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## 2010 ABVE Conference, San Diego CA

By Gray Broughton, MA, CRC, CCM, Diplomate/ABVE,  
President-Elect and Conference Chair



The 2010 American Board of Vocational Experts (ABVE) annual conference was held in San Diego, CA at the Town and Country Resort on March 26-28. I would like to thank everyone who attended and my special thanks to all the presenters. I think it was a great conference and profitable too! Jessica Finney outdid herself keeping us organized and Glenn Zimmerman, as usual, made sure that very few problems occurred. See page 7 for a summary of attendee feedback.

Our 2011 conference will be in Orlando, Florida. My wife, Gail, and I are taking three of our granddaughters. I'll have the easy job attending the conference, while Gail takes them to Disney World, etc. Of course Granddaddy will take them to a few things. Have a great summer!



Pre-conference workshop with Dr. Timothy F. Field



Paul Blatchford,  
CEU Monitor  
Extraordinaire!



David Soja and  
Jessica Finney



Don Jennings, Glenn Zimmerman,  
and Phil Spergel

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## President's Message

*By Larry L. Sinsabaugh, President, 2009-2011*

Hello again, it's time to have the American Board of Vocational Experts (ABVE) chat, hopefully to bring you up to date on things that have happened since the Spring Conference.

Before each Conference, Board of Directors meets to tackle the business issues affecting the Association. This year was no different. The Board came to the Conference early to work on issues affecting membership, to clarify policies and to plan future events including among others, the validation process for the new ABVE National Certification Test (NCT). If you want to have the Board consider an issue important to you, please e-mail your concerns to me or any Board member. The next Board meeting will be held on September 15, 2010. You should know that this year ABVE is in good financial shape, better than any year in recent times. We owe this standing to Glen Zimmerman and BTF Enterprises who shepherd the association using wise methods of financial stewardship. Things look good for the year if we keep focused on the bottom line, characterized by good financial management, and an eye toward member relations - which I intend to do.

One of the most pressing issue facing the ABVE Board is the validation of the new NCT. We had four people take the new test during the Spring Conference. Unfortunately that's not quite enough to get a good sample for validation. In the future, we will be asking members to participate in the test validation process. We need at least 150 members of all categories to take the new test so we can gather enough scores for necessary to render an accurate assessment. So, don't be surprised when we ask for your help with the validation process. Also, the Board is seeking a vendor that will let us test online in a secure environment for a reasonable cost.

Another area that has emerged is membership development. Ron Smolarski has reached out to several groups where ABVE could meet a special need. We were very gratified to have a fairly sizable contingent of our brother and sister VEs from Canada who attended the Spring Conference. It appears that there is sufficient interest to form a Canadian focus. Accordingly I have asked Robert

**CONTINUED ON PAGE 4**

## Newsletter Editor Message

*By Cheryl Chandler, Editor*

Welcome to the spring newsletter. We are very happy to welcome so many new associate members and a special welcome to our northern neighbors in Canada! We are looking to provide a voice and service to you and your colleagues so spend the word. As the newsletter editor I welcome feedback and short articles for publication. Not all of us may be up to a full article for the Journal of Forensic Vocational Analysis, or you are "warming up" your writing skills for the journal, but your ideas may be a good fit for the newsletter. Both national and regional topics are acceptable so please share your own expertise as we grow collectively in the ABVE community.



# Treasurer's Report

*By Estelle Hutchinson, Treasurer*

Thanks to a successful Spring conference in San Diego, revenues exceeded expenses and ABVE realized a net gain of approximately \$9,000. Revenues were largely composed of registrations for the conference, pre-conference sessions, and the Knowledge Enhancement Seminar. The conference ran smoothly and no significant unexpected expenses were incurred during the course of the event.

Traditionally Board members have received a stipend for their required travel and attendance at the annual Board meeting. The amount for the past few years has been \$500 and this is the only compensation members of the Board receive for services throughout the year. At the meeting in San Diego this year, Board members unanimously voted to waive payment of the stipend. This alone amounted to a savings of over \$5,000 for the organization and was a major factor in the financial success of the conference. The specific reason that the Board made this decision was that several thousand dollars will have to be spent on standardizing the revised certification exam using an outside test development expert, and the Board wished to ensure that sufficient money was available for that purpose.

