

**SELECTION AND COMPILATION OF ADVERSE EXPERT'S
PRIOR TESTIMONY AS PROTECTED WORK PRODUCT
IN NEBRASKA STATE COURTS**

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Imagine you are defending a doctor or hospital in a medical malpractice action. Through your contacts in the defense bar, you have obtained copies of prior depositions and trial transcripts of the plaintiff's expert witness. Now the plaintiff's counsel has served you with a document request seeking "any and all transcripts of testimony of the plaintiff's expert that defendant possesses." You respond by objecting to the request because it calls for impeachment materials and calls for attorney work product.

Now imagine that the plaintiff files a motion to compel the production of the transcripts of testimony. Attached to the motion is a copy of a factually similar case from another jurisdiction, which found that deposition transcripts intended to be used at trial for impeachment must be disclosed to opposing counsel upon request through discovery.² The plaintiff urges the court to adopt the reasoning of the foreign court to show that Nebraska is dedicated to the prevention of "surprise, trickery, bluff, and legal gymnastics."³

Is this the rule in Nebraska? Must defense counsel turn over prior deposition transcripts of the plaintiff's own expert that defense counsel plans to use for impeachment purposes at trial? If Nebraska state appellate courts have not directly spoken on the issue, is this the rule they are likely to follow?

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² See, e.g., *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004) (stating that work product privilege could protect the depositions from discovery only if the doctor never expected to use them for impeachment at trial).

³ *Id.* at 1270.

a. *The selection and segregation of particular documents from among many falls within the highly protected category of opinion work product.*

Because NEB. CT. R. DISC. § 6-326(b)(3) controls this issue, it is the first place to start looking for answers to these questions. Rule 6-326(b) contains general provisions that, unless otherwise limited by order of the court, govern the scope of discovery. Subsection (3) of the Rule provides, in relevant part:

[A] party may obtain discovery of documents and other tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.⁴

This rule “provides for protection of material often described as an attorney’s work product, and follows the language of the federal rule.”⁵

“Inasmuch as the Nebraska Rules of Discovery are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.”⁶ In *Omaha Public Power Dist. v. Foster Wheeler*, the court ruled that an attorney's selection and segregation of particular documents from among many fell within the highly protected category of opinion work product protected from disclosure.⁷ Likewise, the Eighth Circuit has recognized that an attorney’s selective review of numerous documents is “based upon [the attorney’s] professional judgment of the issues and defenses involved

⁴ NEB. CT. R. DISC. § 6-326(b)(3).

⁵ See *id.*, cmts. to R. 26 (2010).

⁶ *Gernstein v. Lake*, 259 Neb. 479, 480, 610 N.W.2d 714, 716 (2000) (citing *Stanko v. Chaloupka*, 239 Neb. 101, 103, 474 N.W.2d 470, 471 (1991)).

⁷ *Omaha Pub. Power Dist. v. Foster Wheeler Corp.*, 109 FRD 615, 616 (D. Neb. 1986).

in [a] case” and that “[t]his mental selective process reflects [an attorney’s] legal theories and thought processes, which are protected as work product.”⁸

In our hypothetical scenario, defense counsel has selectively compiled materials in preparation for his cross-examination of Plaintiff’s expert. These documents thus constitute Defendants’ work product, and should not be discoverable absent a special showing in accordance with NEB. CT. R. DISC. § 6-326(b)(3).

b. The discovery process is not a tool for compelling the production of materials for the sole purpose of avoiding impeachment of a witness.

In Nebraska, there is no bright-line rule declaring that all materials intended to be used at trial, even if for impeachment purposes, are subject to discovery. Rather, Nebraska law recognizes that “The trial of a law suit is still an adversary proceeding and our discovery statutes do not require a party to disclose all his evidence, including that which tends to restrain the unscrupulous, unless justice under the name of good cause requires it.”⁹

In *Haarhues v. Gordon*, the Nebraska Supreme Court held that the defendants were not required to turn over to the plaintiff a witness statement taken from a non-party employee of the plaintiff.¹⁰ The importance of the decision in *Haarhues* for purposes of our hypothetical scenario lies in its treatment of impeachment materials, and in its balancing of the competing interests sought to be achieved by the discovery and adversarial processes. The Nebraska Supreme Court determined in *Haarhues* that “[i]t is not the purpose of rules of discovery to supplant our adversary system.”¹¹ As the

⁸ *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) (citing *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985)).

⁹ *Haarhues v. Gordon*, 180 Neb. 189, 198, 141 N.W.2d 856, 862 (1966).

¹⁰ *Id.* at 199, 141 N.W.2d at 863.

¹¹ *Id.* at 194, 141 N.W.2d at 861.

court noted:

It is contended that the purpose of discovery is to require the parties to disclose all the facts in order that more perfect justice will be attained and that the bad features of the competitive trial be eliminated; that a trial become less a game of wits, skill, or energy. But litigants being what they are, with their known tendency to put their best foot forward in their own interest, the adversary must use counteracting methods to arrive at the unvarnished truth. It would not serve the cause of justice to strip a party of the means of protecting against these human tendencies by cross-examination, impeachment, and other devices, which have been long demonstrated as effective methods of insuring the ultimate discovery of truth.¹²

The court in *Haarhues* recognized that, when the information being sought is obtainable from a non-party witness who is both available and not hostile to the movant, “the adversary should not be deprived of the only means he has against colored or false testimony.”¹³ In Nebraska, “[a] party is not entitled, under the guise of discovery, to look over the shoulder of his adversary in preparing for trial.”¹⁴ The discovery process is not a tool for compelling the production of materials for the sole purpose of avoiding impeachment of a witness.¹⁵ And Nebraska is not alone in this regard.

