Rule 26 Changes and the Protection of Attorney-Client Privilege and Work Product While Working with Expert Witnesses

"A Four Course Dinner"

prepared for your pleasure by the
Roscoe Pound Pupilage

Three Appetizers!

The Case of the Illusive Diploma

The Case of the Secret Email

The Case of the Spying Expert

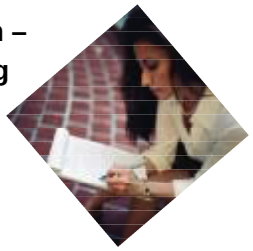
The Main Course!

Current Fed. R. Civ. P. 26(a)(2)(B)

- Rule 26(a)(2)(B) requires testifying experts to file a written report that contains, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions."

Current Status of the Law:

- Majority Position – Assume Anything Shared with an Expert is Subject to Discovery



Examples of the Ease of Waiving a Privilege

- **Conferences** with both the client and expert while discussing the theories and strategies of the case
- **Internal memos** or witness statements shared with the expert
- **Email exchanges** with the expert and client as the expert formulates his or her opinions
- **Commentary** on drafts of opinions

The Work-Product Doctrine

A party may obtain discovery of documents … prepared in anticipation of litigation or for trial "only upon a showing [of] . . . **substantial need** of the materials in preparation of the party's case and that the party is unable **without undue hardship** to obtain the substantial equivalent of the materials by other reasons. In ordering discovery of such materials when the required showing has been made, **the court shall protect** against disclosure of the **mental impressions, conclusions, opinions, or legal theories** of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

- **Will work product protection be strengthened under the proposed changes to Rule 26 that are predicted to be effective December 1, 2010?**

Changes to Rule 26(a)(2)(B) & (C)

- Extends work-product protection to:
  - **Drafts** of Rule 26(a)(2)(B) expert reports and (C) party disclosures [No Report experts]
  - Expert – Attorney Communications WITH EXCEPTIONS

3 Exceptions to Attorney-Expert Communication Require Disclosure

- **Compensation communications**
- **Facts or data the attorney provided to expert that were considered to form expressed opinions *[contrast "the data or other information"]***
- **Assumptions provided by the attorney to the expert that the expert relied upon to form expressed opinions**

Seven Desserts!

Will the changes solve the problems?

- **Will you still have to be careful what you share with an expert?**
- **You will have 2 minutes to decide and provide your best arguments**
- **Judge Piester and Professor Kirst will rule!**

Dilemma 1 – Expert Taking Notes

- **The expert takes notes of all conversations with the lawyer when discussing the facts and theories of the case: are these notes discoverable under the current rule?**
- **The new rule?**

Dilemma 2 – Multiple Test Results

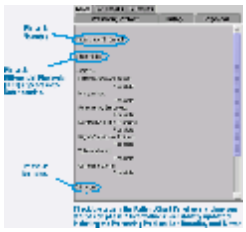
- **The expert has a report that includes charts displaying final test results. Are the results of all prior tests, if any, discoverable under the current rule?**
- **The new rule?**

Dilemma 3 – Drafts of Reports

- The expert e-mails drafts of his report to the attorney and the attorney marks it up with comments and emails it back. Are these drafts with the attorneys' comments discoverable under the current rule?
- The new rule?

Dilemma 4 – Chronologies and Witness Interview Notes

- Are chronologies with notes from witness interviews that an attorney provides the expert discoverable under the current rule?
- The new rule?



Dilemma 5 – Inspections and Emails with Client

- Are the expert's interviews, inspections, or e-mail exchanges with a client discoverable under the current rule?
- The new rule?

Dilemma 6 – Refreshing Memory

- Are the materials reviewed by the expert in preparation to testify to refresh his or her memory discoverable under the current rule?
- The new rule?

Dilemma 7 – Intentionally Conflicting Experts

- To ensure that opposing counsel cannot retain a certain leading expert, an attorney hires all of the leading experts in the field as consulting experts in order to disqualify them from being used by the other side.
- Is this ethical?

Brandy and Cigars!

Practice Pointers: Effective Experts

- What makes an expert most effective with the fact-finder whether a judge or a jury?
- What makes an expert ineffective with the fact-finder whether a judge or a jury?

Questions?

Thank you!

Real World Experiences Compel Changes to Rule 26 Expert Witness Discovery

Jill Robb Ackerman – Baird Holm LLP

Drafts of expert's reports not discoverable? Freedom for attorneys to discuss case theories with an expert without fear of discovery? Routine emails between experts and attorneys no longer discoverable? Treating physicians having to disclose a summary of facts and opinions? Will this be the new pre-trial world under the proposed amendments to Federal Rule of Civil Procedure 26 which are predicted to become effective on December 1, 2010? The Civil Rules Advisory Committee hopes so.

Experts are expensive, but lawyers and clients need experts to help win cases. Lawyers rely on experts to help formulate sustainable case theories by weaving together the salient case facts with the fundamentals and nuances of complex technical fields. The current Rule 26 imposes barriers to the cost effective utilization of experts. Under the common current practice under Federal Rules 26, everything shared with an expert is subject to discovery. As a result, the creation of discoverable paper trails between attorneys and experts is avoided. Time and money are wasted pouring over drafts of expert reports at expert depositions. This total transparency has caused lawyers to fear to speak candidly with experts about theories with the precise people necessary to consult about the formulation of sound proofs. This fear led to the not uncommon but expensive practice of hiring two experts: the first to communicate with frankly and to assist with the selection of the best theories to win a case; the second, to spoon feed information to in order to reach the desired result.

Against this background, the Committee on Rules of Practice and Procedure of the Judicial Conference to the United States drafted modifications to Rule 26 and 1) extended attorney-work product protection to expert drafts, 2) somewhat restricted discovery of materials generated through attorney-expert communications, and 3) reduced reporting requirements for certain types of experts. These modifications are, as the Committee put it, based on "lessons of experience" and not a matter of "high theory." As such, they should make it somewhat easier and significantly cheaper for trial lawyers to deal with expert witnesses, but that does not mean that trial lawyers can completely let their guard down. There are limits to the new general rules, and prudent practice dictates that lawyers ensure the more-relaxed rules applicable to attorney-expert communications do not lead to inadvertent disclosure of work product or privileged information.

The changes to the Rules were approved by the Judicial Conference in September of 2009, and have been forwarded to the Supreme Court for its consideration and recommendation with a recommendation they be adopted and forwarded to Congress. If the rules are forwarded to Congress by May 1, 2010, and Congress does not take action, the changes in the Rule will take effect no later than December 1, 2010.

Changes Made to the "No-Report" Expert Reporting Requirement

The first key area addressed by the Amendments to Rule 26 of the Federal Rules of Civil Procedure tackles the expensive, time-devouring necessity to file a written report for every expert witness, including what is often referred to as "no-report" experts. Under Fed. R. Civ. P. 26(a)(2)(B), a written report generally is required 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 involved giving expert testimony." These reports, as you know, require extensive preparation and need to include significant information, including:

- a complete statement of all opinions the witness will express and the basis and reasons for them;
- the facts or information considered by the witness in forming them;
- any exhibits that will be used to summarize or support them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- 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
- a statement of the compensation to be paid for the study and testimony in the case.

As noted by the Civil Rules Committee Report, the advantages to be gained by requiring reports be filed by experts retained or specially employed to provide expert testimony "so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance." The most common types of these un-retained testifying experts are, of course, treating physicians and government accident investigators – busy people who have not sought to make a career out of providing expert testimony. Rule 26(a)(2)(C) gives these people the opportunity to fulfill their duty to testify without having to sacrifice weekends with the kids to complete a stack of superfluous paperwork.

