# NEW FEDERAL PROCEDURAL RULES GOVERN CATS IN EXPERT HATS

## (Recent amendments to Federal Rule of Civil Procedure 26 greatly alter expert witness discovery)

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## I. INTRODUCTION

Effective December 1, 2010, significant changes regarding expert witness discovery were made to Federal Rule of Civil Procedure 26. Drafts of expert reports and most communications between attorneys and testifying expert witnesses are now specifically exempt from discovery. This is a complete reversal of the practice in the majority of federal jurisdictions where draft expert reports and communications between counsel and a testifying expert witness were discoverable. Rule 26 has also been amended to require parties to disclose a summary of the facts and opinions to be presented at trial by non-retained expert witnesses. This paper examines the recent changes to Rule 26 regarding expert discovery, as well as contrasts the new Rule 26 amendments regarding draft expert reports and attorney-expert communications with Texas state court practice.

## II. RELEVANT HISTORY UNDERLYING THE DECEMBER 1, 2010 RULE 26 AMENDMENTS REGARDING DRAFT EXPERT REPORTS AND COMMUNICATION BETWEEN ATTORNEYS AND TESTIFYING EXPERT WITNESSES

In 1993, Rule 26(a)(2)(B) was amended to require a retained testifying expert to produce a written report which contained "a complete statement of all opinions to be expressed" as well as "the data and other information considered by the witness in forming the opinions." This amendment, especially the "other information" portion, significantly increased the scope of expert witness discovery from that which existed prior to 1993.[1] The prevailing view at the time of the 1993 Rule 26 amendment was to permit a broad range of discovery from expert witnesses. One Advisory Committee comment to the 1993 amendment is instructive regarding the desired scope of expert witness discovery.

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given 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.[2]

From the forgoing comment, the Advisory Committee's intent was clear that any "information considered by" the testifying expert was discoverable, whether or not the expert

ultimately relied upon such information in forming the expert's opinions. There was an obvious effort to eliminate the argument by some litigants that certain materials provided to their testifying experts were privileged.

Despite the 1993 Rule 26 amendment and the Advisory Committee's guidance in 1993, two lines of cases developed regarding the discoverability of draft expert reports and communications with expert witnesses. The minority position was that the 1993 rule change and the Committee note were insufficient to waive the Rule 26(b)(3) protection for "opinion" or "core" work product.[3] Thus, pursuant to the minority position, any draft expert reports or expert communications with counsel that would divulge attorney work product were privileged.

However, the majority of the courts interpreting the 1993 amendment to Rule 26 have held that draft expert reports and communications between a party's attorney and expert are subject to discovery.[4] The cases in the majority usually rely on the Advisory Committee comment previously quoted as the basis for their opinion.[5] Moreover, in support of the court opinions holding that draft expert reports and attorney-expert communications should be discoverable, there was and is the opinion that a party has a right to know who is really testifying, the lawyer or the expert. As one United States magistrate judge put it:

> The trier of fact has a right to know who is testifying. If it is the lawyer who really is testifying surreptitiously through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.[6]

Over the past 18 years, several unintended consequences have resulted from draft expert reports and attorney communications with experts being discoverable. For instance, many practitioners have found it prudent to hire both a consulting and a testifying expert on the very same issue. This allows practitioners to communicate freely with the consulting expert in order to develop a theory of the case without fear of such communication being subject to discovery by opposing counsel. Obviously, hiring two experts for the same issue increases the cost of litigation. Other avoidance behaviors have also occurred, including experts not even sharing or printing any unfinished reports from their computers until such time as the report is in final form. This can lead to an expert's report not being as refined or on point as much as trial counsel would like. Also, attorneys and testifying experts often avoided written communications in order to avoid creating discoverable documents that might reveal trial strategies or thought processes of counsel.

The problems associated with broad expert witness discovery under the 1993 version of Rule 26 have lead many practitioners to negotiate agreements with opposing counsel narrowing the scope of expert witness discovery that will be allowed in a particular case. Such agreements often protect draft expert reports and attorney-expert communications from discovery.

