NELA
National Employment Lawyers Association

08-CV-143

January 27, 2009

Mr. 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
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C 20544

Dear Mr. McCabe and Members of the Rules Committee:

I write on behalf of the National Employment Lawyers Association (NELA) to address the proposed changes to Rule 56 of the Federal Rules of Civil Procedure. We urge the Rules Committee to reject the proposed changes and offer suggestions for alternative revisions to the rule.

NELA is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on the practical realities of how the proposed changes to Rule 56 would actually play out on the ground in employment cases.

It bears noting at the outset that the vast majority of NELA members are sole practitioners or work in offices with no more than three attorneys, with generally no paralegal employees. Therefore, the efficiency and cost of opposing motions for summary judgment is of paramount importance to this group. NELA is very concerned that, as written, the proposed amendments to subsection (c) will allow (even encourage) motions which contain unrestricted statements of supposedly undisputed material facts. Several NELA members who practice in districts using the "point-counterpoint" procedure already have submitted written comments to the Rules Committee to stress the regularity with which they are required to respond to summary judgment motions that contain very lengthy, overly burdensome, abusive statements of supposedly undisputed material facts *See* October 15, 2008 statement of Joseph D. Garrison (08-CV-016) (citing examples of cases with upwards of 292 allegedly material facts), November 10, 2008 statement of Stephen Z. Chertkof (08-CV-048), December 26, 2008 statement of L. Steven Platt (08-CV-100) (citing recent case with 250 allegedly material facts); January 5, 2009

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statement of Ellen J. Messing on behalf of seven Massachusetts lawyers (08-CV-109) (citing recent case with a separate statement of facts in excess of 600 pages). I have collected several additional examples from members around the country that paint a similar picture.

- In *EEOC, et al. v. Von Maur, Inc* , No 4:06-cv-0182 (S. D. Iowa), the defendant's moving papers included 175 pages of 1,189 proposed statements of material fact, along with thousands of pages of supporting materials.
- In *Wilson v Young Windows,* No. 06-05344 (E.D. Pa.), the defendant filed 100 separate paragraphs of so-called undisputed facts, with well over 200 exhibits attached thereto, which required a 150 paragraphs-long counterstatement
- In *Gossage v Wal-Mart*, 3:05-CV-77-CAR, (M.D. Ga.) the defendant's Statement of Undisputed Material Facts was 25 pages long and consisted of 99 separate paragraphs, more than half of which were disputed by the plaintiff
- In *Wolchok v. Law Offices of Gary Martin Hayes and Assoc.*, 1:07-CV-765-CC. (ND Ga.), the defendant filed a statement of 70 alleged undisputed material facts; only 12 of the alleged undisputed facts were in fact admitted as undisputed, and the plaintiff needed to file a 46-page response
- In *Beyst v Pinnacle Airlines*, 2.07-CV-10927 (E D. Mich.), the defendant filed a statement of 85 alleged undisputed facts, requiring a 26-page counterstatement because of serious factual disputes.
- *Waggaman v Villanova University*, No. 04-CV-4447 (E D. Pa.): defendants filed a 35 page memo with narrative allegations and no numbering of undisputed facts, and a huge appendix.
- *Garner v Ward Corp* , No. 3.2005-382 (W.D. PA): 87 facts, more than half of which were denied as either disputed or immaterial.
- In *Sears v Carrier Corp* , No 3:07-CV-5-J-25MCR (M D. Fla.), plaintiff's attorney estimates that he spent more than 150 hours responding to a motion for summary judgment that alleges dozens of facts that were not truly germane to the material issues in the case.
- *Edmondson-Jackson v Molex Fiber Optics*, No. 97 C 3699 (N D. Ill). Defendant's supposed factual materials consisted of 191 pages and 548 citations to legal authority

The foregoing examples tell a story that is all too familiar to plaintiffs' emp loyment lawyers who practice in "point-counterpoint" jurisdictions. they are being submerged with such lengthy statements that the real merits of the summary judgment motion get lost in the shuffle The defendant can begin preparing such statements even while discovery is progressing, precisely noting each reference to the file The small-office plaintiff's counsel, receiving a statement with more than 100 statements, supposedly all material, has no way of responding effectively under the present amendments The risk of admitting immaterial facts as not in dispute solely for purposes of the motion places an untenable burden on the plaintiff's counsel to guess correctly that the judge will agree that the admitted facts are indeed immaterial Instead, NELA suggests that where the movant has failed to be "concise" and/or failed to state only "material" facts not in dispute, the Rule -- or at least the comments -- permit the non-moving party to move to strike the entire statement before being required to respond to any individually-listed fact. We believe that

the District Courts will have a good sense of which statements comply with the intent of Rule 56, so it would not take many rulings in each district to educate moving counsel on the proper boundaries of statements of material fact not in dispute.

