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08-CV-163

February 6, 2009

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

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

Dear Mr McCabe:

We offer the following comments for consideration by the Advisory Committee on Civil Rules with respect to the referenced proposed amendment to Rule 56(c).

Our firm has approximately 720 lawyers, the majority of whom practice in the Ninth Circuit from offices in Seattle, Bellevue, Anchorage, Portland, San Francisco, Menlo Park, Boise, Los Angeles, and Phoenix. We also have offices with strong federal court litigation practices in Chicago, Madison, Denver, and Washington, D.C. Our work spans the breadth of federal court litigation and includes labor and employment, antitrust, securities, constitutional, patent and intellectual property, criminal defense, and products liability law.

Those of us who have signed below are experienced, senior litigation partners in our firm from a dozen different cities who collectively have hundreds of years of experience across a vast array of federal court practice areas Many of us are actively involved in firm management, national and local bar associations, and other professional associations. We all are keenly interested in the proposed amendments your Committee has under consideration, and we all have abundant experience briefing and arguing summary judgment and other dispositive motions before our federal judges around the country.

We unanimously urge the Committee not to adopt the proposed Fed R Civ. P 56(c) amendment that would require all parties to provide separate statements of undisputed facts in connection with any motion for summary judgment Having thought about the issue, and the pros and cons of such an amendment, we individually and collectively have concluded that the proposed amendment should not be adopted. We believe that the proposed rule change would

substantially increase the burden and expense of summary judgment proceedings with no meaningful or identifiable benefit to either the presiding judge or to any party to the proceeding

With regard to a fair assessment of the potential benefits of such a rule change, we find ourselves in total agreement with the views expressed unanimously by the bench of the Western District of Washington as set forth in the enclosed letter authored by Chief Judge Robert S. Lasnik and signed by every other district judge and magistrate judge in the Western District. We believe that the imposition and burden on litigants and their counsel would be even greater than the impediments that Judge Lasnik ably identifies in his letter as likely to impact the sitting judge who hears such a motion brought in conformity with the proposed rule change.

We hope that our input on this important matter is of some interest and assistance to the Committee as you go about your important work.

Very truly yours,

Harry H Schneider, Jr., Seattle

David J. Burman, Seattle

Thomas L. Boeder, Seattle

Kevin J. Hamilton, Seattle

Steve Y Koh, Seattle

Kathleen M O'Sullivan, Seattle

Clark R. Nichols, Bellevue

James N. Leik, Anchorage

Paul T. Fortino, Portland

Richard C Boardman, Boise

David P. Chiappetta, Menlo Park

John S. (Jay) Rossiter, San Francisco

Jason A. Yurasek, San Francisco

William H. Emer, Los Angeles

David J Harth, Madison

Patrick M. Collins, Chicago

Benjamin S. Sharp, Washington, D.C.

Paul F. Eckstein, Phoenix

Leonard H. MacPhee, Denver

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURTHOUSE
700 STEWART STREET
SEATTLE, WASHINGTON 98101

ROBERT S. LASNIK
CHIEF JUDGE

(206) 370-8810

January 23, 2009

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

Re: Proposed Amendment to Federal Rule of Civil Procedure 56(c)

Dear Mr. McCabe.

This letter is submitted for the consideration of the Advisory Committee on Civil Rules as it evaluates the proposed amendments to Federal Rule of Civil Procedure 56(c). I write on behalf of the district judges and magistrate judges of the Western District of Washington who unanimously join in the following comments.

Proposed Rule 56(c), with its point-counterpoint procedure, should not be adopted. Requiring parties to provide separate statements of undisputed facts may seem uncontroversial or even obvious in the context of a summary judgment motion. In practice, however, such a procedure is often counterproductive, costly, and unnecessary.

Consider a fairly simple motion for summary judgment in an employment discrimination case. Under the current rules, the opening paragraphs of the motion generally set forth the basics of the dispute -- the parties, dates of employment, organizational hierarchy, job description, and the first hint of conflict. The parties rarely cite to the record for these matters because discovery has shown that they are not in dispute. The handful of facts that are truly contested becomes clear through the exchange of coherent narratives and a few well-chosen pieces of evidence.

Under the proposed rules, however, the moving party's burden of production is far greater. Each factual contention must be set forth in a separately numbered paragraph, and evidence supporting each contention must be provided even if the contention is undisputed. The cold enumeration of facts makes it very difficult for a party to present its narrative in context or to argue for reasonable inferences. The opposing party is even more disadvantaged by the proposed procedure Its ability to tell its story is severely hampered because it must address the

facts in the order chosen by its opponent, with its facts tacked on to the end of the list. In addition, the opposing party will undoubtedly feel the need to address each numbered contention, whether important or not, in part because that is what lawyers are trained to do and in part because there is a legitimate fear that failing to counter even irrelevant factual contentions could be considered a waiver later in the litigation. The exhaustive lists of "facts" generated by the parties under the proposed rule will themselves become an issue, with collateral fights regarding what is truly undisputed, what is relevant to the issues raised in the motion, and what statements should be stricken. It is the considered opinion of this Court that the addition of formalistic lists to existing motions practice will neither further the efficient resolution of disputes under Rule 56 nor promote the interests of justice.

A number of judges in this district have presided over cases utilizing the point-counterpoint procedure. Our experience with this cumbersome form of motion practice has been consistently unsatisfactory. relatively simple summary judgment motions are presented in separate, but duplicative, documents accompanied by boxes of unnecessary "evidence" regarding undisputed facts. Over the years, we have revised our local rules to avoid just such duplication and waste. Parties in the Western District of Washington are required to file a single moving paper, to comply with strict page limits, and to provide pinpoint citations to the record whenever necessary to meet their burden. The existing procedural rules are both efficacious and cost-effective. The proposed amendment to Rule 56(c), on the other hand, will impose additional costs on the parties and require greater judicial resources to review and resolve summary judgment motions. The judges of this district respectfully request that the Advisory Committee reject the proposed amendment to Rule 56(c) and continue to allow district courts to manage the formatting and presentation of motions in a manner befitting local practices and needs consistent with the pronouncement in Rule 1 that the civil rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding,"

Sincerely,

Robert S. Lasnik
Chief United States District Judge

Barbara J. Rothstein
United States District Judge

Marsha J. Pechman
United States District Judge

Ronald B. Leighton
United States District Judge

Ricardo S. Martinez
United States District Judge

James L. Robart
United States District Judge

Richard A. Jones
United States District Judge

Robert J. Bryan
Senior United States District Judge

Franklin D. Burgess
Senior United States District Judge

J. Kelley Arnold
United States Magistrate Judge

Mary Alice Theiler
United States Magistrate Judge

Brian A. Tsuchida
United States Magistrate Judge

Benjamin H. Settle
United States District Judge

Carolyn R. Dimmick
Senior United States District Judge

Thomas S. Zilly
Senior United States District Judge

John C. Coughenour
Senior United States District Judge

Karen L. Strombom
United States Magistrate Judge

James P. Donohue
United States Magistrate Judge