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Lawyers for Civil Justice

and the

U.S. Chamber Institute for Legal Reform

Supplemental Comments
to the
Committee on Rules of Practice and Procedure
of the
Judicial Conference of the United States

Regarding Proposed Amendments to
Federal Rules of Civil Procedure 56
Summary Judgment and 26 Expert Discovery

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I. Introduction

Lawyers for Civil Justice ("LCJ") and the U.S. Chamber Institute for Legal Reform ("ILR")[1] respectfully submit these supplemental comments on the proposed amendments to Civil Rules 56 and 26 on the final day of a robust comment period that attracted written comments and testimony from over 100 academics, judges, and practitioners. LCJ and ILR have made clear throughout this deliberative process that they commend and support the Rules Committee's efforts to develop consistent national procedures governing summary judgment and expert discovery and have advocated limited, but significant changes to the proposed amendments.

This supplemental comment seeks to demonstrate that the comments and testimony in the record establish that the proposed rules be revised as follows: (1) In proposed Rule 56(a) "must" replace "should" in the phrase "should be granted" when a party has established that it is entitled to

[1]The Institute for Legal Reform, ILR, an affiliate of the U S Chamber of Commerce, seeks improvements in the civil justice system at the national, state, and local levels The U S Chamber of Commerce is the world's largest business federation, representing more than 3 million businesses and organizations LCJ is a nationwide coalition of individual defense trial lawyers, counsel for major American corporations and the *DRI, Federation of Defense and Corporate Counsel,* and the *International Association of Defense Counsel,* which collectively represent over 20,000 civil defense trial lawyers. LCJ and ILR previously submitted extensive comments on the proposed rules on November 12, 2008, 08-CV-061

summary judgment; (2) The "point – counterpoint" procedure in proposed Rule 56 (c) is an effective mechanism for focusing the facts and issues presented on motions for summary judgment and can be slightly modified to render it more useful in a wide range of cases; (3) Rule 26 protection of communications between counsel and "retained" expert witnesses should be extended to "employee" expert witnesses or, alternatively, to all expert witnesses; and (4) Rule 26 protection should apply to the staff of retained experts.

II. Courts "Must" Grant Summary Judgment When the Standard Is Satisfied.

The Committee invited comments on the question whether summary judgment "must" or only "should" be granted when the conditions of Rule 56 are met. The comments received on this question overwhelmingly favored the use of the words "must" or "shall," not "should." We submit that "must be granted" best represents in modern usage the *Celotex* trilogy's (and its progeny's) reading of "shall be rendered forthwith" in the original Rule 56. We would, however, reluctantly support restoring "shall be granted" on the basis that it is a "sacred phrase" that retains the standard applied over seventy years of summary judgment jurisprudence.

As part of its stylistic revisions to the Federal Rules of Civil Procedure, the Committee determined that the term "shall" was not to be used in the Federal Rules. The Committee also declared that the stylistic revisions did not change the well-settled legal standards embodied in the rules. However, the 2007 style revision of Rule 56 that replaced "shall be rendered forthwith" with "should be rendered" created the potential for a drastic change in the responsibility of the courts to decide summary judgment motions and changed the legal standard for summary judgment that will substantially diminish the utility of this important procedural tool.

The term "must" is consistent with the summary judgment standards established by the U.S. Supreme Court in the *Celotex*, *Anderson* and *Matsushita* cases. Changing "shall" to "should" in the Ten Commandments would turn them into the Ten Suggestions, as there are many who would excuse departures from their mandates for a variety of relativist reasons. Even a mundane weight loss analogy makes the point – "Should is aspirational; must is imperative." In a judicial system based on the rule of

law, rules must be rules, not suggestions, or they serve little purpose to guide those who would comply with them.

A. "Must" Will Ensure Consistency in the Current Legal Standard for Summary Judgment.

Throughout the comment period, the Committee received written and oral testimony from many academics, judges, and practitioners on the issue of whether the term "should" adequately maintains the current standard for grant of summary judgment. The record reflects overwhelming support for use of the term "must" as the most appropriate replacement for the term "should" in Rule 56. For example, most practitioners, litigants, and the associations submitting comments advocated substitution of the word "must" for the word "should" in proposed Rule 56(a): American College of Trial Lawyers – Federal Civil Rules Committee (08-CV-060); Twenty seven members of the American Bar Association's Council of the Section of Litigation and the Section's Federal Practice Task Force (08-CV-152); DRI – Voice of the Defense Bar (08-CV-113, 08-CV-117, 08-CV-135); Federal Practice Committee of The Dayton Bar Association (08-CV-162); Federation of Defense & Corporate Counsel (08-CV-124); International Association of Defense Counsel ((08-CV-029), 08-CV-096, 08-CV-140); ILR and LCJ (08-CV-061); Texas Association of Defense Counsel (08-CV-116) and; approximately forty individual practitioners from widely diverse practices and parts of the country.

