

The Ninth Circuit's recent decision in *Republic of Ecuador v Mackay*⁽¹⁾ serves as a reminder that the 2010 version of Federal Rule of Civil Procedure 26 does not provide blanket protection for all materials given to, and communications with, expert witnesses.

Decision

The opinion reviewed rulings from two California district courts ordering Chevron Corporation to produce testifying expert materials for use in a foreign proceeding. Both district courts ordered Chevron to produce all relevant expert documents and communications other than draft expert reports and direct communications between the experts and counsel. Chevron argued that the documents at issue were "trial preparation materials" and therefore immune from discovery under Rule 26(b)(3). The Ninth Circuit disagreed and ordered their production. The purpose of the committee's 2010 amendment, said the Ninth Circuit, was to strike a balance between the protection of attorney work product and the facilitation of consultations with experts about case strategy on the one hand, and the need of the opposing party to have sufficient information to engage in meaningful cross-examination on the other.

Before amended Rule 26 took effect in December 2010, federal courts routinely allowed discovery of attorney-expert communications and draft expert reports. As applied by the courts, the old rule provided little, if any, attorney work product protection for testifying experts. The 2010 amendments provided new work-product protection to certain attorney-expert communications and extended work product protection to draft expert reports.⁽²⁾

The Ninth Circuit used *Republic of Ecuador* to articulate the effect of the new rules. Rule 26(b)(3), "Trial Preparation: Materials", protects from discovery "documents and tangible things" prepared "by or for" a party or its representative "in anticipation of litigation or for trial". However, trial preparation materials may still be discoverable under new Rule 26(b)(3) if a party shows that it has a "substantial need" for the materials and "cannot, without undue hardship, obtain their substantial equivalent by other means".⁽³⁾

Rule 26(b)(4), titled "Trial Preparation: Experts", protects draft disclosures or reports by a testifying expert witness and communications between the party's attorney and any expert who provides a report, with three exceptions for communications that:

- relate to the expert's compensation;
- identify "facts or data" provided by the attorney that the expert "considered";
or
- identify assumptions the party's attorney provided and the expert relied on in forming his opinion.

The advisory committee's notes regarding the 2010 amendments indicate that these exceptions should be interpreted broadly to include "any material considered by the expert, from whatever source, that contains factual ingredients".

Comment

Republic of Ecuador shows why counsel must continue to exercise caution about communications with and documents provided to testifying expert witnesses. Not all expert materials are protected by Rule 26(b)(3), and Rule 26(b)(4) does not afford blanket protection to expert materials and communications. The main takeaways from the decision are as follows:

- Green light – materials that are not subject to discovery are draft reports (although there may be some disagreement as to what qualifies as a draft report), communications with experts containing only attorneys' conclusions, opinions or legal theories and reports of and communications with non-testifying experts.
- Yellow light – materials that may be subject to discovery are experts' notes and communications with experts containing both factual data and attorneys' mental impressions.
- Red light – materials that are fair game for discovery are factual documents and data provided to experts, assumptions or hypotheticals provided to experts and communications with expert regarding compensation.

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Endnotes

- (1) 12-15572, 12-15848, 2014 WL 341060 (9th Cir January 31 2014).
- (2) Fed R Civ P 26(b)(4)(B), (C).
- (3) Fed R Civ P 26(b)(3)(A).