The new amendments to Rule 26 expressly carve out an exception for expert witnesses that are not specially retained for the purpose of providing expert testimony. Specifically, an expert witness who is not retained or specially employed to provide expert testimony need only disclose in a written report: (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. See Rule 26(a)(2)(C). This rule revision narrows the disclosure to the facts that support the opinions. If the witness is also a fact witness, the witness would not be required to also summarize those facts that are not supporting the opinions. These have become aptly known as "No-Report" expert witnesses. The intent of the rule is to still provides enough information for the attorney to prepare, depose or cross-examine the No-Report expert on his or her opinions.

Trial–Preparation Protection Extended to Expert Draft Reports or Disclosures

The second key area addressed by the Amendments to Rule 26 involves the often thorny province of trial preparation. For years, confusion has reigned as to whether drafts of expert reports must be preserved for discovery, and a split of authority emerged among the federal jurisdictions, with no clear consensus. For example, some decisions required production of draft reports on the belief that the expert could not be properly and fully cross-examined otherwise. *See Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278, 301 (4th Cir. 2007) (concluding that administrative law judge rule of procedure which was similar to Rule 26 mandated the production of draft reports because "we are unable, in these circumstances, to agree that [the] expert witnesses could be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications sought by" the plaintiff). By contrast, other decisions found the preservation of drafts impracticable, particularly where drafts were composed on a word processor and saved over repeatedly in the process of composition. *See Teleglobe USA, Inc. v. BCE Inc.* (*In re Teleglobe Communs. Corp.*), 392 B.R. 561, 573 (Bankr. D. Del. 2008) (concluding: "It does not seem logical that the Rule would require the final report to include a list of all the drafts of that report. Further, because most experts now draft their reports on the computer, adding to and subtracting from the document, it would be impractical to require the production of all drafts). In short, the answer to whether draft reports prepared by experts would be protected work product hinged more on geography than any principled, rational basis. It became an incoherent framework that could result in divulgence of work product information and potentially result in a malpractice claim against the practitioner.

The amendments to Rule 26(a)(4) now provide a clear answer to this vexing question, one that—let's hope—will not be interpreted by the courts to differ depending on which side of the Mississippi your case gets filed. Under the revised Rule 26(a)(4)(B), drafts of any report or disclosure required under Rule 26(a)(2) are protected from discovery by Rules 26(b)(3)(A) and (B). See Rule 26(a)(4)(B). Because expert's generally "save over" edits of the draft of a report in the process of adding to and subtracting from the report—as the expert normally would be instructed to do by the attorney—it makes sense that the rule reflect the practical realities of litigation. Even better, questions as to the contents or evolution of draft reports also are barred, according to the Committee Notes. As such, so long as the courts follow the Committee's lead, draft-report discovery battles should go the way of the dodo.

Trial Preparation Protection Afforded to Attorney–Expert Communications

Similarly, Rule 26(a)(4)(C) now provides that Rules 26(b)(3)(A) and (B) generally protect communications between the party's attorney and any expert witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications. Inquiry at deposition or trial as to conversations between an expert and lawyer primarily serve to create the impression that the opinions expressed by the expert are the lawyers and not the experts. While such tactics are common, they do little to test the strength of the opinions based on the science, technology or other specialized field. With the new restrictions on inquiry as to such communication, cross examination will have to challenge the underpinnings of the opinions rather than wasting time mounting a formula attack on credibility.

Currently, lawyers instruct the expert to conduct all communication on an oral basis to avoid generating a paper trail that could be required to be produced. *See, e.g., Colindres v. Quietflex Mfg.*, 228 F.R.D. 567, 571 (S.D. Tex. 2005) (finding that "information that the expert creates or reviews related to his or her role as a testifying expert must be produced," even when materials are privileged, and finding no work-product protection for unsolicited e-mail that defendants' expert sent to defense counsel). Given how much communication now takes place via email and how much time can be saved through that medium, attorneys and experts were hamstrung in trial preparation by the uneven restrictions imposed by certain courts on their ability to communicate.

The revised Rule 26 generally resolves many of the problems that arise from the de facto prohibition on written communication with experts, but this new provision, under the new Rule 26(a)(4)(C) subsection, includes three exceptions to the general rule of nondiscoverability. Specifically, communications between the party's attorney and any expert witness required to file a report may be discoverable to the extent that the communications:

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

Fed. R. Civ. P. 26(a)(4)(C).

As highlighted by the Civil Rules Committee Report on the revisions to Rule 26, the argument for extending work product protection to drafts and some attorney-expert communications is "profoundly practical." As a matter of experience, most attorneys agree that "attempted discovery on these subjects almost never reveals useful

information about the development of the expert's opinions.... Most attorneys agree that so long as the attempt [to discover these communications] is permitted, much time is wasted by making the attempt in expert depositions, reducing the time for more useful discovery inquiries." Besides, it is not uncommon for parties to stipulate that such material will be out-of-bounds for purposes of the expert depositions, both parties recognizing the colossal waste of time and money that such discovery can engender.

The costs to clients of permitting discovery of attorney-expert communications and drafts was not the only motivation for foreclosing discovery in these areas that the Committee discussed. The Committee also noted that "fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of an expert's opinion." Naturally, these self-imposed restraints on communication with expert witnesses inhibit free communication that might lead to more sophisticated and helpful opinions and preclude use of a trial-expert witness for help understanding an adversary's expert witness report, preparing for deposition, or evaluating settlement proposals. It also means that litigators have to bend over backwards to make sure that attorney-expert communications are never memorialized. As the Committee Notes indicated, "[e]xperts and counsel often go to great lengths to avoid creating draft reports, creating drafts only in electronic or oral form, deleting all electronic drafts, and even scrubbing hard drives to prevent subsequent discovery." Additionally, some of the best potential experts are not utilized because you would actually have to talk with them about their role. As the Committee Notes put it, attorneys exhibit a "reluctance to hire potentially superb experts who have not become professional witnesses, for fear that discovery of the necessary conversations that tell them how to behave as witnesses will destroy their usefulness."

Of course, the primary means for evading this snare in the past has been to hire two experts, one for consulting and one for testifying purposes. As the Committee Notes indicated, "many outstanding lawyers ... routinely stipulate out of discovery of draft reports and attorney-expert communications. They find the costs of engaging in such discovery far higher than the infrequent small benefits that may be gained." However, because the practice of such stipulations is not universally followed, the default rule among litigators has been to engage two experts. In practice, this has meant that clients with deep pockets potentially enjoyed a significant advantage from the perspective of trial preparation. Courts that permitted discovery of all material considered by an expert even acknowledged this "harsh" reality. See, e.g., *Mfg. Admin. & Mgmt. Sys. v. ICT Group, Inc.*, 212 F.R.D. 110, 114 (E.D.N.Y. 2002) (mandating disclosure of attorney core work product supplied to testifying expert and noting in an extensive analysis of policy considerations that "effective cross-examination and the integrity of the fact-finding process outweigh the costs of retaining two experts. Modern-day litigation is an expensive proposition, and the reality of certain financial barriers is harsh, but basic equity in an adversarial system necessarily entails costs and all courts are bound by the creed of fairness").

To Narrow Discovery the Terms "Facts or Data" Replaces "Data or Other Information"

The revisions still require a complete statement of all opinions the witness will express and the basis and reasons for them and the facts or data considered by the witness in forming them. However, the phrase "facts or data" has replaced the phrase "data or other information." Whatever the intent of the drafters of the 1993 Amendments to Rule 26, "other information" was interpreted by courts over the years so that this seemingly innocuous catchall came to permit discovery of everything inside your expert's head except her favorite color. As the Committee Notes state, "Time has obscured the meaning of these words... [and] most courts now allow free discovery of draft expert reports and all communications between attorney and expert witness as 'information considered by the expert.'"

