LEWIS BRISBOIS BISGAARD & SMITH LLP

ATTORNEYS AT LAW

ONE SANSOME STREET, SUITE 1400, SAN FRANCISCO, CA 94104
PHONE: 415.362.2580 | FAX: 415 434.0882 | WEBSITE. www.lbbslaw.com

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RALPH A. ZAPPALA
DIRECT DIAL. 415 438.6627
E-MAIL: zappala@lbbslaw.com

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VIA ELECTRONIC MAIL (rules_comments@ao.uscourts.gov)

John K. Rabiej
Chief, Rules Committee
Committee on Rules of Practice and Procedure
Administrative Office of the United States Court
Washington, D.C. 20544

Re: Hearing on Proposed Amendments to Civil Rules 26 and 56
February 2, 2009 - SFO

Dear Mr. Rabiej:

Pursuant to your memorandum dated January 8, 2009, please accept my written statement regarding the Proposed Amendments to Civil Rule 56.

I. Whether to retain the current language carrying forward the Present Rule 56 language that a court "should" grant summary judgment when the record shows that the movant is entitled to judgment as a matter of law, recognizing limited discretion to deny summary judgment in such circumstances.

Under the California summary judgment statute, California Code of Civil Procedure 437c (c) "[the] motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In contrast of Rule 56, (c) states: "The judgment sought should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

I can share my 28 years of experience as trial counsel representing both plaintiffs and defendants in personal injury, products liability, commercial, professional negligence and

wrongful termination cases. Admittedly, my practice is more weighted toward the defense, particularly where the litigants have insurance coverage for the subject matter of the lawsuits. Regardless, in both state and federal courts, I have found there is a strong incentive on the part of the litigants to carefully evaluate the merits of their cases when faced with the consequences of motions for summary judgment (and in the alternative under state practice, motions for summary adjudication).

Although there are many examples, I can describe a limited number of past experiences that serves to illustrate the benefit of a mandatory response by judges to motions for summary judgment. Many cases involve multiple parties. A summary judgment procedure with consequences (i.e., must be granted) provides an incentive for litigants to focus on the claims and defenses and related facts and law that may terminate some or all of the claims, rather than waiting for the entire matter to be tried before a jury. From a plaintiff's perspective, a sufficient record may establish some or all of the claims through summary judgment proceedings. From the defense side, legal and factual defenses to some or all the claims can be explored with the expectation that a court will grant the summary judgment motions when appropriate. Injecting too much discretion into the judge's options to deny these motions takes away the incentive for the court and litigants to get to the crux of the case.

In many instances, a pending summary judgment motion provides an incentive for resolving cases. Seeing an adversary's case presented in an orderly fashion, with evidence, is beneficial to the litigants. I cannot think of any instance where my clients were ill-served by the filing of a well prepared motion for summary judgment. An attorney is expected to protect the client's interests. Having access to an effective and predictable summary judgment proceeding serves this purpose.

For the reasons set out above, I urge the Judicial Advisory Committee to consider the benefits of mandatory language (must) in Rule 56 in place of the word "should." The term "should" is too equivocal and does not establish a meaningful statutory directive regarding the granting motions for summary judgment.

II. Proposed Procedural Changes

A. Separate Statement of Undisputed and Disputed Material Facts [Point-Counterpoint Approach to Summary Judgment]

I know based on experience, as stated above, that summary judgments offer an opportunity to better allocate a litigant's resources depending on the facts and circumstances in a given piece of litigation

The point-counterpoint procedures for summary judgment can, under the right circumstances, lead to an efficient disposition of a case and a more focused pursuit of civil discovery. A point-counterpoint summary judgment motion does in certain circumstances push the parties into recognizing what evidence exists and what evidence really matters to the case at hand.

For instance, in commercial litigation, too often general pleadings lead to expensive discovery based upon causes of actions that will not stand the test of scrutiny. I have seen unfair trade practices cases, with multiple causes of action, where one of the claims, i.e., infringement of a trademark, is eliminated by a point-counter point summary judgment/summary adjudication proceeding. The litigants and the court are spared needless protracted discovery proceedings regarding the trademark claim. Having that claim and cause removed from the litigation can save large sums of money otherwise spent on discovery

Another example in the commercial litigation setting involves an unfair trade practices lawsuit drawing a counter claim or cross-complaint for breach of contract for monies due and owing Having the ability to adjudicate sums due under the contractual relationships between the parties through the point-counterpoint summary judgment proceedings, puts the litigants in a better position to evaluate the merits of continuing the litigation on the remaining claims. A plaintiff may decide to settle the unfair trade practices claim if the counter claim decided in the defendant's favor reduces plaintiff's ultimate recovery due to the set off.

I respectfully ask that the Judicial Advisory Committee consider the merits of maintaining a point-counterpoint approach to summary judgments.

Very truly yours,

Ralph A. Zappala of
LEWIS BRISBOIS BISGAARD & SMITH LLP