"Paula Burlison"
<Paula.Burlison@nelsonmullins.com>
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To Rules_Comments@ao.uscourts.gov
cc "Steve Morrison" <steve.morrison@nelsonmullins.com>, "Carol Plexico" <carol.plexico@nelsonmullins.com>
bcc
Subject Summary of Steve Morrison's comments on the proposed amendments to FRCP 56 and 26

08-CV-050

Summary of Statement of Stephen G. Morrison
on the Proposed Amendments to FRCP 56 and 26
November 17, 2008

I. Proposed FRCP 56(a): Revise "Should Grant" to "Must Be Rendered"

The proposed amendment to Rule 56(a) states a court "should grant" summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. "Should" provides discretion to deny summary judgment even when the movant has properly supported his motion for summary judgment. Such unbounded discretion could result in parts of the case, or the entire case, being tried to a jury when it never should have made it that far. In the interest of providing justice in the most efficient and inexpensive manner, I encourage the Committee to replace "should grant" with "must be rendered" to remove the element of discretion from the application of Rule 56(a).

II. Proposed FRCP 56(h): Revise to Reflect Objective Cost Allocation

Rule 56(g) offers an ineffective tool for sanctioning bad faith behavior because courts hardly ever enforce it in its current form. Rather than amending the rule to make its use discretionary, merely affirming the fact that courts are reluctant to enforce the provision, the Committee should adopt an objective tool in the form of an allocation of expenses triggered by a party's submission of materials without reasonable justification.

III. Proposed FRCP 26(a)(2)(C): Beneficial Clarification to the Rules

Disclosing the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which he will testify is a rational requirement and does not impose a heavy burden. Therefore, I fully support this clarification of required disclosures.

IV. Proposed FRCP 26(b)(4)(B)&(C): Protection of Attorney-Expert Communication and Expert Draft Reports is a Welcome Clarification

I support the Advisory Committee's amendments providing protection to attorney-expert work product and communication. This practical approach encourages full disclosure and open colloquy between attorney and expert witness. Attorneys need to feel free to fully disclose a case to expert witnesses to ensure they are properly prepared, particularly as facts unfold. Acrobatic maneuvering by attorneys to avoid creating discoverable draft reports and attorney-expert communications does nothing for the integrity of our discovery process.

Of course, lawyers want to thoroughly explore the opinions of opposing counsel's experts. However, requiring production of all drafts and communications between attorney and expert, regardless of the substance, creates an economic divide. Clients who can afford to do so hire consulting experts whose opinions and communications with counsel are protected; those who

cannot hope that their attorneys have mastered the art of acrobatic maneuvering required to protect attorney-expert communications and draft reports.

Respectfully submitted,
Stephen G. Morrison

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