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08-CV-041

November 4, 2008

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Changes to Rule 26 of the FRCP

Dear Secretary:

In response to the invitation to comment on the proposed changes to Rule 26 of the FRCP, the following is submitted:

Only occasionally do I become involved in personal injury/product liability cases in the Federal Courts. The different approaches taken by various courts shows the need for the change brought about by Rule 26 (a)(2)(c). There are often times and situations where the attorney for a litigant knows and can name his or her expert as required by 26 (a)(2)(A) and yet is unable to accompany that disclosure with the expert's report. The attorneys practicing in Southwestern Ohio are, for the most part, cooperative, cordial, and professional in their approach to litigation. I can't say that a stipulation allowing for a later report will, where necessary, always be given by one's opponent. Since discovery is intended to take place with as little intervention by the Court as possible, it is my thought that some time be set forth in 26 (a)(2)(B) for the experts' reports to be submitted after the disclosure is made. One's expert may need to read various depositions, reports, witness statements and the like before submitting his or her opinion report.

Some Judges or Magistrate Judges may not modify the timing of disclosures in their Rule 16(b) scheduling order. New witnesses become known. New evidence is discovered. The ebb and flow of a significant case may not allow one's experts to render final reports at the time of witness disclosure. A change in the expert's opinion requires disclosure of that fact by the proponent and a new report and possibly another deposition can and will add significant cost to

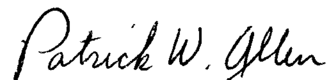
the litigation. Those costs, in a Plaintiff's personal injury case, are more often than not, advanced by Plaintiff's counsel.

I am especially pleased with the protections intended under 26 (b)(4)(B) and (c). Should this become effective in the Federal Rules, I will seek the establishment of a similar rule under our Ohio Rules of Civil Procedure. Our firm recently was required to hire an outside expert to try to retrieve electronic communications between the attorney and the expert witness at no small expense to the firm. However, as the proposed rule is written, such search may still be compelled by a court so as to satisfy an opponents contention that the (c)(i)(ii) and (iii) are being concealed by exemptions counsel or by the expert. As I see (c) and its exceptions there will be no occasions when attorney-witness communications are fully protected if made in any electronic format. Because of that Trial Court's ruling, I find myself using the telephone rather than electronic means of communications, which I feel better protects my work product.

The committee discussed the subject of in-trial questioning of one's expert regarding "other drafts" of opinions. I believe that it would be appropriate to include the protection from disclosure whether in discovery or in trial. It would preclude pre-trial briefing, side-bar conferences, possible appeals or other problems which could arise at trial. If draft opinions are not discoverable before trial, the subject of draft opinions should not be raised in trial.

I look forward to the final product on this rule and hope that other counsel has input as well. Thank you for whatever consideration is given to this letter.

Sincerely,



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