Be an Expert on Experts!

PROGRAM MATERIALS

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TAB 1
“Be An Expert on Experts!”

HYPOTHETICAL: BAD Company Hits A Software Glitch

In early 2015 Base Automation and Design Company (“BAD Company”) launched its K250 home automation system. The K250’s innovative design allows centralized and sequenced automation of all residential systems, including HVAC, security and electrical systems, as well as home entertainment, kitchen, laundry, pet care and landscaping, all from a remote touch screen user interface, installed as an app on the user’s mobile device.

The essence of the K250 is its unique, central processor and software (the “Reptilian Brain”), which allows the K250 to sense and re-program itself (i.e., without input from the user) whenever warranted by changing environmental or other conditions. The user can literally forget to walk the dog and the K250 will take care of it.

The Reptilian Brain processor and software were developed specifically for BAD Company by an independent development company called Code Crunchers, Inc. (“Code Crunchers”). Like many companies that provide software to work with their hardware items, Code Crunchers’ development contract disclaimed any warranty as to the provided software and in fact, in order for BAD Company engineers to download the Code Crunchers software for testing or use, they had to “click through” an agreement acknowledging that the software was provided “as is,” without warranty of any kind, express or implied.

By the summer of 2016, the K250 was a mega-hit throughout the United States. Lawns were watered on schedule and pets were regularly cared for in thousands of homes. Also by the summer of 2016, the United States Military was using the K250 in a variety of applications, most of which were top secret -- but some of which included automated, situational re-programming of high profile defense assets, including the automated deployment of U.S. Naval assets such as ships, submarines and aircraft in the South Pacific.

By year end 2016, BAD Company’s stock was rocketing skyward on the NASDAQ exchange, as it appeared that the sky was the limit for the K250, even though three Fortune 50 mega-companies had launched competing products during the 2016 holiday season.

But on Saturday, April 1, 2017, the trouble began. The Reptilian Brain started reprogramming K250 systems nation-wide to react in a way that was the exact opposite of what was indicated by external conditions. Heating systems in homes from Florida to Texas fired up, while homes in Alaska were cooled; lawns in Arizona went un-watered while dogs in New York City went un-walked. BAD Company’s customer service network failed under the avalanche of customer complaints. The impact of the apparent April Fools’ Day gag on U.S. military deployments is classified.

Also on April 1, 2017, President Donald Trump tweeted that BAD Company had been price gouging the United States Government and secretly purchasing K250 chassis, frames and

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1 This is fiction, folks. Any resemblance to real hardware, software, products or other devices, or to any real case or dispute, is pure coincidence and unintended.
other hardware at cut rate prices from a manufacturer in Mexico. President Trump further tweeted that the K250 was “bogus”.

BAD Company’s stock plummeted when the NASDAQ opened on Monday April 3, 2017, dropping nearly 50 percent in the first 3 hours of trading. By the end of the day, BAD Company’s stock was down 66 percent. The stock recovered modestly some months later after Code Crunchers found and fixed the defective code, but never returned to its former levels as its competitors’ products by then had established their own market positions.

BAD Company thereafter sued Code Crunchers for breach of warranty over the glitch in the Reptilian Brain—which was apparently the product of the bizarre sense of humor of one of the members of the Code Cruncher software development team. As an early stage development company, BAD Company had realized no actual profits from sales of the K250; its early revenues were allocated to research and development and manufacturing “scale up.” But BAD Company is nonetheless seeking damages from Code Crunchers for the destruction of its business caused by the Reptilian Brain hardware and software, in part based on a theory that the market harm to the K250 product can be measured by the drop in stock price.

We join the deposition of BAD Company’s damages expert, in progress . . . .
(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

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

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 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 compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

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

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

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. 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.

(B) Protection Against Disclosure. 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.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.
(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

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

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

Committee Notes on Rules—2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts
or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. 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 trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The 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.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.
Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).

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. 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, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

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. These discovery changes therefore do not affect the gatekeeping functions called for by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and related cases.

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 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.
Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the 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.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). 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.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed. 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.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. 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.

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.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection 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.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).
FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 705. Disclosing the Facts or Data Underlying an Expert

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.
TAB 3
“Be an Expert on Experts!”

A Primer on Working with Experts

This short article is intended as a summary of practice tips, based on the collective experience of the Panelists, who have worked with expert witnesses (and in Dr. Sabry’s case, served as an expert witness) for a combined total of more than nine decades. The outline of authorities found in Appendix A to this submission provides detail regarding the ways in which federal courts have applied the rules governing experts since the 2010 amendments to Federal Rule of Civil Procedure 26, along with a few cases addressing recent experience under *Daubert*. Panelists submitted their top “do’s and don’ts” for working with experts. These have been expanded upon and organized here, with the help of two new lawyers—who now, more than most of their peers, truly qualify as “experts on experts.”

We hope you find these “nuts and bolts” suggestions useful.

**Selecting an Expert.** It is imperative to hire your experts early. This is especially important in narrow fields where good experts are few and far between. Early-retained experts can provide attorneys with input and advice to help shape case strategy and discovery plans, and may assist in resolving early issues arising during the development of the case. Engaging potential experts early also provides attorneys with a better chance of retaining an expert who is qualified on the subject matter and does not have a conflict of interest in the case at hand.

Those experts who are articulate and persuasive are prized, as it is often better to have an expert with those skills than an expert who may have better qualifications but wilts on cross-examination or comes across as lacking in confidence. Unfortunately, the latter qualities are difficult to predict in advance. So use your network to try to find out how the potential experts you are considering hiring have performed in prior cases.

When selecting an expert, consider the audience as well as the subject matter. Would an academic (professor or other scholar) fit the bill, or would the finder of fact find hands-on, nuts and bolts experience more persuasive? Sometimes the experienced auto mechanic may outshine even the best engineer.

Be sure to check out expert witness candidates online. A quick Google search or check on social media websites can sometimes reveal important information about a potential expert.

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1 Material for this article was submitted by P. John Brady, of Polsinelli PC; C. Malcolm Cochran, of Richards, Layton & Finger, P.A.; Dr. Faten Sabry, of NERA Economic Consulting; and Darryl M. Woo, of Vinson & Elkins L.L.P (collectively, the “Panelists”).

2 The Panelists wish to express their appreciation to Nicole Pedi and Renee Mosely, of Richards, Layton & Finger, P.A., for their dogged determination (and excellent assistance) in the preparation of these materials. Opinions expressed herein represent the views of the submitting author only, and not necessarily the views or positions of the other Panelists, their firms or their clients.
When vetting the expert witness candidate, ask whether he or she has ever been “Daubert-ed” or precluded from testifying by any court. Run a Westlaw or Lexis search using the candidate’s name. Ask for a list of cases in which the expert has previously testified and copies of transcripts of prior testimony given in comparable cases. Ask for examples of prior reports so you can judge writing ability. Ask for the expert’s marketing materials, if they have any. Review the list of prior engagements and make certain to investigate those similar to yours. Contact lawyers who have previously used the candidate.

The Engagement Letter. Whether the expert is a consulting expert or a testifying expert, an engagement letter should be put in place. This need not (and probably should not) be long or complex. The practitioner should bear in mind that the letter may well be discoverable under Federal Rule of Civil Procedure 26(b)(4)(C)(i) (governing “communications . . . [that] relate to compensation for the expert’s study or testimony”) (emphasis added). The letter should clearly state whether the expert is being engaged solely as a consulting expert, under Rule 26(b)(4)(D), or as a testifying expert, subject to discovery. The former are generally exempt from discovery, absent exceptional circumstances; the latter are subject to discovery, in accordance with various rules, including Rule 26(b)(4)(A)-(C). Often, experts are engaged initially as consultants, with the decision as to whether to convert the engagement to one of testifying expert deferred, pending further developments. However, once the expert is converted from consultant to testifying expert, the practitioner should expect that otherwise protected communications relating to the consultant arrangement would now be discoverable.

The engagement letter should clearly state the basis of compensation. It should go without saying that the compensation arrangement should bear no relationship to success on the merits of the claim or defense. A straight hourly rate, plus expenses, is most common.

Some practitioners are of the view that the engagement letter should describe the scope in general terms and consider the possibility that the scope of the engagement may change as issues evolve in litigation.

The engagement letter should also include a provision reminding the expert to preserve all documents relating to the engagement, including notes, electronic communications and draft reports. The expert should be reminded, whether in the engagement letter or in consultation with counsel, that anything written may be subject to discovery. It is generally preferable to preserve and litigate discoverability than to face spoliation claims relating to, for example, deleted draft reports. In that regard, while Federal Rule 26(b)(4)(B) now protects (as work product) draft reports or disclosures, these may still be discoverable under the work product exceptions (e.g., Rule 26(b)(3)(A)(ii) (“substantial need”)), and the case law lacks clarity as to whether “facts,” “data” and “assumptions” transmitted by counsel in the guise of a draft report are subject to protection under Rule 26(b)(4)(B) (Protection for Draft Reports) when such would otherwise be discoverable under Rule 26(b)(4)(C)(i)-(iii). See, e.g., U.S. Commodity Futures Trading Comm’n v. Newell, 301 F.R.D. 348, 353 (N.D. Ill. 2014).

It may be preferable for the engagement letter to be between the expert and counsel, on the client’s behalf, rather than with the client directly. Under the 2010 amendments to Rule 26, there are protections for communications between attorney and expert. These protections do not apply, however, as between expert and client, expert and expert, etc. See Fed. R. Civ. P.
26(b)(4)(C). Keeping the engagement between attorney and expert may help to avoid confusion regarding the proper channel of communication—from attorney to expert and back again.

Finally, at the engagement stage, discuss with the expert his or her billing practices—many will not send bills with detailed, task by task descriptions. Bear in mind that the expert’s invoices may be discoverable under Rule 26(b)(4)(C(i).

Communications with Experts: Here the rules have changed, but the practice not so much. Before the 2010 amendments to Federal Rule of Civil Procedure 26, practitioners (and experienced experts) generally understood that most federal courts enforced a “bright line” approach, rendering discoverable any communication with an expert (regardless of source), along with anything the expert generated, including notes, work papers, draft reports and communications with counsel. The bright line approach can be traced to the 1993 amendment to Federal Rule of Civil Procedure 26(a)(2), which required that an expert’s report contain “the data or other information considered by the witness” in coming to her opinion. Fed. R. Civ. P. 26(a)(2)(B)(ii) (1993 revised version) (emphasis added). The approach caused lawyers and experts to be extra diligent on written communications, notes and drafts.

The 2010 amendments to Rule 26 were intended to change all that. Rule 26(a)(2)(B)(ii) was changed to require disclosure only of “facts or data”—the phrase “or other information” was dropped. Safe harbors were established for draft reports and disclosures (see Rule 26(b)(4)(B), and for communications between a party’s attorney and the testifying expert (Rule 26(b)(4)(C)). But counsel should bear three things in mind regarding the scope of these purportedly “safe” harbors: (i) they are intended to protect only the lawyer’s work product, not the expert’s; (ii) they are intended to protect only communications between the party’s attorney and a testifying expert “required to provide a report under Rule 26(a)(2)(B),” and (iii) communications relating to compensation or that “identify facts . . . data” or “assumptions” provided by the attorney are not protected. These exceptions are broad enough to encompass a wide range of expert-related communications.

Thus, for example, client to expert communications and expert to expert communications are not protected; consulting expert to testifying expert communications are similarly not protected. In one recent case, where counsel apparently directed the client to prepare a memorandum analyzing certain financial information, and the client’s memo was provided to the expert, the memo was ordered produced. Fialkowski v. Perry, No. 11-5139, 2012 WL 2527020, at *1, *4 (E.D. Pa. June 29, 2012). Furthermore, communications from counsel containing facts “considered” by the expert or assumptions “relied on” by the expert, have been ordered produced, although the prevailing view is that such communications may be redacted to avoid producing attorney work product (such as an analysis of the facts presented).

Note also that none of these protections apply to counsel’s communications with experts who are not required to prepare a report under Rule 26(a)(2)(C). Experts subject to Rule 26(a)(2)(C) include experts who are not “retained or specially employed to provide expert testimony,” such as a treating physician. Under the 2010 amendments, written disclosures are
now required for these witnesses, but no protection is provided for counsel’s communications with them.³

The lesson here is simple: While there are protections for communications with specially retained, testifying experts, these are narrow and relate almost exclusively to counsel’s work product. And even those may be at risk if they include “factual ingredients” (a term actually used in the 2010 Advisory Committee Note). Thus, the better practice still appears to be the more conservative, bright line approach: Assume that what is sent to, or generated by, an expert is discoverable. One helpful organizational technique is to keep a separate file for all communications, documents, transcripts, etc., sent to or received from the expert.

Information to Be Provided to the Expert. Practitioners should remember that a favorite cross-examination technique is to focus on information not provided to the expert and to magnify its importance in argument. When providing information to the expert, generally more is better. Provide the complaint, the answer and any other pleadings that bear on the issues being considered by the expert. If there has been motion practice, do not overlook the affidavits, as well as the deposition transcripts in cases where the affiant was deposed. Provide a full account of the facts and all relevant documents—including those that may undermine your position, so the expert may consider and account for those in the formulation of his or her views. Keep a running list of the documents, transcripts, pleadings and other materials provided to the expert. This will be helpful when the time comes to prepare the report.

Drafting the Expert Report. There are relatively few reported decisions enforcing the new protections for draft expert reports or disclosures under Federal Rule 26(b)(4)(B). One court compelled production of draft reports shortly after the new rule was adopted, but the decision was based on pre-2010 case law and appears to have involved a failure to comply with the court’s earlier discovery rulings. Gerke v. Travelers Cas. Ins. Co of Am., 289 F.R.D. 316, 323-24 (D. Or. 2013). A more recent decision rejected the traditional argument that drafts should be produced as bearing on the expert’s independence where they evidence attorney involvement in the drafting process. The ruling was based on the 2010 Advisory Committee Note. Newell, 301 F.R.D. at 353.

In general, unless one is certain that a reviewing court would not compel the production of drafts, the better practice may be to assume the draft, or some portion thereof, would be discoverable. There are open questions regarding whether courts will compel the production of portions of drafts that contain “factual ingredients” provided by counsel. Clearly separating factual elements of the draft report (which may be discoverable) from draft analyses and opinions may be of assistance in protecting the latter, since redaction of protectable elements may be more readily accomplished.

It is recommended, however, that counsel still exercise caution in working with retained experts to prepare the report. In this regard, the rule is clear that the report must be “prepared and signed by the witness.” Fed. R. Civ. P. 26(a)(2)(B) (emphasis supplied). Experienced

³ The Advisory Committee Notes to the 2010 Amendments expressly state, however, that “[t]he rule does not exclude protection under other doctrines, such as privilege or independent development of the work product doctrine.”
practitioners understand that it is very important that the experts draft their own reports in their own style and format and to reflect their own opinions. Careful attention should be paid by counsel to the accuracy of the factual elements of the report. Opinions and the entirety of the report, however, are to be those of the expert. Opinions may be discussed with the expert prior to finalizing the report.

Parties might also consider stipulating that draft reports are entirely off limits in discovery, without regard to the exceptions provided in the Federal Rules. This was often done prior to the 2010 Amendments.

Finally, some courts have held that the Federal Rules impose no obligation to preserve drafts. See, e.g., In re Teleglobe Commc’ns Corp., 392 B.R. 561, 572 (Bankr. D. Del. 2008); Univ. of Pittsburgh v. Townsend, No. 3:04-cv-291, 2007 WL 1002317, at *3 (E.D. Tenn. Mar. 30, 2007). Courts have also gone the other way, however (see, e.g., Trigon Ins. Co. v. United States, 204 F.R.D. 277, 289 (E.D. Va. 2001); Semtech Corp. v. Royal Ins. Co. of Am., No. 03-2460-GAF PJWX, 2007 WL 5462339, at *2 (C.D. Cal. Oct. 24, 2007)), and, given the carve-outs under Fed. R. Civ. P. 26(b)(2)(C), practitioners can anticipate that there may be questions asked regarding whether facts or assumptions provided by counsel were included in drafts of the report—along with the corresponding argument that the obligation to preserve such material is implied.

Expert Discovery. In cases before federal courts, an expert’s report should provide comprehensive information regarding the factual basis for the expert’s opinions. But it is better practice to send written discovery requests seeking these details, along with all documents and communications provided to, considered or generated by the expert. The Federal Rules do not require production of the underlying documents considered or generated by the expert, including notes, emails, memoranda and the like.

Also, since the 2010 amendments provide work product protection for draft reports and some, but not all, attorney-expert communications, consider asking for delivery of a privilege log identifying all communications in these categories that are being withheld. Again, factual ingredients and assumptions provided by counsel and contained in these materials may be subject to production. But without a log, you will not know the materials exist. Recognize, however, that if you ask for a log, the other side will too. Limit your own communications accordingly.

Obtain transcripts of past depositions given by the opposing expert (if not prohibited by a protective order), and be sure to check the transcripts of depositions given by your expert. Effective cross-examination material is sometimes found in prior testimony.

Deposing the Expert. Don’t expect to hit a home run against the opposing expert. While you should not shy away from attempting the “killer” cross during depositions, your time is precious, so be sure to budget accordingly. Use your own expert’s testimony to counter the opposing expert, rather than count on your cross.

Consider using the deposition to turn an opposing expert into an expert testifying on your behalf. You can do this by getting the opposing expert to admit non-controvertible facts and
principles that are in your favor. Not only does this lock-in the opposing expert when the facts and principles are presented during trial, it may also provide a nice sound bite, allowing you to quote an opposing expert in support of your argument in a summary judgment brief or use the deposition testimony during cross-examination or in closing argument.

Before deposing the opposing expert, consult with your own expert to prepare. Attorneys should consult with their experts to explain methodologies, identify important assumptions, and locate weaknesses in the opposing expert’s report, which provides topics to explore during the deposition. Following the deposition, your expert can similarly review the transcript of the opposing expert’s testimony to identify weaknesses or contradictions between the opposing expert’s deposition and expert report.

Make certain that you fully explore the factual bases for the expert’s opinions. Identify facts and assumptions that were important to the opinion and those that were not, and have the expert explain why. In the process you may discover facts important to your side of the case that were not considered or not given weight.

**A Word on Daubert Motions.** Daubert motions should not be routinely filed every time an expert is involved in litigation. Not only does this strategy risk upsetting the judge, who may view baseless Daubert motions as a waste of the court’s time and resources; you also have shown your cards to opposing counsel, revealing the holes in their expert’s report and the areas on which they should spend the most time preparing their expert for trial. Unless your Daubert motion has the potential to significantly impact the outcome of the litigation, the better method to further your chances of succeeding at trial is simply to wait until cross-examination to reveal the shortcomings of an expert’s opinion and qualifications in front of the jury or judge.

**Presenting the Expert at Trial.** Attorneys should avoid encouraging the expert to “expertize” the fact record or make legal conclusions in his or her testimony (or expert report). Additionally, attorneys should not ask experts to draw opinions outside their areas of expertise. This makes your expert’s opinion vulnerable to being discredited during cross-examination, and may provide opportunities for opposing counsel to try to impeach your expert based on contrary testimony during his or her deposition.

When preparing the expert for deposition or trial, practitioners should specify the scope of the deposition and questions to their experts. This includes providing all the facts of the case to the expert, even facts that are detrimental to the client’s position. It is important to provide a full account of the facts to your experts so they can defend their conclusions as being supported by the factual record for the case. You don’t want to find out when you put your expert on the stand that his or her opinion would change in light of additional information you didn’t provide.

**Cross Examining the Expert.** “Perry Mason” moments at trial are rare, and even more so with experts. Often, however, you can succeed with a peripheral exam. For example, pin the opposing expert to his or her qualifications and the limitations thereof. The expert may have strong academic credentials but limited practical experience, or vice versa.
Plan your cross-examination strategy ahead of time with appropriate consultation with your own expert. Even the most gifted examiners need to prepare ahead in order to effectively examine an expert.

Use the opposing expert’s report against them. While it’s not admissible and you must be careful not to let the other side admit it into evidence, you can use it for cross. Keep this same point in mind when reviewing your own expert’s report and preparing your expert for cross-examination.
APPENDIX A
Be an Expert on Experts!

