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Summary of Expected Testimony of Mr. Carlos Rincon
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Thoughts on Amending Rule 56

I would like to testify to the proposed amendments to Rule 56 of the Federal Rules of Civil Procedure Considering the body of work that this Honorable Committee has undertaken in this process, the perspective that I hope to bring is simply that of a practitioner in West Texas that finds Federal Court dockets extremely crowded with criminal cases. Consequently with federal judicial resources as burdened as they are in our region, I believe that adoption of rules and procedures that focus and streamline procedures are important and extremely critical.

My practice is dedicated to the defense of corporate organizations in civil cases, primarily tort litigation. I represent the railroad, trucking and manufacturing industries and also represent entities that are involved in cross border commerce in El Paso and Ciudad Juarez, Mexico.

I favor the amendment of the summary judgment rule 56 to include the "must" language relative to the Court's granting of a summary judgment when the case is appropriate for dispositive relief. I also view the "point/counter-point" concept as an effective means to focus Courts and counsel on the material issues in a case and would thus favor a change that would make that a requirement.

Relative to each of these issues, I offer the following brief summary of what I intend to speak to in San Antonio next week:

A "Must" versus "Should"

The prior testimonials, both written and on pod casts have been an invaluable source of information relative to the competing views for this and the subsequent issue. As I consider my remarks, I believe that one of the primary arguments that has been offered against the inclusion of the "must" language is the general concern that too many cases are being disposed of by summary judgment and that somehow the right to a jury trial is being unfairly abrogated.

The mechanism of summary judgment practice is to flush out from the system those cases that are not meritorious enough to warrant a jury trial. There are certainly cases that fit that bill. In this regard, some of what I have heard in opposition to the "must" language can be more accurately

construed as an attack on summary judgment practice as a whole. The sentiment being that summary judgment practice in federal court is inherently unfair to plaintiffs because so much of what plaintiffs rely on depends on assessing the credibility of a witness and matters that are inherently grey, such as motive or intent, that can only be fairly adjudicated from the witness stand and jury box.

In response, I would say that just like all cases are not suited for trial by jury, not all cases are proper for summary judgment and when material issues of fact exist on the issues which form the basis of the summary judgment motion, then those matters can be simply in a response which would include controverting affidavits that can adequately raise the existence of issues of material fact. I do not share the view that adding the "must" language will result in summary judgments being granted in cases where they should not be.

I agree with the assessment that the verbiage of "should" opens the door to discretion even in cases that as a matter of law require dismissal. The net result is to leave undeserving cases on the docket, which unfairly increases litigation expenses and unfairly drives up the costs of settlements on defendants in civil cases.

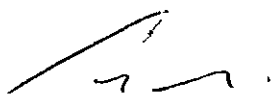
B. "Point-Counter/Point"

The proposed point-counter/point procedure is a mechanism that would preserve and establish a more efficient summary judgment practice. This procedure would force litigants to narrow the issues in the case and point to the record for the support of each contention This process forces the litigants and their counsel to remain focused and to properly address the key issues in the case. Additionally, by highlighting what truly is at issue based on the case record, the parties are on notice of what truly is critical in a case and it affords the parties a sense of transparency in understanding what the Court construes as being more significant in a pending case

C. Conclusion

I believe that these proposed amendments are solid ideas to improve and make more efficient the summary judgment practice. Again, much of what I have heard in opposition to these proposals are not ideas to make the summary judgment practice more efficient but rather to limit its use and effect. I believe that the summary judgment practice is a critical part of our legal system. There are simply some cases that are "law" cases that must be ruled upon by the Court and should not reach a jury. In my opinion, these amendments will make the summary judgment practice more efficient and should therefore be implemented

Respectfully,



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