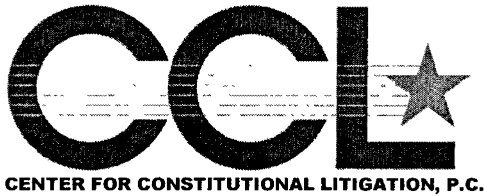

CENTER FOR CONSTITUTIONAL LITIGATION, P.C.

777 6th Street NW, Suite 520
Washington, DC 20001-3723
Tel: (202) 944-2803
Fax: (202) 965-0920
Email: infoccl@cclfirm.com

08-CV-052

November 10, 2008

Delivered electronically to Rules_Comments@ao.uscourts.gov *and by overnight delivery to chambers*

Hon. Mark R. Kravitz
Hon. Michael Baylson
Co-chairs, Advisory Committee on Civil Rules
Judicial Conference of the United States
c/o Rules Committee Support Office
Thurgood Marshall Building
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed amendments to Fed. R. Civ. P. 26(a)(2) and (b)(4) (expert disclosures)
Publication version August 2008
Written Testimony of Stephen B. Pershing, to appear November 17, 2008
on Behalf of the American Association for Justice

Dear Judges Kravitz and Baylson:

The American Association for Justice, formerly known as the Association of Trial Lawyers of America, wishes to thank the Advisory Committee for this opportunity to comment on the expert disclosure rule changes now under consideration. AAJ is the nation's oldest and largest voluntary bar association for attorneys who represent plaintiffs in consumer, personal injury, products liability, and civil rights litigation in federal and state courts. The federal procedural rules, discovery and otherwise, that govern expert witnesses and consultants and constrain the lawyer-expert relationship are of serious concern to our members. These are AAJ's first formal comments on the Committee's proposed amendments to Rules 26(a)(2) and 26(b)(4) on pretrial discovery of expert opinions. We may offer further comments on these amendments by the end of the comment period in February 2009.

A. Which experts must file a written report

The proposed changes to Rule 26(a)(2) largely erase the distinction between employee and non-employee experts for disclosure purposes, requiring reports of both; but they exempt witnesses like treating physicians from the expert report requirement, and allow their anticipated opinions on matters within the scope of treatment to be provided by lawyer-prepared disclosures. AAJ supports this change as a way of adequately disclosing expert opinion to a party opponent, allowing informed decisions about whether to depose and avoiding surprises at trial, *see, e.g., Watson v. United States*, 485 F.3d 1100, 1107 (10th Cir. 2007) (acknowledging surprise to party

not notified of content of expert's testimony under existing rule), while preserving the Committee's 1993 policy to minimize burdens on witnesses who might not make themselves available if the burdens on them were greater. *See, e.g., Hall v. Sykes*, 164 F.R.D. 46, 48-49 (E.D. Va. 1995) (approving 1993 committee note's statement that treating physicians were not necessarily required to provide written reports). The handling of "mixed" witnesses under proposed Rule 26(a)(2)(B) is welcome, as it imposes the report requirement flexibly based on the character of the testimony rather than rigidly by witness identity. *See, e.g., Torres v. City of Los Angeles*, 540 F.3d 1031, 1047 (9th Cir. 2008) (policing expert report requirement by type of testimony rather than solely by witness' employment status). As noted in the discussion and questions following the June 2008 committee note, it is correct to exclude lay opinion witnesses under Fed. R. Evid. 701 from the list of witnesses to whom the Rule 26(a)(2)(A) disclosure requirement applies, as this honors the established distinction between lay and expert opinion. *See, e.g., United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002) ("[A] lay opinion must be rationally based on the perception of the witness. This requirement is the familiar requirement of first-hand knowledge or observation."); *cf.* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

B. Work-product protection for draft expert reports and lawyer-expert communications

Lawyers who typically represent plaintiffs join with those who chiefly represent defendants in saying that practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product, or counsel's manipulation of the expert's output, that takes up time better spent focusing on the expert's conclusions themselves.[1] Underlying this argument is a growing acceptance that lawyer and expert are partners in case development, that the work product of each is laced with the work of the other, and that discovery of material passed between the lawyer and the expert almost inevitably invades the attorney work product protection of *Hickman v. Taylor*, 329 U.S. 495 (1947); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); and existing Fed. R. Civ. P. 26(b)(3). Both the decisions

