

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

HOLLIE T. NOVELETSKY, et al.,)	
)	
Plaintiffs)	
)	
v.)	No. 2:12-cv-21-NT
)	
METROPOLITAN LIFE INSURANCE)	
COMPANY, INC., et al.,)	
)	
Defendants)	

**MEMORANDUM DECISION AND ORDER
ON DISCOVERY DISPUTE**

At my request, *see* ECF No. 97 at 3, the parties have briefed the question of whether, notwithstanding the plaintiffs’ production of their experts’ invoices, the defendants are entitled to discover the experts’ underlying time and billing records. The parties disagree as to whether the 2010 amendments to Federal Rule of Civil Procedure 26 governing expert discovery bear on and/or permit the discovery of expert time and billing records, raising an issue of first impression in this district. After careful review of the parties’ letter briefs and cited authorities, I conclude that the 2010 amendments do not prevent the requested discovery and that the plaintiffs, who do not contest the relevance of the documents sought, do not make a persuasive case that they are otherwise protected from discovery. Therefore, treating the dispute as a motion by the defendants to compel the production of requested expert time and billing records, I grant it.

I. Applicable Legal Standards

Rule 26 of the Federal Rules of Civil Procedure outlines general provisions governing discovery in a civil action:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).

In addition, with respect to experts who may testify at trial, Rule 26 both mandates certain disclosures and provides certain parameters regarding discovery. Fed. R. Civ. P. 26(a)(2)(B) & (b)(4). In relevant part, the rule mandates the disclosure of “a statement of the compensation to be paid for the study and testimony in the case[.]” Fed. R. Civ. P. 26(a)(2)(B)(vi), and, as amended in 2010, conveys work product protection to “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded” and to communications between a party's attorney and expert except to the extent that such communications “relate to compensation for the expert's study or testimony; . . . identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or . . . identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed[.]” Fed. R. Civ. P. 26(b)(4)(B)-(C).

“[A] party resisting discovery has the burden of showing some sufficient reason why discovery should not be allowed[.]” *Flag Fables, Inc. v. Jean Ann's Country Flags & Crafts, Inc.*, 730 F. Supp. 1165, 1186 (D. Mass. 1989) (citation and internal quotation marks omitted).

II. Discussion

The plaintiffs seek to resist the discovery of their experts' time and billing records on the bases that (i) pursuant to Rule 26(b)(4)(B) as amended in 2010, the documents constitute

protected drafts of the compensation information that they were mandated by Rule 26(a)(2)(B)(vi) to disclose, and, (ii) in any event, the records are beyond the scope of permitted expert discovery, which is confined to information expressly made discoverable pursuant to Rule 26(b)(4). Plaintiffs' Letter Brief dated October 17, 2012 ("Plaintiffs' Brief"). Defendants Metropolitan Life Insurance Company, Inc. ("MetLife") and Alan Silverman argue that (i) the protections added in 2010 do not prevent discovery of the documents at issue and, (ii) as a general matter, nothing in Rule 26 places an expert's time and billing records out of the bounds of permissible discovery. MetLife's Letter Brief dated October 17, 2012 ("MetLife's Brief"); Silverman's Letter Brief dated October 17, 2012 ("Silverman's Brief"). MetLife points out that this court has recognized that certain expert financial information is relevant to bias and, accordingly, discoverable. MetLife's Brief at 3. It argues that the time and billing records at issue are relevant to bias, credibility, and assessment of the experts' opinions.

The plaintiffs do not make a persuasive case for the protection of their experts' time and billing records pursuant to Rule 26(b)(4)(B). Rule 26(a)(2)(B)(vi) requires only the disclosure of "a statement of the compensation to be paid for the study and testimony in the case." Fed. R. Civ. P. 26(a)(2)(B)(vi). As the plaintiffs themselves recognize, "[t]he compensation paid is to be disclosed, but detailed back-up in the form of time and billing records (if they exist) is information beyond the compensation paid." Plaintiffs' Brief at 3. Thus, the records at issue cannot fairly be characterized as "drafts" of the compensation information required to be disclosed by Rule 26(a)(2)(B)(vi). Accordingly, they are not shielded from discovery by Rule 26(b)(4)(B). *See, e.g., In re Application of Republic of Ecuador*, 280 F.R.D. 506, 513 (N.D. Cal. 2012) ("The intention of the work product rule [as amended in 2010] is to protect the mental impressions and legal theories of a party's attorney, not its experts. . . . This protection . . . does

not extend to the expert's own development of the opinions to be presented outside of draft reports.") (citations omitted).

Nor do the plaintiffs make a persuasive case that expert time and billing records are otherwise *per se* non-discoverable. They argue that, while the rules provide a basis for disclosure of information relating to compensation, they provide no basis for disclosure of time or billing records, as a result of which such records are not within the contemplated scope of expert discovery. Yet, while Rule 26 mandates certain expert disclosures and provides certain expert discovery protections, it nowhere expressly precludes expert discovery pursuant to the catchall discovery rule, Rule 26(b)(1). Such discovery, thus, presumably may be taken subject both to general discovery protections (for example, protection against irrelevant or overly burdensome discovery or discovery of privileged matters) and to the specific protections accorded to expert discovery.

Nothing in the Advisory Committee notes to the 2010 rule amendments indicates otherwise. As the defendants point out, *see* MetLife's Brief at 2; Silverman's Brief at 2-3, the amendments were designed to address a specific expert discovery problem:

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including – for many experts – an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts – one for purposes of consultation and another to testify at trial – because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interactions with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Fed. R. Civ. P. 26 advisory committee's note (2010 Amendments).

