08-CV-155

Testimony
Advisory Committee Hearing
on Proposed Changes to Federal Rules of Civil Procedure
February 2, 2009, San Francisco, California
Claudia Wilken, United States District Judge,
Northern District of California

I would like to start by thanking the Advisory Committee for its work on revising Rule 56 of the Federal Rules of Civil Procedure. The existing rule does very much need to be revised. As a long-time member and sometime chair of my district's local rules committee, I know how difficult it is to write a rule that is clear and fair, free of unintended ambiguity, and satisfactory to judges, lawyers and parties in many types of cases. And I know it's difficult to struggle and argue over every word and phrase, only to have commenters, who weren't involved in all that work, come forward afterwards and criticize it. So I make these comments, not to micro-manage your work at the last minute, but because our district has had long experience with a point-counterpoint requirement like that in proposed revised Rule 56(c), and experience without it, and we thought our conclusions should be passed along. I have no research or statistics to present, just the experience of judges working under both types of rule.

At a meeting of our court, the active, senior, and magistrate judges who were present voted unanimously to express to the committee our opposition to a national requirement to use the point-counterpoint format. I have already submitted a

memorandum to the committee which expressed this. I'll try not to repeat that memo but to elaborate on it a bit and answer any questions you might have. I will provide you a copy of what I intend to say today.

From at least 1988 until 2002, about fifteen years or so, our district's local rules required that motions for summary judgment be supported by a statement of material facts not in dispute. Parties moving for summary judgment filed statements of undisputed material facts in support of their motions, and they also filed briefs. These briefs contained a factual narrative and legal argument. The briefs were required to comply with our page limitation, but there was no page limitation on the statements of undisputed material fact. These statements were often very lengthy and formalistic, sounding almost like fact pleading or requests for admissions. In contrast, the factual narratives in the moving parties' briefs were more understandable, but they were repetitive of the statements of undisputed material facts.

The opposing parties would then file objections to the moving parties' statements of undisputed material facts, as well as a statement of the facts that contradicted the allegedly undisputed facts, and sometimes their own statement of purportedly undisputed facts. Very often these objections and opposing facts would really raise only semantic disputes over the way the facts were phrased. The opposing parties would also file

briefs with a factual narrative that tended to repeat their statement of disputed and undisputed facts.

The moving parties would then object to the opposing statement of facts and perhaps submit a statement of more purportedly undisputed facts and more facts to dispute the non-moving party's undisputed facts. Further complications in the statements of undisputed material facts arose if the moving party wished to claim that, although an important fact was disputed, the moving party would prevail even if the opponent's version were true. And the complications on cross motions, where the court must accept the non-moving party's statement as true for the purpose of the moving party's motion, but accept the moving party's statement as true for the responding party's cross motion--let's not go there.

As I mentioned, the factual narratives in the briefs were repetitive of the lists of undisputed facts, but I always felt that I and my law clerks had to read both, because the lists of undisputed facts didn't give the comprehensible narrative that the briefs did, but the list might have contained something important, and if we made the parties file them, we had better read them.

We found that the statement of undisputed material facts is a format that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys. Most lawyers that file briefs in our courts are well-meaning and

competent, but, as we all know, some are not. If an incompetent or game-playing attorney submits a long list of deceptively worded facts which may or may not be material, and may or may not be disputed, and may or may not be admissible, his or her opponent is forced, in an abundance of caution, not only to object to them but also to counter each of them. All in all, we found this method of trying to identify undisputed material facts to be duplicative, time-consuming and counter-productive to an understanding of the issues.

I think the underlying reason for this is that, even in the hands of an excellent attorney, a complex narrative can't be effectively told in a list of undisputed material facts. There may be facts that are disputed, that are not material because the result doesn't turn on them, but that are necessary to an understanding of events. There may be facts that are undisputed, that are not material because the result doesn't turn on them, but that are necessary to an understanding of the events. This makes a strict chronological list of only material, undisputed historical facts a poor way to communicate the story to the reader.

Under proposed Rule 56(c), the responding party's statement of undisputed facts will be even less intelligible than the moving party's because the responding party will have to submit a list of disputed facts corresponding in order to the moving party's rendition of undisputed facts. Because the opposing

party must respond to the moving party's facts in order, the opposing party's additional undisputed or disputed facts must be told at the end of the list, out of chronological order and out of context. Again, facts that are not strictly material, and that may or may not be disputed, but that are necessary to an understanding of the events, are not included. The judge and law clerk must turn to the briefs and read all of the facts again to get a coherent narrative.

Another problem with the point-counterpoint format is that a case whose disposition depends on inference cannot be well explained in formal lists of historical facts. Reasonable inferences arise from the synthesis of facts, and two different reasonable inferences can arise from the same facts. The nomenclature of undisputed facts is misleading: often the ultimate facts are legitimately disputed, due to competing reasonable inferences from underlying facts. The historical facts, and reasonable inferences from them, can better be described together in a narrative statement.

For these reasons, in 2002, our district revised our local rules to provide that no separate statement of undisputed facts would be received, unless required by the assigned Judge. Instead, the parties submit their respective factual statements in narrative form as part of their briefs and within the page limitations of the briefs. In the six years since this rule change, we have found the summary judgment motion practice to be

much improved. The complex circumstances of a case can best be expressed in a factual narrative which addresses the incontestable facts and reasonable inferences from them, in the context of all of the facts necessary to explain the events, in a meaningful chronology. Of course, factual narrative must be documented with citations to declarations, documents and discovery excerpts, which are filed along with the briefs, so that the facts can be verified by checking those documents.

The opposing party begins its brief with its own narrative factual statement, in chronological order, containing its version of the facts necessary to an understanding of the events, with citations to the declarations, documents and discovery excerpts, to counter the moving party's facts or present the non-moving party's own undisputed facts, or both. The opposing brief may also contain facts that may be immaterial or disputed but are necessary to an understanding of the events. Objections to the admissibility of the moving party's evidence are made in a separate motion to strike, or, preferably, within the brief itself. Sometimes additional facts are raised in the reply brief.

I suppose a district could set separate page limits on the statements of undisputed facts and on the briefs, or a total page limitation that includes both. But the attorneys would then either have to state the facts twice, in list form and in narrative form, using up more of their pages, or they would have

to rely on the list of facts to communicate the narrative. Neither solution maximizes efficiency and understanding for the judge and the law clerk. Districts could try setting a limit on the number of undisputed facts that could be in the list, but that would simply start an exercise in disputes as to what constitutes a single fact, versus multiple facts disguised as one.

Lawyers have written about the inefficiencies and expense that proposed Rule 56(c) would cause them and their clients, and argued that the burdens will fall disproportionately on certain types of lawyers and litigants. I will not address those issues. I want to express only judges' experience with both types of rule.

My colleagues and I are happy with our decision to abolish the requirement for point-counterpoint statements of undisputed material facts and we do not want to return to such a rule. The judges of my district are very cognizant of the value of nation-wide uniform procedural rules where that is possible. Lawyers from all over the country practice in our courts, and lawyers with their offices in our district practice all over the country. We understand the burden on attorneys of figuring out the rules of each district and each individual judge. We encourage each other not to make unnecessary differing standing orders, and we try to make sure that our local rules comply with Rule 83, that is, not duplicating or contradicting the Federal Rules. For this

reason, we hope the committee won't establish a national rule that our district and a number of others strongly oppose. Without the requirement, judges or districts who want statements of undisputed facts may order them without being inconsistent with the rule, but those who do not want them will not be required to accept them.

Thank you for your work on revising the rules.