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Subrogation & Recovery Alert
News Concerning Recent Subrogation and Recovery Issues

COZEN O'CONNOR

Attorney Means "Attorney" – Lessons for Subrogation Professions From Recent Federal Court Decisions Clarifying the Disclosure Requirements for Expert Materials

The Amendments to Rule 26

In 2010, Federal Rule of Civil Procedure 26 was amended to provide new limitations on the discovery allowed for testifying experts in federal court cases. The most significant changes with regard to testifying experts, i.e., experts you intend to call at the time of trial, were that: (1) drafts of expert reports to counsel are no longer discoverable; and (2) communications between experts and counsel are no longer discoverable unless they relate to (i) compensation or (ii) facts, data, or assumptions provided by counsel that were considered by the expert. For subrogation professionals, these changes were positive as the amendments' goals were to reduce costs and time spent on discovery of draft reports and an expert's discussions or communications with counsel. The changes were further meant to streamline the discovery process and focus the parties on issues that were more central to the case, which was also good news to folks handling subrogation litigation.

The Decision in *Republic of Ecuador v. Bjorkman* and Other Federal Cases

While the 2010 changes to Rule 26 did usher in a new era of limitations on expert discovery in federal court cases, one thing was recently made clear by the U.S. Court of Appeals for the 10th Circuit: *attorney means attorney* and the limitations on discovery of experts do not extend to non-attorneys. In *Republic of Ecuador v. Bjorkman*, 735 F.3d 1179 (10th Cir. November 13, 2013), the U.S. Court of Appeals for the 10th Circuit's decision explained that the protections for communications with experts only extend to a party's attorney. The Court of Appeals declined to accept the appellant's position that the 2010 amendments provided a broader work-product protection to testifying experts that would cover communications with non-attorneys.

At the heart of the issue of expert discovery in *Republic of Ecuador*, which is one of a series of cases involving a decades-long international litigation over environmental contamination, was that the appellee had sought discovery from an expert for appellant that covered documents and communications that the expert received from a variety of sources in the appellant's litigation team, including lawyers, in-house scientists, consultants and other experts. The magistrate judge in the lower court case had held, among other things, that documents containing communications between the appellant's attorney and the expert could be withheld from production but that the appellant could not withhold communications between its expert and "non-attorneys." The magistrate judge explained that Rule 26 is meant to "protect the mental impressions and legal theories of a party's *attorney*, not its expert."

On appeal, the 10th Circuit upheld the magistrate judge's decision, finding that changes from the 2010 amendments were only meant to protect draft reports to counsel and communications between counsel and the expert. Specifically, the court noted that "had the drafters believed that expert materials were protected more broadly … then they could have chosen to bolster the protections afforded under the subdivision rather than providing two explicit protections in [the] subdivision[s] …" 735 F.3d at 1186. The court concluded that "the protections of Rules 26(b)(4)(B) [no discovery of draft expert reports to counsel] and (C) [no discovery of attorney-expert communications] are the exclusive protections afforded to expert trial-preparation materials."

It is also worth noting that the Court of Appeals for the 10th Circuit is not alone in taking the view that attorney means attorney for purposes of invoking the limitations on expert discovery. In

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related cases that followed shortly after the 10th Circuit's decision that addressed the discoverability of expert materials, the 9th and 11th Circuits each took an identical approach as that of the 10th Circuit. *See Republic of Ecuador v. Mackay*, Case No. 12-15572 (9th Cir. January 31, 2014); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. December 18, 2013). Both the 9th and 11th Circuits echoed the analysis and ultimate conclusion of the 10th Circuit that the 2010 amendments protecting expert draft reports and communications from disclosure apply only to an attorney.

Some U.S. District Courts have also recently taken this view. See, e.g. *United States v. Veolia Environmental North America*, 2013 WL 5779653 (D. De. 2013) ("Rule 26(b)(4)(C) only protects 'communications between *the party's attorney* and that party's testifying expert'" (emphasis in original)); *Fialkowski v. Perry*, 2012 WL 2527020 (E.D. of Pa. 2012) ("the purpose of amending Rule 26 in 2010 was to limit disclosure to materials of a factual nature and to protect against disclosure of *counsel's* work product" (emphasis in original)).

What Are the Lessons from These Cases? And Why Does It Matter to Your Recovery Efforts?

Admittedly, one can say that the case law addressing the 2010 amendments is still evolving, but if these recent cases teach us anything, it is that attorneys are the ones who are meant to be protected by the limitations on discovery of experts under the 2010 amendments to Federal Rule 26, not clients or their representatives or consultants. And this matters to subrogation professions why? Because adjusters, recovery personnel and other consultants are not attorneys and therefore their work-product with experts will not be protected in federal court. Recovery personnel need to be mindful of this distinction. If there were any ever doubts about the definition of attorney or the scope of the protection afforded by the 2010 amendments' limitations on the discovery of experts, those doubts have vanished now that three federal Courts of Appeal have made clear that the limitations are narrow and only cover attorneys.

These cases not only highlight that an adjuster's or recovery personnel's communications and draft (or preliminary) reports with experts are not protected and can be fully discoverable in federal court cases, but also serve to remind us of the wisdom of the age old subrogation mantras: "get counsel involved early and let counsel work with experts." Given the lessons learned from these recent federal court cases, it is more important than ever to heed these recommended rules of subrogation, especially if there is a possibility your case will end up in federal court. By following these rules and heeding the lessons from the recent cases, you can ensure that the protections allowed under the amendments to Rule 26 are preserved at the outset and can be invoked later on if needed.

In closing, keep in mind that, as you proceed in your recovery matters, emails, written communications and other materials that you or your team, as non-attorneys, share or exchange with your expert will not be protected from disclosure in federal court. To quote the 10th Circuit, "the work-product doctrine solely protects the inner workings of an attorney's mind." 735 F.3d at 1187.

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