

Summary of Statement
by Brian P. Sanford
to the Advisory Committee on the Civil Rules
Regarding Fed. R. Civ. P. 56
January 14, 2009

08-CV-156

Trials have diminished significantly in federal courts during the last generation. *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 LITIG. 2 (Winter 2004). Summary judgments are a significant factor in the decline of trials. The rules for summary judgment practice should maintain the same level of fairness and due process allowed at trial.

1. Proposed Rule 56(b)(1) should be amended to require a motion for summary judgment at least 30 days prior to and not after the close of discovery. Often, declarations or witnesses not deposed or documents not emphasized in pretrial are presented in motions. At trial, cross-examination is allowed after the additional testimony, and rebuttal witnesses may be subpoenaed. A rule allowing further discovery and examination after a motion would allow the evidence to be properly presented. Additionally, Court's would have less need to extend discovery based upon Rule 56(d).

2. The proposed rule should allow for a sur-reply. At trial, the plaintiff has the right to present her opening statement, witnesses and other evidence, and closing argument first. The plaintiff is also entitled to present rebuttal evidence and a rebuttal argument. This order of proceeding is logical because the plaintiff carries the burden of proof.

In summary judgment practice, the procedure is reversed, yet plaintiff retains the burden of proof. The defendant frames the argument and evidence first and is then allowed a rebuttal after the plaintiff's response. The centerpiece of Defendant's evidence is usually the cross-examination of the plaintiff in a deposition. The plaintiff is not allowed to present his or her direct testimony until after defendant's selection of plaintiff's cross-examination and the plaintiff is chastised if gaps are filled, and punished if there is any change in testimony. At trial, not only would the plaintiff be allowed to present her direct testimony first, but she would be allowed to explain or correct any testimony given on cross-examination.

To more closely simulate the burden of proof at trial, the court should allow the party with the burden of proof a sur-reply to a motion for summary judgment. Some courts allow a sur-reply as a matter of right without leave of court. Local Rule 7(f), U.S. District Court for the Eastern District of Texas. Additionally, a sur-reply is appropriate because oral argument is often not granted on motions in federal court.

3. The proposed rule should not require a court to provide its reasons for denying a motion for summary judgment. A summary judgment is a harsh remedy, the court has discretion to deny for reasons of credibility or fairness. A denial results in a trial. Justifying a denial is not as important justifying a judgment without a trial.