BRYAN CAVE
A Broader Perspective
Bulletin

Commercial Litigation Group

To: Our Clients and Friends November 13, 2013

Dueling with the 2010 Amendments to Federal Rule of Civil Procedure 26: What the Dual-Hat Expert Can Mean for the Work-Product Doctrine

Two federal district courts recently ruled in favor of parties seeking to compel disclosure of documents relied upon by "dual-hat" experts—experts retained as both testifying experts and litigation consultants.

These two rulings, Yeda Research and Dev.Co., Ltd., v. Abbott GmbH & Co. KG, No. 10-1836 (RMC), 2013 WL 2995924, at *1 (D.D.C. June 7, 2013) and In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, No. 00-1989, MDL No. 1358, 2013 WL 3326799, at *1 (S.D.N.Y. June 28, 2013) come two and a half years after the 2010 amendments to Federal Rule of Civil Procedure 26 and give insight into the development and practical application of the amended rule.

On December 1, 2010, Federal Rule of Civil Procedure 26 was amended to increase the protections afforded to attorney-expert communications. Under the new rule, communications between a party and a party's testifying expert are protected except to the extent such communications: (1) relate to the expert's compensation, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied on informing the opinions to be expressed. Fed. R. Civ. P. 26(b)(4)(C).

Prior to 2010, courts had established a "bright line" rule for disclosure —practically everything given to a testifying expert had to be disclosed in discovery, including "core" attorney work product. With the 2010 changes came greater protection for attorney work product disclosed to non-testifying experts. *See* Fed. R. Civ. P. 26(b)(4)(D).

The new wave of changes led some practitioners to believe that the new protections would afford attorneys greater leeway in disclosing certain information to experts, keeping 'core' work product privileged, and allow for the possibility of employing experts in dual capacities. However, these two recent cases illustrate the dangers of using the same expert as both a consultant and a testifying expert.

In Yeda, Judge Rosemary Collyer of the United States District Court for the District of Columbia held that the plaintiff had waived work product protection for documents relating to an experiment Dr. Engelmann had observed as a consultant when it subsequently designated him as a testifying expert. In citing to the 2010 amendments to Fed. R. Civ. P. 26, Judge Collyer noted that the changes were intended to "exclude theories or mental impressions of *counsel*…not the theories or mental impressions of *experts*." Id. at 17. (internal quotations omitted). Judge Collyer further noted that Dr. Engelmann

could not be "expected to draw a mental line in the sand between information gleaned from a behind-the-scenes look at [defendant's] process in 2003 and information he gleaned otherwise." Id. at 20. More recently in a similar ruling, the United States District Court for the Southern District of New York held that where Dr. Stephen Wheatcraft, a dual consulting and testifying expert "considered" a document prepared as part of his consulting work in his capacity as a rebuttal expert, the work product protection had been waived. MTBE, 2013 WL 3326799, at *6. Judge Scheindlin stated that the relevant question was not what "hat Wheatcraft was wearing when he created the [document]. . . but whether he might have *considered* the document. . . in connection with his rebuttal testimony." Id.

In keeping with pre-2010 analysis, both the Yeda and MTBE courts noted that the term "considered" as used in section (b)(4)(C)(ii) of the Rule should be construed broadly, and any ambiguity as to whether an expert considered "facts or data" in forming their opinion should be resolved in favor of production. Yeda, 2013 WL 2995924, at *12; MTBE, 2013 WL 3326799, at *6. Notably, the court in MTBE found there to be ambiguity as to whether the expert had created the document in his capacity as a testifying expert or consulting expert and where such an ambiguity existed, even the amended Rule 26 required disclosure. 2013 WL 3326799, at *6.

With these cases in mind, attorneys should remain cautious about employing experts in dual capacities. Although the intent of the amended rule was to afford greater protections to attorney-expert communications and documents, courts continue to err on the side of disclosure when consulting experts put on a testifying hat. Rejecting arguments that the 2010 amendments altered the landscape with respect to dual hat experts, courts continue to resolve any ambiguity as to whether a testifying expert considered "facts or data" in forming their opinions in favor of production, even if the effect is to compel production of consulting opinions, observations and documents that would otherwise be work product. As Judge Collyer noted, under the amended rule, "attorneys' theories or mental impressions are protected, but everything else is fair game."

For questions or further information, please contact Alec Farr (Washington, D.C., 202-508-6053); William Custer (Atlanta, 404-572-6828); James Sawtelle (Boulder, 303-417-8516); Mark Vasco (Charlotte, 704-749-8930); Steven Smith (Chicago, 312-602-5040); Christine Cesare (New York, 212-541-1228); Walter Herring (Dallas, 214-721-8042); Randy Miller (Denver, 303-866-0572); Stuart Price (Irvine, 949-223-7208); Robert Hoffman (Kansas City, 816-374-3229); Sean McElenney (Phoenix, 602-364-7379); Lee Marshall (San Francisco, 415-675-3444); Jennifer Jackson (Los Angeles, 310-576-2360); Christopher Schmidt (St. Louis, 314-259-2616); Brenda González (Washington, D.C., 202-508-6203) or any other member of the Bryan Cave Commercial Litigation group.