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08-CV-170

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February 17, 2009

Peter G. McCabe, Secretary  
Committee on rules of Practice and Procedure  
Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, DC 20544

Re: Why I'm against the Proposed Amendments to Rule 56

Dear Mr. McCabe

I write to add my comments to those of the National Employment Lawyers Association and its members who have written and testified regarding the proposed imposition of a point-counterpoint approach to summary judgment practice. I am opposed to the proposed rule changes.

I have been practicing law for twenty years and deal with a motion for summary judgment in almost every employment discrimination lawsuit I handle.

The proposed changes will make it even more difficult for plaintiffs to be able to fully tell their stories. In an employment discrimination case, much often turns on subtleties. The point-counterpoint amendment makes it difficult for a lawyer to do his or her job, which is to *persuade*.

The proposed amendment creates additional difficulties in allowing the plaintiff to respond to a motion for summary judgment. Even when facts are set forth as "uncontested," the words used by counsel and the structure of the facts are always designed to be persuasive.

It is true that the plaintiff responding to a motion for summary judgment always has to deal with the fact that the court has first heard the plaintiff's "story" through the defendant's version of "facts." However, the point-counterpoint system makes it even more difficult for the plaintiff to adequately correct some of the subtle misconceptions because the plaintiff is forced to respond within the confines of the defendant's stated version of the story.

Essentially, the plaintiff is not allowed to tell his or her story using his or her own words. That is not fair to the plaintiff. The plaintiff should be allowed to use persuasive advocacy even when setting forth the facts---and not restricted to the point-counterpoint

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approach.

Thank you for the opportunity to submit public comment on this amendment process.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen K. Fitzgerald". The signature is written in a cursive, flowing style with some loops and flourishes.

Karen K. Fitzgerald