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07-CV-021

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendments to Rule 56 of the
Federal Rules of Civil Procedure, Submitted
On Behalf of the American Medical Association
and Other Medical and Related Organizations

Dear Mr. McCabe:

Along with my co-counsel, Professor Paul Rothstein of Georgetown University Law Center, I represent the American Medical Association and a number of medical and related organizations including the American Academy of Neurology Professional Association, the American College of Obstetricians and Gynecologists, the American Academy of Otolaryngology – Head and Neck Surgery, the American Osteopathic Association, the Association of American Medical Colleges, the Medical Group Management Association and the Physician Insurers Association of America.

We have followed with interest the work of the Advisory Committee on Civil Rules toward the revision of Rule 56 (Summary Judgment) of the Federal Rules of Civil Procedure. This is to offer several suggestions, hopefully consistent with the aims of the Committee, as well as the interests of physicians across the country.

As you no doubt appreciate, physicians are frequently caught up in litigation. Notwithstanding merit affidavit requirements imposed by some states, many of the lawsuits brought against physicians are frequently dropped through summary judgment proceedings. However, such dismissals often occur only after the expenditure of substantial legal fees.

For approximately fifty years after the original enactment of Rule 56 in 1938, summary judgment was unduly difficult to obtain; old ways die hard. A trilogy of Supreme Court cases in 1986, Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 474 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex v. Catrett, 477 U.S. 317 (1986), led to a modern age in which trial courts substantially increased the availability of summary judgment. The three cases provided both doctrinal and rhetorical support to summary judgment as a means of effective case management and resolution. In this regard, then Justice Rehnquist's statement in Celotex is often quoted:

> "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action' [quoting Rule 1] . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."

Celotex, 477 U.S. at 327.

Notwithstanding the views expressed by the former Chief Justice, many trial courts remain reluctant to grant summary judgment. I am an active litigator and about a year ago I appeared in a state case in the Midwest. During a discussion with the presiding judge in chambers, I observed a sign that read "No Cussin', No Spittin', No Summary Judgment." Obviously, the sign was intended to be humorous but, at the same time, my experience tells me that it also contains a grain of truth. Summary judgment has not yet achieved the level of acceptance that it should enjoy. It needs further reinforcement.

The organizations that we represent seek further modifications to Rule 56 to hasten the resolution of cases by disposing of bad cases sooner rather than later. Such action would decrease unnecessary expenses incurred by all parties to a case, thereby benefiting both the physician and the allegedly injured party.

Rule 56 currently provides that a defending party may move for summary judgment "at any time." Fed. R. Civ. P. 56 (b). However, that promise is, by and large, illusory. More typically, a case is filed, discovery ensues for a year or two and, only

upon the conclusion of discovery, does a trial court take its first serious look at the evidence supporting claims that are asserted in the complaint. During the discovery period, tens, even hundreds, of thousands of dollars can be spent on fees and expenses.

If a party moves for summary judgment in a case prior to the completion of discovery, he or she is normally met by the invocation of Rule 56 (f), which is intended to protect the non-moving party from premature action in situations where the timely and orderly discovery of valuable information remains underway. The non-moving party cannot be expected to produce evidence that a genuine and material factual dispute exists so as to defeat summary judgment and proceed to trial, if there has not been fair opportunity to uncover such evidence. Ours is a "notice pleading" system where one accuses first and proves later. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 508 (2002). Early on in a case, the idea is not to keep litigants out of court but rather, to keep them in. Overstreet v. North Shore Corp., 318 U.S. 125, 127 (1943).

Generally, Rule 56 (f) is given a very liberal construction. *See* Gonzalez v. K-Mart Corp., 940 F.Supp. 429 (D.P.R. 1996); Elliott Assoc., L.P. v. Republic of Peru, 961 F.Supp. 83 (S.D.N.Y. 1997); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999); In re Deep Vein Thrombosis, 365 F.Supp.2d 1055 (N.D.Cal. 2005); Black v. NFL Players Ass'n, 87 F.Supp.2d 1 (D.D.C. 2000).

