

February 17, 2009

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Washington, D.C. 20544

**Re: Comments on Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure**

Dear Mr. McCabe:

The American Institute of Certified Public Accountants (“AICPA”) is pleased to comment on the Judicial Conference of the United States’ Advisory Committee (“Advisory Committee”) on Federal Rules of Civil Procedures’ proposed amendments to Rule 26 of the Federal Rules of Civil Procedure related to the discovery of expert witness reports and communications. These comments were prepared by the AICPA’s Forensic and Litigation Services Committee (“FLS Committee”) and approved by its Forensic & Valuation Services Executive Committee (“FVS EC”).

The AICPA is the largest professional association of certified public accountants in the United States, with approximately 350,000 members in business, industry, public practice, government and education. CPAs are often called upon to act as expert witnesses (both testifying and consulting) on financial, audit and other related topics in a variety of disputes. Accordingly, the CPA’s work may be subject to the Federal Rules of Civil Procedure (“Rules”). Financial experts like CPAs who serve as testifying experts observe the Rules relating to discovery when performing their work and have direct knowledge of the effort and cost involved in complying with the current Rules. These Rules directly impact the costs of financial experts and, therefore, litigation. In many cases, these costs may not be justified when considering the cost-benefit trade-off.

Our comments are primarily focused on proposed Rule 26(b)(4)(B), which would amend work-product rules to protect from discovery drafts of expert reports of trial witnesses<sup>1</sup>, as well as proposed Rule 26(b)(4)(C), which would protect from discovery attorney-expert communications – both of which we support. Please see item #1, below, which addresses both of these proposed amendments.

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<sup>1</sup> In this response, the use of “expert” refers to trial expert witnesses that are expected to provide expert reports under Federal Rule of Civil Procedure 26(a)(2)(B), unless otherwise described.

In addition, as described in item #2, below, we also support proposed Rule 26(a)(2)(C), which creates a new obligation upon parties to disclose a summary of the facts and opinions of a trial-witness expert who is not required to provide a disclosure report under Rule 26(a)(2)(B). Finally, in item #3 we suggest a modification to the term "considered by," which is used in parts of Proposed Rule 26.

**1. Proposed Rule 26(b)(4)(B) & (b)(4)(C): Trial Preparation: Protection for draft reports or disclosures and attorney-expert communications**

We support the Advisory Committee's proposed amendments to Rule 26 as they relate to trial preparation protection for reports/disclosures and attorney-expert communications, for the reasons set forth below.

First, it is important for CPA experts to collaborate with counsel to develop and refine theories and opinions. In many cases, because of current expert discovery requirements, attorneys retain both a consulting and testifying expert, since communications with the consulting expert are not as easily discoverable. This allows the attorney to engage in discussions with the consultant that are not required to be exchanged with the testifying expert. Given the complexity of the financial and other issues upon which CPA experts opine, this exchange of ideas with counsel is an important part of developing a professionally-appropriate opinion. However, given the current open-ended expert discovery rules, if done only with the testifying expert, this exchange is subject to discovery and thus can serve to chill the process. Indeed, because of this, in many cases these communications do not arrive at any opinions expressed by the testifying expert and time and money is spent discussing them orally. Limiting the expert discovery as suggested would not only limit the need for and cost of consulting experts but also focus expert discovery on issues that bear on the testifying experts' final opinions.

Second, as CPAs who often serve in expert witnesses in litigation matters, we recognize first-hand the extraordinary expense incurred by companies involved in litigation. Discovery is one of the most expensive and time consuming aspects of the American litigation process. Much of the discovery requested or demanded about the expert's process(es) and development of his or her opinions does not result in relevant information that can assist the

opposing party or the trier of fact in developing the case and preparing for trial. Instead, expert discovery results in unnecessary time and expense in pulling together and producing information that, in our experience, is rarely used at trial. The proposed amendments to the Rules appropriately limit discovery to the final opinion of the expert rather than the evolution of the thought process. Since the majority of the cost of litigation is incurred in the discovery phase, focusing on the final opinion of the testifying expert rather than the thought process will help control this extraordinary expense.

Third, under the current requirements of Rule 26, the expert is required to disclose a broad range of information, including, among other things, compensation, documents and other items considered and the basis and reasoning for the opinions. The recommended exceptions to the Rule 26 amendments that allow for the discovery of communications related to compensation, identifying facts or data the attorney provided to the expert and the expert considered in forming the opinions to be expressed and identifying assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed, provide additional assurances that appropriate information will continue to be discovered.

**2. Proposed Rule 26(a)(2)(C): Disclosure for expert witnesses not required to provide a written report under Rule 26(a)(2)(B)**

We support the substitution of a disclosure to the court in lieu of an expert report for those expert witnesses not required to prepare such a report. This amendment effectively balances the cost of providing an expert report with a simpler disclosure that affords fairness with regards to the exchange of the key facts, information and opinion the expert will present at trial.

**3. Modification regarding the term “considered by” as used in Rule 26(a)(2)(B)(ii) & (b)(4)(C)(ii)**

Proposed (and current) Rule 26(a)(2)(B)(i)-(vi) describes what each written expert report should contain, one component of which is that the report contain “the facts or data *considered by* the witness in forming” the witness’ opinion<sup>2</sup>. We suggest replacing the term “*considered by*” with “*relied upon,*” since such a substitution would lead to discovery of

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<sup>2</sup> Proposed Rule 26(a)(2)(B)(ii)

information and facts used directly in the formation of the experts' opinions. Moreover, as the Advisory Committee commented, the word "considered" is broad and has historically been used to attempt to discover information beyond an expert's final opinions. Additionally, the term is so vague that it could (in our view) mistakenly apply to virtually anything an expert consults.

We suggest a similar modification to proposed Rule 26(b)(4)(C)(ii), which places a limitation on protection (from discovery) for attorney-expert communications by allowing the discovery "of facts and data that the party's attorney provided and that the expert *considered* in forming the opinions"<sup>3</sup>. Our suggested modification is that only those communications *relied upon* in forming an expert's opinions should be subject to discovery.

We appreciate the opportunity to comment and urge you to clarify these issues. If we can be of further assistance please contact me at (212) 603-8373 or [patrice.schiano@protiviti.com](mailto:patrice.schiano@protiviti.com); Thomas Hilton at (314) 655-5515 or [thilton@amdcpa.com](mailto:thilton@amdcpa.com); or Teighlor S. March, FVS Senior Technical Manager at (919) 402-4804 or [tmarch@aicpa.org](mailto:tmarch@aicpa.org).

Sincerely,



Patrice Schiano  
Chair, FLS Committee



Thomas E. Hilton  
Chair, FVS Executive Committee

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<sup>3</sup> Proposed Rule 26(b)(4)(C)(ii) is one of three exceptions which allows discovery of attorney-expert communications to the extent that they "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed."