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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 NE
Washington, DC 20544

RE: Proposed Amendments to Federal Rules of Civil Procedure 26 and 56

Dear Peter:

This letter is sent in response to the request for public comments on the proposed amendments to Federal Rules of Civil Procedure 26 and 56.

Rule 26 Amendments. Enclosed you will find a copy of an article that analyzes the proposed amendments to Rule 26. I strongly favor these amendments for the reasons stated in the article.

I have been furnished the draft of a comment letter from John Leubsdorf and William Simon, who I understand to be soliciting signatures from various academics. The letter is distinctly unpersuasive. I do not have the time to devote to a lengthy analysis, but a brief reprise reflects that the arguments cannot withstand cursory scrutiny. The academics' letter fundamentally misses the point — the important issue in the search for truth is the validity of the expert's opinion, not the nuances of its provenance.

First, academics' letter maintains that the limitations on discovery into expert/counsel "interaction" will adversely affect the search for truth. It seems to ignore Proposed Fed.R.Civ.P. Rule 26(b)(4)(C)(ii) and (iii), which permit open discovery into facts and assumptions provided by counsel and the fact that the protection afforded is only work product and thus subject to being pierced on a showing of good cause. It also ignores *Daubert* — the burden placed on proffering counsel of proving the reliability of the basis for the expert's testimony, under Fed.R.Evid. 702(1). This is a particularly potent protection in the real world. Reliance on factual materials that have been provided by counsel may well preclude a finding that the expert's opinion is reliable within *Daubert* and Rule 702. *See, e.g., Sommerfield v. City of*

Chicago, 2008 U.S. Dist. LEXIS 88760 (N.D. Ill. Nov. 3, 2008) (reliance on deposition summaries prepared by counsel renders expert opinion unreliable).

Second, the academics' letter hypothesizes that "[t]he rule that makes an expert witness's communications broadly discoverable is an expression of the basic value of independence." The kindest thing one can say about this notion is that it is unburdened by exposure to reality. Expert independence is best maintained by a free exchange of ideas between lawyer and expert as to the strengths and weaknesses of the positions of all parties and their experts. That discussion is foreclosed by broad discovery because the expert will be crossed on the discussion of weaknesses, and the potentially prejudicial effect on the jury of testimony about any such discussion outweighs the benefits of complete candor with the expert.

Third, the academics opine that the fact that "experts and lawyers will respond to the likelihood of inquiry by such evasive measures as not writing things down seems more like an indication that there are indeed problems with expert testimony that require safeguards than a reason to dismantle those safeguards." That *ipse dixit* ignores the reason for the pejoratively-labeled "evasive measures." Lawyers curtail their written communications with experts to avoid creating highly distortable testimony and exhibits for their adversaries. Tellingly, it is now common for lawyers to agree to dispense with the sort of discovery the academics feel must be important for the simple reason that it is not worth the cost in discovery dollars or in potential truth distortion.

The experts insist there is some benefit to requiring both testifying and consulting experts in every case. In academia, every case is worth every conceivable cost — both in dollars (for two experts) and in potential truth distortion (resulting from limitations on the exchange of ideas with testifying experts). Even high-profile, high-stakes cases generally do not warrant the Doppelgänger approach to expert testimony. Clients have their limits.

Fourth, the academics believe that the exception permitting further inquiry upon a showing of good cause is essentially tautological because there will always be such a need given the absence of open discovery. That premise assumes its conclusion. The issue for litigants and lawyers is the merit or lack of merit of the opinion. Inquiry into the factual predicate (Rule 702(1)) or the reliability of the methodology (Rule 702(2)) or the fit of those two (Rule 702(3)) may or may not implicate counsel/expert "interaction." If it does, good cause may exist. If not, it will not. Yet current practice permits extensive discovery, requires the engagement of multiple experts and otherwise imposes enormous, pointless costs.

Fifth, the academics claim that the amendment somehow runs afoul of the Rules Enabling Act because it is effectively "modifying a privilege." This argument proves too much. If returning the state of discovery to essentially where it was prior to the enactment of the 1993 amendment of Rule 26, then the academics' argument actually proves that the current rule (which is the 1993 amendment to Rule 26) violated the Rules Enabling Act by "establishing" a privilege — something I wondered about in the mid-90s. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97 (1996). It is impossible to argue that the proposed amendment can run afoul of the Rules Enabling Act without conceding that the 1993 amendments — which created the problems now being corrected — did so first.

Consequently, for all of the reasons set forth in the attached article, I strongly support the proposed amendments to Rule 26.

