



# SUMMARY JUDGMENT WITHOUT ILLUSIONS

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**T**HE TERM “SUMMARY JUDGMENT” suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it’s complicated and that judges try to avoid it. Clients say it’s expensive and protracted. Judges say it’s tedious and time-consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations.

For years, district courts have struggled to simplify and rationalize the process through local rules. Recently, national Rules Committees completed their first major overhaul of the summary judgment rule in forty years. Resulting amendments (awaiting Supreme Court and Congressional approval) are modest<sup>1</sup> – appropriately so, since the Committees could not document that local experiments improved summary judgment proceedings materially. Consequently, the amendments will not mute the chorus of complaints about complexity, cost and delay.

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<sup>1</sup> For example, requiring pinpoint record citations; allowing declarations rather than affidavits; setting filing deadlines 30 days after discovery. *See* Report of the Jud. Conf. Comm. on Rules of Prac. & Proc. at 14-16 (Sept. 2009).

Instead, seventy years after its creation it is time for some realism and truth-in-labeling about federal summary judgment. We need to confront how it actually operates, adjust our expectations, and change our terminology. In truth, summary judgment is judgment without trial, a critical event in the course of federal civil justice. Determining whether that resolution of a lawsuit is appropriate demands substantial time, attention and visibility from experienced lawyers and judges – without complaint or apology.

## I

### WHAT SUMMARY JUDGMENT DOES NOT DO

The term summary judgment creates false expectations. Summary judgment does *not* save lawyer time. It does *not* save legal fees. It does *not* significantly reduce court time or trials.

#### A. Lawyer Time and Fees

To seek or resist summary judgment, lawyers must discover – in advance – all the evidence needed for trial and more, including expert opinions. Discovery expense regularly serves as poster child for everything wrong with civil litigation. Notably, about 50% of plaintiffs’ lawyers, 47% of defense lawyers, and 44% of mixed practice lawyers believe “discovery is used *more to develop evidence for summary judgment* than it is to understand the other party’s claims and defenses for trial.”<sup>2</sup> At summary judgment, lawyers cannot rely on what they expect witnesses will testify or on hope that brilliant cross-examination will persuade a judge and jury. Instead, they must have information in documents, deposition transcripts, interrogatory answers, admissions, or affidavits. They must follow sometimes arcane local rules on how to present and cite this “record.” Both sides must file legal memoranda (the moving party also a reply) applying legal principles to disputed or undisputed facts, and explaining why their respective clients deserve victory. Sum-

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<sup>2</sup> Am. Bar Ass’n, Section of Litig. Member Survey on Civil Prac.: Full Report at 71, Table 6.11 (December 11, 2009) (emphasis added).

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mary judgment briefs often are longer and more complex than trial briefs.

Trial practice requires different skills, but summary judgment is neither shorter nor easier. Since lawyer time often drives legal fees, summary judgment is expensive for clients (for lawyers in contingent fee cases). But it is economically rewarding for lawyers who successfully bill for it.

### B. Court Time

Summary judgment does not, overall, save court time. Yes, it may remove a multi-week patent or RICO case from the calendar; partial summary judgment may shave off an issue. But only a miniscule percentage of cases reach trial, so an actual trial is always a slim likelihood. For most cases judges, magistrate judges, and their law clerks collectively spend more time resolving summary judgment disputes and the ancillary motions they spawn than they would handling the trials.<sup>3</sup> Someone must match up factual assertions; determine whether they are supported, adequate, and admissible at trial; decide whether a Rule violation justifies ignoring an asserted fact; fit all that into a legal analysis; and write an opinion that will withstand scrutiny.<sup>4</sup>

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<sup>3</sup> Data are murky for this proposition, so obvious to judges. Case-weighting tables show more *total* judge time for trials than summary judgment in almost all case categories. However, summary judgment totals are only after-the-fact judicial estimates of average time spent in particular case categories, whereas trial times are recorded contemporaneously by courtroom deputies. Moreover, the totals do not include the time of magistrate judges or law clerks and thus fail to account for delegation of work. When event *likelihood* is factored in, trial (because it occurs so seldom) takes less – usually much less – time than summary judgment in all but four case categories *See* 2003–2004 Dist. Ct. Case-Weighting Study, App. J, Circuit-Based Meetings: Participant Info. Packet; App. Y, Final Weights Material Presented to the Stats. Subcomm., Table 4 (FJC 2005).

