

LYNCH & STERN LLP



The 2010 Amendments to the Expert Discovery Rules

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I. Introduction

Effective December 1, 2010, Federal Rule of Civil Procedure 26 was amended with respect to expert discovery. Three main issues were addressed:

1. Rule 26(a)(2)(B)(ii) was revised to narrow part of the scope of an expert's written report.
2. A new subparagraph was inserted at Rule 26(a)(2)(C) to require certain expert disclosures where no written report is mandated by Rule 26(a)(2)(B).
3. New subparagraphs were inserted at Rule 26(b)(4)(B) and (C) to expressly protect as work product draft reports and certain communications between the expert and counsel, respectively.

II. Scope of Written Report – Rule 26(a)(2)(B)(ii)

A. Revision to Rule

Rule 26(a)(2)(B)(ii) describes one part of the information needed to be disclosed in a testifying expert's written report. The amendments changed the rule from the broader "data or other information considered by the witness" into a more narrow "facts or data considered by the witness". The Advisory Committee Notes clarify that the intent of this change is to eliminate this subsection as a basis for requiring disclosure of all attorney-expert communications and draft reports, which the new rules are curtailing (see below). While it narrows disclosure in one sense, "limit[ing] disclosure to material of a factual nature," the Advisory Committee also intended to be "interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."

Magistrate Judge Morton Denlow has explained the history of this rule:

In 1993, Rule 26(a)(2)(B) was amended to require a testifying expert to produce a written report setting forth a complete statement of the expert's opinions, as well as "the data and other information considered by the witness in forming the opinions." Many courts interpreted the rule as establishing a "bright-line" approach that required disclosure of all attorney-expert communications, including "otherwise protected work product and

attorney-client communications” if the expert “read or reviewed the privileged materials before or in connection with formulating his or her opinion.” In re Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. 532, 537 (N.D. Ohio 2008) (citing W. Resources, Inc. v. Union Pac. R.R. Co., No. 00–2043–CM, 2002 WL 181494, at *9 (D.Kan. Jan. 31, 2002)); see also In re Pioneer Hi–Bred Int’l, Inc., 238 F.3d 1370, 1375 (Fed.Cir. 2001) (“[F]undamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony,” regardless of whether it is work product or not.) Such broad expert discovery carried with it several unfortunate consequences. It increased discovery costs and impeded effective communication between attorneys and their experts, sometimes even inducing parties to retain two separate sets of experts — one for consultation and another to testify. Fed.R.Civ.P. 26 advisory committee’s note (2010 Amendments).

In December 2010, Rule 26 was amended to address the undesirable effects of routine discovery into attorney-expert communications. Id. First, Rule 26(a)(2)(B)(ii) was amended to require disclosure of “facts or data,” rather than “data or other information,” considered by an expert witness in forming the opinions to be offered. The advisory committee intended this change to “limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” Id. That said, the committee urged that the amendment be interpreted broadly to cover “any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.” Id.

Sara Lee Corp. v. Kraft Foods Inc., 273 F.R.D. 416, 419 (N.D. Ill. 2011). See also National Western Life Ins. Co. v. Western Nat. Life Ins. Co., Cause No. A-09-CA-711 LY, 2011 WL 840976 *2 (W.D. Tex. Mar. 3, 2011) (discussing history).

B. Cases

1. D.G. v. Henry, No. 08–CV–74–GKF–FHM, 2011 WL 1344200 *1 (N.D. Okla. Apr. 8, 2011) (“notations or highlights on the case files do not constitute facts or data and do not need to be provided under Fed.R.Civ.P. 26(a)(2)(B)(ii)”)
2. Sara Lee Corp. v. Kraft Foods Inc., 273 F.R.D. 416, 419 (N.D. Ill. 2011) (applying new rule in context of expert who is simultaneously a testifying expert for one claim and a non-testifying consultant in another)

3. McCumons v. Marougi, No. 08–11164–BC, 2011 WL 1330807 (E.D. Mich. Apr. 7, 2011) (compelling production of raw data)
4. National Western Life Ins. Co. v. Western Nat. Life Ins. Co., Cause No. A-09-CA-711 LY, 2011 WL 840976 *2 (W.D. Tex. Mar. 3, 2011) (denying motion to compel production of more than “facts or data” under new scope of rule)
5. Graco, Inc. v. PMC Global, Inc., Civil Action No. 08-1304 (FLW), 2011 WL 666056 (D.N.J. Feb. 14, 2011) (differentiating scope of reports required by retained experts and by non-retained employee experts)
6. Chevron Corp. v. Shefftz, 754 F.Supp.2d 254, 264 n.71 (D. Mass. 2010) :

