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2008

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#### Recommended Citation

Adam N. Steinman, *An Ounce of Prevention: Solving Some Unforeseen Problems with the Proposed Amendments to Rule 56 and the Federal Summary Judgement Process*, 103 Nw. L. Rev. Colloquy 230 (2008).

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## AN OUNCE OF PREVENTION: SOLVING SOME UNFORESEEN PROBLEMS WITH THE PROPOSED AMENDMENTS TO RULE 56 AND THE FEDERAL SUMMARY JUDGMENT PROCESS

Adam N. Steinman\*

In 1986, the Supreme Court decided three cases—*Anderson v. Liberty Lobby*, *Celotex v. Catrett*, and *Matsushita Electric v. Zenith Radio*<sup>1</sup>—that transformed summary judgment from “a disfavored procedural shortcut”<sup>2</sup> to a central feature of federal civil litigation.<sup>3</sup> Summary judgment today is so important that federal courts have cited the three decisions in the 1986 trilogy more frequently than any judicial decisions in the history of American jurisprudence.<sup>4</sup> For the first time since the trilogy (and indeed since the Federal Rules of Civil Procedure came into effect seventy years ago), the Civil Rules Advisory Committee has proposed a major revision to Rule 56’s summary judgment process.<sup>5</sup>

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<sup>1</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>2</sup> *Celotex*, 477 U.S. at 327.

<sup>3</sup> Whether the Supreme Court’s summary judgment trilogy caused this shift or merely ratified one that had already occurred is an interesting question. See Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007), available at <http://ssrn.com/abstract=914147> (“[C]hanges in civil rules and federal case-management practices prior to the trilogy may have been more important in bringing about changes in summary judgment practice.”) (link); see also Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track*, LITIG., Summer 2008, at 132 (“Whether the Summary Judgment Trilogy is the cause or was an effect, there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years.”).

<sup>4</sup> Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006).

<sup>5</sup> See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 21–40 (May 9, 2008, as amended June 30, 2008) [hereinafter, COMMITTEE REPORT], available at [http://www.uscourts.gov/rules/Reports/CV\\_Report.pdf](http://www.uscourts.gov/rules/Reports/CV_Report.pdf) (link). The last nontechnical revision to Rule 56 occurred in 1963 and involved fairly minor issues. See FED. R. CIV. P. 56 advisory committee’s notes (1963 Amendment). The public comment period for the current proposal lasts until February 17, 2009, after which the proposed amendments may be reconsidered or revised. See Administrative Office of the U.S. Courts, *Preliminary Draft of Proposed Amend-*

The aim of the Committee's proposal is laudable: "to improve the procedures for making and opposing summary judgment motions, and to facilitate the judge's work in resolving them."<sup>6</sup> It accomplishes this goal by adopting a "point-counterpoint" process, similar to procedures that have been used in several federal districts via local rule.<sup>7</sup> Under this process, the summary judgment movant must file a "statement"—separate from the motion and brief—that "concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment."<sup>8</sup> The nonmovant must then file a "response"—separate from its brief opposing summary judgment—that accepts or disputes each of the facts in the movant's statement, and may also state "additional material facts that preclude summary judgment."<sup>9</sup> The movant must file a "reply"—separate from its reply brief—that accepts or disputes any additional facts stated by the nonmovant.<sup>10</sup> In proposing this procedure, the Committee has wisely stated that "no change should be attempted in the summary judgment standard or in the assignment of burdens between movant and nonmovant," preferring "to leave these matters to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more."<sup>11</sup>

This Essay identifies several problems with the proposed text that could have unfortunate consequences and contravene the Committee's intent. In particular, the proposed text can be read to make significant changes to the summary judgment standard and the burdens on litigants at the summary judgment phase. At the very least, it may inadvertently dictate questionable approaches to aspects of summary judgment procedure that have yet to be directly addressed by the Supreme Court. Although the Committee's stated intent to retain the existing standard and burdens might spur courts to interpret the new text to avoid these ramifications, the safer

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*ments to the Federal Rules of Practice and Procedure: A Summary for Bench and Bar* (August 2008), available at <http://www.uscourts.gov/rules/Reports/Brochure.pdf> (link). The Supreme Court must ultimately approve any proposed amendments and transmit them to Congress by May 1, 2009; unless Congress legislates otherwise, any amendments approved by the Supreme Court would take effect on December 1, 2009. See 28 U.S.C. § 2074(a) (2006).

