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January 6, 2009

08-CV-110

Via Electronic Transmission

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

Re: Testimony Regarding Proposed Amendments to Civil Rules 26 and 56
Docket No. 08-CV-065

Dear Mr. McCabe:

Following is the testimony I intend to offer at the Committee on Rules of Practice and Procedure January 14 hearing in San Antonio regarding proposed amendments to Civil Rules 26 and 56.

Your Honors, Ladies, and Gentlemen, thank you for the opportunity to appear and comment on the proposed rule amendments to Rules 26 and 56. I am Ed Pickle, Senior Government Affairs Counsel with Shell Oil Company, based in Houston. I am a member of the Texas, Louisiana, and Mississippi bars, and have some 37 years of civil litigation experience, focused primarily on commercial, oil and gas, class action, and toxic and mass tort cases, the last 23 years of which have been with Shell. My current government affairs position at Shell deals primarily with civil justice reform issues – legislative, rule making, regulatory, and decisional. Prior to assuming this role, I managed Shell's Litigation Department, first-chaired and managed major cases, and was in private practice.

First, please allow me a few general observations. My primary corporate charge is to help improve the fairness, efficiency, and predictability of the U.S. civil justice system. Over the last 20 years, this system has been strained and tested as never before. When we in the U.S. think of countries in other parts of the world, we tend first to conjure images of traditions, of cultures – the British Beefeater, French fashion, Italian pasta. For most of our history, the images of the U.S. that first came to the mind of others were opportunity, entrepreneurship, and industry Now the picture of the U.S. that first occurs to many foreign business people is

litigiousness and associated uncertainty. We are perceived, with some justification, as a country of the lawyers, by the lawyers, for the lawyers.

If American business is to remain competitive in the world marketplace, the costs of our civil justice system must to be competitive with those of other developed, democratic nations. Presently, we are not. Based on the last Towers Perrin comparative data, our annual tort costs as a percentage of GDP were over twice those of the UK and Japan. Besides our system being much more expensive, it is much less efficient, with only 40% or less of tort costs going to compensate injured claimants. Our system has become too complex, too cumbersome, too expensive, and too uncertain in outcome for both plaintiffs and defendants.

There are many reasons for the strain on our dispute resolution process, but the impacts are manifest. Civil trials largely have become the province of government, consortia of well-heeled plaintiffs' counsel, and large corporations. Statistically even these parties rarely are willing to incur the costs and risks of trial. Within the defense bar community, there is broad concern over the lack of trial experience opportunities for both partners and associates. The seasoned civil trial advocate is becoming an endangered species.

Whatever we as litigants, attorneys, and judges can do to bring greater cost rationality to the civil justice system will improve access, will reduce wars of attrition, will enhance public confidence, and ultimately, will improve the availability and quality of justice.

Rule 56

Historic Rule Has Not Been Discretionary. One of the most effective tools for narrowing issues, discovery, witnesses, exhibits, preparation, trial time, and juror diversion is summary judgment. Material issues as to which there is no genuine factual dispute have no business being litigated. If such an issue is a critical element of a claim or defense, that claim or defense does not belong on the table. There is no room or viable reason for discretion. To provide otherwise is to sanction unnecessary and unjustifiable waste of the parties' and the court's resources. Rule 56 must provide that the court "must" grant summary judgment when there is no genuinely disputed material fact.

Until the stylistic revisions to the civil rules in 2007, Rule 56 historically provided that the court "shall" grant summary judgment under the specified circumstances. The United States Supreme Court consistently has ruled that "shall" means what it says – a mandatory, non-discretionary direction to act. In changing "shall" to "should," the scriveners of the 2007 changes exceeded the scope of their stylistic charge and wrought a material, substantive change in Rule 56. Stating that a court "should" grant summary judgment necessarily implies at least a degree of discretion. "Should" is aspirational. "Must" is imperative. The difference is more than mere semantics. I "should" lose weight. As my wife will confirm, that does not mean I will do so If I "must" lose weight, I am given no option or choice. Consistent with other 2007 stylistic revisions to the rules, the word "shall" in old Rule 56 only could be changed to "must." In providing otherwise, the 2007 revisers elevated unsupported dicta in a few scattered decisions to a rule of black letter law.

Summary Judgment Reduces Trial Preparation, Time, and Costs. The only real argument advanced in favor of a "should" standard is that the court may wish to exercise discretion to deny an otherwise meritorious partial summary judgment motion to avoid the risk of a mandatory retrial if the motion were granted in error. Such an argument begs the question and moots the purpose and intent of Rule 56. Most importantly, the argument ignores the reality that only a miniscule percentage of cases are tried. Narrowing issues as early as reasonably practicable lessens the scope of discovery, trail preparation, and other costs. The trial itself is shortened and costs reduced for every issue taken off the adversarial table.

Prejudicing the Jury with Extraneous Issues and Argument. As a matter of fairness and to avoid jury confusion, litigable issues must be limited to those truly in dispute. If a court declines to grant a meritorious partial summary judgment motion, extraneous issues and attendant potential prejudice to a party necessarily follow. Especially in complex, multi-party cases, the court can and must simplify the issues before the jury as much as possible to avoid obfuscation and distraction. The ability to grant judgment as a matter of law on a particular issue after trial does not cleanse the jurors' minds of the prejudicial effect argument on that issue may have had. We cannot un-ring the bell, much less know whether its clanging drowned out other evidence.

