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REPORTED BY JACQUELINE M. SULLIVAN

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P R O C E E D I N G S

JUDGE KRAVITZ: Good morning everyone, on this bright, chilly day in Washington, D.C. There are a couple of things I need to say at the outset, most important of which is that Gail Mitchell needs your lunch order. That should be your first order of business, and she'll come around and pick them up, because she has to get the order in by 9:30. So you've got a little bit of time to do it.

We're going to go around the room and introduce ourselves so that we are familiar to our guests who are here to testify on both Rule 56 and 26. The committee is enormously grateful for those who have taken time out of their busy lives to comment in writing and those who have chosen to come here today to testify. We are very much appreciative of your willingness to take time out of your lives to give us your wisdom.

And we'll have two more hearings: one in San Antonio in January, and another in San Francisco in early February. We have a fair number of people who wish to testify. John Ravea tells me that if everybody stayed about fifteen minutes total each, we could get this done in time to have our meeting this afternoon, so I guess I'd ask those who are testifying if they could keep their remarks to approximately ten minutes or so, you should assume that we've read your written statement, and then that I'll allow for five minutes or so for questioning. I'm

going to be a little bit more lenient at the beginning. A lot of our questions are early on here. That is it.

My name is Martin Kravitz. I have the great privilege of being the chair of the Civil Rules Advisory Committee. I'm a district judge from Connecticut.

MR. McCABE: I'm Peter McCabe.

JUDGE COLLOTON: Steve Colloton, United States Circuit Judge for the 8th Circuit, from Des Moines.

MR. KEISLER: Peter Keisler, attorney with Sidley Austin here in Washington.

MR. MERCK: Tad Merck. I'm with the civil division here at the Department of Justice.

JUDGE JOLSTICE: Michael Jolstice. I'm a judge on the Eastern District of Pennsylvania court.

MR. GENSLER: Steve Gensler, University of Oklahoma Law School.

MR. MARCUS: Rick Marcus, attorney, associate reporter to the committee.

JUDGE WEDOFF: Gene Wedoff. I'm a bankruptcy judge in Chicago.

JUDGE ROSENTHAL: Lee Rosenthal. I'm a district judge in Houston, Texas, and I'm the chair of the standing committee.

MR. RABIEJ: John Rabiej. I'm from the Rules Committee support office.

MR. ISHIDA: James Ishida.

MR. BARR: Jeff Barr, attorney, with Peter McCantz also.

MR. WILLGING: Tom Willging, researcher with the Federal Judicial Center.

MS. BRIGGS: Laura Briggs, Federal District Court in Southern District of Indiana, and a clerk representative.

MAGISTRATE JUDGE HAGY: Chris Hagy, United States magistrate judge from the Northern District of Georgia.

JUDGE SHEPARD: Randy Shepard, Chief Justice of the Indiana Supreme Court.

MR. VARNER: Chilton Davis Varner, with the law firm of King & Spalding.

MR. GIRARD: Daniel Girard, civil practitioner from San Francisco.

JUDGE CAMPBELL: Dave Campbell, district judge from Arizona.

MR. HEIM: Bob Heim, lawyer in Dechert LLP in Philadelphia.

JUDGE WOOD: Diane Wood. I'm a circuit judge on the 7th Circuit in Chicago, Illinois, and on the standing committee.

MR. VALUKAS: Tony Valukas. I'm a lawyer with the law firm of Jenner & Block in Chicago.

PROFESSOR COOPER: Ed Cooper, University of Michigan Law School, reporter for the committee.

JUDGE KRAVITZ: So we're back around. One reminder

for those who will be testifying: If you could speak into the microphone, that would be great. It's quite a long table here and we want to hear your remarks. If there's anyone here who needs to leave early, we do have a list of those who will testify. Is there anyone who needs to be moved up earlier in the list? Then just come on up and let me know that and we'll try to accommodate you, and we have.

Van, do you want to introduce yourself?

MR. RANWELL: Van Ranwell. I thought I had spilled coffee on the way in. Since I'm from the West Coast, I figured I'd arrive late.

JUDGE KRAVITZ: All right. So I think Claudia McCarron is our first witness. Welcome.

MS. McCARRON: Good morning.

JUDGE KRAVITZ: Mark, each of the witnesses could simply just identify where they practice or what organization they're speaking on behalf of, if they are speaking on behalf of an organization, and then jump in.

MS. McCARRON: Thank you. Good morning, Judge Kravitz, members of the committee. My name is Claudia McCarron. I'm a partner and general counsel for the law firm of -- can you hear me well enough?

JUDGE KRAVITZ: Yes.

MS. McCARRON: I'm a partner and general counsel for the law firm of Nelson, Levine, deLuca & Horst. Our office is

located just outside of Philadelphia in Blue Bell, Pennsylvania. We provide primary litigation services to the insurance industry. We represent the industry in class actions, coverage litigation, extra considerable liability matters, as well as subrogation matters. For that reason, we're frequently involved in lawsuits both as plaintiffs and defendants.

I personally have been involved in litigation for 25 years. I spent the first three years of my career as a law clerk for the late Honorable Judge Hewitt of the Eastern District, and since that time I have represented individuals, other types of commercial entities, both as the plaintiff and the defendant, but represented the insurance industry exclusively for the last seven years. I'm not here on behalf of any particular organization. Although in the interest of full disclosure, I will tell you that I'm a member of DUL and defense-oriented organizations, as well as the Insurance Committee of the American Bar Association.

Thank you for the opportunity to be here today and comment on proposed changes to Rule 56. Over the course of my career, I think I've prepared, reviewed, and responded to countless motions for summary judgment, and one of the reasons why I wanted to speak with you today, in addition to my written comments, which I'm not going to repeat, is that I was surprised to see in the commentary submitted to the committee criticism of the proposed procedure for use of a statement of material fact

in future motions for summary judgment. For some time the Middle District of Pennsylvania as well as by individual order in the Eastern District and Western District of Pennsylvania, the courts that I'm admitted to, the procedure has been in effect, and so I've had an opportunity to prepare or respond to motions for summary judgment that include a requirement that there be a statement of material facts in addition to a brief, and that the opposing party respond to it. And obviously I've also had the opportunity to be involved in motions where no such requirement was in place. I have given an example in my written testimony of the problem that I see developed and that I've probably been at fault for myself.

Insurance coverage matters frequently begin with both sides believing that the matter can be resolved on cross-motions for summary judgment, both parties come in and tell the Court that this is a case that's appropriate for cross-motions for summary judgment, and yet when we finally get to the point where we've completed discovery and we file our briefs, if there is no requirement in that court for a statement of material fact and for a response to that, I find that the advocate in each lawyer makes it nearly impossible to file a brief that really clarify the points of agreement and disagreement, but when that procedure is in place for a statement of material fact by each party, real clarity can be achieved. Without it, I, in the last six months, I've had a colleague standing in my doorway with an

order in his hand saying, you know, that coverage matter we've been talking about, well, the cross-motions were denied, we're not really sure what we're going to try, and I think that that is generally a failure of the attorneys, because obviously they haven't done a good job of convincing the Court that there is no genuine issue of material fact. I have had the experience in the Middle District of being faced with a 50-page brief and an opponent who failed to respond to my statement of material fact. In that case, of course as a moving party I asked the Court to simply grant my motion, but a wise judge simply issued an order directing the opposing party to reply to a very simple statement of material fact, which cut through 50 pages of briefing, got us down to the salient point, and resolved the case, which was again an insurance coverage matter on the point of law that really mattered, but fundamentally there was not a disagreement as to the material facts of the case.

I think one of the criticisms that's been leveled by the commentators who have written to this committee was that the use of the statement of material facts will result in motions that arrive in boxes. I get complaints that arrive in boxes with that number of exhibits and the exhibits for a trial that would take place following a motion that arrive in a box will fill a room. I have worked in large firms; I've worked in smaller firms. I understand the burden when you see that box come in the door, but as long as the Court is willing to work

with the individual lawyers and give them the necessary time to work through those very large exhibits, overall it seems to me that's the better way to resolve a case than asking twelve citizens to share your misery as you go through a trial with many, many, many more exhibits. I also, my experience is, as a practical matter, those motions have not arrived in boxes in my office because the -- these are not requests for admissions, which can be burdensome. These statements are an intention by both parties to get down to the material facts of the case. And so as an advocate you lose the advantage of the statement if you burden it with subsidiary facts. Used properly, it will hone the case down to its essential factual components. That's my principal comment on use of that on a motion for summary judgment.

I would like to speak briefly to the controversy regarding the change from "shall" to "should," and it is my belief that the more appropriate phrasing for the rule is to change "should" to "must."

My initial reaction simply as an advocate is that I never misunderstood the meaning of" shall" in any order that I received from the Court. But I realize that maybe the ship has sailed on whether or not "shall" was ever ambiguous, but I do think that 90 percent of the advocates out there believed, until this most recent controversy, that if they could demonstrate no genuine issue of material fact and that the law entitled their

client to prevail, that they were truly entitled to judgment. The interjection of a discretion to deny an otherwise meritorious motion suggests a kind of arbitrariness that I believe will breed distrust. I've reviewed the cases that were cited to support the use of the word "should." Personally, I think in most of those cases, as I read them, in my humble opinion, that the holding of those cases was not so much that there was discretion to deny, but that those cases might just have easily been decided by finding that a material issue of fact existed. The leading case which was cited to support the change to "should," Kennedy vs. Siless, I reviewed it again last night and it does talk about a change in facts, which again says to me that the case in modern terms might have been decided as one in which summary judgment was inappropriate simply because there were terrible issues of fact, but I also think the flavor of that opinion suggests a generally unfavorable view of summary resolution of cases. And if that were the view in 1948 when Kennedy was decided, surely that position was swept away in 1986 by Celotex and that line of cases.

I took the opportunity after submitting my written statement to look at some of the cases that have been decided since December 1, 2007. This is not part of my written testimony, but I was curious to see whether or not my concern that the use of the word "should" instead of "shall" and instead of "must" has led to a greater number of discretionary denials

of the motion for summary judgment, and I must tell the committee frankly, I did not find that, and I think that the reason is that these changes, to which you are all very sensitive, are not yet in the collective consciousness of the ordinary practitioner. When you look at the cases that have been decided in the last year or just about a year, frankly, there are some cases that don't acknowledge the amendment, they're still quoting the old one, so the rule books haven't been replaced yet, and so for that reason there hasn't been an effort to seize upon a change in language.

There are other cases in which the courts acknowledge the change in language and yet prefer to use the word "shall," so what the Court said in their opinion acknowledged the change in language, nevertheless, outside of quotes, write about the standard for summary judgment this way: they say summary judgment shall be rendered, quote, and then pick up the standard that's in the rule, so to me that's an indication that the view of dimension, there's a number of cases out of Hawaii, Illinois, Minnesota, use summary judgment as a mandatory remedy when the two prongs of the test have otherwise been met. In other words, there's no genuine issue of material fact. As a matter of law, the litigant's entitled to prevail, so you'll see cases that use "shall," summary judgment is required, summary judgment is mandated, and that may lead some people to say that there's no need for concern, but I think there is still a need for concern

about the change in language. In none of the cases that I've reviewed was discretion really an issue. In other words, the motion was granted. There certainly was no request from the nonmoving party for a discretionary denial, and so the issue was never squarely presented, but I do think the concept that a discretionary denial is a realistic alternative when a motion is pending before the court will enter the lexicon of nonmoving parties, and I say that because I have in my office what is a common desk book. It's called Federal Rules of Civil Procedure Handbook. It's a West publication, and the edition -- I've had it in my office for years. The edition that came after 2008 has an entirely new discussion following Rule 56, and that discussion is entitled discretion of the district court. And this is what it says about the December 1st amendments. The 2007 amendments emphasize the breadth of the district court's discretion when resolving a motion for summary judgment. I don't think that that is/was part of the general thinking of the bar when faced with a summary judgment motion. I think as commentators like this, the commentator picked up on the change in language. There will be more requests for discretionary denial. We're pleased to go to trial on a case that was inadequately prepared and greater pressure on the district court as an institution to let those cases go forward.

I thank you very much for your time. It's been a privilege to be here today.

JUDGE KRAVITZ: Do any of the committee members have any questions that they wish to direct to Ms. McCarron? Go ahead.

MS. McCARRON: Good morning, Judge Baylson.

JUDGE BAYLSON: I want to thank you very much for your letter and articulate reviews, and we have struggled with this a great deal. I'm not sure I'm going to say this exactly in the right order, but there are several thoughts that have been discussed and I'd like your views on them.

First of all, as you say, complaints come in boxes as well as motions come in boxes. And sometimes judges get motions for summary judgment that are so -- they're -- the motions are more complex than the case, and sometimes we feel we could try the case in less time than it would take to figure out whether or not there are disputed facts. Having a trial and just calling witnesses to the stand would be a more efficient way to deal with the case than to struggle through pages and pages of depositions and so forth, including what it takes to put together an opinion that will get past the 3rd Circuit hopefully. That is one reason I think warrants the use of the word "should." If you use the word "must," some judges would feel that, oh, I've got to go through these papers because if there are no disputes, I must grant summary judgment so I'm going to have to put the trial off for however long it's going to take me to go through these papers. Why in that situation

would it be better to have "must"? And a concomitant to that is, if the word is "must," then, and we're all cognizant that we're in an era for whatever reason or many reasons of declining trials, but the use of the word "must" there is going to cause trials to decline even further.

MS. McCARRON: Thank you, Judge.

I'm concerned about declining trials because I have a lot of young lawyers working for me who have very little opportunity to try cases. My initial reaction is, and as a law clerk I was on the receiving end of filings by big law firms that seemed to be overwhelming, so I do have some sympathy for the burden on a single judicial chambers with a judge, and I guess now it's three law clerks, but I generally think that when a motion arrives with that much factual material, there are issues of fact, and that summary judgment certainly shouldn't be a substitute for -- it shouldn't become trial in a paper record, but as soon as it becomes that detailed, there are going to be credibility questions, there are going to be -- there are going to be issues of fact, and that just as a matter of an appearance of even-handedness, is it better to decide that particular motion because of issues of fact that can't be resolved than to institutionalize a right for arbitrary denial? And that's just my personal opinion, but I believe that the bar will view a denial, a discretionary denial, and litigants even more than the bar, as something that is arbitrary and unpredictable. If you

lose a motion because the judge disagrees with you on the law or because the judge believes you and your opponent have not done a fair job of identifying the undisputed facts that can support a judgment, everyone can understand in a lawyer-like way how that happened. It's much more difficult to communicate a discretionary denial to litigants.

I also think that there are opportunities for partial summary judgment in these circumstances, and I do wonder what would happen if the Court, and oral arguments are a disappearing animal as well, but if the litigants knew from an oral argument or communications to the Court that they had not done a good enough job and that this case was not going to get resolved on summary judgment, whether or not they would do a better job of trying to achieve that clarity, and in the end there are cases that will be urgently needed to try, there will be injunctive matters, and there's just going to be an institutional pressure because of that to resolve the motions, but I think it is better to resolve the motions on one of the two existing prongs than to invoke a discretionary denial, either because of time pressure or just the overwhelming bulk of the record that's submitted.

JUDGE KRAVITZ: I thank you very much, Ms. McCarron.

MS. McCARRON: Thank you very much.

JUDGE KRAVITZ: Welcome, sir.

MR. SEYMOUR: Thank you.

JUDGE KRAVITZ: We have your written statement.

MR. SEYMOUR: Thank you. I apologize for not having it done early enough. This was actually finished about twenty minutes to four this morning.

I'd like to say just a word of self-introduction. I've been practicing law largely in the field of civil rights and employment discrimination since I left the government in 1969, so it's a little shy of 40 years now. I co-authored a book for the American Bar Association section of labor employment law, which required that I read and analyze virtually all of the published employment law decisions handed down by the appellate courts, and so the perceptions I'm making are based upon reading an ungodly number of decisions.

My concern, the testimony here is chiefly on the question of the right where summary judgment is granted, and the suggestion of the last witness is a good segue into this testimony. The problem that I see in looking at decision after decision is that it's clear that there are many cases that are filed baselessly or the defenses are baseless. We need to have a Rule 56 to dispose of those. The problem is that far too often I see cases, and this is my judgment, but I see cases that ought to have been resolved by a jury but are instead resolved by a judge taking a rule of thumb, transmitting it into no reasonable juror could disagree with this principle of law, that then becomes incepted by the appellate court, results in the destruction in a large number of cases before the Supreme Court

disproves it, and that generally is the life cycle. I've got several examples that are later in the proceedings.

But yesterday I looked at 145 cases, September 1st through last night, published decisions, well, published and nonpublished decisions both, from the courts of appeals, dealing with employment discrimination, retaliation, whistleblower cases and so on. Out of those, there are 122 -- the 145 cases came down to 122 that actually met the criteria to be useful for analysis. Of those, almost one in five resulted in partial or full reversals by the courts of appeals. That to me indicates that there is a problem, that summary judgment is being granted in cases that are close cases. There are three courts of appeals, the 1st, 2nd, and 3rd, that have come in and published decisions on sort of a rush to judgment resulting in summary judgment being granted in what the courts of appeals saw as a docket-clearing mechanism, more than a device to identify hopeless cases and get rid of them.

One problem may be a structural one in that there is nothing in the text of Rule 56 that requires that inferences be dealt with the way that they have to be dealt with if we're to follow the Supreme Court's guidance on the subject of summary judgment. In other words, a motion for summary judgment can be made and supported and granted without the movant ever having to say what is the range of inferences that can permissibly be drawn on behalf of the nonmovant, that to show that granting the

motion does not in fact require the drawing of an inference in favor of the movant. The nonmovant is not required to respond to any discussion like that, so that when it comes to the judge for decision, there is no developed argument that enables the judge to take a look at what both sides have to say about the range of permissible inferences. It comes out of whole cloth at that point, and because of what that, when seized a lot of cases in which the inferences are actually drawn on behalf of the movants, and again there are some examples in here. I've given two illustrations to put some flesh on to the bones.

PROFESSOR MARCUS: I'm sorry. I just wanted to follow-up what you just said.

Is this an argument for including a requirement that an amended rule, an identification of inferences, or in connection with the proposed amendments that are presently out for comment? Is there something missing that would address what you're talking about, and how does what you are talking about relate to what's in the published amendment?

MR. SEYMOUR: Are you referring to an admission is in the public amendment on whether it's on this occasion or a subsequent occasion? I think it's something the committee should really look at because it would make the use of summary judgment more like the use it was intended as opposed to the granting of summary judgment in close cases.

PROFESSOR MARCUS: Would the current proposed

amendments at least seem to you a step in the direction of what you are endorsing?

MR. SEYMOUR: I think the comments have more to do with that than the actual text of the amendment, but nothing is going to succeed as well as changing the text of Rule 56 to require that inferences be addressed by the parties in an order fashion.

The first case, two cases, the illustrations that I've used, one case is a case in which the Court of Appeals caught the problem in what the district court had done. The second case is one in which the Court of Appeals did not catch the problem and replicated it, and as a result there are going to be cases down the line that are going to get the same unhappy result. The first case is a fairly egregious sexual harassment case involving a woman who worked for an Illinois state court judge. The trial court found that there was no adequate showing of an objective -- the objective test for sexual harassment. If one looks on page four of the paper at what the 7th Circuit had to say about the evidence in the case, and mind you we do not have that for an awful lot of appellate decisions affirming summary judgment because they're unpushlished and they're often just very summary decisions where they say based on the X opinion below, which is not published, we affirm, but there are both comments that are too vulgar to repeat orally. The judge, becoming very angry if he thought of the woman as seeing anybody

else, demanding that she have lunch with him, demanding that she shake hands so he's got some physical contact, flying his own plane over her mother's farmstead when she was there just to keep an eye on her, threatening to kill her if she has a relationship with other men, these are things that the district judge found did not meet the objective test of being severe enough to constitute a sexual harrasment claim. Clearly a miscarriage of justice in the district court, rectified on appeal.

There's a 5th Circuit decision which the Court of Appeals simply repeated the same types of mistake made by the district court. The Stray Remarks Doctrine that has been interpreted before the Supreme Court took action, Rieves against Sanison Plumbing Products, was interpreted in a number of circuits as requiring the same kind of evidentiary quality that you would have to have to be a judicial admission of discrimination, i.e., it's got to be the decision-maker, it's got to be made at the time of the challenged decision, it's got to be made with the reference to the plaintiff, it's got to be made with the reference to the challenged decision.

Now, in the context of a murder case, I frankly cannot imagine the court throwing out prosecution evidence of a threat to murder someone fitting the description of the plaintiff just because it was made a couple of months earlier. That's what happened in the 5th Circuit in the Rieves against Sanison

Plumbing Products case with respect to age-related comments that weren't made at the same time; therefore, they're to be discarded. And here there are a lot of things that the Court of Appeals overlooked in the context affirming the grant of summary judgment that a jury would clearly have been entitled clearly, to my way of thinking. Many of you are judges and law professors and probably know much better than I, but to me the jury clearly would have been permitted to find for the plaintiff in those cases and that should have been sustained. The use of summary judgment, the abuse in terms of the rate of summary judgment, has become sufficiently extreme in the field of employment law, which is the one field of law that I can speak with some knowledge about.

I mentioned before the life cycle of these rules of thumb that are perfectly appropriate arguments to be caused in weighing evidence, but they have become transmuted in what plaintiffs' attorneys see as the kind of a summary judgment engine that sweeps in good cases along with bad cases into these rules of law. And the function of the rule of law is if it doesn't meet the test, we'll discard it, we'll put it aside, you don't have to consider it, so it never gets weighed in with all the rest of the evidence is simply knocked out of the case and then there's no obstacle in the path of granting summary judgment and the clearing of the docket.