Outline of Authorities

C. Malcolm Cochran IV, Nicole K. Pedi and Renée M. Mosley

   a. RULE: “Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony. The report must contain:
      i. a complete statement of all opinions the witness will express and the basis and reasons for them;
      ii. the facts or data considered by the witness in forming them;
      iii. any exhibits that will be used to summarize or support them;
      iv. the witness’s qualifications, including a list of all publications authored in the previous 10 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 compensation to be paid for the study and testimony in the case.”
   b. When is an expert report required?
      i. Witness is retained or specially employed to provide expert testimony in the case. See, e.g., In re Application of Republic of Ecuador, 280 F.R.D. 506, 511 (N.D. Cal. 2012) (holding that witnesses were specially retained to provide expert testimony and are thus obligated to produce expert reports); Welton Enters., Inc. v. Cincinnati Ins. Co., No. 13-CV-227-WMC, 2015 WL 5567983, at *4 (W.D. Wis. Sept. 22, 2015) (same).
      ii. Witness is one whose duties as the party’s employee regularly involve giving expert testimony. See, e.g., Tokai Corp. v. Easton Enters., Inc., 632 F.3d 1358, 1365 (Fed. Cir. 2011) (holding that district court did not abuse its discretion by declining to exempt an employee-expert from the written report requirement because the party failed to indicate that the expert’s duties “did not ‘regularly involve giving expert testimony.’”); see also Hellmann-Blumberg v. Univ. of the Pac., No. 2:12-CV-0286 TLN

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1 This Outline of Authorities supplements the presentation and panel discussion entitled “Be An Expert On Experts!” held on May 4, 2017 at the ABA Litigation Section Annual Conference, in San Francisco, California. C. Malcolm Cochran IV is a Director of the Wilmington Delaware law firm of Richards, Layton & Finger, P.A. Nicole K. Pedi and Renée Mosley are associates in Richards, Layton & Finger’s Litigation Department.
DAD, 2013 WL 4407267, at *2–3 (E.D. Cal. Aug. 15, 2013) (discussing when employee-witnesses are required to provide reports, and when they are not).

c. When is summary disclosure required, in lieu of report (see Rule 26(a)(2)(C))?  
   
   
   ii. “Frequent examples include physicians or other health care professionals . . .” Advisory Committee Note, 2010 Amendments.
   
   iii. See Fed. R. Civ. P. 26(a)(2)(A) (“any witness [a party] may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705” [not “retained or specially employed to provide expert testimony . . .”]); see also Rule 26(a)(2)(C) (“Witnesses Who Do Not Provide a Written Report”).

d. Time to Disclose Expert Testimony. If no stipulation or court order: “(i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter . . . within 30 days after the other party’s disclosure.” Fed. R. Civ. P. 26 (a)(2)(D).

e. Must the Disclosure / Report Be Supplemented?
   
   
   ii. But, supplements may be improper when experts were aware of the same information before producing their original reports. See, e.g., Sherwin-Williams Co. v. JB Collision Servs., Inc., No. 13-CV-1946-LAB WVG, 2015 WL 1119406, at *9 (S.D. Cal. Mar. 11, 2015) (holding that supplements intended to augment a report rather than “correct inaccuracies or fill in interstices of an incomplete report” are improper under Rule 26(e)).


   a. RULE: “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.”

b. But Not For Testifying Experts

i. Rule 26(b)(3)(A) “work product” protection does not apply generally to testifying experts. See, e.g., Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1192 (11th Cir. 2013) (“[N]either the text of Rule 26(b)(3)(A) nor its structure, history, and rationale support extending the work-product doctrine to all testifying expert materials.”); see also Republic of Ecuador v. Douglas, 153 F. Supp. 3d. 484, 490 (D. Mass. 2015) (holding that the Rule 26(b)(3) work product protection does not extend to the materials of testifying expert witnesses); Davita Healthcare Partners, Inc. v. United States, 128 Fed. Cl. 584, 588 (Fed. Cl. 2016) (same); Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d 1179, 1185 (10th Cir. 2013) (same); Republic of Ecuador v. Mackay, 742 F.3d 860, 871 (9th Cir. 2014) (same).

ii. Rule 26(b)(3)(A) work product applies by its terms only to “attorney, consultant, surety, indemnitor, insurer, or agent” and not to testifying experts. Hinchee, 741 F.3d at 1192.

iii. Work product protections afforded to communications with and work of testifying experts are addressed under Rules 26(b)(4)(B) (for draft reports) and (C) (for communications with attorneys). Id.; see also Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d at 1187.

c. Expert’s Personal Notes and Emails — Protected?

i. No:

1. Hinchee, 741 F.3d at 1186 (holding that an expert’s personal notes and emails containing his theories and mental impressions were not entitled to work product protection).

2. Republic of Ecuador v. Bjorkman, No. 11-CV-01470-WYD-MEH, 2012 WL 12755, at *6 (D. Colo. Jan. 4, 2012), subsequently aff’d sub nom. Republic of Ecuador v. For Issuance of a Subpoena, 735 F.3d 1179 (10th Cir. 2013) (clarifying that “it is the intention of the rules committee to protect the mental impressions and legal theories of a party’s attorney, not its expert,” and thus prohibiting expert from withholding any documents or information as “work product” unless specifically described in Rules 26(b)(4)(B) and (C)) (emphasis in original).

4. *Douglas*, 153 F. Supp. 3d at 491 (“[T]he work-product doctrine only allows Dr. Douglas [testifying expert] to withhold from discovery the ‘core opinion work-product of Chevron attorneys.’...Communications between Dr. Douglas and attorneys relating to his compensation or identifying facts, data or assumptions for Dr. Douglas to use in forming his opinion are not protected and must be produced.”).


6. Advisory Committee Notes, 2010 Amendment: “[T]he expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule.”

ii. Maybe:

1. *Wenk v. O’Reilly*, No. 2:12-CV-474, 2014 WL 1121920, at *6 (S.D. Ohio Mar. 20, 2014) (ordering notes to be submitted for in camera review due to dispute over whether expert’s notes written on the margins of deposition transcripts are considered notes, or draft of report protected under Rule 26(b)(4)(B)).

2. *Dongguk Univ. v. Yale Univ.*, No. 3:08-cv-441 (TLM), 2011 WL 1935865, *1–2 (D. Conn. May 19, 2011) (Court ordered production of expert’s handwritten notes only after reviewing them to determine whether they reflected communications with attorney, or counsel’s mental impressions.).

3. *Etherton v. Owners Ins. Co.*, No. 10-cv-892-MSK, 2011 WL 684592, at *2 (D. Colo. Feb. 18, 2011) (holding that testifying expert’s “working notes” in the form of five pages of mathematical calculations drafted in connection with his expert report, were shielded from production because they qualified as a draft report. The Court noted that protection for draft expert reports applies “regardless of the form in which the draft is recorded.”).

iii. Yes:

1. *Davita Healthcare Partners, Inc.*, 128 Fed. Cl. at 591 (Work papers of plaintiff’s testifying expert, including spreadsheets, scripts, analyses and presentations were protected work product under Rule 26(b)(4)(C). Plaintiff argued that the work papers reflected communications with counsel and preliminary opinions. The selective presentation of “facts and data” was held to be distinct from the underlying data itself, resulting in protection from discovery, under Rule 26(b)(4)(C)).
2. *Int’l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.*, No. DKC-11-2255, 2012 WL 1900536, at *2 (D. Md. May 23, 2012) (holding that an expert’s notes, created at counsel’s request to assist with the deposition of the opposing expert, were not subject to disclosure under Rule 26(b)(4)(C) because they did not contain opinions that the expert would testify to at trial).

d. Documents Prepared by a Party And Given to Expert -- Protected?

   i. No:

      1. *Fialkowski v. Perry*, No. 11-5139, 2012 WL 2527020, at *1, *4 (E.D. Pa. June 29, 2012) (Documents ordered produced included memo prepared by plaintiff at the direction of her attorney containing her “explanation and assessment of . . . discovery documents and how they relate to the claims [she has] asserted and the various defenses raised by defendants,” which was provided to expert witness and used in preparing his report. The Court found that the document contained “factual ingredients” and that disclosure did not “implicate ‘theories or mental impressions of counsel’ because plaintiff, not plaintiff’s attorney, prepared them.”).

e. Communications between Testifying Expert and other Experts -- Protected?

   i. No:

      1. *Hinchee*, 741 F.3d at 1186 (finding that email communications between an expert and other experts containing their theories and mental impressions were not protected).


      4. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, No. 1:00-1898, MDL No. 1358, 2013 WL 3326799, at *6 (S.D.N.Y. June 28, 2013) (finding that factual matters exchanged by a consulting expert to a testifying expert are subject to disclosure under Rule 26(b)(4)(C)).

      5. *Whole Women’s Health v. Lakey*, 301 F.R.D. 266, 269 (W.D. Tex. 2014) (holding that communications between a testifying expert witness and non-testifying witness are not protected from discovery).
ii. Yes:


f. Communications Between Persons Other Than Party’s Attorney and Testifying Expert -- Protected?

i. No:


2. Powerweb Energy, Inc., 2014 WL 655206, at *4 (holding that there is no protection from discovery for communications between an expert witness and party representative).

3. D.G. ex rel. G. v. Henry, No. 08-CV-74-GKF-FHM, 2011 WL 1344200, at *2 (N.D. Okla. Apr. 8, 2011) (noting that summaries drafted by expert’s “readers” based on information contained in case files and then considered by expert when drafting report were not protected from disclosure by Rule 26(b)(4)(B)).

III. Fed. R. Civ. P. 26(b)(4)(B): Trial-Preparation Protection for Draft Reports or Disclosures

a. RULE: “Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”

b. Protection for Draft Reports and Disclosures?

i. Yes:

1. Republic of Ecuador v. For Issuance of Subpoena, 735 F.3d at 1181–87 (affirming order holding that party “may properly withhold drafts of [testifying expert’s] reports and disclosures, in whatever form, under Rule 26(b)(4). . .”)

2. Veolia Env’t, 2013 WL 5779653, at *7 n.9 (finding draft reports protected under Rule 26(b)(4)(B) notwithstanding allegation that draft contained facts and data subject to disclosure under Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii)).

3. Davita Healthcare Partners, Inc., 128 Fed. Cl. at 584 (spreadsheets and graphs were intended to be included as part of expert’s report, so drafts of such were protected).
ii. No:


iii. Maybe:

1. *United States CFTC v. Newell*, 301 F.R.D. 348, 353 (N.D. Ill. 2014) (noting that despite protections for draft reports contained in Rule 26(b)(4)(B), facts, data, or assumptions provided by an attorney to an expert should not be excluded from production merely because such information was exchanged through the form of a revision to a draft report).

iv. Compare to Treatment of Expert Drafts Prior to 2010 Amendments

1. Prior to the 2010 amendments to Rule 26, most courts applied a “bright line” rule that all matters considered by a testifying expert in forming an opinion must be produced, even if such information is otherwise protected as work product. *See, e.g.*, *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 257 F.R.D. 607, 612, 615 (E.D. Cal. 2009) (compelling production of all prior drafts of testifying expert’s declaration and emails).

c. Notes, Task Lists, Outlines, Memoranda, Presentations, and Draft Letters Authored by an Expert -- Protected?

i. No:

1. *In re Application of Republic of Ecuador*, 280 F.R.D. at 513 (holding that an expert’s notes, task lists, outlines, memoranda, presentations, and draft letters cannot be protected as work product).

2. *Dongguk Univ.*, 2011 WL 1935865, at *1 (“As for Kim’s handwritten notes, as a general matter, an expert’s notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party’s attorney and the expert witness.”).

ii. Spreadsheets, Graphs, Charts Authored by an Expert -- Protected?

1. Yes:


2014) (holding that draft presentations containing “summaries and conclusions” that reflect “counsel’s collaborative interactions with expert consultants” should be excluded from production as privileged).

c. In re Application of Republic of Ecuador, 280 F.R.D. at 512–13 (acknowledging that draft worksheets created by a testifying expert for use in his expert report would be protected under Rule 26(b)(4)(B), but the Rule “does not extend to the expert’s own development of the opinions to be presented outside of draft reports.”).

d. Attorney Participation in Drafting and Editing Portions of an Expert Report

i. Discoverable:

1. Gerke, 289 F.R.D. 316 (relying on case law issued prior to the 2010 amendments to Rule 26, the Court held that the expert had to identify portions of the report that the attorney had drafted).

2. See also Fed. R. Civ. P. 26(a)(2)(B), requiring a report “prepared and signed by the witness . . . .” (emphasis added).

ii. Not Discoverable:

1. Skycam, Inc. v. Bennett, No. 09-cv-294-GKF-FHM, 2011 WL 2551188 (N.D. Okla. June 27, 2011) (holding that attorney’s notes from interviews with experts and write-ups of reports based on notes from meetings with experts were not subject to disclosure because the experts substantially participated in the preparation of the reports).

2. Newell, 301 F.R.D. at 352 (denying plaintiff’s motion to compel certain communications between defendants’ counsel and two of their experts despite plaintiff’s argument that work-product protection does not apply when counsel is involved in drafting expert reports).

3. See Fed. R. Civ. P. 26(b)(4)(B) and (C), providing work product protection under Rules 26(b)(3)(A) and (B) for draft reports, and for communications between the party’s attorney and any witness required to provide a report.

iii. Compare to Treatment of Attorney Contributions Prior to 2010 Amendments:

1. Trigon Ins. Co. v. United States, 204 F.R.D. 277, 283 (E.D. Va. 2001) (noting that Rule 26 requires that an attorney’s work product provided to experts who consider such work product in forming opinions which he or she will be testifying to at trial, is no longer privileged and must be disclosed).
e. Duty to Retain Drafts of Expert Reports?

i. No:

1. *In re Teleglobe Commc'ns Corp.*, 392 B.R. 561, 572 (Bankr. D. Del. 2008) (“The Court is not convinced that the plain language of Rule 26(a)(2)(B)[prior to the 2010 amendment] imposes an obligation on a party or its experts to preserve and produce drafts of an expert’s report.”). The *Teleglobe* Court further noted that an expert’s own revisions to prior drafts are not “considered” by the expert and therefore do not fall in the scope of discoverable evidence. *Id.* at 573. Moreover, even if there was discoverable evidence in the draft reports that was no longer available due to the destruction of the drafts, the exclusion of the experts’ testimony and/or reports was too “drastic” of a remedy. *Id.* at 578.


3. *Simmons Food, Inc. v. Indus. Risk Insurers*, No. 5:13-CV-05204, 2015 WL 5679760, at *3–4 (W.D. Ark. Sept. 25, 2015) (holding that model created by the defendant’s expert constituted the work product of an expert retained in anticipation of litigation. Consequently, the Court noted that the model was protected from discovery and the expert’s subsequent destruction of it “was, at best, a discarded draft.” Accordingly, the Court denied the plaintiff’s motion for sanctions.).

ii. Yes:

1. *Trigon Ins. Co.*, 204 F.R.D. at 289 ([pre-2010 Rules Amendments] finding that communications between litigation consultant and testifying experts and the experts’ draft reports were “intentionally” deleted even though the documents and communications were deleted by an email retention policy).

2. *Semtech Corp. v. Royal Ins. Co. of Am.*, No. CV 03-2460-GAF PJWX, 2007 WL 5462339, at *2 (C.D. Cal. Oct. 24, 2007) ([pre-2010 Rules Amendments] “Where the destroyed evidence consists of a draft report of an expert or other materials on which the expert relied, the expert may be precluded from testifying depending on the culpability of the offending party and the prejudice to the opposing party.”).

3. *But see In re Teleglobe Commc'ns Corp.*, 392 B.R. at 580 (disagreeing with *Trigon* and finding that the plaintiffs’ degree of
fault was not high, because the experts “simply made corrections to their reports on their computers and failed to save prior drafts.”).

4. *Peterson v. Union Pac. R. Co.*, No. 06-3084, 2008 WL 4104169, at *4 (C.D. Ill. Aug. 28, 2008) ([pre-2010 Rules Amendments] “[Expert] also admits that he has lost or discarded discoverable draft reports, correspondence, and e-mails. There is, however, no evidence to support a finding that [Expert]’s failure to preserve this evidence was willful.”).

iii. Depends:

1. *Univ. of Pittsburgh*, 2007 WL 1002317, at *4 (“Because the draft reports were destroyed prior to the creation of any obligation on the part of the experts, the plaintiff or the plaintiff’s counsel to retain them, the Court finds that the destruction of these draft reports was not done intentionally, fraudulently, and with ‘a desire to suppress the truth,’ and therefore, is not sanctionable.”).

IV. Fed. R. Civ. P. 26(b)(4)(C): Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses

a. RULE: “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 on in forming the opinions to be expressed.”

b. Protection For Communications Between Attorneys and Expert Witness

i. Compensation

1. Engagement Letters -- Discoverable?

   a. Yes:

      i. *In re 94th & Shea, L.L.C.*, No. 10-BK-37387, 2011 WL 6396522, at *2 (Bankr. D. Ariz. Dec. 15, 2011) (directing defendant to produce its experts’ engagement letters, and if these agreements were oral, defendant must provide the terms and conditions).
b. Dispute:

i. *Davita Healthcare Partners, Inc.*, 128 Fed. Cl. at 592–93 (finding that the plaintiff sufficiently complied with Rule 26(b)(4)(C)(i) by providing the expert’s invoices, and that the plaintiff was not required to provide a “line-by-line” detail of services and discussions with the plaintiff).


ii. Communication of Facts or Data Between Attorney and Expert Witnesses that Were Relied Upon in Forming Opinions

1. Expert’s Spreadsheets, Graphs, and Analyses -- Discoverable?
   a. No:

   i. *Davita Healthcare Partners, Inc.*, 128 Fed. Cl. at 591 (finding that an expert’s spreadsheets, graphs, and analyses were protected, because they were “interpretations of data that reflect[ed] counsel’s mental impressions and result from the expert’s and counsel’s collaborative efforts to organize, marshal, and present data”).

2. Transmittal Letters -- Discoverable?
   a. Yes:

   i. *In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at *6–7 (finding that “transmittal letters” by the attorney to the expert physicians contained facts, data, and assumptions on which the experts relied and are therefore discoverable).

3. Documents Reviewed by Expert but not Relied Upon -- Discoverable?
   a. Yes:

   i. *CTB, Inc. v. Hog Slat, Inc.*, No. 7:14-CV-157-D, 2016 WL 1244998, at *15 (E.D.N.C. Mar. 23, 2016) (finding that the expert considered facts and data given to her by the attorneys, even though the expert could not recall what was given to her).
ii. *Euclid Chem. Co. v. Vector Corrosion Techs., Inc.*, No. 1:05CV80, 2007 WL 1560277, at *6 (N.D. Ohio May 29, 2007) (finding that everything that a witness “received, reviewed, read, or authored, relating to the subject matter of the facts or opinions set out in his expert’s report” must be produced) (applying pre 2010 Rules Amendment standard).

iii. *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) (discoverable “factual” information includes those materials that experts “considered” even if not specifically relied upon).

iv. *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 537 (N.D. Ohio 2008) (“[A] testifying expert has ‘considered’ data or information if the expert has read or reviewed the privileged materials before or in connection with formulating his or her opinion.”) (internal citations and quotation marks omitted).

v. *Yeda Research & Dev. Co., Ltd. v. Abbott GmbH & Co. KG*, 292 F.R.D. 97, 105 (D.D.C. 2013) (“[M]aterials reviewed or generated by an expert must be disclosed, regardless of whether the expert actually relies on the material as a basis for his or her opinions.”).

iii. Communication of Assumptions Between Attorney and Expert Witnesses that Witnesses Rely Upon in Forming Opinions

1. Attorney’s Hypotheticals -- Discoverable?
   a. No:
      i. *Mackay*, 742 F.3d at 870 (“[D]iscussions with counsel about the ‘potential relevance of facts or data’ and more general discussions ‘about hypotheticals, or exploring possibilities based on hypothetical facts’ are protected. Thus, materials containing ‘factual ingredients’ are discoverable, while opinion work product is not discoverable.”).
   b. Depends:
      i. *Green v. Nemours Found.*, No. N15C-03-208 CEB, 2016 WL 4401043, at *3 (Del. Super. Ct. Aug. 17, 2016) (finding that an attorney’s hypotheticals and proposed possibilities are protected unless the expert states that he or she relied on them)
(interpreting state rule that is identical to Federal Rule 26(b)(4)(C)).

c. Communication Between Attorneys and Experts Who are Not Required to Provide a Report

i. Dual-Hat Experts -- Communications Protected?

1. Yes:

   a. Rule 26(b)(4)(D) states: “Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

      i. as provided in Rule 35(b); or

      ii. on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.”

   b. Sara Lee Corp. v. Kraft Foods Inc., 273 F.R.D. 416, 420 (N.D. Ill. 2011) (holding that an expert’s communications were protected from discovery because they related solely to the expert’s role as a non-testifying consultant. While the expert served as both a testifying expert for one of the advertisements at issue, and a non-testifying consultant for a second advertisement, the specific materials requested were generated “‘uniquely in the expert’s role as consultant,’” and were thus shielded from production).

2. No:

   a. Yeda Research & Dev. Co., 292 F.R.D. at 115 (finding that plaintiff waived the work product protection of an expert’s work as a consultant by re-designating him as a testifying expert witness).

   b. United States ex rel. Westrick v. Second Chance Body Armor, Inc., 288 F.R.D. 222, 228 (D.D.C. 2012) (holding that consulting expert must produce factual information pursuant to exceptional circumstances exception in Rule 26(b)(4)(D)(ii)). The Westrick Court pointed out that “[e]xceptional circumstances ‘may exist when a non-testifying expert’s report is used by a testifying expert as the basis for an expert opinion, or where there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert.’” Id. (quoting Long-Term Capital Holdings, L.P. v. United States, No. 01-CV-
Communications Between a Non-Lawyer and an Expert

i. Communication between a Non-Lawyer Employee and an Expert -- Protected?

1. No:

   a. In re Application of Republic of Ecuador, 280 F.R.D. at 515 (finding that emails between an expert, his assistant, and non-attorney employees of the client were not work product, even though the attorneys were copied on the emails).

   b. Douglas, 153 F. Supp. 3d at 491 (“[A] testifying expert's notes and his communications with other non-attorneys must be produced in discovery.”) The Douglas Court specified that this extended to “communications in which attorneys are merely copied, but in which no attorney work product exists . . . .” Id. at 491-92.

   c. Benson, 2016 WL 1046126, at *6 (noting that the same communications that are shielded from discovery when between a party’s attorney and a reporting/testifying expert cannot be withheld if forwarded by a non-attorney representative of the party).

e. Communications Between an Attorney and Assistant to an Expert

i. Communications between an Expert’s Assistant and Attorney -- Protected?

1. Yes:

   a. In re Application of Republic of Ecuador, 280 F.R.D. at 514 (finding that communications between an expert’s assistant and the attorney are protected by Rule 26(b)(4)(C)).