<sup>4</sup> Namely, appellate review for grants and for denials that reject certain immunity defenses. The pending Rule amendment encourages written explanations for all denials. Magistrate judges always explain their recommendations.

C. Trial Numbers

About 2% of federal civil cases reach trial.<sup>5</sup> Summary judgment resolves about 4%.<sup>6</sup> No one knows how many of those would reach trial if summary judgment were denied.<sup>7</sup> But most cases resolve without trial,<sup>8</sup> and lawyers use summary judgment motions to decrease settlement value. It is unlikely that a significant number of cases where summary judgment is granted would proceed to trial if summary judgment were denied.<sup>9</sup>

II

WHAT SUMMARY JUDGMENT DOES

A. Reassigning Work

Traditionally, much summary judgment preparation was delegated to junior lawyers. Associates accrued extensive billable hours conducting discovery and drafting statements of facts and le-

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<sup>5</sup> Recent percentages are: 1.2%, 2009; 2.0%, 2008; 4.1%, 2007 (an explainable anomaly); 1.3%, 2006; 1.4%, 2005; 1.6%, 2004. *Table C-4, U.S. Dist. Cts. – Civ. Cases Terminated, by Nature of Suit and Action Taken*, ANN. REPORT OF THE DIR., JUD. BUS. OF THE UNITED STATES COURTS (1998-2008).

<sup>6</sup> Theodore Eisenberg & Charlotte Lanvers, *Summ. J. Rates Over Time, Across Case Categs., and Across Dists.: An Empir. Study of Three Large Fed. Dists.*, at 4-5, 7, available at [ssrn.com/abstract=1138373](http://ssrn.com/abstract=1138373) (May 28, 2008) (analyzing various datasets). An FJC re-analysis of 2006 data showed a rate just over 4%. See Joe Cecil & George Cort, *Report on Summ. J. Prac. Across Dists. with Variations in L. R.* at 17, Table 12 (FJC Aug. 13, 2008). (Great variation occurs across case-types and courts.)

<sup>7</sup> See, e.g., D. Theodore Rave, *Note: Questioning the Efficiency of Summ. J.*, 81 N.Y.U. L. REV. 875, 892 (2006).

<sup>8</sup> Though not always by settlement. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIR. LEGAL STUD. 111 (2009).

<sup>9</sup> Summary judgment preparation also provides thorough information to both sides that may prompt settlement even when summary judgment is denied. See Jonathan Molot, *An Old Jud. Role for a New Litig. Era*, 113 YALE L.J. 27, 44, 91 (2003) (hypothesis). ABA survey data, *supra* note 2, show how intensively lawyers prepare for summary judgment.

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gal memoranda. Experienced “trial lawyers” handled the cases that survived summary judgment and proceeded to trial. As trials have decreased, fewer lawyers possess skill and experience to try cases. But plenty of lawyers still acquire skill and experience with summary judgment.

When trials were frequent, trial judges – typically in the courtroom presiding – lacked solid blocks of time to parse facts, supporting documentation, and legal memoranda accompanying summary judgment motions, then produce written opinions. Without other options, earlier trial judges – often former trial lawyers – treated them summarily. After all, they make trial judging seem like appellate judging, writing opinions based on written records and briefs – not what earlier generations of trial judges signed up for as a steady diet.

These days, trials are fewer. But judges confront more summary judgment motions,<sup>10</sup> other duties<sup>11</sup> interrupt the time and attention they demand, and despite case-filing growth, Congress has not enacted omnibus judgeship legislation in twenty years.<sup>12</sup> Congress has, however, provided funding for new magistrate judgeships authorized by the Judicial Conference. Judges confronting large caseloads without uninterrupted time to deal with complex summary judgment motions have two choices. They can ask magistrate judges to prepare recommended decisions, dispositions far easier to review because they condense and organize advocates’ positions into neutral resolutions. Or judges can (like busy magistrate judges) delegate the process to law clerks. Although responsible judges review their work-product carefully, law clerks (sometimes fresh out of law school) with little understanding of litigation’s practical aspects or how summary judgment works, then have first take at lawyers’ filings.

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<sup>10</sup> Summary judgment commenced slowly after 1938. By 1975, 12% of cases contained such motions; by 1986 about 17%; around 19% thereafter. Eisenberg & Lanvers, *supra* note 6, at 4 (citing Joe S. Cecil, et al., *A Quarter-Century of Summ. J. Prac. in Six Fed. Dist. Cts.*, 4 J. EMPIR. LEGAL STUD. 861, 881-83 (2007)).