<sup>6</sup> COMMITTEE REPORT, *supra* note 5, at 21.

<sup>7</sup> *Id.* at 25; see also *id.* at 28–30 (proposed Rule 56(c)(2)). Current Rule 56 contains no particular procedure for presenting, opposing, and resolving summary judgment motions, see FED. R. CIV. P. 56 (current version), and the Committee notes that this silence has led to local rules that "are not uniform, and at times mandate practices that are inconsistent from one district to another." COMMITTEE REPORT, *supra* note 5, at 21. It is beyond the scope of this Essay to argue the merits of the proposed point-counterpoint procedure, although I am inclined to agree with the Committee that the process is an improvement that will "encourage well-founded motions and focused responses" and "facilitat[e] well-informed decision." *Id.* Rather, the focus of this Essay is to ensure that the process is codified in a way that does not inadvertently disturb other aspects of summary judgment procedure.

<sup>8</sup> *Id.* at 28–29 (proposed Rule 56(c)(2)(A)(ii)).

<sup>9</sup> *Id.* at 29 (proposed Rule 56(c)(2)(B)(i)–(ii)).

<sup>10</sup> *Id.* at 29–30 (proposed Rule 56(c)(2)(C)(i)).

<sup>11</sup> *Id.* at 21.

course is to revise the Committee's proposal before it is officially transmitted in spring 2009. Because the proposed amendments affect so critical an aspect of civil litigation as summary judgment, an ounce of prevention is especially well-advised.

Part I of this Essay examines proposed Rule 56(c)(4), which addresses how parties must support the factual positions they express in their statement, response, and reply. Part II examines proposed Rule 56(c)(5), which authorizes parties to challenge the admissibility of their opponent's summary judgment material. Part III points out a minor ambiguity in the proposed rule concerning the standard for evaluating additional material facts asserted in the nonmovant's response. Detailed suggestions for revising the proposed amendments appear in the Appendix to this Essay.

#### I. PROPOSED RULE 56(C)(4): HOW PARTIES MUST SUPPORT THEIR FACTUAL POSITIONS

Proposed Rule 56(c)(4) sets forth how litigants must support their factual positions at the summary judgment phase.<sup>12</sup> It is a key feature of the proposed point-counterpoint process, particularly because the court may confine its inquiry to those "materials called to its attention" under this provision (although it retains authority to consider other materials if it so chooses).<sup>13</sup> There are a number of ways that courts might read proposed Rule 56(c)(4) as changing the summary judgment standard and burdens, contrary to the Committee's intent.<sup>14</sup>

As an initial matter, the proposed amendments may inadvertently modify the summary judgment burden that applies to the party (typically the plaintiff) who will bear the burden of production at trial. The text provides that parties may support their factual positions by "showing . . . that an adverse party cannot produce admissible evidence to support the fact."<sup>15</sup> A plaintiff who bears the burden of production at trial, however, should never be able to support its factual position simply by showing that the *defendant* will not be able to produce admissible evidence to support its view of the facts. That is precisely the argument that the Supreme Court rejected in *Ce-*

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<sup>12</sup> The proposed text reads:

(A) *Supporting Fact Positions*. A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(i) citation to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

*Id.* at 30–31 (proposed Rule 56(c)(4)(A)).

<sup>13</sup> *Id.* at 31 (proposed Rule 56(c)(4)(B)).

<sup>14</sup> See *supra* note 11 and accompanying text (describing the Committee's intent that the proposed amendments leave the existing summary judgment standard and burdens intact).

<sup>15</sup> COMMITTEE REPORT, *supra* note 5, at 31 (proposed Rule 56(c)(4)(A)(ii)).

*lotex*. If the defendant can show that the plaintiff will lack sufficient evidence to satisfy the plaintiff's burden of production at trial, the defendant need not "support its motion with affidavits or other similar materials *negating* the opponent's claim."<sup>16</sup>

The proposed rule could even allow a plaintiff to support summary judgment in *its* favor simply by showing that the defendant "cannot produce admissible evidence" at trial.<sup>17</sup> This would be a drastic change to current summary judgment burdens. Even if the defendant (who ordinarily does not bear the burden of production for the elements of a plaintiff's claim) will have *no* admissible evidence it can use at trial, the defendant should prevail as long as the plaintiff fails to meet its burden of production. The defendant's lack of evidence—standing alone—surely cannot be a sufficient basis for awarding summary judgment to the plaintiff.

