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DISCOVERY**FEDERAL RULES****Expert Discovery Since December 2010: Have the Amendments To Federal Rule of Civil Procedure 26 Made Anything Easier?**

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In complex litigation, experts can be crucial. They can explain engineering concepts, financial theories, and damage models to juries in easy-to-understand ways. Using experts effectively and minimizing the impact of your opponent's experts can often determine the outcome of a case.

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Because experts play such a key role, counsel must maximize the use of expert discovery. This requires obtaining and analyzing the other side's expert disclosures to anticipate arguments, file and defend against *Daubert* motions, and prepare for depositions and trial examinations. Counsel also needs to ensure compliance with all discovery obligations. The first step is knowing the expert discovery rules.

In December 2010, the federal expert discovery rules were amended.¹ The initial reaction to the amendments was positive because the amendments were radically aimed at simplifying discovery obligations, limiting disclosures, and providing more protection for counsel-expert work product.² Almost two years later, however, and it seems that the amendments were less of a "sea change." The scope of expert discovery is basically the same with a couple of exceptions. If anything, the amendments require more analysis and paperwork

¹ See Fed. R. Civ. P. 26(a)(2) & (b)(4). This article focuses on changes to the rules regarding retained testifying experts, not employee experts or the "treating physician" type expert.

² See, e.g., Justin J. Hakala, "A New Day For Expert Discovery," 47 *Experts and Evidence* 6 (June 2011); Allegra J. Lawrence-Hardy and Laurance J. Warco, "Good News For Experts (And Attorneys Who Use Them)," *Law360* (Nov. 29, 2010) (available at <http://www.law360.com/articles/211588>).

than before. And unfortunately, the sparse case law on the amendments still leaves a number of questions unanswered, including questions about what expert materials should and should not be disclosed in discovery and how counsel should manage the process.

Pre-2010 Amendments

Before the amendments, the expert discovery rules were designed to encourage full disclosure of all “data” and “other information” “considered” by the expert. This was accomplished through the required expert report disclosures.³ “Other information” was interpreted broadly; it encompassed research and industry writings, draft reports, notes, correspondence and e-mails (including e-mails with counsel). So too was the term “considered”; it covered anything the expert “generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.”⁴ Counsel could use this information to probe the expert and attempt to deduce what role, if any, the information or opposing counsel played in preparation of the expert’s report and development of related testimony.⁵

In practice, these broad disclosure requirements incentivized counsel and experts to minimize written work product and communications.⁶ Counsel and experts often spoke in person or by phone. They avoided notes, back and forth e-mails, and draft reports. They collaborated on “live” (electronic), single versions of reports. And seasoned experts knew this drill. Consulting experts—those who would not testify and, except in rare cases, were not required to provide expert disclosures under Rule 26(a)(2)—were used frequently. Under the prior rules, the testifying expert essentially was shielded from exposure to materials that might be used against him. This defensive strategy protected sensitive information from disclosure but it also handicapped experts and counsel from fully and artfully developing ex-

pert opinions and related reports and testimony. Complaints about this process led to the December 2010 amendments to the expert discovery rules.⁷

2010 Amendments

Under the December 2010 amendments, only “facts or data” considered by the expert need to be disclosed. The change from “other information” to “facts”—the term “data” was not changed—purportedly was designed to limit disclosure of counsel theories and mental impressions (*i.e.*, work product) in favor of material that is more factual in nature.⁸ Courts have adopted this narrow view of the scope of expert discovery under the amended rules.⁹

But arguably, the change from “other information” to “facts” was essentially no change at all. The Advisory Committee noted that “facts or data” should be “interpreted broadly.”¹⁰ In reality, the main changes to the expert discovery rules are two carve outs from the earlier broad disclosure requirements. First, drafts of expert reports and other required disclosures are protected from disclosure, “regardless of the form in which the draft is recorded.”¹¹ Second, with certain exceptions, communications between counsel and expert are also protected from disclosure, “regardless of the form of the communications.”¹²

⁷ See Committee Note to 2010 Amendment to Rule 26 (“Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.”).

⁸ See Committee Note to 2010 Amendment to Rule 26.

⁹ See *Fialkowski v. Perry*, Civ. Action No. 11-5139, 2012 BL 248993, at *3 (E.D. Pa. June 29, 2012) (“The phrase ‘facts and data’ included in the 2010 version is intended to be narrower than the ‘data and other information’ formulation used in the 1993 version.”); *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1077-78 (N.D. Ill. 2012) (“The rule was amended in 2010 to require the disclosure of ‘facts or data’ rather than ‘data or other information,’ which made clear that disclosure of theories or mental impressions of counsel is not required.”).

