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THE END OF EXPERT PRACTICE AS USUAL: PROPOSED CHANGES TO FEDERAL RULE 26

By Calvin Cheng

On September 15, 2009, the Judicial Conference of the United States, the principal policy-making body concerned with administration of the U.S. Courts, met and approved the recommendations of the Committee on Rules of Practice and Procedure, including the proposed amendments to Federal Rule of Civil Procedure 26 concerning expert witnesses. If approved by the Supreme Court, these amendments will dramatically alter expert witness practice.

The proposed amendments to Rule 26 would impose two reforms. First, they would extend work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, to communications between those witnesses and retaining counsel. Second, the proposed amendments would require an attorney relying on a testifying expert who is not required to provide a Rule 26(a)(2)(B) report to disclose the subject matter and summarize the facts and opinions that the expert witness is expected to offer. Each of these proposals is discussed below in more detail.

Rule 26(b)(4): Work-Product Immunity Extended to Drafts and Communications

Rule 26(a)(2)(B) currently requires that an expert witness report should disclose "the data or other information considered by the witness in forming the opinions." The accompanying 1993 Committee Notes read:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

This passage of the Committee Notes resulted in the widespread practice of permitting discovery of all communications between attorney and expert witnesses and of all drafts of expert reports. The rationale for this broad discovery is that the fact finder needs to know the extent to which the expert's opinion has been shaped by attorney influence.

The practical effect of the current rule, however, is that lawyers and experts often take elaborate steps to avoid creating any discoverable record. These steps often include hiring two sets of experts— one for consultation and one for testimony—to avoid creating a discoverable record of the collaborative interaction with experts. These steps also may include prohibiting the expert from taking any notes, making any record of preliminary analyses or opinions, or producing any drafts of the report. Instead, the only record is a single, final report. These steps hamper efficiency, adding to the costs and burdens of discovery, preventing proper use of the experts, needlessly lengthening depositions, detracting from cross-examination into the merits of the expert's opinions, reducing the pool of qualified individuals willing to serve as experts, and reducing the overall quality of expert work product.

In addition, attorneys frequently take elaborate steps to attempt to discover the other side's drafts and communications. For example, attorneys devote large chunks of time during depositions to trying to discern information about the development of the expert's opinions, attempting (and often failing) to show that the expert's opinions were shaped by the attorney retaining the expert's services. Testimony and statements presented to the Advisory Committee before and during the public comment

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period showed that such questioning during depositions is rarely successful and ends up unnecessarily prolonging the questioning. Spending time asking questions about the retaining lawyer's involvement in the expert's opinions, instead of focusing on the strengths or weaknesses of the expert's opinions, does little to expose substantive problems with those opinions. Instead, the most successful means of discrediting an expert's opinions are by cross-examining the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The inefficiencies of the current practice has led to calls for reform from various quarters. The American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey enacted such a rule and, according to the information obtained by the Advisory Committee, the practicing attorneys reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions. In fact, many attorneys now regularly stipulate at the outset of a case that they will not seek to discover such communications and expert report drafts.

The proposed amendments to extend work-product immunity address the inefficiencies of the current practice. Under the proposed amendments, any draft of a Rule 26(a)(2) report or disclosure is given work-product protection (regardless of the form in which the draft is recorded). Further, communications between the party's attorney and any witness required to provide a Rule 26(a)(2)(B) report are also protected by work-product immunity, with three exceptions. The amended rule specifically denies work-product protection to communications that (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the expressed opinions; and (3) identify assumptions that the party's attorney provided and that the expert relied upon in forming his expressed opinions.

The main argument against the proposed amendments, raised by a group of legal academics, is that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. After extensive study, however, the Advisory Committee was satisfied that the most effective method for evaluating the merits of an expert's opinions is to cross-examine the expert on the substantive strength and weaknesses of the opinions and present evidence bearing on those issues. The Advisory Committee was satisfied that discovery into draft reports and communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions, was time-consuming and expensive, and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

The Advisory Committee concluded that establishing work-product protection for draft reports and some categories of attorney-expert communications would not impede effective discovery or examination at trial. The committee recognized that in some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharmaceutical, Inc.*

Proposed Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

Rule 26 currently identifies two types of testifying experts: (1) those that are "retained or specially employed to provide expert testimony in the case or . . . whose duties as the party's employee regularly involve giving expert testimony"; and (2) those who fall outside the former category (e.g., a treating physician or a government accident investigator).

