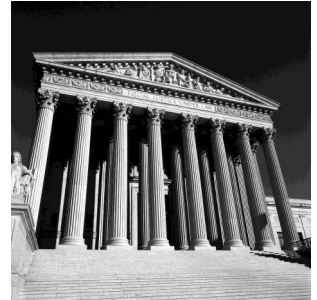


WHV Legal Updates

January 7, 2011

Amendments to Rule 26 of the Federal Rules of Civil Procedure - Expert Drafts and Communications



Complex litigation regularly results in the need to retain expert witnesses. An attorney's dealings with an expert were complicated by the fact that any and all communications with an expert were discoverable. This resulted in a chilling of the communication between attorneys and experts. Most definitely, attorneys and experts were leery of written communications due to the possibility of it being discoverable.

Effective December 1, 2010, Rule 26 of the Federal Rules of Civil Procedure was amended to allow for the protection of the "drafts of any report or disclosure" required of an expert by the Federal Rules of Civil Procedure. This will allow the expert to create his technical draft of the report or disclosure. The attorney will then receive the draft of the report or disclosure and ensure that the technical draft meets the legal requisites necessary for an expert opinion to be admissible by a federal court. Neither the expert nor the attorney has to be concerned with the discoverability of any draft reports or disclosures.

The amendment also protects from disclosure communications, in any form, between the attorney and an expert required to provide a report or disclosure pursuant to the Federal Rules of Civil Procedure. However, this protection is subject to the following limitations:

- Communications pertaining to an expert's compensation;
- The facts or data provided by an attorney to the expert and the expert relied upon such facts or data in forming his/her opinions; or
- Any assumption that the attorney provided to the expert and the expert relied upon such assumption in forming his/her opinions.

These amendments are welcome changes to the expert disclosure requirements of the Federal Rules of Civil Procedure. This should result in a decrease in litigation costs due to the hoops that attorneys and experts had to jump through due to the discoverability fear of draft reports or disclosures and communications. It is hoped that states will follow suit in updating their expert disclosure requirements. However, please note that if a client reviews the drafts of an expert report or disclosure or communicates with the expert then such actions will most likely be discoverable. This amendment clearly indicates that the protections from discoverability, as set forth above, only extend to the attorney.