

Rules Update: Changes to Federal Rule 26 Regarding Expert Disclosures and Communications With Retained and Non-Retained Expert Witnesses

By Lem E. Montgomery III and Katherine E. Bryant

Effective December 1, 2010, Federal Rule of Civil Procedure 26 was amended to alter the expert disclosure requirements and to limit expert discovery.

Under the prior version of Rule 26(a), experts who were required to prepare a written report¹ were also required to disclose the “facts or ***other information considered***” in forming their expert opinions.² This catch-all language (“other information” + “considered”) was interpreted so broadly by the district courts that virtually anything “considered, reviewed or generated” by a retained expert became discoverable, regardless of whether the materials were actually relied upon in forming the expert opinions.³ The former language was interpreted to include drafts of expert reports and even “attorney-expert communications that explain the lawyer’s concept of the underlying facts, or his view of the opinions expected.”⁴ Federal district courts in Mississippi made no exception.⁵ To the federal courts, “other information considered” meant everything under the sun, and counsel and experts went to considerable lengths to protect their communications or avoid them altogether.

The Rules Advisory Committee recognized the problems created by the overly broad scope of Rule 26(a)’s disclosure requirements. The Committee acknowledged that the discoverability of expert-attorney communications has initiated a “guarded attitude” between lawyers and testifying experts and that strategies to protect against expert discovery have increased costs and impeded effective expert communications.⁶ For example, to avoid discovery of their collaborative discussions, attorneys often employ two sets of experts – one for consultation and the other to prepare Rule 26 disclosures and testify at trial.⁷ By the same token, “experts adopt strategies that protect against discovery but also interfere with their work.”⁸

The amendments to Rule 26 are intended to eliminate or at least reduce these problems. Amended Rule 26 replaces the phrase, “facts or ***other information considered***” with “facts or ***data*** considered.”⁹ The Advisory Committee explains that “the refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.”¹⁰ The idea is to create work-product protection for “draft expert disclosures or reports” and “communications between expert witnesses and counsel.”¹¹

¹ Any expert “retained or specially employed to provide expert testimony” or “whose duties as the party’s employee regularly involve giving expert testimony” must provide a written report. Fed. R. Civ. P. 26(a)(2)(B).

² Fed. R. Civ. P. 26(a)(2)(B)(ii) (1993).

³ *Employees Committed for Justice v. Eastman Kodak Co.*, 251 F.R.D. 101, 104 (W.D.N.Y. 2008).

⁴ *Schwarz & Schwarz of Virginia, L.L.C. v. Certain Underwriters at Lloyd’s London Who Subscribed to Policy Number NC959*, 2009 WL 1043929, *6 (W.D. Va. 2009) (citing *Elm Grove Coal Co. v. Director, O.W.C.P.*, 480 F.3d 278, 303 (4th Cir. 2007)).

⁵ See *TV-3 Inc. v. Royal Ins. Co. of America*, 193 F.R.D. 490, 491 (S.D. Miss. 2000) (holding “other information” means “all communications between counsel and a retained testifying expert, even if those communications contain the attorneys’ mental impressions or trial strategy or is otherwise protected by the work product privilege.”).

⁶ 2010 Advisory Committee’s Notes to Fed. R. Civ. P. 26.

⁷ *Id.*

⁸ *Id.*

⁹ Fed. R. Civ. P. 26(a)(2)(B)(ii) (2010).

¹⁰ 2010 Advisory Committee’s Notes to Fed. R. Civ. P. 26.

¹¹ *Id.*

The amendments also encompass Section 26(b)(4)(c) which specifically protects communications between reporting experts and attorneys, regardless of the form of the communications, except to the extent 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.

The revised version of Rule 26(b)(4)(b) further “protect[s] drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” These amendments mirror the 2009 changes to our Uniform Local Rules for the Northern and Southern Districts of Mississippi. See L.U.Civ.R. 26(a)(2)(E).

Points to Consider

While these rule changes will likely ease collaboration between counsel and retained experts, practitioners should understand there still are categories of unprotected communications. Specifically, any communications relating to the following are still discoverable: (1) expert compensation, (2) facts or data considered, and (3) assumptions relied upon by the expert. The Rules Advisory Committee has admonished that the phrase “facts or data” is to be “interpreted broadly,”¹² defining it to mean “any material considered by the expert, from whatever source, that contains factual ingredients.”¹³ Likewise, the term “considered” means more than things an expert relied upon in forming his opinions. While the clear intent of the amended rule is to limit disclosure and discovery of expert communications, not all expert communications are protected, and anytime an expert communication is requested in discovery, the sitting district court – not the Rules Advisory Committee – must interpret the scope of amended Rule 26 to decide whether the communications should be disclosed.¹⁴

In practice, lawyers rarely draft separate letters and emails to convey assumptions, facts and data and mental impressions. Lawyers rarely disclose any mental impressions intentionally. Rather, lawyers communicate with their retained experts about the case and what gets included in their writings is usually a mixture of factual information, thoughts and sometimes strategy. Once an expert communication exists in tangible form and becomes the subject of a discovery request, there is a risk it might get discovered. No lawyer will soon forget the sight of his own letter sliding out of an expert’s file onto the deposition conference table before opposing counsel.

