In-House Experts And The New Federal Rules

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In-House Experts and the Impact of FRCP 26 Amendments

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“First, the impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired.”


2010 Amendments to Rule 26

- Rule 26(a)(2)(B) & (C)
- Rule 26(b)(4)(B)
- Rule 26(b)(4)(C)

- Lessened requirements in the expert report to all “facts and data” considered by the expert (see Fed. R. Civ. P. 26(a)(2)(B));

- Non-reporting testifying experts must be disclosed with a summary of the experts’ opinions (see Fed. R. Civ. P. 26(a)(2)(C));

Rule 26(b)(4)(B)

- Drafts, regardless of form or type of expert, are precluded from discovery.
Rule 26(b)(4)(C)

- Attorney communications with testifying experts are generally not discoverable, with exceptions:
  - Communications regarding compensation for the expert’s study or testimony;
  - Communications regarding facts or data provided by the lawyer that the expert considered in forming opinions; and
  - Assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

Testifying v. Consulting Expert?
Consulting Expert

- Rule 26(b)(3): prohibits discovery of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.”
- 26(b)(4)(D): prohibits discovery of “facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.”

Testifying Experts

- To Report Or Not To Report, That Is The Question?
In-house Experts Must Report When:

- “Specially Employed”

- “One whose duties as the party’s employee regularly involves giving expert testimony.”

Key: Fact, Expert Or Both

- “[t]he distinguishing characteristic between expert opinions that require a report and those that do not is whether the opinion is based on information the expert witness acquired through percipient observations or whether, as in the case of retained experts, the opinion is based on information provided by others in a manner other than by being a percipient witness to the events in issue.”

Non-Reporting Experts Are Open Game

- “[t]he (work product) protection is limited to communications between an expert witness required to provide a report . . . and the attorney . . . .” Fed. R. Civ. P. 26 Advisory Committee notes (2010).

- And, “[t]he rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).”

Advisory Committee Chose Not To Protect In-house Experts

- “For example, if an employee engineer designed a product that was the subject of a product liability case, it would be difficult to separate the engineer’s sense impressions leading up to the design of the product with his expert opinions at trial, and to distinguish between attorney communications regarding the former from those regarding the latter.”

Committee’s Decision Makes It Case By Case

“Both the Subcommittee and the Committee concluded that the time has not yet come to extend the protection for attorney expert communications beyond experts required to give an (a)(2)(B) report. ... Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be “fact” witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert’s fact testimony may have been influenced.”

In-House Experts and the Impact of FRCP 26 Amendments
Joshua B. Fleming

INTRODUCTION
Expert witnesses are virtually indispensable in litigation. Until recently, the free exchange of information and documents between experts and attorneys was often untenable because the federal rules (and often state rules) governing discovery from experts required full disclosure of and access to all documents, materials, and communications considered by an expert whether retained or not. However, in December 2010, the rules changed and now attorney-expert communications and work-product have more protection. The question is, however, do the amendments apply equally to in-house employee experts as they do to outside retained experts.

The answer: it depends on how the expert is designated and whether they are or could be construed a fact witness as well.

In-house experts are often those experts who maintain a dual role as employee and expert. It is this dual role, or wearing of two hats, that has and likely will continue to create problems for the courts, especially since the 2010 Advisory Committee determined that it would not extend the amendments to nor make special exception for in-house employees who are designated experts in litigation. This decision leaves the parties, and ultimately the trial courts, to sort out under what circumstances an in-house employee is required to prepare a report under Rule 26(a)(2)(B) and what information and/or documents provided to, shared by, or generated by an in-house employee/expert are protected versus discoverable.

This presentation examines the amendments to Rule 26’s expert disclosure rules and whether and to what extent the 2010 amendments have the same impact and afford the same protections to in-house experts as they do outside retained experts. And, it will provide some guidance for how to proceed in light of the new amendments with respect to whether an in-house expert is required and/or should provide a Rule 26 compliant report.

The 2010 Amendment to Rule 26.
On December 1, 2010, Federal Rule of Civil Procedure 26 was once again amended. This time the goal was to attempt to undo some of the unforeseen and undesirable effects of the 1993 amendments that permitted nearly unguarded access to an expert’s file materials and communications between expert and lawyers.

In general, the amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony not required to provide expert reports and limit the required report to “facts or data” considered by the witness (rather than “data or other information,” as was the case in the former 1993 rule). See Fed.R.Civ.P. 26 Advisory Committee’s note (2010). Rule 26(b)(4) was also amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three exceptions--communications between experts and counsel.

