The Federal Bar Association
Northern Virginia Chapter

Presents:

A BENCH-BAR DIALOGUE:

EXPERT DISCOVERY
and
SETTLEMENT MEDIATION

A Panel Discussion With The

United States Magistrate Judges
of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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INTRODUCTION: I don't know about you, but when I was new to the bar, I quickly became sick and tired of "lawyer jokes," like this one:

> ***Q:*** *What is black and brown and looks good on a lawyer?*
> ***A:*** *A Doberman.*

A client told me that as we walked out of the courthouse—after winning his case! (I hope he was only referring to the other side's lawyer, but he made no such distinction.) Here's another one: *"A jury consists of 12 persons chosen to decide who has the better lawyer."* Robert Frost said that—yes, *the poet*. When had he become such a cynic, I wondered?

Despite the openly hostile anger and cynicism of lawyer jokes, I later began to feel some professional pride when I heard them. After all, those jokes confirmed the envy that laymen had for us. The Frost witticism, in fact, confirmed the importance—even *the centrality*—of lawyers in the trial process. We were—dare I say it?—*the Star!* The jurors, the judge, our clients, and our opponents all hung on every word we uttered. When the case was won, *we* had won it—yes, *we the lawyers!*

But that has now changed. These days, a trial is more likely to be seen as a "Battle of the Experts." The lawyers—we who once were champions—now are choreographers, presenting the *new Star*, Dr. So-and-so or Professor What's-his-name. Now, there are even expert witness jokes:

> *"If the world should blow itself up, the last audible voice would be that of an expert saying it can't be done!"* Peter Ustinov

> *"An expert is someone who wasn't there when it happened, but who for a fee will gladly imagine what it must have been like."* Michael Tigar

Let's explore how this transformation has taken place, and find out how a lowly supporting cast member has become the leading man at trial.

I. EXPERT DISCOVERY

A. THE SEA CHANGES IN THE FEDERAL RULES

1970 Rule Changes – The Good Ol' Days: The philosophy underlying expert evidence has changed over the years, as has the nature and extent of expert discovery permitted. Prior to 1970, expert witness opinions often were considered "privileged" or "work product," and hence not discoverable. *See* ADV. COM. NOTES, 48 F.R.D. 487, 504-05 (1970). In 1970, when the modern discovery rules were introduced, Rule 26(b)(4) was adopted to permit discovery of the supporting-grounds and opinions of testifying experts. The rule drafters believed that allowing limited expert discovery—particularly in cases presenting "intricate and difficult issues as to which expert testimony is likely to be determinative"—would facilitate effective preparation for trial, effective preparation of rebuttal expert evidence, and effective cross-examination of an opposing expert. *Id.* at 503-05. The discovery tools then permitted were interrogatory questions; an "expert deposition" also could be ordered by the Court, or taken by agreement. (In the Alexandria Division, expert depositions were frequently taken under the 1970 version of Rule 26(b)(4).)

An opposing party also could request production of any "reports" and test results, as well as all documents the expert "relied upon," but little else. Thus, under the 1970 regime, the expert could not be subpoenaed to turn over his entire file, *e.g.*, *Marsh v. Jackson*, 141 F.R.D. 431 (W.D. Va. 1992), nor could he be required to produce all documents he reviewed or that had been provided by counsel—only those "relied upon," *e.g.*, *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985). To avoid even the production of written reports, however, experts often were instructed simply to keep notes and gave telephonic reports to counsel. That has since changed—*twice!*

1993 Rule Changes: Under the 1993 Rule revisions, testifying experts had to prepare and sign detailed written reports, which must identify, *inter alia*, "the data or information *considered*."

Rule 26(a)(2)(B) (superseded 2010) (emphasis added). The Committee explained that "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." ADV. COM. NOTES, 146 F.R.D. 501, 634 (1993) (emphasis added). Moreover, testifying experts could be freely deposed, which is still the rule. FED. R. CIV. P. 26(b)(4)(A). Thus, under the 1993 regime, fact memoranda provided to a testifying expert were discoverable, *see Lamonds v. General Motors Corp.*, 180 F.R.D. 302 (W.D. Va. 1998), as were communications with counsel, communications with other testifying and non-testifying experts, and even drafts of expert reports, *see Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-84, 288 (E.D. Va. 2001). This included e-mail and electronic draft versions of reports. *Id.* This sort of discovery did not draw a line between fact and opinion work product, and often swept up the latter with the former. Obviously, the 1993 regime completely rejected the pre-1970 regime, under which the back-up materials and the opinions themselves were considered privileged or protected as work product. This also was a sea change from 1970 regime, under which attorney work product was protected from disclosure. Had the pendulum swung too far between 1970 and 1993?

2010 Changes – the Current Practice: The 1993 amendments regarding expert discovery proved to be "too much of a good thing." In 2010, the rules were changed again "to address concerns about expert discovery." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 26, Adv. Com. Notes, 2010 Amendment, at 148 (Westlaw 2017) (hereafter cited as "2010 ADV. COM. NOTES at ___"). "*Concerns* …"? That is putting in mildly. The 1993 amendments (once again) confirmed that the law of unintended consequences can wreak havoc on even the most carefully considered rule amendments. Here are the most prominent problems:

Fact and Opinion Work Product was Jeopardized: By requiring disclosure of draft reports and communications with counsel, expert discovery was generally conducted deep "in the weeds"—there were routine document requests for drafts, notes, emails, and communications with counsel, and depositions took on the tone of an inquisition: "Is this *your* opinion, or did counsel ask you to render this opinion?" Instead of being stretched on racks, expert witnesses were tortured with sarcasm and innuendo during interminable, mincing depositions, often focused on emails with counsel, rather than the science and testing undergirding the opinions.

The Committee reported in 2010 that it had 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.

2010 ADV. COM. NOTES at 149. Therefore, the scope of the expert discovery was narrowed.

In particular, Rule 26(a)(2)(B)(ii) was "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." *Id*. This change in wording was intended to "provid[e] work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications." *Id*. It also was intended "to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." *Id*. Nonetheless, "facts or data" that the expert relies on "from whatever source" are discoverable, even if that source is counsel. *Id*. Finally, on this point, the Committee emphasized that the expert's "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." *Id*. So, on this last point,

the scope of the 1993 regime—requiring disclosure of all facts and data "considered," not merely those "relied upon"—has been retained, which has been both workable and reasonable.

Drafts: In addition to narrowing the scope of expert disclosures to protect work product, the Committee adopted provisions in 2010 specifically to preclude discovery "of drafts of any report from the expert or disclosure required under Rule 26(a)(2)." FED. R. CIV. P. 26(b)(4)(B). As a result of the 1993 rule changes, sometimes extensive discovery was permitted regarding drafts and spoliation of drafts. *See, e.g.*, *Trigon, supra*. And attorneys tried a variety of tactics to avoid discovery of drafts, such as overwriting drafts or admonishing the expert not to write down anything except the final opinions. Some of these tactics probably violated the 1993 version of Rule 26(a)(2), but the Committee found that even legitimate tactics unnecessarily multiplied the costs of expert discovery while degrading the output. 2010 ADV. COM. NOTES at 149. So a balance was struck to protect work product, and to give the expert and counsel a little privacy for their collaborative work.

Nonetheless, as you will see below, discovery of some types of work product is allowed. Despite protecting drafts, the rules do not protect an expert's notes or communications with other experts. These are important nuances under the 2010 version of Rule 26(a)(2) & (b).

Communications with "a Party's Attorney": In 2010, the Committee also adopted a provision specifically to preclude discovery of communications with "a party's attorney." *See* FED. R. CIV. P. 26(b)(4)(C). Thinking ahead, the Committee gave further guidance on this change. This is not "limited to communications with a single lawyer or a single law firm," but "should be applied in a realistic manner." 2010 ADV. COM. NOTES at 149. Thus, this protects communications with counsel of record, in-house, counsel, and counsel for the same party in related litigation. *Id*. So this provision should be given a "pragmatic application."

There are three exceptions to the ban on attorney-expert communications: (1) "compensation" of the expert; (2) "to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed;" and (3) "to identify any assumptions that counsel provided to the expert and the expert relied upon in forming the opinions to be expressed." *Id*. at 149-50. These are meant to be narrow—the right to seek *identification* of facts, data, or assumptions does not invite further inquiry into other communications or discussions with counsel.