The decision made several years ago to go from two to one conference per year has been a positive one for ABVE. We have seen better attendance at a single conference and, as a result, the one conference has been more profitable. Another important benefit is that the Board, involved members, and our management company, BTF Enterprises, have been freed up to turn their attention to other important matters for the organization. The evolution of the certification examination and expansion of membership are two key areas that have seen progress as a result of the increased focus by the Board.

The present fiscal year will be drawing to a close as of June 30, 2010. Although a few outstanding expenses remain, it appears safe to predict that this fiscal year will end as one of solid financial growth and stability for ABVE.

## 2010 Annual Awards

### **David S. Frank Lifetime Achievement Award:**

Don Jennings

### **Scott E. Streater Educational Award:**

Timothy Field

### **Retiring Board Member:**

Richard Baine

### **Presidential Citation Awards**

H. Gray Broughton – Conference Chair

Estelle Hutchinson – Knowledge Enhancement Seminar

Peter Lento – Knowledge Enhancement Seminar

Jayne Barton - Knowledge Enhancement Seminar

E. Davis Martin – Journal



Left to Right: Tim Field, Don Jennings, Richard Baine, Larry Sinsabaugh  
ABVE President, Estelle Hutchinson, Gray Broughton

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## President's Message (Continued)

Lychenko to Chair a Committee with the special purpose of assisting ABVE in offering a certification that directly meets the needs of Canadian VEs. The Chair will have Board voting privileges. Just this week the Board overwhelmingly voted to ratify this new committee and Mr. Lychenko's Board voting rights. We are grateful to Robert for agreeing to serve in this capacity. For want of a better term, that is until Robert and his Committee can coin a better term, we will call this new committee the Canadian Contingent. Do look for the name tags at the next conference, congratulate and welcome all those who attend from Canada. This is a significant development in ABVE's history and the Board is proud of this new linkage with the "*Canadian Contingent*."

Those at the Spring Conference know that the membership approved the ABVE BASIC Certification. The Board is hoping that this will also be a forum for the Canada Contingent seeking certification and for those who do not qualify for Fellow or Diplomate status, but who testify and need a basic measure that certifies basic qualifications in vocational expert testimony. The ABVE Basic does not in any way lessen Fellow and Diplomate status; it ensures that those who engage in expert witness testimony have basic credentials, letting the public and Triers-of-Fact know that if one is an ABVE certificant, they can count on a foundational level of knowledge by those who testify as vocational expert witnesses.

Another new happening occurred because of some initial forays into the new *Social Security Information System* on issues affecting VEs in connection with a new *Dictionary of Occupational Titles*. Previously, ABVE input was not well received by some in the Occupational Information Development Advisory Panel (OIDAP) community. Until the Spring Conference, ABVE had not been following the issues other than to respond when invited. I listened to criticisms of our stand and decided that in order to make a more thoughtful, cogent presence the Board would need to form a committee. That committee is chaired by Bonnie Martindale. She will keep ABVE up to speed on the OIDAP issues. She will make informed contributions upon the benefit of ABVE Board and membership. Anyone who would like to be a part of this activity can contact Bonnie ([bmartindale@hotmail.com](mailto:bmartindale@hotmail.com)). More information about OIDAP can be found at URL (<http://www.ssa.gov/oidap/>). In her first report Bonnie wrote,

...I have inquired the committee members in response to the OIDAP recommendations. Member's of this ABVE Committee has some suggestions for the recommended research on the physical demands of work, starting at page 38.

For physical activities, such as reaching, handling, fingering, feeling, gripping, writing, keyboarding, etc., in addition to researching whether the activity occurs occasionally, frequently, or constantly, also research whether it occurs intermittently or repetitively. In terms of sitting and standing or walking, add another category for semi-sedentary work – 50% sitting and 50% standing or walking throughout the workday. Regarding fingering, make a distinction between fingering and fine fingering. Consider adding repetitive movements or static positioning of the neck and back.

