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January 21, 2009

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Civil Procedure 26(b)(4)

Dear Mr. McCabe.

This letter is respectfully submitted on behalf of the Trustees of the Association of the Federal Bar of New Jersey (the "Association") in support of the proposed amendment to Federal Rule of Civil Procedure 26 narrowing the discoverability of communications between experts and counsel and draft expert reports. The Association is the primary association for lawyers who practice in the Federal Courts of New Jersey. Most of the Association's members have long experience practicing in the State Courts of New Jersey, in which a rule similar to the proposed amendment to Rule 26 has been in effect for more than six years. Consequently, our Association is uniquely situated to provide the Committee on Rules of Practice and Procedure with the perspective of attorneys whose expert witness discovery is governed by the proposed rule.

The current New Jersey rule developed in the wake of judicial analysis of the competing principles of protecting work product and facilitating the process of developing expert testimony, and ensuring fair cross-examination of expert witnesses at deposition and trial. Prior to 2002, New Jersey's Rule 4.10-2(d) tracked the language of Fed.R.Civ.P. 26(b)(3). In *Adler v. Shelton*, 778 A. 2d. 1181 (Law Div. 2001), the first published New Jersey State Court decision on the discoverability of draft expert reports, the Court analyzed authority from the Federal Courts and other State Courts, and, while requiring the production of the draft under New Jersey's then current rule, concluded that "a blanket rule requiring disclosure of such draft reports puts too prominent a focus on the mechanics of production of an expert's report rather than focusing on the basis of the expert's opinion." It held.

> These courts have common sense on their side. Experts familiar with the litigation process usually destroy their draft reports and the rules do not forbid this. Thus draft reports usually are available only from the unwary or careless expert or in odd circumstances like the present case.

778 A. 2d. at 1192

The following year, as a direct result of the decision in *Adler*, New Jersey revised R. 4.10-2(d)(1) to provide in relevant part:

> 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) [which enumerates the required contents of an expert's report], 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 [setting forth the standard for discovery of attorney work product and other trial preparation materials.]

The Association's officers and board members, and the overwhelming majority of the New Jersey practitioners who have commented on this issue, have reported a positive experience with the revised rule.

We believe the proposed amendment enhances the search for truth by focusing the fact finder's attention where it should be: on the substance of the expert's opinion. In so doing, it reduces collateral litigation on side issues that, both advertently and inadvertently, distract from the main issue, increase costs, and exacerbate the lack of professionalism infecting much litigation

The proposed amendments focus expert discovery on what is important, the substance of the opinion – the quality of the conclusion – rather than the preliminary process leading up to the conclusion, that is, who said what to whom

There is no reason, empirical or otherwise, to believe that searching, time consuming and expensive discovery over what an attorney said to the expert or what was said in a draft report contributes to a meaningful testing. or is useful in any material way in evaluating, the correctness of the opinion itself, that is, the theories expressed and the scientific basis therefor It is the caliber of the evidence, its substance, its reasoning, and its basis in fact and theory, that matters, not what the attorney may have said to the expert or the expert to the attorney. Indeed, there is nothing in the proposed amendment that bars inquiry into facts and data actually relied upon by the expert, whether provided by counsel or otherwise, or whether the expert considered alternative approaches, and, if so, why the expert discarded them.

To the contrary, experience teaches that it is when there is no legitimate argument to be made on the substance of the report itself, a party with the weaker position focuses its effort on side issues in an attempt to draw attention from the central issue by concentrating on a largely

irrelevant side show of who said what to whom and what language changed from draft one to draft two to draft three.

The free exchange of ideas between counsel and the expert as to the strengths and weaknesses of positions of the parties enhances the system and leads to more relevant and reliable reports. It permits the expert to fashion a thorough, relevant opinion with a solid empirical basis Interference with that collaborative process hampers the ability of the witness to explore fully with counsel what the case is about and to test different theories. As the court observed in *Adler v. Shelton*.

