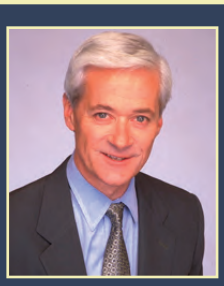
Dunn on Damages

The Economic Damages Report for Litigators and Experts



Robert L. Dunn

Please enjoy the following article, reprinted from *Dunn on Damages*, with my compliments!

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Mike Alerding is the Managing Partner of Alerding & Co., a 30+ person full-service CPA firm headquartered in Indianapolis and Managing Director of Alerding Litigation Support Services. For the past 20 years, Mike Alerding has provided consulting and testifying expert witness services relating to Accountants' Legal Liability (audit malpractice), damages, ownership disputes and a variety of other matters.

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Time for States to Get on Board with New Expert Witness Rules

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Effective December 1, 2010, an important and long-awaited rule change was made to Rule 26 of the Federal Rules of Civil Procedure relating to expert reports. Working as an expert in a variety of different matters for the past 25 years, I was relieved and overjoyed with the change. Now it is time for the different states to get on board with making changes to their rules to accommodate this same type of change.

The changes to Rule 26 now provide that the expert's draft report is no longer discoverable and will be protected under the work product doctrine. Additionally, and perhaps as importantly, communications between the attorney and the expert will be protected with limited exceptions (expert's compensation and facts, data and assumptions provided by the attorney to the expert). In those situations where the expert is not producing a report but does plan to provide testimony at trial, the new rule also requires a summary disclosure of the nature of the testimony and the facts and opinions to which the expert will testify.

These changes only apply to matters being tried in federal court and do not change the rules that states employ in matters being tried in state courts. Each state's requirements are different and historically states are not very prompt in making changes like this, even if they do make sense. Even when states do get around to changes in their trial procedures it is very likely that the changes won't be wholly consistent with the Federal Rules, if states even adopt the Federal Rules changes.

Based on my discussions with lawyers and other experts, the rule change has been universally applauded as both necessary and long overdue. In fact, most everyone wonders why the rule wasn't changed a long time ago. It is certainly no secret that attorneys and experts have had communications in the past regarding the matters covered or to be covered in the experts' report, but the archaic methods of communication were both inefficient and often ineffective – for both parties. With this change, our legal system can finally start to move into the 21st century.

Phone calls to attorneys to read a draft report or showing an attorney a draft in person on a laptop are, thankfully, gone as it relates to federal cases. The extensive efforts that attorneys have gone through to discover draft copies of expert reports and the similar efforts opposing attorneys have used to hide them and protect them, will no longer be necessary. The silliness and waste of valuable court and deposition time that was spent arguing over whether any drafts were available will now hopefully be used to address more salient and important matters. Who knows, this may even result in more time and effort being spent on the substance of the expert's report and opinion and less time on the drafting habits used by the expert when forming the opinion.

Under the old rules, in addition to a testifying expert, attorneys would often have to engage a consulting expert to work with legal counsel on preliminary findings and overall case tactics so that the work product relating to the case strategy could be protected. It is now more likely that the testifying expert can perform the same services as the consulting expert as part of the overall engagement. Using only one expert will not only save clients fees, but will very likely reduce the time spent in trial preparation and markedly improve the quality of the expert's testimony.

Another interesting language change to Rule 26 is the requirement that experts disclose "facts or data" used in forming an opinion. The old Rule 26 required that experts disclose "data and other information." I have always wondered about the definition of "other information." I have had attorneys tell me that it meant anything from "anything and everything you used" to "only those substantive matters you considered." Although it does narrow the definition down somewhat, it still leaves questions. The definition of "fact" is "something that is real, actually exists or is true." I guess that eliminates any fantasies or lies. That is good to know.

Since so many cases are tried in state courts, it is imperative that each state begin the process of changing its trial procedures as soon as possible in order to improve the efficiency, effectiveness and affordability of state trials for their clients. The mantra of independence that the 50 states proudly demonstrate when setting their own rules for matters like this is admirable and brings back feelings of patriotism stretching back to the founding days of our country. However, this independence also creates a huge waste of resources, client fees and precious time on each case. This is a good rule change and needs to be adopted as quickly as possible by the states.

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