08-CV-070

November 30, 2008

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:

We are writing to urge the Committee to reject the proposed amendment to Fed. R. Civ. P. 26(b)(4) released for public comment in August 2008. As explained below, we consider the proposed amendment a dangerous dilution of the safeguards against unreliable and partisan expert testimony.

The signers of this letter are or have been tenured academics who have taught and published in the fields of Civil Procedure, Evidence or Professional Responsibility. Some of us have also been retained as testifying experts, consultants, or counsel in federal civil litigation. We write as law teachers and scholars out of our own convictions and on our own initiative, without having been approached, retained or paid by any other person.

1. The partisan relationship between retaining lawyer and retained expert witness that the amendment would tend to mask has long been recognized as the prime source of the pathologies of expert testimony. The lawyer who retains an expert has the opportunity to present a client's case to the expert in the most favorable light. The lawyer is also better informed than the expert about the case, at least at the outset: in that sense, the lawyer is another expert to whose knowledge the retained expert could easily defer. Even if the expert has not been selected because of having known views, and is not tempted to shade his or her testimony by the prospect of future employment, he or she can easily be influenced by the lawyer's presentation of the case, by intimations of the opinion the lawyer seeks, and by the natural human tendency to respond to someone who seeks one's help. Interaction between lawyer and expert can thus sway the expert's views or tincture the lawyer's expression of them even in the best of circumstances. When the lawyer is less than honest, or the expert is less than disinterested and stubborn, the danger is far greater.

The proposed amendment would drastically restrict cross examination, the main safeguard against these dangers. It would prevent exploration of most of the interaction between lawyer and expert. Even when the expert's report had been drafted or substantially rewritten by the lawyer, which has been known to occur, the opposing party would have no chance to make this known to the factfinder. Inquiries that would help the jury understand the opinions the lawyer wanted to elicit, the opinions the lawyer wished to excise, and the strengthened language that the lawyer hopes to obtain would all be beyond the scope of proper examination.

Dilution of inquiry into the expert's partisan relationship with retaining counsel is directly contrary to the changes many scholars have long advocated in our system of expert testimony. Ever since parties began to retain their own experts in eighteenth century England, judges and observers have observed the resulting partisan testimony with views ranging from disappointment to strenuous opposition. Most foreign judicial systems seek to avoid this partisanship by having experts appointed by the court, often from a list of certified

experts. England and some Australian states have recently moved in this direction by encouraging jointly selected experts and consultation among opposing experts.1 In this country, the *Daubert* case and its successors (as to which the signers of this letter have varying positions) clearly reflect the view that we need additional, not fewer, safeguards to protect the reliability and integrity of expert evidence.

The proposed amendment seems at least as undesirable as would be a similar proposal shielding from inquiry discussions between nonexpert witnesses and lawyers. There too it could be argued that inquiry into the communications between witness and counsel takes time and often yields little impeaching evidence and that it leads to evasive actions by witnesses and lawyers—the same arguments marshaled in favor of this amendment. Indeed, the case for cross-examining experts on their interactions with counsel may be stronger than for other witnesses, since experts are chosen and paid in the hope of obtaining favorable testimony, and since the jury may be less able to appraise the inherent plausibility of their opinions. We doubt that a proposal to limit inquiry into the discussions of ordinary witnesses and lawyers would meet with much favor, and believe that the proposed amendment is no more deserving.

2. The proposed amendment also embraces and solidifies the practice of treating experts as paid advocates rather than as learned observers and interpreters. Current practices send mixed signals to expert witnesses. Experts are told that they should develop and express their opinions independently of the interests of the party paying them. On the other hand, they are treated like partisans in some respects. For example, litigants commonly require retained experts not to speak to anyone, including peers in their field, about the case, even though such peer consultation is basic to the normal ways most experts develop opinions outside of litigation. We suspect that such practices may encourage some experts to assume that a greater degree of partisan orientation is appropriate in the litigation sphere than with respect to their normal professional practice. The rule that makes an expert witness's communications broadly discoverable is an expression of the basic value of expert independence. Replacing it with a rule that treated the expert more like a client for discovery purposes would send the wrong message. It would intensify the signals and pressures that encourage partisan identification with the retaining litigant. It is natural that litigating lawyers should see the experts they retain as partisan allies, but rulemakers and the legal system should resist that view.

3. In our view, the grounds advanced for the amendment are unpersuasive, and rest on misapprehensions about the functions of inquiry into what has happened between lawyer and expert.

The goal of such inquiry is not to demolish the expert but to promote reliable expert testimony. Even were it true that such inquiry usually fails to yield evidence reducing the weight of the expert's testimony—a claim that, so far as we know, has not been empirically investigated—inquiry would still be desirable. Knowing that their interactions with counsel will be explored, experts can be expected to write their own reports, and lawyers to avoid proposing drastic changes in the expert's draft. That is exactly what should be encouraged even though inquiry costs some time and money.

That experts and lawyers will respond to the likelihood of inquiry by evasive measures such 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. Undoubtedly, people engage in similar evasive tactics in many situations. For example, an employer preparing to discharge an employee who is likely to charge employment discrimination may well take care what it records. Yet the likelihood that witnesses will seek to avoid leaving behind harmful discoverable evidence is hardly a reason to shield them from discovery. Rather, it suggests that discovery is especially necessary. And once again, the goal of inquiry is not just to obtain evidence but to promote more reliable expert testimony. Those of us who have been expert witnesses can understand that evasive acts do occur—but we can also recall that our backs were stiffened and our consciences enlivened by our knowledge that opposing parties could ask us about changes in our draft reports.