Please consider these recommendations in the development of the Content Model and Classification Recommendations for the Social Security Administration Occupational Information System.

The American Board of Vocational Experts would like to be considered on-board with this tremendous project. Upon my review of the OIDAP recommendations we can visualize the utilization of the OIS in many disability programs and it will improve the medical-vocational adjudication policies and processes. Bonnie S. Martindale (5/10/10)

ABVE can be pleased with Bonnie's initiative and we look for good things to come from this committee. We will look for future reports from her as the committee works on this issue.

Lately it has been easy to notice an increase in women's participation in ABVE activities. Despite the Board having been influenced by women leaders in the past, to honor women leaders the next Conference will highlight leadership contributions to the association by ABVE women. Every year ABVE becomes a more diverse organization. I am very proud of this development and I am proud of the contributions of our women members and women leaders.

The ABVE Journal needs manuscripts. This is your time to contribute to the field. Write something, about practice techniques, methods, theory, or your empirical research. Then send the manuscript to Dr. E. Davis Martin, Jr. ([martiev@auburn.edu](mailto:martiev@auburn.edu)). I also encourage you to submit articles or resources useful to your colleagues to Cheryl Chandler ([cheryl@crcexpert.com](mailto:cheryl@crcexpert.com)) for the ABVE Newsletter.

As your President, I continually seek new ways for the Board to effect policies that promote the welfare of the membership at large and the Fellows and Diplomate that make the organization the strong entity that it is. I hope you like the member e-News that features a different ABVE member each month. Maybe one day, we can all recognize one another at a glance. One of my personal goals is to have ABVE to become a welcoming organization. Finally, as I am always seeking new ways for ABVE to serve its constituents, do send me any suggestions that you think will make this organization better. Until our next chat, goodbye and continue to hone your craft. See you at the next Conference in Orlando.

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# Report on the March OIDAP Quarterly Meeting

**By Lynne Tracy, M.A., MFT, CRC, CDMS, D/ABVE**

The Occupational Information Development Advisory Panel (OIDAP) has just concluded its Quarterly Meeting in St. Louis. Day One included a report on the SSA project activities, the OIDAP work plan and two subcommittee reports, Communications and Research.

Of particular interest to us, OIDAP is developing job analyst recruitment, training and certification plans. We will follow this process closely and keep our membership informed. They are also developing the functional requirements for OIS, and person-side and job analysis instruments.

To keep interested parties informed, OIDAP is going to record webinars. The first will be an overview of the Panel's recommendations. They have also prepared a brief Fact Sheet which we will post.

**At the 2010 Conference in San Diego, ABVE initiated an advisory committee for the Occupational Information Development Advisory Panel (OIDAP). Bonnie Martindale will serve as the Chairperson for this committee.**

On Day Two, a presentation was given by to members of the National Academy of Sciences, Committee on National Statistics, Center for Education. The NAS just undertook a study over the last year of O\*NET, which is their first look in approximately 30 years of an occupational information system. The two presenters were Margaret Hilton, Study Director and Senior Program Officer, and Tom Plewes, Associate Study Director and Senior Program Director. The prepublication draft of A Database for a Changing Economy: Review of the Occupational Information Network (O\*NET) issued in December 2009 can be viewed at: [http://books.nap.edu/catalog.php?record\\_id=12814](http://books.nap.edu/catalog.php?record_id=12814). The final report will be issued in April or May.

The NAS panel was charged by DOL to document and evaluate the current potential uses of O\*NET in workforce development, human resources management and research. They were also to explore the linkage to SOC and other data sets, and identify improvements.

The NAS's findings and recommendations are important to the OIDAP's work as it goes about making recommendations to SSA on an OIS for disability adjudication purposes. Mr. Plewes pointed out that O\*NET is a general purpose system and provides a basis for uses, but better systems could be made for more specific purposes such as disability determinations. None the less, one of the recommendations in the NAS report is likely to be that SSA and DOL should create an interagency task force to study the viability of potential modifications of O\*NET to accommodate SSAs needs. As the OIDAP has already determined and recommended that O\*NET cannot only not be used in its current form, any workable modification would likely result in a complete overhaul of O\*NET.