A classic example, calling an African-American man a

boy is not probative of racial discrimination in the view, former view of the 11th Circuit and of some others, unless there is a derogatory adjective that is used in conjunction with it. The Supreme Court knocked out that rule in Ashley against Tyson Foods. The rule that you cannot compare the qualifications of the plaintiff with a successful candidate because you don't want to be a super personnel department unless the difference is so extreme that it jumps off the page and slaps you in the face. Again, Ashley against Tyson Foods knocked that out.

The rule that comparators must be virtually identical to the plaintiffs before the comparison can be probative, the Supreme Court has addressed that principally in the field of Batson challenges to the use of peremptory strikes of jurors, Miller, L verses Drepu (ph) as being one of the most recent. And in that case in which the Court relied upon employment law precedence, the Court said that if you have a per se rule that the comparators must be exact, you rule out the use of comparators as viable evidence. People that are potential jurors are not products of a set of cookie-cutters. The same is true in the employment context. We've already excused the ruling voyeur remarks are not probative discrimination under the type of standards that some courts of appeals have used, and I set forth the language disproving that in Rieves against Sanison Plumbing Products, the rule there's a strong presumption against discrimination if the plaintiff was hired or promoted by the

same person who later fired or demoted the person. Again, perfectly proper jury argument, perfectly proper for a plaintiff's attorney to use in deciding whether or not to take the case, but used wrongly as a device on which summary judgment is granted. The ruling that no plaintiff can claim sexual harassment unless her harassment was so severe that it seriously damaged the plaintiff's psychological well-being, that was knocked out by the Supreme Court in Harris against Forklift Systems. The rule of plaintiff's wrongdoing automatically bars relief in the says old Massachusetts highway doctrines from the 1920s and 1930s in which an unlicensed driver was automatically at fault no matter what else happened. That was knocked out by the Supreme Court with respect to employment discrimination cases. Similarly, there is a doctrine followed by a number of district courts that you cannot consider the affidavit of the plaintiff -- this is not where it disagreed with deposition testimony of the plaintiff -- you cannot consider the affidavit of the plaintiff because it's self-serving. Why does the affidavit of the manner of whose career may be at stake depending on what happens in the court not self-serving? But these jury arguments as we see them becoming rules of law under the rubric that no reasonable juror could rely upon this and then being used to dismiss the case and to make summary judgment possible, that is a major problem. It's an abuse of summary judgment. Unlike some other areas of the law, employment

discrimination frequently turns upon the question of intent. It is the Supreme Court and courts of appeals who observed many times defendants have learned not to be very open when there is discriminatory intent so that the case has to be decided based upon circumstantial evidence and the inferences to be drawn from circumstantial evidence. We all know from the trials we participated in that there is a world of difference in how an individual presents testimony, whether it's a trial, by affidavit, does not give anyone the sense of a just result that a trial with live witnesses would produce.

And that brings me to my last point, which is the question of the rule of the Court's respect for the rule of law, the prestige of the courts. I have to confess that I am a corporal filer. I think that the courts and respect for the courts is one of the glues that holds the country together. The third branch of government is the institution, the last institution in which there is broad public support of broad sense that this is where we can put our trust. And that's based in large part on the notion that every person, no matter how defenseless ordinarily, no matter how vulnerable or weak, stands on the same footing in a trial as a person who has -- it's the richest corporation in the world. You've got the American flag there by the judge's right hand, you've got everybody able to see what the testimony is, you know that the jury comes back with its decision, and the jury's composed of ordinary people

and there's respect for the result. Contrast that with a bureaucratic determination, whether it's made by the Social Security Administration or any other government agency where it's done behind closed doors on paper submissions. Where people place their trust is in the public judicial proceeding, and to the extent that a large number of cases are resolved in a bureaucratic style, it seems to me that that undermines the trust and the integrity of the proceeding, the belief that this is a branch of government in which we can continue to put our trust, and quite frankly, the trust that people put in the judicial branch is one of the glues that hold the country together with respect to the two other branches as well. It's just too important. In going over bureaucratic style and away from trial by jury is something which has a cost that I think has to be paid attention to. Thank you very much.

JUDGE KRAVITZ: Thank you, Mr. Seymour, very much.

Are there any questions? Judge Walker?

JUDGE WALKER: Mr. Seymour, you've spoken quite eloquently about what you describe as the abuse of summary judgment in these cases, and as I understand what you have described, it is instances in which summary judgment has been granted that should not be granted. I don't quite understand, is the connection between that error by a trial judge, possibly the Court of Appeals on review, and the proposed changes that we are considering, how are these changes going to increase the

problem that you described rather than have any effect at all? These changes are not intended to change the substantive rules of law, so what's the connection between the problem you've described and the amendments we are considering?

MR. SEYMOUR: Eminently fair question, your Honor.

I began by saying I was addressing the remarks principally to the suggestion by some that the language in the rules should be changed, the proposed rules should be changed from "should" to "must" grant summary judgment, and whatever the meaning of "shall," and I think it's entirely clear to me that there is judges who have regarded themselves as having discretion, parties have regarded them as having discretion. Regardless of any dictionary definition, but having proposed the word "should," changing it to "must" has got to produce a stomp on the accelerated pedal in the grant of summary judgment so that the problems that I've described are going to be exacerbated. It's going to increase the rate at which close cases have summary judgment granted in them.

JUDGE KRAVITZ: Thank you very much.

MR. SEYMOUR: Thank you.

JUDGE KRAVITZ: We appreciate it.

Mr. Schachter?

MR. SCHACHTER: Thank you.

My name is Leigh Schachter. I'm the assistant general counsel with Verizon Wireless in New Jersey. I hope you will --

you're all familiar with our company; maybe some of you. Hopefully most of you are customers.

JUDGE KRAVITZ: Pre cell phone.

MR. SCHACHTER: I was going to recite the clip "Where's the helicopter?"

On behalf of Verizon Wireless, on behalf of our general counsel, Deb Stein, who I know was able to participate in one of your earlier sessions but unfortunately couldn't make it today, and Bob Ernstar, our deputy general counsel for litigation, I want to thank the committee for allowing us to share our views on the proposed change to Rule 56. I had submitted, when we were requested to testify, a short letter summarizing our views. I didn't see it out this morning. Hopefully you have it.

JUDGE KRAVITZ: I have it.

MR. SCHACHTER: Okay. I won't repeat what we said, and I thought that Ms. McCarron, who was the first person testifying, to a great extent summarized what our views are on the amendment, but I'll just try for a couple of minutes to bring our perspective as sort of a practical in-house practitioner our views on the amendments.

First I want to thank the committee for its proposal, and we really strongly support the proposed amendments to Rule 56 and we think that from a practical perspective they will help bring the rule into conformance with the reality that we see in

the courts throughout the country and will hopefully improve the process of making the summary judgment process more efficient and easier for litigants and for the courts. Summary judgment and Rule 56 is something that's very important to us from our perspective. We have a lot of cases in district and state courts throughout the country. And Rule 56 is important not only in helping filter out the meritorious from the unmeritorious cases, which is what I think what naturally we all think of as Rule 56, but from my perspective of it it helps sort out the cases that are primary fact cases from the cases that are really legal cases. And it's surprising to me in my position how many of our cases are at heart not so much fact cases where there are really no big issues of fact but are really purely legal cases, and it's important to us in our context to be able to have those cases decided promptly and effectively on the legal issues that are presented. I can think of one in the last couple of years.

We had a number of municipal tax cases out in California, and these happened to be in state court, but they presented really important issues of law that really needed to be decided by the Court. There were intricate questions. They weren't obvious questions, and they were important to get decided, but unfortunately through discovery they wound up getting muddled with a lot of facts that really weren't an issue, and if you looked at them carefully, of what the facts

were, they really weren't material to the case, but unfortunately they become part of the record and it becomes very difficult to obtain a clear summary judgment decision that becomes critical to the parties and to the public at large, quite frankly, so we think it's important to have a system that allows for summary judgment to be considered, not so much, I wouldn't say granted or denied, but to have summary judgment motions considered in an efficient manner. And I think that the changes that are proposed really will assist in that.

And right now another issue that we see is that wherever you go throughout the country the summary judgment practice will depend upon local rule. I practiced for ten years in New York, Southern District of New York, which is where I did most of my work. We had one set of rules and somewhere else throughout the country you had a different set. I handle cases throughout the country and you have different results and it's difficult and inefficient, I think, to have those different set of rules and I think the proposed rules really do a good job of bringing together those local rules in a way that presents a common rule that can be applied throughout the country consistently with appropriate discretion for appropriate cases where you may need to have different rules, but by and large, at least we'll all be playing on the same playbook throughout. And in particular I would comment on what I call the point-counterpoint, the statement of undisputed fact and the reply to

that statement, which I think really is a very useful tool for trying to identify and narrow what are the issues in the case, what are the facts in the case, and to hopefully allow the Court to answer I think the two questions that it would have to with regard to those facts, which are, is there a genuine dispute as to that fact? And if there isn't, or if there is, I should say, is that fact material to the case, and those are, I think, the two issues that have to be decided. And I think the presentation in that way has really improved through the use of that separate statement of undisputed facts. It has been mentioned, and I'll admit it's been a concern of mine, the fact that often those become burdensome. They can become, you know, a box, or at least a nice thick binder of undisputed facts, and I think hopefully it's important that in practice the courts and the bar will work to make sure that the statement of undisputed facts that they present is concise and really limited to those facts that are important. I thought the note in the comment about potentially limiting the number of undisputed facts in an appropriate case is a good idea that might be appropriate in some cases, but I think just practically, as I think I've said this to people who have, whether it's now outside counsel prepare summary judgment motions, that if you have so many undisputed facts that you're presenting, undoubtedly there is going to be a disputed fact in there, so the more undisputed facts you're presenting, at some point there's got to be some

dispute, so a really effective way to make use of the summary judgment procedure and the process is to limit your statement of undisputed facts to those that are triable with undisputed and truly critical to the case. Overall, again, we think that the amendments are really beneficial.

I do want to say finally one word about the committee has requested our views on the issue of the "should" versus "must" controversy. You know, I'll admit as one who's not -- I didn't pay particular attention to the amendments, it's not something that caught my eye in the amendments, but having had the issue you now called out and really looked at the issue, I really feel strongly that the proper word is really that it should be "must" and that both that is what "shall" was understood to mean, and I think based on my limited view, what the case law did present, and I don't pretend and won't put myself forward as an expert on the case law because I certainly haven't read every single case in which it's been an issue, but I think more importantly from my perspective as a policy perspective as an in-house practitioner I think "must" is the right word. If a party has, after a fair process, presented that there in fact is no genuine dispute as to any material issue of fact, then there's no need to have a trial, and frankly, it's unfair to the party that has made that demonstration to put them through the expense and the time and effort to go through a trial where there's really no need for a

trial, and, you know, certainly we recognize that there is a need for discretion in deciding summary judgment motions, and in fact, there is -- there is what's now Rule 56(d), which allows the Court to put off a motion to pull out further discovery, to set the timing of the motion, to deal with other issues, so certainly there has to be discretion, but if after the process has gone through and each side has had a chance to fairly present the motion and they can demonstrate there's no issue of material fact, then there is really no reason that we could see that summary judgment should not appropriately be granted and that that party should be dispensed with the need to go through to trial.

I saw that in the comment there was the suggestion of having the "must" standard for a full summary judgment motion, so to speak, and a partial summary judgment under the "should" standard. I think as a backup it's better than what's there now, because in the context of a partial summary judgment motion I can certainly understand more where there might be at the margin a need for discretion where you're going to be going to trial anyway's where there might be intertwined issues where you're going to have to present some of these facts as part of the case that goes to trial. I still think in my view it's probably appropriate to grant summary judgment on that issue and you can deal with the periphery surrounding it, but I think that it's less of an issue in the context of a party that's entitled

to complete summary judgment where there's no basis to go to trial, to take a case to trial and put the party to the expense. Under those circumstances really there's no need for that discretion.

And the other thing that concerned me, and I notice this and thought of this last night, is that there is no standard for that exercise of that discretion in the rule. I mean, it's simply -- it suggests that there is some discretion. It ought to be limited. I know it's in the comments, but without some suggestion as to what the standards are for that discretion, it really does run the risk of providing an opening for a situation where courts don't want to grant summary judgment, and unfortunately there are some that we've experienced, not most, but there are cases where, you know, you go into a jurisdiction and, you know, your advice from your local counsel is that no one ever gets summary judgment in that jurisdiction, and having that discretion, judgment may allow for that to happen, so although --

Again, just to summarize, I want to finish that we strongly support the amendments, think they're very helpful, very useful, really are an improvement to the existing rule, and we hope that they would be adopted.

JUDGE KRAVITZ: Thank you very much.

Are there questions from any member of this witness?

Seeing none, I want to thank you very much for both

your written comments and your oral statement.

MR. SCHACHTER: Thank you very much.

JUDGE KRAVITZ: I'll mispronounce this, and I do apologize. Chertkof?

MR. CHERTKOF: Yes. Steve Chertkof.

JUDGE KRAVITZ: Welcome, sir.

MR. CHERTKOF: I'm the president of Metropolitan Employment Lawyers Association, a group of several hundred lawyers who represent plaintiff's side in employment discrimination and civil rights laws.

One of the things I've noticed in the testimony, whether you believe in "must" or "should" seems to depend on whether you think you're bringing the motions or responding to the motions. But to try and stay true to the mission here, I want to focus on how the wording of the rule might be modified or tweaked slightly to better focus the issues in our kinds of cases where intent and large volumes of circumstantial evidence are frequently an issue.

To step back, I do believe that the point-counterpoint can be effective in many kinds of cases where the ultimate issue is one of objective fact, such as limitations or a contract issue. However, where subject and intent and motivation are at issue, I think it is less useful often and sometimes can work against clarification issues. I propose two basics speak to language very specifically in either one. With regard to the

moving party's burden, I propose language in my material that says the fact is material if a dispute over that fact would affect the outcome of the suit as to that count, claim, or issue. That's right out of Anderson versus Bimlimi and New Orleans. I'll leave the reference there. That if there is a fact in dispute as to any fact that identifies material by the moving party, the motion must be denied, should be denied as to that counterclaim, and the reason for this is to make the abuse problem that the plaintiff's side is worried about more self-policing. That is, we often already seek, because we have these rules locally, summary judgment motions arrive in that box with fifty or a hundred or sometimes two or three hundred statements of undisputed fact, which is every little detail, every little communication or phone call or interaction, many of which are really not material but still require the nonmoving party to respond for fear of having them decided against them.

JUDGE KRAVITZ: Does the provision in the proposed rule that allows you to admit a fact only for purposes of the motion help with that in the sense of if you're looking at, and I see these too, somebody is terminated at age 55, and so the first fact will be Kravitz was born on this day and went to college and it will be my life history, which is clearly not material, but you could just admit that for purposes of the motion and really zone in on the things that you as plaintiff think are?

MR. CHERTKOF: Yes. I think in theory that could work, but as I noted in my last point in my letter, that there is an irreconcilable tension between that and 56(g) which allows the Court to decide that certain facts are undisputed. And we do see judges sometimes narrowing the issues for trials based on summary judgment filings, and while somebody's birth date is often not at issue, the issue of whether a particular conversation or interaction or whether a particular project was performed properly or improperly may be relevant down the road and plaintiff's attorney is probably too fearful to say, well, they don't matter for the motion even though they may matter in trial, for fear of never getting the second chance to say why it's relevant down the road.

JUDGE KRAVITZ: But if that were taken care of in some way, so that if you admitted something for purposes of the motion only, the judge couldn't then find that fact against you, would that solve --

MR. CHERTKOF: I think it would improve, but not solve. As I'm coming to -- in many discrimination cases, you're not chasing objective fact, you're not chasing, well, was this document filed or received on a particular date? You're chasing motivation. When a boss fires somebody, is it because of their sex or race, or because they complained about discrimination, or is it because of performance and misconduct? And that's very hard to get to through this point and counterpoint.

A simple hypothetical I used in an appellate argument a while back, I think I highlighted this: consider a simple fact situation for retaliation where a long-time employee files a complaint of discrimination against her boss, goes to the E.E.O. office in the company, files an E.E.O. complaint, and two days later she's ten minutes late for work, the boss sees her and says you're ten minutes late, you're fired, and she brings a claim that's retaliation.

The summary judgment motion, which is inevitable, and one of things I wanted to step back for and say that in our practice it is difficult to ever find a case where a summary judgment motion isn't filed. In fact, the defense bar will often say off the record that it's almost malpractice for them not to bring one, so rather than selecting the cases where it's appropriate, it seems to be a routine matter. The summary judgment motion you'll get in that case will probably bring some of these issues. They'll say, number one, we can't prove that the boss knew about the E.E.O. complaint, that it was filed in the E.E.O., the HR office, and because the boss denies knowing that the claim was claimed, there is no evidence, there's no admission, therefore we lose on that point, even though the circumstances seem to me to suggest that a 20-year employee fired for being ten minutes late, there's something else going on perhaps than just being ten minutes late.

Say there are no comparable employees, this particular

employee's job is so unique that the fact we can show dozens of other employees who have been half hour late, hour late multiple times is irrelevant because they're not almost identical to this particular employment. Again, is that relevant? They sort of divide and conquer.

And lastly, we see courts giving preclusive effect to the decision-maker's own affidavit saying I fired this person for legitimate reasons when we would not do that in other contexts. Consider a criminal case where a defendant puts in an affidavit saying I did not know there were drugs in the car, or I did not know the gun was loaded. Now, that's certainly a jury issue, but we never have a judge or almost never see a judge say that as a matter of law because there's no contrary admission that must be reasonable doubt and therefore the trial can't go forward, and yet we do see judges saying, well, when a decision-maker says that the E.E.O. complaint had nothing to do with this decision, they look for a plaintiff to say, well, if you can't find somebody who testifies that the E.E.O. office told the boss in those two intervening days, you lose.

JUDGE KRAVITZ: There seem to be a strain, and I'll throw this open, I'm just curious about it, that summary judgment is granted too frequently in plaintiff's employment cases, but the data that is now coming out from Professors Clairmont and Schwabb and others suggest that when employment cases go to trial, plaintiffs lose more often in employment

cases than in any other category of civil cases in the district court, and when they win, that their victory is reversed more often than any other category of cases, so I don't know what to make of that. One way you could look at that is to say actually that may not suggest that it's being granted too often because when they get to trial they're losing and when they win it's getting reversed by the Court of Appeals. What would be your comment?

MR. CHERTKOF: Let's say I think they're separately. First of all, I think the excessive number of reversals in the plaintiff's verdict goes hand in hand with what we see as an excessive granting of summary judgment against plaintiffs, so it's two sides of the same coin.

JUDGE KRAVITZ: So it's not just the district courts, it's the Court of Appeals also?

MR. CHERTKOF: Well, all of it, in the sense that there are rules and inferences being drawn against plaintiffs in this context that seem different than in other contexts, but the first point that plaintiffs may lose these trials at a greater rate I don't think is logically connected at all because the Court should not be weeding out cases they think are losers. They should be weeding out cases they think don't have any evidence and a jury could find in their favor. A great number of these cases are he said/she said cases or he said/he said, whatever it is, but it's basically a conflict among several

witnesses' testimony. Employers frequently have more witnesses because most of the documents and most of the relevant witnesses are still current employees of the company, so in most of our cases we go to trial, we have maybe one or two friendly witnesses against eight or ten or fifteen unfriendly witnesses. We still win at the number, but the fact that they're lost in higher percentages is not surprising, but I don't think the goal of summary judgment is to say do you know what? They have ten reliable witnesses on one side and the plaintiff on the other who heard this, you know, "I'm firing you because you're too old" comment, they're never going to win this case, that's not a summary judgment case.

JUDGE HAGY: That would be an improper use of summary judgment.

Let me ask on your example, suppose it went to trial and after the plaintiff's case, if the plaintiff hadn't put any evidence in that the boss knew of the EOC charge, the boss had actually -- maybe they called him for cross-examination -- said he never knew it, should the trial judge allow a case to go forward on a motion to dismiss?

MR. CHERTKOF: In my example, I hope I set it up to say yes, that you can infer from the mere circumstances that a 20-year employee who had a good record and no other blemishes on her career, what changed that made this ten minutes late on this one day a firing offense? And I think the jury could infer,

they need not but they are permitted to infer, that the boss did find out. In fact, when the HR person saw this EEO complaint, they called him up and said, Fred, what's going on with your secretary? She just filed a complaint against you.

JUDGE HAGY: That's evidence. If you had absolutely no evidence of the connection between the boss and the employment section, would it go forward? The only circumstance you said is, well, it happened close in time and therefore that's enough to infer knowledge, I guess. Is that your argument?

MR. CHERTKOF: Yes.

JUDGE HAGY: Temporal proximity infers knowledge as well as causation.

MR. CHERTKOF: Yes, but there's more in that case. When you ask the question if there's no evidence, you're sort of assuming the answer.

JUDGE HAGY: Well --

MR. CHERTKOF: I think that circumstantial evidence is powerful evidence and you don't need an admission. When both players are employees, they have self-interest in the outcome. They understand that they admit they know about this fact. It looks bad. A jury can disbelieve testimony on that basis and can say do you know what? I don't believe that Fred would have fired Wilma that day for being ten minutes late unless there's something else going on, and they haven't given me anything to

explain why that sudden, unusual reaction, and Wilma has explained it perfectly, which is she got fed up with the sexual harassment, she went and filed a complaint, and two days later she's fired on a very thin reason.

JUDGE KRAVITZ: Judge Baylson has a question.

