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Hon. Mark R. Kravitz
Hon. Michael Baylson
Co-chairs, Advisory Committee on Civil Rules
Judicial Conference of the United States
c/o Rules Committee Support Office
Thurgood Marshall Building
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed amendments to Fed. R. Civ. P. 56
Publication version August 2008
Written Testimony of John Vail, to appear November 17, 2008
on Behalf of the American Association for Justice

Dear Judges Kravitz and Baylson:

Thank you for the opportunity to testify before you.[1] I appear on behalf of the American Association for Justice, America's oldest and largest organization of plaintiffs' lawyers, whose members appear often in the federal courts. They take to heart the admonition of Chief Justice Marshall, in *Marbury*, that a first duty of any government is to provide legal protections to injured persons.[2] They believe that the proposal before you will hinder performance of that duty.

AAJ members are particularly concerned with a continuing tendency to take decisionmaking out of the hands of lay people and to vest it in elites.[3] The People rejected the

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[1] I anticipate filing further comments before the February deadline. My prior comments on this issue remain germane. Letter of John Vail, Esq., to Hon. Mark Kravitz, Jan. 23, 2007.

[2] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, C.J.). *See also Downes v. Bidwell*, 182 U.S. 244, 282 - 283 (1901), in which the Supreme Court equated the right to "free access to courts of justice" with the rights of freedom of expression, freedom to worship, and freedom from unreasonable searches and seizures and noted that all of them were "indispensable to a free government."

[3] *See* Stephan Landsman, *The Civil Jury Trial in America*, 62 Law & Contemporary Problems 285, 285 (1999) ("Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period."); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705, 705 (Nov.

draft Constitution for this exact fault, and required addition of the Seventh Amendment to correct it.[4]

In 1954 Judge Weinstein predicted, "It is safe to assume that motions for summary judgment will not be made in cases in which the procedure is not appropriate." Jack B. Weinstein and Harold L. Korn, *Preliminary Motions in New York: A Critique*, 57 Colum. L. Rev. 526, 528 (1957).[5] It is the rare moment when I feel confident asserting that Judge Weinstein was wrong.

Summary judgment today is widely inappropriately used and the proposal before you is apt to exacerbate that problem. We need a new approach to summary judgment, and not the approach taken here.

A Few Key Historical Points

There has been no more forceful proponent of summary judgment than Dean, and later Judge, Charles Clark.[6] I will rely primarily on him for historical points I want to remind the Committee about. Historically:

- The procedure appears to have originated in Virginia in the early eighteenth century, as means of collecting on surety contracts;[7]
- The procedure was codified in England in 1855, where is was generally limited to cases involving debt-collection or landlord-tenant (summary ejectment) matters;[8]
- By the second decade of the twentieth century it had been expanded to almost 20 U.S. jurisdictions, limited to the same kinds of matters.[9] By the early 1950s, after the Federal Rules had come into effect, the procedure had been adopted in 30 states.[10]

2004) (finding that "a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970, [and] that vanishing trials have been replaced not by settlements but by nontrial adjudication.").

[4] Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 295-98 (1966). *See also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

[5] Judge Weinstein alluded to rejected proposals that would have limited the application of summary judgment to certain types of cases, and cited evidence that over a long period in one jurisdiction only one summary judgment motion had been made in an automobile case.

[6] Charles E. Clark was Dean of the Yale Law School, Reporter of the Supreme Court Advisory Committee—predecessor to this body—and later Judge of the United States Court of Appeals for the Second Circuit. His writings on this topic are legion. The Supreme Court has described him as the "principal draftsman" of the Federal Rules. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988). *But see* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 596, n. 14 (Nov. 2004), identifying Edson R. Sunderland as the architect of the federal rules on pretrial procedure.

[7] Charles E. Clark and Charles U. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 463 (1929).

[8] Id. at 424.

[9] Id. at 423.

[10] Charles E. Clark, *The Summary Judgment,* 36 Minn. L. Rev. 567, 568, n. 9 (May 1952).