The use of the term "should" renders the rule internally inconsistent – "the court should grant summary judgment" where a party is "entitled to it" does not make logical or grammatical good sense. Moreover, the term "should" results in elastic language that allows a court to deny summary judgment even where it is procedurally and legally appropriate, regardless of the court's subjective reasoning for denying the motion, and introduces additional appellate issues regarding judicial discretion. As Chief Judge Easterbrook noted, "whenever a rule says that a judge "should" or "may" do something, there is a potential appellate issue." Judge Easterbrook concluded that the "right word to use is 'must'", not only for that reason, but first, because "...granting summary judgment whenever there is no material dispute of fact holds down the expense of litigation." 08-CV-056

The discretionary "should" provides little comfort to moving parties seeking certainty if they are able to meet their burden of proof and, therefore, creates confusion for litigants in assessing the burden that must be met by the moving party. The term "should" will return summary judgment motions to the disfavored status they held prior to the Supreme Court's rulings that clarified the process and made it a "pillar" of the civil litigation system, and will add substantial additional costs and burdens to an already slow and expensive system of justice.

As a recent law review article by Professor Bradley Scott Shannon in 58 Am U.L. Rev. 85 (2008) (08-CV-134) explained, the "seemingly innocent change [from shall to should] might well result in a radical transformation of federal summary judgment practice, a significant aspect of modern federal civil litigation." Professor Shannon's written comments reiterated that his "most significant concern" with the amendments to Rule 56 is the use of "should" rather than "must." As Professor Shannon aptly noted in his article, "Though discretion might have its virtues, it also must be recognized that discretion 'often concentrates unbridled power in few hands, fails to create clear or predictable guidelines, and permits disparate treatment of like cases.'" *Id.* at 119.

It was also pointed out during the hearings that among the states, the rules governing summary judgment, with the exception of Pennsylvania's, are based on Federal Rule of Civil Procedure 56. If the term "should" remains in the Federal Rule, it is conceivable that the individual state rules will also change and result in far fewer summary judgment motions being granted in state litigation as well as federal.

B. Without "Must," Rule 56 Will Be Less Useful.

It was repeated by almost all supporters of the term "must" that if "should" is retained, the utility of 56 will be severely hampered. If the Rule includes "should," it would permit a court to deny summary judgment, even when the moving party has properly supported the motion and the opposing party has failed to come forward with affidavits or other proofs to create a fact question. Not only is Rule 56 necessary in weeding out meritless cases, but it is also an important tool in focusing trial on only those issues of fact and law that are genuinely in dispute. The filing of a well-written summary judgment motion can provide the catalyst for settlement negotiations, making it an important strategic tool. Summary judgment therefore benefits

both plaintiffs and defendants by allowing each to put the other to the test to see if a trial is necessary.

C. Without "Must," The Costs of Litigation Will Continue To Increase Unnecessarily.

It is common knowledge that litigation costs continue to skyrocket. Writing negative discretion into Rule 56 would exacerbate the trend. Lawsuits should be resolved as soon as possible to protect the financial well-being of businesses, both large and small, especially in this time of financial crisis. There is compelling anecdotal evidence in the record of cases that should have been dismissed at the summary judgment stage, but were not, and as a result, litigants were forced to incur excessive litigation costs before ultimately prevailing; or worse, to settle meritless cases to avoid the expense and risk of trial. An ineffective summary judgment procedure will continue to make trial preparation more expensive and time consuming, increase the number of cases on court trial dockets, and result in longer trials. Moreover, the lack of a functional process to limit the scope of issues for trial will create greater confusion for juries faced with issues of law and fact that should have been determined at the summary judgment stage of the proceedings.

