

# **The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder**

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“The most frequent method for discovering the work of expert witnesses is by deposition,” according to the advisory committee notes to Rule 26.<sup>2</sup> On December 1, 2010, certain changes to the expert discovery provisions of this Rule went into effect. These changes clarified the scope of discoverable information about an expert’s work that is available to opposing counsel—and therefore available for use or eligible

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<sup>1</sup> The views expressed herein are those of author and are not necessarily shared by Richards, Layton & Finger, P.A. or its clients.

<sup>2</sup> FED. R. CIV. P. 26 advisory committee’s note (2010).

for inquiry during deposition. This brief article surveys what expert material remains discoverable and what is now off-limits as a result of these amendments, and concludes with the questions that counsel should never forget to ask an expert during deposition.

## I. CHANGES TO RULE 26(A)(2)

The changes to Rule 26(a)(2) were twofold: one, to be more specific about the kinds of information discoverable from experts generally, and two, to clarify which experts must and which experts need not prepare a report.

The following change to Rule 26(a)(2)(B) amended one of the subjects that an expert's report must contain:

| Before 2010 Amendments   | 2010 Amendments  |
|--|--|
| (ii) the data or other information considered by the witness in forming them | (ii) the facts or data considered by the witness in forming them |

According to the advisory committee notes, this change was intended to “alter the outcome in cases that [relied on the previous language] in requiring disclosure of all attorney-expert communications and draft reports.”<sup>3</sup> The purpose of limiting the disclosure to “facts or data” and not “other information” was to protect counsel’s theories and mental impressions.<sup>4</sup>

But the retention of the word “considered” rather than just “relied upon” was intentional. Any factual matter that the expert considered—even if derived from communications with counsel, as we will see below—is fair game. The advisory committee notes instruct that the phrase “‘facts or data’ [should] be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.”

The amendments also included a new Rule 26(a)(2)(C) to clarify the kinds of disclosures expected of those expert witnesses not obliged to prepare a formal report:

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<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 420 (N.D. Ill. 2011) (denying discovery of communication from expert to counsel advising how counsel might conduct a pilot survey of advertisements, since such communications did not include “facts, data, or assumptions that [the expert] could have considered in assembling his expert report”); *United States v. 73.92 Acres of Land*, 2011 WL 3471096, at \*3 (S.D. Miss. Aug. 8, 2011) (denying motion to compel plaintiff to produce its former counsel for deposition about his communications with experts, since defendants “fully understand the assumptions and data the appraisers relied on in rendering their reports; they simply disagree with them”).

| Before 2010 Amendments | 2010 Amendments   |
|------------------------|---|
| [none]                 | <p data-bbox="821 228 1421 359"><b>(C) Witnesses Who Do Not Provide a Written Report.</b> Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:</p> <p data-bbox="919 394 1421 525"><b>(i)</b> the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and</p> <p data-bbox="919 560 1421 625"><b>(ii)</b> a summary of the facts and opinions to which the witness is expected to testify.</p> |

This new section makes clear that those experts not subject to the disclosure requirements of Rule 26(a)(2)(B) still need to provide some indication to opposing counsel of the topics on which they expect to testify.<sup>5</sup> And of course, Rule 26(a)(2)(C) witnesses do not escape a deposition—as one court has said for such witnesses, “[t]he absence of an expert witness report increases the need for a complete and thorough deposition.”<sup>6</sup>

## II. CHANGES TO RULE 26(B)(4)

The changes to Rule 26(b)(4) complement the changes to Rule 26(a)(2) by extending work-product protection to drafts of expert reports and to certain communications between experts and counsel. These rules neither provide for nor exclude the applicability of other privileges or protections that counsel may be able to establish.<sup>7</sup>

Rule 26(b)(4)(B), a wholly new section, prevents opposing counsel from seeking drafts of expert reports:

| Before 2010 Amendments | 2010 Amendments   |
|------------------------|---|
| [none]                 | <p data-bbox="821 1228 1421 1392"><b>(B) Trial-Preparation Protection for Draft Reports or Disclosures.</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.</p> |

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<sup>5</sup> See, e.g., *Graco, Inc. v. PMC Global, Inc.*, 2011 WL 666056, at \*14 (D.N.J. Feb. 14, 2011) (requiring plaintiff to disclose the subject matter and a summary of the facts and opinions offered by its employees in affidavits submitted by them in support of plaintiff’s motion for a preliminary injunction and opposition to defendant’s motion for summary judgment).

