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Experts, Draft Reports, and Work Product: Mistakes You Must Avoid

Work Product Protection for Draft Expert Reports and Attorney-Expert Communications

John M. Barkett
Shook, Hardy & Bacon L.L.P.
Miami, FL

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John M. Barkett
Shook, Hardy & Bacon L.L.P.
Miami, Florida

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John M. Barkett
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INTRODUCTION

Lawyers have engaged in extraordinary measures to control the flow of information between lawyers and experts and to eliminate the creation of “draft” expert reports because of the rule of thumb taught to every first-year associate: “whatever you say to an expert will be discoverable.” Shouldn’t we have a rule that lawyers’ communications with retained experts and the draft reports of those retained experts are work-product protected from production under most circumstances? The Civil Rules Advisory Committee answered this question, “yes,” with its December 1, 2010 change to Fed. R. Civ. P. 26. But the proof of the pie is in the eating. So how have courts have interpreted the rule change? I answer this question below after first exploring the background to the changes and then the changes themselves.

EXPERTS: CHANGES TO RULE 26 TO PROTECT DRAFT REPORTS AND LAWYER-EXPERT COMMUNICATIONS

The December 1, 2010 changes to Rule 26 that provided work product protection to draft expert reports has the potential to have a profound effect on the freedom of communications between counsel and experts.

Retained Experts

Under Rule 26(a)(2)(A) and (B) of the Federal Rules of Civil Procedure, parties are required to disclose the identity of expert witnesses they may use at trial to present evidence, and unless stipulated or ordered by the district court, the testifying experts are required to prepare written reports containing their opinion. The prior version of Rule 26(a)(2)(B)(i) and (ii) stated that the expert’s report “must contain”:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;*

(ii) *the data or other information considered by the witness in forming them.*¹

Subparagraph (ii) was added to Rule 26(a)(2) in 1993. The 1993 Advisory Committee Note contained the following statement on this additional language:

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used 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.

This statement was read literally by many courts who decided that an expert who receives from a lawyer comments on a draft report whether in the form of edits on the report or a separate memorandum or letter or any other type of communication from the lawyer must disclose the lawyer's comments and communications as well as draft reports because they represent "other information considered by the expert."

As a result, lawyers and experts engaged in the legal equivalent of the floor game, "Twister," contorting the expert report drafting process so that, in the most disciplined form of the game, there are discussions, perhaps a single drafting session, and only one version—the final one—of the expert's report. This process has resulted in yet another well-known game, Hide and Seek, where opposing lawyers probe experts in lengthy depositions attempting to learn about who said what to whom in the formation of the expert's report. This costly process has prompted lawyers in symmetric cases, where both sides have the same concerns about discovery of experts, routinely to stipulate that they will not seek discovery of their opponent's draft reports or lawyer-expert communications. When the exception makes the rule, it is time to change the rule.

Changing the rule was proposed by the Advisory Committee on Federal Rules of Civil Procedure (Advisory Committee).² In its May 9, 2008 report, as supplemented on June 30, 2008,³ the Advisory Committee recommended to the Standing Committee on Rules of Practice and Procedure (Standing Committee) that Rule 26(a)(2)(B)(ii) be amended to delete the phrase "or other information" so that subparagraph (ii) would read:

(ii) *the facts or data considered by the witness in forming them* (referring to the expert's opinions).

The proposed Committee Note explained this change. It reads in pertinent part:

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

¹ The remaining portions of Rule 26(a)(2)(B), retained in the amended rule, also require the report to contain (iii) any exhibits that will be used to summarize or support the experts' opinions; (iv) the qualifications of the witness, including a list of publications authored in the previous ten years, (v) a list of "all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition," and (vi) a statement of the expert's compensation "for the study and testimony in the case."

² The proposal followed a recommendation of the Federal Practice Task Force of the Section of Litigation of the American Bar Association that was adopted as a resolution by the ABA House of Delegates in August 2006.

³ The report can be found at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2008.pdf>.

trial - because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called “core” or “opinion” work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers’ memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Rule 26(b)(4)(B) and (C)⁴ were approved by the Standing Committee and transmitted to the Supreme Court and then to the Congress which did not modify them resulting in their adoption effective December 1, 2010. This text explicitly shields draft reports and, with three exceptions, lawyer-expert communications from discovery by characterizing them as attorney work product. The added paragraphs provide:

(B) Trial Preparation Protection for Draft Reports or Disclosures. *Rules 26(b)(3)(A) and (B)*⁵ *protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.*

(C) Trial Preparation Protection for Communications Between 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 Committee Note emphasizes that the work product protection for draft reports applies “regardless of the form of the draft, whether oral, written, electronic, or otherwise.” The protection also applies to drafts of any supplements to a report.

⁴ Existing Rule 26(b)(4)(B) and (C) were renumbered as paragraphs (C) and (D).

⁵ Fed. R. Civ. P. 26(b)(4)(A) provides: “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Rule 26(b)(4)(B) provides: “If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”

The same language is used to demonstrate that lawyer-expert communications are work product:

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The 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.⁶

The Committee Note further explains that paragraphs (B) and (C) to Rule 26(b)(4) also apply to “all forms of discovery” regarding the work of the expert and not just depositions. As if feeling a need to explain itself, the Committee Note adds this statement to demonstrate that there is ample room for discovery from experts:

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. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel 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 expressed.

Even with the adoption of these changes to Rule 26, experts and lawyers still cannot entirely drop their guard. In particular, lawyers working in a multi-party setting, where each party on the same side of the matter may have an expert, and where the lawyers and experts for all parties or some of the parties may confer, will have to be cautious since the Committee Note contains this limitation: “The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any ‘preliminary’ expert opinions. Protected ‘communications’ include those between the party’s attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses....” It remains to be seen how this language will affect discussions involving experts that occur in a joint defense setting. The prudent lawyer will be the cautious one, at least until the case law develops in this arena.

Lest one fear that the Advisory Committee was unmindful that parties involved in multiple lawsuits over the same issue may use different lawyers but the same expert, the Committee Note recognizes that work product protection would extend to such lawyers as well as the in-house counsel that might work with the expert:

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

⁶ The Committee Note also provides that allowance of work product protection in this circumstance does not “exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.”

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.

And what of the three exceptions? The good news is that the Committee Note limits, if it has not eliminated, the future debate over “subject matter” waiver arguments or a broad interpretation of the exceptions:

[T]he discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

The Committee Note then adds these glosses to the three exceptions:

Exception	Committee Note
Compensation	“It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.”
Facts or data provided by the attorney that were considered by the expert	“The exception 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.”
Assumptions provided by the attorney that the expert relied upon	“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 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.”

