Rule 26: Major Changes for Attorneys and Experts

A major revision to the federal rules governing expert witness reports is on track to take effect in December. Lawyers and experts alike agree that the changes are long overdue.

No longer would Rule 26 of the Federal Rules of Civil Procedure allow full discovery of draft expert reports and require broad disclosure of any communications between an expert and trial counsel, as has been the case ever since the rule's revision in 1993.

Instead, under proposed amendments to Rule 26, those communications would come under the protection of the work-product doctrine. The amendments would prohibit discovery of draft expert reports and limit discovery of attorney-expert communications. Still allowed would be full discovery of the expert's opinions and of the facts or data used to support them.

The changes were approved by the U.S. Judicial Conference in September and submitted to the Supreme Court. The Supreme Court is expected to approve the amendments by May 1 and submit them to Congress. Unless Congress rejects the rules, they will take effect on Dec. 1, 2010.

The proposed rule is broadly supported by trial lawyers and bar organizations as a step towards reducing the cost and contentiousness of litigation.

Organizations that endorsed the rule include the American Bar Association, American College of Trial Lawyers, American Association for Justice, Defense Research Institute, Federal Magistrate Judges' Association, Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, and the U.S. Department of Justice.

Dual Sets of Experts

"Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications," the Judicial Conference explained in its report to the Supreme Court.

"The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts."

The proposed rule would expressly provide that the work-product protection applies to "protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded."

The proposed rule retains the three categories of attorney-expert communications that are excluded from the work-product protection under the existing rule:

- Communications pertaining to the expert's compensation.
- Facts or data that the attorney provided and the expert considered in forming opinions.
- Assumptions that the attorney provided and that the expert relied on.

In another change, the proposed rule would alter the procedure for witnesses who will provide expert testimony but who were not specifically retained to provide expert

testimony. Treating physicians and government accident investigators are examples of this category of expert.

Under the proposed rule, if the expert is not required to submit a written report, then the lawyer who will use the testimony must submit a disclosure summarizing the facts and opinions to which the expert is expected to testify.

Support from Both Sides of the Bar

Stephen B. Pershing, a lawyer with the Center for Constitutional Litigation in Washington, D.C., submitted testimony in favor of the proposed rule on behalf of the American Association for Justice. He said that plaintiff and defense lawyers agree on the need to apply work-product protection to expert draft reports.

"Practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product, or counsel's manipulation of the expert's output that takes up time better spent focusing on the expert's conclusions themselves," Pershing said.

The amended rule would enable litigants to avoid the kind of "artificial behavior" that is now all too common, he suggested. No longer would lawyers and experts feel compelled to avoid written communications and no longer would well-funded litigants hire two sets of experts, one to consult in case development and the other to testify.

Another who spoke in favor of the proposed rule is Wayne B. Mason, former board chair of the Federation of Defense & Corporate Counsel and a partner in the Dallas office of Sedgwick, Detert, Moran & Arnold.

"Attorney discussions with experts are too often forced to be verbal in an effort to discourage discovery of draft reports," he said. "The proposed rules supply a well-reasoned approach that strengthens the veracity and straightforwardness of the discovery process while considering the burden and expense."

Mason praised the proposed rule for extending the work-product protection to employee-experts who are not required to prepare a written report. "Facilitating open communication between attorneys and in-house witnesses is an important practical consideration for the committee."

Rule Would Reduce Costs

John H. Martin, a past-president of the Defense Research Institute and a partner with Thompson & Knight in Dallas, said that the proposed rule will help reduce the cost of litigation.

"The proposed amendments provide protection to attorney-expert communications that allows the attorney and the expert to communicate freely with each other without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report," Martin said.

"This allows the attorney to learn about the scientific or technical aspects of the case from the expert so that legal arguments not based on sound scientific methodology can be discarded, and the issues to be presented at trial can be narrowed," Martin added. "At the same time, it allows the attorney to speak freely with the expert, many of whom

are not fulltime professional expert witnesses, and to engage in an ethical preparation of the witness to present opinion testimony."

It appears that the proposed rule extends the work-product protection to not just the expert, but also to the expert's employees. The official Committee Note that accompanies the proposed rule explains that its protection is intended to include communications "between the party's attorney and assistants of the expert witnesses."

A number of lawyers had urged the committee to take this position. "An expert engineer at MIT may use grad students in his doctoral program to assist him in his research," explained R. Matthew Cairns, president-elect of the Defense Research Institute and a lawyer in Concord, N.H., "and those students are the ones that counsel may deal with on a day-to-day basis as the expert's team does his testing and analysis prior to him reaching a conclusion and preparing a report."

Given the broad support for the proposed rule by lawyers and experts alike, the changes to Rule 26 are virtually certain to take effect Dec. 1.