

are unable to obtain the documents from any other source because Lindsey is unable to recall her username and password. See Motion at 4.

A hearing on the Motion was held on May 12, 2010. At the conclusion of the hearing, Defendant was directed to submit the documents for *in camera* review and Plaintiffs were given seven days to file a supplemental memorandum. Defendant submitted the documents on May 12th, and Plaintiffs filed their supplemental memorandum on May 19th. See Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion to Compel MySpace Records (Doc. #40). The Court has completed the *in camera* review and considered the parties' submissions. The matter is now ripe for decision.

Discussion

Based on Defendant's representation that "[t]he MySpace documents in question were obtained by defense counsel's office, while conducting an internet search, after the Rhode Island Blood Center assigned this matter to defense counsel in anticipation of litigation following notification of a claim by plaintiffs' former counsel," Defendant Rhode Island Blood Center's Objection to Plaintiffs' Motion to Strike Objections and Compel Responsive Documents (Doc. #37) ("Objection") at 3, the Court finds that the documents were "prepared in anticipation of litigation," Fed. R.

Civ. P. 26(b) (3);¹ see also United States v. Textron Inc. & Subsidiaries, 577 F.3d 21, 29 (1st Cir. 2009) (“From the outset, the focus of work product protection has been on materials

¹ Fed. R. Civ. P. 26(b) provides in relevant part:

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are **prepared in anticipation of litigation** or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has **substantial need** for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording or a transcription of it that recites substantially verbatim the person’s oral statement.

Fed. R. Civ. P. 26(b) (3) (bold added).

prepared for use in litigation, whether the litigation was underway or merely anticipated."); id. at 30 ("It is only work done in anticipation of or for trial that is protected."). The Court further finds that the documents are discoverable under Rule 26(b)(1),² that Plaintiffs have shown a "substantial need" for them, and that Plaintiffs cannot, without undue hardship obtain their substantial equivalent by other means. In concluding that Plaintiffs have a "substantial need" for the documents, the Court finds that they are similar to surveillance materials and should be produced to Plaintiffs. Cf. Armacost v. Amica Mut. Ins. Co., No. CA 91-0477P, 1993 WL 489658, at *1-2 (D.R.I. Jan. 12, 1993) (finding under prior version of Rule 26 that surveillance materials are "work product" but requiring their production "where the information will come to light during

² Fed. R. Civ. P. 26(b) provides in relevant part:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

....

Fed. R. Civ. P. 26(b)(1).

the course of the trial"); Cabral v. Arruda, 556 A.2d 47, 49-50 (R.I. 1989) (finding that surveillance photographs taken by investigator constitute work product which is "qualifiedly immune from discovery" but requiring that they be produced after defendant had opportunity to depose plaintiff); id. at 50 (finding that "where a plaintiff learns that surveillance material is to be introduced at trial, its nondisclosure constitutes a showing of undue hardship under [R.I. Superior Court Rule of Civil Procedure] 26(b)(2)").

To be clear, the Court finds that Plaintiffs have a "substantial need" for the documents because allowing Defendant to confront Plaintiffs with them for the first time at trial would create undue hardship. Cf. Cabral, 556 A.2d at 50 ("To allow surreptitiously obtained photographs or films to be sprung on a plaintiff at trial creates undue hardship."). Plaintiffs should have the opportunity to review the documents prior to trial to assure themselves of the documents' authenticity and to be able to quickly place in context any comments or statements on which Defendant may choose to focus. Delaying this opportunity until the point in the trial at which Lindsey (or one of her experts) is asked about a comment reflected in the documents would disrupt and delay the trial.

While Defendant notes that the documents "are not surveillance materials generated by a third party . . .," Objection

at 4, and that the documents reflect Lindsey's "own words and publications which she elected to place in the public domain via the internet/MySpace.com," id., the Court is unpersuaded that these circumstances make a difference. There is no reason to believe that the holding in Cabral would have been different if the defendant's attorneys had taken the surveillance photographs themselves as opposed to employing an investigator to do so. As for the contention that Lindsey placed her words in the public domain, the Court does not find this determinative. If Lindsey had gone to the Narragansett Town Beach in the summer of 2006 and played beach volleyball, she would have no expectation of privacy in this very public activity. Yet, if she were surreptitiously photographed or videotaped playing volleyball by Defendant in anticipation of this litigation, the same hardship identified in Cabral would still exist. See Cabral, 556 A.2d at 50.

Accordingly, the Court finds that the documents must be produced to Plaintiffs and overrules Defendant's Objection. See Machi v. Metro. Life Ins. Co., No. 02:07cv1754, 2008 WL 2412947, at *1 (W.D. Pa. June 10, 2008) (stating that "the weight of decisions which have addressed the issue favor discoverability of surveillance information, albeit often with limitations on the timing of the disclosures").

With respect to the timing of the production, Lindsey has already been deposed so that consideration is no longer a factor

here. However, the Court is unpersuaded by Plaintiffs' argument that Plaintiffs' medical experts need the documents in order to render their opinions regarding Lindsey's injuries. Plaintiffs have not shown that these are the only communications written by Lindsey after the injury and that without such documents Plaintiffs' experts are not able to evaluate her mental abilities and render an opinion regarding the effects of her injury. Indeed, the Court suspects that if Defendant had not disclosed the existence of the documents at Lindsey's deposition, Plaintiffs would not have even sought to obtain the documents from MySpace. Thus, with respect to their experts, Plaintiffs have not shown a substantial need for the documents.

Moreover, requiring that the documents be provided to Plaintiffs prior to the production of the reports from Plaintiffs' experts would reduce the effectiveness of the impeachment value of the documents relative to the experts' opinion. Plaintiffs' experts should not be allowed to tailor their reports to adjust for information contained in the documents. Thus, to the extent that Plaintiffs seek the production of the documents before they are required to make their expert witness disclosures, the Motion is denied.

Conclusion

In summary, the Motion is granted to the extent that Defendant shall produce the documents to Plaintiffs within

fourteen days after the disclosure of Plaintiffs' experts' reports. The Motion is denied to the extent that Plaintiffs seek earlier production of the documents.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
May 25, 2010