New Federal Rule on Experts Takes Effect Dec. 1

By Robert Ambrogi

A major revision to Rule 26 of the Federal Rules of Civil Procedure takes effect Dec. 1, bringing about a significant change in the long-standing procedure governing expert witness reports.

No longer will Rule 26 require full discovery of draft expert reports and broad disclosure of any communications between an expert and trial counsel, as has been the case ever since the rule's revision in 1993.

Instead, those communications will now come under the protection of the work-product doctrine. The new rule will prohibit discovery of draft expert reports and limit discovery of attorney-expert communications. Still allowed will be full discovery of the expert's opinions and of the facts or data used to support them.

The rule was approved by the U.S. Judicial Conference in September 2009. The Supreme Court approved the change to the rule in April of 2010 and submitted it to Congress. By law, if Congress takes no action to reject, modify or defer the proposed rule, it takes effect on Dec. 1.

John K. Rabiej, attorney advisor on court rules to the Judicial Conference, confirmed that Congress has taken no action and that the rule will take effect on Dec. 1.

Drafts Protected as Work Product

The rule expressly provides that the work-product protection applies to "protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded."

The rule also applies work-product protection to communications between experts and the counsel who retain them. The rule maintains three exceptions to this protection:

- Communications pertaining to the expert's compensation
- Facts or data that the attorney provided and the expert considered in forming opinions
- Assumptions that the attorney provided and that the expert relied on

In another change, the rule alters the procedure for witnesses who will provide expert testimony but who were not specifically retained to provide expert testimony. Treating physicians and government accident investigators are examples of this category of expert.

Under the rule, if the expert is not required to submit a written report, then the lawyer who will use the testimony must submit a disclosure summarizing the facts and opinions to which the expert is expected to testify.

Problems with Prior Rule

The Judicial Conference proposed the new rule in order to address problems created by the 1993 revisions to Rule 26. Courts interpreted the rule to allow discovery of all communications between counsel and expert witnesses and all draft expert reports. That resulted in "significant practical problems," the conference said in its report to the Supreme Court.

"Lawyers 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 report said.

"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."

Broad Support from the Bar

The change to Rule 26 received broad support from trial lawyers and bar organizations, perceiving it as a long-overdue step towards reducing the cost and contentiousness of litigation. At hearings conducted by the Advisory Committee on Civil Rules on the changes to Rule 26 and Rule 56, some 90 witnesses presented testimony.

Organizations that endorsed the revised rule included the American Bar Association, American College of Trial Lawyers, American Association for Justice, Defense Research Institute, Federal Magistrate Judges' Association, Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, International Association of Defense Counsel and the U.S. Department of Justice.

In testimony on behalf of the American Association for Justice, Stephen B. Pershing, then a lawyer with the Center for Constitutional Litigation in Washington, D.C., said that plaintiffs and defense lawyers agree on the need to apply work-product protection to experts' draft reports.

"Practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product, or counsel's manipulation of the expert's output, that takes up time better spent focusing on the expert's conclusions themselves," said Pershing, who is now director of the UCDC Law Program in Washington, an externship program for law students from the University of California.

Amending the rule would enable litigants to avoid the kind of "artificial behavior" that is now all-too common, he suggested. No longer would lawyers and experts feel compelled to avoid written communications and no longer would well-funded litigants hire two sets of experts, one to consult in case development and the other to testify.

Another who testified in favor of the rule change was Wayne B. Mason, former board chair of the Federation of Defense & Corporate Counsel and a partner in the Dallas office of Sedgwick, Detert, Moran & Arnold.

"Attorney discussions with experts are too often forced to be verbal in an effort to discourage discovery of draft reports," he said. "The proposed rules supply a well-reasoned approach that strengthens the veracity and straightforwardness of the discovery process while considering the burden and expense."

Mason praised the rule change for extending the work-product protection to employee-experts who are not required to prepare a written report. "Facilitating open communication between attorneys and in-house witnesses is an important practical consideration for the committee."

Rule Will Reduce Litigation Costs

Lawyers who supported the rule predicted that it will reduce the cost of litigation.

"The proposed amendments provide protection to attorney-expert communications that allows the attorney and the expert to communicate freely with each other without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report," said John H. Martin, a past-president of the Defense Research Institute and a partner with Thompson & Knight in Dallas.

"This allows the attorney to learn about the scientific or technical aspects of the case from the expert so that legal arguments not based on sound scientific methodology can be discarded, and the issues to be presented at trial can be narrowed," Martin added. "At the same time, it allows the attorney to speak freely with the expert, many of whom are not fulltime professional expert witnesses, and to engage in an ethical preparation of the witness to present opinion testimony."

It appears that the new rule extends the work-product protection to not just the expert, but also to the expert's employees. The official committee note that accompanies the proposed rule explains that its protection is intended to include communications "between the party's attorney and assistants of the expert witnesses."

A number of lawyers had urged the committee to take this position. "An expert engineer at MIT may use grad students in his doctoral program to assist him in his research," explained R. Matthew Cairns, president of the Defense Research Institute and a lawyer in Concord, N.H., "and those students are the ones that counsel may deal with on a day-to-day basis as the expert's team does his testing and analysis prior to him reaching a conclusion and preparing a report."