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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: Proposed amendments to Rule 26 of the Federal Rules of Civil Procedure limiting disclosure and discovery of expert-attorney communications

Dear Committee:

As a former full-time civil litigator and a current legal academic who has devoted most of my research to effective cross-examination of (and, therefore, disclosure and discovery about) expert witnesses,¹ I write in opposition to the proposed amendments to Rule 26 [Note: I support the amendment to Rule 26(a)(2)(C) regarding disclosures concerning experts who are not required to prepare written reports. I oppose the remaining proposed amendments to Rule 26, which would expand the scope of attorney work product protection to cover attorney-expert communications and place drafts of expert reports outside the scope of disclosure and discovery, and thereby substantially limit potentially important disclosure and discovery regarding the formulation of expert testimony.]

Although I applaud the Committee's interest in reducing disclosure and discovery expenses, this means of attempting to accomplish this goal sacrifices too much of what must be the primary (though admittedly not the only) goal of the adversary system—finding the truth. At the surface, the amendments might seem to have little to do with the ability of the jury (or the court, when it acts as the fact finder) to discern the truth. To understand the full damaging effect of the proposed amendments, one must understand the critical practical links between.

- (a) the payment of expert witnesses;
- (b) the substantial control that some, but not all, retaining attorneys exercise over the databases, the analysis, and therefore even the final opinions of their expert witnesses,

¹ See ATTACKING ADVERSE EXPERTS (American Bar Association Litigation Section 2008), *That Is Not All There Is: Enhancing Daubert Exclusion by Applying "Ordinary" Witness Principles to Experts*, 84 NEB. L. REV. 675 (2006); *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV. LITIG. 355 (2003) (with Franklin D. Romines II), "Red Rover, Red Rover, Send That Expert Right Over" *Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses*, 55 SMU L. REV. 1427 (2002), *Can We Talk? Removing Counterproductive Ethical Restraints Upon Ex Parte Communication Between Attorneys and Adverse Expert Witnesses*, 76 IND. L.J. 647 (2001), *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465 (2000); "Yer Outta Here!" *A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1 (1998).

- (c) the frequency with which jurors face the task of deciding which of the two (or more) expert witnesses who have testified to opposite opinions is correct;
- (d) the jurors' need for effective cross-examination that fully exposes the experts' biases, especially the extent of the retaining attorney's influence over the expert; and
- (e) the cross-examiner's need for complete disclosure and discovery of the extent of the retaining attorney's influence over the expert.

In this letter, I will outline the links between these features of the civil justice system. For a more detailed explanation, please see Stephen D. Easton, *ATTACKING ADVERSE EXPERTS* (ABA Litigation Section 2008), especially chapters 4 and 5. For a more expansive outline of my views concerning the importance of discovery regarding drafts of expert witness reports, please see Stephen D. Easton & Franklin D. Romines II, *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV LITIG 355 (2003).

Payment of Expert Witnesses

In my Evidence classes, I usually engage in an exchange something like the following:

Q (from instructor). What do we call it when a lawyer pays thousands of dollars to a fact witness?

A (from a student). A bribe.

Q: Is it allowed?

A: No. It is a crime.

Q: What do we call it when a lawyer pays thousands of dollars to an expert witness?

A: Expert witness fees.

Q: Is it allowed?

A: Sure. Everybody does it.

My intent in initiating this conversation is to get the students to think about why we outlaw payments (beyond travel costs, meals, and miniscule daily witness fees) to fact witnesses. The obvious answer is that we are concerned that the payment of thousands of dollars might have an effect on the witness's testimony.

If this is true when the witness is a fact witness, it is also true when the witness is an expert. Payments to experts are tolerated by the legal system, but we should remember why we tolerate them. We do not allow them because payments lead to more independent, and therefore more correct, testimony. Instead, we tolerate them in recognition of the reality that jurors often need expert testimony to help them assess complicated scientific and other technical issues, and many experts are not willing to provide that assistance without being compensated for doing so.

Expert witness fees, then, are a necessary evil. They are "necessary" as part of the American common law system that expects most, if not all, testimony to be presented by the parties. Parties usually cannot force an expert to analyze the underlying facts and form opinions, so they must pay them to do so. Expert witness fees are "evil" because payments to any witness, whether she is a "fact witness" who will present ordinary perception-based testimony or an "expert witness" who is allowed to present testimony beyond

her perceptions, can color the testimony that is ultimately given. What we readily recognize in the context of fact testimony does not disappear when the subject is expert testimony.

There is an important difference, of course. Payments beyond minimal reimbursement for expenses and daily witness fees are illegal in most, if not all, American jurisdictions, while expert witness fees are permitted (subject to some restrictions). Also, we hope that experts will not betray their science by testifying falsely in exchange for fees. However, we should also hope that fact witnesses will not betray their oaths by testifying falsely. Furthermore, blatantly “false” testimony is usually not the problem. The real concern, with regard to most witnesses, is that the prospect of financial gain from testimony might shade that testimony to favor the side making the payments.

