

Curtailing Superficial Attacks On Experts

Law360, New York (July 26, 2010) -- Nearly all product liability actions require expert testimony. Accordingly, product liability practitioners spend a great deal of time working with experts. Good lawyers understand that their active involvement with their experts throughout their work is critical. Lawyers help their experts learn the important facts and issues, ensure that focused expert reports are created, and prepare the experts extensively for depositions and trial. Unfortunately, however, there has been unproductive tension in this process.

Opposing litigators spend enormous resources attacking opposing experts' conclusions by focusing on the retaining lawyer's role and contact with the expert. The goal of such attacks is to show that the expert's conclusions were not independent but were spoon-fed by the lawyer. In response to such tactics (which usually fail), lawyers engage in elaborate and wasteful avoidance measures.

Fortunately, this problem has been addressed. On April 28, 2010, the Supreme Court of the United States adopted changes to Rule 26 recommended by the Advisory Committee on Civil Rules. The amendments will apply work product protection to draft reports of testifying expert witnesses and, with exceptions, also extend work product protection to communication between testifying experts and counsel. Thus, superficial attacks on expert independence should be deemed off limits. The changes go into effect on Dec. 1, 2010, unless Congress enacts contrary legislation, which is not expected.

Background and the Change to Rule 26

As reported by the Advisory Committee on Civil Rules, the 1993 amendments to Rule 26 were interpreted to allow discovery of draft expert reports as well as discovery of communications between counsel and testifying experts.

Practitioner experience showed that lawyers and experts took costly and elaborate steps to avoid a discoverable record of the collaborative process. This included things such as hiring separate experts

to consult and testify, and advice or instruction to experts not to take notes, make preliminary analyses, communicate in writing, or produce draft reports.

Despite such efforts, observed the Advisory Committee, opposing lawyers devote substantial time during expert depositions in an attempt to expose that the expert's opinions were shaped by the retaining lawyer. Testimony from numerous experienced plaintiff and defense lawyers showed that such lines of attack were rarely successful and accomplished nothing but prolonging the questioning.

Such questioning does not expose substantive problems with the expert opinions. Rather, the most successful means to discredit an expert's opinion is by demonstrating that such opinions are incorrect, unsupportable or otherwise flawed through cross-examination or presentation of contrary evidence.

Practitioners reported to the Advisory Committee about the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices, and wasting valuable deposition time exploring every communication with the retaining lawyer and change to the expert's drafts.

The Advisory Committee noted that, tellingly, many experienced practitioners routinely stipulate not to take discovery on such matters. The fact that good lawyers stipulate to avoid the rule indicated a problem in need of an amendment. The committee acknowledged a resolution by the American Bar Association and enactment of a rule by the State of New Jersey consistent with the recommended change.

The amendments make certain important exceptions. The amended rule specifically allows discovery of communications between lawyer and expert concerning: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In reaching its recommendation, the Advisory Committee rejected an objection by a group of academics that the rule could make it easier for lawyers to influence the opinions of their testifying experts. The committee, based on extensive study, stated that this concern was not borne out by practitioners' experience and that the best means of scrutinizing reports is by cross-examination on the substantive strengths and weaknesses of the opinions and by presentation of contrary evidence.

It also rejected a concern that, because the rule change is not a rule of evidence, it is unclear if draft reports and communications will be protected at trial and thus it might not eliminate the costly avoidance practice sought to be eliminated. This is not an argument against the discovery rule, said the committee, and will not reduce the effectiveness of the amendments since lawyers rarely will go at trial where they have not been in discovery, and in any event many cases settle before trial.

It should also be noted that amended rule 26 changes the practice as concerns witnesses who will provide expert testimony but are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or are not employees who regularly give expert testimony. Under the amended rule, the lawyer relying upon such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

Pre-existing case law also contemplates lawyer assistance with expert reports. As mentioned, the 2010 amendment to Rule 26 was designed to change the 1993 version of the rule that was interpreted to allow unproductive discovery of draft expert reports and lawyer-client communication.