[1] Plaintiffs and defendants both find that enforcement of the 1993 amendments can be vigorous. *See, e.g., Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 464 (E.D. Pa. 2005) (requiring production of all materials medical negligence plaintiff's counsel gave its damages expert regardless of any privilege claim, any draft reports prepared by expert, and expert's notes of meetings with counsel related to subject matter of expert's testimony, and requiring expert to disclose all communications with counsel that expert considered in formulating his opinions); *Iridex Corp. v. Synergetics, Inc.*, No. 4:05CV1916 CDP, 2007 WL 781254, *5 (E.D. Mo. 2007) (not reported in F. Supp. 2d) (ordering accused patent infringer to produce draft of its testifying expert's reports prepared by counsel). Courts construing the existing rule sometimes require counsel to forgo work product protection for draft reports unless they admit they had a substantive role in expert opinion development. *Reliance Ins. Co. v. Keybank U.S.A.*, No. 1:01 CV 62, 2006 WL 543129, *2 (N.D. Ohio 2006) (not reported in F. Supp. 2d) (ruling that expert's notes given to counsel, who claimed merely to have transmitted them to support staff, constituted draft report and were not protected work product); *Krisa v. Equitable Life Assur. Soc.*, 196 F.R.D. 254, 257-58 (M.D. Pa. 2000) (ruling that work-product immunity did not apply to draft expert reports where counsel asserted it had not written them or directed expert's conclusion).

and the Rule set up two tiers of lawyer work product with different degrees of protection: trial preparation materials generally, which are discoverable on a showing of substantial need and undue hardship, and "core" or "opinion" work product—the lawyer's "mental impressions, conclusions, opinions, or legal theories"—which are supposedly protected from virtually all discovery.[2]

As the Committee knows, prior to the 1993 expert disclosure amendments the courts were split on the expert disclosure questions the Committee is now considering, with some favoring protection and others favoring disclosure. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984) ("the basis for an expert's opinion [can be effectively explored] without an inquiry into the lawyer's role in assisting with the formulation of the theory . . . the marginal value in the revelation [of that role] does not warrant overriding the strong policy against disclosure of documents consisting of [core] work product"); *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991) ("absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product"). After 1993, of course, even opinion work product protections for lawyer-expert communications were often weakened or abandoned. *See, e.g., Barna v. United States*, No. 95C6552, 1997 WL 417847, at *2 (N.D. Ill. 1997) (holding that "any information considered by a testifying expert in forming his opinion on an issue, even if that information contains attorney opinion work product, is discoverable"); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) ("[t]he reasoning in *Intermedics* is made even more compelling in light of the revisions contained in Rule 26(a)(2)"); *United States v. City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995) (holding that "[t]he approach which is most consistent with the purpose of the Federal Rules of Civil Procedure is to require disclosure"); *U.S. Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995) (holding

---

[2] There is some disagreement in the cases on whether the protection for opinion work product generally—whether under *Hickman* or under Rule 26(b)(3)—is absolute or qualified, although court-ordered disclosure of opinion work product is extremely rare regardless of how the standard is formulated. *See Upjohn*, 449 U.S. at 401 (leaving open precise extent of opinion protection); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974) ("*Duplan II*") ("no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories. This is made clear by the Rule's use of the term 'shall' as opposed to 'may.'"); *Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 104 (S.D.N.Y. 2002) ("[o]pinion work-product . . . enjoys nearly absolute immunity and can be discovered only in very rare circumstances"); *In re Grand Jury (OO-2H)*, 211 F. Supp. 2d 555, 561 (M.D. Penn. 2001) (opinion work product protection is "virtually absolute") (citing *In re Ford Motor Co.*, 110 F.3d 954, 962 n.7 (3d Cir. 1997) ("near absolute protection")); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 664 (3d Cir. 2003) ("opinion work product protection is not absolute, but requires a heightened showing of extraordinary circumstances"); *Ehrlich v. Howe*, 848 F. Supp. 482, 493 (S.D.N.Y. 1994) ("the privilege against disclosure of an attorney's mental impressions, conclusions, opinions and theories is not absolute and may have to yield in appropriate circumstances") (citing *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (directing production of attorney interview notes despite "potential" opinion content where they "may be the only available evidence" of "what Doe Corp. knew and when it knew it"); 8 Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE 2D § 2026 (1994 & Supp. 2008) (collecting cases).

that when work product documents have been turned over to an expert, "the protection has been waived because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony").

