You've Decided Not To Call Your Expert As A Witness At Trial, Now What?

YOUR CLIENT IS A PARTY TO A CASE IN federal court. You previously designated a testifying expert in the case, but have decided not to call her as a witness after all. Your opponent nonetheless wants copies of all of the documents that you provided to the expert, including some documents that are attorney work product, and to take the expert's deposition. What now?

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Under the proposed amendments to Rule 26 of the Federal Rules of Civil Procedure, which, in the absence of action by Congress to prevent their implementation, will take effect on December 1, 2010, the attorney work product that was provided to your expert will be afforded protection from discovery. This is because, under the revised rule, even attorney work product provided to testifying experts is generally insulated from discovery.

Proposed Rule 26(b)(4)(C) provides that communications between the party's attorney and any witness required to provide an expert report under the Rule, are protected from discovery "regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Proposed Rule 26(b)(4)(B) also extends work product protection to draft expert reports. These amendments flow from a fundamental change to Rule 26(a)(2)(B)(ii), which currently requires disclosure of "data or other information considered" by a testifying expert. The proposed Rule alters the obligation to disclose to encompass only "facts or data considered" by a testifying expert.

Under the current Rule, in resolving disputes over whether all documents provided to a testifying expert must be produced, most courts resorted to a bright-line rule: "[A]ll documents considered by the testifying expert in forming his or her opinion, including attorney work product, are discoverable." *Galvin v. Pepe*, 2010 WL 3092640, at *4-5 (D.N.H. Aug. 5, 2010) (discussing courts' approaches to whether Rule 26 requires disclosure of documents containing the attorney's mental impressions and legal theories that were provided to a testifying expert). The proposed changes to Rule 26 are explicitly "intended to alter the outcome in cases . . . requiring disclosure of all attorney-expert communications and draft reports." Advisory Committee Notes to Proposed 2010 Amendments to Rule 26. The Advisory Committee Notes explain that the "refocus of disclosure on 'facts or data' [from "data or other information"] is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." *Id*. Accordingly, after December 1, 2010, attorney work product provided to testifying experts as well as that provided to consulting experts will generally be protected from discovery in cases instituted after that date and, to the extent "just and practicable," in cases that are already pending. *See Galvin v. Pepe*, 2010 WL 3092640 at *6 (refusing to use proposed 2010 amendments to construe outcome of a motion pending and ready for resolution).

However, even the proposed amendments to Rule 26 don't entirely resolve your current issue, as opposing counsel doesn't only want production of the attorney work product that you provided to your expert but also seeks to take her deposition. With respect to the deposition request, you plan to object and argue that Rule 26(b)(4)(B)(ii) (Rule 26(b)(4)(D)(ii) of the proposed rules) is applicable. Under that rule, discovery can only be obtained from an expert specially retained but not expected to testify at trial if there are exceptional circumstances under which it is "impracticable for the party to obtain facts or opinions on the same subject by other means." This protection from discovery afforded to experts not expected to testify at trial is in sharp contrast to Rule 26(b)(4)(A), which provides (both currently and under the proposed amendments) that a "party may depose any person who has been

identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided." Your opponent insists, however, that you cannot shield your expert from discovery by withdrawing the expert's designation as a trial expert.

Where an expert's opinions have not been disclosed before the expert is redesignated from a testifying expert to a non-testifying expert, courts typically find that the expert is not subject to deposition in the absence of "exceptional circumstances." *See R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 899 (N.D. Ohio 2009); *Estate of Manship v. U.S.*, 240 F.R.D. 229, 233-37 (M.D. La. 2006) (distinguishing cases where depositions of experts were permitted notwithstanding redesignation of the expert to non-testifying). *But see House v. Combined Ins. of Am*., 168 F.R.D. 236 (N. D. Iowa 1996) (applying a balancing test rather than "exceptional circumstances" test where a Rule 35 medical examination had occurred prior to redesignation of the expert conducting that examination).

Even if the expert's opinions have been disclosed, the majority approach is to allow the so-called "consultative privilege" to be restored. For instance, in *Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.*, 2002 WL 1906628 (N.D. Del. Aug. 14, 2002), a party withdrew its expert as a testifying expert after his expert report had been provided to the opposing party and after his deposition had been scheduled, but before the deposition took place. The court fund that the submission of an expert report did not waive the protection provided to non-testifying experts. *Id.* at *3-*4. Similarly, in *FMC Corp. v. Vendo Co*., 196 F. Supp. 2d 1023 (E.D. Cal. 2002), the court applied the "exceptional circumstances" test even though the experts had exchanged opinions and reports before they were redesignated as non-testifying experts.

In finding the "exceptional circumstances" test applicable to redesignated experts, courts have relied on the policy reasons underlying Rule 26's provisions. The purpose of permitting discovery of testifying experts is "to allow opposing counsel to adequately prepare for cross-examination, and to eliminate surprise at trial." *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007). This purpose is not implicated where the expert will not be testifying at trial, even if his opinions have been disclosed. Thus, "there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course litigation should take." *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982). Policy considerations also underlie the rule shielding non-testifying experts from discovery absent a showing of "exceptional circumstances." Chief among them is "to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation." *Durflinger v. Artiles*, 727 F.2d 888, 891 (1984); *see also* Fed. R. Civ. P. 26, Advisory Committee Notes (1970) ("A party must as a practical matter prepare his own case . . . , for he can hardly hope to build his own case out of his opponent's experts.").

Once you've persuaded the court that the "exceptional circumstances" rule applies, you're still not home free. Parties have been able to show "exceptional circumstances" where (1) evidence has deteriorated or been destroyed after the party's non-testifying expert observed it but before the opposing party's expert had an opportunity to observe the evidence, *see Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co*., 128 F. Supp. 2d 1148, 1152 (N.D. Ill. 2001); (2) where there are no other available experts in the field, *see id*.; (3) where the testifying expert relied on the non-testifying expert's work as the basis for the testifying expert's work, *see Long-Term Capital Holdings LP v. U.S.*, 2003 WL 21269586, at *2 (D. Conn. 2003); (4) where there is substantial collaboration between the testifying expert and a non-testifying expert, *see id*. at *2-*4 (ordering deposition of non-testifying expert where there was "seamless collaboration" between the testifying expert and the non-testifying expert); and (5) where "it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive." *Id*. at *2. If one of these situations exists, your expert may still be compelled to sit for a deposition, even though you've redesignated her as a non-testifying expert.

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