THE FEDERAL PRACTICE COMMITTEE OF THE DAYTON BAR ASSOCATION

February 9, 2009 **08-CV-162**

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle NE
Washington, DC 20544

Re: Proposed Amendment to Fed. R. Civ. P. 56· Comments from the Federal Practice Committee of the Dayton Bar Association, Dayton, Ohio

Dear Mr. McCabe·

This letter is submitted in response to the request by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("the Committee") for public comments on the proposed amendment to Rule 56. We appreciate the opportunity to comment and the effort and thought that the Committee has put into the proposed amendment. While a number of the proposed revisions are welcome, there also are changes that we find problematic Our specific comments are set forth below

Subdivision(a): The Committee has invited comment on the use in subdivision (a) of "should" rather than "must." We believe that "should" does not lend itself to clarity and certainty in summary judgment practice, and that the rule text therefore should state that the court "must" grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. "Must" also is not inconsistent with the pre-2007 version of the rule, whose use of the word "shall" adequately conveyed the concept that the rule requires that summary judgment be granted when there is no genuine issue of material fact.

We do not object to the change in subdivision (a) from "issue" to "dispute." Based on the Committee Note and the Committee's detailed discussion of the changes to the rule, our understanding is that the change in wording is for clarity and is not intended to affect the applicability of the extensive jurisprudence that has developed under the "no genuine issue as to any material fact" language in current Rule 56(c)

Subdivision (c) in general. We are opposed to adopting as a uniform, nationwide rule the procedure of subdivision (c) requiring that motion papers be accompanied by a separate document listing indisputable facts and, for the non-movant, a separate statement of disputed

facts. We endorse the well-written and compelling views of Judge Sedwick and of Judge Wilken on behalf of the U.S. District Court for the Northern District of California, opposing this aspect of the proposed amendment. The District in which the attorney members of this committee primarily practice, the United States District Court for the Southern District of Ohio, has chosen not to adopt such a procedure on a district-wide basis. We believe the current rule is preferable, under which such a procedure can be adopted on a District-by-District basis via local rules to the extent a District deems that the additional filings will be useful.

Subdivision (c)(3). Assuming subdivision (c) is adopted, then we have a suggestion as to (c)(3). As other commenters have noted, this section of the rule does not address the effect of a non-moving party's failure to address in its papers a fact that the movant has listed as undisputed We therefore suggest, if the procedure of subdivision (c) is retained, that a provision be added, stating that a party's failure to dispute expressly or to accept expressly a fact that the opposing party has asserted is undisputed shall (or should) be construed by the court as acceptance of that fact for purposes of the motion only.

Subdivision (c)(5). We approve the proposed provision in (c)(5) by which a party can object to the admissibility of supporting material without filing a separate motion to strike

Subdivision (h). We approve the change that expressly recognizes, consistent with current practice, that the awarding of sanctions is a matter for the court's discretion

Very truly yours,

The Following Members of the Federal Practice Committee of the Dayton Bar Association, Dayton, Ohio

Magistrate Judge Michael R. Merz

J Steven Justice, Chairperson
(Taft Stettinius & Hollister, LLP)

Lynnette Dinkler
(Subashi, Wildermuth & Dinkler)

Donald E. Burton
(Faruki Ireland & Cox PLL)

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