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08-CV-167

January 27, 2009

Peter C. McCabe, Secretary
Committee on Rules of Practice and Procedural
of the Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, NE
Washington, DC 20544

Re: Testimony-Proposed Amendments to Rule 26 & 56 of the
Federal Rules of Civil Procedure

Dear Mr. McCabe:

Herein is a summary of the testimony I intend to give on Monday, February 2, in San Francisco. I am the incoming president of the Federation of Defense & Corporate Counsel (FDCC) and write this summary on behalf of our members.

Proposed Federal Rule of Civil Procedure 57(a):

The amendment to the Rule should be revised to mandate “must” rather than “should.”

We are concerned with the potential ambiguity of the current language utilized under Rule 56. Our membership believes that a party who satisfies its burden of demonstrating that material facts are not in dispute is entitled to judgment as a matter of law.

It is not uncommon for one member to have cases where summary judgment motions are not granted, even when both parties have submitted counter motions for summary judgments and agree that the case should be determined by the court.

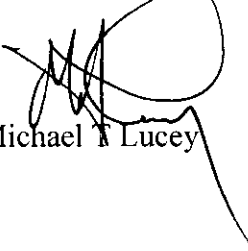
While the costs of filing and responding to a motion for summary judgment can often be quite high, too many of our clients have been faced with the even greater expense of preparing for a trial and trying a case which should have otherwise been disposed of by summary judgment. More important, it appears to our members that the failure to grant a motion for summary judgment sometimes appears to be used as a settlement tool. We ask that any ambiguity be removed and that there be clear direction that meritorious motions must be granted.

Proposed Federal Rule of Civil Procedure 56(h):

The proposed Rule should be revised to provide an objective, reasonable and discretionary cost allegation. Our members have witnessed parties utilizing the undisputed fact procedure unfairly by moving for additional discovery to search for facts not in existence or that are not material to the disposition of summary judgment motions. In its current form, Rule 56(g) does not adequately address the practical burdens associated with such behavior. Courts are often disinclined to make a finding of bad faith based on a subjective intent. We favor a cost shifting when summary judgment papers are submitted without reasonable justification. We recognize Rule 11 provides an appropriate remedy for sanctions and do not seek to impact that Rule.

Respectfully submitted,

GORDON & REES LLP



Michael T. Lucey

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