U.S. Department of Justice

Civil Division

08-CV-180

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 17, 2009

Mr. Peter G. McCabe
Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Civil Procedure. As the nation's principal litigator in the federal courts, the Department has a strong and long-standing interest in participating in the rules amendment process, and in sharing with the Committee its experiences with the Rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to Rules 26 and 56.

1. Proposed Amendments to Rule 26

The Standing Committee has proposed two amendments to this Rule. First, Rule 26(a)(2) would be amended to provide that some expert witnesses would not be required to submit a detailed report under Rule 26(a)(2)(B) Those witnesses would include treating physicians and employees of a party whose responsibility may include acting as a witness on behalf of the party, but not as a regular part of the employee's responsibilities. Instead, the party, not the expert witness, would have to disclose the subject matter of the expected expert testimony and a summary of the expected facts and opinions.

Second, the Committee proposes to provide the protections extended to attorney work-product in Rule 26(b)(3)(A) and (B) to limit the discovery of drafts of expert disclosure statements and reports. The Committee also proposes to provide such protections, with some specific exceptions, to communications between expert witnesses and counsel. Those exceptions are communications that (1) relate to compensation for the expert's study or testimony, (2) "identify any facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed;" or (3) "identify any assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed."

A. Disclosures Of Anticipated Testimony For Certain Witnesses

The Department supports the concept of amending Rule 26(a)(2) to provide for the written disclosure of the anticipated testimony of witnesses such as treating physicians and employees of a party. In the Department's experience, employees of federal agencies often have scientific or technical knowledge, but do not frequently testify in litigation. A written disclosure of the employee's anticipated testimony ordinarily should be sufficient for purposes of discovery and will be less time-consuming and burdensome than the employee being required to prepare and submit an elaborate report. The Department recommends, however, that the Rule state more clearly that attorney-client privilege and/or work product protections should apply to communications between the attorney and such employees. This could be accomplished through Rule text or, at least, through mention of the existence of such protections in the committee Note. For example, the Note could state: "Communications between an attorney and the client's employees often will be privileged. Otherwise privileged communications between an attorney and the client's employee will remain privileged even if the employee is an expert who does not provide a written report under Rule 26(a)(2)(C)."

B Protection of Draft Expert Reports And Attorney-Expert Communications

The Department supports the proposed amendments to Rule 26(b)(3)(A) and (B) to limit the discovery of drafts of expert disclosure statements and reports and communications between the attorney and the retained expert witness. The Department concludes that, on balance, the benefits of this proposal outweigh its disadvantages The Department understands and appreciates the concerns of some commentators who believe that the proposed amendments will enable attorneys to have undue influence over the expert's report and opinions. The Department, however, concludes that the discovery explicitly permitted under the proposed Rule 26(b)(4)(C) (ii) and (iii), *i e.*, what facts or data the attorney provided to the expert and that the expert considered in forming his or her opinions, and what assumptions the party's attorneys provided and that the expert relied upon in forming his or her opinions, ordinarily should be sufficient to enable the attorney to determine if an expert's opinions have been improperly influenced by the attorney

2. Proposed Amendments to Rule 56

The Standing Committee has proposed that Rule 56 would be amended to create uniform procedures for the resolution of summary judgment motions. The amendments are not intended to alter the underlying law of summary judgment. For example, under Rule 56(c), unless a court orders a different procedure in a case, the moving party must submit a statement of facts that it asserts are not in genuine dispute and entitle it to summary judgment. The statement must list the asserted undisputed material facts in separate, numbered paragraphs, with citations to the record. The party opposing summary judgment must file a statement that specifically responds to each fact.

Amended Rule 56(b) would permit a party to move for summary judgment at any time until 30 days after the close of all discovery A party opposing the motion "must file a response within 21 days after the motion is served or that party's responsive pleading is due, whichever is later " These time deadlines will apply unless a different time is set by a local rule or by an order in a specific case. Other proposed changes include language expressly permitting a party to move for summary judgment on "all or part of a claim or defense," to reflect the acceptance of so-called "partial summary judgment" motions.

The Department supports these changes for the most part, but has several concerns.

First, the Committee seeks comment on whether to retain the current language in Rule 56(a) that a court "should" grant summary judgment when the record shows that the movant is entitled to judgment as a matter of law, which would thereby recognize some limited discretion in the court to deny such motions. Until December 2007, when the "re-styled" Civil Rules went into effect, then-Rule 56(c) provided that summary judgment "shall be rendered forthwith" if the pleadings and discovery showed the absence of any "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Committee concluded that "should" was the appropriate language to use in view of some case authority indicating that judges had discretion to deny summary judgment motions in certain circumstances, and that the word "shall" contained ambiguity and was not acceptable under modern style conventions

The Department, however, has serious concerns about the Committee's proposed retention of the "should" language. That language weakens the mandatory terms of the Rule and, if followed, may result in the improper denial of meritorious Rule 56 motions, even in the absence of any genuinely disputed issue of material fact The Department views such results as inconsistent with the governing law. *See Celotex Corp v Catrett*, 477 U.S. 317, 322-23 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The Department recommends that the Committee use mandatory terminology in the Rule – either "must" or "shall " The Department understands that some judges and commentators believe that there are specific instances in which discretion to deny summary judgment motions can be exercised, but the Department believes that such rare instances can be accommodated without using discretionary terminology in proposed Rule 56(c). In addition, in those cases, the district judge should be under a specific obligation to state on the record why summary judgment is not being granted.