Nonetheless, as shown below, substantive communications and input from individuals other than "a party's counsel" may be discovered—which *might* include data and analysis provided by other experts or the expert's interviews of fact witnesses.

B. SCHEDULING EXPERT DISCOVERY: THE FIRST TASK

The Schedule for Expert Disclosures: Under the 1970 regime, the timing of expert discovery was delayed until "the parties know who their expert witnesses will be." ADV. COM. NOTES, 48 F.R.D. at 504. Thus, under that regime, parties often dragged their feet on identifying experts, and little effective expert discovery occurred until the last minute. Often in this district, parties would seek leave of court to take all expert discovery after the cut-off. The 1993 disclosure requirements were designed, among other things, "to accelerate the exchange of basic information about the case." ADV. COM. NOTES, 146 F.R.D. at 628. Since 1993, Rule 26 has provided that expert disclosures "shall be made at the times and in the sequence directed by the court;" in the absence of "a stipulation or court order," the disclosures must be made "at least 90 days before the date set for trial or for the case to be ready for trial" for case-in-chief disclosures or "within 30 days after the other party's disclosure" if the expert evidence "is intended solely to contradict or rebut evidence on the same subject matter identified by another party." FED. R.

CIV. P. 26(a)(2)(D)(i) & (ii). The Eastern District, however, has set forth a different schedule (described next), which sets a default sequence and schedule in the event the parties have not created their own schedule for expert discovery

Local Civil Rule 26(D): Under the local rules, the parties are encouraged to agree upon their own schedule for expert discovery. E.D. VA. CIV. R. 26(D)(1). If the parties do not agree, then they must follow the prescribed schedule and sequence "unless ordered otherwise." E.D. VA. CIV. R. 26(D)(2). Specifically, under the local rule, the plaintiff must serve its disclosure 60 days before the discovery cut-off, the defendant's disclosure is due 30 days thereafter, and plaintiff's rebuttal disclosure is due 15 days after that. *Id.* For the purposes of this schedule, a counterclaimant must follow the plaintiff's schedule. E.D. VA. CIV. R. 26(D)(4). Similarly, if a defendant bearing the burden of proof on an affirmative defense will use an expert, he must follow the plaintiff's schedule, as well. Thus, the parties may end up on the same, tight schedule. Moreover, in all cases, the parties must complete "all forms of expert disclosure and discovery"—all disclosures, supplementation, and depositions—within 30 days after the time for rebuttal disclosures. E.D. VA. CIV. R. 26(D)(3). In complex, expert-driven cases, it is not unusual for the parties to seek leave to complete expert discovery after the discovery cut-off date.

Initial Pretrial Order: The discovery period of a case commences when the Court issues the initial pretrial order (styled simply as "*Order*"). The *Order* is issued soon after the defendant (or any one defendant, if there is more than one) has filed its Rule 12 response, whether answer or motion. The *Order* will set the time for a Rule 16(b) conference with a Magistrate Judge on a Wednesday about two to four weeks later. In addition, the *Order* sets a discovery cut-off about three months after the Rule 16(b) conference, typically the second Friday of the month, and the final pretrial conference is set for the Thursday in the week following that cut-off—which will be

the third Thursday of the month. The *Order* also directs the parties to "confer," as required by Rule 26(f), to, *inter alia*, "develop a discovery plan" to complete all discovery by the cut-off, which ordinarily would include all expert discovery.

Obviously, the parties must immediately set about identifying and preparing experts witnesses because the expert disclosure deadlines come up fast.

Rule 26(f) Conferences and Discovery Plans: The careful litigant will be prepared to discuss—and agree upon—the timing of expert discovery. In most cases, the parties should consider modifying the expert disclosure schedule. I suggest getting an agreement written into the discovery plan modifying the expert disclosure and deposition schedule. Both sides have an incentive to agree. Both parties will want to sequence expert discovery to follow the substantial completion of fact discovery—particularly in a complex case. In addition, the plaintiff may need more time for its principal expert report(s), and the defendant may want more time for rebuttal disclosures and expert depositions. And if defendant has filed a counterclaim (or affirmative defense) that depends on expert evidence, he *really* needs to modify the schedule; otherwise, he must make disclosures just as early as the plaintiff.

Rule 16(b) Conferences and Rule 16(b) Scheduling Order: At the Rule 16(b) scheduling conference, the discovery plan is reviewed and approved (or modified). The Magistrate Judge will review (and if reasonable, approve) the agreed upon schedule for expert discovery, possibly including the use of a little time after the cut-off for completion of expert depositions. If the parties do not agree, however, now is the time to fight for modifying the schedule; otherwise, the Magistrate Judge is likely to leave the schedule as set forth in Local Civil Rule 26(D). Following the Rule 16(b) conference, the Magistrate Judge will issue a *Rule 16(b) Scheduling Order* adopting or modifying the parties' discovery plan, and then stating

several standard local practices. Whether modified by your discovery plan and included in this order, or under Local Civil Rule 26, the expert discovery schedule is now set in stone.

Practice Tips: You should begin planning for expert discovery as soon as you become involved in the case. Here are some ideas and practice tips on scheduling:

- Start to frame the issues for expert opinion evidence and begin to gather the documents and other evidence that will be the factual basis for those opinions.
- Hire an expert immediately—generally, you will need all the time allowed or obtainable.
- Use a written retention letter (which is discoverable). This should spell out the business terms of retention in appropriate detail, but only generally describe the topic area of the expert, state that time is of the essence, and explain the duty of confidentiality.
- Think through the timing and sequencing of fact and expert discovery before the Rule 26(f) conference call.
- Plan as if you are going to trial, even if you believe the case will settle.
- Never fail to do everything necessary to win at the earliest time reasonably possible.

C. EXPERT DISCLOSURES

Rule 26(a)(2) now provides as follows:

> (A) **In General.** In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
>
> (B) **Witnesses Who Must Provide a Written Report.** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony…

FED. R. CIV. P. 26(a)(2). This was one of the biggest changes in 1993, which has been carried forward under the 2010 regime.

Philosophy: Under the 1970 regime, the nature and extent of expert discovery was limited to an expert-interrogatory and possibly a deposition, which hampered expert pretrial preparation, and some important information was shielded by the attorney work product doctrine.

"The information disclosed under the [1970 regime] 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." ADV. COM. NOTES, 146 F.R.D. at 634. The 1993 disclosure requirements broadened expert discovery to facilitate cross-examination of opposing experts and preparation of one's own expert. *Id*. at 634-35. Although expert disclosures were largely stripped of privilege and work product protections in 1993 (*id.* at 634), some of that has been restored by the 2010 revisions.

> ***Content:*** "The report must contain" the following:
>
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

FED. R. CIV. P. 26(a)(2)(B)(i) – (vi). This disclosure, largely carried over from the 1993 regime, should be "a detailed and complete written report, stating the testimony the witness is expected to present during direct examination." ADV. COM. NOTES, 146 F.R.D. at 634. That is a far cry from the "sketchy and vague" information available using the old "expert interrogatory." This is still the philosophy under the 2010 revisions.

Importantly, the expert disclosure is required to be a "complete statement of opinions and the basis for those opinions," and should be "sufficiently detailed and complete to enable adequate preparation" by the opposing party. *Sharpe v. United States*, 230 F.R.D. 452, 458 (E.D.

Va. 2005) (finding expert report inadequate); *but see Lisansky v. CPF Corp*., 1:06cv677 (JCC), 2007 U.S. Dist. LEXIS 30896 (E.D. Va. Apr. 26, 2007) (finding expert report sufficient). Some courts have interpreted this requirement stringently because of the revisor's suggestion that a sufficiently detailed and complete report should obviate the need to depose the expert. *See Sharpe*, 230 F.R.D. at 459 (citing *Salgado v. Gen. Motors Corp*., 150 F.3d 735, 742 n.6 (7th Cir. 1998)). That may be an unrealistically high standard. At the very least, though, the report must be "complete" and "detailed" enough to avoid unfair surprise or trial by ambush.

