



Alerts

Supreme Court Approves Amendments to Federal Rule of Civil Procedure 26 Limiting Discovery of Expert Witnesses

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Lawyers for the Profession® Alert

Report of the Civil Rules Advisory Committee of the U.S. Judicial Conference, Proposed Amendments to Federal Rule of Civil Procedure (FRCP) 26 (proposed Sept. 2009), (adopted by the Supreme Court April 2010).

Brief Summary

The U.S. Supreme Court approved amendments to FRCP 26. The revised rule will limit the information experts are required to disclose in discovery and also will grant work product protection to experts' draft reports and to a range of communications between attorneys and certain experts. The amendments will take effect December 1, 2010, provided Congress does not intervene.

Complete Summary

The Supreme Court has approved amendments to FRCP 26 that will reduce the discoverability of expert witness information. The amendments will take effect December 1, 2010, provided Congress does not intervene. The amendments extend work product protection to expert witness draft reports and, with certain specified exceptions, to communications between attorneys and experts retained or specially employed to provide testimony.

Regarding expert reports, the amended rule first makes clear that not every expert is required to submit an extensive report describing the basis for the expert's opinions. Those who are required to submit reports (*i.e.*, those who are retained or specially employed to provide testimony) will be required to report, *inter alia*, "facts or data considered by the witness in forming" opinions. This requirement is intended to be narrower than the previous requirement, which called for disclosure of "data or other information" considered in forming opinions. Regarding those who are not required to submit reports (*e.g.*, physicians in many cases), the new rule imposes a more limited disclosure requirement. Namely, the subject matter and a summary of facts and opinions on which the witness is expected to testify must be disclosed.

The amended rule provides that drafts of such reports or disclosures — regardless of form — are protected by the work product doctrine. Further the new rule generally extends work product protection to communications between attorneys and those experts who are required to submit reports. There are, however, three exceptions to this work product protection, for communications

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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 upon in forming the opinions to be expressed.

Notably, this work product protection does not extend to communications between attorneys and experts who are not required to submit reports.

Significance of Amendments

These important amendments are designed to remedy problems that arose following the 1993 amendments to FRCP 26. Specifically, the amendments are designed to promote and protect robust communications between attorneys and certain experts, and to ameliorate the inefficiency and expense caused by both the existing broad discovery requirements, and the countervailing attempts to avoid such discovery.

In its report on the recent amendments, the Civil Rules Advisory Committee of the U.S. Judicial Conference noted that the new rule addresses the reality that it may be difficult for attorneys to get extensive reports from certain experts. The committee also acknowledged that attorneys have devised methods of avoiding the 1993 disclosure rules, such as retaining consulting-experts, which result in higher costs for the client and largely render the opposing party's discovery efforts futile. The amended rule attempts to address these issues without losing the benefit of having some degree of expert discovery.

It bears note that the work product protection is not absolute in this context and can, in theory, be overcome on the same bases as in other contexts. Nonetheless, the express protections here are likely to provide a strong presumptive shield for the information.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.