The proposed substitution of "facts or data" for "facts or other information" in Rule 26(a)(2)(B)(ii), would clearly—indeed, more clearly than appeared to some courts before 1993—place within Rule 26(b)(3) work product protection any documentary or other tangible "information" that counsel exchanges with a testifying expert beyond "facts or data." The proposed new language for Rule 26(b)(4)(B) and (C) would clearly place draft reports and lawyer-expert communications in the same category except for matters within the excepted (b)(4)(C) subcategories of expert compensation, "facts or data," or lawyer-provided assumptions. To this extent, the proposed changes would end the disparity between the Rules and the caselaw progeny of *Hickman v. Taylor* regarding treatment of such materials, and would bring the discovery Rules back into harmony with the *Hickman* doctrine from which they came. However, these changes would not effect a presumption that the contents of draft reports or lawyer-expert contacts were opinion work product; that determination, and the level of work product protection to be afforded, would still be left to the judge in each case as is true today.

There are still incongruities between Rule 26(b)(3) and the decisional law of attorney work product, and the proposed changes will introduce variations between that Rule and the new expert disclosure provisions. For instance, Rule 26(b)(3) does not protect oral communications, though, Rule 26(b)(4)(B) and (C) will protect them where shared with experts, and they are still protected by the progeny of *Hickman* for work product in general. *See, e.g., Clute v. Davenport Co.*, 118 F.R.D. 312, 315 (D. Conn. 1988) (*Hickman* doctrine "is not limited in its scope to discovery of documents and other tangible items"); *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) (adverse party cannot force deponent to reveal counsel's mental processes); *American Floral Services, Inc. v. Florists Transworld Delivery Ass'n*, 107 F.R.D. 258, 260 (N.D. Ill. 1985) (*Hickman* reaches intangible evidence prepared in anticipation of litigation, even though Fed. R. Civ. P. 26(b)(3) does not). The Committee should address those divergences, either in comments to these Rule changes or in the text of future ones. But at least the current proposal would end the dramatic inconsistency with *Hickman* for expert disclosures under the 1993 amendments to Rule 26, and courts would be freer than today to repair to *Hickman* where its protections in this regard exceed those of the Rules.

Our member lawyers share the Advisory Committee's belief that litigants often engage in artificial behavior to protect the lawyer-expert case development partnership from discovery, steps that range from avoiding written communications or draft reports up to and including the current practice—among litigants who have the resources—of hiring two sets of experts, one to consult in case development using materials often provided by counsel, and the other to testify based on a smaller set of materials carefully selected by the first set to be least damaging when opened to discovery.[3] AAJ members share the Committee's view that lawyers often stipulate

[3] Even this arrangement can backfire under the rule as it exists. *See, e.g., Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83 (E.D. Va. 2001) (sanctioning government for spoliation because its retained non-testifying experts, who apparently assisted in preparing report of testifying expert, destroyed drafts of reports and communications with testifying expert).

around the existing rule by agreeing, to one extent or another, not to seek discovery of material exchanged between counsel and testifying experts, and believe as the Committee does that this reduces preoccupations or squabbling over such material and increases both sides' focus on the merits of the experts' conclusions.[4] The proposed Rule does not appear to us to exert disparate effects by type of case, for instance mass tort or products cases as distinct from civil rights cases. Experts can be vital to the presentation of one or both sides in any type of civil case. We see no clear indication that the proposed changes will disadvantage one side relative to the other in the run of civil cases of any subject matter type.

