Federal Bar Council

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February 17, 2009

08-CV-174

Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544
Attention: Mr. Peter G. McCabe, Secretary

Dear Mr McCabe:

I am the President of the Federal Bar Council (the "Council"), a non-profit organization of over 2,000 federal court practitioners and judges in the Second Circuit On behalf of the Council, I submit the following comments to the proposed amendments to Federal Rule of Civil Procedure 26 and 56.

As a general matter, the Council supports the policy decisions made by the Advisory Committee on Civil Rules (the "Committee") With respect to the proposed amendments to Rule 26, the Council recommends adopting Rules 26 (a)(2)(B)(ii), 26(b)(4)(B) and 26(b)(4)(C). The Council has specific concerns about the Proposed Rule 26(a)(2)(C). It recommends against adopting this rule, and proposes changes should it be retained. We also propose a revision to the Proposed Committee Note With respect to the proposed amendments to Rule 56, the Council recommends their adoption, while proposing two clarifying changes.

I. Amendments to Rule 26

Amendment to Rule 26(a)(2)(B)(ii)

A Recommendation

We support the Committee' proposal to amend Rule 26(a)(2)(B)(ii) and the corresponding portions in the Committee Note.

Introduction of a New Rule 26(a)(2)(C)

A Recommendation

The Council recommends not to adopt Proposed Rule (26)(a)(2)(C). If the Proposed Rule is retained, we recommend clarifying that the rule does not apply to party witnesses involved in the underlying facts in dispute. We also recommend that the requirement for a summary should not apply when an expert is available to a party only through compulsory process or

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when a deposition of the expert has been taken and has covered the subjects for which the witness is expected to present expert evidence

B. Discussion

The Proposed Rule is likely to provide new grounds for litigation and at the same is unlikely to streamline discovery. As discussed below, the prospect for dispute appears most acute with respect to parties who also are experts in their fields. However, there also is a risk that the rule will create unnecessary difficulty in instances where trial proof is expected to include non-party percipient witnesses

(i) Parties

It is unclear the extent to which the disclosures mandated by proposed Rule would be required of party witnesses who are both experts in their fields and percipient party witnesses. Such party witnesses often testify that they believed their own conduct met relevant professional standards in, for example, professional malpractice or fraud cases. The proposed rule could be read to apply to all such witnesses (although we question whether that was the Committee's intended result) For example, in a legal or medical malpractice case, would the proposed witness summaries be required of each of the legal or medical professionals involved in providing the services at issue who are anticipated to be called as trial witnesses?

(ii). Non Party – Percipient Witness

We believe that the difficulties recognized in 1993 by the drafters of Rule 26(a)(2)(B) exist with the proposed amendment and may lead to situations where counsel are unable to obtain summaries of the sort set forth in the draft rule except through compulsory process.

Both circumstances raise the prospect that disputes about witness statements could arise and might be raised as grounds to preclude relevant trial testimony. In addition, we foresee that without further definition, parties may not agree on the degree of detail required to fulfill the requirements of a "summary of facts and opinion "

We recognize that the language of present Rule 26(a)(2)(B) requiring reports only of experts "retained or specially employed" by a party may, in certain circumstances, be too limiting. In particular there likely have been instances in which expert testimony was proffered by a party's employees who lack both direct factual involvement and for whom expert reports were not provided We believe it would be preferable to leave such isolated instances to the courts' discretion in managing their cases rather than adding a new rule requiring summaries whose contours are likely to be disputed.

If Proposed Rule 26(a)(2)(C)'s requirement for summaries will be retained, we suggest that the Committee clarify that the rule does not apply to party witnesses involved in the underlying facts in dispute We also suggest that the requirement should not apply when an

expert is available to a party only through compulsory process or when a deposition of the expert has been taken and has covered the subjects for which the witness is expected to present expert evidence.

Amendments to Rules 26(b)(4)(B) and 26(b)(4)(C)

A. Recommendation

We generally recommend adopting proposed amended Rules 26(b)(4)(B) and 26(b)(4)(C), but we have concerns as to whether the proposed changes will have their intended effects. For example, because the proposed protections are not absolute, there is likely to be collateral litigation over the applicability and scope of the work-product protection Additionally, the uncertainty of the protection may cause practitioners to continue the practices that the Committee identified as the impetus for changing the rule—*i e* , "attorneys and expert witnesses go to great lengths to forestall discovery" and "these strategies impede effective use of expert witnesses." *See* Report of the Rules Advisory Committee, dated May 9, 2008, as supplemented June 30, 2008 [hereinafter "Advisory Committee Report"] at 3-4

B. Discussion

In our view, the proposed amendments are a welcome attempt at a solution to the problems currently facing litigation practice with respect to expert witnesses. The problems identified in the Advisory Committee Report and the proposed Committee Note appear to be accurate depictions of the challenges facing many attorneys, experts, and litigants. The proposed amendments would encourage open and free communications between attorneys and experts, and would address the inefficiencies and ineffectiveness of the current expert disclosure requirements Thus, we generally recommend adopting proposed amended Rules 26(b)(4)(B) and 26(b)(4)(C)

However, we note that there is a risk that the proposed amendments, as worded, will not have their intended effects.