JUDGE BAYLSON: Yes. Let me ask you this: Obviously we're all in agreement, and I'm sure you are, that we shouldn't be changing substantive standards, we're just talking about procedural rules, and in the McDonald-Douglas context, I think where most summary judgments get granted is, it's fairly easy for the plaintiffs to establish a prima fascia case and it's fairly easy for most defendants to come up with an independent, nondiscriminatory reason, and very often when summary judgment is granted, the district court judge finds that the plaintiff has failed to come up with evidence that breaches it. Now, you can quarrel with that standard, but you're not claiming that our rule is affecting that substantive standard under McDonald-Douglas?

MR. CHERTKOF: Yes and no, your Honor. First of all, I think procedure can affect outcome, which is why we're all engaged in this, but I think I need to get to my second point, which is related to the first, that we want to first limit the inquiry to material facts and not a whole bunch of secondary subsidiary evidentiary facts, but the moving party, the moving party under current substantive law has to establish there is no

dispute as to material fact and not have any inferences drawn in their favor to get there. The responding party --

JUDGE BAYLSON: Isn't that current substantive standard summary judgment law?

MR. CHERTKOF: Yes, but that brings me to my second point, which is, I think we need a change to Rule 56(c)(2)(b)(II)(i), which is basically -- it's on page 29 of the most recent draft, I think. It's basically how you respond by the nonmoving party for summary judgment. It currently reads this:

Made in the response incise ly identified in separately numbered paragraphs additional material facts that preclude summary judgment, and that, while I think it's small, is a substantive change in the law. I think you'll have to delete the word "material" from that and change it to "additional facts or inferences that preclude summary judgment," because a nonmoving party can agree with the facts and argue the inferences or can agree with some facts and put in others, but to put in facts that aren't material, as I defined it, as Anderson vs. Liberty-Lobby defined it, but are still relevant to summary judgment, for example, going to credibility. If the moving party's motion rests ultimately on the affidavit of a witness whose credibility is an issue, that becomes a fact that can defeat summary judgment even though it's not necessarily material in the Anderson vs. Liberty-Lobby sense. So again --

JUDGE VALUKAS: You would advocate eliminating the word "material" in the response?

MR. CHERTKOF: And adding the word "or inferences." The responding party can raise facts or inferences.

JUDGE KRAVITZ: Judge Valukas?

JUDGE VALUKAS: Mr. Chertkof, why wouldn't it be sufficient for the non-moving party, given the circumstances, I mean, I thought your hypothetical was an excellent illustration of the situation where credibility is at issue wherein inferences can be drawn. I thought you did a very nice job of setting that up, but why isn't that appropriate material for the brief, that is, you lay out the facts and then you lay out those things that you think are disputed, and then in your brief, which is accompanying the statement of material facts and the position, you point out to the Court that there are numerous credibility determinations, that the appropriate inferences to draw are that this is pretextual, you lay out all of the things that you set up so nicely in terms of the 20-year employee, all of the other employees who have been late and aren't discharged, that a jury is entitled to draw an inference in favor of the plaintiffs and to find in favor of the plaintiffs on that evidence, why isn't that sufficient?

MR. CHERTKOF: Well, I certainly would do it in a brief, but I actually think that the point-counterpoint process can work but ought to be tweaked to deal with this issue because

Title VII cases are a significant portion of the docket. In many cases the way that the summary judgment motion is going to be handled in a point-counterpoint I think obscures the issue rather than clarifies it. It obscures the issue because the first undisputed fact will be the person was ten minutes late; therefore, the reason is true under McDonald-Douglas and therefore we don't prove pretext, when of course the fact that they are ten minutes late isn't dispositive. The question is whether or not that was the motivation of the supervisor, not whether the particular incident they decided to give as their reason is a true incident.

The second undisputed fact is going to be there's no proof that the supervisor was aware of the E.E.O. complaint because nobody's admitted it and both sides of that potential conversation or communication deny it. And the point is, that I don't think that the point-counterpoint as currently proffered focuses the real material fact there is what is the knowledge and intent of the supervisor. And I think the reason it is developed that way is because that's a much harder question in summary judgment. It's much easier to try and distract and say, well, the issue is did they really miss this deadline, did they really arrive late, did anybody admit that A told B about this fact? And thereby by dividing and conquering, they obscure what is the real and ultimate only fact in issue, which is, what is the motivation of that boss for making this decision? And if

it's focused on that and inferences are drawn from the nonmoving party, I think that summary judgment abuses, as the plaintiffs' side sees it, would be lessened because the point-counterpoint would serve a better function by focusing on the issue of knowledge and taking other things that are dealt with often circumstantially and not dealing with hundreds of obscuring subsidiary facts and e-mails and communications and ages that may or may not be disputed.

JUDGE KRAVITZ: Judge Baylson has a question, but I'll just make, if you think in that situation the point-counterpoint would obscure intent, don't you think the brief is going to do that too?

MR. CHERTKOF: I hope that they would. I hope so.

JUDGE KRAVITZ: So I don't know whether -- you may be right, but I don't know that the point-counterpoint necessarily would be the culprit in your situation. I think that the defendant is going to obscure the fact that intent is the key issue by focusing on facts, and they're going to do that in their brief or they're going to do it in their -- I assume they're going to do it in both.

MR. CHERTKOF: May I respond to that?

In the real world, cases are never quite so simple as they are in hypotheticals, and what I would really expect is that I have a 20-year employee, I've represented a lot of employees, I've had some very strong cases, I've had some more

ambiguous cases, but I've never had a perfect employee, so for the 20-year employee, the employer is going to come forward with all of the various mistakes and problems that employee has ever had: lost this sale, had this conflict with a coworker, forwarded an inappropriate e-mail joke to this one, and all of those are going to show up in the Statement of Undisputed Facts trying to paint this employee as less than superlative, and I may have to respond to a hundred incidents -- excuse me -- a hundred statements of undisputed facts with another dozen or two dozen incidents over this 20-year career, none of which focus on the issue that I think is really at hand and create a very big burden on most of these small firms who don't have teams of paralegals to do this and put together the non-movant's box.

JUDGE BAYLSON: I have two questions. The first follows up on your proposal for (c)(2)(b)(2). When you want to eliminate the word "material," I don't understand how you can defend that, because we've had -- "material" is used in the Supreme Court's trilogy and it's used as a requirement for the moving party's statement, and we've had a lot of discussions about that and a lot of complaints that many lawyers come in with facts that are not material, and having the requirement of materiality really requires a lawyer to think about what is material, because otherwise you get these 100-page statements about what color necktie somebody was wearing in an antitrust case, which really is completely immaterial, anybody would

agree, so I don't understand why you would want to do that.

And secondly, I think your idea of adding inferences is something that deserves discussions, because certainly inferences could be raised in a brief, but I think what you're saying is that maybe judges don't get the import or the impact of possible inferences by just reading a brief and if it was in the counter statement of facts it would be more clear and more obvious. Do you have any comment on that?

MR. CHERTKOF: Well, yes. I appreciate that one out of two. But yes, because in the point-counterpoint, I actually think this can be useful, so if the issue is going to be focused down --

JUDGE BAYLSON: But how can you defend eliminating the word "material"? Why do you want to do that?

MR. CHERTKOF: Because I think "material" ought to be defined narrowly for the moving party to help focus it. But in responding to that, a non-moving party can bring up issues that I don't think are material in the classic sense.

For example, suppose the key affidavit from the moving party is by somebody who has been convicted of perjury. Is their conviction of perjury relevant at trial to their credibility? Of course. Is their prior conviction for perjury material under the Liberty-Lobby standards? I doubt it. And it acts as a word of limitation when what a nonmoving party wants to do is show you all the reasons why the moving party's story

needs a trial, why a jury has to hear the story and decide whether it's accurate.

And there are things about credibility. I mean, many of the witnesses, in fact, most in our cases have an interest in the outcome. They're aligned with the employer or not. They get paid by the employer. They have a reputational interest in whether they're found guilty of sexual harassment or retaliation, and to accept their affidavits without challenging the credibility of those and having the jury hear them is often a miscarriage of summary judgment, but it doesn't mean that we have a material fact on the opposite side of that to say here's why you should disbelieve the supervisor's denial that they had knowledge of the complaint.

JUDGE BAYLSON: Can I ask my second question?

JUDGE KRAVITZ: Yes.

JUDGE BAYLSON: And this goes back to what I said before in the context of pretext. It sounds to me from your eloquent description of this process that what you're really complaining about is the McDonald-Douglas standard. You would like to have the standard be that if a plaintiff in an employment case shows a prima fascia case, he or she is entitled to a jury trial, period. Isn't that really what you're saying?

MR. CHERTKOF: No, your Honor, although the D.C. Circuit recently traced to this in the Brady case, which I think was a good illumination, it follows in the Supreme Court's case

in Aikens, that when you come in at the end of the discovery, the McDonald-Douglas case, which was created at a time when these were bench trials, it was created before the '91 Act, is really of minimal use to us. At that point most of the time you have two stories: you have the employer's story, which is, this person was fired for misconduct or for poor performance or for something else, and you have the plaintiff's story that says, no, my performance was adequate. I was fired for retaliation or for my sex or my race or for taking disability leave, and the question is, you throw everything in the pot and is there enough that if a jury granted a verdict you would survive a Rule 50 motion, that is, the jury was entitled to disbelieve witnesses on one side, believe the others, and decide, do you know what? I don't think the employer's justification makes sense. Sure, the employee wasn't perfect, but they were no worse than anybody else, they shouldn't have been fired for this particular thing, and I think the fact they took disability leave three weeks before they got fired, that was the thing that was the problem, and those are not very amenable to summary judgment. Statute of limitations cases are, exhaustion of remedies cases are, but generally speaking, what somebody's motive is in a particular situation is just not amenable, and I think the statistics show that the district courts shouldn't fear juries. That is, juries do a pretty good job of getting it right, but it may be the scenario where people bring cases and they have an uphill

battle.

JUDGE KRAVITZ: I had a jury trial in an employment case and it took the jury about twenty minutes to come back with the defendant's verdict, and then their first question to me was, who decides these cases go to trial? That would be me. So, you know, it's unclear what the statistics are, but I thought your comment was a good one, which is, you know, maybe we should be letting more cases go.

But we've got a lot of people we've got to get to. I appreciate very much your time and your comments and your thoughts.

MR. CHERTKOF: Thank you very much.

May I have one minute to do the other points I didn't talk about?

JUDGE KRAVITZ: Do that? Well, it's in your written statement. Is it in your written statement?

MR. CHERTKOF: Yes.

JUDGE KRAVITZ: Sure.

MR. CHERTKOF: Sur-reply, oral hearings, because again, we get this complex record. It's very difficult, I think, for the courts to decide these on paper records.

JUDGE KRAVITZ: When we start mandating oral argument, then the judges will surely --

JUDGE BAYLSON: But ask for them.

JUDGE KRAVITZ: We have Professor Schneider next. I'm

sorry. No. Professor Brunet. I'm sorry. Excuse me. I got ahead of myself.

Welcome, Professor. Thank you for coming.

PROFESSOR BRUNET: I want to thank the committee for letting me speak today, and I start off with a story about the late Professor Maury Rosenberg of Columbia Law School. When he taught civ pro he showed up the first day and he put two words on the board: "shall" and "may." What a great divide between sort of a diagonal line, and for years he'd say that at law professors' conventions, and I would always do that. There would be some troublesome rules, like Rule 15(a), leave shall be freely given as justice may require, so that was somewhere in the middle and certainly was discretionary. But let me tell you, it's not easy to teach siv pro anymore with "should" and "may." It's just harder to explain. And I'm not the only one who thinks that, so I'm here to address two issues. The point-counterpoint I'll do secondly, and the "must grant" language that I prefer initially.

So the summary judgment mechanics need to be as firm and non-discretionary as possible in order for Rule 56 to work its magic. As a textual matter, the verb "must" triggers a mandatory grant of summary judgment where the record establishes that no factual disputes exist and, as a matter of law, the movant is entitled to judgment. The word "entitled" in this discussion needs to be given some meaning, and it's meaningless

with a "should." You're not entitled to anything if the verb is "should." Pretextual treatment of Rule 56 provides a useful function without avoiding additional case processing. No other pretrial mechanism performs this summary judgment function.

So what would happen if we stick with "should"?

By the way, you know, we had "should" for a year-and-a-half or so. The rule hasn't tilted from a summary judgment standpoint. On the other hand, I think that's because of the promise you made and it's a promise that you made no substantive changes, but you did. Certainly Rosenberg would have thought that.

What would happen? Well, the word "should" was a normative meaning in the dictionary meaning "should" describes an expression of what is probable or expected. The use of "should grant" means that the rules drafters hope the motion would be granted. A hope is much less than a word casting a mandatory meaning. Long-time use of the words "should grant" will result in the creation of additional judge-made exceptions to summary judgment grants.

The cost of such discretion are considerable. Making Rule 56 motions discretionary, which of course this hearing itself is publicizing the "should/must" divide, this was not publicized greatly after the style project, so we created a monster which is going to be unleashed in one way or another here.

I lecture frequently on summary judgment. I'll begin all my lectures on the "should-must" issue from now on, but I think again I won't be the only one who does that.

So this would guarantee that fewer summary judgment motions over time will be granted, making summary judgment discretionary, thus added burdens on district judges because the movant and nonmovant on each couch their arguments in a difficult-to-decide, discretionary style. They'll argue for discretion, and that, I think, will make summary judgment a more complex process.

The likely decrease in Rule 56 grants will raise the price of settlements as the transactions costs of litigation will increase and greater number of civil cases are tried. The cost of summary judgment would correspondingly rise, as counsel considering filing the motion would face a more complex process and may be deterred from filing by the possible likelihood of the motion's increased cost and possible denial. This would cause us to change summary judgment as we know it.

Without firm language mandating summary judgment upon a showing of no genuine issue of material fact, the concept of summary judgment becomes flabby and ambiguous. In Judge Diane Wood's terms, summary judgment now performs a valuable "put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the facts." This role will be modified

substantially if the word "must" were not used. There's little reason in retaining summary judgment in its present form if it becomes discretionary.

Now, there is discretion in summary judgment. It comes from the appellate courts. So in three types of cases, including antitrust, civil rights, and negligence, we see great reluctance to grant summary judgment in jargon and panel decisions. Professors Wright, Miller and Kane assert that "cases premised on alleged violations of the constitutional or civil rights of plaintiffs are frequently unsuitable for summary judgment." Substantive --

Professor Marcus?

PROFESSOR MARCUS: Can I just underscore or return to something you just said? We've heard a number of witnesses today suggesting that employment discrimination plaintiffs at least are facing inappropriately frequent grants of summary judgment. Now, if motive and intent is recognized as unsuitable for resolution in many instances, that doesn't sound like a problem. I wonder if you could comment on whether in your work on summary judgment, which includes fairly pervasive attention to the matter, this seems to you to be a problem in that category of cases.

PROFESSOR BRUNET: I'm not sure that would conclude as a problem, but looking at the data, MJC, the most recent data, it shows very high grant rates, perhaps arguably

disproportionally high grant rates in employment discrimination cases. I think I'm troubled. I'd like to know more about that. The number is different in negligence cases, so a very, very small percentage of negligence cases.

PROFESSOR MARCUS: Would it be meaningful if the frequency of plaintiff verdicts in tried cases were lower also for that category of cases in deciding whether it's disproportionate?

PROFESSOR BRUNET: Quite meaningful. What we've done, of course, in '86, is line up and equate directed verdict and summary judgment except as to timing. That's what happened. Again, the rule didn't fall apart from that verdict. If you make this change of "should" for summary judgment and don't correspondingly do something for directed verdict, interesting things would happen.

Maury Rosenberg also talked about the scope of review on appeal given discretionary rules, that it was abuse of discretion for discretionary trial court rules in some courts, so will de novo review cease?

Right now de novo review is a substantial safeguard for summary judgment losers, and one sees the numbers to support this. One sees frequently four or five claim cases going up on appeal where summary judgment has been granted, reversed and remanded on one of the claims. Every circuit has cases that do this, particularly in the civil rights area.

So let me sing a little bit some phrases that we got from case law.

JUDGE COLLOTON: Professor Brunet, one question on your point of appellate review. Are you suggesting that if the word "should" remains in the rule, that an appellant who is objecting to the grant of summary judgment might be able to challenge the district court's refusal to make a discretionary denial, and the courts of appeals would then be addressed into figuring out what the standards are for discretionary denials and whether there's an abuse of discretion in not making a discretionary denial?

PROFESSOR BRUNET: I'm afraid that will be argued. How it will be decided is a different issue.

JUDGE KRAVITZ: Judge Wood?

JUDGE WOOD: I have one concern actually that flows from a question Judge Nelson raised earlier and I'd be interested in your comments on it.

I have the feeling that we may be talking past each other just a bit on this "must-should" issue. Those who are arguing strongly for the "must" are really focusing on the entitlement of the party to summary judgment once all the facts are teed up and once somebody has figured out what all the material facts are, whereas the example that Judge Baylson gave is one where there's a massive record where it would really perhaps be better to just go ahead and take it to trial and for

trial management purposes maybe you should think of the word "postponement" or something. No one has actually said in the face of a square legal entitlement we're going to refuse to grant. They're saying something a little more subtle than that, so that's one question I have, whether maybe part of the problem here is actually a timing problem.

The other, which other people also mentioned, is the partial summary judgment where you know you're going to have to have a trial anyway, you might want to get that legal certainty of the final trier of fact's conclusion. Certainly on appellate review if you're reviewing a case where a jury verdict came in, you really do have to find a legal error. You're not going to reexamine that, and even if you're reviewing a case where the trial judge really was entitled to make facts without Rule 52 review, once again, it's a somewhat more robust record to review.

PROFESSOR BRUNET: You made two excellent points. I think the committee has a great handle on the partial summary judgment problem. You need some discretion on it, no question about it. The solution -- I was going to get to this at the end, but this "talking past" phrase you've used might get to the solution.

You need to use the passive voice here and use neither "must" nor "should." Summary judgment is granted if there is no genuine issue of no genuine disputed fact and you're entitled to

judgment as a matter of law. You don't want to use "required," you don't want to use "appropriate" in the passive voice. "Summary judgment is granted if" the sentence should begin, and that resolves the problem there. This will leave it up in the air. There already is substantial discretion in so many Courts of Appeals cases, particularly the civil rights cases, false management cases, and a handful of antitrust cases.

I'm working on a case now where I talk about summary judgment, and a quick look which demonstrates the Supreme Court has pulled back the "quick look" idea and more of course happen for some reason, but this still grants summary judgments in antitrust cases quite frequently.

But I think plaintiffs are protected from their losses by so much of this Court of Appeals in civil rights cases language, so the 9th Circuit, the 7th Circuit, the 8th Circuit, the 2nd Circuit, I'm looking at page 372 and 373 of Marty Retich's and my text on summary judgment law, looking at footnotes that are four inches thick full of quotes why courts should be reluctant to grant summary judgment in civil rights cases, quote, "because smoking gun evidence of discriminatory intent is rare and most often must be inferred." The 8th Circuit says there should be a caution that summary judgment should seldom be used in discrimination cases because such cases depend on inferences rather than direct evidence.

PROFESSOR MARCUS: Can I just follow-up on what you

just said? Do you see in that case law a need to include in the rule some reference to inferences?

PROFESSOR BRUNET: No. You've left burden-shifting out of the rule. You've left out the case law. You've clarified timing nicely. You still got what I call the "time out" rule, that if you need some more time and you're the nonmovant, you can have it. Those are great safeguards for nonmoving parties who are often plaintiffs. They need to be in place, and they are. So we've got the text covered, but we can't cover every issue, and I think inference is just an asking for liability to go there.

I'll address briefly the -- I'll skip over the history. But Judge Clark would like this discussion. Clearly removing boards treating certain kinds of cases differently in summary judgment and summary judgment needs to be generalized over across causes of action under the transubstantiate ideal of the FRCP is. It's worked well for many years. It should work well longer.

Let's talk about the point-counterpoint real quick. The new point-counterpoint and citation requirements of Rule 56 have a cost, but nonetheless are helpful in current practice in many districts. A good lawyer cites to the record and focuses the claim, and many lawyers follow this practice and (inaudible) within the text.

I thought there was one paragraph in the committee

note that was great because it talked about in negative terms how difficult some of these point-counterpoint statements can be with hundreds of points, and I think that needs to be upgraded and put right near the front of the committee comments. So it's apt to emphasize the brevity and succinct nature of the way this practice should work. This is at page 38, line 76, page 85 of the preliminary draft materials. Nicely contrasted proposal of local rules cross the filing of documents contain hundreds of facts and hundreds of pages. This paragraph just needs to be, I think, squared and --

JUDGE BAYLSON: What page?

PROFESSOR BRUNET: It's at page 85 of the printed text.

PROFESSOR MARCUS: Around on 182, I believe?

PROFESSOR BRUNET: Yes.

I see four advantages of the point and counterpoint. Party citations to the summary judgment save judicial time in searching an unfamiliar record; secondly, statements of contested and uncontested facts accompany the record serve to focus the issues that are presented thereby aid the court; thirdly, opposing counsel should see that the summary judgment issues with greater clarity following efforts to cite the record, a vision that greatly facilitates case law promotion and settlement promotion. This will also help appellate review as well by mandating a more tidy and transparency in the summary

judgment record.

I think there's a relationship between the point and counterpoint and the "should," "must," "may" language, that the more focused you are on the record, the more precise one can be in the summary judgment rulings, whether they must or should be granted, and I think that needs further elaboration. These changes are not happening in isolation.

I want to thank the committee and --

JUDGE KRAVITZ: Thank you, Professor, for your remarks and responses to questions.