Summary judgment was promoted to deal with an age-old problem:[11] "the press of litigation and the need to deal with dilatory procedural tactics."[12] Summary judgment was supposed to "enabl[e] the plaintiff to move much more rapidly than he otherwise could."[13]

Two key points here:

- summary judgment, in origin, never was meant to defeat a *complaint*; it was a plaintiff's device;[14]
- it was designed to deal with *defenses*, in particular, sham defenses;[15]
- its value was its "simplicity."[16]

Judge Clark, a little more prophetically than Judge Weinstein, predicted in 1929 that summary judgment might attain "a more important position in future practice systems than merely that of a prod to delinquent debtors."[17]

From its promulgation in 1938, Rule 56 transcended that characterization. It was not limited to any category of case and became the first "completely unlimited summary judgment procedure."[18] Limitations on categories of cases to which it was applicable had been rejected because they "led to confusion and waste in determining their application."[19]

Categorical limitations on summary judgment were rejected in favor of vesting discretion in trial judges. Even Judge Clark counseled that application of Rule 56 could not be automatic, and required judgment: "What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial and, on the

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[11] In the fifteenth century, in the first English law book written for lay people, "an explanation was sought for the 'huge delays' that 'withhold petitioners from their right' and impose 'an intolerable burden of expense.'" John A. Bauman, "The Evolution of Summary Judgment Procedure—An Essay Commerating the Centennial Anniversary of Keeting's Act," 31 Ind. L. J. 329, 329, n.1 (Spring 1956), quoting Fortescue, *De Laudibus Anglie,* c. LII (*c.* 1470), reprinted in Chrimes, Sir John Fortescue 131 (1942).

[12] Clark, supra n. 7, at 471

[13] Id. at 464

[14] Id.

[15] Id., at 423, 453

[16] Id., at 423, 464

[17] Id. at 471. Clearly, summary judgment has attained that greater status. But despite one commentator writing, in 1936, that summary judgment already had "alleviated the economic waste of unnecessary and protracted litigation," Louis C. Ritter and Evert H. Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 21 Marquette L. Rev. 33, 33 (1936) (footnote omitted), assertions about exploding litigation, cost, and delay persist, and they persist despite vastly changed circumstances.

[18] Bauman, supra n. 11, at 344. *See* Notes of Advisory Committee on Rules (citing the recommendation of the Commission on Administration of Justice in New York State (1934) recommending that the "remedy" be available "'in any action.'" The Committee adopted the recommendation even though New York had not.) Clark notes that Virginia permitted the procedure in tort cases as early as 1912. Clark, supra n. 7, at 463, n. 6.

[19] Clark, supra n. 10, at 569.

other, not to allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial."[20]

Clearly summary has attained the "important place" Judge Clark envisioned for it. But it decidedly is not a plaintiff's device; it has become anything but simple; and it has become, itself, a dilatory tactic. It hinders a plaintiff's way, rather than accelerates it, and the proposal before the committee will do anything but "enabl[e] the plaintiff to move much more rapidly than he otherwise could."

A Few Key Empirical Points

In the early days, the discretion Judge Clark envisioned was exercised. Despite the unprecedented scope of Rule 56, as of 1952 it was employed "only rarely" in personal injury and related claims.[21] The federal court in Minnesota issued only one summary judgment in 292 personal injury-related claims adjudicated in 1948-49.[22]

With time, however, the kinds of cases in which summary judgment was used became broader and the rate at which it was employed increased. In the first thirty years of Rule 56, there were only 320 reported district court cases – about 11 per year – in which a summary judgment motion was granted or denied. William P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule,* 6. J. Legal Stud. 427, 453. (1977)[23] About 20% of these cases were tort actions and a little under half were "statutory" claims.[24] Professor McLauchlan noted that cases involving "negligence" or "motive, intent, and subjective feelings" were "generally viewed as rarely subject to summary judgment." *Id.* at 433. He expressed surprise at both the rate at which motions were entertained in tort cases, id. at 435-36, 458, and at the "surprisingly high" defendants' win rate in "cases that involve jury questions, including the question of negligence, which the jury has a special province to decide." *Id* at 439. McLauchlan concluded that defendants have an advantage in "seeking and obtaining" summary judgment. Id. at 441.

