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08-CV-008

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

Re: Comments on Recently Published, Proposed Amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure, Submitted on Behalf of the American Medical Association and Other Physician, Medical and Related Organizations

Dear Mr. McCabe:

Along with my co-counsel, Professor Paul Rothstein of Georgetown University Law Center, I represent the American Medical Association, the American Academy of Neurology Professional Association, the American College of Obstetricians and Gynecologists, the American Academy of Otolaryngology – Head and Neck Surgery, the American Osteopathic Association, the Association of American Medical Colleges, the Medical Group Management Association, the Physician Insurers Association of America and the American Association of Neurological Surgeons, relevant to the Federal Rules amendment processes.

We have followed with great interest and offered our views on the work of the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure toward the revision of the summary judgment procedures set forth in Rule 56 and the discovery of expert witness provisions set forth in Rule 26 of the Federal Rules of Civil Procedure. In response to your recent publication and request for public comment, this is to offer our further views on the proposed amendments.

Rule 56 Amendments

In general, our group strongly supports the Advisory Committee's revision of Rule 56. In particular, we offer comment on a number of features contained in such revision.

1. Enhanced Specificity of Disputes. The revised Rule will require additional specificity by both proponents and opponents of summary judgment by requiring proponent statements delineating material facts that cannot be genuinely disputed and opponent responses accepting or disputing each such material fact. We support this change based upon our belief that such statements and responses will ultimately serve to refine and further enhance the summary judgment process.

2. Partial Summary Judgment. The caption of subsection (a) of the revised Rule makes express reference to summary judgment or partial summary judgment. By adopting the common phrase "partial summary judgment," the caption makes clear that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. Again, we support this change in the belief that it will serve to further promote greater utilization of the summary judgment process.

3. Judicial Discretion. In instances where there is an absence of "genuine dispute as to any material fact," there appears to be agreement all around that the imposition of summary judgment should be mandatory. However, for stylistic reasons, the revised Rule utilizes the word "should" rather than "shall." We agree with comments aired at the meeting of the Standing Committee on June 9, 2008 to the effect that accuracy should trump style here and that it would be preferable to substitute the word "shall" for "should."

4. Phased Discovery. In previous comments submitted to you, we supported greater utilization of "phased discovery" techniques, i.e., initial discovery attention by the parties to one or several elements of a claim or defense on the distinct possibility or likelihood that the burden(s) relevant thereto cannot be satisfied. (*See* letter dated February 25, 2008 from K. Lazarus to P. McCabe at 3-4). In appropriate circumstances, these techniques can facilitate greater utilization of early summary judgment, achieving greater efficiency in judicial processes. We continue to believe that corresponding modification of the initial scheduling conference and/or scheduling order requirements of Rules 26 and 16 in this respect could be extremely useful and need not go so far as to raise the specter of judge-directed discovery. By requiring that the possibility of phased discovery be at least considered by the parties and/or the court early on, attention to the real frailties presented by a case can simply be addressed sooner rather than later. *See* phased discovery discussion by Justice Stevens (dissenting) in Bell Atlantic Corp. v. Twombley, ___ U.S. ___ (decided May 21, 2007) (Slip Opinion at 24-26).

5. Unavailability of Facts to Justify Opposition. In the event a party seeks to avoid the imposition of summary judgment by seeking additional time in which to

discover facts to justify an opposition, we believe that it would be helpful to require some specification of the material facts that the opposing party expects to discover. This would only be in keeping with requirements for greater specificity and reliance on record support for and against summary judgment motions.

6. Scope of Sanctions. The new draft makes clear that bad faith attempts to block or unreasonably delay summary judgment or partial summary judgment may result in the judicial imposition of sanctions covering the reasonable expenses of the moving party, including attorney's fees. We would like to see some further explication of "expenses" in the Rule or Committee Note and support the shifting of all out-of-pocket costs, where relevant, including printing fees, deposition expenses, travel and subsistence expenses, fees for experts, etc.

Rule 26 Amendments

Our group has a number of concerns with respect to the proposed amendments to Rule 26 governing discovery of expert witnesses. The proposed amendments would make substantial changes, generally (1) prohibiting discovery of any discussions between a lawyer and his or her retained, testimonial experts and (2) prohibiting discovery of any notes or draft reports prepared by a retained, testimonial expert. The argument in support of such changes is that they will eliminate the necessity for each side in a lawsuit retaining two experts, one for testimonial purposes and one for consultative purposes, thereby substantially reducing costs of litigation.