The NAS panel is aware of the aggregation issue, but did not agree as a panel about the appropriate level of aggregation that would be acceptable in O\*NET. They have also agreed that O\*NET is not defensible, there are data collection issues, and the construct validity of descriptors varied across the content domains. NAS also will recommend that a technical advisory and external user advisory boards be established.

Although public comment was given, unfortunately, the last time the NAS Panel convened was in April 2009 and they have not and will not meet again. Additionally, we were advised that they never change their major conclusions and recommendations. Therefore, the work of OIDAP and public comments given were not considered by the Panel. Ms. Hilton did concede that had they had the recommendations of OIDAP by April when they last convened, they would have considered those findings. NAS also did not consider the O\*NET from a forensic or disability perspective, not its defensibility although the report comments in two places on the flaws of O\*NET. Mr. Plewes suggested that O\*NET be considered as a framework. In conclusion, NAS found that O\*NET meets some needs, but not all needs.

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# Continuing Education Policies Refined and Updates

**By G. Michael Graham, Ed. D., D/ABVE**

ABVE has had a long-standing policy regarding the need for members to maintain a minimum of 42 acceptable CEU's with each designated three-year membership cycle. This policy still stands and forms the foundation for certification status in The American Board of Vocational Experts CEU Instructions and formats are provided on the ABVE Website under two headings: (a) *Continuing Education Overview* and (b) *Alternative CEU Application*. Please see both of these sections on the ABVE Website ([www.abve.net](http://www.abve.net)) so that you can be in complete compliance. In the interest of official turn-around time and resources, the staff at ABVE Headquarters have been instructed by your Board of Directors to return incomplete CEU applications to the sender for their completion.

However, based on past experiences with members submitting requests for CEU approvals over the past 4-5 years, especially during the "rush" at the end of each 3-year cycle, your Board of Directors has refined the intent and parameters of the CEU approval dynamic. A detailed discussion of the CEU policy and parameters can be viewed and downloaded for printing from the ABVE Website as indicated above.

The primary parameter, which has not changed since it was introduced to ABVE members several years ago is that:

(a) CEU's are encouraged to be submitted at any time during the 3-year membership cycle and all 42 CEU credits must have been submitted at least 45 days BEFORE the end of the membership cycle;

(b) *For all programs that have not been awarded pre-approval by ABVE*, all applicants seeking ABVE CEU approval must submit a completed ABVE application (found on the ABVE Website) with an accompanying copy of the official attendance verification form, a copy of the program or seminar descriptive brochure so that members of the ABVE CEU Committee can determine the forensic application of the sponsored activity and the application fee.

## **New Policy Refinements Passed By Your Board of Directors:**

### 1. Home Study Courses:

ABVE policy states that the maximum CEU's approved per home study course is 14 for *AAACEUs* pre-approved courses. The maximum CEUs allowed for home study courses other than *AAACEUs* pre-approved courses is 6 CEUs. No more than 6 CEU's will be granted for any one Home Study Course, except for pre-approved *AAACEUS* courses, regardless of how many credits are indicated by the sponsoring agency or are accepted by other professional agencies.

In order for the ABVE CEU Committee to determine the forensic relationship of **all** Home Study Courses submitted, applications must include (a) course description, (b) a copy of the Table of Contents to illustrate the forensic value of the course, (c) the applicant must write a brief statement (not more than 1-page) on how the Home Study Course has application to his/her forensic practice and is a value-added information resource going beyond his/her existing competencies, and (d) a copy of a verified course completion certificate from the sponsoring party.

### 2. Conference Speakers

ABVE will automatically grant up to 6 CEUs for ABVE members who prepare and deliver a presentation talk at a designated and sponsored ABVE Conference, seminar or Workshop. If the member is part of a panel presentation, then CEU credits will be dependent upon the member's actual delivery time, plus an automatic 3 CEUs for the research and development of that presentation.

ABVE does not provide CEU credit for members engaged in the development and/or delivery of seminar, workshop or convention speeches, talks or other informational distribution sessions that are not sponsored by ABVE.