Are there any other questions that any of us have for Professor Brunet?

I want to thank you, sir, very much for the assistance and sharing your views.

We have Professor Schneider. Welcome.

PROFESSOR SCHNEIDER: Thank you.

I'll make sure this is a little louder, because it was very hard to hear.

JUDGE KRAVITZ: Yes. I'm not sure mine is on.

PROFESSOR SCHNEIDER: Thank you very much for having me here. Let me introduce myself briefly and then go to some comments that also will try to respond to some questions that you've already asked some of the other folks who have testified that I think I might be able to be helpful on.

I'm Liz Schneider, a Rozel Harper Professor of Law at

Brooklyn Law School, now visiting professor at Columbia Law School. I was a civil rights lawyer for many years before becoming a law professor, clerking for the late United States District Judge of the Southern District of New York Constance Baker Motley, and I have been teaching civil procedure and related civil rights courses for 25 years. And I've been teaching procedure at Brooklyn, at Harvard, at Fordham, and now at Columbia. I've also worked very closely with federal judges as chair of the Academic Judicial Network of the National Association of Women Judges, and I was very happy to participate with you a year ago at the mini conference on summary judgment, which was enormously helpful and important. And as you know from my written comments, I am quite concerned about the direction of the new summary judgment proposals, particularly 56(c).

Let me start. First I want to say that when we met last year there was of course considerable concern by others, by participants, about this new direction in terms of the 56(c) point-counterpoint proposals. As I've described in my article that's subsequently been published, The Dangers of Summary Judgment, Gender and Federal Civil Litigation that I cite to in my comments and others cite to as well, which I will be submitting as an additional comment on these proposed amendments, summary judgment has, as of course you know, become the do-or-die place in federal civil litigation and has had a

huge impact in federal court in removing cases from public adjudication, in giving judges increased powers as fact-finders, in having cases and having federal juris prudence in general developed without full factual and live witness records, and in comparison, for example, when I began to practice civil rights law in the 1970s where summary judgment truly was a disfavored motion, truly was, as Ed Brunet just spoke, the sort of case law, you know, the sort of invocation of course motive, intent, etcetera, etcetera, not appropriate for summary judgment. That has changed dramatically in practice regardless of the invocation of case law. I'm not saying it doesn't sometimes prevent summary judgment, but it has changed a great deal, and I think of course there are also very severe efficiency issues, much of the process that has developed around summary judgment, and that I think the proposed amendments we are suggesting create extensive process for summary judgment where in many cases it would simply just be easier to allow the case to go forward to trial.

I want to suggest also, and the Clairmont-Schwabb material has already been mentioned, the notion that summary judgment has played and continues to play in terms of choice of forum in creating the impression, frankly an impression that I do not think the advisory committee wants to encourage, the federal courts are courts for defendants, not plaintiffs. Now, I am empathetic with the degree to which summary judgment cases

are very, very difficult for judges, and I am very unempathetic with some of the concerns in terms of, for example, the emphasis on orderly presentation, that I think has animated some of the 56(c) proposals. I'll talk about that more fully in a minute. But as we know, summary judgment motions are now routinely made, and of course often cases that look like good candidates for settlement will not settle until after the district court denies summary judgment for the defendant, but what they do require is for district courts to look at all the evidence in a holistic way in order to decide if there are genuine issues. And by the way, I totally agree with your improvement of genuine disputes. I think disputes is much better, disputes of material fact, but I do think that for the reasons that I want to highlight, the point-counterpoint proposals are deeply -- are a matter of great concern.

Now, first, I think that this is not going to make judicial decision-making on summary judgment more effective. I understand that some of what, as I say, has animated these proposals. Many of you who are judges are concerned about the fact that you do not believe that lawyers are doing the job that they should in terms of citation to the record, in terms of orderly presentation, etcetera, and that that is part of what's animated, but I would propose to you that I think that that can be accomplished, and I'll talk in a few minutes about how, without the full panoply of unnecessary and additional work that

these proposals would create for judges and additional transaction costs for lawyers. In my view, these would be reasons enough to oppose these amendments, but the Federal Judicial Center empirical studies that have been done in conjunction with your advisory committee process, also suggest a potential impact on the resolution of civil rights in employment cases. That is troubling. And although I recognize that you are trying very hard to say that this is not going to impact on substantive law and it doesn't change the legal standard, of course procedure and substance are interrelated. How can they not be? And I think the committee here is underestimating the degree to which procedure and substance are interrelated and the way in which they will impact.

Now, I think that in order to make the link which you have -- excuse me -- pushed some of the other folks who testified earlier on exactly how, let me try to help with this. I think that the slice-and-dice tendencies of federal judicial decision-making, which I understand may be hard for some of you to hear or to really accept, particularly I want to say with civil rights and employment cases has really underscored the dangers of summary judgment. We are talking here, and in the article that I wrote that I just alluded to, I'm now writing another article about the interconnection of Prombley (ph) and Daubert and summary judgment, we are talking about judges' decisions on summary judgment, that, as Martha Dautry of the 6th

Circuit has highlighted, impermissible disaggregation of legal issues, or as Professor Steven Burbank sees it, sees less in the parts by subjecting the nonmovant's evidence to piece-by-piece analysis, and is not analyzed contextually.

Now, it is not only employment cases, although they have been highlighted already, that involve complex issues of fact and law, although employment cases and civil rights cases do present an enormous challenge. In fact, Professor Marcus, I think you highlighted that question before in asking about antitrust and other matters as well, and I would say I think that's right. Those are all cases where, yes, the routine law that is invoked says, oh, those aren't appropriate for summary judgment, but that is not what is happening at the district court level, and so I think there is good reason to be concerned as to, even though the stated purpose is more orderly presentation, to be concerned about whether this new point-counterpoint would simply exacerbate, frankly, these problematic tendencies in judicial decision-making.

Let me give you some examples, because in the work that I did, I saw many, many, many cases in which this was done. Now let me give you an example of one, Simpson versus University of Colorado, a case out of the district court in Colorado, 2005, then reversed by the 10th Circuit, and then ultimately after reversal many years later settling for $2.5 million. This was a brutal Title IX claim against the University of Colorado, which

I'm sure many of you were familiar with. It got quite a lot of national publicity. There was an almost 80-page district court opinion on summary judgment, which did not go through, did not put evidence together in a holistic way, went through in the most mechanistic way dice and slice, the 10th Circuit reverses and says effectively there is no way that a reasonable juror could not have returned a verdict for the plaintiff.

In another case, the Jennings case, and this is --

PROFESSOR MARCUS: Can I ask a question there?

PROFESSOR SCHNEIDER: Sure.

PROFESSOR MARCUS: Did that district have point-counterpoint rule?

PROFESSOR SCHNEIDER: You know, that's a very good question and I should know the answer to it but honestly to tell you the truth I don't. Maybe some of you do know that, but I should know the answer to it, and I will, since I'm planning to write additional comments, let me look into that and try to answer that, but in any event, I mean, the tendency that you are highlighting here, obviously there is a perp alary -- there is some preablation of from some district courts obviously who have put this full point-counterpoint, not the token only 21 I think or 20 who have put the full point-counterpoint into play, I understand from the district court perspective that could be viewed as an advantage to sort of push the lawyers, to marshal, but honestly, I think this, the kind of dice-and-slice tendency

that I'm talking about more broadly, is in many, many decisions that in many district courts that are not simply under the rules that, you know, the local rules that you're now seeking to encourage.

JUDGE KRAVITZ: Judge Campbell and then Judge Baylson.

PROFESSOR SCHNEIDER: Sure.

JUDGE CAMPBELL: Professor Schneider, we have 20 districts that have local rules that allow or call for this point and counterpoint. Is there data that suggests that summary judgment is granted more often in those districts for defendants in civil rights cases?

PROFESSOR SCHNEIDER: Well, I believe that the data actually that Joe Cecil and George Kurt put together for you actually does not suggest that they're in -- that there is a dramatic difference between the -- you tell me whether or not I'm wrong -- but my read of that data does not say that in the study that was done in preparation for your proposals, that there is a dramatic difference. I think it's like, you know, three, two or three points perhaps, but what I'm saying to you, I think, was more is really beyond that, which is that this dice-and-slice tendency which has already existed and exists I believe in much judicial decision-making irrespective, frankly, of whether or not the district courts have these proposals, has the potential to be dramatically exacerbated by what you are proposing. I'm not saying that the data is there yet

necessarily on that impact because I think we don't know that for sure, but I think it has the potential, and I think it has the potential in not just, although my focus has really largely been because of my own research on employment in civil rights cases, I believe that it has this tendency more broadly, as well as of course the added expense and litigation costs that have already been highlighted, but let me also -- I'm sorry. Go ahead.

JUDGE KRAVITZ: Judge Baylson?

JUDGE BAYLSON: First of all, Dr. Cecil is hiding in the background. We have a seat for him at the table if he wants to sit here, but I don't think there is any way anyone can say that his data proves conclusively or even inferentially one way or the other that in those districts that it's used that it has some substantive impact, but what I want to come back to is, I would like to just ask you about your assumption that the slice-and-dice, as you call it, is unfavorable to plaintiffs. Why? Because I would like you to think about it this way: It gives the plaintiff, the plaintiff has been, particularly in employment cases, almost always the nonmoving party. It gives the plaintiff two ways to make his or her case to the judge. One way is in the brief, which of course you have now. But the second way is, it gives them the opportunity to go into the record, whatever the record may be, including affidavits by the plaintiff, which very often for some reason are lacking when

they obviously can be the prime evidence mandating the denial of summary judgment, but that's a separate point, but it gives the plaintiff a second way to show the judge that their summary judgment should be denied because you not only have the brief where you can make the argument, but you've got this procedure where you can point to facts in the record, you can point to data in the record, you can point to deposition testimony. All it does is requires the plaintiff's lawyer during the process of discovery to make sure those facts appear of record by an affidavit or deposition testimony, but it gives the plaintiff really a second bite at the apple, and I don't understand why those who argue against this won't deal with that as an advantage, and you keep assuming it's a disadvantage.

And the second point is that, and I, from my own personal experience in talking to many others who were at these many conferences, as it were, that it makes it much easier for the judge to find out what is in the record, to have this point-counterpoint with specific record references instead of weeding through a 20, 30, or sometimes 80-page brief, you know, looking for statements of fact which may or may not be supported by record reference. Those are two questions.

PROFESSOR SCHNEIDER: Great. Thank you. Thank you, Judge Baylson.

On the first question, I don't necessarily assume that the slice-and-dice is only problematic in terms of plaintiffs.

Let me say that. What I think I'm suggesting is that I think that there is a considerable amount, and let me qualify this, there is a considerable amount of slice-and-dice that goes on in terms of summary judgment decision-making, because by the time you are making, who are district court judges, are making decisions about summary judgment, you often have a huge amount of material before you, so just trying to put that material together I understand can be a very daunting task and that's the reason why I said before that I can understand why the impulse around orderly presentation has and animated this, but what I think is that the -- first of all, good lawyers now are making citations to the record even in the present circumstances. You don't need to require, or, you know, if you want orderly presentation, then perhaps you have something that says now that in the brief, or, you know, that there ought to be specific references to the material. It should be woven in. I think the point that some, and what I'm trying to emphasize, is that these are the integration, interrelationship of fact and law, which is inevitable in summary judgment, is being segregated out here in a way that could be very problematic.

JUDGE BAYLSON: But that can be done in the brief. The brief can make this weave between the facts and the law. All the point-counterpoint does is say have the facts separated and supported?

PROFESSOR SCHNEIDER: Yes, you're right, but it does

provide an opportunity for tremendous litigation, and not focusing actually on what is genuinely material as opposed to what our, you know, every issue that can be generated either by the movant or by the nonmovant, and that can be tremendously costly from a transaction standpoint, and frankly, ultimately inefficient even in terms of the purposes for which you want to do this.

JUDGE KRAVITZ: Judge Rosenthal has a question.

JUDGE ROSENTHAL: I have two questions.

JUDGE KRAVITZ: Two questions.

JUDGE ROSENTHAL: Two questions, if I may.

The first question is this: Generally stated, under our present system we have a patchwork of local rules, some of which require point and no counterpoint, some of which require point-counterpoint, and some of which are silent on the subject. One of the changes that would be made by the proposal would be to say to the judges in the various districts, if you don't say anything, here's how it's going to be, but you do have the ability in a case-specific order to tailor the procedure or abandon it entirely, and if the particular case is not well suited to it for any number of possible reasons, I'd like your comments on how you view the change from local rule variation to case-specific variation.

And the second thing I wanted to ask about was for your reaction to Professor Brunet's suggestion that the approach

to the must/should issue be finessed, if you will, by putting it in the passive voice and carrying over the nuances of case law application of the current standards.

PROFESSOR SCHNEIDER: Well, I would say that on the first I guess if you're going to go forward -- put it this way -- with the 56(c) proposal, I certainly like the notion of the fact that judges can make it tailored to the specific case. I totally agree with that.

JUDGE ROSENTHAL: I guess the bite of my question is, is perhaps that if we don't go forward and things remain as they are, then you've got 50 districts that require -- at least 54 districts, I think it is, that require at least the point portion, 20 of those require point and counterpoint, and that may be changing even as we speak.

PROFESSOR SCHNEIDER: Right.

JUDGE ROSENTHAL: But I guess the question is, as between the current regimen and the proposed regimen, given that there have been these local rules that have developed, how you would view perpetuating the current system.

PROFESSOR SCHNEIDER: Well, I like the idea of in theory of specific case-specific rules, although I have to say that what I would be worried about, of course, is if you have argumentation, that would be also more efficient. That would sort of add to this very cumbersome, you know, summary judgment process about even what the process should be, but I would

frankly prefer to leave sort of the evolution of this as it presently is rather than move to the default position of what I think you are proposing, so I would much prefer, and perhaps a case-specific rule would be an alternative in the sense so that it would be effective for cases, you know, so that lawyers could make arguments in particular cases as to why, for example, even local rules that perhaps are now operating, for example, where you have not just, you know, where you have point but not counterpoint, for example, might not be offered in a particular case, so I would prefer that.

JUDGE KRAVITZ: Go ahead. And then we've got to move on to two more witnesses now.

MR. GIRARD: Now, Professor Schneider, I think Mr. Chertkof was saying that the slice-and-dice in a way is a refusal to allow the presentation of inferences in an effective way. His proposal, as I understood it, was to modify the point-counterpoint process so that the party responding to the motion has the ability to bring forward inferences in a formal way. Do you have a view on that?

PROFESSOR SCHNEIDER: I'm not troubled by that, the formulation in the present context. I mean, I think, you know, responding on the material, you know, on the disputed material issues or material disputes would be appropriate, and I think that would, as I think someone suggested, bring in a sort of detailed sort of substantive law into it, but I do share his

concern that the way that 56(c) now is structured does not allow, and I thought his example actually of the issue with the credibility of the witness who, you know, there was a perjury conviction for, was very compelling in the sense that that is an issue which would make it very likely that there should be a trial or would certainly -- put it this way -- militate in favor of trial. That would not be highlighted. That would not be brought to the fore through the 56(c) proposal that you are suggesting because it wouldn't necessarily be an issue that would be material and it wouldn't come up in the response, and that is exactly the reason why I think this is problematic, because those issues of all of the facets of fact and law together, which ought to be argued in the brief and which can be identified by particular responses to the record, are being segmented out in ways that will actually make it more cumbersome, more inefficient, etcetera.

If I could just say one thing that I hope follows up on this. You know, someone just said before, I think, Judge Kravitz, you said -- the issue of oral argument came up before, and I think you said, oh, my heavens, if we have to have oral argument.

JUDGE KRAVITZ: I'm a believer in oral argument, but believe me, there are a lot of people who disagree with me.

PROFESSOR SCHNEIDER: Right. But, you know, that really sums it up to me in some ways, because that's the point,

is, that you would want, I mean, not just -- you really want oral argument often in summary judgment cases because it's everything. That's it. That's the only place you're getting to. That's the place in which you can say to the judge, and so the irony effectively and the direction of all of this, which is cutting it off in a sense and creating all this paper, it's like going back to equity.

JUDGE KRAVITZ: Do you have a comment?

Judge Weinstein features favorably in your article as the paragon of totality of circumstances and everything. And he uses point-counterpoint, so some of us can resist.

PROFESSOR SCHNEIDER: I am sure that there are many of you who, and many judges around the country, who use, can use point-counterpoint in an extremely beneficial way, but we're talking about something more broader here in terms of default testimony.

JUDGE WALKER: As my fellow committee members know, I've shared your concerns for some time, heard me at great length, and the response which they keep coming back to is, what is the alternative to a method or approach to tease out what really matters, what are the decisive issues that a judge has to confront to decide to grant or deny summary judgment? And at least I've been unable to come up with an alternative that satisfies them to this point-counterpoint approach. Perhaps you can do better.

PROFESSOR SCHNEIDER: Well, I will try, and I'm encouraged actually by many of your questions, and I will submit additional comments on that, but most particularly right now --

JUDGE WALKER: Is there a general approach that you can suggest?

PROFESSOR SCHNEIDER: Yes. I mean, I do think that if you want to include that some of what we are talking about here certainly are improvements, dispute of material factors I think is important. The emphasis in some of the notes about the need for orderly presentation, and the emphasis perhaps as I'm suggesting of doing away with a statement, a separate statement of material facts, but suggesting that the brief has to include specific references to the record. I understand it's a massive material to go through, and of course you as district court judges want direction in that and often don't get that from lawyers, but I think that is a much better process, does not add these layers, does not have the impact in terms of burdening the plaintiffs, and allows for the integration of fact and law and the notion that traditionally that this is a disfavored process. This is a dramatic move over 30 years here in terms of the number of cases resolved on summary judgment and the degree to which we now have trials and juris prudence developed on paper, not live witnesses. So I would seek to find some way to do that. I will think more on that. I will try to submit -- I will submit additional comments to the committee to implement to

try to suggest specifically language details on how that could be implemented in the brief without the statement of facts.

Thank you very much.

JUDGE KRAVITZ: Thank you very much, Professor Schneider, and we're grateful for your continuing interest and assistance in this project.

PROFESSOR SCHNEIDER: Thank you.

JUDGE KRAVITZ: Mr. Vail. Welcome, sir.

MR. VAIL: Thank you.

JUDGE KRAVITZ: You too were a participant in our many conferences, and we're delighted to have you back.

MR. VAIL: Thank you.

Well, let me introduce myself first and say I'm John Vail. I'm referenced here. I'm from the Center For Constitutional Litigation. My firm, we represent the American Association For Justice, which was the Association of Trial Lawyers of America, and I think you know who our folks are. There are people -- well, let me say first, I think I'm also the guy who might have moved you to start discussion discussing page limits on comments, so I've given you very extensive written comments and I'll try not to rehash those here except to the extent that you have questions that may be germane.

I really want to focus on two points, and one is, as I identified in the comments, I call it the big whopping conceptual problem, and another, the other is what I call the

big hit in constitutional problem, and I'll preface that only by saying it's not the question of whether summary judgment itself is constitutional, which is well treated. You know, the articles are all out there and I understand how persuasive they are with the committee, but there is a big issue that was touched on in some of the comments before and I'll come back to it.

So obviously we represent the plaintiffs, and plaintiffs have a special role here. I mean, this is really about something that differentially affects plaintiffs and defendants. Summary judgment is primarily a defense motion. It's occasionally a plaintiff's motion, although it didn't start out that way, as we all know. But one thing that's neglected in this debate is a burden the plaintiff has. The plaintiff bears the burden of proof. That is not something the defense usually does. The defense's job is simply to defeat the burden of proof, and the way a plaintiff does that is to tell a story, and this goes to what I call the big conceptual problem, because I think systematically what summary judgment does in general and what the point-counterpoint proposal does in particular is exacerbate the problem of taking away from a plaintiff the ability to tell that story in the way they want to tell it because the summary judgment motion starts from the defense. You get the defense's story and not the plaintiff's story, and a couple -- I do want to quote for you briefly two statements from

the Supreme Court, one in a case from immediately the term after the trilogy was decided. The sum of an evidentiary presentation may well be greater than its constituent parts, something that we all know, something that's intuitive to us, from our study of, for example, literature. This is often why we read literature and why we write stories, is because facts can get in the way of finding truth when you don't get the whole story. Listen to the court elaborate on this point a decade after the trilogy, and this is a longer quotation and it's in the written material, both of these are, but I think it's worth reading to you. Evidence tells a colorful story with descriptive richness, unlike an abstract premise whose force depends on going precisely to a particular step in a course of reasoning. A piece of evidence may address any number of separate elements striking hard just because it shows so much at once. Evidence thus has force beyond any linear scheme of reasoning. As its pieces come together, a narrative gains momentum. With power, not only to support conclusions, but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict and the party with the burden of proof may prudently demur at a request to interrupt the flow of evidence telling the story in the usual way. In sum, a syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to support it.

That's in a criminal case. Some people here have alluded to the fact that some of the things that happen in summary judgment obviously would be intolerable in the criminal context, and I think this goes to why. One, you're dealing here not simply with -- you're dealing with a problem of cognition, a problem of how people perceive facts of how we come to know things, and it tells me that this process clearly is not appropriate in certain kinds of cases, and this goes back historically, and there was a debate when Rule 56 came into existence about whether it should apply to some kinds of cases or not, whether it should have categories of cases to which it was applied, and that was rejected. It was commonplace at the time, but it was rejected.

PROFESSOR MARCUS: Sorry to interrupt you here, but I think I'm looking at your statement, in particularly the detailed material on page five in your Footnote 25 which is part of your historical background.

MR. VAIL: Uh-huh.

