COMMERCIAL AND FEDERAL LITIGATION SECTION

REPORT OPPOSING THE RECOMMENDATION OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION THAT DRAFT EXPERT REPORTS AND COMMUNICATIONS BETWEEN EXPERTS AND ATTORNEYS NOT BE DISCOVERABLE INSOFAR AS IT APPLIES TO NEW YORK STATE PRACTICE

SUMMARY

The Section of Litigation of the American Bar Association (the "ABA") intends to propose to the ABA House of Delegates a recommendation (the "Recommendation") that would shield draft expert reports and communications between an attorney and a testifying expert from virtually all disclosure.[1]

Although the ABA Section of Litigation suggests that the Recommendation be incorporated in federal and state discovery procedures, the Recommendation has no relationship to current procedures for expert discovery under the CPLR, and its adoption would amount to an unwarranted intrusion into an existing discovery scheme that already provides ample protection for attorneys' interactions with testifying experts.

As is clear from the report prepared by the ABA Section of Litigation, the Recommendation was conceived in relation to the procedures for expert discovery set forth in Rule 26(a)(2) of the Federal Rules of Civil Procedure. That rule requires parties to produce, for each testifying expert, a written report prepared and signed by the expert, containing a "complete statement of all opinions to be expressed and the basis and reasons therefore." The rule further requires that the report contain "the data or other information considered by the witness" in forming his or her opinions. Moreover, under federal practice, testifying experts are subject to deposition, and inquiry into any information considered by the expert is generally permitted and encouraged. The Recommendation seeks to curb what it perceives as overly aggressive interpretations of the federal discovery rules to permit discovery of both drafts of expert reports and attorney communications with the testifying expert.

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[1] The ABA Section of Litigation's proposal reads as follows:

RESOLVED, That the American Bar Association recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report, as follows:

> (i) an expert's draft reports should not be required to be produced to an opposing party;
> (ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
> (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Even a cursory review of the procedures for expert discovery under the CPLR shows that the Recommendation has no bearing on current state practice. Unlike federal practice, under the CPLR a party offering a testifying expert is generally only required to "disclose in reasonable detail" the subject matter and substance of facts and opinions on which the expert will testify, and a "summary of the grounds" for the expert's opinion. There is no requirement that this disclosure statement be prepared or signed by the expert; to the contrary, it is common practice for the statement to be prepared by counsel. If the expert does in fact prepare a written report, nothing in the CPLR expressly requires that the report be disclosed to the adverse party, and the caselaw suggests that it is *not* discoverable – at least not without a showing sufficient to overcome the presumption against discovery of materials prepared in anticipation of litigation. *In re Love Canal Actions*, 161 A.D.2d 1169, 555 N.Y.S.2d 519 (4th Dep't 1990); *Bailey v. Owens*, 2004 WL 895972 (Sup. Ct. N.Y. Co. 2004); *see also* CPLR § 3101, cmt. C3101:29(H) (McKinney 2005). Nor, *a fortiori*, are *drafts* of an expert's report routinely discoverable under the CPLR. Thus, from the standpoint of New York state practice, the Recommendation's first prong – protection of an expert's draft reports from discovery – has no application to the expert disclosures that are required under the CPLR, and is superfluous with respect to New York's treatment of expert reports themselves.

Similarly, whereas prevailing federal practice may well require the disclosure of attorney communications with a testifying expert as part of the disclosure of "the data or other information considered by the witness," there is no comparable requirement in state practice; to the contrary, all that is required to be produced is a "summary of the grounds" of the expert's testimony. CPLR § 3101(d)(1)(i). Nor is there any significant risk that attorney communications might be discoverable at a deposition of the expert, because the CPLR does not generally require that testifying experts are subject to deposition. Even in those instances where expert depositions are required or agreed to, there is no established tradition in the New York cases whereby such depositions become a vehicle for discovering the attorney's core work product. Indeed, the CPLR imposes a heavy burden on parties seeking to discover such information, and particularly so where the information would reveal an attorney's "mental impressions, conclusions, opinions or legal theories." CPLR § 3101(d)(2). Moreover, to the extent that an adverse party can make the heavy showing required under New York law to obtain discovery of such information, there is no readily apparent reason to set up a special rule – as the Recommendation requests – that would bar such disclosures in all cases.

To summarize: the Recommendation, as presented, has no bearing on New York expert discovery practice. The barriers against discovery that it seeks to impose on federal practice would, in most instances, be obviated by the limitations imposed on expert discovery under the CPLR, and while current state practice does not impose an absolute barrier against disclosure of attorney communications with experts, there is already sufficient protection for such communications under New York law, thereby eliminating the need for a special rule in this case.

For the reasons stated above, the ABA Section of Litigation's Proposal Regarding Expert Discovery is DISAPPROVED insofar as it seeks to apply to New York state practice.