V. Selected Daubert Issues Relating To Fed. R. Civ. P. 26

a. Fed. R. Evid. 702: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

   i. (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

   ii. (b) the testimony is based on sufficient facts or data;
iii. (c) the testimony is the product of reliable principles and methods; and

iv. (d) the expert has reliably applied the principles and methods to the facts of the case.

1. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994) (holding that plaintiff must make more than a prima facie showing that their witness is qualified to testify. Rather, a judge should only find an expert’s opinion is reliable under Rule 702 if it is based on “good grounds.”).

2. United States v. Bonds, 12 F.3d 540, 557–58 (6th Cir. 1993) (holding than an expert’s methods are reliable even when different methods may have yielded more accurate results). The Bonds Court noted that “Daubert requires only scientific validity for admissibility, not scientific precision.” Id. at 558.

3. Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F. 3d. 594, 598 (9th Cir. 1996) (upholding exclusion of testimony of expert who applied method commonly used by other scientists in his field, but obtained conclusions not shared by other scientists).

b. Fed. R. Evid. 703: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”

i. General Electric v. Joiner, 522 U.S. 136, 146–47 (1997) (excluding expert testimony where the evidence and data relied on did not support the expert’s actual conclusion). “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” Id. at 146.


c. Daubert Standard used to determine the admissibility of an expert’s scientific testimony:

i. whether a theory or technique can be (and has been) tested;

ii. whether the theory or technique has been subjected to peer review and publication;

iii. the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and
iv. whether it has attracted widespread acceptance within a relevant scientific community.


d. Lessons on the Admissibility of Expert Witness Testimony following *Daubert*:

i. Standards articulated in *Daubert* are not limited to scientific experts only.

1. *Kuhmo Tire Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (“We conclude that *Daubert*’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”).

ii. *Daubert* factors are not an exhaustive list to determine the admissibility of expert testimony.

1. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316–17 (9th Cir. 1995) (“We read [the list of *Daubert*] factors as illustrative rather than exhaustive; similarly, we do not deem each of them to be equally applicable (or applicable at all) in every case. Rather, we read the Supreme Court as instructing us to determine whether the analysis undergirding the experts’ testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions.”).

iii. Expert testimony must assist the trier of fact to be admissible.

1. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564–65 (11th Cir. 1998) (“As expert evidence, the testimony need only assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.”).

iv. Experts are not automatically prohibited from testifying about topics that are not published.

1. *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802, 809 (3d. Cir. 1997) (permitting expert to testify on the harmful effects of organophosphates despite not having produced publications on the topic because “his opinion is supported by widely accepted scientific knowledge of the harmful nature of organophosphates.”).

v. Abuse of Discretion is the standard of review applied to an appeal of a court’s decision to admit or exclude expert testimony.

1. *Joiner*, 522 U.S. at 146 (“We hold, therefore, that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence.”).
e. Exclusion Under *Daubert* for Failure to Designate an Expert

i. *Peshlakai*, 2013 WL 6503629, at *18 (“Allowing a treating physician to testify in the same capacity and to the same extent as an expert, without requiring even disclosure of the physician's identity, would undermine both the *Daubert* . . . analysis and rule 702 requirements. Any plaintiff could get around the disclosure requirements of rule 26(a)(2) and *Daubert* . . . reliability standards by simply asking a physician for treatment, even once, instead of hiring a physician as an expert for the trial.”).

f. Exclusion Under *Daubert* for Failure to Provide a Summary of Facts and Opinions

i. *Motio, Inc. v. BSP Software LLC*, No. 4:12-CV-647, 2016 WL 74425, at *2 (E.D. Tex. Jan. 6, 2016) (“Even if, however, the Court found excusable Plaintiff’s mistake regarding interpretation of the Scheduling Order, the Court finds that Plaintiff failed to comply with the requirements of Rule 26(a)(2)(C). Plaintiff did not provide a meaningful ‘summary of the facts and opinions to which [Mr. Moore] is expected to testify’” as required by Rule 26(a)(2)(C)(ii). Plaintiff merely lists a set of topics that Mr. Moore may speak toward, but offers no actual facts or opinions, forcing Defendants to make assumptions based on things outside the disclosure as to what Mr. Moore will testify.”).

ii. *Morrison v. Quest Diagnostics Inc.*, 315 F.R.D. 351, 357 (D. Nev. 2016) (“Plaintiff’s expert disclosure does not comply with her Rule 26(a) expert disclosure obligations. She does not identify, let alone provide a summary of the facts and opinions on which any medical provider will provide testimony. Dr. Soloway’s affidavit contains opinions and some discussion of the bases for his opinions. It does not identify the data or other information he relied upon in forming his opinions except in the most general and unhelpful way.”).

g. Exclusion Under *Daubert* for Providing Unsupported Conclusions?


h. Exclusion Under *Daubert* for Failure to Provide Discoverable Communications?


i. Exclusion Under *Daubert* for Destruction of Expert Drafts?

j. Exclusion Under *Daubert* for Attorneys’ Drafting of Expert Opinions?

TAB 4
Work Product Protection for Draft Expert Reports and Attorney-Expert Communications

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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;
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). In its May 9, 2008 report, as supplemented on June 30, 2008, 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

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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.

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 orDisclosures. 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.

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\(^4\) 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:

<table>
<thead>
<tr>
<th>Exception</th>
<th>Committee Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation</td>
<td>“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.”</td>
</tr>
<tr>
<td>Facts or data provided by the attorney that were considered by the expert</td>
<td>“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.”</td>
</tr>
<tr>
<td>Assumptions provided by the attorney that the expert relied upon</td>
<td>“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.”</td>
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</tbody>
</table>

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

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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. 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, 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 may have to advance the timing of their contact with witnesses who may offer expert testimony and 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 witnesses 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. Signetech 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. Breitling 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. 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. 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)\(^\text{17}\), 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. § 178218 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:

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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 “mislabeled” 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 expert 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.”
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)
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)
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)
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)
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)

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)


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. Rprt. 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)

- *The Battle For Bytes: New Rule 26, e-Discovery*, Section of Litigation (February 2006)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)

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 j barkett@shb.com.
TAB 5
Defendant Yale University filed a motion to compel plaintiff Dongguk University to produce non-redacted versions of documents bates numbered KIM0000951–954, KIM0000467–69, and KIM0000470–75. [doc. # 223]. The documents at issue derive from the files of plaintiff's expert witness, Elaine Kim. The first two documents, KIM0000467–69 and KIM0000470–75, are Kim's handwritten notes. The third document, KIM0000951–954, is a memo from plaintiff's attorneys Robert Weiner and Audrey Lu, to Kim titled “Potential Topics for Expert Report.” This Court has conducted an in camera review of the three documents. After careful consideration, defendant's motion to compel is GRANTED IN PART AND DENIED IN PART.

Discussion

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. Advisory Committee Note on 2010 Amendment of Rule 26(b)(4). These three exceptions concern 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 opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.


The Advisory Committee Note on the 2010 Amendment of Rule 26(b)(4)(C), explains that,

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. 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.

With these guiding principles, the Court turns to the documents at issue. As for Kim's hand-written notes, as a general matter, an expert's notes are not protected by 26(b)(4)(B) or (C), as they are neither drafts of an expert report nor communications between the party's attorney and the expert witness. See Advisory Committee Note to the 2010 Amendment of Rule 26(b)(4) ("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...\n
Attorneys and Law Firms


Felix J. Springer, Day Pitney LLP, Hartford, CT, Howard Fetner, Day Pitney LLP, New Haven, CT, for Defendant.

DISCOVERY RULING

HOLLY B. FITZSIMMONS, United States Magistrate Judge.

*1 Defendant Yale University filed a motion to compel plaintiff Dongguk University to produce non-redacted versions of documents bates numbered KIM0000951–954, KIM0000467–69, and KIM0000470–75. [doc. # 223]. The documents at issue derive from the files of plaintiff's expert witness, Elaine Kim. The first two documents, KIM0000467–69 and KIM0000470–75, are Kim's handwritten notes. The third document, KIM0000951–954, is a memo from plaintiff's attorneys, Robert Weiner and Audrey Lu, to Kim titled “Potential Topics for Expert Report.” This Court has conducted an in camera review of the three documents. After careful consideration, defendant's motion to compel is GRANTED IN PART AND DENIED IN PART.
of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule.”) However, under the work-product doctrine in Rule 26(b)(3)(B), the court must protect against disclosure the attorney's mental impressions, conclusions, opinions or legal theories. The Court finds that the redacted notes on KIM0000468 and KIM000475 are not independently protected by the work product privilege.\footnote{Plaintiff's argument that somehow these redactions constitute communications because they were Kim's notes memorializing a meeting with plaintiff's counsel is not supported by the law and further unavailing, given Kim's inability to recall at her deposition, definitively, when and under what circumstances the notes were taken. [Doc. # 225–1, at 176–183].} The statements are not “mental impressions, conclusions, opinions, or legal theories of a party's attorney”, and as such shall be disclosed to defendant. Fed.R.Civ.P. 26(b)(3)(B).

\*2 Next, we turn to the memorandum. The Court finds that the redacted statements on KIM0000951 and KIM0000952 must be disclosed under Rules 26(b)(4)(C)(ii) and (iii). The statements on those two pages are either facts or assumptions, provided by Dongguk's attorney and relied on by Kim in forming her opinion.\footnote{Kim testified at her deposition that she accepted all the statements in the memorandum in question as true. [Doc. # 225–1, at 175].} As such, they are not protected and shall be disclosed to defendant.

The same is not true of the redacted statements on KIM0000953 and KIM0000954. The Court finds that these statements do not fall under any of the three Rule 26(b)(4)(C) exceptions - compensation, facts and assumptions which require disclosure. As stated in the 2010 Advisory Committee Notes, “the discovery authorized by the exceptions does not extend beyond those specific topics”. Therefore, the statements on KIM0000953 and KIM0000954 are protected from disclosure.

Accordingly, defendant's motion to compel is GRANTED IN PART AND DENIED IN PART. Plaintiff shall comply with this order in five (5) days. This is not a recommended ruling. This is a discovery ruling and order which is reviewable pursuant to the “clearly erroneous” statutory standard of review. 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 6(a), 6(e) and 72(a); and Rule 2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the district judge upon motion timely made.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1935865

Footnotes

1 Plaintiff's argument that somehow these redactions constitute communications because they were Kim's notes memorializing a meeting with plaintiff's counsel is not supported by the law and further unavailing, given Kim's inability to recall at her deposition, definitively, when and under what circumstances the notes were taken. [Doc. # 225–1, at 176–183].

2 Kim testified at her deposition that she accepted all the statements in the memorandum in question as true. [Doc. # 225–1, at 175].
MEMORANDUM

DuBOIS, District Judge.

I. INTRODUCTION

The parties have requested the Court's assistance in resolving a discovery dispute. The dispute centers on plaintiff's refusal to produce materials prepared by plaintiff at the direction of her attorney which plaintiff's expert witness reviewed in preparing his report. Plaintiff asserts that the materials defendants requested are protected from disclosure under the attorney-client privilege and the work product doctrine. Defendant contends that, regardless of privilege, these materials are discoverable under Federal Rules of Civil Procedure 26(a)(2)(B) and (b)(4)(C) because plaintiff's attorney gave these materials to plaintiff's testifying expert for the expert to "consider" and "rely on" in forming his expert opinions.

The present discovery dispute arises from defendants' request that plaintiff produce materials that plaintiff's expert witness, certified public accountant Howard Lapensohn, identified in paragraph 17 of the "Document Review" portion of the written report he prepared pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). In his report, Mr. Lapensohn stated that "[a]s part of my engagement in expressing the below opinion, I have reviewed ... [v]arious spreadsheets and document analysis [that] Plaintiff [prepared] from QuickBooks records, tax returns, and [d]iscovery produced by Defendant Metter." (Def. Metter's Letter/Brief, dated 06/08/12, at 1.)

For the reasons that follow, the Court grants defendants' request for production of the parts of all requested documents containing "facts or data" that plaintiff's expert reviewed or considered or "assumptions" that the expert relied on in forming the opinions he expressed. The request is denied in all other respects.

II. BACKGROUND

This case involves plaintiff Anne E. Fialkowski's claims that defendants David Perry, Sherryl R. Perry, and Stanley A. Metter defrauded her and breached the contractual, legal, and fiduciary obligations they owed to her. Plaintiff and defendants David and Sherryl Perry were partners at the law firm of Perry, Fialkowski & Perry ("PF & P"). Defendant Metter was PF & P's accountant. Plaintiff's claims arise from her assertions that defendants David and Sherryl Perry "unilaterally and retroactively reduced [her] partnership share after she underwent spinal cord surgery" and that defendant Metter aided David and Sherryl Perry in improperly spending hundreds of thousands of dollars of PF & P revenue on personal expenses.

The parties have submitted a total of five letters/briefs: (1) defendant Stanley A. Metter's letter/brief on behalf of all defendants, dated June 8, 2012; (2) defendants David Perry and Sherryl R. Perry's supplemental letter/brief, dated June 11, 2012; (3) a joint status report of the parties, dated June 13, 2012; (4) a letter/brief in response to defendants' letters/briefs, dated June 15, 2012; and (5) defendants David Perry and Sherryl R. Perry's reply letter/brief, dated June 18, 2012. Those letters/briefs constitute the record on the discovery issue addressed in this Memorandum and shall be docketed by the Deputy Clerk with the filing of this Memorandum.
discovery documents and how they relate to the claims [she has] asserted and the various defenses raised by defendants.” (Pl.’s Letter/Brief, dated 06/15/12 (“Pl.’s 06/15/12 Letter”), at 1.)

*2 Plaintiff objects to the production of the requested materials on two grounds. First, plaintiff asserts that the requested materials are “plainly ... covered” by the attorney-client privilege because plaintiff prepared them for the purpose of assisting her attorney “in understanding the Perry, Fialkowski & Perry QuickBook records and documents produced in discovery by defendants.” (Id.)

Second, plaintiff asserts that the requested materials are protected work product under Federal Rule of Civil Procedure 26(b)(4)(C), which plaintiff contends was added to the Federal Rules in 2010 “for the specific purpose of providing work product protection for attorney-expert communications.” (Id.)

III. DISCUSSION

Federal Rule of Civil Procedure 26(b)(1) provides generally that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed.R.Civ.P. 26(b)(1). As the party claiming a privilege, plaintiff has the burden of establishing that a privilege applies. Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138 (3d Cir.2000).

At the heart of the parties’ dispute is a disagreement over the effect of the 2010 Amendments to Rule 26. Plaintiff asserts that the language and intent of Rule 26, as amended in 2010, demonstrates that the materials at issue are privileged and are thus not discoverable. The Court disagrees. Before addressing plaintiff’s assertions of the attorney-client privilege and the work product doctrine, the Court will briefly explain the development of Rule 26.

A. Law Prior to 2010 Amendments to Rule 26

In 1993, Rule 26 was amended to require parties to produce information without formal discovery requests from their opponents. Quinn Const., Inc. v. Skanska USA Bldg., Inc., 263 F.R.D. 190, 194 (E.D.Pa.2009). With respect to testifying experts, the 1993 version of Rule 26 stated that any witness who “may” testify as an expert at trial “must” produce a written report that contained, among other things, “the data or other information considered by the witness in forming” all opinions. Id. (citing Fed.R.Civ.P. 26(a)(2)(B)(ii)). The Third Circuit has not directly addressed whether the 1993 amendments to Rule 26(a)(2)(B) were intended to require the disclosure of information that would otherwise be privileged. However, relying on the Advisory Committee’s Notes to the 1993 Amendments, courts in this District and several federal courts of appeals have held that the 1993 version of Rule 26(a)(2)(B) required the production of otherwise privileged material. See, e.g., id. at 194–95; Fed.R.Civ.P. 26 advisory committee notes to 1993 amendments (“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.”); Reg’l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 715 (6th Cir.2006) (agreeing with “the majority view [before the 2010 Amendments] that Rule 26 ... require[d] disclosure of all information provided to testifying experts”).

*3 Thus, under the pre-2010 version of Rule 26, the requested materials were discoverable. In the next section, the Court analyzes whether the 2010 Amendments have changed this result.

B. 2010 Amendments to Rule 26

In 2010, Rule 26 was “amended to address concerns about expert discovery.” Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments.


As amended in 2010, Rule 26(a)(2)(B) now requires an expert witness to prepare a written report containing, inter alia, “the facts or data” that the witness considered in forming all opinions. Fed.R.Civ.P. 26(a)(2)(B). The phrase “facts and data” included in the 2010 version is intended to be narrower than the “data and other information” formulation used in the 1993 version. See Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments. The 2010 Amendments did not alter the definition of “consider.” See id. Thus, required disclosures under Rule 26(a)(2)(B) still include “any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.” Synthes Spine
Co., L.P. v. Walden, 232 F.R.D. 460, 463 (E.D.Pa.2005); see also Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments (“The 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.”). Because plaintiff’s expert admits that he reviewed the requested materials in forming his opinions, there is no question that he “considered” these materials within the meaning of Rule 26(a)(2)(B).

In explaining the changes to Rule 26(a)(2), the Advisory Committee noted that the changes were intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports... The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.


2. 2010 Amendment to Rule 26(b)(4): Trial Preparation for Experts
In 2010, Rule 26(b)(4)(C) was added to the Federal Rules. Rule 26(b)(4)(C) “provide[s] work-product protection for attorney-expert communications regardless of the form of the communications,” except for 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 opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments; Fed.R.Civ.P. 26(b)(4)(C).

*4 The Advisory Committee Notes to the 2010 Amendments explain that 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.” Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments (emphasis added). The Advisory Committee further notes that the addition of Rule 26(b)(4)(C) was not intended to “impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.” Id. Thus, contrary to plaintiff's assertions, the addition of Rule 26(b)(4) (C) to the Federal Rules does not render the requested materials undiscoverable. In fact, to the extent that these materials identify “facts or data ... that the expert considered” or “assumptions ... that the expert relied on in forming the opinions to be expressed,” Rules 26(b)(4)(C)(ii) and (iii) specifically state that they are discoverable.

C. Plaintiff's Assertions of Privilege under the Attorney–Client Privilege and the Work Product Doctrine
Plaintiff asserts that the requested materials are protected from disclosure under the attorney-client privilege and the work product doctrine. Allowing disclosure of these materials, plaintiff contends, is contrary to the language and intent of the present version of Rule 26. The Court disagrees.

Courts have held that the disclosure requirements of Rule 26(a) (2)(B) “were meant to trump all claims of privilege, mandating production of all information furnished to the testifying expert for consideration in the formulation of [the expert's] opinions, regardless of privilege.” Synthes Spine, 232 F.R.D. at 463; see also CP Kelco U.S. Inc. v. Pharmacia Corp., 213 F.R.D. 176, 179 (D.Del.2003) (“It would be manifestly unfair to allow a party to use the [attorney-client] privilege to shield information which it ... deliberately [used] ... to arm its expert for testimony.... Having chosen to use the information offensively, any privilege Pharmacia ... claimed to defend the information from disclosure is, and remains, waived.”); Kontonotas v. Hygrosol Pharm. Corp., No. 07–4989, 2009 WL 3719470 (E.D.Pa. Nov.4, 2009) (“[Pursuant to Rule 26(a)(2)(B),] the work product privilege and the attorney-client privileges are waived when privileged material is given by a party to its expert for ‘consideration.’ ”). The 2010 Amendments do not invalidate these pre–2010 decisions. See Graco, Inc. v.
As discussed above, the purpose of amending Rule 26 in 2010 was to limit disclosure to materials of a factual nature and to protect against disclosure of counsel's work product. Fed.R.Civ.P. 26 advisory committee notes to 2010 amendments. The requested materials contain “factual ingredients” and disclosure does not implicate “theories or mental impressions of counsel” because plaintiff, not plaintiff's attorney, prepared them. Id. Thus, the 2010 Amendments provide no basis for prohibiting discovery of the requested materials.

*5 Plaintiff's expert was required to include in his written report all of the “facts or data” that he “considered” in forming his opinions. Fed.R.Civ.P. 26(a)(2)(B). Because plaintiff's expert “considered” the requested materials within the meaning of Rule 26(a)(2)(B), the “facts or data” in those materials must be disclosed. See id. (An expert's “report must contain ... the facts or data considered by the witness in forming [all opinions].”). Even if the requested documents are considered “communications” between a party's attorney and an expert within the meaning of Rule 26(b)(4)(C), they are discoverable to the extent that they fall within the exceptions listed in Rules 26(b) (4)(C)(ii) and (iii), for “facts and data” that the expert considered and for “assumptions” that the expert relied on. The requested materials were discoverable under the 1993 version of Rule 26 and they remain discoverable today. This result is consistent with the language and intent of the present version of Rule 26.

IV. Conclusion
The Court grants defendants' request that plaintiff produce the parts of all requested documents containing “facts or data” that plaintiff's expert reviewed or considered or “assumptions” that the expert relied on in forming the opinions he expressed. The request is denied in all other respects.

An appropriate Order follows.

All Citations
Not Reported in F.Supp.2d, 2012 WL 2527020

End of Document
MEMORANDUM ORDER

Stark, UNITED STATES DISTRICT JUDGE

Pending before the Court is Petitioner United States of America's Motion to Enforce Internal Revenue Service ("IRS") Summonses against Veolia Environnement North America Operations, Inc. ("Taxpayer"). (D.I. 1) The Taxpayer has refused to produce certain materials sought by the IRS based on the Taxpayer's assertion of work product protection, attorney-client privilege, and the tax practitioner privilege.

