



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON ADMINISTRATION OF JUSTICE

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08-CV-176

Via E-mail

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

Re: Proposed Amendments to Federal Rules of Civil Procedure 26 and 56

Dear Mr. McCabe:

The State Bar of California's Committee on Administration of Justice (CAJ) has reviewed the proposed amendments to Federal Rules of Civil Procedure 26 and 56 and appreciates the opportunity to submit these comments.

I. Rule 26

CAJ believes that the portion of proposed new subdivision (a)(2)(C)(ii) requiring disclosure of the "facts" to which the witness is expected to testify is too broad, as it may require the disclosure of facts that are unrelated to the expected expert opinion. There may, for example, be an individual who is expected to testify as both a percipient witness and an expert witness. CAJ believes the key under this subdivision is disclosure of the *basis* of the expected opinion (which presumably would include any facts upon which the expected opinion is based). CAJ therefore recommends that proposed new subdivision (a)(2)(C)(ii) be amended to read as follows: "a summary of the ~~facts and~~ opinions to which the witness is expected to testify and the expected basis and reasons for those opinions."

CAJ supports the other proposed amendments to Rule 26 for the reasons stated in the Advisory Committee report.

II. Rule 56

Rule 56(a)

CAJ supports retaining the current language that the court "should" grant summary judgment, for the reasons given by the Advisory Committee, and because "should" allows for the limited discretion recognized by the case law.

Rule 56(c)

CAJ supports the proposal to require a separate statement of undisputed facts. CAJ believes that separate statements are beneficial for the reasons given by the Advisory Committee, that a uniform federal rule for separate statements is desirable, and that the “opt-out” provision makes appropriate allowance for judges who choose to order a different procedure. A minority of our members, however, believe that the decision whether to require a separate statement should be left to local rules and/or individual judges and that there should be no uniform federal rule requiring separate statements

Rule 56(g)

Proposed new subdivision (c)(3) would allow a party to accept or dispute a fact for the purpose of the summary judgment motion only. As the Advisory Committee notes, allowing parties to choose which facts to challenge has the potential to make the summary judgment process far more efficient: Parties can avoid addressing exhaustive or unnecessary lists of facts, while focusing their own arguments – and importantly, the court’s attention – on those facts that are important, material, and most case-determinative.

Proposed new subdivision (g) would allow the court, if it does not grant all the relief requested by the motion, to determine that a material fact is not genuinely in dispute and is established in the case. The Advisory Committee notes that a conditional acceptance for the purpose of the summary judgment motion only, under subdivision (c)(3), should not provide the basis for an order under subdivision (g) determining that the fact is established in the case. The Advisory Committee asks, “Is this relationship so apparent that there is no need for additional drafting?” CAJ believes that the answer is no, and that language should be added to subdivision (g) to make it clear that a conditional acceptance under subdivision (c)(3) cannot provide the basis for an order under subdivision (g) that a material fact is not genuinely disputed and is established in the case.

CAJ believes that proposed new subdivision (g) is intended to apply solely to *facts*, and not to issues, claims, or defenses, and that the provision would authorize the court to enter an order establishing material facts as true regardless of whether the moving party requested that relief in its motion. If so, the title, “Partial Grant of the Motion,” may be somewhat confusing because it seems to evoke a partial summary judgment motion, which can be granted as to “all or part of a claim or defense” under new subdivision (a). CAJ suggests that the title be changed to more accurately describe the provision, such as, “Order Establishing Material Fact.” CAJ believes that the language “including an item of damages or other relief” in subdivision (g) could be construed to refer to something other than facts, and suggests omitting that language. CAJ also suggests that the reference to “facts and issues” in the proposed note to subdivision (g) (“The court may conclude that it is better to leave open for trial facts and issues . . .”) be changed to only “facts” to avoid any suggestion that the provision provides for establishing issues, as distinguished from facts.

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Rule 56(e)

CAJ supports the proposed amendments, for the reasons stated in the Advisory Committee report.

Disclaimer

This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Reuben A. Ginsburg, Chair
The State Bar of California
Committee on Administration of Justice