



LITIGATION QUARTERLY

• A NEWSLETTER RELATING TO NEW JERSEY LITIGATION LAW •

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Attorney-Client Privilege: Does It Protect Communications With Experts?

by Betsy G. Ramos, Esq.

Often in litigation experts are needed to aid your case. Is what you, or your attorney, discusses with an expert protected from disclosure to the other side?

The starting point of the analysis is the scope of the attorney-client privilege. Under both New Jersey state and federal law, confidential communications made between a client and an attorney in the course of this professional relationship are privileged. Based upon this privilege, the client may refuse to disclose any such communication and can prevent his lawyer from disclosing it. Under the court rules, an attorney is required to claim the privilege (and refuse to disclose the client communication) unless otherwise instructed by the client.


The basis for this privilege is the need for consultation between attorney and client without fear of public disclosure. This privilege encourages clients to make full disclosure to their attorney to promote full and free discussion between attorney and client to be able to prepare one's case.

This privilege also extends to communications made by the client to an agent of the attorney, such as an expert, who has been retained to aid in the preparation of the client's case. Additionally, the privilege is broad enough to protect client communications that the attorney shares with the agent or scientific expert. As an example of an "agent," a client may give a statement to a private investigator who is acting on behalf of his or her counsel without fear that this communication will be disclosed.

It does not seem to be required for the attorney to have retained the expert directly (as opposed to the client), as long as the expert has been retained to act on behalf of the attorney. The privilege protects from disclosure communications between an attorney and client, as well as "the necessary intermediaries and agents through whom the communications are made." *State v. Davis*, 116 N.J. 341 (1989).

However, this privilege is not absolute. There are certain exceptions to the attorney-client privilege, such as if the communication is in the course of seeking aid of the commission of a crime or fraud, or if the communication in which both parties to the lawsuit claim the privilege and it is relevant to a claim in the lawsuit. As an example, in a situation in which a lawyer was jointly retained by two parties, neither party could claim an attorney-client privilege against the other concerning any communications jointly made between the parties and the attorney.

Specifically as to communications with experts, however, there are circumstances in which the privilege can be lost. If the expert relies on a communication from a client in arriving at the opinions in his or her report, then such client communication becomes discoverable by the opposing side. Essentially, if the client intends to use that communication (either verbal or written) at trial as evidence, it loses its protection as a privileged communication.

Thus, the ideal is that both attorneys and clients should be able to freely communicate with an expert without fear of having that communication disclosed. But, be careful - if the expert relies on that communication in reaching his or her opinions in an expert report, that communication will become discoverable. Therefore, in providing information to an expert that will be preparing a report, one must beware that any client statement or verbal communication made to an expert, upon which such expert relies, could end up being discoverable by the adverse party. 

Forum Non Conveniens or Do I Really Have To Go There?

by Carol L. Jennings, Esq.

The legal doctrine of *forum non conveniens*, in theory, permits a court, even though it might have jurisdiction, to dismiss a pending case when the court believes that in the interests of justice, the case should be heard somewhere else. Essentially, a defendant may invoke this doctrine in an attempt to dismiss a plaintiff's case on the basis that the matter was brought in an "inconvenient forum." Note that the doctrine exists "in theory," but is not always applied in favor of defendants seeking to move cases to their own jurisdiction, or, at the least, the jurisdiction where the incident occurred.

The doctrine of *forum non conveniens* was first recognized many years ago by the United State Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Since then, the doctrine has been recognized in most jurisdictions, including the State of New Jersey in 1954 through the case of *Gore v. U.S. Steel Corp.*, 15 N.J. 301 (1954).

The rationale behind the doctrine is to prevent a plaintiff from causing injustice by imposing undue inconvenience on a defendant or on a forum. As the *Gulf Oil* Court explained, a "plaintiff may not, by choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting upon him expense or trouble" that is unnecessary to the plaintiff's ability to pursue a remedy." The doctrine also serves to prevent "forum shopping" by plaintiffs seeking the most favorable state law.

