LEGISLATIVE COMMITTEE MINUTES

SB105

Bill as Introduced

SB 105 – AS INTRODUCED

2013 SESSION

13-0944
04/01

SENATE BILL ***105***

AN ACT relative to disclosure of expert testimony in civil cases.

SPONSORS: Sen. Soucy, Dist 18; Sen. Carson, Dist 14; Sen. Lasky, Dist 13; Sen. Boutin, Dist 16; Rep. Wall, Straf 6

COMMITTEE: Judiciary

ANALYSIS

This bill amends the requirements for disclosure for expert testimony in civil cases.

This bill is a request of the New Hampshire supreme court.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 105 – AS INTRODUCED

13-0944
04/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to disclosure of expert testimony in civil cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Disclosure of Expert Testimony in Civil Cases. Amend RSA 516:29-b, II(b) to read as follows:

(b) The ***facts or*** data [~~or other information~~] considered by the witness in forming the opinions;

2 Effective Date. This act shall take effect January 1, 2014.

SB 105 - AS AMENDED BY THE SENATE

03/14/13 0744s

2013 SESSION

13-0944
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SENATE BILL ***105***

AN ACT relative to disclosure of expert testimony in civil cases and relative to the recording of depositions.

SPONSORS: Sen. Soucy, Dist 18; Sen. Carson, Dist 14; Sen. Lasky, Dist 13; Sen. Boutin, Dist 16; Rep. Wall, Straf 6

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill amends the requirements for disclosure for expert testimony in civil cases. This bill also allows a party to record a video deposition, provided the party indicates the intent to record the video deposition in the notice provided to the adverse party.

This bill is a request of the New Hampshire supreme court.

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1 Disclosure of Expert Testimony in Civil Cases. Amend RSA 516:29-b, II(b) to read as follows:

(b) The ***facts or*** data [~~or other information~~] considered by the witness in forming the opinions;

2 Depositions in Civil Cases; Notice. Amend RSA 517:4 to read as follows:

517:4 Notice. The party proposing to take a deposition shall cause a notice in writing, signed by a justice or notary, stating the day, hour and place of taking the same, to be delivered to the adverse party, or one of them, or to be left at his abode, if either of such parties resides in this state, and within [~~twenty~~] ***20*** miles of the place of taking, or of the party taking the same, a reasonable time before the taking thereof. ***A party may, at such party's expense, record a video deposition taken under this chapter, provided the party indicates the intent to record the video deposition in the notice.***

3 Effective Date. This act shall take effect January 1, 2014.

CHAPTER 65
SB 105 – FINAL VERSION

03/14/13 0744s
05/02/13 1410EBA

2013 SESSION

13-0944
04/01

SENATE BILL ***105***

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CHAPTER 65
SB 105 – FINAL VERSION

03/14/13 0744s
05/02/13 1410EBA

13-0944
04/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

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2 follows:
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4 opinions;
5 65:2 Depositions in Civil Cases; Notice. Amend RSA 517:4 to read as follows:
6 517:4 Notice. The party proposing to take a deposition shall cause a notice in writing, signed by
7 a justice or notary, stating the day, hour, and place of taking the same, to be delivered to the adverse
8 party, or one of them, or to be left at his ***or her*** abode, if either of such parties resides in this state,
9 and within [~~twenty~~] ***20*** miles of the place of taking, or of the party taking the same, a reasonable
10 time before the taking thereof. ***A party may, at such party's expense, record a video deposition***
11 ***taken under this chapter, provided the party indicates the intent to record the video***
12 ***deposition in the notice.***
13 65:3 Effective Date. This act shall take effect January 1, 2014.
14 Approved; June 6, 2013
15 Effective Date: January 1, 2014

Amendments

Sen. Soucy, Dist. 18
March 5, 2013
2013-0691s
05/04

Amendment to SB 105

Amend the title of the bill by replacing it with the following:

AN ACT relative to disclosure of expert testimony in civil cases and relative to the recording of depositions.

Amend the bill by inserting after section 1 the following and renumbering the original section 2 to read as 3:

2 Depositions in Civil Cases; Notice. Amend RSA 517:4 to read as follows:

517:4 Notice. The party proposing to take a deposition shall cause a notice in writing, signed by a justice or notary, stating the day, hour and place of taking the same, to be delivered to the adverse party, or one of them, or to be left at his abode, if either of such parties resides in this state, and within [~~twenty~~] ***20*** miles of the place of taking, or of the party taking the same, a reasonable time before the taking thereof. ***A party may, at such party's expense, record a video deposition taken under this chapter, provided the party indicates the intent to record the video deposition in the notice.***

2013-0691s

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Senate Judiciary
March 5, 2013
2013-0744s
05/10

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2013-0744s

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This bill is a request of the New Hampshire supreme court.