Some lawyers supported the retention of this kitchen-sink approach to expert discovery because, to a certain extent, it makes sense to evaluate any potential influence of counsel on the evolution of the expert's opinions. After all, as the courts recognized, such information bears on the credibility of the opinions of the expert's independent view. Besides, the 1993 Committee Notes stated:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

It's hard to gainsay such plain language, and given that the 1993 Committee Note did not invoke the special Enabling Act limits (28 U.S.C. § 2074(b)) that require an Act of Congress to approve any rule creating, abolishing, or modifying an evidentiary privilege, it stands to reason that the Note probably reflects an understanding of privilege rules as they were and as they would be applied under the 1993 Committee's revisions.

Because the revisions to the rule are predicated upon actual attorney experience and not theoretical utility, the new phrasing reins in the exhausting process associated with exhaustive expert pre-trial discovery. Under the old Rule 26, the decisions that required disclosure of all work product divulged to an expert witness typically focused on the "data and *other information considered by*" language to make discoverable every snippet of information that crossed the expert's desk. *See, e.g., MCI Communs. Corp. v. Dataline, Inc.*, 2001 U.S. Dist. LEXIS 18144 (S.D.N.Y. Oct. 29, 2001) (ordering production of all documents furnished to a testifying expert "whether or not ultimately relied upon by the expert").

Under the revised Rule 26, the phrase "facts or data" should help curb the encyclopedic tendency among some of us and restore focus to the discovery of information actually relied upon by the expert in forming his or her opinions. The Committee Notes indicate that the new phrase was intended to "be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert."

For purposes of the new Rule 26, "facts" are just that—the facts—so the term that now has the potential for more expansive interpretation is "data." Data is defined by the Encarta Dictionary as "information, often in the form of facts or figures obtained from experiments or surveys, used *as a basis for making calculations or drawing conclusions*" (emphasis added). The Committee Notes clarify that the exception applies only to communications "identifying" the facts or data provided by counsel and that further communications about the potential relevance of the facts or data are protected. Thus, to the extent that the courts emphasize the italicized portion of this definition, the limits on discovery intended to be implemented by the revised Rule 26 should be realized.

Despite these stronger protections, the revised Rule 26 does not create a cone-of-silence under which all communication with experts vanishes into nothingness. First, it should be noted that the new protections for draft reports and communications apply only to communications with experts required by the revised rule to file a report. As noted by the Committee Notes, the rule provides no protection for communications between counsel and other expert witnesses that are not required to file a report (such as treating physicians or accident investigators).

Second, the Committee Notes acknowledged that the rule continues to accept the established discovery practice that subjects an expert's opinions to intense examination. In particular, "inquiry continues to be permitted as to the opinions, their foundations, all facts or data considered in forming the opinions and the sources of the facts or data, assumptions made, alternatives considered and rejected, alternatives not considered, persons consulted, and still other matters." So inquiry about communications with anyone other than a party's counsel is unaffected by the rule.

Third, the amendments to the rule invoke "work-product standards that allow discovery of draft reports or attorney-expert communications on showing substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means." Consequently, the stronger protections for draft reports and certain attorney-expert communications sometimes may fail to protect from discovery your interaction with experts.

Moreover, the three exceptions enumerated under Rule 26(a)(4)(C) guarantee that the following remain discoverable: an expert's compensation, the facts and data considered, and the assumptions provided by the party's attorney and relied upon by

the expert. The Committee Notes state that compensation includes: all compensation for the study and testimony related to the action; compensation paid to anyone associated with the expert; and any communications about future benefits to the expert, such as further work in the event of a successful result in the present case. The exception requiring disclosure of the assumptions provided by the party's attorney and relied upon by the expert encompasses disclosures such as assumptions regarding the accuracy of evidence or other expert's conclusions, but does not encompass discussions about hypothetical facts or possibilities explored based on a hypothetical, according to the Committee Notes.

A Dozen Sensible Suggestions

An analysis of the revisions, leads me to the conclusion that the revisions themselves will not eliminate all disputes. However, attorneys can take steps to maximize the chances of averting or winning such disputes. Here are a dozen pointers for you to mull over.

1. Right up front explain the ground rules to the expert and be sure the expert understands the rules. Give the expert concrete examples of what is and is not protectible.

2. Use a separate "Compensation Letter" or agreement to set forth the terms of the expert's compensation.

3. Implement procedures to control, segregate and track how facts and assumptions are conveyed to the expert. Formally providing facts and assumptions to an expert will reduce the chance that other communications between the lawyer and expert will be challenged for production. Use Facts, Data and Assumptions (FDA) Letters stating exactly what facts and data you are transmitting and providing the expert for review, and any assumptions you are directing the expert to make. Do not commingle any discussions of the theory of the case or anything else you do not want the court or your opponent to see in either the Compensation or FDA letter.

4. Convey the facts to experts through affidavits, declaration, answers to interrogatories, or depositions of witnesses. If you provide the facts orally to the expert and he or she takes notes, arguably these notes are discoverable.

5. If the expert takes notes while conversing with you, it will be easier to protect such notes from discovery if the expert clearly marks the notes as attorney–expert work product communication and keep the notes segregated. Establishing that you provided the facts and assumptions in clearly defined packages, and not in oral conversations, will also help protect those notes from being produced.

6. Consider waiting to discuss theories of the case with the expert until you have conveyed key facts and assumption to the expert through the FDA letter and accompanying pleadings, depositions or affidavits. While drafts of expert reports will

not routinely be discoverable, discussions of theories of the case and strategies should take place orally. Remember you may still have to list all documents that you claim protected on a log.

7. Remember that the attorney–expert communication protection does not extend to No-Report experts. However, drafts of the No-Report expert disclosures will be protected from disclosure.

8. At times you may still need to hire a consulting expert first. The Committee Note makes it clear that counsel will still be "free to question expert witnesses about alternative analysis, testing methods, or approached to the issues on which they are testifying, [and] whether or not the expert considered them in forming the opinions expressed." Hiring a second expert may be the only way to protect unfavorable tests or statistical runs from providing a treasure map for opposing counsel. It is one thing to ask an expert about other tests he or she could have run, versus having a bad test laid or statistical chart laid out in detail.

9. Caution the expert that while routine e-mails between experts and lawyers may not be discoverable, most communications the experts has with others will likely be discoverable.

10. Do not hesitate to object at deposition to improper inquiry. Attorney/expert discussions about hypothetical, or exploring possibilities based on hypothetical facts are protected and opposing counsel should not be allowed to ask questions about these discussions.

11. Do not share documents that you do not want to produce with an expert to refresh the expert's memory before testifying because such documents may have to be produced under Federal Rule of Evidence 612.

12. Remember these proposed rules are for the federal courts – the majority position in state courts is that expert–attorney work product protection does not apply.

With these changes, you should be more comfortable candidly discussing your case with an expert without fear of discovery. Whether this will ultimately reduce litigation costs or simply create more discovery disputes over different expert issues will remain to be seen. Keep a close watch for when the changes actually are to go into effect; December 1, 2010, is only a well–founded prediction.

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Agenda E-19 (Summary)
Rules
September 2009

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 2-3

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 4-7

   b. Approve the proposed revision of Exhibit D to Official Form 1 and of Official Form 23 to take effect on December 1, 2009. . . . . pp. 5-7

3. Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 9-19

4. Approve the proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 20-24

5. Approve the proposed amendments to Evidence Rule 804(b)(3) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 26-27

Informational Items

The advisory committee is revising and modernizing bankruptcy forms. As part of this project, the advisory committee is analyzing the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and possible approaches to take advantage of technology advances. The advisory committee has retained the services of a consultant who is expert in designing forms.

The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which address appeals to district courts and bankruptcy appellate panels. The advisory committee is considering whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. Though based on the original Appellate Rules, Part VIII has not been updated to account for the amendments to the Appellate Rules or for changes in practice during the past 25 years. A miniconference of judges, lawyers, and academics was held in March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision. An additional miniconference has been scheduled for September 2009 at Harvard Law School in conjunction with the advisory committee's fall meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The

proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to "discharge" in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice's concern that courts and litigants should be aware that some categories of debt are excepted from discharge.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar

organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public

comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-

product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

To: **Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 8, 2009 (Revised June 15, 2009)**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009.

