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Subject Proposed amendments to Federal Rules of Civil Procedure

The Committee invites comments on the question whether summary judgment "must" or only "should" be granted when the conditions of Rule 56 are met.

The right word to use is "must," for two reasons.

First, granting summary judgment whenever there is no material dispute of fact holds down the expense of litigation. Some judges (both district judges and magistrate judges) prefer to deny summary judgment and let the case go to trial--for at least one party will be satisfied by the jury's outcome, both parties may appreciate bring heard out, and the verdict may spare the court the need to decide the motion. But the judge does not bear the extra legal costs that the trial creates or suffer the delay that other litigants waiting in the queue must endure. Saying that the judge "must" grant justified motions will ensure that savings are achieved.

Second, whenever a rule says that a judge "should" or "may" do something, there is a potential appellate issue. Did the judge abuse his discretion in using this power? Using "should" in Rule 56 would set up an argument along the lines of: "True, the evidence at the time of summary judgment was insufficient to support a verdict for the party opposing the motion, but the district judge nonetheless should have denied the motion because that party might have come up with additional evidence by the time of trial, and because the trial would have been short." That is not an argument that appellate litigants should be allowed to make, or appellate courts to address.

The final sentence of Rule 56(a) also should use must, so it would read: "The court must state on the record the reasons for granting or denying the motion." Stating reasons for a grant is essential; it is usually the terminating order. (Even for a partial grant, reasons will help counsel plan the rest of the case.) Reasons are essential for an order denying a motion to dismiss on qualified-immunity grounds or any other time the decision is subject to interlocutory appeal; when reasons are not essential to an appellate they still may help counsel handle the rest of the case efficiently. The discussion section at page 96 of the August 2008 booklet observes that reasons may be clear without explanation; why force a court to state the obvious? That's true, but when the reasons *are* obvious a sentence or two will do. The problem with using the word "should" in the rule is that it authorizes the judge to keep silent even when the reasons are *not* obvious. No one should assume that a power to grant or deny a motion without comment will be used only when the reasons are self-evident.

Some stylistic reactions. The phrase "no material dispute as to any material fact" (page 77 lines 4-5 of the August 2008 booklet) makes me cringe. See Fowler's *Modern English Usage* or Garner's *Modern Legal Usage* on this misuse of "as to". The right word is "about".

In Rule 26(a)(2)(B)(iv), line 26 at page 49 of the booklet, the word "authored" appears as e verb. "Author" is a noun. Use of this word as a verb is becoming more common, but it is not standard

usage and is inappropriate for formal writing, such as a rule of procedure. This word survived the re-stylization but should be fixed now. It is also imprecise: Suppose an expert witness writes in 1996 a scholarly paper that is published in 1998. When the expert prepares a list of publications, is this included (because it was published during the last ten years) or excluded (because written, or "authored," more than ten years ago)? The subsection should read: "the witness's qualifications, including a list of all books and articles published during the previous ten years." The change from "publications" to "books and articles" is not necessary for grammar, though "publications published during..." would be ungainly. More important, "publications" has been made ambiguous by technology. Is a blog posting a "publication"? If the expert runs his own blog, is the whole blog perhaps a publication even though it includes contributions of others? I don't see any need for experts to list their informal work, such as blog posts, op-ed pieces, and the like; it is the scholarly or technical work that matters.

A sentence in the amended Rule 26(a)(2)(D) [line 46 at page 50] begins: "Absent a stipulation..." This use of "absent" is an archaic legalism that should not be employed in modern writing. See Fowler or Garner. I thought that it had vanished with the re-styled rules. Don't allow it to creep back in. Perhaps this particular use slid by under the radar (the re-styling project couldn't catch everything. There are three such constructions in the current rules: Rule 11(c)(1) (final sentence), Rule 26(a)(2)(C) (soon to be Rule 26(a)(2)(D)), and Rule 37(e). All three should be changed to an "except" or "unless" clause.

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