Our group is very sensitive to the substantial costs associated with litigation. However, we would like to summarize and share our concerns in this area with you and the Advisory Committee, as follows:

1. Correlation of Discovery and Trial Evidence. At present, there exists no prohibition in the Federal Rules of Evidence that would bar inquiry at trial into relevant discussions between a lawyer and his or her retained testimonial expert or prohibiting inquiry into any relevant notes or draft reports prepared by a retained, testimonial expert. *See* Federal Rules of Evidence, Art. VII. Opinions and Expert Testimony, Rules 701-706. Further, there does not appear to be any federally-recognized, common-law privilege limiting inquiry into such matters. *Id.*, Art. V. Privileges, Rule 501 and cases decided thereunder. *See, e.g.* Colindres v. Quietflex Mfg., 228 F.R.D. 567 (S.D. Tex. 2005) (work product protection does not apply to experts). Unless such non-discoverable expert information is excludable at trial, which does not appear to be the case, the proposed amendments to Rule 26 may be counter-productive. Shouldn't non-

privileged and relevant matters remain fully discoverable, in accordance with Rule 26 (b)(1) of the Federal Rules of Civil Procedure?

2. Direct Approach to Rule-Making. It is axiomatic to note that procedural and evidentiary rules changes are best approached directly, rather than indirectly. If, in fact, you seek to exclude any inquiry (during the course of discovery or at trial) into attorney-testimonial expert discussions and a testimonial expert's notes and draft reports, we respectfully suggest that you approach the matter head-on, in the context of both Articles V and VII of the Federal Rules of Evidence. [1]/ Indeed, we are concerned that, by attempting to create what arguably amounts to a qualified privilege in the context of Rule 26 of the Federal Rules of Civil Procedure, seeking change indirectly rather than directly, you may be inadvertently inviting an eventual, constitutional attack on the Rules Enabling Act. *See* INS v. Chadha, 462 U.S. 919 (1983) for a discussion of Constitutional principles that guide the law-making process, calling into question the propriety of the paradigm created by 28 U.S.C. §§ 2071-2077. [2]/

3. Public Respect for Law. Common law and the Federal Rules of Evidence limit lay testimony to matters of personal observation and perception. *See* McCormick, Evidence § 10 (5th ed. 1999); Rule 602 of the Federal Rules of Evidence. However, in situations where "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion." Rule 702, Federal Rules of Evidence. Further, care must be taken by the trial judge to ensure that the expert opinion is reliable. *Id; see also* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Thus, our current litigation system is based on the precept that expert witnesses are intended to facilitate the search for truth. The proposed amendments Rule 26 would completely undermine that precept, suggesting instead, that expert witnesses are really advocates – simply another part of the litigation team. There is little doubt that the amendments would facilitate greater deception and

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[1]/ Amendment of Article V would, of course, require affirmative Congressional action. *See* 28 U.S.C.§ 2074 (b).

[2]/ Our group supports revisiting both Articles V and VII of the Federal Rules of Evidence. Specifically, we support the creation of express privileges, including physician-patient and peer-review privileges, and we also support amendment of Rule 702 for the purpose of allowing greater weight to be given to testimony offered by board-certified medical experts, as opposed to general practitioners, especially those who make a full-time profession of testifying.

manipulation in the presentation of a case. Our group is very concerned that such an approach could further undermine public respect for the law.

Closing Note

We shall continue to follow with interest the progress of the proposed amendments to Rules 56 and 26, to attend and participate in the meetings of the Advisory Committee and the Standing Committee and to make known our views in appropriate circumstances. We thank the members of the Advisory Committee and the Standing Committee, the staffs of the Administrative Office of the U.S. Courts and the Federal Judicial Center for their fine public service and their many personal courtesies.

Your consideration is appreciated.

Sincerely,

Kenneth A. Lazarus

cc: Professor Paul Rothstein, Georgetown University Law Center
Judge Lee H. Rosenthal, Chairman, Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Chairman, Advisory Committee on Civil Rules
Judge Michael M. Baylson, Chairman, Subcommittee on Rule 56
Judge David G. Campbell, Chairman, Subcommittee on Rule 26
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