PROFESSOR MARCUS: Rugelia and Olchief were criminal cases dealing with the admissibility of evidence. Those were the two cases you just quoted, and in one theme that seems sometimes to emerge from comments the committee has received is that the wind has been blowing the wrong way on summary judgment for quite a while. In Footnote 25 you say the trilogy is considered a categorical reversal of the prior conception of

Rule 56. While I think that's a very interesting kind of academic point, but one reaction might be these objections to these proposals really seem to involve standing in front of a moving glacier that's doing something different on other topics. Are you really mainly concerned about dangers in summary judgment practice that you perceive and attitudes towards the standard for granting summary judgment, or are you mainly concerned with the proposals actually out for comment?

MR. VAIL: Well, I would say both. I mean, clearly, you know, it should be pretty obvious which way I think the wind blows, and I'll go with Dillon on this one. I don't think you need a weathervane to tell, but I want to note that I've made a career of standing in front of trains that move a lot faster than glaciers. I do indeed consider myself sacrificing my substantial body in that way in this effort.

JUDGE KRAVITZ: I think what Professor Marcus' point is really a serious one, which is, that we clearly have heard that people don't like summary judgment. The prior witness said, you know, it just is granted too much. You've got to stop, more cases have to go to trial, and it sometimes sounds as though people are attacking this rule because they just don't like summary judgment and they just want to sort of go after this rule as a proxy for no more summary judgment, rather than saying, like it or not, we have the trilogy, we have summary judgment, can we make the process better, which I think is what

the committee is trying to do, as opposed to we have the -- I suppose we could get rid of Rule 56, but we're not toying with doing away with summary judgment, and I think that's what Professor Marcus is getting at.

MR. VAIL: Judge Kravitz, I think it's clear you don't oppose the use of summary judgment at all. It's really the question of its use in the kinds of situations we've heard from today - when inferential evidence is important, when subjective things such as intent or motive are important. Those kinds of cases are simply not well adapted to the procedure, and they're not -- and what I'm suggesting to you, particularly I think in the social science that's identified and quoted from on pages, what, eight and nine of my testimony, that there is a systematic problem of cognition of how people deal with facts and how you learn from the objective facts that you find in the universe, and this process exacerbates the problem of looking at a set -- competing sets of objective facts to try to draw subjective conclusions from them.

JUDGE WALKER: Let me, if I might, take you up on that premise which seems to be the premise of your presentation. Summary judgment motions are not the first time that the plaintiff gets to tell his story. The first time that a plaintiff gets to tell his story is generally the Rule 16 counters, and I'm surprised, continually surprised, at how many plaintiff lawyers let the defendant's lawyer prepare the case

management statement instead of coming in at that first opportunity, which is the first time that the judge sees the case, and then and there tells the story, so isn't the premise of your argument against the proposal here that you have assumed that the Rule 56 motion is the first time the plaintiff gets to tell his story, and that in fact is not the case?

MR. VAIL: No, I don't think so, because it's still -- it's the question of what's before the decision-maker at the time the decision is made, and, you know, frankly, it's quite clear. One of the impulses for this rule, one of the things that impels it, is the desire of you to have in front of you in one place at one time those competing statements so that you don't have to seek reference to other things, and I think again it's this question of particularly of inferences and subjectiveness.

I thought the examples that Mr. Chertkof gave you, for example, about, you know, you can find, and it seemed some people were shocked at the idea that if, you know, the employer submits an affidavit that says, well, you know, I didn't know that the 20-year employee was fired, that you have to find that that's the case, and, no, it's obviously not. And it's the power of circumstantial evidence is reduced in this narrative, if you will, that you have before you that is not a narrative that the plaintiff gets to engineer and choose in the effort to discharge the burden that the plaintiff has that the law puts on

the plaintiff.

Let me go to my second point, because I think that's a good segue to it. And I think our general themes here are about discretion and about there may in fact be not necessarily some categories of cases, but some categories of evidentiary decision when you see those kinds of evidentiary issues in a case are a signal that this kind of point-counterpoint procedure is not appropriate. Again, I think those -- and I think that's worth the committee talking about. I think they will be very difficult to define. It's something that escaped the committee in 1938. But I do think because of our underlying concern about dispute resolution and about the ability of people to tell their stories and ultimately the foundation of trust that that creates in employers' roles.

JUDGE ROSENTHAL: If the dividing line between cases that might be appropriate for the presentation that is described in the amended rule and currently exists in some of the districts, and cases that are not well suited for this, is categories of evidentiary characteristics, if you will, if I gather from that that that is only definable on a case-by-case basis or best determined on a case-by-case basis, and if that's right, and that's a question, if that's right, is a rule that requires the judge or allows the judge to decide on a case-specific basis what the best procedure is, more consistent with what you've outlined or less consistent with what you've

outlined than the present state of affairs which has a variety of local rules adverse to the topic?

MR. VAIL: I'll take the easy piece first. If it's true, I think it would be more consistent with our position. Whether it's true, that, you know, I think that's -- I can't say here. I think that would take some real ...

JUDGE WEDOFF: Would your concern be substantially reduced by the proposal that inferences be expressly included as among the potential responses to an alleged fact?

MR. VAIL: I think that that is so, if you were allowed to write a narrative about the inferences. Now, there's been a substantial question about whether that could be in a brief or whether that should be in the statements, and my first question, of course, would be, how many pages are you going to give me for the brief? Because addressing it in a brief could be quite problematic because it could be, you know, it could take quite some length and some places have fairly short page limits on summary judgment briefs, and some, especially the kind of cases I'm dealing with, they're usually pretty meaty on the legal issues and you have to deal with these issues too. You're really looking at a compressed space, so there are different ways to deal with that concern, but I think that is a concern, and I do think ultimately, though, that it is better in the point-counterpoint for that cognitive reason that I talked about about having those things in front of you right then.

Now, my other point was, is --

JUDGE KRAVITZ: Just a short matter.

MR. VAIL: Yes, I can make this one quickly.

We have an argument in front of us for an entitlement program for defendants, and that's the entitlement to summary judgment via the word "must" and it was alluded to that that's what's intended and I do believe that is what's intended by a preponderance of that, and you alluded a little bit to the appellate scenario, so let me raise the appellate scenario.

If there is an entitlement to summary judgment, summary judgment is denied, the case goes to trial, the plaintiff wins, now you have an appeal and the appellate court go back and reverse the denial of summary judgment at this point, well, the current case law we have suggests nobody interprets different language, and it seems to me that the big whopping constitutional problem there is that if the answer to that question were yes, it sure starts to sound a lot like a reexamination of the jury's findings of facts, which is, I think, a whopping Seventh Amendment problem. The only way I can think of to cure that problem would be to grant a right of interlocutory appeal, and I don't think I need to do anything more than suggest that everybody in the room will understand how problematic that could be. So that's my second point.

JUDGE KRAVITZ: Thank you very much, Mr. Vail, for your continued interest in this project.

MR. VAIL: Judge Kravitz, if I could suggest one more thing. There was some testimony about the empirical work and Joe Cecil's work and what that means. I've cited you to a new empirical piece by John Schwabb, the dean of Cornell Law School, who is also a Ph.D economist. I think that it's --

JUDGE KRAVITZ: Is this the bad to worse?

MR. VAIL: Pardon?

JUDGE KRAVITZ: Is this the bad to worse?

MR. VAIL: Yes.

And I think it might even be worth your while to invite some discussion from Professor Schwabb about the relationship of that to this process.

JUDGE KRAVITZ: Good suggestion.

Mr. Gottschalk?

Our third mini conference participant in a row here, so again, thank you for your continued interest in this project and willingness to help us along.

MR. GOTTSCHALK: Well, thank you very much. I appreciate the opportunity to be here, and having been here before and having submitted extensive comments, I feel like I'm certainly straining the patience of the committee. You're very generous to have us all back.

My name is Tom Gottschalk. I'm here in my capacity as the nonexecutive chair of the Institute of Legal Reform, a subsidiary of the U.S. Chamber of Commerce.

During the discussion of point and counterpoint I have to say it's certainly alive and well in the scheduling of witnesses since I follow Mr. Vail and I probably have a counterpoint to his point as we go through his discussion.

JUDGE KRAVITZ: You'll need to have citations.

MR. GOTTSCHALK: If I can cite to the media, I have several of them, I'm sure.

I will try to be brief because I do also rely on the written comments we've presented, and in fact, I really asked myself whether I could add anything new or different by my oral testimony here today and imposing on your time, predictably recognizing this came out in discussion with Mr. Vail and others.

Just to get into my background, 27 years in litigation, primarily in the federal courts, most often for defendants, sometimes for plaintiffs, including civil rights plaintiffs, more recently 13 years with General Motors, so if I seem a little distracted this morning I am, but obviously supervised a lot of cases, but not in the trenches as many of your witnesses have been on summary judgment. Now that I'm back at Kirkland & Ellis in an of counsel capacity, I'm sort of back in the frame, but that is the experience from which I am speaking, but I'm only speaking here on behalf of the Institute of Legal Reform.

But as Mr. Vail indicated, it's obvious from the

surveys and obvious from what you hear, plaintiffs don't like summary judgment very much and defendants would like to have more of it if possible, and I thought it's interesting we get into this discussion, and also since I will focus on this Rule 56 proposed c language of "must" versus "shall," that with the rules committee intent, I'm not trying to change the standard or change the substantive law of summary judgment. We spent a lot of time discussing what the correct standard should be and what the policy should be and sort of wondering why that is and then wondering why it is that with semantics like that that don't usually occupy my time, why am I so passionate about feeling since the change was made to "should" it ought to be reexamined and changed back to "must," so I'll spend most of the few minutes I have trying to step back and give you some perspective more from a personal standpoint almost on why I feel strongly about it.

I not only rely on our past submissions, but I think the committee is aware of the law view article in the American University Law Review in October of '08 by Professor Shannon on should summary judgment be granted, and think he spells out the principles that I would endorse very well.

Let me just again try to step back and say that I want to give you a perspective in response to some of the comments or at least respond to some of the comments made earlier this morning about the importance of this issue and then try in

fairness to address some of the competing considerations, the reasons against my position, just to see if I can at least indicate how I think they are being accommodated in the proposed rule.

I think from the standpoint of the principle involved, the prospective that I bring to this really I realize is heavily influenced by the work that a number of us as general counsel of corporations did as multi-nationals. We know the American legal system is preeminent in the world. We know it is widely respected for good reason. The only negatives are the issues of high cost and intrusiveness which goes along sometimes with the fact-finding function of the courts in the process. As we go around the world and promote the rule of law and we look to the U.S. model, what are we really concerned about?

Well, in many countries, as you all know, you get trapped in the court system that is less than ideal where no matter what the merits are, you are hung up in court indefinitely and the courts are influenced by political pressures and economic influences and personal biases and that is the court, and we know it not in this country but in other countries it goes all the way down sometimes to basic corruption that ties you up in court and you are literally a hostage in an extortionate process. Now, that's not going around in this school and I don't mean to imply that in any way, but it explains a little bit about why I feel so strongly as a matter

of principle that with the word "shall" and the way it's been interpreted in the past, and having been there and now making a change what do we say? I think from the standpoint of a litigant, the notion that a system of justice, whether it's a motion to dismiss on summary judgment, directed judgment, or directed NOV, if a litigant is entitled to judgment as a matter of law, it must be granted. There is no justice in a system that doesn't grant that. You can say justice delayed and you'll get your eventual result at the end of the trial, but the principle is, if you make this burden, plaintiffs think it's too low a burden, defendants think it's too high a burden, if the court is satisfied after all the processes you put forward that the movant is entitled to judgment as a matter of law, there is no way to defend a legal system that doesn't grant it. That's just my fundamental position on that. That's why I feel so strongly about it.

So I look and say okay, well, what's driving back against that principle? But I think it largely, at least from what I hear and reading the comments, is the issue of fairness. I put aside administration of justice because really in my mind it doesn't enter into it as it does for most of you who are judges, so I'll address that if you'd like, but I really think it comes down in most of your concerns as fairness to litigants, particularly individuals, people of limited means and capacity, and it's appropriate that the courts have keen sensitivity to

the fairness of the judicial system in applying these principles, but I look at the current section f, proposed section d, which specifically talks about the ability of a court to deny a motion for summary judgment. It doesn't say a motion that isn't otherwise meritorious or whatever, but it says in a fiat that the proposing party may present an affidavit that sets forth specified reasons for not being able to bring forth proposed facts. That protects them in the event where discovery is needed, it protects them in the event that other reasons which can be addressed later in the trial/pretrial proceedings can help supply a basis for proving that fact, so the court can defer the motion or whatever, so I think we have built into Rule 56 and always have and you certainly maintain in the proposed rule precisely the section you're looking for in subsection d, and the reason I like subsection d is because it at least requires some discipline in the process of explaining why the facts are absent, some sort of affidavit. It's obviously not going to be necessarily a fully factual affidavit, but it's going to be one that's submitted in good faith and gives the rationale for the fact that the evidence sits in the defendant's office and in a locked file and we need discovery to get it or whatever the reason may be.

So in summary, I feel that with that section f soon to be d there, to then incorporate an undisciplined, unrestrained, if you will, undefined, notion of discretion back into Rule

56(c), should without any idea of what really mean by "should" and contrasting that with "shall," is going to present a serious issue in terms of meritorious motions once the grounds have been satisfied of being denied.

Now, I know that the committee asked a question -- this is the third point -- as to what may be recent experience this year under "should" should be looked at and examined as to whether it suggests that my concerns are overblown or not, and while I've not read all the cases, I've had research done and clearly it indicates to me that the courts are wrestling with the word "should" and taking to heart the notion that no change in standard was intended, they go back to Celotex, 30-year or so precedent, and say "should" really means "shall," shall be granted forthwith, so they grant it. But my point is, using the word "shall," we actually note we have the Supreme Court endorsing it as a mandatory command, if you will. We still have some cases that had language, not holdings, but language, that suggested that there was some sort of implicit discretion in meritorious -- timely meritorious motion. That occurred under "shall." We know what's going to happen using the word "should." Whether it's a question of too many papers or too busy workload or whatever, meritorious motions are going to be set aside and litigants are going to be exposed to the full cost of discovery on all other issues, the contested issues, and the full cost potentially of trial and delay before getting the

judgment that they were entitled to earlier on.

The last comment I've heard, I haven't researched, but in all my years of experience, I have never on appeal asked the court to disregard a jury verdict against me and go back and grant a summary judgment motion. I just can't imagine an appellate court is really going to commence that sort of argument if at trial the evidence is really there and supports the verdict, so I don't think that's really an issue.

I told your Honor I would be brief in my remarks. Those are the comments I want to make. I'm happy to take questions if you have any.

JUDGE KRAVITZ: I appreciate you holding up your end of the contract here, and we have a number of questions, though.

Judge Walton?

JUDGE WALTON: Mr. Gottshalk, you've heard Professor Brunet this morning suggest we should finesse this "shall/should" dichotomy by stating simply that summary judgment is granted if there is no disputed issue as to a material fact. What's your reaction to that suggestion?

MR. GOTTSCHALK: Other than a grammatic one, I'm wondering if the custody is "to be granted," I like the idea of it being mandatory, but at this point, sir, I thought we were too far down the road to go back and consider that. I think summary judgment is granted, it's confusing a little bit to the reader for its compliance because it sounds like a ruling was

just made as opposed to is to be granted, but I think is to be granted is as strong as most.

JUDGE KRAVITZ: It looks like everybody is rushing to our break, Mr. Gottschalk, but we thank you for your comments and your passion about this subject and your continued interest in it.

We will take a break at this point for ten minutes. Though I know we clearly need it, if we try ten, we may get back to it.

(Break taken at about 11:07 a.m.)

JUDGE KRAVITZ: Great. I took our break early, but it was no disrespect to Joe Garrison, who is an esteemed practitioner from the great state of Connecticut.

Mr. Garrison, the floor is yours.

MR. GARRISON: Thank you.

As a trial lawyer, I'm not sure whether this is a better time to appear or else the time when I would have been holding you back from your break. Everybody is kind of wandering back in now, so it's a mix. I'll do the best I can anyway to engage you somewhat.

My background is that I am a past president of the National Employment Lawyers' Association, which is the plaintiffs' bar in employment cases, and I'm a past president of the College of Labor Employment Lawyers as well, but that's, as you know, a neutral body.

The fact is, the plaintiffs' bar is not monolithic on this point-counterpoint issue, because I myself as an individual support it. Maybe that's because I practice in Judge Kravitz's district, where we've used it for quite some time.

JUDGE KRAVITZ: I won't hold that against you.

MR. GARRISON: I hope that's true, and in fact, I think that what Judge Baylson said is right, that in the proper usage of point-counterpoint, the plaintiff actually has a reasonable chance of making -- getting two bites at the apple. My own view is that the exception to the point-counterpoint is that there are submissions which are clearly abusive, and I've cited some of those in my letter, and I think that's the key to dealing with this and making this rule a good rule.

You heard earlier, and I can confirm, that in employment cases, which are a large part of the district court dockets, that defense counsel say that it is tantamount to malpractice not to file a motion for summary judgment. And the reality is across the country that these are large-firm defendants that are going against small-firm plaintiffs. Although it is certainly possible, and from time to time large-firm lawyers represent plaintiffs, that's usually not true in employment cases because these are positional conflicts that prohibit representation of both sides, so that your large employer does not want you taking a position that might favor in any individual cases some individual executive, I'd say, in the

case of a large firm representing an individual.

My firm has seven lawyers, and that makes us relatively large in Connecticut. And I think in many states in the country we would be a relatively large firm for one which represents the employee's side. We are careful in our own case selection, we use very up-to-date technology, and we have also the financial resources to combat abusive motions. Abusive motions are what are defined in my letter, that is, motions that have a huge number, in individual cases particularly, of supposed material facts which are not at issue.

But the normal office, the normal office, and I know this from the National Employment Lawyers' Association, which I've done for so many years, for plaintiffs is a solo and maybe will go up to three lawyers. It's usually a solo or two. And those offices cannot confront the abusive motion adequately. The problem with the proposed rule is that the proposed rule gives no guidance at all to those lawyers. And in answer to what Judge Kravitz was talking about earlier, deeming admitted for purposes of the motion, here's what I would say to that:

I think ironically, accepting a fact for purposes of the motion is worse than not responding at all, because in fact, when you don't respond at all, that puts some onus on the judge to review the record. You've said that later in the rule. And so a lawyer would actually be better of not responding at all rather than deeming admitted because the judge would then have

to review the record, maybe find something, and admitting it simply lets the judge off the hook to that degree, so the strategy ought to be simply don't respond rather than deem admitted. That's no strategy at all, it's not really an answer, and that's why I have to say you have to do something about this. Certainly not responding or admitting for the purposes of the motion carries the risk of guessing wrong on materiality, and if you guess wrong, you could lose the summary judgement motion, and then as a solo or a two- or three-practitioner office, you get a malpractice case or you get a grievance from your client, so you have to respond. I'm not sure that that is clear to the group here, but you really have to understand, you're presented with a real conundrum as the plaintiff's lawyer. You have to respond to these because you can't take that chance of guessing wrong.

Now, there's also been a comment that if you submit one of these huge motions of mat -- or statements of material fact, that should equal the denial of summary judgment, just because there must be some facts in all of those that would be material, but that simply isn't so in our experience anyway, and I say this very respectfully, but frankly, judges do look at these and they do not sanction them in any way whatsoever.

So let me just say for you, suppose that you did as a judge see 250 motions of material -- or statements of material fact in an individual case and the plaintiff did not respond.

Does that mean that summary judgment would be denied? Of course it doesn't. Summary judgment would be granted, and so there is simply a serious need to address these what I call abusive statements.

One other comment I want to make in response to what Judge Kravitz had said, and that is, that, you know, in his experience, and I know this is accurate, that when cases have had a denial of summary judgment and they go to trial, more often than not the plaintiff has lost. What I would respectfully submit is that more often than not, in the good cases the cases have been settled, and that's why they're not on your docket any longer, you're only he's the cases that are very close cases and cases where in fact the quality of the evidence really did favor the defendant, and that's what happened in trial, and therefore the defendant won. The good cases, the no-pay cases -- those are the no-pay cases. The good cases have been settled, so that's why there's a reduction in the docket. I would ask sort of the rhetorical questions of why should there be no adequate way to respond to officially. Why should there be no adequate way to respond with minimal costs, no adequate way to respond that's consistent with rule one. In the comments it says courts know what to do. That's fine. Courts may well know what to do, but the plaintiff lawyers have to know what to do, and there's nothing in this rule that guides the plaintiff lawyers about what to do, so because I know it's helpful to

suggest a remedy, I've offered up a remedy of a motion to strike, and I realize that reflexively none of you like that, I know that. And you're saying oh, my god, a motion to strike, we're going to see those all the time and we're going to see collateral litigation and it's just going to be another massive motions. I understand that that's the reflexive reaction, but I want to tell you that I think you are wrong in thinking that. The rules were because the courts interpret them, and in my opinion in this situation in the new procedural Rule 56, it would not take local custom very long to evolve in any particular district. The early decisions that would enforce the rule that says that these are to be concise statements of material fact would spread very quickly and I think they would be honored by all the other judges in the districts. Why wouldn't you honor them? You want short and concise statements of material fact. You don't want these kind of abusive submissions. And also, the idea of do-overs is not going to be engender client appreciation or satisfaction, especially if the counsel who has to do the do-over bills for his or her time. If I were the client and I had had my counsel submit 250 statements which had just been rejected by the court on a motion to strike and I said, oh, now I've got to get it down to something reasonable, and, by the way, I'm going to bill you for that, I don't think that would be well accepted by the client, so I think that that's another experience factor that you should take

into account here in the idea of whether collateral litigation will proliferate. I don't think it will, and frankly, if counsel takes the more ethical view and doesn't bill for the time, then that's a good learning experience as well, isn't it? So I think that these kinds of abusive motions will not often be replicated if you put in a remedy, and the plaintiffs' bar deserves it, the small practitioner deserves it. They don't know what to do otherwise.