The principal amendments relevant to this presentation can be summarized as follows:

1. Lessened requirements in the expert report to all “facts and data” considered by the expert (see Fed. R. Civ. P. 26(a)(2)(B));
2. Non-reporting testifying experts must be disclosed with a summary of the experts’ opinions (see Fed. R. Civ. P. 26(a)(2)(C));
3. Drafts, regardless of form or type of expert, are precluded from discovery (see Fed. R. Civ. P. 26(b)(4)(B)); and
4. Attorney communications with testifying experts are generally not discoverable, with exceptions (see Fed. R. Civ. P. 26(b)(4)(C)). The following communications are still discoverable:
   a. Communications regarding compensation for the expert’s study or testimony;
   b. Communications regarding facts or data provided by the lawyer that the expert considered in forming opinions; and
   c. Assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

More specifically, Rule 26(a)(2)(B)(ii) was amended to require disclosure of “facts or data considered by the witness in forming” the opinions, rather than “data or other information” as prescribed in 1993. The purpose of this amendment, according to the Advisory Committee, was intended to “alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.” See Fed.R.Civ.P. 26 Advisory Committee’s note (2010). The amendments to Rule 26(b)(4) reinforce this direction by providing work-product protection against discovery regarding draft reports and disclosures or
attorney-expert communications. Id. The change to simply “facts or data” limits disclosure to factual material only and excludes theories or mental impressions of counsel. Id. Nonetheless, the Advisory Committee intended that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. Id. The facts or data disclosed must include all facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert. Id.

Rule 26(a)(2)(C) was added to require summary disclosures of the opinions offered by non-reporting expert witnesses and requires a summary of the facts supporting those opinions. Id. “This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B).” Id. However, the Advisory Committee recommends that courts “must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.” Id.

The genesis of this amendment is that there are numerous examples of witnesses who are not required to provide a report under Rule 26(a)(2)(B) yet may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Id. Examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Id. In those instances, parties must identify the witness(es) under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). Id.

The other important change to Rule 26 is that Rule 26(b)(4)(B) was added to provide work-product protection afforded by Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. According to the Advisory Committee, this protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). Id. It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise.

In addition, Rule 26(b)(4)(C) was also added to provide work-product protection for attorney-expert communications. With this addition, counsel’s work product is protected to ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. Id. However, unlike 26(b)(4)(B), “[t]he protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, . . ..” Id. “The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).” Id.

Three important exceptions govern the communications privilege provided under the new 26(b)(4)(B). Because the spirit of the rule is to allow discovery to provide notice of an expert’s opinions and determine the foundation for any opinions, communications regarding the following are discoverable: (1) communications regarding compensation for the expert’s study or testimony; (2) communications regarding facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion. Fed. R. Civ. P. 26(b)(4)(C). The Advisory Committee explains that while discovery is permitted to identify facts or data the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed, the exception applies only to communications “identifying” the facts or data provided by counsel—further communications about the potential relevance of the facts or data are protected. See Ritch and Eppensteiner, Seismic or Snooze-Worthy? Year-Old FRCP Amendments on Expert Requirements, 54 No. 4 DRI For Def. 28 (April 2012) (citing, Fed. R. Civ. P. 26 Advisory Committee’s note (2010)). Similarly, regarding assumptions provided to the expert by counsel, such communications are discoverable where the attorney instructed the expert to assume the truth of certain testimony or evidence and the expert relied on that assumption in forming his or her opinion. Id. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception. Id.

With these new rules in mind, the decision on how to use in-house employee experts is now slightly more complicated if you decide to rely on the employee expert to testify. Your decision on whether to designate and disclose them as a reporting or non-reporting expert will shape the scope of discovery available to the other side. And, be wary of the employee expert that is a hybrid fact and expert witness. From the few cases addressing these types of witnesses it seems that counsel must proceed with caution when trying to prevent discovery of these witness’s percipient
knowledge that could be confused with expert opinion or intertwined with information gained during trial preparation.

Testifying v. Consulting Expert: A Pivotal Decision

The role of the in-house expert, which will ultimately determine the scope of discovery permitted, must be considered at the earliest stages of litigation. Defense counsel must determine whether the in-house employee expert has information obtained prior to litigation in the ordinary course of business, whether the in-house expert can be “retained or specially employed” in anticipation of litigation, and whether the in-house expert is expected to be called as a witness at trial. The answers to all these questions will have a significant impact on whether the expert must provide a report under Rule 26(a)(2)(B), if intended to testify, or whether he/she must be disclosed via summary of opinions only under 26(a)(2)(C), and ultimately, the protection for information provided to or discoverability of information from the expert.