Rule 56. I do not support the amendments to Rule 56. They reflect what was obviously an enormous amount of effort by the Committee, and I highly respect the Committee members, the Reporters, and the amount of thought and work that has gone into this. As a result, I take no satisfaction in finding myself seriously disagreeing with this proposal. I also concede at the outset that it reads much better than the existing text.

In my practice, statements of indisputable fact ("SIF") are expensive and pointless. An example: Enron (assuming that it had gone to summary judgment and had done so under this rule). The statement of indisputable fact would be enormous — every false disclosure, every Special Purpose Entity, etc. Each defendant would respond to each paragraph submitted by the plaintiffs, meticulously analyzing each verb, adjective, adverb and noun in every statement. Even those statements with which there is no substantive disagreement will largely be restated to make sure that the phrasing is acceptable and that nothing is being snuck by.

Two other pernicious aspects of SIFs in practice.

(1) Movants cannot trust that the other side will agree with any of them, so every paragraph has to be restated in an affidavit or declaration anyway at the time the motion is filed. If there are simultaneous motions, as is common, the court will have competing SIFs as well as competing affidavits. What is the benefit of requiring this across the country and eliminating any safe havens of sanity?

(2) Assume that the motion is made under 12(b)(6) or 12(c) and that materials outside the pleading are submitted but the proponent argues that they should be deemed incorporated by reference, and the judge disagrees. (E.g., a securities action but the documents in question are not the offending 10-K but, rather, the stock performance on the NYSE —as to which there is a split of authority concerning whether they may be considered on a 12(b)(6) or 12(c) motion). The restyled rule 12(d) provides that: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Are SIFs now required?

I accept that my view is colored by my experience, and that judges may find value in SIFs in different types of cases. Assuming that mine is the minority view and that the amendments to Rule 56 are going forward, four practical suggestions: (1) Rule 56(c)(3) needs a default; (2) Rule 56(c)(3) should be extended to the initial statements of indisputable fact, not just responses to statements; (3) it is time to retire Rule 56(h); and (4) Rule 56(f) need not be renumbered.

Acceptance/Dispute for Purposes of the Motion (56(c)(3)). What if a party says nothing about whether it is accepting or disputing a fact for all purposes as opposed to doing so only for purposes of the motion? What is the consequence? There is no default. The rule needs one, and the default should be that admissions or denials are made solely for purposes of the motion. There is no harm in limiting the admission or denial to the motion; there may be harm in extending it to the whole case. A point that a party may be willing to concede or is forced to

fight in one constellation of claims, to make one argument before the Court on summary judgment, may be prejudicial before a jury or otherwise harmful under the post-summary judgment array of claims and relevant facts.

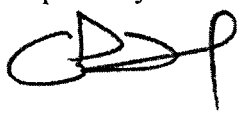
Statements of Indisputable Fact Should Also be for Purposes of the Motion Only (56(c)(3)). The movant's assertions in its SIF fact raise the same problem. Assume that the defendant moves for summary judgment on statute of limitations grounds. Its recitation of the notoriety of its misconduct is important for the motion. If the motion is lost, those statements should not become admissions for purposes of a jury trial. Lawyers will try to draft statements of indisputable fact carefully but no one is perfect. Particularly in long statements (which the Rule requires and the Note disdains), an "allegedly" may be implicit but not contained in every sentence that could be tendered before a jury.

56(h) Is Counterproductive. I agree that sanctions should be discretionary but, as rewritten, the Rule appears to contemplate that some bad faith or dilatory affidavits may be permissible. That clearly is not the intent. It is time to accept that Rule 56(h) is a relic. The area is covered by Rule 11 and multiple other sanctions powers. I would just retire it.

Unnecessary Renumbering. There is no convincing reason why 56(f) has to be renumbered 56(d). The "internal logic" argument is not terribly strong there, and it holds no appeal for our clients who pay for the extra LEXIS or Westlaw searches to pick up both old case law and new. (I am less bothered by the move of 56(c) to 56(a). I see the problem of keeping that as subdivision (c) in light of the other changes in the rule.)

Even when I take issue with it, the work product of the Rules Committees is enormously impressive.

Respectfully submitted,



Gregory P. Joseph

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PROPOSED EXPERT WITNESS RULE AMENDMENTS

Gregory P. Joseph*

The Advisory Committee on the Federal Rules of Civil Procedure has issued for public comment proposed amendments to Rules 26(a)(2) and (b)(4) governing disclosure of expert opinion. These amendments are expected to be adopted effective December 1, 2010, as amended following public comment. This article examines the proposals.

