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01/09/2009 08:15 PM

To <Rules_Comments@ao.uscourts.gov>
cc
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Subject Proposed Amendments to Federal Rules of Practice and Procedure

08-CV-121

Mr. McCabe, I appreciate the opportunity once again extended to the Fellows of the American College of Trial Lawyers to comment on the proposed amendments to the Federal Rules of Practice and Procedure. In reviewing the proposals, I would like to address those that concern Rules 26 and 56.

As to Rule 26(a)(2), it is my understanding that under the proposed amendment work product protection would be extended to communications between an attorney and the expert retained on behalf of his client with certain exceptions. I am opposed to this amendment. Traditionally, although retained by a party, experts have been considered witnesses who are removed from the partisan positions of those who retain them and brought into court to render an unbiased opinion based upon their unique knowledge or experience. In fact, in some jurisprudence experts are effectively deemed to be witnesses of the court, rather than the parties. Although in practice this is certainly not always the case, one of the best assurances that an expert is being forthright in testimony is the ability of the opposing lawyers to obtain all documents and communications related to the formation and rendering of the expert's opinion, and especially all communications with the attorney who retains them and all drafts of their report. This helps to assure that the attorney and expert do not simply shape the expert' s opinion to reflect the position of the advocate and his client. Thus, I would urge that what transparency there is in the use of experts under the Rules be maintained by not approving this proposed amendment.

As to Rule 56, I concur with all aspects of the proposed amendment except the requirement that the statement of undisputed facts and any response be submitted separately from the briefs. This would seem to be a matter best left to local practice, and in my experience it is most convenient to incorporate such a statement or response into the brief. I do think that an explicit disclosure of the undisputed facts or any statement of evidence disputing the opponents facts is necessary, as the court should be able to easily identify what facts are or are not in dispute. However, requiring a separate filing seems to increase the paper required to move for summary judgment or oppose such a motion without good reason. Further, I would suggest the rule should provide that a court "should" grant summary judgment for *either* party in the event that the motion and briefs show that they are entitled to it, either globally or on any specific issue, regardless of whether they are the movant or the respondent.

Thank you for your consideration of these comments. Should you have any questions or further requirements, please do not hesitate to contact me at any time.

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