I. The IRS Audit

This dispute arises out of an IRS audit of the Taxpayer regarding a $4.5 billion worthless stock deduction claimed by the Taxpayer on its 2006 U.S. federal income tax return. (D.I. 5; D.I. 11) The Taxpayer is a U.S. holding company owned by Veolia Environnement S.A. ("VE"), which is itself a subsidiary of Vivendi S.A., a multi-billion dollar French conglomerate. (D.I. 11 Ex. 1 ¶ 7–8)

In April 1999, the Taxpayer purchased Water Application & Solutions Corporation ("WASCO") for $8.2 billion. (D.I. 8 ¶ 6) By 2006, the Taxpayer had come to the conclusion that WASCO's stock was worthless. It retained legal advisors and tax experts to identify a means by which it could claim WASCO's stock as a deduction under Section 165(g) of the Internal Revenue Code, 26 U.S.C. § 165(g). (D.I. 7 ¶¶ 7–11) Specifically, the Taxpayer intended to reduce ordinary income by taking a deduction for worthless securities in affiliated corporations. See 26 U.S.C. § 165(g)(3); see also D.I. 11 at 3–4.

At some point in 2006, the Taxpayer decided that converting WASCO to a Delaware Limited Liability Corporation ("LLC") could be a viable "trigger" for claiming the deduction on its tax return. (D.I. 8 ¶ 10) Before finalizing the decision to convert WASCO to an LLC and claim the deduction, the Taxpayer, in March 2006, began looking for a law firm to provide tax advice regarding the worthless stock deduction and how to best prepare the Taxpayer's case. (D.I. 8 ¶ 11) By March 23, 2006, the Taxpayer had retained counsel at Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") (D.I. 13 Ex. 1), and, thereafter, the Taxpayer sought and obtained a private letter ruling from the IRS interpreting Section 165(g), see I.R.S. Priv. Ltr. Rul. 200710004, 2007 WL 707858 (Dec. 5, 2006). Further, in the fall of 2006, the Taxpayer and VE hired two valuation firms, Aon Accuracy ("Aon") and XRoads Solutions Group LLP ("XRoads"), to evaluate and produce written reports on WASCO's insolvency. (D.I. 7 ¶¶ 7–8; D.I. 8 ¶¶ 18, 20–21) On December 18, 2006, the Boards of Directors of WASCO and the Taxpayer met and authorized the companies to pursue the claim. (D.I. 7 ¶ 12) Several days later, on December 22, 2006, WASCO was converted to an LLC. (D.I. 7 ¶ 15)

In February 2007, the Taxpayer—already under audit by the IRS for its 2004 and 2005 returns—applied for and subsequently enrolled in the IRS's newly established Pre-Filing Agreement ("PFA") program, which was created "to resolve, before returns are filed, issues that are likely to be disputed in post-filing audits." (D.I. 11 at 4–5 (quoting...
On April 30, 2013, following briefing, the Court held a hearing regarding the government's motion. Among the matters discussed were whether the Court should review a portion of the withheld documents in camera and, if so, which ones. (See Tr. at 14) After the parties further met and conferred, the government agreed to withdraw its request for 178 documents and asked the Court to review a sample of 55 documents representative of the remaining 228 contested documents. (D.I. 16 at 2) The Court then ordered the Taxpayer to submit the requested 55 documents for in camera review (D.I.18), and on May 24, 2013 the Taxpayer did so.

The order proposed by the government and entered by the Court in scheduling the April 2013 hearing included a finding that “the file in this matter reflects a prima facie showing” of the factors the government must show in order to obtain enforcement of the summonses. (D.I. 2 ¶ 3) The Supreme Court set out the relevant four-part test in United States v. Powell, 379 U.S. 48, 57–58 (1964), requiring the government to show that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) the information sought is not already within the government's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. The Taxpayer does not appear to dispute that the government has made out a prima facie case; hence, the burden to justify withholding the summoned documents has shifted to the Taxpayer. (See D.I. 11 at 6)

Legal Standards

I. Work Product Protection

*3 Federal Rule of Civil Procedure 26(b)(1) provides broadly that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's
claim or defense ...” The work product exception to this disclosure requirement is set forth in Rule 26(b) (3)(A), which states: “Ordinarily, a party may not discover documents ... that are prepared in anticipation of litigation or for trial by or for another party or its representative.” This work product doctrine functions to “promot[e] the adversary system” by guarding the confidentiality of documents prepared in anticipation of litigation, allowing a party to prepare for litigation without fear that its work product will be used against it. See Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir.1991); Hickman v. Taylor, 329 U.S. 495, 510–11 (1947). Work product protection is limited to documents actually prepared in anticipation of litigation and does not apply to “[m]aterials assembled in the ordinary course of business.” Fed.R.Civ.P. 26(b)(3), adv. comm. note (1970).

The “burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine.” Conoco Inc. v. U.S. Dept. of Justice, 687 F.2d 724, 730 (3d Cir. 1982). “Only by looking to the state of mind of the party preparing the document, or ... the party ordering the preparation of the document” can the Court determine if a document comes within the scope of Rule 26(b)(3) protection. Martin v. Bally's Park, 983 F.2d 1252, 1260 (3d Cir.1993). In addition to showing the appropriate subjective intent, a party withholding a document on the basis of work product protection must also show that the anticipation of litigation was objectively reasonable:

Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced. Thus, the test should be whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

Id. (internal quotation marks omitted).

II. Attorney–Expert Communications

Federal Rule of Civil Procedure 26(a)(2)(B)(ii) mandates the disclosure of all “facts or data considered by” an expert witness retained or employed to provide expert testimony “in forming” “opinions the witness will express.” See also Fed.R.Civ.P. 26(a)(2)(B)(i). In 2010, Rule 26 was amended to “address concerns about expert discovery,” including by adding Rule 26(b)(4)(B), protecting drafts of export reports required under Rule 26(a)(2). See adv. comm. notes (2010). Also added was Rule 26(b)(4)(C), which “protect[s] communications between the party's attorney and any [expert] witness required to provide a report under Rule 26(a)(2)(B),” with three exceptions into which discovery is permitted: “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 opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.” The advisory committee notes accompanying the 2010 amendments state: “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 these communications.”


III. Attorney–Client Privilege

*4 The attorney-client privilege protects communications between a client and its attorney related to the purpose of securing legal advice. See Rhone–Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 852 (3d Cir.1994). The privilege applies to communications from an attorney to a client as well as from a client to its attorney. See Upjohn v. United States, 449 U.S. 383, 390 (1981). The burden of demonstrating the applicability of the attorney-client privilege rests on the party asserting the privilege. See Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir.1986). Specifically, the party asserting privilege must show each of the following:
(1) [T]he asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and

(4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir.1979) (internal quotation marks omitted).

IV. Tax Practitioner Privilege
Pursuant to 26 U.S.C. § 7525(a)(1), communications between a taxpayer and a “federally authorized tax practitioner” for the purpose of obtaining tax advice are privileged, “to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.” See generally Chao v. Koresko, 2005 WL 2521886 (3d Cir. Oct. 12, 2005) (recognizing tax practitioner privilege). Section 7525 codifies the tax practitioner privilege as reflecting “the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney,” and, thus, “the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications.” United States v. BDO Seidman, 337 F.3d 802, 810 (7th Cir.2003).

DISCUSSION
Having considered the parties' arguments and the law, and reviewed the 55 submitted documents in camera, the Court is able to resolve at least a portion of the parties' dispute. The Court's findings and conclusions are provided below.

I. The Taxpayer Anticipated Litigation

An issue central to the Taxpayer's assertion of work product protection is whether the Taxpayer anticipated litigation with the IRS relating to the $4.5 billion stock deduction. The Taxpayer contends that it anticipated litigation as early as March 2006, “when it began to plan in earnest for the potential IRS dispute” by hiring outside counsel to analyze the legal ramifications of the potential tax write-off. (D.I. 5 at 14) The Taxpayer asserts that it took this action because “it was essentially provoking a dispute with the IRS by choosing to claim a $4.5 billion worthless stock deduction.” Id. The government, however, maintains that the Taxpayer has failed to show that it anticipated litigation because the Taxpayer's ordinary business activities involve “acquiring, managing, and divesting operating companies,” such as WASCO, including with the goal of restructuring companies in order to derive tax benefits. (D.I. 11 at 13) In that light, WASCO's conversion to an LLC and the Taxpayer's worthless stock deduction were the types of business actions the Taxpayer regularly undertakes.

5 The Taxpayer is claiming work product protection in connection with the worthless stock deduction for documents created in or after March 2006. (D.I. 5 at 14 n.20)

5 On this issue the Court finds that the Taxpayer has met its burden to prove that it anticipated litigation at least as early as March 2006. The record shows that the Taxpayer sought the valuation reports because of the prospect of litigation with the IRS, believing that an IRS audit was probable. This was also the reason the Taxpayer retained outside counsel Cleary Gottlieb and chose to seek—and obtained—a private letter ruling from the IRS interpreting Section 165(g). It was further the reason the Taxpayer applied to participate in the IRS PFA program, a program intended to address “issues that are likely to be disputed in post-filing audits.” Rev. Proc. 2005–12, 2005–1 C.B. 311, 2004 WL 2956045, § 2 (Dec. 22, 2004) (emphasis added). Thus, the Taxpayer subjectively anticipated litigation.

6 The government observes that the Taxpayer, in its PFA request, stated its belief that “the issue that is subject to this PFA request can reasonably be resolved” before the time the Taxpayer intended to file its 2006 return. (D.I. 11 at 4–5) The Court does not agree with the government that the facts relating to the PFA “undermine[]” the Taxpayer's contention that it anticipated litigation in 2006 and 2007. (D.I. 11
The Taxpayer's expectation of litigation was objectively reasonable, particularly given the sheer size of the deduction—\$4.5 billion—and the fact that the Taxpayer was already under audit by the IRS for its prior year returns. (See D.I. 5 at 4) See also United States v. Roxworthy, 457 F.3d 590, 600 (6th Cir.2006) (finding it reasonable for taxpayer to anticipate litigation based on, inter alia, size of transactions and likelihood of IRS challenge).

Documents being withheld by the Taxpayer support these conclusions. For example, memoranda from the Taxpayer's general counsel and outside counsel identify not only that the Taxpayer expected the transaction would come under scrutiny by the IRS, but also specifically remark on the importance of the role of the independent valuation report from XRoads in any potential litigation. See generally Hodges, Grant & Kaufman v. United States, 768 F.2d 719, 722 (5th Cir.1985) ("If the document was prepared in anticipation of ‘dealing with the IRS,’ it may well have been prepared in anticipation of an administrative dispute and this may constitute ‘litigation’ within the meaning of Rule 26.").

*6 Thus, as explained above, the Court finds that the Taxpayer has met its burden to show it subjectively and reasonably anticipated litigation. 8

To the extent the government is arguing that it can, pursuant to Rule 26(b)(3)(A), overcome any non-waived showing of work product protection established by the Taxpayer (see D.I. 11 at 8–11), the Court does not agree. Given the voluminous materials already produced by the Taxpayer, as well as any additional materials the Taxpayer may be ordered to provide pursuant to the rulings contained herein and in any subsequent orders, the government has not "show[n] that it has substantial need for the materials to prepare its case," and has further failed to show that it "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A)(ii). In any event, it appears that the government argues that it has shown "substantial need" only with respect to "the facts, data and assumptions that VENAO's experts considered or relied upon." (D.I. 11 at 9) As explained in the next section, the Court agrees with the government that such "facts, data, and assumptions" are not protected work product, so with respect to these there is no need to reach the "substantial need" inquiry.

The Court is not, at this point, making a specific holding with respect to any particular document. Rather, the Court is hopeful that the factual finding described above will assist the parties in resolving their dispute, at least in relation to the Taxpayer's assertion of work product protection.
II. Materials Relied On By Experts

The parties dispute whether certain materials pertaining to the creation of the appraisal reports by XRoads and Duff & Phelps must be disclosed by the Taxpayer to the IRS. It is undisputed that XRoads and Duff & Phelps are testifying experts who must provide a written report, as required by Rule 26(a)(2)(B). (D.I. 11 at 7; D.I. 12 at 2)

The government contends that the Taxpayer has failed to disclose the “facts, data, and assumptions that were provided, by anyone, to, and were considered or relied on by, [the Taxpayer's] valuation firms in forming the opinions to be expressed in the appraisal reports.” (D.I. 11 at 5) (emphasis added) The Taxpayer, by contrast, states the requirement somewhat differently, maintaining that it has already provided the government with “all factual information it provided” to XRoads and Duff & Phelps, including “copies of its communications ... to the extent the communications relate to” compensation for the two firms, as well as facts, data, or assumptions provided to and considered by the two firms in forming their opinions. (D.I. 8 at 8–9) (emphasis added) It appears from the Court's review of the documents submitted in camera that the parties' dispute is over the meaning of Rule 26(b)(4)(C), as it appears that the Taxpayer has withheld documents containing communications of facts or data to XRoads provided by entities other than the Taxpayer. (See, e.g., Priv. Log Doc. 297 (containing email chain between XRoads and non-testifying expert Aon); see also D.I. 12 at 2–3)

On this issue the Court agrees with the government. Rule 26(b)(4)(C) only protects “communications between the party's attorney” and that party's testifying expert (i.e., a Rule 26(a)(2) expert). Communications of “facts or data ... that the expert considered in forming the opinions to be expressed” that were provided to the expert by sources other than “the party's attorney” are not protected by Rule 26(b)(4)(C). Nor, here, has the Taxpayer identified any other source of protection from disclosure of such “facts or data.”

*7 The Court's conclusion is supported by other courts to have considered the issue, see Fialkowski v. Perry, 2012 WL 2527020, at *4 (E.D. Pa. June 29, 2012) (stating that disclosure requirements for testifying experts “were meant to trump all claims of privilege, mandating production of all information furnished to the testifying expert for consideration in the formulation of [the expert's]

opinions, regardless of privilege”), as well as the 2010 advisory committee notes (“The intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.... 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 ....”) (emphasis added). It is also the logical result: as one of the exceptions to protection from disclosure of attorney-expert communications is communications that “identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed,” Fed.R.Civ.P. 26(b)(4)(C)(ii), there is no reason that communications from someone other than the party's attorney that likewise identify such “facts or data” should be protected from disclosure.

Therefore, the Court concludes that the Taxpayer must produce, in response to the summonses, any materials containing facts or data considered by XRoads and 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. 9

9 Notwithstanding the government's statement at the hearing that it was “not seeking draft reports of the XRoads and Duff & Phelps appraisal reports.... Rule 26(b)(4) is pretty clear. Draft reports are out” (Tr. at 12–13), subsequently the government advised the Court that it is “seeking the draft reports, or portions of the draft reports, that are not privileged due to issues raised” in the government's briefs, namely that the drafts contain communications within the exceptions to the work product doctrine (Fed.R.Civ.P. 26(b)(4)(C)(i)-(iii) or were disclosed to Valerie Clavie, an officer of VE (D.I. 19 at 1–2). The Court agrees with the Taxpayer (D.I. 20) that it need not produce the draft reports. See Fed.R.Civ.P. 26(b)(4)(B) (“Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”)

III. Attorney–Client And Tax Practitioner Privileges

The government contends that, with respect to at least some of the withheld documents as to which the Taxpayer is asserting attorney-client and tax-practitioner privileges,
the Taxpayer has failed to meet its burden that the materials relate to and were necessary to obtain legal advice. (D.I. 11 at 12–13) Among the requirements for a proper assertion of privilege is a showing that the communication in question was made “for the purpose of obtaining or providing legal assistance for the client.” In re Teleglobe Comms. Corp., 493 F.3d 345, 359 (3d Cir. 2007) (attorney-client privilege); United States v. Trenk, 2009 WL 485375, at *4 (D.N.J. Feb. 26, 2009) (“The scope of the Section 7525 privilege depends on the scope of the attorney-client privilege and is no broader than the attorney-client privilege.”). While the Court agrees with the government that non-legal business advice is “not covered by either the attorney-client or the tax practitioner-client privilege” (D.I. 11 at 16), the Court also recognizes that the Taxpayer contends that the documents the Taxpayer seeks to withhold on the basis of these privileges do involve legal advice. In particular, the documents that the Taxpayer is withholding relate to “legal and tax analyses of complicated provisions of the [Internal Revenue] Code.” (D.I. 12 at 2)

Even after reviewing the sample of withheld documents in camera, the Court is not, yet, in a position to resolve this portion of the dispute on a document-by-document basis. Additionally, given the rulings the Court has made elsewhere in this opinion, the Court needs the parties' assistance in determining which documents (if any) remain in dispute. Thus, the Court will direct the parties to submit their proposal(s) as to how the Court should proceed with respect to evaluating the application of these privileges.

IV. Waiver

*8 The government contends that even if the Taxpayer has met its burden and demonstrated that one or more of the withheld documents are properly withheld on the basis of an assertion of work product protection or the attorney-client or tax practitioner privilege, those protections have been waived, and the withheld documents should therefore be produced. (D.I. 11 at 11–12) Federal Rule of Evidence 502(a) provides that when a disclosure is made to a federal agency and waives the attorney-client or work product protection, “the waiver extends to an undisclosed communication or information ... only if” the waiver is intentional, the disclosed and undisclosed communications or information concern the same subject matter, and “they ought in fairness to be considered together.” As with the “substantial need” exception to work product protection, the government's waiver argument appears to be offered only as a means to obtain “the facts, data, and assumptions that were considered and/or relied upon by VENAO's experts,” on the grounds that these “ought in fairness to be considered together.” (D.I. 11 at 12) (quoting Fed.R.Evid. 502(a)) The Court agrees with the government's premise, but not its conclusion. Since the facts, data, and assumptions that were provided to XRoads and Duff & Phelps are not protected from disclosure or otherwise privileged, there is no protection or privilege for the Taxpayer to waive.

Finally, the government makes another waiver argument: that some of the withheld materials were shared widely among individuals who work for the Taxpayer, as well as individuals who were only employed by related entities. (See D.I. 11 at 16–17) The Court is persuaded by the Taxpayer that it had common interests with its parent and other affiliated entities and that “the presence of the individuals participating in the communications was necessary for obtaining or acting upon the legal or tax advice sought.” (D.I. 12 at 2; see also id. at 8–9; D.I. 14) The government has failed to show that there was a waiver.

CONCLUSION

The Court is hopeful that the findings and conclusions stated above will assist the parties in resolving, in whole or at least in substantial part, their disputes with respect to the withheld documents. Accordingly, IT IS HEREBY ORDERED that the parties shall meet and confer and shall, no later than November 8, 2013, submit a joint status report advising the Court as to whether they have any remaining disputes requiring judicial resolution, including identifying which, if any, of the 55 sample documents as to which they require the Court to make a specific ruling as to the necessity of production.

All Citations
Republic of Ecuador v. For Issuance of a Subpoena Under..., 735 F.3d 1179 (2013)

735 F.3d 1179
United States Court of Appeals,
Tenth Circuit.

In re Application of the REPUBLIC OF ECUADOR;
Diego Garcia Carrion, the Attorney General of
the Republic of Ecuador, Petitioners–Appellees,
v.
FOR THE ISSUANCE OF A SUBPOENA
UNDER 28 U.S.C. § 1782(a) for the Taking
of a Deposition of and the Production of
Documents by Björn Bjorkman for use in a
foreign proceeding, Respondent–Appellant.
Chevron Corporation, Intervenor–Appellant.

No. 12–1402.

Nov. 13, 2013.

Synopsis
Background: Republic of Ecuador and its Attorney
General filed petition for issuance of subpoenas seeking
discovery from oil company's environmental expert to
defend judgment against company by Ecuadorian court.
The United States District Court for the District of
Colorado, 2012 WL 12755, partially granted petitioners'
motion to compel production of documents pursuant to
subpoenas, and company and expert appealed.

Holdings: The Court of Appeals, Paul J. Kelly, Jr., Circuit
Judge, held that:

[1] order partially granting motion to compel was final
appealable order, and

[2] trial preparation materials prepared by or provided to
expert were not protected by work product doctrine.

Affirmed.

West Headnotes (5)


In general; necessity

Federal Courts
What constitutes finality in general
Absent certain exceptions, a federal appellate
court has jurisdiction solely over an appeal
from a “final decision” of a federal district
court, which is a decision ending the litigation
on the merits and leaving nothing for the court
to do but execute the judgment.

1 Cases that cite this headnote

Preliminary proceedings; depositions and
discovery

District court order partially granting foreign
sovereign's motion to compel production of
documents pursuant to statute authorizing
district courts to compel production of
documents for use in proceeding being
conducted before foreign tribunal was final
appealable order, even though magistrate
judge had subsequently issued additional
orders concerning same application, where
district court never adopted magistrate judge's
orders as its own. 28 U.S.C.A. § 1782.

1 Cases that cite this headnote

Procedural Matters

Court of Appeals reviews de novo a district
court's interpretation of Federal Rules of Civil
Procedure.

Cases that cite this headnote

Construction

Statutes
Context

Principle that a court must start with the text's
plain language in interpreting a statute or rule
does not require court to wear blinders to the
context in which a word or phrase or sentence
is used; rather, court must interpret a choice
of words in the context that Congress chose to use.

Cases that cite this headnote


Work Product Privilege; Trial Preparation Materials

Trial preparation materials prepared by or provided to testifying ecological expert in connection with environmental contamination litigation were not protected from production pursuant to work product doctrine. Fed.Rules Civ.Proc.Rule 26(a)(2) (B), (b)(3, 4), 28 U.S.C.A.

10 Cases that cite this headnote

Attorneys and Law Firms


Before KELLY, McKAY, and MATHESON, Circuit Judges.

Opinion

PAUL KELLY, Circuit Judge.

