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Rules of Practice and Procedure Committee
Judicial Conference of the Unites States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, DC 20544

Re: Proposed Amendments to Rules 26 and 56 – Cairns Testimony

Good Morning. My name is Matt Cairns and I thank you for allowing me the opportunity to address the Advisory Committee on Civil Rules. I will be providing brief comments on the proposed amendments to both Rule 56 and Rule 26 today.

By way of background, I am a practicing attorney and partner with the Concord, New Hampshire firm Gallagher, Callahan and Gartrell. Additionally, I am honored to serve as the First Vice President of DRI – The Voice of the Defense Bar. With roughly 23,000 members, DRI is the world's largest organization of attorneys defending the interests of businesses, insurers and individuals in civil litigation. In 2010, I will assume the post of DRI President. DRI, along with invitation only defense organizations such as the International Association of Defense Counsel and Federation of Defense and Corporate Counsel, is a proud member of Lawyers for Civil Justice which has provided written comments on the proposed amendments

I have over 22 years of experience trying cases in state and federal court in the areas of products liability, the defense of civil rights claims against municipal and county

entities and employees, and other general litigation matters. My clients count on me and my firm to attempt to resolve their litigation as cost effectively and promptly as possible. As a result and this is not unique to me by any means, summary judgment and the use of experts are central to those objectives.

Rule 56

Historically, Rule 56 has allowed parties to avoid the cost and expense of trial, either entirely or with regard to certain claims, in situations where there is no dispute of material fact.

For many years, the District of New Hampshire has required a movants to submit separate statement of material facts, and the opposing party to specifically lay out those material facts that are disputed. Local Rule 7.2(b). It has been my experience that the requirement has forced movants and opponents to focus on that which is truly material, i.e. facts that affect the outcome of the litigation under the applicable substantive law, rather than simply asserting a long litany of facts in an effort to either persuade the court of the merits of your overall position without regard to the issues at hand or throwing numerous facts against the wall in the hope that the court will assume that there must be an issue in there somewhere and deny the motion. It has also focused the court's attention and permitted it the luxury of not having to decipher what a party thinks is material or in dispute. This latter point is particularly important in cases where there are pro se litigants, such as civil rights matters where my judges have expressed great frustration in matters I have been involved in. Therefore, I encourage the adoption of that requirement in the proposed rule.

Courts were required to grant summary judgment in those instances where there was no dispute of material fact until the 2007 Amendment replacing "shall" with "should" in Rule 56(c). That amendment made the judge's role discretionary. This amendment must be unwound and mandatory language reinserted into the rule. Like the comments by the LCJ, I support replacing the word "should" with "must," though in my opinion "shall" was just fine. Such a change will reward the diligent litigant who undertakes early and thorough discovery with an eye towards narrowing or eliminating issues for trial – a tack that promotes both the litigant's interest and the interests of an efficient judiciary. If a party is able to establish undisputed material facts, then there should be no disincentive to it filing for summary judgment. The fact that a trial court has the negative discretion to deny that motion by inclusion of the word "should" in the rule, is a disincentive. Finally, a change back to a "mandatory word" will put all parties and counsel on notice of the peril of not complying with the new rules re statements of material fact – if they don't do it, judgment SHALL or MUST be entered against them. Any potential confusion about the mandatory nature of "must" or "shall" can and should be put to rest with an appropriate Comment to the Rule.

I recognize that the Committee has described various situations where a trial court may want to have the option to deny summary judgment such as if it feels the record has not been fully developed or if it is difficult to ascertain credibility from the paper record. I suggest however, that it is the opponent's responsibility to point these issues out in his reply by undertaking discovery and demonstrating a dispute of fact on the record before the court, or by presenting cross examination or other evidence that affects the credibility of an affiant/declarant, both of which will, if sufficient, create a

dispute of fact to deny the motion. The court should not substitute itself for counsel at this stage of proceedings, or bail out the party or counsel who fails in his obligations under the rules and good practice, just as it wouldn't at trial.

While this might be an issue for another day, my clients, partners and I also believe that the mandatory requirement to grant summary judgment should also extend to state court claims that have been joined in the federal action, rather than having those claims remanded to the state court should the federal claims be dismissed, a practice that I see far too often. Again, this promotes judicial efficiency and spares defendants the costs of re-litigating or briefing the same issues again for a different court.

Rule 26

With regard to the proposed changes to Rule 26, I again generally support the position set forth by the LCJ. However, I wish to offer 2 comments.

First, Rule 26(b)(4)(C) protects, with 3 limited exceptions, communications between counsel and an expert required to give a report. By its language, this extends only to communications with the expert and not his/her staff. Just as attorneys often rely on paralegals and other members of their office to prepare their cases (*see generally* Comment to ABA Rule 5.3), expert witnesses often do as well. For example, an expert engineer at MIT may use grad students in his doctoral program to assist him in his research and those students are the ones that counsel may deal with on a day to day basis as the expert's team does his testing and analysis prior to him reaching a conclusion and preparing a report. Communications by paralegals and counsel's staff to the expert will enjoy privileged status under the rule, and so too should

communications between an expert's staff and counsel (or his/her staff). This should be made clear in a comment to the Rule.

Second, since Rule 26(b)(4)(B) protects draft disclosures for experts not required to give reports, should Rule 26(b)(4)(C) also extend to protect communications with in-house experts who do not regularly as part of their duties give expert testimony and thus are only required to make a disclosure? In order to make an appropriate and compliant disclosure, counsel will necessarily have to communicate with that witness, and the rules and comments thus far do not adequately explain why Rule 26(b)(4)(C) makes the distinction it does between the 2 types of experts. I have not formed an opinion as of yet on that question, though some of my colleagues may have, but suggest that it is a topic that requires further analysis and discussion.

In offering this testimony, I have been mindful of a comment made by Judge Harold Perkins when, as a young attorney, I asked for re-redirect of a witness, and he told me, correctly and to the jury's amusement –"Mr. Cairns, I believe the horse has been adequately beaten." I hope this horse has survived my comments and I thank you again for this opportunity.

Respectfully submitted,

R. Matthew Cairns
First Vice President
DRI – *The Voice of the Defense Bar*