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Expert Discovery After Rule 26 Amendments: Lessons from Recent Cases

Navigating the Practical Impact of the "Facts or Data" Scope Change, "Drafts of Expert Reports" Protections, and Other Disclosure Uncertainties

TUESDAY, NOVEMBER 26, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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November 26, 2013

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Lauren DeBruicker

Lauren DeBruicker, a partner in Duane Morris LLP's Trial Group, practices in the areas of commercial and insurance coverage litigation, with an emphasis on matters involving intellectual property. She has represented clients in cases concerning patents, trademarks, copyrights, licensing disputes, trade secrets, false advertising and covenants not to compete, in areas ranging from drug delivery systems and pharmaceutical products to Voice-over Internet Protocol (VoIP) telephony systems, computer software and photography. She has represented insurers in coverage disputes and other litigation relating to the business of insurance and has secured insurance policy proceeds on behalf of the firm's individual and corporate clients.

Ms. DeBruicker also has represented plaintiffs and defendants in employment disputes, and defended organizations from liability arising from alleged criminal acts of their employees. Actively involved in the nonprofit sector, she also has represented charitable organizations in matters relating to their tax-exempt status and advises foundations on governance and other matters.

Based in Philadelphia, Ms. DeBruicker has tried cases to verdict in courts across the country, and obtained results consistently affirmed on appeal. Through targeted discovery and strategic motion practice, Ms. DeBruicker has been particularly effective in helping clients resolve their business disputes efficiently, successfully, and, when desired, out of court.

Ms. DeBruicker is admitted to practice in Pennsylvania.

Jonathan Evan Goldberg

Jonathan Evan Goldberg is a member of Dentons' Litigation and Arbitration practice, where he focuses on all aspects of complex commercial litigation, employment law and litigation, and ERISA litigation.

Jonathan, an experienced litigator, trial lawyer, and public speaker, has successfully represented numerous clients in federal and state courts throughout the United States in matters involving claims of retaliation, discrimination, wrongful termination, fraud, breach of fiduciary duty and breach of contract. Jonathan also routinely represents corporations and individuals in trade secrets and restrictive covenant litigation, assists clients in understanding and addressing the various legal issues raised in connection with the failure of Bernard L. Madoff Securities, Inc., and has defended corporate and individual clients in connection with investigations by the US Department of Labor (DOL) and the US Department of Justice (DOJ), Antitrust Division.

Jonathan also concentrates on and advises US and multinational companies and executives in all aspects of employment law, including drafting and negotiating employment and separation agreements, corporate restructurings and reductions in force, employment advice related to corporate transactions, internal corporate investigations, handbooks and policy manuals, sexual harassment and other sensitivity training, protecting against employee raiding and theft of confidential information, and compliance with all federal, state, and local discrimination laws.

Prior to joining Dentons, Jonathan gained significant litigation and trial experience working at several major law firms and served as a federal law clerk for the Honorable Harvey E. Schlesinger, US District Court for the Middle District of Florida, Jacksonville, Florida.

Jonathan is also a trained and skilled mediator.

RULE 26: EVOLUTION IN RULES RELATING TO EXPERT DISCOVERY

Backdrop: Protections for "Work Product" under Rule 26(b)(3)

Rule 26(b)(3) ***Trial Preparation: Materials*.**

(A) 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, …). ***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.

Rule 26: 1993 to December 2010

- Amended in 1993 to require significant expert disclosures, depositions and reports
- Rules for no-report experts
- Rules for non-testifying experts

Rule 26(a)(2)(B): The Written Report

Witnesses Who Must Provide a Written Report.

Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

Pre-2010 Rule 26(a)(2)(B): The Written Report (ct'd)

The report must contain:

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

(ii) the 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.

Rule 26(a)(2)(B)

- Requirements for Experts from whom no report is required
  - if the witness is not one retained or specially employed to provide expert testimony in the case
  - If the witness' duties as the party's employee do not regularly involve giving expert testimony

Consequences and Fallout from 1993 amendments to Rule 26

- Disclosure of communications with testifying experts ("the data or other information considered by the witness"), including drafts
  - The "Bright Line Rule"
- Inefficient, and ineffective, expert discovery
  - Necessity of hiring non-testifying experts
  - Efforts to avoid creating discoverable information
  - Efforts to discover tampering with expert
  - No-report experts treated inconsistently