> "It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutinizing of the collaborative process serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to ensure that the expert's opinion has been independently derived "

778 A.2d. 1190

Professional experts – the type decried by many of the academics who oppose the rule change – know how to avoid the pitfalls of the 1993 amendment It is the non-professionals – those we are told we should look to with more frequency, those who do not testify for a living – who need guidance as to what is expected of them procedurally and who do not want to put up with what amounts to a little more than harassment.

Inquiry into collateral issues frequently takes on a life of its own literally creating satellite litigation, substantially increases the cost of litigation, makes it more cumbersome, and, thus, is contrary to the mandate of Fed. R Civ. P 1 "to secure the just, speedy and inexpensive determination of every action."

Additional costs include, but are by no means limited to, additional hours of depositions, attendant motion practice, and the need to hire two sets of experts: one with who counsel can exchange ideas freely in consultation without losing the work product protection historically attendant on such communications, and one for testimonial purposes. Such costs vastly outweigh any supposed -- and entirely theoretical -- benefit obtained by allowing broad reaching discovery into every nook and cranny of the communications between the expert and counsel, all for the purpose of exploring irrelevancies' communications that relate neither to the expert's ultimate opinion or the data or information upon which the expert relied in arriving at his or her ultimate conclusion It is hard to imagine what benefit is served by hours of additional depositions to review such irrelevant testimony, or to review and compare drafts of expert reports on a line by line basis

The additional cost and expense does nothing to further the interest of justice. Indeed, it substantially tips the balance of litigation in favor of the well-heeled litigant against the

adversary who cannot afford endless hours of depositions over irrelevant issues and the cost of two sets of experts

Several states, New Jersey in the forefront, have enacted rules that eliminate the invasion into what, before 1993, was considered attorney work product. This enlightened – perhaps reawakened – approach forces the attorneys to zero in on the substance of the report and eliminates the sideshow.

Experienced federal litigators generally support the amendment. In an effort to avoid the problems created under the present interpretations of the rules post 1993, many experienced litigators stipulate around it, agreeing that the communicative process be off limits to discovery. ABA Civil Discovery Standard 21(e) encourages such stipulations. It recognizes that experts are retained to provide assistance to a party and are entitled to have the benefit of counsel's theory – even if tentative It recognizes that experts logically come with a "zone of privacy for strategic litigation planning" which is the basis for the work product doctrine *United States v Adlman*, 68 F 3d. 1494, 1501 (2d Cir. 1995)

Those who oppose the amendment make several arguments, each of which, we suggest, is without merit

They look to the legal systems in foreign countries for comparisons that do not exist. Most of those foreign systems are not adversarial, relying upon a state appointed inquisitor to supplant much of the function of counsel, judge and jury. And, of course, none provide the extraordinary disclosure and discovery mechanisms of the United States legal system. Thus, the problems created by the 1993 amendment, which the present amendment seeks to overcome, would not be present in the foreign system.

It is suggested that expert reports somehow will become less reliable if the focus is taken off of the opinion itself and brought to bear more on the collaborative process which led to that opinion. To state the proposition demonstrates its lack of merit. How does the report become more reliable by distracting the focus from the ultimate conclusion and placing it on the process by which that conclusion was arrived?

Of course there are areas which fairly ought to be open to inquiry. Thus, there is nothing in the proposed amendment that prohibits inquiry into areas of the expert's compensation (from which any untoward bias might come). And the proposed amendment does not restrict the ability to inquire into facts or data actually relied upon by the expert – the basis of the opinion itself. Rather, it attempts to eliminate the unfortunate trend toward focusing on the irrelevant where the relevant appears unfavorable.

It is suggested that shielding the collaborative process between experts and counsel will create ambiguity or confusion about the role of the expert. But in whose mind is the confusion? The suggestion that it may confuse the fact finder is contrary to common experience. Everyone in the courtroom knows that the expert on the stand is hired by one side, and, just in case any juror

does not, the judge explains it in the jury charge. Ultimately, of course, the jury will – and should – be asked to focus on the quality of the expert's opinion and not extraneous issues such as what the attorney may have said to the expert or vice-versa The point of the adversarial system is to arrive at the truth: the quality of the opinion itself; does it hold water?

