Strafford

presents

Expert Witnesses: Leveraging New Rule 26 Amendments

Preserving Work Product Immunity for Expert Opinions and Reports

A Live 60-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
Lauren DeBruicker, Partner, **Duane Morris**, Philadelphia
Jonathan Evan Goldberg, Partner, **Seyfarth Shaw**, New York

Tuesday, September 28, 2010

The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.
Please refer to the dial in/ log in instructions emailed to registrants.

For CLE purposes, please let us know how many people are listening at your location by

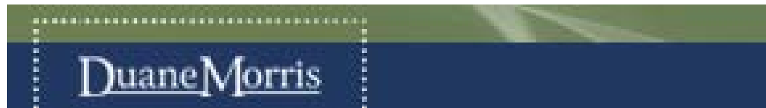
- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

For live event only.

- If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.
- If the sound quality is not satisfactory and you are listening via your computer speakers, please dial **1-866-258-2056** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.
- If you dialed in and have any difficulties during the call, press ***0** for assistance.

Expert Witnesses: Leveraging the New Rule 26 Amendments

Preserving Work Product Immunity for Expert Opinions and Reports



Lauren DeBruicker, Esq.
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
ledebruicker@duanemorris.com
(215) 979-1198

Jonathan Evan Goldberg, Esq.
Seyfarth Shaw LLP
620 Eighth Avenue
New York, NY 10018
jgoldberg@seyfarth.com
(212) 218-3341

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 works of art. She has represented insurance carriers 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 local, state and national associations of independent schools in matters relating to their constituents' interests, including the propriety of legal and injunctive relief in school disciplinary proceedings and local property tax exemptions.

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

Mr. Goldberg, an experienced trial lawyer, is a partner in the Labor & Employment Department in the New York office of Seyfarth Shaw LLP and a member of the firm's Commercial Litigation Practice Group, representing clients in complex commercial litigation, ERISA litigation, and employment litigation.

Among other things, Mr. Goldberg has defended corporate and individual clients in connection with investigations by the United States Department of Labor and the United States Department of Justice (Antitrust Division), defended corporate clients in federal and state courts for claims of discrimination and wrongful termination, and represented corporations and individuals in trade secrets and restrictive covenant litigation.

Mr. Goldberg is also a leader of the firm's interdisciplinary "Madoff Team," created to assist clients in understanding and addressing the various legal issues raised in connection with the misconduct of Bernard Madoff.

Additional areas of concentration include: executive compensation counseling, litigation, and arbitration, advancement and indemnification proceedings, civil RICO litigation, whistleblower litigation, defamation litigation, international litigation and arbitration, antitrust litigation and arbitration, products liability litigation, and environmental and toxic tort litigation.

Mr. Goldberg is admitted in both New York and New Jersey.

RULE 26 IN CURRENT PRACTICE

Current Rule 26

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

Current Rule 26(a)(2)(B): The 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.

Current 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.

Current 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 Rule 26

- Disclosure of communications with testifying experts ("the data or other information considered by the witness"), including drafts
- 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 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)

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

Today…

(2) Disclosure of Expert Testimony

- (A) In General
- (B) Written Report
- (C) Time to Disclose
- (D) Supplementing the Disclosure

After December 1, 2010…

(2) Disclosure of Expert Testimony

- (A) In General
- *(B) <u>Witnesses Who Must Provide a Written Report</u>*
- *(C) <u>Witnesses Who Do Not Provide a Written Report</u>*
- (~~C~~D) Time to Disclose
- (~~D~~E) Supplementing the Disclosure

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.

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

Today…

(4) Trial Preparation: Experts

- (A) Expert Who May Testify
- (B) Expert Employed Only for Trial Preparation

After December 1, 2010…

(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 "D*ocuments 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.

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.

Recent Cases

- *Basco v. Spiegel*, 2009 WL 3851002 (W.D.La. Sept. 21, 2009) (defendant failed to produce drafts of expert reports; court denied plaintiff's request to strike testimony of defendant's experts BUT ordered defendant to immediately produce the drafts and precluded defendant from relying on any information in the drafts not contained in final reports; court noted the impending changes to Rule 26 and stated that defendant merely "failed to provide some information of dubious value").
- *Galvin v. Pepe*, 2010 WL 3092640 (D.N.H. Aug. 5, 2010) (unpublished decision) (holding that emails between expert and lawyer were discoverable in light of, among other things, the bright line majority rule with respect to the current version of Rule 26, and refusing to apply new Rule 26 or adopt the reasoning behind the amendments).