Retaining Attorney Control over Expert Witnesses

Free market labor economies are based upon the implicit assumption that the persons being paid will perform services in the way the ones paying them—their employers—desire. This is a reality that should be called to mind in evaluating disclosure and discovery rules regarding expert witnesses. In the context of retained expert witnesses, the expert’s employer is the attorney who retained her. Like any other employee or independent contractor, the expert will continue to earn compensation only as long as she performs in a way that is to the satisfaction of her boss.

While some will view this as an overly blunt analysis of the relationship between a retaining attorney and an expert witness, it is reality. An expert witness who reaches a conclusion contrary to the one needed by the attorney who retains her will soon find herself fired from that case. Fortunately, this does occur—i.e., sometimes expert witnesses reach opinions inconsistent with those desired by the attorneys who retained them. When this occurs, the retaining attorney often will indicate that the expert’s services are no longer needed, at least in that case (and perhaps in future cases), and the expert will not earn further fees from that case.

Firing the expert is not the attorney’s only way to control her. Instead, she can take several less drastic steps to influence the expert’s final opinion. One of the most important comes from her ability to control the flow of factual information to the expert. Although the language of Rule 703 stating that an expert can rely upon information “made known to the expert” in forming her opinions sounds innocuous, it masks the realities of most expert-attorney relationships. In most instances, the information relied upon by the expert is “made known to” her by the attorney who retained her. The retaining attorney decides which data to provide to the expert. Some retaining attorneys provide all reasonably available information to their experts, but others pick and choose the information to forward in an attempt to influence the expert’s final opinion. While one might suggest that an expert could supplement the information provided by the retaining attorney by conducting her own research, this option is neither that simple nor that common. The expert will only be paid for the work the retaining attorney approves, so a wise expert will acquire the retaining attorney’s advance approval before conducting her own research.

This discussion should not lead to the common, but incorrect, conclusion that all attorneys exercise the same type and extent of control over their witnesses. This is not the case. Instead, some attorneys provide explicit instructions to their experts about the opinions they need to present at trial and provide only information in support of those opinions, while others provide all reasonably available information to their

experts and allow them to reach their opinions independently—or, at least as independently as is possible under the typical system for expert compensation.

Because the attorney is both the primary source of information for the expert and an employer who controls her work, the civil justice system should provide for even more disclosure and discovery regarding experts than fact witnesses. Fact witnesses can testify only to their perceptions and conclusions from those perceptions, see Rules 602 and 701 of the Federal Rules of Evidence, but experts can testify to opinions based upon information outside of their own observations, see Rule 703, including (and in practice often almost exclusively) information provided by the attorneys who retained them. A fact witness's perceptions can be challenged by evidence that directly contradicts those perceptions. The civil justice system provides the opposing attorney, who will cross-examine a fact witness, with full information about these perceptions, via the mechanism of a deposition in which the future cross-examiner can fully explore those perceptions and problems associated with them.

An expert's opinions can be challenged effectively only if the challenger (the cross-examiner) is given full information about the process through which those opinions were formed, including the retaining attorney's influence in the process. Indeed, this is presumably the reason the Advisory Committee created the expert report requirement as a means to provide some information about the formation of expert testimony. However, because the Advisory Committee explicitly approved of efforts by the retaining attorney to "provid[e] assistance" to the expert in drafting of the report, Advisory Committee Note concerning 1993 amendment to Rule 26(a)(2), the expert report will often provide the least possible acceptable amount of information about the formulation of expert testimony. Only through follow-up discovery about the formulation of that testimony can the cross-examiner hope to acquire potentially damaging information about the formulation of the expert's opinions.

If adopted, the proposed amendments will eliminate this source of information, with respect to one of the most important aspects of the formulation of expert testimony—the retaining attorney's influence on the expert. By foreclosing the discovery of information about the attorney's editing of "the expert's" report, the proposed amendments would give the attorney *cart blanche* to massively rewrite—or even write *ab initio*—the expert's report and thereby influence her final opinion, free of any concern that opposing counsel might expose this influence to the jurors. This is a major step in the wrong direction. It would be exacerbated by the proposed amendments' creation of a new work product privilege for attorney-expert communications, which will provide even more opportunities for retaining attorneys to influence their experts' testimony without fear of their influence being revealed to the jurors.

The Jurors' Task in Evaluating Expert Testimony

Due in part to the potential to earn substantial expert witness fees, disputes between expert witnesses are a common feature of modern litigation. Indeed, many modern civil trials feature testimony by the plaintiff's expert to an opinion of "X" and testimony by the defendant's expert to an opinion of "the opposite of X." For example, a diversity of citizenship suit arising from a head on accident on a two line highway might feature a plaintiff's accident reconstruction expert saying that the point of impact (i.e., the place where the two cars first collided) was on the plaintiff's side of the road and a defense accident reconstruction expert saying that the point of impact was on the defendant's side of the road.

This is not an unusual situation, even in the post-*Daubert*² world. While *Daubert* and the resultant amendment to Rule 702 of the Federal Rules of Evidence have caused district courts to more seriously consider motions to exclude faulty expert testimony, many experts still testify to incorrect opinions. Indeed, if a question is framed precisely enough to allow for only one correct answer, any time two experts testify to opposite answers, one of them must be wrong. It is not physically possible for the point of impact to be on the plaintiff's side of the road and the defendant's side of the road.

To whom do we turn when the plaintiff's expert and the defense expert testify to diametrically opposed opinions? To the jury. We ask jurors to determine which expert is right and which is wrong. This is a daunting task, because both experts will be impressively qualified and both will, if the retaining attorneys chose them carefully, be effective communicators. If we are going to ask jurors to decide which of two impressively credentialed, well-spoken experts is wrong, we should give them all relevant information that will help them make that decision.

The Jurors' Need for Effective Cross-Examination

How do the jurors get the information they need to make this critical decision? One important source is cross-examination of the experts. One critical aspect of that cross is the identification of the extent to which the two attorneys exerted their potential influence over the experts. If one, but only one, attorney made clear to her expert which opinion she should reach and controlled the flow of information to her to facilitate her reaching of that opinion, that attorney should suffer the risk that the jurors will discount that opinion precisely because of her excessive influence.

The proposed amendments to Rule 26 will hide that influence from the jurors, because they will allow attorneys to communicate freely with their experts with full work product protection, with the limited exceptions outlined in proposed Rule 26(b)(4)(C). As a practical matter, the only place the jurors will receive information about an attorney's shaping of her expert's testimony is cross. Cross is where and how jurors receive information about the biases of a witness, including a retaining attorney's influence on a witness via payments and attempts to shape her testimony. The law of evidence favors bias over other forms of impeachment (especially Rule 608(b) review of prior dishonest acts, which are considered collateral matters that cannot be proven by extrinsic evidence, and Rule 608(a) evidence of dishonest character, which must come in the form of reputation or opinion when offered in direct examination). If cross does not disclose this information, the jurors will, in the vast majority of cases, never obtain it, even though evidence law appropriately favors bias impeachment.

The Cross-Examiner's Need for Full Disclosure and Discovery Regarding Attorney-Expert Communications

There is a major problem with the jurors' dependence upon cross-examination as the source of bias information, including information about the extent of an attorney's influence on an expert witness. As a practical matter, jurors will receive information about a retaining attorney's influence on her expert witness during cross only if the cross-examining attorney receives it in advance of trial via disclosure or discovery.

This reality is based not just upon the laws of evidence or procedure, but also upon an almost universally known principle of cross-examination. If you ask an experienced trial attorney (or even someone who has

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)

never tried a case) to state one tactical rule of cross-examination, you would almost always receive this response: “Never ask a question on cross-examination when you do not know the answer to that question” In Professor Irving Younger’s famous Ten Commandments of Cross-Examination, this is the Fourth Commandment—and almost certainly the best known See Stephen D. Easton, *ATTACKING ADVERSE EXPERTS* 603 (ABA Litigation Section 2008) .

This rule is particularly well-known and widely followed among attorneys trying civil cases, due to the extensive discovery and disclosure in civil cases While a prosecutor or a defense attorney in a criminal case might occasionally be forced to ask a cross-examination question with an unknown answer, due to the relative (compared to civil cases) paucity of discovery in criminal litigation, civil attorneys are very reluctant to do so Therefore, if the proposed amendments are adopted, a civil attorney conducting a cross-examination would almost never ask an expert about the extent to which a retaining attorney influenced her opinion, because the cross-examiner would not know the answer to that question.

