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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

08-CV-011

Dear Secretary McCabe:

I am writing with comments on the proposed amendment to F.R.C.P. 56. My comments relate solely to the issue on whether the current language directing that a Court "should" grant summary judgment when the record shows that the Movant is entitled to judgment as a matter of law should be retained.

I have very strong feelings on this point and believe that the present language should be retained and that the rule should not be changed.

My concern relates both to how the federal judiciary and state judiciaries will react to this change.

Based on personal and anecdotal experience I do believe that the proposed change, if enacted, would affect a substantial but not a majority of the federal judiciary. Many district judges and some appellate judges disfavor summary judgment already. Summary judgment is a valuable remedy when justified. My concern is that the proposed change would, in the eyes of those who disfavor summary judgment, render the rule meaningless.

I have greater concern with how the state judiciary and possibly state legislatures would respond to this change. I believe most states would quickly adopt the change in their own rules of civil procedure. I believe there are many, if not a majority, of state trial court and appellate judges who disfavor summary judgment under any circumstances. I believe that such a change would make summary judgments extremely rare even when undisputed facts and settled law would otherwise mandate summary judgment. It would be very easy for a judge who already disfavors summary judgment to rely on this change in language to justify the contention that granting summary judgment is totally discretionary under all circumstances.

As Ken Kesey might say, summary judgment is sometimes a great motion. I believe the old rule should be retained in its present form.

Best regards.

Sincerely,

MAY, ADAM, GERDES & THOMPSON LLP

A handwritten signature in black ink, appearing to read "RBA", written in a cursive style.

ROBERT B. ANDERSON
RBA/slg