Two purposes of the 2010 amendments are to reduce litigation costs and also to allow for uninhibited communication between attorneys and testifying expert witnesses. The Advisory Committee note in this regard is instructive.

> The committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analysis. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.[7]

Accordingly, Rule 26 was amended, effective December 1, 2010, in an effort to counter the unintended consequences of the 1993 amendments regarding expert discovery.

## III. RULE 26 2010 AMENDMENTS

### A. "Other Information" Phrase has Been Deleted from Rule 26(a)(2)(B)(ii)

Rule 26(a)(2)(B)(ii) used to provide that "the data or other information considered by the [expert] witness" in forming the expert's opinion were discoverable.[8] Federal courts varied in their interpretation of the phrase "other information" when determining whether draft expert reports and communications between attorneys and testifying expert witnesses should be disclosed. The "or other information" phrase was often used to support the argument that draft expert reports and communications between attorneys and testifying experts should be disclosed.[9]

The 2010 amendment to Rule 26(a)(2)(B)(ii) has attempted to remove any ambiguity regarding the scope of discovery created by the "or other information" phrase contained in the 1993 version of this rule. As a result of the 2010 amendment, only the "facts or data" considered by the expert witness in forming the expert's opinions need be disclosed. By deleting "or other information" and replacing that phrase with "facts or data," the scope of Rule 26(a)(2)(B)(ii) has been narrowed.[10] This change was made specifically to "alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports."[11]

This is not to say that all attorney-expert communications will be privileged. Factual information conveyed to a testifying expert by an attorney is still subject to discovery.

> 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. At the same time, the intention is

> that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.[12]

The Western District of Texas has already utilized the change in this rule to narrow the scope of permissible expert witness discovery. In *National Western Life Insurance Company vs. Western National Life Insurance Company*,[13] the parties agreed to be bound by the 2010 amendments to Rule 26. National sought the discovery of e-mail communications and draft expert reports shared between Western's testifying expert and its non-testifying expert. Discovery of those items was prohibited because of the change in Rule 26(a)(2)(B)(ii).[14] The Western District of Texas found that under new Rule 26(a)(2)(B)(ii), Western was only required to produce the "facts or data" relied upon by the testifying expert in forming his opinions.[15] The production requirement of 26(a)(2)(B)(ii) did not include draft expert reports shared with a consultant or e-mails with the consultant that did not contain facts or data.[16] The Western District found that Western complied with Rule 26(a)(2)(B)(ii) by producing the testifying expert's final report and all e-mails that contained facts or data.[17] The court did not permit discovery of draft export reports and e-mails that did not contain facts or data.

The change to Rule 26(a)(2)(B)(ii) is the foundation for the Rule 26 amendments that specifically exclude draft expert reports and most attorney-expert communications from discovery.

B. Draft Expert Reports are Now Specifically Protected from Disclosure

With regard to draft reports, new Rule 26(b)(4)(B) provides as follows:

> *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.[18]

This new rule protects the draft reports of both retained and non-retained expert witnesses. The protection of draft reports is not absolute. As under the 1993 version of Rule 26, a "substantial need" exception applies to the discovery of draft reports if a party can make the requisite showing that it has a substantial need for the discovery and cannot obtain the substantial equivalent of the materials sought without undue hardship.[19] According to the Advisory Committee's notes to the 2010 version of Rule 26, it should be a rare occurrence for a party to be able to meet the "substantial need" exception.[20] Even if the "substantial need" exception is met, the court must still protect against the disclosure of an attorney's mental impressions, opinions, and legal theories.[21]

C. Most Attorney-Expert Communications are Now Specifically Protected from Disclosure

The new rule protecting attorney-expert communications from discovery is very similar to the new rule protecting draft expert reports. New Rule 26(b)(4)(C) provides as follows:

> *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witness.* 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:
> (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.[22]

None of the exceptions require the disclosure of the mental impressions or opinions of counsel. The exception in subpart (ii) to new Rule 26(b)(3)(A) is consistent with the change to Rule 26(a)(2)(B)(ii). Simply put, the raw facts or data considered by a retained testifying expert in forming the opinions to be expressed are discoverable, no matter the source of the facts or data. However, attorney-expert communications about the potential relevance of facts or data are protected.[23]

There is a distinction made in Rule 26(b)(4)(C) between attorney provided facts or data and attorney provided assumptions. Not all assumptions provided by an attorney to an expert are subject to discovery. Only those assumptions that the expert actually relied on in forming the expert's opinions are subject to discovery. If the attorney provided assumption was considered by the expert, but not relied upon for the expert's opinions, then such assumption does not fall within the exception of Rule 26(b)(4)(C)(iii).

