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The Novel And Emerging Scholastic Privilege

Law360, New York (September 19, 2013, 6:56 PM ET) -- Recently, academics and scientists have seemingly come under increased scrutiny — not in the peer review process of their theories and/or practices but rather by courts, litigators and prosecutors. These are not challenges of contrary findings, conclusions or analyses. Rather, these challenges use legal tools, strategies and arguments to pry into the methods and processes of the scientific work itself.

Scientists see these challenges as epistemological attacks on the field of science as a whole, while lawyers, law enforcement offices and companies seeking the information view the subpoenas as merely subjecting scientists to the same scrutiny any party is subject to when drawn into a litigation. Lawyers and litigants would argue that the power of the subpoena, the annoyance of email productions and intrusive nature of litigation is same whether you have a Ph.D. or an MBA.

This article aims to review the concerns of scientists, academics and their institutions, the apparent increasing frequency of the use of these discovery tools and the options these parties may have when unwittingly pulled into a litigation.

The Views and Concerns of Scientists

Recently, scientists and academics have expressed concern that courts are a new battleground for science. They point to a number of examples, including a relatively recent pharmaceutical litigation, where a Fortune 500 company attempted to subpoena a peer reviewer's comments and notes made on studies published in the medically acclaimed and esteemed New England Journal of Medicine and Journal of the American Medical Association.[1] In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. CIV.A. 08-mc-10008-MLW (D. Mass. March 31, 2008); In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. 08 C 402, 2008 U.S. Dist. (N.D. Ill. March 14, 2008).

The company sought confidential comments and notes to examine the validity of the studies published. NEJM and JAMA argued that making comments and notes public would jeopardize the necessary confidentiality that exists between a reviewer and an author, thereby compromising the entire process that checks and protects good scientific and medical papers. In re Bextra I, 249 F.R.D. at 14 [2].

Similarly, the Virginia State Attorney General Kenneth Cuccinelli doggedly sought records, emails and private correspondence from Professor Michael Mann, a climatologist, relating to his climate research and publications concerning increased global temperatures. See Kenneth T. Cuccinelli, Ii, In His Capacity As Attorney General Of Virginia v. Rector And Visitors Of The University Of Virginia (2010).

Virginia is not the only government seeking academic data. The United Kingdom government sought confidential records and interviews that were collected for an important academic research project

called the Belfast Project. In Re: Request from the United Kingdom … Mutual Assistance in Criminal Matters in the Matter of Dolours Price (2011).

Considering this particular concern of scientists and academics, what challenges to an otherwise valid subpoena does legal counsel have? There is a little-known but important tool at the disposal of counsel for academics and scientists that can create a slightly higher burden to production or, in the least, limit the scope of such productions, and it is called the scholastic privilege.

The Law on Scholastic Privilege

Recently, courts have begun to recognize the important and often critical work of scientists, thereby reflecting a valid and strong concern that if researchers' prepublication internal debates, drafts and discussions are subject to subpoena, then full and honest academic debate will be stifled.

In order to protect the important goal of academic research, academics "engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists." Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) (affirming the district court's order quashing a third-party subpoena seeking academic researchers' notes, tapes and recorded transcripts used for a published study). This protection applies because "scholars too are information gatherers and disseminators." Id.

Moreover, protecting the internal academic discussions on draft scientific publications "help[s] to ensure that the articles disseminated to the medical and scientific communities are of the highest quality." In re Bextra I, 249 F.R.D. at 14 (quashing subpoena of peer review comments of the NEJM); see also In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. 08 C 402, 2008 U.S. Dist. (N.D. Ill. Mar. 14, 2008) (In re Bextra II) (same).

Similar to the attorney-client privilege, discussions are often not complete, frank and open unless confidentiality attaches to those talks. Therefore, "courts, in order to prevent a chilling of the uninhibited conduct of academic and scientific research, have recognized an interest in protecting from discovery the analyses, opinions and conclusions drawn by researchers from their data." Id. at 1157. [3]

This protection exists to allow scientists to have an open debate without fear of being later questioned on a postulated statement taken out of context and/or before debate has concluded. As the First Circuit noted, it is harmful to academic debate "if disclosure of outtakes, notes, and other unused information, even if non-confidential, becomes routine and casually, if not cavalierly, compelled." Cusumano, 162 F.3d at 715 (quoting United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988)).

