Expert Discovery Issues in State and Federal Court
Where's the Ballpark and What are the Ground Rules?

By Bradley R. Kutrow

Lawyers who handle complex cases in both state and federal courts in North Carolina have grown accustomed to working under two different sets of discovery rules. The divergence in the rules governing expert disclosure and discovery in our state and federal courts can create obstacles, both practical and tactical. This paper will summarize the present differences between the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure, discuss areas where those differences can trip up practitioners, and suggest some approaches that may avoid the obstacles and clear the way for fair and efficient expert discovery. Expert discovery disputes can often be avoided if counsel and the court clarify up front how the expert discovery rules will be applied in their particular case.

The differences in state and federal expert discovery are much like the "ground rules" that are applied to adapt the Official Baseball Rules to the quirks and peculiarities of each specific ballpark. While the game is the same, it is essential to know where you're playing and how that ballpark differs from the one where you played the day before. Knowing the ground rules ahead of time can help you win.

I. Comparison of Rule 26 in the Federal and State Rules

A. Federal Rule 26(b)(4) | Substantial changes were made to the Federal Rules governing expert discovery in 2010 after experience taught that changes made in the 1993 Amendments had created practical problems. As the Advisory Committee on Federal Rules of Civil Procedure explained in 2008, courts allowed "free discovery of draft expert reports and all communications between attorney and expert witness," deeming any "information considered by the expert" to be discoverable under the Comment to the 1993 Rule. This interpretation had two negative consequences, the Committee found. First, lawyers and experts went to great lengths to avoid creating discoverable documents or communications, yet opposing counsel "persist in devoting costly deposition time to the vain quest for communications or drafts that may undercut an expert's opinions."[1] Second, and "[p]erhaps worse, these strategies impede effective use of expert witnesses because lawyers restrict communications that might lead to more sophisticated and helpful opinions." Because of their fear that any communications with experts might be discoverable, lawyers were also hesitant to use a testifying expert to help them understand an adverse expert's report or evaluate a case for settlement. In some cases, the 1993 Amendments forced counsel to hire a second consulting-only expert with whom they could have those conversations. As a result, a party "who cannot afford the expense of a dual set of experts is put at a disadvantage." The unintended consequences of the 1993 Amendments, therefore, were ill-prepared counsel, poorer-quality expert testimony, additional costs in terms of wasted deposition time and consulting expert expense, and a tactical advantage for parties who could afford to hire separate testifying and consulting experts.[2] The 2010 Amendments to Rule 26 were intended to eliminate or mitigate these problems.

1. Disclosure/Discovery of Testifying Experts | Under the mandatory disclosure requirements of the 2010 Amendments codified in Federal Rule 26(a)(2)(A), a party is required to disclose the identity of any expert witness (defined broadly as any witness the party intends to use to present evidence under Rules of Evidence 702, 703, or 705). If an expert witness is "retained or specially employed" to provide expert testimony, Rule 26(a)(2)(B) further provides that the expert must prepare and sign a report containing:

- a "complete statement" of the witness' opinions,
- the "facts or data considered by the witness in forming them,"
- proposed exhibits summarizing or supporting the expert's opinions, and
- other background information that was formerly obtained only at deposition (prior testimony, rate of compensation).

2. Work Product Protection for Expert Communications | Federal Rule 26(b)(4)(B) now expressly protects as work product drafts of expert reports, and Rule 26(b)(4)(C) protects as work product communications between attorneys and experts, except those relating to compensation, facts or data provided by the attorney that the expert "considered in forming the opinions to be expressed," or relating to assumptions provided by the attorney and "relied on" by the expert. This formulation is intended to protect and promote useful attorney-client communications while permitting full discovery of the extent to which the retaining attorney has supplied either facts or assumptions to the expert.

Experts must typically retain and produce all documents they create in the course of their work. While it is unclear how long this obligation continues, one court (applying the former Rule 26) held emphatically that a testifying expert did not have to produce an email he wrote (a year after his submitted his own report) that contained his reaction to an opposing expert's report. **FTC v. Lane Labs-USA, Inc.**, No. 00-CV-3174 (DMC), 2008 U.S. Dist. LEXIS 64776 (D. N.J. Aug 25, 2008). The court observed, perhaps wearily, "if a party was entitled to update discovery about what an expert thought about the other expert's testimony, the process would never end." *Id.* at * 8.