It is safe to say that, despite the Advisory Committee’s best efforts to provide ground rules, the limits of these exceptions will be tested. Indeed, the Advisory Committee itself anticipated challenges and then tried to raise the bar to their success when it wrote in the Committee Note that while work product can be discovered if a substantial need and undue hardship are shown, it will be “rare” that such a showing can be made:

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a

*substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.*⁷

Nonetheless, "in the rare case" where a requesting party is able to demonstrate substantial need and undue hardship, the Committee Note provides that the district court "must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B)." That's the good news. This protection, however, "does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial."⁸

These changes should allow lawyers and experts to communicate on legal theories and approaches to formation of the expert's opinions and to exchange draft expert reports without fear that such discussions or documents will become the subject of hours of deposition testimony or motions to compel.⁹ They should reduce the cost of litigation and offer a welcome elimination of a number of items on lawyers' checklists of steps to follow in retaining and working with experts.

Employee or Non-Retained Experts

Some witnesses, like an attending physician, give both fact and opinion testimony.¹⁰ In the latter case, the witness is not by rule required to provide an expert report,¹¹ although some courts have still required such

⁷ Rule 37(a) allows a party to move to compel the production of information that a movant believes is discoverable. By referring to "required" disclosure or discovery, the Committee Note presumably is referring (1) to information that a producing party claims is not captured by any of the three exceptions in Rule 26(b)(4)(C), (2) involves a draft report or a protected lawyer-expert communication (3) but which, in fact, is not covered either by the draft report or the lawyer-expert protections provided by the new rules. Otherwise this sentence makes no sense.

⁸ What if trial occurs, an expert is called to testify, and the cross examiner seeks to interrogate the expert regarding draft reports and lawyer-expert communications? After all, Rule 26 is a "discovery" rule, not a rule of evidence. What should a court do in these circumstances? In an earlier version of the Committee Note, the Advisory Committee was hopeful that courts would honor the spirit of these changes: "Rules 26(b)(4)(B) and (C) focus only on discovery. But because they are designed to protect the lawyer's work product, and in light of the manifold disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, it is expected that the same limitations will ordinarily be honored at trial. *Cf. United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial discovery)." Report of the Civil Rules Advisory Committee, May 9, 2008, as supplemented June 20, 2008, (p. 21 of 63) available at <http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx>. This paragraph was not, however, included in the final Advisory Committee Note.

⁹ New Jersey has comparable rules that were the subject of favorable discussion before the Discovery Subcommittee to the Advisory Committee. In its report to the Standing Committee, the Advisory Committee wrote, "The Discovery Subcommittee met with a group of New Jersey lawyers drawn from all modes of practice, private and public. The lawyers -- who agreed that they disagree about many discovery problems -- were unanimous in praising the New Jersey rule. Their enthusiasm leads them to extend protection beyond the formal limits of the rule, and often to agree to honor the state-court practice when litigating in federal court."

¹⁰ Other examples are other health care professionals, accountants of a party, or other employees of a party who offer opinion testimony (e.g., an owner of a business giving an opinion on valuation of the owner's business or a human resources employee who offers an opinion about the methodology chosen to justify a reduction in force).

¹¹ Written reports are required of a witness "retained or specially employed to provide expert testimony or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B).

reports as a matter of practice.¹² To clarify the rules, the Advisory Committee added a new subparagraph (C) to Rule 26(a)(2) which provides that unless otherwise stipulated or ordered by the district court, if a witness is not required to provide a written report, disclosures required under Rule 26(a)(2)(A) of the identity of witnesses who may be used at trial to present opinion evidence must also state:

(i) *the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705;*¹³ and

(ii) *a summary of the facts and opinions to which the witness is expected to testify.*

While this change may end the judicial debate over the need for reports from these types of witnesses, because required disclosures under Rule 26(a) are made early in the litigation, lawyers (a) may have to advance the timing of their contact with witnesses who may offer expert testimony and (b) determine, earlier than they might otherwise have, what facts and opinions will be offered by these witnesses.

In addition, the Advisory Committee explained that the work product protection afforded to retained experts does not apply to non-retained or employee witnesses¹⁴ who offer expert testimony. The Committee Note states: “The rule provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).”

¹² The Committee Note illustrates the point with two cases: “See *Minnesota Min. & Manuf Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D. Minn. 1998) (requiring written reports from employee experts who do not regularly provide expert testimony on theory that doing so is ‘consistent with the spirit of Rule 26(a)(2)(B)’ because it would eliminate the element of surprise); compare *Duluth Lighthouse for the Blind v. C.B. Bretting Manuf Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a report requirement because ‘we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct’).”

¹³ Rule 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Rule 703 provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” Rule 705 provides: “The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

¹⁴ An employee witness may be a client of the employer’s lawyer as well and thus conversations between the witness and the lawyer that are protected by the attorney-client privilege would not be discoverable. Similarly, while an employee witness offering expert testimony must under Rule 26(a)(2)(C) provide a summary of the facts and opinions to which the witness is expected to testify, the witness as part of a control group of the employer-client may have knowledge of attorney work product that falls outside the ambit of these facts and opinions and would be entitled to protection because of the witness’s status within the employer organization.

CASE LAW ON THE APPLICATION OF RULE 26'S PROTECTION AGAINST DISCLOSURE OF DRAFT EXPERT REPORTS

The case law on the changes to Rule 26 is still sparse and developing. The role that lawyers have played in editing or drafting an expert report, discovery from experts on communications with other than lawyers, and exceptions to work product protection in Rule 26(b)(4)(C) are the focus of the cases discussed below.

Inquiry into the Editing Role Played by Lawyers in the Preparation of the Expert Report

In *Skycam, Inc. v. Bennett*, 2011 WL 2551188 (N.D. Okla. June 27, 2011), defendants argued in pertinent part that two experts' reports were "nothing more than a conduit" through which plaintiffs' counsel, Kenney, was advocating their theory of the case. *Id.* at *1.¹⁵ Defendants sought, therefore, to compel production of attorney's notes made in connection with interviews of the two experts or the preparation of their expert reports. The district court held a hearing on the motion and at the end of the hearing ordered plaintiff's counsel to produce these notes for *in camera*.

The court described the legal framework for deciding the motion. An attorney is allowed to be involved in the preparation of an expert report but the expert must "substantially participate in the preparation of the report." *Id.* at *6 (citation omitted). One of the experts, Williams, testified that he and Kenney "met for seven or eight hours and outlined what would be in the report," that Kenney then "had the report typed up based on notes Kenney took during the meeting, and that Williams then reviewed and made revisions to the report." *Id.* The court held that Williams substantially participated in preparation of the report: "The court has reviewed notes Kenney took during the meeting with Williams, notes of an earlier meeting between the two, and the draft report. The court concludes from its review that Williams substantially participated in preparation of the report." *Id.* The court reached the same conclusion for the other expert after reviewing the expert's testimony and Kenney's notes. *Id.*¹⁶ Hence, it denied the motion to compel.

