

# Expert Discovery: What's Protected?

Joe Meadows

and

Amy Mersol-Barg

# Presentation Roadmap

- I. Expert Disclosures & Protections
- II. Step-by-Step Inquiry
- III. Protections from Disclosure
  - A. Draft Reports
  - B. Counsel-Expert Communications
- IV. Conclusion
  - A. Effect of 2010 Amendments
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# Expert Disclosures & Protections

- Must Disclose Identity of Expert Witness  
FED. R. CIV. P. 26(a)(2)(A).
- Must Disclose Written Report
  - A complete statement of all opinions the witness will express and the basis and reasons for them; and
  - The facts or data considered by the witness in forming them.FED. R. CIV. P. 26(a)(2)(B)(i)-(ii).

- Protection 1: Drafts

- Drafts of any expert report or other required disclosure are protected, “regardless of the form in which the draft is recorded.”

FED. R. CIV. P. 26(b)(4)(B).

- Protection 2: Communications

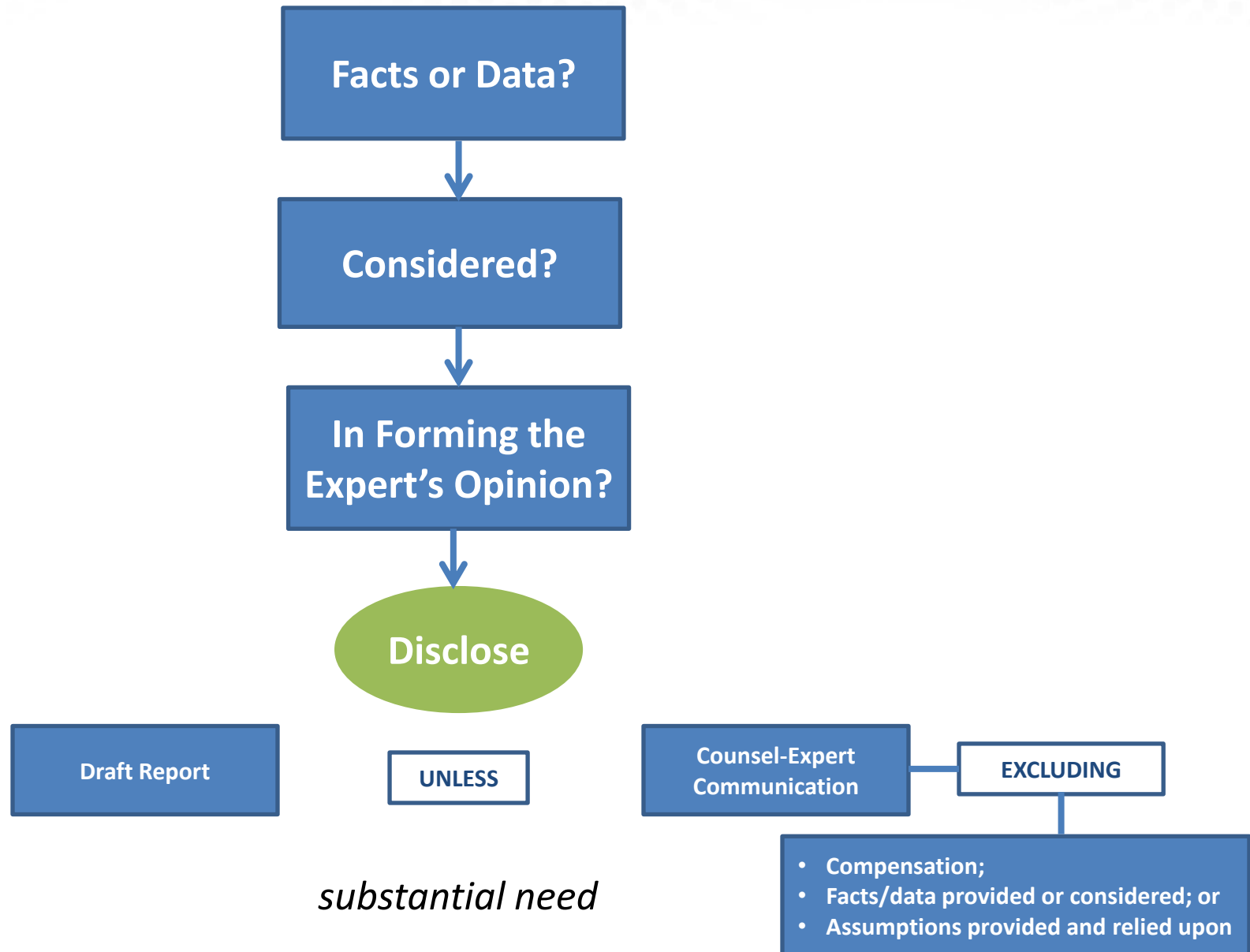
- Communications between the party’s attorney and an expert witness are protected, “regardless of the form of the communications.”

