

CLIENT ALERT

New Expert Discovery Disclosure Rules Take Effect Dec. 1, 2010

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On December 1, 2010, new expert discovery rules will take effect under Federal Rule of Civil Procedure 26. These amendments formally shield production of draft written reports and limit disclosure of communications between an expert and the client's attorney.

These changes come into effect because courts had been interpreting existing expert disclosure provisions to authorize broad discovery into drafts and communications between experts that resulted in excess costs and litigation abuse. Counsel have routinely tried to circumvent these provisions by stipulating, for example, that drafts are not discoverable. In addition, party attorneys have attempted to get around the disclosure rules by employing two sets of experts, one for consulting purposes (presumptively protected from disclosure) while the other set functioned as testifying experts subject to the disclosure rules. The amendments should do away with the need for party use of two separate expert groups by generally protecting drafts and communications from disclosure.

A. Written Reports Limit Disclosure of Information Used to Form Expert Opinions to "Facts or Data."

Rule 26(a)(2) governs disclosure of expert testimony. Currently, Rule 26(a)(2)(B) is captioned "Written Report," stipulating that expert disclosures to be used at trial under Federal Rules of Evidence 702, 703 or 705 had to be "accompanied by a written report." The rule specifies the information that has to be included in the written report such as "a complete statement of all opinions" and "the data or other information considered by the witness in forming them." The rule has now been amended so that the disclosure is of "the facts or data considered by the witness in forming" the opinions, and no longer requires disclosure of "other information."

The Committee Note explains that this change is meant to provide explicitly for work product protection as to draft reports. On the one hand, the "facts or data" formulation "limit[s] disclosure to material of a factual nature by excluding theories or mental impressions of counsel." The Committee Note added though that "[a]t the same time, the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." This includes any facts or data "considered" in forming opinions and not just those relied upon by the expert.

In addition, Rule 26(a)(2)(B) is now captioned "Witnesses Who Must Provide a Written Report." There is also a new Rule 26(a)(2)(C) that has been inserted and is captioned "Witnesses Who Do Not Provide a Written Report." This rule identifies the disclosure responsibilities for a "witness who is not required to provide a written report." In such circumstances, "the disclosure must state ... a summary of the facts and opinions to which the witness is expected to testify."

The Committee Notes provide examples of those not required to provide written reports but could testify as a fact witness and also provide expert testimony under the Federal Rules of Evidence. These include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony.

B. Draft Expert Reports Are Now Considered Work Product and Do Not Have to Be Disclosed.

A new Rule 26(b)(4)(B) now formally codifies that drafts of expert reports do not need to be disclosed. This rule, captioned "Trial-Preparation for Draft Reports or disclosures," reads: "Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2) regardless of the form in which the draft is recorded." Rule 26(b)(3)(A) and (B) are the work product protection rules that generally restrict discovery of documents "in anticipation of litigation."

C. Communications Between a Party's Attorney and Expert Witness Are Work Product Unless Certain Exceptions Apply.

The amendments include new Rule 26(b)(4)(C) covering "Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses." It provides that in general: "Rules 26(b)(3)(A) and (B) protect communications between the Party's attorney and any witness required to provide a written report under Rule 26(a)(2)(B) regardless of the form of the communications."

There are exceptions to this work product protection for communications between the attorney and the expert. The exceptions provide that there has to be disclosure of communications between the attorney and the expert that:

- "relate to compensation for the expert's study or testimony;
- "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed," or;
- identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed."

The Committee Notes state that the purpose of this rule is "to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." This protection, however, is limited to attorney communications with an expert witness who prepares a report under Rule 26(a)(2)(B) including any "preliminary" expert opinions, but not those experts for whom disclosure is required under Rule 26(a)(2)(C). The protected "communications" include those with "assistants of the expert witness."

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