

## NEW EXPERT REPORT AND COMMUNICATION RULES IN FEDERAL COURT CASES

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### I. Introduction:

As amended, Rule 26 of the Federal Rules of Civil Procedure now affords work-product protection to draft expert reports and, with three important exceptions, communications between testifying experts and a party's attorney. There has been no change with respect to the provisions of Rule 26 that limit discovery from experts employed only for trial preparation and the amendments to Rule 26 do not affect a court's gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). [See Full Report of the Civil Rules Advisory Committee, Judicial Conference of the United States, Committee on Rules of Practice and Procedure, p.2; Committee Note, p.18].

### II. "Draft" Expert Reports Are Now Afforded Work-Product Protection

The first major revision to Rule 26 is that the rule no longer allows discovery of "draft" expert reports. This new protection applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It is only in those rare cases where a party can show substantial need and undue hardship that discovery of draft expert reports will be allowed.

Adjusters and subrogation professionals should keep in mind that this amendment does not address the discoverability of preliminary reports prepared for them prior to litigation. As a result, if you still elect to have your expert prepare a preliminary report prior to initiating litigation and retaining subrogation counsel and/or before completing an investigation, such a report arguably remains discoverable under these new amendments because it was not a draft report prepared for a party's attorney.

### III. Disclosure of Expert Opinions is Now Limited to Facts and Data and No Longer Includes "Other Information"

Another new development in the amended version of Rule 26 is that disclosure of an expert's opinions is now limited to facts or data considered by the expert in forming opinions and no longer includes other information. This amendment is meant to allow the parties to concentrate on learning the strengths and weaknesses of an expert's opinions and to exclude from discovery theories or mental impressions of a party's attorney. [See Excerpt from the Report of the Judicial Conference of the United States, Committee on Rules of Practice and Procedure, p.4; see also Committee Note, p.15].

### IV. Communications Between an Expert and a Party's Attorney Are Now Afforded Work-Product Protection

Rule 26 now provides work-product protection for attorney-expert communications regardless of the form of the communications. As with the previously discussed amendment, this amendment was also designed to protect an attorney's work-product and ensure that a party's attorney can interact with retained experts without exposing those communications to searching discovery. [See Committee Note, p.17]. In those rare cases where a party can show substantial need and undue hardship for such discovery, this work-product protection may be overcome.

It should be noted that not all communications with counsel are protected from disclosure. This amendment outlines that there are still three specific areas that remain open to discovery regarding communications between counsel and an expert: (1) compensation for the expert's study or testimony; (2) facts or data provided by counsel that the expert considered in forming opinions; and (3) assumptions provided to the expert by counsel that the expert relied upon in forming an opinion.

This new protection does have some other limitations as well. First, it is limited only to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party. On its face, it does not apply to other insurance professionals, which further shows the strategic benefits of allowing counsel to coordinate communications with the expert. Next, this amendment does not afford protection to communications between counsel and other expert witnesses for whom a summary disclosure is now required under Rule 26(a)(2)(C), which is addressed in the next section of this Alert.

#### V. A Summary Disclosure is Now Required for Expert Witnesses Not Required to Provide Expert Reports

The amendments to Rule 26 also address witnesses who will provide expert testimony but who are not required to provide an expert report under Rule 26(a)(2)(B) because they are not retained or specially employed to provide such testimony or they are not employees who regularly give expert testimony, such as treating physicians and government investigators.

Under this amendment, if the expert is not required to provide a written report under 26(a)(2)(B), the summary disclosure must contain: (1) the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705 and (2) a summary of the facts and opinions to which the witness is expected to testify. The summary of

facts need only include the facts that support the opinions, and, if the witness is expected to testify as a “hybrid” witness to other facts, those facts need not be summarized. [See Full Report of the Civil Rules Advisory Committee, Judicial Conference of the United States, Committee on Rules of Practice and Procedure, p.2]. This disclosure is meant to be less extensive than an expert report required by Rule 26(a)(2)(B) because these witnesses have not been specially retained and may not be as responsive to counsel as those who have. [See Committee Note, pp.15-16].

It should also be noted that drafts of Rule 26(a)(2)(C) summary disclosures are also protected by the work-product provisions of amended Rule 26(b)(4)(B). [See Full Report of the Civil Rules Advisory Committee, Judicial Conference of the United States, Committee on Rule of Practice and Procedure, p.3].

#### VI. Conclusion: Enhanced Privilege Applies if Counsel Coordinates the Preparation of Expert Reports and Communications with Experts

While the amendments to Rule 26 now provide protection from disclosure of draft expert reports and communications between experts and a party’s attorney, these protections are only afforded if counsel coordinates preparation of expert reports and discussions with experts. Early retention of counsel will ensure that a party is afforded the full benefit of these new protections.