Because the "Trial Preparation Protection" provided in Rule 26(b)(3)(A) and (B) is not absolute—*i.e* , there are circumstances when one may be required to disclose materials that are "protected" by the Trial Preparation Protection Rule—the proposed Rules 26(b)(4)(B) and 26(b)(4)(C) may not achieve their intended goals of (a) promoting open discussions between an attorney and an expert, and (b) eliminating collateral discovery litigation. Indeed, subjecting experts' draft reports and attorney-expert communications to the possibility of disclosure if one's adversary can show a "substantial need" and "undue hardship" would create a potential (and some might say an "incentive") for costly litigation aimed at forcing disclosure of those materials. By its very nature, the exception to the Trial Preparation Protection Rule is highly fact-specific and would introducing significant uncertainty over the eventual outcome of any such litigation The possibility of compelled disclosure may lead to continued efforts to minimize the creation of written materials, thus negating the intended

purpose of the amendments. However, we believe that although the protection is not absolute, the following excerpts of the Committee Note will provide comfort to practitioners

> .. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) - that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship *It will be rare for a party to be able to make such a showing* given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. *A contention that required disclosure or discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(B) or (C)*, although it may provide grounds for a motion under Rule 37(a). In the rare case in which a party does make a showing of such a substantial need for further discovery and undue hardship, the *court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B).*

(Emphasis added.)

Moreover, because the proposed amendments do not expressly address the situation of a party's or parties' involvement in multiple suits—and, in particular, instances where one or more suits are in state court—the intended benefits of the proposed amendments may not be realized. Since the Federal Rules do not apply in state court proceedings, a litigant dealing with multiple suits may find that a state court is unwilling to afford the Trial Preparation Protection to disclosures made to an expert in connection with a federal court action. In such a case—with the exception of states that provide comparable protection—draft reports and attorney-expert communications would nonetheless be discoverable. Thus, the litigant who faces that situation would likely not avail itself of the benefits of the proposed amendments; for that litigant, it would be as if the proposed amendments had never been adopted

The Proposed Committee Note Accompanying the Rule 26 Amendments

A. Recommendation

We recommend deleting the following sentence at lines 34-38 of the Committee Note:

> .. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts

B. Discussion

The Advisory Committee Report described tactics similar to those in the Committee Note, *e g* , "Experts and counsel often go to great lengths to avoid creating draft reports, creating drafts only in electronic or oral form, deleting all electronic drafts, and even scrubbing hard drives to prevent subsequent discovery." Advisory Committee Report at 4. The Report also noted that, "many lawyers feel disheartened to have to pursue tactics -- knowing their adversaries are doing the same -- that they believe are necessary to protect against discovery but bring the litigation system into disrepute." Id. We agree that some of the described tactics can bring the litigation system into disrepute, and we are concerned that the Committee Note might be read, or cited, as an endorsement of such practices While we do not believe this is the intent of the Committee we suggest deletion of the sentence to avoid any ambiguity

II Amendments to Rule 56

Amendments to Rule 56(a)

A. Recommendation

We agree with the proposed change to Rule 56(a). Rule 56(a) continues that language from the 2007 amendment that the court "should grant" summary judgment, in place of "shall grant." While there is room for debate, we believe that, on the whole, giving the district court discretion to deny summary judgment, if used in limited circumstances, is salutary, and thus the "should grant" language is preferable to the alternative "must grant."

Amendments to Rule 56(c)

A Recommendation

We agree generally with the proposed change to Rule 56(c). The "point-counterpoint" procedure included in subdivision 56(c) requires a high level of preparation, but we agree that a summary judgment motion should not be made – or resisted – without that preparation We suggest two clarifying changes that we believe would further the rule as proposed.

B. Discussion

(1) Rule 56(c)(3)

We accept the proposal in subdivision 56(c)(3) that a party may limit its acceptance or dispute of a fact for purposes of the motion only. However, we feel that the language in subdivision 56(g) should be amended expressly to provide that the court may not "state" any material fact if a party accepted it "for purposes of the motion only," pursuant to subdivision (c)(3). This can be accomplished by adding the following to the end of proposed subdivision 56(g): "The Court may not do so based upon a party's position that the fact was accepted for purposes of the motion only, as provided in Rule 56(c)(3)."

(ii). Rule 56(c)(5)

We suggest a small language change in subdivision 56(c)(5). As subdivision 56(c)(6) now stands, it states that affidavits or declarations used to support a motion, response or reply must "set out facts that *would be* admissible in evidence. Accordingly, 56(c)(5) should have parallel language to the effect that a response or reply to a statement of fact may state that the material cited by the adverse party to support or dispute the fact "*would not be*" [in place of "is not"] admissible in evidence. In addition to making the two provisions parallel, this change would clarify that any evidentiary determinations would be made on the record as it stands at the time of the motion and in anticipation of whether a foundation for admissibility will be available for such proffered evidence at trial. A further change to the language is also suggested to make it clear which material is being referred to. We propose that the text of Section 56(c)(5) should read

> "A response or reply to a statement of fact may state that the material cited *by the adverse party* to support or dispute the fact *would not be* admissible in evidence." (changes in italics)

We appreciate the opportunity to comment on these important issues. If the Federal Bar Council can be of any further assistance to the Committee, please do not hesitate to contact me.

Very truly yours,

s/ ROBERT J. GIUFFRA, JR.