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Subject Rule 26 and 56

08-CV-151

Rule 26

I support the positions taken by the Committee on Civil Litigation of the US District Court in the Eastern District of New York (Guy Miller Struve) (08-CV-098) regarding the need to clarify that the amendment of Rule 26 will still "permit questioning of an expert on why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions, even if the answers to such questions involve communications with counsel."

Rule 56

I support the positions taken by the USDC, Northern District and the National Employment Lawyers Association regarding the proposed amendment of Rule 56. *See* October 15, 2008 statement of Joseph D. Gamson (08-CV-016) (citing examples of cases with upwards of 292 allegedly material facts), November 10, 2008 statement of Stephen Z. Chertkof (08-CV-048), December 26, 2008 statement of L. Steven Platt (08-CV- 100) (citing recent case with 250 allegedly material facts); January 5, 2009 statement of Ellen J. Messing on behalf of seven Massachusetts lawyers (08-CV-109) (citing recent case with a separate statement of facts in excess of 600 pages); and January 27, 2009 statement of Peter G. McCabe on behalf of NELA (08-CV-143).

I was co-counsel for Plaintiff along with another sole practitioner in *Jadwin v County of Kern, et al* . USDC, Eastern District of California Case No. 1:07-cv-00026-OWW-TAG. Because I believe that an attorney of record must keep abreast of any and all developments in the case, I converted my representation to that an "Of Counsel" attorney in order to concentrate on preparing Plaintiff's Rule 56 motion and the inevitable Plaintiff's Opposition to Defendants' Rule 56 motion while my former co-counsel continued prosecuting the case for another year. The Plaintiff's bar is forced into such risky co-counseling agreements to avoid the trial by attrition that is already far too common. The separate statements of the combined motions contain 457 material facts. The length and complexity of the motions has forced the court to continue the hearing on the motions twice already. And this is a comparatively simple case in that Plaintiff is relying on **direct** evidence of retaliatory motive. Imagine the length and complexity of the separate statement in a retaliation case that depended on circumstantial evidence! The proposed amendment to Rule 56 requiring point-counterpoint separate statements will exacerbate these problems.

I oppose the position taken by the Lawyers for Civil Justice and U. S. Chamber Institute for Legal Reform that a Rule 56 motion can or should be used to avoid discovery in supposedly unmeritorious cases. A decision on the merits, whether through trial or dispositive motion, is

fundamentally unfair if a party is denied access to potential evidence through incomplete disclosure and discovery. This position is particularly egregious in employment rights litigation where the defendant employer holds almost all the evidence and the plaintiff employee must file motion to compel after motion to compel to gain access to it. A Rule 56 motion should not be considered until discovery is completed

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