

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS JAZGUNOWICZ

CIVIL ACTION

v.

L-3 COMMUNICATIONS AYDIN
CORPORATION

NO. 01-CV-3293

ORDER AND MEMORANDUM

AND NOW, this 1 day of May, 2002, upon consideration of the plaintiff's Motion to Compel Production of Summary Shown to Deponents (Document #8), and of the defendant's response thereto, and following a hearing, IT IS **HEREBY ORDERED** that said motion is GRANTED. The defendant shall be required to turn over copies of the factual summary prepared by defense counsel and used by him to prepare witnesses for depositions. The Court finds that in a situation such as this, where a key witness testifies that his recollection was refreshed by attorney work product, that work product must be produced. As detailed below, the defendant shall be given an opportunity to make a proposal to the Court regarding appropriate redaction of the summary.

Nicholas Jazgunowicz, the plaintiff, has sued his former employer, L-3 Communications Aydin Corporation, alleging

that his employment was illegally terminated based on his age and his national origin. The parties agree that it was Mr. Gregory L. Becker, Jr., a former employee of the defendant, who decided that Mr. Jazgunowicz should be placed on the list of employees to be permanently laid off in February of 1999. On March 1, 2002, the plaintiff took the deposition of Mr. Becker.

At the beginning of the deposition, plaintiff's counsel asked Mr. Becker if he had reviewed any documents in preparation and he acknowledged that he had reviewed the summary at issue. When she asked him if it had refreshed his recollection about the lawsuit, he said: "I don't know. Probably, yes." Becker Dep. at 8. She then asked him whether it helped him recall any of the facts related to Mr. Jazgunowicz's termination and he said: "Yes." Id. Plaintiff's counsel asked Mr. Becker to tell her which facts in particular the summary helped him to recall but defense counsel objected and directed the witness not to answer. Id.

Plaintiff subsequently filed this motion to compel production of the summary shown to Mr. Becker and other witnesses pursuant to Federal Rule of Evidence 612.¹ The Court ordered the

¹ One of the **other witnesses** to whom the **summary was shown**, Hans Deviso, also testified that it refreshed his recollection. This decision focuses on Mr. Becker because the parties agree
(continued..)

defendant to submit the summary for in camera review and then held a hearing on whether it should be disclosed to the plaintiff. At the hearing, the Court agreed to wait to decide whether the summary should be disclosed until after the defendant's summary judgment motion was filed. I have now reviewed the summary judgment motion and I find that I cannot decide it without giving the plaintiff an opportunity to test Mr. Becker's testimony with the summary at issue here.

Federal Rule of Evidence **612** provides that:

"[I]f a witness uses a writing to refresh memory for the purposes of testifying, either- (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

Fed. R. Evid. **612**. Under Rule **612**, the plaintiff is entitled to have the summary produced because Mr. Becker testified in his deposition that his memory was refreshed by it.

This case is complicated by the fact that the summary is attorney work product, prepared in anticipation of litigation, which means that under ordinary circumstances it may only be

¹(...continued)
that Mr. Devisø did not make the decision to fire the plaintiff.

disclosed "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Even when the required showing is made, Rule 26(b)(3) provides that the court shall protect against disclosure of what has been termed "core" or "opinion" work product - that is, an attorney's mental impressions, conclusions, opinions or legal theories. See id.

The Third Circuit has noted in dicta that Fed. R. Evid. 612 does not displace the protections of attorney work product provided by Fed. R. Civ. P. 26(b)(3). See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 n.3 (3d Cir. 1984). The two rules must be read together and courts must strike a balance between the disclosure provided for by Rule 612 and the protection provided for by Rule 26(b)(3), bearing in mind that: "the purposes of Rule 612 are generally fully served without disclosure of core work product." Id. See also In re Joint E. and S. Dist. Asbestos Litig., 119 F.R.D. 4, 5 (E. & S.D.N.Y.1988) ("The rules may be reconciled because the 'interests of justice' standard of Rule 612 incorporates as part of the balancing analysis the protection afforded by the work-product doctrine . . . while the 'substantial need' requirement of Rule 26 can take into account

the need for disclosure under Rule 612.").

In this case, I strike the balance between the commands of Rule 612 and Rule 26(b)(3) in favor of disclosure of the summary. Applying the rubric of Rule 612, I find that it is in the interests of justice for the summary to be turned over to plaintiff's counsel so that she can use it to test Mr. Becker's recollection. As the individual responsible for the plaintiff's termination in this employment discrimination case, Mr. Becker is a very important witness, possibly the most important. In addition, the summary does not contain explicit description or expression of defense counsel's mental impressions, conclusions, opinions or legal theories. Applying the test given in Rule 26(b)(3), the plaintiff has substantial need of the summary and there is no substitute for it. To the extent that the summary indirectly reveals defense counsel's opinions and theories, the Court is unable to protect against their disclosure as they are inextricably intertwined with the facts which refreshed the witness' recollection.

The defendant argues that the summary should be protected from disclosure despite the applicability of Rule 612 because it is opinion work product. Defense counsel created the summary "working from his notes of witness interviews [and] his own recollection of the statements made to him by such witnesses,

combined with a review of documents." Def. Opp. at 6. Counsel updated the summary as the case progressed. The resulting document is a recitation of the facts of the case, in particular the history of the plaintiff's employment at L-3 Communications Aydin Corporation and the circumstances surrounding his termination, presented in chronological order. The summary is long and comprehensive and focuses on the facts of the case. It is devoid or nearly devoid of explicit description or expression of defense counsel's mental impressions, conclusions, opinions or legal theories.