FED. R. CIV. P. 26(b)(4)(C).

- Counsel-expert communications are **NOT** protected from disclosure if they
  - 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 on* in forming the opinions to be expressed.

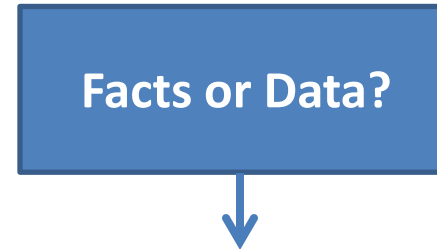
FED. R. CIV. P. 26(b)(4)(C)(i)-(iii).

# Step-by-Step Inquiry



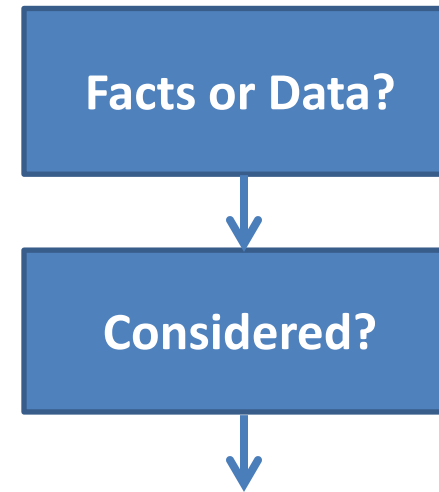
# Step 1: Facts or Data?

- Shift
  - 1993-2010: “**data or other information**”
  - 2010 Amendments: “**facts or data**”
- Intent
  - Curb disclosures of counsel’s work product, legal theories, and mental impressions
  - “Facts or data” is narrower than “other information,” but should still be “interpreted broadly”
    - FED. R. CIV. P. 26 advisory committee’s note (2010).



# Step 2: Considered?

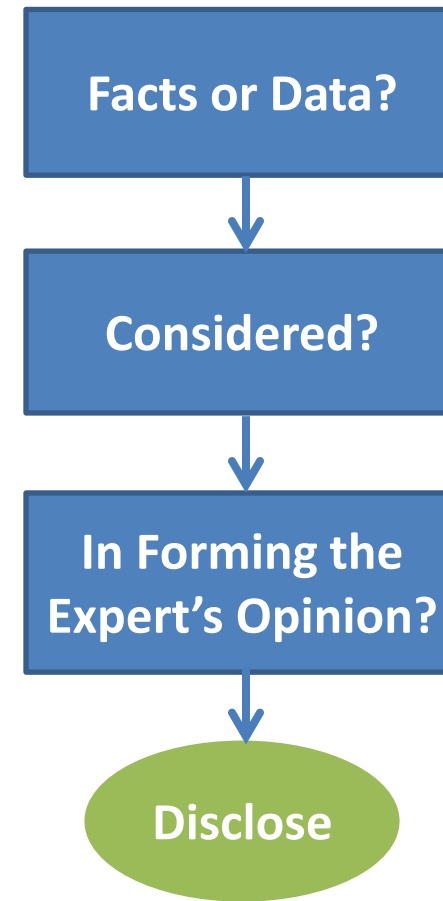
- Anything the expert
  - “generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.”
  - *Fialkowski v. Perry*, Civ. Action No. 11-5139, 2010 WL 2527020, at \*3 (E.D. Pa. June 29, 2012). See also *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714-717 (6th Cir. 2006); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 (9th Cir. 2014).
- Rationale
  - “[I]nformation considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert’s opinion.”
  - *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282 (E.D. Va. 2001).





