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Comparing Communication with Experts Under the Illinois Rules Versus the Federal Rules: Is the Federal Approach Better?

Many cases, whether tried or settled, turn on expert testimony. Thus, a practitioner choosing the proper expert, and that expert providing strong testimony, are keys to successful litigation. One often overlooked aspect of expert litigation is the selection of materials provided to the expert. Counsel should make thoughtful decisions about what they provide to their expert. Failure to provide sufficient information to an expert undermines their credibility and leaves the expert open to an attack on the basis that they do not know the pertinent facts regarding the case. Providing too much information may open your expert to testimony on topics upon which the expert is neither prepared for nor qualified to testify. Determining what to provide an expert may change whether you are in state or federal court. The attorney who practices primarily in Illinois state court may be surprised at the broad protections provided by the federal rules for communications with experts. In the same manner, an attorney who primarily practices in federal court or in other jurisdictions that closely follow the federal rules may be shocked at how little protection Illinois law provides. In comparing the federal and Illinois state rules on this subject, practitioners may find that the federal rules provide a more efficient and reasonable system for expert discovery with respect to communications between counsel and their experts.

Illinois Rules for Communicating with Experts

Under Illinois law, work product protection is not as comprehensive as it is under the federal rules or the rules of many other states. Consultation with experts is one area where Illinois' interpretation of the work product doctrine diverges from the federal courts' interpretation. In Illinois, when disclosed to a third-party, a privileged communication is no longer privileged and is discoverable and may be admissible in litigation. *Center Partners, Ltd. v. Growth Head GP, LLP*, 2012 IL 113107. As such, an expert may be cross-examined with respect to all the material they reviewed—not just the material upon which they ultimately relied. *Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83, 658 N.E.2d 450 (S. Ct. 1995). In Illinois, these principles have been read together to mean that once any document or correspondence is produced to an expert, it is fair game in discovery. Thus, nothing should be produced to an expert if you do not want it turned over in discovery.

This rule does not apply to consulting experts. *See* Ill. S. Ct. R. 201 (b)(3). All communications with consulting experts are privileged until the expert is disclosed. *Id.* Upon disclosure, all the protections afforded to a consulting expert are gone.

When privileged material is inadvertently provided to an expert, there may be an argument that if the information is not relied upon by the expert, it remains privileged. Illinois law provides that the inadvertent disclosure of privileged material does not waive the privilege protection applicable to that material. S*ee People v. Mudge*, 492 N.E.2d 1050, 1051-52 (5th Dist. 1986) (concluding that where a defendant's expert inadvertently disclosed attorney-client privileged material

to an expert for the opposing party, privilege was not waived by the inadvertent disclosure and noting that privilege "may only be waived by the client"); *see also People v. Murry*, 711 N.E.2d 1230, 1235 (2d Dist. 1999) ("[i]nadvertent disclosure can never result in a waiver of the privilege because the client had no intention of waiving the privilege, and a client must knowingly waive the privilege"); *Exline v. Exline*, 659 N.E.2d 407, 410 (2d Dist. 1995) ("Once privilege attached to a communication, it is permanently protected unless the privilege is waived. Further, only the client can effectively waive the attorney-client privilege"). The best practice remains to be very careful with what is sent to your expert. No attorney wants to be in a position where he or she is arguing their actions were inadvertent.

Expert disclosures of opinions are more common in Illinois than expert reports. The rules for expert disclosure of opinion in Illinois are exacting. The rules states "for each controlled expert witness, the party must identify 1) the subject matter on which the witness will testify; 2) the conclusions and opinions of the witnesses and the basis therefore; 3) the qualifications of the witness; and 4) any reports prepared by the witness about the case." *See* Supreme Court Rule 213. The most litigated and controversial portion of the rule is subsection two concerning the expert's opinions and basis therefore. Illinois courts have stated a 213 disclosure must provide specific details. *Sullivan v. Edwards Hosp.*, 209 Ill.2d 100, 806 N.E.2d 645 (2004). The rule was calculated to permit litigants to rely upon the disclosed opinions of opposing experts and construct their trial strategy accordingly. *Id*. A disclosure cannot be made in generalities; catch-all disclosures are insufficient under Rule 213. *Chapman v. Hubbard Woods Meters, Inc*., 35 Ill. App. 3d 99, 812 N.E.2d 389 (1st Dist. 2004).

As such, preparing the disclosure is a time consuming process for both the attorney and the expert. Many times this process leads to the exchange of numerous drafts of a disclosure. These exchanged disclosures may be used in the cross examination of an expert. If the attorney is genuinely changing the expert's opinions, the drafts may be very pertinent in determining what the expert's original opinion was. However, more often than not the opposing attorney just uses the drafts to confuse the expert's opinions. As a result, counsel and the expert often go to great lengths in terms of use of their time, to avoid this type of communication.

It is not unusual for the attorney to have numerous calls or meetings with the expert before preparing a draft of the expert's opinions. The attorney attempts to take all of these calls and put them into one report to avoid multiple drafts.

