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*Evidence—Privileged Communications*

## Strict Limits on Work Product Protection For Experts Affirmed by Three Circuit Rulings

Three recent federal circuit rulings make clear that the 2010 expert witness amendments to the Federal Rules of Civil Procedure provide work product protection only for drafts of expert reports and communications between retained experts and counsel, several attorneys who focus on evidence issues told BNA in recent interviews.

Gregory P. Joseph, of Joseph Hage Aaronson in New York, said Feb. 5 the rulings by the U.S. Court of Appeals for the Ninth, Tenth, and Eleventh circuits, taken together, are ''very significant,'' and provide less work product protection than ''many of us assumed when the Dec. 1, 2010, amendments went into effect.''

''The expert's notes and communications with others—including client representatives (e.g., inhouse scientists) and other experts—are fair game for discovery,'' Joseph, who has served on the advisory group that helps draft amendments to the civil procedure rules, told BNA in an e-mail.

Nirav S. Shah, with Manatt, Phelps & Phillips in New York, and co-author with Kimo S. Peluso of a BNA Insight on the 2010 rule change, *Work Product Protection for Experts: Notable Decisions Under the 2010 Amendments to Rule 26* (81 U.S.L.W. 583, 10/23/12), said in a Feb. 5 e-mail to BNA that the ''real take-away is that attorneys and their experts need to be aware that, even under the Amended Rule 26, not every document created by an expert is going to be protected as work product.''

According to Shah, ''Your adversaries will seek discovery of an expert's internal notes and research, or of expert-to-expert communications, and there is a very real chance those documents will have to be turned over.''

Peluso added that ''draft expert reports and expert-to-attorney communications are generally protected, but when it comes to work product generally, testifying experts are still not in the same boat as other consultants hired to assist with litigation.''

The latest ruling from the federal appeals courts is a Jan. 31 Ninth Circuit decision holding that Rule 26(b)(3) does not shield from discovery all materials used by testifying experts. The ruling, part of a long-running multi-billion dollar environmental dispute linked to contamination in Ecuador, rejected Chevron Corp.'s bid to overturn a pair of discovery orders (*Republic of Ecuador v. Mackay*, 2014 BL 28533, 9th Cir., No. 12-15572, 1/31/14).

In the latest battle in the two-decades-old litigation, Judge Consuelo Maria Callahan upheld in a single opinion separate orders from the Eastern and Northern Districts of California allowing Ecuador to obtain thousands of pages of allegedly privileged documents from Chevron experts Douglas M. Mackay and Michael A. Kelsh, who testified in a 2003 suit against Chevron in Lago Agrio, Ecuador.

The Ninth Circuit said a contrary finding would unfairly hamper an adverse party's ability to prepare for cross-examination and rebuttal.

The ruling in *Mackay* follows a Nov. 13, 2013, decision by the U.S. Court of Appeals for the Tenth Circuit in *In re Application of Ecuador v. Bjorkman*, 2013 BL 313566 (10th Cir. Nov. 13, 2013) (82 U.S.L.W. 736, 11/19/13), and a Dec. 18, 2013, holding by the U.S. Court of Appeals for the Eleventh Circuit in *In re Application of Ecuador v. Hinchee*, 2013 BL 352052 (11th Cir. Dec. 18, 2013).

The *Bjorkman* and *Hinchee* courts ordered Chevron to comply with subpoenas from Ecuador seeking materials prepared by Chevron experts Bjorn Bjorkman and Robert Hinchee.

Ecuador's attorney general, a co-plaintiff in the litigation, called the rulings a ''new victory for Ecuador's defense in the dispute against Chevron.''

Chevron attorneys, however, decried the three rulings for misreading the language of the 2010 amendments to Rule 26, and predicted it will lead to the inefficiency and extra discovery expense the rules were meant to avoid.

**Argument Faced Long Odds.** A BNA review of the appellate transcripts reveals Chevron faced an uphill battle in arguing the rule changes substantially expanded work product protections.

During Nov. 11, 2013, arguments in *Hinchee*, a skeptical Judge Frank M. Hull queried Chevron attorneys as to supporting case law, before being told of one district court case ostensibly backing Chevron's arguments, *Nat'l W. Life Ins. Co. v. W. Nat'l Life Ins. Co.*, No. A-09-CA-711 LY (W.D. Tex. Mar. 3. 2011). Even that contention was immediately disputed by plaintiffs' attorneys—the ruling in *Nat'l. W. v. W. Nat'l* did not reference Rule 26(b)(3), which is at the heart of this litigation.

Even more telling, during similar questioning at Dec. 4, 2013, arguments in *Mackay*, Judge Barry G. Silverman said *Nat'l. W. v. W. Nat'l* ''dealt with a related, but a different issue,'' and seemed unimpressed with Chevron's call for the Ninth Circuit ''to do the right thing.''

Silverman's droll response, ''Yeah, okay. All right,'' provoked laughter in the room, the transcript noted.

**Were Rules Fundamental Change?** At issue in *Mackay* is a proceeding launched by Chevron that argues the ongoing dispute should have been arbitrated based on a bilateral investment treaty between the U.S. and Ecuador, codified at 28 U.S.C. § 1782.

Ecuador contends a 2013 ruling by Ecuador's highest court, upholding a reduced $9 billion judgment against the oil giant for alleged pollution by predecessor Texaco in eastern Ecuador, remains valid. But Ecuador is also participating in the Section 1782 proceeding, and sought expansive discovery from Chevron into Mackay's and Kelsh's materials, which were revealed in Chevron's privilege log.