Editing: Since 1993, Rule 26(a)(2)(B) has expressly required "a written report" "*prepared … by the witness*." Nonetheless, it is understood that counsel will participate in the drafting process: "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 … ." ADV. COM. NOTES, 146 F.R.D. at 634. But the report cannot be "ghost-written" by counsel or by non-testifying consulting experts. *Trigon*, 204 F.R.D. at 291-96. Where editing stops and ghost writing begins, however, might be in the eye of the beholder. *Compare Trigon*, 204 F.R.D. at 293 ("[a]llowing an expert to sign a report drafted entirely by counsel without prior substantive input from an expert would read the word 'prepared' completely out of the rule") (citations omitted), *with Goins v. Angelone*, 52 F. Supp. 2d 638, 664 (E.D. Va. 1999) ("Trial counsel did not act improperly in offering editorial suggestions, which the expert was free to accept or reject."). This is no small issue, however, and must be squarely faced by counsel. As the Court made clear in *Trigon*, if the expert report has been ghost-written, the expert may be found incompetent under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993). The difference between "fine-tuning" the report and ghost-writing is vast—as are the consequences.

Charts and Exhibits: Since 1993, the expert disclosure must attach "any exhibits that will be used to summarize or support" the expert's opinions. Omitted or belatedly served charts or exhibits might be excluded under Rule 37(c)(1). *See, e.g.*, *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996) (affirming trial court's exclusion of undisclosed charts prepared by expert to rebut opposing expert's opinions); *United Phosphorus v. Midland Fumigant*, 173 F.R.D. 675, 677-78 (D. Kan. 1997) (excluding undisclosed expert exhibits). If expert charts and exhibits are not ready when the initial report is served, or are prepared for rebuttal, be sure to serve a formal and timely supplemental disclosure.

Supplementatal Disclosures: Rules 26(a)(2)(E) and 26(e)(1) & (2) require supplementation of expert reports. First, there is the general obligation to supplement "in a timely manner if the [disclosing] party learns that in some material respect the disclosure … is incomplete or incorrect." FED. R. CIV. P. 26(e)(1)(A). Second, there is the general obligation to supplement "as ordered by the court." FED. R. CIV. P. 26(e)(1)(B). For example, in a patent case, the discovery plan, which is then incorporated in the *Rule 16(b) Scheduling Order*, the parties might have agreed to supplement expert reports in light of claim construction rulings. Third, there is the specific obligation to supplement expert opinions whether included "in the report" or "given during the expert's deposition." FED. R. CIV. P. 26(e)(2). Thus, the duty of a party offering an expert may require timely, and possibly repeated, supplementations, including correcting the expert's deposition testimony. Importantly, under Rule 26(e), the duty to supplement expert opinions given at a deposition is independent of the acuity of the questioner;

whether asked or not, the party seeking to use the expert's supplemental opinions has an affirmative duty to disclose them.

The duty to supplement, however, should not be misused as a license to delay. Although a party "has a clear obligation to disclose and supplement" expert evidence in a timely manner, the duty to supplement "does not permit a party to make an end-run around the normal timetable for conducting discovery." *East West, LLC v. Rahman*, 1:11cv1380, 2012 U.S. Dist. LEXIS 133381, at *18 (E.D. Va. Sept. 17 2012) (citation omitted). Thus, the courts distinguish between "true supplementation (*e.g.*, correcting inadvertent errors or omissions)" and "gamesmanship," that is, attempting to introduce altogether "new and improved" opinions in the guise of supplementation. *Id*. (citation omitted); *accord Disney Enterpr., Inc. v. Kappos*, 1:12cv687 (LMB/TRJ), 2013 U.S. Dist. LEXIS 17977, *14-15 (E.D. Va. Feb. 11, 2013). The distinction between supplemental opinions and "new and improved" opinions may be hard to define in concept, but often is easy to see in practice.

Finally, all supplementation of expert opinions must be concluded "by the time the party's pretrial disclosures under Rule 26(a)(3) are due." FED. R. CIV. P. 26(e)(2). But that is an outside-date, and even a disclosure made then may be excluded as untimely and prejudicial for other reasons.

Reply Reports and Reply Opinions: The Civil Rules do not mandate reply reports in Rule 26(a)(2)(D), but Local Civil Rule 26(D)(2) provides a schedule for reply disclosures. These often are very useful to both sides, as an expert might revise his own opinions in light of information or opinions proffered by the opposing expert, or might respond in detail to the other side's rebuttal report. Many parties waive reply reports, however, and use only opening and rebuttal reports. Sometimes this is done because of schedule constraints, but it should not be

done uncritically. Even if reply reports are waived, under Rule 26(e)(1) any revised or reply opinions ***must be supplemented***, for example, at the expert's 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***.

ADV. COM. NOTES, 146 F.R.D. at 634 (emphasis added). So never waive expert depositions if you have waived the reply reports, and never fail to ask appropriate questions designed to elicit and examine reply opinions that may be given at the deposition. And if your expert has been deposed first, you may need to supplement any of his opinions in light of the opinions offered at the deposition of the other side's expert.

Failure to Disclose or Supplement: A failure either to make a timely expert disclosure under Rule 26(a)(2), or to timely and adequately supplement an expert disclosure under Rule 26(e), may justify an order precluding you from using that expert at trial or other sanctions. FED. R. CIV. P 37(c)(1). Whether a supplemental report is satisfactory is addressed to the discretion of the Court. *Compare Coles v. Jenkins*, 181 F.R.D. 569 (W.D. Va. 1998) (Michael, J.) (affirming Magistrate Judge's order requiring supplementation but allowing supplemental opinions), *with Lamonds v. General Motors Corp.*, 34 F. Supp. 2d 391 (W.D. Va. 1999) (Michael, J.) (disallowing supplemental plaintiff's expert report that belatedly asserted a previously disavowed causation theory). Similarly, a belatedly designated defense expert may be excluded. *See Proffit v. Veneman*, 2002 U.S. Dist. LEXIS 13892 (W.D. Va. July 15, 2002) (Michael, J.) (affirming Magistrate Judge's order refusing to enlarge time for expert discovery). Whether to allow or exclude a late disclosure or supplementation is a fact-specific issue.

If a party fails to make timely expert disclosures or supplementation, the Court must look at several factors before deciding to strike the belatedly disclosed information. *See Southern*

States Rack & Fixture v. Sherman-Williams Co., 318 F.3d 592, 595-99 (4th Cir. 2003). The five factors guiding the Court's discretion when determining whether to exclude expert testimony are the following: (1) surprise to the other party, (2) the other party's ability to cure any surprise, (3) any disruption of trial that might occur, (4) the explanation for the late disclosure, and (5) the importance of the expert testimony to a fair decision on the merits. *See id.; see also Disney Enterpr.*, supra, at *16-17 (excluding late supplemental opinions); *Rambus, Inc. v. Infineon Tech. A.G.*, 145 F. Supp. 2d 721 (E.D. Va. 2001) (subsequent history omitted). You should be prepared to address each of these factors in your motion or opposition.

Practice Tips: Here are some ideas for the disclosure phase of expert discovery:

- Provide to the expert only documents and fact summaries (which are discoverable)—*not your opinions*.
- Ask the expert what he or she wants to see, rather than spoon-feeding your ideas and compilations to him or her.
- Explain the expert's duty to preserve materials, notes, and test results.
- Provide edits and comments, but do not ghost-write the report.

D. "TRADITIONAL DISCOVERY METHODS" AND EXPERT DEPOSITIONS:

Traditional Discovery Methods: Although an expert report and a deposition are expressly provided for, under the 1993 revisions, the parties were not precluded from using "traditional discovery methods" to obtain further information beyond the matters disclosed in the expert report. ADV. COM. NOTES, 146 F.R.D. at 628. The 2010 Committee was even more expansive about the additional expert discovery that is permitted:

> For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.

2010 ADV. COM. NOTES at 149. While you might not want to expend an interrogatory making these inquiries, you would do well to consider using documents requests (or a provision in your discovery plan) to seek such information.

Here is a suggested list of documents you can request:

- The expert's notes. *See Dongguk Univ. v. Yale Univ.*, 2011 U.S. Dist. LEXIS 157690 (D. Conn. May 19, 2011); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1191-92 (11th Cir. 2013).

- The expert's communications with members of her staff. *Republic of Ecuador v. Bjorkman*, 2013 U.S. Dist. LEXIS 60739 (D. Colo. Apr. 26, 2013); *Hinchee*, 741 F.3d at 1191-92.

- The expert's communications with the party's employees to obtain facts. *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512 (N.D. Cal. 2012), *aff'd*, 742 F.3d 860 (9th Cir. 2014).

