OBA/CLE and OBA Litigation Section
Litigation and e-Discovery
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# Working with Experts: Are We Off the Record?

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## I. INTRODUCTION

Working with expert witnesses can be one of the most vexing aspects of a litigator's job. The real or perceived need for expert testimony has grown to the point that experts are involved in many if not most civil cases being litigated today. Often, and understandably, experts do not know or fully understand the rules governing disclosure of their opinions, or discovery of their work, such as their collaboration with a party, its counsel, or others. And many experts are better analysts or technicians than they are writers or testifying witnesses. Consequently, in most instances experts have a genuine need counsel's guidance and assistance as they work their way through the process of learning about a case, formulating their opinions, preparing a report, and testifying.

While experts should always be independent both in appearance and in fact, in most instances it is unrealistic to expect their work to be completely independent. For the civil litigation processes to work appropriately and fairly, it is vital that counsel and experts be able to communicate and collaborate openly and honestly, without undue concern over discovery or disclosure that, even in an adversarial system, all too often serves no real purpose in the search for truth. In short, a properly-functioning system requires that counsel and their experts be free, within reasonable limitations consistent with professional ethics and integrity, to communicate with one another "off the record."

For at least two decades, beginning with the 1993 amendments to the federal rules, the prevailing federal and state rules governing expert disclosure, discovery, and related privileges or protections made virtually all communications between a party's counsel and expert witnesses fully discoverable. Though surely well-intended, such rules had several unfortunate effects. For example, rules making practically all such communications "on the record" force attorneys and experts to use inefficient and frequently ineffective means to communicate and collaborate about a matter, and can tempt both to "play the game" in

ways that may push the envelope of honesty and integrity (*e.g.*, in preparation or retention of drafts of an expert's written report).

In connection with the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure, the Advisory Committee cited similar concerns motivating the amendments:

> 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.

The 2010 amendments to federal Rule 26 strike a better, more practical balance between a party's expert witness preparation needs and the opposing party's need for fair discovery, fostering candid communications between counsel and their experts without hampering fair and necessary disclosures and discovery. Regrettably, Oklahoma has not yet followed suit, so in state court litigation attorneys and their experts may still be required to play by the old rules for the foreseeable future.

This paper reviews key changes in federal Rule 26 that took effect in December 2010, along with some of the recent judicial interpretations and applications of the new rules, and offers some suggestions about practicing under the new regime of the federal rules and/or the still-operative and substantially different Oklahoma rules.

## II. FEDERAL RULE 26

### A. Summary of Key Changes – 2010 Amendments

The main changes in the Rule 26 provisions governing disclosure and discovery of expert witness materials were these:

1. A retained expert's report no longer must contain all "data or other information" the expert has considered, but only the "facts or data" the expert has considered in forming the opinions expressed.

2. For non-retained experts who must now be disclosed, but are not required to prepare a report, counsel must provide a written summary of the facts and opinions to be expressed by the witness.

3. Drafts of a retained expert's report, and drafts of the summary of a non-retained expert's opinions, have work product protection from discovery.

4. Communications between a party's counsel and the party's retained experts also have work product protection, with three express exceptions.

## B. Rule 26(a)(2) Disclosure of Expert Testimony.

**(1) Party must disclose all witnesses providing expert testimony.** In addition to the witness disclosures required in a party's Rule 26(a)(1) initial disclosures, Rule 26(a)(2)(A) now requires each party to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." This includes (i) retained experts, and party employees whose duties regularly involve giving expert testimony, both of whom must prepare reports, and (ii) any other witness who is expected to provide expert testimony, such as a treating physician or a party employee who does not regularly give expert testimony.

**(2) Timing and supplementation of disclosures**. Under Rule 26(a)(2)(D), the expert disclosures are to be made at the times and in the sequence the court orders or the parties stipulate. Absent a stipulation or order, they are due 90 days before trial, or if intended solely to rebut another party's expert, 30 days after the other party's disclosure. Rule 26(a)(2)(E) expressly provides that Rule 26(a)(2) expert disclosures must be supplemented "when required under Rule 26(e)."

