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08-CV-159

January 26, 2009

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the Office of the United States Courts
Washington, D.C. 20544

RE: Proposed Amendment to Rule 26 of the Federal Rules of Civil Procedure

Dear Secretary:

Generally, the proposed amendments to Fed. R. Civ. P. 26 relating to expert reports and disclosures are well-conceived and well-drafted. I have, however, three concerns.

I am concerned with the ambiguity that is being introduced into proposed Rule 26(b)(4)(B) and (C) by the statement in the Committee Notes related to those subsections that the protection afforded by them extends to "oral" draft reports and communications. Proposed Rule 26(b)(4)(B) and (C) state that "Rules 26(b)(3)(A) and (B) protect" the drafts and communications referenced in those two subsections; Rule 26(b)(3)(A) and (B) by their plain language, however, protect only documents and tangible things; so either Proposed Rule 26(b)(4)(B) and (C) do not mean what they say, or Rule 26(b)(3)(A) and (B) do not mean what they say, or the Committee Note is wrong. It is apparent from the Detailed Discussion of this language that the Committee has recognized the ambiguity, which it calls a "minor drafting challenge," but it has inexplicably done nothing to cure it. It seems unwise to promulgate a rule of civil procedure which contains an obvious ambiguity that inevitably will generate disputes among litigants and sterile procedural litigation that could readily be avoided by care at the rulemaking stage.

There are two easy potential solutions

One is simply to strike the statements in the Committee Note that the drafts and communications referenced in Proposed Rule 26(b)(4)(B) and (C) include oral ones. The significant problem that needs to be cured by these amendments to the rule is not the discoverability of "oral draft" reports -- a phrase not to be found in ordinary English usage -- or oral communications between lawyers and their retained experts; the problem, as the Committee seems to acknowledge elsewhere in its comments, is the current discoverability of written drafts and communications. The language of Proposed Rule 26(b)(4)(B)(and (C) unambiguously accomplishes that without need for explanation in a Note.

A second solution would be to strike the statements in the Committee Note about oral drafts and communications and also redraft Proposed Rule 26(b)(4)(B) and (C) to say what the Committee Note says they mean.

(B) *Trial Preparation Protection for Draft Reports of Disclosures.* Rules 26(b)(3)(A) and (B) apply to drafts of any report or disclosure required under Rule 26(a)(2).

(C) *Trial Preparation Protection for Communications Between Party's Attorneys and Expert Witnesses* Rules 26(b)(3)A) and (B) apply to communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), and the work product immunity applies to oral communications between the party's attorney and any such witness, except to the extent that communications ...

My own view is that subsection (B) requires no reference to "oral" drafts because ordinary usage of the word "draft" does not include anything oral; but if the Committee understands "draft" differently, it would be easy enough to insert language like I have suggested for subsection (C) into subsection (B) as well

My second concern is with the significance some courts may give to a contrast between the explicit Rule 26(b)(3) and work product protection afforded to communications with specially retained experts and the omission of any reference in the rule to similar protection for communications with other testifying experts. An attorney's communications with some "non-retained" experts -- treating doctors, for example, or police accident reconstructionists -- do not, of course, warrant protection from disclosure; but communications with other "non-retained" experts, such as a corporate defendant's employee who does not ordinarily get involved in litigation matters but is dragooned into assisting with one because of his particular knowledge gained in the ordinary course of his work, deserve protection. Indeed, it is the inexperienced expert who needs the most help in knowing what is expected of him and how to comport himself when thrust into an unaccustomed role in a lawsuit. The Committee Note says Proposed Rule 26(B)(4)(C) "does not exclude protection" for such witnesses "under other doctrines, such as privilege or independent development of the work-product doctrine," but it seems to me that it would be wiser and more likely to avoid needless uncertainty and procedural squabbling just to address the issue head-on in the rule itself That could be accomplished by inserting a new subsection (b)(4)(D) reading:

(D) *Trial Preparation Protection for Communications with Experts Not Retained or Specially Employed* Nothing in Rule 26(b)(4)(B) or (C) shall affect the extent, if any, to which communications between an attorney and an expert witness who is not required to provide a written report by Rule 26(a)(2)(B) may be protected from discovery by Rule 26(b)(3), the work product immunity, or any applicable privilege.

Third, I am a little concerned that the protection afforded to reports by and communications with "testifying" experts is not explicitly extended to reports by and communications with "non-testifying" experts in those narrow circumstances where such experts may be deposed. The Committee should consider amending what is currently Proposed Rule 26(b)(4)(D)(ii) to read:

> (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means; but in the event discovery is permitted under this subsection, Rules 26(b)(3)(A) and (B) shall apply to reports prepared by the witness for the party or attorney who retained the witness and to communications between the witness and the party or attorney who retained the witness and the work product immunity shall apply to oral communications between the witness and the party or attorney who retained the witness.

In light of the non-testimonial role of experts subject to discovery under Rule 26(b)(4)(D)(ii), there is no need for exceptions to the work product protection like those provided in Proposed Rule 26(b)(4)(C)

I hope the Committee will consider these proposed clarifications.

Very truly yours,

John A. K. Grunert