Rule 26(b)(4)(C) only applies to those experts who are "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Unlike the protection offered to the draft reports of both retained and non-retained expert witnesses, the protection to attorney-expert communications does not extend to non-retained expert witnesses.[24]

As with draft reports, the "substantial need" exception of Rule 26(b)(3)(A)(ii) applies to the discovery of attorney-expert communications that fall outside the three exceptions of Rule 26(b)(4)(C).[25] Once again, as with draft expert reports, even if the "substantial need" exception is met, the court must still protect against the disclosure of an attorney's mental impressions, opinions, and legal theories. It is difficult to think of a situation where the "substantial need" exception would be met requiring disclosure of any meaningful attorney-expert communications

that would not infringe on an attorney's mental impressions, opinions, and legal theories. As pointed out in the Advisory Committee's notes, it should be a rare case where a party is able to make a showing of "substantial need" in order to obtain discovery of attorney-expert communications that do not relate to expert compensation, "facts or data" considered by a testifying expert, or assumptions relied upon by a testifying expert.[26]

D. A Summary of the Facts and Opinions to be Offered by Non-Retained Expert Witnesses is Now Required Under New Rule 26(a)(2)(C)

With regard to non-retained experts, Rule 26(a)(2)(C) now requires a party to disclose the subject matter on which the witness is expected to testify as well as provide a summary of the facts and opinions to be offered by the witness. This disclosure requirement is meant to be "considerably less extensive than the report required by Rule 26(a)(2)(B)" for retained expert witnesses.[27] Courts are cautioned to take care against requiring undue detail in this disclosure requirement because non-retained experts are not likely to be as responsive to counsel as retained experts.[28]

Some federal judges required full Rule 26(a)(2)(B) expert reports even from non-retained expert witnesses.[29] Rule 26(a)(2)(C) now makes it clear that reports from non-retained expert witnesses are not required.[30] Undoubtedly, case law will develop over what constitutes proper disclosure of non-retained expert witnesses under new Rule 26(a)(2)(C).

E. An Ohio Court has Ruled that New Rule 26(a)(2)(C) Does Not Apply Retroactively

In adopting the amendments to Rule 26, the United States Supreme Court ordered that "the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."[31] The 2010 Advisory Committee notes are silent as to what may be "just and practicable" for the application of the amendments to cases filed before December 1, 2010. The "just and practicable" language gives courts discretion regarding the retroactive application of the new rules to cases pending before December 1, 2010.

At least at the time of the writing of this paper, only one case has been found addressing the issue of retroactive application of any of the new Rule 26 amendments. In *Lattuga v. United States Postal Service*,[32] the Southern District of Ohio refused to apply new Rule 26(a)(2)(C) retroactively because this amendment was not in place at the time expert disclosures were required in the case. Expert disclosures in *Lattuga* occurred before December 1, 2010, the effective date of Rule 26(a)(2(C). The ruling makes sense, as it would not have been "just and practicable" to hold a party to a Rule 26(a)(2)(C) disclosure requirement that did not even exist at the time expert disclosures occurred. Pursuant to the *Lattuga* ruling, litigants disclosing expert opinions should adhere to the new Rule 26 amendments for expert witness disclosures that occur after December 1, 2010, even for cases that were pending before December 1, 2010.