JUDGE KRAVITZ: Judge Campbell?

JUDGE CAMPBELL: Mr. Garrison, if you're faced with 250 paragraphs, statements of facts, and you file a motion to strike, what's the motion say?

MR. GARRISON: The motion -- here's the benefit of it: It doesn't make me guess. Sooner or later, and I think sooner rather than later, the courts in each district are going to flesh out what it means to have a short and concise motion or a statement of material facts. I think that that's what's going to happen, so I think that what it is, is it simply says this does not comply. That's all. It says 250 -- this is an individual case; 250 statements of material fact does not comply. Judge, please decide. I mean, obviously I wouldn't do it quite that short, but I'd try to be pretty short and concise myself if I were filing such a motion, that that's basically, though, your Honor, what it would say.

JUDGE CAMPBELL: So your motion doesn't say paragraphs

1 through 234 are irrelevant, strike those and look at the remaining 16. It says strike the whole thing because this is abusive.

MR. GARRISON: I think you're actually getting to the level of what the problem is and I appreciate that, because what you're talking about is where the collateral litigation does get really ugly and problematic, so I think if you deal with it the way that I'm talking about, you deal with it in really a much more focused manner, because I do believe, like I think you do from your question, that if I were to file a motion saying, well, you've got 250 here and 50 of them are hearsay and another 20 of them are irrelevant and another 30 are background and so on, then, you know, you've got the same problem as the court that you would have had if you had to just decide it, so if what I'm saying is accurate, what I'm also saying is that if you allow a motion to strike, it too has to have some boundaries to it and the boundaries ought to be pretty clear and precise and they ought to simply be you reject the whole thing and do it over or you don't. And if you don't, then the plaintiff has to go through and answer them. I realize that there's something that you have to do. You have to look at it and you have to do some weighing about whether the plaintiff is right, that it should be rejected, but I would submit in the ones that I have proffered for you here, I was right in all of those. Those were abusive motions and it would have been better to have them sent

back and have the defendants have to do them over again, and you got to put something in the rule, though, to allow it, and so maybe it's too much of a blunt tool, but I think it's probably better than nothing. Thank you very much.

JUDGE KRAVITZ: Now we're having to switch here. We have Theodore and Van Itallie, if I got that right. Al Cortese is going to come at the tail end.

MR. VAN ITALLIE: Thank you.

My name is Theodore Van Itallie. I am the head of litigation for Johnson & Johnson. I've been at J&J for about twelve years, and prior to that was a litigator in New York in private practice for almost twenty years. I moved from being a producer and seller of litigation services to a major consumer of litigation services, and that's the perspective that I would like to bring to the discussion. I'm a tremendous admirer of the process and attention that is brought to the rule-making process and I really am privileged to have a brief opportunity to comment.

I would like to address the shall/should/must issue. You know, it's remarkable the amount of fright that those words now carry, but this has obviously become very consequential. It would have been one thing simply to have made the stylistic change from "shall" to "should" without a lot of back and forth, but now to persist with the word "should," I would suggest with sort of legislative history that's created, it would be much

more consequential than simply not commenting on those 2007 stylistic changes, and would I also frankly feel that to finesse the issue respectfully would, I think, create the suggestion that the committee has embraced in some fashion the discretion that courts have, and I think in some circumstances feel they should have.

JUDGE KRAVITZ: I suppose finessing it could have this one advantage, which is that case law would develop and the Supreme Court might eventually say that "is to be" means "must" or might say "it" means "should," and whereas if we pick one we've sort of decided where that case law is going to go. I mean, that would be the argument, I think, for finessing.

MR. VAN ITALLIE: Well, okay. I guess I understand that. I guess, you know, I think what we've heard from comments around the table and from the number of the witnesses is the, you know, is the inertia against summary judgment, that I think there's some -- there's an institutional feeling for, and I understand that in many instances it may well be that, you know, sending the case to the jury is frankly more or at least seems to be more efficient under certain circumstances than dealing, wrestling with a very complex motion and committing the decision-making to writing.

I do want to make a point, though, I'm not sure has been made so far, which is, from my standpoint, I do think that there is a, you know, significant policy issue, and I think when

the court has an opportunity to apply the facts, to apply the law to undisputed facts, there is a societal benefit, in my mind, in drawing lines and creating guidance, which I can certainly say that this committee is extraordinarily hungry for, and that that opportunity to the degree that that's delegated to a jury down the road is lost, and if not just lost, really sort of undercut.

Now, I mean, there are very respectable commentators out there who have noted the consequences of the litigation theory environment that we have from all sorts of issues, such as the lack of -- the disparate playground equipment to discipline in the classrooms to, you know, the excessive cost of health care, medical care. I'm not suggesting that we're talking about that issue in any kind of significant way, but I do think that there is in effect an obligation in the court. In the courts where there is a circumstance of undisputed fact, to make that application of law in an opinion to provide the guidance that is needed and given the complexities that, you know, we're all working under so that choices can be made and risks can be assessed and decisions can be thoughtfully arrived at. And it's just, you know, it is a problem from my standpoint, to take out of providing that decision-making to a jury in a way that, you know, cannot be teased apart. You really can't figure out what the guidance is from a jury resolution, and I think every time you, you know, you lose that

opportunity to make a pronouncement of law to undisputed fact, you know, you have, you know, created a greater adversity to risk, and to, you know, making thoughtful decisions.

JUDGE KRAVITZ: Maybe you can help me with this since I've been struggling with it. As I've listened to all the commentary, plaintiffs' lawyers tell us that summary judgment is granted too often and very few cases get through summary judgment, and defendants' lawyers tell us that summary judgment is never granted enough and that very few cases get summary judgment and many deserve them, and I'm just trying to figure out where the reality is in here, because either you're litigating different cases or being the good advocates that you are or something, but we've heard this constant refrain that summary judgment is out of control and district judges granted every case, including cases that clearly don't deserve it, and then we hear from the defense bar that the one thing that we know is that summary judgment is not granted enough. Where is the truth, do you think?

MR. VAN ITALLIE: Yes. Well, first of all, we're both plaintiffs and defendants. I mean, we have an enormous intellectual property asset that we pursue aggressively as plaintiffs.

JUDGE KRAVITZ: Sure. So maybe it depends on the type of case.

MR. VAN ITALLIE: Maybe I'm dodging the question to

some degree. I guess what I would be concerned about in this discussion is sort of tipping the balance one way or the other, and, you know, losing the appropriate opportunity to get summary judgment where it should be granted without regard to whether it's granted too little or too much at this point. What concerns me is that we are at risk of creating a record that I think will feed into the institutional bias against summary judgment. It's a demanding, tiresome, you know, complex process that I think I understand why, you know, the kind of resistance to it, but I think the benefits are not just cost savings to defendants like myself in that setting, which are enormous, no question about that, but I think that they're -- again I would just return to my point, I think there's a benefit in getting rules articulated, and this is the perfect vehicle, one of those perfect vehicles to do that.

MS. VARNER: To correspond, just that I'm finding it curious that you're speaking of an institutional bias against summary judgment in light of all the data that we've seen about how frequently it's granted, but my other thought, at least, is that for that small subset of cases that do go to a jury trial, you do actually get legal guidance from a number of things. Certainly the instructions to the jury tell the world what the state of the law is for that particular case and you see where the boundaries are you, if you will, in which cases are the ones that are so closely balanced that you have to get the trier of

fact and resolve it, so I'm not sure this is a world where there's lots of guidance of summary judgment guidance, zero on the trial side.

MR. VAN ITALLIE: Yes, I definitely agree with that. There are obviously other laws to be articulated, but again, I agree with the general proposition that the number of cases that ultimately do get to trial is a fraction of what it used to be and therefore that opportunity is I think diminished, and I think that's partly a function of, frankly, you know, the cost of the process as well as the timelines involved. So I think, you know, again what concerns me is losing the opportunity to have, you know, rules articulated at a juncture that every case, many cases will have, whereas that, if, you know, if that you pass that point in time, the possibility of settlement, you know, I think obviously increases, and not having that, the ability to get guidance at the trial stage is going to be gone.

JUDGE KRAVITZ: Judge Baylson?

JUDGE BAYLSON: I would just like you to comment on the whether using the word "must" would possibly be not in the public interest in three types of cases: One, as I referred to in a prior question where there may be undisputed facts but it would be very hard and time-consuming for the judge to make that decision. Second would be where the facts are undisputed but there are inferences that could be drawn in favor of the nonmoving party. And third, where the judge feels the case has

a great deal of public interest and it's better from a societal point of view as opposed to what you said, granting summary judgment, to let it go to trial and have a jury be instructed on the law and make a decision, even though the facts are in dispute.

MR. VAN ITALLIE: Well, I would be on the other side of each of those examples, frankly. I think that kind of makes more my point in reverse. You know, I think that the complexity of resolving the motion shouldn't be a sufficient rationale for not deciding it or granting it, and I think likely I would argue there's an opportunity for, in a case of significant public interest, if it's a situation of a client, a lot of facts that are undisputed to make a much more significant contribution to the ability of entities to guide their conduct by applying those -- by applying the law to those facts. I get in the middle of, for example, of drawing inferences from the facts. I assume that those become embedded in the facts to some degree, and I guess in that situation to the degree that you really have disputes, then, you know, I think in that setting I think it would be appropriate to deny the motion, but in the other two examples I would argue it's under the obligation of the court to decide the motion as the most imperative.

The other point that I did want to make, which hasn't been addressed so far, is with respect to Rule 56(h). I feel sufficiently strongly about the benefits of securing appropriate

summary judgment rulings that I would argue for an appropriate objective cost-shift standard both for inappropriately made motions but also for oppositions that are objectively unreasonable, and that what I understand under 56(h), that affidavit, this is a provision that is essentially not enforced and really doesn't contribute, I think, to the operation of the rule, and I would argue for a lesser threshold that would, you know, make the decision to make the motion and the quality of the opposition more significant in the standpoint of the litigants.

And then if I can comment quickly on Rule 26, and really I applaud the changes that are proposed in Rule 26.

JUDGE KRAVITZ: Mr. Marcus?

PROFESSOR MARCUS: 26 is what I wanted to ask a question about.

JUDGE KRAVITZ: Go ahead.

PROFESSOR MARCUS: Well --

MR. VAN ITALLIE: Well, yeah. I mean, you know, I think that these are important changes to the rule. I'm very much in favor --

PROFESSOR MARCUS: I wanted to ask you a question about something that I think is going to be mentioned by another witness later, but with your experience particularly at Johnson & Johnson, I believe you might be able to shed light on it. I believe a witness coming up later is planning to urge that it

would be desirable to expand the changes to cover communications between counsel and witnesses not required to provide a report, particularly in-house experts, which might be something that. J & J would encounter, and also that it would be desirable to recognize somehow that communications between counsel and the staff of an expert should be covered. Do you think that those issues are matters concerned in terms of what we have published for comment? I'm just asking you because you're here and I think those may come up later and you might have some background to comment on them. Though they do not relate, as far as I'm aware, the approach in Australia or anything mentioned in your written comments to the committee.

MR. VAN ITALLIE: Well, yes. I understand what you're saying, and I understand that drafts that are exchanged in the report for a non specially retained expert would have the protection of --

PROFESSOR MARCUS: The disclosure drafts like drafts of a report are covered by the protection that we have tried to adopt.

MR. VAN ITALLIE: Right. Right. And I guess I am, you know, I am a little uncertain as to how communications between counsel and a non-specially retained expert are handled because they're obviously exempted from this explicit limitation to compensation and facts and assumption sort of trilogy that applies. I guess one argument would be without calling those

exceptions out, work product protection applies overall and that you're not even entitled to that limited access to the, you know, the exchanges between, you know, counsel, and that not -- the employee witness. I mean, I would suggest that that may be the more logical interpretation of not having made that exception, and particularly now that, you know, that the committee has in effect, you know, backed away from the notion the earlier suggestion committee notes that, you know, work product protection would not apply. I would go, I would take that, I guess, going proposition, take that approach that because the exceptions are not called out, that in general there is work product protection and you're not entitled to get into the exchanges between counsel and employee expert responding or treating physician in that setting.

JUDGE KRAVITZ: Great. Thank you very much --

MR. VAN ITALLIE: Thank you very much.

JUDGE KRAVITZ: -- for your time and thoughts.

So I think I'm right on this, that Mr. Williams is not -- he's in trial?

MR. CAIRNS: Yes, sir.

JUDGE KRAVITZ: Those rare trials that happen once a decade. Now we have Mr. Cairns.

MR. CAIRNS: Actually, Mr. Williams was trying to avoid a trial by seeking emergency appeal before the West Virginia Supreme Court.

Good morning. My name is Matt Cairns. I am the first vice president of DRI - The Voice of the Defense Bar. Some of you may be aware of us. We're 23,000 members, principally defending the interest of individuals and businesses in civil litigation. Mr. Williams is the president of the DRI and I'm here in his stead.

By way of background, I am a practicing attorney from Congran, New Hampshire, from the law firm of Gallagher, Callahan & Gartrell. My written comments were handed out I think after the break and I'll try not to regurgitate them and focus on a couple of questions that we have here.

My experience is set forth and I tried products liability cases, commercial disputes, civil rights matters on the defense side as opposed to the other witnesses who have been here earlier that all seem to have all been on the plaintiffs' side. I would like just to talk about a few matters.

First of all, to get to the professor's comments, I think I might be the person you're referring to who was going to talk about Rule 26. I'll take them slightly out of order in my comments.

I noticed the distinction between the communications piece in Rule 26, and I raise the question without having formed a clear opinion on what the answer should be. I personally believe work product should apply. I think in many instances attorney/client privilege should apply, but I can also see the

argument on the other side, particularly with regard to the attorney/client issue on having the in-house product safety engineer who doesn't regularly get called into court because the company doesn't regularly get called into court and that's not a part of his typical job duties. Is he in the control group? Is he really the client? That question remains, and I suggest that further thought has to be given to that either by this body through comments or through further testimony from other people down the line.

PROFESSOR MARCUS: Would you regard that person as distinct from, say, the treating physician?

MR. CAIRNS: I would.

PROFESSOR MARCUS: Okay.

MR. CAIRNS: I would. Because I'm focusing more on the attorney/client issue, that communication would be.

PROFESSOR MARCUS: The attorney-client protection would exist without regard to anything we do here.

MR. CAIRNS: Correct. I understand that. And I think the point is, a comment needs to be sort of laid out. I draw the distinction between in-house and a treating physician because in-house is really a client-related person. The treating physician is just by fortuitous a person who the plaintiff went to to treat. I know in New Hampshire you cannot have -- the plaintiff's counsel can have unfettered communications with a treating doctor but the defense attorney

can have no communications with that doctor outside of a deposition, and we have faced that situation and unfortunately -- fortunately, we've been able to resolve it. When we tried to ask what did you and plaintiff's counsel talk about, and they'll throw out a privilege objection and we'll suspend the deposition, hash it out and work around it for the sake of our clients, but that possibility exists there where one side has unfettered communication, the other side doesn't, and I'm just looking for perhaps a little quid quo pro in the comments or the drafting of the rule to that regard.

I also in my comments I talk about communications with the staff. I use the example in my comments about retaining the MIT engineer as your expert. Well, the MIT engineer probably has a staff of grad students and Ph.D wanna-bes who are working their way up, who are doing a lot of the leg work for him and he'll be the one who ultimately signs the report.

PROFESSOR MARCUS: Can I ask you a question about your example?

MR. CAIRNS: Sure.

PROFESSOR MARCUS: Do you find that the current regime of broad disclosure interferes with your ability to retain, say, an MIT professor-type expert or are those folks accepting of the current disclosure?

MR. CAIRNS: I've had no problem with that, the experts.

PROFESSOR MARCUS: The reason I'm asking that question is, the one thing we have heard is that some university professor-type experts may bridle at some of the antics that the current regime seems to make necessary.

MR. CAIRNS: I can understand that. I've heard a little bit about it, but in my personal experience and talking with my colleagues, I've not run into that problem at all. I think you need to have, just as our paralegals are protected by a privilege when they work with us, I think the staff of the experts should have a similar measure of protection in the communications so that if I'm calling the Ph.D's research assistant, that that is as if I am calling the Ph.D engineer.

PROFESSOR MARCUS: Do you engage in sort of brainstorming sessions on your own strategy in the case with the underlings of the expert?

MR. CAIRNS: Sometimes they're on the phone call with us, in which case the question is are they outside of the, because you have a third party in the room just like if you had a third party in the attorney-client room, does that take you outside? I think these are open questions, but, yes, several times I've tried to reach Professor Smith. He's been unavailable. His research assistant has called back and said please talk to me, the professor is traveling in Singapore and he won't be back for a while and we're all working on the project, so I've had to talk to them.

PROFESSOR MARCUS: The reason I'm asking that question, one of the objectives here is to make easier the interaction in the lawyer's preparation of what I call the lawyer's work product, and to distinguish what you might call the expert's in-house work product is something different in terms of the lawyer's work product. Do you see that at issue with underling communications?

MR. CAIRNS: First of all, I see it as that being neither a defendant- or plaintiff-biased approach.

PROFESSOR MARCUS: Oh, I suspect that's correct.

MR. CAIRNS: I think that -- well, I don't feel like I have been impeded so far. I can see myself facing this, and increasingly too in society if somebody wants to raise that issue.

PROFESSOR MARCUS: Thank you.

MR. CAIRNS: With regard to the point-counterpoint section, briefly, I've heard Mr. Garrison and Professor Schneider and Ms. McCarron talk about the boxes of documents that are coming in or the 250 statements of material fact. I have never filed anything with that many statement of material facts, and frankly, nor have I had that filed against me in New Hampshire, and perhaps because our judges have made it fairly clear that they don't want that. We have a local rule that does require not number of paragraphs, but it does require a concise short statement of material facts and/or rebuttal, and if you

don't do the rebuttal, everything in the movant's statement is accepted as true. I think if you're going to file 250, you're cutting your nose off to spite your face and you are creating issues of fact and the judge -- you are not focusing the court where you need to be focusing the court, and that is the problem, and I think lawyers should know that and should do it and I don't see that as a risk for a good lawyer who's drafting a good motion for summary judgment or a good reply, because you'll see the replies where they throw everything up against the wall and say there's got to be an issue in here someplace. I think that's just as bad and I think that's just as counterproductive to your case.

JUDGE KRAVITZ: If anybody else has any further questions of Mr. Cairns?

Thank you so much.

MR. CAIRNS: Thank you very much for the opportunity.

JUDGE KRAVITZ: Mr. Morrison?

Mr. Morrison, welcome back. And also an alumnus of the mini conference.

MR. MORRISON: Thank you, Judge Kravitz.

The facts are stubborn things, as John Adams famously declared. The rule that you put together is a great exercise that has the opportunity to bring both clarity and to provide the judiciary and litigants with an additional tool for just, speedy, and inexpensive resolutions, and I think it's high time

that we focused on these and got them done.

From the standpoint of "must" and "should," I speak to you as an old trial lawyer. As you know, I've tried over 240 cases to jury verdict, argued over 60 appeals. I was inside for about 7 years with the New York Stock Exchange company as general counsel, executive vice president and I've bought a lot of legal services, like Mr. Van Itallie, and I've kind of seen this from both directions. The advantage of the "must" or the "shall" is simply that if the case is properly teed up or the issue is properly teed up, the case or the issue is disposed of at that point.

Judge Kravitz, you raised a question, what's the truth about summary judgments? The truth about summary judgment is that rarely does the plaintiff win outright a summary judgment. Rarely does the defendant win outright a summary judgment, but what does happen is cases are focused and dialed in through the summary judgment stage. Frequently if you make a good motion for summary judgment, teeing up these stubborn facts, your opposition will look at those stubborn facts and say, Judge, I no longer want to bring my unfair trade practices cause of action. Judge, I dropped my antitrust cause of action. These causes of action designed to get double or triple damages plus attorneys' fees and punitive damages fall out of the contract case and we're left with a contract where there really is a question as to whether there was a breach or not, whether there

was cause or not, whether or not the amount of damages is appropriate. And so with a summary judgment, the truth, Judge Kravitz, is that we end up with three opportunities for speedy, just, and inexpensive resolutions. One is the moment you make that serious motion. That brings everybody to the table without the judge being involved at all, just the filing of the motion and the need to respond. The parties get very serious about what causes of action should go forward and what causes of action do not, and the point-counterpoint puts a fine focus on that.

The second point at which the parties come together is during oral argument and frequently the phone is not picked up but you show up in court and two or three causes of action are conceded or two or three defenses are conceded, a very important point in time, and then the judge may say one or two defenses are out, and one or two defenses are in, but I have real concerns about the following and I'm going to continue to think about it, and so there's a second point for a just, speedy, and inexpensive resolution. And if the parties are facing a true "must," a true "shall" decide this, and you know the judge is going to decide it, you have the moment before a decision at that point in which you can make the settlement or a just, speedy, inexpensive resolution, and then finally, after the judge rules, with the ruling set forth in a judicial sense, not a jury sense, thumbs up, thumbs down, but in a judicial sense,

here's the reasons why I find the law to these facts means this outcome, granted or denied. At that point the parties have yet another chance for a just, speedy, inexpensive resolution.