Committee Minutes

Printed: 01/30/2013 at 3:25 pm

SENATE CALENDAR NOTICE
JUDICIARY

Senator Sharon Carson Chairman
Senator Bette Lasky V Chairman
Senator David Boutin
Senator Sam Cataldo
Senator Donna Soucy

For Use by Senate Clerk's Office ONLY
☐ Bill Status
☐ Docket
☐ Calendar
Proof: ☐ Calendar ☐ Bill Status

Date: January 30, 2013

HEARINGS

Tuesday **2/12/2013**

JUDICIARY	SH 100	9:00 AM
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

9:00 AM	SB81	authorizing phlebotomists and emergency medical technicians to withdraw blood for alcohol concentration tests.
9:15 AM	SB96	relative to vexatious litigants.
9:30 AM	SB105	relative to disclosure of expert testimony in civil cases.
9:45 AM	SB106	relative to confidentiality in adult guardianship cases.
10:00 AM	SB107	relative to probate administration.
10:15 AM	SB108	relative to the liability of landowners who permit use of their land for recreational activities.

Sponsors:

SB81
Sen. Jim Rausch; Sen. David Boutin; Rep. Charles McMahon; Rep. Mary Griffin

SB96
Sen. Sharon Carson; Sen. Sam Cataldo; Rep. Robert Rowe

SB105
Sen. Donna Soucy; Sen. Sharon Carson; Sen. Bette Lasky; Sen. David Boutin; Rep. Janet Wall

SB106
Sen. Bette Lasky; Sen. Sharon Carson; Sen. Donna Soucy; Rep. Paul Hackel

SB107
Sen. Bette Lasky; Sen. Sharon Carson; Sen. Donna Soucy; Rep. Sylvia Gale; Rep. Paul Hackel

SB108
Sen. Andy Sanborn; Rep. Gene Chandler; Sen. Jeff Woodburn; Sen. Jeb Bradley

Susan Duncan 271-3076

Sen. Sharon Carson
Chairman

SENATE JUDICIARY COMMITTEE

Susan Duncan, Senior Legislative Aide

SB 105 – relative to disclosure of expert testimony in civil cases.

Hearing Date: February 12, 2013

Time Opened: 9:46 a.m. Time Closed: 10:00 a.m.

Members of the Committee Present: Senators Carson, Lasky, Boutin, Cataldo and Soucy

Members of the Committee Absent: No one

Bill Analysis: This bill amends the requirements for disclosure for expert testimony in civil cases and was requested by the NH Supreme Court.

Sponsors: Senators Soucy, Carson, Lasky and Boutin; Representative Wall

Who supports the bill: Senate sponsors; Attorney Howard Zibel on behalf of the Supreme Court and the Judicial Branch; The Honorable Richard McNamara, Superior Court Judge

Who opposes the bill: No one

Summary of testimony presented in support:

Senator Soucy

Explained that the bill was brought forward on behalf of the Supreme Court and deals with expert witnesses. She said that a constituent had a question relative to video tape depositions and that she will be bringing an amendment forward relative to this.

Attorney Zibel

Explained that Judge McNamara brought this idea forward.

Judge McNamara

Said that the overall purpose is to help bring down costs of litigation.

He explained the Daubert standard whereby expert testimony cannot go to a jury – in order to rule out "junk science" and to make sure that only mainstream scientific ideas can come into the record. During these cases, discovery (information that must be given to the other side in the case) has to include data such as any materials the expert reviewed.

He went on to explain the elaborate steps that experts and attorneys take in order to keep information out of discovery – and this leads (especially in the Business Court) to additional costs to litigants, defendants and the court system. It has the additional result of making some experts unwilling to appear.

This legislation is an opportunity to bring our standards forward and to change to the federal rule.

Senator Carson asked about videotaped depositions and how would this play. **Judge McNamara** responded that it is regularly done in both Superior and Business Court. **Attorney Zibel** added that if the idea is not currently in statute, the best approach would be to bring the idea to the Advisory Committee on Court Rules.

Summary of testimony presented in opposition:
No one appeared or testified in opposition

Fiscal Note: No fiscal note is attached.

Future Action: The Committee took the bill under advisement.

sfd
Date hearing report completed: February 13, 2013

[file: SB 0105 report]

Speakers

SENATE JUDICIARY COMMITTEE

Date: February 12, 2013 **Time:** 9:30 a.m. **Public Hearing on SB 105**

SB 105 - relative to disclosure of expert testimony in civil cases.

Please check box(es) that apply:

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
☐	☒	☐	SENATOR SHARON M. CARSON	SD # 14
☐	☑	☐	SENATOR DAVID BOUTIN	DISTRICT #16
☐	☑	☐	Sen. Gasky	Dist. #13
☑	☐	☐	Sen Donna Soucy	Dist 18
☑	☑	☐	HOWARD ZIBEL	JUDICIAL BRANCH
☑	☑	☐	RICHARD McNAMARA	JUDICIAL BRANCH
☐	☐	☐		
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together (Howard Zibel, Richard McNamara)

Testimony

SB 105

ATTACHMENTS

(A) N.H. Rev. Stat. Ann. 516:29-b (2003).