- The expert's communications with consulting experts. *Apple Inc. v. Amazon.com, Inc.*, 2013 U.S. Dist. LEXIS 47124 (N.D. Cal. Apr. 1, 2013).

And once you have these materials, you may use them at the expert's deposition or in cross-examination of the expert at trial.

Depositions: Under the rules, testifying experts can be deposed without leave of court:

> (A) **Deposition of an Expert Who May Testify.** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

FED. R. CIV. P. 26(b)(4)(A). Since first freely allowed under the 1993 amendments, expert depositions have become even more important, as lawyers seek additional information that might lay the groundwork for *Daubert* motions.

Expert depositions are permitted to explore matters "beyond" the report itself, such as opinions, depositions, and reports given in other cases. ADV. COM. NOTES, 146 F.R.D. at 628. In addition, a deposition can be used to separate the wheat (*What facts or data did you rely upon?*) from the chaff (*What facts or data did you merely consider?*), and to explore your theory of the case

(*Assume X is true; would your opinion change?*). *See* 2010 ADV. COM. NOTES at 149 ("Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed."). Indeed, you can go way "beyond" the disclosure. For example, the rule drafters stated in 1993 that fact work product may be probed while the expert was "being deposed."

> Given this obligation of disclosure [under Rule 26(a)(2)(B)(ii)], 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.

ADV. COM. NOTES, 146 F.R.D. at 634. Thus, some questions about the attorney's fact work product given to the expert (like a factual summary or compilation of key documents), factual assumptions suggested by the attorney, and other factual materials furnished by the attorney to the expert are fair game at the expert's deposition.

In 1993, the rule drafters posited that the disclosure of complete and detailed written reports would reduce the length of, or eliminate the need for, expert depositions. ADV. COM. NOTES, 146 F.R.D. at 635, 638-39. That has not been my experience. Taking the opposing expert's deposition is a necessary step in virtually any *Daubert* motion, and such a motion should at least be considered in almost every case. The report will disclose the data considered and the conclusions drawn from that data, but a *Daubert* challenge focuses on methodology. The methodology may be best explored in the expert's deposition.

Practice Tips: Here are some things to consider regarding expert depositions:

- Take the opposing expert's deposition—you will need it.
- Explain to your own expert that she may be asked to testify about communications with you (privileged) and non-testifying experts (not privileged).

- Caution against couching opinions with words like, "I believe," or "I feel"—there must be facts, not beliefs, and there must be a reasoned methodology to reach the expert's conclusion based on those facts, not feelings or intuition.

- Include a means in the discovery plan, or simply use other discovery methods, to obtain copies of expert reports, studies, and deposition transcripts from other cases listed in the opposing expert's report (but which are not produced with it). *See Ladd Furniture, Inc. v. Ernst & Young*, 1998 U.S. Dist. LEXIS 17345, **36-37 (M.D.N.C. Aug. 27, 1998).

E. PAYMENT FOR EXPERT DEPOSITIONS:

Rule 26(b)(4)(E) is often disregarded. That subdivision provides that "Unless manifest injustice would result, the court must require that the party seeking discovery:"

> (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
>
> (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

FED. R. CIV. P 26(b)(4)(E). This is aimed primarily at testifying experts who are deposed under subdivision (b)(4)(A) and non-testifying experts who are deposed by court order under subdivision (b)(4)(D). When this provision was added in 1993, the rule drafters made clear that "the expert's fees for the deposition will ordinarily be borne by the party taking the deposition." ADV. COM. NOTES, 146 F.R.D. at 638. Given that, make sure that you and your opponent have agreed on how to handle expert expenses.

This issue might be too abstract to address at the Rule 26(f) conference, but should be raised no later than when you are scheduling expert depositions—at which time you will know which experts will be deposed, when, for how long, and where. The fees payable under this subdivision may include the expert's time to prepare for the deposition, time to travel to and from a deposition, time to appear at the deposition, and travel costs to appear at the deposition. *See Haarhuis v. Kunnan Enterpr., Ltd.*, 177 F.3d 1007, 1015-16 (D.C. Cir. 1999) (expert's time for preparation and "portal-to-portal" time for traveling to and appearing at deposition);

American Steel Prods. Corp. v. Penn Central Corp., 110 F.R.D. 151, 153 (S.D.N.Y. 1986) (expert's time spent preparing for and appearing at deposition); *Fleming v. United States*, 205 F.R.D. 188, 190 (W.D. Va. 2000) (preparation time); *M.T. McBrian, Inc. v. Liebert Corp*., 173 F.R.D. 491, 493 (N.D. Ill. 1997) (travel costs); *but see Fleming*, 205 F.R.D. at 189-90 (finding that travel costs should not be awarded). In all events, the payment awarded must be "reasonable." *Fleming*, 205 F.R.D. at 189 (citing *Hurst v. United States*, 123 F.R.D. 319, 321 (D.S.D. 1988)). Reimbursable expert witness fees and expenses will mount rapidly, particularly when an out-of-state expert's time is calculated on a portal-to-portal basis.

Practice Tip: Get an agreement with the other side about whether or not to pay expert witness fees for depositions. If you merely assume that each side will bear its own expert costs, you might end up in court arguing (and losing) a motion to compel payment of fees.

II. SPECIAL EXPERT DISCOVERY TOPICS

A. NON-TESTIFYING EXPERTS

Under the 1993 and 2010 revisions, the rules for taking discovery from non-testifying (or "consulting") experts have subtly changed. The key provisions are as follows:

> (3) (A) **Documents and Tangible Things.** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> > (i) they are otherwise discoverable under Rule 26(b)(1); and
> >
> > (ii) the party shows that it has ***substantial need*** for the materials to prepare its case and cannot, without ***undue hardship***, obtain their ***substantial equivalent*** by other means.
>
> (B) **Protection Against Disclosure.** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

> (4) (D) **Expert Employed Only for Trial Preparation.** Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
>
> (i) as provided in Rule 35(b); or
>
> (ii) on showing ***exceptional circumstances*** under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

FED. R. CIV. P. 26(b)(3)(A) & (B) and 26(b)(4)(D) (emphasis added). While the terminology of "substantial need," "undue hardship," "substantially equivalent," and "exceptional circumstances" are consistent with the practices predating the 1993 changes, the practical dynamics are different.

First, in the old days (before 1993), you could retain several experts, and not disclose which one would be your testifying expert until late in the discovery period, when you supplemented your expert-interrogatory answer and produced the expert for a deposition. Now, under the use-it-or-lose-it 1993 and 2010 regimes, you must make timely disclosures for experts who will testify: No timely disclosure, no expert testimony at trial. So, no more hide-the-ball tactics.

Second, as the *Trigon* case makes unmistakably clear, if a non-testifying expert helps in the preparation of the testifying expert's report and preparation, those contributions are discoverable. If the non-testifying expert is the real source of opinions, then the court might find that to be an "exceptional circumstance" justifying the deposition of the non-testifying expert. In this instance, the "exceptional circumstances" standard in Rule 26(b)(4)(D)(ii) may differ from the traditional interpretation of the "substantial need"/"undue hardship"/"substantial equivalent" standard of Rule 26(b)(3)(A)(ii).

Finally, if an expert "wears two hats," acting as a consulting expert and a testifying expert, the expert's ambiguous role may be grounds to require you to produce otherwise protectable materials. *See B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y.*, 171 F.R.D. 57, 61-62 (S.D.N.Y. 1997). This is an important consideration in a complex, expert-intensive case.

In short, the rules for taking discovery from non-testifying experts were *changed* in 1993, even if the terminology used in Rule 26(b)(3) and (4) was not.

B. "EMPLOYEE" EXPERTS AND "TREATING PHYSICIAN" EXPERTS

Expert Interrogatory Redux: Although the expert report was intended to supplant the expert interrogatory under the 1993 revisions, a gap was left concerning certain specially skilled or experienced witnesses who had both percipient knowledge of the subject matter and were asked to testify based on their skill and experience. This gap widened in 2000, when Evidence Rules 701 and 702 were revised in an effort to draw a line between admissible "lay" and "expert" opinions, which left specially skilled witnesses straddling those rules: Did their opinions, based on their personal perceptions—but developed through their technical skill—have to be disclosed in a formal report?