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[20] Clark, 36 Minn. L. Rev. at 579. Professor Burbank, after reviewing the original deliberations of the committee, concluded that "the Committee as a whole probably agreed with Charles Clark" that, despite the breadth of the rule, it would remain applicable chiefly in routine cases such as debt collection. Burbank at 602. The Committee clearly was aware, however, that the tool might be employed in more complex cases. Id. at 619.

[21] Alfred C. Clapp, "*Civil Procedure in State Courts*," Ann. Surv. Am. Law 700, 710 (1952).

[22] Note, *Use of Summary Judgment by Type of Case*, 36 Minn. L. Rev. 515, 519 (table) (1952).

[23] In only seven of these cases was the motion denied. McLauchlan's was the first comprehensive empirical study of Rule 56.

[24] Clark, 83 Yale L.J. at 435-36.

Whether the Supreme Court summary judgment trilogy of two decades ago[25] accounts for an acceleration of the rate of use of summary judgment is a matter of debate, but it is clear that between 1960 and 2000 "[t]he rate of case termination by summary judgment in federal civil cases nationwide increased substantially." Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 592 (Nov. 2004) Burbank estimates that the rate went from about 2% to about 8%, but notes that overall rates could mask great disparities by type of case and by court. *Id.* at 617-18.

In 1990, Samuel Issacharoff and George Loewenstein used economic analysis to determine that "it is not at all clear that the expansion of summary judgment yields the intended consequence of decreasing the likelihood of trial," and that "the expansion of summary judgment will likely increase aggregate legal expenditures, thus producing a corresponding deadweight loss to society." Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 100, 103 (1990). Those authors also concluded that the "unambiguous impact of [summary judgment] is a transfer of wealth from plaintiffs to defendants." *Id.* at 103. *See also* Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. at 542. And because "[n]umerous studies have demonstrated that bargainers are less likely to reach a settlement when inequities of power exist between them than when they are in positions of symmetrical power," many scholars have concluded that summary judgment deters settlement and thus burdens the federal judiciary. *Id.*

A new study by Professors Schwab and Clermont puts firm ground under some of the projections of Issacharoff and Loewenstein. Analyzing court data, they establish that summary judgment biases results against plaintiffs in civil rights cases. Stewart J. Schwab and Kevin J. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 3 (June 7, 2008).[26] This result is consistent with data reported to the

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[25] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elect. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The trilogy is considered a categorical reversal of the prior conception of Rule 56. See, *e.g.*, Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court,* 37 Emory L.J. 171, 215 (1988); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy*, 63 Wash. & Lee L. Rev. 81, 82, 86–88, 143–44 (2006). For an instance of the classic pre-trilogy view of summary judgment and its proper place, see *Arnstein v. Porter*, 154 F.2d 464, 479 (2d Cir. 1946) (Frank, J.). Composer Cole Porter, defending a copyright infringement suit, moved successfully for summary judgment on the ground that he did not know of the plaintiff's compositions, a fact that negated an essential element of liability. The Second Circuit reversed, holding that that the jury, not the court, should determine the factual question whether Porter's claim of ignorance was credible—even though, as Judge Clark pointed out in dissent, *id.* at 479-80, Arnstein had not adduced evidence that Porter had access to the music he allegedly copied. *See also Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'").

[26] Available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf. See also Suja A. Thomas, *Unconstitutional*, 93 Va. L. Rev. at 141 n.5, citing Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L. Rev. 71, 71 (1999); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 101–02 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 206–07 (1993); cf. Rebecca Silver, Comment, *Standard of Review in FOIA Appealsand the Misuse of Summary Judgment*, 73 U. Chi. L. Rev. 731, 757 (2006) (FOIA cases).

Committee by Joe Cecil and George Cort. Joe Cecil and George Cort, *Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules,* Federal Judicial Center, November 2, 2007, http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf, at page 2. Those data indicate that the proposed rule change will exacerbate the problem for that class of cases. *See also* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation,* 59 Rutgers L. Rev. 705 (2007).

