

## A NEW AGE OF DISCOVERY

New rules to light your way in evidentiary exploration.

[ BY JASON A. LEVINE ]

**THE FEDERAL RULES OF CIVIL PROCEDURE** have long exercised a profound influence in litigation document discovery. Among the most crucial of these are the specific rules governing expert discovery, and they recently underwent a dramatic change, one that alters how corporate litigation should be conducted. At the most basic level, dealing with experts has become easier and less expensive because many of their communications with counsel and their draft reports are now protected from disclosure under the “work product” doctrine. But prudent counsel must also be aware of several hidden dangers of the new rules, and should have a strategy for avoiding—or exploiting—them.

Before December 1, 2010, drafts of expert reports and all communications between counsel and experts that pertained to the subject matter of litigation were fully discoverable in nearly every jurisdiction. Lawyers therefore often spent substantial time (and client money) on schemes to avoid creating drafts of expert reports and to minimize communication with testifying experts. In addition, witnesses who were not specifically retained to provide expert testimony, but whose fact testimony at trial would happen to involve their expertise—accountants, for example—were not required to disclose their views in writing. Lawyers therefore could attempt to shoehorn expert testimony into the nonretained expert witness category, thwarting advance disclosure to the opposing party.

The need for these tactics was largely eliminated by four amendments to Federal Rule of Civil Procedure 26 that went into effect in December.

■ First, the requirement of rule 26(a)(2)(B) that an expert report must contain “the data or other information considered by the witnesses” was changed to require “the facts or data considered by the witnesses.” This change is intended to exclude from disclosure the theories and mental impressions of counsel—“other information”—and instead involve only factual material.

■ Second, rule 26(a)(2)(C) was amended to require that fact witnesses expected to provide expert testimony, but not retained as experts, must now disclose in writing the subject matter of their expert testimony and a summary of the facts and opinions about which they will testify. This disclosure is intended to be much less extensive than the written report required from retained experts. Still, it is more than nothing, which was the degree of written disclosure generally provided for nonretained or mixed expert/fact witnesses prior to the rule change.

■ Third, rule 26(b)(4)(B) was revised to provide “work product” protection against discovery about draft expert reports or disclosures, regardless of whether or not the witness is a retained expert. In the normal course, this means that it will be very difficult—but not impossible—to obtain copies of draft reports in discovery.

■ Finally, rule 26(b)(4)(C) now also extends “workproduct” protection to communications

between counsel and retained expert witnesses, except as to communications about compensation, “facts or data” considered by the expert, and “assumptions” considered by the expert. This protection is severable. So even if excepted topics are included in a communication with counsel, the protection will—at least in theory—still apply to the other portions of the communication.

At press time no published federal court decisions had provided substantive interpretations of the amended expert discovery rules. Given this absence of court guidance, careful strategic deployment of the amended rules is especially important as expert discovery unfolds in a case.

The amendments to rule 26 present some practical benefits for companies engaged in federal court litigation. Most importantly, discovery costs should decrease. Outside counsel previously were forced to “game” the disclosure requirements of rule 26 by hiring consulting experts with whom they could confer freely, in addition to testifying experts. This additional layer of expense should not be necessary now that communications with testifying experts and their draft reports are protected as “work product.”

Similarly, because counsel can now work more openly with retained experts, the preparation of reports should be more efficient and less costly. In addition, the depositions of expert witnesses should be streamlined because previous lines of questioning—about draft reports and communications with counsel—are now

largely out of bounds. Likewise, costly disputes over the production of marginally relevant documents bearing on expert opinions should diminish, also saving companies money and permitting the parties to focus their attention on the merits of the case.

Another related benefit to corporate litigants flows from the new requirement for short written disclosures—but not full-blown reports—about the subject matter of

your incurring an involuntary waiver of this protection. Again, there is a flip side: This presents an opportunity for you to discover an adversary's expert materials, or to "break" the privilege log altogether, if it does not appropriately include and describe these documents.

■ Second, although "work product" protection provides some comfort, it is not absolute. In rare circumstances, a party can defeat it by showing a "substantial need"

■ Finally, we are still in the infancy of the amended rules; they will take on a life of their own as courts interpret and apply them to cases. It is possible, for example, that courts will narrowly interpret the severability of the exceptions to "work product" protection for retained experts, with the result that seemingly protected material will be deemed discoverable in some cases. Likewise, courts may vary in their expectations regarding the degree of detail presented in privilege

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expert testimony to be offered by nonretained experts. If an in-house employee is so designated, his or her communications with counsel about the written disclosure will be shielded from discovery as "work product." This should undermine one argument previously available to opposing counsel: that all privilege objections were waived upon designating an in-house employee as an expert witness. Accordingly, the use of in-house personnel as nonretained expert witnesses is likely to grow, further decreasing litigation costs.

**LIKE SO MANY WEAPONS**, this one cuts both ways: The new expert discovery rules also present snares for the unwary. Corporate counsel need to be alert to these dangers, which also—a silver lining to this cloud—present equivalent opportunities for gaining the advantage over unprepared or careless adversaries.

■ First, the extension of "work product" protection to draft expert reports and written communications with experts means that these materials now must be included on the privilege log. Although this is unlikely to be burdensome, it is an important step that corporate counsel overlook at their peril. Failure to provide an adequate log of these items based on their new "work product" status could result in

for the discovery and an inability to obtain the substantial equivalent without "undue hardship." This standard for piercing the shield of "work product" protection should be uppermost in corporate counsel's minds.

■ Third, as counsel, you and your experts must bear in mind the three exceptions to "work product" protection in the new rules to ensure that communications do not mix covered and excluded content. For example, counsel should be careful to keep written communications conveying facts and assumptions (excluded by the rule) separate from conversations about or interpreting those assumptions (covered).

Although the "work product" protection is severable, inextricably mixing topics in a single communication could render it discoverable in toto. For this reason, the safest course is for counsel and experts to make clear that they are merely furnishing—not analyzing or commenting on—assumptions. The same cautions apply equally to expert witnesses, who should be warned against loose communications at the outset of their involvement in a case. Viewed from the offensive perspective, careful scrutiny of the adversary's privilege log, and precise questioning of the expert at his or her deposition, could eliminate "work product" protection for documents with mixed content.

logs. In addition, states may adopt similar revisions to their local rules of practice as well, thus affecting litigation in state courts. Accordingly, counsel must be alert to the developing jurisprudence surrounding the new rule 26.

There is much to cheer, and some to fear, in the amended federal expert discovery rules. Ingenious lawyers may dream up schemes to force disclosure of seemingly protected materials, and courts may surprise us with their interpretations of the rules. For these reasons, you cannot be complacent about expert discovery, but must continue to be both strategic and vigilant in your strategies.

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