UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA **08-CV-090**

MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure
Honorable Mark R.Kravitz, Chair, Advisory Committee on Federal Rules Procedure

FROM: Honorable Claudia Wilken, on behalf of the U S. District Court for the Northern District of California

REGARDING: Proposed Amended Rule 56(c)
DATE: December 11, 2009

I write on behalf of the active and senior judges and magistrate judges of the Northern District of California to address the proposed change to Rule 56(c) of the Federal Rules of Civil Procedure, which would mandate point-counterpoint statements of undisputed facts on motions for summary judgment. At a regularly scheduled court meeting on December 9, 2008, the judges present voted unanimously to authorize me to communicate to the committees the views expressed in this memorandum. I would appreciate it if it could be circulated to the members of the Standing Committee and of the Advisory Committee on Civil Rules I would be pleased to testify on the subject at the Advisory Committee's hearing in San Francisco on February 2, 2009. As a district, we have experience working with a rule of this kind, and subsequent experience without it. We offer our views based on that experience.

From at least 1988 until 2002, our district's local rules required that motions for summary judgment be supported by a statement of material facts not in dispute. In practice, moving parties filed such statements in support of their motions in addition to their memoranda of points and authorities, which in turn contained statements of fact. The memoranda were required to comply with our page limitation, but the statements of undisputed fact were supernumerary, lengthy and formalistic. Opposing parties frequently filed objections to the proffered undisputed facts, and sometimes their own statements of purportedly undisputed facts, again, in addition to the statements of facts in their opposition memoranda of points and authorities Of course, further objections and replies followed, often creating confusing and meaningless semantic disputes. We found these efforts to identify undisputed facts duplicative, time-consuming and counter-productive to an understanding of the issues

A complex narrative cannot be effectively told in a list of undisputed facts There may be facts that are disputed, where the disputes are not dispositive but are necessary to an understanding of events And, most importantly, the responding party cannot meaningfully communicate its version if it must do so, as would be required in the amended Rule, in a list of disputed facts corresponding in order to the moving party's rendition of undisputed facts, again, without the context of disputed but important facts Because the opposing party must respond to the moving

party's facts in order, the opposing party's undisputed facts must be told, out of chronological order, at the end of the list.

Further, a case whose disposition relies on inference cannot be well explained in formal lists of facts. Reasonable inferences arise from the synthesis of facts, and two different reasonable inferences can arise from the same facts. Even the nomenclature of undisputed facts is counter-intuitive. often the ultimate facts are legitimately disputed, due to competing reasonable inferences from underlying facts

For these reasons, in a major local rule revision in 2002, our district provided that, unless required by the assigned Judge, no separate statement of undisputed facts would be received. Instead, the parties would submit their respective statements of facts as part of, and within the page limitations of, their memoranda, and support their statements of facts with citations to declarations, authenticated documents and discovery excerpts. Since this rule change, we have found the summary judgment motion practice to be much improved. The complex circumstances of a case can best be expressed in a narrative statement which addresses the incontestable facts, in the context of all of the facts necessary to explain the events, in a meaningful chronology To be sure, the statement of facts must be documented with citations to declarations, documents and discovery excerpts so that it can be verified Replacing such a narrative, or supplementing it with a duplicative, formalistic list of facts subject to semantic dispute does not contribute to efficiency or understanding

Lawyers have and will express the inefficiencies and expense that proposed Rule 56(c) would cause them and their clients; we address here only our experience with judicial efficiency and understanding We are happy with our decision to abolish this requirement and do not wish to go back. We are hopeful that our experience with both procedures will be helpful to the committees in deciding whether to impose such a requirement nation-wide Without the requirement, judges or districts who prefer such statements may still order them without being inconsistent with the rule, but those who do not want them will not be subjected to them

Thank you for your consideration