Rule 26 Requires Disclosure of Patient Medical Records As "Facts and Data Considered"

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By Peabody & Arnold on May 25, 2017

A New Jersey federal judge overseeing the Benicar Multi-District Litigation ("MDL") has ordered the production of non-party patient medical records relied upon by experts in forming their opinions. The court held that under Federal Rule 26(a)(2)(B)(ii), the information in those records constitute "facts and data considered" by plaintiffs' experts. *See In re Benicar (Omesartan) Products Liability Litigation,* No 1:15-md-2606, 2017 WL 970263 (D.N.J. Mar. 13, 2017). This well-reasoned federal opinion is instructive for counsel faced with experts who purport to base their opinion, at least in part, on non-plaintiff patient data.

The scope of expert disclosures required under Rule 26 was changed in 2010 from "data or *other information* considered" by the expert (emphasis added), to "facts or data considered" by the expert. This change reflected a concern that the earlier iteration of Rule 26 broadly included disclosure of the thoughts and legal impressions of counsel, and in the advisory committee's own words, "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." Rule 26(a)(2)(B)(ii) advisory committee note to 2010 amendment.

It is this "refocus on the disclosure on 'facts and data'" that formed the basis for the court's decision in *Benicar*. In the *Benicar* MDL, two of the plaintiffs' experts confirmed during depositions that they had considered the medical records of patients who were not plaintiffs in reaching their opinions. Over plaintiffs' objection, the New Jersey federal judge determined that the patient medical records reviewed by plaintiffs' experts were the type of "facts and data considered" which must be disclosed under Rule 26(a)(2)(B)(ii). In arriving at its opinion, the *Benicar* court looked to the comments to Rule 26(a)(2)(B)(ii) which state that the intention of the drafters "is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." Rule 26(a)(2)(B)(ii) advisory committee note to 2010 amendment. With this guidance, the court adopted a "pro-discovery" position taken by "[a] majority of courts" wherein "'pursuant to Rule 26(a)(2)(B), a party must disclose all information provided to its testifying expert for consideration in the expert's report[.]'" *In re Benicar* at *2 (*quoting Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 463 (E.D. Pa. 2005)). The court also adopted a "broad definition of 'considered'" which would require "the disclosure of all information a testifying expert 'generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.'" *Id.* at *2.

The judge was not persuaded by the arguments proffered by plaintiffs in opposition to the requested disclosure. *Id.* at *3. First plaintiffs argued that their experts "do not own or control the records, and they do not have the right to produce the records." *Id.* The court held that this argument was conclusory and not substantiated by any competent evidence, noting that contrary to the plaintiffs' assertion, because the experts were able to access the records to review them "it is likely they have 'possession, custody or

control' of the records." *Id.*

Next, plaintiffs made a proportionality objection to the production of the patient records arguing in sum that it would be burdensome to identify, collect, redact and produce the requested records. Putting the irony of this argument aside, the court rejected plaintiffs' proportionality objection on the basis that plaintiffs did not provide any proof to support this objection. Moreover, the court noted that in this case, the plaintiffs' experts had testified to considering a "discrete, identifiable and manageable number of records." The court concluded that "[g]iven the importance plaintiffs place upon their experts' opinions and clinical experience, plaintiffs' proportionality objection is rejected." *Id.*

Third, plaintiffs argued that if the court ordered production of the requested records, it would effectively deter future qualified experts who treat and study patients with the condition at issue because of the "expense and disruption it would cause." *Id.* at *4. The court rejected this argument for two reasons: first, the plaintiffs presented no evidence to support this claim and second, the "plaintiffs' concerns do not trump the Federal Rules of Civil Procedure" which "require testifying experts to produce all facts and data they consider in reaching their opinions." *Id.* The court explained that there is "no exception for paid trial experts who happen to be treating physicians." *Id.*

Last, the court found no merit in an argument presented only orally, that the record review was done years ago and before the experts were retained for trial, holding that "[t]here is no temporal limitation in Rule 26(a)(2)(B)." *Id.* at n. 6.

It is worthy to note that although the *Benicar* court adopted a broad interpretation of the term "facts and data considered," the court inserted a footnote in its opinion which limited its ruling to situations where, "testifying experts considered and relied upon a discrete and identifiable set of records." *Id.* Accordingly, it remains to be seen whether the same disclosure requirement would be imposed where an expert purports to base an opinion more generally on patient medical records reviewed or considered in the course of an expert's clinical experience.

