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Trials&TRIBULATIONS

Work product doctrine given new life

One of the more daunting areas of federal practice is the presentation and discovery of expert witness testimony.

With the passage of amendments to Rule 26 of the Federal Rules of Civil Procedure, effective Dec. 1, this area of the law may be simplified and, for a change, the amendments actually may decrease the cost of litigation.

The U.S. Supreme Court on July 15 ratified proposed changes to key provisions of the Federal Rules of Civil Procedure 26(a)(2) and (b)(4), which essentially deal with expert disclosure and can be summarized as follows:

1. Communications between experts and counsel generally are protected from discovery;

2. Draft expert reports no longer will be discoverable; and

3. Attorneys will be required to summarize in writing the facts and opinions to be attested to by experts, who no longer will be required to file expert reports.

By MICHAEL R. WOLFORD
Daily Record Columnist

The amendments are the outgrowth of difficulties experienced by attorneys and the courts with the changes contained in the 1993 Amendments to Rule 26, interpreted by most courts to require discovery of draft expert reports and broad disclosure of any communications between the expert and the lawyer.

The pendulum appears to be swinging back to a position honoring an attorney's work product compared to the doctrine of full disclosure regardless of its impact.

In order to appreciate the amendments, it is helpful to review the history of expert disclosure in federal courts.

Exception to the work product doctrine

Before 1993, documents prepared by or for an attorney in anticipation of litigation traditionally were protected under the work product doctrine. *See Hickman v. Taylor,* 329 U.S. 495 (1947). Generally it was agreed that Federal Rule of Civil Procedure 26 excluded the discovery of attorney work product, even when provided to testifying experts. *See, e.g., Toledo Edison Co. v. G. A. Techs Inc.,* 847 F.2d 335, 339-41 (Sixth Cir. 1988); *Bogosian v. Gulf Oil Corp.,* 738 F.2d 587, 595 (3d Cir. 1984).

Rule 26 was amended in 1993, however, to require parties to supply expert reports for all testifying experts and, under Rule 26(b), the report produced must "contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions."

Following the adoption of the 1993 amendments, two lines of cases developed regarding the protection of expert work product. The first group held attorney work product was not discoverable merely because it was shared with a testifying expert. *See Haworth Inc. v. Herman Miller Inc.,* 162 F.R.D. 289, 292-96 (W.D. Mich. 1995). The second — and majority — group of cases held that Rule 26 created a bright-line rule requiring disclosure of all information provided to testifying experts, including attorney opinion work product. *See Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.,* 412 F.3d 745, 751 (7th Cir. 2005); *In re Pioneer Hi-Bred Int'l.,* 238 F.3d 1370, 1375 (Fed. Cir. 2001).

In the Western District of New York and other courts within the Second Circuit, it was accepted generally that there was to be full disclosure of materials considered, reviewed or generated by a testifying expert. *See B.C.F. Oil Refining v. Consolidated Edison Co. of New York Inc.,* 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *W.R. Grace & Co.-Conn. V. Zotos Int'l. Inc.,* 2000 WL184 3258 at 10 (W.D.N.Y. 2000) and *Employees Committed for Justice v. Eastman Kodak Co.,* 251 F.R.D. 101, 104 (W.D.N.Y. 2008).

Rules of practice and procedure

A report of the Advisory Committee on Rules of Practice and Procedure recommended the new amendments address the problems created by the extensive changes to Rule 26, interpreted "to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony."

The committee noted that significant problems were encountered following the 1993 amendments, and changes to Rule 26 were supported by a number of lawyers and bar associations, including the American Bar Association, American College of Trial Lawyers and the American Association for Justice.

The amendments resulted in lawyers' and experts' taking elaborate steps to avoid creating any discoverable record. At the same time attorneys took elaborate steps to discover the other side's drafts or communications.

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The advisory committee indicated it was not uncommon for two sets of experts to be retained, one for consultation work and the other to develop the report and provide testimony.

In essence, the committee concluded the amendments caused a considerable amount of gamesmanship and litigation over the discovery of materials reviewed by the expert and lengthened the depositions of experts while not necessarily improving the system of justice.

Dec. 1 amendments

The first significant amendment to Rule 26 is contained at Rule 26(a)(2)(B) and appears fairly subtle. The present rule states that the report must contain "the data or other information considered by the witness in forming" the witness's opinions. In contrast, the amendment states the report must contain "the facts or data considered by the witness."

While the amendment may not appear that striking, clearly it is intended to eliminate the turn over of draft expert reports, previously required by a number of courts.

Rule 26(b)(4)(B) was amended to provide "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.

The advisory committee's report concludes that the extensive discovery into draft reports and all communications between an expert and an attorney are not an effective way to challenge an expert's opinion. It was time consuming, expensive and led to wasteful litigation practices. The most effective way to challenge an expert's opinion is through cross-examination, the committee concluded.

The second significant amendment to Rule 26 focuses on the type of communications subject to discovery. Rule 26(b)(4)(C) was amended to provide: "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 assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."

The committee noted that "compensation" includes potential additional work for the expert as well as compensation for work performed by assistants, associates and affiliated organizations. The committee recognized that by subjecting information to discovery, the parties still could explore the extent to which the expert witness was influenced by the attorney who had retained his or her services.

The third significant amendment deals with disclosure for non-reporting experts. Previously there was no mandatory disclosure requirement for such witnesses. The new Rule 26(a)(2)(C), provides: "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."

Under the present rule — contained at Rule 26(a)(2)(A) — the proponent of the testimony simply was required to "disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703 or 705."

A witness who was not retained for the purpose of providing expert testimony, but who would as a matter of course provide expert testimony such as a treating physician, now must provide the above information as part of expert disclosure.

Retroactive or not?

Although the committee does not address it, some commentators have suggested the amendments are not retroactive, therefore they would apply only to actions commenced on or after Dec. 1. Others suggest the courts may conclude the new rules apply to pending cases that have not yet reached the point of expert disclosure.

In my view, it would be recommended that the parties agree to the applicability of the new rules rather than force the court to determine whether they apply. It is expected there will be further litigation on the subject and, in all likelihood, the issue will be decided by the Court of Appeals or beyond.

As stated earlier, the amendments should prove useful in reducing the time and expense devoted to arguing over the production of draft reports and communications with experts and, as a result, they are welcomed additions to the Federal Rules of Civil Procedure.

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