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Federal Court System Implements New Rules

Changes affect work product, summary judgment procedures

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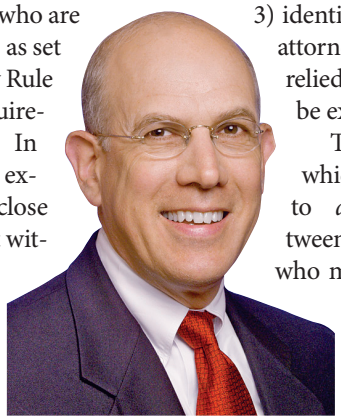
Federal Rules of Civil Procedure 26 and 56 have been amended effective Dec. 1.

The scope of work-product protection regarding testifying experts who must submit reports is expanded, and the procedure for summary judgments is entirely revamped. This article discusses these amendments and provides practical tips to implement them. It does not discuss the simultaneous amendment to Rule 8(c) (1), which eliminates discharge in bankruptcy as an affirmative defense, as being superseded by statutory changes.

Expert Disclosure Rule

Drafts of expert reports are no longer generally discoverable. Old Rule 26(a) (2) (B) (ii) required disclosure of "the data or other information" considered by a testifying expert who must submit a report, in forming opinions. Rule 26(a)(2)(B), which remains unchanged, requires that, unless otherwise stipulated or ordered by the court, a testifying expert retained or specially employed to provide expert testimony in the case, or one whose duties as the party's employee regularly involve giving expert testimony, must submit a report containing everything required in that rule. Thus, expert reports are not required of experts such as a treating physician, or an employee providing expert testimony but not specially employed for that purpose.

New Rule 26(a) (2) (B) (ii) replaces "data or other information" with the narrower "facts or data." The old rule has been interpreted to allow discovery of drafts of an expert's report. New rule 26(b) (3) (A) explicitly protects such drafts from discovery, regardless of the form in which the draft is recorded.



What about expert witnesses who are not required to provide a report, as set forth in Rule 26(a) (2) (B)? New Rule 26(a) (2) (C) imposes a new requirement for such expert witnesses. In addition to identifying such an expert, counsel must also now disclose the subject matter on which that witness is expected to present evidence, and a summary of the facts and opinions to which the witness is expected to testify. Note that this disclosure is prepared by the attorney, not the expert, and that it is less extensive than the reports required under Rule 26(a) (2) (B).

The only qualification to the non-discoverability of drafts of expert reports is the limited exception provided in unchanged Rule 26(b) (3) (A) (ii), allowing for discovery of work product if a party shows substantial need for the materials to prepare its case and that it cannot, without undue hardship, obtain their substantial equivalent by other means.

Communications between expert and counsel are no longer generally discoverable, with significant exceptions New Rule 26(b) (4) (C) protects from discovery all communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), with three significant exceptions as to communications that: 1) relate to compensation for the expert's study or testimony; 2) identify facts or data the party's attorney provided and the expert considered in forming opinions to be expressed; or 3) identify assumptions the party's attorney provided and the expert relied on in forming opinions to be expressed.

Thus, unlike the old rule, which allowed discovery as to *all* communications between counsel and an expert who must submit a report, now such discovery is limited to the three exceptions set forth above and the provisions of Rule 26(b) (3) (A) (ii) which apply where a party can show the requisite substantial need and inability to obtain the substantial equivalent by other means.

Expert Disclosure Tips

Even under the new rules, your communications with testifying experts who must prepare reports are still discoverable as to the following: your discussion of expert compensation; facts or data that the expert considered in forming opinions; and any assumptions you provide the expert that the expert relied on in forming opinions.

These new rules do not protect your communications with experts who are not required to submit reports.

Keep in mind whether your action is pending in state or federal court. The provisions of Practice Book Rule 13-4, even as recently amended, do not provide any of the protections in these amendments to Rule 26.

