FDCC
FEDERATION OF DEFENSE
& CORPORATE COUNSEL

BOARD CHAIR
WAYNE B MASON
SEDGWICK DETERT, MORAN & ARNOLD LLP
1717 MAIN ST SUITE 5400
DALLAS, TX 75201
469 227-4602
EMAIL wayne mason@sdma com

OFFICERS 2008 – 2009

PRESIDENT
STEVEN L BARNEY
PLUNKETT COONEY
PETOSKEY MICHIGAN

PRESIDENT-ELECT
MICHAEL T LUCEY
GORDON & REES, LLP
SAN FRANCISCO CALIFORNIA

SECRETARY-TREASURER
F THOMAS CORDELL
FRAILEY, CHAFFIN, CORDELL PERRYMAN
STERKEL, MCCALLA, & BROWN LLP
CHICKASHA, OKLAHOMA

BOARD CHAIR
WAYNE B MASON
SEDGWICK, DETERT, MORAN & ARNOLD LLP
DALLAS, TEXAS

BOARD OF DIRECTORS
2007-2009
STEPHEN E GOLDMAN
ROBINSON & COLE, LLP
HARTFORD, CONNECTICUT
MICHAEL I NEIL
NEIL, DYMOTT FRANK, MCFALL & TREXLER, APLC
SAN DIEGO CALIFORNIA
TIMOTHY A PRATT
BOSTON SCIENTIFIC CORPORATION
NATICK MASSACHUSETTS
THOMAS A WILLAIMS
LEITNER WILLIAMS COOLEY & NAPOLITAN PLLC
CHATTANOOGA, TENNESSEE

2008-2010
EDWARD M KAPLAN
SULLOWAY & HOLLIS PLLC
CONCORD, NEW HAMPSHIRE
SARAH J TIMBERLAKE
ABOWITZ TIMBERLAKE & DANHKE PC
OKLAHOMA CITY OKLAHOMA
RICHARD K TRAUB
TRAUB LIEBERMAN STRAUS &
SHREWSBERRY LLP
EDISON, NEW JERSEY
GALE WHITE
WHITE AND WILLIAMS LLP
PHILADELPHIA, PENNSYLVANIA

VICE PRESIDENTS
HELEN JOHNSON ALFORD
ALFORD, CLAUSEN & MCDONALD LLC
MOBILE ALABAMA
STEVEN E FARRAR
SMITH MOORE LEATHERWOOD
GREENVILLE SOUTH CAROLINA
ROBERT W FOSTER, JR
NELSON, MULLINS, RILEY & SCARBOROUGH LLP
COLUMBIA, SOUTH CAROLINA
H MILLS GALLIVAN
GALLIVAN, WHITE & BOYD PA
GREENVILLE SOUTH CAROLINA
DEBORAH D KUCHLER
ABBOTT, SIMSES & KUCHLER
NEW ORLEANS LOUISIANA
KENNETH J NOTA
DRYVIT SYSTEMS INC
WEST WARWICK, RHODE ISLAND
STEPHEN P PATE
FULBRIGHT & JAWORSKI LLP
HOUSTON, TEXAS
VICTORIA H ROBERTS
CENTURY SURETY COMPANY
PHOENIX ARIZONA
GREGORY A. WITKE
BRADSHAW FOWLER, PROCTOR &
FAIRGRAVE, PC
DES MOINES IOWA

EXECUTIVE DIRECTOR
MARTHA (MARTY) J STREEPER
11812 N 56TH STREET
TAMPA, FLORIDA 33617
813-983-0022
FAX 813-988-5837
E-MAIL mstreeper@thefederation org

January 12, 2009

Peter C McCabe, Secretary
Committee on Rules of Practice and Procedure
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 Rules 26 & 56 of the Federal Rules of Civil Procedure

Dear Mr. McCabe.

Herein is a summary of the testimony I intend to give on Wednesday, January 14th, in San Antonio.

Proposed Federal Rule of Civil Procedure 56(a):

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

We are concerned with the potential ambiguity with respect to the current language utilized under Rule 56. Our membership believes there should be clarity with respect to the mandate that a movant who satisfies its burden of demonstrating that material facts are not in dispute is entitled to judgment.

While all interested parties in this process recognize the desire for a "just, speedy, and inexpensive determination of every action and proceeding," we don't always agree on how that is achieved. Our members all too often find that 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 a ruling on the motions.

Everyone recognizes that the cost of filing and responding to a motion for summary judgment can be significant. However, too many of our clients have too often 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. 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 that Rule 11 provides an appropriate remedy for sanctions and do not seek to impact that Rule.

Proposed Federal Rule of Civil Procedure 26(a)(2)(C):

The proposed Rule is sound.

We support the Advisory Committee's proposed Rule 26(a)(2)(C) for the clarification provides a sound scheme for precluding employee experts from disclosure requirements.

Proposed Federal Rule of Civil Procedure 26(b)(4)(B); (C):

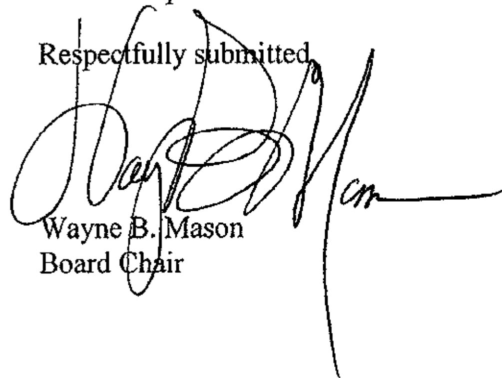
The proposed Rules provide a well-reasoned framework for the protection of counsel/expert communication and an expert's draft reports. The proposed amendments provide needed clarification to the roles played by experts and counsel in litigation. As the Advisory Committee has already pointed out, all too often well-funded clients routinely retain a testifying expert in addition to a consulting expert. Communications with a non-testifying expert are generally not

discoverable, which facilitates a more open dialogue. This practice creates a disparity which should not exist.

Attorney discussions with experts are too often forced to be verbal in an effort to discourage discovery of draft reports. The proposed Rules supply a well-reasoned approach that strengthens the veracity and straightforwardness of the discovery process while considering the burden and expense.

We believe it is important that the work product protection extend to expert witnesses who are otherwise not subject to preparation of a report. Facilitating open communication between attorneys and in house witnesses is an important practical consideration for the committee. Counsel should not have to be concerned as to which state the matter is pending in and whether they follow the control group or subject matter test of attorney/client privilege in order to permit the flow of information between lawyer and the company representative being protected. This holds true whether it is a plaintiff or defendant corporation. While some of our members have concerns regarding the potential exploitation of such a position with respect to treating physicians, on balance, we believe that the better-reasoned approach is to provide work product protection for communications with witnesses who do not provide a written report pursuant to Rule 26(a)(2)(C). Finally, the protection should extend to employees and representatives of all of expert witnesses.

Respectfully submitted,



Wayne B. Mason
Board Chair