It is suggested also that the proposed amendment will contribute somehow to the decline of ethical conduct. None has been observed in New Jersey or, to our understanding, in any of the other states which have adopted rules to eviscerate the problems created by the 1993 amendments. Neither is there any suggestion that the quality of ethical conduct was improved by the 1993 amendments. To the contrary, we suggest the proposed amendment will enhance professionalism, eliminating ad hominem attacks on counsel who all too often become the focus of the discovery. Such conduct exacerbates a lack of collegiality in the practice.

Finally, the assertion that the proposed amendment may not be made without an act of Congress pursuant to 28 U S.C. §2074(b) is misdirected The proposed amendment does not modify an evidentiary privilege, the threshold for application of 28 U.S.C. §2074(b). By statute, the Supreme Court of the United States is vested with the power to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts" provided such rules do not "abridge, enlarge or modify any substantive right" 28 U S.C §2072(a) and (b).

28 U.S.C. §2074(b), however, limits the Court's rule making power, in one respect, cautioning that:

> (b) any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

Objection to the proposed amendment to Rule 26 mistakenly assumes that the amendment would "modify an evidentiary privilege." In fact, the proposed amendment addresses the work-product doctrine, not the attorney-client privilege. The work-product doctrine is not an evidentiary privilege within the meaning of 28 U S.C §2074(b), the doctrine is a federal rule of procedure, recognized from its inception as a discovery protection. At the time 28 USC §2074(b) was enacted in 1988, the evidentiary privileges were codified in the Federal Rules of Evidence. The work product doctrine was not included among these evidentiary privileges and it is to be presumed—consistent with established principles of statutory construction—that Congress understood and intended to cover only those privileges that were included in the Federal Rules of Evidence. Moreover, case law has recognized from the inception of the work-product doctrine that the doctrine was distinct from an evidentiary privilege. *Hickman v Taylor*, 329 U S 495, 509-10 & n 9 (1947) (stating that the work product protection was not a "privilege" as that term is used in the law of evidence.).

Objection to the proposed amendent on the basis that it is inconsistent with the *Erie* principles embedded in Federal Rule of Evidence 501 is similarly flawed First, as noted above, the work product doctrine is not a "privilege" and is, therefore, not within the scope of FRE 501

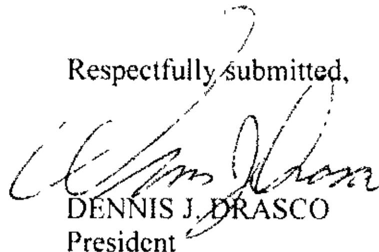
The Advisory Committee Notes to Rule 501 reveal that when the proposed rule was submitted to Congress, it enumerated the specific privileges contemplated. That list included privileges pertaining to required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote. trade secrets, secrets of state and other official information, and identity of informer. (Fed. Rules Evid. Rule 501, 28 U.S.C.) The work product doctrine was not referenced, further illustrating that work product was never contemplated to be among the privileges covered by 501

Consistent with this view, caselaw has specifically recognized that work product protections are not "privileges" and are outside the scope of FRE 501 See, e g., *Railroad Salvage of Conn, Inc v Japan Freight Consolidators (U S A) Inc*, 97 F.R.D. 37, 39-40 (E.D N Y 1983) (Fed.R.Civ P. 26, not state privilege law, controls in a dispute over the discoverability of work product in a diversity case notwithstanding the state law exception for privileges under FRE 501), *Allied Irish Banks v Bank of America, N A*. 240 F.R D 96 (S.D.N.Y. 2007).

In fact, the 1993 amendments were adopted through these same Rules Enabling Act mechanisms. To the extent those amendments are seen as having removed an evidentiary privilege, they suffer from the same infirmity as is suggested here. In any event there is no reason why a rule amendment cannot clarify that these communications are and should be protected as work product. All these proposed amendments do in that regard is to return us to where we were before 1993.

For the foregoing reasons, our Association supports the proposed amendments to Federal Rule of Civil Procedure 26(b)(4) and (a)(2)(B)(ii) in their entirety.

Respectfully submitted,



DENNIS J. DRASCO
President

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