

New Rules Dramatically Affect Health Care Expert Witness Disclosures

By Randall L. Nash and Jason R. Scoby

Many health care professionals are occasionally asked to serve as expert witnesses in civil litigation. For example, a physician may be asked to testify about the probable future consequences of a certain injury or the standard of care of physicians, a nurse may be asked to testify about standard procedures related to patient care, and a hospital administrator may be asked to testify about the economic factors behind providing certain health care services.

The current Rule 26 of the Federal Rules of Civil Procedure requires an expert, such as a health care professional, to prepare a written report stating the expert's opinion and to disclose that report to the opposing party in the litigation. Among other things, this report must contain the complete statement of the opinions that the expert will express, the basis and reasons for those opinions, and all data and information the expert considered in forming those opinions. Consequently, the expert's entire file with regard to the matter, including drafts of the expert's report and any attorney-expert communications, is available for the opposing counsel to review in discovery.

Often, the opposing counsel will review the expert's file in an attempt to show the attorney's influence over the expert's opinion. For example, if the expert's initial draft contained a statement that was absent in subsequently revised drafts, opposing counsel would often use the revision as ammunition to infer that the attorney instructed the expert to make the change so that the report was more favorable. Not surprisingly, attorneys and experts often take intricate steps to avoid creating this discoverable information; likewise, attorneys take intricate steps to attempt to discover the opposing side's drafts and communications. These steps

may significantly impact the litigation process and the cost of litigation. As a result, a proposal currently exists to significantly amend the disclosure and discovery requirements found in Rule 26. If the amendment is approved as expected, it will take effect on December 1, 2010.

Current Law

As an introduction to the current law, it is helpful to understand that the work-product doctrine typically protects from discovery those materials that are prepared by an attorney while working on a case that expresses the attorney's thoughts. Since the opposing counsel cannot uncover these materials in discovery, the work-product doctrine essentially encourages attorneys to prepare a case in the best way possible. If the product of the attorney's work is disclosed to third parties, then the non-disclosure privilege is, to that extent, waived. As a result, current Rule 26 does not apply the work-product doctrine to protect expert's draft reports or attorney-expert communications even though they often contain the attorney's thoughts and impressions of the case.

The current version of Rule 26 provides that a party must disclose the identity of any expert witness it may use at trial to present evidence. This expert must prepare and provide a written report containing, in relevant part, the following items:

- (i) a complete statement of all 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.¹

Courts have interpreted this rule to mean that "disclosure of information transmitted to or from the expert, including draft reports, is discoverable if the expert considered the information."²

Another court stated, "[a] testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination."³ Courts include attorney-expert communications in the category of "information considered by the witness" as well. "Rule 26, requiring disclosure of material 'considered,' allows discovery of all communications between counsel and a retained testifying expert, even if those communications contain the attorneys' mental impressions or trial strategy or [are] otherwise protected by the work product privilege."⁴ Similarly, "[w]hen an attorney furnishes work product—either factual or containing the attorney's impressions—to [a testifying] expert witness . . . an opposing party is entitled to discovery of such a communication."⁵

In a report to the Judicial Conference, the Committee on Rules of Practice and Procedure recommended that Rule 26 be amended and stated that the rule has caused "significant practical problems."⁶ The Committee described the problem as follows:

[L]awyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts—one for consultation, to do the work and develop the opinions, and one to provide the testimony—to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes,



make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report.

The Committee explained the consequences of these complicated avoidance tactics, lamenting that

[t]hese steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.⁷

The Committee related that lawyers faced with these avoidance techniques often dedicate a significant portion of time during depositions of the opponent's expert witness to reveal any information that suggests that the expert's opinions were shaped by the lawyer hiring the expert witness. Despite all of this effort, the Committee noted the testimony and statements provided by many experienced plaintiff and defense lawyers, which "showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning." The Committee agreed with the testimony and statements, asserting

[q]uestions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.⁸

Recognizing these issues, many have sought a change to the discovery rules. In fact, according to the Committee, the American Bar Association recommended that state and federal procedural rules be amended to prohibit the discovery of an expert's draft reports and to limit the discovery of attorney-expert

This subtle change to the existing rule is designed to prevent courts from interpreting the rule to require the disclosure of expert's draft reports and attorney-expert communications, as many courts previously did under the existing rule.

communications while still ensuring that an attorney could discover the expert's opinions and the facts and data used in formulating and supporting them. The State of New Jersey actually enacted such a rule, and, overwhelmingly, New Jersey attorneys strongly supported the amended rule, noting that discovery had improved under the amended rule with no negative effects. All of these circumstances prompted the proposed amendment to the Federal Rules.

Proposed Amendment

The proposed amendments to Rule 26 provide work-product protection to an

expert's draft reports, and, with three exceptions, attorney-expert communications. In particular, the proposed amendment to Rule 26(a)(2)(B)(ii), referenced above, provides that the expert's written report must contain "the facts or data considered by the witness in forming" the opinions.⁹ In contrast, the existing rule says "data or other information considered by the witness in forming" the opinions. This subtle change—adding the word "facts" and eliminating the phrase "other information"—is designed to prevent courts from interpreting the rule to require the disclosure of expert's draft reports and attorney-expert communications, as many courts previously did under the existing rule. In case this subtle change was not enough, the following proposed amendments to Rule 26(b)(4) unequivocally provide protection for expert draft reports and attorney-expert communications:

(B) *Trial-Preparation 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 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 upon in forming the opinions to be expressed.¹⁰

The newly amended rules will have a significant impact on civil litigation. Attorneys will no longer have to caution experts about preparing multiple drafts when writing their reports. Similarly, an attorney will be able to communicate freely with the expert about the attorney's thoughts and opinions related to the case without fear of those communications being discovered by opposing counsel. As a result, attorneys will not implement elaborate schemes to hire multiple consulting experts nor will they refuse to explain their views of the case to their experts. Of equal significance, opposing counsel will more likely focus on challenging the merits of the expert's opinions instead of probing the attorney's influence on the expert's opinions. The new rules will allow experts to prepare their reports using the method they are accustomed to without needing to engage in intricate maneuvering to avoid the discovery of any drafts. Additionally, experts will be able to communicate freely with the attorney about all subjects not included in the three exceptions

above. These amendments are likely to reduce the cost of litigation for all parties involved.

As a note of caution, it must be pointed out that the proposed amendments will probably spur new disputes between opposing attorneys in the civil litigation process in an effort to discredit expert opinions. Attorneys will likely target the new words and phrases in the proposed exceptions, perhaps by focusing on the scope of the phrase "facts or data" or the term "assumptions." So, while attorneys will no longer incur costs by hiring consulting and testifying experts, new issues may arise in discovery related to expert witness testimony as a result of these amendments.

The Judicial Conference, on the advice of the Committee, approved these amendments on September 15, 2009.¹¹ The Judicial Conference then provided the amendments to the Supreme Court for its approval, and the Supreme Court approved them on April 28, 2010. The Court forwarded the amendments to Congress for its approval. If all goes as anticipated, the new rules will go into effect on December 1, 2010.

Randall L. Nash is a shareholder, and Jason R. Scoby is an associate, at the Milwaukee, Wisconsin, office of O'Neil, Cannon, Hollman, DeJong & Laing S.C.

Endnotes

1. Fed. R. Civ. P. 26(a)(2)(B).
2. *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1112 (D. Or. 2006).
3. *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005).
4. *TV-3, Inc. v. Royal Ins. Co. of Am.*, 193 F.R.D. 490, 491 (S.D. Miss. 2000).
5. *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997).
6. Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2009).
7. *Id.* at 11.
8. *Id.* at 12.
9. *Id.* at Rules App. C-18.
10. *Id.* at C-4.
11. See www.uscourts.gov/rules/index2.html#judconf0909.