Second, the proposed Rule would provide uniform procedures for the resolution of Rule 56 motions, principally through the procedures in proposed Rule 56(c). The Department generally supports the principle of there being uniform procedures for all district courts. It also generally supports the proposed requirement that the movant and responding party each have to "concisely identif[y] in separately numbered paragraphs" the material facts that are alleged to be undisputed or disputed. The procedure, already used in a number of districts, should bring clarity to resolving these motions.

The Department notes, however, that the so-called "point-counterpoint" method embodied in proposed Rule 56(c) is not appropriate or suitable to the resolution of some kinds of summary judgment motions. The Department notes, for example, that its attorneys often move for summary judgment in actions involving challenges to federal agency decisions. Because those actions are often based on the court's review of an administrative record, the proposed requirement that the movant identify "material facts" that cannot be "genuinely disputed," or that the nonmovant identify "material facts that preclude summary judgment," would be an artificial and inapposite procedure for the resolution of these cases under the governing law, which ordinarily is the Administrative Procedure Act. *See* 5 U.S.C. § 706.[1] If the Committee proceeds with this proposal, it should determine how such actions can be exempted from the application of these procedures. For example, the Rule could provide: "The procedures for filing statements of material fact and responses to statements of material facts do not apply to cases involving challenges to agency action where judicial review is based on an administrative record." We note that the United States District Court for the District of Columbia recently amended its summary judgment rule to recognize the unique nature of these cases. *See* United States District Court for the District of Columbia LcvR 7(h)(2) (attached hereto). In the alternative, this specific issue could be identified in the Note.

The Department supports the proposed recognition of "partial summary judgment" as to specific claims or defenses, which will be a valuable clarification and recognition of the applicability of the summary judgment procedure in those situations. Rule 56(a) also would be amended to state that judges "should state on the record the reasons for granting or denying the motion." The Department also support this provision. It is critical that parties understand the basis for the court's ruling, whether the motion is being granted or denied.

Finally, the amended Rule would alter the timing for filing Rule 56 motions. Under the current rule, a Rule 56 motion can be filed 20 days after the complaint has been filed. The Committee proposes to eliminate this specific restriction, but would provide instead that, unless a local rule or court order otherwise applies, a party can file for summary judgment "at any time until 30 days after the close of all discovery," and that a party opposing summary judgment "must file a response within 21 days after the motion is served or that party's responsive pleading is due, whichever is later." The Department supports this amendment Under the current Rule,

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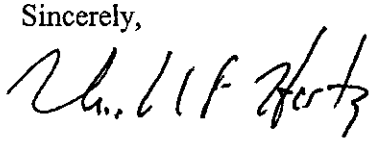
[1] *See Olenhouse v. Commodity Credit Corp* , 42 F 3d 1560, 1580 (10th Cir. 1994) ("This process, at its core, is inconsistent with the standards for judicial review of agency action under the APA The use of motions for summary judgment or so-called motions to affirm permits the issues on appeal to be defined by the appellee and invites (even requires) the reviewing court to rely on evidence outside the administrative record."); *Girling Health Care, Inc. v Shalala*, 85 F.3d 211, 215 (5th Cir. 1996) (endorsing the use of summary judgment motions to review or enforce a decision of a federal administrative agency on the grounds that the procedure allowed the district court to assume that there is no genuine issue of material fact, since "the administrative agency is the fact finder.") (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2733 (1983))

there are sometimes cases in which parties file a complaint against a federal agency and almost immediately move for summary judgment. In those situations, the agency has to respond to the motion within a short period of time, notwithstanding the fact that, under Rule 12(a)(2), it does not have to respond to the complaint, *e.g.*, through a motion to dismiss, until 60 days after service of complaint. Under the proposed amendment, that problem would be remedied.

* * * *

We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,



Michael F. Hertz
Acting Assistant Attorney General

Attachment
Order of United State District Court
for the District of Columbia, Sept. 2, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VOTING: Chief Judge Lamberth, Judges Sullivan, Robertson, Kollar-Kotelly, Kennedy, Roberts, Walton, Bates, Leon, Collyer, Senior Judges Hogan and Kessler.

ORDER

It is this 2nd day of September, 2008 ordered that effective immediately Local Rules **LcvR 7** and **LCvR 56.1**, were amended as follows

LCvR 7

MOTIONS

(h) MOTIONS FOR SUMMARY JUDGMENT

(1) Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. Each such motion and opposition must also contain or be accompanied by a memorandum of points and authorities and proposed order as required by LCvR 7(a), (b) and (c). In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issued filed in opposition to the motion.

(2) Paragraph (1) shall not apply to cases in which judicial review is based solely on the administrative record. In such cases, motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record.

COMMENT TO LCvR 7(h): *This provision recognizes that in cases where review is based on an administrative record the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record As a result the normal summary judgment procedures requiring the filing of an statement of undisputed material facts is not applicable*

LCvR 56.1

MOTIONS FOR SUMMARY JUDGMENT

~~Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. Each such motion and opposition must also contain or be accompanied by a memorandum of points and authorities required by sections (a) and (c) of this Rule. In determining a motion summary judgment, the court may assume the facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues file in opposition to the motion.~~

Comment: *This rule is being deleted as it repeats verbatim current LCvR 7(h) (to be redesignated as LCvR 7(h)(1)).*

FOR THE COURT·

/s/ Royce C Lamberth

Chief Judge