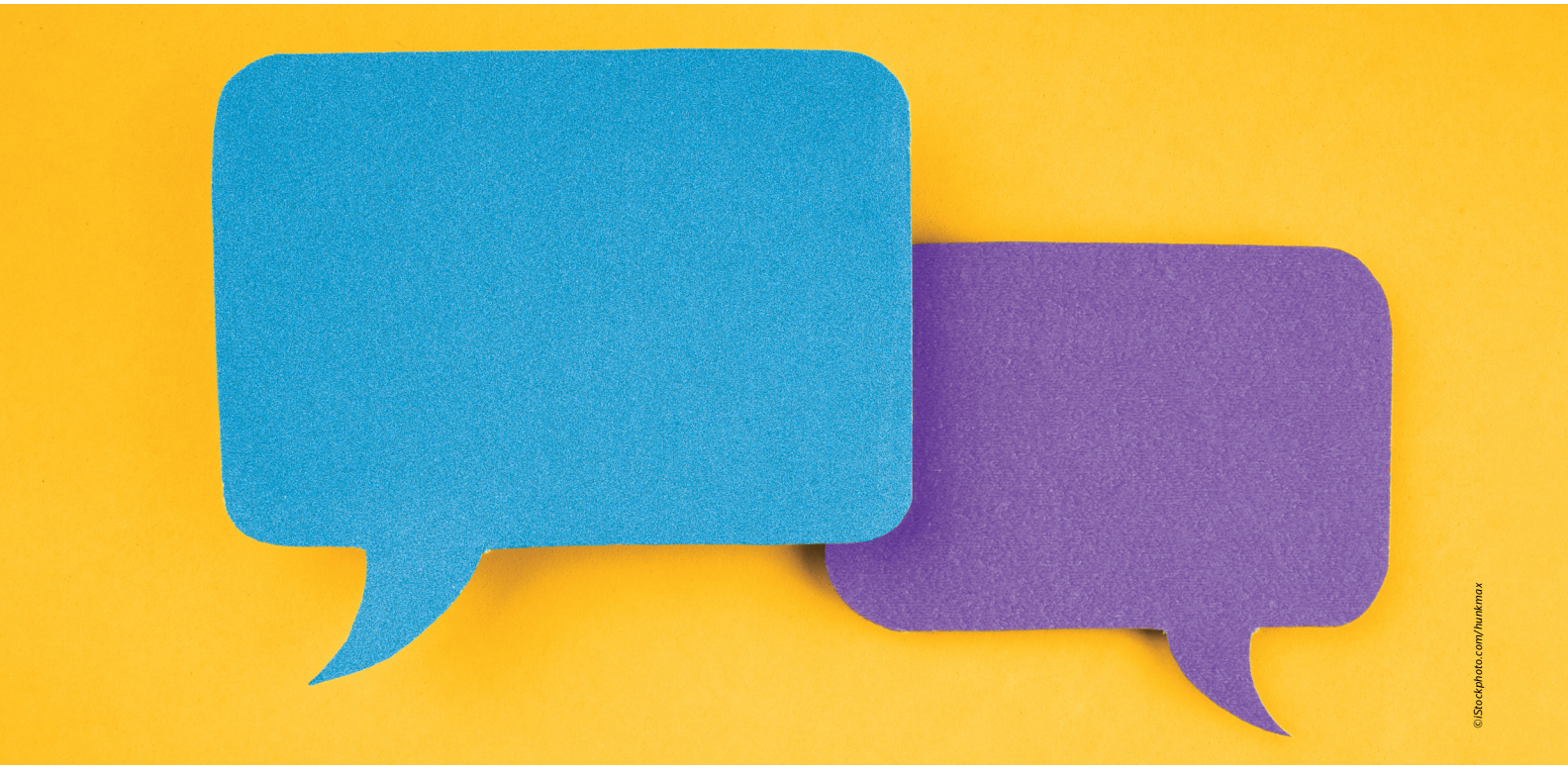

Rule 26 Amendments: Developing Case Law

About a decade ago, Rule 26 of the Federal Rules of Civil Procedure (FRCP) was amended in ways that substantially impacted 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, while many ambiguities remain, case law has provided greater clarity on key issues affected by the amendments. Practical Law asked *Grant R. Mainland* of *Milbank LLP* to discuss these case law developments and the practical implications 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?