**(3) Retained expert's report must contain the "facts or data" considered.** Most of the required contents of a retained expert's report have not changed. But Rule 26(a)(2)(B)(ii) now provides that the report must contain the "facts or data considered by the witness" in forming all opinions the expert will express, instead of the "~~data or other information~~" considered (per the 1993 version).[1] This seemingly modest change dovetails with other changes in the expert disclosure/discovery rules and is more important than may first appear, as the Advisory Committee Notes make clear:

> 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.

[1] Throughout this paper, all emphasis in the text of rules and Committee Notes has been added.

Whether and to what extent data provided to an expert is of a "factual nature" or contains "factual ingredients" is left for case-by-case determination. Furthermore, on its face Rule 26(a)(2)(B)(ii) does not extend the disclosure obligation to any factual material the expert may have considered in some context other than forming the opinions the expert will actually express, such as in connection with opinions the expert considered but did not express. *See In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 04 CIV. 4968, 2013 WL 3326799 (S.D.N.Y. June 28, 2013)(under the framework of Rule 26, furnishing work product of a factual nature to a testifying expert constitutes implied waiver of work product protection to the extent that the expert considers the facts or data disclosed in forming her opinion). These matters may present some practical difficulties for attorneys, when it comes to complying with the disclosure obligations while also protecting against disclosure of other data (*e.g.*, by redactions) constituting protected work product. Some suggestions about managing that are set forth in Section III below.

In any event, though, the disclosure obligation still applies to any materials of a factual nature that the expert has considered, not just those on which the expert has actually or purportedly relied. Because "considered" is not a new term, prior decisions interpreting its meaning remain valid. *Yeda Research & Dev. Co., Ltd. v. Abbott GmbH & Co. KG*, CIV.A. 10-1836 RMC, 2013 WL 2995924 (D.D.C. June 7, 2013). Generally, the cases hold that an expert has "considered" anything she has read, reviewed or used in connection with formulating her opinion(s). *See, e.g.*, *Billups v. Penn State Milton S. Hershey Med. Ctr.*, 1:11-CV-1784, 2013 WL 4041161 (M.D. Pa. Aug. 7, 2013); *In re Commercial Money Ctr., Inc., Equip. Lease Litig.,* 248 F.R.D. 532, 537 (N.D. Ohio 2008) (court will not inquire into subjective mental processes of the expert, such as whether the expert actually relied on the material as a basis for an opinion). And, in a dual-role case, any ambiguity as to whether the person considered materials in a role as a consultant versus that of a testifying expert, should be resolved in favor of the party seeking discovery. *See, e.g.*, *B.H. ex rel. Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652, 660 (N.D. Okla. 2005) (Magistrate Judge Cleary); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.,* 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

**(4) Attorney must provide summary of facts and opinions of non-retained experts.** The 2010 amendments added an entirely new requirement for experts who are not required to prepare a report, contained in Rule 26(a)(2)(C):

> (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 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.

Under the prior rules some courts had required reports even from witnesses exempt from Rule 26(a)(2)(B)'s report requirement. The addition of Rule 26(a)(2)(C) was intended to change that, and make clear that the required summary of a non-retained expert's opinions and supporting factual basis is "considerably less extensive than the report required by Rule 26(a)(2)(B)." Committee Note. The summary need not include facts unrelated to the expert opinions the witness will present. *Id*.