Intervenor–Appellant Chevron Corporation appeals from a district court order granting a motion to compel production of documents pursuant to subpoenas issued under 28 U.S.C. § 1782. Section 1782 allows for discovery of documents to be used in a foreign proceeding. Petitioners–Appellees, the Republic of Ecuador and its Attorney General, Dr. Diego García Carrión (collectively, "the Republic") sought the discovery to defend an $18.2 billion judgment against Chevron by an Ecuadorian court. Since the early 1990s, Chevron and its predecessor company, Texaco, Inc., have defended litigation concerning Texaco's operation in Ecuador and the environmental contamination it allegedly produced. This litigation started in the Southern District of New York but eventually found its way to the courts of Lago Agrio, Ecuador. (For a detailed description of the New York litigation, see *1181 Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir.2002)). In February 2011, the court in Lago Agrio entered an $18.2 billion judgment against Chevron, currently on appeal.

1 Chevron merged with Texaco in 2001 and assumed liability for its operations. Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 388 n. 1, 389 n. 3 (2d Cir.2011).

Prior to the Lago Agrio judgment, in September 2009, Chevron commenced arbitration proceedings against the Republic under the U.S.-Ecuador Bilateral Investment Treaty, pursuant to the rules of the United Nations Commission on International Trade Law. Chevron invoked this procedure to stop the alleged “due process, fair treatment, and international-law rights” violations it allegedly suffered at the hands of Ecuadorian courts. Aplt. Br. 12. In February 2011, immediately following the Lago Agrio judgment, the arbitral tribunal ordered that the Republic stay all efforts to enforce the Lago Agrio judgment, pending further order of the tribunal.

This is where the underlying litigation currently stands. However, gearing up for arbitration, both sides have filed numerous 28 U.S.C. § 1782 applications in district courts throughout the United States seeking discovery of evidence for use in a foreign proceeding. In June 2011, the Republic filed a § 1782 application in the District of Colorado seeking “discovery from Bjorn Bjorkman to aid the Republic in defending the validity of the Lago Agrio judgment.” I Jt. App. 42. The Republic alleged that Mr. Bjorkman served as one of Chevron's chief experts and that the Ecuadorian court explicitly relied on his opinions. Id. at 42–43. Mr. Bjorkman and Chevron, as an interested party, responded challenging discovery, and the district order.

Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm the district court's order.

*Background*

Since the early 1990s, Chevron and its predecessor company, Texaco, Inc., have defended litigation concerning Texaco's operation in Ecuador and the environmental contamination it allegedly produced. This litigation started in the Southern District of New York but eventually found its way to the courts of Lago Agrio, Ecuador. (For a detailed description of the New York litigation, see *Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir.2002)*). In February 2011, the court in Lago Agrio entered an $18.2 billion judgment against Chevron, currently on appeal.

Prior to the Lago Agrio judgment, in September 2009, Chevron commenced arbitration proceedings against the Republic under the U.S.-Ecuador Bilateral Investment Treaty, pursuant to the rules of the United Nations Commission on International Trade Law. Chevron invoked this procedure to stop the alleged “due process, fair treatment, and international-law rights” violations it allegedly suffered at the hands of Ecuadorian courts. Aplt. Br. 12. In February 2011, immediately following the Lago Agrio judgment, the arbitral tribunal ordered that the Republic stay all efforts to enforce the Lago Agrio judgment, pending further order of the tribunal.

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court referred the Republic's application to a magistrate judge.

During the Lago Agrio trial, Chevron retained Mr. Bjorkman, “an ecologist specializing in ecological and human health risk assessments, site investigations, and biological and biodiversity investigations.” Aplt. Br. 15. In this capacity, Mr. Bjorkman prepared and received documents and communications “created in anticipation of litigation with the intent that they would be kept confidential.” Id. at 15–16. These documents and communications came from a variety of sources in Chevron's litigation team, including “lawyers, in-house scientists, consultants, and expert witnesses.” Id. at 17. In the instant action, Chevron argued before the magistrate judge that the 2010 revisions to Fed.R.Civ.P. 26 brought materials prepared by or provided to Mr. Bjorkman under the protection of the work-product doctrine.

In August 2011, the magistrate judge granted the Republic's application, rejecting Chevron's argument and noting that Rule 26 “does not preclude the disclosure of information constituting the basis for a report, even though prepared for use in trial.” I Jt.App. 21. The district court adopted and affirmed the magistrate's order. Pursuant to this order, Chevron produced “all of the facts and data [Mr. Bjorkman] considered in forming his expert opinions.” Aplt. Br. 2. However, Chevron withheld thousands of documents that it believed fell under Rule 26's work-product doctrine. Claiming this violated the discovery order, the Republic filed a motion to compel further production. In January 2012, the magistrate judge partially granted the Republic's motion. Relevant to this appeal, the magistrate judge held that:

1. Chevron may properly withhold drafts of Mr. Bjorkman's expert reports and disclosures, in whatever form, under Rule 26(b)(4)(B);

2. Chevron may properly withhold documents containing communications between Mr. Bjorkman and Chevron's attorneys under Rule 26(b)(4)(C); however, *1182 Chevron may not withhold communications between Mr. Bjorkman and non-attorneys; and

3. Rule 26(b)(3) did not provide work-product protection to all documents in the hands of a reporting expert, only those documents specifically covered by Rules 26(b)(4)(B) and (C) were so protected.

Thereafter, Chevron sought to stay discovery pending review by this court. The district court denied this request and ordered Chevron to produce all documents subject to the October 4, 2012 order not yet produced. On the parties' motion, the magistrate judge entered a stipulated protective order, limiting the Republic's use of materials received from Mr. Bjorkman to “conducting the Bilateral Investment Treaty Arbitration.” I Jt.App. 36. While this appeal was pending, the Republic filed a second motion to compel, alleging that Chevron continued to improperly withhold documents that fell under the October 4, 2012 order. The magistrate judge issued two more orders, in January and April 2013, clarifying the scope of the October 4, 2012 order and compelling further production. See Republic of Ecuador v. Bjorkman, No. 11–cv–01470, 2013 WL 50430 (D.Colo. Jan.3, 2013). Chevron never objected to the January and April 2013 orders under Fed.R.Civ.P. 72, and the district court never adopted them.

Discussion

I. Jurisdiction

[1] Although the parties did not challenge this court's jurisdiction, we raised the issue sua sponte and have the benefit of supplemental briefing. See Smith v. Rail Link, Inc., 697 F.3d 1304, 1312–13 (10th Cir.2012). Absent certain exceptions, “federal appellate courts have jurisdiction solely over appeals from final decisions of the district courts of the United States.” Rekstad v. First Bank System, Inc., 238 F.3d 1259, 1261 (10th Cir.2001) (internal quotation omitted). A decision is final if it “ends
the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir.2013) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)). While the district court's October 4, 2012 order compelling the discovery at issue appears on its face “final,” the magistrate judge's January and April 2013 orders compelling further discovery call its finality into question.

Initially we note that in a § 1782 proceeding, there is nothing to be done “on the merits.” Section 1782 empowers a district court to order a person residing within its district to “give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.” 28 U.S.C. § 1782. The only issue before the district court is discovery; the underlying litigation rests before a foreign tribunal. See *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 189 n. 1 (3d Cir.1999).


Chevron argues that the 2010 revisions to the Federal Rules caused a sea change in the discoverability of documents held by experts. It argues that the Rule 26(b)(3)(A)’s “by or for another party or its representative” language protects trial preparation materials prepared by or provided to a testifying expert. Aplt. Br. 25. Further, it argues that the amendment to Rule 26(a)(2)(B)(ii)’s reporting standard was intended to make clear that reporting experts are protected by the work-product doctrine. Aplt. Br. at 26–29. Finally, it argues that the two limited protections of Rules 26(b)(4)(B) and (C) are not the exclusive protections for expert materials but merely “examples of the broader protection provided by Rule 26(b)(3)(A).” Aplt. Br. at 21. We disagree that the 2010 amendments produced such changes.

[2] The Republic argues that a § 1782 order is not a “final decision” so long as “further proceedings [are] still underway in the district court.” Aplee. Supp. Br. 7. However, the cases it cites do not hold that a district court's § 1782 order cannot be “final” if subject to ongoing dispute about its coverage and scope before a magistrate judge. The Ninth Circuit, in *In re Premises Located at 840 140th Ave. NE*, noted that a § 1782 order is final “[o]nce the district court has ruled on the parties’ motions concerning the evidentiary requests.” 634 F.3d at 566. Here, once the district court affirmatively decided the proper scope of discovery under the Republic's application, it disposed of all “evidentiary requests.”

Moreover, the Seventh Circuit stated in *Heraeus Kulzer, GmbH v. Biomet, Inc.*, that, in the context of a § 1782 application, “when no further proceedings are contemplated, the court's last order, even if it is a discovery order, is an appealable final order.” 633 F.3d 591, 593 (7th Cir.2011). In this case, the district court's “last order” was its October 4, 2012 order. The district court never adopted the magistrate judge's January and April 2013 orders as its own; consequently, neither of those orders are “final decisions of the district court[ ]” appealable to this court. 28 U.S.C. § 1291; see *Phillips*, 466 F.3d at 1222 (holding that a magistrate judge's § 1782 discover order is not appealable unless and until the district court adopts it). The district court's October 4, 2012 order is thus the last definitive word and a “final decision” under 28 U.S.C. § 1291. We proceed to the merits.

[3] In *Phillips v. Beierwaltes*, this court stated without qualification that § 1782 “orders are considered final and appealable to this court.” 466 F.3d 1217, 1220 (10th Cir.2006). However, we were not faced with the circumstances we face here—a § 1782 order by a district court followed by additional orders by a magistrate judge concerning the same § 1782 application.

[4] As with any exercise in statutory or rule interpretation, we start with the plain language of the text itself. *United States v. Ceballos–Martinez*, 371 F.3d 713, 716 (10th Cir.2004). Plain language does not require us, however, to “wear blinders to the context in which a word or phrase or sentence is used.” *Id.* Rather, we must interpret a “choice of words in the context that [Congress] chose to use.” *Id.* Because Chevron relies on...
the change from one set of Rules to the next, we look to the Advisory Committee's comments to place the 2010 revisions in context. See Esposito, 368 F.3d at 1275 (noting that the Advisory Committee's comments are entitled to weight in determining congressional purpose).

We look first to the Rules themselves. Rule 26(b)(3)(A) addresses the work-product doctrine:

(A) Documents and Tangible Things. 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).

Fed.R.Civ.P. 26(b)(3)(A). Whether this extends to a party's expert is the central issue of this appeal. However, other portions of Rule 26 make clear that some forms of expert materials are not immune to discovery. Rule 26(a), which provides for mandatory disclosures, requires a party to disclose the identity of any expert it intends to call at trial and to also provide:

(B) ... a written report ... [that] must contain: ... (ii) the facts or data considered by the witness in forming [its opinion]....


Finally, Rule 26(b)(4) makes clear that some forms of expert materials are exempt from Rule 26(a)(2)'s mandatory disclosures:

(B) Trial–Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2)....

(C) Trial–Preparation Protection for Communications Between a Party's Attorney and Expert Witness. 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)....


A. Rule 26(b)(3)(A)

[5] Chevron argues that the “by or for another party or its representative” language of Rule 26(b)(3)(A) clearly includes materials prepared by or for an expert witness in anticipation of litigation. Aplt. Br. 26. It argues that even before 2010, there existed a “work product protection for expert witness materials.” Id. We fail to see how the Rules or interpreting cases demonstrate that expert materials are protected under Rule 26(b)(3)’s work-product doctrine.

First, the plain language of Rule 26(b)(3) does not clearly mandate the result Chevron seeks. The phrase, “party or its representatives,” implies agency, and each of the six listed examples connotes someone acting in either an agency or fiduciary capacity for the “party or its representative.” Clearly, agents of a party or its representative, who stand in the legal shoes of the party, are entitled to the same work-product protections as the party itself. See United States v. Nobles, 422 U.S. 225, 238–39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (“It is therefore necessary that the [work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”). No showing has been made that an expert would have capacity to act on behalf of a party in this case.

*1185 Second, the traditional understanding of the work-product doctrine militates against concluding that expert materials are protected under Rule 26(b)(3). The Supreme Court has stated that, “[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.” Nobles, 422 U.S. at 238, 95 S.Ct. 2160. We have said the same: “the work product doctrine is intended only to guard against divulging the attorney's strategies or legal impressions.” Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir.1995). This understanding of the work-product doctrine was “substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).” Upjohn Co. v. United States, 449 U.S. 383, 398, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Ever since the Supreme Court first articulated the work-product doctrine in Hickman v. Taylor, the scope of discovery under Rule 26 has been understood to preclude “inquiries into the files and the mental impressions of an attorney.” 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947).
Despite this focus on an attorney's mental impressions, courts applying the *Hickman* doctrine struggled with whether the mental impressions of non-attorneys were also protected, particularly when litigants relied extensively on expert opinions. See *Fed.R.Civ.P. 26(b)(4)* (1970 Comments). Many federal courts held that materials produced by experts were protected under the work-product doctrine. See, e.g., *Carpenter–Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257, 262 (D.Neb.1959); *United States v. Certain Parcels of Land*, 25 F.R.D. 192, 193 (N.D.Cal.1959); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213, 218 (D.Del.1960); cf. *United States v. McKay*, 372 F.2d 174, 177 (5th Cir.1967) (reversing the district court's holding that an appraisal report was protected as “the work product of the expert witness”).

In 1970, the Advisory Committee expressly rejected the holdings of these cases. The 1970 revised Rules were the first to incorporate a version of the *Hickman* work-product doctrine. The drafters noted that leaving the application of the doctrine to caselaw had grown troublesome given the “confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers.” *Fed.R.Civ.P. 26(b)(3)* (1970 Comments). By providing a rules-based work-product doctrine, the Advisory Committee expressly “reject[ed] as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” *Fed.R.Civ.P. 26(b)(4)* (1970 Comments).

The 1970 revisers made clear that Rule 26(b)(3)'s work-product doctrine extends past attorneys to “a party or any representative acting on his behalf.” *Fed.R.Civ.P. 26(b) (3)*. (1970 Comments). At the same time, however, they made plainly clear that this protection did not “bring expert information within the work-product doctrine.” *Fed.R.Civ.P. 26(b)(4)* (1970 Comments). Chevron does not point to contrary authority that refutes this original understanding of Rule 26(b)(3).

Among these disclosures is the requirement that any person retained or specially employed to provide expert testimony prepare a written report detailing that testimony. *Fed.R.Civ.P. 26(a)(2)(B)*. As codified in 1993, Rule 26(a)(2) required that an expert's report contain “the data or other information considered by the witness in forming” his or her opinion. *Fed.R.Civ.P. 26(a)(2)(B)(ii)* (1993 revised version). The drafters made the purpose of this broadly formulated “other information” standard clear:


Other courts held that communications between an expert and a party's attorney—even communications containing the attorney's mental impression—were discoverable under Rule 26(a)(2)(B)(ii). See, e.g., *Elm Grove Coal Co.*, 480 F.3d at 303; *In re Pioneer Hi–Bred Intern., Inc.*, 238 F.3d 1370, 1375 (Fed.Cir.2001); *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D.Cal.1991). These decisions, according to the Advisory Committee, had the effect of raising the cost of litigation and causing attorneys to be overly cautious in their interaction with experts. *Fed.R.Civ.P. 26* (2010 Comments).

Thus, in 2010 the Advisory Committee abandoned the “facts or other information” standard for expert reporting and adopted the “facts or data” standard found in the current version of the Rules. *Fed.R.Civ.P. 26(a)(2)(B)(ii)* (2010 revised version). Through this change, the Advisory Committee “intended to alter the outcome in cases that

B. Rules 26(a)(2)(B), 26(b)(4)(B) & (C)

Chevron next argues that the 2010 revisions to Rules 26(a)(2) and (b)(4) restored broad work-product protection to expert materials. First, we address the changes to Rule 26(a)(2). In 1993, Rules 26(a)(1)-(4) were added, placing on each party the burden of producing “required disclosures” before being served with formal discovery.
have relied on the 1993 formulation in requiring disclosure of all attorney—expert communications and draft reports.” Fed.R.Civ.P. 26(a)(2)(B) (2010 Comments). In conjunction, the drafters amended Rule 26(b)(4) to “make this change explicit.” Id. They provided two exemptions to disclosure: “Trial–Preparation Protection for Draft Reports or Disclosures” (Rule 26(b)(4)(B)); and “Trial–Preparation Protection for Communications Between a Party's Attorney and Expert Witness” (Rule 26(b)(4)(C)).

Contrary to Chevron's assertion that these revisions were intended to have wide-ranging effects, the revisions appear to alter only the outcome of cases either allowing discovery of draft reports or attorney—expert communications. Fed.R.Civ.P. 26 (2010 Comments). Chevron cannot point to any cases allowing discovery of the type sought here that Rule 26(b)(4) silently overturned. Rather, Chevron's contention that Rules 26(b)(4)(B) and (C) are merely “examples” is irreconcilable with the above stated intentions. Had the drafters believed that expert materials were protected more broadly under Rule 26(b)(3) (something they believed “ill-considered” in 1970), then they could have chosen to bolster the protections afforded under that subdivision rather than providing two explicit protections in subdivision (b)(4). Cf., Joseph v. Wiles, 223 F.3d 1155, 1161 (10th Cir.2000) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress *1187 acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotations omitted).

Other comments make clear that the protections of Rules 26(b)(4)(B) and (C) are the exclusive protections afforded to expert trial-preparation materials. “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.” Fed.R.Civ.P. 26(b)(4) (2010 Comments). If Rules 26(b)(4)(B) and (C) were not exclusive, then such a statement would be unlikely.

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 bare-bones factual information underlying an expert's opinion, Aplt. Br. 29, 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.”

AFFIRMED. 3 We GRANT the Republic's motion to file a supplemental appendix.

3 Because we affirm on the merits, we have no need to reach the Republic's contention that Chevron is judicially estopped from raising the arguments it advances here.

All Citations

735 F.3d 1179
741 F.3d 1185
United States Court of Appeals,
Eleventh Circuit.

REPUBLIC OF ECUADOR, Dr. Diego
Garcia Carrion, Petitioners–Appellees,
v.
Dr. Robert E. HINCHEE, Respondent–Appellant,
Chevron Corporation, Intervenor–Appellant.

No. 12–16216.

Dec. 18, 2013.

Synopsis
Background: Oil company initiated arbitration proceedings against the Republic of Ecuador in front of the Permanent Court of Arbitration in The Hague, Netherlands, seeking indemnification or damages from the Republic to cover the cost of a monetary award entered against Chevron in litigation that had occurred in Ecuador. Republic moved to compel discovery of personal notes and e-mail communications prepared by oil company's expert. The United States District Court for the Northern District of Florida, Robert L. Hinkel, J., 2012 WL 5519611, granted motion. Oil company appealed.

[ Holding: ] The Court of Appeals, Hull, Circuit Judge, held that expert's personal notes and e-mail communications were not exempt from disclosure under work-product doctrine.

Affirmed.

West Headnotes (5)

[I] Federal Civil Procedure
Discretion of Court

Federal Civil Procedure
Work Product Privilege; Trial Preparation Materials
District courts are entitled to broad discretion in managing pretrial discovery matters, including when ruling on the applicability of the work-product doctrine.

5 Cases that cite this headnote

Procedural Matters

Interpretation of the Federal Rules of Civil Procedure presents a question of law subject to de novo review.

6 Cases that cite this headnote

Relevancy and materiality

A party is entitled to discover relevant documentary evidence unless the party opposing discovery can meet its burden of establishing that a privilege or the work-product doctrine exempts the documents from discovery. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

14 Cases that cite this headnote

[4] Alternative Dispute Resolution
Discovery and depositions

Personal notes and e-mail communications prepared by oil company's testifying expert in anticipation of treaty arbitration were not exempt from disclosure under work product doctrine; expert was not oil company's representative within meaning of the general work-product doctrine, and documents sought were not draft expert reports or attorney-expert communications. Fed.Rules Civ.Proc.Rule 26(b)(3)(A), (b)(4) (B, C), 28 U.S.C.A.

15 Cases that cite this headnote

[5] Alternative Dispute Resolution
Discovery and depositions

On Republic of Ecuador's motion to compel discovery relating to treaty arbitration with oil company, to the extent any attorney core opinion work-product was embedded in personal notes and e-mail communications
prepared by oil company's expert, such information could be appropriately redacted prior to disclosure, subject to providing a privilege log and submitting the materials for in camera review if requested by the Republic of Ecuador and directed by the district court. Fed.Rules Civ.Proc.Rule 26(b)(5), (a)(2)(B), 28 U.S.C.A.

4 Cases that cite this headnote

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Before HULL and HILL, Circuit Judges, and PANNELL, * District Judge.

* Honorable Charles A. Pannell, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

Opinion

HULL, Circuit Judge:

Respondent–Appellant Dr. Robert Hinchee (“Dr. Hinchee”), who resides in Florida, and Intervenor–Appellant Chevron Corporation (“Chevron”) appeal the district court's discovery order compelling production of Dr. Hinchee's personal notes for his own use and (2) email communications between Dr. Hinchee and a group of non-attorneys consisting primarily of other Chevron experts. Dr. Hinchee and Chevron contend that these documents are shielded from discovery by the work-product doctrine, relying primarily on Rule 26(b)(3) and the 2010 Amendments to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

This case requires the Court to determine (1) the scope of discovery that can be obtained from testifying experts under Rule 26 and (2) the impact of the 2010 Amendments to Rule 26 on that discovery. After careful review of the briefs and with the benefit of oral argument, we affirm the district court's order compelling the production of the documents in this case.

