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Litigation Advisory

DECEMBER 21, 2010

Changes to Federal Rules Regarding Expert Witness Discovery

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Introduction

A major revision to Rule 26 of the Federal Rules of Civil Procedure governing expert witness discovery went into effect on December 1, 2010. As a result of these changes, Rule 26 no longer allows full discovery of draft expert reports or broad disclosure of communications between attorneys and expert witnesses, as had been the case since 1993. Instead, draft expert reports and communications between counsel and expert witnesses are now protected by the work-product doctrine. While prohibiting discovery of draft expert reports and significantly limiting discovery of Attorney-Expert communications, Rule 26 continues to require full disclosure of the expert's opinions and the facts or data used to support them.

The Old Rules Regarding Draft Expert Reports and Attorney-Expert Communications

Under the old rules, drafts of expert reports and all communications between counsel and experts relating to the subject matter of the litigation were fair game in discovery (absent an agreement between the parties that such information was off limits). As a result, lawyers and experts often took elaborate steps to avoid creating drafts of the expert's report and to minimize communications between attorneys and experts.

The New Rules: Draft Expert Reports and Most Attorney-Expert Communications Are No Longer Discoverable

The amendments to Rule 26 close the door to the discovery of draft expert reports and almost all communications between counsel and retained experts. Rule 26(b)(4)(B) now provides that draft expert reports are protected from discovery, and Rule 26(b)(4)(C) confers work-product protection on communications between attorneys and retained experts except to the extent that the communications: (a) relate to compensation for the expert's study or testimony; (b) 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; or (c) identify assumptions that the party's attorney provided to the expert and that the expert relied on in forming the opinions to be expressed.

What Impact Will These Changes Have?

These changes to Rule 26 were broadly supported by trial lawyers and bar organizations as a step towards reducing the cost and contentiousness of litigation. The amendments to Rule 26 should encourage attorneys and experts to communicate freely with each other without having to engage in time-consuming and wasteful measures to minimize their communications and avoid the creation of draft reports.

Additional Points to Keep in Mind Regarding the New Rules

- ***Depositions.*** The protections afforded by the new rules to draft reports and Attorney-Expert communications apply not only to document production, but extend to "all forms of discovery," including depositions.
- ***No Other Limit on Exploring Foundation of Expert's Opinion.*** Neither Rule 26(b)(4)(B) or (C) otherwise "impede[s] discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions." See Advisory Committee Notes to 2010 Amendments.
- ***Substantial Need Required for Additional Discovery.*** The Advisory Committee Note adds that "discovery regarding Attorney-Expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order." That order requires a showing of substantial need pursuant to Rule 26(b)(3)(A)(ii).
- ***Disclosures for Non-Reporting Experts***. Prior to the 2010 amendments, the requirement that an expert must file a report was confined to any expert witness "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." For anyone else expected to provide expert testimony in a case—for example, a treating physician, an employee whose duties did not regularly involve giving expert testimony, or a third party witness—no report was required. The 2010 amendment to Rule 26(a)(2)(C) mandates counsel-prepared disclosures for non-reporting experts that must include: "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify."
- ***Effective Date.*** The changes to Rule 26 apply to all cases filed in federal court after December 1, 2010, and federal courts have the discretion to apply them to pending cases as well. These changes do not apply to cases filed in state court or to arbitrations, but the changes to Rule 26 may influence the way practitioners approach expert discovery in those forums (e.g., parties may agree to adopt the new Federal Rules with respect to expert discovery).

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0827-1210-NAT-LIT