Seismic or Snooze-Worthy?

Year-Old FRCP Amendments on Expert Requirements

Heather A. Ritch
and Jennifer A. Eppensteiner

You must educate your experts about the rule changes and how courts have interpreted and applied them over the past year.

The provisions of Federal Rule of Civil Procedure 26 dealing with expert disclosure requirements and the scope of expert discovery were last amended just over a year ago on December 1, 2010. These amendments sought to address the practical realities of working with an expert—under the former version of the rule, the broad allowance of expert discovery prevented meaningful exchanges between counsel and their party's experts and forced counsel to cautiously avoid creating a discoverable record. While the legal community widely supported the 2010 amendments, and while these amendments have undoubtedly streamlined the process for expert preparation and related discovery, case law over the past year has demonstrated that the amendments present plenty of pitfalls for the unwary.

Evolution of Expert Disclosure and Discovery Under Rule 26

Rule makers intended the most recent amendments to Rule 26 to deal with practical issues caused by the 1993 version of the same rule. The 1993 amendments, which facilitated broad discovery of expert materials and attorney-expert communications, left counsel on both sides taking elaborate steps to prevent the creation of a discoverable record while at the same time attempting to unearth useful material possibly withheld by their opponents and those opponents' experts.

Prior to the 1993 amendments to Rule 26, expert discovery was limited such that it was usually conducted via interrogatories unless leave of court was granted to do otherwise. The standard interrogatory requested the opposing party identify its expert witnesses and state the substance of their expected testimony. The 1993 changes vastly increased the scope of expert discovery accessible to an opponent. First, the 1993 amendments required a party to disclose expert testimony in the form of expert reports from those "retained or specifically employed to provide expert testimony" or "whose duties as employee[s] of the party regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B) (1993).

■ Heather A. Ritch is a senior associate and Jennifer A. Eppensteiner is a mid-level associate in Reed Smith's Life Sciences Health Industry Group, both practicing from the firm's Philadelphia office. Ms. Ritch has substantial experience in pharmaceutical mass tort litigation, as well as commercial and intellectual property litigation. She is a member of the firm's e-discovery team and regularly advises clients on electronic discovery issues. She also serves on DRI's Trial Tactics, E-Discovery, and Young Lawyers Committees. Ms. Eppensteiner's practice focuses on defending pharmaceutical and medical device product liability cases.

The report needed to include "the data or *other information* considered by the witness." *Id.* (emphasis added). Additionally, the 1993 changes also explicitly allowed for the deposition of any person identified as an expert. Fed. R. Civ. P. 26(b)(4)(A) (1993).

The 1993 Advisory Committee Notes reemphasized the move towards increasing disclosure. In explaining the required contents of the expert report, the Advisory Committee noted that the report should "disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions." Fed. R. Civ. P. 26 Advisory Committee's note (1993). The committee further explained that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." *Id.*

Under the 1993 rules, parties routinely sought to avoid disclosure of attorney-expert communications and draft expert reports by retaining two experts—a testifying expert and a consulting expert who did not testify at trial. Often, the attorney worked closely with the consulting expert to develop legal theories consistent with that expert's opinion of the case, while only having limited exchanges with the testifying expert. The testifying expert would aim to prepare only one draft of what would be his or her final report, and communications with counsel were done either in person or telephonically, with the expert purposefully restraining from taking notes.

In crafting the 2010 amendments, the Judicial Conference of the United States Committee on Rules of Practice and Procedure recognized that those "steps add to the costs and burdens of discovery, impede efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work." Report of the Judicial Conference of the United States Comm. on Rules of Practice and Procedure (Sept. 2009) ("JC Report"). As the Judicial Conference observed, these practices wasted both the attorney's time and the client's money, and perhaps most importantly, they prevented meaningful exchanges between the testifying expert and counsel which could have allowed the expert to provide a more effective opinion.

The 2010 Amendments

The 2010 amendments attempt to strike a balance between the extremely limited scope of discovery allowed under the 1970 version of the rule and the more expansive discovery made possible by the 1993 amendments. The Rules Committee recognized that the 1993 amendments, which were interpreted to allow discovery of all attorney-expert communications and all draft expert reports, led to "artificial and wasteful discovery-avoidance practices". JC Report. The 2010 amendments implemented four important changes: (1) a requirement that a party disclose witnesses who are not specially retained as testifying experts but who will offer expert opinions must be disclosed, along with summaries of their expert opinions; (2) a narrower requirement for disclosure in the expert report of "facts and data" considered by the expert; (3) protection of drafts of expert reports from discovery; and (4) protection of attorney communications with a testifying experts, with three important exceptions which we will discuss in greater detail below. While these changes do take into account certain realities of working with an expert, the protections that they offer are not iron-clad.