Although that may be true, it should be recognized that even the 1993 version of the rule expressly contemplated assistance by counsel in preparation of the report and recognize the value of lawyer assistance in the process:

"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." Id.

The value of attorney assistance with expert reports was also addressed in case law. For example, in *Marek v. Moore*, 171 F.R.D. 298 (D. Kan. 1997), the court stated:

"Unlike the attorney, the expert witness more likely preoccupies himself with his profession or field of expertise. He may have little appreciation or none whatsoever for Rule 26 and its exacting requirements for a legally 'complete' report of the expert opinions, including all of the 'data or other information' and designating all supporting exhibits." Id. at 301.

Case law establishes that attorneys may actual "pen" the report, so long as the analysis is fundamentally that of the expert. In fact, court decisions suggest that the lawyer involvement can generally be quite extensive. For example, in a recent case, *In re Asbestos Products Liability Litigation*, 2010 WL 2104151 (E.D. Pa. May 24, 2010), the expert acknowledged that he did not write the report and did not even have a specific recollection of discussing it with plaintiffs' attorneys before he reviewed and signed it.

However, he had discussed the topic with plaintiffs' attorneys on many occasions, and the report "summarizes his opinions as he has relayed them to [plaintiffs'] attorneys in this and many other cases." Id. "He agreed with all of the statements in the [supplemental] report and although an attorney from [plaintiffs' firm] may have typed the document, the opinions and the bases therefore are his alone." Id.

The court thus denied the defendants' Daubert challenge, holding that the expert "was sufficiently involved in the preparation of the supplemental report that this document may be considered as setting forth [the expert's] opinions and not those of counsel."

Other cases illustrating the permissible limits of attorney involvement are: *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F.Supp.2d 908, 933 (W.D. Wisc. 2007)(court did not exclude expert declarations drafted by counsel where evidence established that underlying analysis was that of the expert: “[The expert] did not merely parrot the arguments of counsel; he reached his own conclusions after a lengthy process of collecting and reviewing purchase documents.”); *Crowley v. Chait*, 322 F.Supp.2d 530, 544-45 (E.D.N.J. 2004)(Counsel organized the expert’s opinions and wrote the report for him after discussion.

The court held, “while the type of assistance rendered by [counsel] in the compilation of the report may approach the limits of what Rule 26(a)(2)(B) will allow, it does not run afoul of those limits.”; *Manning v. Crocket*, 1999 WL 342715 at **3-4 (N.D. Ill. May 18, 1999)(court did not strike report notwithstanding that its was “remarkably similar” to plaintiff’s complaint; court concluded that it could not exclude the possibility that the complaint was the product of the expert’s opinions rather than vice versa.)

It is possible, of course, to go too far. For example, a court excluded an expert’s testimony where “undeniable substantial similarities between [the expert’s] report and the report of another expert prepared with assistance from the same counsel in an unrelated case, demonstrate that counsel’s participation so exceeded the bounds of legitimate ‘assistance’ as to negate the possibility that ‘the expert’ actually prepared his own report within the meaning of Rule 26(a)(2).” *In re Jackson Nat’l Life Insur. Co. Premium Litigation*, 2000 WL 33654070 (W.D.Mich. 2000).

An expert’s report was also excluded pursuant to Federal Rule of Civil Procedure 37(c) where, when questioned, the expert could not point to any portion of the report that could be said to be his own. A report cannot be wholly prepared by counsel with the expert merely adding his signature after reviewing it. *Bekaert Corp. v. City of Dyersburg*, 256 F.R.D. 573, 579 (W.D. Tenn. 2009).

In summary, the 2010 amendments, coupled with the pre-existing case law and commentary permitting attorney involvement in drafting expert reports, should collectively be viewed as a clear message that nonsubstantive attacks on the collaborative process should stop. Lawyers and experts should take great comfort in this positive development, and enjoy greater freedom to simply creating outstanding work product.

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