The Draft Rule is Apt to Exacerbate Undesirable Trends, Limit Access to Justice, and Yield No Benefit

Judge Patricia Wald cautioned a decade ago about the dangers of an un-cabined Rule 56:

> I believe our circuit's experience shows that we are now at a stage where the focus should be on ensuring that summary judgment stays within its proper boundaries, rather than on encouraging its unimpeded growth. Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain. That appraisal may seem alarmist, but my perusal of a sample of summary judgments suggests that, at the very least, there is a real danger of summary judgment being stretched far beyond its originally intended or proper limits.

Patricia M. Wald, *Summary Judgment at Sixty,* 76 Tex. L. Rev. 1897, 1917 (1998). Reflective courts have vented similar concerns. See, *e.g.*, *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998), *sub nom., overruled on other grounds*, *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) ("The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases."); *Delgado-Biaggi v. Air Transport Local 501*, 112 F.3d 565, 567 (1st Cir. 1997) ("the 'proper province' of summary judgment is 'to weed out claims that do not warrant trial rather than simply to clear a court's docket.'") (citations omitted).

This theme was reiterated more recently by Professor, and former Committee Reporter, Arthur Miller:

> To honor the rights to a day in court and to jury trial, the equation of the summary judgment and judgment as a matter of law standards demands that the pretrial disposition of cases, whether under Rule 12(b)(6) or Rule 56, be closely scrutinized and constricted since the safety valve of an opportunity to present one's case in a complete and live format is absent in the pretrial context. The task may not be an easy one because many judges do not articulate their reasoning for determining whether an issue is one of law or of fact, taking matters from the jury without any or only a

> limited explanation, thereby making appellate oversight difficult. But the law-fact distinction must be policed; it is a problematic distinction because the boundary between the two and the proper method of resolving mixed questions of law and fact never have been clearly prescribed.

Arthur R. Miller, *The Pretrial Rush To Judgment: Are The "Litigation Explosion," "Liability Crisis," And Efficiency Clichés Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1133-34 (2003).

The more Rule 56 is implemented as a mechanism for judging the strength of each party's factual case, and the less conscientiously it is used as a tool to weed out purely legal disputes, the more intense the doubts that it comports with the Seventh Amendment's jury trial guarantee.[27] The draft rule trends in the wrong direction.

Problems affecting particular elements of the proposed Rule

A. Point-counterpoint

1. The Big Conceptual Problem

The ritualized exchange of opposing fact statements in Rule 56(c) rends the fabric of each side's factual presentation into individual threads of fact, each of which the court must consider in isolation. It deprives the party of the chance to weave her story, to marshal the facts in their most persuasive form. This is precisely what happens at trial. It is the fundamental right of a person bearing the burden of proof—in civil litigation, most often the plaintiff—to present the facts as they deem most persuasive:

> [e]vidence . . . tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once. . . . Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest

[27] *See, e.g.,* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va. L. Rev. 139 (2007); John L. Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522 (2007); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 600 (Nov. 2004); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 Notre Dame L. Rev. 770, 775 (1988) ("[W]hen the moving party would have the burden of persuasion at trial, the courts have . . . strained to permit the granting of the motion by interpreting the amendment not to include a strict submission of matters of credibility to the jury, a questionable determination."); *Kampouris v. St. Louis Symphony Soc'y*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, J., dissenting) (expressing concern about "the expanding use of summary judgment" and its "ominous specter of serious erosion of the 'fundamental and sacred' right of trial by jury") (quoting *Jacob v. City of New York*, 315 U.S. 752, 753 (1942)).

> verdict . . . and the [party] with [the] burden of proof may prudently demur at a . . . request to interrupt the flow of evidence telling the story in the usual way.
>
> In sum, . . . [a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.

Old Chief v. U.S, 519 U.S. 172, 187-89 (1997). *See also Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987) ("Petitioner's theory ignores [] simple facts of evidentiary life. . . . [I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.... [A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.")