The *Lattuga* decision gives some guidance, but many questions remain unanswered as to the retroactive application of the 2010 amendments to Rule 26. For example, the question arises as to the discoverability of attorney-expert communications that occurred prior to December 1,

2010 when experts are disclosed after that date. Some litigants may choose to enter into agreements with opposing counsel applying the 2010 version of Rule 26 retroactively in order to resolve questions about the application of the new rules.

## IV. TEXAS STATE COURT PRACTICE REGARDING THE SCOPE OF EXPERT WITNESS DISCOVERY

Suffice it to say, the practice in Texas state courts is the complete opposite of the 2010 version of Rule 26 regarding the discovery of draft expert reports and attorney-expert communications. Texas affords wide open discovery when it comes to expert witnesses. In a case illustrative of the point of wide open expert discovery, the Texas Supreme Court has held that expert disclosure rules prevail even over the Texas "snap-back" procedure that allows for the recovery of privileged documents which have been inadvertently produced.[33]

In the *Christus Spohn Hospital Kleberg* case, a hospital paralegal sent privileged documents to the hospital's sole expert on standard of care issues. The expert only glanced at the documents, and did not rely upon them in forming any opinions. The hospital sought the return of the inadvertently produced documents pursuant to Texas Rule of Civil Procedure 193.3(d), commonly known as the "snap-back" provision. The Texas "snap-back" provision specifically allows for the retrieval of privileged documents that have been produced to opposing counsel inadvertently with no intent to waive privilege.

The Texas Supreme Court recognized competing interests between the "snap-back" provision and the testifying expert disclosure rule in deciding which rule would prevail over the other. In making its ruling the Texas Supreme Court pointed out that documents produced to a testifying expert lose their work product designation even if the production to the expert was inadvertent.[34] Moreover, the *Christus* Court recognized that an attorney often selects the materials that provide the "color and hue" to the powerful image painted by an expert witness "on the litigation canvas."[35] The Texas Supreme Court favors the policy that the fact finder should know the source of materials and information considered by an expert in order to assess the worth of the expert's testimony.[36] Accordingly, the Texas Supreme Court held that "once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced."[37] "[W]e conclude that [the Texas expert disclosure rules] prevail over Rule 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production."[38]

The *Christus* opinion is recent, having been decided in 2007. Simply put, and as seen in *Christus*, there is no work product protection, or privilege of any kind, that attaches to information known by a testifying expert witness in Texas state courts. Draft reports of testifying experts and attorney communications with testifying experts are afforded no protection or privilege whatsoever. Practitioners should be cognizant of the polar opposite treatment to be given draft expert reports and attorney-expert communications between the federal and state courts in Texas. It is not uncommon for a case filed in federal district court to be remanded to state court. In the event of a remand to Texas state court, an attorney who was planning on the confidentiality of draft expert reports and attorney-expert communications may be in for an unpleasant surprise.

## V. CONCLUSION

The amendments to Rule 26 adopt a belt and suspenders approach in order to exclude draft expert reports and most attorney-expert communications from discovery. The belt was utilized in replacing the phrase "or other information" with "facts or data" in FRCP 26(a)(2)(B)(ii). This change was made specifically to reverse the outcomes in those court cases which held that the disclosure requirement of "or other information" considered by an expert included draft reports and attorney-expert communications. Suspenders were utilized with the adoption of two new rules which specifically exclude draft expert reports and most attorney-expert communications from discovery. With a belt and suspenders approach, the intent is clear that draft expert reports and attorney-expert communications (with three exceptions) are protected from discovery in federal courts.

There is a "substantial need" exception to the ample protections now afforded draft expert reports and attorney-expert communications. Nevertheless, it is anticipated that it will be a rare circumstance when a party is able to meet the "substantial need" test. Even if a showing of "substantial need" is made, federal courts must still protect against the disclosure of an attorney's mental impressions, opinions and legal theories.

Texas state court practice is directly opposite that of the new Rule 26 amendments regarding the discovery of draft expert reports and attorney-expert communications. Texas state courts allow wide open expert witness discovery. Simply put, draft expert reports and attorney-expert communications are discoverable in the state courts of Texas. Lawyers handling federal litigation in Texas should still remain cautious in sharing draft reports and otherwise communicating with their testifying experts if there is a chance of remand from federal to state court. In the event of a remand, draft reports and attorney-expert communications that were thought to be privileged would soon be subject to full discovery.

