# Litigation Update - One Expert Instead of Two

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**LITIGATION UPDATE—ONE EXPERT INSTEAD OF TWO: PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE MAKE IT EASIER (AND CHEAPER) TO USE EXPERT WITNESSES IN LITIGATION**

**By: Sitso Bediako**

A proposed revision to the Federal Rules of Civil Procedure may have a significant impact on the way attorneys and clients hire and use expert witnesses in developing litigation strategy and providing testimony.

Presently, in lawsuits where expert witness testimony is needed, attorneys and their clients face a dilemma: should the client hire one expert witness or two? This dilemma arises because, while the current discovery practice rules in Rule 26 protect communications between an attorney and a consulting expert from discovery by opposing counsel, communications between an attorney and a testifying expert are not afforded the same protection.

This distinction is crucial. Lawyers regularly rely on consulting experts to develop theories, identify case issues, and plan strategy. But, ultimately, testifying experts are needed to present evidence that will aid the fact-finder in resolving the dispute. Rule 26 has often prevented a single expert from serving as both consultant and witness. The rule states that any data or information "considered" by the testifying expert is discoverable, and courts have interpreted that language broadly. This has meant that any draft expert reports and the process for developing those reports were discoverable, along with any conversations between the expert and the attorney. In the end, information unrelated to the foundation for and reliability of the testifying expert's opinion could be used to undermine the expert's (and attorney's) credibility.

Clients could hire two consultants, but those without the means to do so would be at a distinct disadvantage. Another solution was for the attorneys to stipulate that draft reports were not discoverable. Some attorneys micromanaged information, focusing experts strictly on what was necessary and eliminating any paper trail by having only oral discussions. The current rule has been less than successful in achieving its purpose: to provide opposing counsel with sufficient information on which to test the foundation and reliability of an expert's testimony.

The proposed amendments to Rule 26 would be a significant step in addressing the current rule's shortfalls. Most significantly, draft reports and disclosures required by Rule 26(a)(2) of any testifying expert would be protected by the work product rule of Rule 26(b)(3)(A) and (B). According to the advisory committee comments on the amendment, this protection would also prevent any questioning on the contents or evolution of the drafts. Questions on the foundation and reliability of the final report remain appropriate, which may involve questions on the expert's process and analysis. For the most part, draft reports and underlying information not included in the final report no longer need to be produced, and counsel can be less concerned with managing this type of communication.

Another proposal would extend work product protection to communications between attorneys and testifying experts, similar to the protection already available to consulting experts. This protection, however, would be limited to testifying experts required to produce a report under Rule 26(a)(2)(B). The advisory committee believes that this limited protection is appropriate because a testifying expert not required to submit a report (i.e. an expert not specially hired for litigation nor regularly employed in giving expert testimony) is unlikely to be involved in developing trial strategy and testing legal theories. The revision does include exceptions that will help in testing the reliability of the testimony. Communications between an attorney and a testifying expert submitting a report are discoverable if they involve any of the following: (1) the expert's compensation; (2) facts or data provided by the attorney that the expert considered in forming her opinion; or (3) assumptions that the attorney provided and the expert relied upon in forming her opinions.

Additional amendments would also affect testifying experts. Attorneys would need to provide a summary of a testifying expert's testimony if the expert is not required to prepare a report under Rule 26(a)(2)(B).This is meant to apply to experts such as a treating physician not hired for litigation. In the past, courts may have required a report, but the amendment would remove this ambiguity. In addition, reports produced by an expert would only need to include the "facts and data considered" by the expert. The Rule currently reads "data and all information considered," which at times was interpreted to include theories and mental impressions. The amendment emphasizes that only factual information should be included in the reports.

If you have any questions, please contact a member of Gray Plant Mooty's Litigation practice group.