Actually, the proposed amendments will go even further Under the current system allowing discovery (and arguably mandating disclosure) of attorney-expert communications, an attorney is allowed to use discovery to determine, at least to some extent, the influence of the retaining attorney over the expert. Even an attorney who has not used discovery in this fashion is allowed, under the current version of Rule 26, to ask an expert about the extent of the retaining attorney’s influence during cross, even though most consider it unwise. Under the amended Rule 26, some might consider it improper for an attorney to even ask the expert about the extent of this influence. If this influence is “work product,” as the amended rules would provide, some judges might not allow a cross-examining attorney to even ask about the extent of a retaining attorney’s influence Arguably, the proposed amendment would make this inquiry not only unwise, but also improper

Therefore, the proposed amendments will give the retaining attorney the opportunity to exert substantial influence over the expert witness, perhaps by going so far as to tell the expert the exact words to write into his expert report, see *Occulto v. Adamar of N J , Inc* , 125 F R D 611 (D N.J 1989) (noting that an attorney wrote the entirety of an expert’s report and asked the expert to have it retyped on the expert’s office letterhead) and other cases cited at Stephen D. Easton, *ATTACKING ADVERSE EXPERTS* 120-21 (ABA Litigation Section 2008), and to use on the stand, without taking any significant risk that the jurors would ever hear about this heavy handed approach By placing drafts of expert witness reports outside the scope of discovery and disclosure, the proposed amendments will allow attorneys to influence their expert’s reports and, therefore, their opinions (which must be disclosed in the reports and therefore can be influenced via an attorney’s “suggested” edits to the reports) with no fear that the jurors will ever know about their heavy handedness in influencing the testimony of their experts In addition, the proposed amendments’ newly created attorney-expert communications work product doctrine would give a heavy handed retaining attorney even more cover to hide her influence on the development of her expert’s testimony

After these amendments, an attorney who drafted her expert’s report (and, therefore, crafted her opinion) would not suffer in comparison to an opposing attorney who took the approach the system should promote—giving the expert all reasonably available relevant information and letting her independently analyze that information and reach a scientifically (or otherwise) valid conclusion Any step that discourages an approach that is more likely to lead to valid expert analysis and, therefore, to the finding of

the truth by the jury and instead encourages an attorney to play the part of a ventriloquist putting words into the expert's mouth is an unwise step in the wrong direction

Other Considerations

Although the concerns that seem to have driven the proposed amendments to Rule 26 are not without validity, they do not, in my opinion, justify this substantial step toward allowing attorneys to create expert testimony with impunity. In addition, concerns other than those discussed above weigh against the adoption of the proposed amendments.

Cost-Savings Should Not Trump the Search for the Truth From the perspective of an outsider to the Committee's deliberations, it appears that concerns over the costs of disclosure and discovery are the primary driving force behind the proposed amendments. If this is the case, I respect and applaud the interest of the Committee in attempting to keep costs as low as possible, if this can be accomplished without endangering the goals of the system other than efficiency. However, I respectfully disagree about the relative importance of efficiency as opposed to more fundamental goals, especially the discovery of the truth, and about the extent, if any, to which the amendments will result in any significant cost savings.

First, I believe that reducing the cost of disclosure and discovery cannot be a systemic goal that trumps all other goals. If cost-savings trumped all other concerns, Rule 26 and all of the other disclosure and discovery rules should simply be eliminated. All disclosure and discovery requires the parties to expend time and financial resources. Nonetheless, we tolerate those expenditures of time and financial resources because we believe disclosure and discovery helps the civil justice system find the truth.

Furthermore, there is a considerable risk of overestimating the cost savings from these amendments. The amendments do not, of course, take the drastic step of eliminating all disclosure and discovery, or even all disclosure and discovery about the communications between retaining attorneys and their experts. Instead, they simply eliminate disclosure and discovery of some attorney-expert communications and, therefore, some of the influence of the retaining attorney on her expert. The minimal savings from so small a portion of the overall disclosure and discovery universe do not justify eliminating so important a portion of that disclosure and discovery—i.e., full disclosure and discovery of the retaining attorney's influence over her expert.

Indeed, in some cases, the reduced disclosure and discovery costs will be reduced, matched, or even exceeded by the costs of disputes over the extent to which work product precludes discovery of the retaining attorney's influence over the expert. As discussed more fully below, the proposed new work product rule would not be absolute. Instead, there still will be some situations in which an attorney is entitled to learn a bit about the extent to which her opponent influenced her expert via disclosure and to explore the extent of this influence via discovery. Discovery fights, with resultant combative phone calls, e-mails, letters, and other communications between adversaries, drafting of motions to compel and related briefs, and hearings, are often more costly than underlying disclosure and discovery.

If cost savings are the goal, the key is a clear rule, because clear rules provide little room for disclosure and discovery fights. The clear rule that provides the needed disclosure and discovery about the retaining attorney's influence over her expert is easy to articulate and, for the most part, followed by courts under the current version of Rule 26. A party can pursue discovery (including interrogatories, requests for

admission, and questions at expert depositions) regarding an attorney's communications with her expert, including drafts of expert reports that are forwarded by the expert to the retaining attorney and vice versa. As the Committee notes at page 8 of its report of the proposed amendments, "many courts read the [current rule] to call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports." In addition, an attorney who forwards a document to her expert, even one protected by the attorney work product doctrine before it was forwarded to the expert, must disclose that document as an item "considered" by the expert.³

It is correct, as the Committee notes at page 8 of its report of the proposed amendments, that the current version of Rule 26 favors those parties who can afford to hire both a consulting expert and a testifying expert, because an attorney usually can consult with a consulting expert without engaging in discoverable communications. However, the proposed system will still favor those parties with this advantage, because communications between an attorney and a consulting expert will still be more protected than communications between an attorney and a testifying expert.

