RULE 26: MAJOR CHANGES FOR ATTORNEYS AND EXPERTS

by Robert Ambrogi
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A major revision to the federal rules governing expert witness reports is on track to take effect in December. Lawyers and experts alike agree that the changes are long overdue.

No longer would Rule 26 of the Federal Rules of Civil Procedure allow full discovery of draft expert reports and require broad disclosure of any communications between an expert and trial counsel, as has been the case ever since the rule's revision in 1993.

Instead, under proposed amendments to Rule 26, those communications would come under the protection of the work-product doctrine. The amendments would prohibit discovery of draft expert reports and limit discovery of attorney-expert communications. Still allowed would be full discovery of the expert's opinions and of the facts or data used to support them.

The changes were approved by the U.S. Judicial Conference in September and submitted to the Supreme Court. The Supreme Court is expected to approve the amendments by May 1 and submit them to Congress. Unless Congress rejects the rules, they will take effect on Dec. 1, 2010.

The proposed rule is broadly supported by trial lawyers and bar organizations as a step towards reducing the cost and contentiousness of litigation.

Organizations that endorsed the rule include the American Bar Association, American College of Trial Lawyers, American Association for Justice, Defense Research Institute, Federal Magistrate Judges' Association, Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, and the U.S. Department of Justice.

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Dual Sets of Experts

"Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications," the Judicial Conference explained in its report to the Supreme Court.

"The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts."

The proposed rule would expressly provide that the work-product protection applies to "protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded."

The proposed rule retains the three categories of attorney-expert communications that are excluded from the work-product protection under the existing rule:

1. Communications pertaining to the expert's compensation.
2. Facts or data that the attorney provided and the expert considered in forming opinions.
3. Assumptions that the attorney provided and that the expert relied on.

In another change, the proposed rule would alter the procedure for witnesses who will provide expert testimony but who were not specifically retained to provide expert testimony. Treating physicians and government accident investigators are examples of this category of expert.

Under the proposed rule, if the expert is not required to submit a written report, then the lawyer who will use the testimony must submit a disclosure summarizing the facts and opinions to which the expert is expected to testify.

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Support from Both Sides of the Bar

Stephen B. Pershing, a lawyer with the Center for Constitutional Litigation in Washington, D.C., submitted testimony in favor of the proposed rule on behalf of the American Association for Justice. He said that plaintiff and defense lawyers agree on the need to apply work-product protection to expert draft reports.

"Practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product, or counsel's manipulation of the expert's output that takes up time better spent focusing on the expert's conclusions themselves," Pershing said.

The amended rule would enable litigants to avoid the kind of "artificial behavior" that is now all too common, he suggested. No longer would lawyers and experts feel compelled to avoid written communications and no longer would well-funded litigants hire two sets of experts, one to consult in case development and the other to testify.

Another who spoke in favor of the proposed rule is Wayne B. Mason, former board chair of the Federation of Defense & Corporate Counsel and a partner in the Dallas office of Sedgwick, Detert, Moran & Arnold.

"Attorney discussions with experts are too often forced to be verbal in an effort to discourage discovery of draft reports," he said. "The proposed rules supply a well-reasoned approach that strengthens the veracity and straightforwardness of the discovery process while considering the burden and expense."

Mason praised the proposed rule for extending the work-product protection to employee-experts who are not required to prepare a written report. "Facilitating open communication between attorneys and in-house witnesses is an important practical consideration for the committee."

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Rule Would Reduce Costs

John H. Martin, a past-president of the Defense Research Institute and a partner with Thompson & Knight in Dallas, said that the proposed rule will help reduce the cost of litigation.

"The proposed amendments provide protection to attorney-expert communications that allows the attorney and the expert to communicate freely with each other without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report," Martin said.

"This allows the attorney to learn about the scientific or technical aspects of the case from the expert so that legal arguments not based on sound scientific methodology can be discarded, and the issues to be presented at trial can be narrowed," Martin added. "At the same time, it allows

the attorney to speak freely with the expert, many of whom are not fulltime professional expert witnesses, and to engage in an ethical preparation of the witness to present opinion testimony."

It appears that the proposed rule extends the work-product protection to not just the expert, but also to the expert's employees. The official Committee Note that accompanies the proposed rule explains that its protection is intended to include communications "between the party's attorney and assistants of the expert witnesses."

A number of lawyers had urged the committee to take this position. "An expert engineer at MIT may use grad students in his doctoral program to assist him in his research," explained R. Matthew Cairns, president-elect of the Defense Research Institute and a lawyer in Concord, N.H., "and those students are the ones that counsel may deal with on a day-to-day basis as the expert's team does his testing and analysis prior to him reaching a conclusion and preparing a report." Given the broad support for the proposed rule by lawyers and experts alike, the changes to Rule 26 are virtually certain to take effect Dec. 1.