The record also shows that within the past three years, summary judgment was rarely granted under the "shall" standard (3.5%) in cases brought against one company (08-CV-138). If summary judgment is discretionary even when warranted on the law and facts, it is likely that fewer motions will be granted. Courts have been judicious in granting summary judgment. The same data showed that of 20 cases appealed after a grant of summary judgment, 17 were affirmed. This data is consistent with that reported by the Federal Judicial Center and reflects that, if anything, summary judgment is an underutilized, but necessary, tool.

D. A Clear, Predictable, and Mandatory Summary Judgment Procedure Will Increase Public Confidence in the Civil Justice System.

Original Rule 56 declared and the *Celotex* trilogy and progeny established that if the facts are undisputed, a litigant is entitled to summary judgment as a matter of law. Judicial discretion is inherent in the standard that requires a judge to determine the facts in dispute and the law applicable to those facts.

But, once the judge determines the law and the facts merit dismissal, to exercise a negative discretion to deny justice to the litigant based on extraneous factors, would undermine the confidence of litigants in the civil justice system and its commitment to applying the rule of law to resolve disputes.

Our litigation system is perceived in the international business community as unduly litigious and fraught with uncertainty. If American business is to remain competitive in the world marketplace, the cost and inefficiency of our civil justice system must not continue to put our businesses at a competitive disadvantage. For example, in one important area, annual tort costs, our justice system compared to the UK and Japan is twice as costly and almost half as efficient in compensating claimants. 08-CV-110 One small step toward redressing the imbalance would be to ensure that summary judgment is an effective mechanism for narrowing cases and limiting costs by confirming that it "must" be granted if the party is entitled to judgment on the facts and law.

III. The "Point-Counterpoint" Procedure in Rule 56(c) Is an Efficient Means of Resolving Summary Judgment Motions.

LCJ and ILR support adoption of a nationally standardized procedure in Rule 56(c) that utilizes a statement of undisputed material facts. In jurisdictions that currently use such a procedure, an effective statement of undisputed facts sets forth the material facts necessary for the court to make its ruling based upon the substantive law at issue. Requiring the moving party to state facts that it contends are undisputed and requiring the nonmoving party to admit or deny them ensures that the parties reach some shared reality regarding the merits of the case. Our members' experience has been that with this procedure, a principled resolution of the case is possible on a motion for summary judgment. Without it, litigants and courts have a more difficult time evaluating the merits of the motion. It is the most effective means for evaluating the presence or absence of a factual dispute. In the long run, the procedure will save both the court and the parties' substantial time and resources.

There is little doubt that the proposed procedure can be modified to make it acceptable to most. One approach would be to place numerical or page limits on the required statements, or to combine the statement and the brief or motion in one document, which would have the benefit of a simplified,

uniform, and consistent national standard. Perhaps the simplest approach would be to permit local "opt outs" from the national standard by adding the words "or by local rule" at the end of proposed Rule 56 (c)(1): "The procedures in this subdivision (c) apply unless the court orders otherwise in the case **[or by local rule]**." We do not believe that Rule 56 should be silent on what our members tell us is the "best practice" for summary judgment motions.

IV. Rule 26 Work Product Protection Should Be Extended to Employee Experts and the Staff of Retained Experts

A. Work Product Protection Should Be Extended to Those Disclosure Experts Who Are Employed by the Party Making the Disclosure

The Report of the Civil Rules Advisory Committee on Rule 26 discusses at some length the "distinctive concerns" that exist with protecting communications between an attorney and a retained expert. The Report, however, notes that "similar concerns have not been raised about witnesses who give expert testimony but have not been specially retained." (Report *at 6.*) The Committee has requested comment on the question "should the protection of communications be extended to all witnesses expected to testify as experts?" (Report at 7.)

The Report further states that "disclosure experts" (defined as an expert for whom a Rule 26 (a)(2)(B) report is not required, but for whom a disclosure is required under Rule 26 (a)(2)(C)), are not as likely to be as involved with preparation of a litigant's case as are retained experts. The assumption that disclosure experts are not as likely to be involved in the development of case strategy, both offensively and defensively, as retained experts is not consistent with our members' experience. In commercial, product liability, and other litigation, in-house scientists, engineers, and technical personnel are often the most knowledgeable individuals regarding the matters at issue. In many cases, trial counsel's initial education regarding a litigated dispute comes from employee experts. These individuals are very important to trial counsel in helping to winnow down important concepts from a mass of documents and theories. These individuals are also often best suited for explaining the reasonableness, or lack thereof, of a party's conduct. In many cases, utilizing in-house technical assistance is generally the most cost-

effective way for a corporate litigant to develop its prosecution or defense of a matter.

