

## Minority Statement

### *Introduction*

A minority of the Committee favors adopting not only the expert report requirement of the federal rules, but also allowing expert depositions as of right, as provided in the federal rules since 1993. Thus, in addition to the proposed rule changes of the majority, the minority would amend Rule 26(b)(4)(A) to read:

*(A) Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(b)(5)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

The minority believes that both expert disclosure requirements should be incorporated into Mass. R. Civ. P. 26 for at least the following reasons, discussed in more detail below:

- The current rule requiring leave of court to depose an expert provides no guidance as to when such a motion should be allowed, which can lead to inconsistent application of the rule.
- Although requiring expert reports will lessen the need for expert depositions, in some circumstances, there will still be a need to depose experts. Counsel are best equipped to decide if a deposition is needed.
- The cost of an expert deposition is not a reason to treat such discovery differently from any other discovery. Absent exceptional circumstances, the party deposing an expert bears the fee. Furthermore, when accounting for the cost of expert depositions, the cost of disallowing such depositions must be accounted for as well.

In short, there is no compelling reason to shield expert witnesses from depositions when such witnesses often determine the outcome of a case.

### *Current Rule 26(b)(4)*

Currently, Rule 26(b)(4)(A) provides a two-step process for expert discovery. First, through interrogatory answers, a party may identify the opposing party's expert witness, the

subject matter of the expected testimony, and the substance of the facts and opinions to which the expert is expected to testify, with a summary of the grounds for each opinion. Second, a party may then move for “further discovery,” typically to depose the expert. Neither the rules nor Reporter’s Notes, however, provide any guidance as to when the court should grant such a motion. The result is the same that had been found in regard to the cognate federal Rule 26(b)(4)(A)(ii), before the 1993 amendments providing for expert depositions as of right:

The absence of a standard in both Rule 26(b)(4) and in the Advisory Committee Note, leaves each judge free to decide motions consistent with his personal predilections (called his discretion), as to the proper scope, timing, and manner of further discovery under Rule 26(b)(4)(A)(ii). The rule also leaves each judge free to impose on a moving party whatever prerequisites he desires to further discovery, including a burden of establishing “insufficiency,” “exceptional circumstances,” or “substantial need,” and whatever restrictions he desires on the scope, timing, and manner of such discovery.

Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. Ill. L. F. 895, 930 (1976).

*Expert Depositions: The Need and Who Decides Initially*

Experts are ubiquitous in modern litigation. And they address a myriad of subjects. Given their importance in a case, we believe that discovery of experts should not be limited to interrogatory answers drafted by counsel or a report drafted by an expert, often with the assistance of counsel. It is well recognized that, when exploring the reasoning of a witness, “a deposition is incomparably preferable to written interrogatories as a vehicle for seeking out useful evidence, not only because of the greater ease in shaping later questions based on earlier answers but also because the interrogatory answers are typically prepared by lawyers rather than through the uncounseled responses of the witnesses.” *Hendricks v. Coughlin*, 114 F.3d 390, 394 (2d Cir. 1997). That said, it is hoped that the proposal requiring an expert report

will lessen the need for expert depositions by requiring more comprehensive disclosures, signed by the testifying witness, not simply by the party offering the expert. Nevertheless, in those cases where the expert report leaves important questions open or seemingly ignores certain facts or other causes, an expert deposition may be warranted; and its appropriateness should be left, in the first instance, to the decision of counsel.

Along with providing an adequate basis for cross-examination, expert depositions play a critical role in allowing the court to perform its “gatekeeping” responsibilities under the *Daubert/Lanigan* line of cases. In determining the admissibility of expert testimony, *Lanigan* requires that:

The judge must rule first on any challenge to the validity of any process or theory underlying a proffered opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

*Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994) (internal quotation marks and citation omitted). In preparing their reports, experts cannot be counted on to volunteer shortcomings that may be fatal under *Lanigan*. Where a report raises admissibility issues under *Lanigan*, counsel should be able to explore those issues in a deposition. The court will often be well served in having the deposition testimony to decide such issues before trial.

#### *The Cost of Expert Depositions*

Cost has been cited by the Committee and others who oppose allowing expert depositions without leave of court. While recognizing that cost is an important consideration, the minority believes that, on balance, cost does not outweigh the benefits of allowing counsel to decide, at least in the first instance, whether to depose an expert. The proposed rule favored

by the minority requires that, “unless manifest injustice would result,” the party deposing an expert pay the expert a reasonable fee for the deposition. At that point, the cost of the deposition for the opposing party is on par with other depositions.

A concern was also expressed in Committee discussions that a well-heeled party could use expert depositions to abuse an opposing party with less resources. Rule 26(c) already allows a court, however, to tailor protective orders to prevent such abuse should it occur. Moreover, the general rule regarding expert depositions should not be based on exceptional circumstances.

Finally, the cost of expert depositions cannot be viewed in isolation. When necessary to determine issues of admissibility or strength of testimony, for example, an expert deposition can reduce litigation expense by allowing counsel and the parties to make a more informed settlement assessment, before trial. Such depositions also often provide a pretrial basis for dispositive motions on certain claims or the entire case. There is a high cost to the litigants and to the judicial system itself when such decisions are made only after an expert testifies at trial.

### *Conclusion*

In many cases, counsel already make—by agreement—the initial determination whether to depose experts. When there is a failure to agree, however, the lawyer responsible for preparing the case and cross-examining the expert should be able to decide, in the first instance, whether to depose the expert. If there are grounds to oppose the deposition under Rule 26(c), the party opposing the discovery should take the initiative to preclude it. This is how most discovery is handled day in and day out in the courts of the Commonwealth. The

current Massachusetts rule requiring leave of court to depose an expert is based on a historical anomaly originating in the federal rules—long since corrected in the federal courts. The time has come for correction in the Commonwealth.

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