OUTSIDE PERSPECTIVES

Amended Rule 26: No More Expert Games

Julie Rodriguez Aldort
R. Jason Burch

ONCE UPON A TIME, NOT LONG AGO, RULE 26 prompted counsel representing clients in federal court to engage in elaborate and time-consuming efforts to prevent their opponents from peeking into their communications with their testifying experts and into their expert's draft reports. The old rule, by making an expert's work and communications open to discovery, diverted the focus of expert discovery from the merits of a case and the expert's opinions to other matters, including the discovery of oral and written communications with counsel and the details surrounding the alteration or destruction of those communications. Careful counsel managed discovery by retaining two sets of experts, minimizing written communications with the testifying expert, and avoiding multiple drafts of the expert's report. Meanwhile, opposing counsel committed hours of deposition time to exploring counsel's communications with the expert in hopes of gaining some insights into opposing counsel's case strategy or into some supposed counsel influence on the expert's opinion. The 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure sought to remedy this inefficient arrangement by explicitly extending work-product protection (i) to communications between expert witnesses and counsel and (ii) to the expert's draft reports.

The 2010 Amendment

The amendments to Rule 26, in particular Sections 26(a)(2)(B)(iii), (b)(4)(B), and (b)(4)(C), improve the overall effectiveness of the Rule. Amended Rule 26(b)(4)(B) provides that an expert's draft report constitutes trial-preparation material and should be accorded general protection from discovery. The Advisory Committee Notes reinforce this point, stating, "Rule 26(b)(4)(B) is added to provide work protection . . . for drafts of expert reports." The Amended Rule also protects attorney-expert communications from discovery. There are, however, three exceptions to the protection of expert communications: (1) communications that relate to compensation, including compensation for work done by a person or organization associated with the expert; (2) communications that identify facts or data that the party's attorney provided and that the expert considered in forming the opinion; and (3) communications that the attorney provided and that the expert relied on in forming the opinion.

Probable Implications

The two key benefits of the amended rule go hand-in-hand. First, counsel may now engage in open and free communications with the expert about case theory and strategy without having to worry that counsel's mental impressions will be given away in the expert's deposition. Theoretically, this should lead to more focused and useful expert opinions. Second, the expert can produce multiple drafts and share those drafts with counsel. This again should lead to reports that are clearer and more on point to the issues in dispute. This change removes the litigation traps that experts and their retaining counsel could otherwise fall into if they did not take pains to avoid creating multiple drafts of the expert report and to minimize attorney-expert communications.

At the same time, under the amended rule much of expert discovery and trial preparation remain the same. For example, opposing counsel may still explore all aspects of compensation. In addition, the amended rule continues to permit the exploration of all facts and data the expert considered or relied on in forming her opinion, even if that information was provided by counsel.

The Committee Notes to the 2010 amendments emphasize that "the intention [of Rule 26(b)(4)(C)] is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains *factual ingredients*." Advisory Committee Notes on 2010 Amendments to Rule 26 (emphasis added). In practice, however, it may be the facts or data not identified that present the pressure points. Because communications about the relevance of the facts are protected, opposing counsel may, as under

the old rule, elect to criticize an expert's opinion by questioning why certain identified facts or data were not considered by the expert.

The protection afforded by Rule 26(b)(4)(B) (draft reports) and 26(b)(4)(C) (attorney communications with retained experts) extends to depositions and "all forms of discovery." Neither provision, however, impedes discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. Regarding Rule 26(b)(4)(C)(iii), the Committee Notes state that "counsel are also free to question expert witnesses about alternative methods, whether or not the expert considered them in forming the opinions to be expressed." Counsel, for example, could ask why the expert selected a particular testing method over another, including whether testing was conducted and rejected under the other method.

Practice Tips

As can be seen from the discussion above, although the amended rule provides added protection to communications with and work product of the expert, the 2010 Amendments to Rule 26 do not erect an insurmountable barrier to discovery of information flowing from the retention of an expert witness. Counsel may still seek production of all correspondence between the testifying expert and opposing counsel regarding compensation, facts or data considered, and assumptions. Moreover, counsel may seek production of the expert's internal notes and documents that relate to his or her work on the case, as well as production of documents that the expert sent to or received from those other than retaining counsel. This includes any document authored by someone other than counsel that counsel may have then sent on to the expert. Of course, depending on the document, work product protection may still exist.

Although the case law discussing the new amendments is sparse, one opinion—written just before the amendments went into effect—suggests that expert discovery is no dead letter. In *Tikkun v. City of New York*, 265 F.R.D. 152 (S.D.N.Y. 2010), Magistrate Judge James C. Francis IV discussed a "fairness principle" to discovery. It holds that an expert opinion should not be a "black box" used to immunize certain materials from scrutiny by the opposing party. Moreover, because the work-product doctrine is not an absolute privilege, counsel may be able to show need and hardship that overcomes the protection.

The language of the Advisory Committee Notes helps establish the appropriate levels of inquiry into an expert's opinion. The notes state that "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." Counsel is therefore wise to explore the process by which the expert formed an opinion. In a deposition, for example, counsel can and should explore whether the testifying expert participated in any meetings with the party, any fact witness, consulting expert, or non-retained testifying expert. Counsel should then uncover whether any notes were taken or exchanged at the meetings, as they likely are part of the development of the opinion. Counsel should explore the processes by which the expert received "facts or data" or "assumptions," as they go to the foundation of the opinion. Finally, counsel may ask about the total number of draft reports (that themselves are not discoverable) and the extent and types of changes (*e.g.*, stylistic or substantive) made in the drafts. This is also likely to go to the development of the expert's opinion.

The 2010 Amendments to Rule 26 have done much to change the old order of inefficient expert discovery and to reduce the gamesmanship that may have been used to protect expert communications. Counsel may use the exceptions and principles stated in Rule 26 and in the advisory committee notes to get to the heart of an expert's process, and thereby extract information that goes to the merits of the case. At the same time, the changes allow for a free flow of communication by counsel to the expert of counsel's mental impressions regarding case theory without fear of those communications being discoverable.

Julie Rodriguez Aldort is a partner at Butler Rubin Saltarelli & Boyd LLP, a national litigation boutique based in Chicago, where she arbitrates and litigates reinsurance and complex commercial cases. R. Jason Burch is a second-year student at Northwestern University School of Law and was a summer associate at Butler Rubin. The views expressed are personal to the authors. www.butlerrubin.com

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