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To: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Mark R. Kravitz, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 17, 2007**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 8 and 9, 2007. Draft Minutes of the meeting are attached. On November 6, the Rule 56 Subcommittee held a "miniconference" on the Rule 56 draft that was included with the Advisory Committee Report to the June 2007 meeting of the Standing Committee. The Discovery Subcommittee met several times by conference calls over the summer and into the fall. These activities are reported in the discussion items below

Several Civil Rules amendments were published for comment in August 2007, including the Civil Rules part of the Time-Computation project Few comments were received during the early part of the comment period. The full set of comments will be reviewed and the proposals will be considered for further action at the April Advisory Committee meeting.

No action items are presented in this report.

Three discussion items are presented in Part I. The first two, involving summary judgment and discovery of expert trial witnesses, are presented for initial reactions that will help the Advisory Committee as it prepares what may become recommendations to publish amendments next summer. The third, involving notice pleading, is presented for advice on whether, and perhaps when, it will be appropriate to consider the impact of *Bell Atlantic Corp v Twombly*, 2007, 550 U S. ___, 127 S.Ct. 1955. This topic will be presented through a panel discussion.

Part II is a brief description of ongoing Advisory Committee projects

I DISCUSSION ITEMS

A. Rule 56 · Summary Judgment

The Rule 56 proposals described here have been developed in a Rule 56 Subcommittee chaired by Judge Michael Baylson and refined in Advisory Committee discussions. The process has been advanced by the valuable contributions of the many lawyers, judges, and academics who participated in two miniconferences in January and November 2007. Studies by the Federal Judicial Center also have provided important insights into the operation of present Rule 56. Memoranda on

local rules by Jeffrey Barr and James Ishida of the Rules Committee Support Office demonstrated the widespread adoption and great variety of local rules. A preliminary FJC report and the local rules memoranda are attached.

These proposals represent an effort to improve the procedures for making, opposing, and resolving summary-judgment motions. From the beginning, the Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be neutral as between plaintiffs and defendants The aim is a better Rule 56 procedure that improves alike the prospects of good motions and good responses, while equally deterring bad motions and bad responses. No prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments. Improved procedures may, for example, reduce strategic use of summary-judgment motions as a short-cut means to discover an adversary's positions and evidence or as unworthy means of increasing delay and expense. The need to identify clearly the facts said to be established beyond genuine dispute, and to point directly to the record materials that make them so, should discourage motions with little or no chance of success. Even if an ill-founded motion is made, clear presentation will facilitate an efficient response and prompt denial. Improved procedures, on the other hand, may encourage well-founded motions and focused responses, facilitating well-informed decision.

Rule 56 has been held on the Civil Rules agenda for several years following an attempt at thorough revision that failed in 1992; a summary of that attempt is attached. It has been brought back for active consideration in conjunction with ongoing discovery amendments and with consideration of notice pleading. Efforts to achieve fully satisfactory discovery practices have continued without surcease for forty years and show no sign of abating. Notice pleading, the gateway to discovery, has been the subject of puzzled attention for nearly twenty years, and has been brought back to the fore by the *Twombly* decision discussed elsewhere in these materials. Summary judgment is widely recognized as the third main component of the 1938 revolution that established notice pleading and sweeping discovery. The question is whether improvements in summary judgment procedure, made without changing the standard for summary judgment or the related moving burdens, can improve the role of summary-judgment as the third leg of the notice-pleading, discovery, summary-judgment stool.

More concrete considerations supplemented these overarching concerns. Rule 56 has not been amended, apart from the Style Project, for many years. Practice has grown increasingly out of touch with the present rule text. Most districts have adopted local rules to supplement the national rule. The local rules are not uniform, and at times direct practices that are inconsistent from one district to another. It is useful, and increasingly important, to restore greater uniformity through a national rule that builds on the most successful local rules as well as on proliferating interpretations of present Rule 56 text.

It bears emphasizing again that the summary-judgment project began with the determination that the standard for granting summary judgment should not be reconsidered. Restatement of the summary-judgment burdens also was placed off limits because the burdens are closely tied to the standard. It is better to leave these matters to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more

An advanced Rule 56 draft was included in the agenda materials for the June 2007 Standing Committee meeting. The draft was not brought on for discussion because more pressing matters in the five-volume agenda left no room for extended consideration. The Advisory Committee and Subcommittee have taken advantage of the time afforded by the resulting hiatus to revise the draft. A second miniconference was held in November to follow up the lessons of the January miniconference with an entirely different but equally diverse group of lawyers, academics, and

judges. The discussion inspired new recommendations by the Subcommittee that were acted upon by the Advisory Committee and further refined by the Subcommittee after the Committee meeting

The current draft is presented now for purposes of initial discussion. The hope is to learn as much as can be in the time available in the January agenda to advance preparation of a draft that will be ripe for a recommendation at the June meeting to publish proposed Rule 56 amendments for public comment.

Some of the more particular issues that may benefit from discussion are identified by footnotes in the draft rule text and Committee Note. Broader issues are noted here.

Subdivision (a)

Subdivision (a) brings the basic summary-judgment authority up to the front of the rule, in a manner parallel to the closely related Rule 50 provisions for judgment as a matter of law. It also anticipates the repeated later references to summary judgment on a claim, defense, or part of a claim or defense. These provisions do not alter present practice. To the contrary, the statement of the summary-judgment standard emphasizes continuity by taking the words of present Rule 56(c) with only one change, substituting "genuine dispute" for "genuine issue" of fact.

Subdivision (a) also directs that the court must state on the record the reasons for granting — and should state the reasons for denying — summary judgment. Courts of appeals regularly emphasize the need for an explanation of orders granting summary judgment, and lawyers regularly emphasize the importance of guidance on the issues the court believes require trial. As explained in the Committee Note, these statements do not require the detail or formality of Rule 52 findings of fact. The form and detail of the statement of reasons are left to the court's discretion.

Subdivision (c)

In many ways subdivision (c) is the core of the newly elaborated Rule 56 procedure. It grows out of procedures established by many local rules. One goal, indeed, is both to propagate the best lessons to be drawn from the local rules and to establish a uniform template that will work well for most cases. As might be expected, these provisions have been vigorously discussed and debated. Different local practices fostered by divergent local rules win strong support from those who have worked successfully with each particular variation.

The first point to note in describing subdivision (c) is that it establishes a general practice that will serve the needs of most cases without requiring that all cases be fit into the same mold. The first paragraph recognizes that the court may order a different procedure in a case. It is limited to directions by order in a case; it does not contemplate local rules or "standing orders" that routinely displace subdivision (c) procedures for all cases

Subdivision (c)(2) describes the general procedure for motion, response, and reply. The movant provides three things: a motion identifying the claim, defense, or part of each claim or defense as to which summary judgment is sought; a concise statement of facts in separately numbered paragraphs; and a brief. The response must address each fact, accepting, disputing, or accepting in part and disputing in part. The response also may challenge the admissibility of evidence relied on by the movant, and may assert additional facts that preclude summary judgment. The movant must reply to any additional facts.

Each statement or dispute of fact must ordinarily be supported by citations to particular parts of materials in the record. But subdivision (c)(2)(D)(ii) recognizes that a motion, response, or reply may be made without specific record citations. A response, for example, may assert that the

materials relied on in a motion to show the absence of a genuine dispute do not show that. Similarly, a reply may assert that additional facts relied on to show a genuine dispute do not do that. The most sensitive part of this item reflects the Supreme Court's ruling in the Celotex case that a party who does not have the trial burden of producing evidence of a fact may support a summary-judgment motion by "showing" that the party who has the trial burden cannot product admissible evidence to support the fact. It is essential that the rule recognize this definition of the Rule 56 moving burden, however unusual it may be for a movant to rely on such a showing without pointing to particular parts of materials in the record. At the same time it is better that the rule not attempt to elaborate on any continuing uncertainty as to what a movant must do to establish such a "showing." The proposed draft simply accepts the guiding language, relying on continuing evolution in the courts.

The rule text says only that materials cited to support a statement or dispute of fact must be in the record. The Committee Note supplements the text by recognizing that the court may direct that the materials be gathered in an appendix, or that a party provide directions on how to find materials buried in a mammoth record. That authority is securely anchored in subdivision (c)(1). Earlier drafts also recognized the legitimacy of local rules requiring an appendix. Such rules do not seem inconsistent with the proposed rule text; despite continuingly ambivalent feelings about local rules, it may be desirable to restore this sentence.

Some hesitation has attended draft subdivision (c)(2)(E). This subdivision confirms common statements that the court need not consider materials not cited by the parties. At the same time it seeks clarity by confirming that the court may consider record materials not cited by the parties It does not seem wise to require a court, for example, to grant summary judgment in the face of a genuine dispute established by record materials that a nonmovant has not had the wit to cite. But this subparagraph might seem to threaten adversary control of the case. It deserves close discussion.

Subdivision (e)

Subdivision (e) addresses an issue at the heart of summary judgment. A party may fail to respond to the motion, or may respond in a way that does not satisfy subdivision (c). Ordinarily a court will respond in the manner identified by subdivision (e)(1), affording an opportunity to respond in proper form. But the court need not do that, and may well abandon the effort after an unsuccessful attempt. Beyond that point, three main approaches could be taken. One would treat the failure to respond or an improper response as a default, leading to summary judgment without examining the motion or supporting materials to determine whether the movant is entitled to judgment as a matter of law. Subdivision (e) rejects this approach. A second — reflected in more than a dozen local rules — would "deem admitted" facts asserted by the movant but not properly responded to. This approach is not the same as default. If there is no response to a summary-judgment motion, or if the response does not address the facts asserted to be undisputed as subdivision (c) requires, the court could not grant summary judgment unless the facts considered accepted, together with facts otherwise established beyond genuine dispute, support summary judgment. This approach is one of the alternatives recognized in subdivision (e). A third approach would have the judge examine the motion and supporting materials, allowing summary judgment only if the movant has carried the summary-judgment burden even as to facts that might have been considered accepted. This approach too is recognized as an available alternative; when it is taken, the only penalty for failure to respond properly is loss of the opportunity to direct the court to information that would defeat the otherwise sufficient showing made by the movant.

A footnote to subdivision (e) identifies the question whether the rule text should also address a motion — not only a response or reply — that does not comply with subdivision (c) requirements.

Other Subdivisions

The remaining subdivisions are important but have not seemed to present as many issues for discussion. Some of the finer points are identified by the footnotes added to the rule text and Committee Note.

Subdivision (b) carries forward the timing provisions that were published for comment as part of the Time-Computation Project in August 2007. Changes are made only to adapt these provisions to the amended Rule 56 structure.

Subdivision (d) carries forward present subdivision (f). After exploring more extensive changes, the Committee decided that it is better to rely on the well-developed case law than to attempt to capture the multiple relevant factors in a more elaborate rule. The Committee also considered and rejected adding a requirement that a party asking more time for discovery or other investigation describe the facts it hopes to prove. The new text does add an explicit recognition that the court may deny a premature motion rather than carry it forward. The detailed statements and citations required by subdivision (c) enhance the prospect that any consideration of summary judgment after further significant discovery would require such thorough revision as to make it better to start over.

Subdivision (f) recognizes practices well established in current procedure, making clear the court's obligation to give notice to the parties before granting summary judgment on grounds not raised in the motion, or for a nonmovant, or without a motion.

Subdivision (g) recognizes the common tendency to describe summary adjudication of part of a case as "partial summary judgment" and simplifies expression to emphasize the court's discretion in determining whether it is useful to grant partial summary judgment or to establish that a material fact is not genuinely in dispute. A footnote in the draft identifies an issue that was much discussed — whether to add further explicit recognition that the court may (or even should) identify material facts that are genuinely in dispute. This paragraph has been omitted on the view that the subdivision (a) behest to state the reasons for denying summary judgment suffices; it might impose untoward burdens to urge greater detail here.

Subdivision (h), finally, carries forward with only one change present Rule 56(g)'s provision for affidavits submitted in bad faith. Sanctions are made discretionary, recognizing that — as demonstrated by Federal Judicial Center research — Rule 56(g) is almost never invoked.

Conclusion

This proposal draws from the laboratories provided by many local rules and by many years of evolution in practice. It attempts to synthesize the procedures that have been most effective, providing both guidance and consistency lacking in present Rule 56, as well as necessary flexibility to tailor the procedures to the needs of particular cases. Public comment will provide on a larger scale the benefits that have been gained from two successful miniconferences, further revealing the lessons of experience and ensuring achievement of the intended purpose to improve Rule 56 procedures and make them more consistent without changing the standard for summary-judgment rulings or making it either easier or more difficult to obtain summary judgment.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) **Summary Judgment.** A party may move for summary judgment on part or all of a claim or defense. The court should[1] 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. The court must state on the record the reasons for granting — and should state on

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[1] Until November 30, 2007, Rule 56(c) said that the court "shall" grant summary judgment. As explained in the Committee Note for the Style Project revisions, "shall" — a word forbidden in any Rules usage — was rendered as "should." The courts have long recognized discretion to deny summary judgment even when the summary-judgment record seems to show that a movant is "entitled to judgment as a matter of law." The present project is not bound by the Style Project protocol that no change could be made in a rule's meaning. Some Advisory Committee members have urged that "must" should be substituted for "should." They believe that a party who has successfully undertaken to show there is no genuine dispute as to any material fact is truly "entitled" to summary judgment. The Committee majority continues to believe that a one-way discretion to deny summary judgment is important. A trial record may provide a more secure foundation for deciding important issues. Holding trial may require less work than resolving facts on the borderline of genuine dispute, particularly if resolution in favor of summary judgment is followed by reversal. The losing party and the public may trust the trial process better than summary judgment.

the record the reasons for denying — summary judgment.

(b) Time for a Motion, Response, and Reply. These times apply unless a different time is set by local rule or the court orders otherwise in a case:

(1) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(2) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(3) the movant may file a reply within 14 days after the response is served

(c) Procedures.

(1) ***In General.*** The procedures in this subdivision (c) apply unless the court orders otherwise in a case.

(2) ***Motion, Response, Reply; Support; Briefs.***

(A) *Motion.* The motion must:

(i) identify each claim, defense, or the part of each claim or defense as to which summary judgment is sought; and

(ii) be accompanied by[2] a [separate] concise statement in separately numbered paragraphs of only those material facts[3]

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[2] The Subcommittee and Committee debated at length the choice between a "two-document" approach that incorporates the statement of undisputed facts in the motion and the "three-document" approach that — absent a contrary order — requires a motion, a separate statement, and a brief. The three-document approach prevailed. The motion is a summary statement of the relief requested. Several judges stated that they begin with this statement, then read the brief to establish the context, and go to the statement of undisputed facts and supporting citations only as the third step

As a drafting matter, "accompanied by" may suffice to convey the separate-document approach. If so, we can delete the bracketed "[separate] concise statement in separately numbered paragraphs," avoiding the repeat use of "separate." But this may be a message that wants reinforcement.

[3] The miniconferences provided many testimonials to the tendency of some lawyers to produce bloated — and counterproductive — statements of "undisputed facts," at times running to more than 100 pages. Quite a few suggested that the rule should impose at least a

that the movant asserts are not genuinely in dispute and entitle the movant to summary judgment.

(B) *Response.* A response:

(i) must, by correspondingly numbered paragraphs, accept, dispute, or accept in part and dispute in part — either generally or for purposes of the motion only — each fact in the Rule 56(c)(2)(A)(ii) statement;

(ii) may state without argument that the material cited to support a fact is not admissible in evidence; and

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default limit: 10 undisputed facts, or 20. The limit has not seemed attractive. What is left is an attempt at gentle persuasion — the statement must be "concise," and must address "only" "material" facts. The Committee Note fleshes out this effort. It has been difficult to find words to express more forceful encouragement.

(iii) may state in separately numbered paragraphs additional material facts that preclude summary judgment.

(C) *Reply.* The movant must[4] reply in the form required for a response to any additional fact stated in the response.

(D) *Citing Support for Positions.* A statement or dispute of fact must be supported by:

(i) citations 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),

[4] The consequences for failing to respond or reply are addressed by subdivision (e). "Must" here is consistent with "may" in the (b)(3) time-to-reply provision — no reply is required, or even permitted, when the response does not state additional facts.

admissions, interrogatory answers, or other materials; or

(ii) a showing that the materials cited to dispute or support the fact do not establish a genuine dispute or the absence of one, or that an adverse party cannot produce admissible evidence to support the fact.[5]

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[5] This language carries forward language from the Celotex opinion stating that a party who does not have the trial burden of producing evidence of a fact may carry the Rule 56 burden by "showing" that an opposing party cannot produce evidence to carry its trial burden. Celotex Corp. v. Catrett, 1986, 477 U.S. 317, 325: "But we do not think the Adickes language quoted above should be construed t omean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." No attempt is made to resolve the ambiguities that continue to lurk in this language, particularly understanding how a party "shows" or "points out" an absence of evidence. Lower courts have not been entirely uniform in interpreting it, and it may be expected that the case law will continue to evolve. Although the Rule 56 burden is in some

(E) Materials not Cited. The court may — but need not — consider materials of record outside those called to its attention under Rule 56(c)(2)(D).[6]

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ways independent of the standard for determining whether there is a genuine dispute, attempts to clarify the moving burden would severely test the self-imposed purpose to address only the procedures, not the standard, for summary judgment. However these questions come to be resolved, improved Rule 56 procedures will better enable the parties to carry their respective burdens.

[6] This provision appeared in early drafts, was deleted, and then restored. Trial judges lament that summary judgments are reversed for failure to look to record information not cited by the parties. A clear statement that the court need not consider uncited materials, reflecting common statements in appellate opinions and in some local rules, would be welcome. But the statement could be misleading if the rule text does not also recognize that the court may deny summary judgment despite a nonmovant's inept failure to point to record information that does establish a genuine dispute. On the other hand, recognizing the authority to look beyond the parties' record citations may raise concerns that the court will rely on materials the parties recognize as unreliable. The Committee Note attempts to illustrate the intended uses of this provision.

(F) *Affidavits or Declarations.*[7] 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.

(G) *Brief.* A party must submit its contentions as to the controlling law or the facts in a separate brief filed with the motion, response, or reply.[8]

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[7] "Declarations" was in every successive draft until the Style Consultant protested that adding it to Rule 56 will create an ambiguity in every other rule that refers to an affidavit without also referring to a declaration. The Advisory Committee rebelled. Many younger lawyers are so accustomed to using declarations in Rule 56 practice that they do not quite know what an affidavit might be. The rule text should reflect common practice.

[8] This provision is not intended to bar a "reply brief" by a movant who does not file a reply to additional facts. To the contrary, a reply brief may be important to explain why the disputes attempted by the nonmovant are not genuine. Does it suffice to make this point in the

(d) **When Facts Are Unavailable.** 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 consideration of the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Committee Note?

(e) Failure to Respond or Properly Respond.[9] If a response or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:

[9] Some observers suggested that this subdivision should also address a motion that fails to comply with the requirements of (c)(2)(A). It was decided, at least tentatively, that there is no need to do so. Courts know how to deal with defective motions without further guidance. This subdivision is designed to address questions raised by local rules and general practices relating to defective responses.

The Committee Note is long. And it is always uncertain whether to use the Note to address questions deliberately omitted from rule text. Explanation seems called for only if there is a risk that the rule text alone might seem to reflect a (nonexistent) bias favoring movants. The explanation might be relatively brief. One sentence could explain that the rule text does not address defective Rule 56 motions because courts have general approaches to dealing with defective motions of all kinds, and because there may be a variety of defects that call for different responses. Making two documents where there should be three; failure to file supporting materials, failure to cite supporting materials clearly or at all; compound or unclear statements of fact ("the light was working and it was red"); and many other examples could be offered if we wish. A second sentence might add that a nonmovant remains free to point out the defects, and to ask for an extension of time to respond until the defects are cured. There might even be a third sentence observing that silence in the rule text does not mean that a nonmovant's failure to point out the defects waives the defects.

(1) afford an opportunity to respond or reply as required by Rule 56(c);

(2) consider a fact [as] accepted for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials show that the movant is entitled to it;[10] or

(4) issue any other appropriate order.

(f) Judgment Independent of Motion. After giving notice and a reasonable time to respond the court may:

(1) grant summary judgment for a nonmovant;

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[10] Should we add to the Committee Note a statement that the "other appropriate order" in (4) might include an order denying summary judgment because the movant has not replied to additional facts? Or even might include an order granting summary judgment for the nonmovant for the same reason? Do we want to clutter the rule text with these thoughts?

(2) grant or deny a motion for summary judgment on grounds not raised by the motion or response; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Partial Summary Judgment.** If summary judgment is not granted on the whole action, the court:

(1) may grant partial summary judgment on a claim, defense, or part of a claim or defense; and

(2) may enter an order or memorandum stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the action.[11]

[11] There has been lively discussion of a possible third paragraph: "should identify on the record material facts that are genuinely in dispute." This paragraph would recognize the value of guiding the parties by statements more detailed than contemplated by the subdivision (a) provision that the court should state the reasons for

115 **(h) Affidavit or Declaration Submitted in Bad Faith.**[12] If

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denying summary judgment. If it were included in the rule text, the Committee Note might look like this:

Subdivision (g)(3) expressly recognizes that when the court denies summary judgment on the whole action it may identify facts that are genuinely in dispute. The specification may help to focus the parties in ways similar to the guidance that can be achieved through Rule 16 procedures. In some cases the guidance may be important because the denial is appealable. Official-immunity cases provide the most common example. The appeal does not extend to reviewing the determination that there are one or more genuine disputes of material fact. Instead the court of appeals addresses the questions of law presented when all of the facts left open for trial are resolved in favor of the plaintiff. A statement by the district court of the facts open for trial can advance the argument and decision of the appeal.

The court may embody its identification of disputed facts in an order, memorandum, or on the record.

[12] There was spirited discussion of the suggestion that this subdivision should be transformed into a cost-bearing provision reaching beyond Rule 11. The central idea would be that an unsuccessful motion, response, or reply inflicts costs that may appropriately be compensated. The standard might be "unreasonable," or something else. Plaintiffs in some fields might welcome this provision as a protection against clearly premature and often strategically motivated motions. Defendants too might welcome it, on the view that they can avoid motions likely to trigger cost-bearing and that they will benefit from deterring unsuccessful responses (and perhaps deterring the filing of weak actions). The current disposition is to put aside this suggestion. Given the fact that more judgments result from Rule 56 than from trial — and that many of them favor defendants — even a relatively high standard for cost-

satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

COMMITTEE NOTE

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that a party be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases. The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp* , 475 U S. 574.

The practice and procedures implementing Rule 56 have grown away from the rule text. Many districts have adopted local rules

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bearing might be a substantial inroad on the general attorney-fee rules. Employment cases might be particularly troubling, since they often involve statutory fee provisions designed to favor plaintiffs.

governing summary-judgment motion practice. These local rules have generated many of the ideas incorporated in these amendments. Not surprisingly, some local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. There is no change in the rule that a court has discretion to deny summary judgment even if it does not appear that there is a genuine dispute. It may be less burdensome or more transparent to hold trial than to resolve close questions whether the summary-judgment standard is satisfied. Or information not admissible at trial may show a prospect that a nonmovant will be able to find sufficient admissible evidence in time for trial. As observed in the Committee Note to the 2007 amendments, the direction that summary judgment "should" be granted "recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact."

The reference to "any material fact" is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for vicarious liability, the character of the driver's conduct is not material as to this defendant, even though it would be material to a claim against the driver.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense.

Subdivision (a) also adds a new direction that the court must state on the record the reasons for granting, and should state the reasons for denying, summary judgment. Most courts recognize these practices, which facilitate appeals or subsequent trial-court proceedings. The form and detail of the statement of reasons are left to the court's discretion.

The statement on granting summary judgment is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But the statement should identify the general reasons that support the judgment, addressing the dispositive facts and underlying law in a way that supports the decision whether to appeal and the argument and decision of the appeal. And the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver's negligence.

The statement on denying summary judgment need not address every available reason — identifying every genuine dispute of potentially material fact would be burdensome, if not impossible, in complex cases. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) were consolidated and substantially revised as part of the Time Project amendments that took effect in 2009. These provisions are adapted by new subdivision (b) to fit the context of amended Rule 56.[13]

[13] The overlined material is retained provisionally. If the Time Project amendments go forward on schedule it will be deleted.

~~[The rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.~~

~~The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages — including separation of expert-witness discovery from other discovery.~~

~~Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.~~

~~If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.]~~

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for summary-judgment motions synthesized from similar elements found in many local rules.

The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit from different procedures. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion, tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.

Paragraph (2) spells out the basic procedure of motion, response, and reply. It identifies the methods of supporting the positions asserted, recognizes that the court is not obliged to search the record for information not cited by a party that supports a position, carries forward the authority to rely on affidavits, and directs that contentions as to law or fact be set out in a separate brief.

Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which summary judgment is sought. This requirement is expressed in terms that anticipate the "partial summary judgment" provisions in subdivision (g). A motion may address discrete parts of an action without seeking disposition of the entire action.