Non-retained testifying experts are now subject to disclosure requirements pursuant to new Rule 26(a)(2)(C). This disclosure requirement is meant to be less extensive than the report required for retained testifying experts by Rule 26(a)(2)(B). Undoubtedly, federal case law will develop over what constitutes proper disclosure under this entirely new rule.

The United States Supreme Court has ordered that the new amendments to Rule 26 apply to all cases filed after December 1, 2010 and to all cases pending on that date as is "just and practicable." Accordingly, federal courts have discretion as to the application of the new amendments to cases that were filed before December 1, 2010. In order to resolve questions regarding the retroactive application of the new Rule 26 amendments, counsel may choose to enter agreements with opposing counsel agreeing to be bound by the new amendments.

The new rules should reduce federal litigation costs because parties will retain fewer consulting only experts. The amended rules also allow attorneys more freedom to discuss strategy and case theories with testifying experts without fear that such discussions will be subject to discovery. The new rules should also result in fewer agreements among counsel where

the scope of expert witness discovery is negotiated and limited. Expert reports will also likely be more refined without the worry of having to produce various draft expert reports.

## VI. ENDNOTES

[1] 8 FED. PRAC. & PROC. § 2016.5(3d. ed); *In re Christus Spohn Hospital Kleberg*, 222 S.W.3d 454, 441 (Tex. 2007).
[2] FED. R. CIV. P. 26 (Advisory Committee Notes to 1993 amendments, para. 17).
[3] 8 FED. PRAC & PROC. CIV. § 2016.5 (3rd ed).
[4] *Id.*
[5] *Nat. Western Life Ins. Co. v. Western Nat. Life Ins. Co.*, 2011 WL 840976 (W.D. Tex. March 3, 2011).
[6] *Intermedics, Inc. v. Ventritex, Inc.*, 193 F.R.D. 384, 396 (N.D. Cal. 1991).
[7] FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 2).
[8] FED. R. CIV. P. 26(a)(2)(B)(ii) (1993 amendment).
[9] FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 3); *See also*, *Basco v. Spiegel*, 2009 WL 3851002 (W.D. La. Sept. 29, 2009)(holding that draft expert reports should be produced pursuant to the 1993 version of Rule 26).
[10] *Sara Lee Corp. v. Kraft Foods, Inc.*, 2011 WL 1311900 (N.D. Ill. April 1, 2011).
[11] *Id.*
[12] FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 4).
[13] *Nat. Western Life Ins. Co. v. Western Nat. Life Ins. Co.*, 2011 WL 840976 (W.D. Tex. March 3, 2011).
[14] *Id.* at 1.
[15] *Id.* at 2.
[16] *Id.*
[17] *Id.*
[18] FED. R. CIV. P. 26 (26)(b)(4)(B).
[19] FED. R. CIV. P. 26(b)(3)(A)(ii); FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 18).
[20] FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 18).
[21] *Id.* at para. 19.
[22] FED. R. CIV. P. 26(b)(4)(C).
[23] FED. R. CIV. P. 26 (Advisory Committee Notes to 2010 amendments, para. 16).
[24] *Id.* at para. 11.
[25] *Id.* at para. 18.
[26] *Id.*
[27] *Id.* at para. 5.
[28] *Id.*
[29] *Id.* at para 6.
[30] *Id.*; FED. R. CIV. P. 26(a)(2)(B).
[31] April 28, 2010 Order of United States Supreme Court adopting amendments to FED. R. CIV. P. 26.
[32] *William J. Lattuga v. United States Postal Service*, Case No. 1:09-CV-416, Doc. #29, Nov. 29, 2010.
[33] *In re Christus Spohn Hospital Kleberg*, 222 S.W.3d 434, 440-41 (Tex. 2007).
[34] *Id.* at 439.
[35] *Id.* at 440.
[36] *Id.*
[37] *Id.* at 440-441.
[38] *Id.*