Avoiding Harmful Expert Disclosures

by Paul M. Mannix

The expert witness has become a fixture in modern civil litigation. Most cases involve at least some expert testimony and generally both the plaintiff and the defendant present an expert with an opinion favorable to their respective positions. The expert typically speaks to the crucial issues in the case and, as the expert is offered as a witness with special knowledge in the critical field, the expert's testimony is often given great weight. As a result, the outcome of the case frequently depends on which side wins the "battle of the experts." Thus, one of the most important tasks in preparing a case for trial is to retain, prepare, and present the most competent, persuasive, and credible expert witness possible.

Certainly, a key task in accomplishing this objective is to locate and retain an expert with superior credentials and testifying capabilities. Nonetheless, the attorney's role in presenting persuasive expert testimony is far from over once a star expert witness is retained. Counsel must continue to work with the expert to properly educate him or her as to the crucial facts and issues in the case, assist the witness in the preparation of a report, and prepare the witness to testify at deposition and trial. Furthermore, the attorney must be ever mindful of the special legal standards of disclosure and confidentiality that apply to this unique relationship between the attorney and the expert witness.

Over the years, the use of expert witnesses has been criticized as potentially misleading and deceptive to juries. Commentators and courts have both noted that a jury can falsely surmise that the proffered experts are independent witnesses, having no interest in the outcome of the case. While a wholly objective and disinterested expert is likely to provide the most credible and unbiased opinions, modern litigation usually does not include expert testimony from an unbiased expert—he or she is normally influenced by compensation and the potential for future business. Expert witnesses quickly discover that the cash flow on the present case, as well as future litigation, generally ceases soon after the expert provides an opinion that damages the retaining attorney's case. It is true that these incentives for a favorable opinion are generally fertile ground for attacking an expert's credibility on cross-examination. Nevertheless, the weight given to this evidence of bias is likely to vary among juries. Moreover, it is

the rare jury that fully comprehends the inner workings between the attorney and the expert witness that culminate in the expert's final opinion.

Rule 26 of the Federal Rules of Civil Procedure serves as the primary device through which the opposing side can attempt to reveal the true relationship between the attorney and the expert witness. A key goal of Rule 26 as it relates to expert witnesses is to mandate disclosure of expert witness information, both to notify the opposing side of the expert opinions to be presented and to allow the opposing side to properly examine the scientific theories, factual bases, and outside influences that underlie those opinions. Therefore, it is crucial for an attorney to grasp the legal obligations that arise from Rule 26.

The goal of this article is to discuss the history of Rule 26 as it relates to expert disclosures, review relevant case law and provide some practical considerations for presenting the most credible expert testimony in light of the relevant legal standards.

Rule 26 and Its Amendments

Rule 26 of the federal rules contains the general discovery rules for litigation, and also supplies specific provisions for expert discovery. Rule 26(a)(2) governs the mandatory disclosure of expert information, and provides in relevant part:

(B) Except as otherwise stipulated or directed by the court, [disclosures of the identity of an expert] shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

In addition, Rule 26(b)(4) outlines the accepted methods of discovering expert information through depositions and written interrogatories. While Rule 26 has been part of the Federal Rules of Civil Procedure since their

promulgation in 1938, the significant language regarding expert witness disclosures is primarily the product of amendments to the Rules in 1970, 1993, and 2000.

In the first three decades after promulgation, the procedural rules provided little guidance regarding discovery of expert witnesses. Then, in 1970, the United States Supreme Court approved amendments which specifically addressed this issue. Under those amendments, a party was required, through answering interrogatories, to identify each person expected to be called as an expert witness and to "state the substance of the facts and opinions that the expert will testify and the summary of grounds for the opinion."

While directly speaking to the issue of expert discovery, the 1970 amendments were rather limited in the breadth and forms of discovery precisely authorized. There was no language directly requiring a party to produce documents related to the expert's analysis. Furthermore, the 1970 version of Rule 26 did not specifically authorize the taking of an adverse expert's deposition. Due to the Rules' silence on these forms of discovery, a party was generally confined to obtaining information from an adverse expert witness only through the use of interrogatories. Depositions and document production were permitted only in unique situations when, upon motion, the court ordered such discovery.

Furthermore, many litigators argued, and courts found, that Rule 26 was fundamentally limited by the work product doctrine (espoused in Rule 26(b)(3)). While work product protects against the discovery of materials created in anticipation of litigation, Rule 26 indicated that documents forming the basis for the expert opinions were to be identified. In various instances, the information that formed the grounds for the opinions was also material prepared in anticipation of litigation. Thus, an inherent conflict arose: was information that was prepared in anticipation of litigation and was also a basis of an expert opinion protected by the work product doctrine, or was it subject to disclosure under Rule 26?

