UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

SHERROD A. MITCHELL	)	
	)	No. 1:18-cv-00075
v.	)	
	)	JUDGE STEGER
ARCHER DANIELS MIDLAND COMPANY and SOUTHERN CELLULOSE PRODUCTS, INC.	)	

ORDER

Before the Court is Defendants' Motion to Compel [Doc. 19] requesting the Court to require Plaintiff to produce audio recordings of interviews of five potential witnesses—Jesse Mills, Milton Overton, Christopher Morris, Cornell Birdsong and Charles Pitner—which interviews were conducted by Plaintiff's investigator.

Plaintiff objects to producing the audio recordings of the witness statements on the basis that they are protected as "attorney work product." More specifically, Plaintiff relies on two arguments: (1) that the witness statements are not "finalized, sworn affidavits"; and (2) that the witness interviews are tantamount to the process an attorney goes through in preparing successive drafts of affidavits, as opposed to the final, completed product. Implicit in these arguments is Plaintiff's assertion that the audio recordings of the witness statements should not be discoverable because they reveal the attorney's mental thought process and trial strategy. The Court finds Plaintiff's arguments to be unavailing; however, Defendants' Motion to Compel [Doc. 19] will be **DENIED** for other reasons set forth below.

Plaintiff represents that the witness interviews were conducted in anticipation of litigation or for trial. Defendant does not raise any credible argument to the contrary. Indeed, the Court

cannot envisage any other reason for these witness interviews. For this reason, the Court finds that the audio recordings of the witness interviews constitute *trial preparation materials*, and that that Fed. R. Civ. P. 26(b)(3) should control the discoverability of these materials. This rule provides in relevant part:

> (3) ***Trial Preparation: Materials.***
> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
> (i) they are otherwise discoverable under Rule 26(b)(1); and
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
> (B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinion, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3) is, essentially, a codification of the attorney work product doctrine. This rule prescribes a procedure for federal courts to follow when one party seeks another party's *trial preparation materials*, which the rule defines as "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." In their briefing of the instant motion to compel, counsel have, for the most part, referred to the audio recordings of the witness interviews as *attorney work product* rather than *trial preparation materials*. This difference in phrasing confuses the issue because it suggests that the Court should apply a different standard to the discovery of *attorney work product* than it does to the discovery of *trial preparation materials*. Rule 26(b)(3) of the Federal Rules of Civil Procedure does not lend support for drawing such a distinction; however, in reviewing case precedent cited by counsel herein, it appears that this Court may have unwittingly contributed to

their confusion.

The parties cite three cases from this judicial district that stand for the proposition that witness statements are generally subject to discovery because they are not protected as *attorney work product*. In the most recent decision, *Nam v. U.S. Express, Inc.*, 2012 WL 12840094, at *3 (E.D. Tenn. May 15, 2012), this Court compelled the production of recordings of non-party witness interviews, stating:

> Applying the majority view and the previous holdings of this Court, nonparty witness statements and affidavits, at least those that are mere recitations of facts within the knowledge of the witnesses and which do not contain "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation," are not protected from disclosure under the work product doctrine.

In deciding *Nam*, the Court relied upon previous cases decided by this Court holding that "'sworn witness statements and affidavits are evidence; they are not protected by the work product doctrine[].'" *Id.* (quoting *Trustees of Plumbers v. Crawford*, 573 F. Supp. 2d 1023 (E.D. Tenn. 2008) and *Basaldu v. Goodrich Corp.*, No. 4:06-cv-23, 2009 WL 1160915 (E.D. Tenn. April 29, 2009)).

In this line of decisions, the Court does not apply Fed. R. Civ. P. 26(b)(3) which sets forth the procedure the Court should follow in determining the discoverability of a party's *trial preparation materials*. Without expressly saying so, the Court drew a distinction between the treatment of *trial preparation materials* and *work product*. And, further, the Court's decisions seemingly turned upon an unspoken distinction between *fact work product*—which does not reflect attorney mental impressions and trial strategy—and *opinion work product*—which is replete with attorney mental impressions and trial strategy. In the cases cited above, the Court bases its decision on the finding that the witness interviews sought to be discovered do not

contain the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." In other words, because the witness interviews do not constitute *opinion work product*, they should not be protected from discovery. In reaching this conclusion, the Court refrains from an analysis of whether the witness interviews constitute *trial preparation materials*—which they most likely are—and does not apply the steps required by the Federal Rules of Civil Procedure for determining the discoverability of such materials.

