

## FRCP Changes Will Facilitate Sharing Information with Expert Witnesses

by Edward Flanders and Jay D. Dealy

*Effective December 1, 2010, communications with testifying expert witnesses, as well as their work product, will receive greater protection from disclosure under the Federal Rules of Civil Procedure.*

Under the current FRCP Rule 26(a)(2), a testifying expert witness's report must contain data "or other information" considered by the witness in forming his or her opinions. Many courts have interpreted that language broadly, holding that conversations between counsel and testifying expert witnesses are discoverable, and requiring the production of attorney work product, even opinion work product, if given to a testifying expert witness. Some courts have also held that disclosure of documents protected by the attorney-client privilege to a testifying expert witness waives the privilege.

The Advisory Committee on Civil Rules observed that, in response to these rulings, many counsel and experts had developed practices to shield information from discovery that were highly inefficient, such as using two sets of experts (one testifying, one not) and refraining from creating draft reports or other written work product.

In an attempt to eliminate these inefficiencies, three important changes are being made to the rules governing discovery from testifying expert witnesses. It is important to note that, under the Federal Rules of Civil Procedure, there are two kinds of testifying expert witnesses: witnesses who are "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 witnesses who are not retained for the purpose of providing testimony but are otherwise qualified to offer expert opinions, such as treating physicians. The former are required to provide a written report, while under the new rules (as explained below) counsel must provide a more limited statement regarding the subject of the latter's testimony.

First, communications between counsel and expert witnesses who are required to provide a report will be generally protected. The new FRCP Rule 26(b)(4)(C) expressly provides work product protection<sup>1</sup> to

<sup>1</sup> Under FRCP Rule 26(b)(3), work production protection applies to documents and tangible things that are prepared in anticipation of litigation or for trial. The protection may be overcome if a party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. However, a court must protect opinion work product, the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

communications between an attorney and an expert witness required to provide a report, with three exceptions:

- Communications relating to the expert's compensation are not protected.
- Communications identifying facts or data considered by the expert are not protected. However, other conversations about the potential relevance of those facts are protected.
- Communications identifying assumptions provided by an attorney are not protected if the expert actually relied upon them. Communications about general hypotheticals or other assumptions that the expert does not rely upon are protected.

Note that this protection applies to communications regardless of form. The protection is broader than that provided to work product under FRCP Rule 26(b)(3), which applies only to documents and tangible things. In addition, under the new FRCP Rule 26(a)(2)(B) a written report must contain facts or data considered by the expert, but not "other information." This narrower formulation excludes theories or mental impressions of counsel.

Second, for experts who are not required to provide a written report, under the new FRCP Rule 26(a)(2)(C) counsel must state the subject matter and summarize the facts and opinions to which an expert is expected to testify. This revision is designed to prevent a party being ambushed by an unknown expert opinion, as well as reduce the likelihood that courts will require a full written report from such experts.

Third, under the new FRCP Rule 26(b)(4)(B), the work product protection applies to drafts of written reports as well as drafts of the disclosure for other expert witnesses required under FRCP Rule 26(a)(2)(C).

These changes should facilitate the free flow of information between counsel and experts, and relieve counsel from the dilemma of waiving attorney-client privilege and work product protection by disclosure to experts of information or documentation falling in these categories.

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