One implication of this change is that it may encourage corporate parties to use their own employees, rather than retained experts, to provide expert testimony. As long as the employee is not one "whose duties as an employee regularly involve giving expert testimony," a summary disclosure is all that Rule 26(a)(2)(C) requires. For example, in *Allstate Ins. Co. v. Nassiri*, 2:08-CV-00369-JCM, 2011 WL 2975461 (D. Nev. July 21, 2011), where Allstate sought to recover inflated portions of insurance claims settlements based on improper medical services and charges, the insurance company had a retained medical expert but also designated one of its own employees to testify to the reasonable settlement value of the claims. The employee reviewed the claim files, the settlements, and the retained expert's opinion, and then used a formula created by Allstate to calculate reasonable settlement value. Even though the employee was not involved in the underlying settlements, and thus functioned like a traditional retained expert providing "a technical evaluation of evidence he has reviewed in preparation for trial," the court held that under Rule 26(a)(2)(C) Allstate was only required to provide a summary of the employee's expert testimony. A *caveat*, however, is that counsel communications with such an expert may be discoverable notwithstanding the 2010 amendments to Rule 26.

### C. Rule 26(b)(4) Trial Preparation: Experts.

**(1) Deposition of retained expert only after report.** Rule 26(b)(4)(A) permits a party to depose any expert whose opinions may be presented at trial, but states that for experts who must prepare a report the deposition may be taken only after the report is provided.

**(2) Drafts of reports and summaries protected as work product.** Rule 26(b)(4)(B), as amended in 2010, provides:

> (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 the draft is recorded.

This rule protects against discovery of draft reports of retained experts and drafts of the new Rule 26(a)(2)(C) summaries for unretained experts. Drafts of any supplementation under Rule 26(e) are also protected. *See* Committee Note.

(a) Drafts protected from all forms of discovery. The 2010 Committee Note states that the protection of draft reports applies to "all forms of discovery," meaning that a draft report (or summary) cannot be obtained by a request for production or subpoena, nor can the adverse party require the expert to disclose the content of a draft report (or summary) in a deposition.

(b) What constitutes a draft report. In most cases it should be fairly easy to determine what amounts to a draft of an attorney's Rule 26(a)(2)(C) summary of testimony of an unretained expert. On the other hand, it may not be so easy to determine whether a particular writing or other recording qualifies as a draft of a retained expert's report, especially in situations where an expert's report includes multiple opinions, is long or complex, and/or involves a lengthy iterative process. For example, what about partial or even complete outlines of facts, or opinions, the expert may, or may not, include in her final report? Does it matter whether the recording resembles, in form, a final report? What about notes, memoranda, spreadsheets, or charts, whether handwritten or typed, that an expert or her staff intend for the expert to utilize in preparing the report, or to incorporate into or attach to the report? How should scrupulous counsel handle the close calls – is it better to err on the side of disclosure, to be "fair" and minimize the risks and costs of a fight over the scope of the work production protection, or go the other way, despite the possible risks and costs, to avoid possible arguments about waiver of work product protection, etc.? Are there any bright-line tests, or safe harbors, that work in most if not all cases?

Those questions have no pat answers; they will have to be answered over time and in careful consideration of the circumstances of each case, taking into account the case law as it develops, most especially in the relevant federal jurisdiction. That case law development is in its early stages at this time. But a sampling of recent decisions suggests that the application of Rule 26(b)(4)(B) is highly fact-specific. Probably, the nearer in time to the expert's final report that a document is generated, the more likely it is to be viewed as a draft of the report; and the more a document looks like a duck (report), or at least a recognizable part of a duck (report), the more likely a court will agree that it is.

**(3) Counsel communications with retained experts protected as work product.** Rule 26(B)(4)(C) provides:

> (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 on in forming the opinions to be expressed.

(a) Who is "the party's attorney"? This is the first question that comes to mind about the meaning of this amended rule. The rule does not define "the party's attorney," and says nothing about any representatives of a party's attorney (*e.g.*, paralegals). However, the Committee Note indicates that, subject to the rule's specific exceptions, the work product protection afforded to such communications with retained experts is intended to be broad, and applied pragmatically.

> 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.

