A woman sued the manufacturer of her hip implant in federal court, claiming that she developed neurological and other health symptoms as a result of her exposure to the implant's material.

During discovery, the woman's attorney hired a doctor as an expert to assess the woman's case. The doctor evaluated the woman, reviewed her medical records, and concluded that the hip implant was not the cause of the woman's symptoms. After sharing this conclusion with the woman's attorney, the doctor was paid for the time spent assessing the woman's case. The woman's attorney did not retain the doctor's services for trial.

The manufacturer's attorney then served a subpoena on the doctor to take her deposition. The woman's attorney moved to quash the subpoena.

How will the court likely rule on the motion?

A. Deny the motion, because the doctor has evidence relevant to the case.

B. Deny the motion, because the woman's attorney hired the doctor as an expert.

C. Grant the motion, because the doctor is not a party in the case.

D. Grant the motion, because the facts known and opinions held by the doctor are privileged.

Explanation:

Discovery of expert materials

(FRCP 26(b)(4))

Nontestifying expert	• Facts known or opinions held by expert *not* discoverable unless: – relate to court-ordered physical/mental examination *or* – exceptional circumstances make it impracticable to obtain information by other means
Testifying expert	• Facts known & opinions held by expert discoverable through deposition • Drafts of expert reports & disclosures *not* discoverable • Communications between attorney & expert *not* discoverable unless: – relate to expert's compensation *or* – identify facts, data, or assumptions provided by attorney that expert considered in forming opinions

FRCP = Federal Rule of Civil Procedure.

Discovery is the pretrial phase of a lawsuit during which the parties can use various methods (eg, depositions) to **obtain nonprivileged information** that is (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. Information held by an **expert witness** expected to testify at trial is generally nonprivileged and discoverable. But facts known and opinions held by an expert ***not* expected to testify** are **privileged** and not discoverable **unless**:

- that information relates to a **court-ordered physical or mental examination** *or*
- **exceptional circumstances** make it impracticable to obtain that information by other means—eg, a party dies and cannot be evaluated.

Here, the woman's attorney hired the doctor as an expert to assess the woman's case but not to testify at trial. Since no court-ordered examination took place and no exceptional circumstances exist, the facts known and opinions held by the doctor are privileged and not discoverable. Therefore, the court will likely grant the motion to quash the subpoena **(Choice B)**.

(Choice A) Although the doctor has evidence relevant to the case and favorable to the manufacturer, this evidence is privileged.

(Choice C) The fact that the doctor is not a party does not preclude her from being deposed. That is because a party can depose any party or nonparty to obtain *nonprivileged* information relevant and proportional to the needs of the case.

Educational objective:

The facts known and opinions held by an expert not expected to testify at trial are privileged and not discoverable unless (1) the information relates to a court-ordered physical or mental examination or (2) exceptional circumstances make it impracticable to obtain that information by other means.

References

- Fed. R. Civ. P. 26(b)(4) (discovery of expert witnesses).