The defendant argues that the summary constitutes opinion work product because of the fact that it was prepared from the oral statements of witnesses. He notes that the Supreme Court has held that: "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." Upjohn Co. v. U.S., 449 U.S. 383, 399 (1981). See also Bogossian, 738 F.2d at 593 (noting that the Supreme Court has held that witness interview notes are entitled to heightened protection). However, the attorney in Upjohn described his notes as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the

inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." Upjohn, 449 U.S. at 400 n.8. This Court does not read Upjohn to create a per se rule that documents prepared from interviews are always opinion work product, even where, as here, they are dissimilar to the documents which were at issue in that case. See In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (contrasting "pure opinion work product" with the interview memoranda at issue in the case).

Nor does Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), require a different result. In Sporck, "the defendants produced hundreds of thousands documents, from which [plaintiff's] attorney selected more than 100,000 for copying." Id. at 314. Defense counsel showed an unknown number of documents, selected from the hundreds of thousands which were produced, to a witness in preparation for his deposition. Plaintiff's counsel then requested that all of the documents used to prepare the witness be identified and produced.

The Third Circuit declined to order identification or production of the documents, all of which had already been produced to the plaintiff, finding that "the selection and compilation of documents by counsel in this case in preparation

for pretrial discovery falls within the highly-protected category of opinion work product.'" Id. at 316.

The defendant argues that his selection and compilation of the facts as embodied in the summary reveals his legal theories just as the attorney's selection of documents did in Sporck, and that the entire summary is therefore opinion work product. It is true that the summary presents the facts from defense counsel's perspective. However, "it is never possible to completely insulate an attorney's thought process from discovery when any form of work product is disclosed," because "the disclosure of even 'pure' fact work product will necessarily disclose information about an attorney's approach to the litigation of the case[.]" Nutramax Labs., Inc. v. Twin Labs., Inc., 183 F.R.D. 458, 466 (D. Md. 1998) (citing In re Martin Marietta Corp., 856 F.2d 619, 625 (4th Cir. 1988)).

This case is distinguishable from Sporck on two grounds. First, 'inthat case the plaintiff sought the discovery of "pure" opinion work product. The defendant had already produced the requested documents; the plaintiff just wanted to know which of those documents defense counsel thought were important. In this case, any theories that might be gleaned from the presentation of the facts in the summary are inextricably intertwined with the facts themselves, which have not previously

been produced. The possibility that the selection and compilation of facts in the summary might indirectly reveal counsel's legal theories to the plaintiff is not sufficient to protect it from disclosure under the circumstances.

Second, the Sporck court found that the proper Rule 612 foundation had not been laid. The plaintiff has laid the proper foundation here.

This case is factually closer to Bogolian than to Sporck. The parties in Bogolian accepted for purposes of the Petition for Writ of Mandamus that the documents at issue contained nothing but the petitioners' attorneys' legal theories. The question was whether the respondents were entitled to the documents since they had been relied on by petitioners' expert witnesses in forming their expert opinions. See Fed. R. Civ. P. 26(b)(4). The Third Circuit held that the respondents were entitled to discover what facts were provided to the witnesses but not what legal theories were shared with them. The court held that "where the same document contains both facts and legal theories of the attorney, the adversary is entitled to discovery of the facts . . . Where such combinations exist, it will be necessary to redact the document so that full disclosure is made **of facts presented to the expert and considered in formulating** his opinion, while protection is accorded the legal theories and

the attorney-expert dialectic." Bogosian, 738 F.2d at 595.

No mention was made of the possibility that the facts contained in the document might permit respondents to infer what the petitioners' attorneys' legal theories were. See also 4 Joseph M. McLaughlin, et al. Weinstein's Federal Evidence § 612.05(3) [e] (2d Ed. 2001) (discussing the interplay between Rule 612 and Rule 26(b)(3) and suggesting that "[u]nless the judge finds that the adverse party would be hampered in testing the accuracy of the witness's testimony, he or she should not order production of any writings that reflect solely the attorney's mental processes.") (emphasis added).

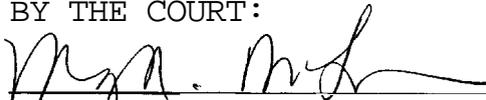
In conclusion, the Court notes that if defense counsel had permitted Mr. Becker to answer the plaintiff's question asking him to elaborate on his statement that his recollection was refreshed, Mr. Becker might have explained that the summaries refreshed his recollection about something minor or unrelated to his role in the plaintiff's termination. If Mr. Becker had so testified, there would be no need to turn the summaries over to the plaintiff for purposes of testing Mr. Becker's recollection of the important and relevant facts and circumstances. In the future, defense counsel can avoid this problem altogether if he avoids refreshing the recollection of prospective deponents with his work product. See 4 Joseph M. McLaughlin, et al. Weinstein's

Federal Evidence § 612.05[3] [e1 (2d Ed. 2001) ("Not only may such documents ultimately fall into opposing counsel's hands if Rule 612 is satisfied, but there are too many risks of unethical suggestions to witnesses when they see such material.").

At the hearing, the Court asked defense counsel for a suggestion as to what could be redacted from the summary, either because it reflected solely his mental processes or because it did not relate to a fact within the personal knowledge of Mr. Becker. At that time, defense counsel was not prepared to make a suggestion. Therefore, defense counsel shall have until May 15, 2002 to provide the Court with a proposal for redaction of the summary. Counsel should also inform the Court which of the two drafts of the summary that were submitted in camera was reviewed by Mr. Becker, or if both were.

The plaintiff may depose Mr. Becker a second time. Based on the parties' representations at the hearing, it does not appear to the Court that it is necessary for the plaintiff to re-depose Mr. Deviso. If the plaintiff disagrees and would like to re-depose Mr. Deviso, he may seek the Court's permission to do **so.**

BY THE COURT:



MARY A. McLAUGHLIN, J.