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Is this the end of "discovery-avoidance"?

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IN *20 Ways To Protect The Attorney-Client And Work-Product Privileges When Working With Experts*, which appeared in the March 2010 issue of The Practical Litigator, Jill Robb Ackerman offered excellent practical suggestions on how to effectively work with testifying expert witnesses, while at the same time avoiding the waiver of any privileges and protecting the confidentiality of communications between testifying experts and the lawyers who retain them.

A number of her suggestions have been addressed by proposed amendments to Federal Rule of Civil Procedure (Rule) 26 governing discovery relating to experts. Those amendments were adopted by the Supreme Court and transmitted to Congress on April 28, 2010. They will take effect on December 1, 2010, absent action by Congress to reject, modify, or defer them. The amendments were broadly supported by both individual lawyers and bar associations, including the:

- American Bar Association (ABA);
- Council of the ABA Section of Litigation;
- American College of Trial Lawyers;
- American Association for Justice (formerly ATLA);
- Federal Magistrate Judges' Association;
- Federation of Defense & Corporate Counsel;
- International Association of Defense Counsel; and
- United States Department of Justice.

Amended Rule 26, as discussed below, would extend work-product protection to draft reports by testifying experts and — with three important exceptions — would extend that protection to communications between those experts and retaining counsel.

CURING THE DISCOVERY-AVOIDANCE PROBLEM • The amendments would change the statutory scheme governing discovery relating to experts that has been in effect since the 1993 revisions to Rule 26 and would address the problems that scheme has created. The 1993 amendments have been interpreted to allow discovery of draft expert reports and communications between counsel and testifying experts. Given that interpretation, as noted by the Committee on Rules of Practice and Procedure (the Standing Committee) when it transmitted the proposed amendments to Rule 26 to the Supreme Court, "lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications." One of the artificial and wasteful discovery-avoidance practices listed by the Standing Committee was the use by lawyers of two sets of experts — one for consultation in developing the opinion and one to provide the testimony — in order to avoid creating a discoverable record of the collaborative interaction with the experts. Other "tortuous" steps included having the expert avoid taking any notes, making any record of preliminary analyses or opinions, or producing draft reports. The Standing Committee went on to note that these discovery-avoidance practices "add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the experts' opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work." As noted above, two proposed amendments to Rule 26 address the Standing Committee's concerns:

- First, proposed Rule 26(b)(4)(B) gives work-product protection to "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded";
- Second, proposed Rule 26(b)(4)(C) gives work product-protection — with three exceptions listed below — to "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 communication."

The exceptions listed in Rule 26(b)(4)(C) state that work-product protection does not extend to communications that (as stated in the proposed Rule):

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided and that the expert considered in forming the expressed opinions; and
- Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions expressed in the report.

In the view of the Standing Committee, establishing work-product protection for draft reports and some categories of attorney-expert communications would not impede effective discovery or cross-examination at trial. And, in any event, the Standing Committee noted that "a party may be able to make the showings of need and hardship that overcome work-product protection."

Thus, if the proposed amendments to Rule 26 become effective on December 1, 2010 — as widely expected given the broad support cited above — it will no longer be necessary in federal practice to seek a stipulation to not require production of drafts of expert reports or expert communications with counsel. And many of the discovery-avoidance

practices that concerned the Standing Committee may no longer be needed.

CONCLUSION • A third proposed amendment to Rule 26 is also worthy of note. Proposed Rule 26(a)(2)(C) would require an attorney relying on a testifying expert who is currently not required to provide a Rule 26(a)(2)(B) report — for example, a treating physician or a government accident investigator — to provide a written report that discloses the subject matter and summarizes the facts and opinions on which the expert is expected to testify. Finally, consistent with the proposed amendments described above, drafts of the summary of facts would be protected by the work-product provisions of proposed Rule 26(b)(4)(B).