COMMENTS OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK REGARDING THE PROPOSED AMENDMENTS TO RULES 26 AND 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

08-CV-098

December 22, 2008

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York has examined the amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure (respectively, "Proposed Rule 26" and "Proposed Rule 56") proposed by the Advisory Committee on Federal Rules of Civil Procedure ("Advisory Committee"). We commend the Advisory Committee on its work, and appreciate this opportunity to comment on its proposals. Based on the experience of our members with the existing Federal Rules of Civil Procedure and our reading of the proposed rules, we provide below four specific comments on the proposed amendments.[1]

1) Rule 26

We support the Advisory Committee's intention, as reflected in the discussions and illustrations on page 7 of the Advisory Committee's Report to the Standing Committee on Rules of Practice and Procedure, to permit questioning of an expert on why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions, even if the answers to such questions involve communications with counsel. In our experience, such questions and answers are important elements of expert discovery and inquiry at trial, and we agree with the Advisory Committee that counsel should be permitted to question experts on those areas.

We are concerned, however, that the language of Proposed Rule 26 does not appear to allow for such questions. The structure of the rule provides that the work product protection of Rules 26(b)(3)(A) and (B) applies to communications between a party's attorney and an expert witness. See Proposed Rule 26(b)(4)(C). Three exceptions are carved out, such that counsel may question an expert about communications that (i) relate to compensation; (ii) identify facts or data that the party's attorney provided and the expert considered; and (iii) identify assumptions that the party's attorney provided and the expert relied upon. See Proposed Rule 26(b)(4)(C)(i)-(iii).

It is not clear that these three exceptions will allow for the types of questions discussed above and on page 7 of the Advisory Committee's report. For example, a party attempting to elicit deposition testimony regarding counsel's directions to an expert to use a certain approach or not to draw a certain conclusion would not appear to fall within any of those three exceptions.

[1] These comments represent the views of the Committee (with three members dissenting, as set forth below), and do not necessarily represent the views of the Court

Such testimony does not involve compensation, it does not constitute "facts or data," and it is not clear that it involves an "assumption" that counsel provided to an expert and the expert relied on in forming an opinion. To ensure that such testimony would be permissible during discovery and at trial, we recommend that a new subsection 26(b)(4)(C)(iv) be added, to read as follows:

> (iv) Relate to matters such as why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions.

Because our committee agrees with the Advisory Committee that it is important for counsel to be able to explore these areas, and because we believe that, in light of the rule's general provisions, this additional exception is required in order to make it clear that such questioning is permitted, we believe that the proposed subsection would be a useful addition to the rules.

2) Rule 56

a. General comment

Current Rule 56 has generated a large body of interpretation over years of practice, judicial construction, and academic study. Altering a rule with such an extensive interpretive history may lead to unintended adverse consequences that neither the Advisory Committee nor this committee can predict. We urge the Advisory Committee to reconsider amending the rule.

b. Statements or Disputes of Fact

Local Rule 56.1 in our district requires a moving party to submit along with a summary judgment motion a statement of material facts about which the moving party contends there exists no genuine issue. Each fact must set forth a specific citation to the record. The opposing party is required to file a response to the statement of material facts. Proposed Rule 56 contains a similar requirement. See Proposed Rule 56(c)(2)(A)(ii); 56(c)(2)(B); 56(c)(4)-(6).

