Lect 34

Atty Work Product

Hickman was partially codified in R 26(b)(3)

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

* An interrogatory asks, “Whom have you interviewed in connection with this case and did you make any reports, memos, etc.”
* May you claim that the information is work-product under 26(b)(3) and/or Hickman?
* No – the existence of WP is not itself WP
* makes sense – to overcome the WP privilege you need to know that there is WP
* A witness you interviewed said that your client was looking the other way while the accident occurred
* You write it up in a witness statement
* The plaintiff requests the statement in a document request
* May you claim that it is work product under 26(b)(3) and/or Hickman?

Yes

* If the interrogatory instead asks your client whether he was looking the other way during the accident, may he refuse to answer on the basis of 26(b)(3) and/or Hickman?

- NO

- cannot allow your client to refuse to answer (or to lie) simply because material has been expressed in WP

* The plaintiff serves you with a document request asking for witness statements drafted by a private investigator retained by your client prior to hiring you, when he was worried that he might be sued
* May you refuse to turn it over under 26(b)(3) and/or Hickman?

probably - in anticipation of litigation – so WP

- doesn’t matter that it’s not a lawyer or a client who made it

- prepared by an agent of the party and for the party

- mere prospect of litigation is enough

* Would it matter if the plaintiff served you with an interrogatory asking for the substance of the witness statements?

not a document or tangible thing, so 26(b)(3) probably does not apply

But it falls under Hickman, which protects the material

* What if the document was instead an unsolicited letter from a witness?

- if in anticipation of litigation

- and was prepared for the party then could be work product

* You are being sued for negligence in connection with a car accident
* The plaintiff serves you with a document request asking for
  + Witness statements taken by your lawyer a year ago – only a few hours after the accident
  + Your lawyer’s notes on the interviews with the witnesses?
* Does the Work Product Privilege apply?

yes

* Can it be overcome?
  + Witness statements taken by your lawyer a year ago – only a few hours after the accident – arguably yes because now you cannot get their substantial equivalent
  + Your lawyer’s notes on the interviews with the witnesses? – NO – opinion WP

3) What about trying to find out if they have impeachment evidence on your witnesses through discovery

* P is going to testify about the extent of his injuries due to D’s negligence
* May P request in discovery any surveillance tapes that D may have made of P after the accident?
* on the one hand, this is not subject to disclosure – that suggests that we want surprises here – catch the witness in the lie before he gets the impeachment evidence
* but the impeachment evidence might be able to be impeached if they were able to get it before trial to examine it

solution?

- allow discovery but give the party with the WP an opportunity to depose witness prior to turning over materials

notice that this concerns WP that the other side has to impeach *your* witnesses

what about other scenarios?

*non-work product* impeachment evidence against *other side’s* witness  
- e.g. prior criminal convictions  
- freely discoverable (unless another privilege applies)

*work product* impeachment evidence against *other side’s* witness  
- e.g. witness statement that contradicts what the witness will say on the stand  
- discoverable only if work product privilege can be overcome (need non-privileged evidence of material discrepancies)

notice schizophrenia about work product privilege

* exists in part because WP is useful for impeachment evidence

BUT can get it if you can show it is really useful for impeachment

*non-work product* impeachment evidence against *your* witness  
- e.g. tapes not made in anticipation of litigation that show that P is not injured  
- freely discoverable (unless another privilege applies)  
- but other side can ask that your witness be deposed before turning it over

Finally, our original scenario...

*work product* impeachment evidence against *your* witness  
- e.g. tapes made in anticipation of litigation that show that P is not injured  
- discoverable if privilege can be overcome (usually fact that tape will be introduced at trial is enough to overcome)  
- but other side can ask that your witness be deposed before turning it over

* A witness, X, who is friendly to the D was interviewed by P’s attorney and a statement was drawn up
* Is there any way that D can get X’s statement despite the fact that it is work-product?

YES

26(b)(3)(C) Previous Statement.  Any party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule  
        37(a)(5) applies to the award of expenses. A previous statement is either:  
            (i) a written statement that the person has signed or otherwise adopted or approved; or  
            (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person’s oral statement.

both a party or a witness has a right to get their own statement (but not the atty’s opinion)

- but (brought up in notes in casebook) - you can’t use a sub duces tecum to get a nonparty to get his statement for you

- but witness could do it willingly

Waiver

- can simply not object (although there is some allowance for mistakes)

- but also can bring the material into issue

- - waive it and much material surrounding it

- other side has right to know the context, to see that you are not distorting things through selective disclosure

Experts

You give an expert you will call as a witness at trial some witness statements to use in determining his opinion?  
Can the material be obtained by the other side without a showing of substantial need?- YES

* in fact, you must give it over without being asked

26(a)(2) Disclosure of Expert Testimony.  
  
    (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705 [i.e. an expert].  
  
