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## Thoughts on Amending Rule 56

### A. Insert the "must grant" language mandating a grant of summary judgment

I support using the verb "must" in Rule 56(a). The summary judgment mechanics need to be as firm and as non-discretionary as possible in order for Rule 56 to work effectively. As a textual matter, the verb "must" triggers a mandatory grant of summary judgment where the record establishes that no factual issues exist and, as a matter of law, the movant is entitled to judgment. This textual treatment of Rule 56 provides a useful function, that of avoiding additional case processing where no real issues remain. No other pretrial mechanism performs this important function.

It is useful to ask what would happen to summary judgment if the word "must" is not used and the words "should grant" are retained. This choice would make summary judgment a discretionary call by vesting considerable discretion in the district judge.[1] The word "should" holds a normative meaning and connotes hoped for behavior. A dictionary definition of "should" describes an expression of what is probable or expected.[2] Unlike the mandatory and certain "must," the use of "should grant" means that the rules drafters hope the motion would be granted. A hope is much less than a wording casting a mandatory meaning. Long-time use of the "should grant" language will result in the creation of additional judge made exceptions to summary judgment grants.

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[1] See Richard Marcus, *Slouching Toward Discretion*, 78 Notre Dame L. Rev. 1561 (2003); Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 Rev. of Lit. 274, 299-301 (1991) (contrasting liberating "may" rules of procedure with non-discretionary "shall" rules).
[2] Merriam-Webster Online Dictionary

The costs of such discretion are considerable. Making Rule 56 motions discretionary would guarantee that fewer summary judgment motions would be granted and assign for trial cases that might not present factual issues. Making summary judgment discretionary would place added burdens on district judges because the movant and nonmovant would each couch their arguments in a difficult to decide, discretionary style. The likely decrease in Rule 56 grants would probably raise the price of settlements as the transactions costs of litigation increase and greater number of civil cases are tried. The cost of summary judgment would correspondingly rise, as counsel considering filing the motion would face a more complex process and may be deterred from filing by the possible likelihood of the motion's increased cost and possible denial.

Perhaps the chief reason to use the word "must" is to retain summary judgment as we know it. Without firm language mandating summary judgment upon a showing of no genuine issues of material fact, the concept of summary judgment becomes flabby and ambiguous. In Judge Diane Wood's terms, summary judgment performs a valuable "put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the facts."[3] This role would be modified substantially if the word "must" were not used. There is little reason to retain summary judgment without its present mandatory nature.

Proponents of integrating discretion into consideration of summary judgment already possess some degree of court fashioned authority allowing some discretion. Many appellate decisions opine that courts should be reluctant to grant summary judgment in specific types of cases. This refrain is seen in cases involving antitrust, civil rights, and negligence. Professors Wright, Miller and Kane assert that "cases premised on alleged violations of the constitutional

[3] *Koszola v. Board of Education of City of Chicago*, 385 F. 3d 1104, 1111 (7th Cir. 2004).

or civil rights of plaintiffs frequently are unsuitable for summary judgment."[4] Numerous cases state this reluctance to grant summary judgment in civil rights litigation. For example, the Ninth Circuit has reversed a summary judgment in a 1981 claim, asserting that "[I]ntentional discrimination cases...present precisely the kinds of complex factual questions best addressed by juries."[5]

These cases articulating case-specific reluctance to grant summary judgment already create a quantum of discretion in the Rule 56 process. In combination with the discretionary "should grant" language, such cases invite a new common-law of summary judgment at odds with the generalized norm set out in the FRCP.

There might be reason to use "should grant" if there were clear Rules Committee or practitioner intent to incorporate the reluctance to grant summary judgment in particular kinds of claims into a new, non-transsubstantive and cause of action specific type of Rule 56. No expression of such an intent exists.

Failing to use the mandatory "must" invites judge made exceptions to the trassubstantive philosophy that has guided FRCP construction since 1938. Charles Clark's idea of straightforward rules of general application has worked well for 70 years. A discretionary summary judgment rule might degenerate into special rules for particular cases and create a Rule 56 at odds with Clark's vision. As developed by Charles Clark, the Reporter of the Advisory

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[4] 10B Wright, Miller & Kane, Federal Practice and Procedure 2732.2 (3d ed. 2006).

[5] *Lindsey v. SLT Los Angeles, LLC*, 447 F. 3d 1138, 1153 (9th Cir. 2006)(reversing summary judgment in a 1981 claim brought by a fashion show presenter against a hotel). Accord, *Paraskevaides v. Four Seasons Washington*, 292 F. 3d 886, 894 (D.C.Cir. 2002) (reversing summary judgment based upon contributory negligence because the issue is "more appropriately resolved by a jury"); *Simmons v. New Public School District 8*, 251 F. 3d 1210, 1218 (8th Cir. 2001) (reversing summary judgment in a Title VII gender discrimination case because "summary judgment should be used sparingly in employment discrimination cases"); *Schwapp v. Town of Avon*, 118 F. 3d 106, 110 (2d Cir. 1997) (asserting that "we are particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question"); Brunet & Redish, *Summary Judgment: Federal Law and Practice* 290, 314-315, 372-373(3d ed. 2006) (collecting cases articulating refusal to use summary judgment in negligence, antitrust and civil rights cases but questioning this practice as inconsistent with Rule 56).

Committee in Charge of drafting rules,[6] the rules system put into place in 1938 sought to use one set of norms for all types of civil cases. Judge Clark strongly opposed allowing special rules for particular cases and put the notion of uniform rules as a preeminent ethos underlying the rules.[7] This reform, which was also supported strongly by Chief Justice Taft,[8] won the day with the Supreme Court's approval of Clark's draft set of rules in 1938. Included in the new rules was a transsubstantive Rule 56, designed to apply the same way in any type of case.

