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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Amendment of Expert Discovery Rules

A handful of recent changes to the federal rules governing work product protection and expert discovery promise to have a profound effect on the mechanics of expert disclosure, the development of expert opinions, and the overall attorney-expert relationship. Specifically, the amendments recalibrate the balance between expert discovery and the work product doctrine, providing a significant zone of work product protection for attorney-expert communications which has not existed since 1993. Additionally, while maintaining the important distinction between "retained" and "non-retained" testifying experts, the amendments also recognize, for the first time, the importance of providing limited expert discovery from fact witnesses who may also give expert testimony.

The amendments to Rule 26 of the Federal Rules of Civil Procedure which went into effect on Dec. 1, 2010,[1] have been years in the making. The changes to the rule, some of which were proposed as far back as 2000, are a response to widespread concern that the 1993 amendments to Rule 26, requiring the production of a detailed expert report and allowing for the deposition of expert witnesses, intruded too far into what had come to be regarded as firmly protected work product territory. Specifically, most jurisdictions, including the U.S. District Court for the Southern District of New York, interpreted the expert discovery provisions of Rule 26 as creating a "bright-line rule" requiring disclosure of all information provided to testifying experts. The prevailing view was that the disclosure requirements of Rule 26 took precedence over or trumped the work product doctrine.[2]

In the nearly two decades since the 1993 amendments went into effect, expert discovery has taken on an ever-increasing significance, and the time and expense devoted to expert discovery likewise has ballooned. A significant portion of that expense has been attributable to "artificial and wasteful discovery-avoidance practices" aimed at preserving work product from disclosure.[3] For example, until now, lawyers have routinely hired two sets of experts—one to serve as consultant and the other solely for the purpose of testifying—

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in order to shield from discovery those expert communications associated with understanding the technical aspects of a case and the theories about which the testifying expert ultimately would testify.

The quality of representation also suffered in some cases where attorneys felt "compelled to adopt a guarded attitude toward their interaction with testifying experts…and experts adopt[ed] strategies that protect[ed] against discovery but also interfere[d] with their work."[4] The 2010 amendments to Rule 26 are aimed at eliminating this fallout.

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Distinctions on Experts

As a threshold matter, the amended rule refines the distinction between retained, professional experts and non-retained experts such as treating physicians, party employees, or government accident reconstruction experts. Under the old rule, only retained experts were required to provide expert reports. The new rule maintains the distinction between retained and non-retained experts, and the recognition that requiring a detailed expert report from a nonprofessional expert would be unduly burdensome and unworkable, but now requires a "summary disclosure" from non-retained experts. Specifically, a new subsection—Rule 26(a)(2)(C)—requires a party with a non-retained expert to disclose the subject matter on which the witness is to present evidence and a summary of the facts and opinions to which the witness is expected to testify.

The Advisory Committee notes that "[t]his amendment resolves a tension that has sometimes prompted courts to require reports…even from witnesses exempted from the report requirement" and cautions courts from requiring "undue detail" in the summary disclosures, noting that non-retained witnesses may not be as responsive to counsel as those witnesses who have been specially retained.[5] In fact, although the rule itself is silent on this point, many commentators have assumed that the summary report required of non-retained experts will be entirely drafted by counsel.[6]

Work Product Protection

The most important aspect of the amendments is their explicit extension of work product protection to draft expert reports and most, though not all, attorney-expert communications. First, the work product rule itself now expressly provides protection for draft reports—a source of information mined extensively under the old regime for hints of how an expert's opinion may have been influenced or directed by counsel, rather than the product of true independent judgment. Newly added Rule 26(b)(4)(B) states that the work product doctrine "protect[s] drafts of any report or disclosure required under Rule 26(a)(2)." This protection applies to any form of recorded draft, whether from a retained or non-retained expert.

The protection accorded to draft reports promises alone to have a salutary impact. As the ABA Section of Litigation Federal Practice Task Force has observed, the requirement that draft reports be produced has resulted in burdensome depositions where experts are required to testify about their preparation and retention of drafts and counsel's involvement in the process—a practice that "prolongs expert depositions, frequently with little corresponding benefit."[7] Further, "[w]hen there are differences between early drafts and the final report, juries have been misled into believing that attorney…collaboration was improper, [even though] Federal Rules recognize that there should be collaboration between experts and the lawyers who hire them."[8]

Many lawyers encourage experts to produce only a single final report—a practice that deliberately trades quality of the final product for confidentiality of the process. Although parties in some cases have addressed these problems through stipulations exempting expert drafts from disclosure, the new rule eliminates the concerns regarding disclosure of draft reports in all cases.