In 2010, the Committee closed that gap by re-casting the expert interrogatory answer as a "required" summary disclosure for witnesses who would not give reports, but who would be offering expert opinions based on their specialized knowledge and experience:

> (C) **Witnesses Who Do Not Provide a Written Report.** Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
>
> > (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
> >
> > (ii) a summary of the facts and opinions to which the witness is expected to testify.

FED. R. CIV. P. 26(a)(2)(C). This subdivision is particularly aimed at skilled employees (such as engineers) and treating physicians.

> The rule revisors were very concerned about clarifying this amendment:
>
> > Rule 26(a)(2)(C) is added to mandate ***summary disclosures*** of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is ***considerably less extensive than the report*** required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.
> >
> > This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).
> >
> > A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. ***Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony.*** Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

2010 ADV. COM. NOTES at 149 (emphasis added). Employee experts and treating physicians are the primary targets of this rule, but there may be other witnesses who have specialized training and experience as well as percipient knowledge.

Employee Experts: The expert disclosure rules are specifically aimed at "any witness [a party] may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705," who is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(A)&(B). These provisions clearly cover "outside" ("specially retained") experts, but under the 1993 regime, it was less clear how "in-house" (employee) experts were to be treated.

What is the skill-level distinction between "lay" and "expert" opinions for employees? How does one determine whether an employee "regularly" gives expert testimony?

Under the 1993 regime, a highly skilled employee expert might have been subject to Rule 26(a)(2)(B) disclosure requirements, even if he did not "regularly" give expert evidence and was, at most, a "hybrid" witness who would testify based on personal knowledge as well as specialized or technical knowledge. *See Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459 (D. Minn. 1998) (treating six employees as "experts" who must serve reports). Courts were wary of making fine distinctions based on an employee's job description, and seemed more inclined to require disclosures from highly skilled employees if the testimony was highly technical.

Similarly, a skilled employee might not have been allowed to give "lay" opinion evidence under Rule 701 regarding a technical issue, even if his testimony would be based on his personal knowledge as a percipient witness. In *Asplundth Mfg. Div. v. Benton Harbor Engrg.*, 57 F.3d 1190 (3rd Cir. 1995), the court of appeals reversed a trial court ruling permitting a machinery maintenance supervisor to give opinion testimony about purported metal-fatigue in an aerial lift as a lay witness under Rule 701 because, in doing so, the district court failed to exercise *Daubert* gatekeeper function to ensure the reliability of those opinions. Judge Becker noted that although federal courts "commonly interpreted [Rule 701] to permit individuals not qualified as experts, but possessing experience or specialized knowledge about particular things, to testify about technical matters that might have been thought to lie within the exclusive province of experts," there was no clear standard for doing so. *Id*. at 1193. He challenged the rules committee to clarify the distinctions between Rules 701 and 702. The Evidence Committee took up this issue in 2000, but the Civil Rules Committee did not address it until 2010.

Under the 2010 regime, the maintenance engineer in the *Asplundth*, who was employed by the plaintiff and personally worked with the allegedly defective aerial lift, would be permitted to testify as both a percipient witness and an employee-expert about the fatiguing of the materials, even while both sides otherwise will have specially retained forensic engineers to opine about the cause of the fracture leading to the accident. The plaintiff would be required to a Rule 26(a)(2)(C) summary disclosure for the maintenance engineer as an "employee expert," while the specially retained forensic engineers would serve detailed formal reports. So, instead of trying to shoe-horn employee expert opinions under Rule 701, they may be admitted under Rule 702, provided that a summary disclosure has been served.

But not all courts simply accept a party's unilateral determination of when an employee expert is excused from the formal expert disclosure requirement. Generally, every witness who is "retained or specially employed to provide expert testimony in the case" or has "duties as the party's employee [that] regularly involve giving expert testimony," would be a "retained expert" who must serve a formal report. *Meredith v. International Marine Underwriters*, No. JBK 10-837, 2011 WL 1466436; 2011 U.S. Dist. LEXIS 41619, at *10 (D. Md. Apr. 18, 2011). An employee expert, by contrast, would be a "hybrid witness"—that is, "a hybrid of an expert and a fact witness." *Id.* at *11. Here is the pivot point:

> To the extent that a witness' opinion is based on facts learned or observations made "in the normal course of duty," the witness is a hybrid and need not submit a report. The same witness, however, must submit a report regarding any opinions formed specifically in anticipation of the litigation, or otherwise outside the normal course of a duty.

Id. at *11-12 (citations omitted). "A party seeking to avoid producing an expert report bears the burden of demonstrating that the witness is a hybrid. … To the extent he has not so demonstrated, the Court must assume that the witnesses are retained experts." *Id*. at 12. Finally, it may be sufficient to make a summary disclosure under Rule 26(a)(2)(C) of hybrid employee

witnesses' opinions regarding matters learned in the normal course of their duties. *Id*. at 21-23. This issue can become fact-intensive and carries with it the potential for an exclusion sanction if you make the wrong disclosure.

Other courts use similar analyses, and reach fact-bound decisions. *Compare Tokai Corp v. Eastern Enterpr., Inc*., 632 F.3d 1358, 1364-65 (Fed. Cir. 2011) (finding no abuse of discretion in district court's order excluding putative employee expert who did not serve formal report), *and Watson v. United States*, 485 F.3d 1100, 1007-08 (10th Cir. 2007) (employee expert who does not regularly give expert testimony for employer may testify without having served a formal expert report). So be prepared to attack—or defend—whenever an employee expert may be used. At the very least, a summary disclosure under Rule 26(a)(2)(C) must be served.

Treating Physician Experts: "Treating physicians" are different from other experts. Although "treating physicians" often give expert opinion testimony under Rule 702, Rule 26 purports to specifically exclude them from the disclosure requirement:

> 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.

ADV. COM. NOTES, 146 F.R.D. at 635 (emphasis added). Thus, "treating physicians" generally do not have to submit Rule 26(a)(2)(B) reports. *See, e.g., Hall v. Sykes*, 164 F.R.D. 46 (E.D. Va. 1995). But there are nuances to the "treating physician" exception to the disclosure rules.

Generally, a "treating physician" who has rendered a diagnosis, prognosis, or provided treatment for the injuries at issue, may give expert testimony under Rule 702 about issues like causation, diagnosis, and prognosis, but need not render a Rule 26(a)(2)(B) report. *See McLoughan v. City of Springfield*, 208 F.R.D. 236, 240-42 (C.D. Ill. 2002) (analyzing cases, noting split of authority and adopting majority rule). Other courts, however, will not permit causation or prognosis

opinion testimony from a treating physician unless a Rule 26(a)(2)(B) report has been provided. *See Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1 (D. Mass. 1996) (requiring expert report in lieu of exclusion). Likewise, any opinion to be elicited from a "treating physician" that goes beyond diagnosis and treatment might trigger the disclosure requirement. *See Littman v. George Mason University*, 5 F. Supp. 2d 366, 377-78 (E.D. Va. 1998) (excusing treating physicians from Rule 26(a)(2(B) report requirement, provided that their trial testimony is confined to facts "learned in the course of their treatment of plaintiff"). These limitations must be understood and observed on pain of exclusion of your pivotal expert witness.

Similarly, if plaintiff's counsel has referred the injured plaintiff to the physician, that physician's status as a "treating physician" will likely be closely scrutinized. *See Perkins v. United States*, 626 F. Supp. 2d 587 (E.D. Va. 2009); *Crawford v. United Seating and Mobility, Inc.*, No. 3:04CV580-JRS, 2005 U.S. Dist. LEXIS 46069; 2005 WL 6001384 (E.D. Va. June 7, 2005). To be sure, counsel's referral is not determinative—but it is an indicator that the physician may really be a retained expert.

There are other caveats to the "treating physician" exception: For example, a late expert witness disclosure might be excused because of the prior disclosure of doctor as a treating physician. *Haga v. L.A.P. CareServices, Inc.*, 2002 U.S. Dist. LEXIS 13848 (W.D. Va. July 29, 2002). A family physician who did not treat plaintiff's injuries, but who is familiar with plaintiff's general health before the accident, may not testify as a "lay witness" under Rule 701, but will be treated as an expert who must make an expert disclosure under Rule 26(a)(2)(B). *See Coles v. Jenkins*, 181 F.R.D. 569, 570-71 (W.D. Va. 1998) (affirming Magistrate Judge's order requiring supplemental report). Finally, the Court might order that specific discovery be made regarding treating physicians other than Rule 26(a)(2)(B) reports. *See Christian v. E. I. du Pont*

de Nemours & Co., 1996 U.S. Dist. LEXIS 21863 (W.D. Va. Sept. 13, 1996). Be on the lookout for these exceptions in your case.