3. Discovery of Non-Testifying/Consulting Experts | Federal Rule 26(b)4)(D) provides that a party many not ordinarily engage in discovery directed to specially-retained consulting experts retained in anticipation of litigation but not expected to testify. It allows discovery only in "exceptional circumstances" when it is "impracticable . . . to obtain facts or opinions on the same subject by other means." In practice, such discovery typically occurs only pursuant to a court order after being sought by motion. The paradigm "exceptional circum-

Continued page 6

Expert Discovery, *continued from page 5*

stance" would be when an expert was called to the scene of an event or accident and made first-hand observations or took photographs that cannot be obtained elsewhere but is then designated a "consulting" expert by the retaining counsel to impede discovery of unfavorable facts or opinions. Courts do not condone such gamesmanship. On the other hand, neither will they permit counsel to obtain information from adverse consulting experts by subpoena or deposition simply to satisfy the curiosity or suspicion of the party seeking the discovery and claiming "exceptional circumstances."

Courts have accorded varying degrees of work product protection to non-testifying or consulting experts. Magistrate Judge Dennis Howell held, under the pre-2010 rules, that the identity of a consulting expert was not protected. **Kaiser-Flores v. Lowe's Home Ctrs., Inc.**, No. 5:08cv45, 2009 U.S. Dist. LEXIS 120064 (W.D.N.C. Dec. 2, 2009); but *see* **Ludwig v. Pilkington N. Amer., Inc.**, 2003 U.S. Dist. LEXIS 17789, No. 03 C 1086 (N.D. Ill. June 9, 2003). Other courts require some disclosure when the level of involvement by non-testifying experts has the potential to impact the evidence presented by the party or its testifying experts. **In re Welding Fume Prods. Liab. Litig.**, 534 F. Supp. 2d 761, 768-69 (N.D. Oh. 2008); **Ochsner Clinic Found. v. Cont'l Cas. Co.**, No. 06-4556-GTP-SS, 2008 U.S. Dist. LEXIS 23424, (E.D. La. March 25, 2008).

One recent case illustrates how far some counsel will go to obtain discovery from non-testifying experts. In a commercial product liability case, the plaintiff insurer learned that the defendant manufacturer had previously used an expert to analyze product failures, in some cases identifying him as a testifying expert. Although no experts had yet been identified in the pending case, the insurer served a Rule 45 document subpoena on the expert in his home state. The expert objected under Rule 45(c)(2), and the manufacturer sought a Rule 26(c) protective order. The manufacturer asserted that the documents subpoenaed were work product protected by Rule 26(b)(3), and that all the expert's work on the product at issue had been as a consulting, not testifying, expert and so was immune from discovery under Rule 26(b)(4)(D). The court quashed the subpoenas on technical grounds and because they were not "clear, concise, and reasonably particularized" as required by the applicable local rules. It required the manufacturer to supplement its privilege log to include any documents in the expert's possession that were responsive to the plaintiff's Rule 34 document requests, but deferred deciding the Rule 26(b)(4)(D) consulting expert work product issue. **Travelers Prop. Cas. Co. of Amer. v. Charlotte Pipe & Foundry Co.**, No. 6:11-cv-00019-JA-GCK, slip op. at 5-6 (M.D. Fla. Nov. 8, 2011).

This case illustrates the complex issues that arise when discovery is sought from non-testifying experts, including the extent to which the party retaining the expert is obligated to list communications protected by Rule 26(b)(4)(D) on a privilege log. Such an obligation arguably undermines a litigant's (and its counsel's) ability to retain a consultant purely to educate counsel and provide specialized behind-the-scenes support, without alerting the opposing party to the consulting expert's identity or involvement.

