

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FELICIA E. GAVETT,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-369-P-H
)	
BO-ED, INC.,)	
<i>d/b/a ATRIUM HOTEL,</i>)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON DEFENDANT’S MOTION FOR SANCTIONS

Now before the court is the defendant’s motion for sanctions against the plaintiff growing out of two separate incidents that arose during the course of discovery (Docket No. 8). Chief Judge Hornby vacated my previous decision on the sanctions motion, determining that it was error to rule on such a motion without holding at least a brief hearing. Accordingly, I conducted a hearing on February 2, 1998 at which counsel for both sides had a full opportunity to be heard. I have also read and considered the briefs submitted by both sides in connection with the proceedings before Chief Judge Hornby as well as two documents filed on February 2 by the plaintiff — a list of supplemental authorities and the declaration of plaintiff’s counsel (Docket No. 46).

The original sanctions motion concerned two matters: (1) certain contact between the law firm representing the plaintiff and an employee of the defendant and (2) a document obtained by the plaintiff but withheld in discovery until just prior to the deposition of the author of the document. As to the former issue, my original decision was not to impose sanctions. That aspect of my original ruling remains unchallenged. As to the latter issue, I originally determined that sanctions were appropriate but the defendant’s successful appeal pursuant to Fed. R. Civ. P. 72(a) led to the remand

of the matter for a hearing and further consideration.

At issue is a written statement made by Barbara Anne Moore, a potential witness. It appears in the record as Exhibit 14 to the Sanctions Motion and bears a date of August 15, 1995. The parties agree that Moore wrote this statement prior to the commencement of the instant litigation but supplied it to the plaintiff's counsel only after he contacted Moore and interviewed her in connection with this case. On or about June 2, 1997 counsel for the plaintiff provided the defendant with a written set of objections and responses to the defendant's request for document production. Exh. 6 to Sanctions Motion. Responding to a request for "[a]ll statements taken from persons who witnessed, participated in or were otherwise privy to any of the events alleged in the Complaint," the plaintiff responded as follows:

OBJECTION: This document request is objected to on the ground that it seeks statements obtained from witnesses by the attorney for the Plaintiff in anticipation of litigation and such statements are protected by the work product privilege.

RESPONSE: Subject to and without waiving the foregoing objection, Plaintiff's counsel has obtained a written statement from former employee Barbara Moore.

Id. at 6. By letter dated August 25, 1997 counsel for the plaintiff again indicated to the defendant that any "information" the plaintiff had pertaining to Moore (as well as certain other potential witnesses) "was obtained by my office in preparation of litigation and thus is protected attorney work product privileged material." Exh. 13 to Sanctions Motion at 1.

Counsel for the defendant deposed Moore on September 19, 1997. As the deposition commenced, the defendant's attorney asked her counterpart whether he had a copy of Moore's statement available so that she could question Moore about its allegedly privileged nature. Counsel for the plaintiff then simply turned the document over to the defendant, who contends this conduct

is a sanctionable violation of Fed. R. Civ. P. 26(g)(2).

At the hearing on the sanctions motion, counsel to the plaintiff conceded that he should have provided the Moore statement rather than withholding it from his response to the original document request. The plaintiff's counsel nevertheless vigorously asserted that sanctions would be inappropriate because his assertion of the work product doctrine was reasonable in the circumstances. In other words, the plaintiff's counsel contends he complied with the requirement in Rule 26(g)(2) that the discovery response in question was

to the best of [his] knowledge, information, and belief, formed after a reasonable inquiry, . . . consistent with [the Federal Rules of Civil Procedure] and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Fed. R. Civ. P. 26(g)(2) and (g)(2)(A). I am unable to agree with the plaintiff's position for several reasons.

As I pointed out in my original decision on the sanctions motion, Fed. R. Civ. P. 26(b)(3) makes the work-product doctrine applicable to documents and tangible things, otherwise discoverable, if they were "prepared in anticipation of litigation." Quite sensibly, counsel for the plaintiff does not now contend that he ever had a good-faith basis for asserting that the document in question was covered by this language in Rule 26(b)(3). Rather, he takes the position that the Supreme Court's seminal opinion on the work-product doctrine, *Hickman v. Taylor*, 329 U.S. 495 (1947), defines protected work product more broadly than Rule 26(b)(3) does, and in a manner that allowed him to advance a good-faith argument for non-production of the Moore statement.

I discern nothing in *Hickman* that provides the plaintiff more of a refuge than does Rule 26(b)(3). At issue in *Hickman* was a party's bid to discover the fruits of interviews of potential

witnesses conducted by an opponent's counsel. *Hickman*, 329 U.S. at 508-09. The Court noted that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Id.* at 510. Accordingly, “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties” is improper. *Id.* The document at issue here was one created by a non-party and voluntarily supplied to the plaintiff’s counsel. As such, it was in no sense prepared or formed by the attorney who acquired it. Thus, the reference in *Hickman* to “information, secured by an adverse party’s counsel in the course of preparation for possible litigation,” *id.* at 497, in no sense shields from discovery a document that happens to come into the possession of an attorney but in no way reveals the attorney’s thought processes, trial strategy or anything else deemed to be “inviolable” under the work product rule, *id.* at 511. It is obvious that if the *Hickman* rule covered every document that came into the possession of an attorney, then the discovery of virtually all documents under Rule 26 would be subject to the “substantial need” and “undue hardship” tests set forth in Rule 26(b)(3) and first suggested in *Hickman* itself. *See Hickman*, 329 U.S. at 511-13.

