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Expert Witnesses: Attorney-Client Privilege and Work Product Protection

Protecting Confidential Communications With Experts and Outside Consultants Before and During Litigation

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Today's faculty features:

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Expert Witnesses: Attorney-Client Privilege and Work-Product Protection
Protecting Confidential Communications With Experts and Outside Consultants Before and During Litigation

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Jonathan Evan Goldberg

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

Jonathan, an experienced trial lawyer and frequent 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 clients with respect to the following: Advancement and indemnification proceedings; Civil RICO litigation; Whistleblower litigation; Defamation litigation; Executive compensation litigation and arbitration; International litigation and arbitration; Antitrust litigation and arbitration; Products liability litigation; Environmental and toxic tort litigation.

Prior to joining SNR Denton, Jonathan gained significant litigation and trial experience working at several major law firms, where he focused at varying times on complex commercial litigation, employment litigation, ERISA litigation, antitrust litigation, products liability litigation, environmental litigation, securities litigation, general commercial litigation, and international litigation and arbitration.

Between 1996 and 1998, Jonathan 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.

Andrew O’Connor

Andrew is an associate at Edwards Wildman Palmer LLP in the Firm's Boston office, practicing in the Intellectual Property Litigation and Intellectual Property Groups. With extensive experience in virtually all aspects of intellectual property litigation, Andrew successfully represents the best interests of clients in intellectual property matters throughout the federal and state court systems concerning patents, design patents, trademarks, trade dress, false advertising, product disparagement, trade secrets, copyrights and related issues. Representing clients in state and federal courts, as well as before the U.S. Patent and Trademark Office, Andrew’s specialized experience in highly complex intellectual property matters is a valuable asset to clients seeking to maintain their competitive advantage.

Andrew works closely with clients to carefully navigate the constantly evolving intellectual property law landscape, including recent changes in the law relating to design patent infringement, willful patent infringement and the attorney-client privilege, as well as emerging issues concerning the Anti-Cybersquatting Act, Hatch-Waxman Act, the Digital Millennium Copyright Act, and many other evolving aspects of intellectual property law that clients must face in order to successfully compete in today’s volatile market. This extensive and expansive breadth of experience combined with his skills both in and out of the courtroom have garnered long-lasting relationships with clients built upon a solid foundation of success.

With the goal of ensuring the best resolution for clients, Andrew focuses on the broader goals of clients that requires extensive strategic planning and skilled advocating outside the courtroom or the scope of a single case. Andrew negotiates various intellectual property license agreements, corporate mergers, and intellectual property asset management projects for a broad array of companies, ranging from entrepreneurs and pharmaceutical laboratories to Blue Chip multi-national corporations. Andrew’s extensive experience in the pharmaceutical, medical device, retail and video gaming industries have produced consistent and successful implementation of each individual client’s specific goals and interests in these highly sophisticated industries.

REVISIONS TO RULE 26 EFFECTIVE DECEMBER 1, 2010

“Profoundly Practical” Revisions

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

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

Rule 26(a)(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 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 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 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) *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.

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

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

(B) *Witnesses Who Must Provide a Written Report~~s~~.* …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…

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.

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.

Fed. R. Civ. P. 26(b)(3)

(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.

Fed. R. Civ. P. 26(b)(4)

(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 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) 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.

(D) 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.

New 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.

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
- Lessons from New Jersey

REALITIES AND PRACTICAL IMPLICATIONS OF THE RULE 26 REVISIONS

Implications for other discovery rules and practices

- Draft Reports
- Oral Communications
- Attorney Hypotheticals
- Testing materials and notes
- *Daubert*

Practical Considerations

- Effective date of December 1, 2010
- Continuing need for consulting experts
- Will the Exceptions in 26(b)(4)(C) Swallow the Rule?
- Removal/Remand/Multi-jurisdictional cases
- Lessons from, and for, State Practice (NJ, NY, PA)
- What will the Courts do?

NJ Rules of Court R. 4:10-2 Scope of Discovery

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of R. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to R. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by R. 4:17-4(a), the furnishing of a copy of that person's report. Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule.

* * * *

(3) A party may discover facts known or opinions held by an expert (other than an expert who has conducted an examination pursuant to R. 4:19) who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means. If the court permits such discovery, it shall require the payment of the expert's fee provided for by R. 4:10-2(d)(2), and unless manifest injustice would result, the payment by the party seeking discovery to the other party of a fair portion of the fees and expenses which had been reasonably incurred by the party retaining the expert in obtaining facts and opinions from that expert.

NJ Rules of Court R. 4:10-2 Scope of Discovery (cont.)

(c) Trial Preparation; Materials. Subject to the provisions of R. 4: 10-2(d), a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under R. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 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...