I. BACKGROUND

A. The Underlying Litigation in Ecuador

The discovery dispute before this Court is only a minor part of a large international controversy. It began in 1993 when a group of Ecuadorian plaintiffs filed a class action complaint against a subsidiary of Texaco, Inc. in the Southern District of New York. The Ecuadorian plaintiffs alleged that Texaco's oil exploration in the Amazonian rain forest polluted private and public lands in Ecuador and that Texaco was responsible for the plaintiffs' oil-related health problems and the environmental contamination of the plaintiffs' property. See Jota v. Texaco, Inc., 157 F.3d 153, 155–56 (2d Cir.1998). The Southern District of New York dismissed the case on the basis of forum non conveniens, Aguinda *1187 v. Texaco, Inc., 142 F.Supp.2d 534, 554 (S.D.N.Y.2001), and the Second Circuit affirmed, 303 F.3d 470, 480 (2d Cir.2002).

After this ruling, some of the plaintiffs filed similar claims in Lago Agrio, Ecuador in 2003. By then, Chevron had merged with Texaco, thereby assuming liability for Texaco's operations. See Republic of Ecuador v. Chevron, 638 F.3d 384, 388 n. 1, 389 n. 3 (2d Cir.2011). The Lago Agrio court in Ecuador issued its judgment in 2011, awarding the Ecuadorian plaintiffs approximately $18.2 billion in damages against Chevron. The first-level appellate court affirmed this judgment in full, but

Ecuador's highest court recently reduced the judgment to $9.1 billion.

B. Treaty Arbitration in The Hague
While the Lago Agrio litigation was pending in Ecuador, Chevron sought arbitration against the Republic of Ecuador ("the Republic") in front of the Permanent Court of Arbitration in The Hague, Netherlands. Chevron claimed that the Republic had violated its obligations under the Ecuador–United States Bilateral Investment Treaty ("Treaty"). Specifically, Chevron contended that the Republic breached the Treaty by: (1) failing to notify the Lago Agrio court that Chevron was fully released from any liability relating to the environmental pollution through a settlement agreement between Chevron and the Republic; (2) refusing to "indemnify, protect and defend" the rights of Chevron in connection with the Lago Agrio litigation; (3) "openly campaigning for a decision against Chevron"; and (4) engaging "in a pattern of improper and fundamentally unfair conduct."

This Treaty arbitration remains ongoing. Chevron seeks, *inter alia*, indemnification or damages from the Republic to cover the cost of the monetary award entered against Chevron in the Lago Agrio litigation. To support its position in the Treaty arbitration, Chevron has sought materials and documents in the possession of experts who testified for the plaintiffs in the Lago Agrio litigation, including experts residing in the United States. In turn, the Republic has requested discovery from Chevron's expert witnesses in the Lago Agrio litigation, including Dr. Hinchee in Florida.

C. Subpoena on Dr. Hinchee
The Republic sought discovery from Dr. Hinchee in the District Court for the Northern District of Florida where Dr. Hinchee resides. The Republic requested this discovery to aid "in defending the validity of the Lago Agrio judgment" in the Treaty arbitration. The Republic explained that "Dr. Hinchee is an environmental engineer and an expert in the assessment and remediation of petroleum contaminated sites." Because Chevron relied on Dr. Hinchee's expert reports in both the Lago Agrio litigation and in the Treaty arbitration, the Republic contended that Dr. Hinchee and his documents were relevant to the Treaty arbitration. The Republic requested that the district court issue a subpoena to Dr. Hinchee for a deposition and production of documents pursuant to 28 U.S.C. § 1782, which allows the district court to issue orders to give "[a]ssistance to foreign and international tribunals and to litigants before such tribunals."

Chevron intervened in the district court action and opposed the subpoena. The district court granted the Republic's request for a subpoena, and Dr. Hinchee and Chevron produced approximately 94,000 pages of documents. However, Dr. Hinchee and Chevron asserted work-product protection over 1,200 documents.

D. The Republic's Motion to Compel
The Republic moved to compel production of the remaining 1,200 documents challenging Chevron's and Dr. Hinchee's assertions of work-product protection and requesting that the district court perform an in camera review. Chevron and Dr. Hinchee opposed the motion.

The district court initially granted the Republic's motion in part, ordering Chevron to submit 40 of the withheld documents for in camera review.

E. District Court's Order After In Camera review
After concluding its in camera review, the district court ruled that 39 of the 40 documents were not privileged. The one document that the district court found protected by the work-product doctrine was a draft of an expert report. The remaining 39 documents consisted of (1) Dr. Hinchee's notes and (2) communications between Dr. Hinchee and "one or more individuals who were neither attorneys nor members of an attorney's staff.” Some of the communications in this second group were between Dr. Hinchee and other expert witnesses testifying for Chevron. Other communications were between Dr. Hinchee and "Chevron nonattorney employees, including Sara McMillan [sic].”

1 Although not apparent from the district court's order, the record indicates that Ms. McMillen is a scientist at Chevron and serves, *inter alia*, as the “Lago Agrio litigation Technical Team Project Manager.”

The district court ordered Chevron and Dr. Hinchee to produce the 39 non-privileged documents, explaining that the “work-product doctrine [does] not protect a testifying expert's own notes or communications with another testifying expert.”
The district court also ordered Chevron and Dr. Hinchee to “produce to the Republic all other documents [listed on the privilege log] ... that were not draft reports or communications between Chevron's attorneys or their staff members and Dr. Hinchee or his staff members.” And to the extent Chevron and Dr. Hinchee still maintained any claim of attorney-client privilege or work-product protection over any document, the district court ordered Chevron and Dr. Hinchee to submit the document to the court for in camera review.

Chevron and Dr. Hinchee timely appealed the district court's order.

II. STANDARD OF REVIEW

[1] [2] “[D]istrict courts are entitled to broad discretion in managing pretrial discovery matters,” Perez v. Miami-Dade Cnty., 297 F.3d 1255, 1263 (11th Cir.2002); see also Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1306 (11th Cir.2011), including when ruling on the applicability of the work-product doctrine, see, e.g., United Kingdom v. United States, 238 F.3d 1312, 1321 (11th Cir.2001) (holding that “the district court did not abuse its discretion by declining to order the production of the Government's confidential work product”); see also Bradley v. King, 556 F.3d 1225, 1229 (11th Cir.2009) (“A district court has wide discretion in discovery matters and our review is accordingly deferential.” (internal quotation marks omitted)). However, the “[i]nterpretation of the Federal Rules of Civil Procedure presents a question of law subject to de novo review.” Mega Life & Health Ins. Co. v. Pieniozek, 585 F.3d 1399, 1403 (11th Cir.2009).

The issue in this appeal is whether the district court erred in its interpretation of Rule 26, including the 2010 Amendments to Rule 26. This presents a question of law subject to this Court's de novo review. See Klay v. All Defendants, 425 F.3d 977, 982 (11th Cir.2005) (noting that a district *1189 court is entitled to broad discretion in pretrial discovery matters, but holding that interpretations of a term in Rule 45 is a legal question subject to de novo review); Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1279 (11th Cir.2000) (“[T]o the extent that the issue involves the interpretation of the Federal Rules of Civil Procedure, we review de novo.”).

III. DISCUSSION

At issue in this appeal are (1) Dr. Hinchee's personal notes prepared for his own use and (2) email communications between Dr. Hinchee and a group of non-attorneys consisting primarily of other Chevron experts. The question is whether the Republic may discover these documents.

A. Rule 26(b)(1) Entitles the Republic to All Relevant, Non–Privileged Information

We begin our analysis with Rule 26(b)(1), which sets forth the general scope of discovery. It instructs that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Fed.R.Civ.P. 26(b)(1). Rule 26(b)(1) indicates that “[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible,” Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir.1985), as this rule generally entitles a civil litigant “to discovery of any information sought if it appears reasonably calculated to lead to the discovery of admissible evidence,” Degen v. United States, 517 U.S. 820, 825–26, 116 S.Ct. 1777, 1782, 135 L.Ed.2d 102 (1996) (internal quotation marks omitted).

[3] There is no dispute here that Dr. Hinchee's notes and email communications with non-attorneys, including other experts, are relevant within the meaning of Rule 26(b)(1). The Republic is thus entitled to discover these materials—unless Chevron and Dr. Hinchee can meet their burden of establishing that a privilege or the work-product doctrine exempts these documents from discovery. See United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir.1991) (holding that the party invoking the attorney-client privilege bears the burden of establishing that the privilege applies); see also Barclaysamerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir.1984) (holding that “[i]t is the party seeking to assert the attorney-client privilege or the work-product doctrine as a bar to discovery who bears the burden of establishing that either or both is applicable”).
The documents here do not involve communications between (1) Chevron's attorneys (in-house or outside counsel) or their staff members and (2) Dr. Hinchee or his staff members. Rather, Chevron and Dr. Hinchee claim that Dr. Hinchee's personal notes and email communications with non-attorneys, such as other experts, enjoy work-product protection under Rule 26(b)(3)(A). We examine this rule next.

B. Rules 26(b)(3)(A) and (b)(4)

First enacted in 1970, Rule 26(b)(3)(A) incorporates the attorney work-product doctrine discussed in the Supreme Court's seminal decision in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Rule 26(b)(3)(A) provides in relevant part: “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).” *1190 Fed.R.Civ.P. 26(b)(3)(A).* It is undisputed that the documents at issue were prepared “in anticipation of litigation or for trial” and that Dr. Hinchee and his colleagues prepared these documents as part of their work for Chevron. It is also undisputed that Dr. Hinchee is a testifying expert for Chevron.

Chevron and Dr. Hinchee contend that Rule 26(b)(3)(A) protects the materials at issue here because Dr. Hinchee is Chevron's “representative” and, therefore, these materials were “prepared by or for a representative.” Alternatively, Chevron and Dr. Hinchee argue that these materials are covered by Rule 26(b)(3)(A) because they were “prepared for a party.” The threshold question is, however, whether Rule 26(b)(3)(A) even applies to a testifying expert.

The text, structure, and background of Rule 26 suggest otherwise. While Rule 26(b)(3)(A) mentions a “party or its representative,” including an “attorney, consultant, surety, indemnitor, insurer, or agent,” the word “expert” is noticeably absent. This silence speaks volumes, in light of the fact that right after subsection (b)(3), Rule 26 contains another provision expressly dealing with experts. Concurrent with the enactment of Rule 26(b)(3)(A) in 1970, the drafters also implemented an entirely new provision in Rule 26(b)(4)(A) to address specifically the discovery of facts known and opinions held by a testifying expert that were “acquired or developed in anticipation of litigation or for trial.” *Fed.R.Civ.P. 26(b)(4) (1970).*

The 1970 version of Rule 26(b)(4)(A) permitted interrogatories requesting “the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” *Fed.R.Civ.P. 26(b)(4)(A) (1970).* The Advisory Committee explained in 1970 that new Rule 26(b)(4) “repudiate[d] the few decisions that have held an expert's information privileged simply because of his status as an expert,” and “reject[ed] as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” *Fed.R.Civ.P. 26,* advisory committee notes (1970) (Subdivision (b)(4)). The Advisory Committee cited with approval the Fifth Circuit's decision in *United States v. McKay*, 372 F.2d 174 (5th Cir.1967), in which the court rejected a claim of work product over an appraisal report prepared by an expert witness. *Id.* at 176–77.

The 1970 Advisory Committee noted that a “prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent.” *Id.* The Advisory Committee elaborated that “[e]ffective cross-examination of an expert witness requires advance preparation,” and “effective rebuttal requires advance knowledge of the line of testimony of the other side.” *Id.* “If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.” *Id.*

2 The Advisory Committee Notes to the 1970 Rule 26(b)(4) state “that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.” *Fed.R.Civ.P. 26,* advisory committee notes (1970) (Subdivision (b)(4)).

In 2010, Rule 26(b)(4) was amended again. New Rule 26(b)(4)(B) was “added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures.” *Fed.R.Civ.P. 26,* advisory committee notes (2010) (Subdivision *1191 (b)(4)).

3 New Rule 26(b)(4)(C) was “added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise.” *Id.* But the 2010 Advisory Committee cautioned that new 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.” Id.


4 New Rule 26(b)(4)(C) provides: “Trial–Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.” Fed.R.Civ.P. 26(b)(4)(C) (2010).

The 2010 Advisory Committee elaborated that “the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule.” Id. “Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule.” Id.

[4] Given that the drafters explicitly and specifically address work-product claims with respect to experts in Rule 26(b)(4) and never mention experts in (b)(3), it is difficult to say, as Chevron does, that Rule 26(b)(3)(A) applies to all testifying expert materials in general and that Rule 26(b)(4) merely clarifies that general principle in a specific context. To the contrary, a reading of Rule 26(b)(3)(A) to include testifying experts would render parts of Rule 26(b)(4) superfluous, a result disfavored by our canons of statutory (or here rule) interpretation. See United States v. Aldrich, 566 F.3d 976, 978 (11th Cir.2009) (“[S]tatutes should be construed so that ‘no clause, sentence, or word shall be superfluous, void, or insignificant.’ ” (quoting United States v. Ballinger, 395 F.3d 1218, 1236 (11th Cir.2005))); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 1351 (11th Cir.1998) (“[W]e avoid statutory constructions that render provisions meaningless.”).

For example, if Rule 26(b)(3)(A) covered all trial preparation materials prepared by or for a testifying expert, there would have been little need for the rule drafters to specifically add work-product protection for draft expert reports and for attorney-expert communications in Rules 26(b)(4)(B) and (C). Draft expert reports and attorney-expert communications would already enjoy work-product protection under Rule 26(b)(3)(A).

Indeed, an 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. See United States v. Curbelo, 726 F.3d 1260, 1277 (11th Cir.2013) (“[T]he negative implication canon, often expressed in the Latin phrase expressio unius est exclusio alterius,... applies where items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”).

There is good reason why the general work-product doctrine of Rule 26(b)(3)(A) does not cover a testifying expert. Rule 26(b)(3)(A) traces its roots to Hickman's directive that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” 329 U.S. at 510, 67 S.Ct. at 393 (emphasis added). Given the need for lawyers to maintain some privacy, the Hickman Court rejected an attempt to obtain “written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties.” Id. The Supreme Court reasoned that if such lawyer materials could be obtained through discovery, “much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.” Id. at 511, 67 S.Ct. at 393–94.
The focus of the work-product doctrine in *Hickman* was to protect the work of lawyers.

In *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), the Supreme Court addressed a report prepared by an investigator. *Id.* at 227, 95 S.Ct. at 2164. While the work-product doctrine “at its core . . . shelters the mental processes of the attorney,” the Supreme Court observed that “attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial.” *Id.* at 238, 95 S.Ct. at 2170. The Supreme Court therefore concluded that it is “necessary that the [work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.” *Id.* at 238–39, 95 S.Ct. at 2170.

The Supreme Court in *Nobles* also noted that Rule 26(b)(3) reflects the view that the work-product doctrine necessarily must also apply “to materials prepared on [the attorney's] behalf.” *Id.* at 239 n. 13, 95 S.Ct. at 2170 n. 13. But for the reasons discussed above, the rule drafters stopped short of protecting all materials prepared by or for a testifying expert.

Unlike an “attorney, consultant, surety, indemnitor, insurer, or agent,” see Fed.R.Civ.P. 26(b)(3)(A), a testifying expert's role is to provide independent, impartial, qualified opinion testimony helpful to the trier of fact. Given that testifying experts offer evidence in court, the opposing side must have the opportunity to challenge the opinions of a testifying expert, including how and why the expert formed a particular opinion. See Fed.R.Civ.P. 26, advisory committee notes (1970) (Subdivision (b)(4)). Cloaking all materials prepared by or for a testifying expert under the work-product doctrine inhibits the thorough and sharp cross examination that is vital to our adversary system. *Id.*

In sum, neither the text of Rule 26(b)(3)(A) nor its structure, history, and rationale support extending the work-product doctrine to all testifying expert materials. It is thus no surprise that Chevron and Dr. Hinchee cannot point us to any case holding that Rule 26(b)(3)(A) applies to a testifying expert. Rather, the Tenth Circuit recently rejected Chevron's and Dr. Hinchee's argument. In another dispute over expert discovery between the Republic and Chevron, the Tenth Circuit *squarely held* that the work-product protection of Rule 26(b)(3) does not extend to materials prepared by or for a testifying expert. *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. § 1782(a)*, 735 F.3d 1179, 1183–85 (10th Cir.2013) (affirming the District of Colorado's order compelling production of documents from Bjorn Bjorkman, another expert witness who testified for Chevron in the Lago Agrio litigation in Ecuador).

C. Rule 26(a)(2)(B) and the 2010 Amendments

The parties also dispute the impact of Rule 26(a)(2)(B) and the 2010 Amendment to that rule. Chevron and Dr. Hinchee argue that because the 2010 Amendments narrowed the expert disclosure requirements of Rule 26(a)(2)(B), Dr. Hinchee need not produce his notes and communications with non-attorneys that are at issue in this case. Chevron and Dr. Hinchee argue that Dr. Hinchee's notes and communications with non-attorneys are protected from discovery under Rule 26(b)(3)(A) and that production of such materials in the past was necessary only because of the expert disclosure requirements of Rule 26(a)(2)(B). Chevron and Dr. Hinchee contend that because the 2010 Amendment to Rule 26(a)(2)(B) narrowed the expert disclosure requirements in Rule 26(a)(2)(B), production of the documents at issue here is no longer required. While our conclusion that Rule 26(b)(3)(A) does not apply to a testifying expert rejects the underlying premise of this argument, we also address the 2010 Amendment to Rule 26(a)(2)(B) because it further supports our ultimate conclusion here.

In 1993, Rule 26(a) was restructured to add new subsections (1)-(4), which impose “on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.” Fed.R.Civ.P. 26, advisory committee notes (1993) (Subdivision (a)). Rule 26(a)(2)(A) required a party to disclose “the identity” of its testifying expert witness, and Rule 26(a)(2)(B) required that this disclosure must “be accompanied by a written report prepared and signed by the witness.” Fed.R.Civ.P. 26(a)(2)(A) and (B) (1993).

Rule 26(a)(2)(B) also required that this expert report contain, *inter alia*, “a complete statement of all opinions to be expressed and the basis and reasons therefor; the data
or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions.” Fed.R.Civ.P. 26(a)(2) (B) (1993). The 1993 Advisory Committee reasoned that “[g]iven 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.” Fed.R.Civ.P. 26, advisory committee notes (1993) (Subdivision (a)(2)).

Relying on Rule 26(a)(2)(B)'s “data or other information” language and its accompanying Advisory Committee Note, the majority of courts concluded that the 1993 Amendments to Rule 26 created a bright-line rule requiring disclosure of all information provided to testifying experts, including attorney opinion work-product. See Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 714–17 (6th Cir.2006) (“[W]e now join the overwhelming majority of courts ... in holding that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.” (internal quotation marks omitted)).

For example, after the enactment of Rule 26(a)(2)(B) in 1993, courts ordered the production of communications between attorneys and testifying experts, even if these communications contained attorney opinion work-product. See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed.Cir.2001). After 1993, courts also ordered the production of draft expert reports, even though such drafts could reveal the opinion work-product of attorneys. See, e.g., Elm Grove Coal Co. v. Director, O.W.C.P, 480 F.3d 278, 301–303 (4th Cir.2007) (“In sum, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine.”). One net result was that the courts' broad interpretation of the “other information” language in Rule 26(a)(2)(B) undermined the protection of attorney opinion work-product afforded in Rule 26(b)(3).

To alter the outcome of these cases, the 2010 Amendments did two things. First, as outlined above, the drafters added Rules 26(b)(4)(B) and (C) to protect draft expert reports and attorney-expert communications as work product. Second, the drafters changed the language of Rule 26(a)(2)(B) from “data or other information” to “facts or data.” This change rejects the outcome reached by cases that relied on the old “other information” language in Rule 26(a)(2)(B) to compel the production of draft expert reports and communications between attorneys and experts. Rule 26(a)(2)(B) was changed so that it would not conflict with new Rules 26(b)(4)(B) and (C), which now expressly exempt draft reports and attorney-expert communications from discovery.

As the 2010 Advisory Committee stated: the amendment to Rule 26(a)(2)(B) “is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.” Rule 26, advisory committee notes (2010). “The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.” Id.

The 2010 Advisory Committee explained the background for this change: after “[m]any courts read the disclosure provision [of Rule 26(a)(2) ] to authorize discovery of all communications between counsel and expert witnesses and all draft reports,” the Committee was told “repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects.” Id. The 2010 Advisory Committee elaborated that “[c]osts have risen,” as “[a]ttorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses.” Id. Moreover, “attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.” Id.

None of this suggests the drafters’ intent to confer work-product status on the notes of a testifying expert. See, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594–95 (3d Cir.1984).

6 By contrast, several courts before 1993 apparently concluded that Rule 26(b)(3) prohibited the discovery of attorney opinion work-product, even when provided to a testifying expert. See, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594–95 (3d Cir.1984).
experts. Rather, the 2010 Amendment to Rule 26(a)(2)(B) was intended to protect the opinion work-product of attorneys in the context of expert discovery. 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.” Id. (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.

[5] To the extent any attorney core opinion work-product is embedded in the 1,200 documents at issue here, Chevron and Dr. Hinchee may appropriately redact such portions—subject to providing a privilege log under Rule 26(b)(5) and submitting the materials for in camera review if requested by the Republic and directed by the district court. Any redaction beyond attorney core opinion work-product is not allowed.

IV. CONCLUSION

For the reasons set forth above, we affirm the district court's order compelling discovery.

AFFIRMED.

