

Proposed Changes to Federal Rules on Experts

BY JOSEPH M. O'MALLEY, JR. AND JASON T. CHRISTIANSEN

The Judicial Conference of the United States Committee on Rules of Practice and Procedure has released for public comment a preliminary draft of the latest proposed amendments to Federal Rule of Civil Procedure 26. The proposed amendments concern disclosure and discovery of expert witnesses:

1. Amend Rule 26(a)(2) such that for expert witnesses who are not required to prepare a detailed report under Rule 26(b)(2)(B), the party (not the expert witness) must disclose the subject matter of the expected expert testimony and a summary of the expected facts and opinions.
2. Amend Rule 26(b)(4) such that the work-product protections of Rules 26(b)(3)(A) and (B) protect drafts of any expert reports or disclosures under Rule 26(a)(2). The proposed amendments would also protect communications between a party's attorneys and expert witnesses required to provide a report except those communications which (1) relate to compensation of the expert; (2) identify information the party's attorney provided and the expert considered in forming his or her opinions; or (3) identify assumptions the party's attorney provided and the expert relied upon in forming his or her opinion.

At this early stage, rule changes have been proposed by the various advisory committees to the Judicial Conference's Rules Committee. The Rules Committee has not yet approved the

proposed amendments, except to authorize their publication for comment. After considering the public comments, the advisory committees on civil procedure will decide whether to submit their proposed amendments, with or without revisions, to the Rules Committee for approval. Any proposals approved by the Rules Committee will then go to the Judicial Conference, and then to the U.S. Supreme Court, for approval.

Comments on the draft proposed amendments are due Feb. 17, 2009. If the amendment process adheres to schedule, the amendments would become effective Dec. 1, 2010, at the earliest.

The proposed rules, reports from the advisory committees, and a link to submit comments are posted on the Federal Judiciary web site at <http://www.uscourts.gov/rules/newrules1.htm>. Specific documents related to the proposed changes to Rule 26 are linked below:

Memorandum to the Bench, Bar, and Public on the Proposed Amendments to the Federal Rules <[http://www.uscourts.gov/rules/2008-08-Memo to Bench Bar 8 8 08.pdf](http://www.uscourts.gov/rules/2008-08-Memo%20to%20Bench%20Bar%208%2008.pdf)>

Brochure Summarizing Proposed Amendments to the Federal Rules <<http://www.uscourts.gov/rules/Reports/Brochure.pdf>>

Report of the Advisory Committee on Civil Rule <[http://www.uscourts.gov/rules/Reports/CV Report.pdf](http://www.uscourts.gov/rules/Reports/CV_Report.pdf)>



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings New York lawyers:

Joseph M. O'Malley, Jr., Litigation Partner
212-318-6090
josephomalley@paulhastings.com

Jason T. Christiansen, Litigation Associate
212-318-6051
jasonchristiansen@paulhastings.com