The best and safest practice for minimizing expert communications and maximizing the effectiveness and efficiency of retained experts is to abide by the following guidelines:

- *Choose the right expert for the job and involve him early and often.*

The month before the expert designation deadline is no time to begin searching for a testifying expert witness. Conscientious counsel should scan the civil complaint the minute it is received and think critically about the type of experts that might be needed. Counsel should then retain the necessary experts

¹² *Id.*

¹³ *Id.*

¹⁴ See e.g., *Dunavant Enterprises, Inc. v. Desoto County School Board of Education*, 2009 WL4591337, *1 (N.D. Miss. 2009) (protecting draft expert reports from discovery but ordering pursuant to L.U.Civ.R. 26(a)(2)(E) – our 2009 Uniform Local Rule similar to amended Rule 26 – the disclosure of all conversations between defense counsel and retained expert to the extent they contain “facts or data considered” and “assumptions relied upon” that were provided by counsel).

and get them involved in the case immediately. Any additional experts should be retained as soon as the expert issues arise or can be identified. An expert who gets involved early, who works closely with counsel, and who receives case information as it is developed has more time to think about the case and form solid opinions than the expert who receives a banker's box of materials four weeks prior to the designation deadline. Early involvement improves the expert's working knowledge and understanding of the case and reduces the need for assistance by counsel in generating the opinions and expert report.

- *Make sure the expert understands his role and the scope of the work requested.*

Retained experts, like all people, will have "opinions" on everything. Plus, some experts have multiple disciplines. Counsel should communicate early with a retained expert to be sure he understands the scope of the work requested, the issues to be addressed, and his role in the lawsuit prior to reviewing the case. Clarifying these matters reduces the likelihood the expert will report on tangential matters outside his expertise or submit a draft report that misses the mark altogether.

- *Do not engage in substantive written communications about the case with an expert.*

Given the discovery rules (old and new alike), written communications are simply not an appropriate forum for collaborative discussions with retained experts. Application of scientific principles to the facts of a civil case is a work in progress. Mental impressions of attorneys and experts often change throughout a lawsuit as the evidence takes shape in discovery. Many times, the smallest factual change can substantially alter an expert's opinion. Sometimes experts make errors along the way that get corrected or they may initially misunderstand a fact. Any problem solver would look less impressive if cross-examined with his every thought process in reaching the solution. Retained experts are no different, and with the jury sworn and duty-bound to measure your expert's credibility, it is critical to avoid this situation. Recording the witness's thoughts and mental impressions (and your own) in substantive written communications throughout the case risks discovery of the writings¹⁵ and unnecessary cross-examination of your expert. Conduct substantive expert consultations face-to-face in the field, in the lab, or in the office. You and your retained expert will have a more cohesive understanding of the case, and you will avoid creating a paper trail of mental impressions that could be unfairly used to your disadvantage in cross-examination.

- *Do not exchange drafts of expert reports.*

Amended Rule 26(b)(4)(b) is intended to protect drafts of expert reports from discovery. Still, exchanging multiple expert drafts is bad practice, and it can easily be avoided by reviewing the case thoroughly with your expert. A full and candid discussion of the case and the issues to be addressed before the report gets drafted ensures the expert's report and opinions will be on point, within the scope of the work requested, and firmly grounded in the evidence. If the expert is well informed about the case and his role within it and can articulate his opinions before writing the report, his first draft should be his final draft (or very close).

- *Let the expert do his own work. Never place a pen or a keystroke on an expert report!*

Amended Rule 26(b)(4)(b) protects draft expert reports from discovery, but what if counsel revises or makes notations on a draft and returns it to the expert? At that point, he has potentially provided

¹⁵ Again, under amended Rule 26, "facts or data considered" means, "any material considered by the expert, from whatever source, that contains factual ingredients." 2010 Advisory Committee's Notes to Fed. R. Civ. P. 26. This author can think of very few letters written in conjunction with a lawsuit that did not arguably contain "factual ingredients."

discoverable “facts or data considered” and/or “assumptions relied upon.”¹⁶ A retained expert is involved in the case, theoretically, because he knows more than anyone in the room about the subject matter of his report and testimony. If the jury believes counsel drafted his expert report, the expert’s credibility is lost. Even the smallest innocuous changes to an expert report by counsel can be made to look like ghost writing at trial. A retained expert must be willing and able to do his own work. Some experts are more diligent than others. Some experts are better writers than others. In the end, however, retaining the right expert for the job, managing the expert and meeting the expert designation deadline is counsel’s responsibility. As tempting as it may be to assist an expert with his report (especially with a designation deadline looming), don’t do it. It is far better to have the expert’s own work product than a report the jury believes was drafted or revised by counsel.