<sup>11</sup> Sentencing and supervised-release-violation hearings are examples.

<sup>12</sup> It has created judgeships from time to time on an ad hoc basis.

I don't mean to paint with too broad a brush. Some experienced trial lawyers write their own motions or oppositions. Some judges assess motions independently, not referring them to magistrate judges. Some judges and magistrate judges take the laboring oar instead of law clerks. But good lawyers know you cannot write a decent motion or opposition in short time segments, with constant interruptions. Likewise, judges and magistrate judges cannot write decent opinions without large segments of uninterrupted time, an often unavailable luxury.

Finally, although federal court time for sustained attention to these motions is limited, it is *abundant* compared to state courts with severely overloaded dockets. State court defendants who believe they have a shot at winning summary judgment frequently remove their cases to federal court if there is jurisdiction.<sup>13</sup> They know federal courts have more time and resources for these motions than beleaguered state courts.

So cases get removed and work moves around.

### B. Delaying Outcomes

Over 56% of plaintiffs' lawyers and 60% of defendants' and mixed practice lawyers report federal judges *routinely* do not rule promptly on summary judgment motions.<sup>14</sup> And 25% of all lawyers pick delayed motions rulings<sup>15</sup> as the *primary* cause of delay (48% blame discovery). These perceptions are troubling.

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<sup>13</sup> See Kevin M. Clermont, *Federal Courts, Prac. & Proc.: Litig. Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1923-24 (2009) (data show "increasing use of removal"; "a surprising number of . . . cases are removed to federal court"); see also ABA Survey, *supra* note 2, at 8 (three-quarters of lawyers prefer federal court; "[a]ll lawyers also cite *more careful consideration of dispositive motions* . . . [as one of] the benefits of federal practice") (emphasis added). But Theodore Eisenberg and Trevor Morrison document increasing remand rates as well and suggest removals are often tactical, designed to increase plaintiffs' expenses. See Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIR. LEGAL STUD. 551, 552-53 (2005).

<sup>14</sup> ABA Survey, *supra* note 2, at 12.

<sup>15</sup> This survey question was not limited to summary judgment motions.

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Troubling, but not surprising.<sup>16</sup> Promptness is in the beholder's eye. Lawyers whose clients ask why their case has stalled can forget the time it took to prepare the motion or opposition and be unforgiving of the judicial officer who fails to give immediate endorsement to their position. Moreover, busy judges or magistrate judges cannot easily assemble sufficient blocks of time to produce a decision, especially when confronting many motions simultaneously. (Every issue looks like a "federal case" to unseasoned law clerks assigned initial drafting responsibility.) Ironically, the pending amendment exhorting judges to explain even summary judgment *denials* risks increasing delay in cases that otherwise would receive peremptory denials and advance promptly to trial or settlement.

### C. Changing Stakes

Summary judgment motions change litigation stakes.<sup>17</sup> By filing them, defendants delay recovery and increase plaintiffs' legal expenses (or plaintiffs' lawyers' expenses in contingent fee cases).<sup>18</sup> They also increase plaintiffs' risk because, if plaintiffs lose, all is over except an expensive, delayed, and uncertain appeal. Therefore, plaintiffs' case values decrease for settlement purposes.<sup>19</sup> But if summary judgment is denied, then case values increase, for now

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<sup>16</sup> Well, somewhat surprising. Semi-annual CJRA reports show a fairly steady decline in motions under advisement over six months, from 10,936 (Sept. 30, 2003) to 5,848 (Mar. 31, 2009). ADMIN. OFFICE OF THE U.S. CTS., Civ. Justice Reform Act of 1990, Report of Mots. Pending More than Six Months at 3, Table 1 (Mar. 31, 2004 & Mar. 31, 2009).

<sup>17</sup> This paragraph draws unabashedly on Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summ. J.*, 100 YALE L.J. 73 (1990). Another change: at trials, plaintiffs go first and last (direct case and rebuttal); at summary judgment, defendants go first and last (motion and reply). Plaintiffs' lawyers are certain this shift is harmful.

<sup>18</sup> I treat defendants' motions – "far more common than plaintiffs' motions," Cecil, *A Quarter-Century of Summ. J.*, *supra* note 10, at 886 (2,526 defendants' motions versus 967 plaintiffs' motions in six districts, 1975 to 2000) – as the norm.