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In doing research on the scope of expert discovery, you can no longer rely on cases based on Rule 26 prior to the recent amendments, to the extent those amendments apply. Note, however, that neither these amendments nor the Advisory Committee Notes indicate whether these amendments apply retroactively to communications made before Dec. 1.

Summary Judgment Motions

Effective Dec. 1, Rule 56, which provides the procedure for summary judgment, is substantially revised. The references below are to the new rule.

Rule 56(a) makes explicit that a motion for summary judgment can be filed as to part of a claim or defense, and imposes the new requirement that the court should state on the record the reasons for granting or denying the motion. This rule now explicitly states the standard for ruling on a motion for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

In Rule 56(b), the time to file is any time until 30 days after the close of all discovery, unless the court orders otherwise, as in issuing an order pursuant to a Rule 26(f) report. Prior Rule 56(a) provided that a motion for summary judgment could be filed at any time after 20 days passed from commencement of the action or after the opposing party served a motion for summary judgment.

Rule 56(c) imposes new requirements for supporting and opposing motions for summary judgment, similar to those in Local Civil Rule 56. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by 1) citing to particular parts of materials in the record, including those made for purposes of the motion only, or 2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Rule 56(c) further provides that a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. This rule also provides that the court needs to consider only the cited materials, although it may consider other materials in the record. This rule allows for filing both declarations and affidavits, whereas the prior rule allowed for filing affidavits but not declarations. (The difference is that a declaration is not sworn. See 28 U.S.C. Sec. 1746.)

Rule 56(d) gives the nonmovant the opportunity to show that it cannot present facts essential to justify opposition, and provides a court remedy in that circumstance, including deferring consideration of the motion or denying it, allowing time to obtain affidavits or declarations or to take discovery, or issuing any other appropriate order.

Rule 56(e) provides a procedure where a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact. In that circumstance, the court may give that party an opportunity to do so, consider the fact undisputed for purposes of the motion, grant summary judgment, or issue any other appropriate order.

Rule 56(f) provides that, after giving notice and a reasonable time to respond, the court can grant summary judgment for the nonmovant, grant summary judgment on grounds not raised, or consider summary judgment *sua sponte*.

Rule 56(g) authorizes a judge to enter an order that certain facts are established in the case even when denying a motion for summary judgment.

Rule 56(h) provides that sanctions for a bad-faith affidavit or declaration are discretionary rather than mandatory, can be imposed only after notice and a reasonable time to respond, and gives the judge options to impose sanctions other than holding the offending party or attorney in contempt.

Summary Judgment Tips

When appropriate, take advantage of the new rule that explicitly provides that you can move for summary judgment even on part of a claim or defense.

Note the new time limit to file motions for summary judgment – until 30 days after the close of discovery, unless the court orders otherwise.

Comply with both new Rule 56 and existing Local Civil Rule 56. You must still provide the Local Rule 56(a) (1) Statement to support a motion for summary judgment, and a Local Rule 56(a) (2) Statement to oppose a motion for summary judgment, all in accordance with the requirements of Local Rule 56(a) (3). Note that the Local Rules do not allow for filing of declarations. Each Local Rule 56(a) (1) Statement and Local Rule 56(a) (2) Statement must be supported either by an affidavit of a witness competent to testify and/or evidence admissible at trial.

As set forth in Rule 56(d), take advantage of remedies available to you if opposing counsel moves for summary judgment before you are able to present facts essential to justify your opposition, as when, for example, you have not yet completed discovery.

Keep in mind the advantage of filing a motion for summary judgment even if it is denied, as provided in Rule 56(g). That new rule provides that, even if the Court does not grant all the relief requested, it may enter an order stating that any material fact, including an item of damages or other relief, that is not genuinely in dispute is deemed an established fact in the case.

In doing research in connection with motions for summary judgment, you can no longer rely on cases based on Rule 56 prior to the Dec. 1 amendments, to the extent those amendments apply. ■