C. DISQUALIFICATION OF EXPERTS

The Court has the "inherent power" to disqualify one party's expert to protect the legitimate interests of the other. *See Wang Labs., Inc. v. Toshiba, Inc.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). Although the existence of that power is clear, often the exercise of it is difficult. *Id.* Generally, the party seeking to disqualify the other side's expert bears the burden of proof. *See English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501-02 (D. Colo. 1993). The Court must balance four competing interests: one party's interest in protecting its confidential information; the other party's interest in retaining the experts it needs to prepare and prove its case; the expert's interests in practicing his profession; and the judicial system's interest in the integrity, fairness, and truth-finding effectiveness of the proceedings. *See Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 336-37, 338 (N.D. Ill. 1990). None of these interests can be ignored or taken lightly, but none can overbear the others.

How the balancing of those interests is done depends on the fact-pattern. There are three typical fact-patterns in expert disqualification motions: (1) the proposed expert works for, or consults with, a competitor of the party seeking disqualification; (2) the proposed expert is a former employee of, or former consultant to, the party seeking disqualification; or (3) the proposed expert had consulted with the party seeking disqualification about being its expert, but then became an expert for the other side—a "turncoat expert." Each is discussed below.

Competitor: When potential competitive harm is at issue in an expert disqualification motion, the Court examines five factors: (1) the nature of the expert's relationship to a competitor; (2) the extent of that relationship; (3) whether the relationship presently involves participation in

"competitive" decision making; (4) whether the relationship may involve such participation in the future; and (5) whether qualification should be conditioned upon the expert's agreement to limit the expert's relationships with competitors. *See Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 490-92 (D. Colo. 1992). This may be a very difficult assessment for the Court to make on the paper record of a motion to disqualify.

Former Employee or Consultant: The concern here is that the former employee or consultant will do more than share his expertise—*viz*., he will share his intimate knowledge of the other party, possibly in violation of a nondisclosure agreement. *See Wang Labs., Inc. v. CFR Assoc., Inc.*, 125 F.R.D. 10 (D. Mass. 1989) (former employee); *Ares-Serono, Inc. v. Organon Int'l B.V.*, 153 F.R.D. 4, 6 (D. Mass. 1993) (former employee). When one party challenges the other party's expert based on a prior relationship, such as employment or consultation, the party must demonstrate that (1) the relationship was confidential, (2) confidential information was imparted to the expert that is (3) "substantially related" to the subject matter of the litigation, and (4) there is a risk of harm to the party from the disclosure of that confidential information to a litigation adversary. *See Marvin Lumber & Cedar Co. v. Norton*, 113 F.R.D. 588, 590-92 (D. Minn. 1986) (consultant). These factors must be carefully weighed.

Turncoat Expert: The decision in *Wang v.Toshiba* squarely decides this issue. The test is whether a confidential relationship was created (with or without formal retention) *and* whether confidential information was imparted to the expert when he was consulted about the case. If so, the expert should be disqualified. If the lawyer is not careful, this could turn out to be a he-said-she-said contest between the lawyer and the putative turncoat expert. When consulting with an expert, therefore, do so in a writing notifying him that you will be imparting "confidential" information in your consultation, and require his agreement to protect the confidentiality of the information

disclosed. *See* VSB LEO 1787 (Dec. 22, 2003). In the first instance, it is the lawyer's duty to protect the client from the turncoat expert; if that fails, seek court intervention.

Withdrawn Experts: Can you designate an expert and then withdraw him if his opinion proves unhelpful to your case? Sure. What is the worst that can happen if you do that? Nothing, you suppose. You would be wrong. Some courts have permitted the *other side* to depose a withdrawn expert and to present those unhelpful opinions at trial. *See House v. Combined Ins. Co.*, 168 F.R.D. 236 (N.D. Iowa 1996). Still other courts have allowed the other side to retain that expert and present him as their own. *Peterson v. Willie*, 81 F.3d 1033 (11th Cir. 1996); *Agron v. Trustees of Columbia University*, 176 F.R.D. 445 (S.D.N.Y. 1997). In *Peterson* and *Argon*, however, the courts ruled that there should be no mention of the prior designation and withdrawal of the expert. Thank goodness for small favors. But the court in *Peterson* also cautioned that any attempt to impeach the expert could open the door to advising the jury that the other side had originally designated the expert as its own. Yikes!

Practice Tips: The disqualification rules apply to both "testifying experts" and non-testifying experts or "litigation consultants." *See The Beam Sys., Inc. v. Checkpoint Sys., Inc.*, 1997 U.S. Dist. LEXIS 8812 (C.D. Cal. Feb. 5, 1997). A non-testifying expert often "flies under the radar." In any expert-intensive case, I suggest that the stipulated protective order include a provision that requires disclosure of the identity of *all* experts and some basic information about any expert who will review confidential discovery materials. In that way, you can move to disqualify if warranted, before the materials have been disclosed. Moreover, if you anticipate the likelihood of disqualification motions in your case, seek (by agreement or court order at the Rule 16(b) Scheduling Conference) an early identification of all experts (testifying and non-testifying), so that all conflict issues may be raised at the earliest possible time.

D. RULE 45 SUBPOENAS TO INVOLUNTARY EXPERTS

Sometimes, counsel will find a really good report or study from a renowned expert that bolsters his client's case. The only problem is that you have not retained the renowned expert (or you cannot afford to retain him). Can you solve that problem by subpoenaing the report and its underlying data, which you will then supply to your own expert? Not really. Rule 45 specifically provides that

> To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires: …
>
> (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

FED. R. CIV. P. 45(d)(3)(B)(ii). This provision was added in 1991 to prevent the "taking" of an unretained expert's intellectual property without just compensation.

II. SETTLEMENT CONFERENCES

Settlement agreements between the parties to litigation are favored by the law. *See Stamie E. Lyttle Co. v. County of Hanover*, 231 Va. 21, 26, 341 S.E.2d 174, 178 (1986). "Courts should foster settlement in order to advantage the parties and promote 'great savings in judicial time and services.'" *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993). Even the Federal Rules provide for exploration of settlement at the outset of the case and again at the pretrial conference. FED. R. CIV. P. 16(a)(5) & (c)(2)(I). The Alexandria Division District Judges and Magistrate Judges encourage settlement mediation in all cases—big or small, complex or simple, doubtful or sure-thing. *See* E.D. VA .CIV. R. 83.6(A). Thus, you should anticipate that the Court, sooner or later, will suggest that settlement be explored in your case.

No matter what the case, there is a good reason to settle. It may be to save costs, or to avoid risks, or to attain finality. But sometimes the parties fail to apprehend those reasons, or are too preoccupied with discovery and motions to seriously consider settlement. Sometimes one party wants to explore settlement, but the other does not. If there is a good reason to settle, but the parties seem unable to get together to discuss their settlement options, then maybe the Court can help. Below is a brief description of the Settlement Conference procedures in the Alexandria Division.

Under the Federal Judicial Code, "Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions …." 28 U.S.C. § 651(b). In the EDVA, "the use of ***mediation*** as an alternative dispute resolution process in all civil actions … is authorized. Litigants in all civil cases shall be advised of the availability of mediation and may request it. The continued utilization of ***settlement conferences*** as a form of mediation is also authorized." E.D. VA. CIV. R. 83.6(A) (emphasis added). The Court has authorized the District Judges and Magistrate Judges to act as mediators. E.D. VA. CIV. R. 83.6 (C). In the Alexandria Division, the standard practice is for the Magistrate Judge assigned to the action to convene any Settlement Conference.

In addition to the standard practice, there are a few other features of our local ADR practices you should know: First, the parties may agree to use a privately retained mediator. E.D. VA. CIV. R. 83.6(B). Second, merely scheduling mediation, whether with the Magistrate Judge or another neutral, "shall not operate to postpone or stay the scheduling of any case or controversy nor shall such appointment be grounds for the continuance of a previously scheduled trial date or the extension of any deadlines previously scheduled by the Court." E.D. VA. CIV. R. 83.6(D). Third, under the "Big Marble Rule," the judicial mediator "may provide that counsel and/or a party representative with full settlement authority shall attend a settlement conference at any time the

judge considers appropriate." E.D. VA. CIV. R. 83.6(H). And finally, the Settlement Conference is confidential:

> The substance of communication in the mediation process shall not be disclosed to any person other than participants in the mediation process; provided, however, that nothing herein shall modify the application of Federal Rule of Evidence 408 nor shall use in the mediation process of an otherwise admissible document, object, or statement preclude its use at trial.