*But see*, *Amco Ins. Co. v. Mark's Custom Signs, Inc.*, 12-2065-CM-KGG, 2013 WL 1633276 (D. Kan. Apr. 16, 2013)(since Rule 26(b)(4)(C) protects only communications between the expert and the party's attorney, notes made by plaintiff's non-attorney agents regarding communications with a testifying expert were discoverable).

In routine cases opposing counsel probably will not dispute that all attorneys in the firm representing the adverse party, and probably also any in-house counsel involved in the matter, are "the party's attorney" for purposes of this rule. However, until the contours of "the party's attorney" become clearer through developing case law – often made in the context of extraordinary circumstances or "bad facts" – careful control over which attorneys communicate directly with a retained expert (especially attorneys who are not counsel of record) is advisable.

(b) Are counsel communications with a retained expert's "assistants" covered? Literally, the rule applies to communications between counsel and the expert "witness" and does not mention "assistants" or other "representatives" of the witness. However, the Committee Note asserts that work product protection extends to "assistants of the expert witness." This may be a fertile area for disputes and resulting judicial interpretations. Here, too, a cautious approach to communicating with an expert's assistants, especially any whose "assistant" status might be questioned, is warranted.

(c) Three exceptions to work product protection. Under Rule 26(B)(4)(C), counsel communications with retained experts are not protected work product to the extent they fall into one of three categories.

Exception 1: communications relating to expert compensation. The term "relating to" is broad. There is no work product protection for communications about the compensation being paid for the expert's work in the particular case, or about any other financial incentives to the expert or her organization (such as potential additional work), because the exception is meant to allow "full inquiry" into all "potential sources of bias." Committee Note.

Exception 2: communications identifying facts or data considered. This exception dovetails with the change in Rule 26(a)(2)(B)(ii)'s disclosure requirements, discussed above. In reference to this exception, there are cases which include sweeping statements to the effect that "attorneys' theories or mental impressions are protected, but everything else is fair game." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 04 CIV. 4968, 2013 WL 3326799 (S.D.N.Y. June 28, 2013). However, in determining what communications this exception covers, and thus permits to be discovered, the words should be carefully parsed, as several limitations are apparent. To be discoverable, the communication (i) must involve "facts or data," as opposed to "other information," (ii) that the party's attorney provided, (iii) that the expert "considered" (see above), (iv) in forming "the opinions to be expressed." Also, and importantly, such communications are discoverable only insofar as they "identify" such facts or data. The Advisory Committee stressed, and courts have agreed, that "further communications about the potential relevance of the fact or data are protected." Committee Note. *See,* e.g., *Medicines Co. v. Mylan Inc.*, 11-CV-1285, 2013 WL 2926944 (N.D. Ill. June 13, 2013).

In theory, distinguishing between communications which merely "identify" discoverable facts or data, and those which concern the "potential relevance" of the data or otherwise reflect counsel's theories or mental impressions, sounds simple. But in actual practice, that may well be very difficult, time-consuming, and contentious, especially if counsel has not been diligent about clearly separating pure identification of such facts or data in his or her communications with the expert.

Exception 3: communications identifying assumptions relied upon. This exception is subject to the same kinds of textual limitations discussed above in relation to Exception 2. Also, assumptions provided by counsel are discoverable only if the expert actually "relied" upon them in forming the opinions the expert has ultimately expressed. Perhaps the most challenging aspect of applying this exception, in practice, is determining what amounts to such an "assumption." For example, counsel typically provide fact witness depositions to the expert, and typically these involve conflicting testimony about facts that may be material to the expert's analysis and opinions. Based on the Advisory Committee's comments, it is clear enough that if counsel "tell[s] the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions," this constitutes an "assumption" that is discoverable under Rule 26(b)(4)(C)(iii) assuming that the expert relied on it in forming the opinions she expresses. But what if counsel gives no such explicit direction and merely communicates his or her mental impressions about which witness accounts of the facts are more credible or reliable? And in that situation, how may the expert appropriately resolve the testimonial tension about material facts without relying on any counsel-provided assumption?

