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08-CV-051

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

Re: Docket No.: 08-CV-034

Dear Sir/Madam:

Please accept the following comments with regard to the proposed changes to the Federal Rules of Civil Procedure, Rule 56 and Rule 26.

Since it has been long understood that summary judgment will be granted provided that the movant meets its burden and there are no material issues of fact, the purported stylistic revision of Rule 56 in December 2007 providing that the Court "should" grant summary judgment in such a case, has raised significant concern. The prior requirement that the court "shall" grant summary judgment in such a case was generally understood to mandate that the court grant summary judgment. While I understand that language evolves over time, I have not thought that we had reached a point where "shall" means the same as "should". "Shall" has, until now, meant "must", whereas "should" allows for discretion and is not a mandate. If, however, the evolution of the language has reached a point where people are seeing no difference between "shall" and "should", then to preserve the intent and purpose of summary judgment, it is preferable that we move away from the use of either term and revise Rule 56(a) to provide that a court "must" grant summary judgment if the burden is met and there is no genuine issue of material fact.

As to the proposed changes to Rule 26, Proposed Rule 26(a)(2)(C) seems to solve the dilemma of determining the extent of disclosure necessary for employees who are "experts" due to the nature of their employment, but do not ordinarily testify as experts. The proposed amendment permitting an attorney summary disclosure in such cases will reduce the complaints of surprise by the opposing party and the risk of preclusion at trial for the employer party.

Proposed changes to Rule 26 extending work product protection are necessary given the complex nature of much of the litigation that occurs in federal court. It is essential that the attorneys in the trenches be able to communicate freely with experts to fully develop and understand the issues in the case. Ethical obligations prevent the attorney from dictating ultimate opinions of the experts. It is often necessary for attorneys and experts to exchange drafts,

question opinions and discuss the reports freely prior to final disclosure. This is the only real way to ensure full and effective representation. The expert report will set forth materials and assumptions provided by counsel. It is impossible for the expert to opine without first having extensive communications with counsel. Forcing discovery of such communications and draft reports discourages full and effective representation. The "gotcha" moment of revealing that an attorney had some input in the process of obtaining the final expert report may feel good for the moment when revealing the lack of integrity of the opposing counsel or expert, however, such a moment is often misleading since it ignores the complexity of litigation. In any event, this does not outweigh the need to protect such communications as attorney work product to ensure effective representation by counsel, especially in complex cases. Therefore, I strongly support the proposed changes to Rule 26.

Respectfully submitted,

Latha Raghavan

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