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December 15, 2008

08-CV-131

Mr. Peter G. McCabe
Secretary of the Committee on Rules of
Practice and Procedure of the Judicial
Conference of the United States
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 56

Dear Mr. McCabe:

I am the Chair of the Commercial and Federal Litigation Section of the New York State Bar Association. Enclosed for consideration by the Advisory Committee on the Civil Rules is a copy of a Report on Proposed Amendments to Rule 56. This report was adopted over one dissent by the New York State Bar Association Commercial and Federal Litigation Section on December 9, 2008.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc. Peter Brown, Esq
Chair, Commercial and Federal Litigation Section

REPORT ON PROPOSED AMENDMENTS TO RULE 56

SUMMARY

The Advisory Committee on Civil Rules has proposed a completely reorganized Rule 56 of the Federal Rules of Civil Procedure with the goal of updating and improving the procedure on summary judgment motions without changing the standards for granting summary judgment. The Section supports the proposed changes, although it believes there should be some clarification that the standard has not changed concerning the determination of the admissibility of material relied on by the parties at the summary judgment stage. In addition, the Section also finds that the use of the language "should," rather than "must," comes closest to preserving the previous standard under "shall" for granting summary judgment.

THE PROPOSED AMENDMENTS

The Advisory Committee has stated that the purpose of the proposed amendments to Rule 56 is:

> [T]he Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be neutral as between plaintiffs and defendants. The aim is a better Rule 56 procedure .[1]

Proposed Rule 56(a) states the standard for granting summary judgment currently in Rule 56(c). It reads, in part: "The Court *should* grant summary judgment if there is no genuine *dispute* as to any material fact and a party is entitled to judgment as a matter of law." (Emphasis added.) This

[1] *See* Report of the Civil Rules Advisory Committee, dated May 9, 2008, as supplemented June 30, 2008, at 21.

statement changes "genuine issue" into "genuine dispute," but no change in the standard is intended.[2] The proposed Rule also continues the use of the verb "should" in place of "shall" (the word used until the stylistic amendments of 2007), although the Advisory Committee has specifically invited comment on changing "should" to "must "[3]

Proposed Rule 56(b) sets out the three components of summary judgment motion practice – motion, response and reply – and the timing for them.[4]

Proposed Rule 56(c) details the procedure. The motion is to identify the part of each claim or defense on which summary judgment is sought, and the movant is to submit a brief and a statement of undisputed material facts justifying summary judgment.[5] In response, the nonmovant must file a brief and a statement that accepts or disputes in whole or in part each fact in the movant's statement and may identify additional material facts that preclude summary judgment [6] In reply, the movant must respond to any additional facts stated by the nonmovant and may file a brief [7] The statements must be supported by citation to materials in the record, including depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers or other materials [8] Statements may also be supported by a

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[2] *Id* at 22.

[3] *Id* at 23-25, 27.

[4] *Id* at 27-28

[5] Proposed Rule 56(c)(2)(A) *Id* at 28-29.

[6] Proposed Rule 56(c)(2)(B). *Id* at 29

[7] Proposed Rule 56(c)(2)(C). *Id* at 29-30

[8] Proposed Rule 56(c)(4)(A)(i). *Id.* at 30. This is broader and more specific than current Rule 56(c) which references "the discovery and disclosure materials on file[ ] and any affidavits "

showing "that an adverse party cannot produce admissible evidence to support the fact."[9] "A response or reply to a statement of fact may state that the material cited to support or dispute the fact *is* not admissible in evidence "[10] (Emphasis added.) The use of "is" might be interpreted to require the material submitted on summary judgment to be admissible at the time of the motion, rather than requiring that the material need only be admissible at trial.

Proposed Rule 56(d) continues the practice in current Rule 56(f) of allowing the nonmovant to demonstrate reasons why it cannot present facts essential to justify its opposition.[11]

Proposed Rules 56(e), 56(f) and 56(g) set out a court's options. When a party fails to comply with the requirements of proposed Rule 56(c), a court may: (i) remind the party to respond or reply properly; (ii) consider a fact undisputed; (iii) grant summary judgment; or (iv) issue any other appropriate order.[12] A court may partially grant the relief requested by identifying facts that will be treated as established in the case.[13] After notice and allowing a reasonable time to respond, a court may consider summary judgment on its own, grant summary judgment to a nonmovant, or decide summary judgment on grounds not raised by the parties.[14]

Proposed Rule 56(h) restates current Rule 56(g) concerning the court's power to impose sanctions for affidavits submitted in bad faith or solely for delay, although it changes "must

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[9] Proposed Rule 56(c)(4)(A)(ii) *Id.* at 31.

[10] Proposed Rule 56(c)(5). *Id* at 31.

[11] *Id.* at 32.

[12] Proposed Rule 56(e). *Id* at 32-33.

[13] Proposed Rule 56(g). *Id* at 33.

