LAWYERS FOR CIVIL JUSTICE

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August 10, 2006

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Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Suite 4-170
1 Columbus Circle, NE
Washington, DC 20544

Dear Mr. McCabe:

Lawyers for Civil Justice respectfully submits the enclosed Comments in response to the invitation to comment on FRCP 26(a)(2)(B). As a nationwide coalition of corporate and defense counsel supporting improvements in the civil justice system, our members are hands on litigators and litigation managers who deal with the civil rules on a regular basis.

We appreciate the action taken by the Civil Rules Advisory Committee to address FRCP 26(a)(2)(B) and we encourage you to call upon us if we can provide you with additional information. Thank you for allowing us this opportunity to express our views.

Sincerely,

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Encl: LCJ Comment Re: FRCP 26(a)(2)(B)

Cc: Honorable Lee H. Rosenthal
Honorable David G. Campbell
Professor Edward H. Cooper
Professor Richard L. Marcus

August 10, 2006

Lawyers for Civil Justice

Supplemental Comment
to the
Civil Rules Advisory Committee

Regarding the Need to Amend
Federal Rule of Civil Procedure 26 (a)(2)(B)
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I. Introduction

Lawyers for Civil Justice ("LCJ")[1] respectfully submits these preliminary comments regarding the Civil Rules Advisory Committee's ("the Committee") consideration of amendments to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure ("the Rule"). We suggest that the Rule be amended to: (1) confirm that employee expert written reports are required only from employees who regularly testify as experts; and (2) protect attorney work product and privileged information from loss when that information is supplied to a testifying expert.

II. The Rule Should be Amended to Confirm that Employee Expert Written Reports are Required Only from Employees Who Regularly Testify as Experts.

A. INTRODUCTION.

Federal Rule of Civil Procedural 26(a)(2)(B) exempts employees of parties who intend to testify at trial as experts from providing written reports so long as the

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[1] LCJ is a national coalition of corporate counsel and civil defense trial lawyers, including Defense Research Institute (DRI), International Association of Defense Counsel (IADC), and Federation of Defense and Corporate Counsel (FDCC), supporting improvements in the civil justice system.

employee's job does not "regularly involve giving expert testimony." The rule clearly exempts these employee experts from having to provide a written report, yet a significant number of district courts require Rule 26 reports from such employee experts. The members of LCJ urge the Committee to clarify the text of the Rule and the Note to confirm the original intent and clear dictate of the rule. For the reasons set forth below, we recommend that Rule 26(a)(2)(B) be amended to better ensure that courts do not deviate from the plain language of the Rule that exempts employee experts (who do not ordinarily testify as experts) from the report requirement. Specifically, we recommend that the Rule be amended as follows:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is EXCLUSIVELY retained or specially employed to provide expert testimony in the case or whose KNOWN and ORDINARY duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

These proposed changes should make clear that the Rule does not require that an employee expert submit a Rule 26 expert report, unless such employee's duties regularly involve the giving of expert testimony.

B. REQUIRING A REPORT FROM THE EMPLOYEE EXPERT WHO DOES NOT REGULARLY TESTIFY IS CONTRARY TO THE PLAIN LANGUAGE OF THE RULE.

Rule 26(a)(2)(A) requires a party to disclose "the identity of any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence." Fed. R. Civ. P. 26(a)(2)(A). The report requirement as set forth in Rule 26(a)(2)(B) provides that "this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a

written report prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). The language of the rule is clear. An employee expert who does not provide expert testimony as part of his regular duties is exempted from the report requirement. See, e.g., Navajo Station v. Norris, 189 F.R.D. 610, 612 (E.D. Wash. 1999) ("Given the plain language of this category, by implication, those employees who do not regularly testify for the employer but are doing so in a particular case need not provide a report.").

While some courts have determined that the employee expert is a person that is "retained or specially employed" and, thus, subject to the requirement of providing a written report under the rule, this is clearly inconsistent with the Rule's plain language for cases in which the employee continues in his pre-litigation duties and his testimony grows out of the facts and circumstances of his pre-litigation job. See, e.g., Day v. Consolidated Rail Corp., 1996 U.S. Dist., Lexis 6596 (S.D.N.Y. May 15, 1996) at *5; KW Plastics v. United States Can Co., 199 F.R.D. 687 (M.D. Ala. 2000) (if an employee is used as an expert witness then he is essentially "specially employed" as an expert). Our proposed revisions address such situations and for good reasons.