The addition of the requirement that a party disclose of the identities and expert opinions of witnesses who are not "specially" retained but who nonetheless will offer expert testimony stems from the reality that, in some cases, the testimony of witnesses such as treating physicians or those in scientific or technical jobs may encompass expert opinions. While these witnesses may testify as lay witnesses about their treatment of a patient or the performance of their everyday jobs of a scientific or technical nature, their training may qualify them to offer opinions beyond the purview of a lay witness. The summary disclosure requirement of Rule 26(a)(2)(C) endeavors to ensure that the expert opinions offered by these witnesses will not surprise opposing litigants. This requirement does not, however, require the disclosure of facts unrelated to the expert opinions the witness will present.

Under amended Rule 26(a)(2)(B), the scope of required disclosure in the expert report has been narrowed. Rule 26(a)(2)(B) now reads: "the report must contain… the facts or data considered by the witness." The old rule required that the expert report disclose "the data or other information considered by the witness." Fed. R. Civ. P. 26(a)(2)(B)(ii) (1993).

Drafts of expert reports are now protected from disclosure under Rule 26(b)(4)(B). This rule has been added to provide work-product protection to drafts of expert reports and all other disclosures required under Rule 26(a)(2) "regardless of the form in which the draft is recorded." This allows an attorney to work closely with the expert, without fear of creating a discoverable record. This protection applies to all witnesses identified under Rule 26(a)(2)(A), regardless of whether the expert must provide reports as specified by Rule 26(a)(2)(B) or are the subject of summary disclosure requirements under Rule(a)(2)(C).

In addition to protecting drafts of expert reports and disclosures, Rule 26(b)(4)(C) now provides work-product protection for attorney-expert communications, again regardless of the form of the communications. The Advisory Committee notes explain that Rule 26(b)(4)(C) is "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." Fed. R. Civ. P. 26 Advisory Committee's note (2010). This protection, however, extends only to those communications with those experts retained for the purpose of testifying in litigation who must provide a report under Rule 26(a)(2)(B). The Advisory Committee's notes explain that "[p]rotected 'communications' include those between the party's attorney and assistants of the expert witness," but states "[t]he rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C)." *Id.*

Three important exceptions moderate the attorney-expert communications privilege achieved through the 2010 amend-

ments. Because the spirit of the rule is to allow discovery into areas important to uncovering the development of and foundation for an expert's opinion, communications regarding the following may be discoverable: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion. Fed. R. Civ. P. 26(b)(4)(C). The Advisory Committee notes offer some guidance as to how to exceptions are to be interpreted; they explain that while under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed, the exception applies only to communications "identifying" the facts or data provided by counsel—further communications about the potential relevance of the facts or data are protected. Fed. R. Civ. P. 26 Advisory Committee's note (2010). Similarly, regarding assumptions provided to the expert by counsel, such communications are discoverable where the attorney instructed the expert to assume the truth of certain testimony or evidence and the expert relied on that assumption in forming his or her opinion. *Id.* More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception. *Id.*

The 2010 amendments attempt to strike a balance between the extremely limited scope of discovery allowed under the 1970 version of the rule and the more expansive discovery made possible by the 1993 amendments.

Recent Case Law Interpreting the 2010 Amendments

In the months since the 2010 amendments went into effect, the case law interpreting these amendments—both to the expert disclosure requirements under Rules 26(a)(2)(B) and 26(a)(2)(C) and the modified protections for drafts and attorney-expert communications under Rules 26(b)(4)(B) and 26(b)(4)(C)—demonstrates less uncertainty as to the discoverability of draft expert reports, but a new set of uncertainties as to expert disclosure requirements and the extent of work product protections to be afforded an expert's notes and communications with counsel. The discussion below touches on just a few of the recent cases interpreting these new rules.

Case Law Differentiating Experts Subject to Rule 26(a)(2)(B) from Those Subject to Rule 26(a)(2)(C) Disclosure Requirements

The first step in working with your expert under the new Rule 26 requires that you distinguish between those experts subject to Rule 26(a)(2)(B) and Rule 26(a)(2)(C) disclosure requirements. This will affect the nature of the report required and the extent to which your attorney-expert communications are afforded protection. Discerning the difference between an expert retained for the purpose of testifying pursuant to Rule 26(a)(2)(B) and who must, therefore, submit an expert report, and those witnesses who may proffer expert opinions in addition to lay opinions, and therefore subject to lessened disclosure requirement of Rule 26(a)(2)(C), has proven to be less black-and-white than the rule drafters likely contemplated.