Social science research supports the importance to the bearer of the burden of proof of the ability to shape their own narrative:

> Empirical research confirms that fact finders process evidence holistically in the form of theories or stories. Professors Bennett and Feldman advance the notion that evidence evaluation involves a choice between competing narratives. Professors Pennington and Hastie offer "a scientific description of the mind of the juror," which provides compelling empirical evidence to support this proposition. After describing the juror as "a sense-making information processor who strives to create a meaningful summary of the evidence available that explains what happened in the events depicted through witnesses, exhibits, and arguments at trial," Pennington and Hastie posit the Story Model to explain the cognitive processes of jurors. The Story Model postulates that jurors impose a narrative story organization on trial information and that the story a juror constructs determines that juror's ultimate decision at trial. Trial advocacy scholarship and the courts both embrace this view.

Michael S. Pardo, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 Nw. U. L. Rev. 399, 402 (2000)(footnotes omitted). This ability to tell a story allows the bearer of the burden of proof to call on multiple cognitive skills in the fact finder:

> Analytical abilities therefore play a crucial, and an inevitable, role in story comprehension, story interpretation, and storytelling.
>
> Analytical abilities alone, however, are radically insufficient for full competence at the comprehension and telling of stories. The meaning of a story is not limited to the kind of knowledge that can be derived from a literal decoding of its words or inferred from an

> atomistic analysis of the legal significance of its details. Vicarious participation in the constructed world of a narrative opens access to an empathic understanding of narrative events, different in kind from the conceptual understanding gained through analysis. It is an experiential understanding acquired by "trying on" a story imaginatively and testing its "fit" and its "feel" from within, and depends more upon a gestalt appreciation of context and connotation than upon a literal-minded focus upon isolated details.

Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought In The Practice Of Law*, 69 U. Colo. L. Rev. 759, 783-84 (1998) (footnotes omitted)[28]

2. Other Problems with Point - Counterpoint

In addition to this huge conceptual problem, the proposed rule sets traps that can catch even wary litigants and leaves room for mischief. Under proposed Rule 56(c)(2)(A)(i) the movant must tie any summary judgment request explicitly to an identified claim or defense, while under proposed Rule 56(c)(2)(B), (c)(4) and (c)(5) the nonmovant must respond point by point with admissible evidence or a convincing statement that none is available. The rule is rigid. Rule 56(c)(1) requires an order in the particular case to vary the point-counterpoint procedures, where before a standing order or local rule could do so.

Under proposed Rule 56(c)(4)(B) the court is not obliged to consider facts not called to its attention, an attractive incentive to better-funded parties to load their fact statements so heavily as to increase the chance that a poorer adversary will miss something. The rule does not limit the number of facts to be adduced (though the Committee note, see p. 35, ll. 59-61; p.36, ll. 77-81, suggests courts might want to impose such a limit in their discretion). AAJ members report that well-funded movant defendants, in federal districts that use variants of the proposed Rule 56(c) procedure locally, pile up fact averments to an absurd degree—running into the thousands—in an attempt to obtain or exploit a tactical advantage over a less well-resourced opponent.

Proposed Rule 56(c)(4)(A) makes clear that facts in the dueling statements must be presented by means of admissible evidence, not just products of discovery, another clue to the trial displacement forces at work here. Yet there is no provision for challenges to the admissibility of evidence at the summary judgment phase. Many questions deserving of clarification linger here even though the admissible evidence requirement has been in place in some form for years: What precisely is the test of relevance or materiality at the summary judgment stage? Does a balancing test apply, and if so what factors or interests are to be balanced? Can the ability to "link up" a piece of evidence subsequently be relevant? What

[28] Indeed, the Supreme Court has intervened several times recently to lift artificial rules that creep into the law to atomize and isolate pieces of evidence from one another. Several civil rights cases are instructive. See, *e.g.*, *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (rejecting the rule that only "ultimate employment decisions" can constitute actionable retaliation against a worker); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (*per curiam*) (summarily rejecting rule limiting probative value of racial slurs); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151–53 (2000) (rejecting rules limiting probative value of age-biased remarks).

about evidence whose admissibility depends on other evidence? This last question seems particularly troubling in view of the balkanized treatment of individual items of evidence, each isolated from all others, under proposed Rule 56(c).