Amended Rule 26(b)(4)(C) also extends work product protection to most communications between a party's attorney and a retained expert,

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regardless of the form of the communication. This amendment is perhaps the most significant, eliminating the gamesmanship that has developed around expert discovery by freeing attorneys to share internal analyses with experts and engage in collaborative development of case theories without concern that the substance of those discussions will be disclosed.

Unlike Rule 26(b)(4)(B), which applies to all experts, the provision covering attorney communications applies only to retained experts. Those responsible for drafting the amendments to Rule 26 concluded that broad discovery rules should remain unchanged with respect to "no-report" experts because such witnesses often serve a dual role as fact witnesses from whom a broad range of information should be discoverable.[9] The Advisory Committee notes that although the rule itself does not protect communications between attorneys and non-retained experts, "[t]he rule does not exclude protection under other doctrines."[10]

There are three exceptions to the extension of work product protection to communications between counsel and a retained expert. First, communications regarding expert compensation are not privileged.[11] This exception extends to compensation for work performed in the case at issue, as well as anticipated future benefits or work the expert may receive. The purpose of this exception is to allow "full inquiry into [] potential sources of bias."[12]

Second, communications related to the identification of facts or data considered by the expert in forming his opinions are not covered by the work product privilege.[13] This exception lies at the heart of the new balance struck between work product and expert disclosure, making explicit the requirement in Rule 26(a)(2)(B) that expert reports must continue to identify all facts or data that an expert relied on in forming his or her opinion, even if work product protection now extends to communications about the relevance or significance of those facts or data.[14]

The third exception permits discovery of attorney-expert communications identifying "assumptions" that counsel provided to the expert and that the expert "relied upon" in forming the opinions to be expressed.[15] This exception is narrowly crafted to apply only to those assumptions "relied upon" by the expert, in contrast to the second exception for facts or data "considered." The Advisory Committee Notes make clear that "[m]ore general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception" and therefore are protected as attorney work product.[16]

Contents of the Expert Report

Consistent with the expansion of work product protection over much expert material, the amendments to Rule 26(a)(2)(B), governing the content of expert reports, narrow the type of information that must be included in a retained expert's report. While the former rule required the inclusion of "data or other information" considered by the witness in forming his or her opinions, the new rule limits the required disclosure to "facts or data" considered by the witness. This amendment is intended to "alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications" and refocus disclosure on material of a factual nature.[17]

However, the Advisory Committee specifically notes that this obligation should continue to be interpreted broadly to include disclosure of any material containing factual ingredients that were considered by the expert, regardless of the source. Most importantly, the Advisory Committee clarifies that facts or data "considered" in forming an expert opinion are not limited to facts or data "relied upon" by the expert, but extends to all facts or data provided to the expert.[18]

This clarification should put to rest any remaining debate as to whether the expert must actually have taken materials into account in forming his or her opinion for those materials to be discoverable, and is consistent with the already prevailing view in the Southern District of New York that the obligation to provide materials "considered" by an expert extends to all materials received, reviewed, or read by the expert, regardless of whether they were ultimately "relied upon" by the expert.[19]

Because the new rules are addressed primarily to the interplay between the work product doctrine and expert disclosure, they leave open the question of whether and to what extent the attorney-client or other privileges must give way to the requirements of expert discovery. Southern District Magistrate Judge James C. Francis IV addressed the tension between privilege and expert discovery recently (albeit before the amendments) in an interesting decision in *Tikkun v. City of New York*.[20] In that case, plaintiff's expert issued a report opining that the absence of policies addressing the treatment of transgendered individuals had contributed to widespread violations of the constitutional rights of this population by the New York City Police Department.

He based his opinion in part on interviews he had conducted and other data collected from individuals seeking legal services from a civil rights organization focused on equality for gender-nonconforming persons with which the expert was associated. The defendants moved to preclude the expert after he refused to disclose the specific information and data on which his opinion was based, asserting the attorney-client privilege.

Judge Francis noted that the broad disclosure requirements of Rule 26 sometimes mandate disclosure of privileged materials, justified by two "complementary but distinct" perspectives. The first, a waiver analysis, provides that a party waives any privilege attached to materials provided to an expert. To the extent that a party includes privileged materials among the facts or data provided to an expert, the new rule would not change the requirement that these materials be disclosed under Rule 26(a)(2)(B). However, in *Tikkun*, the privileged material relied on by the plaintiff's expert did not come from the plaintiff, but consisted of data the expert had collected as a result of his own legal representation of the individuals who controlled the privilege. Judge Francis likened the legal expert in that case to an expert physician who bases a medical opinion on his experience treating a large number of individual patients.

