Expert Discovery Returns to the Past

By Damon W.D. Wright

What do skinny ties, butter, and privileged attorney-expert communications have in common? They are all making a comeback. In the days of Don Draper of the hit television show "Mad Men," attorneys wore narrow neckwear and ate fat-laden breakfasts. They also corresponded with testifying experts about case strategy without losing a wink of sleep because the communications were generally protected from discovery.

Then things changed. Ties became wider and butter was shelved in favor of margarine. The 1993 Rule 26 amendments made attorney-expert communications discoverable, so that over the past 17 years written correspondence between counsel and a testifying expert has become rare. Attorneys were careful to communicate their thoughts to experts by phone or in person to avoid creating a record, avoided printing or circulating draft expert reports, and often hired a separate consulting expert with whom they could enjoy privileged communication.

Today, though, the skinny tie is inching back into fashion and butter is again the spread of choice. And, beginning with new Rule 26 amendments that took effect on Dec. 1, 2010, counsel's communications with a testifying expert are once again generally protected from discovery. What was old has become new again.

A Quick History Lesson

Way back when, courts protected communications between attorneys and experts from discovery on the grounds that the information was subject to the attorney work product doctrine or not "relied upon" by the expert. *See*, *e.g.*, *Bogosian v. Gulf Oil Corp.,* 738 F.2d 587, 593–95 (3d Cir. 1984) (en banc) (opinion work product provided to the testifying expert is absolutely protected from discovery, and fact work product is discoverable only upon showing of substantial need); *Occulto v. Adamar of New Jersey Inc.*, 125 F.R.D. 611, 615 (D.N.J. 1989) (work product provided to a testifying expert should be protected unless "relied upon by the expert witness"); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985) ("in this [c]ircuit, opinion work product is absolutely immune from discovery even if shared with an expert witness"). Beginning with the 1993 Rule 26 amendments, that protection changed: Rule 26(a)(2)(B) was amended to require that an expert's report include "the data or other information considered by the witness in forming the opinions."

The requirement to disclose "information considered" significantly broadened the scope of expert discovery. As the advisory committee explained, "litigants should no longer be able to argue that materials furnished to their experts 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." Based on the 1993 Rule 26 amendments, federal courts eventually came to adopt a bright-line rule that everything provided to a testifying expert was discoverable. *See, e.g., In re Pioneer Hi-Bred Int'l Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 283 (E.D. Va. 2001); *B.C.F. Oil Refining Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997). Absent stipulation, all draft expert reports and all correspondence with a testifying expert about the case typically had to be shared with the opposing party.

This bright-line rule was supported by valid policy considerations. Because experts testify on complex subjects about which the fact finder knows little or nothing, the fact finder should know if counsel influenced the expert's opinion. *See, e.g., Karn v. Ingersoll-Rand Co. et al.*, 168 F.R.D. 633, 637–38 (N.D.Ind. 1996) (absent such discovery, testifying experts may be "nothing more than willing musical instruments upon which manipulative counsel play whatever tune desired"). The production of all information provided to or "considered" by the expert helped the opposing party to explore the validity of the expert's opinion and promoted full cross-examination at trial. *See, e.g., Musselman v. Phillips*, 176 F.R.D. 194, 199–202 (D. Md. 1997). The bright-line rule was also easy to apply. If counsel wanted to retain privilege for certain information,

they knew not to provide the information to a testifying expert. *See, e.g., Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305–06 (W.D. Va. 1988).

Over the past 17 years, however, the bright-line rule also inhibited counsel's ability to work efficiently with experts and drove up the costs of litigation. In many cases, the focus of expert discovery also became less about the merits of the opinion itself and more about peripheral issues such as coffee, lunch, or dinner conversations between the attorney and the expert; how many drafts were created, circulated, reviewed, and edited before the final report was produced; and whether all draft reports or e-mails between the attorney and the expert were produced or had been destroyed. Over time, the bright-line rule lost its popularity.

The New Rule 26 Amendments

The new Rule 26 amendments, which went into effect on Dec. 1, 2010, erase the bright-line rule. It is no longer the law that everything attorneys give and say to their experts is discoverable. The new Rule 26 amendments are somewhat of a return to the pre-1993 rules with some additional wrinkles. In summary, the new Rule 26 amendments—

- eliminate the requirement that a testifying expert's report disclose "information considered" in favor of a more narrow "facts or data considered" standard (Rule 26(a)(2)(B)(iii));
- provide that experts' draft reports or disclosures constitute "trial-preparation materials" generally protected from discovery (Rule 26(b)(4)(B));
- provide that, subject to three exceptions, communications between counsel and a retained testifying expert also constitute "trial-preparation materials" generally protected from discovery (Rule 26(b)(4)(C)); and
- distinguish between retained testifying experts and nonretained testifying experts, providing that a report is not required for a nonretained testifying expert but, instead, a disclosure providing "a summary of the facts and opinions to which the witness is expected to testify" (Rule 26(a)(2)(C)).

