Changes to Federal Rule 26 and the Resulting Impact on Communications with Experts

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Recent changes to Rule 26 of the Federal Rules of Civil Procedure should simplify and streamline one of the more troubling aspects of dealing with experts. That is, how can attorneys effectively communicate with their experts without having all of their communications subject to discovery by the opposing party?

Revised Rule 26 also addresses the problematic issue of discovery of draft expert reports. As of December 1, 2010, Rule 26 of the Federal Rules of Civil Procedure exempts draft reports and an attorney's communication with testifying experts, with three important exceptions, from discovery and disclosure.

In proposing the recently enacted revisions to Rule 26, the Committee on Rules of Practice and Procedure wanted to eliminate the inefficiencies that arose under the existing Rule 26. As highlighted by the Committee, under the previous version of Rule 26, many courts required the disclosure of all communications between attorneys and their testifying experts and the disclosure of any and all draft reports prepared by those experts. The Committee noted that attorneys took elaborate steps to avoid creating a discoverable record, and at the same time, went to great lengths to attempt to discover the other side's drafts and communications. This pattern of behavior increased litigation costs and limited effective communication between attorneys and testifying experts. In many cases, an attorney hired two sets of experts: consulting experts, with whom attorneys could freely communicate, and testifying experts whose communications with the attorneys were subject to discovery. Experts were also routinely instructed not to create draft reports and to "save over" all electronic versions of reports.

Under revised Rule 26, all drafts of expert reports, regardless of the form of the report, are provided work-product protection against discovery. Revised Rule 26 also applies the work-product protection to communications between counsel and testifying experts. However, there are three exceptions to the limitation on the discovery of communications between attorneys and testifying experts. The exceptions are: i) communications related to expert compensation; ii) communications identifying facts or data provided by counsel that the expert considered in forming the expert's opinions; and iii) communications identifying assumptions that counsel provided and that the expert relied upon in forming the expert's opinions.

The revised Rule should foster more effective communication between attorneys and expert witnesses and decrease litigation costs. However, attorneys should proceed with care. It is unknown how courts will interpret and apply the new rules, in particular the requirement to disclose all facts and data considered by the expert witness. Furthermore, the general consensus is that revised Rule 26 does not apply retroactively. In other words, draft reports and communications made prior to December 1, 2010, are likely still subject to discovery and disclosure. Finally, remember this new revised Rule 26 only applies to cases in Federal Court. Many states still allow for the discovery of all attorney-expert communications and draft reports. Attorneys practicing in Federal Court should carefully review and familiarize themselves with revised Rule 26.

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