* * * * *

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee's November meeting began. The remaining hearings were held on January 14, 2009, following the Standing Committee meeting in San Antonio, and on February 2 in San Francisco.

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007.[1]

* * * * *

[1]Following the Standing Committee's meeting on June 1-2, 2009, the Rules Committees approved by email ballot conforming, technical amendments to Illustrative Civil Form 52.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

The Committee recommends approval for adoption of the provisions for disclosure and discovery of expert trial witness testimony that were published last August. Small drafting changes are proposed, but the purpose and content carry on.

These proposals divide into two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

These two parts are described separately. Each applies only to experts who are expected to testify as trial witnesses. No change is made with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation.

New Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

The 1993 overhaul of expert witness discovery distinguished between two categories of trial-witness experts. Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires that the witness must prepare and sign an extensive written report describing the expected opinions and the basis for them, but only "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." It was hoped that the report might obviate the need to depose the expert, and in any event would improve conduct of the deposition. To protect these advantages, Rule 26(b)(4)(A) provides that an expert required to provide the report can be deposed "only after the report is provided."

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance. Common examples of experts in this category include treating physicians and government accident investigators. They are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

Proposed Rule 26(a)(2)(C) balances these competing concerns by requiring that if the expert witness is not required to provide a written report under (a)(2)(B), the (a)(2)(A) disclosure must state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and "a summary of the facts and opinions to which the witness is expected to testify." It is intended that the summary of facts include only the facts that support the opinions; if the witness is expected to testify as a "hybrid" witness to other facts, those facts need not be summarized. The

sufficiency of this summary to prepare for deposition and trial has been accepted by practicing lawyers throughout the process of developing the proposal.

As noted below, drafts of the Rule 26(a)(2)(C) disclosure are protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Rule 26(b)(4): Work-Product Protects Drafts and Communications

The Rule 26(a)(2)(B) expert witness report is to include "(ii) the data or other information considered by the witness in forming" the opinions to be expressed. The 1993 Committee Note notes this requirement and continues: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Whatever may have been intended, this passage has influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the (a)(2)(B) report.

Discovery of attorney-expert communications and of draft disclosure reports can be defended by arguing that judge or jury need to know the extent to which the expert's opinions have been shaped to accommodate the lawyer's influence. This position has been advanced by a few practicing lawyers and by many academics during the development of the present proposal to curtail such discovery.

The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

The losses incurred by present discovery practices are not limited to the waste of futile inquiry. The fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert's opinion. This disadvantage may be offset, when the party can afford it, by retaining consulting experts who, because they will not be offered as trial witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to "information" that has supported broad interpretation of the 1993 Committee Note: the expert's report is to include "the facts or data ~~or other information~~ considered by the witness" in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices. The American Bar Association Litigation Section took an active role in proposing these protections, drawing in part from the success of similar protections adopted in New Jersey. The published proposals drew support from a wide array of organized bar groups, including The American Bar Association, the Council of the ABA Litigation

Section, The American Association for Justice, The American College of Trial Lawyers Federal Rules Committee, the American Institute of Certified Public Accountants, the Association of the Federal Bar of New Jersey Rules Committee, the Defense Research Institute, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges' Association, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, the Lawyers for Civil Justice, the State Bar of Michigan U.S. Courts Committee, and the United States Department of Justice.

Support for these proposals has been so broad and deep that discussion can focus on just two proposed changes, one made and one not made. Otherwise it suffices to recall the three categories of attorney-expert communications excepted from the work-product protection: those 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.
> The change made adds a few words to the published text of Rule 26(b)(4)(B):
> **(B)** * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which ~~of~~ the draft is recorded.

The published Committee Note elaborated the "regardless of form" language by stating that protection extends to a draft "whether oral, written, electronic, or otherwise." Comments and testimony expressed uncertainty as to the meaning of an "oral draft." The comments and testimony also reflected the drafting dilemma that has confronted this provision from the beginning. Rule 26(b)(3) by itself extends work-product protection only to "documents and tangible things." Information that does not qualify as a document or tangible thing is remitted to the common-law work-product protection stemming from Hickman v. Taylor. As amended to reflect discovery of electronically stored information, moreover, Rule 34(a)(1) may be ambiguous on the question whether electronically stored information qualifies as a "document" in a rule — such as Rule 26(b)(3) — that does not also refer to electronically stored information. Responding to these concerns, the Discovery Subcommittee recommended that the "regardless of form" language be deleted, substituting "protect written or electronic drafts" of the report or disclosure. Lengthy discussion by the Committee, however, concluded that it is better to retain the open-ended "regardless of form" formula, but also to emphasize the requirement that the draft be "recorded." The Committee Note has been changed accordingly.

The change not made would have expanded the range of experts included in the protection for communications with the attorney. The invitation for comment pointed out that proposed Rule 26(b)(4)(C) protects communications only when the expert is required to provide a disclosure report under Rule 26(a)(2)(B). Communications with an expert who is not required to give a report fall outside this protection. (The Committee Note observes that Rule 26(b)(4)(C) "does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.") The invitation asked whether the protection should be extended further. Responding to this invitation, several comments suggested that the rule text either should protect attorney communications with any expert witness disclosed under Rule 26(a)(2)(A), or — and this was the dominant mode — should protect attorney communications with an expert who is an employee of a party whose duties do not regularly involve giving expert testimony. These comments argued that communications with these employee experts involve the same problems as communications with other experts.

Both the Subcommittee and the Committee concluded that the time has not come to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some "no-report" experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be "fact" witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert's fact testimony may have been influenced.

Three aspects of the Committee Note deserve attention. An explicit but carefully limited sentence has been added to state that these discovery changes "do not affect the gatekeeping functions called for by Daubert v. Merrell Dow Pharmaceuticals, Inc. * * *." The next-to-last paragraph, which expressed an expectation that "the same limitations will ordinarily be honored at trial," has been deleted as the result of discussions in the Advisory Committee, in this Committee, and with the Evidence Rules Committee. And the Note has been significantly compressed without sacrificing its utility in directing future application of the new rules.

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Rule 26. Duty to Disclose; General Provisions Governing Discovery[**]

(a) Required Disclosures.

* * * * *

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be

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[**]In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

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:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ 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.

(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 ~~the~~ ~~Rule 26(a)(2)(A)~~ 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.

(D~~C~~) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C),

within 30 days after the other party's disclosure.

(ED) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

* * * * *

(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.

(C) *Previous Statement.* Any party or other person may, on request and without the

required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been

identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(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 ~~of~~ the draft is recorded.

(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 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) rRelate to compensation for the expert's study or testimony;

(ii) iIdentify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) iIdentify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(DB) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held

by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E~~C~~) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D~~B~~); and

(ii) for discovery under (DB), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Committee Note

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another

to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that 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 prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

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. At the same time, 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. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is 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. This disclosure is considerably less extensive than the report required by Rule

26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

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 health care 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.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also

applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is 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. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

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 those opinions. For example, the expert's testing of material involved in litigation, and notes of any 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 are also free to 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.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not

limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under 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. 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. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

Twenty Practical Steps *to* Protect *the* Attorney-Client *and the* Work-Product Privileges *while* Working with Experts

By Jill Robb Ackerman *

Experts routinely provide critical elements of proof for both plaintiffs and defendants. Experts help guide lawyers through unfamiliar disciplines. Experts serve the adjudicatory process by analyzing relevant facts from the perspective of their field of expertise. Experts are expected to tell the truth and apply their skills within their field of expertise to assist the trier-of-fact determine the truth.

