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VIA E-MAIL (Rules_Comments@ao.uscourts.gov)
& REGULAR MAIL

08-CV-044

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

Re: Comments on the Proposed Amendments to Rule 56 of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I thank the Committee for this opportunity to comment on the proposed changes to Rule 56 of the Federal Rules of Civil Procedure. The Committee will hear from many prominent persons and important organizations that no doubt have insightful comments on the proposed changes from a policy standpoint. Members of the bench will offer their unique viewpoint. I look forward to reading and listening to their comments. I respectfully submit these comments from the perspective of an ordinary practitioner.

I began my career twenty-eight (28) years ago as a law clerk for the late Honorable Daniel H. Huyett, III, of the Unites States District Court for the Eastern District of Pennsylvania and have been a litigator in private practice since that time. For the last several years, I have represented insurance carriers in coverage, liability, and class action litigation, much of it in the federal courts, although over the course of my career I have represented plaintiffs as well as defendants in commercial and personal injury litigation. I have written, reviewed and responded to numerous motions for summary judgment during that time. I offer these observations from my experience.

I. The Statement of Material Fact is a Valuable Addition to the Rule.

My state, Pennsylvania, is a fact-pleading jurisdiction. The facts giving rise to the case must be pled at the outset in the Complaint. Typically, motions for summary judgment are also fact intensive documents and the facts pled in them are deemed admitted if not properly denied. When I first began to practice law, the practice in the federal courts could not have been more different. Typically, the federal motion was, and still is, a simple paragraph requesting relief

"for the reasons stated in the attached memorandum of law." No requirement existed that the moving party set out the undisputed facts or that the non-moving party respond. However, over time in Pennsylvania, certain federal district courts by local rule or individual federal judges by procedural order have required the moving party to prepare a statement of material fact and required the opposing party to admit or deny, with each side citing the appropriate record support. *See, e.g.,* U.S.D.C. M.D. Pa. LR 56.1 (2007). Over time, my colleagues and I have practiced under similar rules in state and federal district courts in venues other than Pennsylvania as well.

My experience having prepared and responded to motions for summary judgment with and without a required statement of material fact leads me to believe that requiring such a statement is useful and rarely unduly burdensome. A motion for summary judgment that includes a statement of material fact allows the moving party to impose clarity on a case when faced with an opposing party whose theory has evolved continually from the pleading stage through depositions. This is particularly valuable in federal cases where notice pleading permits suits to be initiated without specificity except as provided in Fed. R. Civ. P. Rule 9. Even unsuccessful motions increase the likelihood of the presentation of a coherent case for trial.

Opposing parties who have a clear understanding of their respective theories also benefit from being required to state the material facts and respond to them. For example, cross motions for summary judgment are often filed in insurance coverage disputes. Frequently both sides agree early in the case that this procedure should be adequate to resolve their disputes. Then they prepare their submissions. In federal district courts with no local rule or order requiring a material statement of fact and response thereto, the parties describe their individual visions of the facts in the narrative sections of their briefs. Fearing to concede any point, burdening the narrative with unnecessary nuance, and adhering fiercely to their own reality regarding the case, the parties produce motions papers that seem nearly unrelated. One, sometimes both, sides are later shocked to receive an order denying the cross motions because of "genuine issues of material fact." Advocates will benefit from the discipline imposed on them by requiring statements of fact and responses thereto.

Requiring the moving party to plead facts that it contends are undisputed and requiring the nonmoving party to admit or deny, ensures that the parties reach some shared reality regarding their agreements and disagreements. With this procedure, a principled resolution of the case is possible on a motion for summary judgment. Without it, some cases will proceed unnecessarily to trial, while others will be settled by litigants who are merely worn down by the process.

I am mindful of the concern that the procedure calling for the preparation of and response to a factual statement can result in summary judgment motions that arrive in boxes and overwhelm a smaller firm. However, in these cases, discovery materials and trial exhibits will be no less burdensome.

II. The Improvement Provided by the Statement of Material Fact will be Lost if the Authority to Grant Summary Judgment is Discretionary.

The prospect of a discretionary denial assumes that the court has reached a point in its analysis where it has concluded that there is no genuine dispute as to any material fact and, as a matter of law, the defendant is entitled to judgment. At this point, the language of the former rule stated that summary judgment "shall be rendered." I will venture to guess that nearly every attorney who practiced under the prior rule believed his or her client was entitled to summary judgment if these hurtles were crossed. The language of the new rule provides no such certainty.

I respectfully submit that if the use of the word "shall" in prior Rule 56 was ambiguous, the ambiguity ought to have been resolved as it was in Fed. R. Civ. P. Rule 4 by replacing "shall" with "must."

The use of "should" has been justified by an insistence that summary judgment was always discretionary. I will not repeat their analysis, but other commentators have demonstrated that the prior case law is not so clear on this point. Moreover, with the change in the wording of the rule, the number of cases in which "discretion" will be exercised is likely to increase. In the past, such an exercise of discretion depended upon citation to the few aberrant cases relied upon by the proponents of "should." Now, the rule itself seems to authorize discretionary denial. If we must tell our clients that a meritorious motion can be denied at the discretion of the trial judge, fewer meritorious motions will be filed.

In its report of May 9, supplemented June 30, 2008, the Advisory Committee suggests that one justification for discretion to deny is that "a paper record that fails to show a genuine issue as to any material fact cannot always be an infallible sign that a trial record also will require judgment as a matter of law." The Committee suggests that "[a] judge who is not satisfied that pretrial circumstances have afforded a fully reliable demonstration that trial will not change the record" should be free to send the case to trial. Report of the Civil Advisory Committee at 23-24 (June 30, 2008).

First, trial will always change the record. This logic, if carried forward, undermines the very possibility of finality: the grant of a new trial or a remand on appeal will change the record as well. The existence of Rule 56 must represent a policy determination that summary judgment is an appropriate juncture at which to terminate a case even though it precludes further development of the case through trial. Second, it is the responsibility of lawyers to ensure that "pretrial circumstances" do not fail to afford "a fully reliable" record for summary judgment.

Thank you again for the opportunity to comment on the proposed changes. I respectfully suggest that the Committee retain the statement of material fact procedure but replace "should" with "must" in subsection (a) of proposed Rule 56.

Respectfully submitted,

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CDM/mjb