The language of the federal rules, as amended in 1970, provided little guidance on this issue. Furthermore, the federal courts added to the confusion by failing to apply a uniform method of resolving conflicts with Rule 26(b). Some courts applied a "discovery oriented approach," generally requiring disclosure of the work product. Other courts adopted a "protection oriented approach," shielding the work product from discovery. Still others created hybrid variations of these approaches. See "Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure," 27 *Creighton L.Rev.* 773 (1994). With the conflicting court rulings and the ambiguous language in the federal rules, neither consistency nor predictability was achieved. Moreover, various commentators criticized the narrow scope of expert discovery as not facilitating sufficient disclosure of the basis of an expert's opinion testimony.

Over the next two decades, the Federal Rules Advisory Committee fully investigated these and other issues, and made an attempt to reconcile numerous concerns with the existing rules. In 1993, it crafted various changes and additions to Rule 26. These amendments had a significant impact on expert witness discovery and disclosures, as Rule 26(b)(4) was extensively modified and Rule 26(a)(2) was added. Under Rule 26(b)(4), a party was specifically entitled to take the deposition of an adverse expert witness. Furthermore, the amendments ushered in an era of mandatory disclosure of expert materials under Rule 26(a)(2).

The addition of Rule 26(a)(2) also helped to provide additional direction on the discoverability of attorney work product documents reviewed by an expert. While former Rule 26(b)(4) required an expert to merely answer interrogatories setting forth the "substance of the facts and opinions" to which the expert was expected to testify and a "summary of the grounds for each opinion," the new Rule 26(a)(2) required disclosure of a complete statement of all opinions to be expressed by the expert and the basis and reasons therefor, including the data or other information considered by the expert. The Advisory Committee Note accompanying the 1993 amendments stated that, in light of the obligations imposed by the revised expert disclosure rules:

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 on by the expert, are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Following the amendment, the federal courts permitted more expansive discovery of expert witnesses. However, the extent of this expansion remained a subject of debate. Furthermore, the federal district courts were not obligated to adopt the 1993 amendments, and were permitted to promulgate their own rules on expert disclosures, with the result that many of them chose to "opt out" of Rule 26.

In 2000, Rule 26 underwent another amendment. The primary change with regard to expert witnesses was the revocation of the district court's right to "opt out" of the mandatory disclosures set forth in Rule 26(a)(2). This local opt-out practice approach had led to confusion for attorneys and litigants, and inconsistency among the courts. Therefore, in 2000, Rule 26(a)(1) was amended to establish a national uniform practice. The amendments invalidated all local rules and standing orders that exempted or excluded certain cases from initial disclosure requirements, as well as those rules or orders that limited or expanded the applicability of those requirements.

While the 1993 and 2000 amendments have improved the predictability and the consistency of court rulings on the need for experts to disclose, distinctions among the federal districts remain. Nonetheless, the careful lawyer must be aware that his or her obligations of disclosure and, thus, the potential for attacks on the expert witness, have expanded. As a result, counsel must take necessary precautions in providing materials to an expert and in assisting the expert in preparing the written report.

Screening and Funneling Information to the Expert

Once a first-class expert is selected and retained, provide the expert with information necessary to properly educate him or her on the factual background and key litigation issues. Your expert can provide the best advice if he personally reviews all potential evidence, including existing documents, testimony, and physical evidence. However, both temporal and monetary considerations often make this option unworkable. Litigation involving tens or hundreds of thousands of documents generally requires an attorney to decide what documents and information are relevant to the expert's analysis.

In deciding what documents to provide to the expert, consider that what is not revealed to an expert can be equally or even more damaging to the weight given to the expert's opinion than what is revealed to the expert. Because Rule 26 requires that his report reveal all information considered by the expert, it logically follows that documents and materials not identified in the report were not reviewed by the expert. If at trial, opposing counsel can establish that important information, which arguably supports opposing counsel's position, was not provided to the expert, the jury may well conclude that the expert's opinions were compromised by improper screening of evidence. This will normally lead to a reduction in the weight given to that expert's testimony and, perhaps more importantly, a diminished confidence in counsel's credibility. Thus, when counsel is unable to provide the expert with all possible evidence, close attention must be given to deciding what documents are provided so the expert receives the most objective portrait of the evidence, including the crucial evidence to be relied upon by both sides.

Transmitting Work Product

Time and cost constraints often lead attorneys to educate the expert through the use of documents created by the attorney and/or a paralegal, i.e., attorney work product. Issues that center on the discoverability of an attorney's work product have been the subject of vigorous debate both before and after the 1993 amendments. The work product privilege is codified under Federal Rule 26(b)(3), which provides in relevant part:

. . . a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The purpose of the work product doctrine is to protect certain attorney-prepared materials so as to allow an attorney to work with a certain degree of privacy in effectively representing the client.