The motion must be accompanied by a separate concise statement in separately numbered paragraphs of only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts.

The response must, by correspondingly numbered paragraphs, accept, dispute, or accept in part and dispute in part each fact in the Rule 56(c)(2)(A)(ii) statement. A response that a material fact is accepted or disputed may be made for purposes of the motion only. The response should fairly meet the substance of the asserted fact without seeking to take advantage of imprecise wording.

The response also may be used to challenge the admissibility of material cited to support a fact. The challenge can be supported by argument in the brief, or may be made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does

not forfeit the right to challenge admissibility at trial. (This challenge to the admissibility of materials relied upon by an adversary to support a summary-judgment assertion that a fact is not subject to genuine dispute is different from supporting a summary-judgment motion by arguing that a party who has the trial burden of production cannot produce admissible evidence to support a fact. See subdivision (c)(2)(D)(ii).)

The response may go beyond responding to the facts stated to support the motion by stating in separately numbered paragraphs additional material facts that preclude summary judgment.

If the response states additional facts the movant must reply to the additional facts in the form required for a response. The exchanges stop at this point. The rule does not provide for a sur-reply to additional facts stated in the reply, nor for still further stages. But the court may order further exchanges if that would aid in deciding the motion.

Subparagraph (c)(2)(D) addresses the ways to support a statement or dispute of fact. Item (i) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support the facts. Specific citations are important to enable the parties and the court to address the facts efficiently and effectively. Specific citations to factual materials often will be provided even by a party who does not have the trial burdens on an issue, including citations to discovery responses, stipulations, or other concessions by the party who does have the trial burdens. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Legal sources cited to support a party's position need not be filed.[14] Once materials are in the record, the court may, by order in the case, direct that the materials be gathered

[14] This sentence was added when there was an independent filing requirement. It seems less useful now, and might well be deleted.

in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix.[15] Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(2)(D)(ii) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish a genuine dispute or the absence of one. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to support the fact.

Subdivision (c)(2)(E) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. The court is entitled to rely on the adversaries to identify all the information relevant to the decision. Independent searching may even be dangerous because Rule 5(d)(1) directs that many disclosure and discovery materials must not be filed until they are used in the action; parties that do not rely on filed materials may neglect to file other materials that dispel the effects of filed materials. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties. This authority is more likely to be appropriate when uncited material shows there is a genuine dispute. If the court intends to rely on uncited material to grant summary judgment it often should give notice to the parties by analogy to subdivision (f)(2).

Subdivision (c)(2)(F) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted.

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[15] Up to now, this part of the Note has recognized the legitimacy of local rules that require an appendix. Judge Fitzwater feels strongly about the value of local rules. Should we restore the blessing?

The requirement that a sworn or certified copy of a paper referred to in an affidavit be attached to the affidavit is omitted as unnecessary given the requirement in subdivision (c)(2)(D)(i) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed as true under penalty of perjury to substitute for an affidavit.

Subdivision (c)(2)(G) directs that contentions as to the controlling law or the evidence respecting the facts must be made in a brief. The brief is the place to argue that summary judgment is not warranted even if there is no genuine dispute as to facts asserted by an adversary. The rule text addresses only briefs that support a motion, response, or reply. It does not bar additional briefs. A movant may do a good service to the court by a reply brief that explains why the nonmovant's attempted disputes are not genuine, and it may be that still further briefing will be useful. These matters are best addressed by scheduling orders or other case-specific accommodations.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) ordinarily should seek an order deferring the time to respond to the summary-judgment motion.

It may be better to deny a motion that is clearly premature, without prejudice to filing a new motion after further discovery. Further discovery may so change the record that both the statement of material facts required by subdivision (c)(2)(A)(ii) and the record citations required by subdivision (c)(2)(D) will have to be substantially changed. But it may be feasible to defer consideration of the motion if there is a prospect that it can be addressed without substantial change after further discovery.

Subdivision (e). Subdivision (e) addresses questions that arise when a response or reply does not comply with Rule 56(c) requirements or when there is no response or no reply to additional facts stated in a response. Summary judgment cannot be granted by default even if there is a complete failure to respond or reply, much less when an attempted response or reply fails to comply with all Rule 56(c) requirements. Subdivision (e)(3) recognizes that the court can grant summary judgment only if the motion and supporting materials show that the movant is entitled to it. At the same time the court may consider a fact as accepted for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is accepted only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as accepted, particularly if the court knows of record materials that show grounds for genuine dispute.

When a failure to reply to additional facts stated in a response leads the court to consider the additional facts as accepted, the result may be not only denial of the motion but summary judgment for the nonmovant. [The notice and time-to-respond provisions of subdivision (f)(1) would apply.]

Before deciding a motion absent a proper response or reply, however, the court may afford an opportunity to respond or reply in proper form, or make another appropriate order. The choice among possible orders should be designed to encourage proper responses and replies. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After

giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

Subdivision (g). "Partial summary judgment" is a term often used despite its absence from the text of former Rule 56. It is a convenient description of well-established practices. A summary-judgment motion may be limited to part of an action, including parts of what would be regarded for other purposes as a single claim, defense, or even part of a claim or defense. And a motion that seeks to dispose of an entire action may fail to accomplish that purpose but succeed in showing that one or more material facts is not genuinely in dispute. Former subdivision (d) supported the practice of establishing such facts for the action.

This procedure is carried forward in a form that better conforms to common practice. The frequent use of summary judgment to dispose of some claims, defenses, or parts of claims or defenses is recognized. The court's discretion to determine whether partial summary judgment is useful is more clearly identified.

If it is readily apparent that summary judgment cannot be granted the court may properly decide that the cost of determining whether some potential disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from entering partial summary judgment on that fact. The court has discretion to conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event. Exercise of this discretion may be affected by the nature of the matters that are involved. The polices that underlie official-immunity doctrines, for example, may make it important to grant partial summary judgment for a defendant as to claims for individual liability even though closely related matters

must be tried on essentially the same claims made against the same defendant in an official capacity.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with two changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). And the need for notice and a reasonable time to respond is brought into rule text.

Rule 56 Revision: The Effort that Failed in 1992
(Rule 56 Agenda Materials from October 2005 Meeting)

The Advisory Committee took up revision of Rule 56 in the wake of the 1986 Supreme Court decisions. In September 1992 the Judicial Conference rejected the proposed revision. A few years later the Reporter prepared a first-draft revision of Rule 56(c) based on the earlier proposal. This draft responded to one set of purposes underlying the proposal. Rule 56(c) does not provide much detail about the procedure of moving for summary judgment. Many districts have adopted local rules that spell out detailed requirements. Rule 56 can be improved by adopting the best features of these rules, and some measure of national uniformity may be gained in the bargain. The Rule 56(c) draft remains for initial consideration. The present question is whether to undertake broader revision of Rule 56. If Rule 56 is to be revamped, the Rule 56(c) draft would be revised to fit within the new overall structure For present purposes, Rule 56(c) questions are relegated to the separate memorandum.

The earlier effort pursued a multitude of objectives. This initial description is rough, but should present most of the questions that should be considered in deciding whether to renew the study of Rule 56.

Purpose of Revision

The first paragraph of the final Committee Note seems to reflect a desire to increase the use of Rule 56:

> This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome — while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The first question to confront is what motives might prompt Rule 56 revision. Is there a sense that Rule 56 should be used more vigorously to weed out cases — or parts of cases — that do not deserve elaborate pretrial preparation or trial? That use of Rule 56 has gone too far, so that parties are "deprived of a fair opportunity to show that a trial is needed"? Or that practice varies, not simply in the way courts express themselves but in the actual willingness to dispatch cases by Rule 56? Any of these reasons would prompt a thorough-going reframing of the entire rule

Less ambitious goals might be pursued. The core of current Rule 56 practice could be taken as given, turning attention to matters affecting the procedure of moving for summary judgment. These goals could be reasonably ambitious, or instead could seek more modest gains. Omissions and unfortunate drafting could be cured. Unrealistically short times for response could be adjusted. The 1992 draft undertakes many changes within this general range, to be explored here in no particular order.

Standard

The present standard allows summary judgment only if presentation of the same record at a jury trial would require judgment as a matter of law. The directed verdict standard applies even if jury trial has been waived, or even if there is no right to jury trial. There is no discretion to grant summary judgment in a case that does not meet this standard. But the equation is not exact. Many cases recognize discretion to deny summary judgment even though the directed-verdict standard is

satisfied — Style Rule 56(c) recognizes this discretion by saying that summary judgment "should" be granted when there is no genuine issue as to any material fact.

It would be possible to reconsider each of these points. It might be argued that if the case is to be tried to the court without a jury, the judge should be able to grant summary judgment on the basis of some standard more open-ended than the directed-verdict standard. Indeed, it might be urged that the efficiency gained by summary judgment justifies departure from the directed-verdict standard even in a jury case.

The 1992 proposal did not attempt to make these changes, apart from recognizing discretion to deny summary judgment even when the required showing has been made. The initial effort, indeed, was to integrate Rule 56 more directly with judgment as a matter of law, emphasizing the identity of standards. Application of the jury standard in judge-tried cases was recognized and carried forward. The Rule 50 standard for judgment as a matter of law was expressly incorporated in subdivision (b), while subdivision (a) carried forward the concept of "facts not genuinely in dispute."

The proposal did undertake a task that has been accomplished by the Style Project. The several different phrases that present Rule 56(d) and (e) deploys to describe the "genuine issue" concept are replaced by uniform terminology. The thought was to use the same words to express the same standard, not to suggest that the different expressions had led to different standards.

There is no apparent reason to reconsider the basic standard. The tie to directed verdict standards in jury cases is apparent, and probably wise. Strong resistance to any change is certain. Nor is there any clear reason to reconsider the standard for judge-tried cases. Any party who wishes to present live witnesses should have the opportunity to do so, limited only by predictive application of the directed-verdict standard. If no party wishes to present live witnesses, the case can be tried on a paper record Trial on a paper record is different from summary judgment. It entails Rule 52 findings and review for clear error.

The 1992 draft did write into Rule 56 discretion to deny summary judgment even when a verdict would be directed if the opposing party does not improve its showing at trial. It did this in a way that anticipated but goes beyond the Style Project outcome. Proposed Rule 56(a) said that the court "may" enter summary judgment or "may" summarily determine an issue. The Committee Note explained that discretion to deny has been recognized in the cases, and that the "purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice." This change may be resisted, however, on the ground that it might increase the rate of denials. In addition, the 1992 Committee Note suggests complications: discretion to deny may be limited, or may disappear, when summary judgment is sought on specially protected grounds such as official immunity or First Amendment rights. Although slight, the distinction from "should" in Style Rule 56(c) is real; the Committee Note to Style Rule 56 says that "courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact."

Moving and Opposing Burdens

The Rule 56 moving burden depends on allocation of the trial burden. A party who would have the burden at trial must support a summary-judgment motion by showing evidence that would entitle it to a directed verdict at trial. A party who would not have the burden at trial may carry the

Rule 56 burden in either of two ways. It may undertake a positive showing that negates an essential element of the opposing party's case. But it need not do that. Instead, it suffices to "show" that the opposing party does not have evidence sufficient to carry its trial burden.

The language of Rule 56 has not been changed since the Supreme Court first clearly articulated the Rule 56 burden for a party who does not have the trial burden. The 1992 proposal undertook to express the distinctions derived from the allocation of trial burdens. The words chosen do not accomplish a clear articulation:

> (b) ***Facts Not Genuinely in Dispute.*** A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

This drafting distinguishes between the moving burdens first by looking to "the evidence shown to be available for use at trial" and complementing this showing with "the demonstrated lack thereof." Either party may rely on evidence to establish a right to judgment as a matter of law "under Rule 50," presumably meaning according to the standard for judgment as a matter of law expressed in Rule 50. A party who would not have the trial burden may invoke "the demonstrated lack" of evidence standard, a result ensured by "and the burden of production or persuasion." The reference to "standards applicable thereto" seems calculated to invoke the rule that the trial standard of proof affects the directed verdict standard and with it the Rule 56 standard: if the trial burden requires clear and convincing evidence, stronger evidence is needed to justify a reasonable jury finding.

Although this drafting is a reasonably neat job, it is fair to wonder whether it would mean anything to a reader who does not already understand the Rule 56 burden.

Smaller questions also might be raised. One comment on the drafting, for example, expressed concern that "[a] fact * * * admitted by the parties" might be read to give conclusive effect to a party's out-of-court statement admissible under the "admission" exception to the hearsay rule. Nothing of the sort was intended, but the comment reflects the anxiety that will accompany any effort to state the moving burden.

In this dimension, then, the questions are whether it would be useful to describe the moving burdens in Rule 56; whether the 1992 draft does the job adequately; and whether a better job can be done. These questions may become entangled with residual disagreements about the Supreme Court's rulings.

The 1992 proposal also addressed the burden on a party opposing a summary-adjudication motion. The details are described in the Rule 56(c) memorandum. The immediately relevant provision was the final sentence of proposed 56(c)(2). A party that fails to respond in the required detail "may be treated as having admitted" a fact asserted in the motion. This provision seems to establish discretionary authority to grant summary judgment without independently determining whether the moving party has carried its burden to show lack of a genuine dispute. Presumably the purpose is to give teeth to the requirement of detailed response. But this approach is likely to be resisted on the ground that an opposing party should be entitled to rely simply on the argument that

the moving party has not carried its burden Much will turn on a determination whether — either to help the court consider the motion or to encourage summary disposition — a moving party can impose a burden of detailed response simply by making the motion.

Finally, proposed Rule 56(e)(2) addressed a distinct aspect of the parties' burdens, whether moving or opposing: "The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2)." Without invading subdivision (c) territory, the value of this proposition is apparent. At trial a court is not required to embark on a quest for evidence the parties have not submitted. It should not be required to comb through whatever materials have been filed by the time of summary judgment to determine whether the parties have failed to refer to decisive material. The only question is whether this proposition need be stated in the rule. One advantage of explicit statement may be that it goes part way toward imposing an obligation to respond — the opposing party knows that absent a response the court will consider only the adverse portions of the record pointed out by the moving party.

"Evidence" Considered

The 1992 proposal described the basis for decision as "evidence shown to be available for use at trial." Proposed Rule 52(b). The Committee Note explains that this language "clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support or opposition to summary adjudication."

More elaborate provisions were set out in proposed Rule 56(e):

(e) ***Matters to be Considered.***

> (1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.
>
> (2) The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

The Committee Note begins by stating that subdivision (e) implements the principle stated in (b).

The Note says that facts may be "admitted" for Rule 56 purposes in pleadings, motions, briefs, statements in court (as a Rule 16 conference), or through Rule 36. It states that submission of a document under Rule 56 is sufficient authentication and that there is no need for independent

assurances that a copy is accurate. Other evidence required to establish admissibility should be supplied by deposition, interrogatory answers, or affidavit.

Proposed Rule 56(g)(4) rounded out these provisions by stating that the court may conduct a hearing to rule on the admissibility of evidence.

There is no further discussion of the need to state the admissibility requirement in the rule, nor of the reasons for dispensing with authentication of documents or assurance that a document copy is accurate. Presumably admissibility is required because the purpose of Rule 56 is to determine whether there is a need for trial. The availability of inadmissible evidence does not show the need to try an issue that cannot be supported by admissible evidence.

Apart from wondering whether the admissibility requirement should be addressed in rule text, these provisions tie directly to the timing provisions. The parties must be afforded an opportunity for investigation and discovery that will enable them to find admissible evidence, including the opportunity to find admissible substitutes for inadmissible information. The timing provisions are described below. The proposed amendments to Rule 56(f) also expressly recognized the authority to deny a Rule 56 motion because an opposing party shows good cause why it cannot present materials needed to support its opposition.

A novel feature of redrafted Rule 56(f) would allow a party who cannot present materials needed to oppose a motion to make an "offer of proof." This provision seems to contemplate a statement of the admissible evidence a party hopes to secure, perhaps supported by pointing to information in an inadmissible form that may lead to admissible evidence. A showing that a bystander heard a witness say that the light was red might not be admissible, but could lead to discovering the identity of the witness and development of the same information in admissible form. Surely that approach is recognized in present practice. The questions are whether it need to stated in the rule, and whether reference to an "offer of proof" is the most useful description of the practice.

Together, these opportunities to delay decision seem to address the major potential difficulties of the admissibility requirement.

The provision barring reliance on verified pleadings, unless admitted, is curious. At least at times, a sworn pleading has been given the same effect as an affidavit — each is a unilateral, self-serving instrument, not independently admissible, but each is sworn to. It is required that the verified pleading satisfy the formal requirements of a Rule 56 affidavit, showing that the person signing is competent to testify. This practice is not often invoked, in part because verification is not often required and perhaps in part because verified pleadings do not often meet the formal requirements for a Rule 56 affidavit. This provision may reflect a view that as compared to affidavits, pleadings are verified with less scrupulous concern for truth. It might reflect experience that verified pleadings have been used to support or oppose summary judgment, to undesirable effect. Perhaps the view is that little work is required to copy the verified pleading into a complaint, so this additional assurance is properly required.

Timing

The time provisions in present Rule 56 clearly require revision. Rule 56(a) allows a party making a claim to move at any time more than 20 days after commencement of the action, or at any time after an adverse party has served a motion for summary judgment. That means that a party

making a counterclaim, for instance, can file a Rule 56 motion at the same time that it serves the counterclaim.[1] A party defending against a claim can move at any time. The motion must be served at least 10 days before the time set for hearing. Opposing affidavits can be "served" — including service by depositing in the mail — "prior to the day of hearing." All of these time periods are too short for many cases — often much too short.

The proposed rule sought to establish a functional test to control the motion. Proposed Rule 56(c) provided:

> A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control.

Response time was set at 30 days after the motion is served. (There is no explicit provision for hearing, so no time period was geared to the hearing. Present Rule 56(d) refers to "the hearing on the motion." The 1992 version deleted this reference; the Committee Note explained that the reference was confusing because the court may decide on the basis of written submissions alone. Some of the comments expressed concern at the lack of a hearing requirement. Compare the Style Project understanding that a provision for "hearing" can be satisfied without an in-person appearance before the court.)

These provisions were supplemented by express recognition in proposed 56(g)(1) and (2) of the court's authority to specify the period for filing motions and to "enlarge or shorten the time for responding * * *, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials."

Setting motion time in relation to the opportunity to discover relevant evidence is attractive in the abstract. It is likely to work well — indeed to be largely irrelevant — in actively managed cases. It is not clear that it would work well in cases left to management by the parties. There can easily be disputes whether there has been a reasonable opportunity to discover evidence. But the same disputes can arise under present Rule 56(f), in the form of seeking a continuance to permit affidavits to be obtained, or discovery to be had. And substituting the close of the discovery period is not a good idea — there may not be a defined discovery period, and in any event one stated purpose of the revisions is to cut short the discovery process when dispositive issues can be resolved without further discovery on other issues.

Another possible shortcoming of the reliance on reasonable opportunity for discovery may not be real. One "simplified" procedure that might be encouraged is to permit a motion for summary adjudication with the complaint. Actions that are essentially collection actions are the most likely

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[1] An intriguing observation. Rule 56(a) says that a party seeking to recover on a counterclaim may move for summary judgment at any time after 20 days from commencement of the action. That seems to say that the counterclaim cannot be included in an answer filed 10 days after the action is filed. But Rule 56(b) says that a party against whom a claim is asserted may move at any time. The apparent reconciliation is that the defendant can move for summary judgment against the plaintiff's claim on the 10th day, but cannot move for summary judgment on its counterclaim until the 21st day. Does that make sense?

candidates for such treatment. Perhaps this practice could be fit under the proposed rule by arguing that in such actions there is no need to discover evidence not already known to the defendant. An explicit subdivision describing this possible practice might be useful, however, if the practice seems desirable.

Explanation of Court's Action

The final sentence of 1992's Rule 56(a) reads "In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based." The Committee Note says that "[a] lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute * * *." It also says something not in the Rule — an "opinion" also should be prepared if a denial of summary judgment is immediately appealable. Since 1992 many appellate opinions wrestling with official-immunity appeals have bewailed the absence of any district-court explanation of the reasons for denying summary judgment. This may prove to be an issue that pits the interests of appellate courts against the needs of trial courts; it would be easier to strike a balance if we could know how often denial of an official-immunity motion for summary judgment is not followed by an appeal, and whether there is a practicable way to impose a duty to explain only when there is an appeal.

Reasoned explanation of a decision granting summary judgment is obviously valuable. It is also burdensome. The choice made in 1992 seems right, but must be thought through again.

Explanation of a decision denying summary judgment was urged by some of the comments on the 1992 proposal. This question ties to the question of "partial summary judgment." If a court decides to leave for trial all of the issues presented by the motion, it may be better to leave to Rule 16 conferences or other devices the opportunity to guide further party preparation for trial. Again, the choice made in 1992 may be the best outcome. But there is at least one competing concern. A summary-judgment denial may be appealable. By far the most common example is denial of a motion based on official immunity. There are lots of those appeals. Appellate courts regularly bewail the absence of any statement of the reasons that led to the denial. If it could be done, it might be useful to draft a rule that requires explanation when a denial may be appealed. The most obvious difficulty is to cabin any such rule to circumstances with a realistic basis for appeal in final-judgment doctrine. A rule might be drafted for immunity appeals only — perhaps including not only official immunity, but also Eleventh Amendment, foreign sovereign, and qualifying state-law immunities. It also might include any denial certified for § 1292(b) appeal. Venturing further, account might be taken of circumstances in which denial of summary judgment might arguably be appealable as a denial of interlocutory injunction relief for purposes of a § 1292(a) appeal. Even this much speculation illustrates the difficulty.

Partial Summary Judgment. Nomenclature and Limits

The 1992 proposal elected to retain "summary judgment" as the Rule 56 caption, but was drafted to distinguish three concepts. The general concept, "summary adjudication," embraces both "summary judgment" and "summary determination." Summary judgment refers to disposition of at least a claim; summary determination to disposition of a defense or issue. It is not clear whether the distinction is employed in a way that enhances clarity, but it may prove useful.

Two limits are created for summary determination. The first no doubt reflects much present practice. Present Rule 56(d) does not use the term "partial summary judgment," but commonly is

described that way. It says that if a Rule 56 motion does not dispose of the entire case, the court "shall if practicable ascertain what material facts exist without substantial controversy." The 1992 proposal explicitly changes "shall" to "may," recognizing that the court should have discretion to refuse any summary determination. The Style Project has done the same thing, although in a rather different way. Rather than "may," it says the court "should," to the extent practicable, determine what material facts are not genuinely at issue. This revision, reflecting actual practice, seems safe

The other limitation on summary determination appears in proposed Rule 56(a). Summary determination is authorized only as to "an issue substantially affecting but not wholly dispositive of a claim or defense." The Committee Note explains this limit: "the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some significant impact on discovery, trial, or settlement." The underlying concern seems reasonable. It would be good to restrict the opportunity to use Rule 56 for purposes of delay or harassment. A motion for determination of incidental issues may impede, not advance, ultimate disposition But the practical value of this limit deserves some thought. The effort to sort out issues that do not substantially affect a claim or defense may itself impede progress, particularly if the parties take to responding to Rule 56 motions by arguing the "significant impact" point. And some parties might avoid the attempt to determine whether an issue substantially affects a claim by moving for summary judgment on the claim. Under proposed Rule 56(c) the motion must specify the facts that are established beyond genuine issue, providing an obvious map for summary determination of some issues.

Partial summary disposition was extended by proposed Rule 56(d) to include an order "specifying the controlling law." It went on to provide that "[u]nless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified * * *." The theory is that it can be useful to establish the law as a guide for further trial preparation and trial. The most obvious question is whether this sort of procedure should be added to the traditionally fact-sorting function of Rule 56, or instead should be relegated to Rule 16. There also may be questions of the relationship between this provision and Rule 51 as revised in 2003.

The 1992 version of Rule 56(d) concluded by stating that "An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b)." Current Style conventions suggest that such gratuitous cross-references be deleted. This one may particularly deserve deletion because it gives no hint of the Rule 54(b) doctrine that requires final disposition of all parts of a "claim," or of all claims between a pair of parties. This provision was complemented by a Committee Note statement that denial of a Rule 56 motion does not establish the law of the case; the motion may be reconsidered, or a new motion may be filed. The implicit determination that there is no need to refer to this proposition in the rule may suggest that the Committee Note also can remain silent.

Parties Affected

The 1992 Committee Note says something not clearly anchored in the proposed rule text: When summary judgment is warranted as a matter of law because there are no genuine factual disputes,

> the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason

to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

It is easy enough to understand the sense of frustration that may underlie this statement. If the facts are so clear as to warrant summary judgment in favor of the moving party against the party targeted by the motion, why should the court have to revisit the issue on a later motion or actually have to carry the same facts through to trial as among other parties? But of course another party may do a more effective job in resisting a motion explicitly addressed to that party. Although it is more than frustrating to have to conclude that there is a genuine issue after all — and to have to deal with the contrary earlier ruling — this thought requires careful attention.

