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The Confidentiality of Communications with Attorneys, Clients, and Experts. The Colorado Supreme Court Dispels Misconceptions.

On June 10, 2024, Colorado Supreme Court Justice Richard Gabriel, writing for a unanimous court, dispelled several misconceptions about the attorney-client communication privilege and the protections afforded under Colorado Rule of Civil Procedure 26(a)(2) concerning experts.

In this toxic tort action, the Colorado Supreme Court in *In Re Jordan v. Terumo BCT*[1] engaged in a rare original jurisdiction case pursuant to C.A.R. 21 and held that a district court trial judge erred in finding that:

1. The attorney-client privilege does not apply to protect a client's confidential communications of certain facts to trial counsel; and
2. The duty of disclosure related to experts pursuant to C.R.C.P. 26(a)(2) required plaintiffs to disclose not only a spreadsheet provided to their expert, but also any privileged and confidential communications that the expert never saw but that counsel used to prepare the spreadsheet.

Ethylene Oxide Emissions

The defendant, Terumo BCT, operates a plant in Lakewood, Colorado that sterilizes health care products and medical equipment. Terumo emits ethylene oxide, which is a known human carcinogen, as part of its sterilization process.

The plaintiffs filed three lawsuits against Terumo in Jefferson County District Court. Although only two of the lawsuits had been consolidated for trial, discovery was coordinated in all three cases. The plaintiffs lived and worked near the plant and

alleged that exposure to ethylene oxide emissions caused their cancer.

Plaintiffs' Air Dispersion Expert: The Spreadsheet

The plaintiffs' expert conducted air dispersion modeling to estimate each plaintiff's alleged exposure. To assist in that analysis, the plaintiffs provided their counsel (in emails and interviews) with information that primarily focused on where and when the plaintiffs lived and worked in the area. The plaintiffs' counsel compiled this information in a spreadsheet and provided the spreadsheet to the expert. Counsel did not, however, provide the expert with any of the underlying communications between the plaintiffs and counsel.

The Colorado Supreme Court outlines the discovery battles (special master recommendations, etc.) that I won't go into here. Ultimately, the plaintiffs' counsel produced a spreadsheet to the defense that they had given to the expert as well as a redacted email from counsel to the expert that provided updates to the information in the spreadsheet.

Terumo's Motion for Contempt

Terumo filed a motion for entry of contempt, seeking to compel plaintiffs to produce the attorney-client communications that allowed counsel to prepare the spreadsheet. Terumo argued that, because the attorney-client privilege does not protect the underlying and otherwise unprivileged facts and data that are incorporated into a client's communications with counsel, Terumo was entitled to the underlying communications, which Terumo characterized as the "underlying factual data," to verify the accuracy of the plaintiffs' counsels' summaries upon which [the expert] relied.

The plaintiffs argued that they were not required to produce the underlying communications because, although the facts and data that the expert considered are discoverable, the expert "never received, viewed, or considered" the communications that Terumo seeks and therefore those communications were not discoverable under C.R.C.P. 26(a)(2).

The Trial Court's Ruling: Any Form of Communication and Waiver of Privilege

The trial court granted Terumo's motion, ordering that "any underlying facts and data in any communication between individual plaintiffs and their counsel shall be discovered, in whatever form that takes (emails, surveys, questionnaires, interview notes, etc.)." The court said that "even though [the expert] never saw or considered the attorney-client communication that resulted in the spreadsheet, he did actually consider that underlying data and assumptions in forming his opinions," and, thus, "that underlying data is discoverable under C.R.C.P. 26(b)(1)."

The trial court ordered the plaintiffs' counsel to produce the facts and data emphasizing that because plaintiffs' counsel had been "involved in the data collection process," the plaintiffs' counsel had "waived any privilege they wish[ed] to claim associated with that data collection."

The plaintiffs' motion for reconsideration attached signed declarations from each plaintiff confirming the information that was contained in the spreadsheet. It emphasized that the plaintiffs "always understood [their communications with counsel] to be privileged" and that they did not "waive, and have never intended to waive, privilege over any such communications."

However, the trial court denied the motion for reconsideration and ruled that the signed declarations were insufficient because they did not afford Terumo the opportunity to confirm or analyze whether there had been changes in the plaintiffs' reporting of exposure sites or timeframes or whether there had been omissions from the plaintiffs' counsel's summaries and reports.

