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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Take Advantage Of New Expert Rules Now

Law360, New York (February 22, 2010) -- Important changes to Federal Rule of Civil Procedure 26 are expected to take effect at the end of 2010. These changes will protect draft expert reports and most communications between experts and retaining attorneys from disclosure. They will also require parties to disclose some information about the opinions of experts who are not required to prepare reports.

These amendments enjoy widespread support from many legal organizations and commentators. The American Bar Association House of Delegates previously passed a resolution urging these changes and recommending that counsel voluntarily stipulate to these new protections. Accordingly, counsel should give serious consideration to availing themselves now, via stipulation, of these proposed amendments.

New Expert Provisions

One important change is the addition of a subsection to Rule 26(b)(4) that will provide work product protection to draft expert reports and disclosures, insulating them from discovery under the vast majority of circumstances.

Another new subsection to Rule 26(b)(4) will provide work product protection to most communications between attorneys and the expert witnesses they retain. Three important exceptions exist here, however. To the extent that communications relate to the following topics, they will not be protected from disclosure:

- 1) communications related to compensation;
- 2) communications related to facts or data provided by the attorney and considered by the expert in forming their opinions; or
- 3) communications identifying assumptions provided by the attorney that the expert relied on in forming the opinions to be expressed.

Thus, this amendment strikes a balance between allowing full discovery of the basis of an expert's opinion while promoting full and frank discussions between attorneys and experts.

In a complementary change, the rule governing the required contents of an expert's report will be amended to track the "facts or data" language of the second exception to the amendment protecting most attorney/expert communications.

Once these amendments take effect, Rule 26(a)(2)(B)(ii) will require an expert's report to contain only the "facts or data" considered in forming the opinions, not the current "data or other information" considered.

Again, this change will serve to preserve full discovery of the basis for an expert's opinion, while narrowing the breadth of the required disclosure.

The proposed amendments also require parties to disclose some information about the testimony of witnesses who will provide expert opinion but who are not required to prepare a report.

Experts are currently not required to submit a report if they are not retained or specially employed to provide expert testimony and are not an employee of a party who regularly gives expert testimony.

Experts of this ilk often include treating physicians and government accident investigators. Under the new rule, the party relying on such an expert will be required to disclose the subject matter of the witness' testimony and to summarize the facts and opinions that the witness is expected to offer.

By requiring the disclosure of this information, new Rule 26 establishes a middle ground for these often nonparty, nonretained experts. Having some advance notice of what to expect from such a witness' testimony certainly has advantages while requiring a report prepared by the witness is, in many cases, unrealistic. This amendment provides a solution to this predicament.

Impetus for Change

The proposed amendments to the provisions of Rule 26 regarding experts were proposed primarily to counter discovery and litigation practices that grew out of the 1993 amendments to Rule 26.

The 1993 amendments gave rise to the wholesale discovery of communications with experts as well as drafts of their reports. Allowing such broad discovery significantly expanded expert discovery, as well as led attorneys and experts to take counteractive measures.

In recommending these amendments, the Committee on Rules of Practice and Procedure cited costly inefficiencies, as lawyers and experts avoided creating drafts and notes.

The committee also cited the time and effort often directed at discovering opposing counsel's communications with experts and draft reports, as opposed to discovery directed to evaluating the merits of the expert's opinions.

Parties' utilization of two sets of experts — one for consultation and one for testifying — was also cited by the committee as increasing the cost of litigation, as well as potentially imposing a disadvantage on a litigant who could not afford two sets of experts.

New Jersey's favorable experience with a rule similar to these amendments has also been cited in favor of changing the rule. New Jersey counsel on both sides of the equation are reportedly enthusiastic about the benefits that such changes have had on litigation in their state.

Evidence of the widespread support for these amendments also has been shown by their approval by many diverse legal organizations, including several whose membership primarily includes either plaintiffs or defense counsel.

Current Status of the Amendments

In September 2009, these proposed amendments to Rule 26, along with amendments to Federal Rule of Civil Procedure 8 and 56, were approved by the Judicial Conference of the United States and were transmitted to the Supreme Court for its consideration.

The Supreme Court has until May 1, 2010, to transmit the proposed amendments to Congress. The Supreme Court could reject or modify the proposed amendments, but that is not expected.

Once received by Congress, that body has seven months, or until Dec. 1, 2010, to act on the amendments. If neither the Supreme Court nor Congress modifies the amendments, they will take effect on Dec. 1, 2010, in the form currently proposed.

Endorsement by the American Bar Association

In August 2006, the American Bar Association House of Delegates adopted a resolution recommending the changes encompassed by these amendments and suggesting that, until the amendments were accomplished, counsel should enter voluntary stipulations to avail themselves of these protections.

The amendments are now well on their way to becoming effective with the text of the new proposed Rule 26 on the Web site of the U.S. Courts (www.uscourts.gov).

By stipulating that the new Rule 26 as currently proposed applies in pending cases, counsel can follow the lead of the ABA House of Delegates, and take advantage of the new expert rules now.

--By Jane T. Davis (pictured) and Karen D. Wilson, Nelson Mullins Riley & Scarborough LLP

Jane Davis is a partner in Nelson Mullins Riley & Scarborough's Charleston, S.C., office. Karen Wilson is an associate with the firm in the Charlotte, N.C. office.

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