While the amendments narrowed the scope of expert discovery in specific respects, they did not purport to delineate its permissible outer bounds. To the contrary, the Advisory Committee observed that the amendments were not meant to “impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.” *Id.* In addition, with respect to the exception to work product protection for attorney-expert communications pertaining to compensation, the Advisory Committee contemplated discovery beyond the scope of information mandated to be disclosed, recognizing that such information can go to the question of an expert’s bias:

In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Id.

The plaintiffs cite *Gillespie v. Sears Roebuck & Co.*, 386 F.3d 21, 35 (1st Cir. 2004), for the proposition that, even before the 2010 amendments to Rule 26, the First Circuit held that an expert is not required to produce notes that reflect work done on a case. *See* Plaintiffs’ Brief at 3. They suggest that working notes contain similar information to time and billing records. *See id.* Nonetheless, the First Circuit in *Gillespie* merely held that working notes are not required to be produced as part of *automatic* expert disclosure. *See Gillespie*, 386 F.3d at 35. It did not address the broader question of whether there are any circumstances in which such notes, if requested, must be produced. *See id.*

The plaintiffs cite two additional cases, *Schwarz & Schwarz of Va., L.L.C. v. Certain Underwriters at Lloyd’s, London Who Subscribed to Policy No. NC959*, Civil Action No.

6:07cv00042, 2009 WL 1043929 (W.D. Va. Apr. 17, 2009), and *Smith v. Transducer Tech., Inc. Endevco Corp.*, No. CIV.1995/28, 2000 WL 1717332 (D.V.I. July 3, 2000), and a 1991 Advisory Committee note to Federal Rule of Civil Procedure 45, as clarifying that “Rule 26(b)(4) provides the relevant scope of expert discovery – nothing more and nothing less[,]” which is “distinct from the scope of general discovery provided in Rule 26(b)(1).” Plaintiffs’ Brief at 4.

However, *Smith* and the 1991 Advisory Committee note merely stand for the proposition that a party cannot end-run any limitations on expert discovery conferred by Rule 26 by employing the vehicle of a subpoena *duces tecum*. See *Smith*, 2000 WL 1717332, at *2 (although a notice of deposition does not suffice to compel production of documents from an expert witness at that expert’s deposition, “[a] Rule 45 subpoena *duces tecum* in conjunction with a properly noticed deposition may do so (subject however to any Rule 26 limitations)”; Fed. R. Civ. P. 45 advisory committee’s note (1991 Amendment) (“Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, *whose information is subject to the provisions of Rule 26(b)(4).*”) (emphasis added). To state that expert discovery is subject to the provisions of Rule 26(b)(4) begs the question of whether that subsection delineates the universe of discovery that may properly be had from an expert. These authorities, therefore, do not help the plaintiffs.

The *Schwarz* decision seemingly does support the plaintiffs’ position as to general discovery pursuant to Rule 26(b)(1): the court denied a motion to compel disclosure of an expert’s file pursuant to a Rule 45 subpoena, ordering production only of any “data or other information that was considered” by the expert in forming his opinions, which the court noted was subject to automatic disclosure pursuant to Rule 26(a)(2)(B). See *Schwarz*, 2009 WL 1043929, at *5-*6 (internal quotation marks omitted). But, the *Schwarz* court did not address a

request for expert time, billing, or financial records or an argument that the requested documents were relevant to expert bias and/or credibility.

As MetLife notes, *see* MetLife's Brief at 3, this court has recognized that information on expert compensation beyond that required to be disclosed automatically can be relevant to the assessment of expert bias and/or credibility, justifying its production. For example, this court recently granted a motion to compel an expert to disclose his income derived from his work as a professional expert for the one year preceding the date of his deposition. *See* Memorandum Decision and Order on Motion To Compel (ECF No. 67), *Doyle v. College Pro Painters U.S. (LTD.)*, No. 2:11-cv-10-JAW (D. Me. May 15, 2012), at 8. *See also, e.g., Hunt v. McNeil Consumer Healthcare*, Civil Action No. 11-0457, 2012 WL 2342646, at *4 (E.D. La. June 20, 2012) (permitting discovery of expert's 1099 forms and /or invoices for certain cases in which had had been compensated, which the requesting parties argued were relevant in that they might give light to a lack of impartiality and/or bias). Against this backdrop, I decline the plaintiffs' invitation to hold that an expert's time or billing records are, in any circumstances, beyond the pale of permissible discovery. I do not hold that expert time and billing records are always discoverable; I merely reject the plaintiffs' argument that those records are non-discoverable in this case on the bases that they are protected drafts of compensation information and/or are not specifically made discoverable pursuant to Rule 26(b)(4).¹

¹ In its letter brief, MetLife also seeks the production of other non-privileged materials sought in its notice of the deposition of plaintiffs' expert John Gurley. *See* MetLife's Brief at 3-4. I decline to rule on these other materials, which are beyond the scope of the billing/time record matter that the parties were directed to address in the instant letter briefs and were the subject of a separate ruling directing the parties to meet, confer, and report back to the court. *See* ECF No. 97 at 3.

III. Conclusion

For the foregoing reasons, and treating the instant discovery dispute as a motion by the defendants to compel the production of requested expert time and billing records, the motion is **GRANTED**. The plaintiffs shall forthwith produce said records.²

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 19th day of October, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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² I intimate no view on whether the plaintiffs may legitimately redact portions of the time and billing records at issue, a question that is not before me.

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