ALERTS AND UPDATES

Significant Changes to Federal Rules of Civil Procedure Will Protect Drafts of Expert Reports from Discovery

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The U.S. Supreme Court has approved key changes to the rules governing civil practice in federal court, which will take effect on December 1, 2010. One of the most significant changes is to the portions of Federal Rule of Civil Procedure 26 that govern the discovery of information from expert witnesses who have been retained to testify at trial. The Supreme Court has approved changes that will exempt drafts of expert reports, as well as some communications with attorneys, from discovery by opposing parties.

In recommending these changes, the Committee on Rules of Practice and Procedure (the "Committee") recognized the inefficiencies of allowing expansive discovery of testifying experts and has proposed modifying Rule 26(a)(2)(B) so that only the "facts or data considered by the witness" in forming the expert opinions must be disclosed, replacing the current requirement that an expert disclose all "data or other information" relied on when developing expert opinions, preparing reports or preparing for testimony.

Drafts of Expert Reports Will Be Protected from Disclosure

Since Rule 26 was amended in 1993, federal courts have routinely allowed the discovery of drafts of expert reports, some communications between experts and counsel, and documents reviewed, but not relied on, by experts preparing for trial. The Committee recognized that the fear of discovery under Rule 26 "inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion."

According to the Committee, one of the purposes of its proposed changes is to extend work-product protection to drafts of expert reports. Even though the Committee recognizes that this change will make some areas of discovery off-limits, it has acknowledged that, under the amended Rule 26, the following three types of communications between counsel and an expert will remain "open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion." A purpose of these exceptions is to allow opposing counsel to continue to investigate what, if any, influence the attorneys have exerted over the development of their experts' opinions.

Changes to Rule 26 Are Likely to Streamline Litigation

In proposing changes to Rule 26, the Committee observed that attorneys in federal court often "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 Committee cited the example of parties that commonly hire two experts to advise on the same subject—a consulting expert and a testifying expert—in order to avoid the creation of discoverable information. Traditionally, the consulting expert worked with counsel to develop theories of the case and strategies for trial. Since the consulting expert did not testify, he or she could communicate freely with counsel without fear that his or her communications or drafts would be the subject of discovery. After an attorney worked with his or her non-testifying expert to develop a theory of the case, a

different expert would then be hired to draft an expert report and testify at trial. The Committee recognized that this procedure is duplicative and has required parties to incur unnecessary expenses.

The Committee also acknowledged that the current provisions of Rule 26 caused "lawyers [to] devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions," but that many experienced attorneys admitted that "such questioning during depositions was rarely successful in doing anything but prolonging the questioning." Although the changes to Rule 26 are likely to narrow an attorney's ability to question an expert about the influence of opposing counsel, it appears that these concerns may be unfounded in most cases.

The Committee also discussed the positive experience of practitioners in New Jersey, where drafts of experts' reports are not subject to discovery. In its report, the Committee noted that "New Jersey practitioners emphasized that discovery had improved. . .with no decline in the quality of information about expert opinions." The revisions to Rule 26 are likely to result in the realization of the same benefits recognized by attorneys in New Jersey—a more open dialogue between counsel and testifying experts. The amendments to Rule 26 may also decrease the expenses of discovery that are attributable to the extensive questioning of testifying experts undertaken by some attorneys in federal court.

Conclusion

In proposing amendments to Rule 26, the Committee has indicated that experts have become essential to ligation and that the Federal Rules may encourage attorneys and experts to communicate freely about the case, without fear that draft reports or communications with counsel would become the subject of discovery.

The amendments to Rule 26 have been supported by lawyers and bar organizations, including the American Bar Association, the American College of Trial Lawyers, the International Association of Defense Counsel, and the U.S. Department of Justice. These amendments have been approved by the U.S. Supreme Court and will become effective on December 1, 2010. It is important to note that these changes will not be retroactive, and legal counsel may wish to consider whether depositions and other expert discovery should be delayed until after these changes go into effect.

For Further Information

If you have any questions regarding the upcoming changes to the Federal Rules of Civil Procedure or would like more information, please contact Sharon L. Caffrey, any member of the Products Liability and Toxic Torts Practice Group, any member of the Trial Practice Group, or the attorney in the firm with whom you are regularly in contact.