Following his appointment to the Second Circuit Court of Appeals, Clark fought his fellow Circuit judges in pursuit of an even handed application of summary judgment and motions to dismiss that ignored the specific variety of claim presented. In *Arnstein v. Porter*[9] Clark's dissent lamented the "dislike of summary judgment" that was "difficult to appraise or understand."[10] He stressed that "the clear-cut provisions of [Federal Rule of Civil Procedure]. 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable" and asserted that "summary judgment was "an integral and useful part of the procedural system envisaged by the rules."[11] Clark's opinion reversing a motion to dismiss in *Nagler v. Admiral Corp*,[12] an antitrust conspiracy claim, is noteworthy in its defense of a transsubstantive vision of adjudication. Clark insisted that antitrust cases be measured using the identical notice pleading norms as other causes of action by urging that "the federal rules contain no special exemption for

[6] Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 ( 1935). See, also, Michael Smith, Charles E. Clark and the Federal Rules of Civil Procedure, 85 Yale L.J. 914 (1976).
[7] See, e.g., Charles Clark & James William Moore, *A New Federal Procedure I, the Background*, 44 Yale LJ. 387, 388-89 ( 1935)
[8] See William Howard Taft, *Three Needed Steps of Progress*, 8 ABA J. 34, 35 ( 1922 ) (advocating a simplified and uniform procedure to be used in all types of cases).
[9] 154 F. 2d 464 (2d Cir. 1946).
[10] Id., at 479.
[11] Id. See, also, MacDonald v. Du Maurier, 144 F. 2d 696, 702 (2d Cir. 1944) ( asserting that summary judgment is "available for all—not a selected few—civil actions")(Clark, J.).
[12] 248 F. 2d 319 (2d Cir. 1957).

antitrust cases."[13] Historical research regarding Clark reveals his "satisfaction that this [*Nagler*] decision had at least temporarily halted the campaign for special pleading in antitrust cases.[14] Clark's articles written while on the bench praised the universal application of Rule 56 and criticized rules and decisions that confined summary judgment to case specific, designated categories.[15]

My analysis intentionally ignores the fact that the phrase "should grant" replaced "shall be rendered" in the vast set of Style Project changes. I ignore this change for two reasons. First, the Style Project was premised with a widely publicized promise that the amendments were stylistic only and not intended to change the rules. In a sense, the rules drafters promised that shall meant should. This is a fragile promise with a short half-life. Such a promise is easily forgotten after a year or two. Second, we have only lived with the Style Project "should" for a short period of time and have inadequate experience with the impact of this major change.

## B. The New Statement and Citation Requirements of Rule 56, While Costly, Are Helpful and Reflect Current Practice in Many Districts

The amendment to Rule 56 contains a requirement that both the moving and opposing party concisely identify material facts that support and oppose summary judgment and do so in separately numbered, pleading style fashion with citation to the record. I support this change but worry about its impact.

This change will aid district judges by allowing focus upon supporting and opposing facts. To ask attorneys to support their arguments by providing citations to the record is no great

[13] Id. at 323.
[14] Michael Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L.J. 914, 925 (1976) (citing Clark letter of Oct. 14, 1957 to Julius Abeson).
[15] See Charles E. Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 569 (1952).

imposition and requests work already done by careful counsel. Many districts have local rules that mandate this procedure and the proposed rule reflects this method and sets forth what is becoming standard practice, whether spurred by competence of counsel (who should routinely cite to the record) or the threat inherent in some local rules mandating statements of contested and uncontested facts with references to record support.

On the other hand, this procedure will be interpreted as increasing the cost of moving for and opposing summary judgment. Critics can opine that the new Rule 56(c) increases summary judgment paper work and, correspondingly, costs. They may rail about the further "bureaucratization" of federal practice and perceive this proposal as further reason to steer clear of costly federal courts.

Whether or not the above paragraph is true, The Rules Committee needs to fully assess real and imagined costs and benefits associated with proposed Rule 56(c). A segment of the nation's litigation bar already prefers state court procedures because of their brevity, simplicity and perceived lower costs. This change adds fuel to the fire in evaluating such a preference to forum shop to allegedly less expensive state courts which already share a perceived reputation as forums more hostile to summary judgment.

The present Committee Note accompanying Rule 56 proposed amendments should elaborate on the precise efficiencies achieved by the new Rule 56 (c). One paragraph of the Note, page 38, line 76, nicely contrasts the proposal with local rules that have caused the filing of lengthy documents that contain hundreds of facts and hundreds of pages. This paragraph is very helpful and might be expanded or moved to the start of the discussion of Rule 56(c). The tenor of the present note needs to mirror this important paragraph.

Several clear and important efficiencies are advanced by the proposed Rule 56(c). First, party citations to the summary judgment record save judicial time searching an unfamiliar record. Second, statements of contested and uncontested facts and accompanying record references serve to focus the issues presented and thereby aid the court. Third, opposing counsel should see the summary judgment issues with greater clarity following efforts to cite to the record, a vision that greatly facilitates case evaluation and settlement promotion. Fourth, the new Rule 56(c) helps appellate review by mandating a more tidy and transparent summary judgment record.

In conclusion, the record focus and reference proposals serve to clarify whether summary judgment "must" be granted and facilitate the efficiencies set forth in the first section of this testimony.

Respectfully Submitted,

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