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November 10, 2008

08-CV-060

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

**Re: Proposed Amendments to Rules 26 and 56 of the Federal Rules of
Civil Procedure**

Dear Mr. McCabe:

The American College of Trial Lawyers (the "College") is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Federal Civil Rules Committee of the College (the "FCR" Committee) is charged by the College with monitoring the operation of the Federal Rules of Civil Procedure and other federal civil procedural developments generally, to determine the adequacy of the operation of the rules and procedures in federal civil cases, and to evaluate proposed changes.

At the request of the Honorable Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, the FRC Committee submits comments concerning proposed amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure. Those amendments are contained in preliminary drafts published for public comment.

The FRC Committee reviewed the proposed amendments, focusing on their practical impact on litigation practice. In that process, the FRC did not purport to critique or duplicate the fine and exhaustive scholarly work of the advisory or standing committee of the Judicial Conference. We submit these comments with the hope that they may prove useful in the rulemaking process.

Members of the College participated in preliminary meetings and discussions that led to the proposed revisions before the FRC conducted its review. Several Fellows of the College, including members of the FRC, attended meetings of the Advisory Committee that addressed the proposed changes. Our members followed and discussed the reports of the Advisory Committee as various changes were considered; the FRC also solicited comments from other Fellows of the College.

Comments Regarding Proposed Changes to Rule 26

The College fully supports the proposed changes to Rule 26 dealing with the limited disclosure requirements for expert opinions to be offered by a witness for whom

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no report is required, and with regard to the protection from disclosure of draft reports and certain communications between experts and counsel. In our judgment, those proposed changes provide an appropriate balance between the disclosure obligations that are necessary for the parties to develop their cases and prepare for trial, on the one hand, and the burden and expense that frequently results from discovery of draft reports and communications with counsel, on the other.

Comments Regarding Proposed Changes to Rule 56

The College fully supports the stated purpose of the proposed changes to Rule 56 – to create a uniform procedure for filing summary judgment motions – and believes that the proposed revisions achieve that goal. In particular, the adoption of the “three-document” approach to motions and oppositions that already is used in the vast majority of district courts should provide uniformity of practice across all federal courts.

In the request for comment, the Committee on Rules of Practice and Procedure specifically asked that we address the following question:

“Comment is especially sought on whether to retain the current language carrying forward the present Rule 56 language that a court “should” grant summary judgment when the record shows that the movant is entitled to judgment as a matter of law, recognizing limited discretion to deny summary judgment in such circumstances.”

The College understands that before 2007, Rule 56 stated that summary judgment “shall” be granted where the court finds no genuine issue as to any material fact “and that the movant is entitled to judgment as a matter of law.” In 2007, as part of the “stylistic” changes to Rule 56, “shall” was changed to “should.” The College, although mindful of the considerable effort already given to that change by the Advisory Committee and the Committee on Rules of Practice and Procedure, welcomes the opportunity to revisit the issue.

The tension between the opposing viewpoints is eloquently articulated in the various discussion notes of the Advisory Committee. Without revisiting all of those arguments, we do report that the overwhelming (although not unanimous) sentiment of the FRC is that summary judgment “must” be granted where a movant makes the requisite showing of entitlement to summary judgment.¹

If Rule 56 is to mean anything, then those satisfying its requirements for summary judgment are entitled to judgment in their favor; that decision should not be subject to discretionary denial for reasons unrelated to the merits of the motion itself. The purpose of the motion for summary judgment – rendering judgment short of trial when

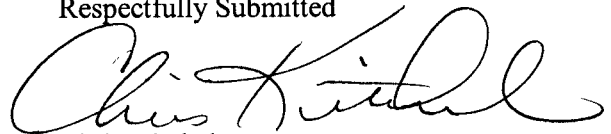
¹Three of 36 members dissented on this word change.

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there are no disputed facts – is a laudable one and should not be undermined by non-mandatory language. Many College Fellows also are troubled by the current practice of some courts to use their discretionary power to force settlement.

In closing, the College is most appreciative of this opportunity to comment on the ongoing efforts of the Judicial Conference to improve the Federal Rules of Civil Procedure. As noted above, the College is generally supportive of the proposed amendments. Please let us know if we can be of any further service.

Respectfully Submitted

A handwritten signature in cursive script, reading "Chris Kitchel". The signature is written in black ink and is positioned above the printed name and title.

Chris Kitchel
Chair

American College of Trial Lawyers
Federal Civil Procedure Committee

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