Protecting Expert Communications

Catherine Ahlin-Halverson
Maslon (Minneapolis, MN)
612.672.8314 | catherine.ahlin@maslon.com

The work and testimony of an expert witness can be pivotal to the outcome of a complex case. Experts may conduct important scientific study of issues central to a case, test theories, educate the jury and the court, assess and explain financial theories and damages models, and can help identify and expose weaknesses in the opposing side's case. It therefore is crucial that lawyers maximize the effectiveness of their expert witnesses by communicating efficiently and effectively with them, and by taking precautions to diminish the possibility of negative attacks against them. Complying with the discovery rules, and appropriately protecting expert communications and draft reports is an important part of minimizing the risk of negative attacks.

Since 2010, the Federal Rules of Civil Procedure protect most communications between attorneys and experts, with limited exceptions. Although these protections arguably allow for more direct and efficient communications with experts than before, they do still provide for disclosure under specific circumstances, and attorneys should have these circumstances in mind at all times when communicating and working with experts so as to minimize the risk of unexpected disclosure.

I. TESTIFYING EXPERTS

To address the inefficiency and uncertainty associated with the potential production of notes or communications with an expert that reflect an attorney's mental impressions, theories, and strategies, the federal rules were amended in 2010 to limit an expert testifying witness's required disclosure to the "facts or data" considered by the expert.[1] The federal rules additionally created two specific protected categories of documents exempt from expert discovery. First, Fed. R. Civ. P. 26(b)(4)(B) provides that drafts of any [expert] report or disclosure, regardless of the form in which the drafts are recorded, are protected work product pursuant to Fed. R. Civ. P. 26(b)(3)(A). Second, Fed. R. Civ. P. 26(b)(4)(C) provides that communications between the attorney and the expert witness also are protected work product pursuant to Fed. R. Civ. P. 26(b)(3)(A), regardless of the form of the communications, unless they relate to the expert's compensation; identify facts or data that the party's attorney provided to the expert and that the expert considered; or identify assumptions that the party's attorney provided and the expert relied on in forming his or her opinions. Draft reports and attorney-expert communications may be discovered if a party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Fed R. Civ. P. 26(b)(3)(A)(ii).

The language of the rule protecting attorney-expert communications may create a potential discoverability loophole for employee experts because employee experts are not in all instances required to submit expert reports, and Fed. R. Civ. P. 26(b)(4)(C) only protects communications with expert witnesses required to submit a report. Fed. R. Civ. P. 26(a)(2)(B) provides that an employee expert witness is not required to submit an expert report unless she is specially employed to provide expert testimony or if her duties as the party's employee regularly involve giving expert testimony. The protections for communications between a party's attorney and expert witnesses only explicitly apply to "any witness required to provide a report under Rule 26(a)(2)(B)." See Fed. R. Civ. P. 26(a)(4)(C). Therefore, a party may argue that communications with a testifying employee expert may not be protected if that employee expert witness

1 Under the federal rules, a testifying expert witness also is required to disclose a report stating all opinions the witness will express and the basis and reasons for them, and additional information listed in the rule. Fed. R. Civ. P. 26(a)(2)(B).

was not required to provide a report. In one case involving testifying employee experts who were also fact witnesses, the court found that the protection afforded by Fed. R. Civ. P. 26(b)(4) applied only to experts required to provide a report, and not to employee experts. The court thus ordered production of all communications between counsel and the employee witnesses, even though the witnesses were testifying at least in part as expert witnesses and even though the attorney-client privilege might have applied to the employees if they had not offered expert opinion testimony in the case. See United States v. Sierra Pacific Industries, 2011 U.S. Dist. LEXIS 60372 (E.D. Cal. May 26, 2011); see also Verinata Health, Inc. v. Sequenom, Inc., 2014 U.S. Dist. LEXIS 80575 (N.D. Cal. June 10, 2014). But see Graco, Inc. v. PMC Global, Inc., 2011 U.S. Dist. LEXIS 14717 (D.N.J. Feb. 14, 2011) (finding that the protection of Rule 26(b)(4) is also afforded to experts not required to submit a report).