Action on Partial SJ Motions Affects Settlement. The grant or denial of a partial summary judgment motion generally has a palpable effect on the settlement value of a case. Resolution of a motion by the court based on the facts and law facilitates settlement discussions and yields a more fair result. Resolution of a partial summary judgment motion often is the catalyst that precipitates resolution through settlement. For those cases that do proceed to trial, every issue removed from the table reduces costs and time for the parties, the court, the jury, and ultimately, the taxpayers.

Summary Judgment Rule Must Be Mandatory. There is little or no distinction in providing that a court "should" grant summary judgment when there is no genuine issue of material fact, and saying that a verdict "should" be based on the evidence. There can no room for discretion in either instance. If an essential element is missing; if there is no credible evidence offered on a crucial point; if mandatory expert testimony has been stricken on Daubert grounds, if sufficient time for discovery has been allowed and a party has come forward with nothing credible to support a claim or an affirmative defense, the admonishment "must" is appropriate.

Rule 56(c) Procedure Facilitates Motion Resolution. The process set for in Rule 56(c) of point-counterpoint pleading of material facts as to which there is no genuine dispute facilitates resolution of summary judgment motions. Non-responsive arguments and obfuscation are rendered more obvious. Sanctions should be imposed for such responses and any additional costs spawned thereby.

Rule 26

Expert Costs Are Substantial. There are three issues of significance in the proposed Rule 26 amendments – reducing expert costs, facilitating and protecting attorney/expert consultation,

and avoiding unnecessary and extraneous demands on corporate witnesses. Expert witness/consulting fees have become one of the most significant economic burdens of litigation, generally taking a back seat only to attorney fees and discovery of electronic data. Reasonable reduction of such costs is critical.

Dual Expert Requirement. Current disclosure requirements mean more than doubling expert expenses for a party. If counsel is to receive confidential expert advice, he or she must retain one expert for consultation and another for testimonial purposes. Without such dualism, there is no protection for counsel's thought processes and the content of the discussion with the consulting expert. The proposed rule would allow one expert to serve both functions, dramatically reducing litigation costs.

Testimonial Expert Disclosure While Protecting Attorney Work Product. We all are aware of the reported artifices that have materialized because of the discoverability of draft expert reports and of communications between testimonial experts and counsel. The results are increased cost and diminished respect for the rules of procedure. The points germane to expert discovery as set forth in proposed Rule 26(b)(4)(C) are the expert's qualifications, independence/bias (e.g., retention agreement, compensation, and past testimonial history), methodology, the facts, data and assumptions (including those provided by counsel) the expert considered in forming an opinion, the expert's opinion, and the bases for that opinion. These are the same salient elements a court reviews when applying Daubert's gate-keeping requirement, albeit expressed in somewhat different language. All can be disclosed and fully discovered without impinging on substantive communications between counsel and the expert, or endangering attorney work product. The proposed amendment is a simple, common sense approach, and reflects what had been common practice in most jurisdictions of which I am aware into the 1980's. An expert either is capable of defending his or her position, or is not. The substance of discussions with counsel does not add to or detract from that truism.

No Protection for Fraud or Deceit. The proposed amendment does not appear to impinge upon the ability of an adversary to discover and expose any sort of illicit arrangement or relationship between counsel and a testimonial expert. Abuses such as those associated with some mass silica and asbestos screening practices disclosed in Texas and elsewhere cannot be countenanced. Protecting work product does not mean protecting fraud or countenancing deception of the parties, court or jury.

Protecting Communications with In-House Experts. Under current rules, if a court construed a material in-house witness to be subject to the same disclosure rules as a retained expert, corporate attorney-client privilege would be compromised in addition to work product. Open and candid communication between counsel and such an individual could be chilled. The ability of counsel to investigate a claim involving a corporate client and to prepare for trial would be adversely affected if there were no protection for the attorney's communications with in-house personnel who may happen to offer opinion testimony.

Avoiding Unnecessary In-House Demands. Additionally, requiring an in-house fact witness whose testimony necessarily may include expert opinion to file full expert reports would be a

significant waste of time and effort. If an employee has material information, his or her identity and the substance of such information would be subject to the disclosure provisions of proposed Rule 26(a)(2)(C) and would be subject to discovery. We must be cognizant that the world outside the courtroom does not revolve around litigation. Employees have important jobs to do, and in today's economic environment, are fully engaged. Any task that demands additional time not germane to the job function is productivity lost and an imposition upon the individual. There simply is no reason to treat such in-house witnesses as formally retained testimonial experts with the attendant reporting requirements.

Summary

Litigants, lawyers, rule makers, legislators, and judges must engage in a combined effort to bring economic reason to our civil justice system. We are pricing that system out of reach of the common man and the traditional claimant. Even for large companies, resolution of disputes ought to be on the merits, not forced attrition. Couple high transaction costs with uncertainty spawned by novel causes of action, endemic claims for punitive damages, mass actions, and wildly divergent and unpredictable awards, and we have a recipe for the demise of the jury trial – a result none of us want.

Whatever we reasonably can to do make our civil justice system more efficient, more fair, and more affordable must be at the top of our agenda. As a starting point, summary disposition must be mandatory, in no uncertain terms, when there is no disputed evidence regarding a material fact. If a critical element of a cause of action or affirmative defense is missing, the court must remove that claim from consideration.

Expert discovery can be streamlined and costs reduced substantially by merging consulting and testimonial expert functions. Discovery would be limited to the traditional elements of expert qualifications and testimony. In-house witnesses who may necessarily testify on expert issues should not be treated as traditional retained experts.

Your consideration of these issues is most appreciated I would be pleased to answer any questions of the panel that I may.

Sincerely,

G. Edward Pickle