There was a different outcome in *Gerke v. Travelers Casualty Ins. Co.* 2011 WL 623304 (D. Or. Feb. 19, 2013). Plaintiff hired an expert, Painter, to give an opinion on whether plaintiff had intentionally burned his truck as the defendant insurance companies were claiming. Plaintiff was ordered to produce to defendants the portions of Painter's files that were not excluded from discovery by Rule 26(b)(4),

excluded documents specifically being Painter's draft reports, and documents containing facts, data, or assumptions from Plaintiff's counsel to Painter. Any document containing such information and also containing attorney work-product must be produced in redacted form. Letters and emails from Plaintiff's counsel to Painter to which are attached discoverable information must also be produced, in redacted form if necessary. Plaintiff shall produce to

¹⁵ Plaintiffs were claiming that defendant Bennett, a former employee of plaintiff, used trade secrets associated with plaintiff's Skycam technology to create a competing system called "Actioncam." 2011 WL 2551188 at *1.

¹⁶ The court held: "Eschborn testified he met with Kenney for seven hours, that he 'dictated the concept' of his opinions and Kenney wrote the opinions on a note pad and then wrote the report based on Eschborn's opinions. The draft report was emailed to Eschborn for his review and signature. [Dkt. # 122, Ex. 2, Eschborn Dep., 190-197]. The court has reviewed notes Kenney took during the meeting with Eschborn, Kenney's notes outlining the report, notes Kenney made during initial inspection by Eschborn of the Actioncam system, and the draft report. The court is satisfied that Eschborn substantially participated in preparation of his report." 2011 WL 2551188 at *6.

Defendants a category-based privilege log of the documents in Painter's file withheld from production.

Id. at *1.

Painter's deposition was taken. A dispute arose over compliance with the court's order and the parties called the court for assistance. In this telephone hearing, the court ordered Painter to produce for *in camera* review his entire file which the court defined as follows:

the expert report prepared and produced in this case, letters, emails, notes, deposition transcripts, affidavits, drafts of reports, reports of other experts, work product of other experts, data, drawings, diagrams, schematics, retainer agreements, and any other document, whether in hard-copy or digital form, contained in Mr. Painter's file, whether or not Mr. Painter read, reviewed, consulted, studied, or considered the document, and from whatever source received, be that source plaintiff's counsel, other experts, assistants, lay persons, or any other source.

Id. at *2. The court also directed Painter not to consult with plaintiff's counsel regarding his submission and was ordered to "err on the side of being inclusive of materials about which he is uncertain are within the scope of the court's order to produce his 'file.'" Painter was also ordered not to copy counsel on his submission. Plaintiff's counsel and defendants' counsel also were permitted to file with the court the portion of Painter's file that was produced to defendants by plaintiff. *Id.*

The submissions were made. The magistrate judge then addressed a number of questions but only one is addressed here: must an expert identify a portion of an expert report that contains text drafted by the lawyer that engages the expert?

In the telephone hearing during Painter's deposition, the court ruled that the expert had to answer questions in his deposition regarding the source of any text in his report written by others in Painter's office but also by plaintiff's counsel. Plaintiff's counsel argued that under Rule 26(b)(4), drafts are "strictly protected from...production." *Id.* at *8. The court responded:

THE COURT: Drafts are, but if you wrote a paragraph or a section of his report, sent it to him, and told him to include it, that goes directly to Mr. Painter's credibility. It's one thing to talk to the expert about the topics to be covered and any gaps, holes, or lack of clarity in an expert's report. But if you write portions and he adopts them or incorporates them in their entirety or in substantial form, then that goes to Mr. Painter's credibility because, Mr. Foster, you are not the expert; Mr. Painter is. This is supposed to be his opinion, not the opinion of his lawyer or his client. And that goes at least to the credibility of the expert's testimony, and it may well go to the admissibility at trial or on motion of the expert's opinion. Because then you have a [Daubert] issue.

So, I know what the rule says. I also know that lawyers are not supposed to write their experts' reports or any portion of them. And if that's happened here, then that goes to credibility and it goes to admissibility, and Mr. Painter has to answer those questions.

Id. (parenthetical in the original.) In the deposition, Painter then testified that he wrote the report and that all of the opinions and conclusions were his and that plaintiff’s counsel had helped him “clean it up, edit it, make it more professional, if you will.” When asked to identify the portions of the report by paragraph that plaintiff’s counsel wrote, Painter said he could not do so without comparing the final report to his original draft.

Relying on *McClellan v. I-Flow Corp., et. al.*, 710 F.Supp.2d 1092 (D. Or. 2010)¹⁷, the court concluded:

McClellan teaches that Rule 26(b)’s attorney work-product protection has limits. Communications between a lawyer and the lawyer’s testifying expert are subject to discovery when the record reveals the lawyer may have commandeered the expert’s function or used the expert as a conduit for his or her own theories. When the record presents that possibility, the lawyer may not use the attorney work-product privilege as a shield against inquiry into the extent to which the lawyer’s involvement might have affected, altered, or “corrected” the expert’s analysis and conclusions.

Id. at 12. The magistrate judge then decided that additional disclosure of communications between plaintiff’s counsel and Painter was warranted and Painter’s deposition should be continued to permit further inquiry on the topic by defendants’ counsel. The court supported this conclusion on three grounds.

First, Painter’s testimony suggested, the court determined, that plaintiff’s counsel,

might have authored portions of Painter’s final report. Painter acknowledged Plaintiff’s counsel changed his preliminary report after Painter emailed it to him, and he could not identify the portions of his October 22, 2012, final report that Plaintiff’s counsel wrote without comparing the final report to his October 18, 2012, preliminary report. Although Painter testified the final report’s conclusions and opinions were his, that statement does not create a barrier to further inquiry. McClellan makes clear that the expert’s adoption or ratification of a lawyer’s changes and additions to the expert’s report does not preclude opposing counsel from learning how the lawyer’s contributions affected the expert’s final opinions, and it does not insulate the expert’s opinion from either evidentiary exclusion or challenge through impeachment.

Id.

Second, Painter’s final report contained opinions about parts of the truck in question that were not discussed or mentioned in a two prior drafts of his report.

