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November 10, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, NE
Washington, DC 20544

Re: Testimony – Proposed Amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

With regard to the proposed amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure, the mandate of Rule 56 regarding summary judgment must not be reversed. As an attorney practicing in federal court, during the course of litigation, often times issues are presented which are ripe for summary judgment and properly supported, but get deferred and ultimately result in a denial of summary judgment. When properly supported, summary judgment must be granted as it lessens the exorbitant costs of litigation and restores faith in the judicial system.

Summary judgment under Rule 56 should continue to be mandatory when a litigant has met the burden of demonstrating that material facts are not in dispute and that the party is entitled to judgment as a matter of law. Interpreting Rule 56 to provide a discretionary standard significantly compromises the importance of summary judgment as a mechanism for resolving cases prior to trial and is a waste of time and resources.

Moreover, I am in support of revising Rule 56 to provide for a reasonable cost allocation when materials are submitted without reasonable justification, in place of the current "bad faith"

standard set forth in Rule 56(g). This should not be viewed as a sanction pursuant to Rule 11, but rather, a cost-shifting mechanism, similar to that of Rule 37.

Regarding Rule 26 of the Federal Rules of Civil Procedure, I am in agreement with the proposed amendment to Rule 26(a)(2)(C) which creates a new obligation to disclose a summary of the facts and opinions of a trial-witness expert who is not required to provide a disclosure report under Rule 26(a)(2)(B). Having an attorney-prepared summary protects both sides so as to promote fairness and avoid trial by ambush.

Finally, I am in favor of extending work product protections to drafts of Rule 26(a)(2)(B) expert reports and 26(a)(2)(C) party disclosures and also to attorney-expert communications, recognizing the three exceptions that allow discovery as a matter of course of the parts of attorney-expert communications relating to: (i) compensation, (ii) identifying facts or data the attorney provided to the expert and that the expert considered in forming the opinions to be expressed, and (iii) identifying assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. The protections, along with the recognized exceptions, promote fairness in the discovery process, while at the same time promoting comprehensive discussions between counsel and the expert witness.

Thank you for the opportunity to speak with the committee. I look forward to meeting you.

Very truly yours,

Debra Tedeschi Herron

Debra Tedeschi Herron