E.D. VA. CIV. R. 83.6(E); *see also* 28 U.S.C. § 652(d) (local rules governing ADR may "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications"). Confidentiality during the process and in the result often is indispensible to a successful mediation.

Commencing the Process: In every case, the parties may jointly request a Settlement Conference. E.D. VA. CIV. R. 83.6(A). It also may be suggested by the District Judge or Magistrate Judge—or even ordered *sua sponte*. While settlement usually is a matter left to the parties, the practiced eye of the Court may spot a case which is ripe for settlement. Or the Court may spot a troubled case in which neither side may want to make the first move on settlement for fear of showing weakness. In such a case, the Court can make the first move so that neither party loses face.

Mediation also may be requested by one party on motion, although that is seldom granted in this Division. A Settlement Conference involves a commitment of time and effort, and its success depends on both parties' willingness to compromise. If one party resists, therefore, the Court usually will not order mediation. Even so, the reluctant party may be encouraged to participate, and the Court will try to keep the door open should the opportunity arise again later in the case.

Scheduling the Conference: Most settlement conferences in the Alexandria Division are conducted by the Magistrate Judge assigned to the case. While settlement conferences sometimes are held on short notice in unusual circumstances, you should plan two to three weeks ahead.

Cases settle for different reasons and based on varying dynamics, and so there is no "right" time at which all cases ought to settle. Nonetheless, there are certain milestones—*e.g.*, prior to commencing discovery, the denial of a motion to dismiss, after completing discovery, or upon granting of partial summary judgment—which present the parties with an opportunity to re-examine settlement, or which may cause the Court to suggest it.

Preparation for the Conference: Once a case has had a Settlement Conference scheduled, the parties are likely to receive a "Dear Counsel" letter advising them who should attend the conference (typically, the lead counsel and a party representative) and instructing them to make certain written submissions (either for exchange with the other side, or for the Court *in camera*, or both). The "Dear Counsel" letters used by the Magistrate Judges are attached as an appendix to this outline.

Preparation by the parties is a critical component of a successful Settlement Conference. It should be approached with the same gravity as would be used for a major motion in the case. Each side should be thoroughly familiar with the merits, of course, but each side also should have formulated a settlement proposal which it can show is fair. Each side, moreover, should have a good idea what its "bottom line" is ***and be prepared to discuss it with the Magistrate Judge if asked in private to do so***.

The written submissions should be carefully prepared. The written submissions must concisely present important information to the Court, including confidential information. Unlike a brief, however, these should identify disputed issues without trying to "win" the case.

In the confidential written submissions submitted to the Magistrate Judge, each side presents the strengths of its case, but each side also must acknowledge the weaknesses. A candid and critical self-analysis of the case is better than "puffing" or self-righteous blustering. The confidential

written submission is not meant to please the client, but to inform the Court. (Indeed, if your client is not already aware of and willing to acknowledge the weaknesses of its case, then you may have acted more as zealot than professional advocate for your client.)

If a party fails to acknowledge an obvious weakness in its case, the Court might suspect which side is "the problem" in the settlement negotiations, and take action accordingly at the conference. That action is likely to take the form of an embarrassing private session with the Magistrate Judge during which he or she points out the weaknesses in no uncertain terms. It is better to acknowledge a weakness than to have your nose rubbed in it.

The Settlement Conference: In this Division, Settlement Conferences are not conducted as arbitration. While the merits are discussed, they are not decided. Nor do the Alexandria Magistrate Judges act as "mediators" in the sense that the term is synonymous with "conciliator." They mediate in the dictionary sense: to intervene between two disputants to bring about an agreement.

The conference usually begins with a joint session at which the case is discussed in general and neutral terms, the prior settlement discussions (if any) are rehearsed, alternative proposals are explored, and a general framework for resolution is identified (that is, what types of terms—both monetary and nonmonetary—will need to be negotiated). The parties might be asked to, or might ask for the opportunity to, address the other side. Sometimes, this is decisive; sometimes this is disastrous. The Magistrate Judge then will hold one or more rounds of private sessions with each side to see what movement toward a negotiated compromise can be made.

In the private sessions, the Magistrate Judge also will discuss the weaknesses of a party's case and offer them as a reason why the party should show more movement or flexibility. As a neutral authoritative figure, the Magistrate Judge's assessment may help break a logjam in your client's position, or that of the other side. In this part of the process, the parties must balance self-

interest with conciliation, neither holding out for too much nor accepting too little. This is when a party's pre-conference preparation pays off, for it has anticipated these issues and is prepared to deal with each thoroughly. It knows its own bottom line and can explain why it should not settle for less.

The Magistrate Judge may go back and forth between the parties for one or more private sessions, and may hold interim joint sessions, until a resolution is achieved or it is clear one will not be achieved. Do not expect the judge to give up easily.

The trial judge is not involved and is not advised of the incidents of the Settlement Conference, even if the trial judge has ordered the mediation. If the conference does not result in a negotiated resolution, the trial judge is merely advised that the case will remain on the trial docket.

Concluding the Conference: If a settlement is achieved, the Magistrate Judge will direct the parties to document it in term sheet or memorandum form before leaving the courthouse. Once that is signed, the Court then will leave it to the parties to do the final paperwork and promptly submit a final order.

The parties should draft and execute the necessary papers with all deliberate speed. Even a court-mediated settlement might start to come apart during the drafting phase. But a party cannot freely change its mind after reaching a court-facilitated settlement because a mediation term sheet may be "a binding agreement." *Long View Int'l Tech. Solutions v. Lin*, Record No. 160228 (Va. Apr. 13, 2017) (unpublished). The district court has inherent authority to ***summarily enforce*** court-facilitated settlement if all terms are agreed upon. *Hensley v. Alcon Labs.*, 277 F.3d 535, 540-41 (4th Cir. 2002). If certain terms are disputed, but it clear that a settlement was reached, the district court may enforce a settlement after a ***plenary evidentiary hearing*** to resolve the dispute. *Id*. at 541. Only if the dispute shows there was no settlement will the case be placed back on the trial-docket—which is rare when a judicial officer is the mediator.

A Settlement Conference, therefore, can be an effective and efficient means to resolve a case without the expense and uncertainty of trial. Use it whenever you can.

Ω

SEVEN DEADLY SINS OF SETTLEMENT MEDIATION

Sloth: Failing to prepare.

Wrath: Venting and ranting, instead of negotiating and resolving.

Greed: Failing to offer enough.

Gluttony: Demanding too much.

Lust: Nursing a revenge fantasy about crushing your opponent at trial.

Envy: Fearing that the other side is getting the better deal.

Pride: Exclaiming, "It's a matter of principle," when it is a matter of *principal*.

United States District Court

EASTERN DISTRICT OF VIRGINIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799

CHAMBERS OF
THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

TELEPHONE (703) 299-2120
FACSIMILE (703) 299-2211

March 16, 2017

Dear Counsel:
Re: xxxxx v. xxxx
Civil Action No. 1:16cv

Dear Counsel:

This letter is to confirm the settlement conference scheduled in chambers on Tuesday, March , 2017 at 2:00 PM.

The Court will not conduct the settlement conference unless counsel previously have conducted serious settlement discussions and believe this conference would be fruitful. By their presence at the settlement conference, counsel are deemed to be making a good faith representation that they have previously met, conferred and attempted to resolve the case in controversy. The conference will be scheduled for two hours.

In the event you cannot settle the case prior to the settlement conference, you are to submit a confidential settlement statement for the Court's review by close of business, Friday, March , 2017. This may be faxed to chambers (703) 299-2211 or emailed.

