08-CV-040

Johnson & Johnson

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November 10, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendments to Rules 26 and 56

Dear Mr. McCabe:

Thank you very much for giving me the opportunity to comment on the proposed changes to Rules 26 and 56 of the Federal Rules of Civil Procedure. I applaud the Committee's effort to consider thoughtful changes to these two important rules.

I am Associate General Counsel of Johnson & Johnson and responsible for the corporation's global litigation. I've been at Johnson & Johnson for over 12 years and before that was a litigation partner at Patterson Belknap Webb & Tyler in New York. As inside counsel, my perspective on the litigation process is at times different from outside counsel who depend upon litigation for their livelihood. J&J prefers not to litigate; when we do so our goal is a fair result, arrived at as quickly and inexpensively as possible.

From that vantage point, let me comment on the proposed changes. First, with respect to Rule 26, I am enthusiastic about the Committee's interest in confronting the unforeseen consequences of the 1993 Committee note to Rule 26(a)(2)(B). The warrant to inquire into all communications between experts and counsel has multiplied expense with little benefit to the parties. Further, it has contributed to the practice commonplace in our cases of retaining two experts, one to testify and the other to provide close consultation with counsel.

If the slate were clean, I would employ the approach in Australia where it is unheard of for trial counsel to steer or direct the contribution of the experts they retain. The experts prepare their reports with minimal input from counsel and provide their testimony with little management. That is a cost effective and valuable approach to expert proof. Sadly, our legal culture is resistant to so diminishing the opportunity of lawyers to

contribute to the presentation of expert proof. If we cannot exclude counsel from the preparation of expert proof, I favor as a second choice what the Committee suggests in its amendments: reasonably protecting the interactions between counsel and expert in order to diminish the satellite litigation over those interactions.

At some point it would be extremely valuable for the Committee to consider a different approach to experts entirely, one which would further encourage selection by the court of experts. Too often the competing expert proof in effect cancels itself out, and the jury is left to make its judgment on other bases. It is not evident that the cost devoted to expert proof by adversaries is in line with its contribution to the fact-finding process.

With respect to Rule 56, I believe it critical that the mandatory "must" replace the precatory "shall", and thus make clear that where there is no disputed issue of fact, summary judgment should be granted as a matter of right. I would go further and ask that the Committee consider a reasonable fee-shifting rule so that if summary judgment is defeated or deferred based on an assertion that can be said to be objectively unreasonable, the cost incurred by the moving party after the motion was defeated be taxed to the losing party.

Summary judgment rulings applying legal principles to undisputed facts create the guidance that unquestionably the business community seeks and which benefits the process of making reasonable choices in a complex world. The uncertainty engendered by delegating to juries that application of law to fact contributes to the litigation-fearing culture that is so prevalent in this country.

Thank you for the opportunity to make these comments.

Very truly yours,

Theodore B. Van Itallie, Jr.