The majority interpretation of the old Rule 26 applied a bright-line rule in which matters considered by a testifying expert in formulating his or her opinion, including attorney work product, were automatically discoverable. S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 257 F.R.D. 607, 612 (E.D. Cal. 2009) (collecting cases on majority interpretation). In contrast, a minority interpretation held that the disclosure of core work product to a testifying expert did not abrogate the protection accorded to such information. Id. at 613. The majority interpretation created “undesirable effects” in old Rule 26. Advisory Committee Notes to Fed.R.Civ.P. 26. The First Circuit never considered the issue and courts in the Circuit were split on the matter. Galvin v. Pepe, 09–cv–104–PB, 2010 WL 3092640, at *4–5, 2010 U.S. Dist. LEXIS 92442, at *11–12 (D.N.H. Aug. 5, 2010).

III. Scope of Disclosure of Non-Retained Experts – Rule 26(a)(2)(C)

A. Revision to Rule

Rule (a)(2)(C) was inserted to mandate a summary form of disclosure for non-retained, testifying witnesses. The Advisory Committee Notes explain that this category often involves physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. They make clear that the purpose was to ensure that this category of experts not be required to provide the full Rule 26(a)(2)(B) report, as courts have sometimes required.

B. Cases

1. Graco, Inc. v. PMC Global, Inc., Civil Action No. 08-1304 (FLW), 2011 WL 666056 (D.N.J. Feb. 14, 2011) (employee opinion witnesses need only provide the disclosures under Rule 26(a)(2)(C) because they are not retained experts)

IV. Expert Work Product Protections for Draft Disclosures – Rule 26(b)(4)(B)

A. Revision to Rule

Rule 26(b)(4)(B) was inserted to provide work product protection for drafts of testifying expert's disclosures, whether long-form reports for retained experts or summary reports for non-retained experts. The rule states simply: "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."

B. Cases

1. D.G. v. Henry, No. 08–CV–74–GKF–FHM, 2011 WL 1344200 *1 (N.D. Okla. Apr. 8, 2011) (case summaries used by expert were factual ingredients required to be produced, not "drafts" under Rule 26(b)(4)(B))
2. Dongguk University v. Yale University, No. 3:08–CV–00441 (TLM), 2011 WL 1935865 *1 (D.Conn.) ("an expert's notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party's attorney and the expert witness")
3. Graco, Inc. v. PMC Global, Inc., Civil Action No. 08-1304 (FLW), 2011 WL 666056 (D.N.J. Feb. 14, 2011) (defendant not entitled to production of any drafts)
4. E.N. v. Susquehanna Tp. School Dist., Civ. No. 1:09–CV–1727, 2011 WL 3163186 (M.D. Pa.) (rule against production of "draft" reports had no applicability to psychiatric evaluation report that doctor provided to counsel following his Fed. R. Civ. P. 35(a) examination because doctor is not a witness who will be called to testify as an expert)

V. Expert Work Product Protections for Communications with Counsel – Rule 26(b)(4)(C)

A. Revision to Rule

Rule 26(b)(4)(C) was inserted to provide work product protection for communications between a party's attorney and testifying retained expert witnesses. The rule carves out three categories of communications that must nevertheless be produced: (1) communications that relate to compensation for the expert's study or testimony; (2) communications that identify facts or data that the party's attorney provided and the expert considered; and (3) communications that identify assumptions that the party's attorney provided and that the expert relied upon in forming opinions.

B. Cases

1. Estate of William I. Allison ex rel. Allison v. Vince Scoggins, P.A., No. 1:09cv468, 2011 WL 650383 (W.D.N.C.) (denying motion to compel communications except those falling within exceptions under Rule 26(b)(4)(C)(i-iii))
2. Daugherty v. American Exp. Co., No. 3:08–CV–48, 2011 WL 1106744 (W.D. Ky.) (denying motion to compel communications except those falling within exceptions under Rule 26(b)(4)(C)(i-iii))
3. Dongguk University v. Yale University, No. 3:08–CV–00441 (TLM), 2011 WL 1935865 *1 (D.Conn.) (requiring production of certain documents because they fell within exceptions under Rule 26(b)(4)(C)(ii-iii), but not others)
4. Greenwood 950, LLC v. Chesapeake Louisiana, LP, Civil Action No. 10–cv–0419, 2011 WL 1234735 (W.D. La.) (overruling objection against production of communications because they did not warrant protections of 26(b)(4)(C))

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE***

**Rule 26. Duty to Disclose; General Provisions Governing
Discovery****

(a) Required Disclosures.

* * * * *

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

* New material is underlined; matter to be omitted is lined through.

