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VIA EMAIL (Rules_Comments@ao.uscourts.gov)

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

RE: Proposed Amendments to Civil Rules 26 and 56
January 14, 2009, San Antonio, TX
Written Statement of Mr Cary E. Hiltgen

Dear Mr. Rabiej:

My name is Cary Hiltgen, and I am a founding director with the law firm of Hiltgen & Brewer, P.C. I am also the current President Elect of DRI – The Voice of the Defense Bar, the largest organization of defense attorneys in the country. In my twenty-eight years of practice I have handled cases in both federal and state courts all across the country. As such, I have seen and experienced first-hand how Rule 26 and Rule 56 varies in different jurisdictions and the effect, both positive and negative, this has on how attorneys work with their clients. Based on my experience, I submit the following comments on the proposed changes to Rule 26 and Rule 56.

Rule 56

I support the adoption of a change that requires undisputed facts to be clearly stated in all motions for summary judgment, but I am very concerned with any proposed change that provides, arguably, unlimited discretionary power to Courts with regard to

summary judgment motions. I believe that the requirement of undisputed facts will bring consistency nationwide, promote good motion practice and will allow Courts the ability to easily and properly adjudicate claims; however, the replacement of the word "shall" to "should" inserts discretionary power that will only lead to inconsistency and confusion.

A change in the language to the word "should" takes away any requirement judges had to sustain meritorious motions and all advancements made by the requirements relating to the statement of the facts become inconsequential. Moreover, the force behind the filing of a summary judgment motion would dissipate. Summary judgment provides the last chance for unsupported claims to be adjudicated before the matter goes to trial. As the United States Supreme Court stated in *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986), summary judgment is necessary "to secure the just, speedy and inexpensive determination of every action." This purpose will be frustrated if federal judges are allowed greater discretion in ruling on motions for summary judgment.

The simplification and clarification of matters that will be tried is an important role served by summary judgment. The use of the word "shall" or better yet "must," creates a clear rule for Courts when they are faced with summary judgment motions. Replacing "shall" with "should" and inserting the Court's discretion creates confusion in the burden required by the moving party Whether or not a genuine issue or dispute of material fact exists no longer matters, as the Court can still decide that the claims should be tried before a jury By allowing Courts this discretion, the resolution of matters will inevitably be drawn out and more expensive, making it less likely that unsubstantiated claims will be eliminated before trial. I believe that this is one of the key differences between state and federal courts. State court rules often provide Courts with far more

discretion. And from my experience, this discretion is the reason why summary judgment motions filed in state courts do not seem to have the same effect as those filed in federal courts. This is unfortunate, as the elimination of claims that do not have adequate factual support is a critical tool in the promotion of an inexpensive and speedy trial. This shift in language, in all likelihood, removes the requirement that these claims be dispensed of before trial, which inevitably leads to an increase in the number of claims on court dockets, as well as the costs related to resolving such claims.

From the perspective of a defense attorney, I also believe that taking the strength out of a summary judgment motion also decreases the possibility for settlement by the parties. In my experience, it is the filing of a motion for summary judgment that often provides the catalyst for settlement negotiations. The fear placed on the opposing party that a well-written summary judgment motion could prevail is an important strategic tool. The proposed change effectively eliminates this fear and thus this strategy for settlement. The ineffectiveness of summary judgment motions will make trial preparation more expensive and time consuming, increase the number of cases on a court's trial docket, result in longer trials and create greater confusion for the jury who will ultimately be faced with issues of law and fact. By creating a clear and consistent burden for claims to avoid summary judgment, judges can more easily resolve claims by limiting the number and scope of trials.

Rule 26

I support the committee's proposed changes to Rule 26, which I believe will promote more effective communication and the efficient flow of information between attorneys and experts. First, I believe that the proposed change to Rule 26(a)(2)(C)

requiring an attorney summary disclosure for a witness who is not required by Rule 26(a)(2)(B) to provide an expert report would be most beneficial and alleviate any concerns about unfair surprise that are often argued when disputes arise over the Rule 26 exception on expert reports. Additionally, it would draw a clearer distinction and make it harder for attorneys and Courts to ignore the exception. More often now, attorneys are compelled to submit an expert report, where arguably none is required, simply to avoid any potential dispute that may arise or sanction that could be imposed by the Court that would prevent their expert from testifying at trial. The fear is far from unfounded, as many Courts in jurisdictions across the country have seemingly ignored the distinction between experts hired to provide an expert opinion and one that is an employee of the party who does not provide expert opinions in the regular course of his/her duties.

Second, a change that would protect the disclosure of draft expert reports and disclosures would not only provide efficiency, reducing time and costs related to the creation of the expert reports and disclosures, but also accuracy to the process of working with expert witnesses. In my experience, the fear that drafts will be disclosed and possibly used against the party often creates barriers in communication between the attorney and the expert. These barriers unnecessarily complicate the process increasing the overall costs of litigation.

Much in the way the protection of attorney client communications is important to effectively advocate your client's position, so too is the protection of communications between the attorney and the expert. The fear of discoverability ends up preventing most written communication and even verbal communication between the attorney and their experts. The fact of the matter is that the expert is ultimately working on behalf of the

client, much in the same way attorneys are working on behalf of the client. Thus the opinions of these experts, good or bad, need to be thoroughly reviewed and discussed in order to effectively prepare a case for trial. Since so much of a client's case relies on the opinions of the expert, a clear understanding of the potential risks the client faces is important to crafting the strategy of a case.

Effective advocacy also means a reduction of costs for the client. Ultimately allowing communication to flow freely back and forth between the attorney and the experts, which arguably includes the expert's secretarial staff, decreases the expense often incurred by attorneys in their attempt to avoid any potential for disclosure.

Respectfully submitted,

Cary E. Hiltgen

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