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Hand-delivery

Dear Mike:

Enclosed is the Hartley document containing the answers for which we seek questions. I find it incredible that Mr. Hartley provided you this document without identification of the questions which he was answering. For example, see page 20 in which he answers "Yes" three times.

So that you will not misconstrue our position, we are seeking the questions which Mr. Hartley was answering in this document, whether the questions themselves, question numbers, or even no identification of the questions actually appeared with his answers.

This position is squarely within the rule established in the June 1, 1979 prehearing conference that unanswered questions from counsel to an expert witness are not discoverable, but when the expert answers the questions both the questions and answers then become discoverable. See Tr. 423.

Sincerely,

Bill

William J. Franklin

Encl.

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MR. LESSY: I haven't heard of it yet here.

What the effect of that ruling really means, that if a man is going to testify as an expert, anything the attorneys do in support of his effort is not privileged.

CHAIRMAN MILLER: That's about right.

Attorneys don't have to get cross-examined, but they are not going to be able to start discussing what witnesses testify and not have the witness subject to cross-examination as to what it consists of. You can't eat your cake and have it.

If you want to stay an attorney, fine. If you want to be an attorney and you want to go ahead with the preparation in such fashion that whatever is being discussed or shown enters into the thinking or could enter into the thinking, which is the subject of the testimony --

MR. LESSY: Okay.

CHAIRMAN MILLER: Okay. Are there others of a different kind or quality, Mr. Lessy?

MR. LESSY: Yes, there is a third category, too. And that is set forth in Documents 2 and 3.

CHAIRMAN MILLER: 2 and 3.

MR. LESSY: Let's take the third document.

1/15/79 memorandum from me to the experts in which I say, for example, that these are the types of questions that I would like you to answer, okay. And I list 100 questions

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1 For example, as I recall the document, again, the
2 types of questions clearly reveal my legal theories, what we
3 are thinking about the areas we think are important. And at
4 a subsequent meeting the expert provides answers to them.

5 My understanding of that would be that that would
6 be pure work product.

7 CHAIRMAN MILLER: What if he disagreed with your
8 theories as propounded in these 100 possible questions? He
9 could come to you and say, "Boy, are you all wet on that one,
10 but here's what I would say if I were on trial?"

11 What do you do then? Call him?

12 However, if as a result of all this byplay of
13 preparation, if he says, or says in substance, or can testify
14 to matters that he thinks are useful to your case and can do it
15 honestly and appropriately, you call him. And you are perfectly
16 entitled to do so.

17 MR. LESSY: He's not providing anything.

18 CHAIRMAN MILLER: You are providing everything.

19 MR. LESSY: I am providing questions.

20 CHAIRMAN MILLER: Well, why are you providing
21 questions?

22 MR. LESSY: To find out what the answers are.

23 CHAIRMAN MILLER: Of course.

24 MR. WOLFE: Are there answers here as to which you
25 claim privilege?

1G 45 1 MR. LESSY: No. Houston says there has to be
2 answers, but there aren't. Houston also said in their pleading
3 that I am providing him facts, which they aren't. These are
4 simply questions which he will answer in a subsequent oral
5 meeting.

6 CHAIRMAN MILLER: Oh, I see. So far they are just
7 questions.

8 MR. LESSY: They are questions. They are a list
9 of questions.

10 CHAIRMAN MILLER: So they are simply a list of
11 questions at this time.

12 MR. LESSY: Those questions clearly reveal counsel's
13 thinking.

14 CHAIRMAN MILLER: We think that if it stops at that
15 point or at that point, we think they would be work product.
16 I mean, it's your product. So long as you don't directly or
17 indirectly hop on that witness stand, fine.

18 Now, there ought to be a question as to what is
19 done thereafter. But I take that --

20 I mean, if he answers them, he can be asked about
21 them. Or if he does it in writing, he can be asked to produce
22 the documents. If he does it orally, he could presumably, if
23 not otherwise privileged, be asked in his deposition. But
24 now this is a witness again. It's not a consulting expert who
25 is not a witness.