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Subject Summary of Charles Miers Testimony for the Hearing on
Proposed Amendments to Civil Rule 26 - January 14, 2009 -
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Summary of Statement of Charles Miers on the proposed Amendments to FRCP 26

Thank you for allowing me the opportunity to testify at the January 14, 2009 Civil Rules Hearing in San Antonio, Texas on the proposed amendments to Civil Rule 26. I have been practicing since 1992, and I am shareholder at Abbott, Simses & Kuchler. Our firm is mainly a defense litigation firm with thirty-three lawyers and offices in Texas, Louisiana, and Mississippi. The firm's clients generally consist of businesses that range from small businesses to Fortune 50 companies. The following is a summary of my anticipated testimony.

Rule 26(a)(2)(C) Disclosure of expert testimony.

I strongly support the changes to Rule 26(a)(2)(C). The changes substitute an attorney summary disclosure for a Rule 26 report when an employee with factual knowledge may also have expert knowledge. In my experience, I may work with the engineers and scientist that a client employs (but who do not ordinarily testify as experts). Under the current rules, (unless I reach an agreement with opposing counsel) I am forced to either submit a Rule 26 report for these employee/experts or risk having a district court preclude them from offering any testimony that may be considered "expert" in nature. Receiving or providing a Rule 26 report for an employee provides little benefit in my experience, adds to the costs of litigation, and generally provides nothing more than what the new rule requires, a summary of the witnesses facts and opinions. In practice, the parties usually attempt to reach an agreement whereby each party's employees who may also be considered "experts," are exempt from the current report requirements. The new rule will prevent this manipulation of the rule.

Rule 26(b)(4)(B) Protection of Draft Reports

I support the addition of Rule 26(b)(4)(B) that extends work-product protection to draft Rule 26 reports and disclosures. Initially, when counsel prepares disclosures, I believe the draft versions would be protected, in most instances, by work product under existing rules. As far as draft expert reports, in my practice to circumvent the effect of the current rule, I have entered into agreements with opposing counsel that neither side will produce draft reports. Further, most experienced experts know not to put anything down on paper until they are ready to create a "final" report because it is discoverable. Because of this maneuvering, the free exchange of information is stifled and case analysis is hampered.

Rule 26(b)(4)(C) Communication with Expert Witnesses

While recognizing the minimal limitation on potential cross-examination this rule will impose, I support proposed Rule 26(B)(4)(C)'s protection of communications (subject to the stated exceptions) between counsel and expert witnesses. I believe this change will benefit open communications and reduce litigation costs. However, I believe the comment to the rule should make clear that similar protection is provided to an expert's staff, researchers, or assistants who are not expected to testify, but who provide input to or assist with certain portions of the testifying expert's report. For example, in an environmental clean-up case, one expert may be expected to testify, but she may have received assistance from a team of experts (hydrologists, environmental engineers, chemical engineers, etc.).

Thank you for the opportunity to participate in this process

Best Regards,

Charles Miers

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