Attorney Desire for Secrecy In support of the proposed amendments, the Committee points to the statements of New Jersey lawyers favoring a system that allows them to communicate with their experts about drafts of their reports with reduced risk that those communications will be discoverable. See Report to the Standing Committee at 4. It is not surprising that attorneys favor secrecy. As any news reporter will confirm, those in positions of authority almost always prefer secrecy to full disclosure, because secrecy allows and therefore promotes activities that those persons might not engage in if they knew they would become public. In other words, secrecy gives one more power—specifically, in this instance, the power to be direct in one's instructions to an expert witness about what the expert's analysis and conclusions should be. Human beings naturally prefer systems that give them more power, so it is understandable that many attorneys would indicate a preference for such a system.

Indeed, some civil litigation operates under an agreement, often implied or even tacit, between opposing counsel to not delve too deeply into the retaining attorneys' influence over experts. As a veteran of a fair number of civil cases, I am well aware of the "if you don't ask too much about what I did to influence my

³ The 1993 Advisory Committee Notes recognized that the requirement of an expert report that disclosed data and other information "considered by" the expert would substantially expand the pre-1993 expert interrogatory answers that merely required reporting of data relied upon by the expert. The Notes stated, "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Curiously, the Report to the Standing Committee suggests that "[t]ime has obscured the intended meaning of these words." *Id.* at 3. The intended meaning is quite clear—once an attorney forwards an item (or a thought) previously protected by the work product doctrine or some other doctrine like the attorney-client privilege to an expert who considers that data in forming her opinions, the work product or other protection is waived. The vast majority of federal courts that have reached this issue have ruled that an attorney who shares her work product with a testifying expert waives the protection of the work product doctrine. See Stephen D. Easton, *ATTACKING ADVERSE EXPERTS* 132-36 (ABA Litigation Section 2008). Thus, the current rule is clear. If an attorney does not want her opponent to learn about that attorney's work product, that attorney should not share it with her testifying expert.

expert, I will not ask too much about what you did to influence your expert” informal (and usually unspoken) agreement. While this system might be convenient to the attorneys, it is not a system that enhances the search for the truth, because it (like the system that will be mandatory under the proposed amendments) allows attorneys to exert substantial influence over experts in the comfort of secrecy.

As one who has spent much of the last decade advocating for more, not less, disclosure and discovery regarding the potentially insidious relationship between retaining attorneys and hired experts, I realize that many would respond to my comments here by saying that they somehow suggest that I do not believe in the adversary system. Nothing could be further from the truth. I will plead guilty to not believing that the best systemic response to testimony that is purchased at high cost and controlled in secret by the attorney doing the purchasing is an adverse expert’s testimony that is also purchased at high cost and controlled in secret by the attorney doing the purchasing. Instead, the best response to purchased, rigidly controlled testimony is a system that rewards attorneys who do not exercise that rigid control, by exposing the control of attorneys who do. Stated another way, the best response to the rather obvious problems presented by the reality of substantial expert witness fees controlled by retaining attorneys is the most fundamental of features of our adversary system—effective cross-examination. To be effective in advising the jurors of the full extent of the retaining attorney’s control over the expert, though, that cross-examination must have the benefit of disclosure and discovery that reveals, not hides, the extent of the retaining attorney’s influence.

The Myth of Partial Work Product Protection The proposed amendments include another inherent problem—expansion of the work product doctrine. The expansion is unnecessary, because the attorney work product doctrine should not protect attorney work product that is shared with a witness, especially one who is allowed to rely upon such communications in forming her opinions. As long as the attorney does not share her thoughts, writings, etc., with anyone else, they should be protected by the work product doctrine. Once she communicates those thoughts, writings, etc., with a witness who is allowed to base her opinion upon them under Rule 703 of the Federal Rules of Evidence, including a communication via the mechanism of writing or editing “the expert’s” report, the opposing side should be alerted to this attempt to influence testimony. Again, a simple rule is best, and the federal courts have almost, though admittedly not quite, universally adopted a simple rule: If an attorney shares work product with a testifying expert, she waives work product protection.⁴ This rule has the usual advantage of simplicity. Attorneys in federal civil cases know the consequences of sharing work product with an expert, so they can decide whether doing so is in their client’s best interests.

