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January 7, 2009

Mr Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
One Columbus Circle N.E.
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

08-CV-113

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

Dear Mr. McCabe:

I am a partner with the Dallas office of Thompson & Knight LLP, where I have practiced civil litigation for over 34 years. I am the Immediate Past President of DRI–*The Voice of the Defense Bar,* the world's largest organization of attorneys defending the interests of business and individuals in civil litigation. I am also Vice President of Lawyers for Civil Justice, and will become President of that organization in May 2010.

I look forward to testifying before the Advisory Committee on Civil Rules in San Antonio on January 14, 2009, and the following is a brief summary of my planned testimony.

One of the major threats to our civil justice system is the escalating cost of civil litigation, particularly in the area of discovery. The proposed changes to Rules 26 and 56 are positive steps that will reduce waste and diminish unnecessary costs that serve little or no purpose. Procedural discovery rules must strike the proper balance between allowing parties to obtain the information necessary to develop their cases for trial and imposing unnecessary burden and expense on litigants responding to discovery. At the same time, rules addressing summary disposition must strike the right balance between allowing sufficient time for the respondent to properly develop the facts of the case and the right of the movant to obtain summary judgment when the undisputed facts demonstrate a clear entitlement

Rule 56

I am strongly in favor of the point/counterpoint procedure in Rule 56(c). I have practiced in districts that utilize that type of procedure and in districts that do not. In my experience, the point/counterpoint procedure requires the parties to specify clearly what facts they contend are, or are not, truly in dispute. While parties sometimes list undisputed facts that may not be material to the outcome of a summary judgment motion, requiring the moving party to list the facts that are undisputed provides the respondents with ample opportunity to demonstrate which dispositive facts they contend are disputed. In my experience, that narrows the focus of the summary judgment argument in most cases to a very small number of potentially disputed issues,

and allows the court to determine whether a fact issue genuinely exists. I realize that this has become a matter of some debate, but in my experience the proposed procedure works quite well and saves the litigants time and money in the long run

I also strongly support the use of the "must be granted" language, but will not repeat what so many others have said about that issue. Granting total, or even partial, summary judgment in proper cases can result in enormous savings of unnecessary litigation costs. For example, I represented a commercial airline in federal multidistrict litigation in which the airline admitted that its crew's negligence caused the crash. After most plaintiffs had settled, a few chose to pursue claims for punitive damages. The district judge granted summary judgment on the punitive damages issue, and that ruling was affirmed by the circuit court of appeals. That ruling eliminated the protracted, costly, and totally unnecessary trial on punitive damages, and led to a prompt resolution of the remaining compensatory damages claims.

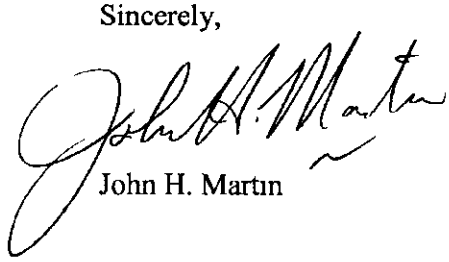
Rule 26

While some progress has been made with regard to the number and length of depositions, I still believe that in a large number of cases, far too much time is expended in wasteful deposition discovery. This is especially true when it comes to expert witnesses. Retained outside experts are required to provide complete reports of their opinions, and the purpose of deposing an expert should be to explore the validity of the opinions themselves. Instead of spending unnecessary time and incurring wasteful expense exploring what the lawyer and the witness talked about, whether draft reports contain minor, and usually insignificant, factual misstatements, and the mechanics by which the final report came into being, counsel should spend their precious time during an expert's deposition in questioning about the opinions themselves and the underlying bases therefor.

The proposed amendments provide protection to attorney-expert communications that allows the attorney and the expert to communicate freely with each other without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report. This allows the attorney to learn about the scientific or technical aspects of the case from the expert so that legal arguments not based on sound scientific methodology can be discarded, and the issues to be presented at trial can be narrowed. At the same time, it allows the attorney to speak freely with the expert, many of whom are not fulltime professional expert witnesses, and to engage in an ethical preparation of the witness to present opinion testimony.

I look forward to appearing before the Committee and to answering any questions you may have at that time.

Sincerely,



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