The proposed Advisory Committee Note correctly recognizes that only "a party who does *not* have the trial burden of production" should be able to rely on a showing that the adverse party cannot produce admissible evidence at trial.<sup>18</sup> This limitation, however, does not appear in the text of the proposed rule. With so many judicial adherents to textualist methods of interpretation,<sup>19</sup> one cannot be sure that clarifications appearing in the Advisory Committee Note or elsewhere in the drafting history will be an adequate solution.<sup>20</sup>

Finally, proposed Rule 56(c)(4) might be read to inadvertently reduce the burden on defendants who file "no-evidence" summary judgment motions (the kind endorsed in *Celotex*) that seek to show that the plaintiff will lack sufficient evidence to meet its burden of production at trial.<sup>21</sup> Under the Committee's proposal, a movant can support its statement that a fact cannot be genuinely disputed with *either* "citation to particular parts of materials in the record" *or* "a showing . . . that an adverse party cannot produce admissible evidence to support that fact."<sup>22</sup> The implication is that a no-evidence motion may properly proceed without *any* citation to materials in the record. While the proposed rule requires the moving party to make a

<sup>16</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis in original).

<sup>17</sup> COMMITTEE REPORT, *supra* note 5, at 31 (proposed Rule 56(c)(4)(A)(ii)).

<sup>18</sup> *Id.* at 37 (emphasis added).

<sup>19</sup> *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.") (interpreting 28 U.S.C. § 1367).

<sup>20</sup> *See, e.g.*, Edward A. Hartnett, *Against Mere Restyling*, 82 NOTRE DAME L. REV. 155, 167–71 (2006) (expressing concern that courts will "attend to the plain language of the restyled rules" rather than heed the drafters' intent that the recent restyling was "intended to make no changes in substantive meaning").

<sup>21</sup> Like the Committee Report, this Essay uses the phrase "'no-evidence' motion" to mean a summary judgment motion that is "made by a party who does not have the trial burden of production" and that "show[s] that] the nonmovant has no evidence to support its position." COMMITTEE REPORT, *supra* note 5, at 49.

<sup>22</sup> *Id.* at 30–31 (proposed Rule 56(c)(4)(A)).

“showing” that an adverse party cannot produce admissible evidence, it would be a substantial change in current practice to suggest that this showing can be made *without* supporting record materials. Current Rule 56 authorizes summary judgment only where the lack of a genuine issue is “show[n]” by the record materials.<sup>23</sup> In *Celotex*, the Supreme Court instructed that even for no-evidence motions, “a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”<sup>24</sup>

Future courts might avoid these consequences, of course, by reading the proposed rule in conjunction with the Committee’s desire not to change the current summary judgment standard or burdens. But it is far from certain that judges would uniformly choose the uncodified intent of the proposal’s drafters over the literal text.<sup>25</sup> The best solution, therefore, is to restructure proposed Rule 56(c)(4) before it is finalized. Detailed revisions are suggested in the Appendix to this Essay, but the basic requirements would be: (1) the summary judgment movant must identify in its statement the parts of the record on which it relies to show the absence of a genuine dispute as to any particular fact; and (2) if the nonmovant disputes that fact, it must identify in its response any additional parts of the record on which it relies to show the existence of a genuine dispute, or whether it simply believes that the movant’s cited materials fail to establish the lack of a genuine dispute. This approach will identify for the court the parts of the record on which each party relies for each factual issue. Each side’s argument as to whether a genuine dispute exists would be left to each side’s summary judgment brief, and would be evaluated under the case law as it has evolved since the Supreme Court’s 1986 trilogy.<sup>26</sup>

<sup>23</sup> FED. R. CIV. P. 56(c) (current version).

<sup>24</sup> *Celotex*, 477 U.S. at 323 (quoting the then-current version of Rule 56(c)). In 2007, the nonsubstantive restyling of Rule 56 revised the language quoted by the *Celotex* Court. Current Rule 56(c) allows summary judgment “if *the pleadings, the discovery and disclosure materials on file, and any affidavits* show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c) (current version) (emphasis added).

<sup>25</sup> See *supra* notes 19–20 and accompanying text; see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (declaring that government by “unexpressed intent” is “tyrannical,” comparing it to Emperor Nero’s practice of posting edicts high up on pillars so they could not easily be read).

