

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL
HOLGUIN, MAURILIO CASTRO, and ROXANNE
SPRUCE BLY

Plaintiffs,

v

DIANNA J. DURAN, in her official
capacity as New Mexico Secretary of State,
SUSANA MARTINEZ, in her official capacity as New
Mexico Governor, JOHN A. SANCHEZ, in his official
capacity as New Mexico Lieutenant Governor and
presiding officer of the New Mexico Senate,
TIMOTHY Z. JENNINGS, in his official capacity as
President Pro-Tempore of the New Mexico Senate, and
BEN LUJAN, SR., in his official capacity as Speaker
of the New Mexico House of Representatives,

Defendants.

NO. **D-101-CV-2011-02942**

CONSOLIDATED WITH
D-101-CV-2011-02944
D-101-CV-2011-02945
D0101-CV-2011-03016
D-101-CV-2011-03099
D-101-CV-2011-03107
D-202-CV-2011-09600
D-506-CV-2011-00913

**DECISION AND ORDER DENYING LEGISLATIVE
DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

Defendants Ben Lujan, Sr., in his official capacity as Speaker of the House of Representatives of the State of New Mexico, and Timothy Z. Jennings, in his official capacity as President Pro-Tempore of the New Mexico Senate (identified as the "Legislative Defendants"), request that the Court enter a Protective Order precluding the discovery of certain information from Brian Sanderoff who has been identified as an expert witness for the Legislative Defendants. For the reasons set forth below, the Court concludes that the Motion for Protective Order should be denied.

In preparing for the evidentiary hearings in this matter, Defendants Governor Susana Martinez, Lt. Governor John Sanchez and Secretary of State Dianna J. Duran (identified as the "Executive Defendants") issued a Notice of Deposition Duces Tecum to

Brian Sanderoff. Mr. Sanderoff and his firm had been hired by the Legislative Council Service to serve as consultants on redistricting issues both before and during the 2011 Special Session of the New Mexico Legislature. Following the conclusion of the Special Session, Mr. Sanderoff was identified as an expert witness in this litigation for the Legislative Defendants. Among the items sought in the Notice of Deposition were communications between Mr. Sanderoff and members of the New Mexico Legislature. In seeking a Protective Order, the Legislative Defendants contend that the information sought is privileged pursuant to the Speech and Debate Clause of the New Mexico Constitution and pursuant to Section 2-3-13 NMSA 1978.¹

The Court concludes that it need not address the issue of whether the communications are privileged. The Court concludes that, even if a privilege exists, the Legislative Defendants have waived the privilege by identifying Mr. Sanderoff as an expert witness in this litigation. Although there is no controlling case law in New Mexico, the rationale set forth by the Arizona Court of Appeals in *The Arizona Independent Redistricting Commission v. Fields*, 206 Ariz. 130, 75 P.2d 1088 (2003), is persuasive. New Mexico recognizes a right to complete discovery and full cross-examination of expert witnesses. New Mexico also recognizes a distinction between “consulting experts” and “testifying experts,” limiting discovery relating to consulting experts while allowing full discovery as to those experts designated as testifying experts. The Legislative Defendants have voluntarily designated Mr. Sanderoff as a testifying expert thereby putting the validity and credibility of his opinions at issue. In examining

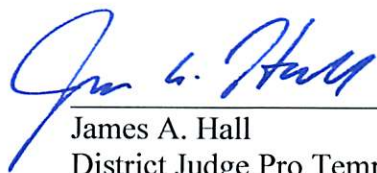
¹ In the motion, the Legislative Defendants also briefly contend that such communications are not relevant to the issues before the Court. Of course, the standard for discovery of information is not limited to whether the information sought is relevant, but whether the information sought may lead to admissible evidence. Under this standard, the information sought may lead to admissible evidence related to what Mr. Sanderoff relied on in forming his opinions and the credibility of those opinions.

the validity and credibility of those opinions, the parties are entitled to discover what information Mr. Sanderoff received from any source related to redistricting issues. The Legislative Defendants have failed to put forth a persuasive argument as to why they, alone among all the parties to this litigation, should be able to affirmatively identify a testifying expert and then preclude the Court and other parties from considering the information the expert received in connection with those opinions.²

For the reasons set forth above, the Legislative Defendants' Motion for Protective Order is hereby denied.

IT IS SO ORDERED.

Dated: 11/29/2011



James A. Hall
District Judge Pro Tempore

Copies to counsel of record via e-filing system.

² None of the authority relied on by the Legislative Defendants lead to a different result on the issue of waiver of any privilege by identification of a testifying expert. For example, the principle case relied on by the Legislative Defendants, *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984), involved a circumstance in which the opposing party attempted to introduce testimony from a consultant to the governmental body. That circumstance presents a very different issue from this case in which the Legislative Defendants seek to introduce Mr. Sanderoff's opinions, but bar inquiry into the information received related to those opinions.