January 26, 2009

08-CV-139

VIA E-MAIL (Rules_Comments@ao.uscourts.gov)

Mr John K Rabiej
Chief, Rules Committee Support Office
Committee on Rules of Practice and Procedure
Administrative Offices of the United States Courts
Washington, DC 20544

Re Proposed Amendments to Civil Rules 26 and 56
February 2, 2009, San Francisco
Written Statement of Kimberly D. Baker

Dear Mr Rabiej:

I thank the Committee for the opportunity to testify before the Committee I am a member of Williams Kastner, a Seattle law firm. For 24 years, I have defended businesses in employment, personal injury and product liability lawsuits I am also the current Secretary Treasurer of DRI-The Voice of the Defense Bar, the largest organization of defense lawyers nationally. Over the years, I have observed the effective use of summary judgment motions as a tool to secure dismissals of lawsuits, in whole or in part, thereby reducing the costs of defending non-meritorious claims and avoiding the extensive investment of time and money to take a case through trial. Summary judgment motions have also served to prompt settlement negotiations or mediation, when the issues for either party are narrowed or the court's ruling significantly impacts the evidence or theories to be presented at trial The following comments are offered regarding the proposed changes to Rule 26 and Rule 56.

Rule 56

During the past few months, many legal commentators have opined that there will likely be a large increase in employment related litigation under the new administration With many having lost their jobs, workers see this environment as ripe for obtaining financial recovery for lost employment and/or restoration to their former jobs For those individuals who can establish that a change in their employment was unlawful, litigation may be an appropriate avenue for redress. However, the anticipated opening of the flood gates for employment litigation will likely result in some, perhaps many, individuals filing claims for wrongful termination, age discrimination, and other bases for relief without a sufficient legal basis. Employers will be required to expend substantial dollars to defend against these claims Employers should be able to confidently seek dismissal by summary judgment when employees have not met their burden That confidence can only be bolstered if the Committee

adopts a standard that requires a motion to be granted, rather than leaving a discretionary standard that would allow for further discovery, costs and hardship Businesses and employers should be certain that when an employee has not met the legal standards to prevail, the lawsuit will be dismissed, eliminating the need to present a defense to a jury that may be comprised of citizens who are angry about the economic turndown and seeking an avenue to strike back.

Complaints initiating employment lawsuits commonly seek relief under many statutes However, when discovery is undertaken, it is also common to find that many of the claims do not have a legal or factual basis Having a mandatory standard for granting summary judgment premised on the "shall" language, rather than "should", will streamline many lawsuits by weeding out ahead of trial, those allegations that are unsupported or for which an affirmative defense exists If tried, the case that a judge or jury will hear should be focused and the basis for relief and damages available narrowly tailored to the remaining facts in dispute.

Rule 26

I encourage the adoption of the proposed changes to CR 26(a) (2) (C) The change will allow all parties to get to the task at hand – discussing the facts of the case openly and candidly with experts and formulating opinions that relate to the disputed issues A summary of the opinions offered will apprise opposing counsel of the opinions held and counsel can then further explore the factual basis and assumptions underlying the opinions and prepare for cross examination of the witness. Time is often wasted by asking why a particular word was used in one report versus another or similar queries about changed formats, etc., which can be more productively and cost efficiently used for discovery Once the cloak of protection from discovery is draped around the attorney-expert communications, a more expansive exchange of information can occur and both parties can focus on the facts and developing opinions, rather than writing and rewriting reports

Very truly yours,

Kimberly D. Baker

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