Three Principal Changes. The principal proposed changes are:

1. Communications between counsel and retained experts are generally protected from disclosure or discovery.
2. Draft expert reports are no longer discoverable.
3. Counsel must summarize in writing the facts and opinions to be attested to by experts who are not required to file expert reports.

Counsel/Expert Communications

The 1993 amendments to Rule 26(a)(2)(B) were construed as opening the door to discovery of all communications between counsel and expert relating to the subject matter of the litigation, for two reasons. First, Rule 26(a)(2)(B) mandates that the retained expert's report contain all of "the data or other information considered by the witness in forming" his or her opinion. "Other information" was interpreted to include everything communicated by counsel to expert. *See, e.g., Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006).

Second, the 1993 Advisory Committee Note observes that: "Given the obligation of disclosure, litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed." Work product protection, to the extent it previously existed, vanished.

The proposed amendments would close the door to almost all discovery between communications between counsel and retained experts. First, Rule 26(a)(2)(B)(ii) would be

amended to eliminate the phrase "data or other information" and substitute: "the **facts or data** ~~**or other information**~~ considered by the witness." The accompanying Committee Note reflects that this amendment "is intended to alter the outcome in cases that have relied on the 1993 formulation as one ground for requiring disclosure of all attorney-expert communications and draft reports." Because this is an amendment to the report requirement, by definition Rule 26(a)(2)(B)(ii) applies only to counsel's communications with experts who must file a Rule 26(a)(2)(B) report.

Second, a new Rule 26(b)(4)(C) is added to confer work product protection (which is set forth in Rule 26(b)(3)) on most communications between attorneys and retained experts:

> **(C) Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses.** Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
>
> **(i)** Relate to compensation for the expert's study or testimony;
>
> **(ii)** Identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or
>
> **(iii)** Identify assumptions that the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed.

Retained vs. Unretained Experts. Note that this provision (like the amendment to Rule 26(a)(2)(B)(ii)) applies only to experts from whom Rule 26(a)(2)(B) reports are required — retained experts or party employees who regularly provide expert testimony on behalf of their employer. New Rule 26(b)(4)(C) does not apply to communications between lawyers and witnesses who provide expert testimony but are not required to furnish a report (non-reporting

experts) because they were not "retained or specially employed to provide expert testimony" or their duties as party employees does not "regularly involve giving expert testimony."

Exceptions. With this scope limitation in mind, the only unprotected communications between attorneys and reporting experts are those relating to (i) compensation, (ii) facts or data provided by counsel and "considered" by the expert, and (iii) assumptions provided by counsel "relied upon" by the expert.

Compensation. The Committee Note clarifies that "compensation" includes potential additional work for the expert, as well as compensation for work done by assistants, associates and affiliated organizations. Presumably all other financial incentives are freely discoverable, as "[t]he objective is to permit full inquiry in so such potential sources of bias."

Facts vs. Assumptions: "Considered" vs. "Relied Upon." There is a world of difference between facts or data "considered" (subpart (i)) and assumption "relied upon" (subpart (ii)), as those quoted words have been interpreted in the jurisprudence of Rule 26(a)(2). "Considered" is the word currently used in Rule 26(a)(2)(B)(ii), and, together with "other information," it is read as requiring disclosure of all communications between attorney and expert "related to the subject matter of the litigation." *See Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (noting that the Advisory Committee in 1993 substituted "considered" for the more restrictive "relied upon" in an earlier draft of rule 26(a)(2)(B)).

Under the proposed amendment, "considered" is confined to "facts or data" provided by counsel, but does not apply to counsel-supplied "assumptions." Therefore, all facts or data communicated by counsel relating to the subject matter of the litigation must be "identif[ied]." The Committee Note stresses that "refocus of disclosure on 'facts or data' is meant to limit the disclosure requirement to material of a factual nature, as opposed to theories or mental

impressions of counsel."[1] The Committee Note also emphasizes that "this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel," and that the facts or data need only be "identif[ied]" — "further communications about the potential relevance of the facts or data are protected."

In contrast, assumptions furnished by counsel are discoverable only if they are actually relied on by the expert in forming his or her opinion.

"Regardless of the Form of the Communications." One of the textual problems with Rule 26(b)(3) is that it affords work product protection only to "documents and tangible things." Work product takes many forms that are non-documentary and intangible, including discussions. For these, litigants must rely on common law protection, derived from *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). *See* 6 MOORE'S FEDERAL PRACTICE § 26.70[2][c] (3d ed. 2008). Rule 26(b)(4)(C) explicitly covers the waterfront, extending to all forms of communication.

