

## Rules and Cases

URCP 26 – General Provision Regarding Discovery

USRCP 29 Stipulations Regarding Discovery Procedure

USRCP 30 Depositions Upon Oral Examination

USRE 615 Exclusion of Witnesses

USRE 701 Opinion Testimony of Law Witness

USRE 703 Basis of Opinion Testimony by Experts

*Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001).

The United States hired a litigation consulting company, and certain principals of the consultant were also retained as testifying experts. The taxpayer requested additional discovery concerning communications between the United States' experts and their draft reports, but the requested information was deleted as a result of the consultant's document retention policy. The taxpayer asserted that the United States was subject to sanctions for spoliation of evidence, and for permitting the consultant to write the expert reports. The court first held that, in view of the United States' intentional destruction of evidence, with ample notice of its potential relevance, drawing adverse inferences respecting substantive testimony and credibility of the experts was appropriate, based on the evidence produced at trial. The United States had a duty to preserve the evidence, and the loss of the evidence severely prejudiced the taxpayer's ability to cross-examine the experts. Further although the taxpayer failed to show that the consultant provided the substance of the experts' reports, the taxpayer was permitted to inquire at trial concerning the alleged ghost writing.

*W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S, 2000 U.S. Dist. LEXIS 18096 (W.D.N.Y. Nov. 2, 2000).

Plaintiff filed suit pursuant to § 113(g)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601 et seq., and state law, seeking contribution for response costs incurred by plaintiff in connection with remediation of hazardous wastes disposed at a site. Plaintiff moved to compel document production related to defendant's expert disclosure and for sanctions. The court granted the motion to compel in part. The availability of cross-examination to probe an expert's opinion was not an adequate substitute for pretrial disclosure. Draft reports prepared by defendant's attorneys provided to the expert were discoverable. The information found in the expert's diary entries regarding the site were relevant and should be disclosed. Certain reports were intentionally destroyed at defense counsel's direction. While the record established a potential basis for sanctions, the court could not determine the extent to which plaintiff could show actual prejudice.

*Lugosch v. Congel*, 219 F.R.D. 220 (N.D.N.Y. 2003).

Defendants and a non-party became a team and jointly invoked the attorney-client privilege and work product doctrine to defeat plaintiffs' request for work product doctrine, particularly under the joint defense agreement, was a rather broad and improper sweep over a multitude of records and should not be countenanced. First, the court found that the continuity of attorney-client privilege and the work product doctrine was not broken when an attorney assumed responsibility to advise the non-party and its employees with regard to this litigation. The court reasoned that it was not beyond credulity for the non-party to believe it would be sued by plaintiffs. Throughout plaintiffs' complaints, plaintiffs made many serious allegations against the non-party as a conspiratorial force to defraud plaintiffs. One would expect that such charges would make a reasonable person suspect that litigation against them was afoot. Second, the court found that defendants had to disclose the engagement letters and the auditor's work papers, reasoning that this information was considered by an expert.