To make this distinction, the court must perform a two-part inquiry: first determining whether any of the contemplated testimony constitutes "expert" testimony (*i.e.*, whether it falls within the ambit of Rules 702, 703, or 705 of the Federal Rules of Evidence), and second, determining whether the witness has been "retained or specially employed to provide expert testimony in the case" or whether his or her "duties as [a] party's employee regularly involve giving expert testimony," as described in Rule 26(a)(2)(B). *See Am. Prop. Constr. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 4 (D.D.C. 2011). Only if the answer to both parts of this test is "yes" does the need to submit an expert report under Rule 26(a)(2)(B) arise. *Id. See also Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1 (1st Cir. 2011); *In Saline River Properties, LLC v. Johnson Controls, Inc.*, No. 10-10507, 2011 WL 6031943 (E.D. Mich. Dec. 5, 2011); *Chesney v. Tennessee Valley Auth.*, Nos. 09-09, 09-48, 09-54, 09-64, 2011 WL 2550721, at *2 (E.D. Tenn. June 21, 2011).

In *Downey v. Bob's Discount Furniture Holdings, Inc.*, one of the first cases from a U.S. Circuit Court of Appeals to discuss the interplay between the two subsections, the plaintiffs discovered an infestation of bed bugs and immediately called a pest control company. *Id.* at 3. Edward Gordinier, a licensed and experienced exterminator, responded to the service call the same day. *Id.* Gordinier composed an incident report describing the infestation and later carried out the necessary extermination treatments. *Id.* Gordinier was disclosed as an expert. *Id.* at 4. He did not, however, produce a written report delineating his expected testimony. *Id.* The district court granted a motion to exclude Gordinier's testimony based on his failure to provide a written report, but the First Circuit reversed and found that the district court had abused its discretion in excluding the testimony. *Id.* at 4, 8. In articulating this distinction between Rule 26(a)(2)(B) experts and Rule 26(a)(2)(C) experts, the First Circuit held that there is a "difference between a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony." *Id.* at 3 (citation omitted). The First Circuit then held that an expert who "is part of an ongoing sequence of events and arrives at his causation opinion during treatment, his opinion testimony is not that of a retained or specially employed expert." *Id.* (citation omitted).

A treating physician can be both a Rule 26(a)(2)(C) and Rule 26(a)(2)(B) witness, depending on whether he or she will offer testimony beyond his or her treatment of the plaintiff. *See, e.g., Goodman v. Staples the Office Superstore LLC*, 644 F.3d 817, 819–20 (9th Cir. 2011) ("when a treating physician morphs into a witness hired

to render expert opinions that go beyond the usual scope of a treating doctor's testimony, the proponent of the testimony must comply with Rule 26(a)(2)"); *Ghiorzi v. Whitewater Pools & Spas, Inc.*, No. 2:10-cv-01778-JCM-PAL, 2011 WL 5190804 (D. Nev. Oct. 28, 2011) (granting defendant's emergency motion to strike plaintiff's expert witness whose opinions were beyond the scope of treatment of the plaintiff).

Likewise, employees whose job responsibilities include technical or scientific skills may also offer "expert" opinions subject to either the Rule 26(a)(2)(B) or 26(a)(2)(C) requirements. *See*, *e.g.*, *In re Google AdWords Litig.*, No. 5:08-cv-03369-EJD, 2012 WL 28068 (N.D. Cal. Jan. 5, 2012). In *In re Google AdWords Litigation*, the plaintiffs' counsel challenged the admissibility of certain opinions of Google's chief economist, Dr. Hal Varian, a senior employee, Jonathan Alferness, and a technical/engineering manager, William Kunz. *Id.* at *3. Google's counsel had advanced these opinions in the form of declarations in support of Google's opposition to class certification. *Id.* As to Dr. Varian's proffered opinions on how the AdWords system worked and his experience applying economic modeling to study the AdWords system, the court found that "just because the underlying facts and data are technical in nature does not transform the information into 'expert testimony' when those facts are within the personal knowledge and experience of the company's employee. Dr. Varian may offer lay witness opinions regarding Google's business, so long as those opinions are based on his own personal, particularized knowledge and experience relating to his employment at Google." *Id.* at *5.

