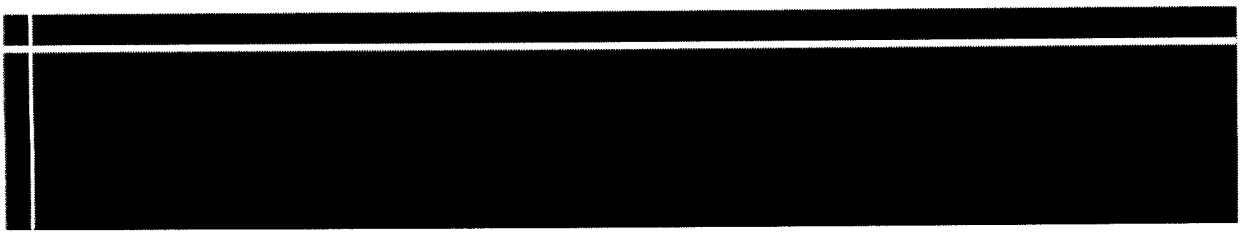

08-CV-061

Lawyers for Civil Justice

and the

U.S. Chamber Institute for Legal Reform

Comments to the
Civil Rules Advisory Committee

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

November 12, 2008

Introduction

Lawyers for Civil Justice ("LCJ") and the U.S. Chamber Institute for Legal Reform ("ILR")[1] respectfully submit these comments regarding proposed amendments to Rules 56 and 26 of the Federal Rules of Civil Procedure. LCJ and ILR commend the Civil Rules Advisory Committee's efforts to develop consistent national procedures governing summary judgment and expert discovery. We support adoption of both sets of amendments, but make some suggestions that we believe will substantially improve them.

I. Rule 56 – Summary Judgment

With the adoption of the statement of material facts procedure, the proposed amendments bring consistency to the national practice. We respectfully submit, however, that the amendments as they currently stand fail to facilitate the use of summary judgment to achieve the "just, speedy, and inexpensive" resolution of cases.

Summary judgment serves the laudable goal of dispatching unmeritorious cases and shortening clearly meritorious ones, without burdening the litigants, courts and juries with unnecessary trials. The process of drafting and responding to the factual statement adopted by this new version of Rule 56 advances that goal by ensuring thoughtful, well documented motions and responses. The goal, however, will be thwarted unless the amendments also restore the mandate of former Rule 56(c) that requires courts to grant summary judgment whenever the movant has satisfied the standard for summary judgment, i.e., that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The Committee should also adopt an objective cost allocation provision in the proposed Rule 56(h) to deter frivolous motions and responses. The mandate ensures that the litigant's effort in preparing the motion and responding to it will not be futile. Objective cost allocation will ensure the integrity of the process and will discipline proper adherence to the rules for making and opposing such motions. Indeed without these elements, the Rule's new statement of material facts may become a hollow additional burden.

A. The Need for Summary Judgment Amendments

In recent years, the Rules Committee has taken valuable steps to adapt the Federal Rules of Civil Procedure to the current landscape of civil litigation. The proposed Rule 56 amendments, particularly the requirement of a statement of material and undisputed facts, reinforce those previous amendments and like them, aim to permit earlier disposition of cases on

[1] ILR is an affiliate of the *U.S. Chamber of Commerce*, working with the Chamber's more than 3 million businesses to improve the civil justice system. LCJ is a nationwide coalition of counsel for major American corporations and the *Defense Research Institute*, *Federation of Defense and Corporate Counsel,* and the *International Association of Defense Counsel*, which collectively represent over 20,000 civil defense trial lawyers.

the merits, to focus and limit discovery, to promote settlement, and generally to reduce litigation costs and burdens.

There can be no doubt as to the importance of maintaining, through ongoing examination and amendment, a viable summary judgment practice in the federal courts. As the United States Supreme Court said in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1). Summary judgment assumes vital importance in advancing the central goals of the Federal Rules by ensuring that claims will not reach trial when a party's entitlement to judgment is clearly established by the evidence (or lack thereof). In so doing, summary judgment "serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these is avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass and coerce a settlement." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). Furthermore, summary judgment "serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so." 5 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1374, at p. 559 (2d ed. 1990) (citations and internal quotation marks omitted).