Were this purely my own reading of *Hickman* and Rule 26(b)(3), I would certainly hesitate to deem an attorney’s assertion of a contrary view to have been made in something other than good faith. However, the principle governing the discoverability of the Moore statement happens to be well-settled in this circuit. Judge Selya’s extensive discussion of both *Hickman* and Rule 26(b)(3), *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988), leaves no room for discussion of the relevant principle. Although Judge Selya notes that Rule 26(b)(3) only “partially codifies the work product doctrine as recognized in *Hickman*,” and discusses at some

length the distinction between “opinion” work product and “ordinary” work product — “the former category encompassing materials that contain the mental impressions, conclusions, opinions or legal theories of an attorney, the latter category embracing the residue” — the baseline is that documents protected as work product are those “prepared in anticipation of litigation.” *Id.* at 1013-14 (citations and internal quotation marks omitted). An example of ordinary work product was the material at issue in *San Juan Dupont Plaza* — lists of exhibits for potential use at depositions, ordered to be disclosed by the district court as part of a case-management protocol in an unusually complex series of related cases. *Id.* at 1009, 1017. Under this paradigm, ordinary work product is so delineated because its disclosure still represents an “incursion[] into the attorney’s mental impressions,” albeit concerning “disclosures which would inevitably take place.” *Id.* at 1017. *San Juan Dupont Plaza* leaves no doubt that, in the First Circuit, attorney work product comprises documents that in some sense would disclose an attorney’s strategy or thought processes simply by virtue of their being read by an opponent.

The *San Juan Dupont Plaza* decision is a scholarly opinion and the insights it imparts require careful reading to discern. However, its conclusions about work product are fully consistent with an antecedent and much more straightforward analysis that has been applicable in this district since 1984. In *Scott Paper Co. v. Ceilcote Co.*, 103 F.R.D. 591 (D.Me. 1984), certain documents were deemed to be beyond the protections afforded by the work-product rule. *Id.* at 596. In so determining, the court observed:

It is not necessary that a document be prepared by an attorney in order for the immunity to apply. On the other hand, the protection does not extend to all documents gathered by an attorney in preparation for litigation. The mere fact that an attorney located a particular document while preparing for litigation does not make the document work product. The protection is limited to items obtained or

produced by the lawyer which involve[] his professional skill and experience.

Id. at 594 (citations and internal quotation marks omitted).

In my opinion, these binding precedents foreclose an attorney practicing in this district from making a good-faith argument that he or she may withhold from discovery a document the attorney happens to have received from a potential witness as was the case here. In arguing to the contrary, the plaintiff relies particularly on *Bartley v. Isuzu Motors Ltd.*, 158 F.R.D. 165 (D.Colo. 1994), in which certain materials obtained by an attorney were determined to be discoverable but the court referred to the problem as “one of first impression” in the District of Colorado. *Id.* at 167. *Bartley*, however, actually deals with an issue that is distinctly different from the instant problem: the question of when a request for documents obtained by an opposing attorney implicates the work-product rule because it reveals how the attorney compiled and selected the materials and, thus, tends to compromise the attorney’s litigation strategy. *See id.* Given the *San Juan Dupont Plaza* case discussed *supra*, even the issue presented by *Bartley* is well-settled in the First Circuit.

Moreover, even if binding precedent did not unambiguously resolve the issue unfavorably to the plaintiff, her attorney has still run afoul of the “reasonable inquiry” requirement of Rule 26(g)(2). Counsel to the plaintiff conceded at hearing that he conducted no legal research prior to deciding he would withhold the Moore statement, relying simply on his general understanding of the work-product rule. Plainly, an attorney practicing in this district must do more than that before taking an action in derogation of the general principle that parties engaged in discovery should “disgorge whatever facts [they have] in [their] possession.” *Hickman*, 329 U.S. at 507. Further, the manner in which this discovery dispute unfolded reveals a troublesome indifference on the part of the plaintiff’s counsel to Rule 26(b)(5), which requires a party withholding information that is

otherwise discoverable to “make the claim [of privilege] expressly” and “in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Fed. R. Civ. P. 26(b)(5). No reasonable attorney would read the plaintiff’s response to the document request, that her counsel has “obtained a written statement from former employee Barbara Moore,” as meaning anything other than that the plaintiff’s counsel spoke with Moore and reduced their conversation to a written statement that is obviously protected work product. It may be, as the plaintiff’s counsel suggested at hearing, that the shrewdest reaction to such an assertion would be to inquire of the attorney what he meant by using the word “obtained.” Still, at least in this district, successful discovery does not require its practitioners to cultivate the skills of a master lexicographer so that he or she may parse every possible nuance in each word used in a discovery response.

Although I am therefore seriously concerned about the conduct of the plaintiff’s counsel that is at issue, I have nevertheless determined that, at this stage, the formal imposition of sanctions would serve no useful purpose. Counsel to the plaintiff adequately demonstrated at hearing that he appreciates the seriousness of the matter and the court’s disapproval of his conduct. More significantly, the defendant was unable to articulate at hearing any basis for a determination that its position was at all compromised by the belated disclosure of the document at issue. As the plaintiff pointed out, the Moore deposition went forward as scheduled. Although the defendant suggested in its written filings that it would not have conducted the deposition had it received Moore’s statement on a timely basis, that is far from apparent. Indeed, given that the statement appears largely to favor to the plaintiff’s view of the case, the defendant had every incentive to examine Moore about it and, in fact, did so. Given that sanctions are reserved for situations that unassailably

warrant them, and because I am convinced that a warning to the plaintiff's counsel is sufficient to deter similar conduct in the future, I do not believe that imposing any further penalty is appropriate.

Accordingly, the defendant's motion for sanctions is **DENIED**.

Dated this 3rd day of February, 1998.

David M. Cohen
United States Magistrate Judge