REVISIONS TO RULE 26 EFFECTIVE DECEMBER 1, 2010

“Profoundly Practical” Revisions

- Narrowed required disclosures – 26(a)(2)(B)
- New express requirements for no-report experts – 26(a)(2)(C)
- New protections for draft reports – 26(b)(4)(B)
- New protections for certain communications between attorneys and experts – 26(b)(4)(C)

Rule 26(a)(2): Required disclosure of expert testimony:

Before December 1, 2010…

(2) Disclosure of Expert Testimony

(A) In General

(B) Written Report

(C) Time to Disclose

(D) Supplementing the Disclosure

Today…

(2) Disclosure of Expert Testimony

(A) In General

(B) Witnesses Who Must Provide a Written Report

(C) Witnesses Who Do Not Provide a Written Report

(~~C~~D) Time to Disclose

(~~D~~E) Supplementing the Disclosure

Today's Rule 26(a)(2)(B): *Witnesses Who Must Provide a Written Report*

…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.

The New 26(a)(2)(C): *Witnesses Who Do Not Provide a Written Report.*

Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

Rule 26(b)(4): "Discovery Scope and Limits" as applied to expert trial preparation:

1993-2010…

(4) Trial Preparation: Experts

(A) Expert Who May Testify

(B) Expert Employed Only for Trial Preparation

Today…

(4) Trial Preparation: Experts

(A) Deposition of an Expert Who May Testify

(B) Trial-Preparation Protection for Draft Reports or Disclosures

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses

(~~B~~D) Expert Employed Only for Trial Preparation

New Rule 26(b)(4)(B): *Trial-Preparation Protection for Draft Reports or Disclosures.*

Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

Rule 26(b)(3)(A) protects *"Documents and Tangible Things"* prepared in anticipation of litigation or for trial by or for another party or its representative, unless **(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.

Rule 26(b)(3)(B) provides that *even if the Court orders the disclosure of these 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.

Rule 26(b)(4)(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) relate to compensation for the expert's study or testimony;

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

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

2010 Amendments: Intended Results

- Make discovery less expensive and time-consuming
  - Reduce wasteful discovery efforts focused on attorney-expert communications
  - Remove duplication in expert duties
- Improve the quality of expert testimony
  - Encourage robust communications between attorney and expert
  - Focus challenges on substance of opinions

Implications for other discovery rules and practices

- Draft Reports
- Oral Communications
- Attorney Hypotheticals
- Testing materials and notes
- Continuing need for consulting experts?
- Exceptions to 26(b)(4)(C): Swallowing the Rule?
- *Daubert*

ACTUAL RESULTS: REALITIES AND PRACTICAL IMPLICATIONS OF THE RULE 26 REVISIONS

26(a)(2)(B): "***facts or data*** considered by the witness"

- *Fialkowski v. Perry*, 2012 U.S. Dist. LEXIS 91165 (E.D. Pa. June 29, 2012) (analyses created by client at attorney's request and reviewed by expert must be produced)

- Courts have held that the disclosure requirements of Rule 26(a)(2)(B) "were meant to trump all claims of privilege, mandating production of all information furnished to the testifying expert for consideration in the formulation of [the expert's] opinions, regardless of privilege." …The 2010 Amendments do not invalidate these pre-2010 decisions.

26(a)(2)(B): “facts or data ***considered by the witness***” (ct’d)

- "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.“ – 2010 Advisory Committee Note

- “any information furnished to a testifying expert that such an expert generates, ***reviews***, reflects upon, ***reads***, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.” *Fialkowski v. Perry*

- Objective standard

26(a)(2)(B): "facts or data ***considered by the witness***" (ct'd)

- The case of serial experts: how far back to go?

  "On the one hand, an expert should not be able to limit the discoverability of facts and data learned during a prior retention by simply stating that he did not consider them when forming his current opinion. On the other hand, an expert should not have to disclose all facts and data known to him relating to any work he ever performed for a party."

  United States v. Dish Network, L.L.C., 2013 U.S. Dist. LEXIS 146202 (C.D. Ill. Oct. 9, 2013) (citing cases)

26(a)(2)(C): Witnesses Who do Not Provide a Written Report

- Subject matter of evidence under FRE 702, 703 or 705
- Summary of the facts and opinions to which the witness is expected to testify
- designed to be "considerably less extensive" than those required under Rule 26(a)(2)(B) and courts "must take care against requiring undue detail."

26(a)(2)(C): Witnesses Who do Not Provide a Written Report

Take "summaries" seriously

[W]hatever its precise meaning, a "summary" is ordinarily understood to be an 'abstract, abridgement, or compendium… . Plaintiff's counsel has simply dumped medical records onto Defendants' counsel. The court will not place the burden on Defendants to sift through medical records in an attempt to figure out what each expert may testify to.

