NEW YORK
CITY BAR

08-CV-173

COMMITTEE ON FEDERAL COURTS

WENDY H SCHWARTZ
CHAIR
599 LEXINGTON AVENUE
FLOOR 28
NEW YORK, NY 10022
Phone (212) 549-0272
Fax (212) 521-5450
wschwartz@reedsmith.com

CASEY D LAFFEY
SECRETARY
599 LEXINGTON AVENUE
FLOOR 28
NEW YORK, NY 10022
Phone (212) 549-0389
Fax (212) 521-5450
claffey@reedsmith.com

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BY E-MAIL AND OVERNIGHT COURIER

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comment to Proposed "Point-Counterpoint" Amendment to Rule 56

Dear Mr. McCabe:

On behalf of the New York City Bar Association, I write to express our views on the portion of the proposed amendments to Rule 56(c) of the Federal Rules of Civil Procedure that contemplates a "point-counterpoint" exchange of statements of undisputed (or disputed) facts as part of a motion for summary judgment. We believe that this additional layer of procedure is unnecessary and would prove to be more burdensome than useful. Moreover, since individual judicial districts and judges already can choose (and have chosen) whether or not to adopt such a procedure, there is no need for a uniform, national rule.

The Association is one of the oldest and largest local bar associations in the United States, with a current membership of over 23,000 lawyers. The Association serves not only as a professional association, but also as a leader and advocate in the legal community on a local, state, national and international level. The Association pursues its advocacy through the work of over 160 committees, including a Federal Courts Committee, a Litigation Committee, and a Judiciary Committee. Among other activities, the Association's committees prepare comments for legislative bodies, regulatory agencies and rule-making committees on pending and existing laws, regulations and rules that have broad legal, regulatory, practical or policy implications. Further information regarding the Association can be found at its web site, http://www.nycbar org.

Our members regularly practice in the two federal judicial districts that encompass New York City: the Southern and Eastern Districts of New York. Since at least the early 1960s, both districts have adopted a local rule requiring a separate "point-counterpoint" exchange of statements similar to what is contemplated by proposed Rule 56(c). *See* S.D.N.Y and E.D.N Y. LOCAL CIV. R. 56.1; *Fund-Del, Inc. v Quigley*, 196 F. Supp. 339, 340 (S.D N.Y 1961) (citing

Rule 9(g), the predecessor to Rule 56.1). The Second Circuit has observed that the purpose of this rule is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001).

In our experience, the rule often does not create the efficiency contemplated and is instead counterproductive. In many cases, the moving party simply repeats most if not all of the facts and citations already stated in its memoranda of law and/or affidavits. Since these statements may not lend themselves to a simple "admit" or "deny," the opposing party may feel compelled to respond to the statements with a more fulsome explanation, which may be similar or identical to the opposition memorandum. And, for the same reasons, the "reply" statement may look quite similar to the reply memorandum of law. The end result is a parallel track set of duplicative summary judgment papers that is unnecessarily burdensome for attorneys and which imposes unnecessary costs upon clients. Judges may find such duplicative submissions cumbersome and pointless. In our experience, many judges in the Southern and Eastern Districts of New York resolve summary judgment motions without appearing to rely upon the mandatory "point-counterpoint" statements from the parties.

We recognize that the proposed amendment to Rule 56(c), and the similar local rules already adopted, aspire to something very different—an exchange of documents that concisely focuses the parties' and the court's attention on the important facts that may be disputed (or not disputed) and the evidence (or lack of evidence) regarding those facts. But this is often not how it works in practice, and there is no mechanism set forth in the proposed rule to force attorneys to use the procedures in this way.[1] Attorneys who are conscientious enough to utilize the "point-counterpoint" procedures as the proposed amendments contemplate are likely conscientious enough to make clear in their memoranda of law both their factual points and the evidentiary support for those points.

More generally, we believe it is easier for attorneys drafting summary judgment motions, and easier for judges reading them, when arguments are presented in regular paragraphs and prose within a memorandum of law—as would be the case in any other type of motion—rather than the

[1] The proposed amendments give district judges wide flexibility to implement and enforce the procedures set forth in proposed rule 56(c). In particular, proposed rule 56(c)(1) allows for judges to make "case-specific procedures" in lieu of the default procedures set forth in the rule, and proposed rule 56(e) gives judges the freedom issue any "appropriate order" in response to a party's failure to comply with the procedures. These provisions reflect a strong deference to individual judges, which raises the question, discussed *infra*, of whether a uniform rule is even necessary in the first place. Moreover, the utility of the proposed procedures is severely undercut by the fact that enforcement of their terms is not mandatory. *Compare* PROPOSED FED R. CIV. P. 56(e) (stating that, in response to a party's noncompliance, court "may" deem facts "undisputed for purposes of the motion" or "issue any other appropriate order") *with* S.D.N.Y and E.D.N.Y. LOCAL CIV. R. 56.1 (facts "will be deemed to be admitted *for purposes of the motion* unless *specifically* controverted") (emphasis in original).

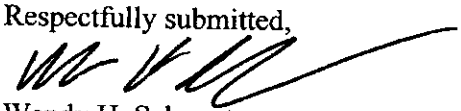
artificial construct of "point-counterpoint" submissions. The "point counterpoint" submission has no comparative advantage because, in either type of submission, the attorney maintains the obligation to bring to the court's attention the facts that it believes are disputed or undisputed, and any supporting evidence. *See, e.g., Wiltshire v Dhanraj*, 421 F. Supp. 2d 544, 550 n.5 (E.D.N.Y. 2005) (noting that "'[j]udges are not like pigs, hunting for truffles buried in briefs'" and that "[m]emoranda of law are submitted precisely to relieve the court of the burden of scouring an entire record . . in search of an argument, sentence, or turn of phrase that will save the day") (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

Separately, we do not believe there is any reason for a uniform, national rule on this issue. This type of procedure has been around (at least in New York federal courts) for over forty years, and many other courts have adopted similar rules. But other courts, perhaps for the same reasons discussed above, have chosen not to adopt such a procedure, despite its long lineage. These include the large federal district courts based in San Francisco, Philadelphia, Houston and Denver. The rule in the Northern District of California (San Francisco) is particularly noteworthy because it affirmatively prohibits such statements, unless ordered by the individual judge N.D. CAL. LOCAL CIV. R. 56-2(a). Likewise noteworthy is the rule in the District of Colorado (Denver), which requires a statement of undisputed facts to be incorporated within the opening submission (not as a separate filing), and which does not require numbered paragraphs or corresponding responses. D. COLO. LOCAL CIV. R. 56.1. (Judges in these districts are of course free to adopt their own procedures, including procedures similar the proposed Rule 56(c). *See*, e.g., Individual Practices of Judge Thomas M. Golden, E.D. Pa., § 5(e) (adopting "point-counterpoint" summary judgment procedure).

The fact that these districts have apparently considered the "point-counterpoint" procedure and decided on something different shows that there is no national consensus that the procedure is useful. There is thus no reason to force litigants to produce "point-counterpoint" statements in cases before judges or courts who do not find these submissions useful, nor is there any reason to force a particular type of nationalized "point-counterpoint" procedure upon courts and judges that have different preferences. In other words, courts and judges should continue to be entrusted to decide on what types of summary judgment papers they prefer to receive.

For these reasons, we urge the Rules Committee not to adopt the proposed "point-counterpoint" amendments to Rule 56(c). We thank the committee for its consideration of our comments.

Respectfully submitted,



Wendy H. Schwartz
Committee Chair