The Illinois rule has become especially complicated with respect to defendant physicians in medical malpractice cases. In *Jackson v. Reid*, 402 Ill. App. 3d 215, 935 N.E.2d 978 (3d Dist. 2010), the court found that neither attorney-client nor work-product privileges protected a defendant doctor from having to disclose medical literature reviewed and even discussed with counsel. The court further stated that once the defendant doctor elected to testify as an opinion witness, his expert opinions previously shared with counsel prior to trial were no longer protected because the privilege had been waived with the approval of counsel.

Fortunately, Illinois courts have not followed the logic of *Jackson* and left it as *dicta*. Applying the applicable discovery rules to experts to defendant doctors would completely undermine the work product doctrine and attorney client privilege.

Federal Rules for Communicating with Experts

The federal rules provide more substantial protection for communications between counsel and experts. Pursuant to the 2010 amendment to Rule 26, 26 (a)(4)(b), drafts of any report or disclosure required under Rule 26 (a)(2), regardless of the form of the draft, are protected. *See* Fed. R. Civ. P. 26 (b)(4)(B); *see also* Fed. R. Civ. P. 26, Committee Notes.

Rule 26 (a)(c) protects communications between the party's attorneys and any witness required to provide a report under Rule 26 (a)(2)(b), regardless of the form of communication, except to the extent that the communication: 1) relates to compensation for expert's study or testimony; 2) identifies facts or data provided by the lawyer and considered by the expert in forming opinions; or 3) identifies assumptions provided by the attorney and relied on by the expert. *See* Fed. R. Civ. P. 26 (b)(4)(B); *see also* Fed. R. Civ. P. 26, Committee Notes. As the rule has developed, this goal of extending the work product privilege to communications between the expert and the attorney has been found to be the primary purpose of the change. *Rep. of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014) (*citing* Committee Notes).

Under the prior version of Rule 26 (1)(2)(b)(i), all communications between the attorney and the expert were not privileged or otherwise protected from disclosure. The Committee Notes state that discovery into draft reports and attorney communications had undesirable effects on litigation. *See also* Fed. R. Civ. P. 26, Committee Notes. The previous rule led to different "games," being played in the litigation process. *See* John Beckett, Protecting Draft Expert Reports from Production Under the Federal Rules, Presented by the American Bar Association Section on Litigation and Professional Development (Aug. 26, 2016). The comments reference parties' attorneys hiring two sets of experts for litigation. *See see also* Fed. R. Civ. P. 26, Committee Notes. One set of experts to develop the opinions and then another set of experts to disclose. Presumably, the belief was that the second set of experts' opinions would be clean, and the experts would not be impeached on the process. Using two sets of experts is clearly a costly and inefficient use of resources.

Also under the previous rules, parties would attempt to have a single drafting session with an expert, and the expert would avoid taking too many notes. *See* Beckett, Protecting Expert Reports from Production under Federal Rules (Aug. 26, 2016). This process is not unlike what is done in Illinois. The notes also reference lawyers taking a guarded approach to their conferences with experts, which protected against discovery, but also impeded the expert's work. *See* Fed. R. Civ. P. R. 26, Committee Comments.

The amended rules resolve those issues by protecting the work product of experts (including communications with attorneys and draft reports) with several exceptions. These exceptions narrow what needs to be disclosed and provide counsel with a clear idea of what they will need to produce if and when the expert is disclosed. *See* Fed. R. Civ. P. 26. Practitioners should note that paragraph (6) does not limit the terms "facts," "data," and "consulted" to only those "relied on." Thus, counsel should anticipate, in federal court, that any factual information or data will be disclosed. Pursuant to the terms of the federal rules, relevant factual data should have been previously produced. *See* Fed. R. Civ. P. 26, 33, 34.

In applying the amended rules, courts have found charts, spreadsheets, work papers, and other compilations of facts by the expert are privileged. *See Davita Healthcare Partners v. United States of America*, 128 Fed. C1.394 (2016) (1.58412016). However, the Court of Appeals for the Ninth Circuit has found these concerns must be balanced against a party's right to thoroughly cross examine the opposing party's expert. *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014). In *Republic of Ecuador*, the Ninth Circuit ordered production of all documents produced to the expert except draft reports, correspondence to counsel, and work sheets. *Id.* Thus, the cross examining counsel would have all the factual information provided by the attorney with which to cross examine.

Under the federal rules, the protection only extends to conversations between counsel and the expert. *See* Fed. R. Civ. P. R. 26 (b)(4)(c). Thus, any conversations between the expert and the client or employer of the client would be discoverable. Moreover, the protection does not apply to Rule 26(A)(2)(c) witnesses, who do not need to prepare a report. If, for example, you disclose an employee as a Rule 26(A)(2)(c) witness, your correspondence to them will not be protected.

Where the expert conducts testing, that testimony will not be privileged. *See* Fed. R. Civ. P. 26. Notes from testimony are also discoverable. This conclusion is reasonable because any other finding would greatly prejudice the opposing party. For example, where a metallurgist tested an object involved in the lawsuit, the opposing party should have access to all notes taken during the testing and be able to review what was done.