NY CPLR 3101(d)

(d) Trial preparation.

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

* * *

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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.

PA

Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert.

The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Applicability of Amended Rules to Pending Cases

- Different Standards for Determining Whether to Apply Amended Rules to Pending Case:
  - FRCP 86(a)(2): Apply amendment "unless (A) the Supreme Court specifies otherwise; or (B) the court determines that applying them in a particular action would be infeasible or work an injustice.
  - Supreme Court's April 28, 2010 Order Amending FRCP 26: Amended rule shall apply "insofar as just and practicable."

Applicability of Amended Rules to Pending Cases

- Courts generally apply the Supreme Court's "just and practicable" standard.
- Daugherty v. American Express Co., 2011 U.S. Dist. LEXIS 30486 (W.D. Ky. Mar. 23, 2011)
  - Case was pending for two years, but discovery cutoff was extended from Dec. 1, 2010 to Dec. 14 to enforce a Nov. 30 document subpoena on expert.
  - "it is just and practicable to apply the 2010 amendments...Plaintiff shall provide a copy of all documents in [expert's] file which have not been identified as privileged…"

- Chevron Corp. v. Shefftz, 2010 U.S. Dist. LEXIS 129540 (D. Mass. Dec. 7, 2010)
  - In case originating in Ecuador, party filed under 28 U.S.C. § 1782 on October 22, 2010 to conduct discovery in U.S. for foreign action.
  - "It is just and practicable to apply the new Rule 26. First, the old Rule 26 faced conflicting interpretations, which the First Circuit never addressed. Second, **the Parties…have had ample notice of the provisions of the new rules that will apply and should have been able to prepare accordingly."**

Experts v. Consultants

- FRCP 26(a)(2)(B) and (C) distinguish between testifying and non-testifying experts.

- FRCP 26(b)(4)(D) protects pure consulting experts from discovery. Exceptions:

  (i) An examiner's report. FRCP 35(b)

  (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."

Experts v. Consultants

- Practice Tip: Try not to have your consulting expert testify on other matters. If the expert must wear "two hats," take great care to clearly segregate the two roles.

- Historically, when the role of testifying expert and consultant is blurred, courts resolve the dispute in favor of disclosure.
  - In re Commercial Money Ctr., 248 F.R.D. 532 (N.D. Ohio 2008) ("If the line between consultant and witness is blurred, the dispute should be resolved in favor of the party seeking discovery.").

- Cases applying amended FRCP 26 still apply this preference for disclosure unless the dual roles are clearly segregated.
  - Sara Lee Corp. v. Kraft Foods Inc., 2011 U.S. Dist. LEXIS 35389 (N.D. Ill. April 1, 2011) ("The Court concludes that the requested materials related solely to [expert's] role as a consultant, even taking into account the preference for disclosure when dealing with an expert who wears two hats.")

Exceptions to Disclosure Protections for Testifying Experts

FRCP 26(B)(4)(C)(1)

Communications that relate to compensation for the expert's study or testimony.

- Practice Tip: When considering experts and negotiating the terms of retention, keep written communications regarding compensation and substance separated.

Exceptions to Disclosure Protections for Testifying Experts

FRCP 26(b)(4)(C)(ii)

*Communications that identify **facts or data** that the party's attorney provided **and** that the expert **considered** in forming the opinions to be expressed*

- The intent of this change is consistent with the overall goal of the amendments: narrow scope of discoverable information from often irrelevant "information" to only "facts and data" that were "considered" by the expert" from any source.

- Practice Tips:
  - Work closely with your expert from the beginning to determine what types of "facts or data" would need to be considered.
  - Keep facts or data clean from notations. *See, e.g.*, D.G. v. Henry, 2011 U.S. Dist. LEXIS 38709 (N.D. Okla. April 8, 2011)
    - Moving party wanted copies of original case files considered by expert because they may have notations and highlights on them. Disclosing party argued that the files were reviewed electronically and had no notations or highlights.
    - Holding: "notations or highlights on the case files do not constitute facts or data and do not need to be provided under Fed. R. Civ. P. 26(a)(2)(B)(ii)."

Exceptions to Disclosure Protections for Testifying Experts

FRCP 26(b)(4)(C)(iii)

Communications that identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

- Committee Notes: "More general attorney-expert discussions about hypotheticals, or exploring possibility based on hypothetical facts, are outside this exception."

- Practice Tip: Work closely with expert to determine what assumptions must be made in order to render opinion. Explore all pros and cons to making that assumption before communicating it to expert.

  - Example: Damages experts in patent cases must assume that certain products are or are not acceptable non-infringing alternatives.