Efficiently preparing testifying experts to help prove your client's case, without waiving attorney-client privilege[i] or work-product privilege[ii], is a challenge. These privileges can easily be waived. For example, these privileges are waived if the litigator shares internal memos or witness statements with the expert; exchanges emails with the expert and client as the expert formulates his or her opinions; or, sits down with both the client and expert and has frank discussions about the theories and strategies of the case.[iii]

The majority rule is that communications between a lawyer and the testifying expert are not privileged, but must be disclosed to the other side as information relied on to formulate his or her opinion.[iv] Disclosure of the information affords the other party a basis to test the opinions and challenge their foundation. All oral statements, notes, scraps of paper and drafts of a report related to the case are fair game for discovery.

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The contents of this article originally appeared in connection with Ms. Ackerman's moderating a panel discussion on the proposed amendments to Rule 26, Federal Rules of Civil Procedure, at the ABA's 2009 annual meeting in Chicago.

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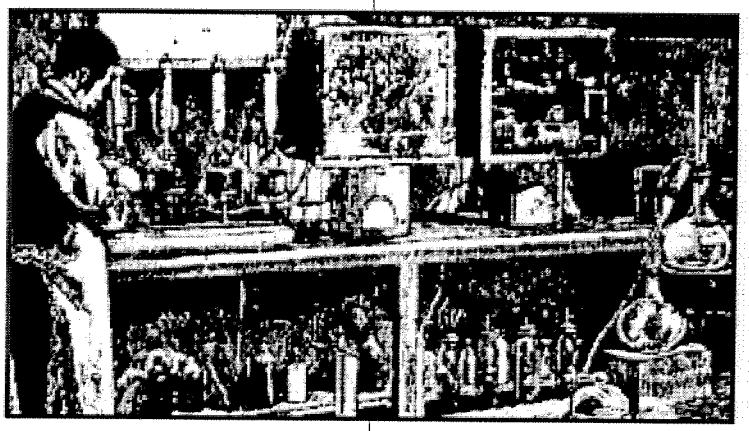
Tension is created by the need for a litigator to communicate relevant information to the expert and the need to do so in a manner that does not waive privileges or creates the impression that the opinion of the expert is the opinion of the attorney rather than of the expert.

Experts are not effective if the expert uses sloppy language that does not express his or her true intent. Experts can be dangerous if they use language that has specific meaning in the legal world that is contrary to necessary proofs in the case. Experts lose credibility if notes or earlier drafts of reports reflect opinions that are less favorable to the retaining party than the opinions expressed in later drafts.



Most, if not all, of these issues can be avoided if the litigator takes an active approach when working with the expert while being ever vigilant to protect the attorney-client and work-product privileges. The following steps can help reduce the risk of waiving such privileges while insuring that the expert's report and testimony will help prove your client's case.

Twenty Practice Pointers:

1. Do your research in advance. Have a good idea what the expert will say before retaining the expert to testify. Test theories in complicated cases with consulting experts before retaining the testifying expert. This takes preplanning. Be careful that you do not taint your best testifying expert by allowing him or her to perform tests that have unknown results that may create evidence negative to your case. Start early. Due to the tight timelines in many federal courts, you can end up disclosing experts that you will have to withdraw if you do not know their opinions before the time of disclosure.

2. Do not permit the experts to take notes in introductory discussions while you are exploring whether to retain them as a testifying expert. Impose this rule whether the discussions are face-to-face or over the telephone. While oral communications are discoverable, as a practical matter, an expert's memory of the details of oral conversations will fade.

3. Explain to the expert that every note taken, every document reviewed and every draft of his or her report will have to be saved and produced. Many preliminary thoughts can and will be misconstrued. Explain that any conversations about the case, any information reviewed, and any documents created can and will be used against the expert.

4. Discuss the extent and terms of the engagement thoroughly before committing the terms to paper. Discuss the issues that the expert will be asked to address in his or her opinions. Then, succinctly and objectively set forth the points clearly in a letter. That letter will serve as the basis for the expert to correctly answer the question, "What were you asked to do in the case?"

5. Out of caution, even if you have vetted the expert's potential opinions, retain the expert as a consulting expert. Then if his or her opinions will assist in proving your case, change the expert to a testifying expert. Only make this change after you have reviewed prior writings and testimony of the expert to insure that the expert has not expressed inconsistent and unexplainable opinions in other forums.

6. Control what is provided to the expert. Provide a copy of the complaint and answers, responses to interrogatories or requests for production in order to explain the theories of the case. This use of unprivileged documents will help guide your explanation of the theory of the case to the expert. Do not let the expert take notes during these discussions.

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17. Caution the expert not to use legal terms unless he or she discusses those with you first. Many times problems arise because of the differences in the terminology used in the expert's field versus the legal field. In particular, experts seem to have difficulty with the concept of legal causation versus the concept of causation in their field of expertise. For example, a correlation between two variables that are related may be evidence of legal causation, but a correlation between two variables is distinct and separate from the concept of causation in the field of statistics.

18. Consider reaching an agreement with opposing counsel in advance not to require production of drafts of expert reports or expert communications with counsel.

19. Many times financial or statistical calculations must be run. Be sure that the expert only runs the calculations that are absolutely necessary to his or her opinions and that are required by his or her field of expertise as a necessary practice. Otherwise you run the risk of creating bad facts and having to hand the facts to the opposing party in a nice neat package.

20. It is likely that the expert will have to produce any versions of the report that the lawyer reviewed with the expert. For that reason, be sure that by the time the litigator reviews a draft, all that remains to be done is to review for clarity and completeness.

As a final note, experts can be an integral part of a case and truly help mold the selection of theories and proof. You might find yourself working very closely with the expert over a significant period of time. Be careful to not become too comfortable with the expert. Do not let your guard down. Simply do not share any information, whether orally or in written form, with the expert that you do not want shared with the opposing party.

Footnotes

i. *Upjohn Co. United States*, 449 U.S. 383, 389 (1981).

ii. *United States v. Nobles*, 422 U.S. 225, 238 (1975)

iii. Confidentiality is the key to these privileges. Waiver will occur if the party attempting to use the privilege discloses the substance of the otherwise privileged information to third parties. *In re Qwest Communications Intern, Inc.* 450 F.3d 1179, 1185-1186 (10th Cir. 2006).

iv. Epstein, Edna Selan. The Attorney-Client Privilege and the Work-Product Doctrine, 993-1003 (5th ed. American Bar Association 2007)(Two volume treatise that summaries specifics of waiver of these privileges under multiple jurisdictions).

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7. Do not share privileged internal memoranda or other confidential documents that have been prepared to assist in trial, or you will waive the privilege to these documents. Do not share witness statements with the expert. Do not provide summaries of testimony or documents to the expert. If this information is shared, it will be subject to discovery.

8. Do not create a paper trail for the opposing party. Use the telephone, not emails or letters. Do not allow emails back and forth unless it is simply a transmittal of electronic data or documents necessary for the opinion. Even emails confirming meetings and phone calls will be a road map for the other party to use to raise inferences that the expert is simply a paid mouthpiece for the attorney. Emails only serve as another vehicle for the opposing party to create doubts about the expert's work. It is simply too easy for the expert to note, "Ms. Litigator told me that..." Similarly, do not allow letters back and forth.

9. Caution the expert not to disclose the information provided to him or her to anyone else. Do not allow the expert to email other colleagues about the matter. This rule should apply even if the email is to communicate to someone with whom the expert is working.

10. Discuss the expert's usual method of working. What notes does he or she usually take? Forbid note taking while talking with the lawyer. If the expert must take notes when interviewing people or inspecting premises, be sure to caution the expert to think before writing the notes. Again, these will be subject to close scrutiny by the opposing party.

