

United States Court of Appeals  
Tenth Circuit  
Post Office Box 10113  
Santa Fe, New Mexico 87504-6113

Paul J. Kelly, Jr.  
Circuit Judge

Telephone  
(505) 988-6541

November 25, 2008

08-CV-071

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

Re: **Proposed Amendment to Fed. R. Civ. P. 56**

Dear Secretary:

Below are two comments regarding proposed amendment.

First, proposed R. 56(c)(3) may provide an incentive for parties to dispute more facts at trial than they would otherwise dispute. Proposed R. 56(c)(3) states that “[a] party may accept or dispute a fact either generally or for purposes of the motion only.” This language may indeed make the summary judgment process more efficient. However, it also may make the trial *less* efficient; to the extent that cautious counsel choose to accept facts solely for purposes of the summary judgment motion rather than generally. Reducing the number of facts accepted generally will, obviously, increase the number of facts that remain disputed at trial. In turn, this will reduce the effectiveness of the language in proposed R. 56(g), which provides that “[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case.”

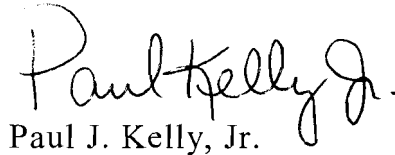
Second, the new direction in proposed R. 56(a) that courts “should state on the record the reasons for granting *or denying* the motion” (emphasis added) may imply that an explanation is warranted beyond stating that genuine disputes as to material facts remain. Certainly, it is critical for courts to state the reasons for granting summary judgment. But it is less clear that it is as critical to state the reasons for denying summary judgment, particularly if the facts at trial may change. The current language of the proposed R. 56(a) does use the word “should,” denoting that courts do retain discretion insofar as stating reasons. The Committee Note also provides that the amount of detail in the statement is left to the court’s discretion, but the next sentence (that the court need not address every available reason for denying summary

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judgment) implies that something more than a summary denial is required. It seems to me that the comment should make it clear that courts are not required to state on the record the reasons for denying a motion for summary judgment, but rather retain discretion to deny a motion summarily.

Thank you for your consideration of these comments regarding the amended R. 56.

Sincerely,

A handwritten signature in cursive script that reads "Paul Kelly Jr." with a stylized flourish at the end.

Paul J. Kelly, Jr.

PJK/rmg