"The Party's Attorney." Parties often have many attorneys, including in-house counsel; outside general counsel; and counsel in other cases dealing with the same or similar subject matters. The Committee Note to Rule 26(b)(4)(C) stresses that the work product protection it recognizes "should be applied in a realistic manner," generally extending to these lawyers, each of whom is "the party's attorney," albeit not necessarily before the court.

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[1] Some of us argued years ago that "data or other information" could and should be read to the same effect because "'[d]ata' and 'information' connote subjects that are factual in nature, not ephemera like 'mental impressions, conclusions, opinions or legal theories' of the sort protected by Rule 26(b)(3)." Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 104 (1996). While some decisions agreed with that approach, the overwhelming majority rule was to the contrary.

Draft Expert Reports

The previously-discussed change to Rule 26(a)(2)(B)(ii) ("the facts or data ~~or other information~~ considered by the witness") is one of the two amendments proposed to protect draft expert reports, as reflected in the Committee Note excerpt quoted above. The second, direct approach is new Rule 26(b)(4)(B), which provides:

> **(B) Trial Preparation Protection for Draft Reports or Disclosures.** Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

Oral Drafts Covered. The concluding phrase, "regardless of the form of the draft," is designed to afford protection to all drafts, "oral, written, electronic or otherwise," and it applies to any supplementation under Rule 26(e), according to the Committee Note. The concept of an "oral" "draft" presumably encompasses conversations relating to a Rule 26(a)(2)(B) report or a 26(a)(2)(C) disclosure.

Non-Reporting Experts. Work product protection extends to the new Rule 26(a)(2)(C) disclosures, discussed below, that summarize the testimony of experts who are not obliged to file a 26(a)(2)(B) report. The concept of an oral draft is particularly significant with respect to these otherwise non-reporting witnesses. That is because Rule 26(b)(4)(C) (the protection for "communications") applies to only to experts from whom reports are required. Rule 26(b)(4)(B) thus extends some similar, if limited, work product protection to communications with non-reporting experts.

Impact on Discovery and Cross-Examination

The proposed Committee Note discusses the breadth of work product protection afforded by Rules 26(b)(4)(B) and (C):

- **Depositions.** The protection afforded by Rule 26(b)(4)(B) (draft reports) and 26(b)(4)(C) (attorney communications with retained experts) extends to depositions and "all forms of discovery."

- **No Other Limit on Exploring Foundation.** Neither Rule 26(b)(4)(B) or (C) otherwise "impede[s] discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions."

- **Effect at Trial.** While Rules 26(b)(4)(B) and (C) are discovery rules, "it is expected that the same limitations will ordinarily be honored at trial."

Rules Enabling Act Issues

Rules 26(b)(4)(B) and (C) by their terms confer work product protection, as codified in Rule 26(b)(3)(A) and (B), on draft expert reports and communications between counsel and reporting experts. This may seem odd, given that 28 U.S.C. § 2074(b) provides: "Any ... rule [of procedure or evidence] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." How, then, can a Rule of Civil Procedure affect work product protection absent an affirmative act of Congress? Of course, the same issue was posed by the 1993 amendment to Rule 26(a)(2)(B), which appeared to strip privilege and work product protection from communications between attorneys and experts.[2] This issue was never the subject of a reported decision (it does not appear that it was ever litigated).

Perhaps work product protection is not "an evidentiary privilege." Perhaps the Rules are simply reverting to the pre-1993 legal landscape. Perhaps it is simply a deferral to the common law. Perhaps this provision, too, will never be litigated.

The common law of work product protection may affect, in practice, the textual differences in scope of Rules 26(b)(4)(B) and (C). Rule 26(b)(4)(B) applies to drafts, including oral drafts, of all expert reports and disclosures, while 26(b)(4)(C) extends work product protection only to counsel's communications with reporting (not non-reporting) experts. Just because Rule 26(b)(4)(C) does not extend work product protection to all conversations with non-

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2 *Id.* at 106.

reporting experts does not necessarily mean that those conversations are unprotected. The Committee Note alludes to the possibility that these communications may be protected by "privilege or independent development of the work-product doctrine." Since the Rules cannot create, abolish, or modify an evidentiary privilege under § 2074(b), this will be left to case law development.

