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BY FEDERAL EXPRESS

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

Re: Comments to Advisory Committee on Civil Rules re Proposed Amendments to F.R.C.P. 56

Dear Mr McCabe

We would like to thank the Committee for the opportunity to comment concerning the proposed amendments to Rule 56 We support the proposed amendments to Rule 56 with the following qualifications and respond to the questions in the Invitation for Comment in the Advisory Committee's Report as follows

As an initial matter we applaud the Advisory Committee for taking on this important subject. At present, contrary to the objective of the Federal Rules, summary judgment practice in the federal courts is governed entirely by a patchwork of local rules, and practitioners are faced with significant variations in practice on a district by district basis, which may serve as traps for those not familiar with them. We believe uniformity in practice is very important to lawyers and their clients, particularly on a motion so critical to the potential disposition of an action; and having a uniform rule will go a long way to increase compliance with those requirements

I Rule 56(c) – Point-Counterpoint Requirement

A central feature of the proposed new rule is the point-counterpoint provision, requiring movants to set forth and document the material facts not in dispute Currently, many district courts, by local rule, have some version of such a requirement; and we understand and appreciate that many judges find them to be quite useful Our

views on the usefulness of such statements vary considerably depending on both the nature and complexity of the case and how they are used and implemented. We have experienced many instances where they have been misunderstood by movants as requiring - - and/or have been misused to overburden the other side with the need to respond to - - far too numerous, detailed and complex fact statements that could not conceivably be considered "material" or, more important, "undisputed." Similarly, careful lawyers seeking to avoid any admission frequently try to deny facts that are genuinely not in dispute, as by challenging an adjective used or the phrasing of the statement. We have also been in many cases where preparing these statements ultimately has been merely a mechanical task done after a brief is completed - - an expensive waste of time that has only served to increase the length and cost of litigation, in contravention of both the letter and spirit of Rule 1. On the other hand, when properly used, limited and targeted fact statements may facilitate the identification of key issues and significantly advance the resolution of an action

We would support the point-counterpoint requirement if the rule were to effectively convey the message that what is sought is the identification of only the material facts critical to sustaining or defeating a claim We are aware that the Advisory Committee has struggled with this drafting issue and we have serious concern that, as a practical matter, if the concept is conveyed solely in its current form, it will not be sufficient to accomplish the objective sought Comments from certain judges urging the rejection of the concept for fear that they will be overburdened with boxes of submissions and testimony, and expressing concerns that the requirement will be an instrument to overburden an opponent, demonstrate that the proposal in its current form - - when overlaid with the history of practice under many local rules providing for a point-counterpoint approach - - has not conveyed the concept that only a limited and targeted fact statement is sought.

In view of the history with these fact statements in many districts, we believe the only way to effectively convey the message that only targeted fact statements are sought is to have a defined limit. We propose that the Advisory Committee consider imposing a numerical limit of facts per claim (such as, for example only, 20 facts per claim or cause of action). In some cases a smaller number will be appropriate However, the rule should permit the movant or respondent to obtain relief from the limit, or from the requirement of point-counterpoint statements in its entirety, from the district judge, if the limit is too low or unworkable in any particular case.

We understand that while numerical limits have been proposed by others during the Advisory Committee's consideration of the proposed rule, the Advisory Committee has been reluctant to propose such a limit for fear of not picking the

appropriate number However, the Advisory Committee has in the past proposed numerical limitations that have been adopted and then have worked well in practice: for example, 10 depositions per side, or 25 interrogatories, with court discretion to alter the numbers These limitations have proved useful (but flexible) in causing the parties to focus on that which is necessary to prosecute or defend their cases In this instance, we believe a numerical limitation is the only way to insure that these statements will be useful, will be focused solely on the facts critical for success, and will not be either "make-work" or instruments for burdening the other side and the court Giving the trial courts discretion, on a case-by-case basis to alter the limit, or to eliminate the requirement in its entirety, further protects against both artificial limits and inappropriate or abusive use of the fact statement requirement.

II. Rule 56(a) – "Should" vs "Must"

Carrying over a change made during the "style" revisions, the proposed rule (by using "should" instead of "must" in place of the original term "shall") suggests that the granting of summary judgment would now be discretionary, even if the movant demonstrated that there were no material facts in dispute and that the movant was entitled to the relief as a matter of law Consistent with the "style" project and, more important, to ensure that summary judgment remains a useful tool, we believe this language needs to change

We would urge that the word "must" be substituted for the word "should" in the second sentence of Rule 56(a). The sentence would then read, "The court must grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law " To conform to this change, the proposed commentary suggesting that the court has discretion to deny summary judgment in these circumstances should be deleted

This "must" wording is consistent with the summary judgment standards established by the U S. Supreme Court in Celotex, Anderson and Matsushita, to which the amendments are intended to adhere. The text – and discussion in the invitation for Comment – seem at odds with the plain language of Anderson, for example, at 477 U S 242, 257. The change would also make the sentence internally consistent i.e., the court "must grant summary judgment" where a party "is entitled" to it. Some of us remember summary judgment practice before the Supreme Court trilogy made it a useful procedure. Earlier, courts routinely denied motions for summary judgment and treated them as disfavored motions The Supreme Court restored the balance in the trilogy We fear that a failure to make our recommended change to "must" will, as a practical matter, return summary judgment to that disfavored status, contrary to the purpose of this proposal which does not seek to alter the summary judgment standard

III Rule 56(c)(4), "Citing Support for Statements or Disputes of Fact; Materials Not Cited"

As currently proposed, the Rule would permit the court to go beyond the matters cited by the parties and consider other materials in the record to establish a genuine issue of fact or to grant summary judgment. If the court looks at other record material to grant summary judgment it must give notice to the parties under Rule 56(f), but it would not be required to give such notice if it were to find a fact issue to deny the motion. We believe the Rule should be more balanced Notice to the parties should be required if the court goes beyond the material cited, whether doing so to grant or to deny summary judgment.

It makes little sense to have a "one-way only" notice provision; and notice may also give a party the opportunity to explain or, more important, to reference yet additional record facts rebutting, the record materials that the court is considering as a basis for denial and thereby to show that denial is not appropriate.

Accordingly, we would insert the words "or deny" in subdivision (c)(4)(B)(ii) so that subdivision (c)(4)(B) would read:

> *Materials not Cited*. The court need consider only materials called to its attention under Rule 56(c)(4)(A), but it may consider other materials in the record·
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> * * *
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> (ii) to grant or deny summary judgment if it gives notice under Rule 56(f).

IV Rule 56(c)(5), "Assertion that Fact is Not Supported by Admissible Evidence"

The Rule provides that a party may respond or reply to a statement of fact by stating that the fact is not supported by admissible evidence Practitioners at a mini-conference asked for clarity as to the mechanism to do so and the Comment now provides that the parties should provide a concise citation to or identification of the basis for the challenge. However, we believe it important to give meaningful notice of the basis for the challenge to both the Court and the party making the challenged statement. We therefore suggest adding the words "together with a concise citation to or identification of the basis for the challenge" to the text of the Rule itself It would be clearer and more helpful to set forth the mechanism in the text of the Rule itself, rather than in the Comment

We appreciate the Committee's consideration of our views, and we look forward to providing any further assistance that may be requested as the rule amendment process moves forward

Very truly yours,

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*Mr Rothman and the other persons listed in the column following his name are officers and members of the Council of the Section of Litigation of the American Bar Association. Mr. Kieve and the other persons listed in the column following his name are members of the Section's Federal Practice Task Force We are submitting our comments in our individual capacities· they have not been approved by the ABA nor do they reflect ABA policy