Court-Initiated Summary Judgment

Current practice recognizes the court's authority to initiate summary judgment by giving notice to the parties that it is considering summary judgment and providing an opportunity to respond at least equal to the times provided to respond to a motion. Proposed Rule 56(g)(3) expressed this practice by providing notice to the parties "to show cause within a reasonable period why summary adjudication based on specified facts should not be entered." This language may restrict present practice by the requirement that the notice specify the facts the court thinks to be established beyond genuine issue. That may be difficult for the court, and might carry an undesirable aura of predisposition. Apart from those questions, it may be asked whether a rule that explicitly recognizes authority to act without motion may create a negative-implication limit on authority to act without motion under other rules that do not expressly recognize action on the court's initiative.

Oral Testimony

Present Rule 43(e) provides that when a motion is based on facts not appearing in the record the court may direct that the matter be heard wholly or partly on oral testimony. This authority can be used on a summary-judgment motion, but not to consider the credibility of the witnesses. The 1992 proposal adapted this practice into Rule 56(g)(4), authorizing a hearing to "receive oral testimony to clarify whether an asserted fact is genuinely in dispute." The Committee Note explains that the hearing, "as under Rule 43(e)," may be useful "to clarify ambiguities in the submitted materials — for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is."

The Committee Note explanation puts this provision half-way in the middle of a familiar problem. Many cases rule that a self-serving affidavit cannot be used to contradict deposition testimony. If summary judgment is warranted on the deposition testimony, the witness cannot defeat summary judgment simply by changing the testimony. This practice recognizes that the self-contradicting affidavit may defeat summary judgment after all if a persuasive explanation is offered. The proposed rule extends this qualification by suggesting that hearing the witness "to determine just what the person's testimony is" will help. The idea is attractive. Whether it really can be separated from clandestine credibility determinations is not apparent

Rule 11 Overlap

Present Rule 56(g) provides that the court "shall" order payment of reasonable expenses, including reasonable attorney fees, caused by filing Rule 56 affidavits "in bad faith or solely for the purpose of delay." It further provides that an offending party or attorney may be adjudged guilty of contempt.

The 1992 proposal eliminated Rule 56(g). The Committee Note observes that Rule 11 applies to Rule 56 motions, responses, briefs, and other supporting materials. In that respect Rule 11 goes far beyond the affidavits targeted by Rule 56(g). But there are at least two respects in which Rule 11 falls short of Rule 56(g). The Committee Note was written at a time when the Advisory Committee had determined to carry forward mandatory sanctions in what became the 1993 Rule 11. Now that Rule 11 sanctions are discretionary, Rule 56(g) — which appears to require sanctions — goes beyond Rule 11 with respect to Rule 56 affidavits. Rule 11, moreover, does not authorize contempt sanctions; a Rule 11(c)(2) direction to pay a penalty into court approaches contempt, but is not contempt.

The question here is whether Rule 56(g) should be abrogated in favor of Rule 11. Severe penalties are available independently for false swearing in an affidavit, or for falsity in a § 1746 unsworn declaration under penalty of perjury. Those penalties, however, may not reach every affidavit presented in "bad faith," and more particularly may not reach an affidavit presented solely for the purpose of delay. 10B FP&P § 2742 describes cases in which sanctions were imposed without any indication that the affidavits were false. It also cites a 1968 district court ruling that sanctions are discretionary, notwithstanding "shall," and agrees: "Although this conclusion appears to be contrary to the language of Rule 56(g), it seems sound." There is so much discretion in determining bad faith or a sole purpose to delay that insisting on mandatory sanctions seems pointless. It also points out that Rule 56(g) applies to an affidavit offered under Rule 56(f) to support a request for additional time; applying a falsity test in that situation might be difficult.

Perhaps the most important observation is that there has not been much apparent use of Rule 56(g). Rule 11 may well suffice.

"Sham Affidavit"

The theory that the summary-judgment standard is the same as the standard for judgment as a matter of law is sorely tested by a common practice sometimes referred to as the "sham affidavit." Courts frequently refuse to accept a self-interested and self-contradicting affidavit offered by a party to change the party's own deposition testimony. The common explanation is that this approach is necessary to preserve summary judgment as an effective procedure. In keeping with this explanation, the practice is complicated by recognizing that the affidavit may be recognized if a plausible explanation is offered — there really is no contradiction despite the appearances, new information justifies the contradiction, the affidavit version of facts is supported by other evidence, and so on. A lengthier description than most is provided by Baer v. Chase, 3d Cir.2004, 392 F.3d 609, 621-626.

The conceptual difficulty with this practice is that it often seems to justify summary judgment when the same contradiction in trial testimony would not justify judgment as a matter of law.

This brief description suggests two good reasons for ignoring the "sham affidavit" practice in any Rule 56 revision. As a practical matter, it would be difficult to capture present practice in rule text As a conceptual matter, an explicit rule provision could be adopted only by attempting to develop a coherent theory that supports some version of this practice — whether the present version

or a modified version — in the standards for judgment as a matter of law and the right to jury trial. It seems better to pass by this set of issues in any Rule 56 project.

LOCAL RULES[1] PROCEDURES re SUMMARY JUDGMENT PRACTICE IN FEDERAL DISTRICT COURTS

I. NUMBER OF SUMMARY JUDGMENT MOTIONS ALLOWED

A. Generally, no limit. A few districts, however, provide that a party may file only one motion for summary judgment, unless otherwise permitted by the court.[2]

II TIME FOR FILING SUMMARY JUDGMENT MOTION

A. FRCP 56(a) A party may move for summary judgment "after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party[.]"

B. Timetable for filing and serving motion and opposition. There is much variation among the districts.[3]

1. FRCP 56(c). "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits."

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[1]A sample of 20 districts with standing orders or general orders posted on their court web sites turned up nothing relevant to summary judgment practice.

[2]N.D.Okla. LCvR 56.1(a); W.D.Okla. LCvR 56.1(a); N.D.Tex. LR 56.2(b). *See also* E.D. Va. LCR 56(C) (unless permitted by court, separate motions for summary judgment shall not be filed addressing separate grounds for summary judgment); E.D. Va. LCR 56(C) (unless allowed by the court, a party may not file separate summary judgment motions that address separate grounds for summary judgment).

[3]*See, e g.*, N.D. Ga. LR 56.1(D)(as soon as possible, but no later than 20 days after close of discovery); D. Guam LTR 9(b)(2) (any time 30 days after last pleading filed and within time so as not to delay trial); S.D. Ill. Rule 7.1(f) (must be filed 100 days before the first day of the trial month); D. Md. Rule 105(2)(b) (last-minute filing prohibited; supporting memoranda must be filed no later than 4:00 pm before the last business day preceding the hearing day to which the memorandum relates); D. N.M. Rule 56.1(a) (must be filed by deadline established in the "Initial Pretrial Report"); W.D. Tenn. LR 7.2(d)(1) (must be filed at least 45 days before trial, unless good cause shown or other deadline set by scheduling order); N.D. Tex. LR 56.2(a) (unless otherwise ordered, motion may not be filed within 90 days of trial); E.D. Va. LCR 56(A) (must be filed and set for hearing within "reasonable time" before trial).

III. FORM OF MOTION FOR SUMMARY JUDGMENT

A. Motion must list all material facts where there is no genuine issue in dispute. Most local rules require the movant to set forth the specific material facts where there are no genuine issues to be tried.[4]

1. FRCP 56(c). "The judgment sought shall be rendered forthwith if the pleadings [etc.] . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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[4]S.D. Ala. LR 7.2(a) ("suggested Determinations of Undisputed Fact and Conclusions of Law"); D. Ariz LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E D. Ark. Local Rule 56.1(a); W.D. Ark. Local Rule 56.1(a); C.D. Cal. L.R. 56-1 (must submit proposed "Statement of Uncontroverted Facts and Conclusions of Law." The parties may also submit a statement of stipulated facts agreed to only for the purpose of deciding the motion for summary judgment); E.D. Cal. L.R. 56-1(a) (must submit "Statement of Undisputed Facts"); N.D. Cal. LR 56-2(a) (unless required by the court, the parties must not submit a separate statement of undisputed facts); D. Conn. Local Rule 56(a)1 (facts must be set forth in "Local Rule 56(a)1 Statement"); D.D.C. LCvR 7(h) and 56.1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S.D. Ga. LR 56.1 (motion to include list of material facts and conclusions of law which are contended there are no genuine issues to be tried); D. Haw. LR 56.1(a), (c), and (d) (party shall reference only the material facts that are absolutely necessary to decide the motion and must be no longer than five pages or 1500 words); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R. 56.1(a); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); E.D. and W.D. La. LR 56.1; D. Me. Rule 56(a); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a) and (c) (parties may also file statement of stipulated facts); E.D. Mo. Rule 7-4.01(E), D. Nebr. Civil Rule 56.1(a)(1) and (a)(2)(defines "material fact" as one pertinent to the outcome of the issues identified in the motion for summary judgment); D. Nev. LR 56-1; D. N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N Y. L.R. 7.1(a)(3); W.D. N.Y. L.R. 56.1(a); D. N.H. LR 7.2(b)(1); E.D Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(a), D. Ore. LR 56.1(a); M D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1) (movant may also include facts that are assumed to be true); D.P R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) (after each paragraph, the word "response" must be inserted and a blank space provided to allow the non-moving party an opportunity to respond); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) (movant should identify both the factual and legal basis for the summary judgment motion); N.D.Tex. LR 56.3 (movant must identify both the factual and legal grounds for the summary judgment motion and include a concise statement that identifies the elements of each claim or defense to which summary judgment is sought. The motion for summary judgment itself must not contain arguments and authorities); D. Vt. DUCivR 56-1(a) (motion must set forth succinctly, but without argument, the specific grounds of the judgment sought); D. V.I. Rule 56.1(a)(1); E D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

2. Undisputed facts must be separately numbered.[5]

3. Movant must cite to specific part of the record. Many local rules require movant to cite to specific parts of the record supporting the contention that there is no genuine issue of material fact.[6]

4. Movant must attached supporting documentation. When a party cites to documents or other discovery, the party must attach or submit the relevant

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[5]S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); D Conn. Local Rule 56(a)1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Me. Rule 56(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1) (failure to provide record references is grounds to deny the motion); D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N.Y. L.R. 7.1(3); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1) (a party may reference only material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local CV Rule 56(a); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

[6]S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); E.D. Cal. L.R. 56-1(a); D. Conn. Local Rule 56(a)1; D.D.C LCvR7(h); M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S D. Ga. LR 56.1; D. Haw. LR 56.1(c); N.D. Ill. LR 56.1(a)(3); S.D. Ill. LR 7.1(e); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R 56.1(a); D. Kans. Rule 56.1(a); D. Me. Rule 56(a) and (f); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1); D. Nev. LR 56-1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(d); N.D. N.Y. L.R. 7.1(a)(3) (the record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions, and affidavits, but does not include attorney's affidavits); W.D. N.Y. L.R. 56.1(d) (all citations must identify the relevant page and paragraph or line number); D. N.H. LR 7.2(b)(1); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b) (court may disregard statement of fact not supported by a record citation); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) and (f) (the "record: includes deposition transcripts, answers to interrogatories, affidavits, and documents filed in support of or in opposition to the motion or other documents in the court files); W.D. Tenn. LR 7.2(d)(2) (if the movant contends that the opposing party cannot produce evidence to create a genuine issue of material fact, the movant must include relevant portions of the record that support the contention); E.D Tex. Local Rule CV-56(a) and (d) ("proper summary judgment evidence" means excerpted copies of pleadings, depositions, answers to interrogatories, admissions, affidavits, and other admissible evidence. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

document.[7]

• FRCP 56(e):

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

5. Movant required to submit proposed order. A few courts require the movant to submit a proposed order with the motion for summary judgment.[8]

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[7]E.D. Cal. L.R. 56-1(a); D. Colo. LCivR 56.1 (voluminous exhibits discouraged. Parties to limit exhibits to essential portions of documents); D. Conn. Local Rule 56(a)1; D. Haw. LR 56.1(c) (only relevant excerpts); N.D. Ill. LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Mass. Rule 56.1; W.D. N.Y. L.R. 56.1(d) (all cited authority must be separately filed and served as an appendix to the statement of material facts); D. Ore. LR 56.1(c)(3) (the party must file excerpts of the document, not the entire document); W.D. Pa. LR 56.1 (B)(3) (must be included in an appendix but need not include the entire document. Excerpts to cited documents are acceptable); D. S.D. LR 56.1(A) (may also append a summary but must make the original documents available to the opposition); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) and (d) (movant should identify both the factual and legal basis for the summary judgment motion. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); N.D.Tex. LR 56.6 (a party that relies on affidavits, depositions, answers to interrogatories, or admissions on file must include such evidence in an appendix); D. Vt DUCivR 56-1(e); D V.I. Rule 56.1(a)(1); E.D. Wash. LR 56.1(a).

[8]S.D. Ala. LR 7.2(a); C.D. Cal. L.R. 56-4.

B. Motion must contain legal grounds demonstrating movant is entitled to judgment as a matter of law.[9]

1. Motion must be accompanied by notice, brief, memorandum, affidavits, exhibits, evidence, and other supporting documents.[10]

C. Page limitation. There is some variation among the districts.[11]

D. Sanctions for Noncompliance with rules. The court may deny the motion or impose other sanction for noncompliance with the rules.[12]

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[9]D. Alaska LR 7.1 (d)(2); S.D. Ala. LR 7.2(a) (movant must include with motion "suggested Determinations of Undisputed Fact and Conclusions of Law"); C.D. Ill. LR 7.1(D)(1)(c); N.D. Ill LR 56.1(a)(3); S.D. Ill. LR 7.1(e); D. Nebr. Civil Rule 56.1(a)(1); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); E.D. Tex. Local CV Rule 56(a) (movant should identify both the factual and legal basis for the summary judgment motion).

[10]S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); N.D. Cal. LR 56-1 (court may sua sponte reschedule hearing to give movant time to file supporting affidavits); D. Colo. LCivR 56.1(A); D. Conn. Local Rule 56(a)3 and 4; D.D.C. LCvR 7(h) and 56.1; N.D. Ga. LR 56.1(C); S.D. Ga. LR 56.1; D. Haw. LR 56.1(a); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56 1(a)(2); S.D. Ill. LR 7.1(e); S.D. Ind. L.R. 56.1(a); N.D. and S.D Iowa LR 56.1(a)(2); N.D. and S.D. Iowa LR 56.1(a)(4); D. Kans. Rule 56.1(a); D. Md. Rule 105 (1) and (5); E.D. Mo. Rule 7-4.01(A); D. N.M. Rule 56.1(b); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); W.D. Tenn. LR 7.2(d)(2); N.D.Tex. LR 56.5(a) (a summary judgment motion must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the motion); D. V.I. Rule 56.1(a)(1).

[11]S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must generally not exceed 25 pages); D. Ore. LR 56.1(d) (the concise statement of material facts may not be longer than 5 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval); D. Vt. DUCivR 56-1(b) (memorandum supporting motion must not exceed 25 pages).

[12]D. Alaska LR 7.1(d)(1); S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in motion being denied); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (motion without concise statement of material facts may be denied); D. Nebr. Civil Rule 56.1(a)(1) (failure to submit a statement of facts constitutes grounds for denying the motion); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (failure to submit statement of material facts not in dispute may be grounds for denying the motion); N.D. N.Y. L.R. 7.1(a)(3) (the failure to include an accurate and complete Statement of

E. Motion for Partial Summary Judgment. Some rules make special provision for partial summary judgment motions.[13]

IV. SERVICE OF MOTION

A. In General.[14]

1. FRCP 56(c). "The motion shall be served at least 10 days before the time fixed for the hearing."

V. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

A. Form of Opposition. Most courts generally require the non-moving party to identify the material facts where there is a genuine issue to be tried.[15]

Material Facts will result in the denial of the motion); W.D. N.Y. L.R. 56.1(a) (failure to attach statement of material facts may constitute grounds for denying the motion); D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); M.D. Tenn. Rule 8(b)(7)(g) (failure to respond to a non-moving party's statement of additional facts will indicate that the additional facts are not in dispute for purposes of the summary judgment motion); D. Vt. DUCivR 56-1(a) (failure to comply may result in sanctions including (i) returning motion to counsel for resubmission, (ii) denial of the motion, or (iii) other sanction as appropriate).

[13]*See* N.D.Tex. LR 56.3(c) (if a moving party seeks summary judgment on fewer than all claims or defenses, the motion must be styled as a motion for partial summary judgment).

[14]D. V.I. Rule 56.1(a)(1) (the moving party must serve all parties with the notice and all pleadings and supporting documentation. The moving party must also file the notice of motion with the clerk of court (with a copy to the judge's law clerk), which extends the time for filing an answer if one has not yet been filed).

[15]S.D. Ala. LR 7.2(b) (opposition must identify disputed facts citing documents filed in the action); D. Ariz. LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E.D. Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party), C.D. Cal. L.R. 56-2 (non-moving party must file and serve a "Statement of Genuine Issues" setting forth all material facts contended to have genuine issues to be litigated); E.D. Cal. L.R. 56-1(b) (must deny all disputed facts contained in moving party's "Statement of Undisputed Facts"); D. Conn Local Rule 56(a)2 (non-moving party must submit "Local Rule 56(a)2 Statement," which indicates whether facts material asserted by movant are admitted or denied); D.D.C. LCvR 7(h) and 56.1 (must include citation to the record and supporting memorandum), M.D. Ga. Local Rule 56 (insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP

56(f)); N.D. Ga. LR 56.1(B)(2) (court will deem each of movant's facts as admitted unless non-moving party (i) directly refutes movant's facts with concise responses supported by record references; (ii) states a valid objection to the admissibility of the movant's facts; or (iii) points out the movant's citation does not support the movant's facts, facts are not material, or other nonconformity with the rules. Insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP 56(f)); D. Haw. LR 56.1(b) (party opposing summary judgment must file and serve a concise statement identifying all material facts where there is a genuine issue to be litigated or all material facts that are accepted); C.D. Ill. LR 7.1(D)(2)(b) (non-moving party must set forth: (i) undisputed material facts, (ii) disputed material facts, (iii) immaterial facts, and (iv) additional material facts); N.D. Ill. LR 56.1(b) (non-moving party must file and serve opposing affidavits, a supporting memorandum, and a response to the movant's statement of material facts); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file: (i) brief that responds to each ground asserted in summary judgment motion, (ii) response to movant's material facts that admits, denies, or qualifies movant's facts, (iii) any additional material facts, and (iv) an appendix); D. Kans. Rule 56 1(b) and (e) (responding party must fairly meet substance of matter asserted. If responding party cannot admit or deny factual matter asserted, the response must state why); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated); D. Mont. Rule 56.1(b); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rules 7.1(b)(1)(A), (b)(2)(A), and 56.1(b)(1); D. Nev. LR 56-1; N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B) (non-moving party must file a statement of material facts that set forth disputed material facts. Each material fact in dispute must be numbered, contain a record reference, and if applicable, state the number of the movant's fact that is in dispute); N.D.Okla. LCvR 56.1(c); W.D.Okla. LCvR 56.1(c) (must be numbered and contain record references. If applicable, must also state the number of the movant's facts that are in dispute); D. Ore. LR 56.1(b) (non-moving party must response to movant's statement of undisputed facts by accepting or denying each fact, articulating opposition to the movant's contention or interpretation of the undisputed material fact, or offering other relevant material facts. A party may reference only

material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1 (opposing papers must include statement of material facts that non-moving party contends there is a genuine issue to be litigated. Statement must include references to the record); W.D. Pa. LR 56.1(C)(1) (non-moving party must file concise statement of material facts that (1) admits or denies each material fact contained in movant's papers, (2) sets forth the basis for the denial, and (3) sets forth in separately numbered paragraphs any other material fact that are allegedly at issue. Non-moving party must also include memorandum of law explaining why the movant is not entitled to judgment as a matter of law); D.P.R. LR 56(c) (opposing party must include in its opposition papers a separate, concise statement of material facts. The opposing statement must admit, deny, or qualify the movant's material facts and support each denial or qualification with a record reference. The opposing statement may include additional material facts in separate numbered paragraphs supported by references to the record); D. S.D. LR 56.1(C) (opposing party's statement of material facts must respond to each numbered paragraph in movant's statement with appropriate citation to the record), M.D. Tenn. Rule 8(b)(7)(c) and (d) (the non-moving party must respond to each of the movant's material facts by (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of the summary judgment motion only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by a record reference. The response must be set forth on the movant's statement of fact or a copy thereof. In either case, the non-moving party's response must be below the movant's material facts. The non-moving party may also include additional material facts. If the non-moving party sets forth additional material facts, the moving party must respond to the additional material facts within 10 days of the filing of the non-moving party's response); W.D. Tenn. LR 7.2(d)(3); E.D. Tex. Local Rule CV-56(b) (opposing papers must include a statement of genuine issues, which contain citation to proper summary judgment evidence); N.D.Tex. LR 56.4 (non-moving party must identify both the factual and legal grounds in response to the summary judgment motion. The response itself must not contain arguments and authorities. The response must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the response); D. Vt. DUCivR 56-1(c) (memorandum in opposition must include concise statement of material facts that party contends a genuine issue exists. Each disputed fact must be separately numbered, refer to the specific part in the record, and, if possible, reference the movant's fact that is in dispute); D. V.I. Rule 56.1(b) (opposing party may respond to motion by serving a notice of response, opposition, brief, affidavits, other supporting documents, and a counterstatement of all material facts where there exists a genuine issue to be litigated); E.D. Va. LCR 56(B) (non-moving party must include statement of disputed material facts with record references); E.D. Wash. LR 56.1(b) (opposition papers must include specific material facts, with record references, establishing a genuine issue for litigation. Non-moving party must explicitly identify any fact asserted by movant that non-moving party disputes or clarifies. The non-moving party may briefly state the evidentiary reason why the movant's fact is disputed).

B. Time Limit. There is much variation among the districts.[16]

C. Page limitation. There is some variation among the districts.[17]

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[16] D. Alaska LR 7.1(e) (opposition must be filed and served within 15 days of service of motion and reply must be filed and served within 5 days of service of the opposition); S.D. Ala. LR 7.2(b) (Nonmoving party has 30 days to file opposition); D. Ariz. LRCiv 56.1(a) (opposing party has 30 days after service of summary judgment motion to file and serve memorandum in opposition. Moving party has 15 days after service of opposition to file reply); E.D. Ark. Local Rule 7.2(b); W.D. Ark. Local Rule 7.2(b) (non-moving party has 11 days after service of motion to file and serve opposition); S.D. Cal. CivLR 7.1.e.2 (opposition must be filed and served no later than 14 calendar days prior to the noticed hearing date); D. Colo. LCivR 56.1(A) (response must be filed within 20 days after the motion was filed, or other time that the court may order. A reply may be filed within 15 days of the filing of the opposing brief); S.D. Ga. LR 56.1 (response to summary judgment motion must be made within 20 days of service of the motion); C.D. Ill. LR 7.1(D)(2) (non-moving party must file a response within 21 days after service of the summary judgment motion. Reply is due 14 days after service of response); S.D. Ill. Rule 7.1(c) (non-moving party has 30 days after service of summary judgment motion to file and serve opposition papers. Reply must be filed within 10 days of service of the opposition papers. A reply is not favored and should be filed only in exceptional circumstances); S.D. Ind. L.R. 56.1(b) and (c) (opposing party must file and serve papers in response no later than 30 days after service of the motion. Reply brief is due 15 days after service of the opposing party's submission); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file response within 21 days after service of summary judgment motion); E.D Mo. Rule 7-4.01(B) (opposing memorandum, containing any relevant argument, citations to authorities, and documentary evidence, within 20 days after service of the motion. Reply memorandum is due within 5 days after service of the opposition); D. Nebr. Civil Rule 56.1(b)(2) (opposing brief may be filed no later than 20 days after service of the motion and supporting brief); W.D. N.Y. L.R. 56.1(e) (the opposing party has 30 days after service of the motion to file and serve opposition papers. The moving party has 15 days after service of the opposition papers to file and serve a reply. Surreply papers are not permitted unless with leave of court); W.D. Pa. LR 56.1(C) (opposition papers due 30 days after service of motion); M.D. Tenn. Rule 8(b)(7)(a) (non-moving party has 20 days after service of motion to serve a response, unless otherwise ordered by the court); D. Vt. DUCivR 56-1(b) (memorandum in opposition must be filed within 30 days after service of motion, or within time specified by court. A reply may be filed within 10 days after service of opposition); D. V.I. Rule 56.1(b) (original and two copies of opposing papers must be served on movant within 20 days after service of notice and motion);

[17] S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); C.D. Ill. LR 7.1(D)(2) (memorandum in support and opposition may not exceed 15 pages); S.D. Ill. Rule 7.1(d) (briefs in favor of and opposed to summary judgment motion must not exceed 20 pages. A reply must not exceed 5 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must

D. Sanctions for Nonconformity. If the non-moving party's opposition papers do not comply with the rules, many courts deem the moving party's material facts admitted.[18]

VI. COURT REVIEW AND DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

A. Court review.[19] Some rules emphasize the court has no independent duty to search and consider any part of the record not referenced in the statements of material facts.[20]

B. Determination. Many rules provide that material facts not contested by the non-moving party are deemed admitted.[21] However, one district court will not enter

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generally not exceed 25 pages); E.D. Mo. Rule 7-4.01(D) (motion, memorandum in opposition, and reply must generally not exceed 15 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval).

