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I'm no expert, but this is a game-changer

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Well . . . a game-changer if you are a player in the expert-witness-in-federal-court game. So, for such experts out there, construction, design or otherwise, or anyone who regularly retains an expert, read on. Effective December 1, 2010, the Federal Rules of Civil Procedure were amended, and Rule 26 received several significant changes concerning experts

The backdrop: Since 1993, Rule 26 has been interpreted to permit discovery of all communications between an attorney and expert witnesses, as well as all draft expert reports. As a result, some attorneys went to great (and often costly) lengths to avoid creating a discoverable record.

Two significant changes to the game:

First, draft expert reports are now protected under the work-product doctrine, which prevents most documents created in preparation of litigation from being discovered by opposing counsel. Rule 26(a) now expressly protects "drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded."

Second, the revised rule now limits the discoverability of communications between experts and attorneys who retain them. Most communications are now protected. As with most legal rules, there are exceptions: (1) communications related to an expert's compensation; (2) communications regarding facts or data provided to the expert and the expert considering in forming the expert's opinion; and (3) assumptions provided to the expert and the expert considering in forming the expert's opinion.

These changes may enable attorneys to avoid engaging multiple experts (i.e., consulting, testifying) to avoid creating discoverable material. Also, they may open the door to qualified experts that were unwilling to serve as experts under the old rules. And more drafts could promote better final reports. Finally, these changes may help reduce costs for parties engaged in litigation involving experts, such as many construction disputes. Always a good thing.

Remember that these are amendments to the Federal Rules of Civil Procedure, and only apply in federal courts. It remains to be seen if states will adopt the same principles to govern experts in state courts. Indiana has generally modeled its rules after the Federal Rules, and perhaps will follow suit. We will keep you undated here at LAW under CONSTRUCTION if there are any further developments.

There are, of course, other changes to the Rules, so please consult a qualified attorney regarding all of the amendments to the Federal Rules. Also, the amendments to Rule 26 are not retroactive and, therefore, absent an agreement, communications and draft reports prepared before December 1, 2010, may still be discoverable, so again, consult with a qualified attorney.

Finally, these amendments are new and their bounds untested, so counsel and clients must still be careful when communicating with experts in connection with litigation.

All-in-all, the game has improved.