While this is by no means an exhaustive list of guidelines for working with retained experts, operating under these principles will at least ensure your retained expert is qualified for the job, that he has thoroughly and properly reviewed the case, and that his work product is his alone and does not appear influenced by counsel. When the expert is deposed about the formation of his expert opinions and report, counsel can forgo the Rule 26 objections and rest easy knowing there is nothing to be discovered.

Non-Reporting Experts

Per Amended Rule 26(a)(C)(i)-(ii), a formal expert report is no longer necessary for experts not “retained or specially employed to provide expert testimony.” Examples of these experts typically include non-retained fact witnesses who happen to have expert knowledge such as plaintiff’s treating physician, auto mechanic, accountant, etc. The Rule change allows counsel to submit a summary disclosure of the opinions to be offered by any such witness instead of a formal report. This disclosure requirement is considerably less extensive and burdensome than the former requirement.

The change does, however, raise one important point of defense practice regarding treating physicians. Defense counsel can informally interview most non-reporting experts (e.g., plaintiff’s auto mechanic) about their opinions and testimony prior to the expert designation deadline. But in Mississippi *ex parte* contact with plaintiff’s treating physician is prohibited.¹⁷ While plaintiff’s medical records are an indicator of how a treating physician might testify, they rarely tell the whole story and can sometimes be incorrect or misleading. In light of this Rule change, defense counsel should consider deposing any treating physicians the defendant intends to designate prior to the expert deadline. Otherwise, the Rule 26(a)(C)(i)-(ii) designation summary for a treating physician will inevitably reveal to plaintiff’s counsel the testimony the defendant *hopes* to obtain from the treating physician. Plaintiff’s counsel (who has access to the doctor) can then contact him and review the “points” in defendant’s designation summary prior to the deposition.

¹⁶ See Federal Rule of Civil Procedure 26(b)(4)(c).

¹⁷ *Scott v. Flynt*, 704 So. 2d 998, 1004-05 (Miss. 1996); see also *Pritchard v. Insurance Co. of North America*, 61 F.R.D. 104, 107 (N.D. Miss. 1973) (holding federal district court in diversity action is bound by state law concerning scope and effect of physician-patient privilege).

Quick Reference Chart of Federal Rule 26 Changes

Rule Amendments	Old Rule	New Rule	Intended Change
Information considered by an expert Rule 26(a)(2)(B)(ii)	Report must contain: the facts or other information considered by the witness in forming them	Report must contain: the facts or data considered by the witness in forming them	The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.
Witnesses who do not provide written report Rule 26(a)(C)(i)-(ii)	Old Rule 26(a)(C)(i)-(ii) entitled “Time to Disclose Expert Testimony” is now Rule Section 26(a)(D)	<i>Witnesses Who Do Not Provide a Written Report.</i> 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.	No report necessary for experts not “retained or specially employed to provide expert testimony.” Allows a summary disclosure of the opinions offered by expert witnesses who are not required to provide reports and of the facts supporting those opinions. This disclosure is considerably less extensive and burdensome than a formal report.
Drafts of expert reports Rule 26(b)(4)(B)	Old Rule 26(b)(4)(B) entitled “Expert Employed Only for Trial Preparation” is now Rule Section 26(b)(4)(D)	<i>New Rule 26(b)(4)(B) Trial-Preparation Protection for Draft Reports or Disclosures:</i> Protects drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.	Under the old Rule, virtually all drafts shared with counsel were discoverable regardless of form. Drafts of “reporting” experts will no longer be subject to discovery. Should allow for more refined and persuasive reports as well as the reduction or elimination of excess expert costs and time spent examining experts about the development of opinions.

Communications with Counsel Rule 26(a)(4)(C)(i)-(iii)	Old Rule 26(b)(4)(C) entitled "Payment" is now Rule Section 26(b)(4)(E)	<i>Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.</i> 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: <ul style="list-style-type: none"> (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. 	Under the old Rule, virtually all communications were discoverable. The new Rule is intended to reduce the pressure felt by experts and counsel to avoid creating discoverable communications.
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Additional Points:

- New Rules took effect December 1, 2010.
- Rules are not retroactive. Expert reports or communications generated or requested before December 1, 2010 may not be protected in some states absent a corresponding local rule, *e.g.*, L.U.Civ.R. 26(a)(2)(E).