Unfortunately, notwithstanding such longstanding and recently reiterated encouragement, LCJ and ILR members report that summary judgment remains an underutilized and ineffective tool. Our members frequently have been involved in matters in which vast amounts of time and money have been expended to litigate claims that should have been adjudicated at a much earlier stage of the proceedings. Significant costs and delays are added by discovery and motion practice directed to non-material issues in ultimately futile attempts to establish the existence (or not) of evidence supporting the claims in the case. All too often rulings on motions for summary judgment are deferred until trial or simply denied without explanation.

Accordingly, we agree amendments are needed and that the amendments must be "designed to be neutral as between plaintiffs and defendants." *Report of the Civil Rules Advisory Committee*, December 17, 2007 at 2 (165). The proposed versions of Rules 56(a) and (h), however, fall short of the neutrality standard. They undermine the purpose and utility of summary judgment and are contrary to the teachings of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which mandated that Rule 56 "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

The cost and burden of modern litigation arises primarily from the demands of pretrial discovery, which has come to characterize litigation in the United States. Rather than aiding in the resolution of disputed issues of fact in a "just, speedy and inexpensive" manner, discovery often turns into a "war of attrition" that forces settlements based upon the costs of the proceeding rather than on the merits of the case. *See Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1966

(U.S. 2007) (noting that "the threat of discovery expense" will often "push cost-conscious defendants to settle even anemic cases"). Summary judgment, with its promise of a principled adjudication, can be a check on the discovery wars of attrition but only if it is available in a meaningful form. It will exist in a meaningful form if success is guaranteed to the party who can demonstrate that the standard has been met and realistic penalties exist for those who attempt to subvert the process.

B. The Mandate of Rule 56 That Summary Judgment "Be Rendered" If "the moving party is entitled to a judgment" Must Be Not Undermined.

Proposed Rule 56(a) should be revised to mandate that a court "must" rather than "should" grant summary judgment if there is no genuine dispute as to any material fact. In December 2007, Rule 56 was amended and "shall" was replaced with "should." This "style" revision supposedly was not intended to change the substantive law of summary judgment. But LCJ and ILR believe this revision invites just such a change and, if retained, will lead courts to take an increasingly expansive view of their "negative discretion" to deny well-founded summary judgment motions. This in turn will greatly undermine the effectiveness of summary judgment as a means of disposing of non-meritorious claims prior to trial. Litigants who cannot successfully oppose a meritorious motion will be encouraged to argue that the motion "should" still be denied on various grounds, including an appeal to the amorphous concept of "fairness."

LCJ and ILR respectfully submit that the grant of summary judgment under Rule 56 should continue to be mandatory when a litigant has met the burden of demonstrating that material facts are not in dispute and that the party is entitled to judgment as a matter of law. While most of the proposed amendments to Rule 56 will clarify the timing and procedures of the Rule, the language of the amendment that sanctions the practice of some courts to deny meritorious motions even when the standard is met will inhibit the Rule's effectiveness and utility. Litigants and the courts should not be encouraged to expend time and money unnecessarily.

In *Celotex,* the Supreme Court observed that Rule 56 "*mandates* the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, supra,* at 322 (emphasis added). This same language was recently cited with approval by the Supreme Court in *Beard v. Banks,* 126 S. Ct. 2572 (2006) (Breyer, J. plurality), where the Court stated that if the non-moving party could not show a genuine issue for trial, "the law *requires* entry of [summary] judgment." *Id.* at 2578 (emphasis added). A number of lower courts have recognized that under *Celotex* and the plain language of former Rule 56(c), summary judgment "is not a discretionary remedy." *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994), *aff'd,* 515 U.S. 304 (1995) ("[s]ummary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted"); *see also Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857-58 (3d Cir. 2000) ("[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment") (quoting *Celotex*, *supra*); *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) ("[a] district court must grant summary judgment if

the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law").

That summary judgment is not discretionary when the court finds a party entitled to it, follows from the plain language of the former version of Rule 56(c), which provided that upon motion, summary judgment "shall be rendered forthwith" if the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As the United States Supreme Court has recognized, "shall" is a "mandatory" term "which normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 ("[t]he word 'shall' is ordinarily '[t]he language of command'"); BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (defining the verb "shall" as "[h]as a duty to; more broadly, is required to...This is the mandatory sense that drafters typically intend and that courts typically uphold"). *See also* B. S. Shannon, *Should Summary Judgment Be Granted?,* 58 AM. U.L. REV. 85 (2008)(discussing the meaning of "shall" in the former Rule 56, "the context . . . strongly suggests a mandatory result").

