# New Federal Rules of Civil Procedure That Apply To Expert Witnesses

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*Part 4 of our series on* How to Be an Effective Expert Witness in Court *[1].*

Rule 26 of the Federal Rules of Civil Procedure was amended in 2010, and as of December 1, 2010, the changes to the rule have significantly altered the type and scope of information that can be obtained from an expert witness in the course of discovery. A number of provisions have been put into effect that limit the amount of information an expert witness must now disclose. Prior to the amendments, case law had interpreted the rules to pretty much require the expert to disclose all of his or her communications with the hiring attorney and all drafts of the expert's report. The expert's file was basically an open book, and the only way to avoid making something discoverable was to be certain no written record of the communication was created in the expert's file.

The old Rule 26 required that the expert's report include "the data or other information considered by the witness in forming [the opinions the witness will express.]" The Committee Notes accompanying the rule stated:

*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 the 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.*

The concern about what had to be disclosed led in some cases to attorneys hiring two sets of experts, a "consulting" expert and a "testifying" expert. Under the applicable rules, the identity of a consulting expert did not need to be disclosed unless the expert was subsequently designated as a testifying witness. Therefore, an attorney would hire a consultant, give him or her all the information available without fear of disclosure, share the attorney's thoughts and impressions about the case, and then determine whether the expert could give favorable opinions. If so, a comparable second expert would be retained as a testifying expert. The amount of information provided to the second expert was limited to only that which was absolutely necessary for the expert to offer opinion testimony. That expert was then

designated as a testifying expert. This was an expensive way to avoid the need for full disclosure under the old version of Rule 26 and it didn't occur in all cases. However, whenever an attorney wanted to freely disclose case information and his thoughts and impressions about the case with the expert this dual track method was the only sure fire way of maintaining confidentiality

The current version of Rule 26 has limitations which are intended to protect the attorney's work product or mental theories or impressions. This enables a free flow of communication between the attorney and the expert. Rule 26(a)(2)(B)(ii) was amended to limit the disclosure obligation to the "facts or data" considered by the expert. According to the Committee Notes, this change was specifically meant to restrict discovery of the attorney's mental impressions or litigation theories shared with the testifying expert. The amended rule now limits disclosures only to "material of a factual nature." In addition, Rules 26(b)(4)(B) and (C) were added to provide protection for drafts of expert reports and communications between the hiring attorney and the expert.

The new rules do not change the fact that discovery may be had of the expert's opinions, including the factual foundation for the opinions. This means for example that the expert's testing methods (those used and any alternatives not used), and the expert's communications with persons other than the attorney are all still subject to inquiry. The limitations on discovery of attorney communications is also not a blanket limitation. If the communications relate to the expert's compensation, identify facts, or data that the attorney provided that the expert considered in forming his or her opinions, or the attorney provided certain assumptions that the expert relied on in forming his or her opinions, discovery of these limited topics is allowed. Furthermore, if the party seeking the information can establish a "substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship," they will be permitted to conduct such discovery. This exception, however, is intended to apply only in rare cases.

From a practical perspective, when serving as an expert in federal court, the most significant change is that an expert witness need not disclose prior versions of their report, or communications had with the hiring attorney about the report. This eliminates a common technique of cross examination in which the expert's evolving drafts were reviewed with the idea of creating the impression on the jury that the expert was willing to change his or her opinions based on improper input from the attorney.

It's important to recognize that this change in the rules in federal court is new, and that in many cases in state courts the older approach is still the prevailing approach. Therefore, you must be cognizant of the distinction between a consulting witness and a testifying witness, know your venue, determine at the outset what your role will be, and then guide yourself accordingly in terms of the information you include in your file. If you are to be a testifying witness in state court you should discuss with the attorney at the outset what his or her expectations are in terms of the type and amount of information you should maintain in your file. You

may need to rely more on your memory and less on memos to the file.

Another statutory provision you need to be aware of is the requirement under Rule 26(a)(2)(b) that you disclose all litigated matters in which you have testified at deposition or in court for the previous four years. You should assume that a diligent opposing attorney will take the time to contact opposing counsel in the other cases to obtain copies of your deposition transcripts. They will also order copies of your courtroom testimony from the official court reporters that covered the trials in which you testified. These transcripts will be scrutinized, and any potential statement that was made in the other proceeding that seems to contradict your testimony in the matter at hand will be used against you in an effort to impeach your credibility. You'll need to be able to articulate a reason that your opinions in one case seem inconsistent with the case at hand.

Always discuss this issue with the current attorney who has retained you. If there is a concern, ask him or her to review your prior testimony to determine what statements might be used against you and discuss in advance how you intend to testify to clarify any apparent contradiction. Obviously, this means that you should keep copies of the transcripts you are given from all of your depositions, and you should make an effort to request a copy of any trial transcripts that the attorney has available. Often the trial transcripts will only be prepared when the case is in the appellate phase, and the attorney will not think of providing you with a copy at that point. It is to your benefit to make the request on your own, and follow-up after trial to make sure you get a copy of your trial testimony if one subsequently becomes available.

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*Read past articles from our series on testifying as a digital forensic expert witness: Part 1 looked at* the role of the computer forensic expert *[2], Part 2 at* expert qualifications and preparing a CV *[3], and Part 3 examined the* Daubert rules for qualification. *[1]*

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