MR. KEISLER: The scenario where there seems to be maybe the broad assessment that a "may" or "should" is better than a "must" is the partial summary judgment scenario, and it seems to me that in some ways your analysis which says that one of the ways, virtues of the summary judgment process is that it pares down a case, even if it doesn't get rid of it, would almost be -- could be understood to suggest that there shouldn't even be a "may" option when the issue is partial summary judgment rather than summary judgment on the whole action. Is that something you are suggesting, or am I just reading that into it?

MR. MORRISON: I think you're reading that in. There shouldn't be a "may" on a partial summary judgment. It should be a "shall" in terms of disposing of the issue. Either there's a genuine issue of material fact or not, the facts being stubborn things.

MR. KEISLER: So you're saying there really should be a mandatory requirement to grant partial summary judgment in those instances in which it's justified?

MR. MORRISON: Yes, because it is just, speedy, and inexpensive, because we no longer under those circumstances have to litigate this extraneous issue which is frequently designed

from a defense standpoint, where I usually represent people who get sued, sometimes I sue people, but usually if I'm suing somebody, I'm going to try to sue them for the maximum I can, so I'm going to go for treble damages, punitive damages, attorneys' fees, and I'll try to figure out statutes that I can create to expose them to the maximum so that we're talking about a settlement discussion I can say, look, you're exposed to the dark shadow of punitive damages or treble damages or plus attorneys' fees. In fact, most of those situations go away before trial. Rarely do we try those cases when they're set forth.

I would just, in response to a question you asked earlier, is it fair for a judge to punt, to simply say I'm not going to give you this opportunity to have the law on your facts resolved because it's too hard or too time-consuming. I would suggest that that is not only inappropriate, but it would be grossly unfair for the U.S. Judicial Conference Rules Committee to reach a conclusion that judges should punt when it's too hard and too time-consuming.

Second, if it's in the public interest, that is, the public is very interested in the issue, the public has great transparency into a judicial opinion. That transparency can be dealt with on the editorial page. Those reasons, when we share reasons with each other, we come to better conclusions. Juries are not required to share reasons. It's a thumbs up/thumbs down

kind of situation, and in that context your public interest is not benefitting more by a jury trial than by the reasoned decision of a judge in the public eye open for debate.

And then finally, you asked a question earlier about inferences, if inferences can be raised from the same stubborn facts on both sides. I agree with Mr. Van Itallie. Probably it's not appropriate for summary judgment. There is a genuine issue of material fact and the judge still has that right to make that decision.

I would also just go back to your point, Judge Kravitz, with regard to the question of whether or not we should go with an if/then sort of ambiguity, if you will. Would it be reasonable for the United States Judicial Conference to send up a rule that we know would have eleven different Circuit opinions and then the D.C. Circuit just because we'd like to have some case law as opposed to the clarity? It seems to me that we're focused on clarity here and that one of the things that we have succeeded in doing by changing "must" to "should" is to create an ambiguity where none existed before, and so there would be no bias on my side towards suggesting that case law should somehow develop in the eleven Circuits, perhaps creating a conflict for the Supreme Court to resolve when I think we can and should agree that clarity should be our primary focus, so if we are thinking about "must" versus "should" in the context of speedy, just, and inexpensive, what is it that creates the speediest,

most just, and most inexpensive dispute resolutions? One is a limited amount of time. A judge who says there's a limited amount of time so we can't throw more bodies at it and we can't throw more litigation at it, so if a judge will hold on to that, and if there's a date for summary judgments, for summary judgments issue dispositive and case dispositive, that date becomes a critical deadline moving forward, and it does result in speedy, just, and inexpensive resolutions.

The second issue is decision-making without the jury in the box. That's the second thing that drives just, speedy, and inexpensive resolutions, and if we have that date by which these motions are made, the motions are made and then responded to effectively, you have a dramatic and very useful tool for the courts to use in driving appropriate resolutions, and that what's tried is what must be tried.

I would say to you that I agree with some comments that have been made that there is a possibility of abuse, and I would suggest that Rule 56(h) be modified so that you have an objective standard for cost shifting, and I testified to that before when I was here. I think that's fair. I think if you do run into either plaintiffs or defendants teeing up motions for summary judgment that are inappropriate, you should give the judge a cost-shifting rule, not a punitive rule, not a you did this in bad faith, not a subjective rule, but a without reasonable justification. Just without reasonable

justification. That's not an ethical violation. It's not a -- it's not a punishment, but it says so the judge can say to the litigants, look, you file one of these motions without reasonable justification, you require all of this counterform response and it's really not a good motion, I want the judge to have the tool to say that wasn't really fair, I'm going to transfer the costs and transfer the costs at a reasonable justification question as opposed to a subjective bad faith finding that there was ill motive on the part of the lawyers. And, you know, Rule 56(g), nobody ever finds bad faith on the part of the lawyers, and so it's an ineffective rule. It's just plain ineffective.

Finally, I would comment very briefly on Rule 26, disclosures with regard to the experts and attorney communications. I think we've done a great job of trying to isolate the attorney communications and keep that out of the discussion with the experts. I think that's an appropriate thing to do. I would suggest you should do it for the assistants as you were just discussing, to include everybody in that overall umbrella so that you have open discussion with the experts, full discovery of what the expert actually thinks, but you're not trying to penetrate the attorney communication with the experts. Just as a practical matter it doesn't work and when you allow that kind of penetration it just goes forever and ever and there's a cottage industry of litigating over what the

attorney said and what's in the attorney's file and so forth.

PROFESSOR MARCUS: Could I just follow-up with you on Rule 26? You mentioned acrobatic maneuvering --

MR. MORRISON: Yes.

PROFESSOR MARCUS: -- in your written commentary. We've heard about that kind of thing.

MR. MORRISON: Yes.

PROFESSOR MARCUS: Do you find that that is an obstacle to hiring some of the potentially most attractive expert witnesses who may simply be unwilling to engage in that sort of maneuvering?

MR. MORRISON: Yes. There are academic experts, the best in their field, scientists, who are reluctant to engage in the artificiality of the litigation process, simply because they don't want all of the information in a text message that can't be discovered, so to speak. They don't want to go through all of this machination of how do we keep our communication private until I have enough information to reach a conclusion.

JUDGE KRAVITZ: So I was just talking to an academic who said I actually like to take notes.

MR. MORRIS: I actually like to take notes. Imagine that, Judge Kravitz. They actually like to take notes, they actually like to gather facts, they like to follow-up soon, so if those facts can be verified after the lawyers talk to them, and that process is made totally artificial by the way we handle

in many states the Rule 26.

JUDGE KRAVITZ: Thank you.

MR. MORRISON: Thank you very much.

JUDGE KRAVITZ: Thank you so much, Mr. Morrison.

Mr. Parker, who, like Mr. Garrison, has had the misfortune of meeting in a different setting.

MR. PARKER: Thank you, your Honor.

Before I begin, I should comment that Mr. Morrison has been my friend for over 20 years, and as a young lawyer I was smart enough at that point to realize that I would never follow Mr. Morrison in anything that I did, so for 20 years I've been successful in that until today, so no matter how my comments go, I will deem this somewhat of a failure personally, and I broke something that I promised myself I would never do 20 years ago.

Having said that, my name is Bruce Parker and I'm here as the past president of the International Association of Defense Counsel. The IADC, as we call ourselves, is the oldest civil defense trial bar in the United States. We do not have separate written comments because we are one of the founding members of the Lawyers For Civil Justice, LCJ, and participated in the preparation of their written comments which are before you. Also I am here as a defense lawyer. I have been practicing for 30 years, the last 18 of which have been in various forms as national trial counsel in a number of mass tort litigations, which has given me a wonderful opportunity to try

cases to verdict in a number of states, both federal and state courts throughout the country and litigate and not try to verdict necessarily in an equal number of other states and federal courts, and that has given me perspective on the Rule 26 amendments, principally because most of my practice over the last 18 years has been either expert testimony, expert preparations, developing experts for my witness -- my clients -- excuse me -- and for doing cross-examination of experts on the other side.

So starting first with Rule 26, on behalf of the IDC, the LCJ, and myself personally, I hardily endorse the changes that have been made with respect to the extension of privilege to expert drafts and communications. I can tell you personally that my clients have had to suffer for a number of years with unnecessary, in my opinion, unnecessary costs incurred in the retention of additional experts whose names are never disclosed in the course of litigation so that I can meet with them and have, if you will, more candid discussions with them that might otherwise not be wise, if you will, tactically in the context of an expert who's been disclosed as an expert, and this is mentioned in the advisory comments, and I hardly endorse that as being the experience of myself and many of my colleagues. It will share costs in litigation.

Yes, sir?

PROFESSOR MARCUS: Could I just ask a follow-up

question on that?

MR. PARKER: Please.

PROFESSOR MARCUS: Do you find yourself in those interactions, including interactions with the underling staff of these people and seeking their opinion sort of separate from the lead person that you hire as an expert?

MR. PARKER: I cannot -- I certainly have had interactions with graduate students for the most part of the professors that have worked with the institutions. I cannot recall ever asking them for their opinion on something. They principally are doing the data backup, work analyses of some form or another for the expert that I'm using, and I can tell you that I never talk to those people when I'm litigating in a jurisdiction where there is no privilege communication.

As we mentioned in the comments, I practice in a good number of jurisdictions where counsel stipulate away whatever rule might exist and we agree that we simply will not do that with each other, so when I'm in a jurisdiction with those rules, I don't do that.

JUDGE KRAVITZ: I have a follow-up question.

MR. PARKER: Yes, Judge?

JUDGE KRAVITZ: We've heard from some that this proposed Rule 26 might be a sort of a movement away from Daubert, and I know you have lots of experience with Daubert. Have you had any experience with Daubert motions where

communications between the expert and the lawyer have figured prominently in the decision whether to allow the expert to testify or not?

MR. PARKER: No, and I don't understand the comments that were brought to you that this would have, and it may have been done by defense lawyers, my colleagues, but, no, speaking candidly, I cannot think of any instance where in my years of litigating in Daubert issues, and there have been many, that conversations between an attorney and a true retained expert -- I'd like to comment certainly on what I call your disclosure experts because they are different and I have very different views about those -- but with respect to a truly retained expert for whom a report has to be provided, what I need is a fair opportunity just to cross-examine that individual. What the plaintiff's lawyer tells that person, that expert, ultimately I don't really care about. If I can't do my job by disclosing the weakness of their scientific opinions in front of a jury, I've not done my job. I will tell you -- I'm jumping ahead in my comments -- that the single greatest impediment to the truth-finding process is not the proposal to grant some form of work product privilege over communication, but it is the conduct of lawyers, defense and plaintiffs' lawyers, to engage in obstruction in a deposition by speaking objections notwithstanding local rules to the contrary, and experts on both sides who give nonresponsive answers that go on for three or

four pages, and the reluctance of courts to provide any opportunity to discipline that behavior, so it goes on because lawyers know, so that we're not confronted in federal court with seven-hour maximum depositions. I can tell you I will come out of depositions with many experts for seven hours with about an hour-and-a-half of useful testimony because five-and-a-half hours have been spent with nonresponsive rambling about something, and that is the last thing a magistrate or district court judge wants to hear from me, is, Judge, here's a Rule 16 motion, compel this expert to come back and answer these questions. They just simply are not worth filing. As Mr. Morrison said, they don't get addressed, so that's the single greatest impediment in the real world to the truth-finding process as it relates to experts. It is not the confidentiality, in my experience.

Now, I do -- I jumped ahead and I kind of threw it out there, I do have a very different view about what I will, with your permission, call disclosure experts. Frankly, there is no consensus in my organization or within the LCJ for our constituent members on this issue. I will tell you as a defense lawyer working with companies, manufacturers and the like, that often times the most knowledgeable people, the most helpful people to help me figure out how to do my cross-examinations, how to do my directs, are the in-house company scientists, and while you may say that, well, Parker, you shouldn't worry about

that because you have an attorney-client privilege, I will tell you that in a diversity case that's a state law decision and the state laws are awfully varied with respect to under what circumstances the attorney-client privilege protects communications of that sort, so part of me says, boy, for all of the reasons that have been discussed by the advisory committee for extending confidentiality, I would sure like that for disclosure witnesses, but on the outside come down and say "no" for this reason:

As a defense lawyer in personal injury litigation, toxic tort and products liability, perceived by the jurors the most credible witnesses we hear over and over and over again -- I'm sure plaintiffs hear the same thing -- are treating doctors. They are perceived by jurors to be independent. Whether that's true or not is not of any consequence. They are perceived that way. There's a bias on retained experts. There's a bias on company scientists. And jurors, properly or not, they discount their opinions somewhat by that bias, but treating doctors are held out differently.

Years ago in many states when I first started practicing, when a plaintiff filed a complaint they put their medical condition at issue and they waived any doctor-patient relationship and in many states I could talk to the doctor if he or she were willing and I could save my client money. I didn't have to take depositions or anything else. For whatever states

still have that rule, HIPPA ended it, so there is no effective way for a defendant to have communication efficiently, cost-effectively, with a treating doctor other than through deposition, and as all of you who are district court judges know who were involved in complex personal injury litigation, there are many, many treating doctors in the average case, so I need to know, because the plaintiff's lawyer can meet with that treating doctor, I need to know what the treating -- excuse me -- what the plaintiff's attorney told the treating doctor. It has happened to me where -- and it's nothing improper about a plaintiff's lawyer doing this, they're doing their job as an advocate -- they will tell the treating doctor certain juicy facts that they've extracted out of a couple of company memos sort of just to set the stage, and then oh, let's talk about your treatment to my patient, and I walk into the deposition and get this overt hostility from the treating doctor that I never would have anticipated, only to find out as we go through it by forced disclosure that, well, the plaintiff's attorney shared some information from his or her perspective. I'm not faulting them for that, but it certainly didn't give the whole story. When I'm able to give the whole story to the treating doctor, he or she sits back and I see in many cases a whole different demeanor develop, so if a privilege were extended over those communications and even if the exceptions were written to that as the exceptions are now written, so that I can get into

matters considered by the expert for their opinion, I dare say that most treating doctors will say not that the plaintiff's attorney told me I'm considering for my opinion of what I diagnosed in my patient, and so I will be thwarted in my efforts to find out what was said to condition that expert, and that's a price I cannot pay for my expert, so -- I mean, for my client, so as a private practitioner, I just assume if that's the price paid, I just assume leave it the way it is.

The committee asked for questions, invited questions, and I do have two observations. Forgive me if they sound a little mundane, but those of you who are district court judges will find yourself having to resolve this issue, and that is, you've created, I think properly so, a new category of experts, what I call disclosure experts. Increasingly we have case management orders in federal courts that limit arbitrarily, in my opinion, the number of experts that we can call in a case. Just pick a number. I often times don't know where the number comes from. It's just a number. Where does the disclosure expert come in to? We're limited to fact witnesses. Is this disclosure expert a fact witness? is it an expert? And that may sound trivial, but it actually is important because at the front end if I know what those rules are, I can decide and make recommendations to my client as to what experts we really do need to develop if in fact I'm going to have to put a disclosure expert in the category of an expert for purposes of seeing

those.

PROFESSOR MARCUS: Can you tell me, those limits sound like they are coming either from local rules or practice of the judge, Rule 16.

MR. PARKER: Case management rules.

PROFESSOR MARCUS: Are you saying that the national rules should somehow provide directives about what judges can do on those matters?

MR. PARKER: Well, I know that I'm asking too much, that the rule would do that, but if there was a sense in this committee in the advisory notice as to how you might think about that, I think it would provide guidance to counsel so that we don't engage in that fighting. I don't want to have any more costs associated with litigation because I actually do like to try cases, and the more efficiently and cost-effectively I can get a case to trial, the more likely I can convince my client to let me try the case. And I can tell you we'll be fighting about that.

JUDGE KRAVITZ: Don't file summary judgment.

MR. PARKER: Judge, that's actually a good segue. It's not something I do very often, I can tell you.

There is one other point, and I know that this is -- I think it needs to be said but it's not within perhaps the direction of this committee, and that is, that I am concerned that good lawyers will fall unwittingly perhaps into a trap down

the road by virtue of if it should become the rule that there is a confidentiality over discussions with experts and drafts, which I favor, that often times in multi-district litigation these same experts are used in state and federal cases, and it is not uniformly the rule in state cases that drafts are immunized from discovery, and I am fearful, in fact, I will begin having practice seminars through our association and my partners, as to what we have to be thinking about when we name experts and we work up an expert and a report is prepared by that expert in the context of a federal case where the drafts are protected and can be destroyed legally without any suggestion of wrongdoing and that expert is then perhaps simultaneously named, by mistake perhaps in terms of timing, not intent, in a state court case and then to find ourselves subject to a spoliation claim with all sorts of sanctions associated with it with the destruction of the drafts in a state court case where that report is provided, it will happen, and through no intentional act of counsel, trial counsel on the plaintiff or defense side, and we figure out how that's going to work out. It's the aspect of our federal-state system.

Let me move to Rule 56. I know I'm overstaying my welcome.

JUDGE KRAVITZ: Make it real short.

MR. PARKER: You mentioned I shouldn't file so many summary judgment motions.

JUDGE KRAVITZ: I just want to get you to trial sooner.

MR. PARKER: Judge, sometimes you have to file them when it shouldn't go to trial. I'm was amazed sitting here as a personal injury lawyer to hear how many summary judgments are granted. I can tell you in my field of practice I can probably count on two hands the number of summary judgments that are granted to both my clients and my colleagues' clients in our area of the law in the last, I don't know, five years. It just look at your Reporters and look how infrequently summary judgment is granted in personal injury litigation. I just don't see that to be a problem. I will say that when I was preparing for my talk today and I read on Rule 56 now, that with regard to the "shall" and the "must" controversy, that this committee wrote in the invitation for comment that the change was made in order to preserve the meaning that "shall" had acquired in practice. That rather hit me. I have argued summary judgments in many, many states and federal courts around the country and it had never occurred to me that the granting of summary judgment was discretionary. I did a very unscientific, biased poll of defense lawyers outside my firm and inside my firm. I practice at Venable. It's a national law firm. Not one lawyer had ever learned that the granting of summary judgment had become discretionary, had become practice, so I was taken aback quite frankly by that, and I would endorse strongly for a reason

I haven't heard addressed here today the return to some mandatory terms "must," and that is, as I look at it from a very simplistic perspective, and that is, it seems to me that it is essential for the integrity of our litigation process a phrase that this committee uses in comments regarding Rule 26 for this simple reason: As a trial lawyer, I know about the vagaries of jury trials. My clients get it, plaintiffs get it, but we all say to our clients that there is something where if the facts are truly undisputed and the law is in our favor clearly that there is a mechanism where I can tell you, client, that you will get judgment as a matter of law. And now I think about how I need to explain this to my client if discretion becomes the rule of day and I go back to say, you know, the law is in your favor and the facts are undisputed but the judge can just deny it for whatever the reason the judge wishes to deny it because they have discretion. I'm sorry, but that breeds a certain disrespect for our litigation process. I have the good fortune, I believe, of having to council many foreign companies that do business in the United States and foreign lawyers who seek counsel here through my association ties. Explaining our litigation system itself is enough of a trial sometimes, but explaining to them how on the law and the facts a party is entitled to judgment but a judge can properly under discretionary rule say "no" for whatever reason, and Rule 56(a) as written out would say it's even discretionary whether to give

reasons, that just breeds disrespect for the system and I strongly hope that this committee returns with a mandatory term.

Thank you, Judge.

JUDGE KRAVITZ: Thank you, Mr. Parker. I appreciate it.

Welcome.

MS. HERRON: Good afternoon, and I promise to be brief.

This is my first foray into visiting with this committee, but I'm here to speak on Rule 56, which I have a particular affection for. I practice in West Virginia, and that is a state that does not have a format with respect to point and counterpoint, and I think that we have to get past the hurdle that summary judgment will work in every case because it clearly does not, and once we get past that hurdle we need to understand that it's an impossibility to craft a rule that will make every-one happy or that will apply in every case. But that doesn't mean that in cases where summary judgment is appropriate that it should not be granted. That is the reason I am a proponent for the mandatory or the "must" standard. I welcome the opportunity for opposing counsel in cases to have counterpoint and to provide me with those specific counterpoints, and I think that if you look at the rule as a whole, it indicates the mandatory standard. If you have point and counterpoint, you have the statement of facts that set forth to the court those undisputed

facts, and if you're confident in that process, then you should be confident in the "must" standard, and if there is a genuine dispute, then it should be discretionary but only if there is a genuine dispute.

The other aspect, if you have the point and counter-point, it permits the court the ability to provide the detailed reasoning it has for supporting its position as noted in the rule in granting summary judgment which allows the parties to go forward to ultimately decide and have a well-reasoned opinion and basis for the granting of summary judgment.

There's been talk today about the volumes of material that will be produced with point and counterpoint. I submit that that doesn't compare to the volumes of material that go to week after week after week of trial in cases where summary judgment, if properly supported, should have or must have been granted. I am a proponent therefore in the standard that Mr. Morrison spoke of, which is the objective or the reasonableness standard with respect to provision H of the rule, because if you read 562 -- or 56(c)(2)(a)(2), it states that only those facts in a statement of facts that cannot be genuinely disputed should be included so the other facts that are just peripheral and have not of any consequence should not be in that material, which would lessen the amount or volume that the court would be looking at, and if we look at a reasonableness standard and the court put some teeth into that standard as opposed to a bad

faith standard, I believe that we can have a system where summary judgment will work without all of the extra added work that appears people are complaining of.

And with respect -- I just would like to applaud the committee with respect to Rule 26. As a practicing attorney, I think that the insight or having the foresight to develop the changes to the rule is a welcome changed in the litigation arena.

