PROTECTING PRIVILEGE ON AN EXPERT WITNESS LEVEL UNDER THE RECENT FEDERAL RULE AMENDMENTS

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Introduction

It is no secret many cases depend on the reports, testimony, and conclusions of expert witnesses. An expert witness is necessary to prosecute or defend all sorts of cases. This is especially true in the world of construction law, where convoluted defect claims, acceleration, delay, liquidated damages, and, of course, structural, architectural, and engineering issues occur every day. Equally important is the discovery phase involving experts, and the ability to both protect and seek disclosure of written communications, notes, reports, and other records contained in an expert's working file.

This article will address the impactful recent changes to the Federal Rules of Civil Procedure clarifying the scope of discoverable information related to experts.

What Must My Testifying Expert Produce in Discovery?

Rule 26(a)(2)(B) now requires a testifying expert witness's report contain *"the facts or data considered by the witness in forming [his or her opinions]."* According to the advisory committee notes, this change was necessary to alter the outcome in cases that required disclosure of all attorney-expert communications and draft reports. The purpose of limiting the disclosure to *"facts or data"* and not the prior language of *"other information"* is to protect counsel's case theories and mental impressions.

For instance, in *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416 (N.D. Ill. 2011), relying on the new Rule language, the court denied discovery of communications from an expert to counsel advising how counsel might conduct a pilot survey of advertisements. The court reasoned the requested communications did not include facts, data, or assumptions the expert "could have considered in assembling his expert report."

Any factual matter the testifying expert *"considered"* is discoverable. This is true even if that information was derived from communications with legal counsel, and involves the attorney's mental impressions, trial strategy, or is otherwise protected by work-product privilege. *TV-3, Inc. v Royal Ins. Co. of Am.*, 193 F.R.D 490 (S.D. Miss. 2000). The advisory committee notes urge the phrase "facts or data" should be interpreted broadly to require disclosure of "any material considered by the expert, from whatever source, that contains factual ingredients." According to *United States v. Dish Network, L.L.C.*, 2013 WL 5575864, at *2, *5 (C.D. Ill. Oct. 9, 2013), this includes discovery of "anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed."

By way of example, in *D.G. ex rel. G. v. Henry*, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011), the defendants requested expert case files, statutes, and policies, and materials prepared by the expert's assistants used in connection with preparing the report. The court held highlights and notations of case files were not subject to disclosure. However, the court concluded the statutes and policies constituted discoverable facts or data, and summaries of case files prepared by the expert's assistants must be produced since they contained factual material considered by the expert.

The advisory committee notes emphasize opposing counsel is still permitted to inquire into an expert's opinions, including the "development, foundation, or basis of those opinions." Furthermore, counsel may even inquire into "alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed." *See, e.g., In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at *7 (E.D. Pa. Dec. 13, 2011) (physician expert's handwritten notes reflecting his interpretation of radiograph results were not exempt from discovery).

Rule 26(a)(2)(B) is interpreted very broadly. Any materials regarding facts or data a testifying expert considered in forming his or her opinions are freely discoverable. This holds true even if that information was derived from information otherwise protected by the attorney-client or work-product privileges.

What Must My Expert Now Disclose if He or She Is Not Preparing a Formal Report?

It is important to note under the Federal Rules there are two kinds of testifying expert witnesses: (1) a witness who is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony;" and (2) witnesses who are not retained for the purpose of providing testimony but are otherwise qualified to offer expert opinions, such as treating physicians. The first category of expert witness is always required to provide a written report, while under the new Rule explained below counsel must now provide a limited statement regarding the testimony of the second category of experts.

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The amendments to the Federal Rules include a new Rule 26(a)(2)(C) to clarify the kinds of disclosures expected of those expert witnesses not obliged to prepare a formal report. In the past, this category of experts was never required to disclose any particular information to opposing counsel. The Rule is designed to prevent a party from ambushing their opponent with an unknown expert opinion. Additionally, the new change resolves a tension that sometimes prompted courts to require expert reports even from witnesses previously exempted from the report requirement.

According to the new Rule 26(a)(2)(C):

Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

> *(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and*
>
> *(ii) a summary of the facts and opinions to which the witness is expected to testify.*

This new section makes explicitly clear experts not subject to the stringent disclosure requirements of Rule 26(a)(2)(B) must still provide an indication to opposing counsel of the topics on which they expect to testify at trial. By way of example, in *Graco, Inc. v. PMC Global, Inc.*, 2011 WL 666056, at *14 (D.N.J. Feb. 14, 2011), the court ordered the plaintiff to disclose the subject matter and a summary of the facts and opinions offered by its employees in affidavits submitted by them in support of the plaintiff's motion for a preliminary injunction.

It should also be noted these experts that are not preparing a final written report must still submit to deposition. Indeed, even if your expert does not prepare a formal written report, he or she must still provide information to opposing counsel concerning his or her expert opinions and conclusions, and cannot escape questioning at deposition.

Are Draft Reports Now Protected From Disclosure?

