LAW OFFICE OF ALICE W. BALLARD, P.C.
1616 WALNUT STREET, SUITE 2205
PHILADELPHIA PA 19103
215-893-9990
Fax: 215-893-9997

08-CV-178

Alice W Ballard
E-mail: awballard@awballard.com
Direct Dial. 215-893-9708

Merry B Guben
E-mail: mbguben@awballard com
Direct Dial· 215-790-1947

February 17, 2009

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Why I'm Against the Proposed Amendments to Rule 56

Dear Mr. McCabe:

I write to add my comments to those of the National Employment Lawyers Association and its members who have commented on the proposed imposition of a point-counterpoint approach to summary judgment practice. Like them, I represent plaintiffs in job rights cases, so I have to answer many summary judgment motions.

I'm against the point-counterpoint amendment for the same reasons cited by NELA and its members, but I'd like to add another comment about why I think it's a bad idea.

As my Trial Practice professor said, the job of the lawyer is to *persuade*, by using theme, context, and narrative structure to tell a story that resonates with the jurors' experience. Opposing counsel is probably trying to do the same thing, but hoping for the opposite outcome.

In my experience with the point-counterpoint system, I have encountered abuses of the kind that other commenters have described. But in some motions, the listing of purportedly uncontested facts is quite persuasive, in and of itself. The facts in the listing look dry and neutral, but when you read them, they have theme, context, and a narrative structure that tells the defendant's story well.

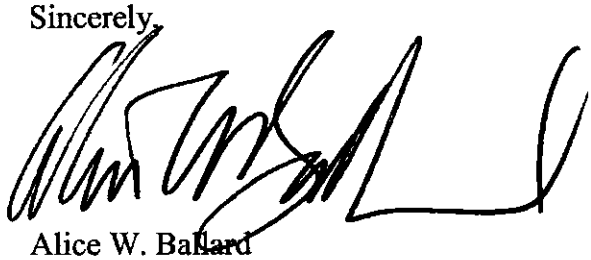
That's fine. It's good advocacy, and plaintiffs have to live with it. Even under the existing rule, the moving defendant has the advantage of primacy. That's a fact of summary judgment life. What the amendment would do, though, is add yet another persuasive edge to the moving defendant's position -- that of forcing the plaintiff to heel within the confines of the defendant's story when responding to the list. This gives the moving defendant not only

primacy, but also remote control over the context and narrative structure of the story in the plaintiff's responding submission, at least for the first ten, twenty, or perhaps even fifty pages of it. To the non-movant plaintiff, it doesn't feel fair.

Of course our judges know that at trial, the jury will hear the plaintiff's story first, the way the plaintiff wants to tell it. Yet on some level, we all believe that advocacy is effective, and one cannot dismiss the concern that the extra persuasive edge I have described will inequitably color the judge's view of how a reasonable juror will respond to the evidence. I think that the cost of injecting that concern into Rule 56 practice isn't worth whatever added utility might be gained by the amendment.

Thank you for the opportunity to submit public comment on this amendment process.

Sincerely,



Alice W. Ballard

AWB/phh