The goal is to make working with expert witnesses easier, expert-intensive litigation less expensive, and expert discovery more focused on the actual opinions themselves. The most dramatic changes concern draft expert reports, Rule 26(b)(4)(B), and attorney-expert communications, Rule 26(b)(4)(C).

The new Rule 26(b)(4)(B) imposes a bright-line rule—except this time the rule is *against* discovery. The advisory committee notes make clear that "Rule 26(b)(4)(B) is added to provide work product protection … for drafts of expert reports or disclosures" and "applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise." Rule 26(b)(4)(B) should be easy to apply.

Because of exceptions that may not always be clear around the edges, the new Rule 26(b)(4)(C) is more complicated and will be harder to apply. The new rule 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 upon in forming the opinions to be expressed.

The advisory committee explains that "[t]he 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." However, "the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions."

Determining whether a communication falls within the "fact or data" exception to privilege under Rule 26(b)(4)(C)(ii) may present a challenge. The advisory committee notes explain: "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." Thus, counsel's "theories or mental impressions" about "facts or data" appear to be protected; even though "facts or data" are not protected, "the intention is that 'facts or data' be interpreted broadly," and "material considered by the expert, from whatever source, that contains factual ingredients" is not protected. Trying to draw this distinction, the advisory committee explains that "[t]he exception [against work product protection] 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." Even the most experienced federal practitioners may have trouble determining when their communication identified "facts or data" (and thus is not protected) versus when their communication addressed the potential relevance of "facts or data" (and thus is protected).

Rule 26(b)(4)(C)(iii) presents similar challenges. The exception allows discovery of communications that "identify assumptions that the party's attorney provided and that the expert relied upon" in forming opinions. The advisory committee notes explain: "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 [requiring disclosure] 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." At the same time, the advisory committee emphasizes that "[c]ounsel 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 to be expressed." Thus, Rule 26(b)(4)(C)(iii) allows discovery into specific assumptions that the expert "relied upon" but does not allow inquiry into "general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts," although counsel can still question expert witnesses about "alternative analyses … whether or not the expert considered them."

The interplay between Rule 26(b)(4)(B) and Rule 26(b)(4)(C) raises additional issues. Under Rule 26(b)(4)(B), an expert's draft report—"regardless of the form"—is protected from discovery. Under Rule 26(b)(4)(C)(ii-iii), however, attorney communications with the expert that identify "facts or data" or provide "assumptions … that the expert relied upon" are not protected from discovery. The advisory committee notes do not expressly address what should happen if counsel were to use the cloak of a draft report to furnish the "facts or data" or "assumptions" to the expert so as to shield the opposing party from discovering that counsel was the source of the "facts or data" or "assumptions." In this situation, it would seem appropriate that Rule 26(b)(4)(C) (ii-iii) would trump Rule 26(b)(4)(B) and require disclosure of at least the drafts of the factual background section of the expert's draft report.

The new Rule 26(a)(2)(C) addresses a simpler and different subject: the disclosure required for nonretained testifying experts. It applies to a testifying expert who is not "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" for whom a full Rule 26(a)(2)(B) expert report is required. The advisory committee notes explain: "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." For nonretained testifying experts, Rule 26(a)(2)(C) requires a disclosure of "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705" and "a summary of the facts and opinions to which the witness is expected to testify." The advisory committee adds: "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."

Finally, it is important to understand who is covered by the new Rule 26 amendments and who is not. Rule 26(b)(4)(C) does not apply to nonretained testifying experts but, instead, protects communications between attorneys and their *retained* testifying experts. In addition, the advisory committee explains that "[p]rotected 'communications' include those between the party's attorney and assistants of the expert witness" and "communications with in-house counsel would often be regarded as protected even if the in-house attorney is not counsel of record in the action." Because Rule 26(b)(4)(C) applies only to *counsel's* communications with the retained testifying expert, communications a retained testifying expert has with a nonretained testifying expert, consulting expert, or any other person about the subject matter of the case also remain discoverable.

Practice Tips

As compared with the past 17 years of practice, counsel will now have greater liberty to assist with draft expert reports and correspond about the theories, strengths, or weaknesses of the case without fear that all these communications will be discoverable. The retained testifying expert also has more peace of mind that all written and oral communications with counsel will not be discoverable. For this same reason, the occupation of consulting expert may join door-to-door encyclopedia sales as a job of the past. There is still a need for counsel and their testifying experts to be cautious, though, recognizing that the new Rule 26 amendments do not protect the testifying expert's communications with others from discovery and that Rule 26(b)(4)(C)'s exceptions to work-product protection have not yet been analyzed in the courts.