¹⁰ Committee Note to 2010 Amendment to Rule 26.

¹¹ Fed. R. Civ. P. 26(b)(4)(B).

¹² Fed. R. Civ. P. 26(b)(4)(C). The counsel-expert communication protection was previously adopted in New Jersey state courts in 2002. The New Jersey rule protected “communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process” as work product (except for “facts and data considered by the expert in rendering the report”). Rule 4:10-2(d) of N.J. Rules of Court. The New Jersey drafters noted that, “[T]he desirability of the retaining attorney and expert discussing the contents and format of an expert’s report substantially outweighs the potential loss of information which might have been used to attack an expert’s credibility and particularly his or her independence. . . . [A] bright line standard reflected in this safe harbor recommendation should simplify discovery, streamline judicial review, and focus the cross-examination on the veracity of an expert’s opinion rather than the attorney’s role in the production of the final report.” Subcommittee of the Civil Practice Committee on the Discoverability of Experts’ Draft Reports,

³ Then, as now, parties could agree by stipulation to alter the scope of expert discovery disclosures. This is common in complex litigation involving sophisticated parties and multiple experts.

⁴ *Fialkowski v. Perry*, Civ. Action No. 11-5139, 2012 BL 248993, at *3 (E.D. Pa. June 29, 2012) (quoting *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 463 (E.D. Pa. 2005)); see also *Reg’l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714-717 (6th Cir. 2006) (following the “overwhelming majority” rule that all information provided to testifying experts is discoverable, including privileged communications, attorney work product and regardless of ultimate reliance by the expert); 8 Charles A. Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 2016.5 (3d ed. 2012) (noting that the expert discovery rules “required disclosure of most or all that was shown to the expert witness”).

⁵ The 1993 Amendments were designed to ensure the disclosure of more, rather than less, information for the purpose of reliability and credibility of expert testimony. See Proposed Rules, 137 F.R.D. 53, 89 (1991); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282 (E.D. Va. 2001) (“[I]nformation considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert’s opinion.”).

⁶ See G.P. Joseph, *Trial Evidence in the Federal Courts: Problems and Solutions*, ALI-ABA Course of Study (Oct. 20-21, 2005) (advising lawyers to curtail written communications with experts).

Post-2010 Case Law

A. Reports

There has been little case law interpreting these two carve outs under the amended expert discovery rules. The case law that has developed raises additional issues and suggests that counsel should analyze expert reports and communications more carefully.

There is no clear consensus among the courts as to what constitutes a non-discoverable “draft” expert report. Some courts have found that draft notes, memoranda, lists, and outlines created by the expert are discoverable because they are not technically “draft” expert reports.¹³ These cases rely on the strict language of Rule 26(b)(4)(B) referring to “drafts of any report.”

In contrast, other courts have found that these same types of materials can nonetheless be protected from disclosure. These courts have relied on a couple of theories. One, the materials could be part of the “draft” expert report and Rule 26(b)(4)(B) says the “draft” can be in *any* form.¹⁴ Or, two, and in line with the policy of the 2010 amendments to protect work product from disclosure, discoverable “facts or data” does not encompass everything that the opposing expert would need to replicate the analysis.¹⁵

The latter line of cases seems the more reasonable approach. The plain text of the expert discovery rules protects all drafts, “regardless of the form in which the draft is recorded.” Moreover, the amended rules were designed to protect work product and counsel mental impressions and theories. It would be inconsistent with this design to require the expert to turn over everything that allowed his adversary to recreate an analysis in every detail. If, instead, the former line of cases were followed, experts could theoretically bury all otherwise discoverable notes, memoranda, lists, etc. into a “draft” report and shield that from disclosure, at least until an *in camera* review by a court.

Report on the Discoverability of Experts’ Draft Reports and Other Materials (Sept. 5, 2011).

¹³ See *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512-14 (N.D. Cal. 2012); *In re Asbestos Prods. Liability Litig. (No. VI)*, Civ. Action No. MDL 875, 2011 BL 313736, at *13 n.11 (E.D. Pa. Dec. 13, 2011); *Dongguk Univ. v. Yale Univ.*, No. 3:08-CV-00441, 2011 BL 335699, at *1 (D. Conn. May 19, 2011).