C. REQUIRING AN EMPLOYEE WHO DOES NOT TESTIFY REGULARLY AS AN EXPERT TO SUBMIT A REPORT IS UNNECESSARY, IMPRACTICAL, AND BURDENSOME.

The burden associated with preparing an expert report is unwarranted when applied to an employee expert who does not regularly testify. The information sought by the report is either not applicable to a typical employee or is more easily developed

through other discovery such as depositions or interrogatory questions.[2] The Rule states:

> The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B). While good reasons exist for making an "outside expert" or a regularly testifying employee comply with these requirements, those reasons do not apply to a typical employee. For example, the typical employee will not have a list of publications or other cases in which she has testified. Additionally, the concern of having a report to assist in "nailing down" the opinion of the outside expert and of the regular testifying employee – persons more likely to be familiar with litigation gamesmanship – is less of a concern when dealing with the typical employee.

Further, in most instances, the employee expert will have played a role in the facts and circumstances that give rise to the suit. Such a person, referred to in cases as an "actor or viewer," should not be required to prepare a report.[3] Because these persons will likely be deposed for their factual testimony, doing away with the report

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[2] While a Rule 26 written report is not required of the employee expert who does not regularly testify, the party seeking information that would otherwise be required in the Rule 26 report is armed with a full panoply of discovery tools to obtain it. Specifically, discovery of expert opinion testimony may be obtained by interrogatories under Rule 26 (b)(4)(B), and by deposition under Rules 26 (b)(4)(a) and 26 (b)(4)(B). This lays to rest the claim by some courts that the party with the employee expert who need not file a report has some unfair advantage. These other discovery tools allow the opponent to obtain the same information without the report.

[3] Courts have similarly referred to witnesses who possess factual knowledge and can express opinions based on those facts as "hybrid" witnesses.

requirement does not mean that the litigant will take a deposition he otherwise would not. Additionally, as an "actor or viewer," expert testimony will be inextricably intertwined in the factual discussion; the mere presence of "scientific, technical or other specialized knowledge" should not trigger the written report obligations. For example, an electrical engineer employed by XYZ Utility on duty at the time of a malfunction will testify as to the chain of events that resulted in the malfunction. The engineer will undoubtedly use "scientific, technical or other specialized knowledge" in his explanation. Typically, however, that discussion is not one that should trigger the report requirements of the Rule. Because the penalty for failing to submit such a report can take the form of preclusion of the employee expert's opinion at trial under Fed. R. Civ. P. 37(c)(1), an abundance of caution causes most parties to submit the written report of an employee expert to avoid the risk. Our proposed amendment removes that ambiguity.

Additionally, it is burdensome and unreasonable for the employee expert to have to compile expert reliance materials required by the rule, especially when the employee has spent many years at the company and has gained his expertise through on-the-job experiences, and when the basis of his opinion comes from a multitude of sources. One of the other discovery tools is better suited for gathering this information.

D. Recommendation as to Expert Reports.

The refusal by some courts to apply the Rule 26 written report exemption mainly focuses on the perception that it puts one party at a severe disadvantage in the cross-examination of the expert, and creates unfair surprise which is inconsistent with the full and open disclosure policy of Rule 26. As discussed above, those concerns are unwarranted. Our proposed amendment clarifies the plain meaning of the rule. That is,

the only testifying expert who must submit a report is one who is an outside consultant, and is independent of the party hiring the expert with no other corporate related function, or who is an employee whose duties regularly require the giving of expert testimony. The only employee witness who must submit the report is one who is exclusively retained to give expert testimony or whose regular duties involve giving expert testimony.

III. Protections Afforded To Attorney Work Product and Privileged Information Should Not Be Lost When That Information Is Supplied To A Testifying Expert.

A. Introduction.

Many courts have read Rule 26(a)(2)(B) and its accompanying Advisory Committee Notes ("Notes") to require privileged and attorney work product information that a party shares with its testifying expert be divulged to the opposing party upon request and without a showing of some heightened or particularized "need." We feel this result is inconsistent with the ends of justice in that it unnecessarily handicaps counsel in his efforts to provide a vigorous and effective defense of his client.

For these reasons, we recommend that the Rule and Notes be amended to make it clear that the mere sharing of protected information with an expert does not strip the information of its protections.

