

SEPARATE STATEMENT

A minority of the committee agrees with the majority position that Mass. R. Civ. P. 26 should not be changed to permit expert depositions as a matter of right, but writes separately with a concern about the proposal to require the provision of expert reports in every case in which an expert will be utilized at trial. Many of the cases brought in the district and superior courts may not warrant the expense associated with obtaining an expert's report. Furthermore, while many of the experts utilized in smaller cases may be willing to provide a verbal opinion to a party, they may not be willing to take the time and effort to prepare a written report. To require expert reports in every civil matter will increase unnecessarily the cost of litigation. For these reasons, a minority suggests that some consideration be given to limiting in some fashion the requirement of obtaining and providing an expert report as part of the discovery process in every case.

A year ago, the American College of Trial Lawyers Task Force on Discovery and The Institute For the Advancement of the American Legal System released the Final Report on their joint examination of the role of the discovery process in perceived problems with the American civil justice system (Final Report). One conclusion reached by the members was that our civil justice system takes too long and costs too much. "Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them." (Final Report, p. 2). Requiring a report from an expert in every case will only add to the expense of litigation and force some deserving smaller cases out of the system.

A minority of the committee, therefore, recommends that the proposed requirement that expert reports be provided should be limited to those cases where the trial or motion judge, in the judge's discretion, finds that the expert interrogatory responses are insufficient to provide due notice of the expert's proposed testimony, the basis of that testimony and the expert's qualifications, and that without the expert's report, the opposing party will be unfairly prejudiced.