

Amended Federal Rule Protects Drafts of Expert Reports and Certain Communications Between Expert and Counsel

By Joseph Decker, Esq.

Effective December 1, 2010, the drafts of an expert's report and certain communications between counsel and an expert will no longer be discoverable by opposing parties in federal court under the new amendments to Rule 26 of the Federal Rules of Civil Procedure.

As amended, Rule 26 (b)(4)(B) will now provide that any draft of "any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded..." is protected from disclosure in discovery. Similarly, amended Rule 26(b)(4)

In the Report of the Judicial Conference, the Advisory Committee on Rules of Practice and Procedure noted the inefficiencies and "wasteful discovery-avoidance practices" created by the 1993 amendments to Rule 26 which allowed discovery of draft reports and communications between attorneys and experts. Frequently parties would hire two experts, one for consultation and development of the opinions and a second to provide testimony. To avoid creating a discovery record,

the practices also [would] include tortuous

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(C) protects "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications..." with three exceptions. These exceptions are attorney-expert communications that:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

steps to avoid having the expert take any notes, make any record of preliminary analysis or opinion, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery"

The Advisory Committee rejected the argument that discovery of the draft reports and communications regarding the preparation of the report was necessary to insure that the opinions of the expert were not "unduly influenced" by the retaining lawyer. Instead, the Advisory Committee was satisfied that, after "extensive study...the best means of scrutiniz-

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ing the merits of an expert's opinion is by cross examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues." The Advisory Committee concluded that discovery into the communications between the expert and the lawyer was ineffective, time consuming and expensive.

Pennsylvania law was headed in the opposite direction, at least until several weeks ago. In the Pennsylvania Superior Court's decision *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, 5 A.3d 404 (Pa. Super. September 16, 2010) (recently withdrawn), the court held that email and correspondence between an expert physician and the plaintiff's counsel was discoverable and *not* protected as attorney-work product under Pa.R.C.P. 4003.3.

In *Barrick*, the defendants sought disclosure of all communications between the plaintiff's treating and expert physician, Dr. Green, including draft reports and email and written communications with plaintiff's counsel. Relying on Pa.R.C.P. 4003.5(b), the Superior Court stated that the correspondence between Dr. Green and the attorney were "highly relevant" to Dr. Green's conclusions. The court rejected the plaintiff's argument that such communications should be accorded the protections of the work product doctrine under Rule 4003.3. According to the court, the defendants were:

entitled to discover information which would enable them to ascertain whether Dr. Green's opinions are his own or whether he merely intended to parrot what he was told by counsel. As such, we reject the notion that Mr. Barrick's medical records contain all of the information upon which Dr. Green relied. We must assume that communications from counsel were reviewed by Dr. Green in the course of his work as an expert and therefore, he may

have relied on said communications in arriving at this opinion. Appellees cannot properly defend against Dr. Green's conclusions without knowing the entire basis for his opinion.

The *Barrick* opinion was withdrawn on November 19, 2010, and the Superior Court has granted rehearing *en banc*.

Concluding Thoughts

Attorneys using experts such as computer forensic examiners should be more confident that, when in federal court, their draft reports and emails to the expert will be protected from disclosure unless they are providing facts, data or assumptions. The "effective date" of December 1st must be considered, especially as to whether the amendments apply to lawsuits already filed, engagements already existing, or reports yet to be written. Consideration should be given as to the advisability of signing a revised engagement letter. Additionally, the unsettled nature of the work product protection in Pennsylvania (and other states) still should encourage caution in communications between attorneys and their experts.

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For questions or comments regarding this issue of qubit, please contact Susan Ardisson at Susan.Ardisson@bit-x-bit.com.

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