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Changes in expert witness discovery: M.R. Civ. P. 26(b)(4)(C) produces more efficient and effective collaboration

Most of us are accustomed to telling our experts to be careful because anything they put in writing can be discovered by the other side. This is because former versions of both the Federal and Maine Rules of Civil Procedure required the disclosure of "the data or other information considered by the witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B) (2009); M.R. Civ. P. 26(b)(4)(A)(i) (2013). Courts interpreted this provision very broadly and it was generally accepted that anything in the expert's file was discoverable. Accordingly, we have been very cautious with our communications and have picked up the phone or met with our expert in person to discuss anything of substance, instead of communicating in writing. (In reality, this practice did not truly protect the communication from disclosure, but it did make it more difficult to discover.) Limiting the exchange of information often compromised the quality of the expert's opinion or led to unwelcome surprises when the expert testified. Some cases required two experts – a consulting expert with whom the attorney engaged in open communications and a retained expert, whose opinion was designated for testimony once the attorney had developed a theory of the case through communications with the consulting expert. I.Rule changes allow freer discussions. In 2010, the federal Committee on Rules of Practice and Procedure formally recognized the gamesmanship and inefficient expenditure of resources that the language of Rule 26 produced. Effective December 1, 2010, the Federal Rules provided explicit protection against the discovery of draft expert witness reports, "regardless of the form in which the draft is recorded." Fed. R. Civ. P. 26(b)(4)(B). Explicit protection was also provided against the discovery of communications between counsel and the retained expert, "regardless of the form of the communication," with three exceptions. Fed. R. Civ. P. 26(b)(4)(C). Communications relating to the expert's compensation; facts or data provided by the attorney and considered by the expert in forming her opinion; and assumptions provided by the attorney and relied on by the expert in forming her opinion were still discoverable. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii). Effective September 1, 2014, the Maine Civil Rules of Procedure were amended to adopt similar changes, with some important differences. II.Differences between the federal rule and the Maine rule. The Federal Rules of Civil Procedure require that the disclosure of any retained or specially employed expert be accompanied by a report prepared by the expert. Fed. R. Civ. P. 26(a)(2)(B). Maine's rules do not impose this requirement. Thus, while the federal rules protect against the discovery of "drafts of any report or disclosure required under Rule 26(a)(2)," *see* Fed. R. Civ. P. 26(b)(4)(B), the Maine rules protect against the discovery of "drafts of Rule 26(b)(4) disclosures ordered by the court and reports to the attorney." M.R. Civ. P. 26(b)(4)(C). "Reports to the attorney" is broader in meaning than the federal counterpart and arguably includes any communication from the expert with information or opinions for the attorney to consider. Thus, if M.R. Civ. P. 26(b)(4)(C) had existed at the time the Law Court decided *Boccaleri v. Maine Medical Cente*r, 534 A.2d 671 (Me. 1987), the letter from the defendant's pathology expert to the defendant's attorney outlining his observations and opinions concerning a biopsy slide, the report issued by the defendant's pathologist, and the applicable standard of may have been protected instead of produced. A second difference between the federal rule and the Maine rule is that the federal rule characterizes drafts of reports and attorney-expert communications as work-product, protected by Fed. R. Civ. P. 26(b)(3)(A) and (B). Accordingly, the

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information is discoverable if it is "otherwise discoverable under Rule 26(b)(1)" and the party seeking the discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii). In contrast, M.R. Civ. P. 26(b)(4)(C) does not characterize the protected information as work-product, and it imposes a stricter standard for the discovery of the protected information. Pursuant to the rule, communications that do not meet one of the three exceptions can only be discovered "as provided in Rule 35(b)," which is the rule regarding the physician and mental examination of persons, or if the party seeking the discovery shows "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Notably, this is the same standard that must be met to discover the facts known, or opinions held by, a non-testifying, or "consulting," expert. M.R. Civ. P. 26(b)(4)(B). III.Developments in the interpretation of the new rule. It will take years for Maine courts to develop case law on M.R. Civ. P. 26(b)(4)(C) in a volume that results in meaningful guidance. In the meantime, guidance from the federal courts is helpful, so long as the differences between the rules are recognized.

- The term "considered" will still be given an expansive meaning. In general, any facts or data that are provided by the attorney and received and reviewed by the expert must be disclosed. This broad definition of "considered" was in place before the amendment to Fed. R. Civ. P. 26 and remains in place currently. *Yeda Research and Development Co. v. Abbott GmbH& Co.*, 292 F.R.D. 97 (D.D.C. 2013) ("Because the word 'considered' is unchanged, cases interpreting its meaning remain valid."); *United States v. Dish Network*, L.L.C., No. 09-3073, 2013 WL 5575864 (C.D. Ill. Oct. 9, 2013).
- If there are any "factual ingredients" in the communication, it will not be protected. According to the 2010 Advisory Comments to Fed. R. Civ. P. 26, "The intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." There is some case law interpreting the scope of the term "facts or data," but we can expect to see more. *See D.G. ex rel. G. v. Henry*, No. 08-74, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011) (notations or highlights do not constitute facts or data, statutes and policies provided to the expert constitute facts or data, and summaries that contain factual ingredients must be produced). Yet, if the expert and attorney collaborate to prepare a summary of the "facts and data," that work-product may be protected. *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (holding that the expert's spreadsheets, graphs and analyses did not have to be produced simply because they contained "facts and data" – "These formulations, however, are interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize, marshal, and present data. This selective presentation of data is separate and distinct from the underlying facts and data themselves.").
- Communications between the expert and individuals other than the attorney will not be protected. *See Fialkowski v. Perry*, No. 11-5139, 2012 WL 2527020 (E.D. Pa. June 29, 2012) (ordering the production of spreadsheets and document analysis prepared by the Plaintiff from her QuickBooks records and tax returns); *In re Application of Republic of Ecuador,* 280 F.R.D. 506, 514–16 (N.D. Cal. 2012) (communications between non-attorney employees of corporation and its expert witness are not protected, nor are those between testifying and non-testifying experts). These holdings prioritize full disclosure over the protection of work-product. Documents and information that would be protected as work-product, such as documents prepared in anticipation by a non-attorney representative, lose that protection once provided to the expert.
- Expert work-product, such as notes and calculations, *may* be protected. In *Dongguk Univ. v. Yale Univ.*,

