel in a manner that could result in a suppression of knowledge of relevant facts, but rather to seek truth and simplify the litigation process in order to reach a fair open and honest determination on the merits. Mercy v. County of Suffolk, 93 F.R.D. 520 (E.D.N.Y. 1982).

Will the parties continue to take recorded or written statements, or will the practice of discovery of such statements lead to having investigators simply talk to witnesses and not record the facts? Clearly, in order to use the materials for impeachment, a record must be made. Statements are always needed as a damage control measure, because unless the lawyer has tangible proof, testimony that originally was thought to be disappointing could be transferred into disastrous testimony at a later date. As most parties realize, relying upon a statement-taker to impeach a witness, where the statement-taker is the employee of the party, will be of little value at a trial of the case. Statements will continue to be taken, as both lawyers and clients need the best information available to make a realistic offer of settlement or a determination to litigate the claim to its fullest extent. So. Railway Co. v. Lanham, supra. Competent lawyers will never

rely upon the impressions of investigators, when the opportunity to have the witnesses' own words is available. If lawyers are to be prepared to meet their opponents facts, they must know what these facts are likely to be.

In Nevada the "work product" concept in the discovery of factual materials is no longer needed to encourage due diligence by attorneys. Diligence is built into the procedure of N.R.C.P. 16.1 which demands thorough preparation and early development of facts and issues. In conclusion the following points may be emphasized:

1. Production of witness statements will advance just, speedy and inexpensive determination of a lawsuit;

2. The production enhances the main purposes of discovery which include elimination of surprise, discovery of relevant evidence, simplification of issues and promotion of expeditious settlement;

3. The search for truth is likely to be fostered, and the testimony more measured in balance, if all relevant parties have access to the statement, including the witness, the examiner and the cross-examiner;

4. The impressions, opinions or analysis of investigators or attorneys is different than the factual witness statement, and such materials are protected;

5. The production of such statements will not hinder an attorney's preparation for trial, nor cause the parties to stop

taking witness statements.

6. Routine discovery of such statements will curb much delay and substantially reduce costs in the discovery portion of the litigation.

With the emerging practice under the new Nevada Rules of Civil Procedure which calls for Early Case Conferences and exchange of information including the names of all witnesses, what they will testify to, factual contentions, disclosure of impeachment information and other liberal discovery mechanisms leaves no room for outmoded restrictions concerning the production of witness statements. The new rules simply emphasize the already tacit conclusions of those who have handled day-to-day administration of discovery and other pretrial litigation that such openness results in better operation of the adversary system. It is for these reasons that such statements must be disclosed.

Pursuant to the mandate of the Nevada Supreme Court, by way of sweeping amendments to the Nevada Rules of Civil Procedure, which rules were intended to compel cooperation among counsel and parties, as well as accomplish the full disclosure objectives of the discovery rules in a just and speedy manner, and by further reasoning as set forth above,

IT IS HEREBY RECOMMENDED that copies of the witness statements in Defendants' possession be produced on or before June 21, 1988.