NAVIGANT

AMENDED RULE 26 EXPERT WITNESS DISCLOSURE REQUIREMENTS

CONSTRUCTION

H. JAMES WULFSBERG, ESQ.
Wulfsberg Reese Colvig & Fristman Professional Corporation

DAVID J. HYNDMAN, ESQ.
Wulfsberg Reese Colvig & Fristman Professional Corporation

navigant.com

About Navigant

Navigant Consulting, Inc. (NYSE: NCI) is a specialized, global professional services firm that helps clients take control of their future. Navigant's professionals apply deep industry knowledge, substantive technical expertise, and an enterprising approach to help clients build, manage, and/or protect their business interests. With a focus on markets and clients facing transformational change and significant regulatory or legal pressures, the firm primarily serves clients in the healthcare, energy, and financial services industries. Across a range of advisory, consulting, outsourcing, and technology/analytics services, Navigant's practitioners bring sharp insight that pinpoints opportunities and delivers powerful results. More information about Navigant can be found at navigant.com.

I. INTRODUCTION

As of Dec. 1, 2010, Sections of Federal Rule of Civil Procedure 26(a) and (b) were amended "to address concerns about expert discovery." In sum, these amendments effectively precluded the discovery of communications between counsel and retained experts, other than for a few limited categories of information. These amendments reverse the 1993 amendments to Rule 26, which courts construed as requiring discovery of all communications between counsel and experts related to the subject matter of the expert's opinion, including the disclosure of all draft expert reports. According to the Advisory Committee Notes, the goal of the 2010 changes was to make working with expert witnesses simpler, less expensive, and more focused on the offered opinions. Specifically, among other things, the 2010 amendments formally accomplish the following:

- Require disclosure of (1) testifying experts providing reports; and (2) testifying experts not providing reports
- Limit disclosure to "facts and data" and not "other information;"
- Shield production of draft written expert reports (these constitute protected "trial-preparation materials")
- Limit disclosure of communications between an expert and the client's attorney;
- Provide exceptions to these new limits on disclosure, allowing inquiry regarding three topics: (1) expert compensation; (2) facts or data provided by counsel and relied upon by an expert; (3) assumptions provided by counsel and relied upon by an expert.

The extent of the practical effect of these amendments will become clearer as courts subject them to judicial interpretation.

II. AMENDMENTS TO RULE 26(A) — EXPERTS PROVIDING REPORTS AND EXPERTS NOT PROVIDING REPORTS; "FACTS OR DATA" AND NOT "OTHER INFORMATION"

Rule 26(a) was amended to "require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports, as well as to limit expert reports to facts or data (rather than "data or other information," as stated in the prior version of Rule 26) considered by the witness."[1] To effectuate this, two sections of Rule 26(a)(2) were amended. First, Rule 26(a)(2)(B)(ii) was altered as follows:

> (a)(2) Required Disclosures; Disclosure of Expert Testimony
>
> (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: … (ii) the facts or data considered by the witness in forming them…

The Advisory Committee Notes explain that this amendment was intended to "provide that [expert] 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 required by the 1993 amendment."

> In addition, a new section was added to Rule 26(a)(2) providing:
>
> (a)(2) Required Disclosures; Disclosure of Expert Testimony.
>
> (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.

This section was "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."

III. AMENDMENTS TO RULE 26(B)-DRAFT REPORTS, COMMUNICATIONS, AND EXCEPTIONS

Rule 26(b) was also amended to alter the treatment of "drafts of expert reports or disclosures" and define the treatment of certain attorney-expert communications. In the past, drafts of expert reports and disclosures were generally recognized as discoverable and not privileged. Rule 26(b)(4)(B) now provides that those materials are afforded the work-product protection set forth in Rules 26(b)(3)(A) and (B).[2]

> (b)(4) Discovery Scope and Limits; Trial Preparation: Experts.
>
> (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.
>
> A new section was also added to Rule 26(b) defining the protection afforded for certain attorney-witness communications:
>
> (b)(4) Discovery Scope and Limits; Trial Preparation: Experts.
>
> (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

1. "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 healthcare 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." Advisory Committee Notes, Rule 26, 2010 Amendments.

