A pharmaceutical company sued its competitor for patent infringement in federal court. The competitor's attorney hired a pharmacist to examine the case and testify as an expert at trial. The pharmacist studied the case and submitted an initial draft of her report to the attorney. After reading the draft report, the attorney noticed that certain facts and data were missing. To correct this issue, the attorney emailed the pharmacist and provided additional facts and data to include in the report. The pharmacist then revised her report based on this additional information.

After receiving this revised report from the competitor's attorney, the pharmaceutical company served a request for production on the attorney to produce the email exchanged with the pharmacist.

Must the attorney produce the email?

A. No, because attorney communications with expert witnesses are privileged.

B. No, because the contents of the email are discoverable through interrogatories served on the pharmacist.

C. Yes, because a draft of an expert report is discoverable.

D. Yes, because the email contained facts and data that the pharmacist relied on to revise her report.

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.

Parties can use various discovery methods, including requests for production, to obtain nonprivileged information that is relevant to any claim or defense and proportional to the needs of the case. Materials held by an expert witness **expected to testify** at trial are **discoverable** with **two exceptions**:

- Drafts of expert reports or disclosures
- **Privileged attorney-expert communications**

All attorney-expert communications are privileged unless they (1) relate to the **expert's compensation** *or* (2) **identify facts, data, or assumptions provided by the attorney** that the expert **considered or relied on** in forming his/her opinions.

Here, the competitor's attorney hired the pharmacist to examine the case and testify as an expert at trial. After reading the pharmacist's draft report, the attorney emailed the pharmacist and provided her with additional facts and data that were missing in the draft. The pharmacist then relied on those facts and data to revise her report, so the email is *not* a privileged communication **(Choice A)**. Therefore, the attorney must produce the email.

(Choice B) Interrogatories are a discovery request in which a party serves written questions on another *party* that inquire about any matter within the scope of discovery. However, interrogatories may not be served on a *nonparty* such as an expert

expected to testify at trial. Therefore, the contents of the email are not discoverable through interrogatories served on the nonparty pharmacist.

(Choice C) Drafts of expert reports are *not* discoverable. Therefore, the attorney would not be required to produce the email on this basis.

Educational objective:

All attorney-expert communications are privileged unless they (1) relate to the expert's compensation or (2) identify facts, data, or assumptions provided by the attorney that the expert considered or relied on in forming his/her opinions.

References

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