The suggestion that the amendment is desirable because it would make it more attractive to use the same expert as a witness and as a consultant seems to us to get things backward. A witness who is also a consultant about settlement values and the like faces still greater temptations than other expert witnesses to provide the testimony that will vindicate his or her advice, and that will promote the success of the party in whose cause he or she has been enlisted. It is just this sort of conflict between the witness and the advocate that helps justify the rule that ordinarily prohibits lawyers from undertaking both roles in the same case. See ABA Model Rules of Professional Conduct, rule 3.7. We are not urging a similar disqualification rule for expert witnesses. But we do believe that, if a party uses an expert both as a witness and as a consultant, the consulting activities should not be hidden from the jury that is asked to appraise the witness' reliability.

4. It is hard for us to understand the exception to the amendment allowing discovery under Rule 26(b)(3)(A)(ii) when the party seeking it can show that it has a substantial need for discovery and cannot obtain the substantial equivalent without undue hardship. In the usual work product situation, this standard allows discovery when the material in question cannot be obtained through other discovery or investigative methods. But that will *always* be the case with the information shielded by the amendment, since the amendment itself bars discovery and the expert will rarely be free to speak with opposing counsel. This might be taken to imply that discovery should always be available through the exception, at least whenever a party has a substantial need to impeach the expert's testimony. Clearly, the drafters contemplate no such reading, since the Committee Note indicates that "it will be rare for a party to be able to make" a showing warranting discovery. But if the traditionally adequate showing does not suffice, precisely what is required? And how can a party show whatever must be shown without access to the very material it seeks to discover?

5. The purpose and effect of the amendment are to extend the attorney client privilege to cover a broad range of communications between lawyers and testifying experts, and it therefore may be subject to 28 U.S.C. § 2074(b)'s provision that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."2

The amendment is plainly meant, not just to forbid exploration of most lawyer-expert discussions at the discovery stage, but to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its declared goals. There would be little point in barring pretrial discovery of draft reports and the like if parties were free to ask about them at trial. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds for the amendment are exactly the same as those relied on to support most privileges: the asserted value of a class of private communications, and the fear that they will be discouraged if outsiders can inquire into them.

Likewise, the amendment's purpose and effect diverge from the traditional work product policy of encouraging each party to conduct its own trial preparation rather than seeking to scoop up an opponent's preparation. As we have noted above, the materials in question here are not accessible to both parties: if discovery of preliminary drafts and communications between an opposing party and its expert is barred by the amendment, those drafts and communications cannot be obtained at all. Once again, the amendment functions as a privilege rule. In addition, work product protection is usually lost when the witness in question testifies at trial.3 The amendment is meant to have just the contrary effect.

In having much the same purpose and effects as modifying a privilege, the amendment also undercuts Fed. R. Ev. 501's provision that, when state law provides the rule of decision, state privilege law applies. And Rule 501 is no ordinary federal rule. It was imposed by Congress, which rejected other rules that would have recognized a set of privileges applicable in all federal cases, including those governed by state substantive law. This rejection was based in good part on the belief that *Erie* and its policies call for deference to state decisions as to which confidential relationships they wish to protect to what extent. And Congress has reinforced its decision through the provision already discussed that requires changes in privilege rules to be approved by it. At least when issues governed by state substantive law are concerned, the Supreme Court should hence not promulgate a rule extending protection for confidentiality further than some states have been

willing to extend it.

Because the amendment may well modify a privilege it follows that, even were it desirable, it should not be enacted without Congressional approval. This conclusion derives reinforcement from the recent enactment of Fed. R. Ev. 502 by Pub. L. No. 110-322, 122 Stat. 3537 (2008). That rule deals with inadvertent waiver of privilege, and might plausibly have been categorized as clarifying the procedural rules for invoking privilege rather than the privilege itself. Nevertheless, it was submitted to Congress. And although Congress approved the text of the rule without changes, it did arrange for a lengthy Statement of Congressional Intent to be included in the explanatory note in order to qualify and in some ways limit the rule's impact. See 154 Cong. Rec. H 7817-19 (Sept. 8, 2008). We cannot predict how Congress would react to the amendment now in question, but shielding from disclosure draft expert reports and communications between testifying experts and lawyers might well not attract the support of a majority of the House and Senate. At any rate, it is Congress that should decide whether making lawyer-expert dealing confidential would be desirable.

For all these reasons, we urge the Committee not to approve the amendment. We do so with great respect for the members of the Civil Rules Committee, and with thanks for the many improvements that our procedural system owes to their work. In this instance, however, we believe that members of the bar with a natural reluctance to expose their relations with expert witnesses to inquiry have promoted a proposal that would render expert testimony still more open to doubts than it already is.

Respectfully submitted,4

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1 Adrian A.S. Zuckerman, Civil Procedure ch. 20 (2003)(England); for Australia, see, *e.g.*, New South Wales Uniform Civil Procedure Rules 2005, rules 31.23, 31.24, 31.37, 31.44, 31.46, 31.52 & Sched. 7.

2 As the Committee will recall, the work product provisions of Fed. R. Civ. P. 26(b)(3) were added in 1970, before the limitations that the Rules Enabling Act places on evidence rules became an active topic of discussion, and before § 2074(b) was added to that Act.

3 See Fed. R. Ev. 612 (disclosure of writing used to refresh recollection); United States v. Nobles, 422 U.S. 225, 239 (1975)(work product protection lost when investigator testified about conversation with witness: "Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony"). For criminal cases, see likewise the Jencks Act, 18 U.S.C. § 3500.

4 Academic affiliations are given for purposes of identification only.