Now that we've describe the "legalese" of the doctrine, let's look at a real life example. In *Russo v. Posada*, 366 N.J. Super. 420 (App. Div. 2004), the plaintiff, Russo, a New Jersey resident, was the owner/operator of six McDonalds restaurants in New Jersey. In July 1999, Russo attended a McDonald's conference in Cancun,

Mexico and stayed at a hotel owned by the defendant, Posada. Posada had its principal office in Mexico, owned no businesses or property in New Jersey, was not registered in New Jersey as a foreign corporation, but did advertise extensively in travel magazines, airline vacation packages, interactive internet websites, and direct solicitations to travel agencies.

During her stay in Mexico, Russo claimed that she was sexually assaulted by a hotel masseuse during a scheduled appointment in the hotel's spa and she subsequently sued Posada in New Jersey. Posada moved to dismiss the action on several grounds, including *forum non conveniens*. While the trial court granted its request, the New Jersey Appellate Division reversed the dismissal based upon the doctrine of *forum non conveniens*, holding that New Jersey had a compelling concern for the protection of its citizens and that Russo's interest, as an ordinary citizen seeking to prosecute a tort action in her home forum, outweighed the interests of Mexico in protecting its tourist industry.

For a New Jersey Court to dismiss a case based upon the *forum non conveniens* doctrine, there are several factors that the Court must weigh:

- ❖ There is a presumption in favor of the forum chosen by the plaintiff. However, if the plaintiff is not a resident of New Jersey, that presumption falls by the wayside. Even if the plaintiff is a resident of New Jersey, this factor is not the dispositive factor. The Court will also look at where the "evidence" for the case is, i.e. where the witnesses are located.

- ❖ The Court must next determine whether the "other alternative forum is adequate." Essentially this means whether the laws of the other forum would provide the

same or similar relief to the plaintiff, if the plaintiff were to be successful in his or her lawsuit.

❖ The Court must evaluate the public versus private factors bearing on the suitability of the chosen forum. The private interest factors focus upon the convenience of the litigants to the forum and include the relative ease to the evidence, the location and proximity of the witnesses to the forum and for trial in the forum, and the availability and ease of obtaining evidence in the chosen forum.

The public factors to be evaluated include the forum's familiarity with the governing law, the court's preference for resolving local disputes locally, and to avoid the burden put upon jurors deciding cases that have no impact on their community.

To make it more difficult for defendants to invoke this doctrine is New Jersey's reluctance to even entertain a motion to dismiss based upon the *forum non conveniens* doctrine until after the parties have attempted to conduct discovery in the litigation. In *Kurzke v. Nissan Motor Corp.*, 164 N.J. 159 (2000), plaintiff Kurzke, a New Jersey resident, purchased a Nissan minivan, which was designed and manufactured in the United States, from a New Jersey dealership. The next year, Kurzke was transferred to German and had the minivan shipped there. Two years later, the plaintiff and his family were in a collision on a German roadway.

Kurzke filed suit in New Jersey against several defendants, including Nissan and the dealership. In the early stages of the litigation, the defendants sought to remove the action from New Jersey based on the doctrine of *forum non conveniens*. After weighing the public and private interest factors, and hearing argument that the discovery of documents and witnesses to the accident

would be hampered if the case were to be tried in New Jersey, the trial court dismissed the New Jersey action. The New Jersey Appellate Division affirmed the trial court's dismissal.

However, the New Jersey Supreme Court reversed the decision, holding that the balancing process used by the trial court was premature, noting that the defendant's arguments about the difficulty of obtaining discovery and witness testimony was essentially speculative and they had not yet attempted to contact the witnesses to see if they would actually come to New Jersey. The Supreme Court found that a motion for dismissal based upon the *forum non conveniens* doctrine should not be heard unless the moving party has made a good faith effort to obtain discovery and can provide the court with a record verifying that discovery in "unreasonably inadequate" in the forum chosen by the plaintiff.