Judge Francis observed that in addition to the waiver principle, which was inapplicable in that context, "there is a second broader interest to be served by requiring disclosure even of privileged information, an interest that might be characterized as a fairness principle." He recognized that an expert opinion should not be a "black box" used to immunize certain materials from scrutiny by the opposing party. Nevertheless, Judge Francis noted that application of the fairness principle did not mean that every "jot" of information relied upon by an expert need be disclosed.

Ultimately, Judge Francis permitted the expert's testimony, despite his assertion of the privilege, because the information was clearly protected by the "carefully guarded" attorney-client privilege, the privileged information provided only one basis for the expert's opinion, and the plaintiff was not seeking to shield from scrutiny any analysis done by the expert for the instant matter. It remains to be seen whether the "fairness" principle, recognized in theory by Judge Francis in *Tikkun*, will remain viable under amended Rule 26 with its more restricted view of expert discovery.

Conclusion

The recent amendments to Rule 26 inject some welcome common sense into the process of expert discovery. By permitting work product protection of much of the internal communication between an attorney and the expert he or she has retained, the amended rule promises to increase the quality of expert opinions while reducing the cost of expert discovery.

1. Pursuant to Federal Rule of Civil Procedure 86, the amendments apply to proceedings in any action commenced after Dec. 1, 2010, and actions then pending unless the court determines that their application would be "infeasible or work an injustice."

2. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 2009 WL 2003382, at *2 (SDNY June 30, 2009) (Scheindlin, J.) (citing *Zheng v. Liberty Apparel Co.*, 2004 WL 1746772, at *2 (SDNY Aug. 3, 2004) (Pitman, M.J.)) (disclosure requirements of Rule 26 "take precedence" over work product doctrine); *Regional Airport Authority of Louisville and Jefferson County v. LFG, LLC*, 460 F.3d 697, 714-15 (6th Cir. 2006) (noting two approaches by federal courts; finding that disclosure is required); *Aniero Concrete Co. Inc. v. New York City School Construction Auth.*, 2002 WL 257685, at *2 (SDNY Feb. 22, 2002) (Maas, M.J.) (Rule 26 disclosure requirement "trumps" work product protection).

3. See Henry L. Hecht, "Proposed Amendments to Federal Rule 26 Offer Protections When Working With Experts," The Practical Litigator at p. 24 (July 2010).

4. Advisory Committee Notes to 2010 Amendments, Rule 26.

5. Advisory Committee Notes to 2010 Amendments, Subd. (a)(2)(C).

6. See, e.g., Hecht, "Proposed Amendments to Federal Rule 26 Offer Protections When Working With Experts" at p. 25; Gregory P. Joseph, "2010 Expert Witness Rule Amendments," Federal Rules Annual Update at p. 8 (Sept. 14, 2010).

7. ABA Section of Litigation Federal Practice Task Force Report, at p. 11 (August 2006).

8. "Reduce Costs and Protect Expert Draft Reports and Communications With Expert Witnesses—an ABA Proposal That Corporate Counsel Should Consider Supporting," The Metropolitan Corporate Counsel at p. 26 (December 2006).

9. Report of the Civil Rules Advisory Committee at pp. 4-5 (May 8, 2009) (available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf).

10. Advisory Committee Notes to 2010 Amendments, Subd. (b)(4) (other doctrines include attorney-client privilege or "independent development of the work product doctrine").

11. Fed. R. Civ. P. 26(b)(4)(C)(i).

12. Advisory Committee Notes to 2010 Amendments, Subd. (b)(4).

13. Fed. R. Civ. P. 26(b)(4)(C)(ii).

14. Advisory Committee Notes to 2010 Amendments, Subd. (b)(4).

15. Fed. R. Civ. P. 26(b)(4)(C)(iii).

16. Advisory Committee Notes to 2010 Amendments, Subd. (b)(4).

17. Advisory Committee Notes to 2010 Amendments, Subd. (a)(2)(B).

18. Id.

19. *Tikkun v. City of New York*, 265 F.R.D. 152, 155 (SDNY 2010) (Francis, M.J.); *In re MTBE Products Liability Litig.*, 2009 WL 2003382, at *2 (citations omitted).

20. 265 F.R.D. 152.