In addition, the trial court stated, "A plaintiff's statements about the facts of where she lived and worked, and the timeframes of possible exposure, squarely fall within the underlying facts and data that form the basis of the claims and are discoverable."

Attorney-Client Privilege and Communications vs. Facts

In a concise four-page primer on the privilege, Justice Gabriel walks us through:

1. Section 13-90-107(1)(b), C.R.S. (2023), which codified the common-law attorney-client privilege that states, "An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his

advice given thereon in the course of professional employment…" and
2. Caselaw starting with *Gordon v. Boyles*[2] that explains that the privilege is premised on the notion that candid and open communication from the client to the attorney without fear of disclosure will promote the orderly administration of justice.

The Colorado Supreme Court concludes:

> Terumo's argument overlooks the fundamental distinction in our case law between communications and facts. As noted above, facts, even when made within a client's communication to counsel, are not protected by the attorney-client privilege and are discoverable. Thus, whether those facts are shared with an expert while preparing for trial or divulged to opposing counsel during discovery, the party sharing those facts has not disclosed anything that can be deemed privileged or confidential.
>
> That does not mean, however, as Terumo appears to suggest, that the client no longer has a reasonable expectation that the communications themselves will be treated as confidential.

Furthermore:

> Nor does it suffice to say that plaintiffs can redact their communications with counsel to ensure that only non-privileged facts are disclosed. As noted above, attorneys and their clients routinely communicate about the facts of a particular case.
>
> If all attorney-client communications were now subject to discovery as long as all parts of the communications other than the non-privileged facts were redacted, then the burden on parties and their counsel – not to mention the already high costs of the discovery process – would increase dramatically.
>
> Such a rule could also become a tool for harassing and vexatious litigation practices. We decline to adopt such a rule.

The Colorado Supreme Court: Waivers and C.R.C.P. 26(a)(2)

The Court then turned to the issue of whether the plaintiffs, as the trial court ruled, had waived their claim of privilege when their counsel provided their expert with a spreadsheet containing information learned in confidential client communications, without providing the communications themselves. The plaintiffs argued that their counsel had merely provided the expert with the spreadsheet and that by so doing they did not waive the attorney-client privilege as to the underlying communications because the expert never considered those communications; the expert only relied on and used the facts and data in forming his opinion.

The Supreme Court agreed:

> [A] client might impliedly waive the attorney-client privilege if the client discloses "privileged communications to a third party." . . . If, however, the client discloses to the third party only non-privileged information, such as factual assertions, and did not place any privileged communications at issue or disclose any privileged communications to a third party, then the client has not impliedly waived the privilege…
>
> If, however, the expert has not considered the document or material in connection with formulating his opinions in the case, then C.R.C.P. 26(a)(2) does not require the production of that document or material. (*Garrigan v. Bowen*[3], concluding that an expert was not required to produce the data underlying a study on which she had relied in formulating her opinions because she had not considered that data in forming those opinions).

Privileged Communications Were Not Provided to the Expert. Thus, No Waiver.

The plaintiffs shared with their expert a spreadsheet containing non-privileged, factual information. The spreadsheet had, indeed, been compiled from confidential communications with plaintiffs. But the disclosure of that non-privileged information "does not mean that 20 plaintiffs impliedly waived the attorney-client privilege as to the privileged communications."

The Supreme Court stated:

> Rather, for plaintiffs to have impliedly waived the attorney-client privilege over their confidential communications, they would have needed to disclose the

communications to the expert.

Nothing in the record indicates, however, and Terumo does not appear to suggest, that the expert saw any of the communications sent from plaintiffs to their counsel.

Moreover, because nothing in the record suggests that the expert ever read or reviewed (*i.e.,* considered) those underlying communications, and because C.R.C.P. 26(a)(2) compels the disclosure of only that which the expert has considered in forming his opinion, we conclude that the district court erred in ordering plaintiffs to produce, pursuant to C.R.C.P. 26(a)(2), their communications with their counsel.

This post was drafted by John L. Watson, an attorney in the Denver, Colorado office of Spencer Fane LLP. For more information, visit www.spencerfane.com.

1 (2024 CO 38)

2 9 P.3d 1106, 1123 (Colo. 2000)

3 243 P.3d 231, 239 (Colo. 2010)

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