2. 26(b) Discovery Scope and Limits; (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.

> 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.

According to the Advisory Committee Notes regarding these amendments,

> "[u]nder 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."

With respect to the exception allowing inquiry regarding compensation, the Advisory Committee Notes clarified that "compensation" includes potential additional work for the expert, as well as compensation for work done by affiliated organizations or assistants, as "[t]he objective is to permit full inquiry into such potential sources of bias."

With respect to the specific exceptions for inquiries regarding information "considered" or "relied on" by an expert witness who provides a written report, under the 2010 amendments, only the narrower "facts and data considered" by an expert must be disclosed. This disclosure requirement does not apply to assumptions provided by counsel, or any other discussions with counsel, unless relied on by the expert. The committee note states that "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." The committee note also provides that "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," and the facts or data need only be identified. "Further communications about the potential relevance of the facts or data are protected."

It should also be noted that amended Rule 26(b)(4)(C) does not protect communications between lawyers and witnesses who provide expert testimony but are not required to furnish a report (non-reporting experts) because they were not "retained or specially employed to provide expert testimony" or their duties as party employees do not "regularly involve giving expert testimony." Pursuant to the Advisory Committee Notes, however, the rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The Advisory Committee Notes also provides that "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 these opinions. For example, the expert's testing of material involved in litigation, and notes of 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 may also 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."

IV. CASES APPLYING NEW RULES

Since the amendments to Rule 26, several cases have provided guidance on the scope and implementation of the changes to rules affecting experts' work product and disclosure requirements. In the summaries of holdings outlined below, courts have applied the new Rule 26 regarding the "facts and data" scope change, "draft expert report" protections, and other work product issues:

On Facts and Data: *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 419 (N.D. Ill. 2011). *The Sara Lee Corp.* court applied the new rule in the context of an expert/consultant wearing "two hats" — simultaneously testifying as an expert for one claim and working as a non testifying consultant in another. The Sara Lee court explained the history of Rule 26 and the reason for the changes:

> "In 1993, Rule 26(a)(2)(B) was amended to require a testifying expert to produce a written report setting forth a complete statement of the expert's opinions, as well as 'the data and other information considered by the witness in forming the opinions.' Many courts interpreted the rule as establishing a 'bright-line' approach that required disclosure of all attorney-expert communications, including 'otherwise protected work product and attorney-client communications' if the expert 'read or reviewed the privileged materials before or in connection with formulating his or her opinion.' In *re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 537 (N.D. Ohio 2008) (citing *W. Resources, Inc. v. Union Pac. R.R. Co.*, No. 00–2043–CM, 2002 WL 181494, at *9 (D.Kan. Jan. 31, 2002)); see also In *re Pioneer Hi–Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) ('[F]undamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony,' regardless of whether it is work product or not.) Such broad expert discovery carried with it several unfortunate consequences. It increased discovery costs and impeded effective communication between attorneys and their experts, sometimes even inducing parties to retain two separate sets of experts — one for consultation and another to testify. Fed.R.Civ.P. 26 advisory committee's note (2010 Amendments).
>
> In December 2010, Rule 26 was amended to address the undesirable effects of routine discovery into attorney-expert communications. Id. First, Rule 26(a)(2)(B)(ii) was amended to require disclosure of 'facts or data,' rather than 'data or other information,' considered by an expert witness in forming the opinions to be offered. The advisory committee intended this change to 'limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.' Id. That said, the committee urged that the amendment be interpreted broadly to cover 'any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert.' Id."

Under the facts of the case before them, the Sara Lee court found that the information requested under Rule 26 related solely to the non expert consultant work, not the expert work. Even if the information were provided under the "testifying expert" rubric, the court found it still would not be discoverable, as the materials contained neither "facts or data" nor "assumptions."

A. **On Facts and Data:** *National Western Life Ins. Co. v. Western Nat. Life Ins. Co.*, 2011 WL 840976 *2 (W.D. Tex. 2011). *The National Western Life Ins. Co.* court denied a motion to compel production of more than "facts and data" under the new scope of the rules. Reciting the changes to Rule 26 and the intent of those changes, the court held that the defendant complied with Rule 26 by solely producing its experts' Expert Report and all emails that contained facts and data.