<sup>26</sup> The revisions suggested in this Essay’s Appendix also eliminate an ambiguity in the proposed text that could make the “statement” and “response” required under the point-counterpoint procedure more lengthy and complex than necessary. The Committee Report suggests that each party must make its “showing” about the presence or absence of a genuine dispute in its separate statement or response. See COMMITTEE REPORT, *supra* note 5, at 50. Although the Committee stresses that “[t]his showing is not an argument—arguments are to be made in the brief,” *id.*, it is not clear how thorough the showing in the statement or response must be. If parties perceive a need to include in their summary judgment statement or response elaborate and lengthy “showing[s]” that essentially duplicate the arguments presented in their briefs, the efficiencies of the point-counterpoint procedure may vanish. This Essay’s

## II. PROPOSED RULE 56(C)(5): ADMISSIBILITY OF SUMMARY JUDGMENT MATERIALS

Another area of concern is a new provision that a party “may state that material cited [by the opposing party] is not admissible in evidence.”<sup>27</sup> Perhaps this language is innocuous; authorizing a party to “state” that material is inadmissible does not necessarily say anything about what sort of evidence is or is not admissible for summary judgment purposes.<sup>28</sup> The danger, however, is that the new provision could be read to require that summary judgment materials satisfy the admissibility standards that govern at trial. The proposed Advisory Committee Note could even be read to suggest such a link.<sup>29</sup> This issue is particularly important when a defendant files the kind of “no-evidence” summary judgment motion that the Supreme Court approved in *Celotex*. For such motions, the dispositive issue is often whether the plaintiff *will* have admissible evidence to support its position at trial. The concern addressed here is whether the plaintiff’s summary judgment materials *themselves* must be in a form that would be admissible at trial.

Lower federal courts today are divided on this question,<sup>30</sup> and the Supreme Court has never endorsed the idea that summary judgment materials must satisfy trial admissibility standards. To the contrary, the Court in *Celotex* stated: “[w]e do *not* mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”<sup>31</sup> At the summary judgment phase, the inquiry is whether the nonmoving party’s materials, “*if reduced* to admissible evidence, would be sufficient to carry [its] burden of proof at trial.”<sup>32</sup> The test is not whether the nonmoving party has presented materials that are *already* admissible evidence sufficient to carry its burden of proof at trial.

Taken seriously, the idea that summary judgment materials must satisfy trial admissibility standards would make it improper for courts to consid-

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suggested revisions avoid this problem by clarifying that the statement and response need only cite to any record materials on which the parties rely for their factual positions. This will allow the court to confine its inquiry to those cited materials, while leaving to the parties’ briefs their precise arguments as to whether a genuine dispute exists.

<sup>27</sup> COMMITTEE REPORT, *supra* note 5, at 31 (proposed Rule 56(c)(5)).

<sup>28</sup> The Committee Report indicates that the impetus for this proposed language was that practitioners had “asked for explicit direction on the proper formal procedure for presenting the position that material cited to support a fact is not admissible in evidence.” *Id.* at 50.

<sup>29</sup> *Id.* at 37 (“If a case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.”).

<sup>30</sup> See Steinman, *supra* note 4, at 121.

<sup>31</sup> *Celotex*, 477 U.S. at 324 (emphasis added).

<sup>32</sup> *Id.* at 327 (emphasis added); see also, e.g., *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (citing *Celotex*); *DeBiasi v. Charter County of Wayne*, 537 F. Supp. 2d 903, 911–12 (E.D. Mich. 2008) (same); *ERBE Electromedizin GmbH v. Canady Tech. LLC*, 529 F. Supp. 2d 577, 586–87 (W.D. Pa. 2007) (same); *Thomas v. City of Pittsburgh*, 34 F. Supp. 2d 965, 969 (W.D. Pa. 1999) (same).

er sworn affidavits by potential trial witnesses. A party generally could not use such an affidavit as proof at trial because it would be hearsay—an out-of-court statement offered to prove the truth of the matters asserted.<sup>33</sup> Yet Rule 56 has always contemplated use of such affidavits for summary judgment purposes, to determine whether a genuine dispute indeed exists.<sup>34</sup>