Moreover, under proposed Rule 56(c)(5), if a party believes evidence adduced by an opponent is inadmissible, or that an opponent's statement of a fact is unsupportable without such evidence, the party may so state; but the party must still refute that "fact" in the response as if it were admissible, at peril of a grant of summary judgment for failure to do so. Although under proposed Rule 56(c)(4)(A) and (c)(5) an objection of this kind can be preserved in the opponent's response to the statement of undisputed facts, or in a reply (and if deemed undisputed can be confined to the purposes of the motion alone under proposed Rule 56(c)(3)), the proposed rule leaves unclear whether such challenges must be stated in the brief, where they would consume valuable page space; whether they are properly included in the Rule 56(c) statement; or whether they must be made by separate motion, and if so what happens to the summary judgment proceeding in the meantime; and whether in fairness a party ought to receive a ruling on the striking of inadmissible evidence before having to respond on the merits. The Committee should clarify the rule to assure a fair opportunity to raise these problems and to respond in light of the ruling.

Even with that clarification, however, the proposed rule still would have no provision allowing an opponent of summary judgment to respond to a movant's listed fact by pointing out that the fact does not allow the inference the movant wants to draw, or that the fact is divorced or disaggregated from a context that puts it in a different light and would allow other inferences against the movant, or that the statement depends on the credibility of a witness the jury would not be required to believe, or that in light of other evidence the fact would be entitled to little weight.[29] We have had reports that some plaintiffs' counsel have tried to point out these kinds of disaggregation or inference problems, in federal districts with variants of the proposed fact statement procedure, only to have their filings rejected because they did not fit into a specific provision of the rule.

B. Back-loading of replies.

Proposed Rule 56(c)(2)(C) has evolved since 2007 to constrain more appropriately a practice too often seen in today's summary judgment litigation: the filing of a rudimentary summary judgment motion, which presents the nonmovant with little to respond to, and then the presentation of much more factual matter in a reply to which no further response is permitted. This blindsiding has been the subject of at least two recent reversals of summary judgment. *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480–82 (6th Cir. 2003) (holding that the lower court abused

[29] Courts of appeal have often had to redress the improper disaggregation of facts that were supposed to be considered in their totality. See, *e.g.*, *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 490 (10th Cir. 2006) (reversing a grant of summary judgment and stating: "We do not necessarily believe that each of the incidents recounted above would support a charge of discrimination in isolation, but taken as a whole, this evidence of racial comments and disparate treatment of black merchandisers creates a genuine issue of fact regarding [defendant's employee's] racial bias."), *cert. dismissed*, 127 S. Ct. 1931 (2007). Cf. *United States v. Arvizu*, 534 U.S. 266 (2002) (rejecting disaggregation of facts alleged to justify police stop under Fourth Amendment totality test).

its discretion in considering new factual submissions made for the first time in defendant's replies in support of its summary judgment motions, without providing plaintiff an adequate opportunity to respond); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003) (same).

This problem has proven relatively easy to mitigate with a requirement that replies under Rule 56(c)(2)(C)(i) (as opposed to reply briefs under Rule 56(c)(2)(C)(ii)) confine themselves to the scope of the response, as indicated in the Committee note, at p. 36 ll. 90-97. However, the proposed text itself does not appear to contain the note's explicit limitations on content of replies, namely that they must confine themselves to additional facts and that they must not deal with facts already listed in the original Rule 56(c)(2)(A)(ii) fact statement whether or not responded to in the nonmovant's (c)(2)(B)(i) or (ii) filing. The (c)(2)(C) text only suggests, ambiguously, that a movant must file a reply statement and may file a reply brief. The difficulty is easily remedied with text to the effect that a (c)(2)(C)(i) reply may introduce new matter only in the rare situation when facts are discovered following the submission of the original summary judgment motion, which itself generally follows the close of all discovery. Of special help with motions filed early in a case would be explicitly to permit sur-replies where the reply supporting summary judgment contains any factual matter beyond the scope of the response.