II. CONSULTING EXPERTS

Typically, a party may not obtain discovery from an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to testify. Fed. R. Civ. P. 26(b)(4)(D). Discovery from such an expert will only be allowed as provided in Fed. R. Civ. P. 35(b), which concerns orders of physical, mental, or blood examinations, or "on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Id.

Federal district courts have addressed whether a party's employee can be considered a consulting expert pursuant to Fed. R. Civ. P. 26(b)(4)(D). In Tellabs Operations, Inc. v. Fujitsu Ltd., 283 F.R.D. 374 (N.D. Ill. 2012), a patent infringement case, Fujitsu argued that an inspection conducted by its own employees, who were specially assigned to that task in anticipation of litigation, and were not designated to testify, was protected from discovery by the work product doctrine. Although some courts have concluded that the plain text of the rule precludes the conclusion that any employee could be "retained or specially employed" in anticipation of litigation or preparation for trial, the Tellabs court found that in-house experts could fall within the rule, but found that the in-house experts at issue in the Tellabs case did not fall within the rule. Id. at 384-390 (Fujitsu failed to show that the special employment was on a project other than the kind the employee normally is engaged in as well as being in anticipation of litigation. The impetus behind the employee's inspection was commercial, not legal). See also In re Shell Oil Refinery, 132 F.R.D. 437 (E.D. La. 1990) (In-house experts came under the rule's protections because "[t]o rule otherwise would encourage economic waste by requiring an employer to hire independent experts to obtain the protection of Rule 26(b)(4)." The employees at issue (1) were engaged by Shell's attorneys to perform specific tasks to defend that lawsuit, including investigating and studying the cause of explosion and preparing preliminary reports, and (2) although they might have studied the explosion regardless of litigation, their usual duties did not include litigation assistance.).

III. THE SCOPE OF PROTECTION AFFORDED BY THE RULES

A. Draft Reports

Drafts of any expert report or disclosure, regardless of the form in which the drafts are recorded, are protected work product. Fed. R. Civ. P. 26(b)(4)(B). Therefore, attorney and expert notes in a draft report, in any form, are protected from disclosure. However, depending on the context, additional draft documents and notes prepared by the expert likely are discoverable. See, e.g., Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1193-95 (11th Cir. 2013) (personal notes and e-mail communications prepared by testifying expert in anticipation of arbitration were not exempt from disclosure); Carrion v. For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a) (In re Republic of Ecuador), 735 F.3d 1179, 1187 (10th Cir. 2013) (documents prepared and received by expert witness, other than draft reports and communications with attorneys, were discoverable); In re Application of Republic of Ecuador, 280 F.R.D. 506, 512-15 (N.D. Cal. 2012) (a testifying expert's various notes, "task lists," outlines, presentations, and memoranda are not protected from discovery as "draft reports"). One district court distinguished between notes that are "simply a compilation of information for possible later use in a case" and notes which are "truly part of a final expert report." Wenk v. O'Reilly, 2014 U.S. Dist. LEXIS 36735 (S.D. Oh. Mar. 20, 2014) (a testifying expert's notes in the margins of depositions or other documents may be discoverable).

B. Communications with Expert Witnesses

Communications between an attorney and an expert witness are protected work product pursuant to Fed. R. Civ. P. 26(b)(4)(C). However, communications between an expert witness and a party's non-attorney employees may not be protected under Rule 26, the work product doctrine, or the attorney-client privilege. See In re Application of Republic of Ecuador, 280 F.R.D. at 513-14; Hinchee, 741 F.3d at 1185-88. And communications between testifying experts may not be protected from disclosure by Rule 26 or by the work product doctrine. See Id.; Powerweb Energy, Inc. v. Hubbell Lighting, Inc., 2014 U.S. Dist. LEXIS 21501 (D. Conn. Feb. 20, 2014).

Moreover, communications from a party's consulting expert to a party's testifying expert likely are not protected from disclosure to the extent that the consulting expert's communications included "facts or data" considered by the

testifying expert. See Nat'l W. Life Ins. Co. v. W. Nat'l Life Ins. Co., 2011 U.S. Dist. LEXIS 21967 (W.D. Tex. Mar. 3, 2011); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 293 F.R.D. 568 (S.D.N.Y. 2013) (communications from a consulting expert furnishing facts to a testifying expert, and considered by the testifying expert in forming an opinion to be offered at trial, are not protected from disclosure).