By contrast, Rule 26 mandates the disclosure of information supplied to and considered by an expert in forming opinions. As briefly outlined above, the 1993 amendments to Rule 26 substantially altered the discovery process as it affects testifying experts. New Rule 26(a)(2)(B) requires a litigant to produce to opposing counsel a disclosure statement describing the expert's opinion, the basis for the opinion, and the information considered by the expert in forming the

opinion. Further, the 1993 Advisory Committee Notes specifically indicate that materials furnished to an expert for use in the formation of opinions are not protected.

Accordingly, a majority of courts have held that the expert disclosure requirements of Rule 26(a)(2)(B) trump the substantial protection otherwise accorded work product under Rule 26(b)(3). The 1993 amendments "make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report." *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed.Cir. 2001). In addition to the disclosure requirements of Rule 26(a)(2), courts have also reasoned that the work product privilege is waived when attorney-created documents are revealed to a testifying expert. **[Cite to a court decision?]** Most courts have concluded that the disclosure applies, not only to fact work product, but also to materials containing the mental impressions, conclusions, opinions, or legal theories of an attorney. **[Cite?]**

However, courts have not universally adopted this "discovery-oriented" approach. Even with a stronger rule requiring disclosure and the corresponding Advisory Committee comments, several courts have refused to require disclosure of work product. *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7 (D.Mass 1999); *Haworth, Inc. v. Miller*, 162 F.R.D. 289 (W.D.Mich. 1995). Most of these courts have distinguished between fact and opinion work product, finding that the latter was not meant to be discoverable under Rule 26(a)(2).

While the courts continue to struggle with the issue, counsel must be aware that attorney work product turned over to an expert witness may be discoverable by the opposing side. As a result, these attorney-created materials may ultimately be introduced as evidence and have a significant impact on the outcome of the case. A jury is likely to sense some impropriety where an expert bases an opinion on the hiring attorney's interpretation of the evidence rather than the evidence itself. Both the expert's and the attorney's credibility are likely to suffer if it is shown

that the expert relied on attorney-work product which provides a factual or legal viewpoint skewed in favor of the employing attorney's position.

Different, yet no less problematic, issues arise if the work product paints the evidence in a light unfavorable to the employing attorney's position. Proper legal analysis requires that an attorney acknowledge the weaknesses in the case, as well as the strengths; it is not uncommon for documents prepared in litigation to identify problems with a case. When revealed to the other side, such evidence may be seen as an admission of liability. In other cases, disclosure of such negative attorney work product may alert the opposing attorney to previously unknown weaknesses. Clearly, there are important reasons for an attorney to maintain the work product privilege. Thus, in light of the trend in federal courts of requiring production of work product given to a testifying expert, the privilege is best maintained by withholding work product from the expert.

Nevertheless, real life circumstances may make it excessively burdensome, costly or otherwise problematic to simply provide the evidence to the expert without some form of attorney work product accompanying the evidence. When an attorney has reviewed and summarized thousands of documents, a client may be unwilling to pay a second time when the expert proposes to conduct an identical review. Time constraints may also require the use of work product in assisting the expert witness. Furthermore, in certain circumstances, attorney work product may have been forwarded to an expert before the expert was formally retained or before litigation commenced. Thus, situations may arise where work product will be reviewed by an expert. This material may ultimately find its way into the courtroom as evidence. Therefore, prior to transmitting the material to an expert, counsel must properly analyze how opposing counsel may use the work product to his or her benefit.

Ghostwriting the Expert Report

After the expert is fully apprised of the relevant facts, attention then focuses on the preparation of an expert report that complies with the requirements of Rule 26. It would be unrealistic to forbid all interaction between an attorney and expert in the preparation of the report. At a minimum, the attorney will need to inform the expert of the crucial issues and direct the expert's attention to the critical evidence in the case. In addition, the attorney will generally be inclined to explain to the expert the position of the respective parties. The drafters of the rules were aware of the realities involved. The 1993 Advisory Committee's Note to this section provides:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

Thus, the drafters did not categorically prohibit attorneys from participating in the drafting of the reports.

At the same time, an attorney must recognize that the extent and form of attorney participation in the preparation of the report may have significant consequences. Even innocent and non-leading involvement can be spun by an effective adversary as coaching of the witness, which is likely to repulse the jury. Excessive involvement by the attorney in preparing the report may even lead to the disqualification of the expert witness. **[Cite a case?]**

While the Advisory Committee's notes acknowledge that an expert witness will likely need some assistance in preparing a report, Rule 26(a)(2)(B) specifies that the report shall be

"prepared and signed" by the expert. It is clear from the rule, the notes, and the history behind the rule that the substance of the report is to be the product of the expert, including the expert's words, thought processes, and final opinions. Thus, assistance provided should generally be limited to organization of the report and identifying issues to be addressed. Clearly, an attorney who actually drafts the entire report has violated the rule, and such unbridled involvement may result in the expert being precluded from testifying. See *Butera v. District of Columbia*, 235 F.3d 637 (D.C.Cir 2001) **[parenthetical explanation?]**. Yet, even less flagrant forms of control over the expert report can lead to serious consequences.