AAJ members with experience under the New Jersey rule cited as a model by proponents of the change, *see* June 2008 proposed committee report at 4,[5] confirm that, in the words of one member, "the civil trial system in New Jersey has not ground to a halt and trials do still get to the bottom of things notwithstanding the change. What has happened from my perspective, and I believe [from that of] most other New Jersey practitioners as well, is [that] a lot of squabbling that once occupied parties and courts has disappeared[,] as [expert] depositions now focus on what the expert is prepared and claims to be able to testify about at trial." The New Jersey courts handled their own prior rule much as the federal courts handle Rule 26(a)(2) today, *see, e.g.*, *Adler v. Shelton*, 343 N.J. Super. 511, 522, 778 A.2d 1181, 1187 (2001) (holding draft report and other lawyer-expert communication documents discoverable); no reported cases address the 2002 revisions, which suggests that the new rule is understood well enough to obviate satellite litigation rather than generate it.

We offer these thoughts on specific matters as to which the Committee has invited comment:

---

[4] A chief complexity of today's expert litigation climate is the preparation required to meet the standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589-95 (1993), an undertaking that entails shared responsibility and close communication between lawyers and their testifying experts. The need to coordinate on *Daubert* matters only exacerbates the difficulties in lawyer-expert communication cited by AAJ members. A classic example is the plaintiff's lawyer separated from his or her expert by many time zones, who must communicate by discoverable e-mail, a marked disadvantage relative to an opponent whose communications with a local expert are not in writing. In such cases, to avoid a waste of time and resources on both sides, counsel may propose either that all lawyer-expert contacts, even the most casual oral ones, be recorded and turned over, or that none of them be subject to discovery, on a work-product hardship showing or otherwise.

[5] N.J. Civ. R. 4:10-2(d)(1), enacted in 2002, provides: "Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule." Rule 4:17-4(e), amended in 2002 to conform to new Rule 4:10-2(d)(1), requires reports (from experts who must provide them) to set forth the "facts or data" on which the expert relied in forming the opinions at issue, and concludes, "Except as herein provided, the communications between counsel and expert deemed trial preparation materials pursuant to R. 4:10-2(d)(1) may not be inquired into."

1. Extension of the proposed protection to trial. Would an expert be subject to cross-examination at trial as to lawyer-expert communications that the current proposal returns to the category of information shielded from discovery under Rule 26(b)(3)? The proposed committee note correctly indicates that the answer should be no, to the same extent as with regard to work product in general. *See* June 2008 proposed committee note at p.12, ll. 150-59; June 2008 detailed discussion and questions at 19-20. A committee member's earlier comment that the changes under discussion should reach only pretrial discovery and that the "situation at trial may be different," *see* January 2008 committee minutes at 26, was wisely set aside. The proposed "*cf.*" citation to the common law protection's development in *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) ("the concerns reflected in the work-product doctrine do not disappear once trial has begun"), gives some guidance on the point, and could give more without exceeding the Committee's proper role under the Rules Enabling Act, 28 U.S.C. § 2074(b).[6] The note could be amplified to state the Committee's view that the disappearance at trial of the Rule 26(b)(3) work product protection would substantially negate the spirit of the current proposed amendments and of the work product doctrine itself. *Upjohn*, 449 U.S. at 398 ("Rule 26(b)(3) codifies the work-product doctrine"); *Hickman*, 329 U.S. at 511 (noting that introducing attorney work product into evidence would lead to "[i]nefficiency, unfairness and sharp practices . . . in the giving of legal advice and in the preparation of cases for trial" and that "[t]he effect on the legal profession would be demoralizing").