Indeed, subjecting summary judgment materials to trial admissibility standards may fundamentally misperceive how evidentiary rules apply to the summary judgment inquiry. An out-of-court statement might be inadmissible hearsay if offered to prove the truth of the matter asserted in that statement,<sup>35</sup> but at the summary judgment phase the nonmovant does *not* need to prove the truth of the matter asserted; she need only show that a genuine dispute exists for trial. If a party indicates an intent to call at trial the individual who made the out-of-court statement—and thus shows that what would otherwise be hearsay can be “reduced to admissible evidence”—then that statement is surely relevant to whether there is a genuine dispute.<sup>36</sup> Of course, the material must be capable of being “reduced” to admissible evidence. If the only witness who might testify to a particular fact at trial is deceased, or incompetent, or barred from testifying due to a privilege or

<sup>33</sup> See FED. R. EVID. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”). Unlike testimony at a deposition, where there is an opportunity to cross-examine the declarant, statements in an affidavit are generally not covered by any exception to the hearsay rule. Cf. FED. R. EVID. 804(b)(1) (providing that prior testimony given at a hearing or deposition should not be excluded as hearsay if the declarant is unavailable and “if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination”); FED. R. CIV. P. 32(a)(1)(A) (providing that depositions may be used against a party at trial only if “the party was present or represented at the taking of the deposition or had reasonable notice of it”).

<sup>34</sup> The Committee appears to recognize this tension in the “Detailed Discussion and Questions” portion of its Report, although the language it uses is somewhat ambiguous. The proposed rule lists the types of evidence that may be considered at the summary judgment phase, namely “depositions, documents, electronically stored information, *affidavits* or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” COMMITTEE REPORT, *supra* note 5, at 30 (proposed Rule 56(c)(4)(A)(i) (emphasis added)). Discussing this provision, the Report explains that “[i]t is important to carry forward the familiar authority to rely on affidavits or declarations because they otherwise *might be excluded from consideration as inadmissible at trial.*” *Id.* at 50 (emphasis added). The italicized language suggests that summary judgment evidence might indeed be “excluded from consideration” if it would be “inadmissible at trial.” The Committee seems to presume, however, that the mere inclusion of affidavits in the list of summary judgment materials solves what “otherwise” would be an inadmissibility problem. But if the types of evidence enumerated in Rule 56 are *per se* admissible for summary judgment purposes, then it is unclear what would *ever* be a valid basis for “stat[ing]” under Proposed Rule 56(c)(5) that material cited by the other side “is not admissible in evidence.”

<sup>35</sup> See FED. R. EVID. 801(c).

<sup>36</sup> A court might not be able to predict with mechanical certainty whether information reflected in a summary judgment document will *in fact* be reduced to admissible evidence at trial. But this is so even with the gold-standard of summary judgment material—a sworn affidavit from a witness with personal knowledge of the relevant facts. For any number of reasons, that witness might testify differently at trial or might not be able to appear at all. See Steinman, *supra* note 4, at 141–42.



other testimonial bar, then material reflecting what the witness's trial testimony *might have been* could not create a genuine dispute. The reason, however, is not that such material is inadmissible for summary judgment purposes. The reason is that it would be impossible to reduce that material to admissible evidence at trial and, accordingly, such material cannot show that a *genuine* dispute exists.<sup>37</sup>

Proposed Rule 56(c)(5) should be eliminated. Rule 56 has never contained general language regarding whether particular summary judgment materials are "admissible in evidence."<sup>38</sup> Adding a provision that could be read to impose admissibility requirements that defy the Supreme Court's explicit language in *Celotex* would contravene the Committee's guiding principle that any change to the existing summary judgment standard or burdens should be left "to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more."<sup>39</sup> Because the use of trial admissibility standards at the summary judgment phase is an open question under the current version of Rule 56,<sup>40</sup>