The plaintiffs' counsel made similar challenges to the admissibility of the testimony of Mr. Alferness and Mr. Kunz. *Id.* at *6–7. Plaintiffs' counsel argued that these individuals prepared their proffered testimony for the purpose of litigation, and therefore outside the scope of their employment. *Id.* Again, the court found that the testimony of both employees fell within their personal knowledge and day-to-day experiences with AdWord, such that reviewing data pertinent to the lawsuit after the suit was filed did not transform their lay opinions into litigation-driven ones. *Id.* Both employees were allowed to provide lay-opinion testimony, and were not subject to the disclosure requirements of expert witnesses. *Id.*

Discoverable Facts and Data Considered by an Expert

Even though Rule 26(a)(2)(B), as amended in 2010, narrowed requirements for disclosure of "facts and data" considered by the expert in drafting their expert report, you can safely assume that opposing counsel will seek the broadest possible discovery allowed under these terms. The amendments do not call for wholesale disclosure of an expert's notes. However, the court has wide room to interpret what exactly is required under the new rule. The Court also has wide latitude to deal with a party who has improperly withheld discovery. For example, in *Etherton v. Owners Ins. Co.*, the plaintiff alleged that the defendant's expert did not produce several pages of calculations. No. 10-cv-00892-MSK-KLM, 2011 WL 684592, at *1 (D. Colo. Feb. 18, 2011). The court denied the plaintiff's motion to strike the defendant's expert's testimony and to preclude introduction of his report, but allowed the plaintiff's attorney to reopen the expert's deposition to question him regarding certain calculations. *Id.* at *2. However, in *Helmert v. Butterball, LLC*, the court denied the parties' cross-motions to compel production of expert data in its electronic, native format where both parties had received copies of the data considered and neither party was denied any material of a factual nature that had been furnished to the experts and that they considered in reaching their opinions. No. 4:08-CV-00342, 2011 WL 3157180, at *2 (E.D. Ark. July 27, 2011).

Access to Expert Notes and Summaries

While it is clear from the language of the amended Rule 26(b)(4)(B), as well as the Advisory Committee Notes, that parties are now restricted in their ability to obtain draft

expert reports, that does not mean that the rule absolutely and completely protects expert's notes from disclosure. Since the amendments were put into effect, at least one court has held that "an expert's handwritten notes are not protected from disclosure because they are neither drafts of an expert report nor communications between the party's attorney and the expert witness."

A treating physician can be both a Rule 26(a)(2)(C) and Rule 26(a)(2)(B) witness, depending on whether he or she will offer testimony beyond his or her treatment of the plaintiff.

Dongguk University v. Yale University, No. 3:08-CV-00441, 2011 WL 1935865, at *1 (D. Conn. May 19, 2011). In *Dongguk University*, the court found no evidence that the handwritten notes which the plaintiff sought to protect were "mental impressions, conclusions, opinions, or legal theories of a party's attorney" nor did they believe the notes memorialized a conversation with counsel. *Id.* Absent such findings, plaintiff's expert was order to produce the notes.

Likewise, in a case in which an expert's assistants compiled and summarized information contained in individual case files, the court required production of the summaries on the grounds that they were not draft reports. *D.G. ex rel. G. v. Henry*, No. 08-CV-74-GKF-FHM, 2011 WL 1344200, at *1 (N.D. Okla. Apr. 8, 2011). In that case the court explained that the summaries contained facts from the case files that the expert had relied on in forming his opinion, which brought them within the scope of "facts or data" under the amended rule. *Id.*

Communications Between Counsel and Nonretained Experts

The Advisory Committee notes to Rule 26(b)(4)(C) explain that the protections afforded to communications between counsel and experts who submit a report pursuant to Rule 26(a)(2)(B) do *not* likewise extend to communications with other witnesses who may offer expert opinions, such as those whose opinions are disclosed pursuant to Rule 26(a)(2)(C): "The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C)." Fed. R. Civ. P. 26 Advisory Committee's note (2010).