As noted in the Committee’s report at 12, the proposed amendments expand work product protection to most communications between attorneys and experts, with three listed exceptions. In addition to the substantial reduction in the civil justice system’s effectiveness in finding the truth inherent in allowing a retaining attorney to influence expert testimony in private discussed elsewhere in these comments, there are problems directly associated with expanding work product protection.

First, any alteration of the current well defined and understood rule into a less settled and less defined rule will lead, almost inevitably, to disputes about the scope of the new rule. For example, when does an attorney’s suggestion about the possible existence of evidence about a particular disputed fact become a

⁴ See *supra* footnote 3

discussion of “facts or data” the expert considered, under proposed Rule 26(b)(4)(C)(ii)? Disputes about the line between the attorney-expert communications the new rule will unwisely protect from discovery via its expansion of the work product doctrine and those communications that are within the three exceptions and are, therefore, not covered will, almost inevitably, lead to litigation (in the form of motions to compel discovery and motions to exclude expert testimony for failure to adequately disclose).

As noted above, those disclosure and discovery battles will consume the very time and financial resources the amendments are presumably designed to save. Under the current rule, which allows full exploration of communications between a retaining attorney and an expert, these fights are unnecessary. An attorney who attempts to improperly claim work product protection for her communications with her experts runs the substantial risk of sanctions under Rules 26(g) and 37.

Furthermore, any movement from a defined rule to a less defined one will mean that attorneys will be less certain of the consequences of their action, and therefore less able to make firm decisions about what is in their clients’ best interests. Unfortunately, when the less defined rule is an expansion of work product secrecy, many attorneys will assume (often, but not always, correctly) that they can influence their experts in private, so more and more communications will be considered, by attorneys engaging in them, to be secret. The drafters of the new amendment seem to appreciate the potentially dangerous scope of any expansion of work product secrecy, because the amendments try to cabin work product claims by listing three exceptions under proposed Rule 26(b)(4)(C).

In reality, many work product claims are themselves secretly made by attorneys, when they simply choose to not reveal certain information in disclosures or discovery responses, but never indicate that they are relying on work product to refrain from disclosure. Thus, the particular danger of an expansion of work product protection is that attorneys will try to move all of the activity they wish to protect from disclosure under the umbrella of the new work product secrecy. Because their opponents are often not even aware of these efforts or of related, but unspoken, work product claims, this pernicious expansion of secrecy is never reviewed by courts.

It is easy to see how this will occur under the proposed amendments to Rule 26. First, a retaining attorney who wishes to exert substantial influence over her expert, but hide that influence from her opponent and, therefore, from the jury, will put many of her instructions to her expert in the form of ghost writing her expert’s report or substantially editing drafts of that report that exchange hands between her and the expert. Under proposed Rule 26(b)(4)(B), which unwisely hides drafts of expert reports from discovery, a heavy handed attorney is given free rein to use this means to influence “the expert’s” analysis via “the expert’s” report, without fear of her heavy handedness being discovered. [Under the current rule, an attorney who was this heavy handed would run a substantial risk of having the jury learn that the report and its contents, supposedly the work of the expert, were actually created by the attorney, because opposing counsel can push to receive drafts that exchanged hands between the heavy handed attorney and the expert and, at trial, make the jury aware of the true author of the report.]

Just in case the placement of expert report drafts outside the scope of disclosure and discovery did not give the heavy handed retaining attorney enough opportunities to influence her expert’s report, the proposed new version of Rule 26(b)(4)(C) would go even further. Under the proposed rule, all communications between the retaining attorney and the expert would be protected from the work product doctrine (and,

therefore, almost always outside the scope of discovery), except those in three areas. As the committee notes at page 12 of the report of the amendments, the intent is to “generally” place attorney-expert communications outside the scope of discovery. The heavy handed attorney who wishes to avoid having her heavy handedness revealed to the jury will do her best to avoid the topics in the three excepted categories (communications about the expert’s compensation, about facts or data considered by the expert, or about assumptions provided by the attorney and relied upon by the expert)

Because the line between what is protected by the newly expanded work product doctrine and what is not will not always be clear, there is even more room for the heavy handed attorney than appears at first blush. That attorney will, in any instance where there is even a glimpse of an argument that the new general attorney-expert work product rule, rather than one of the three exceptions, applies, conclude that the general rule does indeed apply. The heavy handed attorney will usually not even have to disclose that she has made this determination, because the new rule will allow her to make these determinations in secret, without ever requiring her to communicate them to her opponent. Thus, opposing counsel will often never even learn that the heavy handed attorney has, at least arguably, crossed the line into discoverable communications with her expert.