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## CE Policies (Continued)

### Policy Clarification Regarding College and University Level Courses:

ABVE will provide up to 18 CEU's during any one year for satisfactory completion of FORENSIC related courses taken at an accredited college or University (see 16-Core Forensic Competencies on ABVE Website). CEU unit value will be based on the unit value assigned by the college or university. Persons seeking CEU credit for accredited college or university graduate courses must (a) complete the Alternative CEU Application ), (b) pay the appropriate fee as indicated, (c) submit a course description (d) submit a copy of the transcript showing the course completion and grade assigned.

CEU's will not be approved for college and university courses that are taken as a part of one's profession degree requirement or electives. ABVE approves CEU's that are taken outside of one's degree requirements to enhance, further and solidify forensic related competencies.



### Marketing Material Available to ABVE Members

ABVE makes available an informational and marketing brochure titled, "Expertise for the Legal Community."

The brochure educates attorneys about the value of the ABVE certification and why they should use an ABVE Certified Expert.

ABVE Members may order this marketing tool at \$0.25 each to disseminate information about the organization and market their services.

There is space on the back of the brochure to affix a label with members' contact information.

Email [abve@abve.net](mailto:abve@abve.net) to order your set of brochures today.

## 2010 Conference Attendee Feedback

The 2010 Conference Evaluation Summary was rated an overall of 7.99 on a 1-10 scales, which is overall, very positive. The ABVE Board appreciates all feedback and the comments are shared to focus on making the conferences a better product for all. We had many positive comments on the speakers, the range of topics, organization, location and the facility. Constructive criticism included the facility (lighting, distance to walk, too cold in the rooms, noisy doors), food at the reception, and paying for parking. Further there was a feeling of too much emphasis on federal laws, some presentations too short and other too long. Some of the suggestions for 2011 Conference were as follows:

1. Mock trial; part of voc expert direct and cross examination of a few difference scenarios
2. Preconference session of how to administer certain test used in vocational evaluations, including what types of test are best to use, how to obtain; how can they improve our assessments; when tests are not indicated
3. Report writing w/examples; sharing of reports, what difference experts include in a report, how they format, what to include in difference types of cases, e.e. WC, PI, FEELA,
4. Interviewing & how to extract info needed if uncooperative client
5. Labor market search of actual jobs & job placement, methods others use, resources they use to show employability & placeability
6. I would love to see more in depth SSA ODAR prep as this is an underserved educational area for VEs.
7. More interaction with speakers should be built into each session, as it seemed like we always run out of time.
8. What to do to create paperless office
9. Life Care Planning details - go through start to finished product - focus on obtaining resources.

These suggestions will be factored in the formation of the next few conferences slated for Orlando, Las Vegas, and San Francisco, in that order. Please feel free to share any thoughts you have on future conference with the Conference Chair, Howard Caston or Board members. We are always looking for new topics and speakers.

Future ABVE  
Conferences  
Mark Your Calendars  
Now!

**March 24–26 2011**  
The Florida Hotel  
& Conference Center  
Orlando, Florida



**March 23–25 2012**  
Harrah's Las Vegas  
Las Vegas, Nevada



**2013**  
San Francisco, California



**2014**  
Nashville, Tennessee



## 2011 ABVE CONFERENCE ORLANDO FLORIDA March 25-27, 2011 REQUEST FOR PRESENTATIONS

The theme of our conference this year is *Medical Aspects of Disability*.

The planning committee has met and we are currently reviewing ideas for presentations. The primary goal is to provide ABVE members recent information concerning medical information. In addition, suggestions that were submitted by members who attended the San Diego ABVE Conference have been incorporated in our planning.



We are requesting speakers as well as additional ideas from members to be included in our Orlando conference.

Specific areas that the planning committee is considering for topics include:

1. Medical devices and procedures using state-of-the-art surgery, prosthetic, and art that he devices. This could be a “show and tell” type of presentation.
2. A report/peer review workshop that would consist of submission of sample good/bad reports and participant critiquing. The take away from this session would be examples of effective report writing and/or outlines of reports used in the forensic arena.
3. Techniques for expanding the base of forensic work for vocational experts in areas of family law, employment law, discrimination, railroad/ Longshore, and others.

