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To: Discovery Rules Subcommittee
From: Jim M. Perdue, Jr.
Date: January 13, 2011
Subject: Amendments to Federal Rule of Civil Procedure 26

The subcommittee recently issued a memorandum addressing the amendments to Federal Rule of Civil Procedure 26 and the inconsistencies between the amended FRCP 26 and the Texas Rules of Civil Procedure governing discovery related to experts, specifically Rules 192 and 195.

The federal amendments are summarized as two changes from Texas Rules:

a. All retained experts must provide a signed report upon designation which must contain defined elements according to new Rule 26(a)(2)(B); and
b. Report drafts and communications between attorney and testifying expert are protected from discovery.

I certainly cannot speak for any group as discordant as plaintiff's civil trial lawyers. I did conduct an informal survey of attorneys through e-mails and listservers on this topic. Surprisingly, there appeared to be general consensus among members of the bar on these two changes:

1) Not a single attorney favored a mandatory report requirement for retained experts, citing additional litigation cost as the primary issue; and
2) Almost all attorneys favored expanding a work product protection to communications with experts and for draft reports.

I. MANDATORY REPORTS BY A RETAINED EXPERT

While their bases may have differed, not a single attorney favored a change to the Federal Rule mandating a report from any retained expert. The reason given by most is the additional expense this forces upon an already expensive civil litigation system. Corollary to that objection is the way the Federal Rule enforces a default position of expense, rather than a preference for allowing counsel and their clients to design a discovery plan specific for their case and their dispute. This lead to several compliments given the Tex. R. Civ. P. 195 and its default approach, which is considered to allow case specific design and more discretion. For example, one attorney responded:

> The discretionary report requirement of the Texas Rules enables the lawyer to tailor the strategy and expense load to the case. This flexibility is the true genius of the Texas Rules. Also, Federal Rule 26 is silent about the timing of expert depositions and there is always a fight about when the plaintiff's experts are going to be deposed.

The Texas Rules diverge from the Federal Rules in more ways than an inflexible report requirement. Engrafting a report requirement into the Texas Rule in the interest of uniformity makes little sense unless all of the Federal Rule's other differences become the Texas Rule. For example, Fed. R. Civ. P. 26(b)(4)(C) shifts the cost of deposing a retained expert to the party seeking to take the deposition and doing the question. Texas does not, instead keeping the deposition time costs for a retained expert the responsibility of the party who retained him or her. Tex. R. Civ. P. 195.7. Fee shifting for deposition costs makes fair sense when a detailed report has been provided to the other side informing them of the expert's opinion and what they will say at trial but that party still wants to depose the expert. But forcing a party to incur the expense of professional time to write a detailed report, and then require it to incur the additional expense of producing the expert for deposition simply allows parties to play games with litigation expense (and time) when the substance of the expert's opinions and potential trial testimony are already known. There is no more significant driver of litigation expenses than expert fees, and having a mandatory report rule inserted into the Texas Rule where a party must cover its own experts' deposition fees forces, without variance, a new, additional layer of expense on every case.

> The Federal rule also attempts to define what must be included in a retained expert's report.
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> The report must contain:
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> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> (ii) the facts or data considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B).

The effort by rule to define what "must" be in a report inevitably proves as difficult as defining beauty. Texas medical malpractice law exposes the hazards of this approach. While the proposed report requirement does not meet the level of a statutorily required predicate, it still defines what must be included in the report. That substantive question is the essence of what has become a litigation dispute in every Texas medical malpractice case -- whether a report satisfies the relatively benign definition of a qualifying report under Texas Civil Practice & Remedies Code § 74.351. Since that enactment, trial court challenges to reports have been followed by appellate challenges in almost every case, evidenced by the enormous volume of cases forced to address a factually case specific issue and leading one appellate justice to observe:

> Having practiced in the medical malpractice area for seventeen years prior to taking the bench, I have closely followed the development of the law with regard to the requirement of expert reports. I also have closely followed the gamesmanship that has rapidly spawned in this area of the law. This gamesmanship is directly at odds with the ethical concept that the law's procedures should be used "only for legitimate purposes." Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 4.

Regent Care Ctr. of Laredo v. Abrego, 2006 WL 3613190 (Tex. App.–San Antonio Dec. 13, 2006, memorandum opinion) (J. Speedlin, concurring).