(B) Senate Bill 105: AN ACT relative to disclosure of expert testimony in civil cases.

(C) Order, Dartmouth College v. North Branch Construction, Inc., No. 215-2009-CV-152 (August 6, 2012) (McNamara, J.).

(D) Committee on Rules of Practice and Procedure, Excerpt from the Report of the U.S. Judicial Conference: Federal Rules of Civil Procedure Rules Recommended for Approval and Transmission (2009).

(E) Federal Rules of Civil Procedure Advisory Committee Notes – 1993 & 2010 Amendments to Rule 26.

(F) Jason Rawnsley, The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder, ABA Section of Litigation 2012 Section Annual Conference (April 2012).

TITLE LIII
PROCEEDINGS IN COURT

CHAPTER 516
WITNESSES

Competency of Witnesses, etc.

Section 516:29-b

516:29-b Disclosure of Expert Testimony in Civil Cases. –

I. A party in a civil case shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the New Hampshire rules of evidence.

II. Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report signed by the witness. The report shall contain a complete statement of:

(a) All opinions to be expressed and the basis and reasons therefor;

(b) The data or other information considered by the witness in forming the opinions;

(c) Any exhibits to be used as a summary of or support for the opinions;

(d) The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;

(e) The compensation to be paid for the study and testimony; and

(f) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

III. These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

IV. The deposition of any person who has been identified as an expert whose opinions may be presented at trial, and whose testimony has been the subject of a report under this section, shall not be conducted until after such report has been provided.

V. The provisions of this section shall not apply in criminal cases.

Source. 2004, 118:1. 2005, 279:1, eff. July 22, 2005.

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2 Effective Date. This act shall take effect January 1, 2014.

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Dartmouth College

v.

North Branch Construction, Inc. & Lavalle/Brensinger, P.A.

AND

North Branch Construction, Inc.

v.

Building Envelope Solutions, Inc. d/b/a Foam Tech

NO. 215-2009-CV-152

ORDER

The Plaintiff, Dartmouth College, instituted the instant action alleging construction and design defects resulting from a multi-million dollar renovation to its Alumni Gymnasium. The parties have commenced discovery. The Plaintiff filed a Motion to Compel requesting that the Court order the Defendants to produce privilege logs and order Defendant Lavalle/Brensinger, P.A., ("LBPA"), to answer certain interrogatories and document requests. Defendant North Branch Construction ("NBC") filed a response in which it asserts that it does not intend to provide a privilege log because it does not intend to claim a privilege over any documents. LBPA also objects, but has since provided a privilege log and answers to the Plaintiff's remaining interrogatories and document requests. The Court held a conference on July 23, 2012. The issues raised in the Plaintiff's Motion to Compel have been resolved and, thus, its Motion is **DENIED AS MOOT.**

LBPA has also filed a Motion to Compel requesting that the Court order the Plaintiff Dartmouth to provide documents relative to its retained expert that have been withheld. The Plaintiff objects. For the reasons stated herein, LBPA's Motion to Compel is **GRANTED IN PART AND DENIED IN PART.**

I

In its Motion to Compel, LBPA seeks production of documents relative to the Plaintiff's retained expert, Simpson, Gumpertz & Heger ("SGH"). Specifically, LBPA seeks four sets of documents: (1) All documents withheld that are in the custody, possession, and control of its retained expert, SGH, identified in Exhibit 2 attached to LBPA's motion; (2) all correspondence withheld that is to and from SGH, or copied to SGH within Dartmouth's custody, possession, and control, identified in LBPA's Exhibit 1 as entries 10, 21, 26, 55, 59, 63, 64, 65, 69, and 93; (3) unredacted copies of handwritten notes drafted by SGH identified in LBPA's Exhibit 2 as entries 74, 75, and 76; and (4) all hand-written notes withheld that reference SGH for which the author is unknown, identified in Exhibit 1 as entries 8, 13, 18, 19, 24, 27, 28, and 29. Defendant LBPA's Mot. to Compel ¶3. LBPA asserts that these documents are discoverable pursuant to RSA 516:29-b, II(b), as it mirrors the pre-2010 version of Federal Rule of Civil Procedure 26(a)(2)(b), and that pursuant to this statute, "all materials, regardless of privilege, that the expert generates, reviews, reflects upon, reads, or uses in formulating his opinions" are discoverable. Id. at ¶4.