Despite the mandatory language in the former rule, cases have suggested in *dicta* that a court has discretion to deny a motion for summary judgment even if the record clearly satisfies the standard. Indeed, some commentators have cited the Committee note to the 2007 Style amendments as support for the proposition that the entry of summary judgment is discretionary. *See* S. BAICKER-MCKEE, W. JANSSEN, J. CORR, FEDERAL CIVIL RULES HANDBOOK at 972 n. 47 (2008). The amendments as proposed would maintain the "should grant" formulation. Notwithstanding that the style revisions were not authorized or intended to change the meaning of the rules, this particular revision made a dramatic change. The change from "shall" to "should" was premised on the belief that "negative discretion" to deny a well-founded motion for summary judgment is consistent with existing case law. On closer review, the case law in this area does not support the proposition that a district court has discretion to deny a well-founded and timely motion for summary judgment where the court determines that the movant has met its burden under the Rule. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), cited in the Advisory Committee Note accompanying the 2007 "Style Amendments" to Rule 56 to support the change, stands only for the proposition that a motion for summary judgment should not be granted if the case rests on an "indefinite factual foundation." *Id.* at 256. *Kennedy* does not support the view that a court may deny a timely and well-founded summary judgment motion to which a party is entitled.

The facts in *Kennedy* were disputed. Good judicial administration required that the Court withhold judgment "until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." *Id.* at 257 (Emphasis added.). Thus, the summary judgment at issue in *Kennedy* was not well founded, and the movant failed to meet the burden of showing the absence of a dispute as to a material fact. The Court's opinion most definitely does not suggest that a timely motion in which the movant has met its burden may be denied by the trial court as an exercise of its discretion. Yet, that is what the change from "shall" to "should" in effect authorizes. That is a material, substantive change in the law of summary judgment and in the language of the rule and should not have been adopted as a stylistic convention.

"Shall" means "must", not "should", in ordinary usage and in the context of deciding whether to grant a timely summary judgment motion when the movant has met its burden. In the case of some rules other than Rule 56, the authors of the Style Amendments themselves recognized an affinity between shall and must, such as in Rule 4 where the phrase "[a] summons shall," became "[a] summons must." FED. R. CIV. P. 4(c)(1). *See also* Shannon, *supra,* 58 AM. U.L. REV. at 93-94. The history and purpose of Rule 56 called for the same change from "shall" to "must," in its case, rather than from "shall" to "should." "Should" was selected to replace "shall" only in a handful of situations dealing with policy or truly discretionary functions, such as Rule 1's statement that the rules "should be construed and administered to secure just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. *See* Shannon, *supra*, at 93-95 (discussing various replacements for "should" adopted by the prior amendments and why "must" is the proper choice for Rule 56).

While some circuit and district court opinions contain language suggesting that a district court has discretion to deny a motion for summary judgment, there is no persuasive affirmative *holding* that a court may deny a timely and well-founded summary judgment motion. Many of these opinions repeat as *dicta* language found in the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), but none of these decisions applies the language as a holding. *See, e.g., Kunin v. Feofanov*, 69 F.3d 59 (5th Cir. 1995) (incorporating by reference the district court opinion, which cited *Anderson* for the proposition that a district court has discretion to deny a motion for summary judgment, but then affirmed the district court's decision and granted the summary judgment motion at issue). Our review of the case law in this area finds ***no persuasive support***—not at the appellate level or the district court level—for the proposition that a district court has discretion to deny a well-founded and timely motion for summary judgment. If "should" persists in the language of the rule, *dicta* in cases such as *Kennedy* and *Anderson* will have been elevated by reflexive citation and stylistic editing into a rule of law. [2]

A 2008 Litigation Survey undertaken by The American College of Trial Lawyers and the Institute for the Advancement of the American Legal System found that 69% of the Fellows of the College who identify themselves as defense lawyers believe that judges already decline to grant summary judgment even when it is warranted. Significantly, 27% of those surveyed who identify themselves as plaintiffs' attorneys hold the same view. Many of our members agree. Thus, a perception already exists that summary judgment is an underutilized procedure. It would not appear to be in the best interest of the administration of justice to provide further impetus to