In *Marek v. Moore*, 171 F.R.D. 298 (D.Kan. 1997), an expert submitted a draft report to counsel, whereupon counsel made authorized revisions and then submitted the revised unsigned version to opposing counsel as the Rule 26(a)(2)(b) report. The court declined to strike the report, finding that there was no evidence to "suggest some supervening domination over the witness by counsel or some improper conduct by either of them to support an argument that the report is not that of the witness." *Id* at 302. The court did, however, condemn the practice of attorneys preparing expert reports, and certain monetary sanctions were imposed. A similar result was reached by the court in *Indiana Insurance Co. v. Hussey Seating Co*., 176 F.R.D. 291 (S.D.Ind. 1997).

In *Marbled Murrelet v. Pacific Lumber Co.*, 880 F.Supp. 1343 (N.D.Cal 1995), the expert repeatedly received specific direction as to what opinions should be made, through letters from the defendant's attorneys. While the district court did not strike the expert testimony, it did enter a judgment in favor of the plaintiff based, in part, on the lack of credibility of the defendant's expert witness due to the excessive involvement by the defense attorney in the formulation of opinions. Thus, while court decisions have indicated that disqualification of the witness is likely to occur only in the most egregious circumstances, evidence of the attorney's substantial control over the expert witness's report and opinions may nevertheless have the effect of diminishing the

credibility of the expert's testimony. At a minimum, the attorney will be placed in the unenviable position of trying to convince the jury that the expert's opinions were not improperly influenced.

In addition to monitoring his or her own participation in report preparation, the attorney should be cognizant of assistance being provided by expert consultants. In *Trigon v. United States*, 204 F.R.D. 277 (E.D.Va. 2001), consulting experts were used by the defense attorney to advise and prepare testifying experts, as opposed to simply advising the defense attorneys on relevant technical issues. The depositions of the testifying experts established that the consultants had participated extensively in preparing and editing the reports filed by the testifying experts. When this was discovered, plaintiff's counsel demanded production of all communications between the consulting experts and the testifying experts. Over objection, the court ruled that the consultants were required to produce communications, including draft reports, exchanged between the consultants and the testifying experts. The court recognized that the opposing side may not have been entitled to communications between a non-testifying consultant and the attorney; however, it found that Rule 26 mandated production of communications between the consultants and the testifying expert reviewed in connection with the preparation of the final report.

These rulings clearly illustrate that an attorney must tread lightly when assisting the expert in the preparation of reports. While the attorney necessarily must inform the expert on relevant facts and issues, as well as format and the requirements of Rule 26, the attorney must refrain from instructing the expert on methods of analysis and conclusions to be reached. Obviously, written letters or memoranda providing the expert with extensive direction should be avoided. In addition, several courts have ruled that draft reports prepared by the expert are discoverable. *Trigon*, *supra*; *B.C.F. Oil v. Consolidated Edison Co. of New York*, 171 F.R.D.57 (S.D.N.Y. 1997). Therefore, even if the attorney limits his or her control to reviewing draft

reports and orally informing the expert of necessary changes to the report, written proof of this control may be available to opposing counsel in the form of comparisons between draft and final reports. Furthermore, regardless of whether tangible evidence exists, the expert is always bound to reveal the amount of control and direction exuded by counsel when cross-examined. Thus, special attention must be made to avoid action that could be viewed by the jury as improperly directing and controlling the expert witness's opinions.

Conclusion

The scope of expert disclosures and discovery under Rule 26 continues to evolve, and interpretations among the various federal district and circuit courts still differ. Thus, the defense attorney needs to be familiar with the relevant rulings in his or her jurisdiction. Nevertheless, recent judicial trends clearly favor the expansion of expert discovery and, as a result, the opposing side is more likely than ever to learn of an attorney's excessive involvement with the expert's analysis and opinions. Accordingly, as a general rule, the expert should be given as much control over the analysis and preparation of the expert report as the case and circumstances permit. The attorney is strongly cautioned against any activities that can be construed as controlling the expert's analysis and opinions. By keeping these factors in mind and carefully assisting the expert in reviewing the case and preparing the report, the attorney can limit the harmful and inflammatory evidence used by opposing counsel in the cross-examination of the expert. He r she can then focus on the fundamental goal of presenting the more credible and competent testimony in the expert battle.

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