**(4) Counsel communications with non-reporting experts not expressly protected**. A significant limitation in the work product protection afforded by Rule 26(b)(4)(C) is that it applies only to communications with reporting experts, *i.e.*, retained experts and party employees whose duties as an employee regularly involve providing expert testimony. On the other hand, the Advisory Committee pointed out that this rule does not foreclose similar work product protection for counsel communications with non-retained experts: "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." Committee Note. However, that did not persuade the court to extend work product protection to counsel's communications with non-retained expert witnesses under the circumstances of *United States v. Sierra Pacific Industries*, CIV S-09-2445 KJM EF, 2011 WL 2119078 (E.D. Cal. May 26, 2011) (requiring disclosure of all communications between government attorneys and two government employees who were both fact and non-retained expert witnesses).

**(5) Expert's communications with others not protected.** Notably, Rule 26(b)(4)(C) does not shield from discovery the expert's own communications with other experts or persons who do not qualify as "the party's attorney." *See, e.g., In re Application of Ecuador,* 2012 U.S. Dist. LEXIS 157497 (N.D. Fla. Nov. 2, 2012); *Republic of Ecuador v. Bjorkman,* 2013 U.S. Dist. LEXIS 909 (D. Colo. Jan. 3, 2013). In some circumstances, this may make communications between or among the expert and her own staff discoverable. *See, e.g., Apple Inc. v. Amazon.com, Inc.,* 2013 U.S. Dist. LEXIS 47124 (N.D. Cal. April 1, 2013).

**(6) Expert's notes, etc. may be discoverable.** Unless the parties enter into a stipulation about the scope of discovery of expert notes, memoranda and the like, this can easily become a contentious issue. Under the amended Rule 26, determining whether and to what extent such things are discoverable may implicate the "facts or data" disclosure requirement of Rule 26(a)(2)(B)(ii) and/or the Rule 26(b)(4)(B) work product protection for draft reports. A sampling of recent decisions reveals apparent inconsistencies in judicial interpretation of the new rules, or at least that slightly different facts can produce different results. Bright-line rules are hard to find.

*D.G. ex rel. G. v. Henry*, 08-CV-74-GKF-FHM, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011)(Magistrate Judge McCarthy), involved a plaintiff medical expert whose report opined on the basis of medical case examples the expert prepared from summaries his assistants generated, using factual information obtained from medical case files produced by the defendant. In ruling on the defendant's motion to compel, the court held that expert "notations or highlights on the case files" – if any were made – "do not constitute facts or data and do not need to be provided under Fed.R.Civ.P. 26(a)(2)(B)(ii)." *Id*. at *1. However, the court required disclosure of the case summaries prepared by the expert's assistants, on the grounds that they were "material considered by the expert that contains factual ingredients" and "are not drafts of the report protected from disclosure by Fed.R.Civ.P. 26(b)(4)(B)." *Id*. at *2.

Another court held that memoranda, notes, and outlines prepared by the expert or his assistants were not draft reports and were discoverable, as were draft worksheets prepared by the party's employee, but that draft worksheets created by the expert or his assistants for use in the expert's report were part of a draft report and therefore not discoverable under amended Rule 26(b)(4)(B). *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 512-514 (N.D. Cal. 2012). *Cf.*, *Dongguk Univ. v. Yale Univ.*, 3:08-CV-00441 TLM, 2011 WL 1935865 (D. Conn. May 19, 2011) ("As for Kim's hand-written notes, as a general matter, 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."); *In re Asbestos Prods. Liab. Litig. (No. VI), MDL 875*, 2011 WL 6181334 (E.D. Pa. Dec. 13, 2011) (Expert's handwritten notes "do not fall under the draft report provision of Rule 26(b)(4)(B). These notes were not 'draft reports,' but rather reflect his own interpretations of the B-read results he was retained to analyze for CVLO."); *In re Application of Ecuador,* 2012 U.S. Dist. LEXIS 157497 (N.D. Fla. Nov. 2, 2012).