Here are practice tips for counsel working with testifying experts:

- As in the past, counsel should ensure that the testifying expert knows that her communications and correspondence with persons other than counsel are subject to discovery.
- If counsel wants to provide "facts or data" or "assumptions" to the testifying expert in writing, the document should be strictly limited to this (like Detective Sergeant Joe Friday's "just the facts") and not include any mental impressions, opinions, or theories, because the document will be discoverable.
- Because privileged attorney-client communications may be viewed as identifying "facts or data … that the expert considered," counsel should recognize that the privilege may be waived if counsel shares the communications with the expert.
- Both counsel and the expert should label draft expert reports with the header, "Protected Rule 26(b)(4)(B) Draft Report," and label written correspondence with the header, "Protected Rule 26(b)(4)(C) Correspondence."
- In response to requests for "production of all correspondence and materials exchanged with or provided to the retained testifying expert including any draft reports," counsel should object in part that the request is overbroad and improper in light of Rules 26(b)(4)(B) and (C).
- Given Rules 26(b)(4)(B) and (C), counsel may also want to object to deposition questions, such as: "What did you and counsel discuss as you prepared this report?"; "What changes or comments did counsel have to your draft report?"; and "What did you and counsel discuss in preparation for this deposition?"

- Finally, because the advisory committee notes explain that "it is expected that the same limitations [provided by Rules 26(b)(4)(B) and (C)] will ordinarily be honored at trial," counsel should be prepared to object to similar questioning at trial.

For counsel pursuing expert discovery, the new Rule 26 amendments also present new challenges. The advisory committee emphasizes that "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." Yet, the new amendments will make it harder to determine if the expert's opinions are her own or were instead "spoon-fed" by counsel, the party, or a consulting expert. The new Rule 26 amendments also will be harder to apply because, unlike the bright-line rule created by the 1993 Rule 26 amendments, counsel must now be trusted to discern the dividing line between documents that identify "facts or data" versus documents that convey "theories or mental impressions" to the expert. For this same reason, the broad protections afforded by Rule 26(b)(4)(B) and (C) present risk that they will be misinterpreted or abused.

In pursuing expert discovery, counsel should watch out for abuse by the other side. For instance, in an effort to bring all the testifying expert's internal work under the ambit of Rule 26(b)(4)(C), opposing counsel could direct his or her expert to regularly forward every internal note and work paper prepared by the expert to counsel so that the only document produced to the other side that reflects the testifying expert's work is the final report. This practice would appear to be at odds with the advisory committee's admonition that "the expert's testing of materials involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule." Moreover, the new Rule 26 amendments still permit discovery into "alternative analyses, testing methods, or approaches to the issues" that the expert may have explored. It is also possible that opposing counsel could try to shield nonprivileged communications between a testifying expert and others from discovery by creatively using Rule 26(b)(4)(C). For example, in an effort to withhold such correspondence from discovery under Rule 26(b)(4)(C), counsel could try to act as an e-mail messenger by forwarding e-mails to and from the testifying expert, so that there is no direct written communication between the other person and the testifying expert. Although not entirely clear, this strategy would also appear to be improper. According to the advisory committee, "inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule."

With these concerns in mind, here are practice tips for counsel seeking expert discovery.

- As permitted by Rule 26(b)(4)(C)(i–iii), counsel should still seek production of all correspondence between counsel and the retained testifying expert regarding identification of "compensation," "facts or data," or "assumptions."
- By document request—or subpoena if necessary—counsel should still seek production of the expert's internal notes and documents that relate to his or her work in the case.
- Because Rule 26(b)(4)(C) protects only attorney communications with the testifying expert, counsel should still seek production of any documents or correspondence that the testifying expert sent to or received from others, including any document authored even in part by someone other than counsel that counsel may have then forwarded to the testifying expert.
- For the same reason, counsel may also want to explore whether the testifying expert participated in any meetings with the party, any fact witness, consulting expert, or nonretained testifying expert and then uncover whether any notes were taken or exchanged at the meetings.
- At deposition, counsel should explore the process by which the expert received the "facts or data" or "assumptions" referenced in the report and the existence of any withheld documents provided by counsel that set forth the "facts or data" or "assumptions."
- If it appears that opposing counsel has abused Rule 26(b)(4)(C)—for instance by filtering all the testifying expert's internal testing documents through counsel and then withholding the documents on Rule 26(b)(4)(C) grounds—counsel should make a record at the deposition and leave the deposition open to be retaken at the other side's cost.
- If motions practice is required, counsel should emphasize helpful language in the advisory committee notes, including the statement that "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."

Conclusion

The new Rule 26 amendments should make working with experts easier and less expensive. Because the bright-line rule has been erased, however, the new amendments may also lead to more complicated motions practice over the scope of expert discovery, whether Rules 26(b)(4)(B) and (C) were improperly used to withhold documents, and what must now be produced. The last 17 years of case law addressing the 1993 Rule 26 amendments will be of little help on these issues. The bench and the bar may end up looking to the older case law for guidance. In any event, only time will tell whether practitioners like this return to the past. For now, like skinny ties and butter, privileged expert communications are back. And, as a final note, the author does not suggest that any lawyers now wear skinny ties. **TFL**

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