November 30, 2010

New Federal Rules for Pending Cases

M. Anderson Berry
Caroline N. Mitchell

Available at: https://works.bepress.com/m_berry/11/
**New Federal Rules for Pending Cases**

Caroline N. Mitchell is a partner at Jones Day in San Francisco. She litigates complex commercial disputes with a focus on defending corporations against claims related to events in foreign countries.

M. Anderson Berry is an associate at Jones Day in San Francisco. He focuses on complex civil litigation and international arbitration. For questions or comments concerning this article, e-mail aberry@jonesday.com

On Dec. 1, 2010, unless Congress finds time to intervene, changes to Rule 26 of the Federal Rules of Civil Procedure (FRCP) will extend work-product protection to discovery of draft reports by testifying experts and, with three exceptions, to communications between those experts and retaining attorneys. The amendments also require attorneys relying on experts who will provide testimony - but who are not required to provide a full expert report - to disclose the subject matter of the planned testimony and summarize the facts and opinions that the expert expects to offer.

What is not clear is whether this "attorney-expert work-product doctrine" applies to draft reports and communications made before Dec. 1, 2010 in ongoing cases. For example, if you've been dealing with a testifying expert since July in a pending case, and you continue to communicate and receive draft reports through February, are these protected? Or is it only protected if made after Dec. 1? And are drafts completed before Dec. 1 still fair game?

As the U.S. Supreme Court noted over 200 years ago in U.S. v. Schooner Peggy: "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." That remains the law today.

Under the Rules Enabling Act (28 U.S.C. Section 2074), Congress granted the Supreme Court the authority to determine the extent to which an amended rule of civil procedure applies to pending proceedings. In its April 28, 2010 order adopting the amendments to the FRCP, the Supreme Court ordered that the changes "shall take effect on December 1, 2010, and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." That is, the amendments to Rule 26 will apply to any action filed on or after Dec. 1; or to cases pending as of Dec. 1; but only if the application of the rule is both "just" (defined by at least one federal court as "as long as no manifest injustice results") and "practicable" (defined as "performable, feasible, or possible").

Justice John Paul Stevens noted in *Landgraf v. USI Film Products* that very similarly worded Supreme Court orders amending the FRCP "reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." Similarly, in *Diaz v. Shallbetter*, the 7th U.S. Circuit Court of Appeals found that almost identically worded Supreme Court orders and FRCP amendments "may or may not govern further proceedings in pending cases." The court added: "Neither the [Rules Enabling Act] nor the [Supreme] Court's implementing language implies using an amendment to change the consequences of actions completed before December 1. They say only that new acts in cases already on the docket ordinarily should conform to the new rules."

Thus, a court should apply the new attorney-expert work-product doctrine in a pending case only to communications made and draft reports exchanged after Dec. 1, as long as it is feasible and no manifest injustice results. Attorney-expert work-product dated before Dec. 1 would remain discoverable. In most if not all cases, this is "just" because, among other reasons, both parties relied on the old rules through November and would not be surprised or prejudiced that their previous work-product is not protected.
The amendments to Rule 26 divide into three parts. The first creates Rule 26(a)(2)(C), which states that if the expert is not required to provide a report under 26(a)(2)(B), the 26(a)(2)(A) disclosure must include the subject matter that the expert is expected to present evidence under Evidence Rules 702, 703, or 705. Additionally, the expert must include a summary of the "facts and opinions" on which the expert is expected to testify. Made clear by the Committee on Rules of Practice and Procedure of the Judicial Conference, the summary of facts must include facts that actually support opinions. And note: if the expert will also be testifying as a fact witness, those facts need not be included in the summary.

The second part is more complex. 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." The amendment of Rule 26(a)(2)(B)(iii) complements this by amending the prior reference to "information." The expert's report now is to include only "the facts or data considered by the witness in forming [opinions]"; not, "the data or other information considered by the witness." This "refocus" is meant to "limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." But 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...."

In the third part, amended Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert providing a Rule 26(a)(2)(B) report; again, "regardless of the form" of the communications. Unlike the second part, this amendment excepts three categories of information: communications 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 on in forming the opinions to be expressed." Rule 26(b)(4)(C).

The "regardless of the form" language is new. According to the Committee, the Committee Note that sought public feedback on this language stated that protection extends to a draft "whether oral, written, electronic, or otherwise." The scope of this protection was spelled out because Rule 26(b)(3) by itself extends attorney-expert work-product protection only to "documents and tangible things." In the past, information that was not a document or otherwise tangible was covered by Hiatt v. Taylor. Thus, the open-ended "regardless of form" language was added, emphasizing that it applies to drafts and communications, regardless of form, under the rules.

According to the Standing Rules Committee (SRC), discovery into experts' draft reports and communications between attorneys and experts - beyond the exceptions - is not an effective way to expose the weaknesses of an expert's opinion. Depositions, according to the SRC, should focus on substance, not on badgering the expert in order to find out where the substance originated or how it was manipulated. The SRC believes the current practices lead to "wasteful and artificial litigation practices" designed to avoid creating drafts and communicating thoroughly. According to the September 2009 Judicial Conference Report, to avoid creating a discoverable record, attorneys often, for example, hire two experts: one for consultation and one to testify (one discoverable and one not under the pre-December rules). This gave parties with deeper pockets an arguably unfair advantage. Attorneys also avoided written or other discoverable communications with experts, "inhibiting robust communications." This, according to the Committee, jeopardizes the overall quality of an expert's report. The idea is that with free communications and drafts, experts will formulate more substantive opinions. That is the apparent overall goal of these amendments.

The SRC claims that the only "significant" opposition to the Rule 26 amendments was expressed by a group of academics who voiced concern that the changes would make it difficult for a party to show the extent to which an expert's opinion was "influenced" by counsel. The Committee blew off that, simply recommending that opposing counsel conduct better cross-examinations.

What no one seems to mention - including the academics and representatives from the enormous list of organizations supporting the changes - is that allowing such discovery kept experts more honest and limited an attorneys' ability to use the expert as a mouthpiece, more effectively than the amendments will. Under the pre-December rules, opposing parties had access to candid comments experts may have provided to retaining attorneys regarding the propriety of certain arguments.

Finally, someone may argue that these amendments require congressional authorization before they become effective. The Rules Enabling Act does not require congressional authorization unless the amendment "creates, abolishes, or modifies an evidentiary privilege." 28 U.S.C. Section 2074(b). Attorneys could argue that this should reach the attorney-expert work-product doctrine, even though it is technically not a privilege, because it does modify the discovery or other evidentiary use of the materials that fall within its scope.

Caroline N. Mitchell is a partner at Jones Day in San Francisco. She litigates

http://www.dailyjournal.com/subscriber/submain.cfm

11/30/2010
complex commercial disputes with a focus on defending corporations against claims related to events in foreign countries. **M. Anderson Berry** is an associate at Jones Day in San Francisco. He focuses on complex civil litigation and international arbitration. For questions or comments concerning this article, e-mail aberry@jonesday.com.