Privilege Implications

Rules 26(b)(4)(B) and (C) address only work product protection, but they have potential attorney-client privilege repercussions. One effect of the 1993 amendments to Rule 26(a)(2)(B) was to make waiver an unavoidable cost of putting an expert forward to testify. Because communications between counsel and expert, and draft expert reports, were subject to disclosure and discovery, no plausible expectation of confidentiality could be asserted. Therefore, no viable claim of attorney-client privilege could be asserted with respect to those communications.

The proposed amendments to Rules 26(b)(4)(B) and (C), however, reverse the expectation. It is true that, under Rules 26(b)(3)(A) and (B), an opposing party may obtain disclosure of work product on a showing of "substantial need" and an inability, "without undue hardship, [to] obtain their substantial equivalent by other means." The Committee Note that accompanies the proposed amendments contemplates that: "It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regard the expert's testimony." Certain communications between attorney and expert may again be subject to a reasonable expectation of privacy and fall within the umbra of attorney-client privilege.

Disclosures for Non-Reporting Experts

The existing report requirement of Rule 26(a)(2)(B) is confined to any witness "retained or specially employed to provide expert testimony in the case or one whose duties as the party's

employee regularly involve giving expert testimony." If anyone else is to provide expert testimony in a case — a treating physician, an employee whose duties do not regularly involve giving expert testimony, a third party witness — no report is required. Instead, under Rule 26(a)(2)(A), the proponent of the testimony simply "must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." The absence of any disclosures for non-reporting experts has lent itself to the prospect of trial by ambush.

The Advisory Committee is proposing a new Rule 26(a)(2)(C) that mandates counsel-prepared disclosures for non-reporting experts:

> **(C)** *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:
>
> > **(i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
> >
> > **(ii)** a summary of the facts and opinions to which the witness is expected to testify.

This proposal is similar in substance to the pre-1993 version of Rule 26(b)(4)(A), which permitted expert discovery primarily by means of interrogatories requiring each party "to identify each person whom the ... party expects to call as an expert witness at the trial, to state the subject matter on which the expert is expected to testify and a summary of the grounds for each opinion." It is a sensible proposal.

Timing of Disclosure and Rebuttal. Timing is a bit vexing. There is no set time for the new 26(a)(2)(C) disclosure, except "at the times and in the sequence that the court orders," under Rule 26(a)(2)(D). Until pretrial orders are amended to cover these reports — which should, but

probably will not, be immediately — these disclosures may be made at any time up to 90 days before trial (*id.*). Rebuttal reports are particularly problematic under this proposal.

Identical timing for 26(a)(2)(A) summaries and 26(a)(2)(B) reports is implicit in 26(a)(2)(D)(ii), which provides that: "if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure." But the reality is that the timing of 26(a)(2)(B) reports is governed by pretrial orders, not the 26(a)(2)(D)(ii) default. It will take a substantial period of time for pretrial orders to uniformly cover 26(a)(2)(A) summaries, which means that there will be no clear timing for those. Currently, a Rule 26(a)(2)(A) disclosure can be dropped on an opposing party any time before the pretrial order precludes it.

Under the proposed new regime, the timing of a new Rule 26(a)(2)(C) summary disclosure can become problematic — and subject to gamesmanship — because the opponent is forced to respond with expert rebuttal within 30 days. If the 26(a)(2)(C) summary is disclosed when expert reports are exchanged, there is no problem. Experts are lined up. Counsel are focused on experts. If the summary is disclosed in the middle of intense discovery or motion practice or some other inopportune time for the recipient (vacation and holidays come to mind), it may be very challenging to arrange the expert testimony necessary to respond to it within 30 days.

Explicitly, the timing of 26(a)(2)(C) summary disclosures and 26(a)(2)(B) reports should be equated. This will mean that the deposition of the non-reporting expert, on his or her summary, will take place contemporaneously with those of other experts, which is only fair since the expert testimony should be evaluated in the prism of all of the facts, after fact discovery has concluded, and in context with other expert testimony. At a minimum, the expert rebuttal to

26(a)(2)(C) summaries should be the same date that expert reports from the rebutting party are due. This, indirectly, will likely have the same effect because the disclosing party will not want to afford months of additional time to an opponent to respond/rebut.

Second Deposition. Unless the Advisory Committee otherwise addresses the issue, if a Rule 26(a)(2)(A) expert has been deposed before the expert's summary disclosure has been made under Rule 26(a)(2)(C), leave of court will be required under Rule 30(a)(2)(A)(ii) to depose the expert again on the subject matter of the summary. Leave should not be required. That would amount to needless motion practice in the routine case. The burden of showing that a second deposition is unnecessary should be on the party disclosing the summary. Better yet, summary disclosures should coincide with expert reports and obviate the issue.

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