

STATE OF VERMONT  
RUTLAND COUNTY, SS

GENE PAUL SCOTT, INDIVIDUALLY  
and as Administrator of the  
Estate of BEVERLY ANN SCOTT  
Plaintiff

V.

ROSHAN SIVA, M.D.,  
D. BILLINGS WHEELER, JR., M.D.,  
RUTLAND RADIOLOGISTS, INC.,  
JOSEPH VARGAS, M.D., and  
RUTLAND HOSPITAL, INC. d/b/a  
RUTLAND REGIONAL MEDICAL  
CENTER  
Defendants

) RUTLAND SUPERIOR COURT  
)  
)  
) DOCKET NO. S0596-97RcC  
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**CONFORMED COPY**  
RUTLAND SUPERIOR COURT

APR 16 1999

*Hayd. Johnson*  
Clerk

**DECISION AND ORDER**  
**DEFENDANT JOSEPH VARGAS, M.D.'S MOTION TO COMPEL**

In this medical malpractice case, Defendant Joseph Vargas, M.D., seeks an Order compelling production of the entire file of Plaintiff's liability expert, Michael Gear, M.D., including any correspondence to and from Plaintiff's attorney. Defendant claims that he is entitled to disclosure of the correspondence and any notes and records provided to Dr. Gear in order to review the content and source of the expert's information about the case. He contends that without access to such material, he will be unable to effectively cross-examine Plaintiff's expert. His argument is that the materials of testifying experts are excepted from the scope of the work product rule contained in V.R.C.P. 26(b)(3) by the introductory reference in that provision to V.R.C.P. 26(b)(4) which permits discovery from experts. He argues that these interlocking provisions of Rule 26 have the effect of allowing

discovery of correspondence from an attorney to a person offered as an expert witness, and that this is a proper exception to the general protections given to trial preparation material prepared by attorneys. He relies on a series of federal district court decisions and primarily on the analysis set forth in Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991). He argues that to allow communication from an attorney to an expert retained to present expert testimony at trial to be free from discovery frustrates the liberal discovery rules and prevents the Defendant from being able to obtain full information about the basis for an expert's opinion.

Plaintiff seeks to avoid disclosing correspondence between the Plaintiff's attorney and the expert based on the fundamental principle of the attorney work product doctrine. He argues that the work product doctrine provides important protections to counsel and their clients and that it is recognized in the structure of Rule 26(b)(3), which only permits discovery of materials prepared by an attorney if two criteria are met: (1) that the party seeking discovery have substantial need of the materials in preparation for the case and (2) that the party is unable, without undue hardship to obtain the equivalent material from other means. He argues that the Defendant is only entitled to discovery of correspondence from the Plaintiff's attorney if the expert witness at any point testifies that he or she has relied upon otherwise undisclosed correspondence communications from Plaintiff's counsel. He argues that when the expert has so testified, there is not a basis for the Defendant to obtain complete discovery of all correspondence from the attorney to the expert, but only that portion relied upon.

The Court agrees with Plaintiff that the protection of the attorney work product doctrine is important in order to give attorneys maximum flexibility to work on the preparation of cases without having to be concerned about revealing the attorney's mental processes. Nonetheless, at such time as an attorney seeks to rely upon an individual expert as a trial expert, a Defendant becomes entitled to discovery of the communications and materials provided to the expert in connection with the retention of that expert. This is consistent with liberal discovery and the maximum opportunity of the Defendant to determine the basis for the expert's opinion. See Intermedics, Inc. v. Vantritek, Inc., 139 F.R.D. 384 (N.D. Cal. 1991).

It should be noted that an attorney does have the opportunity to consult with an expert for trial preparation purposes without disclosing such correspondence or any other communications to that attorney except under restricted circumstances. V.R.C.P. 26(b)(4)(B). This gives the Plaintiff's attorney the opportunity to work with an expert on trial strategy and development of mental impressions and processes without the necessity of disclosure and discovery. It is the selection of an expert or use for presentation at trial that triggers the requirement that any correspondence or materials provided by the attorney to the expert must be produced in discovery upon request.

Even under an analysis requiring that the two criteria set forth in V.R.C.P. 26(b)(3) must be met before correspondence from the Plaintiff's attorney needs to be disclosed to the Defendant's attorney, both these criteria are met in the present situation. It appears that there are items of correspondence between Plaintiff's attorney and the trial expert. The Court concludes that the Defendant does have need of such materials in order to be able

to ascertain in full the basis on which Dr. Grear reached his opinions, and that there is no other means by which the Defendants would have access to such correspondence.

The importance of liberal discovery and the opportunity for the Defendant's attorney to have a full basis on which to cross examine the Defendant outweighs the work product doctrine with respect to trial experts. It does not make sense to shift to the expert the task of deciding whether or not he can remember whether he did or did not rely on a particular piece of correspondence in formulating his opinion. It may well be that the Defendant's attorney is able to discern from a review of such correspondence ways in which the expert's view of the case might have been influenced without the expert himself being aware of it. It is at the point when Plaintiff's counsel determines to use a particular expert at trial that he must accept the consequences that any correspondence he has had with the expert or any materials he has provided to the expert, even if they reflect his mental processes and trial strategy including legal theories or mental impressions, must be available to the Defendants in discovery in order to enhance the full disclosure principles of the discovery process.

**ORDER**

Wherefore, Defendant Vargas' Motion to Compel is Granted.

Dated at Rutland, VT this 16th day of April 1999.

*Mary Miles Teachout*  
HON. MARY MILES TEACHOUT  
SUPERIOR COURT JUDGE