JUDGE KRAVITZ: We're always willing to take applause, so thank you very much. We don't get it very often.

MS. HERRON: I appreciate the opportunity to speak to the committee today. Thank you.

JUDGE KRAVITZ: Thank you very much.

Ms. Raghavan, welcome.

MS. RAGHAVAN: Thank you.

Good afternoon. This is a privilege for me, and my first time doing this, so bear with me. On Rule 56, I am a proponent of a rule that clearly states what the standard is. There should not be any ambiguity when looking at the rule. It is a "must" standard thou shalt not kill, not that thou shall not kill. "Thou shall not" is the same as "thou must not." It's going back to the basic history of grammar. I really think to confuse the matter by saying that some courts have started a discretionary line of thinking with regards to summary judgment, it ignores the fact that Celotex and the line of cases that have

established the standard and the rule as it existed required mandatory findings, so "must" I think is the only way to make it clear that cases that have come up since December 2007, there haven't been many, but the mere fact that those that have come up ignore the "must" standard, ignore the "should," "would," and go with the "shalt would," should indicate to the committee that it's been established that it is a mandatory standard. There's a reason to make it mandatory and keep it mandatory. Summary judgment has a purpose and this committee shouldn't in a stylistic fashion remove that purpose from the bar.

I practice defense litigation in upstate New York primarily and we rely on summary judgment not to get rid of cases that are of value. This is a process that must be protected to eliminate cases that really should not go to the jury. I think the current supporting amendments in the current rule allow you to go back to establishing a mandatory standard and use the word "must" because with the point-counterpoint that you have outlined, that eliminates some of the concerns that have been raised with regards to boxes or volumes of material that judges have to go through. That should be reduced by the fact that the attorneys are forced to do the work for the judge by citing to the record of any material fact that's not in dispute. Then it's the opponent's problem to come forward and put forth any material facts that are in dispute, again making the work easier for the judge to either grant summary judgment

or not.

And further, in your amended rule you also state that the court can grant summary judgment based on what is raised in the facts and counter-facts without searching the entire record. That also eliminates the unnecessary extra work that the courts may feel burdened with, so I think the other amendment that you're suggesting support and allow you to state the word "must" in the rule to protect the purpose of summary judgment.

If there is any remaining concern about the use, I've heard some people say there is worry that people who make statements of facts that have 200 paragraphs or such, we have a local rule that has for a long time required point and counter-point where I practice, and that has not been an issue of abuse in practice because judges know how to control these matters and they will not tolerate you coming forth with starting with the day someone was born, where they went to kindergarten, if it's totally immaterial to the case. The material facts are all that count, and that is why if you really want to go further you may want to look at your sanction section and make it applicable and reword that in a way that would allow you to make sure that attorneys understand that the only things that should be put in the material statement of facts are things that will lead to the ultimate result and nothing else, so I think you're almost there.

JUDGE KRAVITZ: We just have to change one word?

MS. RAGHAVAN: One word. You just have to change one word and you support yourself with the rest of it.

With regards to Rule 26, it's been in my practice there's been a lot of confusion with mainly with employee witnesses for companies that don't get sued regularly, whether once or twice a paralegal would be considered a regular person who testifies regularly if that's all you're being sued. Magistrates in our area generally tend to say, well, you know, if you're going to produce him for etcetera, etcetera, you better put out a report, and that's a huge burden on the employee, and it's also, you know, it also causes all kinds of issues with regards to attorney-client privilege, so if recognition that you can put for those people that you don't feel fall within the requirement of a mandatory report, you can set forth their opinions, eliminates the chance of surprise and things prejudice that the other side will raise, which I think is a great idea for practical reasons, so 26, I strongly support the amendment.

Thank you.

JUDGE KRAVITZ: Thank you very much.

I thought he was going to take Van Itallie's place.

MR. PERSHING: Steve Pershing for the Center For Constitutional Litigation. We split the duties in which address 26 only. Mr. Cortese has graciously given me what may have been his slot. If the committee would prefer, we can switch. It

doesn't matter.

JUDGE KRAVITZ: No, no. We want to hear from both of you. The question is who wants --

MR. PERSHING: Who wants to be the last person before the committee's break for lunch? I think I'll sit here and I'll let him --

We have submitted written comments. As you know, the American Association of Justice is the oldest plaintiffs' bar voluntary bar association, and I can tell you with some degree of confidence that our members tell us that they are willing to accept a tradeoff inherent in the proposed Rule 26 amendments that would except protection for their own lawyer expert communications in exchange for protection to those of the other side. The squabbling that I think the committee has heard plenty about that has attended the 1993 changes and experience since that time has, it would appear, largely been done away with in the notable jurisdiction to have changed their rule along the lines now being proposed here, other than of course New Jersey. Our sense from New Jersey practitioners are reflected in the comments that we filed in writing, is that it's time for relief, these extraneous matters being dispensed with.

Lawyers have, I think, have an insatiable appetite, very understandable human appetite for lunch. No, I'm just kidding. For the juicy facts about one another's strategies, and I think the point has been excellently made over and over

that we share the view that that's not the point. The question is, can you examine an expert, and to the extent you learn, or I should say reconcile the distinction between experts from whom no expert-authored report is required with experts from whom a report is required, you simply ease that process for all experts.

I think one comment we received tells it all. The lawyer who is in another time zone from his expert is at a tremendous disadvantage when all of the tools of modern communication are available and yet none of them can be used. You all saw president-elect Obama's dilemma that he was going to actually have to get over his use of his BlackBerry. If an expert is in Singapore, as you heard earlier today, that expert can be communicated with virtually only through methods of the kind that place the relationship at its advantage that must disclose all of those written communications.

PROFESSOR MARCUS: Just to follow up on one point, you mentioned in a footnote in your submission the handling of Daubert issues.

MR. PERSHING: Yes.

PROFESSOR MARCUS: Do you foresee any difficulty at all from this change?

MR. PERSHING: No. The only Daubert comment that I would make has a much narrower one to the subsidiary one to the Daubert concern that occupied us a little bit earlier, and that

is just simply that the closed communication and shared responsibility between a lawyer and their expert, on the question of meeting the Daubert standards is in and of itself a burden that copious written disclosures and cross-examination at deposition, so it would only intensify. There's no reason, other than, as I say, the natural lawyerly appetite for information about the opponent's strategy that would pose as a need for that sort of information, and what you really want to do is just look at the ways lawyers interact with their experts and say this doesn't matter and this doesn't matter, and I think the frequency of stipulations around the rule suggest that good lawyers on both sides have come to that understanding.

Let me just say that there is a helpful harmonizing going on here, I think, in these proposed changes between the rule and Hickman, and that courts will now, I think, be able to look to Hickman more freely than they could before in the presence of this glaring exception to Hickman which is sort of what we developed in post-1993 expert disclosure regime, but it would do well for us to recognize, in other words, sort of retire a concern perhaps about that, that there is no presumption in the amended rule, the proposed rule, that a particular lawyer expert contact his opinion, core opinion work product. That determination and the level of work product protection to be afforded to a particular communication will be left to the judge in the individual case just as it is today.

That might concern some people as some kind of a falling short of complete protection, but it seems to me that the advantages of the proposal greatly outweigh that vestigial concern, which, after all, is the same one that you all have on the bench every day. Not all of these decisions after all are clear-cut or easy. That's why we don't have computers deciding our federal litigation, thank goodness.

So we should also mention that, and as the committee has acknowledged and had placed before it repeatedly, that a lot remains open. If fact, some would argue that so much remains open that this change we are making is really a very minor, marginal one. I don't think that's right. I think that squabbling needs to be gotten rid of, and that's all to the good. If the court were present at these depositions, that might have the same effect, but I take it you all are looking for ways to create the impression that you are there in that deposition room even when you cannot be.

The committee asked some questions in its invitation for comment that I could just very briefly address, that basically no, no, and no, but on page seven of the standing committee report there are questions there. Given free discovery of all facts or data considered by the expert, is it important to note that the attorney was the source of those considered but not relied upon? No. Again, it falls in the category of the lawyer's natural appetite for the strategy of

the opposing side, or is knowing the attorney was the source only important as to -- only as to facts or data actually relied upon? Again, in the one case more important perhaps than in the other, but the squabbling is the issue. These are extraneous facts. The lawyer's concern ultimately, if he or she would admit it to him or herself, it to be able with full notice to depose the expert properly as to the basis for that expert's opinions. Where the source was for the opinion is entirely secondary.

And let me say that I think it is helpful and I think it's not universally agreed upon, but I think it is helpful that we accept that in this day and age many of these complicated cases, the preparation of them is fundamentally an interaction between the lawyer and expert, that each is a help to the other, that each is integrally involved with the preparation of the case, devising of a proper approach to the case, and if we just accept that, we're a lot farther along. There's, I think, a small minority of folks who believe, and the principle on which they believe is a very high principle indeed, that an expert should be independent entirely, that the dependence should be scrupulously guarded. I think we've heard testimony from both sides, both plaintiffs and defendants, who say the jury will draw their own conclusions in any event about the perception they have of experts paid by this one or retained to support that one. The real concern is whether the testimony holds

together, and what happens in discovery of course is as important to pretrial settlement, as to what happens at trial perhaps more so, and this is really all about the containment of litigation costs on both sides. So I think that's what grounds my no, no, and no answers here.

There is marginal value to knowing that the attorney identified the subjects the expert considered but didn't rely upon. There may be marginal value. Perhaps the most of the small values in each of those concerns raised by the committee, but there again, I think the lawyer interest in finding out far outweighs its value to that lawyer, for the natural reason I'm supposing.

I don't think there's any serious doubt as to the last question in the invitation: Does anything in the draft words cast doubt on the outcomes about leaving the expert free to answer because, "Well, my lawyer told me not to." I think the comments as they stand are adequate. Of course there could be further comment about that, and let me segue using that point to a final observation, and that has to do with some comments we made in writing about extending to trial and to subsequent litigation the protections that we're trying to ensure here, again, anti-squabbling protections, if you will. These are not anti-disclosure protections. The three exceptions say that. Most all that the lawyer ever really need I think is included in the three exceptions. Little i, little i, ii, iii, but both an

extension to a trial in the case at bar and to subsequent litigation ought to be the rule. I think the committee would be on safe ground to say more has been said in the comments now, the draft now before us about that. Effectively casting into the comment the committee's belief that to fail of those extensions would in effect negate or substantially unmine the anti-squabbling reason, rationale, for these, if you will, change facts, you know, return to the pre-1993 understanding of how this ought to work.

If there are any questions, I'd be happy to try to tackle them, but I think the committee's work on this has been quite admirable.

JUDGE KRAVITZ: Thank you.

MR. PERSHING: Thank you so much.

JUDGE KRAVITZ: I very much appreciate your comments.

MR. PERSHING: Thank you, Judge.

JUDGE KRAVITZ: Thank you.

Don't be daunted by the fact that you're holding us up for lunch.

MR. CORTESE: Not in the least.

JUDGE KRAVITZ: You have one minute.

MR. CORTESE: Thank you, your Honor. It's a pleasure to submit on the papers.

Judge Kravitz, members of the committee, thank you very much for the opportunity to appear here. Al Cortese,

counsel for the Lawyers For Civil Justice.

I would like to hit the highlights of the comment that were submitted on behalf of the Lawyers For Civil Justice and the Institute For Legal Reform. I appreciate the opportunity of cleaning up after the parade, so to speak, and I would like to take a few minutes to go through some of the comments that have been made already and that we have made in our submission to this committee.

We as a group, as the two groups, support the adoption of both amendments, Rule 56 and 26, with some few comments. And we've had the various discussion with respect to all aspects of both rules within our group that has been looking at this. It's interesting that the group, so far as I can tell, the groups are unanimous in their view that you must use "must" in Rule 56. However, the group's are on balance in favor of, for example, a cost allocation addition, but there are some dissenting voices from that which I will get to in a minute, and there also is some dissent, but on balance we feel it's a benefit to the system and the process to adopt the procedures of new Rule 26.

I do want to deal with briefly the first and most important point, which is urging the committee to go back to "must" or "shall" or mandatory prescription for Rule 56. The point is, that it really needs to be said in a mandatory sense in order to re-enforce the utility of summary judgment, and we've heard a lot today about how plaintiffs' lawyers and

liberal academics don't like slicing and dicing. I would assume they would prefer shake and bake, that you just shake it all up and throw it against the wall and hope that it hits. Well, that's not the way the legal system ought to be conducted and there need to be rules, there need to be clear entitlements to judgment, as many of the witnesses have said today, and if the committee were to go -- to were to maintain the "should," that essentially is a change of the law, it is the change of the standard as set out in Celotex, and there is no case, and we've dealt with this in the comment, that has held that the standard is that if the law and the facts entitle a defendant or a plaintiff to summary judgment, then the judge has discretion to not grant summary judgment or discretion to deny summary judgment, the negative discretion, so I think if you maintain the "should" you will be essentially changing the standard in Celotex.

Another point on that is that "should" just does not fit grammatically, syntactically, or whatever way you want to look at it with "entitled." It just doesn't work. It doesn't follow, and if the purpose was to truly emasculate the summary judgment rule, what you would say would be that the judge should grant summary judgment or that you should say that the judge should grant and that therefore the defendant or the party may be entitled to summary judgment, and that would be the grammatical construct that would work, but obviously that would

truly emasculate the summary judgment rule and it would take away the very useful and important tool of the trial judge to organize the case and to structure the case so that justice is done. I think it's clear that the discretion or the judge's responsibility is to determine if the facts and the law support the grant, and as you've heard, that's essentially what the cases find, that once the judge has exercised discretion and exercised the judge's responsibility to find the facts and find the law, then the grant of summary judgment is necessary, it's mandatory, and that to take that away essentially, as you've heard earlier, really would reduce the integrity of the system and depart from that. What practitioners and judges need are rules, not suggestions. "Should" is a suggestion. "Must" or "shall" are rules, and these are rules, they're not suggestions. I mean, we're not talking about the traffic laws in Rome, Italy, where a red light may be just a suggestion that you stop. We're talking about a construct where, if you have found the law and you have found the facts, then judgment must follow. I think that basically would really restore the intention of the original rule as explained in Celotex, and I was a bit taken aback at one of the comments earlier that this overwhelming tied of summary judgment has only been created in the last 30 years while the cases that they were talking about have only been created in the last 20 years and the courts have had to deal with those cases under fixed rules that were set before those

cases came along, and therefore I can't see how you can argue that there has been a tide of summary judgment in particular cases that didn't exist before the rules existed, so I think really that I would urge that this committee basically apply a mandatory standard in that one instance of Rule 56 and not get moved into this area of what I call legal relativity where, even though the law and the facts and circumstances are clear, the judge still has an opportunity to determine whether or not it's fair or related to something or related to something else. You should or should not grant the motion. If the law and the facts and circumstances are clear, the "must be granted," and that basically should stand as a very strong pillar of our legal system, and it has for a number of years and it should continue.

I would like to say just a word about cost allocation.

As I mentioned before, there are some in our group --

FROM THE TABLE: May I interrupt you before you move on?

MR. CORTESE: Please.

FROM THE TABLE: You're a long-time student of the rules process and a very sophisticated one, and we appreciate your constant attention of what we do, and I mean that personally and for all of us, and I know how you feel about this issue of "must." And we all know that in 1992 there was a dedicated effort to modify the rule that failed. One of the concerns that we've talked about, and I think you know this, we

talked about this in all of our meetings, is that if we were to use the word "must," although it has a -- there's some arguments in favor of its logic, and as you -- it's more akin to "shall" and "should." People have made that argument, that the tide of opposition that we've heard today will be magnified many, many times from both lawyers and also from many judges because a lot of judges don't like being told they must do anything, and the chances of passage are going to become much less, if not remote, and if it gets through the standing committee, if we continue with "should" and assume the standing committee approves and it goes to the judicial conference and they prefer "must," they can put it in, they can change that one word by a vote, or if it goes to the Supreme Court and they would rather have "must" than "should," they can change it too, and wouldn't it be better for all the reasons we've discussed, to keep "should" here on the low level, and if the Powers That Be want to make "should" into "must," to be done, because as you recognized, Al, there's a lot of other things in this rule that are very valuable that are not controversial at all, and I would hate to see it submarine because we've picked too strong a word.

MR. CORTESE: I would too, but I would urge you to do the right thing, not necessarily the practical thing, and really in my view the only right thing to do is to use the mandatory construct, because if you don't, you're changing the standard and we can worry about the next levels. Obviously there is

going to be some opposition to the other parts of the rule and that this may increase the burden slightly, but it's the right thing to do.

Judge Walker?

JUDGE WALKER: Mr. Cortese, the present rule says the judgment sought should be rendered if the pleadings, the discovery, disclosure materials on files, so on and so forth, indicate there's no material issue of fact and that the party moving is entitled to judgment as a matter of law, so how does "should" in proposed 56(a) change things?

MR. CORTESE: I'm speaking about the Celotex decision and the original rule, 1938 rule, when it came in.

JUDGE KRAVITZ: Pre-style.

MR. CORTESE: Pre-stylization, and I'm confessing that we probably should have made this argument at the time that the style rules were being considered, but frankly we did not focus on it because we were content with the committee's assertion that they were not changing the substance of any of the rules. We now think on reflection that this is a substantive change and should not have been made in connection with the style program.

JUDGE WALKER: Well, the summary judgment locomotive is still going down the tracks, as we heard from many lawyers, and the style change does not appear to have changed the actual application of the rule, notwithstanding the substitute of "should" for "shall."

MR. CORTESE: Well, we understand that, and I have not read those cases, but I have been informed in a memorandum with respect to them, and essentially what they do is they pick up the same dicta. In many instances, they use the earlier formulation of "shall be rendered" rather than "should be rendered," and that is the -- that has been interpreted as the mandatory formulation.

Now, the problem is that folks have not focused on this, and someone cited the version of the manual, or of the rule handbook, that indicate that now they have a whole section on the new -- the new discretion of the court not to grant motions even when you're entitled to it.

JUDGE WALKER: Well, what you --

MR. CORTESE: Your Honor, I submit that is just wrong.

JUDGE WALKER: Well, what you would be arguing is that "should" in the current rule has acquired a gloss that would be carried over to "should" in the new rule, and if there is that gloss that is now attached to the current rule, why wouldn't it carry over to the amended rule that's proposed?

MR. CORTESE: Because there is too much danger in the use of the word "should." It's just too wishy-washy a word and we need to re-enforce the mandatory nature of the summary judgment procedure, because this has really wide implications. You heard a lot today about how summary judgment is granted in too many cases. I think that has -- that those comments have

been limited only to employment discrimination cases. Maybe that's because there are too many employment discrimination cases rather than too many motions, and as Judge Kravitz had pointed out, there are more employment discrimination cases that lose at trial than in other areas and that are reversed on appeal, that is, the plaintiffs are reversed on appeal, so that the concern we have is that in many areas of the law where summary judgment should be utilized as a tool by the judge to focus on the facts and law in the cases and to give the litigants a clear decision one way or another on those issues only in the circumstance where the judge obviously has found and has exercised his discretion to determine whether or not the facts and the law favor the grant of summary judgment, that the signal that the "should" sends is it gives the court yet another opportunity basically not to enter -- not to enter an order that should be required under the original rule and under the law as set out in the Celotex trilogy.

JUDGE KRAVITZ: Thank you.

MR. CORTESE: Your Honor, may I take just a moment on Rule 26?

I would like to mention that some of our members see some risk, particularly to target defendants, in the cost allocation before I get to 26 that we recommend, but on balance we think the system would benefit by having a reasonable cost allocation mechanism that would discipline adherence to these

new rules and also to the filing of motions. Some of our members feel that basically it's only target defendants that are going to end up paying those cost allocations, but they think that it's worth it because the system would benefit from having a method to discipline adherence to the rules in those instances, particularly when we see many instances in which there are frivolous responses to motions, as well as in some instances frivolous motions, but we're willing to take that risk on balance in order to have this mechanism to discipline adherence to the rules.

Now, on Rule 26 there are some that believe that there ought to be open and free discovery of communications between experts, but the large majority of our members and participants in this process believe that it's most important to protect communications, to protect the Work Product Doctrine, and that this is probably the best way to do it, and that the exceptions that you have carved out of the process are adequate to protect the interest in getting to what the real facts are with respect to the validity and reliability of the expert opinion. And as a matter of protecting that, those interests, we therefore support the rules as proposed.

There were a second set of questions with respect to protecting communications only for retained experts and there has been some discussion on that. We don't yet have a uniform position on it but it is something that we would hopefully like

to get back to you with respect to that. I think there's been enough discussion of that today to perhaps leave it at that.

And then with respect to the protection of communications with an expert's staff or assistants, I think there is a tendency to believe that they probably ought to be included in the protection, but that again is another area where we may want to come back to you for further comment.

I thank you very much for your time, and I would leave you with the thought that we do want commandments, not suggestions.

JUDGE ROSENTHAL: Because they've been so effective?

MR. CORTESE: They haven't been effective enough. I wouldn't dilute them.

JUDGE KRAVITZ: Thank you again.

And I want to thank everyone. These obviously are very important proposals. They affect lawyers directly and judges directly in the work that they do on a daily basis, and I very much appreciate the time that everyone has spent speaking with us, and we will conclude this hearing and pick up again in San Antonio.

What we're going to do right now is take a half-an-hour break. I really want to keep it to a half-an-hour, and then I'm going to start weeding so we can press forward, and we want to still get you all out of here, so that's open, and thank you so much from all of us.

(Proceedings concluded at about 1:13 p.m.)

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I N D E X

CERTIFICATE

I, JACQUELINE M. SULLIVAN, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

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JACQUELINE M. SULLIVAN