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September 24, 2008

08-CV-003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D. C. 20544

Re: Comments on Proposed Changes to FRCP 26 and 56

Dear Mr. McCabe,

I write to oppose the proposed amendment to FRCP 26, and enthusiastically to support the proposed amendment to FRCP 56.

Rule 26:

My opposition to the proposed change to FRCP 26 is not to any of the specific suggested mechanics, nor do I dispute the proffered efficiencies: I do not doubt that lawyers are routinely agreeing not to ask one another's experts searching questions about how the lawyers who retained them reworded their drafts, or about discussions with their experts as to how to refine expert opinions. I do not doubt that lawyers routinely dance a complicated minuet with their experts as to the creation of drafts and the keeping of notes to skirt the discovery of how the lawyers influenced the experts. I am sure it is true that too much money is spent by inquiring lawyers trying to pierce the veils carefully woven and cast by their adversaries over the same. I do not doubt, in other words, that the proposed rule will make trial practice cheaper by obviating expensive dodges lawyers and their experts use and the further expense of trying to defeat the dodges.

But I very much doubt whether, in validating the dodgy practices of lawyers and experts, the proposed changes will take the trial practice in a direction that it ought to go.

Missing from the discussion about the efficiencies to be gained by conforming the rules to how lawyers and experts actually behave is any careful consideration of whether they *ought* to behave that way in the first place. I think they should not, and that the proposed rule omits to consider the unique role of the expert in American trial practice.

Expert testimony under our rules of evidence represents an extraordinary exception to the usual principles governing the reception of evidence in our courts. Experts need have no personal knowledge of the matters over which they give evidence. They can rely on, and can repeat, hearsay. They can express opinions. And, as every experienced trial lawyer and trial practice professor emphasizes to the novitiate, they can sum up a case in the middle of a party's case in chief. These are rhetorical tools of great power.

This extraordinary privilege to give evidence of such broad scope arises from what almost be described as an implied covenant between the expert and the court, based upon an assumption, implicit in the requirement that the expert have "knowledge, skill, experience, training, or education," that the expert's devotion to his craft or discipline will tend to enhance the expert's independence and make him or her other than a partisan. Opinions that are "meaningless assertions which amount to little more than choosing up sides" are to be excluded (as the comment to Fed. R. Ev. 701(b) points out), while our system supposes that, for example, a "physician makes life-and-death decisions in reliance" on data that can be admitted as a basis for his or her opinion, so that "ought to suffice for judicial purposes." Comment, Fed. R. Ev. 703.

It is no secret, however, that this covenant has been strained as lawyers became more creative and paid experts-for-hire became more willing to put, as necessary, the interests of the litigants who have hired them over their devotion to their crafts and professions. See, generally, Huber, Galileo's Revenge: Junk Science in the Courtroom, Basic Books (1991). The Supreme Court has found it necessary to dedicate considerable attention in recent years to the problem posed by the willingness of experts to break the bonds of professional restraint, in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) and its progeny. And a great deal remains to be done; there is still plenty of scope for obliging "trained seals" (in the parlance of the courthouse corridor) to ply their trade.

Viewed from the larger perspective about the expert's role in the trial process and their significant power to skew that process through the abuse of their authoritative

positions, I am completely unconvinced that a rule change that simply yields to the partisan instincts and habits of the lawyers is a good thing. I think on the contrary that it moves in exactly the wrong direction. If something needs to be tightened up, I think any change ought to be in the direction of reducing, rather than facilitating, the partiality of expert witnesses. Rather than validate the fun and games being played by the lawyers, the rules should if anything more strongly condemn them, to ensure that experts who display undue partiality are, if not barred, at least fully exposed.

Rule 56

I enthusiastically support the proposed change to Fed.R.Civ.P. 56, to require organized statements of fact. In the Eastern District of Washington, where I practice, Judges Robert J. McNichols and Justin L. Quackenbush nearly thirty years ago introduced a local rule that provides:

LR 56.1. SUMMARY JUDGMENT

(a) Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts relied upon in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to the specific portion of the record where the fact is found (i.e., affidavit, deposition, etc.). The specific portions of the record relied upon shall be attached to the statement of material facts.

(b) Any party opposing a motion for summary judgment must file with its responsive memorandum a statement in the form prescribed in (a), setting forth the specific facts which the opposing party asserts establishes a genuine issue of material fact precluding summary judgment. Each fact must explicitly identify any fact(s) asserted by the moving party which the opposing party disputes or clarifies. (E.g.: "Defendant's fact #1: Contrary to plaintiff's fact #1, . . .") Following the fact and record citation, the opposing party may briefly describe any evidentiary reason the moving party's fact is disputed. (E.g.: "Defendant's supplemental objection to plaintiff's fact #1: hearsay.")

(c) The moving party may file with its reply memorandum, if any, a statement in the form prescribed in (a), setting forth the specific facts which the moving party asserts establishes the absence of genuine material fact disputes. Each fact must explicitly identify any fact(s) asserted by the opposing party which the moving party disputes or clarifies, although the moving party need not

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repeat facts asserted in its initial statement of facts. (E.g.: "Plaintiff's fact #1: Contrary to defendant's fact #1, . . .") Following the fact and record citation, the moving party may briefly describe any evidentiary reason the opposing party's fact is disputed. (E.g.: "Plaintiff's supplemental objection to defendant's fact #1: party admission exception to hearsay.")

(d) In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by the record set forth in (b).

This procedure forces the disorganized lawyer to think clearly about the evidence in his or her case before bringing a motion for summary judgment, and forbids the wily practitioner from manufacturing a spurious "genuine issue of material fact" by raising a confusing welter of facts in opposition, with the happy result that motions that ought not be brought (or granted) are not, while cases truly deserving of summary disposition are more easily identified.

Respectfully yours,

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, PS

Leslie R. Weatherhead

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