** In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

(B) Witnesses Who Must Provide a Written

Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one 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. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data ~~or other information~~ considered by the witness in forming them;



- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, ~~this the~~ Rule 26(a)(2)(A) disclosure must state:



- (i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
 - (ii)** a summary of the facts and opinions to which the witness is expected to testify.
- (D)** *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
- (i)** at least 90 days before the date set for trial or for the case to be ready for trial; or
 - (ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another



party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety,



indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the 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.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*



(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection 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 ~~of~~ the draft is recorded.

(C) Trial-Preparation Protection 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.

(DB) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may



not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

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- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (~~DB~~); and
- (ii) for discovery under (~~DB~~), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Committee Note

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure,



including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or



data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).



Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation,



or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given



communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.



Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert’s testimony. A party’s failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert’s own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read “regardless of the form in which the draft is recorded.” Small changes were also made to the Committee Note to recognize this change to rule

language and to address specific issues raised during the public comment period.



To: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure
From: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure
Date: May 8, 2009 (Revised June 15, 2009)
Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009.

* * * * *

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee's November meeting began. The remaining hearings were held on January 14, 2009, following the Standing Committee meeting in San Antonio, and on February 2 in San Francisco.

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007.¹

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¹Following the Standing Committee's meeting on June 1-2, 2009, the Rules Committees approved by email ballot conforming, technical amendments to Illustrative Civil Form 52.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

The Committee recommends approval for adoption of the provisions for disclosure and discovery of expert trial witness testimony that were published last August. Small drafting changes are proposed, but the purpose and content carry on.

These proposals divide into two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

These two parts are described separately. Each applies only to experts who are expected to testify as trial witnesses. No change is made with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation.

New Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

The 1993 overhaul of expert witness discovery distinguished between two categories of trial-witness experts. Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires that the witness must prepare and sign an extensive written report describing the expected opinions and the basis for them, but only "if the witness is one 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." It was hoped that the report might obviate the need to depose the expert, and in any event would improve conduct of the deposition. To protect these advantages, Rule 26(b)(4)(A) provides that an expert required to provide the report can be deposed "only after the report is provided."

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance. Common examples of experts in this category include treating physicians and government accident investigators. They

are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

Proposed Rule 26(a)(2)(C) balances these competing concerns by requiring that if the expert witness is not required to provide a written report under (a)(2)(B), the (a)(2)(A) disclosure must state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and “a summary of the facts and opinions to which the witness is expected to testify.” It is intended that the summary of facts include only the facts that support the opinions; if the witness is expected to testify as a “hybrid” witness to other facts, those facts need not be summarized. The sufficiency of this summary to prepare for deposition and trial has been accepted by practicing lawyers throughout the process of developing the proposal.

As noted below, drafts of the Rule 26(a)(2)(C) disclosure are protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Rule 26(b)(4): Work-Product Protects Drafts and Communications

The Rule 26(a)(2)(B) expert witness report is to include “(ii) the data or other information considered by the witness in forming” the opinions to be expressed. The 1993 Committee Note notes this requirement and continues: “Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.” Whatever may have been intended, this passage has influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the (a)(2)(B) report.

Discovery of attorney-expert communications and of draft disclosure reports can be defended by arguing that judge or jury need to know the extent to which the expert's opinions have been shaped to accommodate the lawyer's influence. This position has been advanced by a few practicing lawyers and by many academics during the development of the present proposal to curtail such discovery.

The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

The losses incurred by present discovery practices are not limited to the waste of futile inquiry. The fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion. This disadvantage may be offset, when the party can afford it, by retaining consulting experts who, because they will not be offered as trial witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to "information" that has supported broad interpretation of the 1993 Committee Note: the expert's report is to include "the facts or data ~~or other information~~ considered by the witness" in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices. The American Bar Association Litigation Section took an active role in proposing these protections, drawing in part from the success of similar protections adopted in New Jersey. The published proposals drew support from a wide array of organized bar groups, including The American Bar Association, the Council of the ABA Litigation Section, The American Association for Justice, The American College of Trial Lawyers Federal Rules Committee, the American Institute of Certified Public Accountants, the Association of the Federal Bar of New Jersey Rules Committee, the Defense Research Institute, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges' Association, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, the Lawyers for Civil Justice, the State Bar of Michigan U.S. Courts Committee, and the United States Department of Justice.

Support for these proposals has been so broad and deep that discussion can focus on just two proposed changes, one made and one not made. Otherwise it suffices to recall the three categories of attorney-expert communications excepted from the work-product protection: those that

- (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.

The change made adds a few words to the published text of Rule 26(b)(4)(B):

(B) * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which ~~of~~ the draft is recorded.

The published Committee Note elaborated the "regardless of form" language by stating that protection extends to a draft "whether oral, written, electronic, or otherwise." Comments and testimony expressed uncertainty as to the meaning of an "oral draft." The comments and testimony also reflected the drafting dilemma that has confronted this provision from the beginning. Rule 26(b)(3) by itself extends work-product protection only to "documents and tangible things."



