Expert witness discovery under revised federal Rule 26

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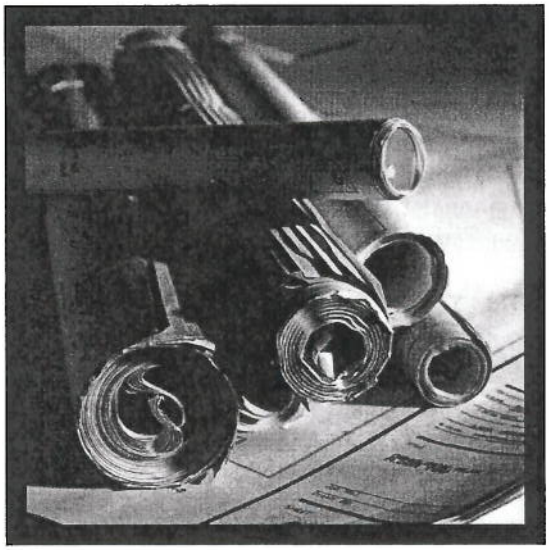
Effective Dec. 1, 2010, Rule 26 of the Federal Rules of Civil Procedure has been amended to limit the scope of expert witness discovery. The 1993 amendments to Rule 26 greatly expanded expert witness discovery, causing consternation and uncertainty as to which communications between a lawyer and his expert are protected and which will eventually be disclosed. The new amendments now in place allow a more free flow of information between a lawyer and his expert.



Background

In 1993, Rule 26(a)(2) was amended to greatly expand expert discovery, requiring the disclosure of not only the materials upon which a testifying expert relied, but also all "data or other information considered" by the expert in forming his or her opinion. Changes to Rule 26(a)(2)(B) further prevented work-product and attorney-client privileges from protecting this information.

Most federal courts construed "other information considered" to include all facts and data provided by an attorney to an expert, as well as all draft expert reports and all attorney communication with the expert, even if those communications contained attorney work-product. The rule was interpreted to require the disclosure of virtually every document, e-mail and communication shared with the expert, together with every expert report revision and draft, thereby greatly constraining communication between attorneys and experts about trial strategy, theories of the case and related discussions that, if disclosed to the opposing side, would reveal key confidential and privileged information.

To solve this problem, many lawyers employed a set of consulting experts, in addition to their testifying experts, to facilitate the types of strategic discussions and brainstorming they could no longer safely conduct with testifying experts. Of course, employing twice the number of experts dramatically increased litigation costs and demanded significant professional time (from both attorneys and experts) to comply with the expanded discovery obligations, and generating volumes of responsive information and communications resulting in significantly longer expert depositions with all sides facing the high costs of requesting, producing and digesting this information.

New Rule 26

There are three primary changes to Rule 26.

1. Communications between a lawyer and his testifying expert are now protected from any type of discovery.
2. Draft expert reports are no longer discoverable.
3. New categories of expert witnesses are not required to produce an expert witness report.

Communications between lawyer and testifying expert

The amendment to Rule 26(a)(2)(B)(ii) now only provides for disclosure of all "facts or data considered" in forming the expert's opinion, rather than the broader "data or other information" disclosure prescribed in the old rule.

Exceptions

New Rule 26(b)(4)(C) expressly confers work-product protection to almost all communication between attorneys and retained experts.

The protection for communications between the retained expert and a party's attorney should be applied in a realistic manner and may not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of cases similar in nature and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection should apply to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not

"counsel of record" in the action.

The new rules are designed to allow lawyers to work with testifying experts without exposing those communications to discovery, subject to three important exceptions, which allow discovery of:

1. Any communication related to compensation;
2. Facts or data provided by counsel and considered by the expert in forming the opinions to be expressed and
3. Assumptions provided by counsel and relied on by the expert in forming the opinions to be expressed.

According to the Advisory Committee notes, the term "communication related to compensation" is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the lawsuit. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. Inquiry may also be made into compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into all such potential sources of bias.

Under Rule 26(b)(4)(C)(ii), discovery is permitted to 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. The exception applies only to communications "identifying" the facts or data provided by counsel. Further communications about the potential relevance of the facts or data are protected.

Under Rule 26(b)(4)(C)(iii), discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied on in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually relied on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Exceptions to the exceptions

Under the amended rule, discovery regarding attorney-expert communications on subjects outside these three exceptions, or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) - that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A). Remedies are provided by Rule 37.

Draft reports

Amended Rule 26(b)(4)(B) specifically expands work-product protection to draft expert reports and attorney-expert communications, stating as follows: "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." It applies regardless of the form in which the draft is recorded, whether written, electronic or otherwise.

Summary disclosure for "unretained" experts

There is a new Rule 26(a)(2)(C) and a new category of experts who are not required to provide written reports. Under the new rule, a report is only required "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." If this type of expert is to be used, counsel must prepare a report that provides 1) the subject matter on which this expert is expected to testify, and 2) a summary of the facts and opinions to which the expert is expected to testify.

In addition to experts such as treating physicians, this amendment is designed to cover situations in which the witness is a party, or an employee of a party, who may testify as a both a fact witness and an expert. One example would be a Chief Financial Officer of a company who, in addition to facts, plans to testify about compliance with generally accepted accounting standards.

Timing of disclosure

A party must make these disclosures at the times and in the sequence that the court orders; however, absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

Conclusion

Needless to say, this article touches only on the highlights of these very important changes to Rule 26. When this issue arises, and it will, you need to read ALL of Rule 26 and also read the extensive notes of the advisory committee explaining the purpose and effect of these changes.