Rule 191(b) Affidavits: Should Lawyers Be Able to Sign Them?

by Colin H. Dunn

Rule 191(b) affidavits: Should lawyers be able to sign them?

When told the law presumed his stronger-willed wife acted under his direction, Dicken's Mr. Bumble said: "[i]f the law supposes that, the law is an ass - a idiot." Recently, while representing a nice elderly lady who was attacked in the parking lot of a grocery store, I had the same feeling.

The store filed a motion for summary judgment before discovery had ended. Because one of its arguments was that the attack on my client wasn't reasonably foreseeable, I decided I needed an expert to opine on that issue. But I needed time to procure that expert's report so I could include it as part of my response to the motion.

So I told my client she needed to sign an affidavit saying that, based on *her* personal knowledge, she was aware that the store had raised the issue of reasonable foreseeability (a term she'd never heard before) in its motion for summary judgment (ditto), and was requesting time to procure an expert's report on that issue. Her response to me: "Why am I signing this…shouldn't you?" Good question.

When one party files a dispositive motion, Illinois Supreme Court Rule 191(b) sets forth what the nonmovant must do if she wants to conduct additional discovery before formally responding to that motion:

> **When Material Facts Are Not Obtainable by Affidavit.** If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion.[1]

Because the rule says an "affidavit of either *party*," several courts have held the party (in my case, my 76-year-old non-lawyer client), and not her attorney, must sign the affidavit.[2] While that reading of the rule is true to its plain meaning, the result is absurd.[3] There's no reason to require the party, who probably has no idea what a motion for summary judgment is, much less what is necessary to respond to that motion, to sign that affidavit; that's why they've hired us.

The federal counterpart to Rule 191(b) appears to have a similar requirement. Federal Rule of Civil Procedure 56(d) (previously Rule 56(f)) says:

> **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> **(1)** defer considering the motion or deny it;
> **(2)** allow time to obtain affidavits or declarations or to take discovery; or
> **(3)** issue any other appropriate order.[4]

Rule 56(d), like Illinois Rule 191(b), affords a safety net for parties that need more time to gather facts essential to resist a motion for summary judgment.[5] This safeguard, when properly invoked, serves as a way of ensuring that judges will not "swing[ ] the summary judgment axe too hastily."[6]

Rule 56(d) "authorizes a district court to refuse to grant a motion for summary judgment or to continue its ruling on such a motion pending further discovery if the nonmovant submits an affidavit demonstrating why it cannot yet present facts sufficient to justify its opposition to the motion."[7] To obtain Rule 56(d) relief, the movant must submit an affidavit which "state[s] with sufficient particularity ... why [additional] discovery [is] necessary."[8]

The affidavit must also satisfy three criteria. First, it must outline the particular facts the nonmovant intends to discover and describe why those facts are necessary to the litigation.[9] Second, it must explain "why [he] could not produce [the facts] in opposition to the motion [for summary judgment]."[10] Third, it must show the information is

in fact discoverable.[11]

But even though Rule 56(d) says the "nonmovant" must "show[] by affidavit or declaration" a need to delay the motion for summary judgment, federal courts have found that the nonmovant's attorney can sign that affidavit.

In *Resolution Trust Corp. v. N. Bridge Associates, Inc.*,[12] after the plaintiff filed a motion for summary judgment, the defendant-nonmovants filed a motion to conduct discovery and attached a Rule 56(f) (now (d)) affidavit. Because the affidavit was signed by the defendants' attorney, the plaintiff said that affidavit was defective. While that argument was true "[r]eading the rule literally," the court rejected it. Citing its prior decision in *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*,[13] where the court stated "unequivocally that a Rule 56[d] proffer may acceptably take the form of 'written representations of counsel subject to the strictures of Fed.R.Civ.P. 11,'" the court found the affidavit signed by the attorney "floats comfortably within the safe harbor contemplated by the *Paterson-Leitch* court."

In reviewing the at-issue affidavit, the court noted:

- It was of record and had been duly served on the opposing party;
- It was signed by a person who possessed firsthand knowledge and who was competent to address the specifics of the matters discussed;
- The fact that the affiant is also the nonmovants' attorney did not undermine the proffer since the nonmovants themselves would know the relevant particulars only through communications from counsel;
- And since the nonmovants could hardly speak either to the cause or the effect of discovery delays, requiring that the supporting affidavit be signed by them rather than by a lawyer would "mindlessly exalt form over substance."

So the court found the attorney's affidavit was "sufficiently authoritative" to satisfy the requirements of the rule.

Other courts have followed the first circuit's lead in finding that a party isn't required to sign the affidavit.[14] But not just anyone can sign it; an expert witness' affidavit has been found to be deficient.[15]

It's time for Illinois courts to recognize the absurdity of requiring that the party sign a Rule 191(b) affidavit. Following the plain language of a rule is an important principle. But no rational legislature would have thought it improper if the party's attorney signed that affidavit.

It's not an evidentiary document that could be used at trial (like a request to admit or interrogatory answer) where it would make sense for a party to sign it. The Rule 191(b) affidavit simply sets forth what additional information the nonmovant's attorney needs in order to respond to the summary judgment motion; it informs the court the motion isn't ripe for consideration. And of course a party doesn't sign the response to the motion for summary judgment, so why should she be required to sign a document seeking to delay filing that

rule 191(b) continued on page 32

rule 191(b) continued from page 31

response. If the reason is so the party can be held responsible for a frivolous attempt to delay a ruling on a dispositive motion, that's not a good reason either: Illinois Supreme Court Rule 137 allows a court to impose sanctions on the lawyer or party (or both) if the lawyer signs a frivolous document.

