Civil Rules Advisory Committee
February 2, 2009
San Francisco

08-CV-142

Testimony of Chief Judge David F. Hamilton
Southern District of Indiana

Proposed Amendments to Rule 56

Thank you for the opportunity to speak at this hearing If adopted, the changes you are considering will affect the daily work of district judges, their staffs, and attorneys. I believe the proposed changes may well affect outcomes — and certainly will affect time and expense — in tens of thousands of civil cases every year. I appreciate the careful attention you and your staff are giving to these technical, arcane, and yet very important details of federal civil procedure.

Let me explain why I am here. As the saying goes, good judgment comes from experience, and experience comes from bad judgment. In 1998, motivated by many of the concerns that seem to be driving the proposed national rule — especially the "point-counterpoint" feature — the Southern District of Indiana experimented with a local rule similar in many ways to the pending national proposal. We experienced some significant problems and made substantial changes in 2002 If the Civil Rules Advisory Committee intends to move forward with the proposed national change, I offer these observations and suggestions based on the experience of our court and our bar with that rule. I hope the Committee and the nation can learn from our mistakes and experience.

Limits on "Point-Counterpoint" Submissions: When we first adopted the requirements for "point-counterpoint" statements of material facts, we required that they be filed as separate documents, as the pending proposal would. A significant problem emerged quickly. The separate "point-counterpoint" documents provided a new arena for unnecessary controversy. We saw huge, unwieldy, and expensive presentations of hundreds of factual assertions. Those assertions then became the focus of lengthy debates over relevance and admissibility. By the end of the briefing, the complete documents often ran to 100 pages or more in routine cases. [examples] Lawyers were too often using the statements and responses to argue every conceivable evidentiary objection and point of relevance — sterile objections and trivial arguments that would never be made in a trial. Junior associates seemed to treat the statements as a kind of graduate course in evidence law, one in which the challenge was to identify all available objections. These objections and arguments were made on paper simply because they could be. In substance, what happened was an exponential increase in motions to strike, all presented in these elaborate statements and responses. The result was far from the goal of Rule 1, the just, speedy, and inexpensive determination of civil actions.

Although we were troubled by these developments, our court was reluctant to abandon the "point-counterpoint" rule entirely We had seen benefits in the clarity of

a similar provision if you go forward with the changes. If you are reluctant to add that to the rule itself, then please, at the very least, add an advisory note reminding district courts that they have discretion to excuse failures to comply strictly with the rule when doing so would serve the purposes set out in Rule 1. That will help promote just resolution of cases and will help discourage some of the sterile collateral motions practice that can grow up around such rule changes.

Must v. Should: I know this is an issue drawing great attention. I offer a couple of thoughts. First, when the rules say a court or a party "must" do something, I expect there to be consequences for failure "Must" therefore seems to imply an intent to provide for some form of appellate review, either by appeal or mandamus, for denials of summary judgment. I doubt the Committee intends to go in that direction. Keeping in mind the proverbial boy who cried "Wolf!", as a general matter of rule drafting, I do not believe "must" should be used when there are no consequences for failure to comply.

Second, I believe "should" is strong enough, especially in light of the institutional incentives that are present. I do not know district judges who are going out of their way to look for additional work — by trying cases, for example, in which they clearly should have granted summary judgment. But we all see cases in which summary judgment presents a close question, especially in cases that present what my colleagues and I like to call "genuine issues of material law." If I grant summary judgment, I might be affirmed on appeal, but the legal issue is close to a toss-up When cases go up on appeal from a summary judgment, the summary judgment standard often requires the appellate court to consider a highly artificial and even hypothetical set of facts, or even two or more sets of hypothetical facts where there are cross-motions. In those close cases, I think it's helpful to have the option of a trial, where shaky testimony can be knocked down, rather than to force the appellate courts to develop the law based on improbable testimony.