Many attorneys in our district had expressed confusion about the meaning and operation of the predecessor Local Rule 56.1, and as a result the Local Rules Committee for the United States District Courts for the Eastern and Southern Districts of New York ("Local Rules Committee"), which consists of attorneys in varied practices in the public and private sectors and magistrate judges from the two courts, undertook to revise the rule. The experience of our committee in revising this local rule may be of help to the Advisory Committee, and we have attached both the new Local Rule 56.1, as well as an excerpt from the report of the Local Rules Committee which suggests revisions to then-existing Local Rule 56 1

c. Rule 56(c)(5)

We suggest a small language change in Proposed Rule 56(c)(5). Proposed Rule 56(c)(6) states that affidavits or declarations used to support a motion, response, or reply must "set out facts that *would be admissible* in evidence." (Emphasis added.) Proposed Rule 56(c)(5), however, states that responses to a statement of fact may state that the material cited to support or dispute the fact "*is not* admissible in evidence." (Emphasis added.) We would suggest

amending Proposed Rule 56(c)(5) to state "*would not be* admissible in evidence." (emphasis added). This change would make the two provisions parallel, and would also make clear that any evidentiary determinations would, consistent with current practice, be made on the record as it stands at the time of the Rule 56 motion and in anticipation of whether a foundation for admissibility will be available for the evidence at trial.

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** Mr. Heinemann, Mr. Rando, and Mr. Sack dissent in part in the attached Partial Dissent.

PARTIAL DISSENT OF GUY L. HEINEMANN, ROBERT J. RANDO, AND JONATHAN S. SACK

We dissent from one aspect of the Comments of the Committee on Civil Litigation of the United States District Court for the Eastern District of New York Regarding the Proposed Amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure (the "Comments"). The majority urges the addition of a new subsection, Fed.R.Civ.P. 26(b)(4)(C)(iv), to permit discovery into attorney-client communications concerning why an expert witness did, and did not, consider certain factors, use certain approaches or methodologies, and draw certain conclusions in his/her opinion.

We disagree with this suggestion because, if adopted, it will invite wide-ranging discovery of discussions between expert and counsel concerning the preparation and substance of the expert's opinion. In our view, the practical effect of the new language will most likely be to discourage the candid dialogue between expert and counsel that the Advisory Committee wishes to protect and encourage.

In its proposed Rule(a)(2)(C), the Advisory Committee uses the work product protection to limit expert discovery so as to end "what most courts now allow[, namely,] . . . free discovery of . . . all communications between attorney and expert." (Report, p. 3).[1] The object of the new Rule is to permit questioning as to "the foundation and reliability of the [expert] opinion itself" – including the facts, assumptions and theories on which the opinion does (and does not) rest – but to curtail questioning as to the communications with counsel that led up to the development of the opinion. Put simply, the Advisory Committee wishes to encourage ample discovery as to the substance of the opinion while sharply limiting inquiry into the process by which the opinion was developed.

Against this backdrop, the Advisory Committee would make an exception to the work product protection and permit discovery into three discrete areas of attorney-expert communications: (i) compensation; (ii) "facts and data" provided by the attorney which the expert considered; and (iii) identification of the "assumptions" provided by the attorney on which the expert relied. See Rule (a)(2)(C) (i)-(iii). While subsections (ii) and (iii) permit inquiry into communications relating to the substance of the opinion, the scope of the inquiry is expressly limited.

Regarding subsection (ii), the proposed Advisory Committee Note emphasizes that "the exception applies only to communications 'identifying' the facts or data," not "communications about the potential relevance of the facts or data." Similarly, questioning would be permitted as to facts or data bearing on the opinion, not "all facts or data that may have been discussed . . ." (Proposed Amendments, p. 13)

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[1] Citations herein to the "Report" and "Proposed Amendments" are, respectively, to the "Report of the Civil Rules Advisory Committee," dated May 9, 2008, as supplemented June 30, 2008, and to the "Proposed Amendments to the Federal Rules of Civil Procedure" annexed to the Report.

Likewise, regarding subsection (iii), the proposed Advisory Committee Note as well as the language of the Rule itself makes clear that the exception is limited to identifying those assumptions "rel[ied] upon in forming the opinion[] . . . . More general attorney-expert discussions about hypotheticals or exploring possibilities based on hypothetical facts are outside the exception." (Id., p. 13) (Emphasis added). Consistent with its goal of permitting discovery as to the substance of an opinion while placing off limits most dialogue between counsel and expert, the Advisory Committee would permit inquiry into attorney-expert communications bearing directly on the opinion itself – i.e., identifying the facts, data and assumptions relied upon by the expert – but no more.