[18]S.D. Ala. LR 7.2(b) (failure will be construed as an admission that no material factual dispute exists, however, the rule is not construed to require non-moving party to respond where the moving party has not carried its burden of establishing that there is no dispute as to any material fact); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in facts being deemed admitted); S.D. Ill. Rule 7.1(d) (allegations of fact not supported by citations may not be considered); N.D. and S.D. Iowa LR 56.1(b); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated. Failure to file will result in facts being deemed admitted); E.D. Mo. Rule 7-4.01(E), D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); D. Vt. DUCivR 56-1(f) (failure to respond timely to summary judgment motion may result in the court granting the motion without further notice).

[19]D. V.I. Rule 56.1(a)(3) (after the motion has been addressed by all parties and is ready for submission to the court, the moving party must file a cover letter listing all documents filed and all papers with the clerk of court (with a copy to the judge's law clerk), with copies served on all parties).

[20]D. Haw. LR 56.1(f) (the court has no independent duty to search through and consider any part of the court record not otherwise reference in the parties' papers); D. Me. Rule 56(f); D. Ore. LR 56.1(e); D.P.R. LR 56(e); E.D. Tex. Local Rule CV-56(c) (the court will not scour the record to find an undesignated genuine issue of material fact before entering summary judgment).

[21] E.D Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party); D.D.C. LCvR 7(h) and 56.1;

summary judgment on an unopposed motion unless the court finds no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[22]

VII. HEARING AND ORAL ARGUMENT

A. Hearing/Oral Argument. Many courts do not ordinarily schedule oral argument on motions for summary judgment. A party must usually request oral argument.[23]

M.D. Ga. Local Rule 56; S.D. Ga. LR 56.1; D. Haw. LR 56.1(g); N.D. Ill. LR 56.1(b)(3)(B); N.D. Ind. L.R. 56.1(b); S.D. Ind. L.R. 56.1(e); N.D. and S.D. Iowa LR 56.1(b) (court may grant motion if no opposition is filed); D. Kans. Rule 56.1(b); E.D., M.D., and W.D. La. LR 56.2; D. Me. Rule 56(f); D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B); N.D.Okla. LCvR 56.1(c); W.D.Okla. LCvR 56.1(c); D. Ore. LR 56.1(f); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1(E); D.P.R. LR 56(e); D. S.D. LR 56.1(D); M.D. Tenn. Rule 8(b)(7)(g), E.D. Tex. Local Rule CV-56(c); D. Vt. DUCivR 56-1(c); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(b).

[22]D. Alaska LR 7.1(d)(2).

[23]D. Ariz. LRCiv 7.2(f) and 56.1(b) (parties may request oral argument); C.D. Ill. LR 7.1(D)(4) (parties may file a request for oral argument, otherwise court may take the motion under advisement); S.D. Ill. Rule 7.1(h) (party must move for oral argument); N.D. Ind. L.R. 56.1(c); S.D. Ind. L.R. 56.1(g); N.D. and S.D. Iowa LR 56.1(f); D. Md. Rule 105(6); D. Nebr. Civil Rules 7.1(d) and 56.1

VIII. PRO SE LITIGANTS

A. Special Notice. Some courts require special notice to pro se litigants in summary judgment proceedings.[24]

[24]D. Conn. Local Rule 56(b) (represented party moving against pro se party must file and serve "Notice to Pro Se Litigant Opposing Motion for Summary Judgment"); D. Haw. LR 56.2; N.D. Ill. LR 56.2; N.D. Ind. L.R. 56.1(e); S.D. Ind. L.R. 56.1(h); D. Mont. Rule 56.2; E.D. and S.D. N.Y. Local Civil Rule 56.2.

MEMORANDUM TO:	**Judge Michael Baylson**
CC:	**Judge Lee H. Rosenthal, Professor Edward H. Cooper, Peter G. McCabe, John K. Rabiej**
FROM:	**Jeffrey Barr and James Ishida**
DATE:	**March 21, 2007**
RE:	**Survey of District Court Local Summary Judgment Rules**

You had asked us to undertake additional research on summary judgment local rules and practices in the courts. Specifically, you had asked us to identify:

- the district courts that have local rules requiring the (a) moving party to include a statement of undisputed facts with its motion for summary judgment, and (b) non-moving party to respond to the movant's statement, fact by fact;

- the districts with the above local rules that also have provisions stating that facts not properly disputed are deemed admitted or accepted; and

- the number of judges in districts without such local rules who have similar requirements in their individual standing orders.

We reviewed the local rules of 92[1] district courts posted on the *Federal Rulemaking* web site at http://www.uscourts.gov/rules/distr-localrules.html. We found 56 districts that have local rules requiring the moving party to attach a statement of undisputed facts with its motion for summary judgment.[2] Of the 56 districts, 20 districts require the non-moving party to respond to

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[1]We were unable to access the web sites of the District of the Northern Mariana Islands and Western District of Wisconsin.

[2]Six districts do not require the movant to file a list of undisputed facts in support of its motion for summary judgment — Northern District of California, District of Colorado, Southern District of Illinois, Western District of Tennessee, Eastern District of Washington, and Northern District of West Virginia

1. Northern District of California LR 56-2(a)(unless required by the assigned judge, no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted),

each of the movant's alleged undisputed facts.[3] The remaining 36 districts[4] do not require the

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2. District of Colorado LCivR 56.1(A) (a motion under Fed. R. Civ P. 56 shall be accompanied by an opening brief A response brief shall be filed within 20 days after the date of filing of the motion and opening brief, or such other time as the court may order);

3 Southern District of Illinois Local Rule 7.1 (any brief in support of or in opposition to a motion for summary judgment shall contain citation to relevant legal authority and to the record, together with any affidavits or documentary material designated pursuant to Federal Rule of Civil Procedure 56 supporting the party's position. All briefs must contain a short, concise statement of the party's position, together with citations to relevant legal authority and to the record);

4. Western District of Tennessee LR 7.2(d)(2) (on every motion for summary judgment the proponent shall designate in the submit in a separate document affixed to the memorandum each material fact upon which the proponent relies in support of the motion by serial numbering, and shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of each material fact. The opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied shall respond to the proponent's numbered designations);

5. Eastern District of Washington LR 56.1 (any party filing a motion for summary judgment shall set forth separately from the memorandum of law the specific facts relied upon in support of the motion The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to the specific portion of the record where the fact is found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must file with its responsive memorandum a statement in the form prescribed above, setting forth the specific facts which the opposing party asserts establishes a genuine issue of material fact precluding summary judgment. Each fact must explicitly identify any fact(s) asserted by the moving party which the opposing party disputes or clarifies); and

6. Northern District of West Virginia LR Civ P 7.02(a) (motions for summary judgment shall include or be accompanied by a short and plain statement of facts).

[3]District of Arizona, District of Connecticut, Eastern District of California, Middle District of Georgia, Northern District of Georgia, Central District of Illinois, Northern District of Illinois, Northern District of Iowa, Southern District of Iowa, District of Maine, District of Nebraska, Eastern District of New York, Northern District of New York, Southern District of New York, District of Oregon, Middle District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, District of South Dakota, and Middle District of Tennessee.

[4]Southern District of Alabama, Eastern District of Arkansas, Western District of Arkansas, Central District of California, District of the District of Columbia, Northern District of Florida, Southern District of Florida, Southern District of Georgia, District of Hawaii, District of Idaho, Northern District of Indiana, Southern District of Indiana, District of Kansas, Eastern District of Louisiana, Middle District of Louisiana, Western District of Louisiana, District of Massachusetts, Eastern District of Missouri,

non-moving party to address each of the moving party's list of undisputed facts, fact by fact, but do require the non-moving party to provide its own list of disputed facts or respond to the movant's undisputed facts in opposing the motion for summary judgment.[5]

Thirty districts do not have local rules specifically addressing summary judgment practice.[6]

In addition, every one of the 20 districts requiring the movant to submit a list of undisputed facts and non-moving party to respond to each of the movant's undisputed facts has a "deemed admitted" provision in their local rules, except for the Eastern District of California.

We also checked the web sites of the four largest districts[7] without such local rules — the Central District of California, Southern District of Florida, Northern District of Ohio, and Northern District of Texas. (Your staff had polled judges in your district, Pennsylvania Eastern.) We found eight judges[8] in the Central District of California who have issued standing orders posted on the court web site prescribing paragraph-by-paragraph requirements. Your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

Western District of Missouri, District of Montana, District of Nevada, District of New Hampshire, District of New Jersey, District of New Mexico, Western District of New York, Middle District of North Carolina, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, Eastern District of Pennsylvania, Eastern District of Texas, District of Utah, District of Vermont, District of the Virgin Islands, Eastern District of Virginia, and District of Wyoming.

[5]*See* Appendix.

[6]Middle District of Alabama, Northern District of Alabama, District of Alaska, Southern District of California, District of Delaware, Middle District of Florida, District of Guam, Eastern District of Kentucky, Western District of Kentucky, District of Maryland, Eastern District of Michigan, Western District of Michigan, District of Minnesota, Northern District of Mississippi, Southern District of Mississippi, Eastern District of North Carolina, Western District of North Carolina, District of North Dakota, Northern District of Ohio, Southern District of Ohio, District of Rhode Island, District of South Carolina, Eastern District of Tennessee, Northen District of Texas, Southern District of Texas, Western District of Texas, Western District of Virginia, Western District of Washington, Southern District of West Virginia, and Eastern District of Wisconsin

[7]The districts having the greatest number of civil filings in 2000.

[8]Eight judges out of 60 district and magistrate judges serving in the Central District of California.

A. Districts Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

1. District of Arizona (a party filing a motion for summary judgment must file a statement setting forth each material fact on which the party relies in support of the motion. Each material fact must be set forth in a separately numbered paragraph. Any party opposing a motion for summary judgment must file a statement setting forth for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph. Each statement of facts set forth in the moving party's statement of facts shall be deemed admitted for purposes of the motion if not specifically controverted by a correspondingly numbered paragraph in the opposing party's separate statement of facts).

2. District of Connecticut (a "Local Rule 56(a)1 Statement" must be attached to each summary judgment motion, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in movant's statement and supported by the evidence will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2. The papers opposing a motion for summary judgment must include a "Local Rule 56(a)2 Statement," which states in separately numbered paragraphs and corresponding to the paragraphs contained in the moving party's Local Rule 56(a)1 Statement whether each of the facts asserted by the moving party is admitted or denied).

3. Eastern District of California (each motion for summary judgment must be accompanied by a "Statement of Undisputed Facts" that must enumerate discretely each of the specific material facts relied upon in support of the motion. Any party opposing a motion for summary judgment must reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts that are undisputed and deny those that are disputed).

4. Middle District of Georgia (the movant must attach to the motion a separate and concise statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately. The respondent must attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. A response must be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement must be deemed to have been admitted, unless otherwise inappropriate).

5. Northern District of Georgia (a movant for summary judgment must include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. The respondent must file a response containing individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts. The movant's facts are deemed admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence; (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the rules).

6. Central District of Illinois (a party filing a motion for summary judgment must include in that motion a list of each undisputed material fact that is the basis for the motion. The respondent must file a response to the movant's list of undisputed facts indicating which facts are: (i) undisputed material facts, (ii) disputed material facts, and (iii) immaterial. The respondent may also file any additional facts relevant to its opposition. In addition, Local Rule 7.1(D)(2) requires the non-moving party to file a response to the motion for summary judgment within 21 days after service of the motion. The rule also provides that "[a] failure to respond must be deemed an admission of the motion." In *Foley v Plumbers & Steamfitters Local No. 149*, 109 F. Supp.2d 963, 966 (C.D.Ill., 2000), the court held that "[f]ailing to submit an appropriate response to a statement of undisputed facts allows the court to assume that the facts stipulated by the moving party exist without controversy." Because the Plaintiff's statement of undisputed facts did not admit or deny any specific allegations and did not support many of the statements, the court found that it did not comply with Local Rule 7.1(D)(2)).

7. Northern District of Illinois (the movant must file with its summary judgment motion a statement of material facts which the moving party contends there is no genuine issue and entitles it to judgment as a matter of law. The non-moving party must file a concise response to the movant's statement of facts that contain: (i) numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed, and (ii) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (iii) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party).

8/9. Northern District of Iowa and Southern District of Iowa (the joint rules of the Northern and Southern Districts of Iowa require the movant to append to its motion a statement of material facts setting forth each material fact that the moving party contends there is no genuine issue to be tried. The non-moving party must file with its opposition papers a response to the statement of material facts in which the resisting party expressly admits, denies, or qualifies each of the moving party's numbered statements of fact. Failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact).

10. District of Maine (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, each set forth in a separately numbered paragraph(s), as to which the moving party contends there is no genuine issue of material fact. A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by the rule, must be deemed admitted unless properly controverted).

11. District of Nebraska (the moving party must set forth in the brief a separate statement of material facts which the moving party contends there is no genuine issue to be tried and that entitle the moving party to judgment as a matter of law. The party opposing a motion must include in its brief a concise response to the moving party's statement of material facts. The response must address each numbered paragraph in the movant's statement Properly referenced material facts in the movant's statement will be deemed admitted unless controverted by the opposing party's response).

12/13. Eastern and Southern Districts of New York (the joint rules of the Eastern and Southern Districts of New York provide that the movant must attach to the notice of summary judgment motion a separate, short, and concise statement, in numbered paragraphs, of the material facts to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party which is contended there exists a genuine issue to be tried. Each numbered paragraph in the moving party's statement of material facts will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the opposing party's statement).

14. Northern District of New York (a motion for summary judgment must contain a Statement of Material Facts. The Statement of Material Facts must set forth, in numbered paragraphs, each material fact that the moving party contends there exists no genuine issue. The opposing party must file a response to the Statement of Material Facts. The non-movant's response must mirror the movant's Statement of Material Facts by admitting or denying each of the movant's assertions in matching numbered paragraphs. Any facts set forth in the Statement of Material Facts must be deemed admitted unless specifically controverted by the opposing party).

15. District of Oregon (a motion for summary judgment must be accompanied a separately filed concise statement of facts, which articulates the undisputed relevant material facts that are essential for the court to decide the motion for summary judgment. The non-moving party must include a separately filed response to the movant's statement that responds to each numbered paragraph by: (i) accepting or denying each fact contained in the moving party's concise statement; or (ii) articulating opposition to the moving party's contention or interpretation of the undisputed material fact. For purposes of the motion for summary judgment, material facts set forth in the moving party's concise statement, or in the response to the moving party's concise statement, will be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).

16. Middle District of Pennsylvania (a motion for summary judgment must be accompanied by a separate, short, and concise statement of the material facts, in numbered paragraphs, which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts, responding to the numbered paragraphs set forth in the movant's statement, to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted by the non-moving party's statement).

17. Western District of Pennsylvania (a motion for summary judgment must be accompanied by a concise statement of material facts setting forth the facts essential for the court to decide the motion for summary judgment, which the moving party contends are undisputed and material. The facts set forth in any party's Concise Statement must be stated in separately numbered paragraphs. The opposing party must file in opposition a concise statement responding to each numbered paragraph in the moving party's Concise Statement of Material Facts by: (a) admitting or denying whether each fact is undisputed and/or material; (b) setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety (as to whether it

is undisputed or material), with appropriate reference to the record; and (c) setting forth in separately numbered paragraphs any other material facts that are allegedly at issue, and/or that the opposing party asserts are necessary for the court to determine the motion for summary judgment. Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).

18. District of Puerto Rico (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, set forth in numbered paragraphs, which the moving party contends there is no genuine issue of material fact to be tried A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny, or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, must support each denial or qualification by a record citation as required by this rule. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, must be deemed admitted unless properly controverted).

19. District of South Dakota (the moving party must include with the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact must be presented in a separate, numbered statement and with an appropriate citation to the record in the case. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. The opposition must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party).

20. Middle District of Tennessee (a motion for summary judgment must be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact must be set forth in a separate, numbered paragraph. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either: (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed. Failure to respond to a moving party's

statement of material facts, or a non-moving party's statement of additional facts, within the time periods provided by these local rules shall indicate that the asserted facts are not disputed for purposes of summary judgment).

B. Judges Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

You had also requested — after we identified those district courts which have a local rule mandating a paragraph-by-paragraph statement of undisputed facts by the moving party and a paragraph-by-paragraph response by the opposing party — we examine standing orders or "procedures" issued by individual district judges in the four largest districts that do not have such local rules. You asked that we ascertain how many judges in those four districts have prescribed similar requirements by means of standing order.

In those four districts, we found eight judges — all in the Central District of California — who have issued standing orders prescribing paragraph-by-paragraph requirements.

1. The four-district sample. The four districts we chose in addition to the Eastern District of Pennsylvania — after a quick examination of civil caseload statistics published in *The Judicial Business of the U S. Courts* — are as follows:

a) Central District of California,[9]

b) Southern District of Florida,[10]

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[9]The Central District of California does require, in Local Rule 56-1, that each moving party file a "Statement of Uncontroverted Facts and Conclusions of Law," and in Local Rule 56-2, that each opposing party file a "Statement of Genuine Issues" setting forth all material facts as to which the opposing party contends there exists a genuine issue necessary to be litigated. But this local rule does not require any paragraph-by-paragraph enumerations or lists. Therefore we thought it appropriate to include the Central District of California among the four courts we examined.

[10]The Southern District of Florida requires in Local Rule 7.5(A) that "[m]otions for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which the movant contends there is no genuine issue to be tried." Local Rule 7 5(B) requires the non-moving party to include in its papers in opposition "a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." For the reason given for the Central District of California, *supra* n. 9, we decided to include the district in our sampling

c) Northern District of Texas, and

d) Northern District of Ohio.

2. No relevant standing orders in three districts In three of the four districts — the Southern District of Florida, the Northern District of Texas, and the Northern District of Ohio — we found nothing. That is, we did not find a single standing order or similar provision issued by any individual judge prescribing paragraph-by-paragraph requirements for summary judgment motions and oppositions. Nor did we find any standing orders of the court as a whole addressing this point.

In the Southern District of Florida, we found that only a minority of the district judges have issued, and posted on the court's web site, any individual standing orders or "procedures" at all. But in the Northern District of Texas and the Northern District of Ohio, virtually every district judge has done so. None of these standing orders, again, contain summary judgment provisions of the type the subcommittee is interested in.

3. Eight relevant standing orders in the Central District of California. The Central District of California, however, is another story. Virtually every judge in that district has issued individual standing orders or "procedures." Although the majority of them do not prescribe the requirements the subcommittee is interested in, eight of them do The eight judges are Judges Percy Anderson, Valerie Baker Fairbank, Gary A. Feess, Dale S. Fischer, Philip S. Gutierrez, Stephen G. Larson, A. Howard Matz, and S. James Otero.

The provisions prescribed by these eight judges — in every case embedded in a larger document headed "standing order" or "scheduling order" — are very similar. Ninety to ninety-five percent of the language is identical in each of the eight provisions, although most judges appear to have added a bit of idiosyncratic language here and there as well.

Here is an example, taken from Judge Otero's "initial standing order":

18. Motions – Form and Length:

* * * * *

b. Statement of Undisputed Facts and Statement of Genuine Issues: The separate statement of undisputed facts shall be prepared in a two-column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially

numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

The opposing party's statement of genuine issues must be in two columns and track the movant's separate statement exactly as prepared. The left hand column must restate the allegedly undisputed fact, and the right hand column must state either that it is undisputed or disputed. The opposing party may dispute all or only a portion of the statement, but if disputing only a portion, it must clearly indicate what part is being disputed, followed by the opposing party's evidence controverting the fact. The court will not wade through a document to determine whether a fact really is in dispute. To demonstrate that a fact is disputed, the opposing party must briefly state why it disputes the moving party's asserted fact, cite to the relevant exhibit or other piece of evidence, and describe what it is in that exhibit or evidence that refutes the asserted fact. No legal argument should be set forth in this document.

The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, which shall follow the format described above for the moving party's separate statement. These additional facts shall continue in sequentially numbered paragraphs and shall set forth in the right hand column the evidence that supports that statement.

* * * * *

4. Eastern District of Pennsylvania. Again, your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

APPENDIX

Districts Not Requiring Fact-by-Fact Response to Movant's Statement of Undisputed Facts

1) Southern District of Alabama Local Rule 7.2(b) (the non-moving party must identify facts in dispute from the movant's list of undisputed facts);

2/3) Eastern District of Arkansas and Western District of Arkansas Local Rule 56.1(b) and (c) (if the non-moving party opposes the motion for summary judgment, it must file, in addition to any response and brief, a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried. All material facts set forth in the statement filed by the moving party will be deemed admitted unless controverted by the statement filed by the non-moving party);

4) Central District of California L.R 56-2 and 56-3 (any party who opposes the motion must serve and file with the opposing papers a separate document containing a concise "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are controverted by declaration or other written evidence filed in opposition to the motion);

5) District of the District of Columbia LCvR 56.1 (an opposition to a summary judgment motion must be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion);

6) Southern District of Florida Rule 7.5(B) (the papers opposing a motion for summary judgment must include a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);

7) Northern District of Florida Local Rule 56.1 (a motion for summary judgment must be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The party opposing the motion must, in addition to other papers or matters permitted by the rules, file and serve a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);

8) Southern District of Georgia LR 56-1 (the non-moving party must include, in addition to the brief, a separate, short, and concise statement of the material facts as to which it is contended there exists no genuine issue to be tried as well as any conclusions of law. Each statement of material fact must be supported by a citation to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by a statement served by the opposing party);

9) District of Hawaii LR 56.1(b) and (g) (any party who opposes the motion for summary judgment must file and serve with his or her opposing papers a separate document containing a concise statement that: (i) accepts the facts set forth in the moving party's concise statement; or (ii) sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. Material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party);

10) District of Idaho Civil Rule 7.1(c)(2) (the responding party must file a statement of facts which are in dispute not to exceed ten (10) pages in length);

11) Northern District of Indiana L.R. 56.1 (a) and (b) (any party opposing the motion for summary judgment must file and serve a response that includes a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated);

12) Southern District of Indiana Local Rule 56-1(b) and (e) (the non-moving party may file and serve in opposition to the motion a brief that includes a section labeled "Statement of Material Facts in Dispute," which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment. For purposes of deciding the motion for summary judgment, the Court will assume the facts claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted in the opposing party's "Statement of Material Facts in Dispute");

13) District of Kansas Rule 56.1(b) (a memorandum in opposition to a motion for summary judgment must include a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered by paragraph, must refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, must state the number of movant's fact that is disputed. All material facts set forth in the statement of the movant will be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party);

14-16) Eastern, Middle, and Western Districts of Louisiana LR 56.2 (the uniform local rules for the Eastern, Middle, and Western Districts of Louisiana require that papers opposing a motion for summary judgment must include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule);

17) District of Massachusetts Rule 56.1 (any opposition to a motion for summary judgment must include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties),

18) Eastern District of Missouri Local Rule 7-4.01(E) (every memorandum in opposition must include a statement of material facts as to which the party contends a genuine issue exists. All matters set forth in the statement of the movant will be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party);

19) Western District of Missouri Local Rule 56.1(a) (a suggestion in opposition to a motion for summary judgment must begin with a section containing a concise statement of material facts that the non-moving party contends there exists a genuine issue for trial. All facts set forth in the movant's statement will be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party);

20) District of Montana Local Rule 56.1(b) (any party opposing a motion for summary judgment must file a Statement of Genuine Issues setting forth the specific facts, if any, that establish a genuine issue of material fact precluding summary judgment in favor of the moving party. There is no "deemed admitted" provision);

21) District of Nevada Local Rule 56.1 (motions for summary judgment and responses thereto must include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies);

22) District of New Hampshire Local Rule 7.2(b)(2) (a memorandum in opposition to a summary judgment motion must incorporate a short and concise statement of material facts, supported by appropriate record citations, as to which the adverse party contends a genuine dispute exists so as to require a trial. All properly supported material facts set forth in the moving party's factual statement will be deemed admitted unless properly opposed by the adverse party);

23) District of New Jersey Civ. Rule 56.1 (on motions for summary judgment, each side shall furnish a statement that sets forth material facts as to which there exists or does not exist a genuine issue. No "deemed admitted provision);

24) District of New Mexico Local Rule 56.1(b) (a party opposing the motion must file a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. All material facts set forth in the statement of the movant will be deemed admitted unless specifically controverted);

25) Western District of New York Local Rule 56.1 (the papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party);

26) Middle District of North Carolina Local Rules 7.2 and 56.1 (a party requesting summary judgment must set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party must also set out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of those elements. In a responsive brief, the opposing party may set out the statements required by LR7.2(a)(1)-(3) and also set out the elements that the claimant must prove (with citations to supporting authority), and either identify any element as to which evidence is insufficient (and explain why the evidence is insufficient), or point to specific, authenticated facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact, or explain why some rule of law (e.g., an applicable statute of limitations) would defeat the claim. The failure to file a response may cause the court to find that the motion is uncontested);

27) Eastern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the numbered paragraphs of the movant's facts that are disputed. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

28) Northern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section that contains a concise

statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant must be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

29) Western District of Oklahoma Local LCivR 56.1(c) (the brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

30) Eastern District of Pennsylvania LCivR 56.1 (the movant must include a brief in support of the motion for summary judgment that contains a section with a concise statement of material facts that the moving party contends there are no genuine issues of material fact. The respondent's brief must contain a concise statement of material facts which the non-moving party asserts genuine issues of material facts exist);

31) Eastern District of Texas Local Rule CV 56 (a motion for summary judgment must include: (1) a statement of the issues to be decided by the Court; and (2) a "Statement of Undisputed Material Facts." Any response to a motion for summary judgment must include: (1) any response to the statement of issues; and (2) any response to the "Statement of Undisputed Material Facts");

32) District of Utah DUCivR 56-1(c) (a memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56);

33) District of Vermont Local Rule 7.1(c)(2) and (3) (a separate, short and concise statement of disputed material facts must accompany an opposition to a motion for summary judgment or a motion under Fed.R.Civ.P. 12(b)(6) or 12(c) that is converted to a summary judgment motion. All material facts in the movant's statement of undisputed facts are deemed to be admitted unless controverted by the opposing party's statement),

34) District of the Virgin Islands Local Rule 56.1(b) (any party adverse to a motion submitted under this rule may respond by serving a notice of response, opposition, brief, affidavits

and other supporting documentation, accompanied by a separate concise counterstatement of all material facts about which the respondent contends there exist genuine issues necessary to be litigated, which shall include references to the parts of the record relied on to support the response and statement);

35) Eastern District of Virginia Local Civil Rule 56(B) (each brief in support of a motion for summary judgment must include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion); and

36) District of Wyoming Rule 7.1(b)(2)(A) (a party who files a dispositive motion must serve and file with the motion a written brief containing a short, concise statement of the arguments and authorities in support of the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). Affidavits and other supportive papers must be filed together with the motion and brief. Each party opposing the motion shall, within ten (10) days after service of said motion, serve upon all parties a written brief containing a short, concise statement of the argument and authorities in opposition to the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). In the event a motion for summary judgment is filed, the parties shall include in their respective briefs a list of all claimed undisputed and disputed facts, together with a short statement of evidence and any other basis which supports a claim that a fact is disputed or undisputed. Failure of a responding party to serve a response within the ten (10) day time limit may be deemed by the Court in its discretion as a confession of the motion)).