¹⁷ *McClellan v. I-Flow Corp., et. al.*, 710 F.Supp.2d 1092 (D. Or. 2010), was decided before the draft expert report amendments were added to Rule 26. The district court in *McClellan* addressed an argument that many of plaintiffs’ expert reports were drafted by counsel by saying that Rule 26 does not prohibit counsel’s assistance in preparing or drafting an expert report but an expert report “ghost written” from ‘whole cloth’ violates the spirit, if not the letter of the Rule, as do reports that have been altered by counsel or prepared ‘merely for appeasement or because of intimidation or some undue influence by the party or counsel who has retained him.’” *Id.* at 1118 (citation omitted). The district court then added: “Whether counsel’s assistance in preparing an expert report violates Rule 26 is a fact-specific inquiry,” *id.*, in ultimately finding that “generally” “acceptable editorial assistance from counsel” had been rendered. *Id.*

The record is unclear how and why Painter arrived at those additional opinions. Only four days passed between the date of Painter's two October 18, 2012, reports and the date of Painter's final report. Painter testified that he never inspected Gerke's tool truck, that Gerke's tool truck is the first Matco Tools truck he has "been involved in," that he was retained and first received the materials for this case on October 15, 2012, that he made no working notes during his review of this case, and that he spent a total of four hours reviewing the file and issuing his report. These facts create a genuine question whether Painter came to these additional opinions and analyses so quickly because they were suggested or given to him by Plaintiff's counsel.

Id. at *13 (record citation omitted.)

Finally, the court held that additional disclosure was consistent with the privilege exceptions specified in Rule 26(b)(4)(c) because Painter's testimony suggested that his final report contained "facts, data, and assumptions provided by Plaintiff's counsel. If Painter adopted that information as his own opinion and included it in his final report, then under the exceptions Painter considered and relied on that information in forming his opinion. Indeed, the facts, data, and assumptions provided by Plaintiff's counsel might well have become Painter's opinion or have formed part of it." *Id.*

Gerke relied on pre-rule change case law to support its outcome. The court in *United States CFTC v. Newell*, 301 F.R.D. 348 (N.D. Ill. 2014) recognized this flaw in distinguishing *Gerke* and denying the CFTC's motion to compel certain communications between defendants' counsel and two of their experts (Burnside and Parkes).

The CFTC had issued interrogatories seeking all communications between defendants and their experts. In response, defendants produced "some drafts and notes related to defendants' expert reports, including two drafts of Mr. Burnside's report, emails between defense counsel and Mr. Parkes, and 16 pages of Mr. Parkes's handwritten notes." *Id.* at 349.

This production raised suspicions about the role of defendants' counsel in the drafting of the experts' reports argued the CFTC:

The CFTC maintains that the documents produced raised suspicions about the role of defendants' attorney, Nicholas Iavarone, in drafting the reports. For example, one of the drafts of Mr. Burnside's report, which the parties refer to as "version 7," purportedly shows multiple paragraphs of the report as being "inserted" by Mr. Iavarone. It also shows a few words and phrases as being added by Mr. Newell. (Id.) Further, according to the CFTC, the production related to Mr. Parkes contain less work product than one would expect to see regarding the substance of the reports.

Id. (record citations omitted).

At a meet-and-confer session, defendants apparently agreed to produce some additional expert emails. *Id.* Messrs. Burnside and Parkes were then deposed. Burnside testified that "he discussed changes to his report" with defendant's counsel who then typed the changes. Burnside then accepted the changes. *Id.* "Mr. Burnside

was sure there were additional parts of the report that Mr. Iavarone wrote and he accepted, but he could not recall which parts specifically.” *Id.* (deposition citation omitted).

Parkes testified that he and defendant’s counsel had “passed drafts of the report back and forth and that defendant’s counsel ““was involved in the process of developing the opinions, the whole report.”” *Id.* at 350. “Mr. Parkes also admitted that he incorporated portions of analysis from Mr. Burnside and other unknown sources into his report without independently assessing the accuracy of that analysis.” *Id.*

The day before the motion to compel was filed, defendants produced portions of a draft of Parkes’s report that, unbeknownst to defendants’ counsel, had been provided to Burnside to show him what an expert report looked like. *Id.*

On this record, the CFTC, argued that defendants had to produce any other drafts of Parkes and Burnside’s reports, and all communications with the experts that contain facts, data, or assumptions supplied by counsel. Relying on *Gerke*, the CFTC argued that Rule 26(b)(4) provided no protection to the drafts because defendants’ counsel “likely drafted” portions of the reports. It added that Rule 26((b)(4)(C) permits discovery of facts, data, or assumptions supplied by counsel.

The court first distinguished *Gerke* pointing out that its reliance on *McClellan* was suspect:

The McClellan decision, however, like the other decisions cited in Gerke, predates the amendment adding Rule 26(b)(4)(B) and (C), which was effective December 1, 2010. See Gerke, 289 F.R.D. at 329. Furthermore, the McClellan decision was not about discovery or work-product protection. The court there considered a Daubert challenge to certain experts’ reports, taking into account pre-amendment case law regarding lawyers’ assistance in drafting expert reports. McClellan, 710 F. Supp. 2d at 1118.

Then citing the express language of Rule 26(b)(4), the court rejected the CFTC’s arguments:

In the present motion, the CFTC argues that defendants should be deemed to have forfeited Rule 26(b)(4)’s work-product protection because there is evidence that defendants’ counsel participated in drafting sections of the report. That argument depends on the type of discovery the amendment was intended to prevent. The CFTC’s approach would require an analysis of the degree of counsel involvement (both quantity and quality) in the drafting of the report. Such an analysis would necessarily require production of all of the drafts of the report for comparison, as well as production of all, or virtually all, communications between expert and counsel. The drafters intended Rule 26(b)(4)(B) and (C) to protect against that discovery.

Thus, the court rejects the CFTC’s argument that the court should undertake a detailed analysis of Mr. Iavarone’s involvement in the drafting of the experts’ reports and declare that defendants have forfeited the protection of Rule 26(b)(4)(B) and (C) based on some quantitative or qualitative threshold of attorney involvement.

Id. at 352 (footnotes omitted).

The court then reviewed defendants’ privilege log, which listed 14 emails between defendants’ counsel and the two experts. “Eleven of those emails are from Mr. Iavarone and are described as consisting of comments or

questions on draft reports, review of a draft, ‘correction in data,’ and ‘[i]nformation regarding complaint.’ Two emails were exchanged between Mr. Parkes and Mr. Iavarone regarding questions from Mr. Parkes about the scope of his assignment.” Two other emails were described as covering “complaint questions” or the content of the draft report. *Id.* at 353 (record citations omitted). The court directed defendants to review these emails and “produce any portions that contain materials covered by the exceptions in Rule 26(b)(4)(C)(ii) or (iii),” while redacting the remainder of the emails. *Id.*¹⁸

The CFTC also sought facts, data, or assumptions provided to counsel that were contained in other draft reports. The court said that it was arguable that facts, data, or assumptions provided by an attorney should not be insulated from production because they were included in a draft report. But it did not have to decide the question since there were no additional draft reports to be produced. *Id.*¹⁹

Production of Documents Other Than Draft Reports or Communications Other Than With Counsel

In re Application of the Republic of Ecuador, 280 F.R.D. 506 (N.D. Calif. 2012) involved an application for a subpoena under 28 U.S.C. § 1782²⁰ to an expert, Kelsh, for the intervenor, Chevron. Chevron was involved in a bilateral investment treaty (BIT) arbitration to challenge environmental litigation in a provincial court in Ecuador started by Ecuadoran plaintiffs against Chevron (referred to as the Lago Agrio litigation) for alleged personal injuries caused by oil exploration in the Amazonas region of Ecuador. *Id.* at 509. Kelsh worked for a consulting firm, Exponent, and was an expert in the litigation. The Republic was seeking a number of documents from Kelsh, including drafts of reports he prepared for the litigation, to establish the validity of the Lago Agrio judgment in the BIT arbitration. Pending before the court was a motion to compel production of 2,000 documents withheld by Kelsh as privileged.