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### Isn't It Time You Were Published?

ABVE's *Journal of Forensic Vocational Analysis* provides a forum to address the changing climate of vocational expert testimony.

E. Davis Martin, Editor, welcomes your submission.

Visit the Publications section of the ABVE website for submission guidelines. Manuscripts, general and empirical, should have direct relevance to vocational and rehabilitative forensics.

You may be interested in submitting manuscripts to related publications. Contact Timothy Field at Elliot & Fitzpatrick for more opportunities.

## 2011 Conference Request for Presentations (Continued)

4. Life care planning/attorney interaction. Demonstrate examples of working together with catastrophic cases incorporating current medical information.
5. A panel presentation consisting of an ALJ, claimant representative, and vocational expert to discuss Social Security hearings.
6. Issues of online job searches; archives of job openings, and relationship to DOT issues.
7. An update on OIDAP.
8. Current activities within the Veterans Administration relative to PTSD, amputations, grants/funding, etc.
9. Any other medically related/forensic related papers or presentations will be appreciated.

**If you are interested in participating as a presenter, visit [www.ABVE.net](http://www.ABVE.net) to download the RFP. Submissions are due by July 15, 2010**

Once the RFP's are submitted they will be reviewed by the committee and speakers informed concerning the request.

This organization contains a wealth of talent and abilities in various aspects of forensics in the vocational and disability areas. The arena is progressively expanding and it is imperative that we maintain our competencies especially in regards to medical advancements in the

treatment and rehabilitation of individuals with disabilities. The committee as well as the ABVE board are all committed to maintaining this high level of competence and excellence.

We are all looking forward to an exciting and informative conference in Orlando next year!

Please contact Howard Caston, conference chair if you have any questions or suggestions. 513-985-9151;  
[hcaston@castonassociates.com](mailto:hcaston@castonassociates.com)



Howard L. Caston, Ph.D., LPC, CRC  
Licensed Professional Counselor  
Certified Rehabilitation Counselor  
Diplomate; American Board of Vocational Experts

## WELCOME NEW ABVE MEMBERS!

**We would like to congratulate our newly Certified Members:**

Maria Babinetz, Diplomate  
Derek Nordin, Diplomate (Recertified)  
DT North, Diplomate  
Amy Williams, Diplmate

**ABVE would like to welcome the following new Associate Members:**

Laurie Arnold  
Phillip Boswell  
David Bruce  
Christine Carrozza-Roth  
Reginald Caruthers  
Deborah Caskey  
Karen Cochran  
Maggie Crump  
J. Chad Duncan  
Addie Greco-Sanchez  
Barbara Holmes  
Beal Lowe  
Ellen Rader Smith  
Joanne Pfeffer  
Dean Powers  
Rodney Schilling  
Marilyn Thomas  
Thomas Tilghman  
Jean Vaneps  
Laura Wilson

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## Rule 26: Major Changes for Attorneys and Experts

*By Robert Ambrogi, BullsEye: February 2010*

This article was originally published in BullsEye, an IMS *ExpertServices* electronic newsletter. [IMS \*ExpertServices\*](http://www.ims-expertservices.com/) (<http://www.ims-expertservices.com/>) is the industry's leading provider of best-of-class expert witnesses to the AmLaw 200

A major revision to the federal rules governing expert witness reports is on track to take effect in December. Lawyers and experts alike agree that the changes are long overdue.

No longer would Rule 26 of the Federal Rules of Civil Procedure allow full discovery of draft expert reports and require broad disclosure of any communications between an expert and trial counsel, as has been the case ever since the rule's revision in 1993.

Instead, under proposed amendments to Rule 26, those communications would come under the protection of the work-product doctrine. The amendments would prohibit discovery of draft expert reports and limit discovery of attorney-expert communications. Still allowed would be full discovery of the expert's opinions and of the facts or data used to support them.

The changes were approved by the U.S. Judicial Conference in September and submitted to the Supreme Court. The Supreme Court is expected to approve the amendments by May 1 and submit them to Congress. Unless Congress rejects the rules, they will take effect on Dec. 1, 2010.