<sup>19</sup> See Vivian Berger, Michael Finkelstein & Kenneth Cheung, *Summ. J. Benchmarks for Settling Employment Discrim. Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 55-67 (2005) (assessing likelihood of denial in certain districts).

that obstacle has been surmounted, and a judge has given quasi-approval to the plaintiff's case. The Rules Committee observed this stakes-changing role, reporting that defendants' lawyers "emphasize the importance of summary judgment as a protection against . . . *the shift of settlement bargaining that follows denial of summary judgment.*"<sup>20</sup>

For pro se claims, the effect of summary judgment motions is dramatic. At trials, parties without lawyers can at least testify. Win or lose, they air their complaints publicly (subject to evidentiary rule hurdles) and receive a determination of their claims' merits. Not so when defendants file summary judgment motions. Then, rule technicalities befitting Kafka can exclude factual assertions and prevent even a judge, let alone a jury, from considering the merits. The amendments address this pro se disadvantage. They say that when a party does not properly support or dispute a fact, a court may "give an opportunity to properly support or address the fact," or "issue any other appropriate order."<sup>21</sup> The Advisory Committee Note admonishes: "Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant."<sup>22</sup>

### III

#### WHAT CAN WE DO ABOUT SUMMARY JUDGMENT?

The candid answer is, not much! Despite serious and prolonged attention to reform, the national Rules Committees could not devise significant simplifying changes for Rule 56. Local rules experiments have not provided demonstrable benefits that support national adoption.<sup>23</sup> Strong economic interests make more than incremental change unlikely.

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<sup>20</sup> Report of Civ. R. Adv. Comm. at 21 (May 8, 2009) (emphasis added).

<sup>21</sup> *Id.* at 31 (proposed Rule 56(e)(1),(4)).

<sup>22</sup> *Id.* at 39-40.

<sup>23</sup> *See id.* at 21-22.



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### A. We Can't Eliminate It

Some academics say the Seventh Amendment makes summary judgment unconstitutional.<sup>24</sup> Only the Supreme Court can resolve that challenge and, for over seventy years, there has been no hint of unconstitutionality.<sup>25</sup> Many in the plaintiffs' bar would like to be rid of it. There is some academic and empirical support for their grievances about how it is administered. But unless it is ruled unconstitutional, the defense bar and interests they represent will continue to support it strongly, for reasons I have mentioned. Few federal judges would support its complete repeal. Although it can be tedious and time-consuming, its availability undoubtedly deters some frivolous lawsuits.<sup>26</sup> Barring an unexpected Supreme Court decision, summary judgment is here to stay.

### B. We Can't Reduce Complexity

Federal summary judgment is complex because federal lawsuits reflect the complexity of law and life. Statutes and regulations – employment, patents, securities – are lengthy, byzantine, and ambiguous.<sup>27</sup> Facts on which claims and defenses depend can be convoluted, encompass many years, and raise difficult issues (sometimes cutting-edge) of economics, science, and technology. Summary judgment motions often deal with entire cases, asking judges to conclude that, even after considering all the plaintiff's evidence, there is not enough to reach a jury. Since the constitutional right to jury trial is at stake, judges must assiduously avoid deciding disputed facts or inferences, and can only sift the record to determine what

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<sup>24</sup> See, e.g., Suja A. Thomas, *Why Summ. J. is Unconstitutional*, 93 VA. L. REV. 139 (2007). But see Edward Brunet, *Summ. J. is Constitutional*, 93 IOWA L. REV. 1625 (2008).

<sup>25</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (summary judgment does not violate Seventh Amendment, citing *Fidelity & Deposit Co.*, 187 U.S. 315, 319-21 (1902), which upheld earlier DC summary judgment rule); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) (“[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.”).

<sup>26</sup> See, e.g., Issacharoff & Lowenstein, *supra* note 17, at 105.

<sup>27</sup> Procedural rules (e.g., class actions) also create complexity.

facts are material, and whether a genuine dispute exists. This exercise — paper-intensive and often tedious — contributes to complexity. But it is constitutionally required as a prelude to granting summary judgment instead of adjudication by trial.<sup>28</sup>

Ironically, cases usually are *more* complex at summary judgment. At trial, experienced lawyers strategically simplify the facts for juries, and allow judges to narrow legal issues in jury instructions. Those same dynamics do not operate at summary judgment, at least with less-experienced lawyers. They may lack talent or incentive to reduce issues, details, and arguments they have uncovered. “Everything-but-the-kitchen-sink” sometimes seems the rule-of-thumb.