**(7) What remains "fair game" for expert cross-examination.** The Advisory Committee emphasized that notwithstanding the work product protection the rules now confer on communications between a party's counsel and a reporting expert, and on draft expert reports, "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." Committee Note. Although the Committee Note does not specifically discuss this frequent line of deposition questions, the rules probably still allow an interrogator to inquire, at least generally, about how counsel assisted an expert in developing the expert's opinion, including whether counsel reviewed any draft report and provided comments or suggestions. Presumably, though, questions about the substance of counsel's communications with the expert in those regards are out of bounds, unless and except to the extent they fall within one of Rule 26(b)(4)(b)'s three express exceptions. Under thorough and skillful examination of an expert, however, those boundary lines may well become blurry.

## III. CHECKLIST OF SUGGESTED PRACTICES

Following is a checklist of suggestions for working with expert witnesses in federal cases governed by the current federal rules and/or in Oklahoma state court cases still governed by expert disclosure and discovery rules which are substantially similar to pre-2010 federal rules. This list is not exhaustive, and the best approach in any particular case, whether federal or state, requires thoughtful consideration and planning.

**All Cases:**

1. ***Witness Identification.*** Determine, as early as feasible, experts who may be needed for the case, including:

    a. "Reporting Experts" (federal), including specially retained experts and party employees who regularly provide expert testimony.

    b. "Non-Reporting" experts (federal), including party employees who do not regularly provide expert testimony, treating physicians, etc.

2. ***Engagement Letters.*** Use "standardized" expert engagement letters whenever feasible.

3. ***Initial Preparation.*** At the beginning of every expert engagement, before significant substantive communications with the expert and before the expert has commenced substantial work:

    a. ***Conflicts.*** Fully vet all potential conflicts of interest (parties, issues, etc.), and ensure that appropriate safeguards exist to prevent conflicts from arising during the engagement.

b. ***Expert Education.*** Educate the expert about all applicable disclosure, discovery and privilege rules.

c. ***Expert Assignment.*** Define the expert's assignment as precisely as possible.

d. ***Staffing.*** Discuss and agree upon how the engagement will be staffed, how any changes will be approved, and the consequences of departures from the agreed upon staffing.

e. ***Timing and Availability.*** Discuss counsel's expectations about the duration of the case, the timing of any required report, the timing of deposition and trial testimony, and the expert's availability and known scheduling conflicts.

f. ***Costs.*** Discuss and agree upon the anticipated costs for the expert's work (budget).

g. ***Billing and Payment.*** Discuss and agree upon the timing and format (*e.g.*, level of detail) for the expert's bills, and the source and timing of payments. Depending on the needs of the particular case, determine whether it is wise to include such particulars in the engagement letter.

h. ***Expert Materials***. Request that the expert provide, as early as possible, a case list, all available transcripts of prior testimony, and all of the expert's potentially relevant publications; these should not be limited to information the expert will be required to disclose to the adverse party.

i. ***Report Form***. Provide, if necessary, a general template (outline of required elements, not substantive opinions) for the expert's use in drafting a report.

j. ***Communications***. Discuss preferences regarding the channels for, and the form, format, and substance of, communications between counsel (both outside counsel and in-house counsel, if applicable), the represented party or representatives of the party, and other experts if applicable (including other experts for the same party or experts for other aligned parties).

k. ***Expert's File***. Discuss and document how the expert (and staff) will organize and maintain the case file, including internal and external

written communications, discoverable information and materials provided by counsel, expert notes (including notes of meetings and discussions with counsel), work files, report drafts, etc.

l. ***Joint Defense Agreement***. In multi-party cases, consider the desirability of a common interest / joint defense agreement to protect expert communications, collaboration, or materials sharing.