B. On Facts and Data and Draft Reports: *D.G. v. Henry*, 2011 WL 1344200 *1 (N.D. Okla. 2011). The *D.G.* defendants contended that the plaintiffs had not produced the case files considered by the expert, the statutes, and policies considered by the expert, and the basis for the case examples in his report. Although the case files reviewed by the expert were originally produced by the defendants, the defendants requested the files produced back to them, as the expert might have made notations or highlights on them. The court, however, found that notations or highlights on case files do not constitute facts or data and are not required to be produced under Fed.R.Civ.P. 26(a)(2)(B)(ii). Nonetheless, the *D.G.* court found that the statutes and polices considered by the expert were facts or data required to be produced under Fed.R.Civ.P. 26(a)(2)(B)(ii). The court also found that although case summaries prepared by the expert were not draft reports under Fed.R.Civ.P. 26(b)(4)(B), they did fall within the definition of facts and data and were required to be produced under Fed.R.Civ.P. 26(a)(2) (B)(ii).

C. On Facts and Data, Drafts, and Categories Required to be Produced: *Dongyuk University v. Yale University*, 2011 WL 1935865, *1 (D. Conn. 2011). The *Dongyuk University* court found that an expert's notes are protected by Fed.R.Civ.P. 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. The court also recognized that communications regarding expert compensation, facts and data, and assumptions must be produced.

D. On Scope of Expert Protection — How Far It Extends: *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012). In addition to seeking protection for the communications between respondent's counsel and the expert, the respondents also asserted a claim of privilege over communications between the expert and other expert employees; between the expert and non-attorney respondents' employees; between the expert and the respondent's agent; and between the expert and other experts retained by respondents.

The *Ecuador* court held that any form of an expert's draft reports in the same litigation are protected from disclosure, and that communications between the expert and the attorney are protected from disclosure. Communications among experts are not protected from disclosure, however, nor are "notes, task lists, outlines, memoranda, presentation, and draft letters" done outside the context of the expert report. The *Ecuador* court also held that communications among experts, even between testifying and consulting experts, are subject to discovery. Likewise, the *Ecuador* court affirmed that communications among the testifying expert and his employees are protected. Communications with respondents' employees, however, are not protected.

The *Ecuador* court concluded by affirming the 2010 Advisory Committee Notes:

> The Advisory Committee clarified that the amendments are meant to protect the disclosure of two types of discovery: an expert's draft reports and the communications between a retained reporting expert and the party's attorney. FED. R. CIV. P. 26(b) (2010 Advisory Committee Notes). Respondents cannot withhold communications between their testifying experts under a rule that protects only attorney-expert communications. ("[I]nquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule.") Because communications among the numerous reporting expert witnesses listed in respondents' privilege log are not those between expert Kelsh and any attorney, the [petitioner's] motion to compel as to communications between [expert] Kelsh/exponent and other [ ] testifying experts is GRANTED.

V. SUMMARY IMPLICATIONS TO EXPERT WORK

It is clear that expert draft reports and disclosures, as well as certain other attorney-expert communications, now carry a greater level of protection. However, the amendments leave a number of matters open to judicial interpretation. When working with testifying experts, counsel should consider doing the following in light of the 2010 amendments:

- Make sure the expert understands that communications with individuals other than retaining counsel will not be protected (the protection may not apply, for example, to communications with a client's in-house counsel, other client personnel, or a party's consulting expert).
- Limit information provided to experts — particularly written information — to facts, data, and assumptions that counsel wants the expert to rely upon. Counsel's opinions, mental impressions, or legal theories should not be included in written documents provided to the expert, given the continued risk of disclosure.
- Mark draft expert reports or other protected expert materials as privileged and confidential.
- Object to discovery requests seeking all expert materials as improper and overbroad.
- Remind expert witnesses that the expert's internal notes and other documents related to his or her work (including testing reports and notes), may remain discoverable.