Information that does not qualify as a document or tangible thing is remitted to the common-law work-product protection stemming from *Hickman v. Taylor*. As amended to reflect discovery of electronically stored information, moreover, Rule 34(a)(1) may be ambiguous on the question whether electronically stored information qualifies as a “document” in a rule — such as Rule 26(b)(3) — that does not also refer to electronically stored information. Responding to these concerns, the Discovery Subcommittee recommended that the “regardless of form” language be deleted, substituting “protect written or electronic drafts” of the report or disclosure. Lengthy discussion by the Committee, however, concluded that it is better to retain the open-ended “regardless of form” formula, but also to emphasize the requirement that the draft be “recorded.” The Committee Note has been changed accordingly.

The change not made would have expanded the range of experts included in the protection for communications with the attorney. The invitation for comment pointed out that proposed Rule 26(b)(4)(C) protects communications only when the expert is required to provide a disclosure report under Rule 26(a)(2)(B). Communications with an expert who is not required to give a report fall outside this protection. (The Committee Note observes that Rule 26(b)(4)(C) “does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.”) The invitation asked whether the protection should be extended further. Responding to this invitation, several comments suggested that the rule text either should protect attorney communications with any expert witness disclosed under Rule 26(a)(2)(A), or — and this was the dominant mode — should protect attorney communications with an expert who is an employee of a party whose duties do not regularly involve giving expert testimony. These comments argued that communications with these employee experts involve the same problems as communications with other experts.

Both the Subcommittee and the Committee concluded that the time has not come to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some “no-report” experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be “fact” witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert’s fact testimony may have been influenced.

Three aspects of the Committee Note deserve attention. An explicit but carefully limited sentence has been added to state that these discovery changes “do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* * * *.” The next-to-last



paragraph, which expressed an expectation that “the same limitations will ordinarily be honored at trial,” has been deleted as the result of discussions in the Advisory Committee, in this Committee, and with the Evidence Rules Committee. And the Note has been significantly compressed without sacrificing its utility in directing future application of the new rules.

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Avidan J. Stern

Avidan J. Stern is co-founder of Lynch & Stern LLP, a boutique litigation firm based in Chicago, Illinois. Prior to opening that firm in early 2008, Mr. Stern practiced in the Chicago office of Jenner & Block LLP for 18 years. Mr. Stern has represented numerous clients in federal and state trial and appellate courts in a wide variety of commercial litigation, including securities matters, contract disputes, real estate development and mortgage matters, class actions, corporate governance disputes, derivative actions and consumer claims.

In securities and shareholder class action litigation, Mr. Stern has represented broker-dealers, securities issuers, investment companies, investment advisors, corporate directors/officers and special litigation committees. Representative cases include defending a securities broker in Indiana state court and administrative proceedings regarding services provided to a large institutional client; representing the special litigation committee of a Fortune 500 media conglomerate in a shareholder class action brought in Illinois state court, successfully moving to dismiss; defending the officers and directors of a Midwestern retailer in federal court in Michigan against a shareholder class action, settling favorably through a third-party mediator; and working on the trial of a shareholder class action and tender offer contest in Delaware Chancery Court on behalf of the general partner of a real estate limited partnership.

In addition, Mr. Stern has represented a variety of clients in other types of commercial litigation. Among other cases, he recently tried a quiet title action on behalf of a developer in Chicago's Near North Side against a neighbor using part of the client's building as a party wall, obtaining a complete victory. Mr. Stern currently represents an international hotel conglomerate prosecuting antitrust claims against manufacturers of polyurethane foam. He also represents a large commercial real estate developer in ongoing disputes with a lender regarding a mall in Chicago's Loop, including a contested receivership motion and interlocutory appeal. Other representative matters include participating in a trial over a prepayment penalty in a large commercial mortgage, in which the court ruled that the client was not required to pay the demanded penalty of over \$50 million; prosecuting claims by an electric utility against three former executives in Ohio state court over alleged breaches of fiduciary and contractual duties, settling during trial; representing a major distributor of electronic news and market pricing information regarding a contract dispute involving assets purchased in a bankruptcy sale, overturning a preliminary injunction on interlocutory appeal and settling the parties' respective remaining claims through mediation; and defending a landlord against a multi-million dollar claim of wrongful refusal to sublease, obtaining full dismissal on summary judgment.

Mr. Stern has written and lectured on civil procedure matters for many years, and also maintains a blog concerning interesting civil procedure and electronic discovery developments at www.civprolaw.com. He received his bachelor of arts degree *magna cum laude* from the University of Pennsylvania in 1986 and his J.D. *with honors* from The University of Chicago Law School in 1989.