The proposed rule is broadly supported by trial lawyers and bar organizations as a step towards reducing the cost and contentiousness of litigation.

Organizations that endorsed the rule include the American Bar Association, American College of Trial Lawyers, American Association for Justice, Defense Research Institute, Federal Magistrate Judges' Association, Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, and the U.S. Department of Justice.

### Dual Sets of Experts

"Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications," the Judicial Conference explained in its report to the Supreme Court.

"The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts."

The proposed rule would expressly provide that the work-product protection applies to "protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which the draft is recorded."

The proposed rule retains the three categories of attorney-expert communications that are excluded from the work-product protection under the existing rule:

1. Communications pertaining to the expert's compensation.
2. Facts or data that the attorney provided and the expert considered in forming opinions.
3. Assumptions that the attorney provided and that the expert relied on.

In another change, the proposed rule would alter the procedure for witnesses who will provide expert testimony but who were not specifically retained to provide expert testimony. Treating physicians and government accident investigators are examples of this category of expert.

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## Rule 26 (Continued)

Under the proposed rule, if the expert is not required to submit a written report, then the lawyer who will use the testimony must submit a disclosure summarizing the facts and opinions to which the expert is expected to testify.

### Support from Both Sides of the Bar

Stephen B. Pershing, a lawyer with the Center for Constitutional Litigation in Washington, D.C., submitted testimony in favor of the proposed rule on behalf of the American Association for Justice. He said that plaintiff and defense lawyers agree on the need to apply work-product protection to expert draft reports.

“Practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel’s work product, or counsel’s manipulation of the expert’s output that takes up time better spent focusing on the expert’s conclusions themselves,” Pershing said.

The amended rule would enable litigants to avoid the kind of “artificial behavior” that is now all too common, he suggested. No longer would lawyers and experts feel compelled to avoid written communications and no longer would well-funded litigants hire two sets of experts, one to consult in case development and the other to testify.

Another who spoke in favor of the proposed rule is Wayne B. Mason, former board chair of the Federation of Defense & Corporate Counsel and a partner in the Dallas office of Sedgwick, Detert, Moran & Arnold.

“Attorney discussions with experts are too often forced to be verbal in an effort to discourage discovery of draft reports,” he said. “The proposed rules supply a well-reasoned approach that strengthens the veracity and straightforwardness of the discovery process while considering the burden and expense.”

Mason praised the proposed rule for extending the work-product protection to employee-experts who are not required to prepare a written report. “Facilitating open communication between attorneys and in-house witnesses is an important practical consideration for the committee.”

### Rule Would Reduce Costs

John H. Martin, a past-president of the Defense Research Institute and a partner with Thompson & Knight in Dallas, said that the proposed rule will help reduce the cost of litigation.

“The proposed amendments provide protection to attorney-expert communications that allows the attorney and the expert to communicate freely with each other without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report,” Martin said.

“This allows the attorney to learn about the scientific or technical aspects of the case from the expert so that legal arguments not based on sound scientific methodology can be discarded, and the issues to be presented at trial can be narrowed,” Martin added. “At the same time, it allows the attorney to speak freely with the expert, many of whom are not fulltime professional expert witnesses, and to engage in an ethical preparation of the witness to present opinion testimony.”

It appears that the proposed rule extends the work-product protection to not just the expert, but also to the expert’s employees. The official Committee Note that accompanies the proposed rule explains that its protection is intended to include communications “between the party’s attorney and assistants of the expert witnesses.”

A number of lawyers had urged the committee to take this position. “An expert engineer at MIT may use grad students in his doctoral program to assist him in his research,” explained R. Matthew Cairns, president-elect of the Defense Research Institute and a lawyer in Concord, N.H., “and those students are the ones that counsel may deal with on a day-to-day basis as the expert’s team does his testing and analysis prior to him reaching a conclusion and preparing a report.” Given the broad support for the proposed rule by lawyers and experts alike, the changes to Rule 26 are virtually certain to take effect Dec. 1.

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