And, to add an additional burden to defendants' seeking to use the *forum non conveniens* doctrine, the *Kurzke* Court also noted that while the defendants must take the time to attempt to obtain discovery to prove to the court that the discovery is unobtainable, if the litigation is "too far advanced," a dismissal based on the doctrine should be avoided as it would impose "heavy costs" on the plaintiff. Thus, while a defendant may not be able to use this doctrine at the early stages of a lawsuit, waiting too long could also preclude its use.

So while the doctrine of *forum non conveniens* exists in New Jersey to allow a defendant to remove a case from an "inconvenient forum" chosen by a plaintiff, the doctrine is sparingly granted by New Jersey courts. The bottom line - you may be stuck litigating your case in New Jersey whether you like it or not! 📌

TOPICS YOU WOULD LIKE TO SEE ADDRESSED

If you have any suggestions for future articles, please contact Newsletter Editor and Litigation Group Chair, Betsy G. Ramos, Esq., via telephone at 856.914.2052 or via email at bramos@capehart.com.



In addition to editing the *Litigation Quarterly*, Betsy G. Ramos, Esq. is chair of Capehart Scatchard's Litigation practice and has been recognized as one of South Jersey's Top Attorneys as published by *SJ Magazine*. She has over 25 years experience as a litigator handling matters including business litigation, employment litigation, tort claims and civil rights defense, construction litigation, insurance coverage, tort defense, estate litigation, and general litigation.



Ms. Jennings focuses her practice on litigation in the construction, transportation, commercial, and employment areas, and also litigates, drafts, and provides advice regarding non-competition agreements, non-solicitation, and non-disclosure agreements. She represents a diverse group of national and local clients including nursing and physician practices, staffing, design, management, railroad, trucking, computer, manufacturing, financial, and lending institutions.

Upcoming Seminars

April 28, 2009 -- Click here to view brochure

Capehart Scatchard will be hosting a breakfast seminar entitled "[Using Agreements to Prevent Disputes Among Business Owners](#)" at the Doubletree Guest Suites Mt. Laurel. Registration begins at 8:30 a.m. with the seminar concluding at 11:30 a.m. Speakers to include Betsy G. Ramos, Esq., Chair of Capehart Scatchard's Litigation Group, Helene R. Leone, Shareholder, Business and Tax; Commercial; and Real Estate and Land Use Groups, and Yasmeen S. Khaleel, Esq., Wills, Estates and Trusts Group. The topics to be covered are:

Which Agreements Are A Must?

- ❖ Shareholder Agreement (for corporation) or Operating Agreement (for LLC)
- ❖ Noncompete and Confidentiality Agreement

Use These Agreements To:

- ❖ Control ability and method used to transfer or sell ownership interests
- ❖ Prevent departing owners and employees from taking customers and proprietary information

The cost of the seminar is \$25.00. For further information, please contact Beth Hopkins or Carol Wright at 856-234-6800 or visit our website at www.capehart.com.

May 13, 2009 -- SAVE THE DATE

Capehart Scatchard will be hosting a breakfast seminar entitled "[The Commercial General Liability Policy: Coverage and Exclusions](#)" at the National Conference Center at the Holiday Inn of East Windsor. Robert Hicken, Esq., a Shareholder in Capehart Scatchard's Litigation Group, will be the moderator and speaker. He will be joined by other members of our Litigation Group.

The cost of the seminar is \$25.00. For additional information, please contact Beth Hopkins or Carol Wright at 856-234-6800 or visit our website at www.capehart.com.

June 11, 2009 -- SAVE THE DATE

Capehart Scatchard will be hosting a breakfast seminar entitled "[From Hiring to Record Keeping: Business and Employment Law Issues](#)" at the Doubletree Guest Suites Mt. Laurel. Registration begins at 8:30 a.m. with the seminar concluding at 11:30 a.m. Speakers to include Carol Jennings, Esq. and Stephen Alexander, Esq., members of Capehart Scatchard's Litigation and Labor & Employment Groups.

The cost of the seminar is \$25.00. For additional information, please contact Beth Hopkins or Carol Wright at 856-234-6800 or visit our website at www.capehart.com. 

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