4. ***Facts or Data Provided by Counsel.***

a. ***Document Logs***. Keep a log of all documents provided or made available for the expert's review, with dates and details sufficient to enable efficient review and verification that the file to be produced to the adverse party is complete.

b. ***Lists of Facts and Assumptions***. Consider using single, master documents which identify, for discovery purposes, the "facts or data" the expert has considered and the "assumptions" on which the expert has relied. Also consider annotating such documents with citations to non-privileged evidence supporting such facts or assumptions (with appropriate caveats, disclaimers and reservations of rights).

5. ***Foreseeable Issues.*** Anticipate troublesome or unsettled issues that may arise in discovery, and consider seeking discovery stipulations to address them in a fair and balanced way.

6. ***Verbal Communications.*** In verbal communications, never tell the expert anything, or express anything in a manner, that could be damaging or embarrassing if discovered.

7. ***Written Communications.*** Always prepare all written communications to the expert with a view toward potential discoverability, and likewise police all such communications from the expert.

8. ***Opinion Work Product.*** Never rely on the expanded work product protection as a basis for providing the expert written work product containing sensitive attorney opinions, mental impressions or the like (much less attorney-client privileged communications).

9. ***Expert Opinions.*** Determine whether the expert's opinions are favorable as early as possible, preferably before disclosing the expert's name, and

certainly before disclosing the expert's report; do not rely on de-designation or re-designation (as a consultant) to protect the expert from discovery.

10. ***Expert Report.*** Never write any significant portion of the substance of the expert's report. Relatedly, when commenting on a draft report, always emphasize that the expert's report must be her own, and ensure that the expert is appropriately prepared to answer questions about the role of counsel (or others) in the expert's preparation of her report.

11. ***Expert Deposition Preparation.***

    a. ***Witness Preparation***. Never assume that an expert requires less testimonial preparation than a typical fact witness.

    b. ***Compensation***. Before the expert prepares to testify or testifies, educate the expert about the applicable rules regarding adverse party payment for the expert's time in responding to discovery, and provide specific guidance about how the expert should document the time spent and expense incurred, to facilitate a request for payment.

12. ***Counsel Preparation.*** Think through likely expert cross-examination, prepare to assert all appropriate objections to protect work product or other privileged information, and determine how to prepare the expert to avoid inadvertent waivers, etc.

**Oklahoma State Cases:**

1. ***Nothing off record.*** Always assume that all communications between counsel and the expert are "on the record" and fully discoverable, absent a discovery stipulation altering the default rules of disclosure and discovery.

2. ***Stipulations.*** Consider using a discovery stipulation to alter the Oklahoma rules to conform more closely to the current federal rules. Sample stipulations are set forth in Appendix A.[2]

[2] Under 12 O.S. §3229, and unless the court orders otherwise, the parties may by written stipulation: "2. Modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Sections 3226, 3233, 3234 and 3236 of this title for responses to discovery may, if they would interfere with any time set for completion of discovery, be made only with the approval of the court. A person designated by the stipulation has the power by virtue of his designation to administer any necessary oath."

3. ***Draft Reports.*** Discuss with the expert, before the expert provides her written report, how the expert and counsel will handle any preliminary drafts of the report, and how the expert and/or counsel will respond to any requests to produce any preliminary draft.

## IV. CONCLUSION

The 2010 amendments to federal Rule 26 confer work product protection on drafts of expert reports and required summaries of non-reporting experts, as well as many communications between a party's counsel and a reporting expert. However, the amended rules also impose some additional expert disclosure obligations and put significant limitations on the scope of work product protection. In a federal case, counsel have somewhat greater freedom to work with experts "off the record," but gray areas still exist, and a cautious approach is still advisable. In Oklahoma state litigation, practically everything remains "on the record," at least for now.

# Appendix 1

## STIPULATION AND ORDER REGARDING EXPERT DISCOVERY

The parties to this action ("Parties") have retained or anticipate that they will retain experts to be designated as testifying experts ("Retained Expert"). The Parties recognize that their Retained Experts' investigation and development of their opinions can become unnecessarily inhibited and costly if their work-product - such as drafts of reports and notes - can become the subject of discovery.

