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08-CV-140

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January 26, 2009

Via Email: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Offices of the United States Courts
Washington, DC 20544

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

Dear Mr. McCabe:

Thank you for the opportunity to provide testimony on the proposed amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure. A summary of the comments I intend to make on February 2 in San Francisco follows.

I am in my 26th year of practice and have represented defendants in products liability, commercial, and employment litigation throughout my legal career. I have extensive experience in both Federal and State courts throughout the country and in particular in my home state of California. I am a partner in the San Francisco office of King & Spalding LLP and I am an active member of the Defense Research Institute (DRI) and of the International Association of Defense Counsel (IADC), where I serve as a member of the IADC Board of Directors.

Rule 26

With respect to Rule 26, I endorse and support many of the comments previously submitted, in particular, those offered by the Federation of Defense & Corporate Counsel (FDCC) and Lawyers for Civil Justice (LCJ). The practice of having to retain two experts on the same topic (one to testify, one with whom the client and attorney can freely consult) is expensive and contributes to a legal fiction which need not be perpetuated. In addition, employees of a party who may offer minimal expert opinion testimony should be excused from report requirements and work product protection should extend to experts who do not prepare reports pursuant to Rule 26(a)(2)(C).

Rule 56

The proposed amendments should be revised to contain the word "must," or at a minimum "shall." A properly supported summary judgment motion lessens the cost of litigation and eliminates claims that lack merit. The word "should" is vague and provides little comfort to moving parties seeking certainty if they are able to meet their burden of proof. There should be no doubt as to whether or not a motion for summary judgment will be granted if a showing has been made that no material fact is in dispute.

The filing of a separate statement of facts [as we do routinely in State courts in California pursuant to California Code of Civil Procedure 437c(b)(1)], is neither wasteful nor cumbersome as some critics have suggested, but actually helps focus the parties on the material facts at issue. As the rule prescribes no specific length for such separate statements, practitioners familiar with their submission will attest to the fact that shorter is often better. Extraneous disputes over "non-material" facts should not deter the Court from granting meritorious motions for summary judgment and judges/clerks can discern whether papers have been lodged in an attempt to obfuscate the real issues at hand.

Thank you for your consideration of my comments.

Respectfully submitted,

Donald F. Zimmer, Jr.

DFZ:ks