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

- Limit the discovery of draft expert reports (FRCP 26(b)(4)(B)) (for more information on expert reports, search Experts: Expert Reports on Practical Law).
- 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 their opinions; or
- identify assumptions provided by counsel on which the expert relied in forming their 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 their 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).)

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

Understandably, litigants frequently attempt to bring a wide variety of expert-generated materials within the meaning of "draft report" to guard against disclosure. In the wake of the 2010 amendments, several courts construed the term rather strictly, finding that an expert's notes generally are not protected from disclosure. More recently, courts have construed the Rule 26 protection for draft reports more broadly, but the distinction between an expert's notes and a draft report is still not entirely clear.

The following are examples of cases in which the court required disclosure of an expert's notes under Rule 26(b)(4):

- ***Dongguk University v. Yale University.*** In compelling production of a testifying expert's notes, the court concluded that these notes generally 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 under Rule 26(b)(3)(B) because the statements did not constitute mental impressions, conclusions, opinions, or legal theories of a party's attorney. (2011 WL 1935865, at *1 (D. Conn. May 19, 2011).)
- ***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 the expert's 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. (280 F.R.D. 506, 513 (N.D. Cal. 2012).)
- ***Hernandez v. The Office of the Commissioner of Baseball.*** The court held that a memorandum an expert prepared after drafting the expert report was discoverable because it served as the expert's notes. The memorandum "was not created to be part of any [c]ourt-authorized report" and "no version of its contents was ever included in any report." (335 F.R.D. 45, 49 (S.D.N.Y. 2020) (distinguishing the court's decision in *Deangelis v. Corzine* (2016 WL 93862 (S.D.N.Y. Jan. 7, 2016)) because the expert in that case testified that the documents at issue were created specifically to be included in a draft report authorized by the court).)

Recently, courts have construed the Rule 26 protection for draft reports more broadly, but the distinction between an expert's notes and a draft report is still not entirely clear.

By contrast, the following are examples of cases in which the court treated the draft report concept more expansively:

- ***International Aloe Science Council, Inc. v. Fruit of the Earth, Inc.*** The court considered the discoverability of an expert's notes drafted at the request of the plaintiff's counsel. The notes related to criticisms of the defendant's expert and were created to help the 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 the notes:
  - communicated to counsel the expert's analyses of the defendant's expert reports to assist that counsel in preparing for a deposition; and
  - did not fall within an exception to Rule 26(b)(4)(C) given that they did not contain opinions that the expert would provide at trial.

  (2012 WL 1900536, at *2 (D. Md. May 23, 2012).)
- ***In re Elysium Health-ChromaDex Litigation.*** In a more recent case, the court denied a motion to compel discovery of an expert's unreported calculations reflecting the expert's communications with counsel that the expert prepared while drafting the expert report on damages. The court:

- rejected the moving party's argument that the underlying calculations were discoverable because they contained math used by the expert in developing the expert's opinion on damages; and
- accepted the non-moving party's representation of the unreported calculations as a draft under Rule 26(b)(4).

(2021 WL 1249223, at *3 (S.D.N.Y. Apr. 5, 2021).)

- ***Deangelis v. Corzine.*** Where a testifying expert requested a write-up and chart from a consulting expert to include in the testifying expert's draft expert report (which the testifying expert did later include), the court concluded that the write-up and chart formed part of the draft expert report and were therefore protected under Rule 26(b)(4)(B). (2016 WL 93862, at *1, *4.)

The question of whether an expert should disclose a communication identifying facts or data depends on the extent to which the communication reflects counsel's mental impressions. The less the communication reflects counsel's mental impressions, the less likely it is that the communication is entitled to protection.

How do courts interpret the "facts or data" disclosure requirement under Rule 26?

