Expert Q&A on the Rule 26 Amendments: Developing Case Law

Rule 26 of the Federal Rules of Civil Procedure (FRCP) was amended on December 1, 2010, substantially impacting discovery related to the retention and use of expert witnesses in cases pending in federal court. The amendments were widely supported by the legal community but left several matters open to judicial interpretation. Since then, additional decisions have provided more clarity on the scope of the amendments, although we have yet to see a substantial body of case law develop. Practical Law asked Robert J. Liubicic of Milbank, Tweed, Hadley & McCloy LLP to examine recent decisions interpreting the amendments and provide recommendations that counsel should consider when retaining and communicating with experts.

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What are the primary changes to Rule 26 that went into effect in 2010, and what issues gave rise to the amendments?

The 2010 amendments to Rule 26 impose new limits on expert discovery. Significantly, the amendments:

- Limit the discovery of draft expert reports (*FRCP 26(b)(4)(B)*).
- Protect from discovery communications between trial counsel and retained expert witnesses who are required to submit expert reports under Rule 26, except to the extent that the communications:
  - relate to the expert's compensation;
  - identify facts or data provided by counsel that the expert considered in forming his opinions; or
  - identify assumptions provided by counsel on which the expert relied in forming his opinions.

(*FRCP 26(b)(4)(C)*.)

- Require parties intending to call a non-retained expert (that is, an expert witness who is not compensated for his time and does not provide a report, and who may also provide some fact testimony) to prepare a written disclosure containing:
  - the subject matter on which the witness is expected to present expert testimony; and

- a summary of the facts and opinions to which the witness is expected to testify.

(*FRCP 26(a)(2)(C).*)

Before the 2010 amendments, there was a widespread feeling among litigators that Rule 26 had led to gamesmanship and inefficiencies. The pre-amendment rule protected very little when it came to draft expert reports and attorney-expert communications, resulting in wide-ranging expert discovery. Therefore, parties would often use elaborate tactics to avoid creating a discoverable record. The 2010 amendments aimed to address these concerns and were designed to increase efficiency, reduce cost, encourage open attorney-expert communications, decrease the use of consulting experts and focus discovery on what matters most — the actual opinions rendered by experts.

Search Expert Discovery: An Update on the Rule 26 Amendments for more on the 2010 amendments and their impact on the use of expert witnesses.

Rule 26 now protects draft expert reports as attorney work product, regardless of the form in which the draft is recorded. How broadly are courts construing this protection?

Not surprisingly, litigants have been trying to bring a wide variety of expert-generated materials within the meaning of "draft report." To date, several courts have construed the term rather strictly. A number of those cases have addressed whether an expert's notes are protected from disclosure, and have found they generally are not.

For example, in *Dongguk University v. Yale University*, the court compelled production of a testifying expert's notes, concluding that as a general matter these notes are not protected under Rule 26(b)(4)(B) or (C) because they are neither drafts of an expert report nor communications between the party's attorney and the expert witness. The court also held that the expert's redacted notes were not independently protected as work product because the statements were not mental impressions, conclusions, opinions or legal theories of a party's attorney. (*Dongguk Univ., No. 3:08-cv-00441, 2011 WL 1935865, at *1 (D. Conn. May 19, 2011).*)

Similarly, in *In re Application of the Republic of Ecuador*, the court found that notes, task lists, outlines, memoranda, presentations and letters drafted by a testifying expert and his assistants did not constitute draft reports and were not independently protected as work product. The court reasoned that Rule 26(b) does not extend protection to an expert's own work product outside of draft reports. (*Republic of Ecuador, 280 F.R.D. 506, 513 (N.D. Cal. 2012).*)

Another court, by contrast, considered the discoverability of an expert's notes drafted at the request of plaintiff's counsel. The notes related to criticisms of the defendant's expert and were created to help plaintiff's counsel prepare for the deposition of that expert. The court held that the notes were protected as attorney work product and were not subject to disclosure under Rule 26(b)(4)(C) because they did not contain opinions that the expert would provide at trial. (*Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc., No. 11-2255, 2012 WL 1900536, at *2 (D. Md. May 23, 2012).*)

