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VIA EMAIL (Rules_Comments@ao.uscourts.gov)

Mr. John K. Rabiej
Chief, Rules Committee Support Officer
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
Corrected Written Statement of Marc E. Williams

Dear Mr. Rabiej,

I am a partner with the law firm of Huddleston Bolen LLP in Huntington, West Virginia. In my 23 years of practice, I have handled over 100 matters in the USDC for the Northern and Southern Districts of West Virginia. These cases have dealt with personal injury, product liability, class action and environmental torts. I have tried more than fifty cases to jury verdict, over half of which have been in federal court. In these cases I have had an opportunity to see the ways that the proposed amendments to Rules 26 and 56 would affect civil cases.

I am also serving a one year term as President of DRI – the Voice of the Defense Bar. DRI is the 23,000 member international organization of attorneys defending the interests of business and individuals in civil litigation. Our members are involved on a daily basis in handling the full breadth of civil matters in the federal courts of this country. I am pleased to express not only my personal views on these issues, but also those of the members of DRI.

I truly appreciate the opportunity to address the Committee on Rules of Practice and Procedure, and I would like to make the following comments on the proposed amendments to both Rule 26 and Rule 56.

Rule 56

There is no denying that summary judgment is one of the most powerful tools available in our civil justice system to regulate the progress and disposition of civil actions. As such, it is important to ensure that careful thought is given to any substantive change to the Rule. In regard to the proposed amendment to Rule 56 that is, in part, the subject of today's hearing, I support the aspect of the amendment that requires undisputed facts to be clearly stated in all motions for summary judgment. This revision will grant both the Court and the parties the ability to clearly ascertain at an early juncture the facts and legal issues under contention, thereby promoting efficiency and better use of judicial resources. I am strongly opposed, however, to the proposed amendment's failure to reverse the aspect of the 2007 Rule 56 amendment which, under the guise of a so-called "stylistic change," replaced the term *"shall grant"* with *"should grant."* In my view, the wide discretion granted to a Court as a result of the 2007 amendment has the potential to greatly hinder the consistency we should all strive for within our federal court system.

First, on a bright note, I support the aspect of the proposed Rule 56 amendment that would require both parties to draft a statement of undisputed facts. In my opinion, this "point-counterpoint" procedure would help ensure that the matters taken into consideration by a Court in a summary judgment proceeding are focused solely on the issues that are material to an ultimate disposition of the case, thereby bringing cases to an earlier, and less expensive, disposition. While I have taken note that some fellow commentators are of the view that this aspect of the proposed Rule 56 amendment will leverage the advantage that "larger firms" have over "smaller firms," I respectfully disagree While the "point-counterpoint" characteristic of this requirement will undoubtedly lead to disagreements over what constitutes an "undisputed fact," any additional work associated with the litigation of the statement of undisputed facts will likely be more than offset by a process that is streamlined to focus the subsequent litigation solely on issues that are relevant to a swift resolution.[1] As such, it is readily apparent why firms of all sizes will ultimately benefit from this aspect of the proposed amendment to Rule 56 and I respectfully ask the Committee for its approval. Moreover, the litigants and the civil justice system will benefit.

I am unable to support the inclusion of the *"should grant"* formulation within the proposed Rule 56 amendment As the Committee is well aware, the 2007 Rule 56 Amendment changed the language of the Rule from *"shall grant"* to *"should grant "* While this amendment was intended to be nothing more than a mere stylistic revision, the practical effect of the amendment has been to grant Courts wide discretion in their ability to deny a party summary judgment when there is no disputed issue of material fact. In *Celotex*, the Supreme Court set forth the view that Rule 56 "*mandates* the entry of summary judgment . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial " *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added) This unqualified requirement, however, has effectively been eroded by the 2007 amendment. Meritless cases that were once ripe for

[1] Additionally, the argument that compliance with rules is dependant on the size of one's firm is insulting to the legions of small firm lawyers, many of whom are DRI members, who are committed to representing their clients interests through the meticulous compliance with the rules of court

summary judgment are now subjected to the threat of an extended, expensive litigation process. While this outcome is far from the 2007 amendment's intended effect, the latent damage caused to summary judgment proceedings by this "stylistic change" should be duly noted. To ensure that Rule 56 is interpreted consistently within the federal judiciary, and that meritless cases are efficiently disposed of, I respectfully urge the Committee to consider restoring the mandatory aspect of Rule 56 by replacing the current *"should grant"* formulation with the more concrete *"must grant"* formulation.

Rule 26

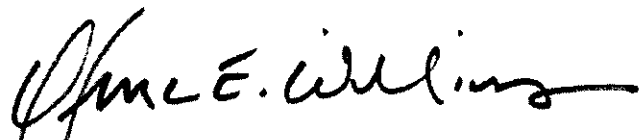
With regard to the proposed amendments to Rule 26, I would like to preface my statement by stating that I support the decision to provide work product protection to experts who are *required* by Rule 26 to write reports. However, from what I understand, this issue was discussed at great lengths during previous hearings held by the committee. Thus, I would like to focus my remaining time on the issues associated with the proposed amendment's effect on experts who are *not required* by Rule 26 to provide substantive reports.

First, I strongly support the aspect of proposed Rule 26(a)(2)(C) that mandates the preparation of a summary disclosure for trial-witness experts who are not required to provide a report under Rule 26(a)(2)(B). Under the current version of Rule 26, attorneys frequently prepare Expert reports, even when a report may not be clearly required by the Rule, merely to ensure that they are not later subjected to sanctions which could prevent their witness from testifying at trial. By approving this portion of the proposed amendment to Rule 26, the Committee would help eliminate this trying conundrum by ensuring that parties are able to accurately ascertain the Rule's distinction between employees who do not provide expert opinions in the regular course of their duties and experts hired to provide an expert opinion. The advantages that will be provided to the litigation process by this clarification are readily apparent, not the least of which is the limiting of the sometimes substantial resources currently expended on the preparation of the aforementioned non-required expert reports.

Additionally, I support extending the work product protection of the proposed Rule 26(b)(4) (C) amendment to communications with those witnesses not required to produce an expert report. The protections offered by the work product doctrine are essential tools in the litigation process, and although I have taken note of the concerns associated with the limitation on discovery that this aspect of the amendment will provide, it is my belief that the benefits provided by additional work product protection in this regard simply outweigh any potential additional costs. By extending work product protection to those not required to produce expert reports, the Committee would help ensure that parties are able to gather information free from the underlying threat of having to divulge that information at a later date. The benefits associated with this freedom from interference are clear, not the least of which is an increased reliance on individuals, such as in-house experts, who possess a unique, and sometimes highly sensitive, familiarity with the relevant subject matter Accordingly, for many of the same policy reasons that garner my support for extending work product protection to experts who are required by Rule 26 to write reports, I support revising the proposed amendment to extend work product protection to those experts who are not required to prepare reports

I look forward to answering any questions from the Committee when it convenes in San Francisco.

Respectfully submitted,



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