As noted above, Rule 26(b)(4)(C) requires disclosure of communications between an attorney and a retained expert who will submit an expert report, where the communications identify facts or data that the party's attorney provided and that the expert considered in forming their opinions. 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. However, it has become clear that the question of whether an expert should disclose a communication identifying facts or data depends on the extent to which the communication reflects counsel's mental impressions. The less the communication reflects counsel's mental impressions, the less likely it is that the communication is entitled to protection.

For example, courts have required disclosure of the following materials because they constituted facts or data:

- **A plaintiff's written analyses of relevant documents in the case.** In *Fialkowski v. Perry*, the analyses of relevant documents were prepared by the plaintiff for the purpose of assisting the plaintiff's attorney and were reviewed by the plaintiff's expert in drafting the expert 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 materials constituted 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; and
  - the materials were not independently protected as work product because they were prepared by the plaintiff rather than the plaintiff's attorney and did not implicate counsel's theories or mental impressions.

  (2012 WL 2527020, at *4-5 (E.D. Pa. June 29, 2012).)
- **Statutes, policies, and summaries of case files prepared by the expert's assistants.** In *D.G. ex rel. G. v. Henry*, the defendants sought an order compelling the plaintiffs to provide all facts and data considered by the plaintiff's expert, including statutes, policies, and summaries of case files prepared by the expert's assistants. The court concluded that these materials constitute facts or data and noted that the summaries contained factual material considered by the expert. (2011 WL 1344200, at *1-2 (N.D. Okla. Apr. 8, 2011).)
- **Certain documents that the expert considered but did not ultimately use.** In *Plexxikon Inc. v. Novartis Pharmaceuticals Corp.*, the court considered whether the plaintiff must disclose documents related to the different ways to synthesize a chemical that the plaintiff's expert considered but did not ultimately use. The court:
  - examined whether the documents contained facts or data considered by the expert in forming the expert's opinions or whether they merely contained "alternative analyses, testing methods, or approaches to the issues" that are not mandatory to disclose; and
  - held that the experts must disclose any documents that contain "factual ingredients" about the

unused synthetic routes that the expert considered.

(2019 WL 8508083, at *2, *4 (N.D. Cal. May 3, 2019) (distinguishing *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584 (Fed. Cl. 2016)); see also *Republic of Ecuador v. Mackay*, 742 F.3d 860, 870 (9th Cir. 2014) (stating that materials containing factual ingredients are discoverable, while opinion work product is not discoverable).)

By contrast, courts have held that the following materials did not constitute facts or data subject to disclosure under Rule 26:

- **An expert's highlights and notations.** In *Henry*, the defendants sought disclosure of case files considered by the plaintiff's expert. The case files were originally produced by the defendants, but the defendants wanted the plaintiffs to reproduce the files with any added highlights and notations of the plaintiff's expert. The court denied the defendants' motion to compel with respect to those files, concluding that highlights and notations are not facts or data that an expert must provide under Rule 26(a)(2)(B)(ii). (2011 WL 1344200, at *1.)
- **An expert's spreadsheets, graphs, and analyses.** In *Davita Healthcare Partners, Inc. v. United States*, the court explained that an expert's spreadsheets, graphs, and analyses in the expert's presentations to counsel are "interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize, marshal, and present data." The court further stated that this "selective presentation of data is separate and distinct from the underlying facts and data themselves." Therefore, the materials were entitled to work product protection. (128 Fed. Cl. at 591.)

What does it mean for an expert to "consider" facts or data?

Case law has clarified the expansive scope of the term "consider," which courts have 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" (*United States v. Dish Network, L.L.C.*, 2013 WL 5575864, at *2, *5 (C.D. Ill. Oct. 9, 2013)).

For example, the court in *SEC v. Rio Tinto PLC* interpreted the term "consider" broadly in holding that a testifying expert who previously served as a consultant in the same case considered the expert's consulting work in forming the expert's testifying opinion. More specifically, the court found that it had not been "clearly established" that the expert "drew 'a mental line in the sand' between his expert work in his consulting and testifying capacities." Accordingly, the court resolved the tension in favor of disclosure of the consulting documents. (2021 WL 2186433, at *7 (S.D.N.Y. May 28, 2021).)

