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5 Tips to Avoid the In-House Expert Trap in the Federal Rules of Civil Procedure

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You are defending your client, a company engaged in complex scientific or technical work. As you head to trial, you have a tough decision to make. The client has employees and consultants with the knowledge and expertise to present expert testimony to help the fact-finder understand these issues. The client also has employees and consultants who are percipient witnesses whose factual testimony may be construed as venturing into expert territory, and you must ensure that these individuals are not precluded from testifying for failure to disclose them as experts. The safest, most cost-effective, and efficient approach might be to list these individuals as non-reporting experts (i.e., witnesses who have not been retained or specially employed to provide expert testimony in the case or whose duties as the party's employees do not regularly involve giving expert testimony). However, in doing so you may have walked into a trap caused by Rule 26 of the Federal Rules of Civil Procedure ("Rule 26"). Your opponent can now try to argue that the attorney work product and attorney-client privileges have been waived and demand production of broad categories of previously protected documents.

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Prior to December 2010, "data and other information considered by [an] expert" in formulating her report had to be disclosed to opposing counsel. (Notes of Advisory Committee on 1993 Amendments to Rule 26.) Courts generally interpreted this rule expansively, holding that an expert's notes, draft reports, and communications with counsel were all fully discoverable. (See, e.g., South Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 257 F.R.D. 607, 610-15 (E.D. Cal. 2009) ("[A]ny material, including attorney opinion, considered by a testifying expert in formation of his testimony is not protected by the work product rule.").) "Undesirable effects" resulted from this approach, including: 1) counsel hiring two sets of experts—testifying experts and consulting experts, 2) counsel taking a "guarded attitude" toward their testifying experts, and 3) experts adopting strategies that interfered with their work in order to protect against discovery. (Notes of Advisory Committee on 2010 Amendments to Rule 26.)

To eliminate "artificial and wasteful discovery-avoidance practices," Rule 26 was amended in December 2010. (Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2009), p. 11.) The amended rule provides that communications between counsel and reporting experts are covered by the attorney-client privilege except for certain enumerated topics, namely: 1) the expert's compensation, 2) facts or data provided by the attorney which the expert considered in forming her opinions, and 3) assumptions provided by the attorney which the expert relied on in forming her opinions. (Rule 26(b)(4)(C).) However, this protection does not, by its terms, apply to experts who may testify at trial but who do not prepare a report. (*Id.*)

The Advisory Committee considered, but declined to extend, protection to communications between counsel and non-reporting experts because they concluded that extending the protection to in-house expert witnesses or treating physicians could be too broad, and they were concerned about unforeseen consequences. (Report of the Civil Rules Advisory Committee (May 8, 2009, amended June 15, 2009), pp. 4-5.) Regardless of whether the Advisory Committee's rationale for declining to extend the protections afforded for reporting experts to non-reporting experts was justified, the Committee made sure to suggest that other protections might still apply and non-reporting experts may nonetheless be able to maintain privilege over their communications. (Notes of Advisory Committee on 2010 Amendments to Rule 26 (Rule 26 "does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.").) To date, however, courts which have considered the question have often found that *all* documents and communications of non-reporting experts must be provided. (*See, e.g., United States v. Sierra Pac. Indus.*, 2011 U.S. Dist. LEXIS 60372, at *21-*38 (E.D. Cal. May 26, 2011) (noting the Advisory Committee's discussions and finding that all documents and communications that the non-reporting employee expert "generated, saw, read, reviewed, and/or reflected upon" had to be produced, regardless of whether the documents ultimately affected the analysis); *PacifiCorp v. Northwest Pipeline GP , 879 F. Supp. 2d 1171, 1213-1214* (D. Ore. 2012) (same); *Luminara Worldwide, LLC v. Liown Elecs. Co.*, 2016 U.S. Dist. LEXIS 158327, at *13-*15 (D. Minn. Nov. 15, 2016) (same).)

In light of the current distinction under Rule 26, consider these practice tips:

1. Be aware of the distinction between reporting and non-reporting experts.

2. At the outset of the suit, consider whether scientific or technical opinion testimony may be needed from your client's employees or consultants whose duties do not regularly involve giving expert testimony.

3. If such testimony is needed, consider whether it can be provided by an employee or consultant who will not need to be included in attorney-client privileged communications about the litigation.

4. Consider whether an outside expert should be engaged to avoid waiving applicable privileges.

5. If your opponent discloses an employee or consultant as a non-reporting expert, consider requesting documents and communications related to their opinion, including any previously withheld as privileged.

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