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January 16, 2009

08-CV-128

VIA FIRST CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.
Washington, D.C. 20544

Re: Comments of the ABA Section of Litigation on proposed amendments to Fed. R. Civ. P. 26 dealing with expert witnesses

Dear Mr. McCabe:

On behalf of the ABA Section of Litigation, this letter will respectfully (a) respond to the specific questions raised in the June 9, 2008 report of the Civil Rules Advisory Committee and (b) address concerns that we understand are being raised by certain academics and others.

As the members of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Federal Rules of Civil Procedure are aware, the proposed amendments to Rule 26 dealing with expert witnesses originated with the Section of Litigation's Federal Practice Task Force. After approval by the Section's Council, the Task Force's recommendations were adopted as ABA policy by the ABA House of Delegates in 2006.

We sincerely appreciate the time and effort the Advisory Committee has devoted to these issues since that time. We believe the proposed amendments will focus the courts on the substance of the expert's opinion, reduce litigation expense for all concerned and advance the cardinal command of Fed. R. Civ. P. 1 that the Federal Rules of Civil Procedure should serve to "to secure the just, speedy, and inexpensive determination of every action and proceeding."

The proposed amendments have received widespread support from a broad variety of "users" of the federal courts, including experienced lawyers who represent both plaintiffs and defendants, litigants themselves and other interested groups. We urge the Advisory Committee to recommend the final adoption of these proposals.

Should be the rule be amended because it does not meaningfully contribute to testing expert opinions and imposes unwarranted "transactional" costs?

The first question is whether the premise that the rule in its current form "does not in fact contribute significantly to testing expert opinions in many cases" – voiced by many attorneys representing a broad cross-section of practice experience – is sound. We believe the answer is yes, it is sound.

But a more informative formulation might be whether, without the burdens imposed by the current regime, counsel will still be able to effectively explore and test an expert's opinion. We believe the answer to that formulation is also yes.

Our method of resolving civil (as well as criminal) cases is based on the adversary model. It is no accident that the right to trial by jury is encased in the U.S. Constitution and virtually every state constitution. Lawyers represent clients. Lawyers present their clients' cases to the finder of fact.

Part of a lawyer's case is the presentation of evidence. That includes, in appropriate cases, expert evidence. It is the caliber of that evidence – its substance, its reasoning, its basis in fact and theory (scientific, mathematical or otherwise) and how well the expert explains it – that will sway (or not sway) the finder of fact. A court may bar expert evidence under *Daubert* and subsequent cases. If expert testimony is admitted, opposing counsel is free to explore and challenge every aspect of it, both by cross-examination and by adducing contrary testimony.

We are aware of no meaningful evidence that the quality of justice or expert testimony in particular under the post-1993 version of Rule 26 has improved since 1993. We are convinced, as experienced trial lawyers, that the costs of the 1993

amendments far outweigh any theoretical benefits of allowing the parties to explore every nook and cranny of the communications between counsel and expert. This includes not only dollars and delay, but the burdens on the justice system itself from the duplication of effort and gamesmanship the current rule engenders, which is the impetus for the proposed amendments.

We have seen the letter from a number of academics, led by Professors Paul Simon and John Leubsdorf, that takes issue with the proposed amendments. With all due respect, those views are strikingly lacking in qualitative or quantitative evidence to support them. In contrast, the practicing bar on "both sides of the 'v.'" overwhelmingly supports the proposed amendments – because they know that they still will be able to cross-examine and test the opposing expert based on what matters: the content and quality of the expert's report and testimony.

From their inception in 1999, the ABA's Civil Discovery Standards (which originated from a predecessor to the Litigation Section's Federal Practice Task Force) have recommended that counsel stipulate to the practice of having communications between counsel and an expert witness be off limits in discovery. *See* ABA Civil Discovery Standard 21(e) and accompanying Comments (2004). Stipulations to this effect are routinely entered into by experienced counsel and approved by the courts.

The professors' draft states (in part 1) that the proposed amendments are "contrary to the changes many scholars have long advocated in our system of expert testimony." We are not told who these scholars are or their experience with or background in civil litigation in the U.S.