The Plaintiff objects and asserts that, although the language in RSA 516:29-b, II(b) is the same as the language in pre-2010 FRCP 26(a)(2)(b), the Court should nevertheless construe the statute's language to conform with the version of Rule 26(a)(2)(b)

as amended in 2010. The amended Rule 26 provides broader work-product protection for those communications between experts and attorneys, including preliminary and draft reports, that are relied on by experts in formulating their opinions, thus resulting in narrower discovery as compared to the pre-amendment version. Effective December 1, 2010, the Rules Committee restored broad work product protection for most expert materials in order to alter the outcome in cases that have relied on the 1993 formulation of the rule and requiring disclosure of all attorney-expert communications and draft reports. Under this statutory construction, the Plaintiff concludes that all of the documents LBPA requests are not discoverable because they fall under the protection of the work-product doctrine, and thus within the broad protection that RSA 516:29-b, II(b) affords when construed similarly to the amended version of FRCP 26(a)(2)(b).

II

In New Hampshire, the work product doctrine protects any document from discovery that is "the result of an attorney's actiyities when those activities have been conducted with a view to pending or anticipated litigation." Riddle Spring Realty Co. v. State, 107 N.H. 271, 274 (1966). The work product of an attorney generally consists of "his mental impressions, conclusions, opinions or legal theories." Id. at 275 (quotations omitted). "It may consist of correspondence, memoranda, reports, . . . exhibits, trial briefs, drafts or proposed pleadings, plans for presentation of proof, statements, and other matters, obtained by him or at his direction in the preparation of a pending reasonably anticipated case on behalf of a client." Id. (quotations and citations omitted). The real issue in this case is whether information exchanged by a lawyer and an expert is discoverable.

Historically, "[r]eports obtained by a lawyer from his experts [were] almost always considered to be part of his work product," Willett v. General Elec. Co., 113 N.H. 358, 359 (1973). But as a matter of practice, for at least the last 20 years, expert reports have been required to be exchanged in discovery. See, e.g. Superior Court Rule 35 (f). New Hampshire Courts generally relied on FRCP 26 in resolving expert discovery disputes. Johnston by Johnston v. Lynch, 133 N.H. 79, 95 (1990), (the Court relied on FRCP 26 to determine that, under Superior Court Rule 35b(3)(b), which was "essentially the same as" the federal rules of discovery, "the identity of an expert whom the opposing party has retained but does not expect to call as a witness is discoverable without any special showing of exceptional circumstances"). Change in state expert discovery practice paralleled changes in federal practice. The 1993 Amendments to FRCP 26(a)(2)(B) broadly expanded discovery of communications between lawyers and testifying experts. FRCP 26 (a) (2) (B) provided in relevant part that an expert witness must disclose:

(ii) the facts, or data, *or other information* considered by the witness in forming his testimony. (Emphasis supplied)

The Advisory Committee Note provided with the 1993 version of the rule expressly states:

> The report is to disclose the data and other information considered by the expert. . . . Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Advisory Comm. Notes to 1993 Amendments to Fed. R. Civ. P. 26.

In interpreting the language "data or other information" contained in the 1993–2010 version of FRCP 26(a)(2)(B), the majority of federal courts apply a "bright line rule

. . .: all documents <u>considered</u> by the testifying expert in forming his or her opinion, including attorney work product, are discoverable." Galvin v. Pepe, No. 09-CV-104-PB, 2010 WL 3092640, at *4 (D.N.H. August 5, 2010) (emphasis added); see also Elm Grove Coal Co. v. Dir., Office of Workers' Compensation Programs, 480 F.3d 278, 302 n. 24 (4th Cir. 2007); Regional Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 715 (6th Cir. 2006); In re Pioneer Hi–Bred Int'l, 238 F.3d 1370, 1375 (Fed. Cir. 2001). The bright line rule has not only been adopted by a majority of courts, it is been adopted by every Court of Appeal that has considered the question. South Yuba River Citizen's League v. National Marine Fisheries Service, 257 F.R.D. 607, 612 (E.D. Cal. 2009). "Courts adopting the bright line rule have reasoned that providing privileged material to the expert for him or her to consider in formulating an opinion affects a waiver of the work product privilege, by putting otherwise privileged material at issue in the case." Galvin, 2010 WL 30926240, at *5.

However, in 2011, FRCP 26 (a) (2) (B) was amended to provide that an expert witness must:

(ii) *identify facts or data* that the parties attorney provided and that the expert considered in forming the opinions to be expressed. (Emphasis supplied)

The purpose of the 2011 amendment was to specifically limit the expansive discovery allowed under the 1993 iteration of FRCP 26. The Advisory Committee Notes state: "the proposed amendments address the problems created by extensive change to rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony."

The majority interpretation of the 1993 version of FRCP 26 is consistent with current New Hampshire state discovery practice. See 4 R. Wiebusch, New Hampshire Civil Practice and Procedure §22.21[5] at 22-25 (2010) ("Except in the case of experts retained for and expected to testify at trial, a party cannot be required to disclose what the attorney or other representative has prepared in the course of work on the case . . ..") (emphasis added).