<sup>6</sup> *Allstate Ins. Co. v. Nassiri*, 2011 WL 2975461, at \*10 (D. Nev. July 21, 2011).

<sup>7</sup> FED. R. CIV. P. 26 advisory committee’s note (2010).

This protection extends to those experts required to produce formal written reports under Rule 26(a)(2)(B), as well as those witnesses for whom a party need only disclose the subject matter and a summary of the facts and opinions on which it expects the witness to testify.<sup>8</sup>

Rule 26(b)(4)(C), also new, did likewise for communications between counsel and experts:

| Before 2010 Amendments | 2010 Amendments   |
|------------------------|---|
| [none]                 | <p><b>(C)</b> <i>Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses.</i> 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:</p> <ul style="list-style-type: none"> <li><b>(i)</b> relate to compensation for the expert’s study or testimony;</li> <li><b>(ii)</b> identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or</li> <li><b>(iii)</b> identify the assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.</li> </ul> |

Note that, unlike the new Rule 26(a)(2)(B), this section applies only to experts required to produce a written report;<sup>9</sup> any protection for communications with those witnesses who need not produce a written report must be found elsewhere.<sup>10</sup>

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<sup>8</sup> See, e.g., *Republic of Ecuador v. Bjorkman*, 2012 WL 12755, at \*4 (D. Colo. Jan. 4, 2012) (stating that drafts of reports and disclosures prepared by both Rule 26(a)(2)(B) and Rule 26(a)(2)(C) experts are protected from disclosure).

<sup>9</sup> See *United States v. Sierra Pac. Indus.*, 2011 WL 2119078, at \*5–7 (E.D. Cal. May 26, 2011) (reviewing Civil Rules Advisory Committee’s reasons for not extending work-product protection to communications with Rule 26(a)(2)(C) experts).

<sup>10</sup> See, e.g., *Graco, Inc.*, 2011 WL 666056, at \*14 (protecting under the attorney-client privilege communications between plaintiff’s counsel and employee expert witnesses who were not required to provide a written report). *But see Sierra Pac. Indus.*, 2011 WL 2119078, at \*10 (finding “no immediately apparent policy reason to treat an employee expert whose duties regularly involve giving expert testimony any differently than an employee expert whose duties involve only intermittently giving expert testimony,” but that hybrid fact and expert witnesses, “such as treating physicians and accident investigators, should be treated differently than reporting witnesses with respect to the discoverability of their communications with counsel”).

### **A. *What the 2010 Amendments Do Not Protect***

The overarching purpose of these amendments was to protect the mental impressions and theories of counsel and to allow for unguarded and free communication between counsel and experts. But this still leaves a broad area beyond the report itself open for inquiry. The advisory committee notes emphasize that opposing counsel are not forbidden to inquire into an expert's opinions, including the "development, foundation, or basis of those opinions."<sup>11</sup> Such matters as the testing of materials and notes from such tests, for example, are discoverable.<sup>12</sup>

Though drafts are not discoverable, the amendments provide for three exceptions to the protection of communications between counsel and experts.