Further, attorney work product, such as discussions of the relevance of facts or data provided by the attorney, is still protected except to the extent such work product constitutes "facts or data" considered by the expert in formulating his or her opinions. Some courts protect all communications between experts and counsel regardless of whether such communications reveal "facts and data" considered by the expert in forming his or her opinions, while others do not. *Compare Graco Inc. v. PMC Global Inc.*, No. 08-1304, 2011 WL 666056, at *14–15 (D.N.J. Feb. 14, 2011) (finding that the defendant was entitled to "all relevant discovery regarding the facts/data considered, reviewed or relied upon for the development, foundation or basis of the expert witnesses' opinions," but not to any communications between them and the plaintiff's counsel) *with Republic of Ecuador v. Bjorkman*, No. 11-cv-01470, 2012 WL 12755, at *5 (D. Colo. Jan. 4, 2012) ("information constituting facts or data considered by the expert may not be withheld simply because it was used and/or prepared in anticipation of litigation by or for an attorney").

The Consequences of Failing to Disclose Experts and Their Opinions Sufficiently

An appropriate sanction for failure to make an expert disclosure timely and in accordance with Rule 26(a)(2) is exclusion of the expert and his or her opinions at trial. *See* Fed. R. Civ. P. 37(c)(1) (allowing a court to preclude use of that expert and that expert's information at trial, "unless the failure was substantially justified or is harmless."). Recent case law evidences that courts are not shy about imposing this sanction. For example, in *Campbell v. United States*, a wrongful death action brought under the Federal Tort Claims Act, the plaintiff was precluded from offering her expert's opinions at trial because her attorney submitted the expert report five days late and the report failed to satisfy the requirements of Rule 26(b)(4)(B). No. 11-1554, 2012 WL 34445, at *2 (E.D. Va. Jan. 9, 2012). The court held that preclusion was proper given the plaintiff's expert's report "failed to delineate the applicable standard of care, discuss the issue of causation, explain the factual basis for his conclusions, or reveal the records that he reviewed." *Id.*

In *Malone v. Ameren UE*, 646 F.3d 512, 515–16 (8th Cir. 2011), the Eighth Circuit Court of Appeals affirmed the lower court's decision to exclude three affidavits proffered by the appellant because the expert opinions within those affidavits had not been properly disclosed as required by Rule 26(a). Similar results were reached in two other courts. *See Holm v. Town of Derry*, No. 11-cv-32-JD, 2011 WL 6371792, at *7–8 (D.N.H. Dec. 20, 2011) (precluding the plaintiff from offering expert testimony at trial for failure to identify any expert in accordance with Rule 26(a)(2)); *SG Industries, Inc. v. RSM McGladrey, Inc.*, No. 10-cv-11119, 2011 WL 6090247, at *7 (Dec. 7, 2011) (same).

Practice Tips

We have six practice tips for managing the pitfalls that the 2010 amendments to Rule 26 have created: (1) identify blended factual and expert testimony that will require Federal Rule of Civil Procedure 26(a)(2)(c) disclosures; (2) determine if you will need to submit a 26(a)(2)(B) report or a 26(a)(2)(C) disclosure; (3) remember and plan for the three exceptions to Federal Rule of Civil Procedure 26(b)(4) discussed above; (4) take the "substantial need" exception into account and plan accordingly; (5) consider that a court may deem the 2010 Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4) to apply retroactively to cases filed before December 1, 2010; (6) discuss the 2010 changes with your experts.

Identify Blended Factual and Expert Testimony

While treating physicians or those with scientific or technical jobs might not even view themselves as providing "expert" testimony regarding tasks performed in the

scope of their employment, a court might consider portions of their testimony to be "expert" in nature, especially in complex, scientific or technical litigation matters. So you will want to consider early in the litigation which witnesses might qualify to offer blended factual and expert testimony, to be sure that their identities are properly and timely disclosed in accordance with Rule 26(a). At a minimum, you want to ensure that you provide to the other side an appropriate summary of the anticipated subject matter, underlying facts, and opinions expected in such testimony, in compliance with new Rule 26(a)(2)(C).

Determine Whether "Expert" Testimony Requires a Rule 26(a)(2)(B) Report or a Rule 26(a)(2)(C) Disclosure

Accurately evaluating the distinction between witness testimony requiring you to provide a Rule 26(a)(2)(B) and 26(a)(2)(C) can be critical, for failing to make a sufficient disclosure can result in preclusion of that expert and his or her opinions. While the required disclosures to be made in an expert report are fairly straightforward under the new Rule 26(a)(2)(B), Rule 26(a)(2)(C) offers little guidance about the proper form of a summary expert disclosure. In recent months, however, there has been some specific guidance provided by the courts. For example, in *Chesney v. Tennessee Valley Authority*, the court specifically endorsed the following as adequate disclosures pursuant to Rule 26(a)(2)(C):