New Hampshire RSA 516:29-b, enacted in 2004, requires parties to disclose a testifying expert's identity as well as "a written report signed by the witness." RSA 516:29-b, II. Significantly, the language of the statute is identical to the language of the 1993 iteration of FRCP 26. RSA 516:29-b II mandates disclosure of:

"the data or *other information* considered by the witness in forming the opinions.

When the legislature enacted RSA 516:29-b, the Judiciary Committee noted that the enactment of the statute would "not be a significant change in current practice." NEW HAMPSHIRE JUDICIARY COMMITTEE HEARING REPORT, S. 04–0362 (Feb. 9, 2004) (statement of Attorney Honigberg). Moreover, the statutory language "data or other information" was taken directly from the 1993 version of FRCP 26(a)(2)(B). Fed. R. Civ. P. 26(a)(2)(B) (2007); see id., ("the language is straight from Federal Rule 26") (statement of Attorney Honigberg). Precedent, practice, and the Legislature's reliance on the language of FRCP 26(a)(2)(B) in enacting RSA 516:29-b in 2004, indicates that statutory interpretations of FRCP 26(a)(2)(B), as it read from 1993–2010, are controlling. Thus, application of the majority view interpretation of FRCP 26(a)(2)(B) will ensure that the construction of RSA 516:29-b is consistent with the legislature's intent. The Court notes

that at least one other Superior Court justice has reached a similar conclusion. Order, Champney v. EMCOR Energy Services, Inc. No. 216-CV-176 (January 3, 2012) (Garfunkel, J.).

Dartmouth argues cogently that the 2010 Amendments to FRCP 26 are an improvement in the law and should be applied here. The Committee Notes to Amended FRCP 26 notes that the amendments were "broadly supported by lawyers and Bar associations, including the American Bar Association, the Council of the American Bar Association section on litigation, the American College of trial lawyers, the American Association for Justice (ATLA), The Federal Magistrate Judges Association, the Federation Of Defense And Corporate Counsel, The International Association Of Defense Counsel, and the United States Department of Justice." The 2010 Rule was drafted to expedite litigation, and reduce expense. As the Advisory Committee Notes state:

> Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, show that lawyers and experts take elaborate steps to avoid creating a discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. These 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 testimony—to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, making a record of preliminary analysis or opinions, or producing a draft report. Instead the only record is a single final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinion, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the expert work.

There is much to be said in favor of the new Rule. But, however salutary the changes in Rule 26 are, the Court is not at liberty to interpret a statute inconsistently with the language of a statute; a court "must honor the expressed intent of the legisla-

ture as expressed in the statute itself". Premium Research Services v. New Hampshire Department of Labor, 162 N.H. 741, 744 (2011).

III

Dartmouth alternatively argues that, even if RSA 516:29-b is interpreted to be construed as pre-2010 FRCP 26, the statute's application is a violation of Part II, Art. 73-a of the New Hampshire Constitution, which provides that the New Hampshire Court is vested with the exclusive constitutional authority to prescribe judicial procedures, and, as such, the Court may disregard the statute and apply the new federal Rule as an expression of New Hampshire practice. Cf. In re Bayview Crematory, 155 N.H. 781, 784 (2007) (in construing Superior Court Rule 27, the Court will rely on federal cases interpreting the Rule as analytic aids). The Plaintiff primarily relies on certain language in Opinion of the Justices (PSAE), 141 N.H. 562, 573 (1997) for the proposition that the legislature has no power to prescribe procedural rules for the Court. However, Opinion of the Justices (PSAE) cannot be read so broadly. In that case the Court held that a proposed statute which would, in substance, amend NHREv. 404(b) to create a rebuttable presumption that evidence of a prior sexual assault would be presumptively admissible in sexual assault cases, would be unconstitutional. The actual holding of the case was that the legislature may not enact laws which contravene rules established by the court "to assure fundamental due process in civil and criminal trials." Id. at 577. There can be no serious claim that the 1993 iteration of FRCP 26 violates a party's right to the due process of law.

More importantly, in State v. Ploof, 162 N.H. 609, 625 (2011), the Supreme Court noted that "Opinion of the Justices was an advisory opinion issued in response to

a request from the Senate, rather than a litigated case, [and thus] the opinion does not constitute binding precedent." Accordingly, the Court cannot determine that application of RSA 516:29-b is unconstitutional.