[14] Proposed Rule 56(f). *Id*

order" to "may order" sanctions to reflect actual experience.[15]

ANALYSIS OF THE PROPOSED AMENDMENTS

Material Considered Need Only Be Admissible At Trial

Proposed Rule 56(c)(5) should be changed to state: "A response or reply to a statement of fact may state that the material cited to support or dispute the fact *could not be reduced to a form* admissible in evidence *at trial*." (Emphasis added.) This change should prevent a misinterpretation of the proposed Rule to be that material considered on a motion for summary judgment must be in admissible form at the time the motion is considered rather than by the time of trial

In *Celotex Corp v. Catrett*, Justice Rehnquist wrote·

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(e), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.[16]

Most courts have interpreted this statement and Rule 56 to mean that material may be considered on a summary judgment motion, if it could be reduced to an admissible form at trial, even if the material were not submitted in admissible form on the motion.[17] Some courts have read

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[15] *Id* at 33-34, 40

[16] *Celotex Corp v Catrett*, 477 U.S. 317, 324 (1986).

[17] *See Trevizo v. Adams*, 455 F 3d 1155, 1160 (10th Cir 2006) ("'[t]o determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury' in some form" (quoting *Argo v Blue Cross & Blue Shield of Kansas, Inc* , 452 F 3d 1193, 1199 (10th Cir. 2006))), *Fraser v Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."), *Santos v Murdock*, 243 F.3d 681, 683 (2d Cir 2001) ("[a]ffidavits

this statement more narrowly, emphasizing the last sentence quoted above to conclude that only materials listed in Rule 56(c) can be in a non-admissible form on a summary judgment motion.[18] However, even with this narrow interpretation, it should be clear that materials listed in present Rule 56(c) do not have to be in admissible form on summary judgment. "Parties may, for example, submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in admissible form."[19]

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submitted to defeat summary judgment must be admissible themselves or must contain evidence that will be presented in an admissible form at trial"); *Gleklen v Democratic Cong Campaign Comm , Inc* , 199 F.3d 1365, 1369 (D C Cir. 2000) ("[w]hile a nonmovant is not required to produce evidence in a *form* that would be admissible at trial, the evidence still must be capable of being converted into admissible evidence" (emphasis in original)), *Eisenstadt v. Centel Corp* , 113 F.3d 738, 742 (7th Cir 1997) ("[s]ome courts have, it is true, allowed letters, articles, and other unattested hearsay documents to be used as evidence in opposition to summary judgment . provided some showing is made (or it is obvious) that they can be replaced by proper evidence at trial"), *McMillian v Johnson*, 88 F.3d 1573, 1584 (11th Cir 1996) ("[w]e read this statement [from *Celotex*] as simply allowing *otherwise admissible* evidence to be submitted in *inadmissible form* at the summary judgment stage, though at trial it must be submitted in admissible form" (emphasis in original)), *U S Dep't Hous & Urban Dev v Cost Control Mktg. & Sales Mgmt of Va , Inc* , 64 F.3d 920, 926 n 8 (4th Cir. 1995) (in *Celotex*, "the Supreme Court held that the nonmoving party could defeat summary judgment with materials capable of being reduced to admissible evidence at trial"), *J.F Feeser, Inc. v Serv-A-Portion, Inc* , 909 F 2d 1524, 1542 (3d Cir. 1990) ("Fed R.Civ P 56(e) requires the production, at the summary judgment stage, of evidence '"as would be admissible at trial" . and thus "reduc[ible] to admissible evidence"'" (quoting *Williams v Borough of West Chester*, 891 F 2d 458, 466 n.12 (3d Cir 1989))), *Fin Timing Publ'ns, Inc v. Compugraphic Corp* 893 F 2d 936, 942 (8th Cir. 1990) ("[a] party . must show that admissible evidence will be available at trial to establish a genuine issue of material fact")

[18] In *DuPlantis v Shell Offshore, Inc* , 948 F 2d 187, 191-92 (5th Cir. 1991), the Fifth Circuit wrote. "It has long been settled law that a plaintiff must respond to an adequate motion for summary judgment with admissible evidence . . [I]n context, it is clear that the Supreme Court [in *Celotex*] meant merely that full depositions were not required, and that other documents listed in Rule 56(c), such as 'answers to interrogatories, and admissions on file, together with affidavits,' could suffice." *See also Tinsley v Gen Motors Corp* , 227 F.3d 700, 703 (6th Cir 2000) ("although the evidence produced by the nonmoving party need not necessarily be 'in a form that would be admissible at trial,' *Celotex* . . ., it is well established that hearsay evidence cannot be considered by a trial court ruling on a motion for summary judgment"); *Garside v Osco Drug, Inc.*, 895 F 2d 46, 49 (1st Cir. 1990) ("a mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax")

[19] *Argo*, 452 F.3d at 1199, *see also Eisenstadt*, 113 F.3d at 742 ("affidavits and depositions, which (especially affidavits) are not generally admissible at trial, are admissible in summary judgment