Thus, the new rules will give heavy handed attorneys (i.e., those who actively and extensively influence the development of their expert’s conclusions by communicating via report drafts and other protected communications) substantial potential advantages over their opponents who provide all reasonably obtainable relevant information to their experts and allow them to independently reach their own conclusions. Perversely, and certainly unintentionally, it will also give heavy handed attorneys even further advantages over their colleagues who more reasonably interpret the extent of the new work product protection, by exposing the communications of those attorneys who reasonably interpret the scope of the new work product protection while protecting those who unreasonably interpret those protections. Expanding the scope of work product protection while simultaneously trying to cabin it with exceptions carries this inherent risk.

In the end, then, the proposed amendments will work to the advantage of heavy handed attorneys who will unreasonably interpret the scope of the new work product rule, and to the disadvantage of attorneys who want independent expert analysis and reasonably interpret the rules. This is a step in the wrong direction that will lead to more problematic expert testimony.

Expert Witnesses Are (Usually) Not Clients In one aspect of an attorney’s work, we value secrecy above almost any other concerns. That circumstance, uniquely valued by our tradition, is the attorney’s communication with her client. With relatively rare exceptions (and, of course, subject to waiver), an attorney and a client are allowed to communicate in secret, because we believe such communications are integral to the ability of the attorney to adequately represent the client.

Unfortunately, the proposed amendments unjustifiably give similar protection to an attorney’s communications with her experts. Perhaps this stems from a common, but incorrect, categorization of expert witnesses. To some, an expert seems “like” a client of the attorney. Except in unusual circumstances, though, the expert is not the attorney’s client. Indeed, the employment relationship usually runs in the opposite direction—the attorney (or the attorney’s client, but still effectively the attorney) is the client of the expert. The expert works for the attorney. The attorney does not work for the expert.

This is an important distinction. In the attorney-client relationship, fees flow from the client to the attorney. In the attorney-expert relationship, fees flow from the attorney to the expert [Technically, fees flow from the attorney's client to the expert, but the attorney controls the flow of those fees]

We allow clients to communicate with their experts in private because we believe this is the only way they can effectively obtain representation. There is no similar concern regarding the attorney's "need" for expert testimony. Expert witnesses, after all, take the same oath to tell the truth as other witnesses. While a client does have the right to an attorney who will do her best, within ethical restrictions, to represent her interests, no attorney has a "right" to certain expert testimony. To take the example discussed above, if the point of impact was on the plaintiff's side of the road, the defense attorney and the defendant she represents do not have a "right" to present expert testimony that the point of impact was on the defendant's side of the road. The defendant does have a right to an attorney who will represent her interests, to be sure, but not to call an expert witness who will testify in support of her incorrect claim that the crash occurred on her side of the road, if the facts and the science do not support that conclusion.

The realities of modern litigation, particularly the imprecision of physical and other evidence regarding the facts and the potential flow of fees to an expert, might result in the defense attorney finding an expert who will testify that the crash occurred on the defendant's side of the road, even if it actually occurred on the plaintiff's half of the road. When that occurs, the jury needs all the information reasonably available about the defense attorney's financially based influence upon that expert, to help it determine whether that influence led the expert to incorrect testimony.

The New Oath-Helpers The modern system of party financed experts is not as different as we would like to think from the long abandoned oath-helper litigation of the early common law. Like the oath-helpers of old, modern experts are called by advocates who expect them to support their cases. In the modern system, the loyalty of these experts is purchased at the cost of thousands of dollars of expert witness fees. While this system of acquisition of expert testimony does not necessarily result in incorrect testimony (after all, except in the rare case of a crash at exactly the mid-line of the road, either the plaintiff's expert saying the crash was on the plaintiff's half of the road or the defense expert saying the crash was on the defendant's half of the road is correct), we should be concerned about a system that depends so heavily upon payments to key witnesses.

Sometime in the future, legal historians might look back upon our current system with the curiosity and disdain that we currently reserve for oath-helper litigation. If the proposed amendments are adopted, it is not difficult to imagine the professor/student exchange in a legal history class sometime in the future.

Student: You mean they let the parties pay these "expert witnesses" thousands of dollars?

Legal History Professor: They did. And that was a lot of money back in those days.

Student: And the attorneys controlled those payments?

Professor: Yes. The attorneys decided which experts to hire. They decided which information to send them. And they had the ability to fire the experts at any point, so the experts had a built in incentive to say what the attorneys wanted them to say.

Student: Wow. Well, at least they made sure the jurors knew about the extent of the attorneys' influence, right?

Professor: For a while, they did. But in about 2010, they decided to let the attorneys control the experts in private, under a new attorney-expert communications work product doctrine, as long as

they either used drafts of expert reports to communicate or avoided three subjects in their communications, or at least convinced themselves they had done so

Student: Seriously? They let a party pay key witnesses lots of money, and let attorneys control the flow of that money? Then they hid that control from the jurors, the very people who were asked to evaluate the expert testimony that resulted from all that influence? What were they thinking?

