

## Outside Counsel

## Expert Analysis

# Amended Expert Discovery Rules One Year Later: Has Anything Changed?

**A**mendments to Federal Rule of Civil Procedure 26, effective as of Dec. 1, 2010, promised to dramatically restrict the discoverability of materials related to work performed by a party's testifying experts. An express purpose of the amended Rule 26 was to "alter the outcome in cases that... require[d] disclosure of all attorney-expert communications and draft reports." Fed. R. Civ. P. 26 advisory committee's note, 2010 amendment. Accordingly, with limited exceptions, amended Rule 26 grants work product protection to draft reports prepared by testifying experts, as well as to communications between a party's attorney and a testifying expert.

But one year after the amended Rule 26 took effect, has the landscape of expert discovery truly changed?

### Impetus for Amendment

Old Rule 26(a)(2) required a retained testifying expert's report to contain all of "the data or other information considered by the witness" in forming his or her expert opinion. As a result, prior to the Dec. 1, 2010, amendments, draft expert reports and attorney-expert

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communications were unquestionably fair game for discovery by an opposing party. As one court explained, under the old Rule 26, "documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report." *In re Pioneer Hi-Bred Int'l Inc.*, 238 F.3d 1370, 1375 (Fed.Cir. 2001).

The 1993 Advisory Committee Notes echoed this interpretation of the old rule, stating that "litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed." Fed. R. Civ. P. 26 advisory committee's note, 1993 amendment.

The threat of broad expert discovery under old Rule 26 caused attorneys and experts to go to great lengths to avoid the creation of discoverable material. Attorneys and experts devised innovative—and costly—ways to interact without exchanging hard copy or

electronic drafts of reports. When draft reports were created and transmitted in a discoverable format, the parties would often be forced to spend time litigating a motion to compel the production of those notes and drafts. Furthermore, because all communications between attorneys and testifying experts were generally discoverable, on larger cases it was common for attorneys to retain two experts on the same topic—one for testifying and one solely for consulting. Attorneys did this so that they could work with at least one expert (the consulting expert) under the umbrella of protected work product. In short, the regime of expert discovery prior to the amended Rule 26 was costly and, at times, awkward.

Amended Rule 26 did away with the requirement that a testifying expert must disclose all of the "data or other information considered" by the expert in forming his opinion. Instead it requires only the disclosure of the "facts or data considered by the witness." Fed. R. Civ. P. 26(a)(2)(B)(ii). Amended Rule 26 also expressly provides that only the expert's final opinion must be disclosed, and further states that "drafts of any report" and "communications between the party's attorney and any witness required to provide [an expert report]" are ordinarily protected from discovery as work product under Rule 26(b)(3)(A)-(B). Fed. R. Civ. P. 26(b)(4)(B)-(C).

The amended rule, however, carves out three exceptions to that discovery protection. The three types of attorney-expert communications that are not protected under the amended rule are communications that (1) relate to the expert's compensation, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (3) operate as assumptions that the party's attorney asked the expert to rely on. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii).

### Interpretation of Rule to Date

During amended Rule 26's first year of existence, courts having an opportunity to consider the amended rule have acknowledged that the December 2010 amendments were intended to significantly limit expert discovery. For example, in a recent case, the Northern District of Illinois recognized the shift in the expert discovery rule, noting that certain attorney-expert communications "arguably may have been discoverable under the pre-amendment Rule 26, but no more." *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 420 (N.D.Ill. 2011).

The court declared that the previous version of the rule had led to "several unfortunate consequences," and the amended Rule 26 "address[ed] the undesirable effects of routine discovery into attorney-expert communications," such as increased discovery costs and hamstrung communication between attorneys and experts. *Id.* at 419. In that case, although the witness in question was held to be a non-testifying consultant, the court determined that even if the witness were a testifying expert, the amended Rule 26 protected attorney-expert communications from disclosure. See also *Graco Inc. v. PMC Global Inc.*, No. 08-1304 (FLW), 2011 WL 666056, at \* (D.N.J. Feb. 14, 2011) (holding that a party was "not

entitled to any drafts, regardless of form, of expert reports, affidavits, or disclosures pursuant to amended Rule 26(b)(4)(B)" and "[c]ommunications between [the party's] counsel and the [experts] are protected by the attorney-client privilege").

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One case illustrates how, despite the major shift embodied in amended Rule 26, its exceptions could significantly limit its new discovery protections.

In another case, a court in the District of Connecticut examined whether certain materials fell within the limited exceptions to amended Rule 26. *Dongguk Univ. v. Yale Univ.*, No. 3:08-CV-00441 (TLM), 2011 WL 1935865 (D. Conn. May 19, 2011). There, the court found that certain parts of a memorandum from the attorneys to the expert must be disclosed pursuant to the exceptions in Rule 26(b)(4)(C)(ii)-(iii), because those statements were "either facts or assumptions, provided by [the party's] attorney and relied on by [the expert] in forming her opinion." *Id.* at \*2. However, other statements in that same memorandum that were redacted but did not constitute facts or assumptions relied upon by the expert were properly redacted and protected under amended Rule 26.

The District of Connecticut case illustrates how, despite the major shift embodied in amended Rule 26, its exceptions could significantly limit its new discovery protections. Almost any communication between an attorney and an expert could arguably contain a "fact" or an "assumption." How is an attorney to know at the time of a communication what will be deemed later by a court to be a "fact" or an "assumption?"

It is perhaps for this reason that the

author of this article has noticed very little change in the way attorneys and experts interact on large cases since the 2010 amendments have become effective. Cautious practitioners may well hold the view that because any communications with a testifying expert witness might be discoverable, there should be an assumption that all such communications will be discoverable.

### Conclusion: Tread Carefully

Those courts that have contemplated the contours of the 2010 amendments appear to agree that discovery into draft reports and attorney-expert communications is now dramatically limited compared to the allowances made under the previous version of Rule 26. However, there is still no meaningful guidance in the case law to inform the question of how to distinguish between a communication including a "fact" or "assumption" and protected communications. Accordingly, counsel who have not entered into a stipulation with their adversaries regarding the scope of expert discovery should continue to be cautious in working with testifying experts, mindful that just about anything shared with a testifying expert may still be fair game in discovery.

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