# To Retain or Not to Retain

**Wednesday, June 15, 2011**

You've heard the expression "why buy the cow if you can get the milk for free." Well, if your cow is an expert witness, there may actually be a good answer to that question – privileged communications.

Today we bring you a case from outside the products liability arena, but one that deals with a subject near and dear to our hearts – experts. By now, products liability practitioners are familiar with the 2010 amendments to Federal Rule of Civil Procedure 26(a) and (b) aimed at clarifying the permissible scope of expert discovery. We discussed those changes here. But as with most areas of the law, clarity only comes, if at all, after much debate. With the 2010 amendments in their infancy, the debate is only beginning. So, while there are many facets to the new Rule 26 to be explored, the recent case that caught our eye deals with the distinction drawn by the rule between reporting and non-reporting experts as to the protection afforded communications with party counsel and more worrisome whether the latter can be converted to the former for a nominal fee.

At issue in United States v. Sierra Pacific Industries, 2011 U.S. Dist. LEXIS 60372 (9th Cir. May 26, 2011) – which involves damages caused by a forest fire in 2007 – was whether the United States waived work product and attorney-client privilege as to communications between its attorneys and two federal government employees when it designated those employees as expert witnesses. The Ninth Circuit said yes.

In reaching its conclusion, the court focused on the experts at issue being *non-reporting experts*. Who are non-reporting experts? Anyone designated as an expert who isn't a reporting expert. So, then who is a reporting expert: one who is "retained or specially employed to provide expert testimony . . . or one whose duties as the party's employee regularly involve giving expert testimony." Rule 26(a)(2)(B). There was no dispute in Sierra Pacific that the employee experts, who were in fact two of the investigators as to the origin and cause of the fire, were non-reporting experts. They were designated as experts to provide testimony "limited to the knowledge and opinions they formed at the time they . . . wrote their investigative report" and they "*have not been paid at any time for their expert opinions.*" Id. at *17 (emphasis added). Why is it so important that the employee experts were non-reporting? Because the new Rule 26(b)(4)(C) only protects communications between party attorneys and *reporting* experts. Non-reporting experts (and lawyers engaging them), the court holds, don't enjoy the same protections.

Under the old Rule 26, communications between party counsel and designated experts were generally discoverable. While the 2010 amendments seek to offer new protections, as to counsel communications the rule draws a line between reporting and non-reporting experts. The Sierra Pacific decision provides a detailed account of the Advisory Committee's minutes concerning its decision not to provide protection for communications between non-reporting experts and counsel. See id. at *20-24. Primary among the reasons for its decision is that

non-reporting experts include "a varied class" (such as party employees, former employees, in-house counsel, and treating physicians) who present "unique policy considerations." Id. at *31-32. The Advisory Committee was not naïve about the "obvious opportunities for mischief", id. at *22 (citation omitted) if the rule was extended to *all* non-reporting experts.

> "For example, if any employee engineer designed a product that was the subject of a product liability case, it would be difficult to separate the engineer's sense impressions leading up to the design of the product with his expert opinions at trial, and to distinguish between attorney communications regarding the former from those regarding the latter."
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> Id.

While our clients may well have benefitted from a broader Rule 26 protection with respect to employees and former employees, such a rule would have been devastating if it protected communications between plaintiffs' counsel and treating physicians. Fortunately, the committee recognized the potential for abuse in this situation:

> "There are reasonable grounds to believe that broad discovery may be appropriate as to some "no-report" experts, such as treating physicians who are readily available to one side but not the other."
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> Id. at *23 (citation omitted).

So, on the whole, we support the decision not to protect communications with non-reporting experts, which with respect to treating physicians continues to allow us to thoroughly question the doctor at deposition about his discussions with plaintiffs' counsel. But we wish to alert those on our side – who have occasion to use corporate employees as experts – to be careful. **Attorney communications with the corporate employee experts of a client are not protected from discovery by the 2010 amendments to Rule 26.**

While amended Rule 26 did not create a new protection for non-reporting experts, neither did it "abrogate any existing protections for such communications." Id. at *24. Therefore, with respect to non-reporting experts, it appears that the law prior to the 2010 amendments remains applicable.

Another thing that intrigued us about this case was the unveiled threat by the United States to retain its own employees as expert witnesses for a nominal fee, "thus making them reporting experts". Id. at *14. Is the consequence of the distinction drawn by Rule 26, as the United States argued in this case, that "parties will buy privilege by retaining all of their experts." Id. *34. Could it really be that simple? While the court refused to rule on the permissibility of such an action by the United States, it recognized that the issue "is one caused by the rule itself." Id.

The new Rule 26 affords a level of protection to counsel communications with reporting experts that is not extended to non-reporting experts. If it is as easy to take advantage of that protection as writing a check, then what is to stop plaintiffs' counsel in product cases from hiring treating physicians as retained experts before even filing suit. We shudder at the thought. Could our clients also benefit from retaining the treating physicians? Conceivably

yes. But, as we all know, we don't have unfettered access to the plaintiffs' treaters and with minimal effort, plaintiffs' counsel can beat us to the doctor's office, cash in hand.

As the Ninth Circuit, opined, the reason for not affording protection to counsel communications with non-reporters is because most non-reporters are hybrid fact and opinion witnesses:

"While it is desirable that any testifying expert's opinion be untainted by attorney's opinions and theories, it is even more important that a witness who is testifying regarding his own personal knowledge of fact be unbiased."

Id. at *32-33.

If the Advisory Committee was as sensitive to this issue as its discussions suggest, it seems odd that the distinction between the two types of designated experts could be overcome so simply – and we think the answer is that – we haven't heard the answer yet. There is fertile ground here for significant debate and so we will be paying close to attention to whether the United States (or anyone else) makes good on its threat to buy the cow.