First, expert compensation, in all aspects, is fair game.<sup>13</sup> This "extends to all compensation for the study and testimony provided in relation to the action," and includes "additional benefits to the expert, such as further work in the event of a successful result in the present case" as well as "compensation for work done by a person or organization associated with the expert."<sup>14</sup>

Second, consistent with the amendment to Rule 26(a)(2)(B), communications identifying facts or data provided by counsel to their expert are discoverable.<sup>15</sup> But this only extends to communications that "identify" the facts or data; "further communications about the potential relevance of the facts or data are protected."<sup>16</sup>

Third, if counsel instructed an expert to assume certain matters in preparing his opinions, such assumptions are discoverable, but only to the extent that the expert actually relied on these assumptions in preparing his opinion. Hypotheticals posed by counsel and the discussion of other possibilities are not subject to this third exception and thus remain protected.<sup>17</sup>

### **B. *The Work Product Exception Still Applies***

Because the 2010 amendments to Rule 26(b)(4) are rooted in the work-product doctrine, opposing counsel may still discover otherwise protected information upon a showing of the standard exception to work-product protection under Rule 26(b)(3)(A)(ii)—substantial need for such reports or communications

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<sup>11</sup> The advisory committee notes also state that communications between an expert and a third-party do not receive protection under the amendments to 26(b)(4), and that counsel may also ask 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." FED. R. CIV. P. 26 advisory committee's note (2010).

<sup>12</sup> See, e.g., *In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at \*7 n.11 (E.D. Pa. Dec. 13, 2011) (holding that physician expert's handwritten notes reflecting his interpretation of radiograph results were not exempt from discovery).

<sup>13</sup> See, e.g., *In re 94th & Shea, L.L.C.*, 2011 WL 6396522, at \*2 (Bankr. D. Az. Dec. 15, 2011) (ordering disclosure of engagement letters between debtor and its experts).

<sup>14</sup> FED. R. CIV. P. 26 advisory committee's note (2010).

<sup>15</sup> See, e.g., *In re Asbestos Prods. Liability Litig. (No. VI)*, 2011 WL 6181334, at \*6–7 (concluding that "transmittal letters" containing individuals' asbestos exposure, medical, and smoking history that plaintiffs' counsel sent to its physician experts were discoverable, since they contained facts, data, and assumptions on which the experts relied).

<sup>16</sup> FED. R. CIV. P. 26 advisory committee's note (2010).

<sup>17</sup> See *id.*

and the inability to obtain the substantial equivalent by other means without undue hardship. The advisory committee notes state that this exception should be rare, however, given the other disclosure requirements that apply to expert opinion.<sup>18</sup> And even if such a showing is made, the notes further instruct courts to “protect against disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories,”<sup>19</sup> just as the Rules do for the work-product doctrine generally.<sup>20</sup>

### **III. CONCLUSION: THE QUESTIONS NOT TO FORGET DURING EXPERT DEPOSITIONS**

Though the 2010 amendments to Rule 26 extended work-product protection to cover certain materials that may previously have been discoverable, a wealth of material about an expert’s work remains open to inquiry. First, you are entitled to know *any* facts or data considered by the witness, whatever the source may be, and you should not be shy about asking about those sources. The deposition of the expert may be your last chance to see whether discoverable communications with opposing counsel exist. Second, though compensation tends to be displayed prominently in expert reports, don’t leave the deposition until you are confident that you know about any form of direct benefit that the expert may receive as a result of his work. And finally, always remember to ask whether the expert was instructed to rely on certain assumptions that may not be evident from the report itself. If you remember to ask these questions—and follow up exhaustively on the answers you receive—you will remain within the permissible lines of inquiry under the amended Rule 26.

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<sup>18</sup> *See, e.g., Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 421 (N.D. Ill. 2011) (“Plaintiff has examined the data and methods underlying Dr. Wind’s report, deposed Dr. Wind about the report, and retained its own expert to rebut the report. Given these considerable opportunities to test Dr. Wind’s methodology, Plaintiff has not shown a ‘substantial need’ for the materials here.”).

<sup>19</sup> FED. R. CIV. P. 26 advisory committee’s note (2010).

<sup>20</sup> *See* FED. R. CIV. P. 26(b)(3)(B).