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November 2, 2007

Memorandum

To: Judge Michael Baylson

From: Joe Cecil and George Cort

Subject: Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules

The Advisory Committee on Civil Rules asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. Those proposed amendments will, among other things, require the movant to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law," and require the respondent to address each one of those facts in similarly numbered paragraphs.

We sorted each federal district court into one of three groups based the districts' local rules governing summary judgment, relying on the analysis of local rules by Jeffrey Barr and James Ishida to guide this classification.[1] The first group consisted of twenty federal districts that have local rules with summary judgment requirements similar to those of the proposed amendment. In general, local rules in these districts require the moving party to include a statement of undisputed facts with its motion for summary judgment, and require the non-moving party to respond to the movant's statement, fact by fact. We assumed that summary judgment practice in these districts follows a pattern that will become common in other federal districts if the proposed amendments are adopted.

The second group consisted of thirty-six federal district courts with local rules that require the moving party to include a statement of undisputed facts, but do not require the respondent to address each fact. We believe that summary judgment practice in these

[1] Memorandum to Judge Michael Baylson from Jeffrey Barr and James Ishida, Survey of District Court Local Summary Judgment Rules (March 21, 2007)

districts may have some, but not all, of the characteristics of summary judgment practice under the proposed amendment.

The third group consisted of thirty-six federal district courts that do not require the moving party to submit a statement of undisputed facts with its motion, either because these courts do not have a local rule governing summary judgment practice or because the courts' local rules do not address the manner in which the motion should be presented. We believe that summary judgment practice in this third group would be most affected by the proposed amendment. A list of the districts in each of the three groups is presented in Appendix A.

Tables 1 through 5 report the nature and outcome of individual summary judgment motions in the three groups of districts. Tables 6 through 12 report the characteristics of the cases in which the summary judgment motions are filed and resolved. Each table first reports the results for all cases in each of the three groups of districts, and then reports the results separately for five broad types of cases – contracts, torts, employment discrimination, other civil rights, and other remaining cases.

After removing problematic cases, our analyses found very few meaningful differences in summary judgment practice across the three groups of district courts. (We interpret a meaningful difference as exceeding five percentile points.) Summary judgment motions are filed and granted at approximately the same rate across all three groups. It appears that more time is required to resolve motions in districts that require stipulation of facts by both the movant and respondent (see Table 5). A few differences also were found among certain types of cases. Defendants in "other civil rights cases" may be less likely to file summary judgment motions in districts that require such stipulation of facts (Tables 6 and 7). Summary judgment motions in employment discrimination cases in such districts also are more likely to be granted rather than remain unresolved (Table 3), though there is no difference in the percentage of motions granted and denied (Table 4). Employment discrimination cases also are somewhat more likely to be terminated by summary judgment in districts that require stipulated facts, a difference that approaches our standard for a meaningful difference (14% vs. 10% and 9%).

Methodology Note

This study examined summary judgment practice in the 276,120 civil cases terminated the federal district courts in Fiscal Year 2006. We used Case Management / Electronic Case Filing (CM/ECF) data to identify 60,013 summary judgment motions and related court orders. Where necessary, we recoded these orders to indicate the final action taken by the court. We then determined, for each case, the number and type of summary judgment motions, number of motions by plaintiffs and defendants, number of motions granted in whole or in part, number of motions denied, the number of motions in which the court took no action, whether the case was terminated by summary judgment, and the time require to resolve the motion.

Some motions, cases, and districts were excluded from the analyses. We were unable to obtain useable CM/ECF data from five districts: Northern District of Ohio, Western District of Wisconsin, District of Oregon, District of the Northern Marianas Islands, and District of the Virgin Islands. We excluded an additional six districts due to difficulty interpreting the CM/ECF codes: Eastern District of Pennsylvania, Eastern District of Michigan, District of Minnesota, Central District of California, Southern District of California, and District of Delaware.

We included in the analyses only cases originally filed in the specified district, cases removed to the district from state court, and cases transferred to the district through a change of venue. We excluded cases designated as class actions (though we have learned from other research that the attorney designation of a class action is an imprecise indicator of such cases), cases consolidated in multidistrict litigation proceedings, cases reopened or remanded from the courts of appeals, and cases appealed from magistrate judges' rulings. We also excluded asbestos personal injury product liability cases, bankruptcy appeals and withdrawals (because summary judgment motions are not filed, social security cases (because summary judgment motions are the procedural device used to review the decision of the administrative law judge), and prisoner cases (because such cases are likely to be exempt from the proposed rule due to the pro se nature of the plaintiff). Finally, we removed from the third group of districts those cases terminated by seventeen judges who, according to the district web site, routinely use a standing order that requires the parties to engage in the kinds of stipulations and presentation required by the proposed local rule

After these exclusions, we were left with 118,796 cases, or 43 percent of cases terminated in FY 2006. Of these cases, 20,697 contained at least one motion for summary judgment. In total, we analyzed 39,120 motions for summary judgment. For the final report we will resolve the data problems for as many of the excluded districts as we can and add them to the analysis.

Table 1: Party Moving for Summary Judgment

		Local Rule Requires Stipulated Facts by			
		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motions in All Cases	Defendant	73%	72%	73%	28342
	Plaintiff	26%	26%	24%	9934
	No Moving Party	1%	2%	3%	844
Contracts	Defendant	56%	59%	56%	
	Plaintiff	**42%**	40%	**35%**	
	No Moving Party	**2%**	0%	**10%**	
Torts	Defendant	85%	85%	87%	
	Plaintiff	14%	14%	12%	
	No Moving Party	1%	1%	1%	
Employment Discrimination	Defendant	90%	90%	91%	
	Plaintiff	9%	9%	8%	
	No Moving Party	1%	1%	0%	
Other Civil Rights	Defendant	83%	81%	84%	
	Plaintiff	16%	17%	16%	
	No Moving Party	1%	2%	1%	
Other	Defendant	58%	57%	62%	
	Plaintiff	41%	40%	36%	
	No Moving Party	1%	3%	2%	

Table 2: Type of Summary Judgment Motion

Motions in		Local Rule Requires Stipulated Facts and Response by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Summary Judgment	92%	87%	89%	34816
	Partial Summary Judgment	8%	12%	11%	4089
	Rule 54 Motion	0%	1%	1%	215
Contracts	Summary Judgment	88%	82%	86%	
	Partial Summary Judgment	12%	18%	14%	
	Rule 54 Motion	1%	1%	1%	
Torts	Summary Judgment	90%	84%	86%	
	Partial Summary Judgment	10%	15%	13%	
	Rule 54 Motion	0%	1%	1%	
Employment Discrimination	Summary Judgment	96%	94%	96%	
	Partial Summary Judgment	4%	6%	4%	
	Rule 54 Motion	0%	0%	0%	
Other Civil Rights	Summary Judgment	94%	92%	93%	
	Partial Summary Judgment	5%	8%	7%	
	Rule 54 Motion	0%	0%	1%	
Other	Summary Judgment	90%	85%	87%	
	Partial Summary Judgment	9%	14%	13%	
	Rule 54 Motion	1%	1%	1%	

Table 3: Action on Summary Judgment Motion

Motion in		Local Rule Requires Stipulated Facts and Response by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	17%	15%	16%	6208
	Grant Whole or Part	31%	25%	27%	10748
	Adopt Mag R&R	0%	0%	0%	7
	Moot	2%	2%	2%	778
	No Disposition	50%	58%	55%	21379
Contacts	Denied	17%	17%	17%	
	Grant Whole or Part	24%	21%	20%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	56%	60%	61%	
Torts	Denied	17%	17%	17%	
	Grant Whole or Part	25%	22%	25%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	3%	2%	
	No Disposition	55%	59%	56%	
Employment Discrimination	Denied	13%	12%	11%	
	Grant Whole or Part	**46%**	37%	**35%**	
	Adopt Mag R&R	0%			
	Moot	2%	1%	1%	
	No Disposition	**39%**	**49%**	**53%**	
Other Civil Rights	Denied	15%	10%	14%	
	Grant Whole or Part	34%	28%	33%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	3%	
	No Disposition	**49%**	**60%**	50%	
Other	Denied	20%	18%	19%	
	Grant Whole or Part	26%	22%	25%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	**51%**	**59%**	54%	

Table 4: Outcome of Summary Judgment Motions Granted or Denied

Motions in		Local Rule Requires Stipulated Facts and Response by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	35%	38%	37%	6208
	Grant Whole or Part	65%	62%	63%	10748
Contracts	Denied	42%	46%	45%	
	Grant Whole or Part	58%	54%	55%	
Torts	Denied	41%	43%	41%	
	Grant Whole or Part	59%	57%	59%	
Employment Discrimination	Denied	22%	25%	24%	
	Grant Whole or Part	77%	74%	75%	
Other Civil Rights	Denied	30%	26%	29%	
	Grant Whole or Part	70%	74%	71%	
Other	Denied	44%	45%	43%	
	Grant Whole or Part	56%	55%	57%	

Table 5: Median Weeks to Disposition for Motions Granted (Whole or Part) or Denied

Motions in	Local Rule Requires Stipulated Facts by Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	**23**	**17**	**14**	16,427
Contracts	**23**	**16**	**14**	
Torts	**23**	**13**	**12**	
Employment Discrimination	**26**	**17**	**16**	
Other Civil Rights	**21**	19	**14**	
Other	**23**	18	**15**	

Table 6: Cases with at least One Summary Judgment Motion Filed by Any Party

	Local Rule Requires Stipulated Facts by			Total Cases
	Movant & Respondent	Movant Only	Neither Party	
All Cases				
No Motions	85%	82%	81%	98099
At Least One Motion Filed	15%	18%	19%	20697
Types of Cases with at Least One Motion				
Contracts	15%	19%	20%	
Torts	13%	13%	12%	
Employment Discrim.	35%	35%	38%	
Other Civil Rights	**19%**	26%	**28%**	
Other	9%	12%	13%	

Table 7: Cases with at least One Summary Judgment Motion by Defendant

	Local Rule Requires Stipulated Facts by			Total Cases
	Movant & Respondent	Movant Only	Neither Party	
All Cases				
No Motions	87%	85%	84%	101170
At Least One Motion	13%	15%	16%	17626
Types of Cases with at Least one Motion by a Defendant				
Contracts	10%	14%	14%	
Torts	11%	12%	11%	
Employment Discrim	34%	34%	38%	
Other Civil Rights	**18%**	23%	**26%**	
Other	7%	9%	10%	

Table 8: Cases with at least One Summary Judgment Motion by Plaintiff

	Local Rule Requires Stipulated Facts by.			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	95%	94%	94%	111966
At Least One Motion	5%	6%	6%	6830
Types of Cases with at Least one Motion by a Plaintiff				
Contracts	9%	11%	11%	
Torts	2%	2%	2%	
Employment Discrimin	3%	4%	3%	
Other Civil Rights	4%	6%	6%	
Other	5%	7%	7%	

Table 9: Cases with at Least One Summary Judgment Motion by a Plaintiff and at least One Summary Judgment Motion by a Defendant

	Local Rule Requires Stipulated Facts by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	97%	96%	97%	114915
At Least One Motion	3%	4%	3%	3881
Types of Cases with at Least one Motion by a Plaintiff and One by a Defendant				
Contracts	5%	6%	6%	
Torts	1%	1%	1%	
Employment Discrim	3%	3%	2%	
Other Civil Rights	3%	4%	4%	
Other	3%	4%	4%	

Table 10: Cases with at least One Summary Judgment Motion Granted in Whole

	Local Rule Requires Stipulated Facts by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	94%	95%	94%	112,157
At Least One Motion	6%	5%	6%	6,639
Types of Cases with at Least one Motion Granted in Whole				
Contracts	5%	5%	5%	
Torts	4%	3%	3%	
Employment Discrimin.	17%	13%	13%	
Other Civil Rights	8%	9%	9%	
Other	3%	3%	4%	

Table 11: Cases with at Least One Summary Judgment Motion Granted in Whole of Part

	Local Rule Requires Stipulated Facts by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	93%	94%	93%	110,502
At Least One Motion	7%	6%	7%	8,294
Types of Cases with at Least one Motion Granted in Whole or Part				
Contracts	6%	6%	7%	
Torts	5%	4%	4%	
Employment Discrimin	21%	16%	17%	
Other Civil Rights	10%	11%	12%	
Other	4%	4%	5%	

Table 12: Cases with Terminated by Summary Judgment

	Local Rule Requires Stipulated Facts by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
Not Terminated by Summary Judgment	93%	94%	93%	114,410
Terminated by Summary Judgment	4%	4%	3%	4,386
Types of Cases Terminated by Summary Judgment				
Contracts	3%	3%	3%	
Torts	2%	2%	1%	
Employment Discrimin.	**14%**	10%	**9%**	
Other Civil Rights	6%	6%	6%	
Other	2%	2%	3%	

Note Court records include no specific designation of cases terminated by a grant of a summary judgment motion This designation was constructed for this table by identifying those cases that court records indicate were resolved through a dispositive motion before trial and included at least one summary judgment motion that was granted in whole

Appendix A: Classification of Individual Districts

Local Rule Requires Fact-by-Fact Stipulation And Response	Local Rule Requires Fact-by-Fact Stipulation by Movant Only	Local Rule does not Address format of Summary Judgment Motion
Arizona	Alabama - Southern	Alabama - Middle
California - Eastern	Arkansas - Eastern	Alabama - Northern
Connecticut	Arkansas - Western	Alaska
Georgia - Middle	California – Central*	California - Northern
Georgia - Northern	District of Columbia	California – Southern*
Illinois - Central	Florida - Northern	Colorado
Illinois - Northern	Florida - Southern	Delaware*
Iowa - Northern	Georgia - Southern	Florida - Middle
Iowa - Southern	Hawaii	Guam
Maine	Idaho	Illinois - Southern
Nebraska	Indiana - Northern	Kentucky - Eastern
New York - Eastern	Indiana - Southern	Kentucky - Western
New York - Northern	Kansas	Maryland
New York - Southern	Louisiana - Eastern	Michigan – Eastern*
Oregon*	Louisiana - Middle	Michigan - Western
Pennsylvania - Middle	Louisiana - Western	Minnesota*
Pennsylvania - Western	Massachusetts	Mississippi - Northern
Puerto Rico	Missouri - Eastern	Mississippi - Southern
South Dakota	Missouri - Western	North Carolina - Eastern
Tennessee - Middle	Montana	North Carolina - Western
	Nevada	North Dakota
	New Hampshire	Ohio – Northern*
	New Jersey	Ohio - Southern
	New Mexico	Rhode Island
	New York - Western	South Carolina
	North Carolina - Middle	Tennessee - Eastern
	Oklahoma - Eastern	Tennessee - Western
	Oklahoma - Northern	Texas - Northern
	Oklahoma - Western	Texas - Southern
	Pennsylvania – Eastern*	Texas - Western
	Texas - Eastern	Virginia - Western
	Utah	Washington - Eastern
	Vermont	Washington - Western
	Virgin Islands*	West Virginia - Northern
	Virginia - Eastern	West Virginia - Southern
	Wyoming	Wisconsin - Eastern

* Districts excluded from the reported analyses No information on local rules for Wisconsin – Western and Northern Marianas Islands was found, and those districts also were excluded from the analysis.

B. Expert Trial Witness Disclosure and Discovery

For more than a year, the Discovery Subcommittee has been considering changes to the expert disclosure and discovery procedures in Civil Rule 26. The possible changes concern expert witnesses only. No consideration has been given to the provisions of Rule 26(b)(4)(B) that sharply limit discovery as to "consulting" experts who have been retained or specially employed in anticipation of litigation but are not expected to be called as a witness at trial. The possible changes include the disclosure provisions in Rule 26(a)(2)(A) and (B), as well as discovery of communications between an attorney and a testifying expert, draft expert reports, and expert working papers. The Subcommittee and Committee hope to have formal proposals ready for consideration at the June Standing Committee meeting. This report introduces the issues and previews possible Rule 26 amendments.

Background: Rule 26 requires a party to disclose the identity of any witness it may use at trial to present evidence under Evidence Rules 702, 703, or 705. It also requires disclosure of a written report by some, but not all, expert witnesses. The disclosure requirement has in turn affected expert-witness discovery.

Expert witness discovery was first directly addressed in the Civil Rules by Rule 26(b)(4), added in 1970 at the same time as work product protection was first addressed by Rule 26(b)(3). In the 1970 version, Rule 26(b)(4) was explicitly separated from work product protection. In 1993, the expert witness discovery provisions were substantially revised and Rule 26(a) disclosure practice was adopted. Rule 26(a)(2)(B) requires disclosure of a detailed written report prepared by the witness "if the witness is one retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony." The report must include not only "a complete statement of all opinions the witness will express and the reasons for them," but also "the data or other information considered by the witness in forming them." The 1993 Committee Note adds this statement:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

The report requirement is secure in the rules; no question has been raised concerning its continuing vitality. The reference to "other information," in conjunction with the Committee Note, has, however, led courts to hold that communications between retaining attorneys and their expert witnesses generally are subject to full discovery. Courts also generally hold that drafts of expert reports may be discovered.

ABA Proposal: In 2006, the Federal Practice Task Force of the Litigation Section of the American Bar Association recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and attorney-expert communications. The Task Force recommendation was later approved by the ABA House of Delegates. A copy of the Task Force's report is attached.

The Task Force noted that the discoverability of attorney-expert communications and draft expert reports has resulted in artificial procedures and expensive litigation practices. Experts and counsel often go to great lengths to avoid the creation of draft reports, creating drafts only in electronic form, deleting all electronic drafts, and even scrubbing hard drives to prevent the

subsequent discovery of drafts. Lawyers and experts often avoid written communications or the creation of notes on the part of the expert, encumbering attorney-expert communications and the formulation of effective and accurate litigation opinions. Litigants often engage in expensive discovery seeking to obtain draft reports or attorney-expert communications. Parties often retain two sets of experts, one for consultation purposes and a second for testimony. Some experienced lawyers avoid such expense and inefficiency by agreeing that draft reports and attorney-expert communications will not be discoverable in the litigation.

The Task Force concluded that discovery of draft reports and attorney-expert communications rarely yields information that influences the outcome of the case The merits of expert opinions, not draft reports or communications with counsel, tend to be the most important considerations at trial.

Believing that the benefits of full expert discovery do not justify the costly and inefficient practices that have developed since 1993, the ABA Task Force made the following recommendations:

(i) an expert's draft reports should not be required to be produced to an opposing party;

(ii) communications, including notes reflecting communications, between an expert and attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

(iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Treating Physicians and Employee Experts: Because Rule 26 requires that expert reports be produced only by experts specially retained for the litigation or employees whose job regularly includes the providing of expert testimony (Rule 26(a)(2)(B)), some categories of expert witnesses are not required to produce reports. Treating physicians, for example, are not generally viewed as having been "specially retained" for the litigation and typically are not required to prepare expert reports, and yet they often provide important opinion testimony under Rule 702. If treating physicians are asked to opine on causation or prognosis issues that were not addressed during treatment, a good argument can be made that the physicians should be required to provide some form of expert report. When such a report is not prepared, parties often are surprised at trial by the undisclosed physician opinions and courts are required to choose between requiring a surprised party to respond to the opinion or depriving the propounding party of an expert opinion that Rule 26 did not require to be disclosed in a report.

Employee witnesses also often provide important testimony under Rule 702. Rule 26's contrary directive notwithstanding, several courts have held that employee witnesses who do not regularly give expert testimony must produce expert reports. These courts have reasoned that Rule 702 opinions provided by employees should, in fairness, be disclosed to the opposing party. Report requirements have therefore been imposed on employee witnesses even though not required by Rule 26. See, e.g., Prieto v. Malgor, 361 F.3d 1313, 1319 (11th Cir. 2004); Minn. Min. & Mfg. Co. v. Signtech USA, Ltd., 177 F.R.D. 320, 325 (D Minn. 1998).

The Subcommittee's Work to Date: The Discovery Subcommittee has studied the issues raised by the ABA Task Force and the testimony of treating physicians and employee experts The Subcommittee has held two mini-conferences, one in January of 2007 with a cross-section of

attorneys from around the country, and a second in April of 2007 with a cross-section of attorneys from New Jersey, a state that has prohibited discovery of draft reports and attorney-expert communications. Notes on the April miniconference are attached to illustrate the remarkable unanimity of opinions favoring the New Jersey rule, which commanded support by lawyers from all branches of practice.

In addition, the Subcommittee has held a number of conference calls to discuss these issues in detail; research has been conducted on selected topics; and these issues have been addressed at some length in three meetings of the Advisory Committee. Attached to this memorandum is a report prepared in advance of the Advisory Committee's meeting in November of 2007. The report identifies issues that are now under consideration by the Subcommittee.

Treating Physicians and Employee Experts: The Subcommittee has reached a fairly firm conclusion on the issues presented by treating physicians and employees who do not regularly give expert testimony. The Subcommittee believes that Rule 26(a)(2)(A) should be amended to require that attorneys – not the experts – provide disclosures regarding opinions to be provided at trial by treating physicians, employee experts, and others not retained or specially employed to give expert testimony. These lawyer disclosures would not be as detailed as the written reports required of specially retained experts, but would put opposing counsel on notice of expert opinions to be provided under Rule 702. The attorney making the disclosures under Rule 26(a)(2)(A) would be required to identify the subject matter on which the witness is expected to provide expert testimony and the substance of the facts and opinions about which the witness is expected to testify. The Subcommittee's current draft of a proposed amendment to Rule 26(a)(2)(A) reads as follows (new language is underscored):

> (2) Disclosure of Expert Testimony.
>
> (A) In General; Disclosure Regarding Testimony of Certain Witnesses. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witnesses it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. For any such witness who is not required to provide a report under Rule 26(a)(2)(B), this disclosure must also state:
>
> (i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) the substance of the facts and opinions to which the witness is expected to testify.

Such disclosures would provide the opposing party with notice of the expert opinions to be provided by treating physicians or employee experts, and the opposing party could then decide whether to depose the witness to obtain additional information.

