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The Unrealized Promise Of Rule 26 Amendments

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Prior to the 2010 amendments to Federal Rule of Civil Procedure 26, courts adopted what was widely called the "bright-line rule," making all materials shared with testifying experts, and all drafts of testifying expert reports, open to discovery in litigation.[1] The theory behind the bright-line rule was that while these materials may contain work product created in anticipation of litigation, the need for discovery to test the experts' theories outweighed the need for work product protection.[2] Over time, that rule spawned a host of convoluted methods of communicating with experts, requiring attorneys to restrict how and what they shared with the experts they planned to rely on at trial. It became commonplace for attorneys to hire two sets of experts, one to consult, strategize and test theories, and the other only to testify once all the theories had been vetted and a final strategy had been adopted.[3] The Civil Rules Advisory Committee noted — with no little understatement — that the fear of discovery under the pre-2010 rules "inhibit[ed] robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion."[4]

The 2010 amendments were intended to eliminate the bright-line rule, thereby allowing attorneys to openly communicate with their testifying experts and explore their experts' theories without fear of discovery. But the promise of the 2010 amendments has not been fully realized, and recent judicial decisions have forced attorneys to again adopt convoluted communication strategies to avoid discovery of communications between testifying experts and nonattorney party representatives.

2010 Amendments to Rule 26

Among the 2010 amendments was the addition of Rule 26(b)(4)(B) to protect "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."[5] Rule 26(b)(4)(C) was also added in 2010 to protect all communications between attorneys and experts with

the exception of communications that (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 expressed opinions, or (iii) identify assumptions provided by the attorney and upon which the expert relied in forming his or her expressed opinions.[6] Taken together, these amendments were intended to allow for more open communications between attorneys and expert witnesses, thus fostering more efficient and effective trial preparation.

Courts' Interpretations of the 2010 Amendments

Rule 26(b)(3)(A) generally provides protection against discovery for documents prepared in anticipation of litigation by or for a party or its "representative," which is defined to include a party's attorney, consultant, surety, indemnitor or agent.[7] Rule 26(b)(4)(D) further provides a presumption of protection for the facts known and opinions held by nontestifying experts.[8] Rule 26 does not, however, provide explicit work product protection for the work of testifying experts, and courts have generally held that no presumption of protection exists. In three separate cases involving the discoverability of expert witness materials, the Ninth, Tenth and Eleventh Circuits held summarily that the work product doctrine does not apply to testifying experts under Rule 26.[9] The courts explained that the protection of draft reports and certain communications with attorneys under Rule 26(b)(4)(B)-(C) would be redundant if the work product doctrine applied to testifying experts in the first place. The courts also invoked the negative implication canon to conclude that, because experts are excluded from the definition of "representative" in Rule 26(b)(3)(A), the Civil Rules Advisory Committee intended to deprive expert witnesses of work product protection.[10] In other words, those courts adhered, sub voce, to the bright-line rule that materials shared with testifying experts are not protected, modified only by the exceptions identified in Rule 26(b)(4)(B)-(C).

Using similar rationales, other courts have found that there is no protection against discovery for communications between an expert witness and a party,[11] or communications between an expert witness and a nontestifying consultant.[12] Even if a party representative or consultant is working at the specific behest of a party's attorney, and working with the attorney to understand and explore a testifying expert's report, that representative or consultant cannot communicate with the testifying expert without the risk that the communication would be open to discovery. To ensure protection for communications with a testifying expert under these court decisions, a party representative or consultant would have to route all of his communications with a testifying expert through the party's attorney.

Frustration of the Goals of the 2010 Amendments

Stepping beyond the textual scrutiny of Rule 26 to consider the policy implications of these decisions interpreting the 2010 amendments, there appears to be a tension between two competing sets of goals under Rule 26. On the one hand, Rule 26 is designed to foster broad discovery, particularly regarding expert witnesses, in order to allow for robust cross-examination and rebuttal at trial.[13] On the other hand, Rule 26 is marked by a notable emphasis on the work product doctrine and the promotion of effective trial preparation. These two areas of focus are often at odds with each other, as exemplified by Rule 26(b)(4)(C), which deals with the discoverability of communications between attorneys and expert witnesses.[14] The rule provides a baseline of protection for such communications, an instance in which the desire for broad discovery gives way to the work product doctrine. However, Rule 26(b)(4)(C) further provides that certain types of communications between attorneys and experts — those pertaining to expert compensation, facts or data considered by the expert, and assumptions relied on by the expert — are subject to discovery. For these particular types of attorney-expert communications, the work

product doctrine yields to the desire for broad discovery.