Often, employee experts wear two hats: one of a specially employed expert in anticipation of litigation with Federal Rule 26(b)(4)(D) protection; and, one of an ordinary witness protected only by the standards of relevancy. Which hat they wear, and ultimately what protection is afforded the expert and the documents they possess, depends on whether their knowledge was gained in the course of their special employment in anticipation of litigation or in the course of their regularly assigned duties.

A. Consulting expert.

This paper and presentation are not intended to cover the issues of discoverability of consulting expert materials versus testifying experts, but it would not be complete if it did not address whether and to what extent an in-house employee can be engaged as a consulting expert in whom counsel can entrust work product and on whom they can rely to assist in preparation of the case. And though that topic could serve as the basis for an entire presentation, suffice it to say, discoverability of the expert’s knowledge truly depends on the employee’s role, their evidentiary value on percipient factual issues, and whether his or her activities can be shown to have been performed in anticipation of litigation.

Rule 26(b)(3) codifies the work product rule and prohibits discovery of “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, . . ., or agent). Rule 26(b)(4)(D) (formerly 26(b)(4)(B)) ordinarily prohibits a party from discovering “facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.” Fed. R.Civ. P. 26(b)(4)(D). These rules have been used by lawyers to engage in-house experts to assist them in inspecting accidents and preparing for trial for decades. Yet, the rules are not without exception and it behooves you to be familiar with the actual scope of the permissible and available protections.

The recent decision Tellabs Operations, Inc. v. Fujitsu Ltd., Case Nos. 08-C-3379, 09-C-4530, 2012 WL 1520333 (N.D. Ill. May 1, 2012) provides an excellent history of how courts around the country have treated the issue of whether an in-house employee can be “specially employed” in anticipation of litigation and, thus, avail his or her work to the work product protections available to a consulting expert under Rule 26(b)(4) (D). Effectively, without drawing or recognizing any bright line rule, the district court found that assuming a requisite showing can be made to demonstrate that the employee was engaged to conduct work in anticipation of litigation, an in-house employee can be specially employed to avail himself or herself and the company’s counsel of the work product protection. However, that does not necessarily mean that the witness who possesses percipient factual knowledge cannot be compelled to participate in discovery. It is generally a case by case analysis.

B. Testifying experts.

In many cases the best testifying expert can and will be an employee of the defendant. These in-house experts frequently know more about a product than anyone else, the history of a transaction, an invention, or damages, and they are obviously less expensive than outside experts. Unfortunately, the testifying in-house expert is often the same individual who works closely with counsel in formulating strategy and responding to discovery. Following the 2010 amendments, once the decision is made to designate an employee as a testifying expert, depending on whether the expert is classified a reporting expert or a non-reporting expert could determine whether the party must be prepared to produce all documents and communications considered by the expert.

Therefore, if you conclude that an in-house engineer, accountant, chemist or other employee possesses the
requisite experience, skills, education or knowledge to serve as a testifying expert, you must make the early determination about whether the expert has an obligation to author a report in compliance with Rule 26(a)(2)(B) or a summary under 26(a)(2)(C). And then, depending on which you choose, whether and to what extent the expert is exposed to discovery of the materials to which he or she has been provided access. Failing to address these issues early, could lead to an inability to protect against discovery by the other side later.

To Report Or Not To Report, That Is The Question.
Possibly the single most defining question to consider given the recent amendments is whether the in-house expert should be designated a reporting expert under Rule 26(a)(2)(B) or a non-reporting expert under 26(a)(2)(C). This determination and designation will define the discovery to which the expert shall be subjected and the protections available. While historically you may have tried to find a way to avoid a report, now may be the time to re-evaluate that strategy.

A. When must an employee expert provide a report?
To answer this question, there are a few considerations that must be taken in to account. One is whether the employee is truly an expert witness versus a fact witness, or a hybrid fact and expert witness. Another is whether strategically you want to designate the witness as an expert and subject the expert to a report requirement. Also, though unlikely to be challenged, you must be able to sustain the designation as a reporting expert by being able to show that the expert was “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” It will not be long before lawyers begin challenging designations as reporting experts, arguing that an in-house expert that provides a report only did so as a sham to avoid the broader discovery available had he or she not.

Multiple courts over the years have addressed whether an employee or other non-retained expert has been required to provide a report. Since the amendments took effect, a number of courts have also analyzed this question – though most often to determine whether a party should have prepared and provided a report when they had failed to. According to one federal court, “[t]he distinguishing characteristic between expert opinions that require a report and those that do not is whether the opinion is based on information provided by others in a manner other than by being a percipient witness to the events in issue.” United States v. Sierra Pacific Industries, Case No. S-0902445, 2011 WL 2119078, *4 (E.D. Cal. May 26, 2011).

