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January 23, 2009

Via e-mail
rules_comments@ao.uscourts.gov

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to Civil Rules 26 and 56
February 2, 2009, San Francisco, CA

Dear Mr. Rabiej:

I appreciate the opportunity to testify before the Committee on Rules of Practice and Procedure in San Francisco. I am a partner in the San Francisco office of Keller and Heckman LLP and 2009 will mark my 30th year in the practice of law. Over the course of that time, I have had the opportunity to handle cases in federal and state courts across the country and have had first-hand experience in addressing the issues posed by Rules 26 and 56.

I am currently an active member of both the DRI and FDCC organizations, but in certain commercial litigation matters, I have also represented plaintiffs.

Rule 26

I support the Committee's proposed changes to Rule 26. The proposed change to Rule 26(a)(2)(c), which requires an attorney summary disclosure for any witness who is not required by Rule 26(a)(2)(b) to provide a report, would go far in reducing the number and scope of arguments relating to who is an expert and who is not.

Proposed Rule 26(b)(4)(B) and (C) to protect the disclosure of draft expert reports will not only eliminate the "verbal gymnastics" that many attorneys engage in while discussing a case with an expert, but will also eliminate the "fiction" that either drafts are not prepared or that they are systematically eliminated by virtue of the word processing equipment being used by the particular expert.

Additionally, the protection of communications between an attorney and an expert will enable a much more thorough vetting of proffered opinions.

Rule 56

I support the adoption of a change that installs the phrase "must" rather than "should." I have reviewed the comments of many of my colleagues and have listened to the podcasts on this issue, and I do not feel that further discussion is required on this issue other than to emphasize that use of the word "must" will eliminate any ambiguity and provide the courts with guidance as to when to grant and/or deny motions for summary judgment.

I also support the "point-counterpoint" proposed change. Having had the experience of prosecuting and defending summary judgment motions in jurisdictions where a statement of undisputed facts and response thereto is required (*i e.*, California), it has been my experience that rather than burdening the court with unnecessary facts, an effective statement of undisputed facts sets forth the material facts necessary for the court to make its ruling based upon the substantive law at issue. In fact, it has been my experience that there is a direct inverse relationship to the success of a motion for summary judgment and the number of facts at issue. Specifically, the fewer the material undisputed facts asserted, the chance of success on the motion for summary judgment increases.

Very truly yours,

Daniel J. Herling

DJH/tsb