C. Time between complaint and summary judgment motion.

Proposed Rule 56(a) continues to make summary judgment available to a nonmoving defendant as early as the moment an action is commenced. Former versions of the Rule did the same, but required claimants to wait 20 days to move for summary judgment. It is fair to say that a procedure under which plaintiffs were required to wait before moving, while defendants could move at any time, created a double standard; but the solution to that arguable inequity is not to equalize leave to file summary judgment motions before an opponent may be ready, since that amounts to a thumb on the scales favoring summary judgment-seeking defendants. Furthermore, although trial courts can still use Rule 16 to postpone summary judgment when circumstances warrant, and under proposed Rule 56(d) can defer or deny a motion filed too early, proposed subsection (a) likely will force many nonmoving plaintiffs to respond to summary judgment motions before they can conduct enough discovery to obtain the support they need for the responses that proposed subsection (c) requires. The Rule should not authorize, or appear to authorize, so severe a degree of duress on nonmoving plaintiffs in the guise of leveling the playing field.

D. Balance of time and resources during summary judgment proceedings.

Proposed Rule 56(b) would allow the movant—usually the defendant—to take months to prepare a summary judgment motion, and limit plaintiffs to 21 days to respond. This is better than the allowance of as little as ten days under current Rule 56(c) (14 days under the Committee's proposed time computation revisions), but still not adequate even if the defendant's statements of undisputed facts are clear and correct.

Counsel for movant defendants and nonmovant plaintiffs are compensated differently and operate under opposite incentives. Defendants' attorneys are typically paid by the hour for all

contingent preparations in litigation. Plaintiffs' counsel are typically compensated only if the client prevails, either by contingent fee or under federal fee-shifting statutes. Thus the more time-consuming the tasks that are imposed on counsel in civil cases, the more remunerative is a defense-oriented practice and the less efficient is a plaintiff-oriented practice, with obvious adverse consequences to the already distorted balance of power and resources between the two sides. The rule should acknowledge this gap in time and resources and should permit nonmovants to challenge the number of fact statements the movant has filed, or the materiality of the facts adduced, before a full response is required.

Proposed subsections (c)(3) and (e)(2) preserve the court's discretion to deem certain facts undisputed, and to limit such deeming to the motion only, both of which AAJ much prefers to more rigid alternatives; but proposed Rule 56(g) allows the court to deem a fact established in the case, and proposed Rule 56(f)(3) even allows the court to grant summary judgment based on it, thus taking away much of what is given in subsection (e)(2)'s recognition of the relative flexibility of current "deeming admitted" practice.

The current proposal uses "should," where the pre-Style Project Rule had "shall" with regard to the court's power or duty to enter summary judgment. Some still argue for a conversion to "must." AAJ believes, given the concerns just described, that reducing trial judge discretion to deny summary judgment from little to zero in any circumstance would be a profound and dangerous mistake.

E. Sua sponte summary judgment.

Not least among AAJ's concerns is the proposed Rule 56(f)(3) language explicitly giving trial courts discretion to launch summary judgment proceedings *sua sponte* just by notifying the parties and "identify[ing] . . . material facts that may not be genuinely in dispute." The parties know their cases far better than the court, but this provision would invite courts to substitute their pretrial suppositions about the facts for the parties' own, developed through discovery that typically is not filed with the court. Notwithstanding this narrow window a court has on the facts, a judge's written invitation to a defendant to move for summary judgment, and the resulting pressure from the client to do so, would typically be difficult for defense counsel to resist. The codification of such would add greatly to whatever cost and delay the parties judged they could handle before the court intervened.

Overall Conclusions about the Proposed Rule

Greater flexibility, not greater rigidity, is needed in summary judgment practice. Trial court judges need, and should be encouraged to use, the discretion to deny summary judgment simply because the procedure does not promise to streamline litigation. A summary judgment motion identifying a hundred purportedly uncontested facts, in a case that would take two days to

try, is not likely to conserve resources.[30] An obvious consequence is that the rule must continue to permit, but not require, the issuance of a summary judgment.

