2010 Expert Witness Rule Amendments

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The new Rules will eliminate much of the need for maneuvers once used to protect communications with experts.

EFFECTIVE December 1, 2010, Federal Rules of Civil Procedure 26(a)(2) and (b)(4) are substantially amended. These amendments govern disclosure of expert opinion. The three principal practice changes are:

- Communications between counsel and retained experts are generally protected from disclosure or discovery;
- Draft expert reports are no longer discoverable; and
- Counsel must summarize in writing the facts and opinions to be attested to by experts who are not required to file expert reports.

COUNSEL/EXPERT COMMUNICATIONS • The 1993 amendments to Rule 26(a)(2)(B) were construed as opening the door to discovery of all communications between counsel and expert relating to the subject matter of the litigation, for two reasons. First, Rule 26(a)(2)(B) mandated that the retained expert's report contain all of "the data or other information considered by the witness in forming" his or her opinion. "Other information" was interpreted to include everything communicated by counsel to expert. *See, e.g., Reg'l Airport Auth. v. LFG, LLC,* 460 F.3d 697, 716 (6th Cir. 2006). Second, the 1993 Advisory Committee Note observed that: "Given the obligation of

disclosure, litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed." Work product protection, to the extent it previously existed, vanished.

The 2010 amendments would close the door to almost all discovery of communications between counsel and retained experts. First, Rule 26(a)(2)(B)(ii) is amended to eliminate the phrase "data or other information" and substitutes: "the facts or data" considered by the witness in forming the opinions. The accompanying Committee Note reflects that this amendment "is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports." Because this is an amendment to the report requirement, by definition Rule 26(a)(2)(B)(ii) applies only to counsel's communications with experts who must file a Rule 26(a)(2)(B) report.

Second, Rule 26(b)(4)(C) is amended to confer work product protection (which is set forth in Rule 26(b)(3)) on most communications between attorneys and retained experts:

"(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided to the expert and that the expert relied on in forming the opinions to be expressed."

Retained vs. Unretained Experts

Note that this provision (like the amendment to Rule 26(a)(2)(B)(ii)) applies only to experts from whom Rule 26(a)(2)(B) reports are required — retained experts or party employees who regularly provide expert testimony on behalf of their employer. Amended Rule 26(b)(4)(C) does not apply to communications between lawyers and witnesses who provide expert testimony but are not required to furnish a report (non-reporting experts) because they were not "retained or specially employed to provide expert testimony" or their duties as party employees do not "regularly involve giving expert testimony."

Exceptions

With this scope limitation in mind, the only unprotected communications between attorneys and reporting experts are those relating to: (i) compensation; (ii) facts or data provided by counsel and considered by the expert; and (iii) assumptions provided by counsel relied on by the expert.

Compensation

The Committee Note clarifies that "compensation" includes potential additional work for the expert, as well as compensation for work done by assistants, associates, and affiliated organizations. Presumably all other financial incentives are freely discoverable, as "[t]he objective is to permit full inquiry into such potential sources of bias."

Facts vs. Assumptions

There is a world of difference between facts or data "considered" (Rule 26(a)(2)(B)(i)) and assumption "relied on" (Rule 26(a)(2)(B)(ii)), as those quoted words have been interpreted in the jurisprudence of Rule 26(a)(2). "Considered" is the word used in the 1993 version of Rule 26(a)(2)(B)(ii), and, together with the now-stricken "other information," it was read as requiring disclosure of all communications between attorney and expert "related to the

subject matter of the litigation." *See Karn v. Ingersoll Rand,* 168 F.R.D. 633, 639 (N.D. Ind. 1996) (noting that the Advisory Committee in 1993 substituted "considered" for the more restrictive "relied upon" in an earlier draft of rule 26(a)(2)(B)).

Under the 2010 amendment, "considered" is confined to "facts or data" provided by counsel, but does not apply to counsel-supplied "assumptions" (those must be "relied on"). Therefore, all facts or data communicated by counsel relating to the subject matter of the litigation must be "identif[ied]." The Committee Note stresses that "the refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." The Committee Note also emphasizes that: (1) "the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients"; and (2) the facts or data need only be "identif[ied]" — "further communications about the potential relevance of the facts or data are protected."

In contrast, assumptions furnished by counsel are discoverable only if they are actually relied on by the expert in forming his or her opinion.

"Regardless Of The Form Of The Communications"

One of the textual problems with Rule 26(b)(3) is that it affords work product protection only to "documents and tangible things." Work product takes many forms that are non-documentary and intangible, including discussions. For these, litigants must rely on common law protection, derived from *Hickman v. Taylor,* 329 U.S. 495, 510-11 (1947). *See* 6 Moore's Federal Practice §26.70[2][c] (3d ed. 2010). Rule 26(b)(4)(C) explicitly covers the waterfront, extending to all forms of communication.

"A Party's Attorney"

Parties often have many attorneys, including in-house counsel; outside general counsel; and counsel in other cases dealing with the same or similar subject matters. The Committee Note to Rule 26(b)(4)(C) stresses that the work product protection it recognizes "should be applied in a realistic manner," generally extending to these lawyers, each of whom is "the party's attorney," albeit not necessarily before the court, and observes that "[o]ther situations may also justify a pragmatic application of the 'party's attorney' concept."

DRAFT EXPERT REPORTS • The previously-discussed change to Rule 26(a)(2)(B)(ii) (the change from "facts or other information" to "facts or data") is one of the two amendments proposed to protect draft expert reports, as reflected in the Committee Note excerpt quoted above. The second, direct approach is new Rule 26(b)(4)(B), which provides:

"(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."

Only "Recorded" Drafts Covered

The text of Rule 26(b)(4)(B) and the Advisory Committee Note were amended after comments were received on the publication-version of this proposal to add that the drafts covered by this provision must be "recorded." Oral communications with retained experts are separately cloaked with work product protection by Rule 26(b)(4)(C). Therefore, this revision should be construed as eliminating any protection for unrecorded oral communications with unretained experts.