After holding that Rule 26 as amended on December 1, 2010 was applicable to the motion, the court held that draft reports and draft worksheets prepared by Kelsh or his assistants for use in Kelsh’s expert reports were protected from disclosure under Rule 26(b)(3)(A) and (B) but draft worksheets prepared by non-attorney Chevron employees had to be produced. *Id.* at 512. The court also made the following findings:

¹⁸ *Holland v. National Union Fire Ins. Co.*, 2013 U.S. Dist. LEXIS 157161 (E.D. Calif. Oct. 31, 2013) was a coverage case over the existence of a long term disability. National Union issued a subpoena to a lawyer, who had successfully represented Holland in an earlier personal injury lawsuit, seeking production of, among other documents, draft expert reports. The court quashed the subpoena with the exception that the attorney “must disclose (1) facts or data that the attorney provided and that the expert considered in forming the opinions to be expressed; or (2) the assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed.” *Id.* at *14-15.

¹⁹ The CFTC argued that there must be additional draft reports because one of the reports produced was labeled “version seven” and only two versions of this report had been produced. The court acknowledged that defendants had “arguably waived the protection of Rule 26(b)(4)(B)” by producing drafts, but accepted defendants’ representations that there were no other draft reports: “Although defendants have arguably waived the protection of Rule 26(b)(4)(B) for drafts that were transmitted to defendants’ counsel by producing such drafts, the CFTC’s argument that there are additional such shared drafts is simply speculation. Thus, based on defendants’ representations, the CFTC’s request for production of further drafts of the reports is denied. See *Daniels v. Spencer Gifts, LLC*, 2012 U.S. Dist. LEXIS 17976, 2012 WL 488099 at *5-6 (N.D. Ill. Feb. 14, 2012) (denying request for additional discovery raising ‘mere possibility’ more existed); *Bryant v. Gardner*, 587 F. Supp. 2d 951, 969 (N.D. Ill. 2008) (refusing to order further discovery when there was little to suggest more existed); see also *Inter-Med, Inc. v. ASI Medical, Inc.*, No. 09-CV-383, 2010 U.S. Dist. LEXIS 77861, 2010 WL 2854288 at *2 (E.D. Wis. July 19, 2010) (“The defendant cannot produce documents which do not exist. Mere speculation that there is more will not suffice.”) (internal quotation and alternations omitted).” *Id.* at 353-54.

²⁰ Under 28 U.S.C. § 1782, a district court may order a person over whom there is jurisdiction to give testimony or produce documents or tangible things for use in a proceeding in a foreign or international tribunal.

- “[N]otes, task lists, outlines, memoranda, presentations, and draft letters authored by Kelsh and/or Exponent, non-attorney Chevron employees, and other testifying experts from the Lago Agrio litigation must be disclosed as they are not protected as draft reports and are not independently protected as work product.” *Id.* at 513.
- Memoranda, notes, outlines, and reviews “misabeled” as draft reports (based on an *in camera* review) had to be produced. *Id.* at 513-14.
- Communications between Chevron’s attorneys and Kelsh or his assistants were protected work product. *Id.* at 514.
- “[C]ommunications among non-attorney Chevron employees and Kelsh are not work product and simply labeling them ‘work product’ or ‘attorney-client privilege’ does not suffice. (Citation omitted.) Nor does copying an attorney on a communication automatically render it work product. (Citation omitted); *see, e.g.*, MAK_PL000703 (e-mail re: translation of documents from Exponent employee to third party consultant, copying Chevron attorney). Respondents provide no indication that these communications include the ‘theories or mental impressions of counsel.’ FED. R. CIV. P. 26(b)(4)(C) (2010 Advisory Committee Notes). The Court’s *in camera* review reveals that e-mails between Kelsh, his assistants, and non-attorney Chevron employees, including those in which attorneys are copied, *e.g.*, MAK_PL000703 and MAK_PL000715, are not work product and must be disclosed.” *Id.* at 515.
- “[C]ommunications between Chevron’s attorneys and consulting experts; between Kelsh/Exponent and consulting experts; or between various consulting experts cannot be cloaked as communications between ‘Chevron’s litigation team members’ and other Chevron ‘agents’ to fit within the confines of Rule 26(b)(3).” *Id.* at 516.
- “[C]ommunications among the numerous reporting expert witnesses listed in Respondents’ privilege log are not those between expert Kelsh and any attorney,” and therefore, are not protected from disclosure. *Id.*²¹

The theme throughout the magistrate judge’s analysis was that the 2010 amendments to Rule 26 were designed to protect from disclosure only two types of discovery: “an expert’s draft reports and the communications between a retained reporting expert and the party’s attorney.” *Id.* at 516. Unless a document fell into these categories, under the court’s analysis, it had to be produced.

In affirming, the Ninth Circuit, in *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014) concluded that the 2010 amendments were to designed to protect attorney opinion work product. The court of appeals rejected Chevron’s arguments that (1) the text of Rule 26(b)(3), which protects materials prepared “by or for” a party or its “representative,” “applies to expert materials that do not fall within the attorney-expert communication or draft report protections under Rule 26(b)(4),” and (2) “there are no applicable exceptions beyond the limited requirements for disclosure (*e.g.*, ‘facts or data’) and specific exempted categories of attorney-expert communications,” *id.* at 866:

²¹ In *United States v. Veolia Env’t N. Am. Operations, Inc.*, 2013 U.S. Dist. LEXIS 153245 (D. Del. Oct. 25, 2013), the court held that Rule 26(b)(4)(C) protects communications between a party’s attorney and that party’s testifying expert and that communications with the expert by others who provided “facts or data” were not insulated from discovery: “Therefore, the Court concludes that the Taxpayer must produce, in response to the summonses, any materials containing facts or data considered by XRoads or Duff & Phelps in forming the opinions expressed in their reports — even if such facts or data were provided by Aon or anyone else or any entity other than the Taxpayer and the Taxpayer’s attorneys — unless the Taxpayer can demonstrate some basis for non-disclosure.” *Id.* at *22 (footnote omitted).

