Recent amendments to Rule 26 of the Federal Rules of Civil Procedure changed the disclosure and discovery requirements for expert witnesses in federal court. These changes — which have been endorsed by the U.S. Department of Justice, the American Bar Association and many other lawyer groups — are intended to facilitate frank and open communications between attorneys and their experts and should make collaboration with experts more effective and less expensive.

Work Product Protection for Expert Discovery

Amended Rule 26(b)(4) provides work-product protection against discovery for draft expert reports and — with three specific exceptions — communications between testifying experts and counsel. Such communications are discoverable only if they

• relate to the expert's compensation;
• identify facts or data that the expert considered in forming the expressed opinions; or
• identify assumptions that the expert relied on in forming the expressed opinions.

In addition, amended Rule 26(a)(2) requires expert reports to state the "facts or data" — rather than the "data or other information," as in the previous version of the rule — considered by the expert witness. The Advisory Committee Notes explain that this change is "meant to limit disclosure to material of a factual nature" and exclude "theories or mental impressions of counsel." (Unless otherwise noted, all subsequent quotes are from the Advisory Committee Notes on the 2010 Amendments.)

Before the new amendments, many federal courts had allowed discovery of all communications between counsel and expert witnesses and all draft reports. The Advisory Committee was "told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects," including rising costs. For example, attorneys often used two sets of experts — one for consultation and the other for testimony — to avoid disclosure of the attorneys' legal analysis and concerns.

The Advisory Committee also noted that, under the previous rules, attorneys tended to "adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication" and experts tended to "adopt strategies that protect against discovery but also interfere with their work." For example, experts were often warned not to make notes or put anything in writing in order to avoid discovery.

According to the Advisory Committee, communications between the party's attorneys and assistants of the expert witness are also protected. In addition, "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."

The Three Exceptions

Attorney-expert communications regarding *compensation* are still fair game for discovery. Such discovery "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 ." Compensation for work done by any "person or organization associated with the expert" is also subject to discovery. "The objective is to permit full inquiry into such potential sources of bias."

Attorney-expert communications that identify the *facts or data* provided by counsel and considered by the expert are subject to discovery, but "further communications about the potential relevance of the facts or data are protected." To avoid confusion, disputes and unwanted disclosures, counsel should take care to keep communications that identify the facts or data to be considered by the expert separate from communications that discuss the relevance of those facts or data. Then the former can be disclosed without having to disclose the latter.

Attorney-expert communications that identify any *assumptions* that the expert relied upon in forming the expressed opinions are also subject to discovery. "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 a bout hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception."

Discovery regarding attorney-expert communications on subjects other than the three exceptions or regarding draft expert reports "is permitted only in limited circumstances and by court order." The party seeking such discovery must show that it "has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship." Even if a party makes such a showing, "the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories…."

The amendments to Rule 26 became effective on December 1, 2010, and "shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See Supreme Court Order of April 28, 2010. In order to remove any uncertainty, counsel with pending federal cases should consider

proposing a stipulation and order to establish whether and to what extent it is "just and practical" to apply the new amendments.

Bear in mind that California law does not provide any work product protection for a testifying expert’s drafts, notes or communications with counsel. Accordingly, unless and until that law changes, attorneys litigating in our state courts will continue to face all of the problems with expert discovery that the new federal rules were intended to eliminate.