Even before the rule changes, and though not always adhered to in practice, the majority rule was that employees who were “specially employed” to give expert testimony were required to provide a report. See e.g., Day v. Consolidated Rail Corp., No. 95 Civ. 968, 1996 U.S.Dist. LEXIS 6596 (S.D.N.Y. May 15, 1996); Minn. Mining & Mfg. Co. v. Signtech USA, Ltd., 177 F.R.D. 459 (D. Minn. 1998); K.W. Plastics v. U.S. Can Co., 199 F.R.D. 687, 690 (M.D. Ala. 2000). For example, in Day the district court rejected Consolidated Rail’s contention that its employee experts were not required to provide a Rule 26(a)(2)(B) compliant report:

The principal difficulty with this argument is that even if the quoted language is perhaps susceptible to several alternative interpretations, the reading proposed by defendant would create a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information. The logic of defendant’s position would be to create a category of expert trial witness for whom no written disclosure is required - - a result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulable policy.

In a case such as this, in which it appears that the witness in question—that is, Mr. Heide—although employed by the defendant, is being called solely or principally to offer expert testimony, there is little justification for construing the rules as excusing the report requirement. Since his duties do not normally involve giving expert testimony, he may fairly be viewed as having been “retained” or “specially employed” for that purpose. Moreover, although defendant might argue that Mr. Heide is not receiving extra compensation for that performance—the record is silent on the matter—the rules contain no disclosure exemption for experts who are not monetarily compensated.


Because under the 1993 amended Rule 26 expert disclosure requirements and authority interpreting
the scope of expert discovery, everything between counsel and experts seemed fair game, the goal with in-house employee experts was generally to avoid providing a report, if possible, because the rules somewhat ambiguously approved such an approach if the employee’s role did not typically involve providing expert testimony. Thus, if a witness could be construed as a hybrid fact/expert witness, one argued no report was required, thus lessening the burden on a client’s employee. That approach had its traps as evidenced by the Day decision, and now, since the Advisory Notes make so clear that the new protections do not extend to non-reporting experts, it makes sense to re-evaluate the strategy of having an in-house expert issue a report so as to attempt to preserve some ability to communicate with and rely on the expert during the course of the litigation to prepare for trial without the fear of discovery of counsel’s mental impressions and opinions.

B. Non-Reporting experts may be required to disclose everything.

The Advisory Committee’s notes leave very much open the question as to whether disclosure of a non-reporting employee expert waives the work product privilege afforded reporting experts and exposes those experts to the full discovery. The Advisory Committee notes state unequivocally that “[t]he (work product) protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, . . ..” Fed. R. Civ. P. 26 Advisory Committee notes (2010). And, most importantly that “[t]he rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).” Id. (emphasis added).

Few cases, if any so far, have adequately analyzed this issue and developed the precedent to say for sure how courts will ultimately come down on this issue. But one, after a detailed review of the Advisory Committee’s 2009 meeting minutes, found that non-reporting employee experts were not intended to be protected in the same fashion as retained experts. See United States v. Sierra Pacific Industries, Case No. S-0902445, 2011 WL 2119078 (E.D. Cal. May 26, 2011). According to the Sierra court, “under the new rule, some communications can occur without waiving work product protection, but the rule differentiates between experts who are required to provide reports and experts who are not.” Id. at *1. Moreover, the new rule explicitly sets out different requirements and protections for reporting experts and non-reporting experts. Id. at *2. Where the newly amended Rule 26 explicitly protects communications between a party’s attorney and reporting experts, (see Fed.R.Civ.P. 26(b)(4)(C)), the rule is silent as to communications between a party’s attorney and non-reporting experts. Id.

Because of this silence toward non-reporting experts, the Sierra court engaged in a detailed review of the Advisory Committee notes and meeting minutes. According to the district court, the Advisory Committee notes and minutes explain that the new rule does not provide protection for communications between non-reporting experts and counsel, but does not disturb any existing protections. Id. at *6 (“A review of the minutes of the Civil Rules Advisory Committee meetings shows that the committee did not intend that communications between a party’s counsel and non-reporting experts generally be protected.”) The meeting minutes demonstrated that the committee discussed and rejected the idea of protecting communications with all non-reporting experts, and more specifically, with non-reporting party employee experts. Id.