The majority's proposed subsection Fed.R.Civ.P. 26(b)(4)(C)(iv) would permit discovery outside the clear limits set forth in the Advisory Committee's Rule 26(b)(4)(C)(ii) and (iii) and, in our view, thereby upset the Advisory Committee's desired balance between discovery into the substance of expert opinions, on the one hand, and candid and productive dialogue between counsel and expert, on the other hand.

First, the new subsection would allow discovery of communications far beyond the factors, approaches or methodologies, and conclusions actually considered, used and drawn by the expert; the majority would permit inquiry into attorney-expert discussions on these matters even if they were discussed and rejected, for example, on grounds of relevance, persuasiveness or inconsistency with other aspects of the case. The new subsection would thus permit discovery into matters that did not form part of the opinion being rendered. In contrast to the Advisory Committee, which would forbid discovery into "all facts or data that may have been discussed," the majority would permit discovery into all factors, approaches or methodologies, and conclusions that may have been discussed between counsel and expert.

Second, whereas the Advisory Committee would allow discovery of communications relating only to "identify[ing]" facts, data and assumptions bearing on the opinion rendered, the majority's proposal by its terms would allow discovery of communications relating to all aspects of the factors, approaches or methodologies, and conclusions bearing (and not bearing) on the expert's opinion. The Advisory Committee proposals would forbid discovery into "communications about the potential relevance of the facts or data." In contrast, the majority would permit discovery into what the attorney and expert said to one another about the potential relevance - and all other aspects - of the factors, approaches or methodologies, and conclusions discussed between counsel and expert. The majority proposal, in our view, would inevitably lead to an examination of "[m]ore general attorney-expert discussions about hypotheticals or exploring possibilities based on hypothetical facts" – one of the chief evils the Advisory Committee seeks to stop through its application of the work product doctrine.

In sum, we are constrained to conclude that the majority's proposed Rule 26(b)(4)(C)(iv), as written, is inconsistent with the spirit and letter of the Advisory Committee's proposed Rule 26(b)(4)(C)(i)-(iii). The majority would permit the wide-ranging discovery of attorney-expert communications which, in the view of the Advisory Committee, has led to a chilling of useful attorney-expert communications and added expense, among other undesirable conditions.

We recognize that the majority's proposal stems from the Advisory Committee's apparent intention of permitting discovery into the "theories" that were (and were not) explored by the expert. (Report, p. 7). Of course, nothing in the proposed rule would limit discovery into the substance of the expert's approaches or methodologies, including the reasons for relying upon, or not relying upon, various theories and methodologies. The sole issue is whether discovery would be permitted into the attorney-expert communications about the use of such theories and methodologies.

Consistent with the purpose of the new rule, we believe the following additional language would appropriately expand Rule 26(b)(4)(C) to make clear that limited discovery is allowed into communications concerning the expert's theories:

> (iv) identifying the theories provided by the party's attorney and the expert relied upon in forming the opinions to be expressed.

This language limits discovery to attorney-expert communications that actually bear upon the expert's opinion; it does not permit the wide-ranging inquiry permitted by the majority. Further, this language does not include the majority's concepts of "factors" considered and "conclusions" drawn by the expert. We believe that "factors" are adequately reflected in the Advisory Committee's reference to "facts or data" and "assumptions." And we do not believe that permitting an inquiry into "conclusions" logically grows out of either the Advisory Committee's proposed rule or its Invitation for Comment.

For these reasons, the dissent respectfully recommends the adoption of a narrow subsection (iv) which, in our view, incorporates the Advisory Committee's suggestions while adhering closely to the limits placed upon discovery in the Advisory Committee's proposed Rule 26(b)(4)(C)(i)-(iii).