No court has ever articulated a reason for requiring that the party sign the affidavit (other than "that's what the rule says"). Nor has any court articulated a justification for why the party's attorney shouldn't be allowed to sign it. So, as the first circuit said, Illinois courts should stop "mindlessly exalt[ing] form over substance" and permit a party's attorney to sign the Rule 191(b) affidavit. A Rule 191(b) affidavit is nothing more than a case management scheduling device; we shouldn't be required to bother our clients with it.

Endnotes

[1] Illinois Supreme Court Rule 191(b).

[2] See *Crichton v. Golden Rule Ins. Co.*, 358 Ill. App. 3d 1137, 1151 (2005) ("The plaintiff's affidavit was exclusively signed by the plaintiff's attorney, whereas the rule requires that the affidavit be signed by a party"); *Giannoble v. P & M Heating & Air Conditioning, Inc.,* 233 Ill.App.3d 1051, 1064 (1992) (the Rule 191(b) affidavit was fatally defective because it was signed by the plaintiff's attorney, not by the party); *Rush v. Simon & Mazian, Inc.,* 159 Ill.App.3d 1081, 1085 (1987) (the Rule 191(b) affidavit should have been filed by the party, not by the party's attorney).

[3] See e.g., *People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (explaining that "where a plain or literal reading of a statute produces absurd results, the literal reading should yield: 'It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity'").

[4] Federal Rules of Civil Procedure 56(d).

[5] *Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (explaining that "[a]ny potential problem with [a] premature [motion for summary judgment] can be adequately dealt with under [this rule]"); *Rivera–Torres v. Rey–Hernández,* 502 F.3d 7, 10 (1st Cir.2007) (similar).

[6] *Rivera–Torres,* 502 F.3d at 7, 10 (quoting *Resolution Trust Corp. v. N. Bridge Assocs., Inc.,* 22 F.3d 1198, 1203 (1st Cir.1994) (internal quotation marks omitted).

[7] *Woods v. City of Chicago,* 234 F.3d 979, 990 (7th Cir.2000).

[8] *Ikossi v. Dep't. of Navy,* 516 F.3d 1037, 1045 (D.C.Cir.2008) (internal

quotation marks, citation omitted).

[9] *Byrd v. U.S. Envtl. Prot. Agency,* 174 F.3d 239, 248 (D.C.Cir.1999) ("Byrd [must] show what facts he intended to discover that would create a triable issue...").

[10] *Carpenter v. Fed. Nat'l Mortg. Ass'n,* 174 F.3d 231, 237 (D.C.Cir.1999); *see also Wichita Falls Office Assocs. v. Banc One Corp.,* 978 F.2d 915, 919 (5th Cir.1992) ("[T]he trial court need not aid [a party] who ha[s] occasioned [its] own predicament through sloth.").

[11] *Messina v. Krakower,* 439 F.3d 755, 762 (D.C.Cir.2006) ("We will not find an abuse of discretion where the requesting party has offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required." (internal quotation marks omitted)).

[12] 22 F.3d 1198, 1204 (1st Cir. 1994).

[13] 840 F.2d 985, 988 (1st Cir.1988).

[14] *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99-100 (D.C. Cir. 2012) ("Convertino easily satisfied the first two Rule 56[d] criteria. In opposition to DOJ's summary judgment motion, Convertino submitted the affidavit of his counsel, who outlined the particular facts Convertino hoped to discover and why those facts were necessary to his claim"); *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-3118-D, 2013 WL 943406, at *2 (E.D.N.C. Mar. 11, 2013) (finding that although the better practice is for a party (rather than an attorney) to file a Rule 56(d) affidavit, the court may accept an attorney's Rule 56(d) affidavit.); *Mathis v. GEO Grp., Inc.*, No. 2:08-CT-21-D, 2011 WL 2899135, at *8 (E.D.N.C. July 18, 2011) (Although the better practice is for a party (rather than an attorney) to file a Rule 56(d) affidavit, the court has discretion to accept an attorney's Rule 56(d) affidavit).

[15] See *475342 Alberta., Ltd. v. Dataphon Cellular P'ship*, No. 95-C-174-BU, 1995 WL 877499, at *5 (N.D. Okla. Sept. 28, 1995) *aff'd sub nom 475342 Alberta Ltd. v. Dataphon Cellular P'ship*, 100 F.3d 967 (10th Cir. 1996) (noting that while cases where an attorney of a party has been permitted to file an affidavit, the court was "unable to find cases where a nonparty witness' affidavit has been found sufficient for purposes of Rule 56[d]; particularly, when that nonparty witness does not have first hand knowledge of why facts essential to a party's opposition cannot be presented").

Colin Dunn *is a partner at Clifford Law Offices, P.C. In recognition for his outstanding legal work, Colin was named to the Law Bulletin Publishing Company's 2010 "40 under 40." He was named a Super Lawyers' "Rising Star" annually since 2009, and a "SuperLawyer" annually since 2013.*

Colin obtained his law degree from Loyola University of Chicago School of Law.