Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Good News For Experts (And Attorneys Who Use Them)

Allegra J. Lawrence-Hardy

Law360, New York (November 29, 2010) -- Amendments to Federal Rule of Civil Procedure 26, taking effect on Dec. 1, should streamline the management of testifying expert witnesses and reduce the costs of expert witness discovery in cases pending in federal court. The amendments provide for expanded discovery protection of communications between attorneys and testifying expert witnesses, including protection of any of the testifying expert's draft reports, by classifying those communications and reports as protected attorney work-product.

The new rule, however, will not protect communications between an attorney and a testifying expert: (1) relating to the expert's compensation; (2) identifying facts or data provided by an attorney and considered by the expert in forming an opinion to be expressed; and (3) identifying assumptions provided by an attorney that the expert relied upon in forming an opinion to be expressed. These changes will likely affect the way in which attorneys work and communicate with expert witnesses in federal cases.

Laurance J. Warco

Existing Rule for Testifying Experts

In 1993, Rule 26 was amended to require disclosure of reports by any witness retained to provide expert testimony or by any party's employee whose duties involve giving expert testimony. Many courts interpreted these amendments broadly, requiring disclosure of almost all communications between attorneys and testifying experts, including drafts of any expert reports.

One consequence of the expansive disclosure requirements was that many attorneys employed two sets of experts: one set of consulting experts to strategize and develop theories of the case, and another set of experts who would actually testify at trial. For many parties, however, this bifurcated strategy was cost-prohibitive.

Even when a party employed only one set of experts, expert discovery was still time-consuming and costly. Because opposing attorneys often sought all types of communications between an attorney and expert through document requests and expert depositions, litigants anticipated such requests and were driven to take elaborate steps to avoid the disclosure of attorney-expert communications. These steps included the preparation of expert reports on software programs that prevented the creation of separate drafts for each iteration of an expert's report, as well as lengthy conference calls to discuss and edit the report to avoid the creation of any written communications.

Because of these discovery-prevention efforts, the Committee on Rules of Practice and Procedure noted that "attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions."[1] Realizing the futility of these inquiries, many attorneys stipulated at the outset of expert depositions that they would not attempt to discover such information.

Changes Effective Dec. 1

The imminent changes to Rule 26 are designed to alleviate the costly effects of the old rule on expert discovery practice. Under the amendments, Rule 26(b)(4)(B) and (C) provide work-product protection for drafts of expert reports in any form, and for most communications between attorneys and testifying experts for a particular party.

Notably, because the rule only protects communications between the expert witness and the "attorney for the party on whose behalf the witness will be testifying,"[2] it is not yet clear whether parties operating under a joint defense or common interest agreement will be able to protect any communications between an expert and attorneys for other parties to such an agreement.

In addition, not all communications between the attorney and expert will be protected under the new rule. First, any communications regarding the expert's compensation are discoverable, including potential additional benefits to the expert for providing his or her services, such as additional work in future cases.[3]

Second, any facts or data provided by a party's attorney and considered by the expert in forming an opinion will continue to be discoverable, even if that material is not ultimately relied upon by the expert in forming the opinion.[4] The new rule, however, purposely excludes the phrase "or other information" from this exception, which had previously supported courts' broad interpretation of disclosure requirements for testifying experts.

Third, a party may seek to discover any assumptions provided by a party's attorney that the expert relied upon in forming an opinion. Any "general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, however, are outside this exception."[5]

Finally, as is the case for all attorney work-product, a party may seek to discover attorney-expert communications if the party demonstrates that it has substantial need for the information and cannot obtain substantially similar information without undue hardship. The committee notes, however, that "[i]t 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."[6]

The Changing Landscape of Expert Discovery

Expert witnesses are a crucial part of modern litigation. The new federal rules recognize this importance and seek to change discovery practice to foster more efficient expert witness management and more open attorney-expert communication. The new rule will likely change the way in which attorneys work and communicate with expert witnesses. In cases pending in federal court, there will be less reason for parties to hire both consulting and testifying experts.

Under the new rule, an attorney's communications with a testifying expert will receive greater protection. This protection should allow more open and effective communication between attorneys and testifying experts. Attorneys will be able to work more closely with experts to help refine draft reports and strategize without fear of creating discoverable material.

Attorneys will still likely seek to limit the amount of discoverable material provided to expert witnesses, given the exception related to facts or data "considered" by the expert, but the changes to Rule 26 should ease some of the frustrations and costs of limiting discoverable information exchanged between an attorney and his or her expert.

--By Allegra J. Lawrence-Hardy and Laurance J. Warco, Sutherland Asbill & Brennan LLP

Allegra Lawrence-Hardy (allegra.lawrence-hardy@sutherland.com) is a partner with Sutherland in the firm's Atlanta office and co-leader of the firm's business and commercial litigation team. Laurance Warco (laurance.warco@sutherland.com) is an associate with the firm in the Atlanta office. Atlanta-based Sutherland associate S. Trent Myers contributed to this article.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

[1] Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Report of the Civil Rules Advisory Comm., May 8, 2009 (Revised June 15, 2009), at 3.

[2] Id. at 17.

[3] Id. at 18.

[4] Id. at 15.

[5] Id. at 19.

[6] Id.