¹⁴ See *Etherton v. Owners Ins. Co.*, Civ. Action No. 10-cv-00892-MSK-KLM, 2011 BL 43591, at *2 (D. Colo. Feb. 18, 2011) (protecting an expert’s “working notes” from disclosure because, *inter alia*, the trial preparation protections of the amended rules apply to drafts of any expert report, regardless of form).

¹⁵ See *Helmert v. Butterball, LLC*, No. 4:08CV00342, 2011 BL 194901, at *2 (E.D. Ark. July 27, 2011) (“Nor is there any suggestion in Rule 26(a)(2) that an expert report is incomplete unless it contains sufficient information and detail for an opposing expert to replicate and verify in all respects both the method and results described in the report.”) (quoting *Cook v. Rockwell Int’l Corp.*, 580 F. Supp. 2d 1071, 1121-22 (D. Colo. 2006)); *Etherton v. Owners Ins. Co.*, Civ. Action No. 10-cv-00892-MSK-KLM, 2011 BL 43591, at *2 (D. Colo. Feb. 18, 2011). See also *In re Levaquin Prods. Liability Litig.*, MDL No. 08-1943, 2012 BL 209558, at *5 (D. Minn. Aug. 17, 2012) (no discovery violation for counsel’s failure to produce a recreation of “a calculation that [the expert] did not remember doing and of which he had no record”).

B. Communications

Under the amended rules, all communications between counsel and testifying experts, “regardless of the form of the communications,” are protected from discovery with three exceptions: communications related to (1) expert compensation, (2) facts or data provided by counsel that the expert considered in forming opinions, and (3) assumptions provided by counsel that the expert relied upon in forming an opinion.¹⁶

Courts have applied these exceptions fairly consistently. In *Fialkowski v. Perry*, the court observed that even if the requested documents were considered counsel-expert communications, the documents were discoverable to the extent that they contained facts or data considered by the expert or assumptions relied on by the expert.¹⁷ Similarly, in *Coffeyville Resources Refining & Mktg. v. Liberty Surplus Ins. Corp.*, the court granted a motion to compel facts, data, and assumptions provided to the experts even when contained in correspondence with counsel.¹⁸

Where counsel-expert communications do not contain facts, data, or assumptions provided to the expert, the communications are clearly protected. In *Sara Lee Corp. v. Kraft Foods Inc.*, the court found that the requested communications were not discoverable because, even assuming that they related to the expert’s role as a testifying expert, “[n]one of the communications contain facts, data, or assumptions that [the expert] could have considered in assembling his expert report.”¹⁹ The communications contained advice on how to conduct a pilot survey of one of the advertisements involved in a false advertising suit. But the expert neither conducted the survey nor learned the results of the survey that the party independently commissioned, and thus the expert could not have considered the survey in forming his opinions.

Ultimately, the amended rules require counsel to conduct a deeper analysis of communications with experts to determine what must be disclosed. Counsel must determine on a case-by-case basis whether the communication contains information about the expert’s compensation, facts or data considered by the expert, or assumptions relied upon by the expert, such as assumptions as to liability, causation, the truthfulness or accuracy of testimony or evidence, or the reliability of another expert’s conclusions.

Open Issues

In the wake of the 2010 amendments, open issues remain. First, as noted above, courts differ as to what constitutes a non-discoverable “draft” expert report. Without a clear rule across the federal courts, this issue may depend on the jurisdiction. It nonetheless would be wise for experts to generally avoid placing all work product into “draft” reports.

Second, the amendments only protect communications between the testifying expert and counsel; other communications are free game. Indeed, in *In re Application of the Republic of Ecuador*, the court found that

¹⁶ Fed. R. Civ. P. 26(b)(4)(C).

¹⁷ Civ. Action No. 11-5139, 2012 BL 248993, at *4-5 (E.D. Pa. June 29, 2012).

¹⁸ 2012 BL 105122, at *2 (D. Kan. April 26, 2012).

¹⁹ 273 F.R.D. 416, 420-21 (N.D. Ill. Apr. 1, 2011).

communications between the expert and party employees, consultants, and other experts were not protected.²⁰ Even copying counsel on an email between an expert and a third-party consultant was insufficient to protect the communication from disclosure.²¹ But this issue may turn simply on whether the communications contain facts, data, or assumptions considered/relied upon by the expert. In *National Western Life Insurance Co. v. Western National Life Insurance Co.*, the court did not require disclosure of communications between testifying and other experts unless they contained such facts, data, or assumptions.²²

Third, the counsel-expert communication exception only applies when “the party’s attorney provide[s]” facts, data, or assumptions to the expert. If the expert already knows of these things, communications covering them might not have to be disclosed. To date, there have been no cases discussing this issue.