The Committee Report and Proposed Note speak often of the compelling need to protect communications between an attorney and retained expert. (See Report, at 6-7, 10-11, and 17-20.) All of those reasons are equally applicable to a disclosure expert who is employed by a party. Indeed, while the proposed Rule provides no explicit protection for communications between counsel and disclosure experts, the Report is clear that no attempt was made in drafting the changes to Rule 26 to exclude protection of communications between disclosure experts and counsel. Specifically, the proposed Committee Note to subdivision (b)(4) provides that the Rule "does not exclude protection under other doctrines such as privilege or independent development of the work-product doctrine." (Report *at 11.)*

Extension of the work product protection to disclosure experts who are employees of the party making the disclosure, but not to other disclosure experts, is supported by the following reasons. Expert witnesses who are employees of a litigant are very likely to be viewed by jurors as having some degree of bias in favor of the party for whom the expert is testifying, even though their employment does not regularly involve giving expert testimony. Non-party employee disclosure experts such as police officers, federal investigators, government officials and treating physicians are more likely to be viewed by jurors with a greater degree of impartiality. In the case of safety and law enforcement investigators, jurors are likely to assume that their conclusions have not been influenced by counsel. Full discovery of conversations between investigators and counsel may be probative for a showing that, "the sources of information or other circumstances indicate a lack of trustworthiness" under FRE 803(8). For this reason, there is a greater need for counsel to be able to freely discover communications between opposing counsel and the expert which might reveal the expert's bias. Finally, communications between the disclosure expert and counsel are not likely to fall within any of the recognized exceptions set forth in FRCP 26(b)(4)(C). For these reasons, we urge the Committee to extend work product protection to those experts who are employees of the party offering the expert.

The extension of work product protection to employee experts can be accomplished quite simply, by revising proposed Rule 26(b)(4)C), as follows: *** Rules 26(b)(3)(A) and (B) protect communications between the

party's attorney and any witness required to provide a report under Rule 26(a)(2)(B) **[identified as an expert retained or employed by the party]**, regardless ****"

Another specific, but slightly longer alternative would be:

"***Rules 26 (b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B) [OR FOR WHOM A DISCLOSURE IS REQUIRED UNDER RULE 26 (a)(2)(C) AND WHO IS AN EMPLOYEE OF THE PARTY PREPARING THE DISCLOSURE,] regardless****"

LCJ and ILR urge the Committee to extend work product protection afforded retained experts to employee experts under proposed Rule 26(b)(4)C) for the reasons stated above. However, recognizing that several of our members have taken the position that the importance of extending protection to employee experts outweighs the downside of protecting communications with other disclosure experts such as treating physicians, we would support extension of such protection to all witnesses testifying as experts.

B. Rule 26 Protection Should Apply to the Staff of Retained Experts.

With the exception of three specified topics, *proposed* rules 26(b)(4)(B) and (C) provide work product protection under Fed. R. Civ. P. 26(b)(3)(A) and (B) for draft reports and attorney-expert communication. However, it is unclear whether or not such privilege extends to communications between an attorney and the expert's staff that includes researchers, associates and assistants. These individuals, while not expected to testify, can play an integral role in the research, development and preparation phases of the expert report and opinion – which are often a collaborative effort of a group of individuals. Therefore, a few words should be added to the proposed Committee Note for the purpose of clarifying that the work product privilege set forth in proposed rules 26(b)(4)(B) and (C) extends to an expert's staff including individuals that assist the expert in the development of the expert report and the overall provision of expert services. The extension of the work product privilege in this context is consistent with the spirit and legislative intent of the work product privilege currently incorporated in Fed. R. Civ. P. 26(b)(3).

Earlier cases treated experts as "agents" of the attorney under the attorney-client privilege and denied discovery on that basis. *See, e.g., Schuyler v. United Airlines, Inc.* 10 F.R.D. 111 (M.D. Pa. 1950); *Cold Metal Process Co. v. Aluminum Co.*, 7 F.R.D. 684 (Mass. Dist. Ct. 1947). However, the 1993 amendments to Rule 26 "make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report." *Herman, et al. v. Marine Midland Bank*, 207 F.R.D. 26, 28-29 (W.D. NY 2002). Fed. R. 26(b)(3), which governs the work product privilege in federal court, "is expressly subject to the provisions of subdivision 26(b)(4)." *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 363 F. Supp. 1013, 1014 (S.D. NY 1983). Specifically, courts have held that "[t]he expert disclosure requirement of Fed. R. Civ. P. 26(a)(2)(B) trumps the substantial protection otherwise accorded opinion work product" under Rule 26(b)(3). *Herman*, 207 F.R.D. at 28-29.