Rule 26 does, however, more narrowly limit the disclosure of communications that identify assumptions provided by counsel. The expert must disclose these communications only to the extent they identify assumptions on which the expert actually relied. For example, in *Estate of Puppolo v. Welch*, the court defined "relied on" narrowly, holding that audio recordings that the expert may or may not have listened to were not disclosable, as there was little evidence of the expert's reliance on the recordings in forming the expert's opinion (2017 WL 4042342, at *10 (D. Vt. Sept. 12, 2017), aff'd sub nom., *Puppolo v. Welch*, 771 F. App'x 64 (2d Cir. 2019)).

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 was to safeguard attorney work product, not provide per se protection of expert work product. The Tenth Circuit clarified this point in *Republic of Ecuador v. For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a)*, where 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)).

Other examples of cases confirming that a testifying expert's communications with a non-attorney are largely unprotected include the following:

- ***Millsaps College v. Lexington Insurance Co.*** The court reiterated the general principle that "there is no protection for communications among a testifying expert and non-attorney employees of the party or other testifying experts." (2017 WL 3158879, at

Expert Toolkit (Federal)

The Expert Toolkit (Federal) available on Practical Law offers a collection of resources to assist counsel with the use of experts in federal civil litigation. It features a range of continuously maintained resources, including:

- Experts: Locating and Retaining an Expert
- Depositions: Deposing an Expert (Federal)
- Depositions: Defending an Expert Deposition (Federal)
- Experts: Expert Report Checklist
- Experts: Daubert Motions
- Standard for Excluding Expert Testimony: 50 State Survey
- Experts: Testifying Expert Budget Template
- Expert Evidence in International Arbitration
- Patent Litigation: Expert Privilege and Confidentiality Considerations Checklist

*1-2 (S.D. Miss. July 24, 2017); see also *McClurg v. Mallinckrodt, LLC*, 2018 WL 3047014, at *4 (E.D. Mo. June 20, 2018) (noting that courts have generally held that a testifying expert's notes and communications with non-attorneys are discoverable).)

- ***Benson v. Rosenthal.*** The court held that communications between a testifying expert and a non-attorney are discoverable and must be produced or at least logged. (2016 WL 1046126, at *6 (E.D. La. Mar. 16, 2016); see also *Sw. Insulation, Inc. v. Gen. Insulation Co.*, 2016 WL 9245433, at *2 (N.D. Tex. Aug. 31, 2016) (noting that multiple courts have held that communications between testifying experts and non-attorneys are discoverable even if the non-attorneys are representatives of the resisting party); but see *Progressive Nw. Ins. Co. v. Gant*, 2017 WL 656676, at *8 (D. Kan. Feb. 16, 2017) (holding that a communication between an expert and a claims adjuster was rightfully labeled "confidential," seemingly because the documents included proprietary pricing and budgeting information).)
- ***EMW Women's Surgical Center v. Meier.*** The court held that communications between testifying experts and attorneys from another case were not privileged. (2018 WL 10215971, at *2 (W.D. Ky. Nov. 9, 2018).)
- ***United States v. Veolia Environnement North America Operations, Inc.*** The court required disclosure of all communications between a testifying expert and anyone other than the party's attorney, including communications between the expert and the party. (2013 WL 5779653, at *6 (D. Del. Oct. 25, 2013).)
- ***Fialkowski v. Perry.*** As discussed above, the court required production of materials prepared by the plaintiff at the direction of counsel and given to the expert for consideration in preparing the expert 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. However, if a consulting expert transmits factual information to a testifying expert, the communications identifying the factual information may be discoverable. (See *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 293 F.R.D. 568, 577 (S.D.N.Y. 2013).)

What materials are hybrid witnesses required to disclose under Rule 26?

The case law has seen interesting developments regarding the disclosures expected of so-called "hybrid witnesses," that is, witnesses not retained to provide expert testimony but who have personal knowledge and offer both fact and expert testimony. Hybrid witnesses are not subject to Rule 26(a)(2)(B), which requires a detailed written report to accompany a disclosure when a witness is "retained or specifically employed" to provide expert testimony (for more information, search Experts: Expert Reports on Practical Law).

