United States District Court
Western District of Wisconsin
Robert W. Kastenmeier Courthouse
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

08-CV-123

Chambers of
Barbara B. Crabb
District Judge

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Peter McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the United
States Courts
Washington, DC 20544

Re Proposed Amendment to Fed. R. Civ P. 56

Dear Mr McCabe:

As the committee evaluates the proposed amendment to Rule 56, I would like to weigh in with a few questions and comments about the proposed changes, starting with what seems to be the controversial one, subsection (c)

Our court uses a procedure very much like the one set out in the proposed subsection and I find it very helpful in dealing with summary judgment motions Yes, the process can be daunting, particularly in patent suits and class actions, but it does seem to cut through the chaff. However, and this is a big "however," I would not like to see the procedure written into the Federal Rules For the very reasons noted by the committee in its report, I think it better to continue to let the individual courts serve as laboratories in this respect, rather than impose a set way of doing things on all courts.

As other courts have noted, this procedure is not the only one that can be effective in getting at the genuine disputes in cases. Some courts are satisfied with requiring a stipulated list of undisputed facts, supplemented by a list of those facts that are disputed Others see merits in confining the proposed facts to the briefs, so long as each "fact" is supported by a citation to the record

So long as each court makes it clear to the litigants what its expectations are, I'm not convinced that litigants are affected adversely by not having a consistent federal rule on the subject Certainly, the adverse effect is not so great as to offset the difficulty courts might experience if required to use a "one size fits all" approach, whatever their own preferences and the needs of their cases

I turning then to some of the other proposals. Subsection (e) gives the court four options in the absence of a compliant response or reply, one of which (2) is to consider a fact undisputed for the purposes of the motion Another (3) is to grant summary judgment if the motion and facts considered undisputed show that the movant is entitled to it

I don't see (2) as having any purpose independent of (3) Why else would one consider a fact undisputed but for the purpose of deciding the motion? To avoid misleading litigants and particularly the uncounseled litigants who make up so much of our summary judgment practice, I would combine (2) and (3) so that it is clear that the court will not only consider the fact undisputed but may proceed to grant summary judgment for the movant on the basis of that undisputed fact and others

In subsection (f), it is not clear to me what kind of notice would be required in order to grant the motion for the nonmovant. Would it be sufficient to have a local rule or procedure saying that the court has the authority to grant judgment to a nonmovant whenever the moving papers support doing so? Or would it be necessary to pause between deciding the motion and making it public to give specific notice to the litigants that the court might grant judgment to the nonmovant? Does notice have to come from the court and does it have to be anything more than the losing party's being "on notice that she had to come forward with all her evidence?" Celotex Corp. v. Catrett, 477 U S 317, 326 (1986)

Finally, in subsection (g), what does the committee contemplate would be the relationship between facts treated as "established in the case" and (c)(3), which talks of accepting or disputing a fact either generally or for purposes of the motion only?

Thank you for this opportunity to comment on the proposals

Very truly yours,

/s/

Barbara B Crabb
District Judge

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