B. Work Product Should Be Protected.

While the Rules permit liberal discovery, that discovery is subject to necessary and well-accepted limitations, especially when privileged or work product materials are sought. Rule 26 states that "[p]arties may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1) (emphasis

added). Federal Rule of Civil Procedure 26(b)(3) places further limitations on what is discoverable:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3) (emphasis added). Significantly, Rule 26(b)(3) also states that when ordering such discovery, "the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

In 1993, Rule 26(a)(2)(B) was adopted. It is that rule, speaking to discovery of information divulged to experts, which several courts have relied upon to undercut the well-settled limitations of Rules 26(b)(1) and 26(b)(3). Rule 26(a)(2)(B) states:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report....The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions....

Fed. R. Civ. P. 26(a)(2)(B). The Advisory Committee Note to Rule 26(a)(2)(B) states that:

> The [expert's written] report is to disclose the data and other information considered by the expert.... 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.

Fed. R. Civ. P. 26(a)(2)(B) Advisory Committee's Note. This patchwork of rules has caused federal courts to "sharply disagree" about whether a party must produce protected material that has been given to employee experts. "One line of decisions has adopted a bright-line rule, maintaining that Rule 26 mandates disclosure of all information shared with a testifying expert, including the mental impressions and opinions of the attorney." Mfg. Admin. & Mgmt. Sys. v. ICT Group, Inc., 212 F.R.D. 110, 114 (E.D.N.Y 2002) (cases collected). "Other courts have ruled that 'core attorney work product,' comprising the mental impressions and opinions of the attorney, are protected from discovery, notwithstanding communication of that information to a testifying expert." Id. (cases collected). Raising the attorney's risk of making the wrong call on this issue, there looms the possibility of spoliation sanctions for guessing wrong. See, W.R. Grace & Co.-Conn. v. Zotos, Int'l, 2000 U.S. Dist LEXIS 18096 (W.D.N.Y 11/2/02), complaint dismissed, W.R. Grace & Co. v. Zotos Int'l, Inc., 2005 U.S. Dist LEXIS 8755, (W.D.N.Y. 2005) (potential basis for spoliation sanctions found where attorney instructed expert to destroy draft reports containing protected information).

C. Protecting Work Product Given to Testifying Experts Is Sound Policy.

The policy underpinnings for the protections afforded attorney work product and related concepts are set forth in Hickman v. Taylor, U.S. 475, 510-511 (1948). It is worth revisiting the words of Justice Murphy.

> In performing his various duties... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation for a client's case demands that he assemble

> information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. This is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed... as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

Id. (emphasis added).

An attorney's collaboration with her expert is a logical, and, in today's environment, a necessary extension of the process Justice Murphy describes. An attorney uses the expert to vet various approaches and to test whether (or to what extent) those approaches are supported by the discipline represented by the expert. For example, who can imagine trying a complicated antitrust or securities case – a case where facts, law and economics often merge so that distinctions blur to the point of non-existence – without a candid discussion with an economist? Similarly, in cutting edge products liability cases which rely on competing scientific and technological theories, the lawyer must be allowed to probe freely with her expert the viability of many concepts. This collaboration between expert and attorney often takes the form of exchanging drafts. Requiring these attorney work product discussions/documents to be divulged – especially when no substantial need is displayed – is an inappropriate invasion into protected work product.

An additional unfairness is worked on clients as their counsel work to avoid having the protections stripped by Rule 26(a)(2)(B). A practice has developed whereby counsel retains two experts: a testifying and a non-testifying expert. The discussions with the non-testifying expert are not easily discoverable so the attorney carries out a fuller and more candid discussion with that expert and a more sanitized discussion with the testifying expert. This inflicts an unnecessary and often substantial expense on the client, and imposes inefficiencies on the attorney's practice.

D. Recommendation as to Privilege and Work Product.

Accordingly, we recommend that the protections set forth at Rules 26(b)(1) and 26(b)(3) apply to information provided to an expert and that the Advisory Committee Note be revised consistent with this recommendation.

IV. Conclusion.

LCJ appreciates the opportunity to submit these preliminary comments regarding the Committee's consideration of amendments to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure and to respectfully suggest that the Rule be amended: (1) to confirm that employee expert written reports are required only from employees who regularly testify as experts; and (2) to protect attorney work product and privileged Information from loss when that Information is supplied to a testifying expert. We look forward to working with the Committee as it continues its consideration of these important amendments.

Respectfully submitted,

Lawyers for Civil Justice