The Subcommittee has concluded that Rule 26(a)(2)(B) written reports should not be required of treating physicians and employee witnesses who do not regularly give expert testimony. Attorneys consulted by the Subcommittee have stated that treating physicians will be unwilling to cooperate in litigation if they are required to write expert reports and that testimony of employee experts generally is not problematic. Consistent with the 1993 exemption of such witnesses from the report requirement, the Subcommittee believes that the attorney disclosures should be required in lieu of expert reports. Such a change would be intended to nullify cases that have imposed report requirements on employee witnesses.

Draft Reports: After conferring with attorneys at the January and April mini-conferences, the Subcommittee has concluded that draft reports should be protected from discovery. This conclusion primarily results from a cost-benefit analysis. The Subcommittee has concluded that the marginal benefits resulting from discovery of draft reports are clearly outweighed by the costs incurred in artificially avoiding the creation of drafts and the discovery fights over drafts. Protecting draft reports from discovery would eliminate many of these artificial procedures and much of this litigation cost, while enabling lawyers and experts to collaborate more freely in the preparation of a final written report of the expert's opinions. The Subcommittee has concluded that draft reports should receive the same protection as other trial preparation materials under Rule 26(b)(3). Thus, draft reports would be subject to discovery only if the "substantial need" and "undue hardship" tests are satisfied. The Committee Note would make clear that a lawyer's desire to obtain draft reports in order to enhance his cross-examination of the expert at trial would not ordinarily satisfy the substantial need and undue hardship requirements

Attorney-Expert Communications: After consulting with counsel at the January and April mini-conferences, and discussing the subject extensively, the Subcommittee has also concluded that some attorney-expert communications should receive work product protection. Again, this conclusion results primarily from a cost-benefit analysis. The costs incurred by parties in avoiding direct communications or the creation of notes, and in retaining second sets of experts, substantially outweigh the benefits derived from opening attorney-expert communications to discovery. The Subcommittee has found, however, that this issue presents serious line-drawing challenges.

We have considered the ABA's proposal that would place virtually all attorney-expert communications off limits. This approach is similar to the rule now followed in New Jersey, where communications constituting the "collaborative process" between the attorney and expert are protected from discovery. This approach has the virtue of eliminating many of the problems presented by the current rule. Attorneys and experts no longer need to avoid the creation of notes of conversations, free collaboration can occur in preparation of the expert's opinions, and attorneys are not required to retain second sets of experts in order to test hypotheses or consult generally with an expert about the case. Although there is much to be said for these advantages, the Subcommittee sees more serious disadvantages from such broad protection of attorney-expert communications. A full inquiry into the evolution of an expert's opinion is often necessary to evaluate the merits of that opinion, and such an inquiry may necessarily include the collaborative efforts between the expert and the attorney. Some attorney-expert communications might also go directly to expert bias, such as the promise of other work if the expert provides the opinions sought by the lawyer. Because the Subcommittee is not convinced that all attorney-expert communications should be placed off limits, we tentatively have decided that the ABA proposal is too broad.

The Subcommittee has considered an approach that would protect from discovery any attorney-expert communications that (a) reveal the lawyer's mental impressions or opinions concerning the litigation or (b) concern aspects of the litigation other than the opinions to be expressed by the expert at trial. Although protecting attorney mental impressions and opinions might facilitate some broader communication between lawyers and experts, such a protection might present serious practical problems for litigants and judges. Distinguishing between attorney-expert communications that reflect the lawyer's thinking and those that do not could prove quite difficult in most cases. Parties might end up litigating about this issue, defeating some of the cost-saving goals of this effort, and judges might be placed in the unenviable position of reviewing attorney-expert communications in camera in order to separate lawyer mental impressions from the rest of the communications. And if these practical line-drawing problems render the protection of lawyer mental impressions uncertain, lawyers will not include them in their communications with experts and any benefits of the protection will be lost. One approach, then, might be to leave this issue out of the rule and allow courts to decide what protection, if any, to afford lawyer mental impressions communicated to experts.

The Subcommittee does see a distinct benefit to be gained from protecting attorney-expert communications concerning aspects of the litigation other than the opinions to be expressed by the expert at trial. Some of the expense of litigation could be avoided if lawyers were free to have their experts critique the opinion of the opposing side's expert, prepare an outline for cross-examination of expert or fact witnesses, or express views on the merits of the litigation or the settlement value of the case. Permitting such communications to occur without fear of later discovery would result in better-informed lawyers and decrease some of the expense incurred in retaining second sets of experts.

The Subcommittee has also spent significant time discussing the treatment of expert notes and work papers. The ABA proposal would place such written materials, at least to the extent they reflect attorney-expert communications, off-bounds in discovery. Although we have considered affording some level of protection to such materials in order to foster full collaboration between attorneys and experts, we tentatively have concluded that such papers are too central to the development of an expert's opinion to make them non-discoverable.

One of the grounds on which courts have permitted discovery of draft reports and attorney-expert communications is the present requirement that the parties disclose not only the "data" considered by the expert, but also any "other information" considered. Consistent with the Subcommittee's conclusion that draft reports should not be subject to disclosure, the Subcommittee has concluded that the disclosure requirement should be limited to "facts or data" considered by the expert, not "facts or other information." This is the formulation proposed by the ABA Task Force and included in the New Jersey rule, where it appears to have worked well. The Subcommittee also discussed the ABA's suggestion that the rule be changed to require disclosure only of facts or data "relied on" by the expert, as opposed to facts or data "considered" by the expert. The Subcommittee believes this change would unduly constrict expert disclosure and discovery.

The Subcommittee's conclusions represent a work in progress. We hope to have a final recommendation ready for the Advisory Committee next Spring.

Additional Issues: The Subcommittee is also addressing interesting legal issues that arise from these possible amendments. We have wondered, for example, whether lawyers would rely on these protections if they were concerned that the protection might be lost in future cases. Research by Monica Fennell and Jeff Barr at the AO has revealed, however, that work product protection generally survives the case in which the work product is created, particularly if the case in which it is later challenged includes an attorney or party who was involved in creation of the work product initially.

Andrea Thomson, Judge Rosenthal's law clerk, has provided helpful research on whether protections placed in Rule 26 would apply at trial. The research has been undertaken in response to a similar concern – whether protections placed in Rule 26 might prove meaningless if draft reports or protected attorney-client communications could be obtained at trial. The Subcommittee recognizes that Rule 26 is a rule of discovery, not a rule of evidence, but has concluded that any revised Rule 26 will provide helpful guidance on what is truly relevant to evaluating an expert's opinion: full inquiry into the facts and data considered by the expert, the process by which the expert's opinions were developed, and any factors that might show bias. Subjects falling outside these areas of full inquiry are less relevant and protecting them from disclosure will eliminate some of the inefficiencies of the current system. As noted above, the Subcommittee has not come to rest on just where the lines should be drawn, but it is undertaking this work with a consciousness of limitations on the Advisory Committee's role.

Conclusion: The Subcommittee thus far has concluded that drafts of Rule 26(a)(2)(B) reports should not be discoverable, but it continues to debate discovery of communications between

attorneys and experts. Communications that do not involve matters on which the expert will express opinions at trial are promising candidates for protection. Communications made in the course of developing trial opinions present strongly competing considerations. On one hand, the discoverability of such communications has led to costly litigation practices such as the retention of second sets of experts and avoiding the creation of notes and work papers. The communications also may involve "core" work product – the attorney's mental impressions, conclusions, opinions, or legal theories – or even privileged information. On the other hand, these communications may be important to understanding the evolution and value of the expert's opinions, and much wasted effort could be spent trying to draw lines between communications that reveal core work product and communications that do not. The Subcommittee will continue to study these issues.

The Subcommittee is also conscious of the fact that prohibiting discovery will not accomplish its objectives unless inquiry at trial also is prohibited. The discovery rules cannot directly address evidence rulings at trial, but the expectation is that disclosure and discovery regarding all facts or data considered by the expert, coupled with discovery regarding all attorney-expert communications about the opinions to be expressed at trial, should encompass all questioning that would ordinarily be permitted during a trial.

It may help to focus these problems by offering a sample that illustrates one possible approach. This example has not been considered by the Subcommittee in this form, and includes in brackets a provision that could easily be deleted as deliberations proceed. It opts for an escape that allows discovery on the showings provided for work product, an analogy that may or may not hold up. With those caveats, here is a possible addition to Rule 26(b)(4)(A):

> The protection of trial-preparation materials established by Rule 26(b)(3)(A) and (B) applies to drafts of a report required by Rule 26(a)(2)(B), [communications in any form between retaining counsel and the expert that reflect counsel's mental impressions, conclusions, opinions, or legal theories concerning the litigation,] and communications in any form between retaining counsel and the expert regarding aspects of the litigation other than the opinions the expert will express.

The Subcommittee welcomes input from the Standing Committee on these challenging issues.

EXPERT DISCOVERY ISSUES

Since the April meeting, the Discovery Subcommittee has given considerable further attention to issues of discovery regarding expert witnesses. On the day before the April meeting began, it held a mini-conference with New Jersey lawyers to learn more about their experience with a New Jersey state-court rule that imposed limits on expert-witness discovery. A brief report on that event was made during the April meeting. Since then, the Subcommittee has held telephone conferences on six occasions -- May 8, June 22, July 17, Aug. 17, Sept. 12, Sept. 28, and Oct. 11 -- to discuss these matters further. In addition, Judge Kravitz and Prof. Marcus participated in a panel discussion during the ABA convention devoted to expert discovery issues.

The Subcommittee has found the issues raised more intricate and challenging than might have been expected. As a consequence, it does not return with fully-formed proposals for possible amendments. Instead, it returns with some ideas fairly fully formed and others still forming. The purpose of this memorandum is to sketch the work done since the April meeting and introduce the issues raised. During the meeting, the Subcommittee hopes to receive advice and reactions from the other members of the full Advisory Committee.

Besides this memorandum, the agenda book should also include the following materials that should help to flesh out the picture regarding the issues raised:

(1) Notes on Oct. 11 conference call

(2) Notes on Sept. 28 conference call

(3) Notes on Sept. 12 conference call

(4) Sept. 5, 2007, memo regarding issues to be discussed on Sept. 12. (Ultimately the conference calls on Sept. 12, Sept. 28, and Oct. 11 largely dealt with these issues. Accordingly, the memorandum seems useful to provide a context for appreciating the discussion during those calls. In addition, it sets out a variety of considerations that bear generally on the matters discussed and that may be useful as background.)

(5) Notes on Aug. 17 call

(6) Research memo from Matt Hall (Matt Hall was Judge Levi's Rules Clerk. At the request of the Subcommittee, he did research on the showings necessary to obtain discovery of material protected under Rule 26(b)(3) or 26(b)(4))

(7) Notes on April 18 mini-conference with New Jersey lawyers

The purpose of this memorandum is to introduce these issues with some specifics on current thoughts about possible amendments. As noted above, the Subcommittee is not presently recommending going forward with any of these amendment ideas, although some have advanced relatively well along in the amendment process. In some instances, there is also a rough draft of a possible Committee Note.

The Subcommittee has not seen these drafts of possible amendments before the were included in the agenda book, although they attempt to carry forward ideas discussed during the Subcommittee's deliberations. The Subcommittee has not yet discussed any draft Committee Note language. So all of these matters remain open for discussion by the Subcommittee and the full Committee and will certainly be revised before being formally submitted to the full

Committee. Needless to say, some or all current ideas may be discarded after further examination.

For the present, then, the memorandum proceeds with the following:

(1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports

(2) Report requirements in Rule 26(a)(2)(B) -- revisions to deal with issues of disclosure of attorney-expert communications and disclosure of draft reports

(3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports

(4) The problem of expert "work papers"

Because the notes on the last four conference calls (and the memorandum on which the last three calls focused) provide considerable detail about the drafting refinements that have occupied the Subcommittee, it does not seem important to provide a detailed introduction about those matters. But some overview of the orientation of the discussions leading up to those calls seems helpful to acquaint the full Committee with developments since the April meeting.

By way of background, at the April meeting the discussion included presentation of the idea that attorney disclosure should be required for expert witnesses who do not have to provide reports under Rule 26(a)(2)(B). That issue was the first that called the Committee's attention to expert discovery roughly three years ago. Then it seemed that some courts were requiring full reports from these exempted witnesses, somewhat in the teeth of what the rule said, because they thought that disclosure was very important to permit the other side a fair chance to prepare to meet those expert opinions.[1] But requiring a full report of such witnesses could present difficulties. Treating physicians would probably resist preparing reports. Imposing the "waiver" consequences of the report requirement on in-house experts who don't regularly testify might produce difficulties also (although other changes now being discussed might reduce those difficulties). The Subcommittee's idea presented in April was to require attorney disclosure rather than a full report from these people. Since then, the Subcommittee has continued to regard this addition as important,[2] and item (1) in this memorandum therefore deals with this issue.

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[1] Not all courts have taken this view of the current exemption. For example, in Watson v. United States, 485 F.3d 1100, 1107-08 (10th Cir. 2007), the court rejects the argument that a report should be required because it is otherwise unfair to allow a party to call an expert to offer opinions on the ground that the drafters of the 1993 amendments decided not to require reports from these witnesses.

[2] Recent decisions show that courts still resist the exemption from the report requirement in Rule 26(a)(2)(B). For example, in Dyson Technology, Ltd v. Maytag Corp., 241 F.R.D. 247 (D. Del. 2007), the court held that the cases requiring full expert reports even of those experts whom current (B) exempts were persuasive and therefore not only that a full report was required as to an employee who did not ordinarily offer expert testimony, but also that as a result all privileged or work product information considered by the witness was subject to the waiver consequences we have been trying to ameliorate. Although this issue arises infrequently in reported cases, then, it continues to arise with vigor.

A related issue involved treating physicians. Another concern regarding expert witness disclosure was the failure to identify a treating physician as an expert witness. If the doctor will testify about causation or prognosis, that testimony ordinarily would come in under Fed. R. Evid. 702, 703, and 705, making identification of the doctor pursuant to Rule 26(a)(2)(A) necessary even if a report need not be prepared.[3] Failure to identify could therefore raise the risk that the doctor would be prevented from testifying.[4] The Subcommittee discussed including a reference

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[3] Recent cases highlight these issues. In Kirkham v. Societe Air France, 236 F.R.D. 9 (D.D.C. 1006), defendants moved to strike plaintiff's designation of two treating doctors as expert witnesses or to require that they provide reports. The court said that treating doctors can testify without preparing a report, but added that "the applicability of the written report requirement to treating physicians who provide expert testimony is unclear because, in practice, the testimony of treating physicians often departs from its traditional scope -- the physician's personal observations, diagnosis and treatment of the patient -- and addresses causation and predictions about the permanency of plaintiff's injuries, matters that cross over into classic expert testimony. Thus, there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B)." Id. at 11. See also Gonzalez v. Executive Airlines, Inc., 236 F.R.D. 73, 79 (D.P.R. 2006) ("Because they necessarily rely on their opinions as experts in treating patients, treating physicians are not bound by the expert report requirements of Rule 26 so long as they limit their testimony to those opinions they formed and relied on during the course of their examination and/or treatment of the patient. Any opinions that they form outside the context of their examination of the patient, however, constitute expert opinion testimony and are subject to the more stringent requirements of Rule 26(b)(4)(B).").

[4] A recent example is Fielden v. CSX Transportation, Inc., 482 F.3d 866 (6th Cir. 2007). Plaintiff sued his employer, claiming that he had developed carpal tunnel syndrome due to his work He provided no expert reports by the deadline for serving them. Defendant then moved for summary judgment on the ground there was no evidence of causation even though plaintiff had listed his treating doctors in answer to an interrogatory as witnesses who would testify on causation. Plaintiff opposed the motion with a letter report from a treating physician that counsel had obtained after the cutoff for expert disclosure. Although the doctor's deposition had been taken, and had shown that the doctor developed his conclusion about causation as a part of treatment (see id at 867 n.1), the district judge held that the letter report had to be excluded under Rule 37(c)(1).

> The Court of Appeal reversed:
>
> > Fielden did not retain Dr. Fischer for the purposes of providing expert testimony because there is evidence that Dr. Fischer formed his opinions as to causation at the time he treated Fielden and there is no evidence that Dr. Fischer formed his opinion at the request of Fielden's counsel. * * * Under a straightforward reading of the rule and its advisory note, Fielden did not need to file an expert report from Dr. Fischer.
> >
> > This conclusion is supported by the obvious fact that doctors need to determine the cause of an injury in order to treat it. Determining causation may therefore be an integral part of "treating" a patient.

Id. at 869-70. At the same time, the court recognized that "[a] party might attempt to avoid Rule 26(a)(2)(B)'s requirement by having a treating physician testify on an issue instead of having an expert do so." Id. at 870. And in order to reach its decision in this case the appellate court had to

to treating physicians in the text of Rule 26(a)(2)(A) to alert lawyers to the existing need at least to identify those witnesses, as well as the need to provide disclosure under the new disclosure requirement, but decided that it was inadvisable to single out these expert witnesses. Below, there is an attempt in the draft Committee Note to highlight the need at least to identify treating physicians, along with the need to provide disclosure regarding their testimony. Adding a disclosure requirement not only provides appropriate notice to the other side of the likely content of doctors' opinions, but also may alert lawyers to the need to identify doctors who will offer such opinions.

Regarding attorney-expert communications, the Subcommittee first thoroughly discussed the basic question whether such protection should be provided. Although a different conclusion is possible,[5] the Subcommittee unanimously concluded that providing protection would be desirable. The costs of intense inquiry into attorney-expert communications and draft reports were high, and the benefits low in terms of actually providing information important either to determining whether the expert should be allowed to testify under Daubert or whether the jury should accept the testimony.[6]

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deal with and distinguish a lot of other cases.

See also Botnic v. Zimmer, Inc., 484 F.Supp.2d 715 (N.D. Ohio 2007) (plaintiff's failure to provide an expert report announcing expert opinions from a treating physician warranted exclusion of the physician's testimony).

[5] Consider Elm Grove Coal Co. v. Director, Off. of Workers Comp. Programs, 480 F.3d 278 (4th Cir. 2007), in which the court dealt with the specialized question of discovery in administrative proceedings under work product provisions essentially identical with those applicable in court under the Civil Rules, but minus the 1993 expert disclosure provisions. The administrative proceeding had accepted a claim by Blake, a retired coal miner, for benefits under the Black Lung Benefits Act arising from his work for Elm Grove. Blake's expert witnesses testified that Blake's lawyers had provided them with materials and were involved in drafting of their reports, but the ALJ refused to order production of draft reports or discovery of attorney-expert communications. The Court of Appeals concluded that discovery had to be ordered. It explained as follows (id. at 301):

> [W]e are unable, in these circumstances, to agree that Blake's expert witnesses could be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications sought by Elm Grove. As the Supreme Court has cautioned, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." [citing Daubert] And, as several courts have observed, it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

[6] Another point to keep in mind goes back before the 1993 adoption of Rule 26(a)(2)(B). Some fifteen years before that amendment, Judge Frankel concluded that Fed. R. Evid. 612(2) ordered disclosure of what the lawyer gave an expert witness, even though seemingly core work product. If one wants to clear the field, therefore, it might be important to consider amendments to the Civil Rules saying that discovery may be had only on a very exacting showing, does that trump (or at least inform) a determination whether production should be ordered pursuant to Evidence Rule 612(2) because "it is necessary in the interests of justice."

Once that initial determination was made, the extent and location of protection became the focus of much discussion. The concern about the extent of protection was that, given the current atmosphere of intense scrutiny of these topics in many courts, lawyers would continue to press for such discovery unless it were forbidden or virtually forbidden. Thus, for example, one suggestion was that discovery of draft reports be flatly prohibited. But a flat prohibition seemed odd; if discovery of the work done by a nontestifying expert could be had under Rule 26(b)(4)(B) in exceptional circumstances, it would be strange for discovery with regard to the drafts done by a testifying expert to be completely off limits. As an alternative, the "exceptional circumstances" standard of Rule 26(b)(4)(B) (seemingly favored by the ABA in its resolution) was also considered, as was work-product protection as provided in Rule 26(b)(3)(A) and (B). To shed light on the choice between the Rule 26(b)(3) and (b)(4) standards, Matt Hall, Judge Levi's Rules Clerk, was enlisted to do research on the application of those standards. His research report should be included in these agenda materials. It indicated that the showing required to justify discovery under Rule 26(b)(3) is quite demanding, and that the seemingly higher standard of Rule 26(b)(3)(B) is not clearly preferable. The Subcommittee decided that the Rule 26(b)(3) standard was the proper fit. It concluded also that trying to set a new standard would lead to undesirable complications; better to choose one already recognized by the courts and counsel.

Regarding location, the Subcommittee extensively discussed three possible locations. First, a protective provision could be located in Rule 26(a)(2), which was in a sense the source of the current "problem." But that might raise questions about whether the protection extended beyond disclosure and also applied to discovery. It also considered locating the provision in Rule 26(b)(4)(A), because the expert's deposition is likely to be the main setting in which these issues will be thrashed out. But once the decision was made to use the standard for discovery articulated in Rule 26(b)(3), that made including the provision in (b)(4) questionable In addition, including the provision in (b)(3) had the advantage of making it clear that it applied to all discovery methods, not just depositions. Further drafting concerns exist about how to frame

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There is, of course, a very good argument that Rule 612 was never about the situation we are addressing in our discussion because the expert witness is not using the sort of materials the lawyer is likely to provide "to refresh memory for the purpose of testifying," which is what Rule 612 is focused upon. There is usually no issue of refreshing memory here. We are, instead, talking of materials the lawyer provides to the potential expert witness to orient her to the issues in the case, long before the expert testifies and often long before a decision whether this person will be identified as a witness is made. Maybe, indeed, it would make sense for Rule 612(2) to apply (in civil cases) only to materials used by the expert witness after she has been identified under Rule 26(a)(2)(A). Then, at least, the idea of refreshing memory may be salient.

It could thus well be argued that Evidence Rule 612(2) could easily co-exist with the regime outlined in this memorandum, and that amendments to the Civil Rules could be pursued without a glance at Rule 612. In addition, the idea that the more specific controls over the more general (if that applies to provisions from different sets of rules) arguably means that the addition of Rule 26(a)(2) in 1993 superseded the pervious decisions based on Rule 612. It seems likely that since 1993 the decisions have focused on Rule 26(a)(2) and not on Rule 612.

Nonetheless, it may be unwise to assume that a change to the Civil Rules will be treated as superseding decisions based on Rule 612. Reference to this issue in a Committee Note to an amendment of a Civil Rule might be helpful, but it is not clear that it could do much about the interpretation to be given to an Evidence Rule. The draft Committee Notes below do not include discussion of Evidence Rule 612.

such a protection, but item (3) below offers first-cut ideas that can serve as the focus for discussion during this meeting.

Item (2) below, therefore, includes possible amendments to Rule 26(a)(2) that parallel and provide a basis for the protections outlined in item (3). It specifies that only a "final" report must be disclosed, to deal with arguments that there is still a requirement to disclose draft reports. And it removes the phrase "or other information," which seems to have provided support for disclosure or discovery regarding attorney-expert communications. Instead, it says that disclosure is required of "the facts or data considered by the witness." This phrase is further explained in the draft Committee Note. The Subcommittee discussed, but unanimously rejected, changing "considered" to "relied on." Such a change, it was feared, would unduly curtail legitimate inquiry into the basis of the opinions to be presented at trial.

Regarding draft reports, the Subcommittee eventually decided to treat these in the same way as lawyer-expert communications. Accordingly, item (3) below permits discovery of draft reports only upon the showing required for discovery of work product under Rules 26(b)(3)(A) and (B). The Subcommittee considered limiting protection for draft reports to those "prepared by the witness." But eventually it decided that this limitation would produce time-consuming and pointless inquiries into the relative roles of the lawyer and the witness in preparing the final report. In addition, the risk that the lawyer would simply write the report and have the expert sign it seemed not to be too pressing because such an expert would be very vulnerable to cross-examination.[7]

Finally, item (4) below briefly introduces the problem of expert "work papers" on which the Subcommittee hopes for considerable input and advice from the full Committee. Some courts assert that such materials are not discoverable,[8] but often justifications for probing such materials are accepted. As the notes of the Sept. 28 and Oct. 11 conference calls report, the Subcommittee has considered this issue at some length. At present, it seems that there are two competing considerations that bear on whether protection should be given such materials. On the one hand, if the absence of protection means that some experts will adopt strategies to avoid creating such working papers that interfere with their effective preparation, providing the protection might not take anything away from the other side and promote efficiency in the use of experts. On the other hand, inquiry into the work papers prepared by the expert during the development of the opinions to be expressed in testimony seems central to adequate probing of the opinions that will be presented. Indeed, even the testing of nontestifying experts may sometimes be discoverable under Rule 26(b)(4)(B) when no alternative source of essential information exists. Making the materials generated during preparation of the opinions offered by the testifying expert almost as hard to obtain (as by protecting them unless the Rule 26(b)(3)(A) and (B) showing can be made) may be unwise.

