



The “Attorney-Expert” work product protection under the federal rules

How courts have interpreted the amendments over the past five years under various scenarios

By **BRIAN J. MALLOY**

Over the past five years, parties in federal court have been operating under a new “attorney-expert” work-product protection. This new protection differs significantly from the expert practice in California state court. As of December 1, 2010, Federal Rule of Civil Procedure Rule 26 was amended to make a host of information that was previously discoverable – and still is discoverable under California state law – off limits. This article will examine these relatively new limitations on expert discovery and how courts have interpreted the

amendments over the past five years under various scenarios.

At the outset, nothing prevents parties in federal court from reaching agreements which differ from these requirements. Nor does anything prevent parties in state court from agreeing on these limitations, if you believe it is desired for a particular case.

The relatively new federal rule regarding expert discovery

• Expert disclosure obligations under the federal rules

Rule 26 provides the requirements for civil disclosure and discovery in

federal court. Rule 26(a) requires mandatory disclosures of various items, including (unless agreed upon differently by the parties), the identity of expert witnesses. Rule 26(a)(2) addresses the disclosure of expert testimony. There are two types of disclosures: one for witnesses who must provide a written report (Rule 26(a)(2)(B)) and one for witnesses who do not need to provide a written report (Rule 26(a)(2)(C)). A witness must provide a written report if he or she “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.” Rule



26(a)(2)(B).¹ For other witnesses, those who are not required to provide a report, the disclosure must nevertheless state “the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705” and “a summary of the facts and opinions to which the witness is expected to testify.” Rule 26(a)(2)(C).

• **Work product protection for draft reports and expert/attorney communications**

One of the changes to the expert report requirements was on the content of the written report for retained experts. Rule 26(a)(2)(B). Experts no longer have to disclose “the data or other information considered by the witness” as was prior law, but now must only list “the facts and data considered by the witness . . .” Rule 26(a)(2)(B)(ii). Note, though, that this is not just “facts or data” *relied upon*, but broader as to any fact or data *considered*.

The meat of the changes occurred with Rule 26(b)(4)(B) and (C), which makes draft reports and certain communications off-limits from discovery. Draft expert reports are shielded from discovery under Rule 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.”

Rule 26(b)(4)(C) addresses communications between an expert and attorney. Such 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 communication” are generally² protected from disclosure except to the extent 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.” Rule

26(a)(2)(C)(i)-(iii). Under the federal rules, then, email communications between the expert and attorney are no longer discoverable, provided the email communication does not fit within one of the three exceptions (compensation, facts or data considered, or relied-upon assumptions).

The Advisory Committee Notes to these amendments state that they were added to “to provide work-product protection against discovery regarding draft expert disclosures or reports and – with three specific exceptions – communications between expert witnesses and counsel.”

These changes differ significantly from California law. In California, “all discoverable reports and writing” of a retained expert must be produced upon a timely expert demand. (CCP § 2034.210(c); CCP § 2034.270.) Thus, draft reports are discoverable. An expert’s unreasonable failure to produce all discoverable reports and writings may result in the exclusion of that expert’s testimony. See CCP § 2034.300(c). Counsel may inquire into all communications that the expert had with the retaining attorney regarding the assignment, including matters that go beyond compensation, the providing of facts or data and assumptions.

• **Case law interpreting these new amendments under various situations**

In the five years since these rules became effective, courts have had some occasion to interpret the scope.

In *Republic of Ecuador v. MacKay*, 742 F.3d 860 (9th Cir. 2014), the Ninth Circuit took a broad view of discovery and a narrow view of the protection, rejecting Chevron’s argument “that the plain language of Rule 26(b)(3) generally protects expert materials as trial preparation materials prepared ‘by or for’ a party or a party’s representative.” *Id.* at 864. Instead, consistent with the other Circuit Courts of Appeal to address the issue, *MacKay* recognized that “[t]here 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.” *Id.* at 864-871.

MacKay noted that while “discussions 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,” “[m]aterials containing ‘factual ingredients’ are discoverable . . .” *MacKay*, 742 F.3d at 870 ((quoting Rule 26(b)(4)’s Advisory Committee’s Notes (2010 amendments)). When focusing on whether these protections apply, “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.” *MacKay*, 742 F.3d at 870.

