

THE NEW RULE 26: WHAT YOU NEED TO KNOW

Effective December 10, 2010, expert discovery under the rules of civil procedure changed significantly with respect to both retained testifying experts and non-retained testifying experts, such as treating physicians.

Non-Retained Testifying Experts

The first significant change to Rule 26 is that a party wishing to present testimony from non-retained experts at trial (such as treating physicians and employees with expertise who do not regularly provide expert testimony), must now file a disclosure regarding any such expert's opinions and the bases for them. Recall that under former Rule 26, no disclosure was necessary for such experts. Specifically, the new Rule 26 requires a disclosure which states: "(i) the subject matter on which the witness is expected to present evidence under Federal Rules of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." See FRCP 26(a)(2)(C).

It is important to note that the rule by its own terms does **not** require disclosure of intended factual testimony which is unrelated to the expert testimony the witness intends to present. That is the new Rule 26 still permits treating physicians and other non-retained testifying experts to simultaneously serve as both fact witnesses and expert witnesses, while only requiring the disclosure to address the expert opinion and supporting facts aspects of their testimony.

While some U.S. District Courts' local rules already contained similar requirements, this is a significant step towards unifying U.S. District Court practice. More importantly, this change

now prevents the scenario where treating physicians are permitted to hide behind their chart notes which often fail to disclose the true breadth of their opinions. This helps to eliminate some of the surprise element of treating physician expert testimony. It also is significant in that the requirement to disclose the specific expert opinions and facts supporting the opinions could make it easier for parties to challenge the admissibility of those opinions under the *Daubert* "gatekeeping" function.

Retained Testifying Experts

There are also changes to the portion of Rule 26 pertaining to retained testifying experts. Such experts have long been required to prepare an "expert report," and this has not changed. The new Rule 26 also still requires that such experts issue their "expert report" prior to their deposition. Here is where the changes begin.

Under the former Rule 26, once the "expert report" had been issued, it was common practice to request production of the expert's complete expert file, including all materials relied upon, notes made, drafts of expert reports, communications with counsel and billing statements. This was routinely done via a document production request or via a subpoena requiring production of these materials at the time of the expert's deposition.

This practice often produced materials which might be used for impeachment of the expert, and also offered attorneys the rare opportunity to peer around the wall of protection created by the work product doctrine and view their opposition's theories and strategies. While seemingly beneficial in this respect, this rule also required wise practitioners (and expert

witnesses) to be wary of these same consequences in dealing with their experts.

Common practices used to protect against intrusion by one's opponents were to not use e-mail, write nothing substantive in any letter, and strictly communicate via phone. It was also common for experts to simply revise their reports so as to purposefully avoid maintaining any drafts which might be subject to discovery. Further, many practitioners elected to retain two (2) experts for every litigation—one to provide testimony and one to simply consult with, whose work was totally protected. All of these practices necessarily made dealing with retained testifying expert witnesses more difficult, and also drove up the costs of litigation. With the institution of the new Rule 26, much (but not all) of this changes.

1. Drafts of Expert Reports and Disclosures are No Longer Discoverable

One thing is clear, experts and attorneys no longer need to be concerned about draft reports, as they are now protected. New Rule 26(b)(4)(B) specifically “protects drafts of any report or disclosure required un Rule 26(a)(2), regardless of the form in which the draft is recorded.”

2. Most Attorney-Expert Communications are No Longer Discoverable

While this area is a little muddier than drafts of expert reports, the new Rule 26 protects attorney-expert communications with only three (3) exceptions. In other words, all communications between attorneys and experts who are required to provide a report are protected from disclosure “except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.”

See FRCP 26(b)(4)(C). As is apparent, this change is significant because the majority of attorney-expert communications do not fall within these limited exceptions and are, therefore, protected.

According to the Advisory Notes, this should afford a great deal of protection. For instance, while communications about facts are only discoverable to the extent of identifying facts which the expert considers in forming opinions, communications discussing the relevance or significance of those facts should be protected. Similarly, communications pertaining to assumptions are only discoverable if the expert actually relies on them in forming opinions. Thus, communications discussing hypotheticals would also be protected. In essence, the types of communications which are most useful to the opposition (i.e. for bias and impeachment) are no longer discoverable.

Nevertheless, this loss does not come without its own benefits. For instance, attorneys and experts are now free to discuss strategy, possible theories and the significance of facts and data via e-mail or other written communication without fear of it being discoverable. Attorneys may also openly play “devil's advocate” with their experts without fear of exposing the weaknesses of their expert's opinions to the other side. These benefits should serve to achieve one of the purposes of the amendments, which was to make working with experts more efficient and reduce the need for consulting experts. While some

practitioners may have preferred playing the “nothing in writing” game and hoping to obtain significant impeachment evidence via a subpoena to the opposition’s expert, the new Rule 26 certainly makes things simpler.

3. Additional Considerations

There are five (5) additional things that all practitioners should keep in mind when working under the new Rule 26. First, the protection afforded to draft “expert reports” also specifically applies to draft disclosures for testifying experts that are not required to provide an expert report.

The same, however, is not true of the communications protections. FRCP 26(b)(4)(C) **only** applies to communications with experts that are required to provide reports. As such, parties should still be able to seek via subpoena any communications with non-retained testifying experts.¹

The third consideration is that where part of a communication falls within one of the three exceptions of FRCP 26(b)(4)(C), a party need only disclose the specific portion of the communication which falls within the exception. The remainder of the communication retains protection.

The fourth consideration is that while the added protections to draft reports and communications may prevent disclosure of some of the most useful materials which were previously discoverable, parties are still free to subpoena all the data and materials which a retained testifying expert considered or relied upon. Parties may also still subpoena any notes prepared by the expert. In other words, practitioners may still be able to

¹ Communications with experts retained for consulting purposes only still retain full protection. See FRCP 26(b)(4)(D).

obtain useful impeachment materials despite the amendments.

Finally, practitioners should keep in mind that the protections offered to draft reports and disclosures, and communications which do not fall within the three exceptions, is limited to work-product protection, and thus is only a qualified privilege. That is, a party may still attempt to obtain production of the protected expert materials via court order. The party seeking production will, however, have to meet the heavy burden of showing that “it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” While this is always a heavy burden, the Advisory Notes suggest that in the case of otherwise protected expert materials, the burden will likely be even greater because the mental impressions of opposing counsel are almost certainly at risk. Thus, any party seeking disclosure of otherwise protected expert materials should be prepared for a very steep uphill battle.

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