Dartmouth argues that given the importance of work product immunity to the judiciary's ability to decide disputes, the Court should, to the extent it disagrees with Dartmouth's arguments concerning the meaning of RSA 516:29, still decline to apply it, citing Superior Court Rule 214 (VIII). The Rule provides that "[t]he presiding justice of the [Business and Commercial Dispute Docket] may establish generally, or in a particular case, procedures consistent with law... in order to achieve prompt resolution of discovery...." Pl. Memo. of Law in Support of Obj. to Motion to Compel ¶ 33. However, the authority of the justice of the Business and Commercial Dispute Docket of the Superior Court to create standing orders to facilitate litigation does not include the authority to make orders which contravene a statute, absent a violation of a party's constitutional rights. It follows then, that any documents or materials that SGH considers or has considered in rendering its opinion are discoverable and shall be provided to LBPA.

IV

Finally, the Court distinguishes certain documents that LBPA identified for the purpose of this motion as not discoverable under RSA 516:29-b. First, the handwritten notes identified in Exhibit 1, entries 8, 13, 18, 19, 24, 27, 28, and 29, remain undiscoverable as there is no indication from the Plaintiff that these notes were given to SGH or that SGH considered them in rendering an opinion. Second, the documents identified on pages 12–13 of the Plaintiff's Objection to the Motion to Compel are not discoverable

because, as the Plaintiff points out, these are communications between attorney and client. As a result, they are protected by privilege and are not related to expert disclosures.

In sum, the Plaintiff's Motion to Compel is **DENIED AS MOOT**; and, consistent with the foregoing opinion, LBPA's Motion to Compel is **GRANTED IN PART and DENIED IN PART.**

So ORDERED.

8/6/12 — *s/Richard B. McNamara*

Date — Richard B. McNamara
Presiding Justice

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to "discharge" in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice's concern that courts and litigants should be aware that some categories of debt are excepted from discharge.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that 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 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 practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case

that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions

of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio

of well-known cases, and the district courts have, in turn, prescribed local rules with practices and procedures that are inconsistent in many respects with the national rule text and with each other. The local rule variations do not appear to be justified by unique or different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities among them. The proposed amendments draw from many summary-judgment provisions common in the current local rules. For example, the amendments adopt a provision found in many local rules that requires a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. Other salient changes: (1) recognize that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion; (2) provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (3) set a time period, subject to variation by local rule or court order in a case, for a party to file a summary-judgment motion; and (4) explicitly recognize that "partial summary judgments" may be entered.

The public comment drew the advisory committee's attention to two provisions that raised significant interest. The first dealt with a single word change in the rule that took effect in December 2007 as part of the comprehensive Style Project and remained unchanged in the Rule 56 proposal published for comment in August 2008. The second was a proposed amendment that would have enhanced consistency by putting in the national rule the practice of

many courts requiring parties to submit a "point-counterpoint" statement of undisputed facts. This proposed "point-counterpoint" provision in the national rule was a default, subject to variation by a court's order in a case. With the exception of these two important aspects, the public comment on all other provisions of the proposed amendments was highly favorable.

The first aspect of divided public comment related to a change made in 2007 with virtually no comment. As part of the Style Project, the word "shall," which appeared in many rules, was changed in each rule to clarify whether it meant "must," "may," or "should." The word "shall" is inherently ambiguous. Whether "shall" meant, in a particular rule, "must," "may," or "should," had to be determined by studying the context and how courts had interpreted and applied the rule. In 2007, the word "shall" in Rule 56(a) was changed to "should" in stating the standard governing a court's decision to grant summary judgment. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") The change to "should" was based on the advisory committee's and Standing Committee's study of the case law. Like all the changes made as part of the Style Project, the change to "should" in Rule 56(a) was accompanied by a statement that the change was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. That change was virtually unnoticed until the current proposed amendments to Rule 56 were published for comment. Those amendments left the word "should" unchanged, consistent with the intent to improve the procedures for litigating summary-judgment motions but not to change the standard for granting or denying them.

Many comments expressed a strong preference for "must" or "shall," based in part on a concern that retaining "should" in rule text would lead to undesirable failures to grant appropriate summary judgments. Proponents of the word "must" pointed to language in

opinions stating that a grant of summary judgment is directed when the movant is "entitled" to judgment as a matter of law. These comments emphasized the importance of summary judgment as a protection against the burdens imposed by unnecessary trial and against the shift of settlement bargaining power that follows a denial of a valid summary-judgment motion.

Equally vigorous comments expressed a strong preference for retaining "should." These comments emphasized the importance of the trial court having some discretion in handling summary-judgment motions, particularly motions for partial summary judgment that leave some issues to be tried, and the trial record will provide a superior basis for deciding the issues as to which summary judgment was sought. These comments emphasized case law supporting the continued use of the word "should" as opposed to changing the word to "must." And trial-court judges pointed out that a trial may consume much less court time than would be needed to determine whether a summary judgment can be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review.

