08-CV-039

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REGARDING PROPOSED AMENDMENTS TO FRCP 56

I have reviewed the proposed changes to Rule 56, and I agree that they do not work any substantive changes in the operation of the Rule that would make it easier or harder to grant summary judgment. I also agree that the changes will improve the operation of the Rule and bring the practice in line with the better practices in a number of districts. I do, however, have a few comments and suggestions that I have set forth below.

"Should" vs. "Must" Grant Debate: I prefer the "should" language largely for the reasons given in the invitation for comments. I would also add that, in some cases, especially those that will be tried without a jury, a judge who might believe that there were no genuine factual disputes, but thought the question was close, would find it easier to have a short trial, make the necessary findings, and send the case to the court of appeals once, instead of having the appeals court find factual disputes requiring another round in each court. I think the cautionary language is fine as is and that it makes it clear that ordinarily summary judgment should be granted if there are no material facts in dispute, but that there are rare exceptions with no disputed material facts in which a denial is still appropriate. In that connection, it is worth noting that all the incentives for the judge are to grant summary judgment, if at all reasonable to do so, and hence there is little likelihood that district judges will abuse whatever discretion they have to deny summary judgment when it should be granted. I think that including some examples of appropriate denials in the Notes would be helpful, but not essential.

Rule 56(b): This provision allows the briefing times to be varied by local rule or court order in a case. Why should the time for replying to a motion not be able to be extended by stipulation of the parties, without court approval, unless the court has set a schedule in a scheduling order in the case?

Paragraph (1) sets a time limit for filing a motion for summary judgment. I would suggest that, like in the case of an appeal and a cross appeal, additional time should be allowed either side if the other moves for summary judgment at or near the end of the time allowed (unless there is a court order setting a different time in the case).

The wording of paragraph (2) – the opposing party "must file a response" – sounds more mandatory or directive than I think is needed or intended. In a number of other places in these and other rules, the provision states that "a response may be filed" within the appropriate time frame, and everyone understands that the deadline is real. I would change "must" in line 13 to "may," and then in (3) change it to read "the movant may file a reply within 14 days after the response is served."

Rule 56(c): If the suggestions regarding must & may in (b) are accepted, similar changes would be advisable in (c)(2)(B) & (C). They would read as follows (with some minor additional stylistic suggestions designed to improve readability):

(B) *Response and Brief by the Opposing Party.* A response to a motion for summary judgment (i) must, in correspondingly numbered paragraphs, accept or dispute – or accept in part and dispute in part –each fact in the movant's statement; (ii) may concisely identify in separately numbered paragraphs additional material facts that preclude summary judgment; and (iii) include a separate brief with its contentions regarding disputed issues of law or fact.

(C) *Reply and Brief.* The movant: (i) may respond to any additional facts stated by the nonmovant, in the form provided by Rule 56(c)(2)(B)(i); and (ii) may file a reply brief."

Paragraph (4)(A) would be improved by adding in line 59 after "or" the words "that is".

I am unclear how the "showing" required by Rule 56 (c)(4)(A)(ii) is to be made, especially in the statement of material facts. Suppose one party claims that there is no support – in the portions of the record cited by the moving party or elsewhere – for a particular asserted fact. Proving ("showing") that cannot generally be done simply by citing to portions of the record because some explanation is needed. In that event, would the explanation be made in the response to the statement or in the accompanying brief? If the former, the statement would become longer and more argumentative than is generally true under existing practice, and if the latter, it would cut into pages of the brief. I agree that the opposing party should make such a showing, but I think the Rule needs to give more attention to how it is made and in what document.

Paragraphs (5) & (6). I am unclear what the relationship is between the requirement in (5) that evidence be admissible, and the requirements for affidavits & declarations in (6). I assume that no change in the existing law is intended, under which affidavits can be used to support or oppose summary judgment

provided that the affiant/declarant would be permitted to testify in court to the substance of his sworn statement. *See* page 54 (booklet 101). Put another way, although an affidavit, as such, is almost never admissible at trial, that does not bar its use at summary judgment so long as the affiant would be competent to testify to its contents. I think the confusion can be eliminated by amending (6) by adding "may be" before used and deleting "must be", and making other minor tense adjustments. It would then read as follows: "An affidavit or declaration may be used to support a motion, response, or reply if it is made on personal knowledge, sets forth facts that would be admissible in evidence, and shows that the affiant or declarant is competent to testify on the matters stated."

Rule 56(h): I generally do not favor sanctions motions, but if they are to be allowed under Rule 56, I do not think that bad faith affidavits or declarations are the problem. If there is a problem, it is that a motion for summary judgment is made (or in some cases an opposition filed) solely for purposes of delay, especially when made by defendants who have every incentive to delay. I would change "affidavit or declaration" to "motion or response". This way the court could examine the entire motion or response and determine whether, as a whole, it was justified, without having to limit is focus to one part of the factual submission.

Role of Local Rules under Rule 56: I fully support allowing judges to vary these rules, especially the timing provisions, by court orders in a given case, but I do not see any reason why local rules should be able to vary them on an across the board basis. Although the trend, a wise one in my judgment, is to reduce substantially the impact of local rules, Rule 56(b) explicitly allows local rules to vary times for filing etc. I disagree. However, I also am even more troubled by the discussion on page 38 (85 of the booklet) where in one place local rules seem to be acceptable and in other are doubtful, but with no principle against which either situation can be measured. The confusion is furthered by the references to local rules etc on pages 52-53 (booklet 99-100). If these amendments are adopted, as I hope they will be, that should be the end of local rules in this area. Practitioners should not have to learn multiple local rules; any needed variance can be adopted by a court order in a given case, but not, by local rules, or, as the Notes correctly assert, by a judge's standing orders, or whatever else they may be called.