In some circumstances, the distinction between an expert's notes and a draft report may not be entirely clear. For example, one court held that the defendant's testifying expert did not need to produce five pages of mathematical calculations created by the expert in connection with his report. Although the court described the calculations as "working notes," it found the notes were protected under Rule 26 because the protection for draft reports applies "regardless of the form in which the draft is recorded." (*Etherton v. Owners Ins. Co., No. 10-cv-00892, 2011 WL 684592, at *2 (D. Colo. Feb. 18, 2011).*)

Therefore, while recent decisions suggest that courts will narrowly construe the Rule 26 protection for draft reports, counsel should expect the contours of what constitutes a "draft report" to be further defined by the courts over the next few years.

Many courts relied on the pre-amendment rule in requiring disclosure of essentially all communications between counsel and expert witnesses. How are courts interpreting the "facts or data" disclosure requirement under amended Rule 26?

Consistent with the overall purpose of Rule 26(b)(3), the 2010 amendments sought to explicitly exclude from disclosure the theories or mental impressions of counsel. The case law regarding the scope of "facts or data" is still developing. Nevertheless, it has become clear that whether a communication identifies facts or data that should be disclosed appears to depend on the extent to which the communication reflects counsel's mental impressions. The less the communication reflects these impressions, the less likely it is that the communication is entitled to protection.

For example, in *Fialkowski v. Perry*, the court tackled the issue of whether the plaintiff had to produce its written analyses of relevant documents in the case, prepared by the plaintiff for the purpose of assisting her attorney and which the plaintiff's expert reviewed in preparing his report. The plaintiff argued that these analyses were protected as attorney-expert communications under the 2010 amendments. However, the court required production of the materials, stating that even if the requested documents were "communications" between a party's attorney and an expert under Rule 26, they fell within

the exceptions listed in Rule 26(b)(4)(C) for facts and data that the expert considered and assumptions on which the expert relied. Additionally, the court noted that the requested materials were not independently protected as work product because they did not implicate theories or mental impressions of counsel, as they were prepared by the plaintiff rather than the plaintiff's attorney. (*Fialkowski, No. 11-5139, 2012 WL 2527020, at *4-5 (E.D. Pa. June 29, 2012).*)

D.G. ex rel. G. v. Henry also provides guidance on what constitutes facts or data that must be disclosed. In that case, the defendants sought an order compelling the plaintiffs to provide all of the facts and data considered by the plaintiffs' expert, including case files, statutes and policies, and materials prepared by the expert's assistants used in connection with preparing the report. The case files were originally produced by the defendants, but the defendants wanted them reproduced by the plaintiffs with any added highlights and notations of the plaintiff's expert.

The court held that highlights and notations are not facts or data that must be provided under Rule 26(a)(2)(B)(ii). However, the court concluded that the statutes and policies do constitute facts or data. The court further held that summaries of case files prepared by the expert's assistants must be produced because they contained factual material considered by the expert. (*Henry, No. 08-74, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011).*)

Rule 26 requires disclosure of facts or data that the expert considered in forming his opinions, not just those ultimately relied on by the expert. Did the 2010 amendments modify the meaning of "considered"?

As recently made clear in *United States v. Dish Network, L.L.C.*, the 2010 amendments did not change the meaning of the term "considered." The court noted the expansive scope of the term, explaining that it has been defined to include "anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed." (*Dish, No. 09-3073, 2013 WL 5575864, at *2, *5 (C.D. Ill. Oct. 9, 2013).*)

The 2010 amendments do, however, more narrowly limit the disclosure of communications that identify assumptions provided by counsel. These communications must be disclosed only to the extent they identify assumptions on which the expert actually relied.

How are communications between a testifying expert and a non-attorney treated under Rule 26?