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No. 3:08-cv-00441, 2011 WL 1935865, *1 (D. Conn. May 19, 2011), the United States District Court of Connecticut concluded that an expert's notes did not constitute a draft of a report, nor were they intended to be communications between the expert and the attorney. Thus, they were not protected. The Ninth Circuit has also refused to provide blanket protection to an expert's work-product. In *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014), the court concluded that the "driving purpose" of the 2010 amendments was to protect attorney opinion work product from discovery. *Id*. at 870. Accordingly, the rule "does not provide presumptive protection for all testifying expert materials as trial preparation materials." *Id*. at 871. *See also Republic of Ecuador v. Hinchee,* 741 F.3d 1185, 1195 (11th Cir. 2013).

On the other hand, the District of Colorado concluded that pages of calculations, described by the court as "working notes," were protected because Rule 26(b)(4)(B) protects against the disclosure of draft reports "regardless of the form in which the draft is recorded." *Etherton v. Owners Ins. Co.*, No. 10-cv-00892, 2011 WL 684592, *2 (D. Colo. Feb. 18, 2011); *see also Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.,* No. 11-2255, 2012 WL 1900536 (D. Md. May 23, 2012) (protecting notes that were created by the party's expert for the purpose of assisting the attorney prepare to depose the adversary's expert); *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (protecting drafts of spreadsheets, graphs, and charts that were prepared for inclusion with draft expert reports); *United States v. Veolia Env't N. Am. Operations, Inc.*, No. 13–mc–03, 2014 WL 5511398 (D. Del. Oct. 31, 2014) (protecting emails between a testifying expert and counsel who were collaborating on the creation of a valuation report). As the *Davita* court explained, "documents reflecting [the expert's] preliminary analysis are work product whether viewed as a 'preliminary expert opinion' or as a communication from expert to counsel reflecting their joint effort to develop strategy." 128 Fed. Cl. at 591. The fact that M.R. Civ. P. 26(b)(4)(C) protects against the disclosure of "reports to the attorney," regardless of whether the report to the attorney includes any attorney opinion work product, suggests that greater protection may be afforded to "working notes" in Maine than in some of the federal cases cited above. The expert could, for instance, include all of his or her working notes in a report to counsel, theoretically invoking the protection of the rule. On the other hand, the advisory committee's notes suggest that the content of the documents might still be discoverable: "The facts observed, the information learned, and the opinions reached by the expert are not protected from discovery simply because they are shared with the attorney." M.R. Civ. P. 26 Advisory Note – June 2014. The circumstances under which expert work product is protected under M.R. Civ. P. 26(b)(4)(C) requires further clarification. IV.Practical implications for communications with experts. The goal of M.R. Civ. P. 26(b)(4)(C) is to enable freer communications between attorneys and experts, thereby reducing the costs of litigation and producing higher quality expert testimony. There is a concern, however, that placing limits on expert witness discovery will stifle effective cross-examination. The legitimacy of this concern will be revealed as Maine courts interpret and apply M.R. Civ. P. 26(b)(4)(C). In the meantime, litigants should employ the following practices in order to safeguard against waiving the protections afforded by the rule:

- Advise your expert that her notes may be discoverable but that the risk of production can be lessened by containing them within a report to counsel. If, for example, an expert wants to create a summary of the evidence, that should be done in a report format.
- When communicating with your expert, clearly separate the communications that contain facts and data from the communications that contain mental impressions or your theory of the case. If you send a letter to your expert enclosing medical records for review and also have a question you need your expert to answer, send your question in a separate letter.

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- Discuss the different standards in M.R. Civ. P. 26(b)(4)(C) with your expert. Facts and data that have been provided by the attorney must be disclosed if they are "considered" by the expert, which is a very broad standard. Assumptions provided by the attorney need only be disclosed if they were "relied on." Your expert should be able to differentiate between those standards.
- Limit your expert's communications with anyone other than you.
- Send summaries of facts and data only if the underlying facts and data has been provided. You may be able to argue that the summary reflects your mental impressions and is protected by the rule. That argument will not succeed, however, if the facts and data have not been provided outside of your summary.

In closing, the new rule should allow parties to focus on the expert's opinions and the support for those opinions. If the expert's opinions are supported by the facts and the standards of his or her profession, then the expert's opinion should carry weight, regardless of whether the retaining attorney's theory of the case was presented to the expert along the way.

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