Before the 2010 amendments, hybrid witnesses were generally permitted to offer both fact testimony and expert opinions without preparing a detailed report. Rule 26(a)(2)(C) now addresses any ambiguity about hybrid witness disclosures by requiring that hybrid witnesses submit a summary disclosure of opinions and supporting facts that they expect to offer.

In *Indianapolis Airport Authority v. Travelers Property Casualty Co. of America*, the Seventh Circuit held that hybrid witnesses need not submit a "full-fledged" report and that summary disclosures are sufficient. The court explained that hybrid witnesses "do not have carte blanche to testify" and instead must testify from their personal knowledge. Testimony based on personal knowledge may contradict opposing experts' opinions "provided that their disagreement is factual in nature." The Seventh Circuit directed district courts to "police this distinction" to prevent hybrid witnesses from crossing the line into the territory of retained experts. (849 F.3d 355, 370-71 (7th Cir. 2017).)

However, the case law confirms that parties should exercise caution when designating a witness as a hybrid witness who is not subject to the expert report requirement. In *Tokai Corp. v. Easton Enterprises, Inc.*, the district court sustained objections to expert declarations submitted by the plaintiff in opposition to the defendant's motion for summary judgment, reasoning that the plaintiff failed to submit written reports for the declarant experts during expert discovery. On appeal, the plaintiff argued that one of the experts was its employee and therefore exempt from the written report requirement under Rule 26(a)(2)(B). Rejecting the plaintiff's argument, the Federal Circuit concluded, in part, that even if the expert were an employee of the plaintiff, the plaintiff failed to introduce evidence indicating that the proffered expert's duties did not regularly involve giving expert testimony to qualify for the employee-expert exception to the written report requirement. (632 F.3d 1358, 1365 (Fed. Cir. 2011).)

Although *Tokai* was decided shortly after the 2010 amendments, later cases have cited to *Tokai* and confirmed its enduring relevance (see, for example, *White v. City of Greensboro*, 2021 WL 1258402, at *12 (M.D.N.C. Apr. 5, 2021)).

Search Experts: Hybrid Witnesses (Federal) and Experts: Working with a Hybrid Witness Checklist (Federal) for more on hybrid witnesses, including the disclosure requirements applicable to hybrid witnesses.

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

Although cases examining the provisions in the 2010 amendments have provided some clarity on the requirements under Rule 26, the case law is still developing and there remains uncertainty about the scope and proper interpretation of certain provisions. In light of this ongoing ambiguity, 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 take any form, adhering to formalities can lessen confusion and make it easier to demonstrate that materials are indeed part of a draft report if questions are raised. However, counsel should keep in mind that even what is indisputably a draft report may 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, which:
  - draws a clear distinction between communications that are protected and those that may be discoverable; and
  - 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. In the rare circumstances where an expert's communications with a non-attorney are unavoidable (such as where an expert wishes to conduct an interview of a factually knowledgeable witness), counsel should be careful to ensure that the communications are appropriately cabined to the necessary subject matter.
- **Carefully prepare hybrid witnesses.** When offering the testimony of a hybrid witness, thorough witness preparation is essential. Counsel should:
  - carefully define the boundary between the witness's "expert" knowledge and their "personal" knowledge of the facts; and
  - ensure that the expert's opinions are appropriately disclosed and do not invade the province of non-hybrid experts also possibly offering opinions and testimony.

If both sides are willing, counsel can sidestep much of the ambiguity generated by the case law by stipulating to exactly what is and is not to be disclosed.

- **Stipulate to avoid ambiguity.** If both sides are willing, counsel can sidestep much of the ambiguity generated by the case law by stipulating to exactly what is and is not to be disclosed. The parties may, for example, stipulate that no expert notes are to be disclosed or that all are to be disclosed (for more information, search Experts: Expert Stipulation and Proposed Order (Federal) on Practical Law).

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 for a collection of resources to help counsel navigate the attorney-client privilege and work product doctrine in federal litigation.

Search Expert Privilege and Confidentiality Considerations Checklist for more on best practices counsel should consider to preserve privilege and work product immunity when working with experts and minimize the risk of disclosing confidential information.

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