Fourth, in order to comply with the amended rules, the parties will undoubtedly need to generate and produce privilege-type logs listing materials withheld from expert disclosures, including draft expert reports and counsel-expert communications.²³ Although the rules do not require this, nor has any court held it to be a requirement, parties have already begun logging expert materials protected from disclosure.²⁴ Without logs, a party or court may have no way to ensure that the other side is complying with the rules.

Fifth, the duty to supplement expert disclosures (including information given during expert depositions) has not changed. The duty extends until the time pre-trial disclosures are due.²⁵ Before trial, however, the expert may review materials to prepare for his testimony. While some of those materials may be protected under the expert discovery rules (including supplemental disclosure rules), they may not be so protected if the expert uses them to refresh his memory before or during trial.²⁶ Indeed, the Advisory Committee expressly rejected a note that would have said the new expert discovery protections would “ordinarily be honored at trial.”²⁷

Conclusion and Practical Tips

Beyond the two carve outs for draft expert reports/disclosures and counsel-expert communications dis-

cussed above, the scope of expert discovery has essentially remained the same. But the effect of the carve outs has likely created more work for litigators. Before the December 2010 amendments, nearly all expert material was produced in discovery, with no need to segregate protected drafts of reports and counsel-expert communications. In some ways, this was an easier way to manage the process because counsel and experts kept less paperwork and written analysis. It remains to be seen whether most litigators continue under the old “ways” of shielding testifying experts from outside input and reducing related paper trails, or relying on the express protections of the amended rules and exchanging draft reports and communicating in writing with experts.

Nonetheless, counsel should consider these practice tips under the amended rules:

- Set clear ground rules early on and/or enter into a stipulation regarding the scope of expert discovery. A stipulation can often provide more clarity on what is and is not discoverable.

- Limit the number of draft expert reports.

- A smaller number of drafts is easier to log. Moreover, the number of drafts and the dates they were generated may still be discoverable and useful by a skillful cross-examiner. Importantly, should the draft reports be subjected to *in camera* review, there may be questions about whether facts, data, or assumptions should have been produced.

- Although “live” (electronic), single version expert reports are probably less necessary now, it might remain a good practice to use them if otherwise permitted in the jurisdiction.

- Avoid the temptation to bury otherwise discoverable information (e.g., notes and lists containing facts and data) into what may be labeled “draft” expert reports.

- Segregate counsel-expert communications containing facts, data, and assumptions from other communications.

- Maintaining this segregation will make it easier to redact and log counsel-expert communications.

- Consider creating a single document for production that contains all of the facts, data, and assumptions that counsel “provides” to the expert. All other counsel-expert communications may either duplicate what is produced or fall into a non-discoverable category.

- Limit communications to and by the expert.

- The rules protect only communications between retaining counsel and the testifying expert.

- Be mindful of otherwise protected information that is shared with the expert to refresh his memory in advance of testimony.

- Select a testifying expert that already knows the facts, data, and assumptions so that counsel may not have to otherwise “provide” that information to the expert and hence produce it.

- Continue to consider using consulting experts if cost is not an issue. The protections afforded consulting

²⁰ 280 F.R.D. 506, 515-516 (N.D. Cal. 2012).

²¹ *Id.* at 515.

²² See *National Western Life Ins. Co. v. Western Nat. Life Ins. Co.*, No. A-09-CA-711 LY, 2011 BL 64766, at *2 (W.D. Tex. Mar. 3, 2011).

²³ The Advisory Committee Notes suggest that redaction of material subject to the disclosure exceptions is appropriate, rather than total withholding. Committee Note to 2010 Amendment to Rule 26 (“Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.”).

²⁴ See, e.g., *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512 (N.D. Cal. 2012); *Republic of Ecuador v. Bjorkman*, Civ. Action No. 11-cv-01470-WYD-MEH, 2012 BL 1828, at *6-7 (D. Colo. Jan. 4, 2012).

²⁵ See Fed. R. Civ. P. 26(e)(2).

²⁶ See Fed. R. Evid. 612.

²⁷ Advisory Committee, Report to Standing Committee (June 2008).

experts remain stronger than those for testifying experts.²⁸

²⁸ See Fed. R. Civ. P. 26(b)(4)(D).