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[2] The district court cases dealing with this issue can be grouped into a few categories:

- Cases in which the motion was not well-founded and did not meet the Rule 56 standard (i.e., either the court identified a genuine dispute of material fact or determined that there was insufficient evidence from which to determine whether the movant met the Rule 56 standard). See, *e.g., Lister v. Prison Health Servs., Inc.*, No. 04-2663, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (unpublished) (court denied defendant's motion because the relevant events were "sufficiently blurred with material fact disputes such that summary judgment is inappropriate.").
- Cases in which the motion was, in a practical sense, untimely. See, *e.g., Payne v. Equicredit Corp. of America,* No. 00-6442, 2002 WL 1018969 (E.D. Pa. May 20, 2002) (unpublished) (court denied defendant's motion because it was filed less than two weeks before trial was scheduled to begin).
- Cases in which the motion was granted. See, *e.g., Caine v. Duke Comm'ns Int'l,* No. 95-0792, 1995 WL 608523 (C.D. Cal. Oct. 3, 1995) (unpublished).

the denial of meritorious motions by maintaining language originally intended as only a "stylistic" change.

When the evidence demonstrates that a litigant is entitled to summary judgment, allowing a matter to proceed to trial is wasteful for the court and the litigants. Interpreting Rule 56 to provide a discretionary standard significantly compromises the importance of summary judgment as a mechanism for resolving cases prior to trial. Accordingly, LCJ recommends that the Rule 56 amendments restore the mandatory character of the Rule as interpreted by the Supreme Court by replacing *"should"* with *"must"* to ensure that summary judgment is granted when the standard has been satisfied.

In addition, we urge the Committee to include language in the Note to the Rule that explains the need in modern litigation to grant summary judgment when the party seeking it is entitled to it on the facts and law for the reasons stated above. Language along the lines of that in the Committee Note to the 1992 proposed amendments would serve the purpose: Changing *should* to *must* "...would enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome, while at the same time assuring the parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters."

The Invitation for Comment suggests other possible alternatives to "must" or "should", but, candidly, we see no real alternative to "must". Use of "should" with an explanatory Note attempting to limit the discretion to the rare case would, we think, be confusing. Crafting language in the passive voice to avoid using "must" or "should" runs too great a risk of creating a new standard. And, as to using "should" for partial summary judgment, we believe that the misfortune to be avoided by granting discretion to deny partial summary judgment is outweighed by the importance of narrowing the issues for trial and providing the movant with certainty on issues about which there is no genuine dispute as to material facts.

C. Amend Proposed Rule 56(h) to Adopt an Objective, Discretionary Cost Allocation Test

LCJ and ILR are concerned that the statement of undisputed fact procedure, as drafted in proposed amended Rule 56, may allow a case to proceed through extensive, unnecessary discovery and motion practice when the opposing party insists on additional discovery to search for facts that simply do not exist or are not material to disposition of the motion. As a result, the moving party may face the cost and burden of responding to discovery, as well as needless delay in the resolution of the motion. Accordingly, the Rule should provide some deterrent to: frivolous motions by any party, or "fishing trips" by parties that seek to extend discovery by "qualifying" a response, or who contest undisputed facts without support, or that submit a non-responsive, unsupported affidavit. To maintain the balance and neutrality of the Rule, the same discipline should apply to a party that submits a motion, response, reply, affidavit, or declaration without substantial justification.

Rather than amending current Rule 56(g) [proposed Rule 56(h)] to render it discretionary because it is seldom utilized, we urge the Committee to make 56(h) a more useful tool for

managing summary judgment practice by changing the proposed Rule 56(h) to provide for reasonable, discretionary cost allocation, as follows:

> **Rule 56(h) Materials ~~Affidavit~~ Submitted *Without Reasonable Justification.* ~~in Bad Faith.~~** If satisfied that ~~an~~ **motion, *response, reply,*** affidavit or declaration under this rule is submitted ~~in bad faith or solely for delay,~~ ***without reasonable justification,*** the court – after notice and a reasonable opportunity to respond – may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. ~~An offending party or attorney may also be held in contempt.~~ (Additions in ***Underlined Bold Italic***; Deletions, ~~Double Strikethrough~~).