For example, during the February 2009 meeting, it was suggested that the protection should be extended to communications with all non-reporting experts, or alternatively, to experts who are employed by a party but whose duties do not involve regularly giving expert testimony. Id. (citing, Minutes, Civil Rules Advisory Committee Meeting (February 2–3, 2009) p. 7). “On the one hand, it was argued that lawyers should be free to communicate with employee experts who do not regularly give testimony as they are to communicate with those who are retained or specially employed to give testimony.” Id. Yet, on the other hand, employee experts often have fact knowledge apart from their expert opinions and, therefore, if communications with all employee experts were protected, lawyers might abuse the rule by designating a former employee as an expert witness. Id.

At the Committee’s April meeting, the issue was discussed further. Id. (citing, Minutes, Civil Rules Advisory Committee Meeting (April 20–21, 2009) p. 14–20). During that meeting, it was decided not to protect attorney communications with all non-reporting experts, and specifically, not to protect communications with employee experts, for fear of unintended consequences. Id. at 20. According to the Committee minutes, a party’s employee might be an important fact witness as well as an expert witness, leading to “obvious opportunities for mischief.” Id. at
20. “For example, if an employee engineer designed a product that was the subject of a product liability case, it would be difficult to separate the engineer’s sense impressions leading up to the design of the product with his expert opinions at trial, and to distinguish between attorney communications regarding the former from those regarding the latter.” Id. The district court found that the May 2009 minutes reflected the final decision not to codify protections for communications with employee experts:

... Both the Subcommittee and the Committee concluded that the time has not yet come to extend the protection for attorney expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some “no-report” experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be “fact” witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert’s fact testimony may have been influenced.


Accordingly, based on the history behind the amendments, the Sierra court found that “there were certain circumstances under which broad discovery should be allowed into a party attorney’s communications with a non-reporting employee expert witness.” Id. Nonetheless, the district court held that the Advisory Committee “did not intend that such communications with non-reporting expert witnesses be discoverable in all cases.” Id. Consequently, it will be important to any analysis – whether to determine to provide a report initially or to defend your position that an expert is a reporting expert – to consider whether the person is or has been “specially employed” to give expert testimony and whether the person is a hybrid fact and expert witness. The hybrid fact and expert opinion witnesses create problems for the protections available due to the concerns about lawyer mischief and factual relevance. As the district court in Sierra held, “[w]hile it is desirable that any testifying expert’s opinion be untainted by attorneys’ opinions and theories, it is even more important that a witness who is testifying regarding his own personal knowledge of facts be unbiased.” Id. at *10. Therefore, at least in some cases, discovery will be permitted into such witnesses’ communications with attorneys, in order to prevent, or at any rate expose, attorney-caused bias.

In sum, it appears evident that the Advisory Committee considered and rejected the notion that a non-reporting employee expert could refrain from full discovery like a retained expert following the amendments. However, the decision to generate a report must not be made with complete assurance that your employee reporting expert will not still be subject to discovery of your communications. Before you rest easily, you must answer first whether that person could be called to discuss percipient facts and whether those facts/communications can be distinguished from protected communications. If the answer is they are a hybrid witness, it remains to be seen what will be open for discovery.

CONCLUSION
As demonstrated above, the amendments may have created more questions than they answered for the use of in-house employee experts and the discovery to which they will be subjected. Therefore, it is imperative that you consider these amendments early in your case and determine what kind of expert your employee will be: consulting only or testifying. If you envision that your employee will be a testifying expert you must then decide whether he/she will be a reporting expert or a non-reporting expert. Unless the employee has truly percipient or relevant factual knowledge to the issues at hand in the case, it is very likely that you will be able to sustain that the employee was “specially employed” to give expert support and testimony and, therefore, is availed of the protections promulgated under the new rules. However, be cautious when the employee is also a fact witness as the hybrid status can lead to serious questions about the validity of the expert’s
disclosure such that a court may ultimately determine that the expert was not a reporting expert, but rather only cloaked as such to try to avoid full discovery of the expert.
Josh concentrates his practice in product liability, premises liability and general commercial litigation. He has defended clients around the country in litigation involving product liability and premises liability claims, complex and mass toxic tort claims, as well as prosecuting and defending a variety of commercial claims. He has represented clients in both state and federal courts, and at the appellate level.

Josh’s litigation experience includes prosecuting and defending breach of contract and UCC Article 2 claims, as well as enforcement of restrictive covenants contained in employment agreements, defending trade secret claims and other business related disputes. In addition, he has served as national counsel to product manufacturers in a variety of industries, including automotive restraints, industrial and construction equipment, motorcycles, and chemicals. Josh also regularly advises and defends land owners and contractors in catastrophic loss and property damage claims arising out of construction accidents and fire losses.

Highlights and Recognitions
• Selected for inclusion in Indiana Super Lawyers Rising Stars® 2010, 2012

Memberships and Affiliations
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Education
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