<sup>37</sup> See Steinman, *supra* note 4, at 128–31. The analysis above focuses on materials used to rebut a *Celotex*-style "no evidence" motion. Trial admissibility standards may play a more direct role when the movant (whether plaintiff or defendant) seeks summary judgment based on *affirmative evidence* that its factual position is true, for example, by submitting material showing that the traffic light was in fact red or green when the defendant's car entered the intersection. In this situation, the movant *is* using that material "to prove the truth of the matter asserted," FED. R. EVID. 801(c), because such a movant satisfies the summary judgment standard *only* by establishing the truth of the matter beyond any genuine dispute. Yet even in this context, current practice does not fully incorporate trial admissibility standards. As discussed *supra* notes 33–34 and accompanying text, affidavits are routinely used for summary judgment purposes, even though they are generally not admissible at trial. Perhaps evidentiary flaws in the movant's material are more suitably resolved by the summary judgment standard itself, rather than by a separate inquiry into whether the material is "admissible" for summary judgment purposes. Imagine that a movant presents no sworn testimony by witnesses with *personal* knowledge of what color the traffic light was, but seeks summary judgment based on a deposition where the deponent testifies that *someone else* had said that the light was green. Even if the court may permissibly *consider* this testimony for summary judgment purposes, the hearsay problem may mean that the movant has failed to truly "foreclose the possibility" of a genuine dispute and, therefore, has not met the summary judgment standard. Cf. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (holding that affidavits from two of the defendant's employees stating that *they* had not conspired with any policemen to refuse service to the plaintiff were insufficient bases for summary judgment because the affidavits "fail[ed] to foreclose the possibility that there was a policeman in the Kress store . . . and that this policeman reached an understanding with some [other] Kress employee that [the plaintiff] not be served"). It is beyond the scope of this Essay to exhaustively explore the role of trial admissibility standards in different summary judgment situations; for this Essay's purpose, it is sufficient to note that significant open questions remain.

<sup>38</sup> COMMITTEE REPORT, *supra* note 5, at 31 (proposed Rule 56(c)(5)). Rule 56 has always required that *affidavits* (but not other summary judgment materials) "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." FED. R. CIV. P. 56(e) (current version). This language regarding affidavits has been retained in the Committee's proposal. See Committee Report, *supra* note 5, at 31–32 (proposed Rule 56(c)(6)).

<sup>39</sup> COMMITTEE REPORT, *supra* note 5, at 21.

<sup>40</sup> See Steinman, *supra* note 4, at 121.

the safer course is to leave Rule 56 silent on the admissibility issue (as it always has been).<sup>41</sup>

### III. ASSESSING ADDITIONAL MATERIAL FACTS IDENTIFIED BY THE NONMOVANT

One minor concern is how the proposed “point-counterpoint” procedure operates when the nonmovant identifies additional facts in response to a summary judgment motion. Whereas the proposed rule states explicitly that the *movant* may assert “only those material facts that cannot be genuinely disputed,” the rule does not address the standard for evaluating “additional material facts” asserted by the *nonmovant*.<sup>42</sup> Because summary judgment is proper only when “there is *no* genuine dispute as to any material fact,”<sup>43</sup> a nonmovant’s additional fact should be accepted for summary judgment purposes as long as there is *at least* a genuine dispute about whether the fact is true. Whether that fact indeed precludes summary judgment will depend on the circumstances of the case, but the fact cannot be ignored unless there can be no genuine dispute that the fact is false. To avoid confusion on this issue, the proposed rule should explicitly recognize the standard for evaluating additional facts asserted by the nonmovant. Suggested revisions are set forth in the Appendix.

### CONCLUSION

The potential problems with the proposed amendments to Rule 56 can be fixed with fairly modest redrafting. There may be other ways to address these concerns; the specific revisions suggested in the Appendix are but one possible approach. The goal of this Essay is simply to bring these concerns to the forefront, and to thereby encourage further consideration by the Advisory Committee and the legal community before the amendments come into effect. The Committee is to be commended for its excellent work on the proposed amendments, as well as its conscientious efforts to solicit comment from the legal community in accordance with the Rules Enabling Act.<sup>44</sup> When it comes to a crucial issue like the summary judgment process, close vetting of proposed textual changes is essential to avoid the needless, costly, and time-consuming uncertainty that might otherwise result.

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<sup>41</sup> Eliminating proposed Rule 56(c)(5) would not *prevent* a litigant from arguing that her opponent’s summary judgment material is inadmissible. Such an argument could be raised in her summary judgment brief (or reply brief).

<sup>42</sup> COMMITTEE REPORT, *supra* note 5, at 29 (proposed Rule 56(c)(2)(B)(ii), authorizing the nonmovant to state “additional material facts that preclude summary judgment”).

<sup>43</sup> *Id.* at 27 (proposed Rule 56(a) (emphasis added)); *accord* FED R. CIV. P. 56(c) (current version, authorizing summary judgment when “there is no genuine issue as to any material fact”).

<sup>44</sup> *See* 28 U.S.C. § 2073; *see also supra* note 5.