The draft also tells us that "[m]ost foreign judicial systems seek to avoid this partisanship [*sic*] by having experts appointed by the court, often from a list of certified experts." That notion would seem to be the starting and ending point for their argument. "Most foreign judicial systems" (other than the few other common-law systems) do not have an adversarial system. None of them has the extraordinary disclosure and discovery mechanisms of the U.S. system. Instead, the prevailing foreign model is based on an inquisitorial system where (a) there is no right to a jury, (b) discovery is virtually unheard of and (c) an "independent" inquisitor determines (i) the issues, (ii) the witnesses and (iii) what other evidence or information to obtain and assess in resolving a dispute. The professors' premise is therefore inapplicable because that is not how cases are resolved in United States' courts.

The professors seek "to promote more reliable expert testimony." They offer no evidence that focusing expert discovery on the expert's opinion and having an expert stand behind his or her testimony – and the assumptions, facts, scientific or other basis for it, etc. – is less reliable if the expert is permitted to develop that testimony through discussions with counsel.

The professors seek a pure and untrammeled world of litigation (or rather decision-making), again presumably based largely on the continental inquisitorial system, in their argument (in part 2) that the "proposed amendment also risks compounding the ambiguity and confusion that currently clouds the role of testifying expert witnesses." There is no ambiguity or confusion in the real world of litigation in the U.S. An expert is hired by one side to make a presentation that favors that side. Jurors know that. If, for some reason, they did not know that, opposing counsel will make that clear (among other ways by noting how much the expert is being paid). If the case is tried to the court, the court will also know that. The expert's testimony will stand or fall, and be accepted or not, based on its content and credibility, not on the preliminary steps that led to it (including steps that leave no footprints such as oral communications that are never reduced to or reflected in a writing).

The professors insist (in part 3) that, if counsel wants to thoroughly explore and test the validity of a scientific position, he or she (or rather the client) has to retain a consulting expert. That costs more money. That often is the case today; the rule change may reduce this expense, but it surely will not increase it. Again, apart from the professors' conjecture, there is no evidence that this results in a measurable improvement in the quality of justice.

They also suggest (in part 5) – as do Mr. Kenneth Lazarus and Professor Paul Rothstein in a separate letter – that the proposed amendments run afoul of 28 U.S.C. § 2074(b)'s provision that a rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." But the current expert witness provisions in Rule 26 were adopted in 1993 through the normal Rules Enabling Act mechanisms. No one suggested at the time that this required an Act of Congress.

To the extent that courts interpreted the 1993 amendments as removing an attorney's communications with a testifying expert from work-product protection, there is no reason why a further rule amendment cannot make clear that these communications are now protected as attorney work-product. All the proposed amendment does is return the rule to its pre-1993 status, before communications

between counsel and an expert became fair game for inquiry (and made the entire process more expensive and cumbersome).

If the professors' premise was correct, the 1993 amendment itself would be invalid because it would have presumably "abolished" an evidentiary privilege. We are not aware that work-product has ever been considered a "privilege," or that an Act of Congress ever has been required to define it or its limitations. By the same token, we do not anticipate these issues being raised again at trial, because work-product objections would properly prevent inquiry there too and keep the trial focused on the issues that matter – in this case, on the substance of and support for an expert's opinion.

Should communications between counsel and experts who have not been specifically retained as such be subject to discovery?

To quote Professor Arthur Miller, the two most important words in the law are "it depends." We believe the answer to this question depends on the kind of expert testimony that is being given. If, for example, the testimony comes from someone who is essentially a fact witness – the archetype being a treating physician – then communications between counsel and that witness should be discoverable.

If the witness is more akin to a retained expert – for example, an employee of a party, such as an in-house mechanical engineer whose opinion is sought on a matter within her scientific expertise – then the rationale for maintaining traditional attorney work-product protections for communications between counsel and the witness would seem to apply.

To what extent should communications between counsel and an expert not be discoverable?

The June 9, 2008 report asks how far opposing counsel can go in exploring the facts and data "considered" by a retained expert and, specifically, whether counsel can ask the expert if he or she obtained certain facts, data or assumption from the lawyer that retained the expert.

We believe that the answer to this question is again found in the ABA Civil Discovery Standard 21(e), which provides that "[t]he [expert's' report should disclose, however, any data or [facts], including that coming from counsel, that the expert is relying on in forming his or her opinion." We do suggest that the Advisory

Committee make this clear, both in the text of the rule and in the accompanying notes.

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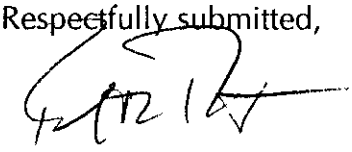
We appreciate the excellent work of the Advisory Committee on this important issue and are grateful to have the opportunity to submit these additional comments.

Respectfully submitted,



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