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NEW FEDERAL RULE 26 – THE GOAL IS EFFICIENCY WITHOUT HARMING EFFECTIVE EXAMINATION

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Introduction

As of December 1, 2010, amendments to Federal Rule of Civil Procedure 26(b)(4) are in effect that will change the way you develop expert testimony, depose experts, and even cross-examine experts at trial. The amendments, in part, apply work-product protection to the discovery of draft reports by testifying expert witnesses, and with three exceptions, communications between experts and retaining counsel.[1] As any good litigator might ask, will this change diminish the presentation of draft or "discarded idea" questions that genuinely arise? Is there anything improper about inquiring into changed opinions at deposition or when the expert takes the stand at trial? Although the new Rule takes away the incentive to hunt for the "holy grail" of expert discovery (the draft Rule 26(a)(2)(b) expert report), there remain many viable ways of exposing an opinion-shift. There is no change in the new Rule that should minimize the effectiveness of any examination.

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The Old Rule

The amendments change sections of Rule 26 in place since 1993. Although expert discovery appeared to be generally subject to work-product protection (also contained in Rule 26), the 1993 comments broadly allowed discovery of all communications by attorneys with testifying experts, including disclosure of draft expert reports.

The text of former Rule 26(a)(2)(B)(i)-(ii) provided that a written expert report must "contain . . . (i) a com-

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[1] Other recent changes to Rule 26 address disclosure of expert opinions where experts are not required to provide a report under Rule 26(a)(2)(B). Under Rule 26(a)(2)(C), a party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify. This article does not discuss that new requirement.

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plete statement of all of the opinions the witness will express and the basis and reasons for them; [and] (ii) the ***data or other information*** considered by the witness in forming them. . . ." (emphasis added). The Comments provided guidance as to what constituted "data or other information," and explained that all data and information, even if not relied upon, was fair-game and not privileged or otherwise protected in discovery:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, ***litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure*** when such persons are testifying or being deposed.
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> Comments to Rule 26(a)(2)(B) (emphasis added).

Why Change?

According to the 1993 Rule/Comment, draft reports and attorney communications were not given "privilege[] or other[] protect[ions]" provided in Rule 26. Thus began the practice of retaining two sets of experts – one as a consulting expert, who actually did the work and developed the opinions, and one as a testifying expert, who was shielded from the bulk of attorney assistance, draft work, and prior discarded opinions. Attorneys avoided creating a paper record of preliminary expert thoughts and impressions or to draft anything that could be considered a "first", "preliminary" or "draft" report.

Despite the fact that many attorneys employed these discovery-avoidance tactics, because the Rule/Comment allowed leeway to do so, attorneys still inquired into draft reports and expert's communications with retaining lawyers. The often lengthy inquiries at depositions attempted to show that the retaining lawyer actually crafted the expert opinions. When questioned at the time of the Rule change, many attorneys felt that, ultimately, such questioning was a dead-end, as everyone was already employing the tactics to protect expert drafts and attorney communications.[2] Overall, the 1993 Rule/Comment created needless expense that was time-consuming and resulted in little, if any, discoverable information of use to the case.

The 2010 Fix

Rule 26 now contains brand-new language at 26(b)(4)(B) and (C) that expressly provides work-product protection to draft reports and communications, as follows:

> (B) *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.
>
> (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 assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Rule 26 was therefore expressly amended to apply work-product protection to draft reports and most attorney-expert communications. The exceptions to work-product protection are for those communications regarding compensation, identifying facts or data considered by the expert in forming the opinions, and identifying assumptions relied on by the expert in forming the opinions.

How and When to Place Opinion-Shifts Before the Jury

So, if the new Rule takes away any potential of exposing a draft report, litigators are left with the question of identifying effective means of exposing a discarded theory or changed opinion to the jury. Imagine that the scenario where you sense a change of opinion. There remain many discoverable and admissible explanations for the shift other than the "smoking-gun" draft report. For example, you may find changes in opinion from your opposing party's representatives to its newly hired expert. You may also ascertain a

[2] Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2009, at p. 10.

change of opinion from an initial expert report to a later, rebuttal report. In either instance, there is nothing improper about discovering the facts or data (what was relied upon and what was not relied upon) that could explain the opinion-shift. This is true under new Rule 26(b)(4)(C) ***even if*** the attorney provided the facts or data that caused the changed opinion. This area of inquiry has always been and remains a viable option for examination.

This is because the 2010 Rule does not put a flat prohibition on discovery of the bases of an expert's opinion. Discovery of facts or data that are genuinely important for assessing the reliability of an expert opinion are still discoverable. According to the Judicial Conference that proposed and adopted the changes, inquiries into what caused an opinion-shift remains a proper area of inquiry. As the Summary of the Report on the Judicial Conference recommending the Rule change provides, "parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial."[3] The only difference is that now the exploration will be done without the possibility of finding a draft report or an attorney communication that requires the new report.

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[3] Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2009, at p. 13.

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front of a jury, even a strong person and good witness can lose focus. Your witnesses losing focus can be very detrimental, and one way to avoid it is by making them familiar with the courtroom where their testimony will take place, before they are asked to perform.

5. Test your and the court's electronic equipment.

Simple, but a must do. Before trial, take your technological equipment to the courtroom where the trial will take place and literally run through all video deposition clips, and any type of electronically generated visual aides to make certain your equipment works seamlessly with the court's connections, monitors and other equipment. We have all made presentations and assume all will go well or can be easily "fixed", but as long as you do not disclose anything you want to keep protected while doing it, there is no downside to making sure it works in the courtroom before you try it in front of the jury. I also recommend having physical, "old school" poster board exhibits and key documents, testimony, and other trial materials ready to place on an overhead projector or ELMO, just in case the computers fail for any reason.

6. Designate a partner/associate at the office to be "on call" and accessible throughout trial.

In almost every trial, an unexpected argument will arise about a significant issue that, for whatever reason, was not identified or briefed before trial. Often, counsel trying the case calls back to the office, attempting to find a partner or an associate who has time to research the issue and put a quick brief together. These efforts to find help frequently occur late in the afternoon or early evening once trial has stopped for the day, and can result in resentment on the part of the partner/associate having to unexpectedly stay late. The time, stress and effort in trying to find someone to do the work and educating that person on the matter during trial is very valuable time and energy lost. It is simple to avoid all of the negative aspects of this scenario. Weeks before trial, identify someone who can be available to be on call to do this type of work. Educate them on the basics of the matter, exchange cell numbers, e-mail addresses, and any other contact information. That way, everyone is on the same page; there is no problem trying to find someone; and there is no resentment or negative feeling on the part of the person staying late and doing the work. We all have different skill sets, so pick someone who is a good researcher and solid writer as well. There will be no time to follow up on the work or to revise it.

7. Before and during voir dire, research potential jurors via all available social media, and follow-up regarding jurors during the trial, too.

Today's world of social media has opened up all kinds of resources for getting to know our prospective jurors better. This should be done as soon as the jury pool becomes available, followed during voir dire, and throughout trial, as well. It is amazing what people — not just young people — will put on the internet, even after being instructed not to do so by a judge. Everyone wants to let everyone else know what they are doing —