APPENDIX

Your confidential settlement statement must include:

- a brief statement of the facts;
- an itemized list of damages (plaintiff only);
- a statement describing any relevant procedural history, including any dispositive motions pending or to be filed;
- a concise statement setting forth a theory of liability and counsel's evaluation of the likelihood of success (plaintiff only);
- a concise statement setting forth defenses to plaintiff's liability theory and counsel's evaluation of the likelihood of success (defendant only);
- statement of fees, time and costs expended to date and counsel's estimate of the likely fees, time and costs through a trial to judgment;
- a concise statement describing the settlement history of the case, including all demands, settlement offers and counter-offers with their corresponding dates;
- counsel's evaluation of the terms on which the case can be settled fairly;
- the trial date and expected length of trial; and
- a list identifying the parties who will attend the conference.

It is preferred, but not mandatory that the parties attend the settlement conference with counsel. However, an individual with authority to settle the case should either be present or be immediately available by telephone.

If counsel needs to bring a laptop or cell phone into chambers for communication with client please contact chambers to request this prior to conference.

Your settlement statement is confidential and need not be sent to the opposing party.

Sincerely,

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHAMBERS OF
IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314
(703) 299-2119
FAX (703) 299-2219

[DATE]

[Counsel]

[Counsel]

Re: Settlement Conference in [Civil Action Name and Number]

Dear Counsel:

In the referenced matter, a settlement conference has been scheduled in my chambers on [Date & Time].

I understand and expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference. I strongly prefer and urge the decision maker to be physically present at the settlement conference. However, in limited circumstances, upon my approval, the decision maker may be present by telephone, so long as the decision maker's presence is both actual and immediate throughout the conference. Also, I strongly recommend that the parties bring drafted settlement language or a drafted agreement to the conference. The actual language of the agreement is often as important to settling the case as the substance of the agreement. To be clear, I only want to see draft agreement language for the nonmonetary conditions upon which the parties wish to settle the case.

My law clerk has already advised you that an exchange of information would be expected prior to the conference. On [Date One Week Before Settlement Conference], the parties should exchange by hand or email, and deliver to the Clerk of the Court **by hard copy only**, Settlement Conference Statements that concisely provide the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) An itemized summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality, limitation of

a release, etc., the party expects to be part of a settlement;

(e) The persons who will attend the settlement conference;

(f) The history of settlement discussions to date. (If the parties have not already attempted to settle the case, you should so notify me immediately by telephone.); and

(g) Whether the party intends to settle the case or whether the party is only appearing at the conference at the direction of the United States District Court Judge.

On [Date One Week Before Settlement Conference], each party should also deliver to the Clerk of the Court **by hard copy only** a confidential letter, *which shall not be filed or served on any other party.* This confidential letter shall forthrightly address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's *and the client's* candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

The settlement conference will occur in a conference room in chambers. **Prior to commencing the settlement conference, please proceed to Courtroom 301 and wait for my Courtroom Security Officer to let you know when we are ready to begin**. I expect to begin the settlement conference with a meeting attended by both sides, at which you summarize your respective positions orally for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate.

I look forward to meeting you at the settlement conference.

Very truly yours,

Ivan D. Davis
United States Magistrate Judge

IDD:wm

APPENDIX

United States District Court
EASTERN DISTRICT OF VIRGINIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799

CHAMBERS OF
MICHAEL S. NACHMANOFF
UNITED STATES MAGISTRATE JUDGE

TELEPHONE (703) 299-3367
FACSIMILE (703) 299-3371

April 19, 2017

Jane Roe
Alpha & Omega LLP
123 Main Street, NW
Washington, DC 20000

Sam Samuels
Samuels Law Office, PLLC
456 North Street, Suite 789
Arlington, VA 22201

Re: Settlement Conference in 1:16-cv-01234-JCC-MSN, *Doe v. Smith, et al.*

Dear Counsel:

A settlement conference in the above referenced matter has been scheduled in my chambers for **Thursday, May 4, 2017, at 1:00 p.m.**

I understand and expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having **full authority** to negotiate and settle the case on any terms at the conference.

My law clerk has already advised you that an exchange of information is expected prior to the conference. By **5:00 p.m. on Thursday, April 27, 2017,** the parties should exchange Settlement Conference Statements via email and send an electronic copy of the statement to MSN_chambers@vaed.uscourts.gov in PDF form. The subject line should read: "Settlement Conference in 1:16-cv-01234-JCC-MSN, Doe v. Smith, et al." For settlement statements over 20 pages, hard copies must be delivered to my chambers by 5:00 p.m. on the same day (but not filed with the Clerk).

Your statements should concisely provide the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) A summary of the relief sought;

(c) A description of any related litigation or other matter that might have any bearing on settlement of this case;

(d) Any additional terms such as confidentiality, limitation of a release, etc., the party expects to be part of a settlement;

(e) Who will attend the settlement conference; and

(f) The history of settlement discussions to date.

By **12:00 p.m. on Monday, May 1, 2017,** each party should also deliver to chambers in hard copy form and email to MSN_chambers@vaed.uscourts.gov a confidential letter, which shall not be filed or served on any other party. This confidential letter shall forthrightly address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's *and the client's* candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

I expect that each party's decision maker will participate in preparing that party's Settlement Conference Statement and confidential letter. I also expect that each decision maker will read the opposing party's Settlement Conference Statement and discuss it with counsel prior to preparation of the confidential letter.

I look forward to meeting with you at the settlement conference. Any questions may be directed to my law clerk, Steve Stephens, at Steve_Stephens@vaed.uscourts.gov or (703) 299-3367.

Sincerely,

/s/
Michael S. Nachmanoff
United States Magistrate Judge

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799

CHAMBERS OF
JOHN F. ANDERSON
UNITED STATES MAGISTRATE JUDGE

TELEPHONE: (703) 299-2118
FACSIMILE: (703) 299-2215

[Date]

[Method of Delivery]

[Plaintiff's Counsel's Contact information]

[Defendant's Counsel's Contact Information]

Re: Settlement Conference in [Case Number], [*Case Name*]

Dear Counsel:

A settlement conference has been scheduled in the above matter on **[date and time]**. I expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference.

In order to assist counsel and the court, I will require counsel to exchange information before the conference in addition to submitting a confidential statement to me. By **[date and time]**, counsel for each party should exchange and hand deliver to my attention at the Clerk's Office a settlement conference statement that provides the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) An itemized summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality or limitation of a release, that the party expects to be part of a settlement;

(e) Who will attend the settlement conference; and

(f) The history of settlement discussions to date. If the parties have not already attempted to settle the case, you should notify me immediately by telephone.

By **[date and time]**, each party should also hand deliver to my attention at the Clerk's Office a confidential letter, which shall not be filed or served on any other party. This confidential letter shall address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's **and the client's** candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

I expect that each party's decision maker will participate in preparing that party's settlement conference statement and confidential letter. I also expect that each decision maker will read the opposing party's settlement conference statement and discuss it with counsel prior to preparation of the confidential letter.

I expect to begin the settlement conference with a meeting attended by both sides, and I will have you summarize your respective positions orally for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate. You and your clients should make arrangements to stay as long as necessary to fully discuss a resolution of this case. I look forward to meeting with you at the settlement conference.

Sincerely yours,

John F. Anderson
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799

CHAMBERS OF
JOHN F. ANDERSON
UNITED STATES MAGISTRATE JUDGE

TELEPHONE: (703) 299-2118
FACSIMILE: (703) 299-2215

[Date]

[Method of Delivery]

[Plaintiff's Counsel's Contact Information]

[Defendant's Counsel's Contact Information]

Re: Settlement Conference in [Case Number], [*Case Name*]

Dear Counsel:

A settlement conference has been scheduled in the above matter on **[date and time]**. I expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference.

In order to assist the court, I will require counsel to submit a confidential statement to me by no later than **[date and time]**. This confidential letter shall be hand delivered to my attention at the Clerk's Office and shall provide the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) An itemized summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality or limitation of a release, that the party expects to be part of a settlement;

(e) Who will attend the settlement conference;

(f) The history of settlement discussions to date. If the parties have not already attempted to settle the case, you should notify me immediately by telephone;

(g) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(h) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(i) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(j) Counsel's **and the client's** candid evaluation of the terms on which the case can be settled fairly.

I expect that each party's decision maker will participate in preparing that party's confidential letter.

I expect to begin the settlement conference with a meeting attended by both sides, and I will have you summarize your respective positions orally for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate. You and your clients should make arrangements to stay as long as necessary to fully discuss a resolution of this case. I look forward to meeting with you at the settlement conference.

Sincerely yours,

John F. Anderson
United States Magistrate Judge

APPENDIX