

The Ninth Circuit Offers Guidance on the Scope of Rule 26 Expert Discovery

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Since Federal Rule of Civil Procedure 26 was amended in 2010, federal appellate courts have been slow to issue guidance about the scope of the attorney work-product protection afforded to expert witnesses and the materials in their files. Parties can reach agreements in advance about the scope of expert discovery—and often do—but when seeking answers after a dispute has ensued, the Ninth Circuit's recent opinion in the *Republic of Ecuador* tracks holdings from the Tenth and Eleventh Circuits¹ and gives litigators important guidance: Do not interpret Rule 26 too broadly when addressing expert discovery because the work-product privilege does not presumptively protect materials furnished to or provided by expert witnesses. Rather, it protects from discovery only documents that would disclose attorney opinions, as opposed to the factual basis for the expert's opinion.

The path to this result starts with the long-running legal dispute involving Chevron and the Republic of Ecuador that spans decades and multiple continents, so it is there that we begin.

Background

*Republic of Ecuador v. Mackay*² and *Republic of Ecuador v. Kelsh*,³ are two of several actions surrounding a dispute with Ecuador over contamination allegedly caused by the oil exploration and extraction activities of Chevron's subsidiaries. A trial court found against Chevron and awarded the plaintiffs \$18 billion in damages. After Ecuador's highest court halved the damages award but otherwise upheld the judgment, Chevron demanded arbitration based on Ecuador's bilateral investment treaty with the United States.

During arbitration, plaintiffs sought discovery from two Chevron experts, Mackay and Kelsh, who helped with the Ecuador litigation. In cases filed in the federal district courts for the Eastern and Northern Districts of California, plaintiffs claimed that discovery would show that Chevron and its experts manipulated data to obtain favorable results. Chevron intervened in the actions.

Both federal district courts granted the plaintiffs' discovery requests. Chevron produced hundreds of thousands of pages of expert documents, but withheld thousands more, claiming the materials were protected from discovery by the attorney work-product doctrine embodied in Rule 26. The lower courts largely rejected Chevron's privilege claims and ordered production of most of the withheld documents, except for draft expert reports and certain expert communications with Chevron's attorneys.

On appeal, Chevron unsuccessfully argued that all of the expert witness materials are presumptively privileged under Rule 26(b)(3) because they were necessarily prepared “by or for a party or its representative.” After conducting its *de novo* review of the key legal issue regarding the scope of Rule 26, the Ninth Circuit affirmed the lower courts’ discovery rulings holding based on the text of the Rule that, except for draft reports and most expert-attorney communications, expert witness materials are generally discoverable.⁴

The Ninth Circuit’s Opinion and the 2010 Amendments to Rule 26

Chevron’s argument and the court’s ruling focus on the attorney work-product privilege as applied to Rule 26 expert discovery, and on the 2010 amendments to the Rule.

Setting the framework for expert discovery, Rule 26(a) requires certain mandatory disclosures by parties, including the identity of expert witnesses and any reports containing the “facts or data” considered by an expert in forming his or her opinion. Rule 26(b)(3), however, limits the scope of expert discovery by protecting “documents and tangible things” prepared “by or for” a party or its representative in anticipation of litigation. While an opposing party may sometimes overcome that limitation by showing a “substantial need” for certain factual materials, the “mental impressions, conclusions, opinions, or legal theories of a party’s attorney” concerning litigation are “virtually undiscoverable.”

The Judicial Conference Advisory Committee in 2010 amended the language of Rule 26(a)(2)’s disclosure obligation. The Rule had previously required a report or disclosure of the “facts and information” on which the expert relied; it now requires instead a disclosure or report of the “facts and data” that the expert considered to form his or her opinion. Additionally, the Committee included new language under Rule 26(b)(4)(B) specifically protecting from discovery any drafts of expert reports or disclosures, and also most expert-attorney communications.⁵

In *Mackay* and *Kelsh*, Chevron unsuccessfully argued that the 2010 amendments “fundamentally changed the scope” of work-product protection under Rule 26. Specifically, Chevron argued that, under the amended Rule, expert witness materials falling outside of the scope of Rule 26(b)(4)’s attorney-expert communication or draft report protections should nevertheless be shielded from disclosure under Rule 26(b)(3) because they are materials prepared “by or for” a party or its representative.

The Ninth Circuit rejected Chevron’s argument, holding that the Advisory Committee’s comments are consistent with the text of the Rule and also make clear that the 2010 revisions were adopted because some courts had incorrectly concluded “that any material given by an attorney to an expert was discoverable, including opinion work product.” Revised Rule 26 instead limits discovery of expert witness materials to those containing the expert’s opinions and the facts that the expert considered in forming those opinions, but prevents the disclosure of draft expert reports or attorney-expert communications that could reveal attorney opinion work-product. As the Ninth Circuit succinctly wrote:

“There is no indication that the Committee intended to expand Rule 26(b)(3)’s protection for trial preparation materials to encompass all materials furnished to or provided by testifying experts, which would unfairly hamper an adverse party’s ability to prepare for cross-examination and rebuttal.”

Practical Implications

The Ninth Circuit's ruling provides important guidance that clarifies the boundary between expert materials that are privileged and those that are subject to disclosure under Rule 26. Under the Ninth Circuit's interpretation, the 2010 amendments to Rule 26 strike a balance between producing "any material considered by the expert, from whatever source, that contains factual ingredients" so that the opposing party may prepare for litigation, and excluding the "theories and mental impressions of counsel."

The Ninth Circuit's interpretation of Rule 26 emphasizes a broad obligation to disclose expert witness materials, including all the facts "considered," and not just those "relied upon," by the expert in forming his or her opinion. At the same time, the ruling confirms that, to the extent that they reflect counsel's thoughts and opinions about litigation, draft expert reports and most expert-attorney communications remain firmly protected under the work-product privilege.

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¹ See *Republic of Ecuador v. Hinchee*, No. 12-16216, 2013 WL 6655490 (11th Cir. Dec. 18, 2013); *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. § 1782(a) (Bjorkman)*, 735 F.3d 1179 (10th Cir. 2013).

² *Republic of Ecuador v. Mackay*, No. 12-15572 (9th Cir. Jan. 31, 2014).

³ *Republic of Ecuador v. Kelsh*, No. 12-15848 (9th Cir. Jan 31, 2014).

⁴ The Ninth Circuit conducted a *de novo* review because the dispute turned "on the legal issue of whether the court properly interpreted the rule's requirements..." Since Chevron did not challenge the lower court's specific assessment of certain categories of documents, the Ninth Circuit did not apply the "abuse of discretion" standard typically applied to discovery rulings.

⁵ Rule 26(b)(4)(C) protects all expert-attorney communications, except to the extent that they "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."