Asking for More Discovery: I understand that the Committee has been urged to have sympathy for non-movants who hedge their bets and say, in essence, "the court should deny the motion, but if the court is inclined to grant it, I would like more time to conduct some additional discovery." See proposed Rule 56(d). I have no problem with the current Rule 56(f) option of asking for more time instead of responding immediately But if an alternative response is a permissible response to a motion for summary judgment, I expect it will become the standard response. And it will increase dramatically — perhaps nearly double — the existing workload for courts and the time and expense that attorneys, and parties spend on summary judgment motions In response to the original motion and briefs, the court will first have to provide an advisory opinion. Then the court will have to wait for several months while the non-movant conducts more discovery and the parties re-brief the case. The court will then need to re-learn the case and issue a second and "real" decision. Please — make clear that this is not a permissible response. The Committee should close the door to such alternative responses that would allow the non-movant to force the court to decide the motion twice.

Again, thank you for your hard work on these technical but important issues, and thank you for the opportunity to appear before you. I would welcome any questions you might have, now or at a later time.

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For the convenience of those who might be interested in these suggestions, I have attached below the current of text of Local Rule 56.1 of the Southern District of Indiana

Southern District of Indiana Local Rule 56 1 - Summary Judgment Procedure

(a) Requirements for Moving Party. A party filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56 shall serve and file a supporting brief and any evidence not already in the record upon which the party relies. The brief must include a section labeled "Statement of Material Facts Not in Dispute" containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue. These asserted material facts shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence either already in the record or contained in an appendix to the brief. Such citation shall be by page or paragraph number or similar specific reference, if possible; this citation form applies to all briefs filed under this rule.

(b) Requirements for Non-Movant. No later than 30 days after service of the motion, a party opposing the motion shall serve and file a supporting brief and any evidence not already in the record upon which the party relies. The brief shall include a section labeled "Statement of Material Facts in Dispute" which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment. These facts shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence either already in the record or contained in an appendix to the brief.

(c) Reply Brief. A party filing a motion for summary judgment may file a reply brief no later than 15 days after service of the opposing party's submissions.

(d) Surreply. If, in reply, the moving party relies upon evidence not previously cited or objects to the admissibility of the non-moving party's evidence, the non-moving party may file a surreply brief limited to such new evidence and objections, no later than seven days after service of the reply brief.

(e) Effect of Factual Assertions. For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party's "Statement of Material Facts in Dispute" by admissible evidence; are shown not to be supported by admissible evidence; or, alone, or in conjunction with other admissible evidence, allow

reasonable inferences to be drawn in the opposing party's favor which preclude summary judgment. The Court will also assume for purposes of deciding the motion that any facts asserted by the opposing party are true to the extent they are supported by admissible evidence. The parties may stipulate to facts in the summary judgment process, and may state that their stipulations are entered only for the purpose of the motion for summary judgment and are not intended to be otherwise binding. The court has no independent duty to search and consider any part of the record not specifically cited in the manner described in sections (a) and (b) above.

(f) Collateral Motions. Collateral motions in the summary judgment process, such as motions to strike, are disfavored. Any dispute regarding the admissibility or effect of evidence should be addressed in the briefs.

(g) Oral Argument or Hearing. All motions for summary judgment will be considered as submitted for ruling without oral argument or hearing unless a request for such is granted under Local Rule 7.5 or the Court otherwise directs.

(h) Notice Requirement for Pro Se Cases. A party moving for summary judgment against an unrepresented party must file and serve a notice that:
(1) briefly and plainly states that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of material fact; and
(2) sets forth the full text of Fed. R. Civ. P. 56 and S.D. Ind. L.R. 56.1; and
(3) otherwise complies with applicable case law regarding required notice to pro se litigants opposing summary judgment motions.

(i) Compliance. The Court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule.

Local Rule 56.1 amended effective July 1, 2008 Previous amendments adopted July 1, 2002, January 1, 2000, April 30, 1999, and December 17, 1998.