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08-CV-160

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Opposition to Proposed Amendments to Fed. R Civ. P. 56(c)

Dear Mr. McCabe:

I have read Professor Stephen Burbank's January 28th letter to you in opposition to the proposed amendments to Fed R. Civ. P. 56(c). I have been a trial lawyer (at a time when there were trial lawyers who tried cases in open court), taught civil procedure for almost four decades, and written extensively about procedural reform in the nineteenth and twentieth century and about the Federal Rules. I concur with Professor Burbank's opposition in every respect. I would, though, like to emphasize three points.

1) The amendments to the Federal Rules continue to add steps to the process. We have had multiple additions since the original rules, such as mandatory disclosure near the time of commencement, discovery conference, discovery plans, expert disclosure, pre-trial conference, pre-trial disclosures, potential Rule 11 motions. Local Rules add still other steps and papers. Each of these steps has the realistic potential of increasing time and expense. This amendment would add another set of documents when there is a summary judgment motion, with no empirical support which I have seen that would realistically suggest increased efficiency or accuracy. The opposite is more likely. It will be regrettable if the Advisory Committee continues to propose adding to the already burdensome federal civil litigation process in a way that discourages litigants with meritorious claims but scant resources.

2) The amendments would continue the trend of replacing oral advocacy and trial in open court with disposition by documents. I suspect, as Professor Burbank's letter suggests, that it will aid in placing one more nail in the coffin of the constitutionally protected trial by jury. I hope there are still members of the Advisory Committee who see value in oral advocacy, trial in open court, and the American jury trial.

3) Professor Burbank, correctly in my view, cautions restraint in adopting steps that add to judicial power and discretion, and urges judges to be aware of their own limitations and unavoidable prejudices. Deciding summary judgment motions, as Professor Burbank and Professors Kahan, Hoffman and Bramin warn, often inherently calls for subjective determination of what is a sufficiency of evidence and what inferences to draw from evidence. Judges, like all humans, cannot be perfectly neutral, try as they may. Justice Benjamin Cardozo beautifully explains this judicial predicament:

> "... Of the power of favor or prejudice in any sordid or vulgar or evil sense, I have found no trace, not even the faintest, among the judges whom I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is

> revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties." B. Cardozo, *The Nature of the Judicial Process* 174, at 175 (Yale Paperbound, 1961, 1st ed. 1921).

At a time when a newly elected president has urged a sense of community, it would be particularly unfortunate to take a wholly unnecessary step that might well help undermine the right to jury trial, one of the few remaining citizen opportunities to join in a government-sponsored communal exercise. I urge the Advisory Committee to reject the proposal for amending Rule 56(c).

Very truly yours,

Stephen N. Subrin
Professor of Law