Such a rule would give judges an objective, neutral tool to manage adherence to the Rule and would deter the "gamesmanship" that too often occurs in practice. For example, if a party that is in position to know the undisputed facts asserts that it requires additional discovery to respond to a Statement of Undisputed Facts and puts the other party to the expense and time of unnecessary discovery, the party demanding discovery should bear the costs of the unnecessary effort. Similarly, a party that disputes facts without reasonable justification should bear the costs the other party incurs replying to a groundless counter-statement of material facts. Cost allocation based on a reasonableness standard would be preferable to the current approach, which conditions sanctions upon whether a party has submitted affidavits in "bad faith" or "solely for the purpose of delay." FED. R. CIV. P. 56(g). The current approach places too much emphasis upon the subjective intent of the opposing party or counsel, which may be difficult or impossible to determine. In practice, sanctions under this provision have generally been limited to "egregious" conduct,[3] with courts declining to impose sanctions even when baseless allegations were due to "sloppy lawyering" in a "desperate attempt" to defeat the motion to dismiss.[4] We suggest deleting the last sentence of the existing Rule to underscore that it is not intended to be a sanctions provision that overlaps Rule 11.

An objective standard for cost shifting is the appropriate companion to the new procedure requiring a statement of material facts and ensures that it will be an effective tool to narrow factual disputes. By reinforcing compliance with the Rule and deterring parties from making unsupported responses, revised Rule 56(h) will help ensure that the new Rule 56 procedures will not be used to prolong litigation, but to bring it to earlier, less expensive resolution.

II. Expert Discovery

A. New Rule 26(a)(2)(C) Disclosure.

LCJ and ILR strongly support proposed Rule 26(a)(2)(C) that substitutes an attorney summary disclosure for preparation of a report by a trial-witness expert who is not required to provide a report under Rule 26(a)(2)(B). Many good and practical reasons support the need to confirm the

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[3] *Moorer v. Grumman Aerospace Corp.*, 964 F. Supp. 965, 976 (E.D.N.Y. 1996).

[4] *Mugno v. Societe Internationale de Telecommunications Aeronatiques, Inc.*, No. 05-cv-2037, 2007 WL 316573, at *10 (E.D.N.Y. Jan. 30, 2007).

original intent and clear dictate of the rule in exempting employee "experts" (who do not ordinarily testify as experts) from the report requirement. Because the penalty for failing to submit a report can take the form of preclusion of the employee expert's opinion at trial under Fed. R. Civ. P. 37(c)(1), an abundance of caution now causes most parties to submit the written report of an employee expert to avoid the risk, adding additional costs and little benefit. Moreover, it is burdensome and unreasonable for the employee expert to have to compile expert reliance materials required by the rule, especially when the employee has spent many years at the company and has gained expertise through on-the-job experience, and when the basis of the opinion comes from a multitude of sources. We trust that with adoption of the new subsection, as stated in the Committee Note: "courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement."

B. Draft Reports and Attorney-Expert Communications.

The core changes to Rule 26 (b)(4) extend work-product protection to drafts of Rule 26(a)(2)(B) expert reports and 26(a)(2)(C) party disclosures and also to attorney-expert communications. However, three exceptions allow discovery as a matter of course of the parts of attorney-expert communications relating to: (i) compensation, (ii) identifying facts or data the attorney provided to the expert and that the expert considered in forming the opinions to be expressed, and (iii) identifying assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed.

On balance, LCJ and ILR support the core amendments that would protect work product and attorney-expert communications. Some of our members are opposed to protecting such communications and drafts, preferring open discovery as a bulwark against threats to the integrity of expert testimony. However, an overwhelmingly large majority of our members support the changes because the small benefits of open discovery do not justify the cost and burden of protecting such communications and the erosion of attorney work product protection.

Effective representation by counsel is one of the cornerstones of our civil justice system. It logically follows then that we have enacted provisions to protect the attorney-client relationship from intrusion. Similarly, we have afforded attorney work product a zone of privacy that is free of interference.