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[7] On this point, consider Faruki, Cross-Examination That Hurts the Witness, Not You, 33 Litigation 38, 39 (Spring 2007):

> With an expert whose report was largely ghostwritten by counsel, traps abound unless the expert has studied and internalized the report. For example, if the expert does not know what is in her own lengthy report, you may find opportunities to have the expert deny having reviewed documents or performed an analysis that the report says she did review or perform.

[8] See., e.g., McDonald v. Sun Oil Co., 423 F.Supp.2d 1114 (D. Or. 2006) (experts' working notes were not subject to disclosure during discovery).

A related consideration that the Subcommittee has discussed is the proper treatment of experts who are designed to testify on some matters and also serve as "sounding boards" with regard to general strategy. If the goal is to discourage the wasteful practice of hiring two sets of experts, curtailing inquiry into the preparatory activities of the expert witness may be necessary to avoid trespassing also into the work done by the expert in the "consulting" role. On one level, this focuses on what was "considered by" the expert in reaching the opinions to be offered at trial. When the expert explores various analytical methods or tests before settling on one that will be the basis for the opinion offered at trial, the question whether the others were considered in reaching the opinion to be offered become central. On another level, it focuses on whether strategic interaction with the lawyer about the conduct of the case should be accessible because the expert is to testify. For example, if the expert advises the lawyer on how to probe or challenge the report of the other side's expert, should that interaction be regarded as discoverable? A likely response would be that it does not relate to "facts or data" considered by the expert in reaching her own opinions, but it is a legitimate concern in addressing the problem raised by item (4)

The Subcommittee has reached no conclusion about whether any rulemaking to deal with the issues presented in item (4) would be appropriate. It will attempt during the November meeting to make clear the tradeoffs and considerations that bear on the question whether to proceed further on this topic. It is worth noting, however, that this specific subject was not raised in the ABA resolution, and that pursuing rule change ideas like those described in items (1), (2), and (3) may produce considerable benefits without necessitating a venture also into the topic introduced in item (4).

Duration of work product protection: During the Oct. 11 conference call, as reflected in the notes of that call, the Subcommittee also began discussion of the question whether it should broaden its inquiry to include discussion of the duration of work product protection. Presently, many courts apparently regard protection as ending once the litigation is completed. But for many litigants related litigation may begin or continue after the suit for which the work was initially done has ended.

The Supreme Court dealt with related issues in FTC v. Grolier, Inc., 462 U.S. 19 (1983). In a concurring opinion, Justice Brennan articulated reasons supporting extension of protection beyond the first suit: "Any litigants who face litigation of a commonly recurring type -- liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on -- have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." Id. at 31. But the question whether this concern has particular salience in relation to the work of expert witnesses, and the way in which it should be handled when the party for whom the expert worked in the earlier case is different from the party for whom the expert is working in the current case, raised issues beyond the current understanding of the Subcommittee.

For the present, the Subcommittee intends to explore these issues further, and it invites the full Committee to provide reactions and advice about this topic.

(1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports

Rule 26. Duty to Disclose: General Provisions Governing Discovery

(a) Required Disclosures

* * *

(2) ***Disclosure of Expert Testimony***

(A) *In General; Disclosure Regarding Testimony of Certain Witnesses* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. For any such witness who is not required to provide a report under Rule 26(a)(2)(B), this disclosure must also state:

(i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) the substance of the facts and opinions to which the witness is expected to testify.

Draft Committee Note[9]

Rule 26(a)(2)(A). Rule 26(a)(2)(A) is amended to mandate disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). Before 1993, an interrogatory seeking the identity of expert witnesses permitted inquiry about the opinions to be offered by all such witnesses. The expert report requirement of Rule 26(a)(2)(B) -- added in 1993 -- calls for much more extensive information, but that rule exempted certain expert witnesses from providing a report at the same time it eliminated the former interrogatory practice. This amendment adds disclosure requirements regarding those exempted witnesses in Rule 26(a)(2)(A)(i) and (ii).[10] These new provisions include information that formerly could be obtained by interrogatory. Under Rule 26(b)(4)(A), the depositions of these expert witnesses may be taken, using the information provided by this disclosure. The goal is to ensure fair notice of the expected expert testimony.

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[9] The Subcommittee has not discussed any draft Committee Note. These drafts are provided only to indicate what sorts of discussion might be included, and to shed light on the discussion of the possible rule changes outlined in text.

[10] Initially, the Subcommittee considered including also an additional requirement -- "(iii) a summary of the grounds for each opinion." Eventually that was dropped on the ground that it was not urgently needed and that it might present considerable difficulties with regard to some witnesses affected, particularly treating physicians.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. Reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable, these courts have disregarded the limitations on who must prepare a report under Rule 26(b)(2)(B). But with the addition of this disclosure requirement to provide advance information about the opinions of such witnesses, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

Sometimes the person who will offer expert testimony also will be a "fact" witness -- often called a "hybrid expert." A frequent example is a treating physician or other health care professional. Another recurrent example is an employee of a party who does not regularly provide expert testimony. Often such witnesses provide not only testimony about strictly historical facts but also evidence under Fed. R. Evid. 702, 703, or 705. Parties must identify such witnesses under Rule 26(a)(1)(A) and provide the required disclosure with regard to such opinions. Failure to do so may lead to requests to exclude evidence under Rule 37(c)(1).

[Additional issues may arise with "hybrid experts." First, if the person's deposition has already been taken as a "fact" witness, there may be an objection that it cannot be taken under Rule 26(b)(4)(A) because of the one-deposition limitation of Rule 30(a)(2)(A)(ii). In general, such objections should not be well-taken to the extent the deposition is limited to the opinions enumerated in the Rule 26(a)(1)(A) disclosure; otherwise a party could prevent an expert deposition by designating as its expert a fact witness who had already been deposed. But if the party who designated the witness can show that the original deposition fully explored the issues on which the opinion testimony will focus, that may be a ground for a protective order against a further deposition of the witness.

Second, the ten-deposition limit of Rule 30(a)(2)(A)(i) might be raised if a party who seeks to take the person's deposition after the Rule 26(a)(1)(A) designation has taken ten depositions already. If the designated expert was one of those ten, the expert deposition should be viewed as separate from the "fact" witness deposition for purposes of the ten-deposition limit; otherwise, parties might be deterred from designating as experts those who have already been deposed as fact witnesses. This treatment is consistent with regarding the expert deposition of the witness as separate from a prior deposition of the same person as a "fact" witness for purposes of the one-deposition rule.

In regard to both types of Rule 30(a)(2)(A) issues, the parties should try to reach agreement, and in the absence of such agreement courts will need to design appropriate arrangements for the circumstances in individual cases.][11]

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[11] The bracketed material is a very rough first effort at addressing issues that might properly be foreseen in the Note. Perhaps, however, it would be better to remain silent on them. But it could be better to propose different default views.

(2) Report requirements in Rule 26(a)(2)(B) -- revisions to deal with issues of disclosure of attorney-expert communications and disclosure of draft reports

Rule 26. Duty to Disclose: General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) Disclosure of Expert Testimony

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them.

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Draft Committee Note

Rule 26(a). Rule 26(a)(1) and (2) are amended -- together with Rule 26(b)(3) -- to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony from those expert witnesses not required to provide expert reports and limit the disclosure obligation -- whether under Rule 26(a)(1)(A) or (B) -- to facts or data considered by the witness. In addition, the amendments make clear that draft expert reports need not be disclosed. Rule 26(b)(3) is amended to limit discovery regarding communications between expert witnesses and counsel or of draft reports. Together, these changes provide

broadened disclosure regarding some expert testimony and curtail disclosure and discovery that have proven counterproductive.

Before 1993, only very limited discovery was provided regarding the expected testimony of expert witnesses. A party had a right by interrogatory to require other parties to identify such witnesses and provide a general description of the testimony they would offer. The court could thereafter order further discovery -- often by deposition of the expert witness -- but there was no right to any further discovery.

In 1993, major rule changes were made regarding expert discovery. The former expert-witness interrogatory provision was removed. Rule 26(a)(2) was added requiring disclosure -- without the need for a discovery request -- identifying every expert witness. As to all such witnesses retained or specially employed to provide expert testimony, and as to any employee of a party whose duties regularly included giving expert testimony, an extensive report was required, including a complete statement of all opinions to be presented at trial and the basis for those opinions, all exhibits to be used in relation to the opinions, a detailed listing of the witness's qualifications, including all publications during the prior ten years, a list of all cases in which the witness testified as an expert during the prior four years, and the compensation to be paid to the expert. Rule 26(b)(4)(A) was amended at the same time to provide each party the right to take the deposition of another party's expert witness. Rule 37(c)(1) was added to preclude testimony at trial on matters not properly disclosed before trial.

The current amendments narrow none of these 1993 provisions. Indeed, by adding an obligation to provide disclosure about expert witnesses who are not required to provide expert reports, they strengthen disclosure about certain expert witnesses.

[Insert Committee Note on Rule 26(a)(2)(A) amendment here]

Rule 26(a)(2)(B). One aspect of the 1993 amendments has produced problems, however, which these amendments seek to cure. Under Rule 26(a)(2)(B), an expert report was also to include "the data or other information considered by the witness in forming the opinions." This provision has been widely interpreted to call for disclosure of all communications between counsel and expert witnesses required to provide reports, and to require production of drafts of expert reports. The Committee has been repeatedly informed that these features of practice under the 1993 amendments have produced considerable costs without corresponding benefits. The American Bar Association has adopted a resolution urging that court rules be changed to protect against undue intrusion into collaboration between attorneys and expert witnesses and to preclude production of draft reports.

The sole justification for discovery from retained experts is to permit preparation of effective cross-examination of the expert testimony to be offered at trial. Before 1993, the authorized interrogatory provided only a limited opportunity to prepare for expert testimony at trial. The 1993 amendments' introduction of disclosure and the expert report, combined with depositions of right, provided a valuable expansion of that opportunity. This expansion could be particularly important in relation to determinations whether proposed expert testimony should be admitted under the standards of Daubert v. Merrell Dow Pharmaceuticals. Inc., 509 U.S. 579 (1993).

The Committee has been told repeatedly that routine discovery into attorney-expert communications and regarding draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants

would reveal their most sensitive and confidential case analyses, often called "core" or "opinion" work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Discovery or cross-examination focused on the details of attorney-expert communications, or minor variations between draft reports and final reports, can consume much time without producing corresponding benefits. Only rarely -- if at all -- does such discovery contribute significantly to a court's decision whether to admit proposed expert testimony under *Daubert* or to a jury's decision whether to accept or reject the expert's testimony at trial. Much more often, inquiry into these matters has proved to be a waste of time and money.

Recognizing these drawbacks, experienced attorneys often stipulate to forgo disclosure or discovery regarding attorney-expert communications beyond the facts or data considered by the expert, and to forgo disclosure or discovery of draft reports. The widespread use of stipulations to avoid the effect of broad interpretations of Rule 26(a)(2)(B) is a signal that the rule provisions interfere with effective practice. At least one state -- New Jersey -- has amended its discovery rules to insulate against such discovery. See N.J. R. 4:10-2(d)(1). The Committee has been informed that the New Jersey rule change was well-received by the bar, and that it has worked well in practice.

Rule 26(a)(2) is therefore amended to specify that disclosure is required only of "final" reports. Rule 26(b)(3)(D) is added to provide that discovery of draft reports may be allowed under some circumstances, but only by satisfying the provisions of Rule 26(b)(3)(D) can a party obtain such discovery. This amendment does not weaken the duty to supplement under Rule 26(e), however; like other disclosure obligations, expert reports must be supplemented as provided in Rule 26(e).

In addition, Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered. This amendment deletes the phrase "or other information" included in 1993, which has been one ground for decisions requiring disclosure of all attorney-expert communications and draft reports. The refocus on "facts or data" is meant to limit the disclosure requirement (and corresponding opportunity for discovery) to material of a factual nature, as opposed to theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients likely to affect or bear on the opinions to be offered at trial. The disclosure obligation -- and discovery opportunity -- extends to any facts or data "considered" by the expert, not only that relied upon by the expert. In this way, the important advantages of the 1993 amendments can be preserved while the excessive costs and intrusion into attorney-expert communications experienced in some cases under the 1993 version of the rule can be curtailed.[12]

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[12] This paragraph is a first effort to explain how "facts or data" should be interpreted to ensure that parties get what they need to mount an effective challenge to the adversary's expert testimony. If we go forward, the content and placement of this explanation in a Note will be important.

Rule 26(b)(3)(D) permits discovery regarding attorney-expert communications or draft reports only upon a showing that the party seeking discovery has a substantial need for such discovery. Given the breadth of the disclosure and discovery opportunity regarding facts or data considered by the expert, it is expected that this showing can be made only rarely, as explained further in the Committee Note to Rule 26(b)(3)(D). Even where that showing of need is made, the protections of Rule 26(b)(3)(B) apply to guard against disclosure of mental impressions, opinions, or legal theories [of counsel]. In this way, these amendments will guard against the difficulties that have been reported under existing practice.

(3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports

Rule 26. Duty to Disclose: General Provision Governing Discovery

* * *

(b) Discovery Scope and Limits.

* * *

(3) ***Trial Preparation; Materials.***

* * *

(D) *Communications between counsel and an expert witness.* A party may obtain discovery regarding communications between a person who has been identified under Rule 26(b)(2)(A) and [retaining] {a party's} counsel -- or regarding a draft report prepared by such a person -- only with regard to facts or data considered by the expert in forming the opinions the expert will express. The court may order further discovery only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii) If the court orders further discovery, the protection of Rule 26(b)(3)(B) applies [to counsel's mental impressions, opinions, or legal theories].[13]

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[13] An alternative to the version in text that was also discussed by the Subcommittee could be as follows:

(D) *Communications between counsel and an expert witness.* All communications between [retaining] {a party's} counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) -- and any draft report -- are protected as trial preparation material under Rule 26(b)(3)(A) and (B), except that disclosure and discovery are allowed with regard to facts or data considered by the expert in forming opinions the witness will express.

The text version may be preferred because it avoids the argument that the protection is limited to "documents and tangible things," as in Rule 26(b)(3)(A), because the phrase "subject to Rule 26(b)(4)" complicates the use of Rule 26(b)(3)(A) protections for expert witnesses, and

Draft Committee Note

Rule 26(a)(2)(B) is amended to require expert-witness disclosure only with regard to the "facts or data considered" by the expert in forming the opinions to be expressed in testimony, and to require only that a final report be provided. As explained in relation to that amendment, experience under case law that required disclosure or permitted discovery of attorney-expert communications or draft reports has shown that this form of discovery has many negative consequences and few positive benefits.

Rule 26(b)(3)(D) is added to provide protection comparable to work-product protection under Rule 26(b)(3)(A) and (B) for all attorney-expert communications. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether or not they are required to provide reports under Rule 26(b)(2)(B). It applies to all communications, whether in writing, by e-mail, or otherwise. Thus, Rule 26(b)(3)(A)'s limitation of its protection to "documents and tangible things" does not apply to the protection provided by Rule 26(b)(3)(D).

Rule 26(b)(3)(D) provides similar protection against discovery for draft expert reports. The term "draft report" refers to any document or electronically stored information in the form of a report prepared before service of the final report. With regard to a supplemental report provided pursuant to Rule 26(e), the term would include any draft of such supplemental material. But scientific testing of material involved in the litigation, and notes of such testing, would not be exempted from disclosure to the extent that related to any opinion or conclusion reached by the expert witness.[14] [And if the testing resulted in the destruction of the material so that it could not be tested by other parties, that might be an exceptional circumstance that would warrant permitting discovery even of preliminary analyses that were not the basis for any opinion or conclusion reached by the expert witness.][15]

Discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be extremely rare for a party to be able to make such a showing with regard to expert-attorney communications.

Rule 26(a)(2)(B) requires disclosure of all facts or data considered -- not just relied on -- by the expert in forming the opinions to be presented at trial. Rule 26(b)(3)(D) authorizes searching examination of the development of the expert's opinions, including consideration of alternative approaches to the issues presented and methods or information not considered by the

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because it is possible to make it clear that the protections of Rule 26(b)(3)(B) apply only with respect to the mental impressions, etc., of counsel.

[14] This discussion would need to be reevaluated depending on what is done about expert "work papers." If protection is afforded to "work papers," that may bear on discovery of the material mentioned in text.

[15] The bracketed material was prompted by questions during the Aug. 9 ABA event. It is really about a separate problem that is more akin to a ground for discovery under Rule 26(b)(4)(B) regarding the work of a nontestifying expert.

expert.[16] A party that believes full disclosure or discovery has not been provided with regard to such facts or data may present that contention to the court under Rule 37, but such a contention is not a ground for broaching the protection against inquiry into attorney-expert communications or draft reports. To the contrary, the assumption of the rule is that the broad disclosure Rule 26(a)(2)(B) requires -- coupled with permission under Rule 26(b)(3)(D) to inquire by deposition and otherwise about any facts or data considered by the expert -- should abundantly empower the interrogating lawyer. Against this background, it is not enough for a party to suggest that further discovery might yield something more of value to examining the expert witness.[17]

If the rare case in which a party does nonetheless make a showing of such a substantial need for discovery regarding attorney-expert communications, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). This protection should not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.[18] But the court should protect against inquiry into the attorney's mental impressions even if a party has made the showing of need required to justify any discovery.

This stringent protection is limited to communications between the expert witness and ["retaining"] {a party's} counsel. The difficulties that the Committee has learned about arise from the relationship between lawyers handling litigation and expert witnesses they retain to assist in that litigation, including providing testimony. The protection is limited to that situation. But in appropriate cases, it may be that an expansive interpretation should be given to this term. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a given expert witness is retained to testify on that party's behalf in several such cases. In such a situation, a court should recognize that "retaining" counsel should include all lawyers acting on behalf of the client in relation to the related litigation. Other situations involving similar reasons for interpreting ["retaining counsel"] {"a party's counsel"} expansively may exist.

Although Rule 26(b)(e)(D) forbids discovery of draft reports, there should be no limitation on inquiry into the basis for any opinion expressed in an expert witness's final report. Either during deposition or at trial, full and searching inquiry into the grounds for such opinions -- including alternative theories or methods considered and rejected by the witness -- should be allowed.[19]

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[16] This assertion may need to be reexamined if protection is to be afforded for expert "work papers."

[17] This is a first-cut effort to provide a clear statement in the Note about the difficulty of justifying discovery based on the "I think that the lawyer coached the witness" assertion.

[18] Again, this point may need to be reconsidered if protection will be afforded to the expert's "work papers."

[19] This paragraph is intended to foreclose objections to deposition or trial questioning about the expert's process of analysis. Is it sufficient? It should also be noted that it might be in tension with protection for an expert's "work papers."

(4) The problem of expert "work papers"

The expert "work papers" topic focuses on notes, etc., prepared by the expert in connection with readying the opinions to be offered at trial. We have heard a great deal about counsel telling their experts never to take notes, and about experts who have developed rather elaborate ways of leaving no traces of their thinking processes. We have also heard that lawyers often feel constrained to hire a second set of experts for frank communication about the case that won't be subject to discovery. The protections afforded by a rule like 26(b)(3)(D) -- described in item (3) above -- would at least partially respond to those concerns and reassure counsel. But arguably allowing inquiry into the preparation of the opinions to be expressed by the expert would also intrude into those candid exchanges about the case unless protection were provided for the expert's preparation activities. Practiced experts might still avoid taking notes. Canny lawyers might tell their experts to create a file entitled "draft report" immediately and put all their thoughts down there in order to provide protection against discovery.

This topic surfaced during the Subcommittee's discussions since the April Committee meeting. As footnotes above suggest, it bears on the first three topics because it could affect the latitude allowed a party to probe the opinions to be offered by an expert witness. Arguably, the greater that latitude, the clearer the point that generally precluding discovery of attorney-expert communications and draft reports does not materially impair the legitimate interests of the other side. Expert discovery was never a way to gather relevant information in general, but only a way to empower the other side to challenge the opinions to be offered. At the same time, the broader the inquiry into development of the expert's opinions, the greater the temptation to engage in strategic behavior to foil discovery.

Discussion of these issues was central to the Sept. 28 and Oct. 11 conference calls, and the notes of those calls contain much important detail about that discussion. As yet, the Subcommittee has not reached a conclusion about whether any effort to provide protection for expert work papers should be undertaken. It has not discussed broader protection for preparatory work done by testifying experts (e.g., forbidding deposition questioning about that work), but might give serious consideration to some possible rulemaking to facilitate the work of experts and enable lawyers to speak candidly with them.[20]

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[20] Only for purposes of suggesting what a rulemaking effort might look like, it might become a new Rule 26(b)(3)(D):

> **(E)** *Expert witness work papers.* Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing that satisfies Rule 26(b)(3)(A), and subject to the protections of Rule 26(b)(3)(B) [for counsel's mental impressions, conclusions, opinions, or legal theories].

The Subcommittee has only discussed the general topic of whether there should be serious consideration of protection of expert "work papers." This rough draft is provided only because sometimes possible rule language lends concreteness to discussion.

The "dual purpose" use of a single expert might provide particularly difficult problems. If discovery is allowed only about the opinions to be expressed at trial, it appears that with regard to the other work done by the person as a consultant the protections of Rule 26(b)(4)(B) would apply. If so, it may well be that there will be frequent occasions when retaining counsel contend that the discovery goes beyond what is allowed regarding the opinions to be offered at trial. But how readily could that protection be applied if there is a close relationship between the opinions to be offered and the opinions that are not to be offered?

No doubt experts would prefer to have "work product" protection for their trial preparation activities that correspond to what lawyers are afforded under Rule 26(b)(3). No doubt affording them such protection -- at least with regard to "work papers" -- would also provide comfort to lawyers deciding how broadly or candidly they could discuss the case with the expert. If such protection is not forthcoming, it may be that amendments like the ones sketched in parts (1) through (3) will not achieve their purpose of eliminating the unfortunate practices that have arisen since 1993.

But further constraints on discovery regarding the basis for the opinions to be offered might significantly compromise the ability of the opposing party to prepare those opinions. And work papers may be key to that challenge.

MINI-CONFERENCE ON NEW JERSEY
EXPERT DISCOVERY PRACTICE
April 18, 2007
New York, NY

These notes describe the discussions during the Mini-Conference held by the Discovery Subcommittee of the Advisory Committee on Civil Rules regarding New Jersey state court expert discovery practice in New York on April 18, 2007. Members of the discovery Subcommittee present included Judge David Campbell (Chair), Chilton Varner, Daniel Girard, Anton Valukas, Peter Keisler and Theodore Hirt, as well as Prof. Richard Marcus (Special Reporter). Also present from the Advisory Committee were Judge Lee Rosenthal (Chair) and Prof. Edward Cooper (Reporter). Representing the Administrative Office were Peter McCabe, John Rabiej, James Ishida, and Jeffrey Barr. Also present, from the Federal Judicial Center, were Joseph Cecil and Thomas Willging. Invited participants to the conference included William Buckman, Douglas Eakeley, Jeffrey Greenbaum, John Zen Jackson, James Martin, Alan Medvin, Gary Potters, Ellen Relkin, Ezra Rosenberg, Christopher Seeger, and Richard Williams. Also present as an observer was Alfred Cortese.

Judge Rosenthal welcomed the invited participants, explaining that their input would be extremely valuable to the Committee in determining whether to consider revisions to federal-court expert discovery practices resembling the changes introduced in New Jersey state court practice. On behalf of the Discovery Subcommittee, Judge Campbell emphasized the value of receiving a hands-on report from counsel familiar with the recent changes in New Jersey practice.

At Judge Campbell's invitation, the various New Jersey lawyers introduced themselves and summarized their varying practice experiences. There was a broad range of experience. Some lawyers specialize in mass tort litigation, but there were representatives of both the plaintiff and defendant sides of such litigation. Others mainly handled plaintiffs' personal injury work, including medical malpractice. Some did insurance defense and coverage litigation. One specialized in plaintiffs' civil rights litigation. Another is with the New Jersey Attorney General's office and supervises litigation on behalf of all agencies, involving tort and employment litigation, and oversees litigation on both the defense and plaintiff side.

The overall topic was introduced as emerging from initial consideration of asserted problems with Rule 26(a)(2)(B)'s exemption from the report requirement for employees who do not regularly testify as experts, and then focusing on issues involved with treating doctors. Concern with those problems has been eclipsed, however, by more recent expressions of uneasiness about the intrusion of expert discovery into areas otherwise protected by privilege or work product. Before 1993, Rule 26 had only authorized an interrogatory about the contours of expert witness testimony. In many places depositions commonly followed, either by agreement or by court order, but the rule did not guarantee a right to take the expert witness's deposition. The 1993 amendments thus changed the rule very substantially by introducing disclosure, including a report that was much more comprehensive than the prior interrogatory answer, and by guaranteeing the right to take the expert witness's deposition after disclosure. The Committee Note accompanying the 1993 amendment said that privilege protection did not apply to what the expert was given by the lawyer or to their communications. The impact of prospective disclosure and discovery on free and productive communication between lawyers and the experts they hire prompted the ABA to adopt a resolution in 2006 recommending rule changes to insulate that interaction and to protect against discovery of experts' draft reports.