All Citations

741 F.3d 1185, 87 Fed.R.Serv.3d 699, 24 Fla. L. Weekly Fed. C 845
DAVITA HEALTHCARE PARTNERS, INC. (f/k/a Davita Inc., f/k/a Total Renal Care Holdings, Inc., f/k/a Medical Ambulatory Care Delaware, Inc.), and Physicians Dialysis, Inc., and Physicians Dialysis Ventures, Inc., and 175 Dialysis Center Owners (d/b/a 1,462 Dialysis Centers), Plaintiffs, v. The UNITED STATES, Defendant.

No. 11-297C

(Filed: September 29, 2016) 1

1 The Court issued this order under seal on September 16, 2016, and directed the parties to file proposed redactions by September 23, 2016. The Court publishes this order indicating redactions by asterisks “[***],” and correcting errata.

Synopsis

Background: Contractor filed suit against United States, claiming that Department of Veterans Affairs (VA) underpaid contractor for dialysis services and seeking to recover damages. Government moved to compel production of 86 documents, withheld as attorney work product, that were prepared by or related to contractor's testifying expert witness on damages.

Holdings: The Court of Federal Claims, Williams, J., held that:

[1] expert's spreadsheets, scripts, analyses, and presentations were protected work product, and

[2] redacted information on expert's invoices for her services was protected work product.

Motion denied.

West Headnotes (16)

[1] United States

Work product

Under the “work-product doctrine,” attorney work-product protection attaches to documents prepared in anticipation of litigation or for trial by a party or his representative. RCFC, Rule 26(b)(3).

Cases that cite this headnote

[2] United States

Work product

The core intent behind the work-product doctrine is to shelter the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. RCFC, Rule 26(b)(3).

Cases that cite this headnote

[3] United States

Work product

The work-product doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor. RCFC, Rule 26(b)(3).

Cases that cite this headnote

[4] United States

Work product

The party asserting work-product protection carries the burden to show that the material in question is a document or tangible thing, prepared in anticipation of litigation by or for a party or its representative. RCFC, Rule 26(b)(3)(A), 26(b)(5).

Cases that cite this headnote

[5] United States

Work product
Under the work-product doctrine, protecting documents and tangible things prepared in anticipation of litigation or for trial by or for another party or its “representative,” which may include the other party's attorney, consultant, surety, indemnitor, insurer, or agent, but representative does not include an expert. RCFC, Rule 26(b)(3)(a).

Cases that cite this headnote

[6] United States

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The work-product doctrine is not an absolute bar to discovery. RCFC, Rule 26(b)(3).

Cases that cite this headnote

[7] United States

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The work-product doctrine's substantial need exception, allowing discovery of otherwise protected documents upon a showing of substantial need of the materials in the preparation of the party's case and inability to obtain the substantial equivalent by other means without undue hardship, applies only to the underlying facts in the documents; as such, Court of Federal Claims is still required to protect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative. RCFC, Rule 26(b)(3)(A).

Cases that cite this headnote

[8] United States

.wrap
Testifying experts' documents and tangible things prepared and provided to counsel in anticipation of litigation are not protected under the general work-product doctrine, but rather are protected under a more specific provision, addressing communications between counsel and testifying experts; in addition, drafts of any expert report or disclosure are also protected. RCFC, Rule 26(b)(3)(A), 26(b)(4)(B), 26(b)(4)(C).

Cases that cite this headnote

[9] United States

.wrap
While testifying expert materials are not broadly entitled to presumptive work-product protection, limited work-product protection is provided to testifying experts' communications with counsel. RCFC, Rule 26(b)(4)(C).

Cases that cite this headnote

[10] United States

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Expert's spreadsheets, scripts, analyses, and presentations communicated to contractor's counsel about expert's preliminary analyses and report strategies prepared for litigation in which she would testify on contractor's damages from Department of Veterans Affairs' (VA) alleged dialysis services underpayments were protected under work-product doctrine as applied to testifying experts and in part as drafts for draft expert report prepared for counsel; documents were work product either as preliminary expert opinion or communication from expert to counsel reflecting their joint effort to develop strategy, and were interpretations of data reflecting counsel's mental impressions and resulting from collaborative efforts with expert to organize and present data distinct from underlying facts and data. Fed. R. Civ. P. 26(b)(4)(B), 26(b)(4)(C).

Cases that cite this headnote


.wrap
Spreadsheets, graphs, presentations, and charts are protected under the work-product doctrine, so long as the documents were prepared by the testifying expert to be
An expert must include in her report the facts and data that she considered in forming her opinion; such a disclosure, on the face of the report, enables the opposing party to test the accuracy and applicability of the facts that the expert relied upon in forming her opinion. RCFC, Rule 26(a)(2)(B).

Cases that cite this headnote

[12] United States

Expert evidence

Cases that cite this headnote

[13] United States

Discovery, Subpoenas, and Compelling Production of Evidence

Cases that cite this headnote

[14] United States

Work product

Cases that cite this headnote

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Motion to Compel; Work-Product Protection; RCFC 26(b)(3); Testifying Experts; Draft Expert Reports; RCFC 26(b)(4)(B); Communications with Counsel; RCFC 26(b)(4)(C); Expert Compensation; 2010 Amendments to Fed. R. Civ. P. 26.

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO COMPEL

WILLIAMS, Judge.

**1 This matter comes before the Court on Defendant's motion to compel production of 86 documents withheld as attorney work product. The documents were prepared by, or relate to, Plaintiffs' testifying expert witness on damages, Ms. Laureen Ryan. Defendant further requested that Plaintiffs provide a revised privilege list clarifying what facts or data provided by Plaintiffs' counsel the expert used in creating her report. The Court held oral argument on August 10, 2016, and granted Defendant's request for a more detailed privilege log. Plaintiffs submitted their revised privilege log on August 11, 2016, and Defendant renewed its motion to compel on August 16, 2016. 2

2 On September 12, 2016, Defendant filed a Reply in support of this renewed motion to compel further requesting that Plaintiffs produce documents listed on a different privilege log—Ms. Ryan's August 18, 2016 privilege log. Def.'s Second Reply App. 2-17. By order dated September 15, 2016, Defendant's Reply was stricken from the record as procedurally deficient. In the event that Defendant seeks to compel production of documents on the August 18, 2016 privilege log that are described differently than documents covered by this Order, Defendant shall file a separate motion and identify which documents it seeks to compel. As such, this Order only covers documents on Ms. Ryan's August 11, 2016 privilege log.

In its renewed motion, Defendant narrowed its request to 58 documents—document numbers 1-6, 8-13, 16-32, 44-48, and 53-86 on Ms. Ryan's revised privilege log. The documents fall into the following two categories:

1) All work papers, including scripts, spreadsheets, graphs, and presentations that Ms. Ryan made to counsel containing claims data analyses;

2) Work papers relating to Ms. Ryan's compensation.

For the reasons stated below, the Court denies Defendant's sixth motion to compel.

Discussion

The Work-Product Doctrine: Legal Standards

[1] [2] [3] Under the work-product doctrine, “attorney work-product protection attaches to documents prepared in anticipation of litigation or for trial by a party or his representative.” Blue Lake Forest Prods., Inc. v. United States, Nos. 01–570C, 2007 WL 5161595, at *1 (Fed.Cl. Mar. 29, 2007) (internal citation omitted). The core intent behind the work-product doctrine is to shelter “the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.” United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). “Essentially, the work-product doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor.” In re EchoStar Commc'ns Corp., 448 F.3d 1294, 1301 (Fed.Cir.2006) (citing Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

[4] [5] The work-product doctrine is codified in Rule 26(b)(3) of the Rules of the Court of Federal Claims (“RCFC”), which provides in pertinent part:

(A) Documents and Tangible Things. 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 RCFC 26(b)(4), those materials may be discovered if:

*588 **2 (i) they are otherwise discoverable under RCFC 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.

(B) Protection Against Disclosure. 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.

RCFC 26(b)(3)(A)-(B). In other words, the party asserting work-product protection carries the burden to show that the material in question is a document or tangible thing, prepared in anticipation of litigation by or for a party or its representative. RCFC 26(b)(3)(A); RCFC 26(b)(5); see also Hickman, 329 U.S. at 511–12, 67 S.Ct. 385. Rule 26(b)(3)(a) provides that a party's “representative” may include “the other party's attorney, consultant, surety, indemnitor, insurer, or agent”—but does not include an expert. RCFC 26(b)(3)(a); see Republic of Equador v. Hinchee, 741 F.3d 1185, 1190 (11th Cir.2013).

[6] [7] The work-product doctrine is not an absolute bar to discovery. EchoStar, 448 F.3d at 1301. Under Rule 26(b)(3)(A), a party may discover documents otherwise protected under the work-product doctrine upon a showing of “substantial need of the materials in the preparation of the party's case” and inability to obtain the substantial equivalent by other means without undue hardship. Id. at 1302 (citation omitted). This “substantial need” exception, however, applies only to the underlying facts in a work-product protected document. Id. As such, the Court is still required to protect “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative.” Id.

[8] Testifying experts' documents and tangible things prepared and provided to counsel in anticipation of litigation are not protected under the general work-product doctrine embodied in Rule 26(b)(3)(A), but rather are protected under a more specific provision, Rule 26(b)(4)(C), addressing communications between counsel and testifying experts. In addition, “drafts of any report or disclosure” are protected under Rule 26(b)(4)(B). See Republic of Ecuador v. Mackay, 742 F.3d 860, 865–66, 871 (9th Cir.2014); Hinchee, 741 F.3d at 1190–91. 3

3 Identical versions of the 2010 amended Federal Rules of Civil Procedure 26(b)(4)(B) and (C) were added to the Rules of the Court of Federal Claims in 2011, as RCFC 26(b)(4)(B) and (C).

Rule 26(b)(4)(C), “Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witness,” provides:

RCFC 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under RCFC 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 on in the forming of the opinions to be expressed.

RCFC 26(b)(4)(C).

Prior to the 2010 amendments to the Federal Rules of Civil Procedure and the corresponding 2011 amendments to the Rules of the Court of Federal Claims, courts generally applied a “bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.” Mackay, 742 F.3d at 869 (quoting Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir.2006)). This bright-line rule had “undesirable effects” such as impeding the efficient interaction and communication between counsel and experts that led to experts adopting strategies that shielded their communications from discovery but interfered with their work and increased litigation costs. Mackay, 742 F.3d at 869 (quoting Fed. R. Civ. P. 26 Advisory Committee Notes (2010 amendments)). These “undesirable effects” led to the 2010 change *589 in the Federal Rules that created an express but limited work-product protection for collaborative interactions between counsel and testifying experts. Id.; see e.g., Damon W.D. Wright, Expert Discovery Returns to the Past, 58 Fed. Law. 32, 33 (Jan. 2011) (“The goal” behind the 2010 amendments “is to make working with expert witnesses easier, expert-intensive litigation less expensive, and expert discovery more focused on the actual opinions themselves”).
The 2010 Advisory Committee notes clarify how the work-product doctrine applies to testifying experts:

**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. 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.


The Rules and Advisory Committee Notes also confirm that work-product protection extends to drafts of expert reports or disclosures. Rule 26(b)(4)(B), “Trial-Preparation Protection for Draft Reports or Disclosures,” provides:

**RCFC 26(b)(3)(A) and (B)** protect drafts of any report or disclosure required under RCFC 26(a)(2) [including disclosure of the testifying expert providing a report], regardless of the form in which the draft is recorded.

**RCFC 26(b)(4)(B)**. The Notes to this Rule explain:

**Rule 26(b)(4)(B)** is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C).

It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e).

**4 Fed. R. Civ. P. Rule 26 Advisory Committee Notes, Subdivision (b)(4) (2010).**

**Ms. Ryan's Expert Reports**

On July 29, 2016, Plaintiffs filed Ms. Ryan's April 15, 2016 Expert Report and June 15, 2016 Expert Rebuttal Report. **Ms. Ryan's April 15, 2016 report states that “Plaintiffs produced non-contract claims (also referred to as fee-based claims) data for services rendered to the VA during the Damage[s] Period [2005-2011].” Ryan Report 23.** This report contains a section titled “Key Data Sources & Summary Statistics,” which states that Plaintiffs' damages analysis “is based on the claims data that Plaintiffs produced electronically in this matter.” Id. Ms. Ryan continues for six pages to discuss each source of data related to her damages calculations, including the data produced by the VA. Id. at 23–29. Ms. Ryan's report also includes a 12-page “List of Information Considered,” identifying all court filings, declarations, depositions and exhibits, and data produced by Plaintiffs and Defendant, as well as all Government files, correspondence, miscellaneous documents and files, websites, and other publicly available information that Ms. Ryan considered in forming her expert report. Ryan Report Ex. B, at 1-12. Both Plaintiffs’ and the Government’s data sets providing the factual bases for Ms. Ryan's opinions are listed in her report. Id. at 5–7.

**4** On July 28, 2016, the Court ordered the parties to file Ms. Ryan's report to facilitate resolution of the instant motion.

Ms. Ryan also appended the following six exhibits to her report detailing the “Key Sources and Summary Statistics” on which she relied: 1) Plaintiffs' Claim-Level and Charge-Level Data Summary, 2) Plaintiffs' Payment Data Summary, 3) Charge-Level Data Summary of the VA Dataset, 4) VA Fee Schedule Production Summary Statistics, 5) Charge-Level Data Summary, and 6) HCPCS/CPT [Healthcare Common Procedure Coding
System] Codes and Modifiers in the Plaintiffs' Claim Data. Ryan Report Exs. C.1-C.6. These six exhibits summarized the factual basis from which Ms. Ryan derived her damages calculations. Instead of listing each of the 71,697 claims separately, the report summarized that these claims were tied to 4,680 patients, with a total amount billed of [***]. As the Report notes, the data underlying these claims have already been produced to Defendant. Ryan Report 23; see DaVita HealthCare Partners v. United States, 125 Fed.Cl. 394, 397–98 (2016) (noting that DaVita finished its production of “the remaining relevant claim data in rolling productions on November 18, 2014, December 19, 2014, January 16, 2015, and January 28, 2015,” which contain “millions of lines of charge- and claim-level data regarding non-contractual claims by Plaintiffs”).

**Ms. Ryan's Expert Work Papers, Scripts, Spreadsheets, Graphs, and Presentations Provided to Counsel**

Defendant seeks all 86 of Ms. Ryan's “work papers” listed on Plaintiffs' privilege log, or “at a minimum” 26 of the 86 documents listed on Plaintiffs' privilege log described as “spreadsheets with claims data analysis for presentation to counsel,” “graphs with claims data analysis for presentation to counsel,” and a “presentation to counsel providing analysis of claim related documents and data,” dated from February 13, 2015 through March 10, 2016. Def.'s Mot. 4, 6, App., at A14-15 (document numbers 8, 11-13, 16-31, 41, 44-45, 47-48). Defendant added another 10 documents to this list in its renewed motion to compel. Def.'s Renewed Mot. 2 (adding document numbers 1-6, 9, 10, and 46). Defendant argues that the general attorney work-product doctrine provides no basis to withhold expert work papers reflecting that expert's preliminary analysis, the 2010 amended Rule 26(b)(4)(C) affords limited work-product protection to testifying experts' communications with counsel. See Mackay, 742 F.3d at 865–66, 871.

Plaintiffs counter that the spreadsheets, scripts, analyses, and presentations are protected “communications from Plaintiffs’ testifying expert, Ms. Ryan, to Plaintiffs’ counsel about Ms. Ryan’s preliminary claims data analyses and report strategies” protected under Rule 26(b)(4)(C). Pls.' Resp. 5. Each entry in Ms. Ryan's privilege log describes her analyses communicated to counsel, in the form of *591* scripts, presentations, outlines, and spreadsheets, prepared for the instant litigation. Pls.’ Resp. Appx-026-27. While Defendant asserts that the work-product protection does not cover a testifying expert's work papers reflecting that expert's preliminary analysis, the 2010 Advisory Committee Notes on Rule 26(b)(4)(C) directly refute that argument. These Notes state:

> The [Rule 26(b)(4)(C)] 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.

Defendant mistakenly equates the expert's spreadsheets, graphs, and analyses in her presentations to counsel with “facts and data.” These formulations, however, are interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize, marshal, and present data. This selective presentation of data is separate and distinct from the underlying facts and data themselves. See United States v. Veolia Env't N. Am. Operations, Inc., No. 13–mc–03, 2014 WL 5511398, at *5 (D.Del. Oct. 31, 2014) (finding emails between a testifying expert and counsel collaborating on the creation of a valuation report to be protected under Rule 26(b)(4)(C)). Indeed, because Ms. Ryan included an extensive list of facts and data she considered in formulating her report in her description of “Key Data Sources,” Defendant has obtained a full factual predicate for this expert's opinions and has what it needs to probe and test those opinions. See Ryan Report 23-29.

**6 [11]** Plaintiffs further argue that document numbers 15, 33-34, 36-38, 40, 42-43, 46, and 49-52 listed on Ms. Ryan's privilege log are protected as “drafts” under rule 26(b)(4)(B) as they were created for and included in Ms. Ryan's draft report. As Rule 26(b)(4)(B) explicitly states, an expert's draft report is protected under the attorney work-product privilege “regardless of the form in which the draft is recorded.” RCFC 26(b)(4)(B). Spreadsheets, graphs, presentations, and charts are protected under Rule 26(b)(4)(B), so long as the documents were prepared by the testifying expert to be included in draft expert reports. See, e.g., Deangelis v. Corzine, No. 11–cv–07866, 2016 WL 93862, at *4 (S.D.N.Y. Jan 7, 2016) (recognizing that an expert's prepared chart used in a draft expert report was properly protected under the attorney work-product privilege); Veolia, 2014 WL 5511398, at *5 (finding draft presentations that contain “summaries and conclusions” that reflect “counsel's collaborative interactions with expert consultants” to be protected as privileged); see also In re Application of Republic of Ecuador, 280 F.R.D. 506, 512–13 (N.D.Cal.2012), aff'd, sub nom, Mackay, 742 F.3d 860 (9th Cir.2014) (acknowledging that draft worksheets created by a testifying expert for use in his expert report would be protected under Rule 26(b)(4)(B), but the Rule “does not extend to the expert's own development of the opinions to be presented outside of draft reports”).

In sum, Plaintiffs have met their burden to show that documents numbered 1-52 on Ms. Ryan's privilege log are properly protected under the work-product doctrine applied to testifying experts, and that documents numbered 15, 33-34, 36-38, 40, 42-43, 46, and 49-52, are protected as drafts for Ms. Ryan's “draft expert report” prepared for counsel in anticipation of the instant litigation. Ryan Rev. P. L. Nos. 1–52.

**Work Papers Containing Facts or Data Used in Forming Expert Opinions**

Second, citing Rule 26(a)(2)(B)(ii), Defendant seeks to compel production of the same 86 documents under a different Rule, claiming that they contain facts or data considered by Ms. Ryan in forming her opinions and that these facts and data are discoverable because they were provided by Plaintiffs’ counsel to Ms. Ryan. Invoking a different rule does not alter the character of the documents. As found above, these documents do not contain a mere recitation of facts and data provided by counsel for the expert to review. Moreover, the Rule Defendant invokes, Rule 26(a)(2)(B), applies to the expert's report, not expert-counsel communications.

Rule 26(a)(2)(B)(ii) provides:

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

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

(ii) the facts or data considered by the witness in forming them ....

RCFC 26(a)(2)(B) (emphasis added).
Rule 26(a)(2)(B) thus mandates that an expert must include in her report the facts and data considered by the expert in forming her opinion. Such a disclosure—on the face of the report—enables the opposing party to test the accuracy and applicability of the facts that the expert relied upon in forming her opinion.

The facts and data which Ms. Ryan considered in forming her opinions have already been produced to Defendant. Pls.' Resp. 6. As discussed above, Ms. Ryan's report details every document and data set she considered in forming her analyses. Defendant does not argue that Ms. Ryan's report or her disclosures are somehow insufficient or incomplete, but instead seeks documents containing Ms. Ryan's preliminary analyses of claims data and various damages scenarios, reflecting Plaintiffs' counsel's mental processes in developing litigation strategy, or work on drafts of the report. Pls.' Resp. Appx-0026. These preliminary analyses are not discoverable. RCFC 26(b)(4)(C); see also Nobles, 422 U.S. at 238, 95 S.Ct. 2160 (“At its core, the work-product doctrine shelters the mental processes of the attorney ....”).

The 2010 Advisory Committee notes clarify that a party seeking discovery of “facts or data” provided by counsel or an expert is limited to facts and data—not any further analyses of those facts and data:

*593* Under Rule 26(b)(4)(C)(i) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. 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.


Defendant's argument is untenable. The fact that the redacted information relates to tasks for which the expert was compensated does not alter that information's privileged status. Of course, details of work revealed in the expert's work description would relate to tasks for which she was compensated, but Plaintiffs have established that this description itself reveals protected communications with counsel. This situation is analogous to protecting attorney-client privileged information contained in counsel's bills describing work performed. An attorney's description of work performed for a client in an invoice itself reflects privileged information that is routinely protected as privileged, despite the fact that it appears in a bill. See Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir.1999) (recognizing that “'correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law,' ” are protected from disclosure) (quoting Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir.1992)); see also Amster v. River Capital Int'l Grp., LLC, No. 00 CIV. 9708 (DCDF), 2002 WL 2031614, at *2 (S.D.N.Y. Sept. 4, 2002) (permitting a party to withhold the “breakdown of the expert's various services” appearing on an expert's bill while ordering production of a “statement of the total compensation paid to the expert”).