The Parties believe, in general, that it is the Retained Expert's final report, and any other information (regardless of source) that he or she relies on for that report, that should be the subject of discovery production requests or disclosure requirements. However, the Parties also believe that they should be free to determine, through cross-examination of a Retained Expert, whether and to what extent a Retained Expert has, for purposes of his or her opinions in this case, given any consideration to any "Discoverable Information" as defined herein; and that if a Party discloses to a Retained Expert any information contained in a document identified on a privilege log of the Party, such information should become "Discoverable Information" as a result of such disclosure to a Retained Expert regardless of whether the Retained Expert states that he or she relies upon the information as a basis for any opinion in this case.

Accordingly, and in order to clarify a Retained Expert's obligations, whether arising under 12 O.S. § 3226(B)(3)(a)(2) or otherwise, in responding to any request for discovery, the Parties have agreed that discovery related to a Retained Expert's opinions and work-product shall be limited as follows:

1. For purposes of this Stipulation, the term "Discoverable Information" means and includes (a) all documents produced in this case by the Parties pursuant to written discovery requests or by third-parties pursuant to subpoena or pursuant to a joint request by the Parties; (b) all depositions taken in this case; (c) all disclosed written reports of any Retained Expert for any Party; and (d) except as limited by paragraph 2 below, all other documents and information that a Retained Expert or his or her assistants may obtain from any other source including not limited to a Party or any attorney for a Party.

2. The following information or documents that may have been considered by a Retained Expert in forming his or her opinions shall *not* constitute Discoverable Information and shall *not* be discoverable from the Retained Expert or from any Party sponsoring the testimony of the Retained Expert, pursuant to 12 O.S. § 3226(B)(3)(a)(2) or otherwise, *unless and except to the extent that* the Retained Expert states that he or she relies thereon as a basis for any opinion that is the subject of the Retained Expert's testimony:

   a. Any notes taken or prepared by the Retained Expert or his or her assistants as part of the investigation and development of any expert report prepared in this case;

b. Any draft of any report(s) prepared by a Retained Expert or his or her assistants in this case; and

c. Except as limited by paragraph 3 below, written or oral communications between or among the Retained Expert, his or her assistants, and the retaining Party or the retaining Party's in-house or outside counsel.

3. For the avoidance of any doubt, nothing in this Stipulation (including paragraph 2(C) above) is intended to permit a Retained Expert or a Party to shield from discovery any information contained in a document that a Party has identified or is obligated to identify on a privilege log of that Party, if such information has been disclosed in any way to a Retained Expert or such expert's staff. That is, if and to the extent that a Party or that Party's counsel provides or discloses any such information to a Retained Expert or his/her staff, then such information shall constitute Discoverable Information regardless of whether the Retained Expert states that he or she relies thereon as a basis for any opinion that is the subject of the Retained Expert's testimony.

4. Unless otherwise agreed by all Parties in a particular instance, every Retained Expert's file of Discoverable Information shall be provided to all Parties or made available for their inspection at least five (5) business days before the Retained Expert is deposed.

This Stipulation is hereby APPROVED by all parties, through undersigned counsel, and ORDERED by the Court on _____.

**STIPULATION AND ORDER REGARDING EXPERT DISCOVERY**

The parties to this action ("Parties") stipulate that for purposes of discovery of the Parties' respective expert witnesses in this action, the rules set forth in Rule 26(b)(4)(B) and Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure, as amended to date, shall apply in lieu of any and all Oklahoma Rules of Civil Procedure pertaining to expert witness disclosures or discovery, but only to the extent such Oklahoma Rules of Civil Procedure are inconsistent with Rule 26(b)(4)(B) and/or Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure.

This Stipulation is hereby APPROVED by all parties, through undersigned counsel, and ORDERED by the Court on _____.