First Experiences Under the Amended Federal Rules of Civil Procedure

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On April 28, 2010, amendments to the Federal Rules of Civil Procedure, (the "Rules") as adopted by the Supreme Court of the United States were submitted to the U.S. Congress with a December 1, 2010 effective date.

Rule 26(a)(2)(B) still requires disclosure and submission of a signed expert witness report consisting of a complete statement of all of the opinions the expert is expected to express and the basis and reasons for them as outlined under Rule 26(a)(2)(B)(ii-vi). However, Rules 26(b)(3)(A) and (B) now protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

In addition, Rules 26(b)(3)(A) and (B) now protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2), regardless of form, *except:*

- for communications relating to the compensation of an expert, and;
- to identify the facts and assumptions that the party's attorney provided to the expert considered in forming the opinions to be expressed.

Over the past few months, many articles have been published on how the amended rules are expected to affect the testifying expert in the litigation process. To some experts who have been working as expert witnesses for most of their career, this may seem like a new lease on life. For some experts, no more cryptic or generic-sounding emails to the attorneys. No more playing phone tag to ask the attorney a simple question. No more caution with printing and sending draft reports. No more rushing over to the attorney's office on the report due date to let him read your draft report from your laptop. No more reading your 30-page report to him over the phone. No more reviewing reports via secure websites so nothing was ever "sent" to the attorney. Right?

Well, maybe not. Some of our recent experiences have caused us to pause a bit before rushing into this brave new world of email and draft report freedom.

During the past year, our firm has been working as a testifying expert in a complex legal dispute being litigated in the State of Mississippi Judicial Court System, which operates under rules that are similar to the amended federal rules. Our experience on this engagement has seen counsel use a cautious, "take it slow approach" until they become more familiar and experienced in the practical application of the amended Rules.

Be careful not to assume that all new cases fall under the amended Rules. State laws may not have adopted all or the same Rules yet, so be sure to discuss the relevant rules with your engaging attorney in all non-federal cases. Also, a case may have been filed prior to the adoption of the new rules, or the parties may have agreed to procedures (Rule 11 agreements) that differ from the Rules. In any case, it's best to confirm the "rules" you will be required to adhere to at the very beginning of your engagement.

One weakness we have observed under the amended Rules is a threat to the testifying expert's credibility and perceived independence as counsel's temptation to author or significantly rewrite the testifying expert's report has sometimes increased. This new threat, of course, is due to the added protections given to draft reports and communications. To mitigate this threat, we expect disclosure requests and deposition questions concerning authorship of the expert's report to be more prevalent and more probing under the amended Rules.

The amended rules also demand a new awareness of how the expert will separate and maintain their work file between discoverable and protected work product. While this may sound like a small adjustment in the expert's case management procedures, the amended Rules basically necessitate that counsel will now be required to vet the testifying expert's work file prior to submission to ensure protected communications are not inadvertently released. A new round of communication between counsel and the expert will be required to ensure that the final content of the expert's produced work file does not damage the expert's credibility on the stand or threaten the basis of their opinions.

In short, the new rules alleviate many of the burdensome and costly minefields of attorney-expert communications. However, take care before jumping into that next "field" of litigation, there may still be a few hidden mortar shells scattered about.

For more information, see the front-page article from Dunn on Damages, *Issue 1, written by Bob Dunn.*