There are a number of situations where Rule 26(b)(4)’s protections may not be so clear.

What if an attorney prepares a summary of factual information and provides the expert with this summary? In *Damgaard v. Avera Health*, No. CV-13-2192, 2015 WL 4993701 (D. Minn. June 18, 2015), a medical malpractice case, experts during their depositions testified to reviewing a timeline and charts prepared by the attorney’s office. The attorney refused to produce the timeline and charts, claiming they were not discoverable under Rule 26(b)(3). The court ordered the production of the timeline and charts, finding them to contain factual information provided to the experts. The court, however, did allow for the redaction of “comments” in a separate section of the chart, finding that the “comments” were not “facts or data” but instead were protected work-product.

What if a prior report does not have “draft” stamped on it? *Inman v. General Electric Company*, No. 2:11-cv-666, 2015 WL 5084312 (E.D. Cal. Aug. 27, 2015), denied a plaintiff’s attempt to have defendant produce the documents, determining the documents were “draft



reports” entitled to work-product protection, even though the documents were not labeled “draft.” *Inman* based its finding of “draft reports” because (1) they were unsigned; (2) the expert testified they were drafts; (3) counsel immediately objected to their disclosure; and (4) the documents reflected “differing approaches to countering the matters brought into focus by plaintiff’s testimony and/or plaintiff’s expert report” which “raise a sound inference that they were brought about by discussions with counsel.” (*Id.* at *2.) Given that the documents were entitled to work-product protection, *Inman* further held that the plaintiff did not make a sufficient showing of “substantial need” under Rule 26(b)(3)(A) to overcome the protection. (*Ibid.*)

What if an expert testifies that he or she did not “rely” on the fact or data so the expert is neither listing that information in the report nor producing it? That is not the correct standard. Experts must disclose “the facts and data *considered* by the witness . . .” Rule 26(a)(2)(B)(ii) (emphasis supplied).

Courts have found that a testifying expert has “considered” facts or data “if the expert has read or reviewed the privileged materials before or in connection with formulating his or her opinions.” *Damgaard*, 2015 WL 4993701, *4-5 (citations omitted). The party “must produce 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.” (*Id.* at *4 (citations omitted).) In *Damgaard*, for instance, the testifying experts said they did not rely on the summary charts but the court nevertheless ordered their production. Note, though, that for discovery of the

“assumptions that the party’s attorney provided,” Rule 26(b)(4)(C)(iii) requires that the expert actually relied on those assumptions informing his or her opinion.

What if an expert communicates with a non-attorney in formulating his or her opinion? That communication should be discoverable. According to the Advisory Committee Notes, “[i]nquiry about communications the expert had with *anyone other than the party’s counsel* about the opinions expressed” are not exempted from discovery. Rule 26(b)(4) Advisory Committee’s Notes, 2010 Amendments (emphasis supplied). This makes sense, given that these amendments were to protect against the disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories from discovery. (See *Mackay* (2014) 742 F.3d at 870.)

What if there is a draft report but it was not prepared in anticipation of litigation? The draft report should be discoverable. Rule 26(b)’s protection for draft reports only applies to drafts “that are prepared in anticipation of litigation or for trial.” (Rule 26(b)(3)(A); see also *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, No. 09-CV-3312 ARR VMS, 2013 WL 1680684, at *5 (E.D.N.Y. Apr. 17, 2013).)

These are just some of the new scenarios that courts have grappled with in interpreting the 2010 amendments. In addressing other scenarios that will arise, courts will be guided by “the driving purpose” of these amendments which was to protect an *attorney’s* mental impressions, conclusions, opinions or legal theories from discovery. *Mackay*, *supra*, 742 F.3d at 870

Conclusion

While nothing prevents parties in federal court from reaching agreements which differ from these requirements,

should an agreement not be reached, counsel needs to be aware of these relatively new changes to expert discovery in federal court and how courts continue to interpret what is – and now is not – discoverable attorney-expert communications.



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Endnotes

¹ The written report must contain the following: “(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.” Rule 26(a)(2)(B).

² The materials are “generally” protected because under Rule 26(b)(3)(A), a party may obtain “documents and tangible things that are prepared in anticipation of litigation or for trial” by another party or party representative if those materials are “otherwise discoverable under Rule 26(b)(1)” and “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.”