11. Discuss whether the expert generally creates versions of reports. The preference is for the expert only to create one version. Due to the requirement to preserve documents, if the expert generates electronic versions of reports, or prints out drafts of the report, the expert will likely have to produce each marked up draft or be subject to allegations that he or she destroyed relevant evidence. Tell the expert to use one version and make all changes on that version. Tell the expert that he or she will be grilled on every single change made in the document even though some thoughts may be subject to change as he or she finalizes his or her thoughts. Then if the expert is asked, "Did anyone tell you to create one version?" The expert can give the exact answer and reason.

12. If the expert insists on creating versions of the report, be sure the expert expressly marks the document "Draft Only-Subject to Significant Revisions." Explain to the expert that he or she will be subject to being questioned on every single difference between any drafts and the final report.

13. Do not let the expert create an electronic trail. Many experts today simply create one version of the report and keep it on a thumb drive. If the expert travels with a laptop, have the expert create and keep only the version of the report on the laptop.Caution the expert to not create the report on a desktop computer, then transfer the document to a laptop to travel or use a thumb drive to transport the document for review, because the expert may well be leaving an electronic trail subject to discovery. Requests to copy drives of experts are becoming more common.

14. If the expert must interview your client or your client's employees, prepare your client before the visit. Inform your client that any information shared with the expert will not be privileged. Be sure that an attorney is present during such interviews. Be selective who the expert interviews because that person will be a possible witness. If two people have information and only one needs to talk with the expert, pick the person that will make the best witness and will be least likely to damage the case. Again, caution the expert to carefully think before making any notes and that any notes can be used against him or her.

15. If the expert must inspect a scene or equipment consider whether you want the client there. Again, anything that the client says to the expert will not be privileged.

16. Do not allow the expert to write any opinion or report without having completely discussed the details of what will be said. Consider sitting with the expert as he or she initially drafts the report to insure that nothing is written down that hurts the case.

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Supreme Court of Nebraska.
STATE of Nebraska EX REL. ACME RUG CLEANER, INC., and Roger W. Pettit, relators,
v.
Honorable Mary G. LIKES, Judge, District Court for Douglas County, Nebraska, respondent.
No. S-97-1160.

Jan. 29, 1999.

Relator brought action seeking writ of mandamus compelling district court to vacate its overruling of relator's motion to quash subpoena duces tecum directing relator's medical expert in underlying action to produce certain information concerning expert's history of testifying as defense witness. The Supreme Court, Wright, J., held that relator was entitled to writ of mandamus protecting expert from compliance with overbroad subpoena.

Peremptory writ issued.

West Headnotes

[1] Mandamus 250 1

250 Mandamus
250I Nature and Grounds in General
250k1 k. Nature and Scope of Remedy in General. Most Cited Cases
"Mandamus" is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

[2] Pretrial Procedure 307A 19

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak19 k. Discretion of Court. Most Cited Cases
Generally, the control of discovery is a matter for judicial discretion.

[3] Pretrial Procedure 307A 19

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak19 k. Discretion of Court. Most Cited Cases
A trial court has discretion in the matter of discovery where material is sought for impeachment purposes.

[4] Courts 106 26

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k26 k. Scope and Extent of Jurisdiction in General. Most Cited Cases
A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.

[5] Mandamus 250 32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases
In determining whether mandamus applies to an issue of discovery, the Supreme Court considers whether the trial court clearly abused its discretion in not quashing the subpoena or issuing a protective order which limited the nature of the discovery.

[6] Pretrial Procedure 307A 31

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak31 k. Relevancy and Materiality. Most Cited Cases
The trial court must balance the competing interests and the relevance of the information sought by discovery for impeachment purposes against the burdensomeness of its production.

[7] Pretrial Procedure 307A 31

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak31 k. Relevancy and Materiality. Most Cited Cases

Pretrial Procedure 307A 41

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak41 k. Objections and Protective Orders. Most Cited Cases
Parties may obtain discovery regarding any matter, not privileged, which is relevant, and the district court may make any order which justice requires to protect a party from undue burden or expense. Discovery Rule 26(b)(1), (c).

[8] Mandamus 250 168(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(2) k. Presumptions and Burden of Proof. Most Cited Cases

Mandamus 250 168(4)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(4) k. Weight and Sufficiency. Most Cited Cases
In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.

[9] Mandamus 250 32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases
Relator was entitled to writ of mandamus compelling district court to vacate its overruling of relator's motion to quash subpoena duces tecum directing relator's medical expert in underlying action to produce names of all persons expert had examined on behalf of insurance carriers over past five years, fees charged for those examinations, court case numbers, and names of attorneys involved, where district court failed to balance plaintiff's right to information that might impeach relator's expert witness against relator's right to choose its expert witness and not have such witness burdened to extent that witness would refuse to testify, relator had clear legal right to have scope of discovery limited, and relator had no other remedy that would prevent it from losing expert of its choice as witness.

*****784** *Syllabus by the Court*

***34** 1. **Mandamus: Words and Phrases.** Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

2. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.

3. **Pretrial Procedure: Evidence: Impeachment.** A trial court has discretion in the matter of discovery where material is sought for impeachment purposes.

4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the

selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.

5. **Pretrial Procedure: Evidence: Impeachment.** A trial court must balance the competing interests and the relevance of the information sought by discovery for impeachment purposes against the burdensomeness of its production.

6. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.

Thomas J. Culhane and Kevin R. McManaman, of Erickson & Sederstrom, P.C., Omaha, for relators.

***35** E. Terry Sibbernsen and Mandy L. Stringenz, of E. Terry Sibbernsen, P.C., Omaha, for amicus curiae Jayne Kanger.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, Justice.

NATURE OF CASE

The relators, Acme Rug Cleaner, Inc., and Roger W. Pettit, seek a writ of mandamus, compelling the district court to vacate its overruling of their motion to quash a subpoena duces tecum. We granted leave to file this original action and now issue a peremptory writ of mandamus.

FACTS

Jayne Kanger sued Acme Rug Cleaner, Inc., and Roger W. Pettit (collectively referred to as Acme) in Douglas County District Court. On October 9, 1997, as part of pretrial discovery, Kanger served notice of her intent to take the deposition of Dr. Joel Cotton, a physician who was to testify on behalf of Acme as an expert witness. A subpoena duces tecum was served, directing Cotton to produce certain information and materials at the time of his scheduled deposition. In response, Acme moved to quash the subpoena and requested a protective order. Acme objected to paragraphs 5, 6, and 7 of the subpoena for the reason that the items requested therein were not relevant or material and would be unduly burdensome and expensive to produce. The paragraphs at issue requested the following:

> 5. The names of all individuals that you have examined on behalf of insurance carriers or defense attorneys within five (5) years preceding this deposition.
>
> 6. The amount of charges for each individual as set forth in No. 5 above.
>
> 7. The names of any case, the court case number, the name of the person examined,****785** and the names of the attorneys involved and charges for any deposition or court testimony within a period of five (5) years preceding October 21, 1997.

At the hearing on the motion to quash, Acme offered the affidavit of Karen Breen, office manager for Cotton's medical partnership. The relevant part of the affidavit stated:

> ***36** 3. The subpoena requests the names of all individuals who have been examined on behalf of insurance carriers or defense attorneys within the last five years by Dr. Cotton. Our office opens approximately 3,500 new patient files every year. New files are not opened under a particular doctor's name and no separate record is kept of those files which are opened for the purpose of an examination requested by an insurance carrier or defense attorney. To ascertain the information requested in paragraphs 5 and 6 of the subpoena it would be necessary to review the contents of each file opened by this office during the last five years to determine whether it involved an examination on behalf of an insurance carrier or defense attorney.
>
> 4. I have also reviewed paragraph 7 of the subpoena, which requests the court case number, the name of the person examined, and the names of the attorneys involved and charges for any deposition or court testimony given by Dr. Cotton within the last five years. Our office does not maintain separate records of court or deposition testimony given by Dr. Cotton during the last five years. It would not be possible to ascertain the information re-

> quested without a review of each patient file opened during the last five years, with the exception that our office has maintained a list, by date and patient name, which shows those patients with regard to whom Dr. Cotton has testified by deposition or at trial since July 1, 1996.