In other areas, like communications between expert witnesses and a party's nonattorney representatives, Rule 26 is not as explicit in terms of which goal should predominate. When analyzed against the backdrop of other Rule 26 provisions, the emerging judicial consensus that these communications are not entitled to protection raises an interesting conundrum. Under Rule 26(b)(4)(C), communications between experts and attorneys enjoy a presumption of protection. Under Rule 26(b)(3)(A), materials prepared by a nonattorney party representative also enjoy work product protection. However, when a nonattorney party representative communicates with a testifying expert, the courts generally have decided that such communications are not protected, regardless of the content of the communications. Thus, in the absence of explicit guidance under Rule 26, courts have decided that the work product doctrine yields to discovery where expert communications are directed to or from a nonattorney as opposed to an attorney.

This disparity in treatment between attorney-expert communications and representative-expert communications frustrates the goals of the 2010 amendments by reestablishing unnecessary barriers to effective expert communication. In complex litigation, a litigation team and expert witnesses need to communicate with nonattorney representatives such as consultants, other expert witnesses, or the party's employees. These decisions encourage the use of the attorney as a middleman for all such communications, even where the attorney's direct involvement serves no purpose other than protecting the communications against discovery. This inefficient result runs counter to the spirit of the 2010 amendments. In fact, this situation — where "experts adopt strategies that protect against discovery but also interfere with their work" — represents a persistence of the exact problem the Civil Rules Advisory Committee sought to remedy via the 2010 amendments.[15]

Conclusion

The 2010 amendments to Rule 26 had the laudable goals of streamlining communications with testifying experts and allowing attorneys to work with testifying experts without concerns about discovery. In some ways, the amendments have advanced these goals. Expert draft reports can be created and exchanged with counsel without fear of discovery. Attorney-expert communications also are better protected, fostering more open and effective communications during the trial preparation process. Nonetheless, courts' reluctance to apply work product protection to communications between experts and a party's nonattorney representatives has created new barriers to effective communication with testifying experts. The Civil Rules Advisory Committee appears to have anticipated the potential for this problem when it suggested in 2010 that "[t]he protection for communications between the retained expert and 'the party's attorney' should be applied in a realistic manner," and more explicitly noted that "[o]ther situations may also justify a pragmatic application of the 'party's attorney' concept."[16] Courts should take that admonition to heart and recognize that attorneys often need consultants and other experts to fully evaluate and understand the difficult scientific concepts about which experts testify. Just as Rule 26 should not hamper a testifying expert's work, it also should not hamper an attorney's ability to work with other party representatives to effectively communicate with that expert.

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[1] See, e.g., Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006) ("[W]e now join the 'overwhelming majority' of courts, Herman v. Marine Midland Bank, 207 F.R.D. 26, 29 (W.D.N.Y.2002), in holding that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.").

[2] See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001) ("The revised rule [26 of the 1993 amendments] proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.").

[3] See Fed. R. Civ. P. 26 Advisory Committee Notes (2010 amendment).

[4] Report of Civil Rules Advisory Committee (May 8, 2009).

[5] Fed. R. Civ. P. 26(b)(4)(B).

[6] Fed. R. Civ. P. 26(b)(4)(C).

[7] Fed. R. Civ. P. 26(b)(3)(A).

[8] Fed. R. Civ. P. 26(b)(4)(D).

[9] Republic of Ecuador v. Mackay, 742 F.3d 860 (9th Cir. 2014); Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a), 735 F.3d 1179 (10th Cir. 2013); Republic of Ecuador v. Hinchee, 741 F.3d 1185 (11th Cir. 2013).

[10] Mackay, 742 F.3d at 866-67; For the Issuance of a Subpoena, 735 F.3d at 1186-87; Hinchee, 741 F.3d at 1192.

[11] See PowerwebEnergy, Inc. v. Hubbell Lighting, Inc., 2014 WL 655206 (D. Conn. Feb. 20, 2014).

[12] See Whole Women's Health v. Lakey, 301 F.R.D. 266, 269 (W.D. Tex. 2014); but see also Nat'l W. Life Ins. Co. v. W. Nat. Life Ins. Co., No. A-09-CA-711 2011 WL 840976 (W.D. Tex. Mar. 3, 2011) (holding that non-fact or data emails between testifying expert and non-testifying expert were not discoverable due to protections afforded by Rule 26(b)(4)(D)).

[13] See Fed. R. Civ. P. 26 Advisory Committee Notes (1970 amendment).

[14] See Fed. R. Civ. P. 26(b)(4)(C).

[15] Fed. R. Civ. P. 26 Advisory Committee Notes (2010 amendment).

[16] Id.