

Commercial Litigation Engine Room

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Changes to Rule 26 Make It Easier To Work With Experts

Recent changes to the Federal Rules of Civil Procedure (FRCP) Rule 26 make it easier to communicate with expert witnesses and to prepare them for deposition and trial testimony while still protecting attorney work product.

Effective December 1, 2010, substantive changes were made to FRCP Rules 8, 26 and 56 regarding asserting the affirmative defense of discharge from bankruptcy, working with expert witnesses, and procedural changes to bringing and opposing a summary judgment motion. This alert focuses on the changes made to Rule 26 and the immediate impact this has on working with expert witnesses.

Expert discovery has been a part of federal practice since 1993; however, the period dedicated to the discovery of attorney-expert communications and draft expert reports has become increasingly time consuming during pre-trial preparation. The recent amendments address this development and attempt to create an atmosphere that encourages better communication between attorneys and their experts.

Communications With An Expert

Before December 1, 2010, virtually all communications between an expert witness and counsel were subject to discovery. Now, Rule 26(b)(4)(C) provides protection to all communications between counsel and experts, regardless of the form, with three exceptions:

- (1) Communications regarding the expert's compensation
- (2) Facts or data provided by the lawyer that the expert considered in forming opinions
- (3) Assumptions provided by the lawyer that the expert relied upon in forming an opinion

The new rule will reduce, if not eliminate, the need to specifically avoid the creation of a discoverable record. Lawyers, clients and their experts will now be able to communicate by email, written letters or other forms of communication without worrying about having those communications surface later in discovery (subject to the restrictions noted above). However, considering the last two exceptions listed above, it would be a good practice to forward facts, data and assumptions that may form the basis of the expert's opinions separate and apart from substantive discussions of its interpretation.

The protection is only extended to those witnesses required to provide a written report under Rule 26(a)(2)(B) (witnesses retained to provide expert testimony or witnesses whose duties as the party's employee regularly involve giving expert testimony). The rule does not protect communications between counsel and other expert witnesses who do not have to submit a report (such as treating physicians).

Draft Expert Reports

Before the rule change, almost all draft reports were discoverable, regardless of form. Now, Rule 26(b)(4)(B) has been amended to protect draft expert reports from disclosure (both the initial report and any supplementations). The amendment will allow for more refined and persuasive reports and, it is hoped, will reduce the amount of time spent examining an expert about the development of his or her opinions.

Information 'Considered' By An Expert

Before the rule change, experts were required to disclose data or "other information" considered. Now, they must disclose only "facts or data considered." Counsel and their experts no longer have to contend with the nebulous "other information" phrase that was often used to discover attorney-expert communications and draft reports. While "facts or data" is meant to be broadly interpreted, it is limited to factual information only and should not be expanded to include theories or mental impressions of counsel.

The recent amendments to Rule 26 should make it easier to communicate with retained experts and to prepare them for deposition and trial testimony. Small changes to litigation practice (such as the separation of communications conveying facts or assumptions from substantive discussions) will allow for better communication with experts while still protecting counsel's work product. For further information and tips on how to incorporate best practices in light of the recent amendments, please join us for a Reed Smith University CLE on the topic January 24, 2011.

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