B. North Carolina Rule 26(b)(4)

1. Disclosure/Discovery of Testifying Experts. | North Carolina's expert discovery rule is substantially unchanged since it was adopted in 1975, and even then it trailed by several years similar changes in the parallel federal rule. A close review of the rule reminds us that typical state court practice now varies from the letter of the rule in important ways.

- Parties are *entitled* to obtain expert disclosure only "through interrogatories."

- Expert depositions can be obtained over objection only by court order, and the court "shall require" that the deposing party "pay a reasonable fee for time spent in responding" to the deposition or other form of discovery.

- Exception: Expert who was also "an actor or viewer" with respect to the lawsuit's subject matter (i.e., a treating physician) may be deposed and should be "treated as an ordinary witness." Comment to 1975 Amendment to Rule 26(b)(4); **Green v. Maness**, 69 N.C. App. 403, 316 S.E.2d 911 (1984).

Notwithstanding this rule, expert depositions are routinely conducted by agreement. In cases where each party has its own expert(s), counsel recognize the benefits of reciprocal expert depositions. Getting an opportunity to obtain full disclosure of opposing expert's qualifications, experience and opinions and to cross-examine the expert is frequently necessary for counsel to evaluate the case and facilitates settlement.

Thus, expert disclosure in state court typically begins with Rule 26(b)(4) interrogatories to elicit a summary of expert opinions followed by a deposition where opposing counsel can probe the basis for the opinions, try out potential lines of cross-examination, seek helpful admissions, and lay groundwork for motions to exclude or limit the expert's opinions.

North Carolina Business Rule 18.5 states simply that expert discovery, including expert depositions and disclosure of expert information, will be completed within the discovery period set by the Case Management Order in each case.

2. Work Product Protection for Expert Communications

North Carolina's work product rule, as set out in Rule 26(b)(3), substantively tracks the current federal rule. However, there is very little North Carolina case law applying the work product doctrine to documents created by experts or to communications between counsel and experts.

In one Superior Court case, then-Business Court Judge Albert Diaz granted a protective order that strictly limited inquiry into testifying experts' communications with the counsel who was proffering their testimony. **Hospira, Inc. v. AlphaGary Corp.**, 05-CVS-6371 (Mecklenburg County Sup. Ct. March 20, 2007) (included as Appendix 1). Plaintiff's counsel sought "the substance of all discussions wherein opposing counsel may have revealed to an expert his 'mental impressions, conclusions, opinions, or legal theories' of the case, regardless of whether the expert relied on them in forming his opinion." Slip op. at 1.

Judge Diaz' analysis began with the basic scope of discovery set by Rule 26(b)(1), noting that discovery was limited to matters "relevant to the subject matter," and that under Rule 26(c) the court could deny discovery "where the information sought is of no or marginal relevance, particularly if the sought after discovery will impose an undue burden or otherwise prejudice a party."

He then noted that there was no North Carolina precedent on point, but observed that the North Carolina Rules of Civil Procedure "provide no right to take the deposition of an expert witness," instead providing only that the discovering party may obtain through interrogatories the "facts known and opinions held" by experts. Under Rule 26(b)(4)(a)(2), further discovery of experts is authorized only "upon order of the court," he noted, and then only subject to such restrictions on scope as the court deems appropriate. Slip op. at 3. Judge Diaz' order continued:

> In determining the appropriate scope of expert depositions in this case, the court returns to a basic principle: discovery is intended to grant a party access to information that is relevant to the issues in the lawsuit. During the hearing of this matter, Hospira never explained how the deposition questions it seeks to ask are relevant to the proper purpose for conducting expert discovery under Rule 26 – i.e. to discover the opinions held by the expert and the facts relied on by the expert in forming that opinion. Instead, Hospira's position is that its deposition questions are fair game because AlphaGary waived any attorney work product privilege that might otherwise attach to counsel's mental impressions, opinions and theories if they were disclosed to a testifying expert.