Professor: As near as we can tell, they did it because the attorneys liked it that way .

Student: I would guess so. I might have liked that, too

Professor: . . . and they thought it would be cheaper. But it did not really turn out to be any cheaper, because they fought about different things, including the line point at which attorney-expert communications could be discovered under the three exceptions to the attorney-expert communications work product rule.

While the foregoing is an attempt to be a bit light hearted about a very serious topic, it does reflect the danger of the step proposed in these amendments. Because of the influence of money and retaining attorneys on adverse experts, we should expose that influence to disclosure and discovery and, thereby, to the jury via cross-examination.

Despite all of my concern about the influence of financial pressure and retaining attorneys upon experts, I believe expert witnesses are helpful in many trials . Indeed, I believe expert testimony is a necessary component of much modern litigation. Often the disputes the jurors are asked to resolve turn on complicated, highly technical aspects of science or other specialized knowledge. Jurors need expert testimony to resolve those disputes. I have proudly called many an expert to the stand, because I believe those experts have helped jurors reach the correct decisions about science and other specialized knowledge. Indeed, because I am a strong advocate of the jury system, I am a strong advocate of expert testimony . If we want the jury trial to play its traditional and, in my view, vital role in dispute resolution, including resolution of disputes about highly technical issues, we need to provide jurors with expert testimony. I write not as a critic of the adversary system, but as one of its biggest fans. Because I believe in jury trials, I am very concerned about the damage the proposed amendments will do to the jury trial system.

Unlike many academics who call for the replacement of party-financed expert witnesses with court experts, I do not believe this would be beneficial . Our adversary system relies upon the parties to present testimony, not the courts . As a big believer in the adversary system, I believe we need to allow parties to present, and therefore to finance, expert testimony. However, as a big believer in the adversary system, I also believe that we need to empower a critical aspect of that system—cross-examination . To expose the influence of retaining attorneys on experts, we need disclosure and discovery about that influence.

As a trial attorney, I am not immune to the temptation to exert too much influence over expert witnesses. If the system is designed to be a search for the truth, it is helpful for me to be concerned about the possibility that my influence on an expert will be communicated to the jury . If I realize that my letter to an expert saying “just sign the expert report that I wrote for you” might become a trial exhibit that will be shown to the jury, I am far less likely to write that letter . A system that exposes the influence of retaining attorneys on experts, including my influence on the experts I retain, will lead to less attorney influence and, therefore, to more of the kind of independent expert analysis that will help jurors find the truth

Bottom Line Recommendation I urge the committee to refrain from adopting the proposed amendments to Rule 26, except the amendment to Rule 26(a)(2)(C). I strongly disagree with the Committee's claim, at page 11 of its report of the proposed amendments, that proposed "Rule 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions." In reality, the retaining attorney has substantial potential influence on the "development" of expert opinions, because she controls the flow of expert witness fees and information and can, therefore, direct the expert's analysis. The proposed amendments to Rule 26 provide a means for the attorney to exercise this influence without having to disclose it, or even to respond to discovery requests about it.

To put it plainly, as the Committee notes at page 8 of its report of the proposed amendments, "many courts read the [current rule] to call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports." The proposed amendments would provide for substantially less disclosure and discovery regarding attorney-expert communications, by placing drafts of expert reports, as well as many other attorney-expert communications (with three exceptions) outside the scope of disclosure and discovery. This is a change in the law, and it is a change that will substantially reduce the amount of disclosure and discovery regarding the retaining attorney's influence on the "development" of expert testimony. While I do not believe this is a wise change, I recognize that the Committee is not wasting its time considering a meaningless step. If the change is warranted, so be it. [I disagree, but I recognize that reasonable minds can differ.] But the Committee should not suggest that its reduction of the scope of disclosure and discovery about the attorney's influence on the development of expert testimony is a nullity.

Except for changes that would increase, rather than decrease, the extent of disclosure and discovery regarding attorney-expert communications, as I have suggested in the past, see Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 544-49, 610-14 (2000), no changes regarding this subject are needed at this time.

Conclusion

At least for the foreseeable future, the system will allow—indeed, encourage—attorneys to employ expert witnesses, pay them considerable fees, and exercise some (or extensive) control over them. In the context of fact witnesses, we abhor such actions. In the case of experts, we should at least be concerned enough about them to require full disclosure and discovery, to bring the disinfecting power of sunlight to attorney-expert communications and to expose the attorneys who go too far in creating expert testimony.

Thank you for your consideration of my views. Please allow me to close by expressing my appreciation for the Committee's hard work in continuing to adjust the rules to reflect modern practice. Although I am very concerned about the possible adoption of the proposed amendments discussed here, I am grateful for the Committee's efforts to improve the civil justice system.

Sincerely,

Stephen D. Easton