08-CV-083

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12/12/2008 05 48 PM	bcc	
	Subject	Civil Rule 56 Amendment -- Request to testify -- San Antonio or San Francisco

History: This message has been replied to.

Dear Mr McCabe

I request the opportunity to provide brief testimony, either at the San Antonio hearing on January 14, 2009 or the San Francisco hearing on February 2, 2009 on the proposed amendment to Rule 56 In 1998, motivated by many of the concerns that seem to be driving the proposed national rule, the Southern District of Indiana experimented with a local rule similar in many ways to the pending proposal We experienced some significant problems and made substantial changes in 2002 If the Civil Rules Advisory Committee intends to move forward with the proposed national change, I would like to share three observations and suggestions based on the experience of our court and bar with that rule

Limits on "Point-Counterpoint" Submissions: When we first adopted the requirements for "point-counterpoint" statements of material facts, we required that they be separate documents, like the pending proposal. We had a negative experience with the "point-counterpoint" provision We saw huge, unwieldy, and expensive presentations of hundreds of factual assertions, supported by debates over relevance and admissibility that made the complete documents run to 100 pages or more in routine cases Lawyers were too often using the statements and responses to argue every conceivable evidentiary objection and point of relevance But our court was reluctant to abandon the "point-counterpoint" rule entirely, so we found a simple and effective correction in 2002 Instead of requiring (or allowing) the facts to be presented in **separate** documents, we now require that the moving party's brief contain a statement of undisputed material facts, **within the page limits for briefs** The non-moving party's brief similarly must contain the response to the moving party's statements and any additional facts, again within the page limits for briefs This simple solution takes advantage of the page limits on briefs (We allow 35/35/20) This solution has been very effective in reducing volume and expense I won't say it's perfect, and a few unusually complex cases require more pages, of course But this solution has cured one of the most annoying and expensive effects of the original "point-counterpoint" rule It has also allowed and encouraged attorneys to exercise their professional judgment as to which facts and evidence are most relevant I would like to urge the committee to consider a similar provision to keep the submissions to a manageable length, without undue expense

Surreply Briefs: Our experience with the "point-counterpoint" process also led us in 2002 to provide explicitly for surreply briefs **under limited circumstances** I realize that surreplies as a matter of right might sound appalling to some. In our court, however, this limited right has been useful, Most important, it has been fair As the case is still taking shape in the trial court, the moving party's reply brief very often. (a) cites additional evidence for the first time, or (b) objects to the admissibility of the non-moving party's evidence, or (c) both Basic fairness requires that the non-moving party have an opportunity to respond to new evidence and evidentiary objections We have imposed a tight deadline (seven days) for submitting such a surreply, so it does not threaten to delay the briefing process unduly, and it enhances the fairness of the process This opportunity also works as an effective substitute for numerous (and unwelcome) motions to strike that would otherwise prolong motions-briefing even further I would like to urge the committee to include a similarly limited provision allowing a surreply as a matter of right IF the moving party in the reply brief cites new evidence or objects to the non-moving party's evidence.

Flexibility in Enforcement: Our experience with the more complex rule also led us in 2002 to add a new

provision stating "The Court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule " The "or" is important, because often there is not genuine "good cause." Many lawyers who do not often practice in federal court have trouble complying strictly with the rule. This point in the rule codifies discretion that is inherent in the court, but stating it explicitly in the rule helps discourage games of "gotcha " I would also like to urge the Committee to consider a similar provision

For the convenience of readers who might be interested in these suggestions, I have attached below the current of text of Local Rule 56.1 of the Southern District of Indiana

I would be interested in appearing personally before the Committee to testify about these matters and to answer any questions the Committee might have I could testify in San Antonio if the hearing there is likely to extend into the afternoon of January 14th, or I could testify in San Francisco on Monday, February 2nd Please let me know which might work better, and thank you for your consideration

David F. Hamilton
Chief Judge, Southern District of Indiana

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Southern District of Indiana Local Rule 56 1 - Summary Judgment Procedure

(a) Requirements for Moving Party A party filing a motion for summary judgment pursuant to Fed R Civ P 56 shall serve and file a supporting brief and any evidence not already in the record upon which the party relies. The brief must include a section labeled "Statement of Material Facts Not in Dispute" containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue These asserted material facts shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence either already in the record or contained in an appendix to the brief Such citation shall be by page or paragraph number or similar specific reference, if possible, this citation form applies to all briefs filed under this rule.

(b) Requirements for Non-Movant. No later than 30 days after service of the motion, a party opposing the motion shall serve and file a supporting brief and any evidence not already in the record upon which the party relies The brief shall include a section labeled "Statement of Material Facts in Dispute" which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment These facts shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence either already in the record or contained in an appendix to the brief.

(c) Reply Brief A party filing a motion for summary judgment may file a reply brief no later than 15 days after service of the opposing party's submissions

(d) Surreply If, in reply, the moving party relies upon evidence not previously cited or objects to the admissibility of the non-moving party's evidence, the non-moving party may file a surreply brief limited to such new evidence and objections, no later than seven days after service of the reply brief

(e) Effect of Factual Assertions For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party's "Statement of Material Facts in Dispute" by admissible evidence; are shown not to be supported by admissible evidence; or, alone, or in conjunction with other admissible evidence, allow

reasonable inferences to be drawn in the opposing party's favor which preclude summary judgment. The Court will also assume for purposes of deciding the motion that any facts asserted by the opposing party are true to the extent they are supported by admissible evidence The parties may stipulate to facts in the summary judgment process, and may state that their stipulations are entered only for the purpose of the motion for summary judgment and are not intended to be otherwise binding The court has no independent duty to search and consider any part of the record not specifically cited in the manner described in sections (a) and (b) above

(f) Collateral Motions. Collateral motions in the summary judgment process, such as motions to strike, are disfavored Any dispute regarding the admissibility or effect of evidence should be addressed in the briefs

(g) Oral Argument or Hearing. All motions for summary judgment will be considered as submitted for ruling without oral argument or hearing unless a request for such is granted under Local Rule 7 5 or the Court otherwise directs

(h) Notice Requirement for Pro Se Cases A party moving for summary judgment against an unrepresented party must file and serve a notice that
(1) briefly and plainly states that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of material fact, and
(2) sets forth the full text of Fed R Civ P. 56 and S D Ind L R 56.1, and
(3) otherwise complies with applicable case law regarding required notice to pro se litigants opposing summary judgment motions

(i) Compliance The Court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule

Local Rule 56 1 amended effective July 1, 2008 Previous amendments adopted July 1, 2002, January 1, 2000, April 30, 1999, and December 17, 1998