Rule 56 (f) provides that in the event "it appears from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment . . . order a continuance. . . or . . . make such other order as is just." However, notwithstanding the Rule's express language, a Rule 56 (f) request need not necessarily be accompanied by a sworn affidavit. *See* Hernandez-Santiago v. Ecolab, Inc., 397 F.3d 30, 35 n. 3 (1st Cir.2005) (failure to comply with affidavit rule can, in appropriate circumstances, be excused as technical error); Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir.2002) (statement, without affidavit, found adequate to satisfy rule); Cacevic v. City of Hazel Park, 226 F.3d 483, 488-89 (6th Cir.2000) (noting practice by other courts to permit Rule 56 (f) request by form other than affidavit); Stults v. Conoco, Inc., 76 F.3d 651, 657-58 (5th Cir.1996) (affidavit form not required).

Because of the relative ease in obtaining Rule 56 (f) relief, as discussed above, it appears that motions for summary judgment are most times delayed until after the close of discovery and thus, its highest and best use is undermined. To rectify the situation,

we respectfully request that the Advisory Committee, incident to its ongoing review, consider a range of possible changes to Rule 56.

One possibility might be to expressly encourage trial courts to more frequently impose plans for so-called "phased discovery," in order to uncover a perceived weakness in a case sooner rather than later. By directing, for example, that initial discovery focus on the existence of an essential element of an alleged claim or defense to a claim for a period of thirty to ninety days, it may be possible to uncover all relevant facts necessary to permit determination of an early summary judgment motion on the claim or defense, thus blunting in part the harmful implications of Rule 56 (f). *See* Bell Atlantic Corp., *et al.* v Twombley, *et al.*, 127 S.Ct. 1955 (2007) (Stevens, J. dissenting). Such encouragement could be included either in the text of the Rules or in the Notes of the Advisory Committee that accompany the Rules.

Another possibility is to require the filing of an affidavit in support of any Rule 56 (f) motion, in keeping with the practice of the vast majority of federal trial courts. *See, e.g.,* Ball v. Union Carbide Corp., 376 F.3d 554, 561 (6th Cir.2004); American Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 237 (4th Cir.2004); DiBenedetto v. Pan Am World Serv., Inc., 359 F.3d 627, 630 (2d Cir.2004. *See also* Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508 (3d Cir.1994) (noting that affidavit requirement ensures that Rule 56 (f) protection is being invoked in good faith and provides trial court with the showing necessary to assess the merits of the party's opposition to the summary judgment motion).

Yet another possibility is to amend Rule 56 to provide for mandatory sanctions, including attorney fees, whenever a trial court determines that a Rule 56 (f) affidavit has been submitted in bad faith or with the exclusive purpose of promoting delay. At least one federal court has suggested such an approach. *See* Cobell v. Norton, 214 F.R.D. 13, 20 (D.D.C.2003). In this regard, mandatory sanctions are currently imposed under the Civil Rules for failure to make discovery. Fed. R. Civ. P. 37; *see also* Interactive Products Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 700 (6th Cir.2003). Along the same line, contempt of court has been suggested by another court as an appropriate remedy for the filing of a bad-faith Rule 56 (f) affidavit. *See* Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 110 (3d Cir.1999).

We strongly support the idea that the time has come for revision of Rule 56, for the purpose of promoting consistency of practice and more effective utilization of early conflict resolution options. We are especially supportive of the pending proposal to require statements of undisputed and disputed facts by the party proposing and the

party opposing summary judgment. Similarly, the requirement for some delineation of facts or genuine issues of material fact that the Rule 56 (f) movant intends to prove or establish within the additional time allowed would be a worthwhile addition to the law.

Your consideration and public service are appreciated. Please let us know if we can be of any assistance whatsoever to your offices or to the Advisory Committee.

With kind regards, I am

Sincerely,

Kenneth A. Lazarus

cc: Judge Mark R. Kravitz, Chairman, Advisory Committee on Civil Rules
Judge Michael M. Baylson, Chairman, Subcommittee on Rule 56
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
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Michael Stinson, Physician Insurers Association of America