The district court judge overruled Acme's motion to quash and for a protective order. Cotton declined to further participate or testify as an expert witness rather than produce the information specified in paragraphs 5, 6, and 7 of the subpoena, and his deposition was canceled. We granted Acme's application to file an original action for a peremptory writ of mandamus compelling the judge to vacate her order overruling the motion to quash and for a protective order. We also granted an alternative writ of mandamus, ordering the judge to show cause why a peremptory writ should not be issued, and we stayed the underlying proceedings. The judge reaffirmed her prior order, and subsequently, a hearing was held in front of a special master for findings of fact relevant to Acme's petition for writ of mandamus.***37** At the hearing, in addition to Breen's affidavit, Cotton's affidavit was offered, which adopted Breen's explanation regarding the difficulty in obtaining the requested information.

The special master found:

> Dr. Cotton's medical partnership office opens approximately 3,500 new patient files every year. New files are not opened under a particular doctor's name, and no separate record is kept of those files which are opened for the purpose of an examination requested by an insurance carrier or defense attorney. To ascertain the information requested in paragraphs 5 and 6 of the subpoena, it would be necessary for someone to review the contents of each file opened by the partnership during the last five years, a total of approximately 17,500 files, to determine whether the file involved an examination at the request of an insurance carrier or defense attorney.

Further, the special master found that Cotton's office had not made separate records regarding court and deposition testimony given by Cotton during the prior 5 years or regarding the names of individuals examined on behalf of insurance carriers or defense attorneys and that it would not be possible to ascertain the information requested in paragraphs 5, 6, and 7 of the subpoena without a review of each patient file opened during the prior 5 years. An exception was that Cotton's office has maintained a list, by date and patient number, which shows those patients with regard to whom Cotton has testified by deposition or at trial since July 1, 1996. No showing was made that it would have been impossible or impractical for Acme to obtain the services and testimony of another physician****786** willing to comply with the requirements of the subpoena.

ASSIGNMENTS OF ERROR

Acme contends, in summary, that the district court erred in failing to grant the motion to quash and in failing to issue a protective order pursuant to Neb. Ct. R. of Discovery 26(c) (rev.1996). Acme asserts that mandamus is the only adequate remedy and that unless the subpoena is quashed or a protective order issued limiting the scope or methods of discovery, Cotton will refuse to testify rather than attempt to comply with the subpoena.

***38** ANALYSIS

[1] Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Fick v. Miller,* 255 Neb. 387, 584 N.W.2d 809 (1998).

Rule 26 sets forth the general provisions governing discovery. Under rule 26(b)(1),

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at

> the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Under rule 26(c),

> [u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the district court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had;
>
> ....
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> ***39** 4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters[.]

[2][3][4] Generally, the control of discovery is a matter for judicial discretion. *In re Interest of R.R.,* 239 Neb. 250, 475 N.W.2d 518 (1991). We have more specifically stated that a trial court has discretion in the matter of discovery where material is sought for impeachment purposes. *State v. Cisneros,* 248 Neb. 372, 535 N.W.2d 703 (1995). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Bondi v. Bondi,* 255 Neb. 319, 586 N.W.2d 145 (1998); *Smith v. Papio-Missouri River NRD,* 254 Neb. 405, 576 N.W.2d 797 (1998).

The subpoena duces tecum requests documentation regarding all individuals Cotton has examined on behalf of insurance carriers and for defense attorneys within the past 5 years; the charges therefor; and the names and numbers of cases, the persons examined, and the attorneys involved. This information is sought for purposes of discovering bias which might affect Cotton's credibility as an expert witness.

[5] In our determination of whether mandamus applies to an issue of discovery, we consider whether the trial court clearly abused its discretion in not quashing the ****787** subpoena or issuing a protective order which limited the nature of the discovery. Whether the trial court abused its discretion is determined by whether Acme has a clear legal right to the relief sought and whether there is a corresponding duty on the part of the trial court to quash or limit the scope of the discovery. Absent a clear legal right, the trial court's refusal to quash the subpoena is left to the discretion of the court. In addition, Acme must establish that it has no other plain and adequate remedy available.

In *State ex rel. FirsTier Bank v. Mullen,* 248 Neb. 384, 534 N.W.2d 575 (1995), we issued a peremptory writ of mandamus, directing the trial court to vacate its order denying FirsTier's motion to ***40** compel discovery and to sustain FirsTier's motion to compel discovery. FirsTier sought discovery of a fee arrangement between the law firm which had been disqualified from representing the relator and the relator's successor counsel. The question of whether the disqualified firm was participating with successor counsel was highly relevant to a pending action. We explained that the trial court had a clear and absolute duty to allow the discovery requested. We noted that although the discovery order could be reviewed from a final judgment, such remedy was inadequate because to wait for an appeal on the issue would mean that any divulgences of relevant confidences and secrets of disqualified counsel would have already occurred and the parties thus could not be returned to the status quo.

Heretofore, we have not addressed whether a writ of mandamus will lie to direct a trial court to quash a subpoena and issue a protective order on the basis that the requested discovery constitutes an undue burden upon the witness. An examination of cases from other jurisdictions is helpful to our analysis.

In *Syken v. Elkins,* 644 So.2d 539 (Fla.App.1994), the plaintiff sought, inter alia, to compel the defendant's expert witness physician to produce documentation of income earned by the expert from independent medical exams (IME's) since January 1, 1990; the

percentage of IME income relative to private patient income since January 1; the number of IME's performed for insurance carriers and defense attorneys since January 1; the amount charged for IME's; and the number of impairment ratings, court appearances, and attorney conferences since January 1990, and the charges for these.

In response, the physician stated that his patient files were kept alphabetically and would have to be reviewed individually in order to gather the requested information. Prior to the hearing, the physician submitted a notarized affidavit which stated in part that on an average he saw 15.33 patients per day, of which 1.5 were seen for performing IME's. He worked approximately 48 weeks per year and estimated that he saw 2,944 patients, of which 288 were for IME's. The average charge for an IME was $500, and a reasonable estimate of his income from IME's was $144,000 per year. At a hearing on the defendant's motion for a protective order, the physician stated that his patient files numbered some 15,000 in the past 25 years, and he ***41** objected to the burden imposed and claimed that his 1099 forms were not probative. After the hearing, the trial court required the compilation of reports, the implementation of new procedures for recording IME's, the creation of new documents evidencing the time spent on IME's, and the production of the physician's tax forms for the last 3 years.

The appellate court accepted certiorari to harmonize divergent opinions of the court involving the scope of discovery reasonably necessary to impeach the testimony of an opponent's medical witness. While the discovery rules were broadly written so as to allow discovery of any relevant matter not privileged, the appellate court noted that in the context of medical expert witnesses, the courts in Florida have long held that the trial court must balance the competing interests of the relevancy of the discovery information sought as impeachment against the burdensomeness of its production. En banc, the court concluded that to demonstrate the probability of bias, it was sufficient for a physician to give an honest estimate of IME's and total patients seen in a year, and not an exact number. The court reasoned that a doctor should not be required to disclose the amount of money he or she earned ****788** from expert witness work or disclose total income.

The appellate court set forth the following guidelines:

> [D]iscovery of an opposing medical expert for impeachment is limited by the following criteria:
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> 1. The medical expert may be deposed either orally or by written deposition.
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> 2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
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> 3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
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> 4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she ***42** performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
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> 5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
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> 6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
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> 7. The patient's privacy must be observed.
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> 8. An expert may not be compelled to compile or produce nonexistent documents.

Syken v. Elkins, 644 So.2d 539, 546 (Fla.App.1994).