Respectfully, this approach by the Court seems to be a departure from the express procedure set forth in Fed. R. Civ. P. 26(b)(3), which is intended to be a codification of the work product doctrine. As indicated, this rule prescribes a procedure for the Court to follow when one party seeks another party's *trial preparation materials* (defined as "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative"). Initially, at least, the discoverability of *trial preparation materials* does not turn upon the degree to which those materials reflect "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Rather, all *trial preparation materials* are subject to the constraint imposed by Rule 26(b)(3)(A); specifically, "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."

Applying that rule in the present case, the Court starts with the understanding that recordings of witness interviews by or at the direction of an attorney in anticipation of litigation are generally not discoverable. And, that is true whether the recordings contain attorney mental impressions or whether they do not. In other words, the Court will not depart from the procedural framework set forth in Fed. R. Civ. P. 26(b)(3) simply by finding that the audio

recordings in question contain only facts from non-party witnesses and do not reflect attorney mental impressions or trial strategy. The initial question is whether they constitute *trial preparation materials*, not whether they contain *opinion work product*.

In the next stage of the analysis required by Rule 26(b)(3), the Court determines whether a reason exists to override the general rule that *trial preparation materials* are not discoverable. In doing so, the Court must analyze the applicability of the exceptions in subparts (i) and (ii) of Fed. R. Civ. P. 26(b)(3)(A), *to wit*: (i) whether the recorded witness statements are discoverable under Fed. R. Civ. P. 26(b)(1) because they are "relevant to any party's claim or defense and proportional to the needs of the case"; AND (ii) whether Defendants have demonstrated that they have a "substantial need for the materials to prepare [their] case and cannot, without undue hardship, obtain their substantial equivalent by other means."

Here, the Court finds that the audio recordings of non-party witness statements conducted by Plaintiff's investigator are relevant to the claims and defenses in this lawsuit. Indeed, it is uncontroverted that the investigator's purpose in interviewing the witnesses was to obtain information that had a bearing on the issues in the lawsuit. Further, production of the statements would result in minimal expense or burden to Plaintiff and would in no way be disproportionate to the needs of the case. Consequently, the witness statements are discoverable under Fed. R. Civ. P. 26(b)(1).

On the other hand, in order to overcome the general proposition that *trial preparation materials* are not discoverable, parties seeking such discovery must also demonstrate that they have a substantial need for the materials and that they cannot, without undue hardship, obtain the information by some other method. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii). It is at this point that

Defendants' motion to compel production of the non-party witness statements falls short. Defendants have not claimed—much less demonstrated—that the witnesses interviewed by Plaintiff's investigator are not equally accessible to Defendants. There is no suggestion that any of these witnesses has died or left the area for parts unknown. In other words, Defendants have not shown that they would face some undue hardship if they were forced to obtain the information sought via some method other than requiring Plaintiff to produce the audio recordings of the witness interviews. For that reason, the Court finds that the exception to the general non-discoverability of *trial preparation materials* contained in Fed. R. Civ. P. 26(b)(3)(A)(ii) does not apply. Therefore, Plaintiff's audio recordings of witness interviews—which the Court has determined are *trial preparation materials*—are not discoverable by Defendants. And this is true irrespective of whether the witness interviews reflect or do not reflect attorney mental impressions and trial strategy.

The Court's decision in this case rests upon the reasoning set forth above. However, the Court notes that, had Defendants been able to establish "substantial need for the materials to prepare its case," as well as an inability, "without undue hardship . . . [to] obtain their substantial equivalent by other means," the Court would have compelled the production of such witness interviews to Defendants. Under those circumstances, the Court would have been required to follow the requirements contained in Fed. R. Civ. P. 26(b)(3)(B):

> *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Such protection of *opinion work product* could have been accomplished through redaction of portions of the witness interviews reflecting attorney mental impressions, trial strategy and the

like. But, of course, if the materials were so replete with *opinion work product* that redaction would be ineffective, the Court could determine that production of the witness interviews would simply reveal too much of the attorney's mental impressions and trial strategy, and for that reason deny the motion to compel discovery of the sought-after *trial preparation materials*. Here, the Court did not reach that final stage of the analysis because Defendants were unable to articulate an exception to the general proposition contained in Rule 26(b)(3) that Plaintiff's *trial preparation materials* are not discoverable.

For the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Motion to Compel [Doc. 19] is **DENIED**.

2. The parties shall bear their own costs and attorney fees in connection with Defendants' efforts to compel Plaintiff to produce the witness statements.

ENTER.

/s/ *Christopher H. Steger*
UNITED STATES MAGISTRATE JUDGE