

# Expert Q&A on the Rule 26 Amendments: One Year In

PLC Litigation & ADR

Rule 26 of the Federal Rules of Civil Procedure 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 the new Rule 26 left several matters open to judicial interpretation. Practical Law Company asked Robert Liubicic of Milbank, Tweed, Hadley & McCloy LLP to examine court decisions from the past year interpreting the new Rule 26 and the practical implications that trial and in-house counsel should consider when retaining and communicating with experts going forward.

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### What are the primary changes to Rule 26 that went into effect just over a year ago?

The 2010 amendments to Rule 26 impose new limits on expert discovery. Most significantly, they protect from discovery draft expert reports, as well as most communications between attorneys and retained expert witnesses who are required to prepare an expert report under Rule 26. Discoverable attorney-expert communications are now limited to communications that:

- Relate to compensation for the expert's study or testimony.
- Identify facts or data provided by counsel that the expert considered in forming an opinion.
- Identify assumptions provided by counsel on which the expert relied in forming an opinion.

In addition, there is a new disclosure requirement related to non-retained experts. These are expert witnesses who are not compensated for their time and do not provide a report, and who may also provide some fact testimony (the classic example is a treating physician). Before the amendments took effect, there was no explicit disclosure requirement for these experts and courts developed various, sometimes inconsistent, methods for dealing with them. Now, parties intending to call a non-retained expert must 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.

### What issues or concerns gave rise to the amendments?

There was a widespread feeling among litigators that the pre-amendment rule 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. Parties would therefore go to some length to avoid creating a discoverable expert record.

For example, it was common for attorneys to avoid almost all written communications with testifying experts and instruct experts not to create multiple written drafts of expert reports. Some experts would create virtual data rooms, where a report could be viewed from different locations and edited without creating a new version of the draft. Some parties would also retain a second, non-testifying set of "consulting" experts with whom they could discuss ideas and theories freely without fear of waiving privilege or work product protections. Nonetheless, litigators could find themselves spending large chunks of time in expert depositions asking questions about drafting history and attorney-expert communications in an attempt to find inconsistencies, suggest bias and the like.

The amendments were designed to increase efficiency, reduce cost, improve attorney-expert communications, decrease the use of consulting experts and focus discovery on what matters most — the actual opinions rendered by experts.

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## Will courts apply the amendments in cases filed before December 2010 that are now about to start expert discovery?

The amendments will likely apply to these cases. Language in the US Supreme Court's implementing order states that the amendments should apply in pre-existing cases "insofar as just and practicable." The issue has come up in several reported cases over the past year. Those courts have almost universally concluded that the amendments apply to proceedings that were pending on the effective date. However, there has been at least one exception. For parties who want to take advantage of the amendments, the best practice may be to stipulate with opposing counsel to their applicability.

## How broadly are courts construing the new protection for draft expert reports?

Perhaps not surprisingly, during the past year litigants have been trying to bring a wide variety of expert-generated materials within the meaning of "draft report." Courts are now taking a closer look. To date, three courts have rejected attempts to construe notes taken by experts and other materials as draft reports.

I expect the issue of what is and is not a draft report will continue to come up in reported cases going forward, with the courts eventually laying down some bright-line rules. Perhaps there will be clearer guidance on where brainstorming ends and a rough draft begins. For now, counsel should instruct experts to clearly label as a draft anything they believe to be a version or portion of their report.

Also, it is important to keep in mind that even what is indisputably a draft report could be discoverable under the amendments 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.

## How are courts interpreting the disclosure requirement related to non-retained experts?

Litigants are trying to figure out how much detail is required in the summary of opinions that the amendments require for non-retained experts. The amendments clearly do not require anything nearly as extensive as a traditional expert report. But the disclosures need to be sufficiently detailed to put the opposing party on notice of the basics of the non-retained expert's opinions. To date, two courts have found disclosures insufficient under the amendments. One of those courts refused to permit the non-retained expert to testify as a result. Parties should assume that judges will take this requirement seriously, and disclose accordingly.

## Are the amendments fulfilling their stated purposes?

It is still early, but one year in I would say the answer is a qualified yes. In my own practice, communication with experts

has become more open as a result of the amendments, which I think, on balance, is a good thing. I believe the amendments are also likely to eliminate at least some of the more cumbersome tactics I noted earlier, such as going to great and often time-consuming lengths to avoid creating multiple drafts of a report.

Some of the other stated purposes may be achieved partially, or not at all. For example, I think there will be incrementally less use of consulting experts as a result of the amendments but they will certainly continue to be used in many cases. Similarly, I think the amendments may streamline expert depositions somewhat in that it has become much more difficult to depose experts about drafting history. However, counsel will find other questions to ask during their allotted time so expert depositions are not likely to become appreciably shorter. Finally, all protected drafts and communications may need to be included on a privilege log, which in large cases will itself be a costly and time-consuming process.

## What uncertainties in the application of the amendments remain?

A lot of questions remain. The biggest area of uncertainty, to my mind, is the scope of the exceptions to the protection afforded to attorney-expert communications. The courts are starting to interpret these exceptions, but there is some ambiguity as to exactly what it means to "identify facts or data" for an expert, and I think even more ambiguity as to what it means to "identify assumptions" for an expert. Until there is more guidance from the courts on the scope of these exceptions, I would tread carefully.

## Do you see the concepts embodied in the amendments catching on in state procedural laws?

It would not surprise me to see some of the states afford greater protection to draft reports and attorney-expert communications over time. In fact, Pennsylvania and Texas have considered amending their procedural rules to bring them in line with certain aspects of the federal amendments. Some states may adopt a wait-and-see approach and assess how the federal amendments perform in practice, while other states are likely to stick with the rules they currently have in place.

>> For more detailed information on recent decisions interpreting the new Rule 26 and the practical implications that counsel should consider, search [Rule 26 Amendments](#) on our website.