Ecuador argued it needed additional discovery because the experts—one an epidemiologist, the other a soil and ground water expert—engaged in ''selective sampling'' to achieve favorable results.

Chevron countered, saying a 2010 change to Rule 26 ''fundamentally changed the scope of work product protection for expert materials'' and shielded the experts' materials. Chevron said that revision expanded Rule 26(b)(3)'s limits on trial preparation materials to encompass all materials furnished to or provided by testifying experts.

Siding with Ecuador, the appeals court said the historical evolution of the rule, its current structure and the explanatory notes by the Advisory Committee on the Federal Rules of Civil Procedure that drafted the rule ''make clear that the driving purpose of the 2010 amendments was to protect opinion work product from discovery,'' such as attorney mental impressions, conclusions, opinions or legal theories.

The rule targets its protections for draft reports and attorney-expert communications in the areas most vulnerable to the disclosure of opinion work product, the court said.

''But there is no indication that the Committee was attempting to do so at the expense of an adversary's ability to understand and respond to a testifying expert's analysis,'' the *Mackay* court said.

The comments in *Mackay* echo those found in *Bjorkman* and *Hinchee*.

In *Hinchee*, Judge Frank Hull for the Eleventh Circuit panel said that by withholding Hinchee's personal notes and communications with other experts, Chevron and Hinchee impermissibly attempted to shield the theories and mental impressions of Hinchee and his fellow testifying experts. ''Rule 26 provides no basis for this, neither before nor after the 2010 Amendments,'' Hull said.

Similarly, in *Bjorkman*, Judge Paul J. Kelly Jr. said for the Tenth Circuit that, contrary to Chevron's assertion that the 2010 revisions were intended to have wide-ranging effects, ''the revisions appear to alter only the outcome of cases either allowing discovery of draft reports or attorney/expert communications.''

A Feb. 4 statement from Ecuador's attorney general, Diego Garcia Carrion, a co-plaintiff in the litigation, called the rulings a ''new victory for Ecuador's defense in the dispute against Chevron, that has lost each of the appeals it has used to seek to avoid Ecuador's access to the documents of its environmental experts.''

According to Carrion, the latest group of documents demonstrates that ''the methodology used and conclusions reached by Chevron's experts in the analysis of contamination caused by the company during its operation in our country, are inaccurate and reveal a strategy to hide the contamination caused during Texaco's operation in our country.''

**Chevron Decries 'Misreading of Amendments.'** Chevron attorneys Ethan Douglas Dettmer and Theodore J. Boutrous Jr. told BNA in a Feb. 5 e-mail, ''In affirming the district courts, the courts of appeals misread the language of the 2010 amendments to Rule 26, leading to exactly the inefficiency and extra expense the amendments were meant to avoid: to maintain work product protection over trial preparation materials, parties will still need to employ two sets of experts—one set of testifying experts, and one set of consulting experts to help the litigation team prepare for trial.''

Dettmer and Boutrous, with Gibson, Dunn & Crutcher LLP in San Francisco, said Chevron and its experts had produced over 405,000 pages to Ecuador in these cases, and withheld about 19,000 pages under the work product doctrine.

**'Critical Questions' Remain.** Joseph, a former chairman of the American Bar Association's litigation section and past member of the U.S. Judicial Conference's Advisory Committee on the Federal Rules of Evidence, said that the rulings leave open several ''critical questions,'' including the range of protections available for communications between an expert and his or her staff, and between an expert's staff and counsel.

''Are these protected?'' Joseph said, adding there is ''a strong argument that they are, and this has been recognized in some of the lower decisions,'' including the district court ruling in *Republic of Ecuador v. Kelsh*, 280 F.R.D. 506 (N.D. Cal. 2012), ''but these issues have not been uniformly resolved and none of the three Circuits has addressed them.''

Discovery expert Kevin F. Brady, with Eckert Seamans Cherin & Mellott in Wilmington, Del., told BNA in a Feb. 6 e-mail that 2010 amendments to Rule 26(b) were an attempt to narrow the scope of discovery, reduce the confusion regarding discovery as well as the rising costs associated with expert-attorney interactions.

''However, as the arguments by the parties in these three cases make clear, some legitimate confusion still exists,'' Brady said.

Looking ahead, Brady, who authored a BNA Insight on evidentiary rule changes, *The (Broken?) Promise of Federal Rule of Evidence 502* (80 U.S.L.W. 328, 9/13/11), said the best approach in this area is for counsel to be proactive and raise the issue as to the scope of expert discovery before experts are retained.

''That way, there is clarity as to the scope of discoverable information,'' Brady said. ''In addition, the agreement can be reduced to a stipulation which can be filed with the court. Indeed, the courts should encourage this approach because it reduces uncertainty in discovery as well as the likelihood of motion practice.''

Some courts, such as the Delaware Court of Chancery, publish guidelines or best practices for attorneys litigating cases in that court, including a sample expert discovery stipulation that sets forth the parameters of what expert discovery shall be permitted, Brady noted.

Ecuador was represented by Eric W. Bloom of Winston & Strawn in Washington, and C. MacNeil Mitchell with Winston & Strawn in New York.

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Chevron's attorneys include Dettmer of Gibson, Dunn in San Francisco, and Boutrous, with Gibson Dunn in Los Angeles.

By Bruce Kaufman

*Full text at http://www.bloomberglaw.com/public/document/Republic_of_Ecuador_et_al_v_Douglas_Mackay_et_al_Docket_No_121557.*