The current proposals do not directly address the narrower set of work product problems arising at trial under Fed. R. Evid. 612, which ordinarily entitles an adverse party to see writings used at or before trial to refresh a witness' recollection and to cross-examine the witness about them. Judge Sloviter in *Bogosian* strongly rejected the view that opinion work product lost its protection by being shown to a testifying expert under Rule 612. "Even assuming that this provision applies to documents shown before trial to an outside expert, the purposes of Rule 612 are generally fully served without disclosure of core work product. Rule 612, like [Rule]26(b)(4), does not displace the protections of [Rule] 26(b)(3)." *Id.*, 738 F.2d at 595 n.3. *Bogosian* seems both correct and congruent with the expert disclosure policies proposed here: even though Rule 612 is undeniably important to meaningful questioning at trial as to an expert's

---

[6] This indication in *Nobles* has been quoted and followed in both civil and criminal cases. *Stansberry v. Schaad Properties*, No. 88-0163-A, 1991 WL 11015266 W.D. Va. 1991) (not reported in F. Supp.), at *2 (civil) ("although Rule 26 is generally inapplicable at trial, the work-product doctrine as developed at common law controls"); *United States v. Walker*, 910 F. Supp. 861, 865 (N.D.N.Y. 1995) (criminal) (observing that absent the protection, "a criminal defendant's preparation can only be crippled by the prospect of creating an unfavorable witness every time he attempts to obtain an unbiased assessment of the government's evidence by consulting an expert"). The abridgment of work product protection for criminal defense counsel's preparation of experts may present the additional problem of effective assistance of counsel under the Sixth Amendment. *See United States v. Alvarez*, 519 F.2d 1036, 1046-47 (3rd Cir.1975) ("The issue . . . is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. [Such a] rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases . . . . The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness").

opinions and his or her support for them, the Rule can operate as it should without forcing abandonment of the policy behind the current proposals at the door to trial. As with regard to the proposed *Nobles* citation discussed *supra*, the committee note can set forth this understanding of the interaction of Rule 26(b)(3) and Rule 612 without exceeding its prerogatives under the Rules Enabling Act, and AAJ urges that it do so.

2. Subsequent litigation; relatedness of claims and parties. The cases show a majority and a minority rule on whether or in what circumstances material deemed protected as work product in one case may be similarly protected in a different or later case. The problem is not new. *See* Caroline T. Mitchell, Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COL. L. REV. 412 (1983). Among cases holding there is essentially no such protection are *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977) (denying immunity for work product prepared for "prior, completed litigation"), and *Research Institute for Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation*, 114 F.R.D. 672, 680 (W.D. Wis. 1987) (holding that when litigation generating work product ends, "the need to protect the material from disclosure no longer exists"). Some courts draw lines regarding relatedness of claims. *See Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967) (applying work product immunity in later case to documents prepared for prior litigation involving related transaction); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977) (extending work product protection to subsequent litigation only "where the two cases are closely related in parties or subject matter").

The better view, and the one AAJ believes is more in tune with the policies behind *Hickman* and the Rules, is seen in other decisions extending to later litigation the full protection afforded in the earlier proceeding, regardless of relatedness of claims, at least so long as the cases have one party in common. As the Court held in *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 25-27 (1983), the "literal language" of Fed. R. Civ. P. 26(b)(3) "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *See also Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 (4th Cir. 1973) ("*Duplan I*") (holding that the interests of the legal profession and the public "are better served by recognizing the qualified immunity of work product materials in a subsequent case as well as that in which they were prepared"); *id.* at 484 n.15 (holding that "technical" requirement that actions be "closely related" is "incompatible with the essential basis of the Hickman decision"); *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980) (holding that privilege extends "necessarily to the work product compiled in previous, terminated litigation"); *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (work product protection "extends beyond the termination of the litigation for which the documents were prepared"); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994) (characterizing "emerging majority rule" as applying work product privilege in subsequent litigation, "related or not"). We encourage an espousal of this view in the committee note in order to encourage courts to give the protection its greatest reasonable effect. Nevertheless, for subsequent cases involving the same lawyers and experts and similar facts—but not the same parties—as in earlier litigation where the work product immunity was applied, counsel may need to stipulate as to the protection's scope and duration. The committee note could acknowledge that such circumstances form a legitimate basis for stipulating to the protection in some cases even though

the same protection may be unwarranted or could disserve the truth-seeking function of litigation in other cases.

Thank you for this opportunity to comment.

Sincerely,

Stephen B. Pershing
(Please note our new address)
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W., suite 520
Washington, DC 20001
Phone: (202) 944-2856
Fax: (202) 965-0920
Email: steve.pershing@cclfirm.com