Carrillo v. B&J Andrews Enters., LLC, 2013 U.S. Dist. LEXIS 12435 (D. Nev. Jan. 29, 2013)

A summary is defined as a brief account that states the main points of a larger body of information. ..[C]itation to records with no clear indication of what sections will be used or how the facts or opinions will be framed and presented in testimony does not constitute a "summary of the facts…" within the meaning and requirements of Rule 26(a)(2)(C)(ii).

A.R. v. Corp. of the President of the Church of Christ of Latter-Day Saints, 2013 U.S. Dist. LEXIS 140684 (D. Colo. Sept. 30, 2013)

26(a)(2)(C): Witnesses Who do Not Provide a Written Report

Take “summaries” seriously

What “won’t do”:

- Document dumps
- Deposition transcripts
- “To Whom it May Concern” letters
- Medical notes
- “three word descriptions”
- Single disclosure for groups of witnesses

26(a)(2)(B) and (C): "Dual Hat" Witnesses

- Witness serving as both testifying expert and non-testifying consultant

Broader disclosures for testifying experts apply to everything except materials generated or considered *uniquely* in the expert's role as consultant.

> "If the line between consultant and witness is blurred, the dispute should be resolved in favor of the party seeking discovery."

Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416, 417 (N.D. Ill. 2011)

26(a)(2)(B) and (C): "Dual Hat" Witnesses

- Consultants later retained to testify
- Not a question of time, but the substantive relationship between the two expert roles.

- On distinguishing whether prior work was among "facts of data considered" in current engagement:

> Even a man as highly educated as Dr. Engelmann cannot be expected to draw a mental line in the sand between information gleaned from a behind-the-scenes look at Abbott's process in 2003 and information he learned otherwise. It would be impracticable to ask such a Herculean task of dual-hat experts[]; that is why courts eschew a subjective standard for whether a testifying expert has "considered" "facts or data," … and why courts construe the dual-hat expert rule in favor of the party seeking discovery.

Yeda Research & Dev. Co. v. Abbott GMBH & Co. KG, 292 F.R.D. 97 (D.D.C. 2013)

26(a)(2)(B) and (C): "Hybrid" Witnesses

- Treating Physicians

  They are a species of percipient witness. They are not specially hired to provide expert testimony; rather, they are hired to treat the patient and may testify to and opine on what they saw and did without the necessity of the proponent of the testimony furnishing a written expert report.

  [T]o the extent he or she treated the plaintiff, diagnosed the conditions and reached a prognosis, that testimony is not testimony for which the expert has been specially retained. But once the lawyer for the claimant undertakes to elicit an opinion whether a particular traumatic event caused the condition as opposed to another cause, the expert has been transformed into the same type of expert envisioned by the report requirement. . . .

Goodman v. Staples the Office Superstore, LLC, 644 F.3d 817 (9th Cir. 2011)

26(a)(2)(B) and (C): "Hybrid" Witnesses

- Treating Physicians

> [A] treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment."

Goodman v. Staples the Office Superstore, LLC, 644 F.3d 817 (9th Cir. 2011)

Special consideration:

- Opinions regarding ***causation and prognosis*** may trigger report obligation
- Opinions beyond treatment may be stricken if unsupported by a report; treating physician may be restricted to just a fact witness

26(a)(2)(B) and (C): "Hybrid" Witnesses

Other "Non-retained witnesses"

- *Downey v. Bob's Disc. Furniture Holdings*, 633 F.3d 1 (1st Cir. 2011) (exterminator was allowed to opine as to causation without submitting a Rule 26(a)(2)(B) report, as his opinion testimony "arises not from his enlistment as an expert but, rather, from his ground-level involvement in the events giving rise to the litigation.")

- *Laship, LLC v. Hayward Baker, Inc*., 2013 U.S. Dist. LEXIS 161820 (E.D. La. Nov. 13, 2013) (portion of subcontractor's opinions were arrived at over course of remediation work, but other opinions rendered specifically for litigation required 26(a)(2)(B) designation and full report)

26(b)(4)(B) – new protections for draft reports

26(b)(4)(C) – new protections for attorney-client communications

Practical Tips and Considerations

- Considerations when experts change roles or scope of engagement changes; “serial experts”
- Consider “considering”
- Ghost-writing
- A continuing role for non-testifying experts?
- Rule 37 Sanctions for non-compliance