Changes to Rule 26(b)(4) are also in place, which extend the work-product privilege protection to drafts of expert reports, as well as certain communications between experts and counsel. Specifically, Rule 26(b)(4)(B) now prevents opposing counsel from seeking written drafts of actual expert reports:

Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

This protection extends to both: (1) experts required to produce a formal written report under Rule 26(a)(2)(B); and (2) witnesses for whom a party need only disclose the subject matter and a summary of the facts and opinions on which it expects the witness to testify, referenced above in Rule 26(a)(2)(C). *Republic of Ecuador v. Bjorkman*, 2012 WL 12755, at *4 (D. Colo. Jan. 4, 2012). Thus, both forms of experts are now protected from disclosure of their draft expert reports, regardless of form.

Be cautious. Courts have construed this protection narrowly, and expert notes are not treated as draft reports. For example, in *Dongguk University v. Yale University*, 2011 WL 1935865, at *1 (D. Conn. May 19, 2011), the court required production of a testifying expert's notes, concluding notes are neither drafts of an expert report nor communications between the party's attorney and the expert witness. The court also held that the expert's redacted notes were not independently protected as work-product because the statements were not mental impressions, conclusions, opinions or legal theories. *See also In re Application of the Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012) (notes, task lists, outlines, memoranda, presentations, and letters drafted by a testifying expert and his assistants did not constitute draft reports and were not independently protected as work-product).

What Protections Exist for Communications Between Counsel and My Expert?

Rule 26(b)(4)(C) also now protects communications between counsel and testifying experts from discovery. Protected communications, whether oral, electronic, or written, include those between the party's attorney and assistants of the expert witness. The notes also provide that communications between an expert and a third-party do not receive the same protection.

According to the recent Rule change:

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B) 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 the assumptions that*

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the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

However, it should also be noted that unlike Rule 26(a)(2)(B), this specific protection only applies to experts required to produce a written report. Indeed, any protection for communications with those witnesses who need not produce a written report must be found elsewhere, including the common law of the relevant jurisdiction. *See United States v. Sierra Pac. Indus.*, 2011 WL 2119078, at *5–7 (E.D. Cal. May 26, 2011) (reviewing Civil Rules Advisory Committee's reasons for not extending work-product protection to communications with Rule 26(a)(2)(C) experts); *Graco, Inc.*, 2011 WL 666056, at *14 (protecting under the common law attorney-client privilege communications between plaintiff's counsel and employee expert witnesses who were not required to provide a written report).

Moreover, the amendments also provide for three specific exceptions to the protection of communications between counsel and experts, regardless of form:

1) Expert compensation, in all aspects, is discoverable. According to the notes, this extends to all compensation for the study and testimony provided in relation to the case, and includes "additional benefits to the expert, such as further work in the event of a successful result in the present case" as well as "compensation for work done by a person or organization associated with the expert."

2) As noted above, communications identifying facts or data provided by counsel to their expert are discoverable, to the limited extent the communications "identify" the facts or data considered by the expert in forming his or her conclusions. *See, e.g., In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at *6–7 (simple "transmittal letters" containing asbestos exposure, medical, and smoking history plaintiffs' counsel sent to its physician experts were discoverable, since they contained empirical facts, data, and assumptions on which the experts relied). On the other hand, communications about potential relevance, significance, or other legal theories are still protected.

3) If counsel instructed an expert to make certain assumptions in preparing his or her opinions, those assumptions are discoverable, but only to the limited extent the expert actually relied on those assumptions in preparing his or her opinion. Thus, hypotheticals and the discussion of other possibilities remain protected.

What Are the Best Practices for Communications Between Counsel and Experts Moving Forward?

In sum, the recent amendments to the Federal Rules of Civil Procedure are intended to provide greater protection of the mental impressions and theories of counsel, and encourage open communication between counsel and experts without worrying about disclosure in discovery. However, the Rule changes still leave many unanswered questions, and a plethora of information remains discoverable.

Below are a few helpful tips for dealing with expert discovery under the new Rules.

• **Caution the preparation of draft expert reports.** Always ensure the document being prepared is actually a report, as compared to expert notes, which are fully discoverable. Even when the document is a draft report always be aware of the work-product discovery exception available for discovery if the opposing party can show a substantial need for the draft and an inability to obtain the information contained in the draft from other sources. While this exception is rarely applied, counsel and experts alike should continue to be very cautious when preparing multiple written expert reports or "evolving" drafts.

• **Segregate communications involving facts or data from those involving legal analysis or mental impressions.** When communicating pure facts or data (i.e. transmitting documentary evidence, statistics, or transcripts of testimony) to an expert, legal counsel must avoid the temptation to include their own analysis of this information. Facts and data based information is freely discoverable. Thus, by separating legal analysis in a separate report, email, or letter, counsel can safely preserve privilege. Counsel must avoid the temptation to simply and easily send one joint communication to an expert "lumping together" full legal analysis with facts or data for consideration by an expert

• **Be careful whenever placing anything in writing to or from an expert.** While the new Rules try to facilitate open communication between counsel and experts by affording greater discovery protections, there is still plenty of uncertainty. Once something is in writing, it exists, and could still potentially be discoverable even under the new Rules. Both experts and counsel alike must be aware of this whenever preparing a written document of any length or importance. Further, the protections do not extend to third-parties outside of counsel, the expert, or their respective assistants or agents.

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