After considering these comments, and after extensive research into the case law in different contexts, the advisory committee concluded that it could not accurately or properly decide whether "shall" in Rule 56(a) meant "must" or "should" in all cases. Both the proponents of "must" and of "should" found support for their position in the case law. The case law ambiguity on whether "shall" means "must" or "should" is further complicated by circuit differences in the summary-judgment standard and differences in the standard depending on the subject matter. But the cases reflect, in part, the fact that they were decided based on the word "shall" in the statement of the standard for granting summary-judgment motions. The advisory committee decided that changing the word "shall" created an unacceptable risk of changing the substantive summary-judgment standard as it had developed in different circuits and different subject areas. The advisory committee decided that the words of Rule 56(a) – "The court *shall*

grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" – had achieved the status of a term of art or "sacred phrase" that could not be safely changed for stylistic reasons without risking a change to substantive meaning. Instead, the advisory committee decided to restore the word "shall" to avoid the unintended consequences of either "must" or "should" and to allow the case law to continue to develop.

After extensive public comment, the advisory committee decided to withdraw the "point-counterpoint" proposal that was included in the rule text published for comment. Under the proposal, a movant would be required to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing it in part (which could be done for purposes of the motion only). A court could vary the procedure by order in a case. The point-counterpoint statements were intended to identify the essential issues and provide a more efficient and reliable process for the judge to rule on the motion.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the advisory committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Some courts adopted the point-counterpoint procedure by local rule and subsequently abandoned it or are rethinking it. Testimony and comments did not provide sufficient support for including the point-counterpoint procedure in the national rule. Instead, the rule is revised to continue to provide discretion to the courts to adopt the procedure or not, by entering an order in an individual case or by local rule.

The proposed revision of Illustrative Form 52, Report of the Parties' Planning Meeting, (formerly Form 35), corrects an inadvertent omission made during the comprehensive revision of illustrative forms in 2007. The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection. The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006. The proposed revision is not published for public comment because it is technical and conforming.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Federal Rules of Civil Procedure
Advisory Committee Notes – Rule 26. Duty to Disclose; General Provisions Governing Discovery

1993 Amendments.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. RevisedRule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

2010 Amendments

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2)require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4)is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert

communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Complete Document

Can Be Viewed

In Bill Folder

ABA Section of Litigation 2012 Section Annual Conference April 18–20, 2012: Deposition Practice in Complex Cases: The Good, The Bad, and The Ugly

The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder

Jason J. Rawnsley
Richards, Layton & Finger, P.A.
Wilmington, Delaware[1]

"The most frequent method for discovering the work of expert witnesses is by deposition," according to the advisory committee notes to Rule 26.[2] On December 1, 2010, certain changes to the expert discovery provisions of this Rule went into effect. These changes clarified the scope of discoverable information about an expert's work that is available to opposing counsel—and therefore available for use or eligible

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[1] The views expressed herein are those of author and are not necessarily shared by Richards, Layton & Finger, P.A. or its clients.

[2] FED. R. CIV. P. 26 advisory committee's note (2010).

and the inability to obtain the substantial equivalent by other means without undue hardship. The advisory committee notes state that this exception should be rare, however, given the other disclosure requirements that apply to expert opinion.[18] And even if such a showing is made, the notes further instruct courts to "protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories,"[19] just as the Rules do for the work-product doctrine generally.[20]

III. CONCLUSION: THE QUESTIONS NOT TO FORGET DURING EXPERT DEPOSITIONS

Though the 2010 amendments to Rule 26 extended work-product protection to cover certain materials that may previously have been discoverable, a wealth of material about an expert's work remains open to inquiry. First, you are entitled to know *any* facts or data considered by the witness, whatever the source may be, and you should not be shy about asking about those sources. The deposition of the expert may be your last chance to see whether discoverable communications with opposing counsel exist. Second, though compensation tends to be displayed prominently in expert reports, don't leave the deposition until you are confident that you know about any form of direct benefit that the expert may receive as a result of his work. And finally, always remember to ask whether the expert was instructed to rely on certain assumptions that may not be evident from the report itself. If you remember to ask these questions—and follow up exhaustively on the answers you receive—you will remain within the permissible lines of inquiry under the amended Rule 26.

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[18] *See, e.g.*, *Sara Lee Corp. v. Kraft Foods Inc.*, 273 F.R.D. 416, 421 (N.D. Ill. 2011) ("Plaintiff has examined the data and methods underlying Dr. Wind's report, deposed Dr. Wind about the report, and retained its own expert to rebut the report. Given these considerable opportunities to test Dr. Wind's methodology, Plaintiff has not shown a 'substantial need' for the materials here.").

[19] FED. R. CIV. P. 26 advisory committee's note (2010).

[20] *See* FED. R. CIV. P. 26(b)(3)(B).

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

FOR THE CONSENT CALENDAR

Date: March 5, 2013

THE COMMITTEE ON Judiciary

to which was referred Senate Bill 105

AN ACT relative to disclosure of expert testimony in civil cases.

