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# **2010 AMENDMENTS TO THE EXPERT DISCLOSURE PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD REDUCE COSTS, INCREASE EFFICIENCY**

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Among the most significant recent changes to the Federal Rules of Civil Procedure are the amendments to Rule 26 affecting discovery relating to expert witnesses. Effective December 1, 2010, Rules 26(a)(2) and (b) (4) of the Rules were substantially revised to formally shield production of draft written expert reports and limit disclosure of communications between counsel and experts. In practice, the amendments should liberalize the communications attorneys can have with their testifying experts and reduce expenses that are incurred to comply with the Rule.

## **HISTORY OF FEDERAL RULE OF CIVIL PROCEDURE 26**

The previous language in Rule 26 relating to expert disclosures was adopted in 1993. While attempting to provide additional clarity to expert testimony, interpretations of the 1993 provisions allowed for broad discovery of communications between counsel and their testifying experts, including any draft versions of the expert's reports and the expert's notes. Specifically, the previous language of Rule 26 required a party to disclose "the data and other information considered by the witness in forming" his or her opinions. This "other information" could include anything the expert read, reviewed, or wrote down. As a result, lawyers and experts began taking counterproductive and often expensive steps to avoid the creation of discoverable material.

Prior to 1970, the rules were silent on

the discoverability of matters relating to a party's expert. In 1970, the Rules were amended to permit discovery of expert's identity and the subject matter of his or her testimony through interrogatories to minimize "trial by ambush." The Rules were significantly overhauled in 1993. The 1993 version of Rule 26 went further and required expert reports, listing of all the opinions the expert would express at trial and the reasoning behind them and the "data and other information" relating to such opinions.

## **PROBLEMS WITH THE 1993 AMENDMENTS**

The broad discovery permitted by the 1993 version of the Rule led to excess costs and litigation abuse. Parties have gone to great lengths to avoid creating discoverable information, conducting all exchanges in meetings, calls or virtual data rooms to avoid producing discoverable writings. Experts have been discouraged from taking or saving notes or drafts. Some attorneys even hire separate, parallel experts, one to develop the theory of the case while the other would testify and provide the expert report. Other counsel would attempt to frustrate the Rule by stipulating that drafts are not discoverable. As written, the 1993 version of the Rule has led to form ruling substance, rather than solving the problems the drafters had intended to address. Ultimately, the 1993 amendments have led to inefficient litigation practices and traps for the unwary.

## THE NEW 2010 AMENDMENTS

The 2010 amendments dramatically restrict discovery of communications between counsel and their testifying experts. Rule 26 (a)(2) governs disclosure of expert testimony. The new amendment will no longer require the disclosure of “other information” when providing the facts and data considered by the expert when forming his or her conclusions. The Committee Note explains that this change is meant to explicitly extend work product protection to draft reports. While “facts or data” are discoverable, the amendments should exclude any theories or mental impressions of the case provided by counsel.

Rule 26(b)(4)(B) now formally codifies that drafts of expert reports do not need to be disclosed. This rule states that it “protects drafts of any report or disclosure required under Rule 26(a)(2) regardless of the form in which the draft is recorded.”

In addition, new Rule 26(b)(4)(C) has been amended so that *all* communications between counsel and testifying experts, regardless of the form, are protected from discovery except under three limited exceptions. The Committee has anticipated disagreements over exactly whose communications with a retained expert are privileged by making the privilege applicable to all trial and in-house counsel. The Committee Notes instruct that the attorney-expert privilege should be interpreted broadly to protect communications with the entire trial team and its retained experts, without regard to the fact that different plaintiffs or defendants may be involved in different jurisdictions.

Finally, the amendments also provide that a lawyer relying on a witness who will provide expert testimony but is not required to

provide a Rule 26(a)(2)(B) report, whether because the witness is not retained or specially employed to provide expert testimony, must disclose the subject matter of the witness’s testimony and summarize the facts and opinions that the witness is expected to offer. These witnesses can include treating physicians or government officials. If these witnesses are not required to submit an expert report before trial, then the attorneys who utilize their testimony will ultimately be required to submit a disclosure to the court summarizing the facts and opinions to which the expert is expected to testify.

## BALANCING DISCOVERY

The protection afforded by the amendments is not unlimited, however. Communications between attorneys and experts will still be discoverable to the extent that they: (1) relate to an expert’s compensation; (2) “identify facts or data” that the attorney provided and which the expert “considered in forming” his or her opinions; and (3) “identify assumptions” that the attorney provided upon which the expert “relied on in forming the opinions to be expressed.” A purpose of these exceptions is to allow opposing counsel to investigate what, if any, influence the attorneys have exerted over the development of their experts’ opinions.

Moreover, additional discovery may be permitted “in limited circumstances and by court order.” This discovery would likely be limited to situations where the discovery proponent can demonstrate substantial need and an inability to obtain the information through other means without undue hardship. According to the Comments, such extraordinary discovery should be “rare.”

Although some opposed the amendments on the basis that the changes would limit a litigant’s ability to attack an expert’s

opinion and provide license for attorneys to influence the opinions of their experts, the Committee Notes reject this argument and conclude that parties are still free to explore an expert's qualifications and what the expert considered, adopted, rejected or failed to consider in forming opinions to be expressed at trial.

### CONCLUSION

In general, the amendments have been viewed as an improvement to most trial attorneys, from both the plaintiff and defense bars. Experts and attorneys may now communicate

more freely, such as by email, instead of engaging in time-consuming practices meant to avoid creating potentially discoverable communications. The amendments allow attorneys and experts to exchange draft reports for review and discussion without fear of the consequence of the production of such communications. It also eliminates attorney time spent trying to negotiate a stipulation to avoid disclosure of this information. Of course, the end result for the clients should be reduced costs in preparing for trial. However, as with all rule changes, time will tell whether the rules function as intended.