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08-CV-186

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

Re Proposed Amendments to Fed R. Civ. P 56

Dear Mr. McCabe

I write to offer my comments on the pending proposed amendments to Rule 56 on summary judgment I base my comments on 38 years of experience representing both plaintiffs and defendants in complex commercial litigation, mostly but not exclusively in federal courts I have been an active member of The American Law Institute for many years, and have participated in many of this Committee's projects including those focused on Rule 23 class actions, discovery of electronically stored information, and Rule 26 scope of discovery. I was an invited participant in the January 2007 mini-conference that kicked off this project.

I have shared my views with many members of the Committee over the years, so I will make my comments brief.

I strongly urge the Committee NOT to adopt a "point/counterpoint" procedure (such as that in the proposed amendments) that requires the moving party to set forth its supposedly undisputed facts in separate numbered paragraphs and the non-moving party to respond point by point, and then set forth its own supposedly undisputed facts. I make that recommendation for the following reasons·

- Based on my experience with the "point/counterpoint" procedure, it imposes an enormous amount of unproductive busywork on both the parties and the Court

- In complex cases the moving party almost universally lists hundreds of facts that are supposedly undisputed, many of which have only tangential impact on the core dispute The non-moving party is then compelled to contest or at least re-cast hundreds of peripheral facts, and then come up with its own list of supposedly undisputed facts. In one of my recent antitrust cases the moving party filed 156 separately numbered paragraphs of "undisputed" facts, and the non-moving party responded with 144 single spaced pages contesting those facts and its own counter-statement of "undisputed" facts, amounting to 596 separately numbered paragraphs and 228 single spaced pages The number of lawyer hours that went into those filings had to be in the thousands

- As noted by Judge Vaughn Walker and others, the proposed requirement for separate specification of disputed and undisputed facts has the potential to make resolution of summary judgment motions as time-consuming and expensive as a trial, thus defeating the whole purpose of the summary judgment procedure

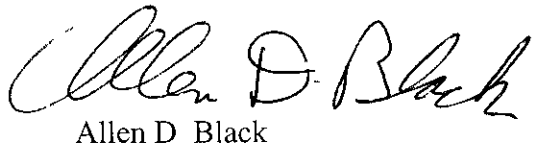
- The proposed rule defers the judge's input into the summary judgment process until after the parties have invested tremendous amounts of time and expense in preparing statements of undisputed and disputed facts. I would suggest a far more efficient and productive amendment would be to require a conference with the judge **prior** to filing any summary judgment motion, at which the parties and the court would discuss the factual issues in the case and identify those few truly core or determinative issues that the putative moving party believes to be undisputed The Court would then issue an order specifying the issues to be addressed on summary judgment. We have lots of experience with the use of such conferences under both Rule 16 and Rule 26; and we know they work Why not use that tool to streamline and simplify the summary judgment process, rather than impose the cumbersome and costly requirements of the current proposal?

- Alternatively, the rule could limit the number of undisputed facts a moving party could claim, absent leave of court, to (say) 10. That would keep the process manageable, unless the moving party approached the court for an exception which with any luck would segue into a pre-motion conference as suggested above

- Finally, as Alice Ballard and others have observed, the procedural requirement to dissect a case into hundreds of separately numbered factual issues would tend to foster an improper analysis – prompting the parties and the court to look at each fact individually rather than looking at the case as a whole. This could have substantive impact in some cases, notably employment and antitrust

Bottom line, I believe a "point/counterpoint" rule would be counter-productive, and should be rejected by the Committee.

Sincerely,



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