Having considered the same, the committee recommends that the Bill:

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 5 to 0

AMENDMENT # 0744s

CONSENT CALENDAR VOTE: 5 to 0

Senator Donna M. Soucy for the Committee

This bill amends the standards for disclosure for expert testimony in civil cases. The amendment clarifies that if a party wishes to video record a deposition, they may do so at their own expense and upon notification to the opposing party.

Susan Duncan 271-3076

New Hampshire General Court - Bill Status System

Docket of SB105

Docket Abbreviations

Bill Title: (New Title) relative to disclosure of expert testimony in civil cases and relative to the recording of depositions.

Official Docket of **SB105**:

Date	Body	Description
1/3/2013	S	**Introduced** and Referred to Judiciary; **SJ 4**
1/30/2013	S	Hearing: 2/12/13, Room 100, SH, 9:30 a.m.; **SC7**
3/6/2013	S	Committee Report: Ought to Pass with Amendment **#2013-0744s**, NT, 3/14/13; Vote 5-0; CC; **SC11**
3/14/2013	S	Sen. Bragdon Moved to Remove SB 105 from the Consent Calendar
3/14/2013	S	Chair Ruled Non-Germane Amendment
3/14/2013	S	Without Objection Rule 3-17 is Suspended to Allow Non-Germane Amendment 0744s, NT, Without Objection, 2/3 necessary, MA, VV;
3/14/2013	S	Committee Amendment 0744s, NT, AA, VV;
3/14/2013	S	**Ought to Pass with Amendment** 0744s, NT, MA, VV; OT3rdg; **SJ 7**
3/27/2013	H	Introduced and Referred to Judiciary; **HJ31**, PG.1074
4/2/2013	H	Public Hearing: 4/11/2013 2:00 PM LOB 208
4/10/2013	H	Executive Session: 4/16/2013 11:00 AM LOB 208
4/17/2013	H	Committee Report: Ought to Pass for April 24 (Vote 19-0; CC); **HC33**, PG.1094
4/24/2013	H	**Ought to Pass**: MA VV; **HJ38**, PG.1242
4/24/2013	H	Enrolled Bill Amendment #1410e Adopted; **HJ38**, PG.1257
5/2/2013	S	Enrolled Bill Amendment **#2013-1410e** Adopted
5/8/2013	H	Enrolled
5/9/2013	S	Enrolled (05/02/13)
6/6/2013	S	Signed by the Governor on 06/06/2013; Chapter 0065; Effective 01/01/2014

NH House NH Senate

Other Referrals

SB 105 -- *(NEW TITLE) RELATIVE TO DISCLOSURE OF EXPERT TESTIMONY IN CIVIL CASES AND RELATIVE TO THE RECORDING OF DEPOSITIONS.*

COMMITTEE REPORT FILE INVENTORY

__✓__ **ORIGINAL REFERRAL** ______ **RE-REFERRAL**

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

__✓__ **DOCKET (Submit only the latest docket found in Bill Status)**

__✓__ **COMMITTEE REPORT**

__✓__ **CALENDAR NOTICE**

__✓__ **HEARING REPORT**

__✓__ **PREPARED TESTIMONY AND OTHER SUBMISSIONS HANDED IN AT THE PUBLIC HEARING**

__✓__ **SIGN-UP SHEET(S)**

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

__✓__ - AMENDMENT # 0691S __✓__ - AMENDMENT # 1410-EBA
__✓__ - AMENDMENT # 0744S ____ - AMENDMENT # ______

ALL AVAILABLE VERSIONS OF THE BILL:

__✓__ AS INTRODUCED __✓__ AS AMENDED BY THE HOUSE
__✓__ FINAL VERSION __✓__ AS AMENDED BY THE SENATE

__Ø__ **OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):**

DATE DELIVERED TO SENATE CLERK
6/11/13

BY: Susan F. Duncan
COMMITTEE AIDE

ENROLLED BILL AMENDMENT TO

- Page -

April 26, 2013

2013-1410-EBA

06/03

Enrolled Bill Amendment to SB 105

The Committee on Enrolled Bills to which was referred SB 105

AN ACT relative to disclosure of expert testimony in civil cases and relative to the recording of depositions.

Having considered the same, report the same with the following amendment, and the recommendation that the bill as amended ought to pass.

FOR THE COMMITTEE

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Explanation to Enrolled Bill Amendment to SB 105

This enrolled bill amendment makes 2 technical corrections.

Enrolled Bill Amendment to SB 105

Amend RSA 517:4 as inserted by section 2 of the bill by replacing lines 2 and 3 with the following :

a justice or notary, stating the day, hour, and place of taking the same, to be delivered to the adverse party, or one of them, or to be left at his ***or her*** abode, if either of such parties resides in this state, and