Those in the former category are required by Rule 26(a)(2)(B) to provide an expert report, but those in the latter category are not. According to the 1993 Committee Notes, the purpose of the expert report is to clarify the "substance" of the expert testimony. Ideally, the thought was that the expert report would remove the need to depose the expert or, alternatively, would improve the conduct of the deposition. In keeping with this purpose, Rule 26(b)(4)(A) requires that an expert cannot be deposed "until after the report is provided."

Some courts have so admired the advantages gained from requiring expert reports, however, that they have gone beyond Rule 26(a)(2)(B) and required *all* testifying experts to provide reports, not just those that were "retained or specially employed to provide expert testimony in the case." The problem with this approach is that testifying experts not covered by Rule 26(a)(2)(B) (including hybrid witnesses—non-retained witnesses who also qualify as experts) may find it difficult or impossible to draft the reports because their careers are devoted to causes other than giving expert testimony. Despite this, courts still recog-

nize the usefulness of having advance notice of an expert's testimony.

Proposed Rule 26(a)(2)(C) strikes a compromise between these two considerations. If an expert witness is not required to provide a written report under 26(a)(2)(B), proposed Rule 26(a)(2)(C) would require the (a)(2)(A) disclosure to state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and to provide "a summary of the facts and opinions to which the witness is expected to testify." The summary of facts should include only the facts that support the expert's opinions (and not the facts a hybrid witness would testify to). As stated above, drafts of the summary of facts would be protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Conclusion

Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly the American Trial Lawyers Association), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the U. S. Department of Justice.

The proposed amendments will be transmitted to the Supreme Court with a recommendation that they be approved. If the Supreme Court adopts the recommendation, the Supreme Court will prescribe the amendments and transmit them to Congress by May 1, 2010. Absent any congressional action to reject, modify, or defer the proposed amendments, the amendments will become law on December 1, 2010.

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WHAT NOT TO DO WHEN CHOOSING AN EXPERT FOR YOUR INTERNATIONAL ARBITRATION

By Robert M. Craig III and Tim Tyler

Although the "battle of experts" is sometimes decried as part of the "Americanization" of international arbitration, adversarial presentation of expert testimony is a longtime fixture in those international forums. Experts' opinions provide the metes and bounds for the ultimate award of damages, so selecting the right experts for a particular case directly affects the bottom line of the award, positively or negatively. Even though clients have their own inclinations about experts—frequently formed by the forums in which they most often appear—international arbitration counsel will most often have central responsibility in vetting and selecting the experts.

To help practitioners find the most appropriate expert team, this short article identifies some common though avoidable pitfalls. The list is not ranked—each item stands alone. The general approach, as with selecting arbitrators, is "horses for courses." But beyond that truism, arbitration counsel should abandon its bias for a limited role for experts and truly understand the variety of roles experts might play in a particular case. An expert's "usefulness" goes far beyond developing a credible report or presenting an effective direct examination. More seasoned advocates select and use experts early for such roles as evaluating trade usage or damages at case intake, identifying necessary and properly requested documentation, and presenting clearly and simply the technical or economic case.

1. Don't miss the opportunity for early expert involvement.

First, even before there is a case, an expert's early opinion can help the client and counsel determine whether sufficient, provable damages merit the cost of pursuing the case. An independent expert's ability to assign at least a range of preliminary values to a claimant's case can sometimes avoid the prosecution of a liability-strong/damage-light case where the ultimate damages don't justify the risk of going forward. Assigning a range value early in the case also allows project-based budgeting. Because a claimant's case is like any other project, with costs and a range of expected outcomes, a financial expert can instill greater rigor into a preliminary valuation exercise. Knowing the value of this service, and the ground-floor opportunity it presents, some firms that provide expert witnesses will provide first looks at very reasonable rates.

Second, financial and technical experts can help claimants understand and request information necessary to best present the case. Experts who understand what information they need (and, just as importantly, what they do not) can allow the client to assemble the information with as little disruption as possible. Moreover, by identifying the information in the hands of the opponent, experts can help formulate narrow requests for information