An obvious concern with the federal approach is that the opposing party does not know how much involvement the attorney had with the development of the expert's opinions. The federal courts have addressed this issue. The expert must substantially participate in the preparation of the report. *Skycam, Inc. v. Bennett*, 2011 WL 255188 (N.D. Okla. June 27, 2011). Federal courts have found communications between a lawyer and a testifying expert are subject to discovery when the records reveals that the lawyer may have commandeered the expert's function or used the expert as a conduit for his own theories. *McClellan v. I-Flow Corp*., 710 F. Supp.2d 1092 (D. Or. 2010).

In *United States Commodity Futures Trading Commission v. Newell & Quiddity, Inc*., 301 F.R.D. 348 (N.D. Ill. 2014), the District Court, Northern District of Illinois confronted claims that an attorney commandeered the drafting process. The court noted that the moving party's approach would require analysis of the degree of counsel's involvement (both quality and quantity) in drafting of the report and such an analysis would necessarily require production of all drafts of the report for comparison, as well as production of all or virtually all communications between the expert and counsel. The court noted that the drafters intended Rule 26 (b)(4) (b) & (c) to protect against this type of discovery. Based on the above argument, the court rejected the argument that the court should undertake a detailed analysis of the attorney's involvement in the drafting of reports and refused to claim that the party forfeited the protection of Rule 26 (b)(4)(b) & (c) based on some quantitative or qualitative threshold of attorney involvement. The court noted that certain documents had to be produced including facts, data, and assumptions provided by the attorney to the expert.

This conclusion should be compared to the determination made by the Oregon District Court. In *Gerke v. Travelers Cas. Ins. Co*., 2013 WL 623304 (D.Or. Feb. 19, 2013), after a dispute arose over the source of the opinions contained in the expert's report, the court, after *in camera* review, ordered that the expert had to provide in his deposition the basis for all opinions and facts stated in his report.

Where there is evidence that counsel was actively involved in drafting the expert's opinions, the court may disregard the opinion altogether. *See Cantrell v. BNSF*, 2013 WL 8632378 (D.N.M. 2013); *O'Hara v. Travelers*, 2012 WL 3062300 (D. Miss. 2012). In *Cantrell*, an FELA case, the court disregarded plaintiff's expert report and granted summary judgment on medical causation to the defendant.

The best way to avoid this issue is to avoid doing anything that could be construed as commandeering the process. Clearly, the expert's opinions should be his or her own, and counsel should obviously avoid doing anything to change the opinions or put their opinions into the expert's mouth.

Comparison Between the Illinois Approach and the Federal Approach

In practice, the federal approach has numerous benefits. Allowing drafts of reports and disclosures to remain privileged encourages the free flow of ideas and opinions between expert and attorney. If all of these communications were privileged under Illinois law, it would be easier for experts to give their uninhibited thoughts on a case and then allow the attorney to form the disclosure to meet the needs of the case. As it currently stands in Illinois, disclosures are often incredibly time consuming. An attorney will often have numerous discussions with their expert, and then will draft

the disclosure with the expert as they work through it together. Then the expert reviews the disclosure. This is the most efficient way to obtain all of the expert's opinions on a certain topic.

The federal approach will also take some of the "game-playing" elements out of expert disclosures. Attorneys will not need to go through numerous discussions and then draft a disclosure integrating those discussions. Moreover, attorneys will not expend deposition time on questions regarding correspondence between counsel and the expert that do not affect the expert's opinions.

A primary distinction between the federal system and the Illinois system relates to how disclosures are made. Under the federal rules, reports are required. Under Illinois rules, reports are prepared by retained experts only. However, more often opinions are disclosed through written disclosures pursuant to Illinois Supreme Court Rule 213(f). This distinction does not make the federal rule inapplicable to Illinois. The same line of reasoning can be applied to a disclosure as to a report. Although Illinois rules allow the attorney to draft the disclosure, the opinions must be those of the expert. In every expert deposition, the expert is asked whether that disclosure reflects his opinions. If the disclosure does not reflect the expert's opinions, it would be problematic for the party and expert no matter what the discovery rules are.

Furthermore, in litigation, computer reenactments and computer diagrams are becoming much more common. These reenactments often change as more facts come into the case about positioning of parties, positioning of vehicles, etcetera. As discussed above, protecting the draft disclosure for free exchange of ideas between counsel and the expert would protect computer reenactments which can be a report and therefore part of the disclosure. If drafts are not protected, the party may need to wait and have the expert do one computer reenactment after all the evidence is in. This is an inefficient use of the expert's time and does not allow the expert to fully assess the case. For example, if an attorney is working with an expert who is doing computer reenactments throughout the case because they know will be protected, the attorney is in a better position to assess his potential liability and to assess the possibility of settlement throughout litigation.

Illinois would benefit from an incorporation of the amended Rule 26 into Supreme Court Rule 213. This change would streamline litigation and benefit parties and experts.

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