Compelling such disclosure would be "harmful to the [academic institution's] ability to fulfill both its journalistic and scholarly missions, and by extension harmful to the medical and scientific communities, and to the public interest." In re Bextra I, 249 F.R.D. at 14.

The scholastic privilege of course is not absolute but rather subject to a balancing test. Cusumano, 162 F.3d at 716. As laid out in Rule 26(b)(2)(c)(iii), the court should limit the extent of discovery if it determines the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the action, and the important of the discovery in resolving the issue." In re Bextra I, 249 F.R.D. at 11 (citing rule); see also Cusumano, 162 F.3d at 716.

Similar to the work-product privilege, that burden should be high for parties seeking disclosure of confidential documents, absent a finding of absolute necessity.

Courts have therefore found that academics' notes, conversations and debates regarding publications

are confidential and, when appropriate, should be kept that way. In re Bextra I, 249 F.R.D. at 13-14. Consequently, they should not be compelled to production absent a strong showing.

Seeking internal drafts, notes and information on academic debates for impeachment purposes is not a valid "necessity." In re Bextra I, 249 F.R.D. at 12 (noting that, although "comments ... which could form a basis for impeachment of the authors [may be relevant]," their "probative value is nevertheless limited") (citing Cusumano, 162 F.3d at 716).[4]

Further, a party does not need to see internal confidential discussions to review or analyze the data; a party's "own experts are equally able to review and analyze the articles for flaws in methodology or otherwise." In re Bextra I at 13.

Finally, as academics will almost always be nonparties, courts typically give deference to that status. As the First Circuit has stated, "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Cusumano, 162 F.3d at 716.

Conclusions

The law of scholastic privilege is new and developing but provides an important tool in protecting the scientific endeavors of researchers and the academic institutions they belong to. Protecting the scientific method is critical both to the scientific process being successful and to assuring that U.S. jurisdictions continue to be the haven of technological advancement, research, patent protection and home to the world's best places of learning.

Merely raising the privilege is, by no means, or should it be, an absolute protection. But raising the privilege can be important defense for protecting the scientific process engaged in by clients in academic and scholastic endeavors.

This is because courts protect researchers from overreaching scrutiny that "'inevitably tend[s] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.'" Dow Chemical, 672 F.2d at 1276 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957)).

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[1] Peer review comments and notes are strictly confidential. They are used to challenge authors and to make papers stronger. They are made confidential so that the author of the paper, theory and/or conclusion does not know who in his or her field is making the comments and therefore protect the wall between the reviewer and the author.

[2] See also, Kennedy, Science, editorial (2008; 319: 1009; doi: 10.1126/science.1156250) (calling such tactics an "assault" on the scientific editorial system that provides independent reviewers, who challenge, check, and question studies conducted by peers, by "willingly provid[ing], without compensation, confidential and candid evaluations of the work of others.")

[3] See also Dow Chemical Co. v. Allen, 672 F.2d 1262, 1274 n.20 (7th Cir. 1982) (quashing a subpoena of university researchers for all "letters, memoranda, correspondence, reports, notes, drafts, working

papers, protocols for scientific studies, laboratory notebooks, raw data, data compilations, graphs, charts or papers of any kind" regarding their study); In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 269 F.R.D. 360, 364–65 (S.D.N.Y. 2010) (noting, "It is not uncommon for courts to quash subpoenas seeking discovery from research institutions" out of concern for the chilling effect it may have, and that "this concern is at its peak when a party seeks ... the internal communications or work product of the research body" and requiring the research institution to turn over only the raw data from the study, the final report,and any communication it had between itself and the defendant); cf. In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig., MDL No. 2100, (S.D. Ill. Nov. 15, 2011) (denying defendant's motion to compel production of the peer review comments on an academic paper and observing that the "pillars of a successful peer review process are confidentiality and anonymity; anything less discourages candid discussion and weakens the process").

[4] See also Plough Inc. v. National Academy of Sciences, 530 A.2d 1152 (D.C. 1987) (rejecting an attempt to compel "internal deliberations" and preliminary drafts of a study on aspirin in hopes to "rebut the presumption of validity" of the study).