# Step 3: In Forming Expert's Opinion?

- “Considered” does not mean reliance only information.
- Unclear if “in forming” is meaningful when combined with “considered.”
- *But note:* for counsel-expert communications, assumptions counsel provides to an expert are discoverable *only if* the expert actually relied on them “in forming” his opinion.

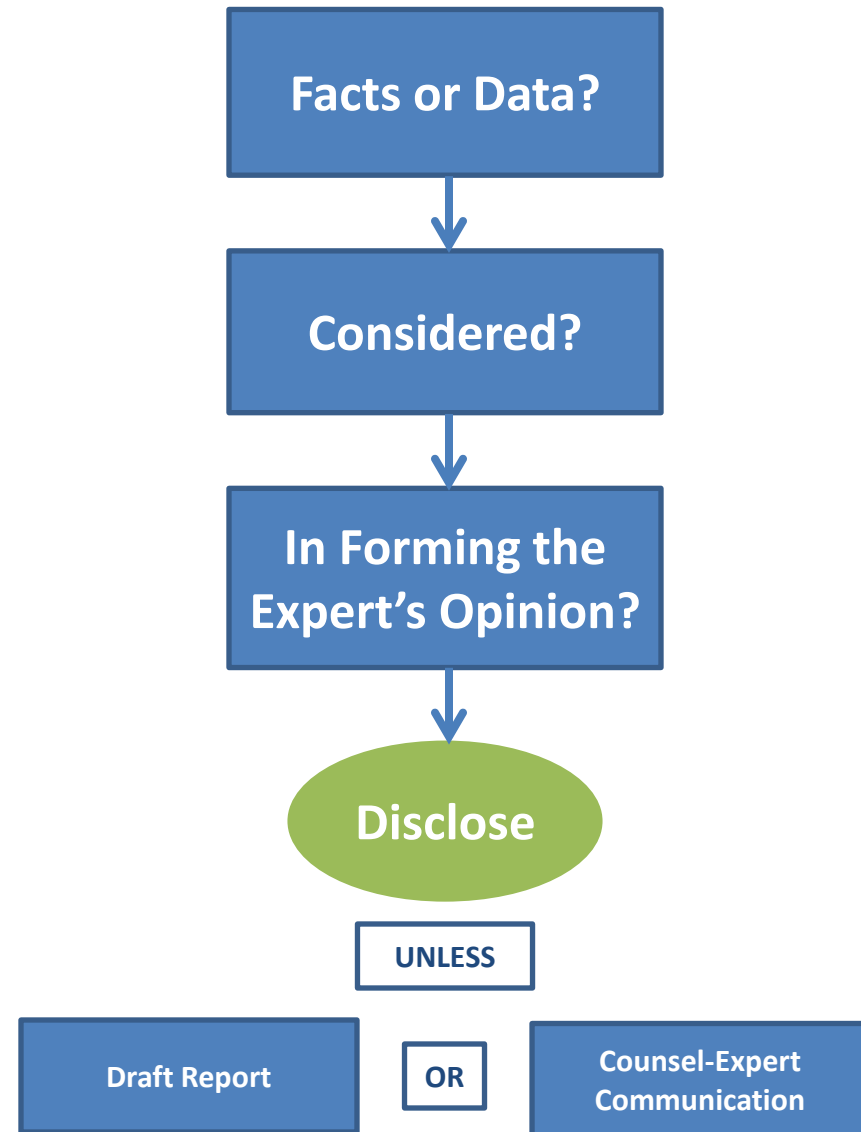


# Short Detour on Disclosures

- Disclosures in the form of
  - Report
  - Exhibits
  - Data production
- Follow-on disclosures
  - Supplement v. amendment v. rebuttal v. late report
  - Rules 16 and 37 sanctions

# Step 4: Protections

- Draft Report?
- Counsel-Expert Communication?
- If not, must disclose



# Draft Reports

- **Generally protected from disclosure** “regardless of the form in which the draft is recorded.”
  - FED. R. CIV. P. 26(b)(4)(B).
- **BUT** the 2010 Advisory Committee Note suggests that “draft report” is **narrowly defined**.
  - “Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the **development**, foundation, or basis of those opinions. For example, the expert’s testing of material involved in litigation, and **notes** of any such testing, would not be exempted from discovery by this rule.”