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Reader Comments

Comment submitted by **IMS ExpertServices** on **3/15/2010 10:49:11 AM:**

http://www.uscourts.gov/rules/Reports/CV_Report.pdf

Comment submitted by **Ed R** on **3/15/2010 10:47:18 AM:**

Great article. How can I obtain a copy on the new Rule? Thanks, Ed

Comment submitted by **LawyerB** on **3/1/2010 9:35:13 AM:**

Now lawyers can overtly shade the expert's opinions without anyone ever knowing. Why is this good?

Comment submitted by **vanderson** on **2/24/2010 10:21:10 AM:**

good news honesty prevails should memory fail!

Comment submitted by **Insurance Expert** on **2/17/2010 6:16:27 PM:**

I have always justified my practice of not creating or retaining drafts because I have not agreed to subscribe to the opinions in the report until I have carefully and acurately crafted and edited them. Only then will I sign my name to the report and claim them as mine. Anything prior to that point is best likened to a search for the best way to accurately state the conclusions and opinions of the report, but any difference in wording before I sign means that until that time I had simply not found the words I believe accurately stated my opinions. I welcome this change; it will be a vast improvement to the process of creating a report.

Comment submitted by **Barry Z.** on **2/17/2010 1:35:48 PM:**

Let us know when the rule comes into effect. It will make the work of an expert much easier although I tend to write my reports as I go through documents.

Comment submitted by **Phillip N.** on **2/17/2010 1:35:15 PM:**

Yes I heartily agree with the decision. Too much time is spent on attacking experts with threats of subpoenas to seach office records. An expert shpuld be judged on the value of evidentiary material presented and nothing else.

Comment submitted by **Equiis S.** on **2/16/2010 10:39:53 AM:**

I hope the fed rule passthru to the state atty work product rules dont get impacted by (1.) state fraud exception to atty work product, or (2.) Title II of the ADA's federal preemption of the atty work product rule as discriminatory. I think there's an oversight sometimes when the fed rules simply passthru to the state law -- another e.g., service of process fed rules. I'm just sayin'

Comment submitted by **Lloyd** on **2/10/2010 10:20:12 PM:**

This rule change will be great if approved by the powers that be. I have been on both sides of this as a primary plaintif in apatent infringement case where care had to be taken with our expert witnesses and later as a non-testifying expert in the field. This change would have significantly reduced attorney time and expenses. I hope this works.

Comment submitted by **James C. S., CPA, CFF, CFE** on **2/10/2010 3:23:44 PM:**

The rule change will make it possible for a CPA to comply with planning and supervision standards without subjecting the client to excessive discovery cost and the expert and court to hours of non relevant cross examination.

Comment submitted by **Monty M.** on **2/9/2010 5:48:48 PM:**

Does anyone know how this rule may apply to currently proceeding litigation? I have several matters I'm involved with that are now in the discovery phase but may go to trial after the rule change.

Comment submitted by **Anonymous** on **2/9/2010 12:56:25 PM:**

I was an Expert Witness and Consultant in litigation relevant to patents, specific technology, contracts, and non-payment of commissions. I received eight 3 inch binders containing documents from previous trials, letter/e-mail exchanges and patents. The only way that I could track the information and my opinions/comments was to prepare several memos to files. A draft expert report was also prepared, from which information was removed which was deemed irrelevant by the attorneys. Sections were redacted which the attorneys felt were irrelevant and work product. All of this information became the subject of arguments between the trial attorneys. The judge's final decisions were ultimately based on facts presented, and not the argued and not the memos to files and redacted paragraphs which were ultimately revealed. I agree, it was a waste of time. I served as a consultant to the attorneys because they lacked the scientific understanding of the facts presented to me. So I was their consultant and teacher. I needed the memos to capture comments/facts for discussion as a consultant and later for the Expert Witness Report. I have been called to be an Expert in cases where I have not testified and have assumed that I was one of

several Experts who served in a discovery and strategy mode, rather than as the testifying Expert. And sometimes I believe that the Testifying Expert was a more experienced and more renowned Expert who summarized all of the collected info generated by me and others. I like the proposal. If I had a similar situation, I'd have to repeat the practices of memos to files and probably a draft Expert Report.

Comment submitted by **Walter Z., ASA** on **2/9/2010 11:49:24 AM:**

Objectivity, independence and competence override all of the characteristics of an expert witness. Hopefully this rule change will buttress these characteristics. An expert should be free to consider all information received from and through lawyers who are advocating for their respective clients - as well information received from fact witnesses and outside sources. In sum, the expert must be free to advocate only for one thing - his or her opinion. The expert report should be the principal if not the only document on which testimony will be provided. An expert should be responsible for assistance provided by his professional associates and junior subordinates.

Comment submitted by **Software Copyright Specialist** on **2/9/2010 11:22:42 AM:**

All I can say is, "It's about time!" This will make the entire process far more productive. Thanks for the well-written article describing the proposed rule change!

Comment submitted by **Engineer** on **2/9/2010 10:59:48 AM:**

This will make my job a lot easier, particularly with respect to patent cases.

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