UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
701 East Broad Street, Suite 7310
RICHMOND, VIRGINIA 23219-3528

Chambers of
ROBERT E PAYNE
Senior United States District Judge

(804) 916-2260

08-CV-190

January 30, 2009

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Thurgood Marshall Federal Judicial Building
Washington, D.C. 20544

Dear Mr. McCabe:

This comments on the proposed amendment to Fed. R. Civ. P. 56(c).

Several years ago, our district adopted a local rule which requires that each brief in support of a motion for summary judgment must include a listing of undisputed facts with citations to the parts of the record relied upon to support those allegedly undisputed facts. The responsive brief then must include a specifically captioned section listing all material facts contended to be in genuine dispute with citations demonstrating the existence of that dispute. The local rule thereby requires that lawyers carefully identify the basis upon which they assert that facts either are or are not in dispute. My experience with the rule is that it helps focus the briefing and also eliminates inappropriate summary judgments.

However, our local rules also restrict opening and response briefs to 30 pages and rebuttal briefs to 20 pages unless a judge orders otherwise (which happens only infrequently). Taken together, the two local rules require that the statement of undisputed (or disputed as the case may be) facts be included in the briefs. In that fashion, our procedure avoids the circumstance related by Chief Judge Sedwick in his comments of October 15, 2008.

Experience here has shown that, if lawyers are allowed to file separate statements of fact with citations, they exercise no restraint and then judges are confronted with the very situation that Chief Judge Sedwick outlined. However, if there are page limitations for briefs and if the statement of undisputed facts with citations must be included within the briefs, the objectives sought to be achieved by the proposed amendment to Rule 56(c) are accomplished and the legitimate concerns presented by Chief Judge Sedwick are avoided.

Chief Judge Sedwick is correct, in my opinion, that the procedure proposed by the amendment will make the job of judges much more difficult and indeed presents the very real risk that the process of dealing with summary judgments will overwhelm judicial dockets. Moreover, there is, to my knowledge, no broad or widespread complaint that existing summary judgment practice is problematic for courts or practioners. Accordingly, I respectfully submit that the procedure outlined in proposed Rule 56(c) be deleted and that the matter be left for regulation by local rule and individual judges.

Sincerely,

Robert E. Payne

Robert E. Payne

/amh
cc: Chief Judge Sedwick
Judge Graham Mullen
Chief Judge David C. Norton
All EDVA Judges