A second important problem with the amended Rule is its failure to recognize that the "point-counterpoint" process does not work well for those cases where the plaintiff relies heavily on *inferences* which can be drawn from undisputed facts, and which depend on placing those facts in a broader context of other facts. In employment cases, counsel for plaintiffs often request the trier of fact to draw rational inferences from certain proven facts, and standard jury instructions allow jurors to draw such inferences. We agree with the judges of the Northern District of California (*see* 08-CV-090) that the complex narratives typical to our members' cases cannot be effectively told in a list of undisputed facts. But if the Rules Committee is inclined to adopt a "point-counterpoint" process which includes separate statements, the non-movant should at a minimum be expressly permitted to articulate the reasonable inferences that might be drawn from the listed facts, and point to other facts in the record supporting those inferences. There is no good reason for omitting this from the "point-counterpoint" process, and the drafters at a minimum should make this correction.

Third, motions for summary judgment allow cases to be framed by the party that does not have the burden of proof at trial, and even worse as the rule is presently drafted, that party gets the last word. NELA members have complained that they have been "sandbagged" by primary briefs which had provided abbreviated or unclear statements of facts or arguments, tactically written to prevent cogent or complete responses, with the Reply Brief clarifying or even adding arguments and providing additional authorities in support of those arguments As noted in NELA Executive Board member Mark Hammons' December 8, 2008 comments (08-CV-075), many circuits presently allow sur-reply briefs, or expressly limit reply briefs to the four corners of the arguments made by the non-moving party in opposition to summary judgment. NELA suggests that the tactical use of reply briefs should not be countenanced by the drafters To prevent this tactic, the Rule should specifically allow provision for a sur-reply Furthermore, the comments should make clear that both the reply and the sur-reply should be confined to responding to material in the opposing submission, and that all "new" material will be disregarded by the court.

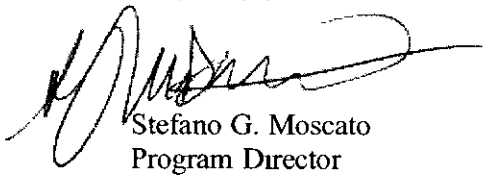
For the reasons stated above, NELA agrees with the cogent observations of the judges of the Northern District of California and the Northern District of Indiana that, as presently amended, the Rule should not be adopted NELA would, however, reconsider this position if the important changes referenced above were incorporated into the Rule and/or comments, as appropriate.

NELA also suggests that district court judges should not be compelled to rule on all aspects of motions for summary judgment, even when the motions were for partial summary judgment, by use of the word "must." NELA supports the present draft which uses "should." In our experience, these motions consume significant time for those courts confronted with them. To require the court to issue a decision on every issue, indeed every partial segment of a Motion for Summary Judgment, seems to us to be unnecessary micromanagement. To our knowledge,

there has been no outcry that federal courts have been guilty of denying summary judgment in cases where it should have been granted, particularly in employment matters. To the contrary, the empirical evidence is otherwise *See* Kevin Clermont and Stewart Schwab, Discrimination Plaintiffs in Federal Court: From Bad to Worse, *Harvard Law & Policy Review* (forthcoming Winter 2009) (available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf.) This study reveals that employment discrimination cases are far less likely to succeed at pretrial, trial and appeal than other types of cases. "The most significant observation about the district courts adjudication of these cases is the long-run lack of success for employment discrimination plaintiffs relative to other plaintiffs Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases (15%) was lower than that for nonjobs cases (51%) " *Id.* at 30. The gap in win rates between employment discrimination plaintiffs and other plaintiffs appears, for example, in pretrial adjudication. . . . Over the period of 1979-2006 in federal court, employment discrimination plaintiffs have won 3.59% of their pretrial adjudications, while other plaintiffs have won 21.05% of their pretrial adjudications." *Id.* at 31. *See also* Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007) (available at http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (study of federal court cases found that employment discrimination plaintiffs lost 73-75% of summary judgment motions, vs. a 60% rate for all cases, in 2006) If the language is rewritten as "must," will there be a genuine appellate issue that a court refused to grant summary judgment, perhaps for legitimate reasons of docket control, when "the record demanded it"? This would be a seriously adverse consequence of changing the language

We appreciate the opportunity to address the Committee Please do not hesitate to contact me should you have any questions or require additional information.

Very truly yours,



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