PRACTICE POINTERS

The following pointers should assist counsel in attempting to prevent the creation of discoverable documents that may impact a testifying expert's credibility. A number of categories of documents may not fall squarely within the protections given to draft reports and communications between attorneys and experts by the federal rules. These practice pointers are designed to minimize the risk of the creation of such documents that may be subject to disclosure.

- Separate communications with the expert witness containing facts, data and assumptions from other communications with the expert witness.
- Do not include the client, the client's employees, or other third parties on communications with the expert witness.
- If the case merits use of a consulting expert witness, do not allow the consulting expert witness to communicate with the testifying expert witness in writing.
- Do not allow testifying expert witnesses to communicate with one another in writing.
- Prepare a privilege log setting forth communications and draft reports withheld from production.
- Ask an expert witness to do much of her work within a draft report, and to limit the creation of internal memoranda, notes, and emails.
- If an expert witness is developing theories through the use of documents outside of the draft report, have the expert witness draft, prepare, and provide them to counsel for review and comment in memoranda addressed to counsel.
- Ask the expert witness to refrain from taking notes during meetings, including notes on otherwise protected draft reports or other expert-attorney communications.
- If an expert witness must take notes during a meeting, encourage the witness to record only the facts or data he or she considered during the meeting.

Catherine Ahlin-Halverson

Partner
Maslon (Minneapolis, MN)

612.672.8314 | catherine.ahlin@maslon.com
http://www.maslon.com/cahlin-halverson

Catherine Ahlin-Halverson is a partner and served as co-chair of Maslon's Litigation Group from 2011-2013. She represents business entities in high-stakes complex and class action litigation, and she has successfully represented clients in multiple state and federal jurisdictions. Catherine has significant expertise litigating a wide range of business disputes, including product liability claims, business torts, and unfair competition claims. In addition, Catherine has experience with and expertise in complex discovery issues, including electronic discovery. Prior to joining Maslon, Catherine practiced in the San Francisco office of Gibson, Dunn & Crutcher LLP.

Catherine is a 2000 graduate of Columbia Law School where she was a Harlan Fiske Stone Scholar. She graduated cum laude from Smith College in 1996 with a B.A. in music.

Areas of Practice
- Business Litigation
- Competitive Practices/Unfair Competition
- Tort & Product Liability

Selected Experience
- In re American Medical Systems, Inc., CV-11-3933 (Hennepin County District Court, Minnesota). Lead Minnesota trial counsel defending thousands of consolidated state court actions alleging multiple tort theories against American Medical Systems related to female mesh products.
- League of Women Voters Minnesota v. Ritchie, 819 N.W. 2d 622 (Minn. 2012). Pro bono representation of civic organizations and individuals challenging ballot question for proposed amendment to Minnesota Constitution, which was subsequently defeated by voters.
- In re: National Arbitration Forum Trade Practices Litigation, MDL 10-2122 (D. Minn.) Defense and court approved class settlement of nationwide class action asserting consumer protection claims against arbitration forum and its investors.
- Paulson et al. v. 3M Company, C2-04-6309 (Washington County District Court, Minnesota). Defeated motion seeking class certification of a 67,000 member putative class claiming chemical exposure via drinking water contamination (2007) and served as second-chair counsel, obtaining a defense verdict on the merits after a seven-week jury trial (2009).
- Microsoft Corp. v. Ion Techs. Corp., 484 F. Supp. 2d 955 (D. Minn. 2007). Obtained partial summary judgment on claims based on violations of federal anti-counterfeiting statute related to computer software.
- Curtis 1000, Inc. v. George B. Martin and David L. Bean, et al., 2006 WL 2981305 (M.D. Tenn. 2006). Obtained ruling against two former sales representatives of client in breach of non-compete agreements.

Education
- Columbia Law School; J.D., 2000
- Smith College; B.A., cum laude, 1996 -- Major: Music