## APPENDIX

Following are suggested revisions to the Proposed Amendments to Rule 56 circulated by the Civil Rules Advisory Committee in its Report of May 9, 2008, as supplemented June 30, 2008. Suggested additions to the Committee's proposal are marked in underline font. Suggested deletions are marked in ~~striketrough~~ font. The suggested revisions are directed at sections (a) and (c) of the Committee's proposal.

**Proposed Rule 56(a): Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment on all or part of a claim or defense. The court should grant summary judgment if the materials in the record—including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials\*—show that there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

**Proposed Rule 56(c): Procedures.**

(1) *Case-Specific Procedure.* The procedures in this subdivision (c) apply unless the court orders otherwise in the case.

(2) *Motion, Statement, and Brief; Response and Brief; Reply and Brief.*

(A) *Motion, Statement, and Brief.* The movant must simultaneously file:

- (i) a motion that identifies each claim or defense—or the part of each claim or defense—on which summary judgment is sought;
- (ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and
- (iii) a brief of its contentions on the law or facts.

(B) *Response and Brief by the Opposing Party.* A party opposing summary judgment:

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\* This listing of materials is taken verbatim from proposed Rule 56(c)(4)(A)(i). The list is moved here in light of this Essay's suggested revisions to proposed Rule 56(c)(4). This suggested approach parallels current Rule 56, which explicitly links the enumerated summary judgment materials with the general summary judgment standard. See FED. R. CIV. P. 56(c) (current version) ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.").

(i) must file a response that, in correspondingly numbered paragraphs, accepts or disputes—or accepts in part or disputes in part—each fact in the movant’s statement;

(ii) may in the response concisely identify in separately numbered paragraphs additional material facts—as to which there is at least a genuine dispute—that preclude summary judgment; and

(iii) must file a brief of its contentions on the law or facts.

(C) *Reply and Brief.* The movant:

(i) must file ~~in the form required by Rule 56(c)(2)(B)(i), a reply that, in correspondingly numbered paragraphs, accepts or rejects—or accepts in part and rejects in part—to any~~ each additional facts stated by the non-movant opposing party under rule 56(c)(2)(B)(ii); and

(ii) may file a reply brief.

**(3) *Accept or Dispute Generally or for Purposes of Motion Only.*** A party may accept or dispute a fact either generally or for purposes of the motion only.

**(4) *Citing Support for Statements or Disputes of Fact; Materials Not Cited.\*\****

(A) *Supporting the Movant’s Statements of Fact.* For each fact the movant identifies in its Rule 56(c)(2)(A)(ii) statement, the statement must cite to particular parts of materials in the record that show the absence of a genuine dispute as to this fact.

(B) *Disputing the Movant’s Statements of Fact.* For each fact that the opposing party’s response disputes—or disputes in part—under Rule 56(c)(2)(B)(i), the response must either:

(i) assert that the materials cited in the movant’s statement fail to establish the absence of a genuine dispute as to this fact; or

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\*\* This Essay’s suggested sub-sections (A)–(D) of Rule 56(c)(4) would replace the Committee’s proposed Rule 56(c)(4)(A), which reads:

(A) *Supporting Fact Positions.* A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(i) citation to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

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(ii) cite to particular parts of materials in the record that show the presence of a genuine dispute as to this fact; or

(iii) both (i) and (ii).

(C) Supporting the Opposing Party's Additional Statements of Fact. For each additional fact that the opposing party identifies under Rule 56(c)(2)(B)(ii), the response must cite to particular parts of materials in the record that show that there is at least a genuine dispute as to this fact.

(D) Disputing the Opposing Party's Additional Statements of Fact. For each additional fact that the movant rejects—or rejects in part—under Rule 56(c)(2)(C)(i), the movant's reply must either:

(i) assert that the materials cited in the opposing party's response fail to establish that there is at least a genuine dispute as to that fact; or

(ii) cite to particular parts of materials in the record that show that there is no genuine dispute that this fact is false; or

(iii) both (i) and (ii).

~~(B)~~(E) Materials Not Cited. The court need consider only materials called to its attention under Rule 56(c)(4)(A)–(D), but it may consider other materials in the record:

(i) to establish a genuine dispute of fact; or

(ii) to grant summary judgment if it gives notice under Rule 56(f).

~~(5) Assertion that Fact is Not Supported by Admissible Evidence.~~ A response or reply to a statement of fact may state that the material cited to support or dispute the fact is not admissible in evidence.

~~(6)~~(5) Affidavits or Declarations. An affidavit or declaration used to support a motion, response, or reply must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

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