

# FROM YOUR VANTAGE POINT

## EXPERT REPORTS IN FEDERAL LITIGATION

BY JOHN ZEN JACKSON, ESQ.

The first year of the new provisions regarding expert discovery in the Federal Rules of Civil Procedure has now been completed. The amendments to Rule 26 regarding expert witness disclosures took effect on December 1, 2010, and included significant changes. Knowledge of these rules can benefit physicians participating as expert witnesses in federal litigation. Many of the new aspects of federal practice have actually been in place in the State court system in New Jersey since 2002. Indeed, the changes to Rule 26 were "crafted with an eye on the New Jersey experience" after a 2007 meeting of a subcommittee of the Civil Rules Advisory Committee with practitioners from this State.<sup>1</sup>

The provisions of Federal Rule 26 that had been in effect since 1993 permitted virtually all communications between an attorney and expert witness to be discoverable. These provisions made for some interesting and, at times, exciting collateral issues that frequently distracted attention from the merits of an expert's opinion. The recent amendments expand the concept of work-product protection to cover draft reports, communications between attorneys and experts, and certain information that experts may consider in reaching an opinion. This should allow a more efficient process for the preparation of expert reports.

Rule 26, as it was in effect before the 2010 amendments, required that a party retaining an expert witness provide a written report from the expert. In addition, Rule 26(a)(2)(B) stated that the expert's report must contain all of "the data

or other information considered by the witness in forming" the opinion. Most courts interpreted this as opening the door to total discovery of communications between testifying experts and the retaining counsel, including draft reports, meeting notes and e-mails; i.e., the phrase "other information" meant everything communicated to the expert. For example, in *Regional Airport Authority v. LFG, LLC*, the court stated that it would "now join the 'overwhelming' majority" of courts...in holding that Rule 26 creates a brightline rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts."<sup>2</sup> The scope of discovery under the pre-2010 amendments extended to obtaining copies of draft reports, especially those in which counsel retaining the expert had had a role in preparing. In granting a motion to compel production of documents submitted to an expert that included such a draft report, one court wrote:

The weight accorded to an expert's opinion must vary in accordance with the expert's competence and knowledge; an expert who can be shown to have adopted the attorney's opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion.<sup>3</sup>

However, in recommending the 2010 amendments, the Advisory Committee commented that discovery into attorney-expert communications and draft reports had several "undesirable effects."<sup>4</sup> The Advisory Committee Notes are considered a very important,

although not conclusive, source of information to be given considerable weight in interpreting the Federal Rules. They are akin to a legislative history.<sup>5</sup> In its report explaining the rationale behind the 2010 Amendments, the Advisory Committee commented that efforts to discover draft reports or attorney-expert communications “almost never reveal[ed] useful information.”<sup>6</sup>

The Advisory Committee took note that attorneys had developed an approach of avoiding the creation of draft reports entirely, and communicating with experts in such a way as to avoid creating any discoverable material. This included the expert not taking notes or other having any record of any



preliminary opinions. In addition, parties and their attorneys expended time and incurred significant expense attempting to discover this information at expert depositions with extensive questioning on these topics. The Advisory Committee observed that “the fear of discovery inhibit[ed] robust communications between attorney and expert trial witness, jeopardizing the quality of the expert’s opinion.”<sup>7</sup> The Committee concluded that costs had risen and avoidance strategies had proliferated to the significant disadvantage of some litigants.

With the 2010 amendments, the discovery of draft reports and preliminary communications between attorney and expert has been curbed. Rule 26(a)(2)(B)(ii) was amended to require only the disclosure of “facts or data considered by the witness in forming” the opinion, rather than all “data or other information” required in the prior version. The Advisory Committee intended this change to “limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.”<sup>8</sup> In addition, the amendment of Rule 26(b)(4)(B) explicitly protects draft expert reports from disclosure “regardless of the form in which the draft is recorded.” Thus, the protection applies to all forms of draft reports, whether written, electronic, or otherwise.<sup>9</sup> Moreover, Rule 26(b)(4)(C) was amended so that all communications between attorneys and testifying experts “regardless of the form of the communication,” are protected from discovery except for three exceptions:

- (1) communications relating to the compensation the expert received,
- (2) communications identifying facts or data that the attorney provided and that the expert considered in forming the opinions, and that the expert considered in forming the opinions to be expressed and
- (3) communications identifying assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed.

The Advisory Committee notes reveal that this rule was “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.”<sup>10</sup>

These amendments will increase the protections offered by the attorney-client privilege and the attorney work-product doctrine to expert witness disclosures. Attorneys and experts can now communicate via e-mail without fear of creating a discoverable written record. The changes will allow attorneys and experts to work together in revising and editing expert reports without producing the resulting drafts and notes. This should result in more refined and persuasive expert reports produced in less time and at lower cost. The changes should eliminate the

need for attorneys to engage “consulting experts” in an attempt to avoid having to turn over a preliminary expert report. They should make it easier for attorneys to communicate with retained experts and to prepare them for their depositions and for trial. In their totality, the changes should reduce discovery disputes over the production of expert material that is often irrelevant, allowing the parties (and the court) to focus on the actual merits of the case.

There are several points of caution that must still be observed.

Communications that include facts or data provided by the lawyer that the expert considered in forming opinions and assumptions provided to the expert that the expert relied upon are still discoverable. It will be necessary for attorneys to initiate a practice of separating communications conveying facts or assumptions from communications involving substantive discussions and to avoid commenting on facts/assumptions in the same communication in which they are provided so as to protect any legal theories being developed. Nothing in the 2010 amendments limits an attorney’s ability to explore or attack an opposing expert’s opinions. It is still appropriate to explore the expert’s qualifications and what information the expert considered in reaching an opinion.

Even the newly protected areas of communication and drafts are not completely immune from discovery. In its notes, the Advisory Committee remarked that “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.” Such an order requires a showing of “substantial need” and “undue hardship” pursuant to Rule 26(b)(3)(A)(ii). The Advisory Committee, however, stated that 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.”<sup>11</sup> As a result, it is prudent to maintain those communications and early drafts without destroying, altering or disposing of any materials. These communications and drafts are presumptively confidential and protected and not to be produced; however, if a “substantial need” showing were made with a court order for production being entered, the failure to produce the items might well lead to adverse consequences. These might be a claim of spoliation or willful destruction or suppression of evidence or at least the allowance of a negative inference. At this point, there are no cases addressing the issue or providing guidance.



## References

<sup>1</sup> April 20-21, 2009 Minutes at page 20 attached to Report of Civil Rules Advisory Committee (May 8, 2009) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf>

<sup>2</sup> 460 F.3d 697, 716 (6th Cir. 2006).

<sup>3</sup> *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 616 (D.N.J. 1989).

<sup>4</sup> Advisory Committee Notes to Rule 26 (2010 Amendments).

<sup>5</sup> *Reed v. Binder*, 165 F.R.D. 424, 427 (D.N.J. 1996).

<sup>6</sup> Report of Civil Rules Advisory Committee at page 3 (May 8, 2009) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Advisory Committee Notes to Rule 26 (2010 Amendments).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*



## About the Author

John Zen Jackson is certified by the Supreme Court of New Jersey as a civil trial attorney. He is a partner in McElroy, Deutsch, Mulvaney & Carpenter, LLP of Morristown, New Jersey, and is a member of the firm's health care practice group.

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