The historical evolution of the rule, its current structure, and the Committee’s explanatory notes make clear that the driving purpose of the 2010 amendments was to protect opinion work product — i.e., attorney mental impressions, conclusions, opinions, or legal theories — from discovery. The protections for draft reports and attorney-expert communications were targeted at the areas most vulnerable to the disclosure of opinion work product. The Committee thus sought to acknowledge the reality that attorneys often feel that it is extremely useful — if not necessary — to confer and strategize with their experts. But there is no indication that the Committee was attempting to do so at the expense of an adversary’s ability to understand and respond to a testifying expert’s analysis.

To the contrary, the Committee sought to balance the competing policy considerations, including the need to provide an adversary with sufficient information to engage in meaningful cross-examination and prepare a rebuttal, on the one hand, and the need to protect the attorney’s zone of privacy to efficiently prepare a case for trial without incurring the undue expense of engaging multiple experts, on the other. There is no indication that the Committee intended to expand Rule 26(b)(3)’s protection for trial preparation materials to encompass all materials furnished to or provided by testifying experts, which would unfairly hamper an adverse party’s ability to prepare for cross-examination and rebuttal. We accordingly reject Chevron’s argument.

Id. at 870-71 (citation and footnote omitted).

The Ninth Circuit reached the same conclusion as had been earlier reached by the Tenth Circuit in a second reported circuit court opinion on the Chevron-Ecuador discovery battles. *Carrion v For the Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a)*, 735 F.3d 1179, 1187 (10th Cir. 2013). The court of appeals held that “facts and data” include any documents containing “factual ingredients”:

Thus, the underlying purpose of the 2010 revision was to return the work-product doctrine to its traditional understanding. The drafters articulated: “The refocus of disclosure on ‘facts and data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” Fed. R. Civ. P. 26(a)(2)(B) (2010 Comments). Thus, Rule 26(b)(4), especially subdivision (C), restores the core understanding that the work-product doctrine solely protects the inner workings of an attorney’s mind. Though Chevron argues that “facts or data” is to be construed narrowly to limit discovery to the barebones factual information underlying an expert’s opinion, the comments reinforce the strong preference for broad discovery of expert materials: “[T]he 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.” Fed. R. Civ. P. 26(a)(2)(B) (2010 Comments). This indifference as to the source of material refutes Chevron’s contention that documents provided to an expert by a party are protected under Rule 26(b)(3). And materials containing “factual ingredients” include far more than materials made up solely of “facts or data.”

Id. at 1187 (record citation omitted).

Probing Whether Counsel Provided Facts or Data or Assumptions to the Expert

Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416 (N.D. Ill. 2011) was a fight between two competitors in the sale of hot dogs involving mirror-image false advertising claims. Defendants retained an expert, Dr. Wind, to serve as a testifying expert as to one of plaintiff's advertisements but as a consulting expert²² as to another of plaintiff's advertisements. *Id.* at 417-18. When deposed, Dr. Wind was instructed not to answer any questions regarding his work as a consultant. Apparently as part of the motion practice that followed, defendants submitted *in camera* their communications with Dr. Wind. Those documents showed that Dr. Wind was serving only as a consultant, the court agreed. Nonetheless, plaintiff sought their production in a motion to compel. *Id.* at 418.

The court held that the "requested materials" did not contain, in Rule 26(a)(2)(B)(ii) terms, "facts or data" or, in Rule 26(b)(4)(C)(iii) terms, "assumptions that the party's attorney provided." Because the communications between the expert in his role as a consultant and counsel receive work product protection under Rule 26(b)(4)(C), the court required plaintiff to make a Rule 26(b)(3)(A)(ii) showing to overcome work product protection. It could not show a substantial need for the materials. Hence, the court denied plaintiff's motion to compel additional deposition testimony and documents. *Id.* at 420-21.

In Re Asbestos Products Liability Litigation (No. VI), 2011 WL 6181334 (E.D. Pa. 2011) involved a number of motions related to plaintiffs' principal diagnosing and testifying expert physicians. Plaintiffs' counsel provided "transmittal letters" to the doctors. These letters "may have furnished certain information about exposure, medical and smoking history to the doctors and may have been utilized by them in the formation of any letters or reports provided to counsel to support a claim." *Id.* at *6. After reviewing Rule 26(b)(4)(C)(ii) and (iii), the court framed the question to be answered as: "whether information provided constitutes 'facts or data' or 'assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.'" *Id.*

Plaintiffs argued that the proper question was whether these transmittal letters represented communications between a party's attorney and the expert witness protected from disclosure under Rule 26(b)(4)(C). But the court rejected this argument saying that the "information and format" that plaintiffs' counsel "provided to its diagnosing doctors regarding individuals' exposure, medical, and smoking histories" fell "squarely within the definition of all 'facts or data' considered by the expert, which the amendments will not protect under Rule 26(b)(3)(A) or (B)." *Id.* at *7. Hence, the court ordered production of any documents in their original format that (1) plaintiffs' counsel provided to the doctors (2) that the doctors "considered" (3) including any draft letters, (4) adding that production was required whether the documents were still within the possession of the doctors or plaintiffs' counsel or "anyone under their control." *Id.*

²² Normally the identity of a non-testifying expert does not have to be disclosed, and the 2010 changes to Rule 26(b)(4) did not change this rule. *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122-23 (S.D.N.Y. 2014) ("The 2010 Amendments is silent as to whether the identity of a non-testifying expert is protected from disclosure under Rule 26(b)(4) or whether the 2010 Amendments changed Rule 26(b)(4) in way that would now preclude the protection of such information. Indeed, the 2010 Advisory Committee's Notes do not explicitly depart from the 1970 Committee's Notes, it only adopts work-product privilege to experts. The 2010 Amendments retained prior Rule 26(b)(4)(B) as Rule 26(b)(4)(D). See 2010 Advisory Committee's Notes on Fed. R. Civ. P. 26 ('Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E).'); *Higher One, Inc. v. TouchNet Information Systems, Inc.*, No. 13-mc-6020 CJS, 298 F.R.D. 82, 2014 U.S. Dist. LEXIS 22978, 2014 WL 702118, at *6 n.17 (W.D.N.Y. Feb. 24, 2014). Accordingly, the 1970 Committee's Notes' preclusion from discovery of the identity of an informal consulting expert remains after the 2010 Amendments.").

Are Notes Made by An Expert in Reviewing Depositions Shielded From Production?

In a third Chevron-Ecuador court of appeals' opinion, *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. 2013), the 11th Circuit affirmed an order compelling production, among other documents, of a testifying expert's (Dr. Hinchee) personal notes.