# Draft Reports

Does this rule protect:

- Notes?
- Worksheets?
- Preparatory Materials?
- Preliminary Analyses?



**UNSETTLED**

# Draft Reports

## NO, Not a Draft Report

- Protection “does not extend to the expert’s . . . notes, task lists, outlines, memoranda, presentations, and draft letters.”
  - *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512–14 (N.D. Cal. 2012), *aff’d sub nom. Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014).
- Expert’s hand-written notes are not protected from disclosure.
  - *Dogguk Univ v. Yale Univ.*, No. 3:08-CV-00441, 2011 WL 1935865, at \*1 (D. Conn. May 19, 2011).
  - *In re Asbestos Prods. Liability Litig. (No. IV)*, Civ. Action No. MDL 875, 2011 WL 6181334, at \*6 n.11 (E.D. Pa. Dec. 13, 2011).

# Draft Reports

## YES, A Draft Report

- An expert's "working notes" are protected from disclosure.
  - *Etherton v. Owners Ins. Co.*, Civ. Action No. 10-cv-00892-MSK-KLM, 2011 WL 684592 (D. Colo. Feb. 18, 2011).
- A "living document that was changed by various contributors in its electronic form" where there are no paper "drafts" may be somewhat protected.
  - *Avramides v. Liberty Mut. Fire Ins. Co.*, No. 8:12-cv-2014-T-27TGW, 2014 WL 202662, at \*3 (M.D. Fla. Jan. 17, 2014) (reasoning that "Rule 26(b)(4) provides some protection to drafts of 'any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded'").

# Draft Reports

- **Case-by-case** determination with *in camera* review
  - *E.g., Wenk v. O'Reilly*, No. 2:12-cv-474, 2014 WL 1121920 (S.D. Ohio Mar. 20, 2014) (finding that an expert's notes in the margins of documents he did not prepare are likely not draft reports).
- **Factors**
  - How “final” is preliminary expert work product ;
  - Time elapsed between work product and “final” opinion;
  - Whether work product appears in substantially same language; and
  - Whether work product appears similar to other materials which cannot be considered “draft reports”



# Counsel-Expert Communications

- Communications between the party's attorney and an expert witness are **protected** from disclosure, "regardless of the form of the communications."
- **BUT** communications about 3 topics are **NOT protected**:
  - Compensation;
  - Facts/data provided and considered; or
  - Assumptions provided and relied upon
- However, "the protection applies to all other aspects of the communication beyond the excepted topics."  
FED. R. CIV. P. 26 advisory committee's note (2010).

# Counsel-Expert Communications

- To protect from disclosure, **the expert should only communicate with counsel**
  - Communications between experts are generally **NOT** protected
  - Communications between the expert and the client are generally **NOT** protected

FED. R. CIV. P. 26(b)(4) advisory committee's note (2010). *See also Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1191-92 (11th Cir. 2013) (“[T]he rule drafters [made] . . . a calculated decision *not to extend* work-product protection to a testifying expert’s notes and communications with non-attorneys.”) (emphasis in original); *Whole Women’s Health v. Lakey*, 301 F.R.D. 266, 270 (W.D. Tex. 2014) (“Inquiry about communications the expert had with *anyone other than the party’s counsel* about the opinions expressed’ are not exempted from discovery.”) (emphasis in original).

# Conclusion: Effect of 2010 Amendments

- 2010 Amendments to Rule 26 **did not cause sea change** in expert discovery
    - “facts or data” = “data or other information”
  - Amendments only impact outcome in cases involving
    - Draft reports
    - Counsel-expert communications
- FED. R. CIV. P. 26 advisory committee’s note (2010).

# Conclusion: Application to Practice

- Set clear ground rules early on and/or enter into a stipulation regarding the scope of discovery.
- Limit the number of draft expert reports/privilege logs.
- Limit communications to and by the expert/privilege logs.
- Do not bury otherwise discoverable information (e.g., notes, lists containing facts/data) into a potential “draft” expert report.
- Segregate counsel-expert communications containing facts, data, and assumptions from other communications.
- Select a testifying expert that already knows the facts, data, and assumptions so counsel need not “provide” that information to the expert and hence produce it.
- Don’t forget consulting experts if cost is not an issue.