The policy underpinnings for the protections afforded attorney work product and related concepts are set forth in *Hickman v. Taylor*, 329 U.S. 495, 510-511(1947). So while our system permits liberal discovery, that discovery is subject to necessary and well-accepted limitations, especially when privileged or work product materials are sought. Rule 26 codifies these limitations. Rule 26(b)(1) states that "[p]arties may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1) (emphasis added). Significantly, Rule 26(b)(3) also states that when ordering such discovery, "the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

Many courts have read Rule 26(a)(2)(B) and its accompanying Advisory Committee Notes ("Notes") to require the disclosure of privileged and attorney work product information that a

party shares with its testifying expert to the opposing party upon request and without a showing of some heightened or particularized "need." We feel this result is inconsistent with the ends of justice in that it unnecessarily handicaps counsel in their efforts to provide a vigorous and effective defense of the client. In 1993, Rule 26(a)(2)(B) was adopted. It is that rule, speaking to discovery of information divulged to experts, which several courts have relied upon to undercut the well-settled limitations of Rules 26(b)(1) and 26(b)(3).

The overlay of these rules has caused federal courts to "sharply disagree" about whether a party must produce protected material that has been given to testifying experts. "One line of decisions has adopted a bright-line rule, maintaining that Rule 26 mandates disclosure of all information shared with a testifying expert, including the mental impressions and opinions of the attorney." *Mfg. Admin. & Mgmt. Sys. v. ICT Group, Inc.*, 212 F.R.D. 110, 114 (E.D.N.Y 2002) (cases collected). "Other courts have ruled that 'core attorney work product,' comprising the mental impressions and opinions of the attorney, are protected from discovery, notwithstanding communication of that information to a testifying expert." Id. (cases collected). Raising the attorney's risk of making the wrong call on this issue, there looms the possibility of spoliation sanctions for guessing wrong. See, *W.R. Grace & Co.-Conn. v. Zotos, Int'l,* 2000 U.S. Dist LEXIS 18096 (W.D.N.Y 11/2/02), complaint dismissed, *W.R. Grace & Co. v. Zotos Int'l, Inc.,* 2005 U.S. Dist LEXIS 8755, (W.D.N.Y. 2005) (potential basis for spoliation sanctions found where attorney instructed expert to destroy draft reports containing protected information).

An attorney's collaboration with the expert is a logical, and, in today's environment, a necessary extension of Justice Murphy's *Hickman* analysis. An attorney uses the expert to vet various approaches and to test whether (or to what extent) those approaches are supported by the discipline represented by the expert. This collaboration between expert and attorney often takes the form of exchanging drafts. Requiring these attorney work product discussions/documents to be divulged – especially when no substantial need is displayed – is an inappropriate invasion into protected work product.

An additional unfairness is worked on clients as their counsel work to avoid having the protections stripped by Rule 26(a)(2)(B). A practice has developed whereby counsel retains two experts: a testifying and a non-testifying expert. The discussions with the non-testifying expert are not easily discoverable so the attorney carries out a fuller and more candid discussion with that expert and a more sanitized discussion with the testifying expert. This inflicts an unnecessary and often substantial expense on the client, and imposes inefficiencies on the attorney's practice. Therefore, on balance, we support the amendments.

C. Protection for Communications between Attorney and Expert's Staff.

Rule 26(b)(4)(C) attempts to provide protection to certain communications between an expert who must provide a report and a party's attorney. But, it is not clear if there is any protection for communications between a party's attorney and the expert's staff, researchers, or assistants who are not expected to testify, but who provided input into or researched certain portions of the testifying expert's report. Often an expert bases a report and resulting testimony on the work of a team of individuals. Therefore, we suggest including a comment in the Note to the effect that an expert communication subject to protection would include communications between a party's

attorney and the professional staff of any witness required to provide a report under Rule 26(a)(2)(B).

III. Conclusion

As the cost and burden of litigation continue to grow, so too does the need for rules that advance the efficient resolution of disputes without compromising fairness. Our proposed changes to the pending amendments to Rules 56(a) and 56(h) would serve this purpose by encouraging adherence to the requirements of the Rule and facilitating a principled resolution of the issues prior to trial where appropriate. And, we believe that the proposed amendments to Rule 26 will, on balance, protect attorney work product while saving substantial time and effort.

Respectfully submitted,

Lawyers for Civil Justice
U.S. Chamber Institute for Legal Reform