Proposed rules 26(b)(4)(B) and (C) will extend work product protection in certain circumstances to draft expert reports and attorney-expert communications. The question then becomes – Who is encompassed within the extended privilege? As the Committee has heard, the question has come up in litigation and should be clarified in the Committee Note. It is only logical that the proposed protection extend to an expert's staff.

Currently, Fed. R. Civ. P. 26(b)(3) protects from disclosure any material prepared by an attorney, a party *or an agent of either* in anticipation of litigation. "The work product doctrine extends protection to data assembled by attorneys *or agents acting in an investigative role on behalf of a client and to parties or their agents who in readiness for litigation, prepare materials designed to aid their cause.*" *Mobil Oil Corp. v. Department of Energy, et al.*, 102 F.R.D. 1, 11 (N.D. NY 1983) (emphasis added); *see also Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 649 (N.D. Ill. 1994) ("Rule 26(b)(3) "extends the work product privileges to 'agents' of a party to the litigation. Employees of a party are agents of the party, and work product prepared by them is privileged, even if not prepared in response to an attorney.") In the context of attorney-client privilege, "courts have extended the privilege to the *substantive advice and technical assistance.*" *In re CV Therapeutics, Inc. Securities Litigation*, 2006 U.S. Dist. LEXIS 41568, *17 (N.D. Cal. 2006) (emphasis added). Further, "[a]s is the case with the attorney-client privilege, the presence of third parties, if

essential to and in furtherance of the communication, should not void the privilege." *Sunnyside Manor, Inc. v. The Township of Wall, et al.*, 2005 U.S. Dist. LEXIS 36438, *9 (D.C. NJ 2005).

All members of the litigation team, which certainly includes experts and their staff, must have the ability to examine the facts, reach conclusions, and speak freely in order to render effective legal services. *See Feshbach, et al. v. Securities and Exchange Commission*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997) (noting that the Securities and Exchange Commission has withheld notes and staff research documents prepared by Commission attorneys *and staff working at their direction* under the attorney work product privilege). This notion is consistent with current Federal law. "Work product immunity covers not only confidential communications between the attorney and client. *It also attaches to other materials prepared by attorneys and their agents in anticipation of litigation.* Like the attorney-client privilege, *work product immunity promotes the rendering of effective legal services.*" *In re: Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997) (emphasis added). "By its very own terms, then, the work product privilege *covers materials prepared by or for any party or by or for its representative; they need not be prepared by an attorney or even for an attorney.* While the work product may be, and often is, that of an attorney, *the concept of work product is not confined to information or materials gathered or assembled by a lawyer.* In light of the realities of litigation, it is necessary that the work product doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.C. Cir. 2003) (emphasis added).

Due to the integral role played by an expert's staff in the research, development and preparation phases involved in the provision of expert services, including the drafting of expert reports, it is logical and necessary that the work product provision set forth in proposed rules 26(b)(4)(B) and (C) encompass not only such experts, but also their staff. Although some may claim that extension of the work privilege to certain draft expert reports and attorney-expert communications, as well as extension of the privilege to an expert's staff, is too "all-encompassing," this extension would not remove the burden that must be demonstrated by "[a] party claiming an item as work product [by] offering a specific explanation why the item is privileged from discovery." *Vardon Golf Co., Inc. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 646 (N.D. Ill. 1994). The burden on the party seeking to protect the materials as work product should aid in alleviating any concern associated with the

extension of the work product protection in this context. The reach of the protection could be accomplished merely by changing a few words in the Committee Note, as follows:

"The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications **[between attorneys and experts, including staff working at their direction.]**" (See proposed Committee Note at lines 56-59.)

V. Conclusion

LCJ and ILR commend the Committee for its excellent work on the proposed amendments to Rules 56 and 26 and offer the above suggestions in the same spirit in which we know they will be considered by the Committee – the objective of crafting the right rules that are best for our system of justice.

Respectfully submitted,

Lawyers for Civil Justice

and

The U.S. Chamber Institute for Legal Reform