



Revisions to FRCP Make Communications With Experts Not Discoverable

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Effective December 1, 2010, FRCP 26(b)(4)(C) protects communications between a party's attorney and expert witnesses who must provide a report pursuant to FRCP 26(a)(2)(B). Communications are discoverable only where they relate (i) to the expert's compensation, (ii) to facts the expert considered in forming an opinion, and (iii) to assumptions the attorney provided **and** that the expert relied upon in forming an opinion.

Note that this section, like FRCP 26(b)(4)(B) (protections for draft expert reports), does not prevent discovery of things otherwise discoverable under Rule 26(b)(1)¹ where the party seeking disclosure shows it has a "substantial need" and cannot obtain the information without "undue hardship." FRCP 26(b)(3)(A)(i) and (ii). The protections of FRCP 26(b)(3)(B), which requires the Court to prevent disclosure of "mental impressions, conclusions, opinions, and legal theories of a party's attorney or other representative," remain in place.

FRCP 26(b)(4)(C)(ii) states that the expert must only "identify" facts and data that the party's attorney provided and that the expert relied upon. Arguably, identification of such facts would not require the expert to disclose the letter from counsel or notes from a phone conference with counsel where applicable facts were disclosed. Likely, simply stating the facts counsel provided in the expert's written report would suffice.

These new protections, however, apply only to experts "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." FRCP 26(a)(2)(B). Thus, non-retained experts such as a treating physician do not enjoy these same protections. A later post will address the reporting duties related to a non-retained expert.

The amended Rule resolves a split that had developed among the federal trial and appellate courts relating to discoverability of work product that is provided to an expert witness. See 6 Philipps, Kramer & McMurtry, *Kentucky Practice, Rules of Civil Procedure Annotated*, 6th ed., CR 26.02, Author's Comment 12 at p. 101 (2010 supp.).

¹ FRCP 26(b)(1) governs the scope and limits of discovery.