Judge Campbell then reported that, in general, it appeared that the majority of the participants in the Subcommittee's January mini-conference in Scottsdale, Ariz., had favored the ABA approach that would guard against intrusion into the collaborative relationship of the lawyer and the expert witness. At the same time, some lawyers strongly opposed these changes,

arguing that they would unduly constrict the opportunity to show that the witness was not the true source of the testimony being offered, and that the lawyer was really speaking through the witness.

The existence of this debate pointed up the value of receiving information from those who had been operating in a system governed by a rule resembling what the ABA was endorsing. The New Jersey changes of approximately five years ago seem to present just such a situation, so this mini-conference was intended to follow up on the questions left unresolved by the January event. The materials for this mini-conference outlined a number of questions on which the Subcommittee sought guidance. It seemed useful to consider four general topics during this conference: (1) the reasons for and the reception of the New Jersey rule change; (2) how the revised New Jersey rule was working; (3) potential problems that might arise if the Civil Rules were amended in a similar way, such as having lawyers ghost write expert reports and unduly limiting inquiry into the reports through depositions; and (4) the impact under the New Jersey practice of the conditional access it appears to authorize to lawyer-expert interactions, and whether that possibility undermined the protective provisions of the New Jersey rule.

Three of the participants were directly involved in the development of the New Jersey rule as members of the state's Civil Practice Committee, which recommends procedural changes to the state's Supreme Court, which in turn has authority to adopt such changes.

The background was that before 1993 the New Jersey practice was like the pre-1993 federal one -- "you could send an interrogatory." There was no mandatory disclosure. But the actual practice was nonetheless to provide written reports. With the 1993 change in federal practice, however, the New Jersey state court practice changed as well even though the rule had not changed. Depositions became more expensive, and often focused largely on what attorneys did in relation to the production of the report. This led to "uncomfortable constraints" on the side producing the report. One lawyer offered the example of a situation in which the expert had worked up a 165-page report and the lawyer went to the expert's office and made oral comments on the report before it had ever been printed. "I would not ask for drafts." Sometimes experts would come to the lawyers' offices with laptops on which they had electronic versions of their drafts. Alternatively, the experts would read the draft reports to the lawyers over the phone, and the lawyers would offer their comments. One concern was that if the lawyer's correction of simply factual matters were know that would make the expert look bad -- "you didn't even understand the facts, did you?" So lawyers would tell experts "Don't take notes. Just listen."

It was asked whether lawyers often stipulated around this potential intrusion. One attorney said he did not. "This was something you had to deal with." An example was the Adler case decided by Judge Walsh (who was the chair of the drafting subcommittee of the New Jersey civil practice committee that drafted the new New Jersey rule). In that case, an inexperienced expert actually printed off a draft report, and the judge felt he had to order it produced even though he thought that production in discovery should not be authorized. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Given these difficulties, there seemed at that time to be three possibilities for New Jersey practice: (1) keep things as they were, (2) add protections against discovery, or (3) allow caselaw to develop on the topic. The eventual decision was that caselaw would not be a good solution, and that things should be changed. Hence the proposal for the new rule.

There was little dissent, if any, when the change was announced. Although there is usually no public hearing process for New Jersey rule changes unless there is controversy, there was a lot of publicity about this one. There were front-page articles in the New Jersey legal

papers. Lawyers knew this was being proposed. (At least one invited lawyer whose office is in Manhattan confirmed being aware of the proposal.) The change was viewed as welcome by attorneys across the board. Things had reached a point at which half the time in an expert deposition might be occupied with these essentially unimportant topics about the interaction with the lawyer. And lawyers had to spend a lot of time working on the initial development of the expert's reports.

It was asked whether experts ever did their initial reports by themselves -- without the lawyers' involvement. One attorney involved in the development of the rule said that "Now I want to collaborate because of discovery of drafts. Before discovery came up, I was more likely to leave the expert alone."

Another lawyer involved in the development of the new rule explained that the practice in New Jersey had been to produce reports and then take depositions. This contrasts with the practice in state court in New York, where expert discovery is usually limited to complex cases. It was recognized in New Jersey that the facts given to the expert were discoverable. But with the advent of the new federal practice under the 1993 amendment to the federal rule, depositions began to go through machinations about what was a draft. People would ask supplemental interrogatories -- "Did the expert prepare a draft?" One lawyer observed that "We tried to say it was work product, but the better argument was that it was not within our definition of work product." In toxic tort cases there would be seven or eight day depositions involving word-by-word analyses of reports and draft reports.

Another lawyer emphasized that this change in practice after 1993 produced significant discomfort. The first question would be "Did your lawyer . . ." That put the spotlight on the lawyer. Under the new rule, "you zero in on the substance of the report." "This rule furthers collegiality, and takes away the sideshow focusing on what the lawyer did."

It was asked whether these lawyers found themselves retaining a second set of experts due to the prospect of discovery. One attorney said that in bigger cases the client would sometimes insist on it to protect against discovery.

A question was raised about the amount of publicity of the rule change and the reaction to it. The response was that the New Jersey Civil Practice Committee has a two-year cycle on recommending rule changes that is well known. Lawyers know that every other January there will be a report on proposed new rules. The reports are published in the legal press. There are rarely hearings; they are only for topics that provoke great controversy. Although it is impossible to say who reads the newspaper reports carefully, there were articles in the New Jersey Lawyer and the New Jersey Law Journal. "This was well known and well publicized." There was no controversy.

Another lawyer seconded this view. "This was universally well-accepted." This lawyer recalled that before the rule change there was inquiry into drafts often; only once did anything of importance emerge. Since he represents public bodies, he never had two sets of experts, for that would be too costly. More generally, the practice before the New Jersey rule change produced problems for less wealthy clients.

Another attorney who represents plaintiffs in mass tort litigation reported that he often handles litigation with coordinated state-court and federal-court cases. He urges litigants in those cases to stipulate to the New Jersey practice for all the cases. Sometimes defense counsel will resist. He can't understand their resistance. To prepare for this conference, he talked to a

number of plaintiffs' attorneys. Nine out of ten say a draft of the report is not useful. It is just a way to attack defense counsel. That is not useful.

Another plaintiffs' lawyer volunteered that "Any time a lawyer's conduct becomes the focus, that is bad for the system." When the case involves an attack on an attorney, that is harmful. Jury consultants show that these attacks are not even useful; the juries know that the experts are retained by the lawyers and responsive to their objectives.

Because the New Jersey practice is that the facts used by the expert are discoverable, it was asked how the line is drawn between what is and is not discoverable. The response is that "There is a pretty clear line." A defense lawyer cited Franklin v. Milner, 375 A.2d 1244 (1977), a case in which the court parsed a letter to the expert to determine what constituted facts provided to the expert and what constituted work product. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Another plaintiff's lawyer pointed out that in the Bextra and Celebrex MDL proceedings, pending in U.S. District Court in San Francisco, Judge Breyer by pretrial order had adopted the parties' stipulation to protect against discovery:

> No Production of Drafts, Work Product, or Deliberative Process. With regard to exchange of expert reports, the parties hereby stipulate that draft reports need not be disclosed and that other writings between the expert and the counsel that reveal work product or deliberative communications between the expert and the attorneys need not be produced.

In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, MDL No. 1699, Pretrial Order No. 21 paragraph 11 (March 16, 2007). By letter agreement, the parties extended this provision to cover oral communications between counsel and the experts. Initially, defendant Pfizer had balked at this stipulation, but it later agreed.

Bextra is the first mass tort with such a stipulation. One reason for the Bextra order was that there was a tight deadline for completing expert discovery. The expert witnesses were located around the world -- some in England and New Zealand. Without such an arrangement, counsel might think they have to travel to meet the witness, or insist the witness travel long distances to counsel's offices, to avoid creating discoverable drafts. This would be very time-consuming and wasteful, and particularly difficult with the schedule so tight. That is why there was such a stipulation.

This plaintiffs' mass tort lawyer sees no difficulty in probing the analytical basis for the expert's opinion without having draft reports.

Another plaintiffs' mass tort lawyer agreed. "If you ghost a report, the expert will be ripped apart."

Another attorney agreed. "You can address these issues with hypothetical questions -- Would your opinion change if . . ." I will get the expert's file, and also a privilege log of what's been held back. I can proceed from there. This lawyer added that ghostwriting of reports is not a problem. "This rule takes the pressure off. I can let the expert work up the report on her own." Nonetheless, this lawyer said "I'm very careful about what I give to my expert to keep things from being produced." He added that "not every communication is protected" because only the collaborative process is protected.

It was noted that under the New Jersey rule the protection is limited to the "collaborative process," suggesting that a fair amount of interaction may not be protected. One lawyer offered a simple example: In an auto accident case, the lawyer sends the expert the police report. But the expert gets the direction of the defendant's car wrong. The lawyer calls this mistake to the attention of the expert, who corrects it. The fact that the lawyer sent the expert the police report is subject to discovery. The fact that the expert made this mistake is not.

Should this matter? One attorney said that at trial it would be effective to say "You said the car was going south when it was going north. Were you equally careful with the rest of your analysis?" Another lawyer volunteered that a Daubert decision might be affected by this -- "You mean the 'expert' doesn't know the difference between North and South?" But the common view of those present was that no legitimately important opportunity to challenge the expert's testimony would be lost.

Another question was whether inserting an "escape hatch" into a protective rule permitting a court to order disclosure in exceptional circumstances would produce undesirable consequences. [It is worth noting that the New Jersey rule seems to say that discovery may be ordered if a standard like the one in Rule 26(b)(3) is met.]

One attorney responded that such a possibility "would chill the collaborative process." Another noted that e-mail has become universal and necessary. Allowing intrusion into that can be crippling to effective work of attorneys. Another noted that allowing the possibility of access will cause motion practice for the court. Another noted that there is now a real problem with lack of collegiality between counsel. The New Jersey rule is a positive development, and it fosters collegial relations. There are fewer games of gotcha. We should craft rules that foster collegiality rather than gotcha behavior.

Another attorney turned to the concern about attorneys ghost-writing expert reports. At three levels, he felt there was not a problem:

First, this concern disregards the purpose of the expert report. The report does not have pristine independent importance. It was introduced because it is better than the an attorney's interrogatory answer. The real goal is to give the other side a fair opportunity to inquire into the grounds for the expert's opinion. That is possible without access to draft reports or to the collaboration between the lawyer and the expert. Ghost-writing a report simply won't work without access. "The witness will be ripped up" if the report is somebody else's work.

Second, most experts have integrity. They feel it's their job to work up the analysis and do the report. That is also a pragmatic value because they should realize that if they can't explain the results they will be ripped up.

Third, for some people there is a need for the lawyer's help and focusing on that is distracting. For example, if an auto mechanic would not be comfortable writing up a report the lawyer can assist. Making a big deal out of that activity by the lawyer is not sensible.

Another lawyer (a plaintiffs' lawyer) summed up the discussion -- "This is a cross-section of attorneys who are unanimous this has worked well. We say this is a shared view of all attorneys in New Jersey. And this is a bright line test that works for us."

A defense lawyer agreed. "This has led to a sort of behavior change. We're glad to be Jersey lawyers." But this lawyer said that he would make one change. He would not cut off the protection as of the date that the final report is served. the plaintiffs' lawyer who had just spoken

agreed -- the distinction in treatment between pre- and post-report communications with the expert was a problem.

A plaintiffs' mass tort lawyer mentioned that in some such cases plaintiff and defendant attorneys agree that the protection should not end with the service of the final report.

Another lawyer explained why this has been a good rule for lawyers -- "As an attorney, I don't have an obligation to go after this material. My client may want me to make the other lawyer's life more difficult, but now that I can't do so, and that temptation has been removed." He added that "Nobody bothers with the pre- and post-report distinction." Instead people respect the protection without regard to chronology.

It was asked whether there are any New Jersey cases interpreting this new rule. The answer is that there are not, and that the absence of interpretation shows that the rule is clear and is working. He added that introducing an escape hatch would have bad results.

This prompted the observation that the New Jersey rule seems already to have an escape hatch using the standard required to obtain access to work product. Don't New Jersey lawyers think they can get this? Why don't they try?

The initial response was that there is a body of law in New Jersey on access to the work of nontestifying experts, which is very difficult to justify Another lawyer said that "exceptional circumstances" is an almost insurmountable obstacle to discovery. He added, however, that even that would undermine the protection provided by the rule. This prompted the remark that the rule seems to allow access on a less compelling showing, and the observation that it is interesting that people are not trying to gain access. The answer was that this was a result of the standard -- discovery is only allowed if you can't get what you are seeking from any other source.

A lawyer who practices in both New York and New Jersey added that "A lot of this is culture. It's a different feel over there."

After a break, another attorney sought to correct what he feared might be a misimpression -- that the New Jersey bar is so collegial that the practice in question was largely a cultural feature of that bar, not something that could be adopted elsewhere. Actually, New Jersey is right between New York and Philadelphia, and it is not different from a lot of other metropolitan areas.

At this point, two more attorneys joined the conference, and they were asked to offer their views on the New Jersey rule.

One, who represented civil rights plaintiffs and defendants in criminal cases, said he liked the rule. He usually represents people with limited means in suits against governmental agencies. He doesn't want to be sidetracked on a tangent regarding how many drafts there were. This sort of thing will delay the case. In the long run, it's more efficient and less of a burden for plaintiffs. He hasn't found smoking guns using the federal rule that would justify the negative features of that rule. He added that it's not always a good idea to depose the other side's expert. Why educate them? But it is essential to have an expert report; attorney disclosure is not an adequate substitute.

The other lawyer handles class actions and other complex civil litigation from a defense perspective. His experience is that the New Jersey rule is a good one. It's become popular enough that in federal class actions parties now stipulate to the New Jersey rule. He contrasted

the New Jersey approach to admissibility of scientific opinion testimony. There he would strongly urge adopting Daubert. [This elicited strong disagreement from plaintiff lawyers who said the vigorous disagreement on this issue showed that they don't agree with defense counsel on much more than the wisdom of the New Jersey rule under discussion in this conference.] But it's surprising how easy it is to persuade parties to stipulate to this discovery rule in multiparty federal cases. And he's seen no disadvantage in the Daubert process in doing so; it is possible to challenge the plaintiff's expert evidence without the more intrusive federal rule.

It was asked whether these attorneys have run into downsides to the New Jersey rule. One attorney offered that there is still a risk of waiver if the witness overtly relies on the lawyer. But in one case where that sort of issue arose he was able to avoid being immersed in side-issues as a result.

Another question was whether counsel retain draft reports. One response was that it's not so much that you have a file called "draft reports," but that you don't have an elaborate and protective relationship with your expert. Another said that "I want to know what will be in the report before the report is developed. It's unrealistic to say experts prepare their reports without attorneys."

Another attorney said that he communicates by e-mail with his experts, and they send him draft reports. He's sure he has them somewhere as a result.

Another lawyer noted that experts' behavior has not changed even if New Jersey lawyers' behavior has. Many experts testify across the land, not just in New Jersey.

Another attorney recalled a New Jersey federal judge who would often order that all draft expert reports be retained. "This would lead to settlement. Who can live with this?"

Returning to the question of an escape valve, it was noted that there seemed no enthusiasm for such a provision, but that there was unhappiness with limiting the protection to the pre-report stage. One attorney responded that the rule change was to avoid issues and another said the current exception is "an illusory exception."

Another lawyer said that he is still retaining drafts, but also that he spends a lot of time with experts before retaining them. "No matter what the rule says, I'll be very cautious. I don't need the protection of the rule. But I don't want this to be a distraction. And I've found few smoking guns, so I think it is mainly a harmful distraction."

Another inquiry was about the term "collaborative process" that appears in the rule. Was this a term of art before the rule? Is it defined anywhere?

This question prompted the response that the fact there are not reported cases shows that the rule is understood and is working. Another said that the Adler case introduced the phrase "collaborative process," and that Judge Walsh (who wrote that opinion) wrote it into the rule (as Chair of the subcommittee that produced the proposed rule).

Another lawyer volunteered that this rule facilitates getting the best possible experts. An example was a possible expert witness who was a high-ranking academic with many grant proposals and other concerns. Such a person will refuse to serve as a witness in a regime that requires the elaborate and pointless activities produced by the federal rule. The New Jersey rule, on the other hand, provides a way to recruit such a person.

Another attorney noted that the collaborative process is less likely to be important for the "professional" expert witness. It's the people who don't do this all the time who benefit from that collaboration. Another said "These are the experts we want. They hate this kind of sideshow. Sometimes we can't get them under the federal rule." Yet another illustrated with the sorts of struggles experts face under the federal rule -- "Do I have to preserve draft reports on Webex?"

Another question was whether the framers of the New Jersey rule thought about limiting discovery to items relied upon by the expert witness. The answer was that this was discussed and the broader "considered by" terminology was chosen to make the rule sweep more broadly. Another explained that the New Jersey practice was too narrow.

Another question was whether the New Jersey rule has resulted in time savings in depositions. One attorney said that a significant amount of time has been saved due to the rule. Another said that he had a "gut feeling" that there were time savings. Another added that the quality of the report was better, which could save time in depositions.

One lawyer noted, however, that "I talk to my expert more now, so that's a larger cost. But you get a better report." Another acknowledged that deposition preparation may be longer, so that there are probably not major cost savings.

A plaintiffs' lawyer said that, in his cases, the deposition is shorter, although it may be that the defendant has to pay for a longer preparation session.

Another said the practice is more efficient, but added that it has not eliminated the need sometimes to hire a consulting expert.

A plaintiffs' mass tort lawyer stressed that the rule saves time on turn-around. "Now we don't have to go in person to talk to the expert."

The conference ended at 3:45 p.m.

APPENDIX

Because several lawyers referred to the following two New Jersey cases, it seemed useful to include a summary of them.

Adler v. Shelton, 778 A.2d 1181 (N.J. Super. 2001), was decided by Judge Walsh, a member of the committee that drafted the New Jersey procedure on which the mini-conference focused. The dispute there was about the production of a draft report of a structural engineer. The suit claimed that defendant architects had misdesigned plaintiffs' house. Plaintiffs had a roof leak and hired a contractor to deal with the problem. He in turn hired a structural engineer who concluded that plaintiffs' home was in imminent danger of collapse and designed repairs to address what he thought were serious structural defects. Thus, the structural engineer started out as an actor or viewer who was brought into the situation by the contractor, not by a lawyer.

Plaintiffs then contacted a law firm, which hired the same structural engineer to assist them on expected litigation as well. The law firm filed a suit claiming that defendant architects (who designed plaintiffs' house) negligently designed the house. The engineer prepared a report for the law firm that was provided to defendants. During his deposition, the structural engineer testified that he probably prepared a draft report but that he never kept drafts because "it just adds up to a lot of paperwork" to keep drafts. He acknowledged that he furnished plaintiffs' law firm

with drafts once or twice, and that changes may have been made in response to lawyer comments to the manner of presentation in the report, but not to the content. Defense counsel asked the structural engineer to search for drafts but he reported back that he had not found any.

The matter might have rested there, but during the deposition of plaintiffs' contractor it turned out that he had one of the structural engineer's drafts. The reason seems to have to do with payments. The structural engineer was originally hired by the contractor, and billed his work on the house to the contractor. Contrary to the law firm's recommendation that they pay the structural engineer directly for his work on the litigation, plaintiffs continued to pay the contractor for all the structural engineer's work (including work on the litigation) and for that reason the contractor had a draft report from the structural engineer, which was submitted in connection with a billing for the litigation work. The contractor then produced the draft at his deposition. But because New Jersey guards against waiver for inadvertent disclosure this production did not waive any applicable protection. It did, however, bring to the fore the issue whether the draft should be produced, and defendants moved for production

Judge Walsh concluded that the draft should be produced, drawing considerably on federal decisions to reach his conclusion. He noted the disagreements among federal courts on whether core work product provided to expert witnesses is discoverable and endorsed interaction between lawyers and their experts:

> It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutiny of this *collaborative process* serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to insure that the expert's opinion has been independently derived.

Id. at 1190 (emphasis added). He also quoted the Third Circuit's views from Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984):

> Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, . . . the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong public policy against the disclosure of documents constituting the core attorney's work product.

Nonetheless, the judge held that the report in question had to be turned over (id. at 1192):

> Here the facts plainly favor the draft report's production. [The law firm] played no role in the preparation of the draft. The law firm provided no information to the expert at least as far as the record before the court indicates. Even if it had, there is nothing to suggest that [the law firm] had shared any of its "opinion" work product with [the structural engineer]. . . . There is not even evidence that the draft report was produced as a result of collaborative efforts between [the law firm] and [the structural engineer]. There certainly is no dispute between the parties, nor could there be one, about the facts the expert considered, or at least relied upon, for his opinion here. Consequently, the court directs the disclosure of [the structural engineer's] draft report forthwith.

Franklin v. Milner, 375 A.2d 1244 (N.J. Super. 1977), was a medical malpractice action in which both plaintiffs and defendants hired expert medical witnesses to review and express

opinions about what the medical records showed. The parties then exchanged these reports. The discovery issue resulted when plaintiffs asked their medical expert to comment on the report of the defendants' expert, and plaintiff's expert did so in a letter to counsel that contained a number of observations about the expert's strategic views and recommendations. The letter was submitted to the court for in camera review in connection with defendants' demand that it be produced. The court went through the letter sentence by sentence and separated statements that were medical in nature from those that it viewed as legal in nature. For example:

> The last two sentences in the first paragraph on the second page we consider argumentative, nonmedical comments entirely barren of expert opinion and of no evidential competence. They might suggest a line of inquiry for plaintiffs' counsel to pursue during trial, but cannot lead to discoverable evidence.
>
> The last paragraph is Dr. Kanter's estimate of the prospects of concluding the case without a trial. It expresses a legal thought and repeats an observation made in his deposition that credibility is in issue.

Id. at 1248. More generally, the court noted:

> It is common for experts to serve a dual role as prospective witnesses and as consultants to attorneys in preparing a case. In other jurisdictions the work-product protection has been preserved for those communications of an expert made in the capacity of an advisor in preparation for trial, although discovery can be had of the knowledge and opinions about which they are prepared to testify.

Id. at 1252. Because it felt that the doctor's strategic musings were not relevant or likely to lead to admissible evidence, the court held that they were not discoverable.

C. Notice Pleading: Bell. Atlantic Corp. v. Twombly

The decision in *Bell Atlantic Corp v. Twombly*, 2007, 127 S.Ct. 1955, needs no introduction. Speculations as to its meaning and long-term impact run rampant. Introducing these questions to the rulemaking world, however, requires some preamble.

The basic question is whether — and, if so, when — to begin crafting formal rules amendments to channel, redirect, modify, or even retract whatever changes in notice pleading flow from the Twombly decision. Discussion at the November Civil Rules Committee meeting led to a consensus that the best approach for the moment is to keep a close watch on the evolution of practice as courts seek to digest and implement the multitude of approaches sketched by the Supreme Court. The close watch might well include empirical studies by the Federal Judicial Center after time has generated sufficient experience to support meaningful study. But a close watch implies that nothing immediate will be done to draft new rule text for consideration.

Further discussion now can be useful for at least two purposes. One is to get a better sense of how others understand Twombly, and how it has had whatever impact it has had in the very short term of its present life. A second purpose is to consider the alternative opportunities that may be available to amend present rule texts. If there are pressing immediate problems that seem likely to endure for some time, and if they can be understood well enough to support effective rulemaking, the Advisory Committee may have been too timid. If the Committee should be launching rules amendments now, it is important to understand that.

Several sets of Advisory Committee materials are provided under the separate tab for the Twombly panel discussion to provide background for the discussion. These materials summarize Advisory Committee consideration of notice pleading issues dating back to 1993, the year of the Leatherman decision, and carrying forward to 2006. These materials reflect almost casually the direct and recurring tie between notice pleading and the Committee's parallel (and ever-continuing) work on discovery. Just as the Twombly opinion emphasizes the direct interdependence of pleading and discovery that has characterized the Civil Rules from the beginning in 1938, so the Committee has continually fretted that the time may have come to reconsider notice pleading, either in particular applications or more generally, to protect against the burdens of discovery on claims that should have been cut off earlier.

Another set of materials is provided in the draft Minutes for the November meeting, reflecting the Advisory Committee's initial encounter with the Twombly decision.

Discussion of these questions will be led by a panel moderated by Professor Stephen B. Burbank, and including the Honorable Anthony J. Scirica, Chief Judge of the Third Circuit Court of Appeals; Gregory Joseph, Esq., of Gregory P. Joseph Law Offices LLC; David M. Bernick, Esq., of Kirkland and Ellis LLP; and Elizabeth J. Cabraser, Esq., of Lieff Cabraser Heimann & Bernstein, LLP