To avoid any misinterpretation that proposed Rule 56(c)(5) has changed the standard on summary judgment to require only admissible evidence to be considered on motions for summary judgment, proposed Rule 56(c)(5) should be changed to make clear that material considered on summary judgment need only be reducible to a form admissible in evidence at trial. This suggested change is also more consistent with the expanded list of materials that may be considered on summary judgment in proposed Rule 56(c)(4)(A)(ii) to explicitly include "documents, electronically stored information . . . or other materials," none of which on their face at the time of a summary judgment motion would necessarily be in admissible form, even though there may be a demonstrable expectation that by the time of trial their admissibility could be established

"Should" Not "Must"

Prior to December 1, 2007, Rule 56(c) directed that "[t]he judgment sought *shall* be rendered forthwith if . . [there is a] show[ing] that there is no genuine issue as to any material fact " (Emphasis added.) The stylistic amendments of the rules changed the language in Rule 56(c) to: "The judgment sought *should* be rendered . . .." (Emphasis added.) This change was made in accordance with the stylistic principle: "Banish *shall*. . . . *Shall* is notorious for its misuse and slipperiness in legal documents."[20] (Emphasis in original.) The Advisory Committee Note to the 2007 amendments to Rule 56 stated:

> "[S]hall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that

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proceedings to establish the truth of what is attested or deposed").

[20] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure (February 2005), at xviii.

there is no genuine issue as to any material fact. *Kennedy v Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728.

The Advisory Committee has now invited comment on whether the change from "shall" to "should" in current Rule 56(c) should be further changed to "must."[21] We believe the present formulation is better, adequately preserves the competing interests involved and is most consistent with the law described in the 2007 Advisory Committee Note describing the stylistic change.

To the extent that "shall" in the original Rule 56(c) was meant to be mandatory, that is not how courts applied the rule, as the Advisory Committee Note to the 2007 amendments points out. If experience taught the courts to ignore a mandatory rule in practice, it would be expected that the same good reasons that caused courts to exercise discretion in the past would cause them to ignore a similar mandatory rule in the future. Rather than cause courts to discreetly break the Rule, it is better to honestly acknowledge that there may be circumstances where a savvy court would not grant summary judgment by using the verb "should" in the Rule. Courts should have some discretion in not granting summary judgment in situations where concerns regarding case management or timing of settlement discussions or trial suggest that a delay in granting or a refusal to grant summary judgment might cause a matter to be resolved more efficiently and efficaciously. Similarly, concerns about the eventual admissibility at trial of evidence, discussed above, might be a reason to delay or deny summary judgment on the record before the court at the time of the submission of the motion. Moreover, the slight additional discretion embodied in the word "should" compared to the word "must" is unlikely to result in judges failing to dispose of cases on

[21] *See* Report of the Civil Rules Advisory Committee, dated May 9, 2008, as supplemented June 30, 2008, at 23-25, 27.

summary judgment that deserve such disposition. Courts' self-interest in disposing of cases on their dockets should not be discounted.

Further, although there may be concern that use of the imperative "must" must be used to prevent judges from delaying decision on valid motions for summary judgment in hopes of settlement,[22] there is no empirical evidence presented as proof for this proposition, and we feel it is unlikely that most courts would continue to lavish valuable resources in delaying decision on legitimate candidates for summary dismissal.

However, neither should courts be discouraged from attempting to settle cases immediately after summary judgment motions have been briefed, as that may be the most opportune time to reach settlement when both sides' facts have been fully disclosed and the risk of one side losing must be weighed against the cost of trial. A standard that would discourage courts from trying to resolve cases short of formal adjudication seems unwise.

Then too, use of the word "must" without a specific deadline to decide the motions are likely to do nothing to actually speed those recalcitrant or overworked jurists who are unable or unwilling to make a decision.

Nor do we feel that the suggestion of a possible distinction between requiring that a court "must" grant summary judgment as to all claims but only requiring a precatory "should" where fewer than all claims are resolved is tenable [23] The standards should be the same for granting

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[22] *Id* at 24

[23] *See id.* at 25

partial or full relief to a movant.[24]

The Section concludes that the modal "should"" makes the most sense, conveying an obligation for a court to dispose of cases where trial would be useless, but preserving needed discretion to manage a court's docket while balancing fact-sensitive issues important to litigants on a case-by-case basis.

CONCLUSION

The New York State Bar Association Commercial and Federal Litigation Section supports the proposed amendments to Federal Rule of Civil Procedure 56 to modernize the procedure for summary judgment while not changing the standard. In that vein, the Section suggests that proposed Rule 56(c)(5) be modified to state, "A response or reply to a statement of fact may state that the material cited to support or dispute the fact *could not be reduced to a form* admissible in evidence *at trial*," rather than "is not admissible in evidence." In addition, the Section supports continuing to use "should," not "must," in describing when a court is to grant summary judgment under the standard stated in proposed Rule 56(a)

New York State Bar Association
Commercial and Federal Litigation Section

December 9, 2008

[24] *See* proposed Rules 56(g) and 56(a)