Agreeing with the Tenth Circuit's decision in *Carrion* as the Ninth Circuit had done in *Mackay*, the court of appeals first explained that even after the 2010 amendments, Rule 26(b)(3) did not provide work product protection to experts.

[A]n overbroad reading of Rule 26(b)(3)(A) would undermine the drafters' deliberate choice in Rules 26(b)(4)(B) and (C) to extend work-product protection to only draft expert reports and attorney-expert communications. In crafting Rules 26(b)(4)(B) and (C), the drafters easily could have also extended work-product status to other testifying expert materials, such as an expert's own notes or his communications with non-attorneys, such as other experts. But the rule drafters did not. This omission, if anything, reflects a calculated decision not to extend work-product protection to a testifying expert's notes and communications with non-attorneys.

Id. at 1191-92 (emphasis in original).

The court of appeals also rejected Chevron's argument that Dr. Hinchee's notes (or his communications with other experts) were shielded from protection because of the change in Rule 26(a)(2)(B)'s requirements of the contents of a written report to identify the "facts or data" considered by the expert, instead of the "data or other information" considered by the expert. *Id.* at 1194. It explained that the 2010 amendments to Rule 26(a)(2)(B) was designed to protect the opinion work product of attorneys, not the notes of experts:

*As the 2010 Advisory Committee put it, "[t]he 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." [Rule 26, advisory committee notes (2010)] (emphasis added). At the same time, the term "facts or data" should "be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." *Id.* And Rule 26(a)(2)(B)'s "disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert." *Id.* In other words, the term "facts or data" includes all materials considered by a testifying expert, except the core opinion work-product of attorneys.*

Notably here, Chevron and Dr. Hinchee do not argue that the discovery materials at issue in this case contain the core opinion work-product of Chevron attorneys. Instead, by withholding Dr. Hinchee's personal notes and communications with other experts, Chevron and Dr. Hinchee attempt to shield the theories and mental impressions of Dr. Hinchee and his fellow testifying experts. Rule 26 provides no basis for this, neither before nor after the 2010 Amendments.

Id. at 1195 (emphasis in the original).

A near similar outcome was reached in *Wenk v. O'Reilly*, 2014 U.S. Dist. LEXIS 36735 (S.D. Ohio 2014) but the argument was a different one than was made in *Hinchee*. Defendants had retained an expert, Dr. Hughes, who reviewed depositions of other witnesses in the matter and made marginal notes on the transcripts of the depositions. Plaintiffs sought these documents. Defendants objected claiming that they represented draft reports insulated from production, or that the notes did not represent either facts or data that had to be produced.

After considering the trilogy of *Chevron* cases, the court explained that notes made by an expert are not work product, and such notes may contain facts or data that must be disclosed:

These three cases seem to this Court to be fully consistent with the language of Rule 26 and the intent of the drafters of the 2010 amendments, as expressed in the Advisory Committee Notes. They stand for two propositions: that notes made by an expert witness are not work product, and that such notes typically contain "factual ingredients" and are therefore included in the type of "facts or data" an expert has considered in formulating opinions and therefore must disclose. Here, Defendants do not appear to be advancing a work product theory, so the first of these propositions is not directly germane to this case. Defendants do, however, argue that Dr. Hughes' notes, which they describe as including "his observations about and the analysis of facts and data that came directly from other sources, such as deposition transcripts, exhibits, and industry articles" do not "themselves contain independent facts or data" and are not subject to disclosure under Rule 26(a)(2)(B)(ii).

2014 U.S. Dist. LEXIS 26735 at *10-11 (record citation omitted).

The court then rejected defendants' argument:

Apart from shielding attorney work product from disclosure, there is no reason to prevent an opposing party from finding out how an expert arrived at his or her conclusions, including discovering the thought processes which led the expert there. Drafts are protected because, as noted above, the drafting process ordinarily entails communications between the expert and counsel and usually involves feedback from counsel, a process which is likely to include revelation of attorney work product. Notes made independently by an expert do not fall into that category, and notes which contain observations about facts or analyses of facts have "factual ingredients," making them subject to disclosure or discovery. Although the Court has not seen these notes, from Defendants' descriptions of them, they appear to qualify as "facts or data," as that phrase is read broadly, and cannot be withheld from production on that ground.

Id. at *11-12.

In deference to the argument that the expert was, in fact, making notes of a draft report as opposed to compiling information for possible later use in the matter, the court required defendants to submit the notes *in camera* to decide whether the notes "can be legitimately characterized" as draft reports. However, the court offered guidelines for defendants' consideration before they decided whether they wanted to bother with the effort of *in camera* review. Comparing an expert's note-taking in connection with an inspection of a tangible item to a review of transcripts, the court explained that interpreting the phrase "draft reports" too broadly

would “shroud” an expert’s thought processes in secrecy without protecting attorney work product from disclosure:

The type of note-taking which typically occurs in that kind of case seems to be the equivalent of what an engineer does when, for example, he or she observes a machine or a mechanical process and jots down notes or preliminary observations while doing so. In a case where the factual matter to be examined and analyzed consists of witness statements, depositions, or written policies, why should the notes or preliminary observations made by a reviewing expert be treated differently? And there is a substantial risk in interpreting the concept of “draft report” too broadly. While an expert may legitimately believe that every thought which occurs to him or her from the beginning of the assignment onward is a nascent report or portion of one, if the law makes all of these materials drafts, a substantial portion of the expert’s actual thought process will be shrouded in secrecy, and opposing parties will have to rely on the expert to recount that process fully and truthfully without having the means to test the expert’s narrative through contemporaneously-created notes. Finally, it is important to remember that the protection against disclosure in the context of draft reports and communications with counsel is designed not to shield the expert’s reasoning process from discovery, but to guard against the disclosure of attorney work product and to facilitate the communication process between attorney and expert. Having to turn over notes taken by an expert which did not result from or reflect any attorney-driven communications does not implicate the work product doctrine, and the fact that such notes may be subject to discovery does not appear to impact the attorney’s ability to communicate effectively with the expert as the drafting process gets underway in earnest.

Id. at *17-18.

The court then described the procedure it would have to follow to answer the question of whether the notes made by Dr. Hughes were actually part of what became a draft report:

This is not to say that in order to obtain protection of an expert’s written product as a draft report, that writing must be so labeled or be in any particular format. Rule 26(b)(4)(B) explicitly says otherwise. But there must be a reasoned and principled way to draw the connection between a written note and the final expert report which protects actual drafts but allows disclosure of the preparatory material which is used to make a draft, and it is difficult to draw that line in the absence of any salient facts. To answer the precise question presented in this case - not the larger legal question, but simply to decide if the notes made by Dr. Hughes are really drafts of his report - the Court would need to see his final report, to see his notes, and to determine how significant the notes appear to be in the context of his final set of opinions. It would also help the Court to know how well-formulated the notes are, and how much time elapsed between when he took the notes and when he began to draft an opinion in earnest. It will also be useful to explore whether the notes appear in any subsequent or final draft in substantially the same language, or whether they appear simply to have formed the basis for Dr. Hughes’ conclusions in a manner similar to other materials - like the deposition testimony or the content of other documents he reviewed - which cannot be considered “draft reports.”