Some lawyer economic self-interest feeds the complexity, perhaps unintentionally. But couple lawyers’ benefit in billing for summary judgment with clients’ fear of out-of-control verdicts; add today’s greater prevalence of cases threatening defendants’ financial stability; calculate summary judgment’s effect on settlement value; and you begin to see that complexity will not easily be exorcised.

The Supreme Court could make one simplifying change. It could eliminate *McDonnell Douglas*’s cumbersome requirements for assessing employment discrimination based on circumstantial evidence at summary judgment. The central question is whether there is enough evidence of discriminatory intent. Circuit courts recognize that *McDonnell Douglas* has no relevance to a jury considering the evidence. Neither do trial judges need a multi-step test that mostly complicates analysis and verbiage.<sup>29</sup>

But summary judgment still will be complex, expensive, and time-consuming. We judges and lawyers need to change our mind-

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<sup>28</sup>The Advisory Committee was unable to document the effectiveness of point/counterpoint procedures, which generally require filing (separately from briefs) statements of undisputed facts and responses that address each fact by accepting, disputing, or accepting in part and disputing in part, to force “parties to identify and focus on what is really at issue and provide an effective process for the judge to rule on the motion.” Report of the Jud. Conf. Comm., *supra* note 1, at 29.

<sup>29</sup>See the thorough analyses in *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (Kavanaugh, J.), and *Lapsley v. Columbia Univ.-College of Physicians & Surgeons*, 999 F. Supp. 506, 513-16 (S.D.N.Y. 1998) (Chin, J.).

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sets about these characteristics and accept the inevitable. Constant efforts to simplify, through local rules and procedures, perversely drive up legal expense and shift bargaining positions in favor of those best able to meet the new demands.

### *C. We Can't Prevent Work Delegation*

**B**usy district judges must take indictment waivers, accept guilty pleas, resolve difficult sentencing issues, and conduct supervised-release-violation hearings. They won't find uninterrupted time to take primary responsibility for their summary judgment motions, except in select cases. Rules Committees, academics, and appellate courts tend to impose academic and appellate work models on trial judges by asking for detailed written elaborations of decisions. Until academic and appellate *schedules* (large uninterrupted blocks of time) apply to trial judges, they will continue delegating these responsibilities to magistrate judges and law clerks. Although critics occasionally bemoan how judges use law clerks or magistrate judges, lawyers generally seem satisfied with federal practices here.<sup>30</sup>

Clients' desire to avoid risk or delay payment, coupled with the revenue summary judgment generates, will continue to motivate defendants' lawyers to file such motions. Law firm economics will lead to using junior lawyers with lower billing rates and uninterrupted time segments. Perhaps we can take a few steps to involve seasoned lawyers more, but generally delegation in law firms will continue.

### *D. What We Can Do*

#### *1. We Can Change Terminology and Expectations*

**I**n marketing, labeling and terminology are critical. The wrong label causes misunderstanding, failed expectations, and confusion. That is an apt description of summary judgment at work. As long as we call it summary, people will try to make it so, and complain when it is not. Or plaintiffs will interpret summary as mean-

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<sup>30</sup> See, e.g., ABA Survey, *supra* note 2, at 8 (noting lawyers' favorable view of federal treatment of dispositive motions).

ing short shrift to their claims. The process is not summary, we cannot make it summary, and this is no place for a legal fiction.

Instead, we must change the label. That requires a rule amendment, but an easy one, and there is precedent. We recognized the “motion for a directed verdict” as a misnomer and changed it to “motion for judgment as a matter of law.”<sup>31</sup> The Rules Committees should rename summary judgment a “motion for judgment without trial.” That is an accurate, even-handed description of the process. It may underline its gravity and help us stop expecting simplicity and brevity.