Work Papers Related to Compensation

Defendant requests all of Ms. Ryan's “invoice[s] for services” numbered 53-86 on Plaintiffs' privilege log. However, all invoices reflecting Ms. Ryan's compensation were provided to Defendant. See Ryan Rev. P. L. Nos. 53–86 (Aug. 11, 2016) (describing the withheld documents as “detailed work descriptions, including descriptions of protected attorney-expert communications and work product ....”). Plaintiffs posit that Defendant is actually seeking “a line-by-line detail of the work performed, including descriptions of preliminary work, discussions with Plaintiffs' counsel, and work on drafts of the report,” that were redacted from the invoices. Pls.' Resp. 8, Appx-010. Defendant does not dispute Plaintiffs' characterization of the redacted material but instead makes a strange argument that because the withheld “line-byline detail” relates to tasks for which Ms. Ryan was compensated, this detail is not subject to the work-product doctrine. Def.'s Reply 4.
compensation, not on the tasks performed that led to compensation. Fed. R. Civ. P. 26, 2010 Advisory Committee Note 172 (noting that any “benefits to the expert” are discoverable). The Note further states that the objective of discovery into expert compensation “is to permit full inquiry into such potential source of bias”—not a roving inquiry into litigation strategy documented in invoices. Id. That objective has been fully met here. Plaintiffs disclosed all required information relating to the expert’s compensation. As Plaintiffs note in their Appendix, they produced Ms. Ryan’s engagement letter, retainer, fee arrangement, and emails discussing her compensation. Further, in her expert report, Ms. Ryan notes that she is being paid $725 per hour. Pls.’ Res. Appx-001; Ryan Report 6. These disclosures comport with the exception to the work-product protection for expert compensation. Additional disclosures of privileged communications on the invoices are not required.

**8** Defendant’s motion to compel filed on June 3, 2016, and renewed on August 16, 2016, is DENIED.

Conclusion

All Citations

128 Fed.Cl. 584, 2016 WL 5831597
TAB 6
Areas of Focus
- Antitrust
- Class Action Litigation
- Commercial Litigation
- Health Care Industry
- Health Care Litigation
- Health Care Services
- Litigation and Dispute Resolution

Education
- J.D., Creighton University, 1980, cum laude
- B.S., University of Nebraska-Lincoln, 1976

Bar Jurisdictions
- Missouri, 1980
- Kansas, 1987

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"My goal is the timely and efficient analysis, evaluation and resolution of a client's claim or litigation exposure by settlement or jury verdict."

Overview
In his more than three decades of trial practice, Jack Brady has represented plaintiffs and defendants in almost every type of case.

His successful business litigation trial experience includes cases involving class action, breach of warranty, breach of contract, breach of fiduciary duty, director and officer liability, fraud, tortious interference, antitrust, accounting malpractice, lender liability, and adversary bankruptcy proceedings.

Jack’s successful tort litigation trial experience includes cases involving product defects of farm implements, auto crashworthiness, medical devices, and construction machinery, and also cases involving auto/truck collisions, medical malpractice, hotel security, and premises liability.

Jack’s experience on either side of the courtroom provides a diverse perspective and valuable insight into his opponents’ trial strategy, which allows for successful and efficient resolutions.

Distinctions
- Recognized by Best Lawyers® as the 2017 Medical Malpractice Law - Defendants “Lawyer of the Year” in Kansas City, Missouri
- Selected for inclusion in The Best Lawyers in America,® 2007-2017
  - Commercial Litigation
  - Litigation - Antitrust
  - Medical Malpractice Law - Defendants
  - Personal Injury Litigation - Defendants
- Selected for inclusion in Missouri & Kansas Super Lawyers for Business Litigation, 2005-2014
- Honored by The Kansas City Business Journal as the 2015 "Best of the Bar" in the fields of:
  - Commercial and Business Litigation
  - Health Care and Personal Injury Litigation
  - Accounting Litigation
Key Matters

- Represented a class of direct purchasers of thin film transistor liquid crystal display panels that sued numerous Japanese, Korean and Taiwanese based manufacturers for price-fixing. Settlements of almost $500 million were obtained and a jury verdict against Toshiba was also obtained.

- Represented with two other firms a class of direct purchasers of potash in a price-fixing case against an international cartel. Obtained a unanimous en banc opinion from the 7th Circuit on the non-applicability of the Foreign Trade Anti-Trust Improvements Act (FTAIA) and a $90 million dollar settlement for the Class.

- Co-lead counsel and lead trial counsel for several consumer class action cases against General Motors. Case successfully settled in for confidential amount.

- Successfully represented at trial ANUHCO, Inc., et. al. in a breach of contract lender liability case against Westinghouse Business Credit. After a six-week jury trial, verdict was returned in favor of plaintiffs in the amount of $70 million. Judgment was affirmed on appeal and paid in the amount of $81 million including interest. This case represents the largest verdict ever affirmed in the State of Missouri.

- Successfully represented at trial Block Financial Corporation, a subsidiary of H&R Block, in a breach of contract case against America Online (AOL) in a transaction involving the sale of CompuServe, Inc. to AOL. Case tried for three weeks with verdict for Block Financial Corporation and against AOL in the amount of $21 million.

- Successfully represented the trustee of the bankruptcy estate of Mountain Energy Corporation in numerous adversary proceedings resulting in a reduction of total claims and set-offs valued at $59.3 million to the creditors of the estate.

- Successfully arbitrated MEZ, Inc.’s claim against SPX, a large British conglomerate, in an eight-day arbitration. The breach of “earn out” provision contained in a purchase and sale of assets agreement claim resulted in an award of the full amount of the contingent “earn out” — $6.5 million, plus prejudgment interest in the amount of $495,000 and an award of attorneys’ fees and expenses.

- Successfully represented a 9-year-old boy with permanent brain injury in a product defect case against Ford Motor Company. Case settled after three weeks of trial, prior to closing argument, for confidential amount.

- Successfully represented a 19-year-old woman in a negligent hotel security case, which settled after one week of trial for $2.725 million.

- Successfully represented a 25-year-old woman in a Federal Torts Claim Act case against the U.S. Government and another defendant for medical malpractice. Case settled before trial for in excess of $2 million.

- Successfully tried a medical malpractice failure to diagnose cancer case in Omaha, Neb. After one-week trial, verdict of $500,000 was obtained.

- Numerous successful trial verdicts for physicians and hospitals sued for medical malpractice and corporate negligence.
For more than 25 years, Mike Cochran has focused his practice on the litigation and trial of complex business and other civil disputes. He is a skilled advocate who has represented a wide variety of clients, ranging from multinational and publicly traded companies to local Delaware businesses and institutions. His clients have also included state and local governments, prominent public figures, estates, individuals and many others.

Mike has substantial experience in the Delaware Court of Chancery, the Delaware Superior Court and the United States District Court for the District of Delaware. Recently, he has been engaged in a series of cases involving complex trade secret and restrictive covenant claims. Mike has litigated a wide range of other, complex business disputes, injury and death claims, civil rights claims, and many more.

Honored with several awards for his work on behalf of Delaware’s abused and neglected children, Mike is committed to pro bono work and serves as chair of the firm’s Pro Bono and Community Service Committee. He also heads the Litigation Department’s Commercial and Business Litigation Group.

Representative Experience

- **Incyte Corporation v. Flexus Biosciences**: Ongoing representation in Delaware Superior Court (“CCLD”) of biosciences company in defense of trade secret and related claims arising in connection with the development of cancer immunotherapy medication.

- **RCS Capital Corp. v. Lightyear Capital LLC**: Defense of expedited litigation in Delaware Bankruptcy Court alleging breach of confidentiality and non-competition agreements.

- **McDole v. City of Wilmington**: Ongoing defense of civil rights litigation brought against City of Wilmington and four of its police officers in connection with the death of an individual during a 2015 incident.

- **Revolution Retail Systems, LLC v. Sentinel Technologies, Inc.**: Representation of technology company in defense of claims brought in Delaware Court of Chancery alleging breach of confidentiality, noncompetition, and licensing agreements.

- **Michael Spinks v. Estate of Ronald E. “Butch” Lewis**: Representation of the estate of internationally known boxing promoter Butch Lewis in the defense of claims brought in the Delaware Court of Chancery by former heavyweight champion Michael Spinks alleging breach of fiduciary duty and conversion.

- **PCMS International Inc. v. 2295113 Canada, Inc.**: Defense of trade secret, license and related claims in the Delaware Court of Chancery. Case involved complex computer software, contract and licensing issues.

- **Teleglobe Communications Corp. v. BCE**: Representation of subsidiaries of a major international telecommunications provider in the litigation of claims brought in the Delaware District Court and Bankruptcy Court relating to parent's decision to withdraw funding. Case involved claims in excess of $500 million.

- **Statoil Marketing and Trading (US) Inc. v. Western Refining Yorktown, Inc.**: Representation of oil refiner in claims brought in the Delaware Superior Court arising from alleged breach of oil supply contract due to event of force majeure. Case involved claims in excess of $100 million.

- **Hale v. City of Wilmington**: Representation of the City of Wilmington and its
police officers in a highly publicized civil rights case filed in the Delaware District Court, involving complex constitutional claims arising from the death of an individual as he was being taken into police custody.

- **Occupy Delaware v. City of Wilmington**: Representation of the City of Wilmington in the defense of civil rights claims brought in the Delaware Court of Chancery by the ACLU on behalf of Occupy Delaware, over the occupation of Peter Spencer Plaza in the City of Wilmington.

- **Frontier Oil Corp. v. Holly Oil Corp**: Representation of petroleum refiner in claims brought in the Delaware Court of Chancery arising from the alleged breach of a merger agreement. Case focused on the interpretation of a material adverse change provision in the merger agreement and on the doctrine of repudiation under Delaware law.

- **DeBakey Corp. v. Raytheon Service Co.**: Defense of joint venture partner in claims exceeding $50 million arising from failed venture for the development and sale of telemedicine systems. Case was tried in the Court of Chancery, resulting in a defense verdict.

- **Evonik Stockhausen, Inc. v. Tyco Healthcare Group**: Delaware counsel for plaintiff in Delaware District Court case involving claims exceeding $20 million arising from alleged breach of a commercial supply agreement.

- **Chesapeake Corp. v. Shore**: Representation of plaintiff in Delaware Chancery Court trial of claims arising from corporate control contest where defendants were found to have wrongfully adopted defensive measures in an effort to ward off corporate takeover.

- **Emerald Partners v. Berlin**: Representation of plaintiff in Delaware Chancery Court trial of claims for breach of fiduciary duty arising from a merger, resulting in Delaware Supreme Court decisions further defining the fiduciary duties of directors under Delaware law.

- **VS&A Communications Partners L.P. v. Palmer Broadcasting Ltd. Pshp**: Representation of defendant in the trial of an action brought in the Delaware Court of Chancery for specific performance of an asset purchase agreement for the acquisition of broadcast properties, resulting in defense verdict.

- **Special Board Committees**: Representation of a special litigation committee formed to investigate stock option vesting and related claims arising from the failed merger of two multinational telecommunications companies; representation of other special committees formed to investigate claims of misconduct by corporate officers and directors.

- **Delaware Compensation Rating Bureau v. Insurance Commissioner of the State of Delaware**: Representation of the Insurance Commissioner of the State of Delaware in litigation filed in the Delaware Court of Chancery regarding the Commissioner’s implementation of Delaware’s workers’ compensation reform statutes, forcing a statewide reduction in premium rates for Delaware businesses.

- **Harden and City of Wilmington v. Christina School District**: Representation of the City of Wilmington and individual plaintiffs in a Delaware Chancery Court case that resulted in the issuance of an injunction preventing school district from closing its elementary schools in the City of Wilmington.

- **Keefe Commissary Network, LLC v. The Delaware Department of Correction**: Representation of commissary and financial services contractor in bid dispute with the Delaware Department of Corrections. This Chancery Court litigation forced a re-bid of the contract at issue.

- **Christiana Care**: Representation of Delaware’s largest hospital system
and subsidiaries in various matters, including AAA arbitrations of disputes with health benefits providers, peer review proceedings, emergency guardianship and malpractice matters.

- **Nanticoke Hospital**: Ongoing general representation.
- **Townsend Fire Company v. VFIS**: Representation of local fire company in Delaware Superior Court case seeking insurance coverage for damages resulting from the collapse of its fire hall during blizzard of 2010.
- **PHB v. Travelers Insurance Company**: Representation of local building contractor in insurance coverage dispute resulting from concrete failures.
- **Liggett Group Inc. v. Affiliated FM Insurance Company, et al.**: Representation of Reliance Insurance Company in Delaware Superior Court coverage action brought by tobacco companies for coverage of tobacco health-related lawsuits.

**Recent Publications**

- “But the Examination Still Proceeds: A Primer on Surviving the Difficult Deposition,” *ABA Section of Litigation 2012 Section Annual Conference*, April 18, 2012
- “The Delaware Superior Court’s Complex Commercial Litigation Division,” BNA’s *U.S. Law Week*, October 4, 2011
- “Court of Chancery Issues New Guidelines for the Preservation of Electronically Stored Information,” *ABA Commercial and Business Litigation*
- “The Delaware Corner: A New Forum for Complex Commercial Disputes,” *ABA Commercial and Business Litigation*
- “The Delaware Corner: Poison Pills and a New Judge,” *ABA Commercial and Business Litigation*

**Panels and Presentations**

- “Deposition Do’s and Don’ts,” Delaware State Bar Association, 20th Annual Rubenstein-Walsh Seminar, Wilmington, Delaware, February 6, 2015
- “Delaware’s Business Courts: Recent Developments and Best Practices,” ABA Section of Litigation and Delaware State Bar Association, Wilmington, Delaware, May 16, 2014
- “Deposition Practice in Complex Cases: The Good, the Bad, and the Ugly,” ABA Section of Litigation, Section Annual Conference, Washington, D.C., April 18, 2012
- “Lessons from Tragedy: Legal, Professional and Ethical Issues Raised...”
by Bradley and Beyond,” Widener University School of Law, Wilmington, Delaware, November 4, 2011

- “Leadership Fights and Multi-Jurisdictional Gamesmanship in Deal Litigation,” ABA Commercial and Business Litigation Committee, June 2, 2011
- “Children & Families First Honors Director Mike Cochran,” Wilmington, Delaware, November 15, 2010

Awards

- Christopher W. White Distinguished Access to Justice Commitment Award, Delaware State Bar Association, 2015
- Delaware Volunteer Firefighter’s Association President’s Award, 2014
- ABA Section of Litigation, Outstanding Subcommittee Chair, 2013-14
- Delaware Service to Children Award, 2012, Office of the Child Advocate for the State of Delaware
- J. Thompson Brown Award For Outstanding Contributions to Family Life In Delaware, 2010

Leadership

- Co-Chair, Commercial and Business Litigation Committee, ABA Section of Litigation
- Chair, Delaware Child Protection Accountability Commission (2006-2016)
- Co-Chair, Joint Committee on the Investigation and Prosecution of Child Abuse (2011-2013)
- Co-Chair, 147th Delaware General Assembly Task Force on the Funding of Ambulance and EMS Service in Delaware (2013-2014)
- Director, Delaware Bar Foundation
- Member, Delaware Superior Court Committee on Complex Civil Litigation
- Member, American Bar Association, Litigation and Business Law Sections
- Member, Delaware State Bar Association, Corporate Law and Litigation Sections
- Member, Delaware State Bar Association, Nominating Committee (2010-2012)
- Member, Delaware Child Death, Near Death, Still Birth Commission (2006-2016)
- Member, Governor’s Steering Committee on the Protection of Children (2010-2015)
- New Castle County Co-Chair, Combined Campaign For Justice (2014)
- Member, Delaware State Bar Association Musical Players
Education
• J.D., Catholic University of America, Columbus School of Law, 1985
• B.A., University of Delaware, 1982

Admitted to Practice
• Delaware
• United States District Court, District of Delaware
• United States Court of Appeals Third Circuit
• United States Supreme Court

Pro Bono Activities
• Chair, Richards, Layton & Finger’s Pro Bono and Community Service Committee
• Represents children in proceedings in the Delaware courts through Delaware’s Office of Child Advocate
Dr. Faten Sabry
Managing Director
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Dr. Sabry is a Managing Director in the Securities and Finance Practice at NERA and leads the Bankruptcy and Financial Distress Practice. Dr. Sabry has testified as an expert at trial in State and Federal Courts on issues related to statistical analysis, causation, damages, economic analysis of class certification, and valuations.

Examples of her assignments include:

- Analysis of settlement allocation in the United States Bankruptcy Court for the District of Delaware, *In re: AgFeed USA, LLC, et al.*
- Causation and damages regarding investments in certain equity derivative products in the United States Bankruptcy Court for the Middle District of Florida – Orlando Division, *In re: Sherwood Investments Overseas Limited, Inc. (Debtor) v. The Royal Bank of Scotland N.V.*
- Analysis of the capital market reactions including credit default swaps to the foreseeability of bankruptcy during the credit crisis, *In the Official Committee of Unsecured Creditors v. Citibank, et al., Re Lyondell Chemical Companies, et al.*

Dr. Sabry received her PhD in Business from Stanford Business School and was awarded the J.M. Olin Graduate Fellowship, the Graduate School of Business Fellowship, and a Ford Foundation Fellowship. She received her BA, magna cum laude, and her MA in economics from the American University in Cairo.

Her research has been published in the *Journal of Structured Finance, Journal of Real Estate Practice, Journal of Investment Compliance, Journal of Alternative Investments, Business Economics, International Trade Journal,* and others. She is a member of the American Finance Association, the American Statistics Association, and the American Bankruptcy Institute. She has been accredited as a professional statistician by the American Statistics Association.

**Education**
Post-Doctoral Fellow, International Food Policy Research Institute, Washington, DC
PhD, Stanford Business School
MA in economics, American University, Cairo
BA in economics, magna cum laude, American University, Cairo
Accredited Professional Statistician, American Statistical Association

Publications
- The Handbook of Mortgage-Backed Securities, 7th Edition
- Home Equity, Home Value and Determinants of Mortgage Defaults during the Credit Crisis
- Credit Crisis Litigation Update: Significant Settlement Activity in 2014 and New Cases against RMBS Trustees and Mortgage Lenders
- An Economist's View of Market Evidence in Valuation and Bankruptcy Litigation
- The Use of ABX Derivatives in Credit Crisis Litigation
- Credit Crisis Litigation Update: It is Settlement Time
- Comcast and Economic Analysis of Class Certification Issues
- The Use of ABX Derivatives in Credit Crisis Litigation
- What Do the New Risk Retention Requirements of the Dodd-Frank Act Mean for Securitization? <br>
- Credit Crisis Litigation Revisited: Litigating the Alphabet of Structured Products
- An Update on the Credit Crisis Litigation: A Turn Towards Structured Products and Asset Management Firms
- Study of the Impact of Securitization on Consumers, Investors, Financial Institutions, and the Capital Markets
- How Did We Get Here? The Story of the Credit Crisis
- The Use of Economic Analysis in Predatory Lending Cases: Application to Subprime Loans
- Subprime Securities Litigation: Key Players, Rising Stakes, and Emerging Trends
- When Do Breakpoints Give Mutual Fund Investors a Break?
- The Subprime Meltdown: A Primer
- The Propensity to Sue: Why Do People Seek Legal Actions?
- Where are Mesothelioma Claims Heading?
- Institutional Response to Tort System Breakdown: Asbestos Enters a New Phase
- Forecasting Product Liability by Understanding the Driving Forces
- Trends in Mutual Fund Advisory Fees
- Forecasting Asbestos Liability After Recent Bankruptcy Decisions: How Forecasts Must Adjust for Changes in the Tort System
- Costs of Asbestos Litigation and Benefits of Reform
- Forecasting Claims in an Era of Tort Reform
- The Development and Effectiveness of the WTO's Dispute Settlement Body
- An Analysis of the Decision to File, the Dumping Estimates, and the Outcome of Antidumping Petitions

Practice Areas
Bankruptcy and Financial Distress Litigation
Class Actions and Class Certification
Commercial Litigation and Damages
Consumer Protection in Financial Services
Financial Institutions and Banking
Financial Risk Management
Product Liability and Mass Torts
Securities and Finance
Valuation
White Collar, Investigations and Enforcement

Dr. Faten Sabry
About Nera

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.
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Darryl is a veteran trial lawyer who has successfully tried numerous cases to verdict, and concentrates his practice on patent litigation and other complex technology litigation, principally in the areas of semiconductors, information technology, life sciences and biotechnology.

He has appeared as lead counsel in patent litigation across the country, including the ITC, dealing with technologies ranging from software to semiconductor fab equipment, materials chemistry, voice over IP, networking, bio assays, diagnostic tools, medical devices, pharmaceuticals, and recombinant DNA. In addition, Darryl has represented a range of clients in copyright, trademark and trade dress infringement cases, trade secret and licensing disputes, unfair competition, trade libel, false advertising, and other complex litigation.

Darryl received his Juris Doctor from Georgetown University and his Bachelor’s in Biology from the University of California, Berkeley. Darryl is a licensed member of the State Bar of California, and a member of the Bar Association of San Francisco, American Bar Association, American Intellectual Property Law Association, Federal Circuit Bar Association, Mechanics Institute of San Francisco, and Asian American Manufacturers Association. Darryl served as a member of the board of the Northern California Chapter of the Association of Business Trial Lawyers from 2005 to 2012. Darryl is admitted to practice in California, all federal district courts in California, the United States District Court for the Eastern District of Texas, the United States Courts of Appeals for the 9th and Federal Circuits, and the United States Supreme Court.

Darryl has been named to The Best Lawyers in America©, one of the Top 100 Leading Lawyers in California in 2007, a Top 75 IP Lawyer in California in 2014, and to the IAM Patent 1000 list of The World’s Leading Patent Practitioners from 2013 to 2016. He was selected to the Northern California Super Lawyers list, Super Lawyers® (Thomson Reuters) from 2004 to 2016 and selected as Managing Intellectual Property’s IP Star for 2015 and 2016.