    (B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:   
  
        (i) a complete statement of all opinions the witness will express and the basis and reasons for them;   
        (ii) the data or other information considered by the witness in forming them;   
        (iii) any exhibits that will be used to summarize or support them;   
        …

- report concerning expert prior to trial

- qualifications

- compensation

- opinions to be expressed

- basis and reasons including data

- What if that test is given to a nontestifying expert?

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); (physical exam) or  
  
(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

- real problem

- you don’t always know whether they will be trial or nontrial

Inadeq discl.

* D . . .
  + did not turn over disclosure materials
  + made frivolous discovery requests
  + and illegitimately refused to turn over materials that were within the scope of your discovery requests
* What do you do?

What do you do

Can get sanctions for violation of certification (like R 11) in 26g1

*26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.  
  
    (1) Signature Required; Effect of Signature.  Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney’s own name — or by the party personally, if unrepresented — and must state the signer’s address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry:  
        (A) with respect to a disclosure, it is complete and correct as of the time it is made; and  
        (B) with respect to a discovery request, response, or objection, it is:  
            (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;  
            (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and  
            (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.  
...  
    (3) Sanction for Improper Certification.  If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.*

But how do you get stuff that D won’t turn over?

* motion to compel

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions  
(a) Motion for an Order Compelling Disclosure or Discovery.  
(1) In General.  
  
On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

If, the motion is granted and D does not turn over, then sanctions

*37(b)(2) Sanctions in the District Where the Action Is Pending.  
  
(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent ...fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.   
  
They may include the following:  
  
(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;   
  
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;   
  
(iii) striking pleadings in whole or in part;   
  
(iv) staying further proceedings until the order is obeyed;   
  
(v) dismissing the action or proceeding in whole or in part;   
  
(vi) rendering a default judgment against the disobedient party; or*

- but notice that asking for sanctions without a motion to compel first is possible concerning disclosure

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37(c) Failure to Disclose; to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement.

If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

WHY immediate sanctions for failing to satisfy disclosure?

- otherwise disclosure obligations would be like discovery obligations

Terminating Litigation before trial

1) 12(b)(6) (ONLY USED BY DEFENDANT)

- take facts as true, if they fail to add up to a violation of the law, then dismissal

2) motion for judgment on the pleadings (USED BY EITHER SIDE)

- when brought by a D it is like a 12(b)(6) motion, except brought after answer is submitted

- and P can use if D introduces only one defense that fails as a matter of law

- about legal insufficiency given the facts – not about evidentiary insufficiency

what about avoiding trial due to evidentiary insufficiency

summary judgment  
directed verdict  
judgment notwithstanding the verdict

best to start with standards at trial

Burden of pleading (or of allegation), burden of production and burden of persuasion

* You already know burden of pleading/allegation
  + P has burden for all elements of cause of action
  + D has burden for affirmative defenses
* burden of production is burden of providing sufficient evidence to get the matter to a jury
  + usually is on party with the burden of pleading
  + burden of providing evidence such that a reasonable jury could find in your favor
* if you have not satisfied burden then D can get the action dismissed
  + D will not even have to introduce any contrary evidence
* burden of persuasion – who bears the burden of non-persuasion?

if the standard of proof is not satisfied, then must find against the party who had the burden

* in particular, if the finder is on the fence about whether the standard of proof is satisfied, then must find against the party with the burden
  + P satisfied his burden of production at trial concerning every element of the cause of action  
    D offers no evidence  
    directed verdict for P?
    - NO
    - To say P has satisfied the burden of production means that he has offered evidence such that a reasonable jury *could* find in his favor
    - Doesn’t mean that it must
    - Assume for example that P is a witness to every element of the cause of action and provides testimony for all the elements
      * Has satisfied the burden of production, but does not mean that a jury has to believe him
    - NOTE: some jurisdictions hold that if there is uncontradicted and unimpeached testimony by a disinterested witness then a reasonable jury must take it to be true

- directed verdict at trial is called in federal court a Rule 50 Judgment as a Matter of Law- “no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue”

Motion for summary judgment under Rule 56 is the same reasonable jury standard, but this motion occurs before trial

rarely brought until after discovery

- standard?

- pleadings and discovery materials show

- “no genuine issue of material fact and that moving party is entitled to j as a matter of law”

- does this mean no contested issue of material fact?

* NO – if P and D agreed about the facts the parties could bring a motion for a judgment on the pleadings

- the idea is that there is no genuine issue of material fact, because no reasonable jury could find for the non-movant on the basis of the evidence that would be presented at trial

* - P sues D for negligence  
  - P offers evidence that at trial would satisfy the burden of production concerning negligence and damages but nothing concerning causation  
  - D offers no evidence and moves for summary judgment
* Granted

summary judgment for defendant concerning a cause of action:  
no reasonable jury could find for the plaintiff with respect to at least *one* element of the cause of action

- P sues D for negligence  
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury *would have* to find in his favor  
- D offers no evidence

Summary judgment for P

summary judgment for plaintiff concerning a cause of action: no reasonable jury could find for the defendant with respect to *each* element of the cause of action