Although Rule 26(b)(4)(C) provides protection for certain communications with testifying experts, this protection applies only to a testifying expert's communications with a party's attorney. Indeed, the primary purpose of the 2010 amendments is to provide protection to attorney work product, not per se protection of expert work product. The US Court of Appeals for the Tenth Circuit recently made this clear in *Republic of Ecuador v. For the Issuance of a Subpoena* when it expressly rejected the appellant's arguments that the 2010 amendments provided work product protection to testifying experts (*735 F.3d 1179, 1184-86 (10th Cir. 2013)*).

UPDATES

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- Eleventh Circuit: Testifying Expert's Notes and Communications with Non-attorneys Not Covered by Work Product Doctrine
- Tenth Circuit Takes a Narrow View of Work Product Protection Over Expert Material
- District Court Adopts Objective Approach to Determining What Facts Were "Considered" by an Expert under FRCP 26
- S.D. Ind.: Testifying Expert May Be Re-designated As Consulting Expert

In *United States v. Veolia Environnement North America Operations, Inc.*, the court required disclosure of all communications between the expert and anyone other than the party's attorney, including communications between the testifying expert and the party (*No. 13-mc-03, 2013 WL 5779653, at *6 (D. Del. Oct. 25, 2013)*). Similarly, as discussed above, in *Fialkowski*, the court required production of materials prepared by the plaintiff at the direction of counsel and given to the expert for consideration in preparing his report, because the plaintiff, not the plaintiff's attorney, prepared the materials (*2012 WL 2527020, at *4*).

These same principles may apply to certain communications between a testifying expert and a consulting expert. Under Rule 26(b)(4)(D), a party may not discover facts or opinions held by a consulting expert absent a showing of exceptional circumstances. But if a consulting expert transmits factual information to a testifying expert, the communications identifying the factual information may be discoverable. The US District Court for the Southern District of New York recently noted that while the 2010 amendments do not alter the protection afforded consulting experts, factual matters transmitted from a consulting expert to a testifying expert are subject to disclosure under Rule 26(b)(4)(C) (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 1:00-1898, MDL No. 1358, 2013 WL 3326799, at *6 (S.D.N.Y. June 28, 2013)*).

What best practices should counsel consider in light of the developing case law?

There is more clarity now than when the amendments first went into effect, but the case law is developing slowly and there remains some uncertainty about the scope and proper interpretation of certain provisions. However, court decisions to date suggest that counsel should consider the following best practices when dealing with testifying experts:

- **Limit expert work product to draft reports.** Counsel should advise experts to be disciplined about memorializing their theories and opinions within their actual draft reports, to the extent possible, rather than in separate notes or other documents that less resemble a report. Although Rule 26 provides that a draft report can technically be in any form, adhering to formalities can lessen confusion and make it

easier to demonstrate that material is indeed part of a draft report if questions are raised. However, counsel should keep in mind that even what is indisputably a draft report could be discoverable under Rule 26 if the opposing party can show a substantial need for the draft and an inability to obtain the information contained in the draft from other sources.

- **Separate communications of facts and data from attorney work product.** When communicating pure facts or data (for example, transmitting documentary evidence or deposition testimony) to an expert, counsel should avoid the temptation to weave into the communication their own commentary or editorializing. The better practice is to provide any necessary analysis separately, thereby drawing a clear distinction between communications that are protected and those that may be discoverable. Doing so has the added benefit of reducing the need to redact work product in a document production.
- **Limit expert communications with non-attorneys.** Counsel should limit an expert's direct communications with non-attorneys to help minimize disclosure. To the extent possible, counsel should have the expert communicate exclusively with counsel or its agents regarding the subject matter of the expert's opinions. Although this does not automatically protect a communication, it can offer protections not afforded to communications with non-attorneys.
- **Stipulate to avoid ambiguity.** If both sides are willing, counsel can sidestep much of the ambiguity in the 2010 amendments by stipulating to exactly what will and will not be disclosed. The parties could, for example, stipulate that no expert notes will be disclosed, or that all of them will.

Adhering to these guidelines can help limit the amount of expert discovery in a case and avoid disputes with opposing counsel over the proper scope of disclosure.

Search Attorney-Client Privilege and Work Product Doctrine Toolkit or see page 48 in this issue for a collection of resources to help counsel maneuver the various privilege and secrecy rules in the US.

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