*2. We Can Take It Out of the Back Room,  
Make It Part of Public Litigation, and Elevate Its Status*<sup>32</sup>

**I**n many districts, summary judgment now is largely back-office. Lawyers file materials electronically, without ever visiting the courthouse. Judges, magistrate judges, and law clerks read them in their offices and write decisions there, without ever visiting the courtroom. Parties and the public have nothing to observe, except electronic written exchanges. Too many – judges and lawyers – are comfortable with this “office practice,” and see face-to-face interchange as a distraction and delay. Yet many judges rue the disappearance of public trials where the local bar, citizenry, and media used to watch law at work. When we do have civil trials, economics now keep bar and media observers away. But we can bring lawyers in the particular case back into the courthouse and demonstrate a human face to civil justice. Sound institutional reasons counsel it, ranging from public scrutiny, to court-bar relations, to maintaining federal courtrooms as an active presence in the community.

For example, judges could require conferences, after discovery is complete, to discuss where cases stand before summary judgment motions can be filed. At such a conference, the judicial officer could ask any lawyer who wants to file such a motion to identify specifically the key issues on which there is no factual dispute and invite a

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<sup>31</sup> Fed R. Civ. P. 50 Adv. Comm. Note 1991 Amend.

<sup>32</sup> I haven't practiced everything I preach here, but I should. These ideas come from best practices of colleagues elsewhere.

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response to see if the list shrinks. After the conference, the judge could issue an order limiting the motion only to issues that remain. This practice might simplify some motions and briefs.<sup>33</sup> Admittedly, it demands judicial officers' commitment earlier, not merely at the opinion-signing stage.<sup>34</sup> But most judges wouldn't think of starting trials without final pretrial conferences and orders, because experience shows those procedures are helpful to effective and orderly trials.<sup>35</sup> Determining whether to grant judgment *without* trial after all the evidence is compiled deserves similar preparation and judicial attention. Authority to conduct pre-summary-judgment conferences exists now.<sup>36</sup> Doing it in person could encourage law firms to send well-qualified, well-prepared lawyers.

Moreover, judges could require oral argument on motions more often, demonstrating to the parties and the public that federal judges take seriously the determination whether cases should terminate without trial. Oral argument might get more skilled, experienced lawyers involved.<sup>37</sup> In any event, face-to-face with a judge,

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<sup>33</sup> Judge John G. Koeltl (SDNY), among others, requires a conference before parties can file summary judgment motions. See John G. Koeltl, Individual Rules of Practice; accord Shira A. Scheindlin, Individual Practices (available at SDNY website). He tells me the practice sometimes discourages motions when factual issues are plainly apparent.

<sup>34</sup> Border courts will be skeptical, already lacking civil case time. Judges in other districts could accept their motion assignments and use videoconferencing technology to consult lawyers.

<sup>35</sup> Lawyers are evenly divided on final pretrial conferences' usefulness, but 70% believe they inform the court of the issues in the case, and over 83% believe final pre-trial orders are somewhat or very helpful in preparing for trial. ABA Survey, *supra* note 2, at 11, 135 (Table 10.11(b)), 136 (Table 10.11(c)), 145 (Table 10.12(b)).

<sup>36</sup> Fed. R. Civ. P. 16(c)(2)(E) authorizes a conference to "consider and take appropriate action" on "determining the appropriateness and timing of summary adjudication under Rule 56." See Civ. Litig. Mgmt. Manual at 47 (2010); Manual for Complex Litig. Fourth at 46 (2004) (both suggesting "prefiling conference").

<sup>37</sup> Judge Baylson suggests circuit courts could require oral argument "as a matter of judicial administration." Michael M. Baylson, Are Civ. Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic & Cultural Imperative: A Resp. to Judge Higginbotham at 13 (Dec. 11, 2009) (unpub-

lawyers of all experience levels are more reasonable in their positions. Even parties might attend, especially if their lawyers tell them this is likely the only public courtroom proceeding in their case.<sup>38</sup> Judgment without trial surely deserves comparable public attention to adjudication by trial.

Trial lawyers could help by ending their denigration of motion practice and the lawyers (“litigators,” said sneeringly) who engage in it. It’s impolite, contrary to the economic interests of their firms, and insulting to the system of justice we all support.

### 3. *We Can Just Say No*

Some say expanding caseloads, together with Speedy Trial Act pressures in criminal cases, lead federal judges to prefer summary judgment over civil trials.<sup>39</sup> Statistical studies show employment discrimination cases in particular generate a significantly higher share of summary judgments than other categories.<sup>40</sup> But over 61% of defense lawyers and 54% of mixed practice lawyers believe “judges decline to grant summary judgment even when warranted.” (About 19% of plaintiffs’ lawyers agree; about 26% of plaintiffs’ lawyers disagree strongly.<sup>41</sup>)

What should we make of data and criticisms like these? Obviously, there is no correct proportion of summary judgment grants; energized advocates always will disagree over a judge’s decision. Nevertheless, some propositions must govern.