It appears unavoidable that the question of whether a mandatory report satisfies the rule will become a "mini-litigation" event. It is easy to foresee Motions to Strike Expert Witness, Motions to Declare Designation Insufficient, and Motions for Summary Judgment all based upon a requirement to provide a report intended to disclose opinions under a scope of discovery standard but that "must" contain certain undefinable elements. It is undeterminable at this point what the stakes of that dispute may be in federal courts until cases interpret the new rule and explain the ramification of a "non-qualifying report." But it is hard to envision an interpretive development where the report requirement in Fed. R. Civ. P. 26(a)(2)(B) will not add time, litigation expense, and create additional substantive disputes before trial and appellate courts regarding expert reports.

II. WORK PRODUCT PROTECTION FOR COMMUNICATIONS WITH EXPERTS AND DRAFT REPORTS

Contrary to the unanimous objection to the report requirement, there was a general consensus in support of the changes embodied in Fed. R. Civ. P. 26(b)(3)-(4). The substantive effect is to protect drafts of reports and the communications between attorney and expert from the scope of discovery. Presumptively, these changes would become proposed changes to Tex. R. Civ. P. 192.3(e) and 192.5. I never lose faith in this committee's ability to debate an issue, but this particular issue has been studied by more than a few deliberative bodies before.

The ABA House of Delegates recommended the changes to Rule 26 that would substantively provide a work product privilege to all attorney communications with retained experts and their draft reports. The text of the ABA resolution read:

> RESOLVED, That the American Bar Association recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report, as follows:
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> (i) an expert's draft reports should not be required to be produced to an opposing party;
>
> (ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
>
> (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.
>
> FURTHER RESOLVED, That the American Bar Association recommends that, until federal, state and territorial rule and statutory amendments are adopted, counsel should enter voluntary stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

Resolution of the American Bar Association House of Delegates, adopted August 7-8, 2006.

The Report of the Judicial Conference Committee on Rules of Practice and Procedure recommended the changes to Rule 26 with similar consensus and explained the substantive basis:

> The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.
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> Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt

> to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts - one for consultation, to do the work and develop the opinions, and one to provide the testimony - to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report.
>
> Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work. Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

Report of the Judicial Conference, Rules, September 2009, pp. 10-12.

In my personal experience, counsel's efforts to define an expert's opinions through examination into their correspondence and communication are a rote area of deposition questioning. Anecdotally, most attorneys reported personal experiences where far too much time is spent in deposition marking as exhibits then reciting every transmittal letter ever sent the expert, followed by questions like "What did he mean by that?" or "Didn't that tell you what to do?" The issue of charges and compensation is addressed routinely, but nothing in the rules change prevents fully obtaining that information. The amounts and source of such is usually explored, and the rules change allows fully obtaining that information.

Two additional criteria in measuring a restriction on the scope of discovery can be considered. Accepting that a large amount of time is spent on discovery into attorney-expert communication, how does the volume of discovery efforts translate to trial? This can be considered both (a) in the substantive exploration of an expert's opinion and (b) in collateral issues on which an expert may be persuasively attacked. The lone objection I received to the rule change felt that the effort by opposing counsel to direct the opinion of an expert was a substantive issue in the analysis. Obviously, whether an expert's methodology and opinion has a non-judicial use is a potential

substantive consideration of admissibility. The fact that an expert worked closely with the attorney and modified his or her reports at the attorneys direction does not precisely translate to the ultimate inquiry of non-judicial use. Nothing appears in the rules change to limit the scope of discovery into that substantive admissibility element.

This leaves consideration of persuasive points during cross examination. Most experiences that were registered, mine included, state that cross-examination at trial rarely addresses the communication between expert and attorney. Cross examination of an expert with communications from opposing counsel at trial invariably is based in the effort to put opposing counsel's conduct on trial. Personally, I have rarely seen that approach have much success. Exposure of an expert relying on incorrect data, at variance with recognized literature, or stretching opinions defying the science or medicine in his field is both more substantive and more persuasive in trial. While there may indeed be some instance where focus on counsel's communication is professional and appropriate, the Federal Rule appears to allow discovery in those instances. Fed. R. Civ. P. 26(b)(3)(A) and (b)(4)(C). I believe most attorneys would admit the situation of an attorney crafting from whole cloth an expert's opinion or successfully misleading an expert into a conclusion that cannot be exposed substantively are rare. Rather, the Federal change sets the rule at an appropriate default position -- where deposition practice will be to focus attorneys on the substance of the expert's opinion, litigation will assume that attorney communications with their experts were professional and ethical, and cross-examination will assume that the expert holds ultimate ownership of whatever he or she puts in a report or is willing to testify to on the record. Present Texas practice, with the inordinate amount of time used to depose experts on any detail of attorney-expert communication, reflects a default assumption that within communications there must be something untoward or unethical. That in itself may be a reason for the change.

J.M.P., Jr.