Summary judgment originally was not intended for cases that presented questions juries normally answer, and originally it was not intended to deprive of plaintiff of the prerogative of deciding how best to shape the evidence, of how to present facts to most persuasively suggest inferences that can be made. The importance of those functions has been well-recognized by the Supreme Court. Trial judges require the flexibility to assure that plaintiffs are not deprived of them by resort to summary procedure.

Thank you for this opportunity to comment.

Sincerely,

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Enclosure

[30] *See*, Schneider, supra 6, 59 Rutgers L. Rev. 705, 776 ("But efficiency goals are clearly not met by the new practice of summary judgment—more time might be spent on the processes of summary judgment than might be spent at trial.")

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January 23, 2008

Via Federal Express Standard Overnight (Tracking No. 792492711373)

The Hon. Mark R. Kravitz
The Hon. Michael Baylson
c/o Rules Committees Support Office
Administration Office of the US Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Delivered electronically to Rules_Comments@ao.uscourts.gov and by overnight delivery to chambers

Re: Rule 56

Dear Judges Kravitz and Baylson:

I wanted to thank you for your invitation to the November meeting regarding Rule 56 and, in advance of your next meeting, to amplify two critical concerns about summary judgment: its effects on litigants and its effects on the development of the law.

Trials, once seminal events in the lives of communities, have become demonized. Our language about them has changed. A trial is now a failure, a waste of resources, a thing to be avoided at all costs. We have lost the idea that a trial is an exercise in direct democracy, and are losing the traditional respect bench and bar have shown for the value an individual citizen attaches to their right to their day in court.

A trial – especially for a plaintiff in an employment discrimination case, the kind of case about which Joe Cecil's research raises special concerns – is a way for the plaintiff to ask the community to judge whether she has been wronged.

A trial is an opportunity for a plaintiff to tell a story. Stories are powerful, more powerful than the recitation of a list of uncontested facts. Such a list is, at most, the bones of a story. The proposal under consideration by the Committee invites decisionmaking on merely the bones of stories.

Such decisionmaking yields three undesirable consequences. Each time a judge grants summary judgment, a plaintiff is deprived of the right to tell a story. This right is the core of the right to petition protected by the First Amendment.

Each time a judge grants summary judgment, the community is deprived of an opportunity to formulate and apply norms of conduct. The Seventh Amendment was propounded to avoid that result.

Each time a judge grants summary judgment, the law is developed on the basis of scant records that do not reflect the fullness of a story well told. These uncontested facts – uncle kills father, marries mother; everyone thinks son is crazy; son goes on a killing spree – sound more like daytime television than *Hamlet*.

The law well knows that the best rules of law reflect the nuanced experience of the citizenry, and the law well knows that factual findings are best made by persons who see witnesses and discern nuance. Written transcriptions – the kind of evidence commonly relied on in summary judgment motions – do not convey the full meaning of the testimony of a witness.

Federal judges now average only three civil jury trials per year and only nineteen total trials per year, civil and criminal, jury and bench.[1] If the lesson of the law is experience, we should be especially wary of any proposal that further distances the federal judiciary from listening to the stories, in all their complexity, of the citizenry.

Empirical research shows that, at best, detailed recitations of assertedly uncontested facts burden litigants and have little effect on outcomes. At worst, they create a systematic bias against civil rights plaintiffs. They undermine the longer term values embraced in the Seventh Amendment and in its precursors in state constitutions. From the perspective of real persons, it is hard to see any value in them.

I thank you for your attention and I look forward to continuing to work with you.

Very truly yours,

John Vail

Cc: to chambers, via overnight delivery
The Hon. Lee Rosenthal

[1] Based on *2006 Report of the Director: Judicial Business of the United States Courts*, http://www.uscourts.gov/judbus2006/contents.html, Table C-7 (12,6612 trials, 2097 civil jury trials), Table X-1A (674 judgeships). .