Assuming arguendo that North Carolina law works such a waiver (and Hospira presented me with no binding authority to support that claim), Rule 26(b)(4) is clear that what is properly discoverable with respect to experts are not the opinions and impressions of counsel, but rather those of the expert. Accordingly, while it is certainly fair to allow Hospira to elicit, via deposition, all information relied on by AlphaGary's expert to form his opinions, regardless of its form or source, the Court, in its discretion, will not allow Hospira to roam any further and specifically will not allow Hospira to ask AlphaGary's testifying experts to disclose any mental impressions, opinions, and theories of AlphaGary's counsel not relied on by the expert in forming his opinion.

In a footnote, Judge Diaz noted the then-existing split of authority in the federal courts concerning the discoverability of work product provided to testifying experts. He cited **N.C. Elec. Membership Corp. v. Carolina Power & Light Co.**, 108 F.R.D. 283, 285 (M.D.N.C. 1985) as a "protection-oriented" case holding that opinion work product materials provided to experts are not discoverable. Slip op. at 4. This split, of course, was later resolved by the amendments to Federal Rule of Civil Procedure 26(b), and Judge Diaz' Order in the **Hospira** case took the protective approach later adopted by the federal rules.[3] Other state court judges should follow Judge Diaz' lead and protect such communications as work product, so that state and federal practice is consistent.

3. Discovery of Non-Testifying/Consulting Experts

In enacting the 1975 Amendments to Rule 26, the General Assembly declined to adopt a provision permitting limited discovery of consulting experts. The Comments state that the failure to adopt the provision did not foreclose such discovery under the standard for obtaining work product set out in Rule 26(b)(3). Since then, state appellate courts have had few opportunities to address discovery directed to consulting experts, but have held that consulting attorneys are generally not subject to discovery. *See* **Sisk v. Transylvania Cmty. Hosp.**, Inc., 364 N.C. 172, 695 S.E. 2d 429 (2010)(affirming trial court order revoking *pro hac vice* admissions of attorneys who had contacted adversary's consulting expert); **State v. Dunn**, 154 N.C. App. 1, 571 S.E.2d 650 (2002)(recognizing work product protection for results of drug testing performed by criminal defendant's consulting expert).

Dunn, in an opinion by now-Supreme Court Justice Robin Hudson, cited federal cases holding that the work product doctrine protected non-testifying, consulting experts from discovery. It held that the trial court violated a criminal defendant's Sixth Amendment right to effective counsel and "unnecessarily breached the work-product privilege" in admitting (over defendant's objection) testimony and results of testing performed by employees of Lab Corp, which was retained by the defense to test the substance seized from defendant. 154 N.C. App. at 17, 571 S.E.2d at 660.

These cases suggest that North Carolina's appellate courts would extend protection similar to that provided by Rule 26(b)(4)(D) to non-testifying experts.

II. Issues Relating To Expert Disclosure and Discovery

Innumerable issues can arise in the course of expert discovery, and courts and counsel often have to deal with them on the fly. The best way to manage these issues is to anticipate and address them at the outset during a Rule 26(f) conference in federal court, a Case Management Meeting and Case Management Conference under Rule 17.3 of the North Carolina Business Court Rules, or a discovery meeting or discovery conference under new Rule 26(f) of the North Carolina Rules of Civil Procedure. Expert discovery issues can be most effectively addressed in this setting, so that counsel have articulated and agreed upon the ground rules governing discovery and can plan accordingly. It is generally beneficial to negotiate ground rules before work with experts has begun. Too often, when unanticipated expert issues and conflicts arise in midstream, the parties take positions based on their tactical interest at the time rather than the "best practices" the rules and this paper are intended to foster.

A. Scheduling and Sequence | When no sequence of expert reports or disclosures is set by local rule or court order, issues can arise as opposing counsel seek an advantage by avoiding or delaying their expert disclosures. Most courts recognize that the party having the burden of proof on a claim (or counterclaim) typically should make the first expert disclosure about that claim, followed within a 30- or 60-day period by the opposing party's expert disclosure, and then by a rebuttal disclosure or disclosures. This is described as "three-tier" or "four-tier" expert disclosures... •

Bradley R. Kutrow is a partner at McGuire Woods LLP in Charlotte, North Carolina. He has broad experience in complex litigation, with emphasis on business torts, securities, and products liability.

For more on this topic, please attend our CLE – see page 4 for details!