Id. at *18-20. The court gave defendants seven days to decide whether they wished to submit the notes *in camera* for this level of review.²³

CONCLUSION

Changes to Rule 26 of the Federal Rules of Civil Procedure now allow lawyers and experts to work together without losing work product protection for their communications and draft expert reports. But the case law on the contours of Rule 26(b)(4)(B) and (C) is in its infancy. Communications by the expert with other than counsel can be outside the protection afforded by the 2010 amendments. Work product protection for expert-generated notes has consistently been rejected. Depending upon the jurisdiction, a lawyer's excessive interference in the drafting process may become the subject of discovery under certain circumstances despite the protection afforded to draft reports. *In camera* inspections of attorneys' notes, if they exist, may be required if the testimony of an expert prompts a judge to evaluate the respective roles of the expert and counsel in drafting an expert report. The exceptions contained in Rule 26(b)(4)(C) will be animated if it appears or can be argued that counsel provided an expert with "facts and data" or "assumptions" that the expert relied upon in forming opinions expressed. A properly prepared expert should be able to address these topics in a deposition without creating confusion that may result in a motion to compel or possibly *in camera* inspection of attorney notes.

The bottom line? Know that the work product protection rules regarding experts gives lawyers more leeway in dealing with their experts that should reduce the costs of litigation, but lawyers and experts still must never become complacent or smug in dealing with discovery likely to be sought from those experts.

/jmb

²³ "For the reasons set forth above, the Court directs Defendants, if they wish to continue to withhold the notes in question, to submit those notes to the Court *in camera* within seven days of the date of this order. They shall also submit a copy of Dr. Hughes' final report, any drafts of that report (also *in camera*), and any additional argument they wish to make about the question of whether the notes are a 'draft report,' focusing on the factors set forth in the preceding section. Otherwise, they shall arrange to disclose the notes to Plaintiffs in a timely fashion." 2014 U.S. Dist. LEXIS 36735 at *20-21.

ABOUT THE AUTHOR

John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude*) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. He is also the recipient of one of the 2011 Burton Awards for Legal Achievement, which honors lawyers for distinguished legal writing. Mr. Barkett has been a member of the Advisory Committee for Civil Rules of the Federal Judicial Conference since 2012. Mr. Barkett has been a member of the ABA Standing Committee on Ethics and Professional Responsibility since 2014.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, or reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals" He has served or is serving as a neutral in scores of matters involving in the aggregate more than \$4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He has also served as a discovery special master in both federal and state court actions involving claims of antitrust violations, unfair competition, and deceptive and unfair trade practices. He is a Fellow of the American College of Civil Trial Mediators.

Mr. Barkett also consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also consults with other lawyers on questions of legal ethics.

Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers* (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past six years, in addition to a number of other articles on a variety of topics:

- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Webinar, October 2014, updating a presentation first made at the ABA Annual Meeting, Chicago, 2009)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar September 2014)
- *The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, and More (or Less) Unanimity* (ABA Annual Meeting, Boston, August 7, 2014)

- *Arbitration: Hot Questions, Cool Answers* (Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals*, (Miami-Dade County Bench and Bar Conference, February 8, 2013 updated for Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Perspectives on the New York Convention Under the Laws of the United States* (co-authored with F. Cruz-Alvarez; M. Paulsson, and S. Pagliery) (International Council For Commercial Arbitration 22nd Biennial Congress, April 8, 2014, Miami, Florida)
- *New Rule 45*, 28 N.R.E. 50 (Spring 2014)
- *Refresher Ethics: Steering Clear of Witness Minefields* (with Green, Bruce; Sandler, Paul Mark) (Professional Education Broadcast Network Webinar, May 16, 2014)
- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent*, (ABA Annual Meeting, San Francisco, August 10, 2013)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012; updated, ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (ABA Section of Litigation Annual Conference, Chicago, April 26, 2013 where an earlier version of this paper was presented)
- *Lawyer-Client Fallout: Using Privileged Information To Establish A Claim Against a Client/Employer* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals*, (Miami-Dade County Bench and Bar Conference, February 8, 2013)
- *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review* (http://law.duke.edu/sites/default/files/centers/judicialstudies/TAR_conference/Panel_5-Original_Paper.pdf) (Duke Law School, October 2012)
- *The Roberts Court 2011-12: The Affordable Care Act and More* (ABA Annual Meeting, Chicago, August 3, 2012)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012)
- *Un-taxing E-Discovery Costs: Section 1920(4) After Race Tire Amer. Inc. and Taniguchi* (June 29, 2012) (<http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf>)
- Barkett, *ABA to Tackle Technology Issues in Model Rules at August Meeting*, (<http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560335059&thePage=3&slreturn=1>). Law Technology News (June 25, 2012)
- *E-Communications: Problems Posed by Privilege, Privacy, and Production* (ABA National Institute on E-Discovery, New York, NY, May 18, 2012)
- *The 7th Circuit Pilot Project: What We Might Learn And Why It Matters to Every Litigant in America* (ABA Section of Litigation News Online, December 11, 2011) http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf
- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011) (Mr. Barkett received the Burton Award for Legal Achievement for this paper).
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)

- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York, 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0*, (ACEDS Conference, Hollywood, FL March 2011)
- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010) (<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Walking%20the%20Plank.pdf>)
- *Zubulake Revisited: Pension Committee and the Duty to Preserve*, (Feb. 26, 2010) (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *From Canons to Cannon in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics* (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rpt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules in Electronic Disclosure in International Arbitration* (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13*, (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)
- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August, 2007)
- *Help Has Arrived...Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Meeting, Los Angeles (2006)

- *The Battle For Bytes: New Rule 26, e-Discovery*, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and the editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002).

Mr. Barkett is a Fellow of the American College of Environmental Lawyers. At the University of Miami Law School, Mr. Barkett teaches two courses, "Environmental Litigation" and "E-Discovery."

Mr. Barkett has been recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including Who's Who Legal (International Bar Association) (since 2005); Best Lawyers in America (National Law Journal) (since 2005); Legal Elite (since 2004), (Florida Trend), Florida Super Lawyers (since 2008), and Chambers USA America's Leading Lawyers (since 2004). Mr. Barkett can be reached at jbarkett@shb.com.