> Cassandra L. Wylie, Manager of [Defendant's] Atmospheric Modeling and Analysis Group[.] In accordance with Rule 26(a)(2)(C), [Defendant] states that Ms. Wylie may be called to testify about air monitoring activities conducted as a result of the [ ] coal ash release. She may also be called to testify about the results of air monitoring for particulate matter… compared to regional [ ] levels and to the Environmental Protection Agency [ ] standards. Finally, she may be called to testify about the correlation between regional [particulate matter] and power generation at [Defendant's plants.]
>
> David L. Bowling, Jr., Manager of [Defendant's] River Forecast Center[.] In accordance with Rule 26(a)(2)(C), [Defendant] states that Mr. Bowling may be called to testify about water flows and elevations… at various locations and times.

Nos. 3:09-CV-09, 3:09-CV-48, 3:09-CV-54, 3:09-CV-64, 2011 WL 2550721, at *3 n.3 (E.D. Tenn. June 21. 2011). *See also Saline River Properties, LLC*, 2011 WL 6031943, at *10 (citing examples of Rule 26(a)(2)(C) disclosures deemed adequate by *Chesney* court).

Additionally, remember that the attorney-client protections afforded by Rule 26(b)(4)(C) *only* extend to communications with those experts retained for the purpose of testifying in the litigation and required to provide a report under Rule 26(a)(2)(B), and *not* those whose opinions are disclosed pursuant to Rule 26(a)(2)(C).

Remember the Three Exceptions to Rule 26(b)(4)

The attorney work-product protections afforded to expert report draft and communications between an expert and counsel for the party that retained the expert are not absolute. Rule 26(b)(4) permits discovery of attorney-expert communications concerning (a) compensation, (b) facts or data considered by the witness in forming opinions, and (c) assumptions provided by counsel and relied upon by the expert. While the Advisory Committee Notes provide some guidance in how to distinguish between "facts or data considered by the witness" and "assumptions provided by counsel and relied upon," it will benefit you to communicate as clearly as possible when providing either facts or data or assumptions to your expert. Understanding that these categories of communication are discoverable, find a way to delineate these communications from strategy discussions. Additionally, when working with your expert, be wary of providing new facts or data directly into a draft of the expert report. If opposing counsel believes facts or data have been withheld, they may challenge your right to withhold the draft, which could result in the court ordering a redacted draft report disclosing such facts or data.

Account for the "Substantial Need" Exception

Bear in mind that while the amendments to Rule 26(b)(4), in particular the 26(b)(4)(B) and 26(b)(4)(C) amendments, restrict opposing counsel's ability to extract discovery concerning expert draft reports and communications with counsel, they do not eliminate that ability entirely. Rule 26(b)(3)(A)(ii) allows for discovery of such drafts upon a showing of "substantial need." Of course, whether an opponent can demonstrate "substantial need" will depend on the specifics of each case.

Consider That a Court May Apply the Amended Rules Retroactively

While the amendments to Rule 26(a)(2) and 26(b)(4) became effective on December 1, 2010, courts may deem them to apply retroactively to those cases filed prior to December 1, 2010, where discovery is still ongoing or where such application is "just and practicable. *See Civix-DDI, LLC v. Metropolitan Regional Information Systems, Inc.*, 273 F.R.D. 651, 652–53 (E.D. Va. 2011) (finding, on the parties joint motion, that Rule 26(b)(4) applied retroactively despite the fact that the case was commenced in August 2010 because discovery did not commence until well after the amendment went into effect and "there remains ample time for the parties to conduct thorough discovery of testifying expert opinions on substantive grounds, without also inquiring into draft expert reports and attorney-expert communications."). *See also Republic of Ecuador*, 2012 WL 12755 (applying the 2010 amendments to an action that commenced prior to December 1, 2010 because, inter alia, "Petitioner makes no argument that application of the Amendments to this proceeding is infeasible, and the Court perceives none. As such, the Court finds that the 2010 Amendments shall apply to this proceeding in a pending action pursuant to Fed. R. Civ. P. 86(a)(2).").

Discuss the 2010 Changes with Your Expert

Whether you are engaging a new expert or working with an expert on an ongoing matter, you must educate him or her about the amendments and how the courts have interpreted and applied them over the past year. Consider what is required of each type of expert, which communications are protected, and the effect of each on their work product going forward. If necessary, update your expert's engagement letter to reflect your relationship under the new Rule 26. FD