In *Potts M.D. v. Williams*,¹⁶ the Court of Appeals of Indiana faced a situation that is factually similar to our hypothetical scenario. The minor plaintiff in *Potts* brought a medical malpractice action against a doctor. The defendant doctor sought to compel copies of materials the plaintiff intended to use on cross-examination of the defendant’s expert witness. The motion to compel was denied, and at trial the plaintiff cross-examined the defendant’s expert regarding his testimony in other cases.¹⁷ In ruling that

¹² *Id.* at 194, 141 N.W.2d at 860–861.

¹³ *Id.* at 197–198, 141 N.W.2d at 862.

¹⁴ *Id.* at 198, 141 N.W.2d at 863.

¹⁵ *See id.*

¹⁶ 746 N.E.2d 1000 (Ind. App. 2001).

¹⁷ *Id.*

the trial court did not abuse its discretion in denying the defendant's motion to compel, the court first noted that "Products of investigation are work product because their subject matter relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved."¹⁸ The court then went on to hold that:

The requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.

Here, in preparation for his cross-examination of [the defendant's expert], [plaintiff] obtained copies of depositions and trial transcripts of [the expert]'s testimony in other shoulder dystocia cases. Those documents thus constituted [the plaintiff]'s work product and were not discoverable absent a special showing. Because [the defendant] had equal, if not better, access to [the expert]'s prior testimony, the trial court did not abuse its discretion when it denied [the defendant's] motion to compel discovery.¹⁹

In our hypothetical scenario, as in *Potts*, defense counsel has selectively compiled materials in preparation for his cross-examination of the plaintiff's expert. These documents thus constitute defense counsel's work product, and are not discoverable absent a special showing in accordance with NEB. CT. R. DISC. § 6-326(b)(3).

c. Procedures and guidelines for asserting claims of work-product protection under Greenwalt v. Wal-Mart Stores, Inc.

Under the 1997 Nebraska Supreme Court decision of *Greenwalt v. Wal-Mart Stores, Inc.*,²⁰ a party asserting a work-product objection to discovery must, in response to a motion to compel, make out a prima facie claim that the doctrine applies. "In order to fulfill this burden, the asserting party must submit a motion for protective order, in

¹⁸ *Id.* at 1005–1006.

¹⁹ *Id.* at 1006 (emphasis added).

²⁰ 253 Neb. 32, 567 N.W.2d 560 (1997).

affidavit form, verifying the facts critical to the assertion of the privilege or doctrine.”²¹

The criterion set forth by the court in *Greenwalt* for a motion for protective order presents a special problem when the work-product doctrine is being asserted to protect the selection and compilation of documents. According to the *Greenwalt* opinion:

The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.²²

Of course, in our hypothetical situation it is the *selection process* itself that represents defense counsel's mental impressions and legal opinions. Thus any requirement that counsel list the documents, dates, authors, etc. in the motion for protective order would defeat the purpose of the work-product objection. Disclosure or description of the documents in question would provide the plaintiff with the unfair benefit of access to defense counsel's detailed preparatory work for the trial of the action.

Defense counsel's motion for a protective order and supporting affidavit should carefully approach the dilemma created by the second requirement of the rule in *Greenwalt*. The contents of the motion and/or the supporting affidavit should include language such as:

- (1) In preparation for cross-examination of the plaintiff's expert, defense counsel obtained copies of depositions and trial transcripts of the expert's testimony in other medical malpractice cases;
- (2) Counsel's selection and segregation of particular transcripts from numerous

²¹ *Id.* at 40, 567 N.W.2d at 566 (citing NEB. CT. R. DISC. 26(c)).

²² *Id.* at 40, 567 N.W. 2d at 566–67.

copies of prior testimony of the plaintiff's expert is based upon his professional judgment of the issues and defenses involved in the case;

- (3) Counsel's mental selective process reflects his legal theories and thought processes, which are protected as opinion work product;
- (4) Because the *selection process* itself represents defense counsel's mental impressions and legal opinions in the matter, the court's order should provide that the defendant shall not be required to list the documents or provide the date or author of the documents, or disclose any other matter that will reveal the protected information; and
- (5) To the best of his knowledge, defense counsel's copies of the plaintiff's expert's prior testimony are not the only copies in existence, and the plaintiff has equal, if not better, access to the prior testimony of the plaintiff's own expert.

Conclusion

In conclusion, transcripts of an adverse expert's prior testimony that are selectively compiled in preparation for cross-examination should fall within the highly protected category of opinion work product and be protected from disclosure. It is the *selection process* itself that represents counsel's mental impressions and legal opinions in the matter. In Nebraska, this selection process should be considered the work product of counsel, and the selected documents should be subject to the protection of Rule § 6-326(b)(3).