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lished paper, 2010 Duke Conf. on Civ. Litig.).

<sup>38</sup> Since even if summary judgment is denied, the case probably will settle.

<sup>39</sup> See *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997) (Posner, J.). Stephen Burbank says it is unfair to attribute summary judgment grants to “strategic judicial behavior” directed at clearing “crowded court calendars,” but it “surely plays a part in some courts.” Stephen B. Burbank, *Vanishing Trials and Summ. J. in Fed. Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIR. LEGAL STUD. 591, 625 (2004).

<sup>40</sup> E.g., Eisenberg & Lanvers, *supra* note 6, at 17-18; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrim. Pls. in Fed. Ct.: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 128 (2009).

<sup>41</sup> ABA Survey, *supra* note 2, at 117, Table 8.5.

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First, judges are duty-bound to resolve legal disputes, no matter how close the call. But when facts or inferences are conflicting, judges are duty-bound at summary judgment *not* to decide them. As Chief Justice Rehnquist said in *Celotex*, the rule demands a balanced approach, requiring a grant of summary judgment when there is no material factual dispute and a trial when there is one.<sup>42</sup> Still, just because summary judgment did not provoke reversal in a similar case when appellate judges found no issue of material fact, that does not necessarily mean that the trial judge must grant summary judgment in *this* case. The point is particularly pertinent in employment discrimination cases, where the critical issue – inference of discriminatory intent – is so fact-intensive. Judges should be slow to take inference questions away from juries, even when colleagues are affirmed in doing so.

Second, judges and magistrate judges must be careful that their chambers' investment of substantial time and energy assessing motions does not subliminally counsel *granting* them so as to justify the investment.

Third, many districts no longer confront heavy trial calendars. And we know that even where summary judgment is denied, trial likelihood remains slim because other forces motivate settlements. So busy judges should resist consciously *any* tendency – even unintentional – to choose summary judgment over trial because of docket concerns.

Fourth, there is no constitutional right to summary judgment, but there is to jury trial. Federal judges should not be reluctant to send parties to trial.

And so I say: when in doubt whether facts or inferences (not law) support summary judgment, judges should “just say no,” and let the case proceed to trial or settlement.

Now, given the intense struggle over the appropriate auxiliary verb in the pending Rule amendments (“must,” “may,” “shall,” or “should” grant),<sup>43</sup> I don’t expect a full-throated chorus of hoorays to

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<sup>42</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

<sup>43</sup> Recently, “shall” was changed in each rule to clarify whether it meant “must,”

my suggestion. But a modest change of judicial tone here would be appropriate.

## CONCLUSION

Summary judgment is complex – necessarily so, because of the nature of federal law and life, and the constitutional right to jury trial. Unlike trials, the process is tedious for trial judges and lawyers. But many are committed to it, it will not go away, and no miracle will cure its complexity. Experienced lawyers and judges, therefore, need to give full, serious attention to summary judgment motions. Although they cannot avoid delegating parts of their responsibilities, we need more of their experience in refining the motions and decisions they generate. These motions seek *judgment without trial*, and they should receive fitting prominence, energy, and attention accordingly. I suggest it is time to give an accurate label to this part of federal civil justice, bring it into public courtrooms where civil trials largely have disappeared, and showcase advocacy and judging skills there. And when in doubt on facts or their inferences, judges should “just say no.”



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“may,” or “should.” In 2007, without controversy Rule 56’s “shall” became “should” to describe the standard for a court’s decision to grant summary judgment. But when the latest Rule 56 changes were proposed, criticism erupted. The defense bar asserted that the previous style change unfairly allowed judges to deny summary judgment in more cases, making defendants proceed to trial or pay more in settlement. They wanted “must,” or at least restoration of “shall.” Vigorous contrary argument supported “should.” As a result, the pending amendments restore “shall.” The Rules Committee professed it intended no change in practice due to *either* the first *or* the second amendment. Report of the Jud. Conf. Comm., *supra* note 1, at 15-17. (Previously, some decisions suggested summary judgment denial was discretionary in appropriate cases. See Jack H. Friedenthal & Joshua E. Gardner, *Jud. Discretion to Deny Summ. J. in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 105 (2002) (circuit split).)