The appellate court concluded that the data suggested by its guidelines would normally be sufficient to show the jury the expert's background and orientation and that the opponent could with minimal cross-examination make it perfectly clear to a jury that “a

defense doctor testifies as a defense doctor, and [a] plaintiff's doctor testifies as a plaintiff's doctor, and that each may spend considerable time doing just that." *Id.* at 547. The court noted that if it were disclosed that the witness had falsified or misrepresented the required data, the witness could be excluded from testifying and receive other sanctions, and that discretion to vary the guidelines could be exercised where appropriate.

Unit Rig & Equipment Co. v. East, 514 P.2d 396 (Okla.1973), was an original action to prohibit the enforcement of an order directing the defendant's medical expert to appear with certain records so that the plaintiff's attorney could take his deposition. The court held that the plaintiff was entitled to take the deposition and examine the records of the defendant's medical expert who had examined the plaintiff as long as they did not require the doctor to violate his patient-physician relationship with other patients.

In *Jones v. Bordman,* 243 Kan. 444, 759 P.2d 953 (1988), the Supreme Court of Kansas held that the denial of a motion to quash a subpoena duces tecum for a witness' medical and tax ***43** records was improper. The plaintiffs had sought to obtain extensive documentary materials from the defendant's medical expert, including all medical reports made by him for the past 6 years, income tax returns, and a list of all cases in which he served as an expert witness for the defendant's attorneys.

Kansas law permitted the discovery of material that was reasonably calculated to lead to the discovery of admissible evidence. However, the court opined that the medical records pertaining to persons who were not parties to the action were not relevant and, therefore, inadmissible. The court stated that it was proper to ask what percentage of a physician's practice involved examining, diagnosing, and/or testifying for defendants and what amount the physician was paid for such work. A showing of bias or prejudice did not require that the details of those medical reports be disclosed, and the law did ****789** not contemplate the discovery of medical records of persons who were not parties to the lawsuit for the sole purpose of obtaining evidence which might show a bias or prejudice. Since the information sought did not appear reasonably calculated to lead to the discovery of admissible evidence, the subpoena was not allowed.

In *Allen v. Superior Court of Contra Costa County,* 151 Cal.App.3d 447, 198 Cal.Rptr. 737 (1984), the appellate court held that the trial court had erred in granting a subpoena duces tecum requiring a medical expert witness appearing for the defendant to produce, among other things, records of any kind that would reveal what portion of the doctor's total income was from treatment of patients, as opposed to evaluation of persons for defense for the prior 5 years; records related to depositions in cases over the prior 5 years when he was asked by the defense to examine someone; and all reports of examinations and evaluations prepared at defense request over the prior 5 years.

Concluding there was no showing that the information sought could not be obtained through other means, such as by conducting a deposition without the production of records, the appellate court found that the trial court had abused its discretion when it failed to require a less intrusive method of discovery. The appellate court stated that the medical expert could be asked questions directed toward disclosing what percentage of his practice involved examining patients for defense and how ***44** much compensation he derived from defense work. To show bias or prejudice, the party seeking discovery need not learn the details of the expert's billing and accounting or other specifics of his prior testimony and depositions. Exact information as to the number of cases and amounts of compensation paid to medical experts was unnecessary for the purpose of showing a bias. The court thus issued a "writ of mandate" to protect the witness.

In *Davis v. Hinde,* 141 Ill.App.3d 664, 96 Ill.Dec. 13, 490 N.E.2d 1049 (1986), the court held that the defendant in a personal injury action was not entitled to discover a list of names and addresses of clients of plaintiff's attorney who had been treated by plaintiff's physicians for the past 3 years. Despite the contention that the names were needed for purposes of showing bias and attacking the credibility of the physician, the request was too broad and should have been limited to the number and frequency of referrals and any financial benefit derived therefrom.

[6][7] From our examination of the above cases, we conclude that the trial court must balance the competing interests and the relevance of the information sought by discovery for impeachment purposes

against the burdensomeness of its production. This reasoning is used in our consideration of whether the trial court had a clear legal duty to limit the discovery and whether Acme had a corresponding legal right. Rule 26 recognizes the balancing of such interests. Parties may obtain discovery regarding any matter, not privileged, which is relevant, and the district court may make any order which justice requires to protect a party from undue burden or expense. See rule 26(b)(1) and (c).

[8][9] Kanger has a right to discover information that might impeach Acme's expert witness. Acme has a corresponding right to choose its expert witness and not have such witness burdened to the extent that the witness will refuse to testify. The district court's refusal to balance such interests and establish guidelines for the discovery was an abuse of discretion. The clear legal right to have the discovery limited and the failure of the trial court to perform its duty by limiting the discovery establishes the first two criteria for a peremptory writ of mandamus. In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is ***45** legally obligated to act. *State ex rel. Fick v. Miller,* 255 Neb. 387, 584 N.W.2d 809 (1998); *State ex rel. FirsTier Bank v. Mullen,* 248 Neb. 384, 534 N.W.2d 575 (1995).

With regard to whether Acme has an adequate remedy at law, we note that Acme failed to establish that it could not proceed without the use of its designated expert or that it was impossible to obtain the testimony of another physician who was willing to comply****790** with the subpoena. However, we conclude that under the facts of this case, no other remedy was available to Acme because no other remedy would prevent Acme from losing the expert of its choice. Because Acme had a clear legal right to a protective order, the trial court had a clear duty to issue such protective order, and because there is no other plain and adequate remedy available in the ordinary course of the law, mandamus will lie to protect Acme's expert witness from the extensive discovery sought in this case.

With regard to discovery of the opposing medical expert for purposes of impeachment, the following are intended as guidelines: (1) The expert may be asked what he or she has been asked to do in the pending case and the compensation paid to the expert. (2) The expert may be examined in general about his or her expertise and the nature of his or her work. (3) The expert may be asked to give an approximation of the amount of work performed as an expert for plaintiffs and for defendants and the percentage of each. (4) The expert may be asked what portion of his or her total work is performed as an expert witness, including an approximation of hours expended, percentage of income earned as an expert, and the approximate number of independent medical exams performed per year. (5) The expert shall not be required to disclose the amount of income earned as an expert, but must disclose the percentage of total income received for work performed as an expert. (6) In all cases, the privacy of the patients seen and treated by such expert shall be observed. (7) The expert shall not be required to compile or produce documents that are nonexistent other than the information that is required in these guidelines. (8) To the extent that the expert has such information reasonably available, the expert shall be required to identify each case in which the expert has testified at trial or by deposition, performed an IME, or otherwise***46** furnished evidence in such case and whether the expert was retained by the plaintiff or the defendant. Such information shall be furnished for the prior 3 years.

The special master found that Cotton has compiled certain patient information since July 1, 1996. As to such information so compiled, in the event that Cotton testifies, he shall first produce the name of any case in which he has testified, given a deposition, performed an IME, or otherwise furnished information or evidence in such case and shall disclose whether he furnished such information on behalf of the plaintiff or the defendant. He shall also disclose the total number of individuals in each of the above categories that he has examined on behalf of insurance carriers, defense attorneys, and plaintiffs' attorneys since July 1, 1996.

In the event that the expert elects not to furnish such information, then he or she may be excluded from testifying or being a witness in the case. The trial courts shall have discretion to vary such guidelines where appropriate and where the facts of the case so dictate. To the extent that such guidelines will have application to future witnesses, they shall serve as a basis for the trial courts' rulings for discovery.

CONCLUSION

We order that a peremptory writ of mandamus be issued, directing the respondent to vacate the order denying the motion to quash and to enter an order sustaining the motion to quash subject to the guidelines set forth herein.

PEREMPTORY WRIT ISSUED.

Neb.,1999.
State ex rel. Acme Rug Cleaner, Inc. v. Likes
256 Neb. 34, 588 N.W.2d 783

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